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TESTIMONY.

For Complainants.

Testimony Before Master—Exhibit C. 4.

EXHIBITS.

Amended Bill of Complaint.

Filed March 13, 1934.

In Chancery of New Jersey

To the Honorable Luther A. Campbell,
Chancellor of the State of New Jersey:

The complainants, Agnes Croake and Ellen Louise White, both of the City of New York and State of New York, by their amended bill of complaint respectfully show that:

FIRST CAUSE OF ACTION.

1. On the 13th day of July, 1928, Mabel V. Marshall, late of the City of Summit, in the County of Union and State of New Jersey, who departed this life on the 14th day of July, 1933, made and executed her last will and testament and the complainants, as they are informed and verily believe, were therein named as legatees and devisees. Said will was prepared by and executed in the presence of Leonard N. Snedeker, a member of the Bar of the State of New York. The witnesses to the said will were the said Leonard N. Snedeker, Edwin L. Snedeker and Elizabeth Frewen, respectively, a partner and employee in the office of the said Leonard N. Snedeker.

2. The aforesaid last will and testament was prepared at the direction of the aforesaid Leonard N. Snedeker, together with a carbon copy of the same, pursuant to the practice of his office. After the execution of the said last will and testament, the carbon copy of the same was retained the files of the said Leonard N. Snedeker.

3. Upon the death of the said Mabel V. Marshall, inquiry was made of the said Leonard N. Snedeker for the said will, to the end that the same might be offered for probate before the Surrogate of the County of Union, but the said Leonard N. Snedeker, after a diligent, careful and exhaustive search for the paper in and about his office, the files and safe contained therein, and in and about the home and residence of the late Mabel V. Marshall, was unable to find the said will. He did, however, find among the files in his office, a carbon copy of the said will, which he had caused to be made at the time when he prepared the said will.

4. The aforesaid carbon copy of the will so executed by Mabel V. Marshall is in the terms of a copy which is hereto annexed to this bill and made a part hereof.

5. On or about the 20th day of July, 1933, application for letters of administration of the estate of Mabel V. Marshall, deceased, was made to the Surrogate of the County of Union by Ernest B. Patten, Trust Officer of the Summit Trust Company of the City of Summit, in the County of Union and State of New Jersey, for and in behalf of the said Trust Company. A renunciation having been filed by Robert Jesse Marshall of Brooklyn, New York, a brother and only living heir of the decedent, Letters of Administration upon the said estate were granted on the 21st day of July, 1933, to the Summit Trust Company of Summit, New Jersey, which took upon itself the burden of administering the said estate.

6. The legatees, devisees, and executors named in the said will, all of full age, together

with their relationship to the decedent, so far as the same are known, are as follows:

Robert Jesse Marshall, brother.
Maud I. Marshall, sister. Deceased.
Albert A. Marshall, first cousin.
Herbert Marshall, first cousin. Deceased.
Agnes Croake, first cousin.
Ellen Louise White, first cousin, once removed.
J. Dupree Stanard, exact relationship unknown.
Benjamin Stanard, exact relationship unknown.
Lulu Reed, exact relationship unknown.
Martha Whitmore, first cousin, once removed.
Mary Bell Hunt, exact relationship unknown. Deceased.
Brooklyn Bureau of Charities.
The Brooklyn Trust Company, executor.

7. Robert Jesse Marshall, J. Dupree Stanard, Benjamin Stanard, Martin Whitmore, Brooklyn Bureau of Charities and The Brooklyn Trust Company are made defendants herein, since they have either refused to join as complainants, although so requested, or signified by the actions that such a request would be useless.

8. Albert A. Marshall and Lulu Reed are defendants herein, since although diligent search has been made to ascertain their post-office addresses, the same could not be found.

9. The complainants further allege on information and belief that the decedent, Mabel V. Marshall never revoked the aforesaid will.

10. The complainants further allege on information and belief that the decedent, Mabel

V. Marshall did not execute a new will subsequent to the aforesaid will.

SECOND CAUSE OF ACTION.

1. On or before the 13th day of July, 1928, Mabel V. Marshall, who departed this life on the 14th day of July, 1933, together with Maud I. Marshall, who departed this life on the 17th day of March, 1931, sisters and both, late of the City of Summit, in the County of Union and State of New Jersey, agreed to make mutual and reciprocal wills for the benefit of each other and for the benefit of the devisees and legatees named in paragraph No. 6 of the First Cause of Action hereinabove, and did, on the aforesaid date, execute mutual and reciprocal wills, pursuant to the aforesaid agreement. A copy of the will of Mabel V. Marshall is hereto annexed and the will of Maud I. Marshall being identical with that of Mabel V. Marshall, except for the interposition of names, both are made a part hereof.

2. By the terms of both of the aforesaid wills, the complainants were named therein as legatees and devisees, pursuant to the agreement made between Maud I. Marshall and Mabel V. Marshall, as stated in paragraph No. 1 of the Second Cause of Action.

3. On the 17th day of March, 1931, Maud I. Marshall died, leaving her last will and testament heretofore mentioned, which was duly offered for probate on the 13th day of April, 1931. Letters testamentary were issued, thereon, pursuant to the terms of the aforesaid will to Mabel V. Marshall, the executrix named therein; and the said Mabel V. Marshall did take, accept and retain thereunder the benefits de-

vised and bequeathed to her in the aforesaid will of Maud I. Marshall.

4. Up to and including the date of the death of Maud I. Marshall, to wit: the 17th day of March, 1931, both of the aforesaid wills did continue valid and subsisting and in existence.

5. Complainants repeat paragraph No. 3 of the First Cause of Action and make same a part hereof.

6. Complainants repeat paragraph No. 5 of the First Cause of Action and make same a part hereof.

7. Complainants repeat paragraph No. 6 of the First Cause of Action and make same a part hereof.

8. Complainants repeat paragraph No. 7 of the First Cause of Action and make same a part hereof.

9. Complainants repeat paragraph No. 8 of the First Cause of Action and make same a part hereof.

Complainants are without adequate remedy in the courts of law and therefore pray:

a. That the Summit Trust Company, Robert Jesse Marshall, Albert A. Marshall, J. Dupree Stanard, Benjamin Stanard, Lulu Reed, Martha Whitmore, Brooklyn Bureau of Charities and The Brooklyn Trust Company, who are defendants in this suit, may answer this amended bill of complaint and each statement therein made.

b. That this Court may establish that the said Mabel V. Marshall did, in her lifetime, duly execute a last will and testament in the manner

and form hereinbefore set forth, which is a valid and subsisting and that the same may be admitted to probate as the last will and testament of the said Mabel V. Marshall; and that this Court may establish and decree there to be a trust upon all the moneys, rights, credits, choses in action and all the property, real and personal, of the late Mabel V. Marshall, deceased, which may be in the custody, possession or control of the defendants, or each, any and all of them; and that the defendants may be decreed to execute such necessary deeds, conveyances and assignments as to carry out the terms of the aforesaid last will and testament of Mabel V. Marshall;

c. That the said Summit Trust Company, Robert Jesse Marshall, their counsel, attorneys, solicitors, and agents, and each and every one of them, may be restrained and enjoined from distributing, conveying, assigning, mortgaging or alienating in any manner whatsoever, whatever property of the late Mabel V. Marshall that may be in their possession, custody or control; and for such other relief as this Honorable Court may see fit to grant.

d. That a writ of subpoena may issue, commanding the said defendants to answer this Amended Bill of Complaint and to abide by such decree as this Court may make in the premises.

And your complainants will ever pray, etc.

LOUIS E. KLEIN,
Solicitor of Complainants.

ISIDOR KALISCH,
Of Counsel.

Will of Mabel V. Marshall.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } SS.:

AGNES CROAKE, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am the complainant in the foregoing amended bill mentioned. I have read the said bill and know the contents thereof, and the same are true of my knowledge, except as to matters that are therein stated to be on information and belief, and as to those matters, I believe them to be true.

AGNES CROAKE.

Sworn to and subscribed this 8th day of March, 1934.

JACQUES H. HECHT,
A Master in Chancery of New Jersey.

I, MABEL V. MARSHALL, of the Borough of Brooklyn, County of Kings, City and State of New York, do make, publish and declare this my last Will and Testament. Hereby revoking any and all former wills and codicils by me made.

FIRST: I order and direct my executrix or executor hereinafter named, to pay my just debts and funeral expenses.

SECOND: All my house hold goods, ware and furniture silverware, clothing, jewelry, pictures, books and bric-a-brac, I give and bequeath to my sister, Maud I. Marshall, if she shall survive me, or, if she shall die before me, then to my cousin Martha Whitmore.

THIRD: I give and bequeath the sum of Ten Thousand Dollars to my brother, Robert Jesse Marshall, if he shall survive me, and if he shall die before me, I direct that the same shall fall into and form part of my residuary estate hereinafter mentioned.

FOURTH: All my right, title and interest at my death, of in and to the lands and premises known as No. 416 East 58th Street, in the Borough of Manhattan, City and State of New York, I give and devise to my sister, Maud I. Marshall if she shall survive me, or, if she shall die before me, then to my brother, Robert Jesse Marshall, and if neither my said sister or brother shall survive me, then I direct that the same shall fall into and form part of my residuary estate, hereinafter mentioned.

FIFTH: All my right, title and interest at my death, of in and to the lands and premises known as No. 21 Greenwich Avenue (also known as Nos. 128 and 128-A West 10th Street) in the Borough of Manhattan, City and State of New York, I give and devise to my sister, Maud I. Marshall, if she shall survive me, or if she shall die before me, then I give and devise the same to Brooklyn Trust Company in trust, to hold the same (subject to the power of sale hereinafter mentioned) to collect the rents, issues and profits thereof, and to pay said rents, issues and profits to my brother, Robert Jesse Marshall, for and during his life, and upon his death I give and devise the same, together with all unexpended income thereon, or the proceeds of sale thereof, if the same shall have been sold, to my cousin Albert A. Marshall, if he shall be living at my brother's death, or if he shall then be deceased, then to the child or children of said Albert A.

Marshall living at that time, or if neither said Albert A. Marshall, nor any child of his, shall then be living, then to such of the following named persons as shall then be living, to wit: Herbert Marshall, Agnes Croake, Ellen Louise White, J. Dupree Stanard, Benjamin Stanard and Lulu Reed. If neither my said sister, nor my said brother shall survive me, I give and devise said right, title and interest in said last mentioned real property to said Albert A. Marshall, if he shall survive me, or if he shall die before me, then to his child or children me surviving. If neither my said sister, nor my said brother, nor said Albert A. Marshall, nor any child of his, shall survive me, then I direct that said right, title and interest in said last mentioned real property shall fall into and form part of my residuary estate hereinafter mentioned.

SIXTH: All my right title and interest, at my death, of in and to the lands and premises known as No. 47 St. Johns Place, Borough of Brooklyn, City and State of New York, I give and devise to my sister, Maud I. Marshall, if she shall survive me, or if she shall die before me then to my cousin Martha Whitmore, if she shall survive me, or if she shall also die before me, then to the child or children of said Martha Whitmore, me surviving; and in case neither my said sister, nor said Martha Whitmore, nor any child of hers shall survive me, then I direct that said right, title and interest of in and to said last mentioned real property shall fall into and form part of my residuary estate hereinafter mentioned.

SEVENTH: All my right title and interest of in and to any real property in the State of Florida

at the time of my death, I give and devise to my sister Maud I. Marshall if she shall survive me, or, if she shall die before me, then to Mary Bell Hunt, if she shall survive me, or if neither my said sister, nor said Mary Bell Hunt shall survive me, then to the child or children of said Mary Bell Hunt, me surviving, and if neither my said sister, nor said Mary Bell Hunt, nor any child or hers, shall survive me, I order and direct that said real property last mentioned shall fall into and form part of my residuary estate, hereinafter mentioned.

EIGHTH: All the rest, residue and remainder of my property and estate, real and personal, and wheresoever situate, I give, devise and bequeath to my sister, Maud I. Marshall, if she shall survive me, or, if she shall die before me, to such of the following named persons, Herbert Marshall, Agnes Croake, Ellen Louise White, J. Dupree Stanard, Benjamin Stanard, and Lulu Reed, as shall survive me.

NINTH: I nominate, constitute and appoint my sister, Maud I. Marshall, executrix of this my will. If my said sister shall die before or after me, I nominate constitute and appoint Brooklyn Trust Company executor hereof.

TENTH: If my said sister shall die before me and if the trust in the lands and premises known as 21 Greenwich Avenue, also known as Nos. 128 and 128-A West 10th Street in the Borough of Manhattan, City and State of New York, provided for in the foregoing FIFTH Clause shall take effect, I authorize the Trustee in said Clause named at any time in its discretion during the life of my said brother, and either at public or private sale, and either for cash or part cash

and part credit, to sell the real property or interest in real property forming the corpus of said trust, and to execute, and deliver all necessary deeds to convey the fee of the property or interest therein so sold to the purchaser or purchasers and I direct that in case of such sale the proceeds thereof shall continue to be held and invested under such trust, the income collected and paid, and the principal pass and be distributed all in the same manner as said real property or interest therein would have done had the same not been so sold.

ELEVENTH: If any beneficiary under this will shall contest the same, or the probate thereof, then and in that event, I annul each and every legacy or devise by this will made to such beneficiary, and I give and bequeath the property which would otherwise have gone to such beneficiary to Brooklyn Bureau of Charities, and provided further that if the legacy thus annulled shall be a gift of income for life, the said gift of income shall fail, and the property which would have been held to produce such income shall pass under the provisions of my will as though such income beneficiary had died before me.

TWELFTH: I order and direct that no bond or other security shall be required of either my sister or said Brooklyn Trust Company as executrix, executor, trustee or in any other capacity whatsoever.

IN WITNESS WHEREOF I have hereunto set my hand and seal the 13th day of July, Nineteen hundred and Twenty-eight.

MABEL V. MARSHALL (L. S.)

Signed, sealed, published and declared by the above named Testatrix, MABEL V. MARSHALL, as and for her last Will and Testament, in the presence of us who at her request, in her presence and in presence of each other subscribe our names as witnesses.

EDWIN L. SNEDEKER,
429 Washington Avenue, Brooklyn, N. Y.

LEONARD N. SNEDEKER,
363 Carlton Avenue, Brooklyn, N. Y.

ELIZABETH FREWEN,
50 Sterling Place, Brooklyn, N. Y.

Answer of Defendant Robert Jesse Marshall.

Filed April 25, 1934.

IN CHANCERY OF NEW JERSEY.

Between AGNES CROAKE and ELLEN LOUISE WHITE, *Complainants,* *and* THE SUMMIT TRUST COMPANY, ROBERT JESSE MARSHALL, ALBERT A. MARSHALL, J. DUPREE STANARD, BENJAMIN STANARD, LULU REED, MARTHA WHITMORE, BROOKLYN BUREAU OF CHARITIES and THE BROOKLYN TRUST COMPANY, *Defendants.*	*On Bill, etc.* *Answer of Defendant Robert Jesse Marshall.*

The answer of the defendant, Robert Jesse Marshall.

The defendant, Robert Jesse Marshall, answering the bill of complaint, says:

DEFENSE TO THE FIRST CAUSE OF ACTION.

(1) This defendant denies the allegations in the first, second, third and fourth paragraphs of said bill.

(2) Paragraph 5 is admitted.

(3) This defendant admits that he is the brother of said Mabel V. Marshall, but denies the

other statements set forth in the sixth paragraph.

(4) This defendant has no knowledge or information sufficient to form a belief as to the statements in Paragraphs 7 and 8.

(5) This defendant denies the statements of Paragraphs 9 and 10, and says that the said Mabel M. Marshall died intestate, leaving this defendant as her only heir at law.

DEFENSE TO THE SECOND CAUSE OF ACTION.

(1) This defendant denies the statements in Paragraphs 1, 2, 3, 4 and 5.

(2) This defendant admits the statements set forth in Paragraph 6.

(3) This defendant admits the statement contained in Paragraph 7, that he is the brother of said Mabel V. Marshall, but denies the other allegations in said paragraph.

(4) This defendant has no knowledge or information sufficient to form a belief as to the statements contained in Paragraphs 8 and 9.

This defendant further answering says that the said Mabel V. Marshall died intestate, leaving this defendant as her only heir at law, and prays that the said amended bill may be dismissed, and that a decree may be made accordingly that this defendant as the only heir at law is entitled to her estate.

WILLIAMS & WILLIAMS,
Solicitors for the Defendant
Robert Jesse Marshall.

Answer of Defendant The Summit Trust Company.

Filed April 9, 1934.

The defendant The Summit Trust Company, answering the bill of complaint says:

DEFENSE TO FIRST CAUSE OF ACTION.

1. This defendant has no knowledge or information sufficient to form a belief as to the statements in Paragraphs 1, 2, 3 and 4.

2 Paragraph 5 is admitted.

3. This defendant has no knowledge or information sufficient to form a belief as to the statements in Paragraphs 6, 7, 8, 9 and 10.

DEFENSE TO SECOND CAUSE OF ACTION.

1. This defendant has no knowledge or information sufficient to form a belief as to the statements in Paragraphs 1, 2, 3, 4 and 5.

2. Paragraph 6 is admitted.

3. This defendant has no knowledge or information sufficient to form a belief as to the statements in Paragraphs 7, 8, 9 and 10.

WILLIAMS & WILLIAMS,
Solicitors of Defendant
The Summit Trust Company.

Answer of Defendant Brooklyn Bureau of Charities.

Filed June 20, 1934.

The answer of the defendant, Brooklyn Bureau of Charities, a membership corporation organized and existing under and by virtue of the laws of the State of New York and located at 285 Schermerhorn street, Borough of Brooklyn, City and State of New York:

This defendant, Brooklyn Bureau of Charities, answering the Amended Bill of Complaint, says that:

1. This defendant has no knowledge or information sufficient to form a belief as to any of the allegations contained in the Amended Bill of Complaint, but prays that this Court may determine whether the instrument in question, a copy of which is annexed to the Amended Bill of Complaint, is the Last Will and Testament of Mabel V. Marshall, deceased; and further prays that this Court may by its decree declare a trust, in favor of the beneficiaries under said instrument and in accordance with the terms thereof, upon all the moneys, rights, credits, choses in action, and upon all the property, real and personal, of the said Mabel V. Marshall, deceased, which may be in the custody, possession or control of the Summit Trust Company, both individually and as administrator of the estate of the said Mabel V. Marshall, deceased, and of the other defendants, or each, any and all of them; and that the Summit Trust Company, both individually and as administrator of the estate of Mabel V. Marshall, deceased, and the other defendants, may be decreed to execute such

necessary deeds, conveyances and assignments as to carry out the terms of the instrument in question. This defendant further prays that the Summit Trust Company, both individually and as administrator of the estate of the said Mabel V. Marshall, deceased, and Robert Jesse Marshall, their counsel, attorneys, solicitors and agents, and each and every one of them, may be restrained and enjoined, pending the final decree of this Court in this matter, from distributing, conveying, assigning, mortgaging or alienating, in any manner whatsoever, whatever property of the said Mabel V. Marshall, deceased, as may be in, or may at any time come into, their possession, custody or control; and for such other relief as this Honorable Court may see fit to grant.

PITNEY, HARDIN & SKINNER,
Solicitors of Defendant,
Brooklyn Bureau of Charities.

Consent is hereby given to the filing of the within Answer as of time.

LOUIS E. KLEIN,
Solicitor of Complainants.

June 18, 1934.

Replication.

Replication.

Filed April 21, 1934.

The complainant joins issue on the Answer of the defendant, the Summit Trust Company.

LOUIS E. KLEIN,
Solicitor of Complainant.

Replication.

Filed April 26, 1934.

The complainant joins issue on the Answer of the defendant, Robert Jesse Marshall.

LOUIS E. KLEIN,
Solicitor of Complainant.

Testimony.

100—632.

IN CHANCERY OF NEW JERSEY.

Between	
AGNES CROAKE and ELLEN LOUISE WHITE, *Complainants,*	*On Bill, &c.*
and	*Testimony.*
SUMMIT TRUST COMPANY, *et al.,* *Defendants.*	

FIRST DAY.

Testimony taken in the above entitled cause, at the Union County Court House, Elizabeth, N. J., on Monday, the seventeenth day of December, 1934, at 12:50 P. M.

Before Hon. John H. Backes, Vice-Chancellor.
Appearances:

Louis E. Klein, Esquire, (Harry Kalisch, Esquire, of counsel), solicitor for complainants.

Messrs. Williams and Williams, by Mr. Williams, (Andrew H. Van Blarcom, Esquire, of counsel), solicitors for defendant Robert J. Marshall.

Messrs. Pitney, Hardin and Skinner, by Shelton Pitney, Esquire, solicitors for defendants National Newark Building and Brooklyn Bureau of Charities.

LEONARD N. SNEDEKER, a witness produced in behalf of the complainants, being duly sworn, testifies as follows:

Direct examination by Mr. Kalisch.

Q Mr. Snedeker, where do you live? A Brooklyn, New York.

Q You are a practicing attorney in Brooklyn? A Yes, sir.

Q And have been so for how long? A Since 1904.

Q You are a member of the firm of Snedeker and Snedeker? A Yes, sir.

Q And that firm has been in existence how long? A The present firm since the death of my father.

By the Court.

Q How long has the firm been in existence? A That firm has been in existence when my father—

Q Well, 20 years? A 20 years or more.

Q Mr. Snedeker, you knew Mabel and Maud Marshall? A Yes, sir, very well.

Q How long had you known them? A Since my boyhood.

Q Did they live near you? A Within three or four blocks of where I live.

Q Did you know their parents? A I never have myself, no.

Q Do you know whether their parents had any business relations with your office? A Yes, they had.

Q How long are they dead? A Upwards of 20 years.

Q Since their death, did you have business relations with these two sisters, Maude and Mabel Marshall? A Yes, sir.

Q Did you personally conduct business with them? A Some of it, and some my brother.

Q Which brother? A My brother, Edwin L. Snedeker, is my partner.

Q When you had any business dealings with them, did they both come together or separately? A They came together.

Q Do you recall their being at your office in the month of July, 1928? A Yes, sir.

Q In connection with the making of a will? A I do.

Q Do you recall whether they had called to see you before the day you made that will? A Yes, on several occasions.

Q Did they come to your office separately, or together? A Together.

Q How many times, do you recall, did they see you in connection with that will before it was finally drawn? A I have no exact recollection of the number, but I should say four or five or possibly more.

Q And when you discussed that with them were they both in your office together, or did each one see you alone? A Together.

Q Now, then, do you recall the conversation, any conversations, you had with them, or either of them, in connection with the will, as to what disposition was to be made of the estate? A I recall the conversations were had with both of them together, and they were on the subject of the making of these two wills. Specifically what was said, I can't recall, but the substance of it was what the wills say in themselves.

Q Did you draw the will yourself, or dictate it? A Yes, dictated it.

Q To whom did you dictate it? A Our stenographer, Miss Frewen.

Q She is here today? A She is here today.

Q She typed it? A Yes, sir.

The Court: Do the wills contain the contract?

Mr. Kalisch: There is nothing of the contract mentioned in the wills, no.

Q I show you this paper and ask you what this is? A That is a carbon copy of the will which I prepared for Maude I. Marshall, and which she executed in my presence on the third of July, 1928.

Q After this will of Maude Marshall was made and executed, what did you do with the original will? A I don't recall—

Q After you prepared both of these wills, what did you do with them? A I attended the execution of them.

Q And after the execution of them, who had custody of the original wills, did you keep them or give them to them? A I don't recall who had the custody immediately.

Q Did you make copies of them? A Copies were made at the time the wills were typed, before their execution.

Q What did you do with the copies? A Put them in our office files.

Q I show you this will, which purports to be the will of Maude I. Marshall, and ask you whether that is a copy that was made? A That is the copy.

Q What did you do with that copy after the original will was executed? A Kept it continuously until the present time in our office files.

Q Who were the witnesses to that will? A My brother and myself and Elizabeth Frewen.

Q Who? A My brother and Miss Elizabeth Frewen and myself.

Q Just tell us how the will was executed, the manner of executing the will of Maude Marshall? A We were all present at the same time that the testatrix, Maude I. Marshall, was present in our office. She signed the will in our presence, and in answer to my question stated that she had read the will and that she declared it to be her last will and testament, and requested my brother and Miss Frewen and myself to sign as witnesses, which we did.

By the Court.

Q In her presence? A In her presence, yes.

Q Did she make this declaration in the presence of the three of you? A Yes, sir, and the declaration was by her affirmative response to my question.

Q Miss Maude Marshall, died when? A A couple of years before her sister Mabel.

Q What date, about? A I don't recall the date.

Q Was her will probated? A It is my information—we didn't probate it.

Q I show you this paper and ask you whether this is the original of the copy that you have just spoke about? That is a certified copy from the Surrogate's office.

The Court: The certificate is there.

A This is a copy. This is the 13th of July, 1928.

Mr. Kalisch: I offer that in evidence.

Mr. Van Blarcom: No objection.

Said certified copy of will is marked Exhibit C. 1.

Q Now, I show you another paper and ask you what that is? A That is a carbon copy of the will of Mabel V. Marshall, which was drawn by me and executed by her in my presence on the 13th of July, 1928.

Q That is the same day, the same time, this other will was executed? A The same occasion, the same day.

Q Were they both present when both of these wills were executed? A They were both in the office at the same time, whether they were in each other's immediate presence, I don't know; I don't think they were, but they were in the office together.

Q Tell us the manner of executing this copy? A The original of this was signed by Mabel V. Marshall in the presence of my brother and Miss Frewen and myself and the witnesses were referred to before it was declared by her to be her last will and testament, and by her affirmative response to my question, which I addressed to her, had she read and did she declare it to be her last will and testament and did she request my brother and Miss Frewen and I to sign as witnesses, she answered in the affirmative. She did sign it, and we signed it after she had signed it, and after the declaration, the witnesses,

Miss Frewen and myself, signed our names and addresses at the end of the will as witnesses.

By the Court.

Q It was all done as one transaction? A It was all done as one transaction, all being present at the same time.

Q What did you do with this copy of the will? A The same as I did with the copy of the Maude I. Marshall will, put it in our office file where it has remained until the present time.

Q That original will, you don't know what became of that? A I have no knowledge.

Q You don't know whether you gave it to Mabel Marshall, or what you did with it? A I think I did; that is my impression.

Q You also think you gave the other one to Maude Marshall? A Yes.

Mr. Kalisch: I offer this copy in evidence, of the will of Maude Marshall.

Said carbon copy of the will of Maude I. Marshall is marked Exhibit C. 2.

Mr. Kalisch: I also offer in evidence the copy of the will of Mabel Marshall.

Said carbon copy of the will of Mabel V. Marshall is marked Exhibit C. 3.

Q Now, Mr. Snedeker, you have testified that both of these sisters came to see you on occasions before the execution of this will? A Yes, sir.

Q And in consulting you, just what language did they use; without telling us what the instructions were, tell us what the language was. A I can't recall the identical language, but the substance of what they told me was instructions to

prepare those wills as they were prepared and as they stand and to provide for the gifts and other disposition of their property, as the wills provide.

Q Do you know whether anything was said between them?

Mr. Van Blarcom: I object to the leading question.

The Court: Exhaust your witness first.

Q Who gave the instructions to you concerning the provisions of these wills? A Both Maude and Mabel Marshall, always together; I don't mean speaking in one voice, but one saying one thing and the other saying another.

Q Both giving instructions in the hearing of the other? A Yes.

Mr. Van Blarcom: That is objected to.

Q Were they both present at the time the instructions were given? A Always.

Q What else was said? A The two sisters on the various occasions that I am referring to preceding the actual execution of the will or wills, jointly, if I may express myself, meaning that both participated in the conversation, gave me the instructions to make the wills, which are the wills before the Court; and I proceeded to do so in accordance with those instructions. They were given to me by the two indifferently, both contributing instructions and directions they gave me.

Q What else? A They were always there at the same time on these occasions.

By the Court.

Q Did they say anything else? A Yes, they—you mean the specific features of the wills?

Q Yes. A They discussed with me the provision in the will as to the so-called forfeiture clause regarding any beneficiary who might contest the will. They said they wanted that in the will, and, as I recall, at the outset they wanted a provision similar to it that any beneficiary who contested the will would lose their interest, and I suggested, trying to keep the will properly drawn, that they make it more specific and make a more specific provision in that case, which was done. That was discussed at considerable length between the three of us on these several occasions.

Q Was there anything said in connection with the bequest to the brother?

The Court: Exhaust your witness first.

Q Was anything else said that you recall?

By the Court.

Q Was anything else said, outside of these directions and instructions that were given to you, as now contained in the will? A I think that at the outset they were discussing that particular clause I have last mentioned and there was some discussion of mentioning the brother as a contestant—

Q Those provisions are in the will? A I am trying to give, to the best of my recollection, the discussion; I can't remember anything more specific.

Q You say you had other discussions with them before the day the will was executed? A Yes, a number.

Q Did you know the brother? A Yes, surely.

Q Robert Jesse Marshall? A Yes.

Q How long have you known him? A The same period of time I had known his sisters.

Q Did he discuss with you any of his personal affairs? A No.

Mr. Van Blarcom: I object to that as immaterial and irrelevant.

Cross examination by Mr. Pitney.

Q Had you drawn previous wills for these two maiden sisters? A Yes.

Q Do you recall approximately what the date of the earlier wills was? A There were two drawn in 1922, yes.

Q Were those wills like wills? Were they like wills or unlike wills? A They were like each other; they were identical.

Q And in that regard they were similar to the wills of '28? A Yes, sir.

Q Can you pick out of this file which you so kindly loaned me a little while ago, copies of the wills of '22? (Handing witness file.) A I don't think they are here. I think they are in my file. (Looking in another file.) Here are two copies of the wills of 1922.

Q Are these copies of the wills of 1922? A I strongly think they are, although I have no recollection. They came from our files.

Mr. Pitney: I offer in evidence the carbon copy of the will of Maude I. Marshall.

Mr. Van Blarcom: I don't think they are properly identified, and I think Mr. Pitney represents a defendant.

The Court: I will admit them

Said carbon copy of will of Maude I. Marshall (1922) is marked Exhibit DB. 1.

Mr. Pitney: I also offer the carbon copy of the will of Mabel V. Marshall.

Said carbon copy of will of 1922 of Mabel V. Marshall is marked Exhibit DB. 2.

Q At the time or just before the time of the execution of the wills of ''22, Mr. Snedeker, did you receive any written instructions from either of these sisters with respect to the contents of their will or wills? A Yes.

Q Have you that written instruction with you? A Yes. (Producing paper.) With reference to just one portion of the will.

Mr. Van Blarcom: Well, I object to that.

The Court: Objection overruled.

Q Is this the letter to which you refer? A Yes, sir.

Q And is that the envelope in which it came? A Yes, sir.

Q Was that paper you have annexed to it, an enclosure with that letter? A Yes.

Mr. Pitney: I offer the letter which the witness has identified bearing the signature of Maude I. Marshall and the envelope and the enclosure.

Mr. Van Blarcom: I object to that.

Said letter is marked Exhibit DB. 3 Also the envelope and enclosure.

Mr. Pitney: I will read the letter. "Mr. Leonard N. Snedeker. My dear Mr. Snedeker: We have been thinking it over and we think we would like to have the enclosed inserted in our wills. Sincerely Maude I. Marshall, August 24, 1922."

The enclosure reads as follows: "I am giving a lesser amount to my brother, Robert Marshall than bequest to my sister, Maude I. Marshall. I will say that I have given my services to my brother, Robert Marshall for many years, as one of the trustees of the real estate, and have never taken the usual compensation due me for such services to him. Therefore, I consider he has had a considerable gift of my services, time and money, for many years."

Q I ask you whether or not that provision you were requested to insert, did become inserted in the wills of 1922? A It was put in those two wills.

Q Referring to these wills of '22, did you receive instructions from the two sisters jointly at that time? A Yes, sir.

Q I don't know whether you can recall at this late date about how many conferences you had with respect to the wills of '22? A I couldn't recall that.

Q Do you recall whether or not they executed the wills of '22 together on the same day on the same occasion in your office? A Yes, they did.

Q To your memory, was it as in the case of the wills of '28, before the same witnesses? A It couldn't have been.

Q I don't mean the same witnesses as '28. A Oh, that's my recollection, yes.

Q How long after the execution of the wills in '22, how long was it before they or either of them, saw you again on the subject of a will or wills, as distinguished from other business? A I don't think there was any other occasion, but I couldn't be positive.

Q Until when? A Until the 1928 wills.

Q You say you saw them four or five and perhaps more times in reference to the '28 wills? A Yes.

Q Were their instructions to you in '28 given to you in the same way that their instructions in '22 were given? A They were.

Q Who acted as spokesman, if either did? A As spokesman?

RECESS UNTIL TWO O'CLOCK.

AFTER RECESS.

Q In their conferences with you that led up to the execution of the wills of 1928, which one of the sisters, if either, took the lead in giving you instructions? A Possibly Maude was a little more, a little bit more, assertive than the other, but there was very little difference. They both contributed indifferently. I can't estimate any difference between them.

Q They contributed approximately equally, you mean? A Yes.

Q Was there any discussion between them in your presence with respect to any particular feature of their wills, which comes back to your

memory at this time? A Yes, I could recall about the forfeiture clause.

Q Give us exactly the first instructions, if you can recall the first instructions that you had with respect with the forfeiture clause.

Mr. Van Blarcom: I object to that.

The Court: What is the object of it?

Mr. Pitney: This leads to the relationship. May I ask you to take it subject to later connection?

The Court: All right.

Q (Stenographer repeats the question.) A I can't recall the first or the last, but I know the general discussion regarding the forfeiture clause was whether it should be directed specifically to this brother or in general towards any legatee.

Q Toward the brother or toward any legatee? A Yes.

Q Whether the form of the language should be one or the other? A Yes.

Q Did they express to you their purpose in inserting in either of the wills the clause respecting forfeiture?

Mr. Van Blarcom: That is objected to.

The Court: I will take it now.

A It was to prevent a contest.

Q Did they express to you from whom they feared a possible contest? A Yes, sir.

Q Who was that? A Their brother.

Q Do you know from your knowledge of the sisters, what was the relationship between the

sisters over the year? A Between the two sisters?

Q Between the two sisters? A Most intimate; they lived together

Q Did their brother live with them? A That I don't recall; I don't think he did during the time I am speaking of

Q What was their relationship with him, if you know? A As of that time I don't know. I don't think they lived together; that was all.

Q Were they on friendly terms? A Of my own knowledge I can't testify directly, but from what they—they said very little to me on that subject, but my estimate would be they were not.

The Court: Strike that out.

Q Was there any difference in their method of giving you instructions with respect to the wills of 1928—

The Court: Are you through with the subject to which objection was made?

Mr. Pitney: So far as this witness is concerned, yes, sir.

The Court: I will strike out his testimony with respect to the matters objected; the clause of the will must speak for itself.

Q What if any difference, Mr. Snedeker, was there with respect to the method with which they gave you their instructions with respect to the wills of 1928 and with respect to the method of giving their instructions of the wills of 1922?

Mr. Van Blarcom: I object to that.

The Court: Objection sustained.

Mr. Pitney: My purpose is to show there had been no change in their plan.

The Court: You may ask him that, but your question asked for his conclusion.

Q Was there any change that you observed, Mr. Snedeker, when they advised and consulted with you with respect to the preparation of the wills of 1928, from their manner or their method of giving instructions in connection with the wills of 1922? A No, sir.

Further cross examination by Mr. Van Blarcom.

Q Mr. Snedeker, I observe that in this Exhibit DB. 3, it seems to be cut off at the bottom. Was that in the same condition as when you received it? A I imagine it was.

Q You don't remember anything else on there that has been removed? A No.

Q And did you say that when these people met in your office, that they were in the same suite, as I think you said, or all in your room? A They were always—when they were together they were in the office together, in the suite. In consulting me they were always together with me.

Q When these wills were signed, is it so that one sister signed at one time and then left the room and then the other one came in and signed? A That is my recollection.

The Court: Is there any dispute as to the execution of these wills as testified to by Mr. Snedeker?

Mr. Kalisch: No.

Mr. Van Blarcom: None whatsoever.

Mr. Pitney: I would like to ask the witness about the method under which she prepared the wills under instructions from Mr. Snedeker at the time.

Mr. Van Blarcom: I don't think it is competent.

The Court: Mr. Kalisch was going to call Mr. Snedeker's secretary, but she simply did the mechanical end, and there seems to be no dispute as to the execution of the wills.

Mr. Pitney: It is possible that as a part of the transaction, the method of preparing the wills might be important.

The Court: Well, I suppose if you want to put this witness on I won't stop you.

Mr, Pitney: This goes to the manner in which these mutual wills were prepared pursuant to the understanding and instructions given at the time.

The Court: Do you think she knows more than Mr. Snedeker about this matter?

Mr. Pitney: She might.

The Court: All right.

ELIZABETH FREWEN, a witness produced in behalf of the complainants, being duly sworn, testifies as follows:

Cross examination by Mr. Pitney.

The Court: Mr. Pitney you may take up the question you want to develop.

Q What is your recollection, Miss Frewen, as to whether these two sisters—

By the Court.

Q First, you are secretary to Mr. Snedeker and helped him in the preparation of these wills? A Yes.

Q The wills were prepared in your office? A Yes.

Q You still are secretary in that office? A Yes.

Q What is your memory, Miss Frewen, as to whether these two sisters executed the wills in the office at the same time or whether each one went out while the other will was executed? A I think they both stayed there while they were being executed.

Q Miss Frewen, will you state how the work was given to you, of preparing these wills? A Mr. Snedeker had a draft of the two wills, and he dictated one and then he asked me to draw an identical will, reversing the names. I drew the one will and then—

Q He had a draft of the two wills? A He had one draft, a pencil memorandum.

Q What did he say? A He dictated one will and said, "Now draw the other identical with that and reverse the names," and told me to put Maude instead of Mabel, and so forth.

EDWIN L. SNEDEKER, a witness produced in behalf of the complainants, being duly sworn, testifies as follows:

Direct examination by Mr. Kalisch.

The Court: In view of the admissions made, won't you go at once to the things you think this witness can give in addition?

Mr. Kalisch: Yes, sir.

Q You are a partner of Mr. Leonard Snedeker? A I am.

Q You knew both these Marshall girls? A Yes, sir.

Q Do you recall the death of Mabel Marshall? A Yes, sir.

Q When did that occur? A July 13, 1933.

Q Did you make a search for the will? A I did.

Q Where did you search? A In our office, in the Summit Safe Deposit Company, or the Summit Trust Company, and in a trunk in the Pioneer Warehouse Company in Brooklyn.

Q Did you visit the house? A I did.

By the Court.

Q Why did you search in the warehouse? A I had been informed they had a warehouse trunk and I went there to find it.

Q Did you find anything there? A No, no will.

Q You found other papers there? A Yes, a miscellaneous lot of papers.

Q The search you made in the Trust Company, what was that in the safe deposit box? A No, we—

The Court: Do you admit there was a thorough search made and no will found?

Mr. Van Blarcom: I certainly do.

Mr. Pitney: Yes.

Q Now, Mr. Snedeker, when did you first hear of the death of Mabel Marshall? A On the morning of the 14th of July. Police Captain Nelson, of the Summit Police Station, phoned the office.

Mr. Van Blarcom: That is objected to as hearsay.

The Court: Objection overruled.

Q Well, as a result of a 'phone call, you went to the home. Is that correct? A No, I 'phoned Mr. Marshall's home and I got no response.

Q What Mr. Marshall? A Mr. Robert Jesse Marshall. I got no response. Then I sent a note advising him of his sister's death, and the note was left at his place in Park Place, Brooklyn.

Q Did you visit the home? A Either that day or the following day, Saturday, I went out to Summit and I saw the police captain and I told him—

Mr. Van Blarcom: Objected to.

A And I told him that I understood they employed no servant and that the house was unoccupied and that there was a likelihood that papers of various kinds might be found in the house, and they should be safeguarded, and I wished him to detail an officer with me, and with that officer I went to the house and the house was opened by approaching the back second

story window, by a ladder, and the police officer and I went into the kitchen and he told me, on Thursday night—

Mr. Van Blarcom: I object to that.

Q Tell us what you saw? A We went from the kitchen—

By the Court.

Q Who told you about the death? Did he tell you? A Yes, and then we went up to the bedroom and things there were in a very much disheveled condition, and the bed linen had been thrown back and papers were all over the bureau and mantle piece and the police officer and I together collected such of them as we thought important and they were turned to the police station. And along with the papers was this key to a safe deposit box and it had a tag on it. If I recall correctly, "Summit Safe Deposit Company." And on the following Tuesday following the funeral services, I went with Captain Nelson to the safe deposit vault and there met in the office of the Summit Trust Company, an officer of the Company, and at the same time Mr. Williams, who was the attorney for the company, appeared and the four of us went in the safe deposit box, examined the box for the will, and we found no will. Then I returned to Brooklyn, and I don't know how much more of this testimony you want.

Q Do you know anything, Mr. Snedeker, about the relations existing between Mr. Marshall, that is, the brother, and these two sisters? A

Well, I had letters from Robert Marshall complaining of his lack of income coming through his sister Mabel's hands. Other than that, I don't know anything. It was the correspondence, and it is available if you want it, and the letter speaks for itself.

Cross examination by Mr. Pitney.

Q Mr. Snedeker, you said you found papers in Miss Mabel's bed room, topsy turvey, or disheveled? A I said disheveled.

Q Give us that picture a little more in detail, if you please?

The Court: It was an upset room with papers scattered around, wasn't it?

A Papers were scattered all over; they consisted of rent statements, expired and unexpired life insurance, honored checks and uncancelled checks in several amounts of something less than a hundred dollars, and in the closet the officer found these keys.

The Court: You have told us that.

Q How did the condition of that room and the papers that had been left all around in that room, how did the room compare with the other rooms in the house? A Everything in the house other than in that room was in a very orderly condition.

Q What is your memory as to whether the two sisters executed the will at the one and the same time without taking turns at leaving the room? A That I don't recall.

Q You started to tell of your attempt to notify the brother of Miss Mabel's death. When did you first hear from him, when you sent that letter around to his address? A I heard indidirectly, the day I was in Summit; the day I went to the funeral services, which was the same day we went to the Safe Deposit Company, and as I was returning to Mr. Williams' office, the police officer came from the opposite side of the street and inquired of the captain where Mr. Snedeker was, that there was somebody on the 'phone.

The Court: I am not interested in this, am I, not in the details?

Q You first heard from him on the morning of the funeral? A Yes, sir.

Q Did you speak to him that day on the 'phone? A I did, that afternoon.

Q What did he say? A Well, he wanted to know the details of the funeral services and as to who was present and as to who went to Greenwood, and that conversation terminated there and the 'phone rang again.

By the Court.

Q He was not at the service? A He was not at the service. I could explain that in detail as to why he wasn't there. The reason he assigned was because he didn't have suitable linen. He was advised of it by my secretary and that was the substance of the talk which she wished to give me when I was in Summit.

Q Did you have a second telephone conversation with him on that afternoon? A I did.

Q Describe how shortly after and whether he called you or whether you called him? A He called me and asked me if there was any will and if there was no will would he inherit the entire estate and I said yes.

Q Was that all? A That's all on that second conversation.

Further cross examination by Mr. Van Blarcom.

Q When did you go to Summit the first time? A Either Friday afternoon, the 14th or Saturday afternoon the 15th.

Q That was the day after or two days after she died? A Yes, sir.

AGNESS EVERSON CROAKE, a witness produced in behalf of the complainants, being duly sworn, testifies as follows:

Direct examination by Mr. Kalisch.

Q Where do you live, Mrs. Croake? A Brooklyn, New York.

Q And were you related to Maude and Mabel Marshall? A My mother and their mother were sisters.

Q You are a first cousin? A I am a first cousin, yes.

Q Did you have on occasions, conversations with Mabel Marshall concerning the disposition of her estate? A Yes.

Mr. Van Blarcom: I object to that on the ground that it is inadmissible under the evidence act.

The Court: I am going to sustain that objection, but I am going to take the testimony. I am not so sure about it. I am inclined to think it is not admissible, but it is on the border line and I will take the testimony and hear counsel on it later. It doesn't appear by the bill that anybody appears in a representative capacity, does it?

Mr. Van Blarcom: Yes, the Summit Trust Company.

The Court: That company is made a party defendant, but not as administrator.

Mr. Pitney: I think the bill has been amended. I am not sure of it.

Mr. Van Blarcom: They also have a count to establish a contract.

The Court: Yes, but I am not going to decide that at this time.

Q How many such conversations did you have with Mabel Marshall? A They were so numerous I couldn't count them.

Q Well, can you recall the last one you had before her death? A Before Miss Mabel Marshall's death?

Q Yes. A The fourth of June, '33.

Q What year? A '33.

Q That was a little over a month before she died? A Yes, sir.

Q What was the substance of that conversation? What was that conversation? A Well, she was always talking about money—

The Court: Now, this is very important; it is very important that you answer the lawyer directly.

Q Stenographer repeats the question as follows: What was the conversation? A She was speaking about her will.

Q What was said? A She said she had not changed her will.

Q Give us the entire conversation? A Well, I can't tell you the entire conversation, because I was there from two o'clock until five.

Q Where? A Summit, New Jersey.

Q You had been visiting her? A Yes.

Q Well, can you recall any conversation that you had with Mabel Marshall in connection with her will? A She was constantly talking about it.

Q (Stenographer repeats the question.) A Yes, sir.

Q Fix the time and the place of the conversation. A Summit, New Jersey; the time, in January, February, March, April, May, June. She told me she had left money to the Southerners, the Standards in Baton Rouge, Louise White, Lulu Reed, Bell Hunt and myself. She said any money that you leave to Robert is squandered, but she says, "He has to be taken care of. I want to leave some money to Greenwood Cemetery and put the plot into perpetual care."

Q Was that all the conversation? A Oh, no, she was telling about money that her brother had had.

Q Whom do you mean? A Robert J. Marshall. She said his mother had left him more than the real estate, she had left him mortgages and from their Aunt Mary he had a share in the house on 71st street, New York, and the $10,000.00 he got from Maude's estate, she said, "The money has all gone, all gone," she says.

"He has spent it all." The only plea was that the money left to the brother was squandered.

Q Did you have any conversation with Maude, the elder sister, in connection with the disposition of their estate? A Yes.

Q Prior to her death? A Yes, in about April, 1928, they called me up on the 'phone and told me that, first, Maude would call me up and say they were making their will and tell me different ones she wanted to leave the money to. Then, a half an hour afterward Mabel would call me up and say the same things.

Q What did she say? A She said they were making wills, just the same.

By the Court.

Q Who was talking to you? A Maude Marshall, the one that passed on March 17, 1931. This was in 1928.

Q I understood you to say Mabel Marshall? A No, you asked me Maude.

The Court: Don't let us get incompetent testimony into this case.

Q All I wanted to get in is Mabel's conversation with you. What was that conversation that you started to give us, over the 'phone; what was it?

Mr. Van Blarcom: That is objected to as incompetent and immaterial.

The Court: I don't know whether it will be or not.

Q And the time? A That was Maude?

Q I am asking you that now. What was your conversation with Mabel V. Marshall over the

telephone and when did the conversation take place? A That was in 1928, before the will was made.

Q What was the conversation? A That they were leaving their money to the members of the family.

Q Was that all the conversation? A No, they were leaving it to the Standards, and the Southern cousins, Lulu Reed—

By the Court.

Q Who was telling you this? A Mabel Marshall.

Q Over the telephone? A Yes, sir, and every night they called me up on the 'phone and discussed the matter. One would call me up one time and the other a half an hour after, and it's hard to distinguish between the two.

Q Give us the conversation. A That was practically the conversation; that was the principal conversation, the making of their wills.

Cross examination by Mr. Pitney.

Q Won't you give us in more detail, Miss Croake, the conversations first of one sister and then of the other sister, on the occasion to which you have referred, when one and the other telephoned to you in, I think you said, April, of 1928?

Mr. Van Blarcom: I object to the question.

Q Which one called you first? A Maude Marshall.

Mr. Pitney: The objection would not go to what Maude said.

The Court: It goes to the question of hearsay. It is self-serving testimony. That is the theory.

Mr. Pitney: I don't know how you would establish an oral contract unless you would have an opportunity to examine the one who heard it.

The Court: You can bring it in by estoppel. You may ask your question and I will rule on it and other questions as you go along.

Q I am referring now to a conversation in April, 1928. Where did the two sisters live at that time? A 47 Saint John's Place, Brooklyn, New York.

Q In April, '28? A Yes.

Q Now, you say Maude spoke to you first? A Yes.

Q Now, tell us what Maude said to you? A Maude called me up on the 'phone—

Mr. Van Blarcom: Objected to.

The Court: Objection sustained.

Q After you had concluded your conversation with Maude, how shortly thereafter was it that Mabel called up? A About a half an hour.

Q And what did she say?

Mr. Van Blarcom: That is objected to; that is also incompetent.

The Court: Objection overruled.

A The same as Maude, that they were making their wills.

Q And what if anything else, did she say? A She asked me, for one thing, if I wouldn't promise to leave the house that I lived in—

Q No, relating to their affairs? A That did. They wanted the money that they had to be divided among the relatives and the house at 47 Saint John's Place—

The Court: Answer the questions of counsel. What was said?

Q What was said? What did Mabel say to you? A She said, "Agnes, don't you think that the money that is in the family should stay in the family?" A I said, "Yes."

Q What else did she say? A She said, "I want to leave the house to Martha Whitmore, 47 Saint John's Place, don't you think she would be doing very well if she got that, because she got so much from the other members of the family?" I said, "Yes." Then she said, "Will you agree to leave your house, or if you sell that house, the money that it brings, to Louise White and Martha Whitmore?" I said, "No."

Q Did she identify in her conversation with you at that time the property that she contemplated leaving to Miss Whitmore? A 47 Saint John's Place.

Q What property did she identify? A 47 Saint John's Place.

Q Where? A In Brooklyn, New York.

Q Did you have a copy of Maude's will after her death? A Yes, sir.

Q Where did you get that? A I sent to the county seat at Elizabeth.

Q After you received it, did you then have a conversation with Mabel? A Yes.

Q What was that conversation?

Mr. Van Blarcom: That is objected to on the grounds that it is against the evidence act.

The Court: I am letting it in and reserving that. I am sustaining your objection, but letting the testimony in.

A Mabel told me she thought that I would be interested in hearing about Maude's will, but she couldn't give me the details. So I said I had sent to Elizabeth, the county seat, and got a copy of it. Then she said, "Well, all right, then you have a copy of my will, too."

Mr. Van Blarcom: No questions.

The Court: When did Mabel Marshall die?

Mr. Kalisch: July 13, 1933.

ELLEN LOUISE WHITE, a witness produced in behalf of the complainants, being duly sworn, testifies as follows:

Direct examination by Mr. Kalisch.

Q Where do you live, Mrs. White? A I live in Brooklyn, N. Y.

Q And you are a cousin of Mabel Marshall? A Yes, I am.

Q Prior to her death, Mabel's death, in 1933, July 14th, did you have occasion to see Mabel Marshall? A Yes.

Q Did you talk with her? A Yes.

Q Did she ever have a conversation with you in connection with the disposition of her estate? A Yes.

Q Can you fix the time when you had the conversation with her prior to her death? I mean approximately? A The first time that Mabel ever talked to me in regard to her will, and Maude called upon me at the Hotel St. George, where I lived, in Brooklyn, and she said that—

Mr. Van Blarcom: Objected to.

Q When did you have a conversation with Mabel Marshall concerning the disposition she was making of her estate, Mrs. White? A Your question is hard for me to answer without speaking of Miss Maude Marshall, for the first time Miss Mabel Marshall spoke to me in regard to her will was during the lifetime and in the presence of her sister.

Q Well, that's all right. Go ahead and tell us what the conversation was with Mabel.

Mr. Van Blarcom: That is objected to as immaterial and hearsay.

The Court: The objection is sustained, but I will take the testimony, as before.

A Miss Mabel Marshall said to me that they had just come from their lawyers' office. This was in January, 1929; and had consulted their lawyer in regard to adding a codicil to their will. That was the first time.

Q That was the first time? A That was the first time, yes.

Q Is that all that was said by Mabel on that occasion? A Yes.

Q When was the next occasion you spoke to Mabel? Give it approximately; you need not give it exactly, if you can't. A The next time was the night after the funeral services of Miss Maude Marshall.

Q The funeral services were held on what date? A March 19, 1931.

Q Very well. Go ahead. A Miss Marshall asked me if I would come back to Summit with her.

Q This is Mabel Marshall? A This is Mabel Marshall. She asked me if I would return to her home in Summit, N J., after the funeral services. And after dinner that night she said to me, "Louise, would you like to see a copy of Maude's will?" She went into her room and she brought out a longhand, written in longhand, apparently, a copy I read it.

Q What conversation ensued, if there was any? A I expressed surprise—

The Court: No.

Q Just tell us the conversation. A I said, "Maude has left Robert $10,000.00 in cash, I see. I am surprised at that," because for various reasons—

By the Court.

Q What was said? A "I am surprised at that." And Miss Marshall said, "Maude and I talked it over, and we decided to let Robert have $10,000.00 to squander. Now you have read that copy of Maude's will and, Louise, you know what mine is."

Q Were there any more conversations with Miss Mabel Marshall, Miss White? A From 1931 until—

The Court: Just answer the question.

Q Were there any more conversations? A Yes.

Q Let us have them? A From 1931 until Miss Mabel Marshall died I saw her many times, and almost every time she referred to her will and her brother.

Q Well, what was the conversation? Fix the time, if you can, and the place, and give us the conversation, if you can, concerning what she said in reference to her estate or her brother? A Well, she said that she was having a great deal of trouble and a great deal of worry in regard to her brother and his affairs, and she said to me, "You know, Louise, that I have not made any other will. That will that Maude and I made at the same time is what I want."

By the Court.

Q When did she make that statement to you? A The last time I saw Miss Mabel Marshall alive, your Honor, was on March 21, 1933.

Q When did she make the statement to you? A On that day.

Q You didn't see her after that date alive? A No, that was the last date or time alive that I ever saw Miss Mabel Marshall.

Cross examination by Mr. Pitney.

Q After you returned to Brooklyn, where were you then living, as I understand it, did you have any conversation with Mr. Marshall, the brother, following your return from Summit after Miss Maude's funeral? A Yes, I did.

Q After the burial? A Yes.

Q How soon did you return to Brooklyn? A Miss Maude Marshall was buried on Thursday, and I went back to Summit and remained there until Sunday evening and returned to Brooklyn Sunday evening.

Q In March '31? A Yes.

Q After you got back to Brooklyn that evening, did you have a conversation with Mr. Marshall? A Mr. Marshall called on me at the Hotel St. George on the following Monday evening.

Q And said what?

Mr. Van Blarcom: Objected to as immaterial and incompetent.

The Court: I will hear it. You may move to strike it out if you desire.

Q Go on. A Mr. Marshall asked me all concerning the questions in regard to whether I knew anything about his sister Maude's will.

Q What did he say? Can you remember the substance of what he said? A He said if she hadn't left him some of the jewelry as well as the property, that he ought to have it; and things of that description; words of that nature.

Q Did he ask you what your knowledge of the will was? A Yes, he did.

Q What else did he say? A Well, he asked me any number of questions in regard to the matter, and I didn't answer him satisfactorily—

By the Court.

Q You didn't know? A No, your Honor, I didn't. And then he said to me, "Well, I know one thing, and that is that Maude and

Mabel had made wills just alike." And that was about the end of the conversation.

Q Besides the visit you made to the Summit house immediately after the burial of Maude, did you make any other visit to the Summit house? A Yes, until I left the city for my country home I went out there a number of times.

Q Before Maude's death did you make a visit out there? A I went out to Summit, but I didn't go to 140 Maple street. I went to the Beechwood Hotel, where they were.

Q Did you find them in? A Once, yes.

Q Tell us of your arrival there and what happened? A You mean at the Beechwood Hotel?

Q Yes. A I just went and called on them at the Beechwood, and they told me they were moving into their new home.

Q Did you call on them at their new home after they moved in there? A Yes, once.

Q Did you go to the front door on that occasion, of their new home? A Yes. You mean before Miss Maude Marshall died?

Q Yes. A Yes, I did.

Q Did you find them both there? A Yes.

Q Do you recall anything of the conversation at that time, with Miss Mabel? A Are you asking me about before Miss Maude Marshall's death or after?

Q Before. A They were both at home.

By the Court.

Q Did you have any conversation with Miss Mabel? A Yes, they were both at home.

Q Were they both up and around at that time? A Yes.

Q Did you pay a visit there while Miss Maude was sick? A No, she died very suddenly.

Q Well, at any time when Miss Mabel was sick did you pay a visit? A After Miss Maude Marshall's death?

Q Either before or after? A I was out there a number of times to see—

By the Court.

Q When she was sick? A Miss Mabel Marshall wasn't sick, to my knowledge.

Q Were you always admitted by the front door when you went to call on them in their Summit house? A Until about a year before Miss Mabel's death.

Q That is the visit I am trying to fix. What happened on that occasion when you went to call? A I was notified—

By the Court.

Q Did you go to the back door? A Yes, she let me in at the back door. I knocked at the front door a number of times, and then I went to the back and she opened the back door and let me in.

Q What did she say? A She was very much worried over financial conditions.

Q What did she say in explanation of letting you in the back door? A She didn't offer any explanation except she looked out of the window to see who it was.

Q What did she say? A She was glad to see me, apparently.

Q What else did she say? A I went in and I visited with her and I remained there.

Q What did she say when first she saw you or when first you were admitted through the back door? A She said she was glad to see me.

Q What else? A I don't seem to recall, unless I go into general conversation. She was worried about financial matters.

Q What did she say, if anything, with respect to her brother Robert? A Well, of course, all the conversation—

Q Did she say anything about him? A Yes, she did.

Q What did she say? A She said she was afraid of him.

Q What did she say she was afraid of? A Because he was going out there and worrying her about financial matters, and she said she was afraid of Robert.

Further cross examination by Mr. Van Blarcom.

Q What was her condition of health at that time? A Physically she was run down.

Q And mentally she was also run down, was she not? A Mentally she was apparently all right.

Q Now, where did she show you this longhand copy of the will? A Where?

Q When was it? A She showed it to me the night her sister was buried; the night of the afternoon her sister was buried.

Q That was in March, 1931? A March 19, 1931.

Q Where did that take place? A Upstairs in her room.

By the Court.

Q That was a copy of Maude's will? A That was a copy of Maude's will.

Q In whose handwriting was that, if you know? A I should say it was her handwriting.

Q Which one would that be, Maude or Mabel? A That would be Mabel.

Q It would not take many sheets? A It was on, I should say, a sort of foolscap paper, a cheap pad; not yellow paper, but white paper, with a sort of blue lines on it.

Q How many pages were there? A Really, that I couldn't tell you, but I should say, approximately, perhaps, six, or something like that.

Q Did you read the will as she showed it to you? A Yes, I did.

Q Where was the house in which you saw this will? A 140 Maple street, Summit.

Q That is the place she died? A Yes, sir.

Q When did she move into this house? A They moved in, I think, the September or October of the year that Miss Maude Marshall died. Miss Maude Marshall died March 13, 1931, and I think they moved in in the early fall of that year.

By the Court.

Q Of the year before? A Yes, sir; or 1930.

Q Did you ever see the original will which is claimed to be lost? A I never did.

Q She never showed you that or offered to show it to you? A No.

By the Court.

Q Who conducted the household? A Miss Maude and Miss Mabel Marshall lived alone.

Q Was there any help? A They had a colored maid part of the time.

Q Was it a small house? A Yes, sir.

Q How large? A Well, three bedrooms, a living room, a foyer, a dining room and kitchen.

Q How old were they? A Miss Mabel Marshall was sixty-seven and Miss Maude Marshall, I think, was seventy-one, I think, or seventy-two. I can't recall exactly.

Q Were they educated ladies? A Yes.

Q And they retained their mentality up to the time they died? A Up to the time I saw Mabel Marshall the last time she was mentally all right.

Q Mentally firm for her years? A Yes, but not physically.

Q Was this a house that needed more help than they had? A It was a house that they ought to have had or kept a servant in.

Q They should have kept a servant? A Yes.

Q Was it neatly furnished? A No, all the old family furniture had been taken down from Brooklyn.

Q Was it a new house? A Yes, comparitively speaking; eight, ten years old. They bought it.

Q Did Miss Mabel have a servant the last time you were there? A No, she didn't.

Q How long had she been without a servant? A She had a servant, a colored maid, as she told me—

Q How long had she been without a servant the last time you called on her? A I should say for approximately for a year anyhow.

Q How was her house kept? A It was immaculate.

Q At her years? A Yes.

Q How long did you remain when you were there in March? A When Miss Maude died?

Q March, 1933, you told me was the last time? A Oh, that day. I was there three or four hours probably.

Q Did you stay to a meal? A I went out in the kitchen and prepared a little tea.

Q Why did you go out and prepare it? A Because she was tired and nervous.

Q She was tired and distressed? A Yes.

Q At that time was she capable of taking care of her home? A Perfectly. She gave me an account of her affairs and the taxes and everything.

Q No, I mean taking care of her household ? A Well, it was quite a burden to her.

Q But did she take care of it? A Yes, she did.

Q You said something about her being distressed over money matters? A Yes, sir.

Q Did you know of her money affairs? A Yes, your Honor.

Q Pretty well to do, was she? A Yes.

Q Supposedly well to do? A Yes.

Q To what extent, so far as you then knew, $100,000.00 or $200,000.00 or $300,000.00? A I should say approximately, yes, about $200,000.00. Of course, it was in real estate mostly.

Q And the investments were troubling her? A Yes, sir; but there were no mortgages. The taxes were worrying her.

Q As far as you know she had plenty to live on? A Yes.

Q And nothing to worry about? A I wouldn't think so.

Q Do you know where the wills were kept, of the two sisters? A No.

Q Did either of them tell you where they were kept? A Miss Mabel Marshall told me she had taken a safe deposit box in Summit.

Q Did she tell you she put her will in there, and did you say "Why did you do that?" and she said, "Because I want all of my valuable papers where I can get at them without having to go into the city"?

By the Court.

Q New York? A Yes.

Q Did she have any strong box at home, that you know of? A In Brooklyn?

Q No, in Summit? A Not to my knowledge.

Q Did you see any of her documents while you were at the Summit home? A The only thing I saw of that nature were some insurance policies on property and this copy she had made of the will.

Q You don't know where she got that from? A She took it out of her desk, your Honor, that night.

Q Did she have any other papers in that desk? A Yes, it was filled with papers when she opened it.

Q When, with reference to that evening, was it that she told you she had a safe deposit box? A No, she told me that earlier.

Q I say when, with reference to that evening, upon one of your earlier visits to that house? A Yes.

Re-cross examination by Mr. Pitney.

Q You know the handwriting of Maude and Mabel? A Yes, sir.

Q Will you examine Exhibit DB. 3, and tell me in whose handwriting that letter is? A I should say that that had been written by Miss Maude Marshall.

Q Maude? A Yes, sir.

Q Will you look at the paper annexed, and which came as an enclosure with that Exhibit, and tell me in whose handwriting that enclosure is? A I am positive that is Miss Mabel Marshall's. I have with me a letter Miss Mabel Marshall wrote me, if you want it. I know that is her writing, and I am almost positive that is Maude's.

Q In whose handwriting, if you can recall, was the copy shown you by Miss Mabel, of Miss Maude's will, when you went out there? A That was Miss Mabel Marshall's handwriting. She had made that copy.

ELIZABETH FREWEN, being recalled in behalf of the complainants, testifies as follows:

Direct examination by Mr. Kalisch.

Q Miss Frewen, do you recall the conversation that was had with Mr. Marshall over the telephone at the time of the death of Mabel Marshall, at the time just before the funeral took place? A Yes.

Q Did you personally have the conversation? A Yes, sir.

Q Did you recognize Mr. Marshall's voice? A Yes, I did.

Q You had spoken to him before? A Yes, I had heard his voice. I heard him speak with Mr. Snedeker before over the 'phone.

Q What was the conversation? A Mr. Marshall telephoned the office and said that he had just arrived in from Jamaica, in Brooklyn, and he telephoned the office—

Mr. Van Blarcom: I object to that.

Q Did you answer the 'phone? A I answered the 'phone. There was nobody else there.

By the Court.

Q What did he say? A He said he had just arrived in from Jamaica. He wanted to know what I knew about Mabel Marshall's death and who had gone to the funeral and when the funeral was taking place, and I told him that I thought the funeral was just leaving Summit. He asked me what I would do and I said, "If you want to know what I would do, I would certainly go to the funeral." He said "I can't do it; I am very nervous and I have to go back to Jamaica and pick up some clean linen or clean clothes," either one or the other. And he said, "On that account I can't go to the funeral." I said, "Mr. Snedeker is over there and I think you ought to go, and you should telephone Greenwood and they could tell you when the funeral was going to arrive, and in that way you could get there." He said, "No, I got to go back to Jamaica and pick up my suitcase, and as I spoke with him I wrote down the conversation in

shorthand, because I wanted to tell Mr. Snedeker that Mr. Marshall was available, because we had been trying to get him for three days then.

Cross examination by Mr. Pitney.

Q Where is this Greenwood Cemetery? A I don't know. I think it is the other side of Prospect Park in Brooklyn. It is in Brooklyn.

Further cross examination by Mr. Van Blarcom.

Q At the time this telephone conversation took place, isn't it true that the funeral had already taken place?

The Court: She told him it was about to take place.

A It was about to leave. It was about one o'clock.

ANNE M. RALSTON, a witness produced in behalf of the complainants, being duly sworn, testifies as follows:

Direct examination by Mr. Kalisch.

Q Doctor, where do you live? A 121 Henry street, Brooklyn.

Q How long have you been practicing? A Since 1900.

Q Have you had occasion to attend or see Miss Mabel Marshall at her home in Summit? A I saw Miss Mabel Marshall at her home, just once, in Summit.

Q When was that? A August 25, 1932.

Q You are a physician? A Yes, sir.

Q You saw her in 1932? A I did.

Q Did you have a talk with her? A I did.

Q What was the conversation you had with her in connection with her brother? A Well, it is absolutely necessary for me to tell you why she made this statement. You would not understand it if I didn't.

By the Court.

Q Let us see. What did she say? A I said to her, "Why don't you come and visit me at my home at Manhattan Beach and stay for two weeks? Miss White is with me, and inasmuch as you are nervous you need a rest and a change of scene away from here. It would be a very good thing for you to come with us. I have got the car outside and it wouldn't cost you a nickel to come for the two weeks" She said, "It's very nice of you to want me to come to your home. I would like to go, but I am afraid of my brother." I said, "What are you afraid of your brother for?" She said, "He is the only one that has a key of this house, and if I leave and go to your home I wouldn't know what would happen."

Q And that is all she said in reference to her brother? A Yes.

Q Did you see her again? A No, I didn't.

Cross examination by Mr. Pitney.

Q What, if anything, did she say with respect to her will? A She said nothing about her will to me.

Mr. Kalisch: I offer in evidence the transcript of the testimony taken under stipulation.

Said transcript of the testimony of Frances Rockwell, taken before Jacques Hecht, Esq., Master, on September 26, 1934, and filed with the Clerk in Chancery on October 23, 1934, is designated Exhibit C. 4.

Mr. Pitney: I want to put in evidence copies of deeds of the two sisters, of the Brooklyn property, which they bequeathed under these wills to Miss Whitmore, to which, I think, one of the witnesses testified, and also the title to the Summit property.

The Court: What has that to do with the case? They afterwards conveyed the property that they had devised, didn't they?

Mr. Pitney: No, sir; the ownership of that property was as tenants in common, and the way the Brooklyn property was treated in their wills will have a bearing on their intention.

The Court: Is that all?

Mr. Pitney: Yes, just those two documentary proofs.

The Court: What is the second one?

Mr. Pitney: A property which they had bought together.

The Court: Were both properties held as tenants in common?

Mr. Pitney: Your Honor, I want to check the records.

The Court: Read the testimony.

(Mr. Kalisch reads the testimony contained in Exhibit C. 4.)

NEWARK, NEW JERSEY

AGNES CROAKER and ELLEN LOUISE WHITE,
Plaintiffs,

vs.

SUMMIT TRUST COMPANY, *et al.*,
Defendant.

Transcript of the testimony of the stenographic notes as taken before Jacques Hecht, Esq., a Master in Chancery of New Jersey, and in the presence of Louis E. Klein, Esq., counsel for the plaintiffs, Andrew M. Van Blarcom, Esq., (Williams & Williams, Esqs.), counsel for the defendant, Summit Trust Company, and Edward K. Mills, Jr., Esq., (Pitney, Hardin & Skinner, Esqs.), for the defendant, Brooklyn Bureau of Charities, at 146 Maple street, Summit, New Jersey.

(The stenographer was duly sworn.)

MISS FRANCES ROCKWELL, called as a witness on behalf of the plaintiffs, being first duly sworn by the Master, testified as follows:

Direct examination by Mr. Klein

Q Miss Rockwell, did you know the decedent Miss Mabel Marshall? A Yes, I knew her.

Q How long before her death did you know her? A I knew her from the time she left the Beachwood Hotel and came next door here. She came for several months—

Q Roughly, won't you fix the date that you first knew her? A They took possession—that is the first of June or the last of May.

Q What year? A Well, it is long ago—it is when they first lived, I am not good on dates.

Q This is 1934. A That would be about three years, wouldn't it? They had possession the first of June. If they were from the first of June until—

Q What year? 1931, would you say?

Mr. Van Blarcom: She didn't say. Don't lead the witness.

The Witness: 1934. It must be three years ago.

By Mr. Klein.

Q That would be what year? A This is 1934. It is about 1930 or thirty-one, if I am to be accurate about that. I am not good on dates. They were strangers; I knew when they came here.

Q Miss Rockwell, do you recall the date of Maude Marshall's death, roughly? A Yes, sir, the sister died first.

Q Yes. A Well, I have to figure this out. The month, the last of October, she was taken sick and November—she was taken sick in November and died the following March. That would be 1932, wouldn't it? I would say.

Q Shortly after the death of Maude Marshall, do you recall a conversation with Mabel Marshall? A What was that?

(The reporter read the last question.)

The Witness: That is the living sister?

By Mr. Klein.

Q Yes. A Yes, I do.

Q Do you recall what the occasion was for that conversation? What brought that conversation about? A Well, she came here a great deal. She told me her troubles and trials and I knew of her trouble with you—

The Master: Whom do you mean by "you"?

The Witness: Mr. Williams.

She came with her affairs and she said, "I am very lonely, Miss Rockwell. I have a brother out here who is undependable."

I said, "Why not have that brother out here with you?"

She said, "He can never live with me. He is nothing but trouble. He is always causing us trouble." Well, that stopped the conversation, so I didn't consider it any of my business, but she wanted to talk of her affairs and talk of her will.

Mr. Klein: One moment, please.

Mr. Van Blarcom: I object to the witness being interrupted.

The Witness: All right, I can go on; I can give you the facts. She came in time and time again. She was busy with the inheritance tax.

She said at one time, "My cousin has not been to see me and I feel hurt because she don't come and I haven't seen her in so long. After my sister's death it was a help to see her. I have felt good—

Mr. Klein: Just a moment. I am trying to confine it to the conversation that Miss Rockwell had with the decedent.

The Witness: Well, she told me all about how she was situated and I told her it was a depression and she came—she came over often. She thought I knew a great deal.

Mr. Van Blarcom: Was this all after the sister's death?

The Witness: Yes, sir, after the sister's death. She spoke about her brother causing her so much trouble and said we made our wills and made a joint will, my sister and I with the family lawyer. My sister left him ten thousand dollars right out in New York State. We knew he would cause trouble. He is not capable to hold a position and not competent to do a good day's work, and he was getting worse and worse. I said to Miss Marshall, "This is a depression here and you are living here."

Then this happened. It could not go on; it had to be reported. I went in to ask the people; I went in to see her and ask her what was her lawyer's name. I asked her who Miss White was. It was not much use; she was getting worse.

Mr. Klein: Can I interrupt? I think you answered the question.

By Mr. Klein.

Q On this first occasion when Miss Marshall referred to her will, was that in response to anything or was that volunteered to you? A That was by her. We were never away, the brother would not bother—

Q Do you recall the exact words she referred to that will with? A She referred to it?

Q Can you repeat exactly what she said? A Finally she came and wanted to sell this jewelry—

Q No. I mean— A She said, "I have my brother; I have provided for him in my will. I could not leave him the money or he would spend it. He would not have anything to live on nor my mother would not to live with. He would spend all the money.

Q Did she ever refer to that will again in your presence? A Yes, she often spoke of the will and she spoke of the jewelry. I said, "It is bad, if your brother is what you say he is." She wanted me to buy some, maybe, but she would not leave any jewelry to her brother.

Q When she spoke of the will did she characterize it as any kind of will? A No, she had cousins—

Mr. Klein: One moment.

Mr. Van Blarcom: I object. Let the witness answer. This is my objection on the record. I want this testimony.

Mr. Klein: After all, Miss Rockwell is my witness. It is for my purpose; you can cross examine her.

Mr. Van Blarcom: I might not want to cross examine her.

Mr. Klein: I don't want to clutter up the record.

By Mr. Klein.

Q The first time you referred to this will, Miss Rockwell, you referred to Miss Marshall

saying that they made a joint will with her family lawyer?

Mr. Van Blarcom: I object and want to have it stricken. That is not what the witness testified to; it is repetition and leading.

(Discussion between counsel off the record.)

By Mr. Klein.

Q I will reframe the question. I will withdraw the question.

Q When Miss Marshall referred to the will the first time, Miss Rockwell, you said she called it her joint will, is that true? A Yes, sir.

Q On the subsequent occasion when she referred to her will, did she call it by the same name or refer to it as her will? A She referred to a joint will.

Q She always referred to the will as a joint will? A Yes, my sister and I—I wanted to see—

Mr. Van Blarcom: I object to the witness volunteering any testimony.

By Mr. Klein.

Q Can you recall, Miss Rockwell, roughly, on how many occasions Miss Marshall referred to her will? A Well, let me see. I say about four times.

Q You are quite sure that it was—were you intimate with Miss Marshall? A Only by her coming in here to me with her difficulties and affairs and asking me. I told her first there was a depression.

Q Did she on any other occasion ever tell you she had revoked her will? A Never. No, she was firm about that. A family lawyer and it was a joint will.

Q Do you recall how long before her death she last referred to her will in your presence? A Well, let me see; I can tell you. Not after when she was not her real self. After she was not her real self and never mentioned it, but when practically normal.

Q How long before her death? A I should say over a year she was mentally gone, over a year.

Q Do you recall when Miss Marshall died? A Let's see. The fourth of July; it was either the tenth or the thirteenth; about that time.

Q What month? A July.

Q What year? A Well, let me see. A year ago last July. Tell me that date.

Q Prior to her death, do you recall the season of the year she referred to the will? A It was the winter after her sister died. Her sister died in March and it was that summer and the following winter and not after that. She was not herself after that.

Q When she did refer to her will, Miss Rockwell, that is Miss Marshall, was she normal or abnormal? A Yes, sir. She was normal. Normal as she would be.

Q In other words—withdraw that—her not being normal began after the last occasion when she told you of the will?

Mr. Van Blarcom: I object to the leading questions.

Mr. Klein: I withdraw the question.

By Mr. Klein.

Q Did this period that you refer to as when Miss Marshall was not herself begin after the last time she referred to her will? A What was that?

(The last question was read by the reporter.)

The Witness: I cannot say right off. It was just how her case was reported in this neighborhood. She would not ever see anybody, only as she peeped out the window. I didn't see that it was any of our business how she acted.

By Mr. Klein.

Q Miss Rockwell, did Miss Marshall ever say that she had destroyed her will? A Never.

Q Did she ever say she had lost her will? A No. It was settled when it was made with the family lawyer.

Mr. Klein: That is all. Cross examine.

Mr. Mills: No questions.

Cross examination by Mr. Van Blarcom.

Q She died in July, 1933? A It was a year ago last July. I should say last July. I think the thirteenth day of July.

Q It was July, 1933? A A year ago.

Q What would that be? 1932 or 1933?

Q 1933? A 1933, I am not sure.

Q Your memory is not very good? A Not for dates.

Q How long before that was she abnormal? A About a year and a half.

Q That would bring it up to— A I cannot give it to you exactly.

Q I don't expect you to. That is January 1, 1932, when she had this trouble? A Yes, sir. In the winter she had trouble and screamed and in the summer time it was when it was reported.

Q When did you say it was reported? A They left Beachwood Hotel—it was the first of June or the last of May there was remodeling work. Then they came in a taxi and took them back.

Q At that time that is when they were strangers to you? A Yes, sir.

Q How long after she moved was it that she talked over her personal affairs? A After her sister died. There was a great deal of sorrow.

Q When did her sister die? A She died in March. I cannot give you that date.

Q Do you remember the year? A Well, it must be—this is three years ago; I cannot give the exact date. It is three years more or less and it was March.

Q The year you don't remember? A She lived there that winter and died in March. That means she was there the next summer and in the winter she died.

Q I know that—you can count it up from that. A This time of the year what it was? I was not especially interested. I know the time she died and tried to help her out. That following winter and that summer was when she was so bad.

Q Where did the sister live when she was alive? A The same house.

Q It is right next door to here.

Q How long did she live there before she died? A The one that died first?

Q Yes, sir. A They moved there October last, or the middle of October and she died the following March.

Q That is about six months? A I will let you figure it out.

Q It was from the fall until the spring? A She went there from October until she was sick and they came to me for a doctor; she died in March, I think along the first. I don't know sure.

Q It was after the sister's death you had this discussion about their troubles? A Yes, sir.

Q How long after did she talk to you? A The sister died in March and she came in occasionally. It was not long. She was busy with the inheritance tax with Mr. Williams and she kept that up and then she would not see anybody; then she was exposed.

Q What do you mean by exposed? A She screamed so the neighbors called her crazy—a crazy woman. She needed help and I seen the neighbors on each side, but she screamed and one of the neighbors exposed the case.

The Master: What do you mean?

The Witness: The complaint of the neighbors. They went for the Chief Murphy and then provided a detective to prove it.

By Mr. Van Blarcom.

Q Now, when was that that she began this screaming? A She began screaming in the winter after the sister died. The house was closed up.

Q What house was closed up? A Her house. She lived there.

Q She lived there? A Yes, sir.

Q Did you ever go in to see her? A Yes, two times. The last time I went in to find out about her people. I had quite a time to find out who Miss White was.

Q Did she live in a miserly way? A Yes, sir.

Q How long did that go on, this screaming? A That winter it was terrible and in the summer, too.

Q Do you mean she died in March? A She screamed in the house and when it was opened up in the summer she still screamed and this was the summer and I went to find out who her relatives were.

Q Did she do the screaming when the sister died? A That was the following winter; it was around after Christmas and she got worse.

Q And in the meantime she came over and talked to you about the will? A After the sister died, from March to Christmas time she told me of her affairs and what to do.

Q Was she normal at that time, do you think? A She was normal at that time, as far as I know.

Q Why did you hesitate in that answer? A I wanted to be sure that it was the truth.

Q Was she normal or not? A What do you mean by being normal?

Q Just that question. After her sister's death? A Yes, she was. She was not always a normal woman, because she was peculiar. She had lots of financial affairs that worried her very much indeed.

Q Did she give you the names of the cousin she spoke about? A She gave me the name of a cousin in Brooklyn and Miss White she had,

but the other cousin is married, the cousin in Brooklyn.

Q Did she mention the other name? A Just cousin.

Q Any other names given? A She mentioned in Freeport and one in Brooklyn.

Q Did she mention any names? A I don't know. Miss White and Miss Cook, I am not sure about that. Miss White was the favorite.

Q Where did Miss White live? A The St. George Hotel then.

Q That is Brooklyn? A Yes, sir, the St. George Hotel.

Q Now, what had been the trouble? Did she give you any idea why she disliked her brother? A What was that?

(The last question was read by the reporter.)

The Witness: He was not dependable.

By Mr. Van Blarcom.

Q When did she talk about it? A It was after the sister talked about it. She talked quite a good deal, and said, "It was my will that he was settled for in."

Q What I mean is, I just wondered— A (Interrupting.) Because in that case his trouble was they could not leave anything about, he would spend it.

Q What does he do? A He just spends.

Q Do you know how old he is? A I think he is sixty-seven from the papers; I don't know how old he was. I think he was a little older than the last sister that passed on.

Q How long after they moved, the two sisters, did you get on friendly terms with them? A As

I said when they came here they had no phone and they asked me if they could phone and they were two single ladies and so was I and they made it something of a rule to ask me which was the grocer and the baker and so—

Q How long after did you become on friendly terms with them? A They came in October and had some remodeling of the place in the St. George Hotel. They came in and asked me about a baker and a grocer and they came in to ask me to advise them.

Q How long after they moved up there did you get on friendly terms with them, not merely this just talking with them? A I saw them in the yard when the sister was taken sick, in November, and they were not settled very long and she was not well and November was the time of the sickness. I saw her not so much at that time but after the sister died she came in very, very often from nine o'clock to ten o'clock to eleven o'clock.

Q That is how you really got friendly? A Yes, sir, really knew her. I am not friendly with people like that.

Q What do you mean? A I am not intimate.

Q What do you mean "like that"? A I talk with people—

Q What do you mean "with people like that"? A I mean these women came and the one called on me and we were on friendly terms, but I saw her mind was going and she was very much depressed; she needed help.

Q When did you see her mind was going? A After they had exposed her. When the detectives saw and heard her then she was exposed.

Q When was that, do you think? A The date was, I think, early fall. I didn't pay any attention to this kind of thing.

Q How long did she live after that expose? A I think a year and a half. I don't know. I think that is about it.

Mr. Van Blarcom: I think that is all.

By Mr. Van Blarcom.

Q How old was she at the time she died, Mabel? A Why, I think the paper said she was over sixty.

Q I mean from your observation? A I would say the woman was about sixty. I am not sure about that. I say sixty or a little more, maybe a little more.

Re-direct examination by Mr. Klein.

Q When was—when she came to you after the death of Maude, the first sister, you said the first time I questioned you, that you would call Mabel normal; on cross examination by Mr. Van Blarcom I think you said she was a bit normal?

Mr. Van Blarcom: I object to the question. It does not recite the testimony.

Mr. Klein: I withdraw the question.

By Mr. Klein.

Q I will ask you the same question; that she spoke to you of a will after the death of a sister, was she in your opinion, mentally sound? A Yes, sir; oh, yes, that is exactly what she was doing. She told me that she was doing.

By Mr. Van Blarcom.

Q You hesitated as to whether or not she was normal the first time? A This was not the question. This was a question of the will. You didn't ask me this the first time. It was after she screamed she was not normal after that.

Mr. Van Blarcom: I don't think the record will show that exactly.

By Mr. Van Blarcom.

Q When was it that she was not normal? A That winter she was very busy with Mr. Williams.

The Master: Can you fix the year of "that winter," Miss Rockwell?

The Witness: I should say it was 1931. I cannot give you stated correct, exact—it was 1931 or 1932.

(Discussion between the Master and Counsel off record.)

By Mr. Klein.

Q Mabel, the second sister, died July 14, 1933? A I had that right.

Q And Maude died March 17, 1931? A I had that right too.

Q Now, remembering that Maude died in March of 1931 about when did this screaming of Mabel commence? A The winter after that. She died in March and then the summer and then the winter.

Q That is the winter of 1931 to 1932? A After Christmas she began that way then.

Q That is after Christmas of 1931? A Yes, sir.

The Master: Of that year?

The Witness: Yes, sir, after the Christ- was. She died in March, then, the following year; that would not be until January.

By Mr. Klein.

Q Maude died March, 1931? A Yes, sir.

Q Now, do you mean the Christmas following the death? A Yes, sir.

Q That would be the Christmas following 1931? A Yes, the Christmas following then.

Mr. Klein: Well, as far as I am concerned the dates are fixed.

By Mr. Van Blarcom.

Q How long have you been living in Summit? A Six years and you can go to the doctor for references—

The Master: Strike out the last part.

By Mr. Van Blarcom.

Q What is your age? A I told you you could not get my age. Do you have to know?

Q What is your age? You can say over sixty. A All right; I am just a little over sixty.

Mr. Van Blarcom: That is all.

Mr. Klein: That is all.

(Witness excused.)

I Hereby Certify that the foregoing is a true and accurate transcript of the testimony as taken stenographically by me at the time, place and date hereinbefore set forth.

JAMES C. O'BRIEN,
Reporter.

Mr. Kalisch: Complainants rest.

EDWIN L. SNEDEKER, being recalled by the Court, testifies as follows:

By the Court.

Q When, as to the time of day, as you understood it, did Miss Mabel die? A 10:30 in the evening of the thirteenth.

Q When did you arrive there? A I am in doubt as to whether it was in the afternoon of Friday or the afternoon of Saturday; but I think it was Saturday.

Q Was anybody in the house when you arrived there? A No, sir.

Q Who informed you that she was dead? A Captain Nelson.

Q By telephone? A By telephone.

Q Who had been in the house before you got there? A I don't know.

Q Do you know whether anybody had been in the house? A None other than the officer that Captain Nelson sent with me.

Q Had the funeral director been there? A That I don't know.

Q Did you see the body when you arrived? A No, sir; the body had been taken from the house and was at that time, as I

understood it, in the funeral establishment at Summit.

Q When was the body taken there after death? A I couldn't say; I wasn't informed by anybody as to that.

Q Before you went to the house did you know the body was at the funeral parlor? A No, sir; I didn't.

Q Didn't the captain tell you? A I don't think the captain or the officer made any mention as to where the remains were.

Q Did you make any inquiry? A No, I made no inquiry.

Q You were not interested whether the body was at the house or at the morgue? A Strange as it might seem, I made no inquiry.

Q And had not been told that the remains were not at the house? A No.

Q It is strange? A It is a little strange.

Q It was your mission there to look after her affairs? A Correct.

Q How long did you remain at the house? A Oh, from an hour to an hour and a half.

Q What did you do there? A Well, we went through the kitchen up to her bedroom.

Q You entered by way of the kitchen? A No, I came from the first floor, but the officer went from the ladder—

Q But you entered by way of the kitchen? A Yes, then we went directly upstairs to her room and then went through on in the other room looking for property and papers, and we went through all of the desks or bureaus and we found nothing in the bedroom, that bedroom, that was in any way disordered.

Q Well, what was your mission there? A To safeguard the property.

Q The papers or the household property? A The whole business; the papers particularly.

Q And your mental bent was searching for papers? A Correct.

Q Where did you first search for them in the house? A In the bedroom.

Q Whose bedroom? A Mabel's.

Q How did you know it was Mabel's? A The officer told me so.

Q In which room of the house was that? A I don't remember. The house faces Maple street. Assuming that the house faces south, then it would be at the northeast corner of the house. It was the rear right room as you face the house.

Q There were two other rooms there? A As I recall it, there were two front rooms.

Q When you got into her room what did you do? A I saw all these papers on the bureau and on the mantelpiece.

Q Only there? A Yes. Some stray papers on the floor; some few.

Q They didn't attract your attention? A Not much.

Q There were many papers on the bureau? A Yes.

Q And on the mantelpiece? A Yes.

Q Did she have a desk in that room? A No.

Q Where was her desk? A I think there was a desk in the front of the house, in the room—there is a bedroom—

Q Downstairs? A No. Suppose this is the bedroom (Illustrating)—

Edwin L. Snedeker (Recalled), By the Court.

The Court: (Addressing Ellen Louise White, the witness previously sworn, see page 46.) Where was the desk, Miss White?

Miss White: Her desk was on the left of the door in the room.

Q When you spoke of the bureau did you mean the desk? A No, sir.

Q How were the things on the bureau? A Everything was disarranged; nothing was arranged.

Q What else was on the bureau, ladies' toilet articles? A I don't recall that.

Q A brush? A I don't recall even a brush.

Q Was anything on the bureau except papers, that you recall? A I don't recall anything on the bureau except papers, but I wouldn't swear there wasn't.

Q How many papers would you say there were on the bureau? A As I remember it the bureau top was about that wide and about that deep (indicating).

Q About two and a half feet? A Right. And it was completely covered with papers.

Q What kind of papers, legal documents? A No; rent receipts, insurance policies, checks—

Q Piled on top of each other? A Yes.

Q The same as a lawyer's disorderly desk? A Yes, a little more so, I should say.

Q Was there a little space left for writing? A No, that was on the bureau.

Q Were the papers dusty? A No, these checks were of very recent date.

Q Do you mean cancelled vouchers? A Yes, and some checks that had not been

cancelled were of recent dates and they tied up with these rent statements.

Q Tied up? A Not bound up. I mean that they doubtless referred to the statements.

Q Where were they on the desk with reference to each other? A They were all disheveled; all topsy turvy.

Q Now, you tell me they bore some relation to each other? A Yes, certain rent statements would be found and then in another part of the top would be found a check.

Q Not with the statement? A No. It was just as if a hand had gone like that (executing a swinging motion of the arm). And the same thing as to the mantelpiece.

Q Did you open the bureau drawers? A Yes.

Q What was in there? A Clothing.

Q Orderly? A Orderly. There was a marked difference between that room and the rooms—

Q You have told us that. Was the bed mussed? A The bed looked exactly as though a person had been sleeping in it.

Q Was that the room in which she is supposed to have died? A No, I don't think so. She died on the floor below in the kitchen, I think, if she died from asphyxiation.

Q You didn't see the desk? A No, I didn't.

Q You were searching for papers? A Yes.

Q And the desk would be the most likely place to find them? A Yes.

Edwin L. Snedeker (Recalled), By the Court.

Q Miss White said there was a desk in the room. A Yes, sir.

Q Would you say there was no desk there? A If there was a desk there—

Q What would you say about that? A If there was a desk there I would have examined it.

Q You don't recall examining it? A No. I know if there was a desk in the room I looked through it.

Q What was on the mantelpiece? A The same array of papers.

Q Anything else? A No. I think the officer did make a search, did more of the searching for the papers than I did.

Q Did he muss them up? A He got into them.

Q And they were more mussed when he got through with them? A No, that isn't so. They were disarranged, yes, just as though somebody had rummaged through.

Q But when you were through they were a little more so? A Oh, yes, a little more so.

Q They were perfectly clean? A Yes, they were clean papers.

Q What else was in that room? A The ordinary fixings of a bedroom.

Q Did you find any papers anywhere else in that bedroom? A No, sir; I didn't go in the closet; the officer went in the closet.

Q You were looking for papers? A Exactly.

Q Did you go in the closet to look for them? A No.

Q The closet had a shelf? A Yes, sir.

Q Did you tell the officer you were looking for papers? A Oh, yes.

Q He was helping you? A Yes.

Q Was the closet in order? A Yes, I don't think there was anything unusual about that.

Q Just as you would find an old lady's closet? A Yes, but they were both orderly women.

Q When had you seen Miss Mabel before her death? A Oh, Miss Mabel had been in the office about a year or a little longer before her death.

Q Was her mind orderly? A Yes, but she was very much exercised about her real estate.

Q But an orderly mind? A Oh, her mind was all right.

Q From that bedroom where did you go? A I went in the remaining rooms on the second floor.

Q What did you do there? A Exactly the same thing.

Q What? A In each bureau or desk, and I made a very thorough search for papers.

Q Everything orderly? A Yes, sir.

Q Did you find any papers? A No, sir.

Q There were no papers anywhere except in this bedroom? A No. The contents showed they had not been disturbed for a long while in those other bureaus and what not.

Q Now, downstairs, did you go through whatever drawers there might be? A Yes.

Q You found no papers? A Nothing.

Q Nor in the kitchen? A Nothing.

Edwin L. Snedeker (Recalled), By the Court.

Q Nothing at all? A Nothing. The only thing in the whole house that had anything—

Q The only difference between that room and the other rooms was that in the bedroom you found on the bureau papers in disorder and on the mantel papers in disorder? A Correct.

Q Such as receipts and check vouchers? A Yes.

Q Anything else? A Insurance papers.

Q Anything else? A That is all I can recall.

Q She had considerable real estate? A Yes, sir.

Q Acquired by purchase? A I think most by inheritance.

Q She had mortgage securities? A Well, not so—

Q Did she have mortgage securities? A One or two, I have been advised.

Q You were looking for papers? A Yes, but I didn't see them.

Q What other securities had she? I mean besides mortgages? A I know of nothing else. I understood the only mortgages was guaranteed mortgages in Brooklyn.

Q Did you find where the papers were? A No, sir.

Q You didn't aid in the administration of the estate? A No, sir.

Q Did she have anything but her real estate? A No, I saw none. The only papers I saw was in the safe deposit box in Summit, one or two bonds.

Q Then you did find those? A That's all.

Cross examination by Mr. Pitney.

Q Were there any deeds in the safe deposit box that you found? A Not that I can recall.

Q Did you find any deeds anywhere in the house? A No, sir.

Mr. Kalisch: We can, I think, provide testimony as to what was found, by this officer.

The Court: No, I don't want it.

COMPLAINANTS REST.

Continued to Monday, December 24, 1934.

SECOND DAY.

Testimony taken in the above entitled cause, on Monday, the twenty-fourth day of December, at 10:45 A. M., at the Union County Court House, Elizabeth, New Jersey.

Before Hon. John H. Backes, Vice-Chancellor.

Appearances, as heretofore noted.

JOSEPH FINNERAN, a witness produced in behalf of the defendant, Robert Jesse Marshall, being duly sworn, testifies as follows:

Direct examination by Mr. Van Blarcom.

Q You are connected with the Summit Police Department? A Yes.

Q How long have you been on the force? A 17 years.

Q Did you have anything to do with this Marshall matter? A I did sir.

Q What time did you make any discovery? A Ten-forty P. M.

Q What date? A July 13.

Q What attracted your attention to this house? A We got a call from a man in Summit that there was an odor coming from the house.

Q An odor? A An odor of gas coming from the house.

Q What did you do? A We went over there and broke in the rear door.

Q What did you find? A Found Miss Marshall dead in the kitchen.

Q Did you do anything about the house? A Yes, we went through the house.

Q What did you find upstairs in the bedroom? A There was some milk bills on a bureau upstairs.

Q Was there any signs of disorder among her papers and boxes? A There was not.

Q What condition were they in? A The room was in order.

Q Who removed her body? A Mr. Brewster.

Q When was that done? A A little after eleven o'clock.

Q Did you see the lawyer from Brooklyn when he came out? A I wasn't talking to the lawyer from Brooklyn.

Cross examination by Mr. Kalisch.

Q On what date did you get word concerning this death? A July 13th.

Q Who notified you, if you know? A A man by the name of Mr. Becker. He lives in the Forest Court Apartments, Summit avenue, Summit, New Jersey.

Q Did he notify you by telephone? A No, he came into police headquarters.

Q What did he tell you? A That there was an odor of gas around 140 Maple street.

Q Did you go up with him? A No, I sent an officer there; Officer Hanville.

Q And when did you go up? A I went up there about eleven-fifty.

Q Why didn't you go up with the officer? A I was in charge at police headquarters and couldn't go with the officer at the time.

Q So that you went up there about a half an hour after you had sent him? A No, it wasn't a half an hour.

Q How long was it? A Eight or ten minutes, it might be.

Q You were notified at ten-forty, weren't you? A We were notified at ten-forty, yes.

Q When did you go up there? A It might be ten-fifty.

Q Ten minutes later? A About eight or ten minutes later.

Q Were they already in the house? A No.

Q Where were they? A Officer Hanville was outside, and he said there was a slight odor of gas.

Q Who was with the officer when you got there? A Nobody but me.

Q He went up ahead of you? A Yes.

Q With this gentleman, Mr. Becker? A Mr. Becker didn't go with the officer.

Q You mean Mr. Becker left the police station before the officer went out of the station? A When Mr. Becker come in there the officer was sent right away to 140 Maple street.

Q Did he go with Mr. Becker? A He did not.

Q Did he go after Mr. Becker left? A I told you as soon as we got the call the officer was sent there. I don't know whether Mr. Becker left at that time or not.

Q Did he leave with the officer? A No, he didn't go in the patrol with the officer.

Q Where was the officer when you got there? A In the rear of the house.

Q How did you gain entrance to this house? A Through the rear door.

Q Was it locked? A Yes, sir, it was locked.

Q Did you break it open? A Yes, we broke a window over the knob of the door and got in that way.

Q What room did that door lead you to? A Into the kitchen.

Q And when you got into the kitchen that is where you say the body of Mabel Marshall? A Yes.

Q Where was she lying? A She was lying on a table alongside the gas range.

Q A kitchen table? A A kitchen table.

Q Where was the table? A Along the side of the gas range.

Q Was the gas escaping from the gas range? A It was.

Q Was she dressed? A She was.

Q Completely dressed? A Completely dressed.

Q Did she have shoes on? A She did.

Further cross examination by Mr. Pitney.

Q Was there any light on in the house when you entered with the other officer? A No.

By the Court.

Q Was it in the morning? A Ten-forty P. M.

Q Do you know how long Miss Marshall had been dead at the time you arrived? A Dr. Milligan said she might have been dead ten or twelve hours.

Q Who is Dr. Milligan? A He is the city physician.

Q Was there an autopsy performed? A She was taken over to Mr. Brewster's morgue; I guess there was.

Q How long were you in the house on that occasion? A Probably till around eleven o'clock.

Q So that you made this entire investigation in ten or fifteen minutes? A I went through the house.

Q How long did it take you to make the investigation? A Probably twenty-five minutes.

Q You and the other officer were the only persons in the house at that time? A At that time.

Q And how long was it before the body was removed? A Probably eleven o'clock.

Q This all occurred then, between ten-forty, when you got the word at the police station, and eleven o'clock? A Yes, I think the body was removed about eleven-five or eleven-ten.

Q Were you there when the body was removed? A Yes, sir.

Q When you left the house had the body already left the house? A Yes, sir.

Q You say you went upstairs before you left? A Yes.

Q Did you go in a bedroom in the left rear corner of the house? A Yes, I went through all the house.

Q You went through every bedroom in the house? A Yes, sir.

Q And was there a bedroom in the left rear corner, in which the bed was unmade as if somebody had slept in it and it had not been made since that time? A The beds were all made.

Q There was no room with any bed unmake in it? A No.

Q You left the house shortly after the body was taken from the house by the undertaker? A Yes.

Q Did the other officer leave at the same time? A The officer didn't leave at the same time.

Q When did you next see the other officer that you left behind you? A Well, it might be a half an hour.

Q And he then returned to the police station? A Yes.

Q You saw him there? A Yes.

By the Court.

Q Where did you leave him? A I left him at the house.

Q In the house? A He was in the house and at the house.

Q When you left him was he in the house at that time? A Yes.

Q Had he gone through the house with you? A He had gone through the house with me.

Q Did you at any subsequent time return to the house? A I did not.

Q Did you detail anyone from your headquarters to remain in charge of the house? A I did.

Q And whom did you detail? A Officer Cochran.

Q Was he to remain on twenty-four-hour duty in the house? A He was to remain there in the morning till he was relieved.

Q He was to remain until he was relieved in the morning? A Yes.

Q What other steps did you take the following morning, if any? A I didn't take any steps.

By the Court.

Q Well, he was relieved? A He was relieved.

Q By whom? A I don't know who was the officer in charge.

Q He quit? A Yes.

Q Did you take any fingerprints? Did you do that or instruct that fingerprints be taken? A I did not.

Q And you didn't go back the following day, that Saturday, with Mr. Snedeker? A I did not.

Q You say there were no papers around any of the bedrooms upstairs except a few milk bills? A That's all.

Q At the time you were there? A At the time I was there.

By the Court.

Q Where did you see the milk bills? A They were on a bureau in a bedroom upstairs.

Q In which room? A The house faces east and west. They were in the bedroom in the northwest corner.

Q The room you understood to have been her bedroom? A Yes.

Q Who told you it was her bedroom? A Well, I understood that was her bedroom; I wasn't sure whether it was or not.

Q Did it have the appearance of having been used? A It looked like it was used by the lady herself. It was a lady's bedroom by the looks of it.

Q Was it a front room where you saw the milk bills? A A front room in the northwest corner.

Q Did you go into a bedroom in the left rear; that is to say, entering the house from the street, did you go into a bedroom on the second floor, left rear? A As well as I can recollect I went through all the rooms. I did go through all the rooms in the house.

Q Did you see any papers in disorder in the left rear room? A No papers in disorder.

Q And the bed in the room, to your memory, was made up? A It was made up.

Q What if anything, did you do to repair the broken glass door by which you had gained access to the house? A I didn't do anything.

Q Did the coroner come and view the body? A Permission was given from the County Physician to remove the body to Brewster's morgue.

Q So the body was removed after the coroner view the body in the house? A Yes.

Further cross examination by Mr. Kalisch.

Q You said that when you entered through this door where you broke the window, that that brought you right into the kitchen? A Yes, it led to the kitchen.

Q What do you mean by that? A There's another door on the inside, but it leads to the kitchen.

Q What I want to know is, does this door which you succeeded in opening, does that door lead directly into the kitchen, or not? A Not directly, no.

Q Where does it lead to? A There was another door inside that led into the kitchen.

NICHOLAS JAMES GRASSO, a witness produced in behalf of the defendant, Robert Jesse Marshall, being duly sworn, testifies as follows:

Direct examination by Mr. Van Blarcom.

Q You are a member of the Summit police department? A Yes, sir.

Q And have been for how long? A Eight years and a half.

Q Did you know where Miss Marshall lived in her life time? A I did.

Q Whereabouts? A On Maple street.

Q Were you detailed there by Chief Murphy, who was then Chief of Police, to go with somebody to that house? A I was.

Q Who? A Mr. Snedeker from New York.

Q A lawyer? A Yes.

Q What did you do when you got there? A Went through the house.

Q When did you go there? A On the 14th.

Q What time of day or night? A Well, I couldn't exactly say what time of the day it was.

Q Morning, afternoon, or don't you remember? A It was around the middle of the day.

Q How did you get in the house? A With a key.

Q What happened when you got in? A Why, Mr. Snedeker and I were going through the house. We were looking—Mr. Snedeker was looking for papers.

Q What papers were there that you saw before he began to look? A There were various notes around the living room, notes stating that keys to such a box was in such a place.

Q Did you see any papers laying around the desk and bureaus in confusion? A No, there wasn't any.

Q What did Mr. Snedeker do? A He took various papers out of different drawers and put them on top of the desk or tables or what was handy so he could look them over.

Q Did he put some of them back afterwards? A He put some of them back.

Q Did he say what he was looking for? A He told me he was looking for a will.

Cross examination by Mr. Kalisch.

Q What time did you say you got there, Mr. Grasso? A I really couldn't say what time of the day it was, because I didn't look at the watch.

Q Was that the day she was found dead? A The next day.

Q The next day? A Yes.

Q And this was on the 14th that you went there? A That's right.

Q You are sure of that? A Quite sure.

Q You say you found notes in and about the living room when you got there? A That's right.

Q And had the body been removed at that time? A Yes, sir.

Q And these notes had reference to certain keys, where they could be found and so forth? A That's right.

Q Did you take possession of those notes? A I did not.

Q Did you just leave them there? A Yes, sir.

Q Did anyone else, to your knowledge, take possession of them? A Mr. Snedeker took some of them.

Q In your presence? A In my presence to locate some of the keys.

Q Did he locate them? A I think he did.

Q What were they the keys to? A Well, I think he got some keys to a safe deposit box.

Q And any other keys? A Keys to closets upstairs.

Q And did he go up and look in those closets. A He did.

Q With you? A Yes, sir.

Q How many closets did he look into? A Well, there's a closet in the front room—

By the Court.

Q He looked in all of them, did he? A Yes, he did.

Q What did he find in these closets? A Well, there was different boxes full of clothes and stuff there, and he went through those.

Q Just clothes? A Right.

Q That is all he found? A That's right.

Q No papers? A There were papers in the boxes.

Q Did he look at the papers? A He did.

Q Did you look at them too? A I looked at some.

Q What were they? A There were some letters and bills, and stuff like that.

Q You say you went up in the front room occupied by Miss Marshall. Did you go up there that day? A I'm not saying it was occupied by Miss Marshall.

By the Court.

Q Was there a room that looked as though it had been occupied, that looked more that way than others? A No.

Q There was nothing to indicate which was her room? A No, there was not, not in that room.

Q In the house, was there any room upstairs that seemed to you that it was her room? A Yes, sir.

Q What room was that? A Her room?

Q Yes. A The right rear room.

Q That is, facing the house from the street? A Yes, sir.

Q The right rear room? A Yes, sir.

Q Was hers? A Yes, sir.

Q If you were standing on the sidewalk facing the house where would the room be? A On the right rear.

Q This was not a corner house? A No, sir.

Q What was in that room? A Well, I found a wig in there. There were forty or fifty pairs of shoes.

Q Where were they? A In the closet. There was a bureau in one corner and a little desk alongside of the closet.

Q And the bed? A And the bed.

Q Was the bed made? A The bed was; just the sheet was turned over.

Q What did you mean by it looked as if it had been made after someone slept in it? A I

don't know. It looked as if someone was ready to go to bed and the sheet was just pulled over.

Q Did you, with Mr. Snedeker, examine the desk? A We did.

Q You looked through the desk? A Yes.

Q Did you look through it? A He was the one that looked through it and I was watching him.

Q Did you look at the papers as they were taken out of the desk? A I did.

Q Do you know what they were? A No. My object—

Q I didn't ask you that. You didn't know what the papers were? A I looked at the papers. I wasn't interested in anything.

Q Was there anything on the floor? A There was no papers on the floor. When we entered the room there wasn't any papers on the floor.

Q On the mantelpiece when you entered the room? A Some books.

Q Were there any papers there? A I can't say whether there was or not.

Q In the bureau? A There was.

Q Do you know what those papers were? A I do not.

Further cross examination by Mr. Pitney.

Q Did you go in the room to the left rear of the house? A I did.

Q What was the condition of that room? A It was in order.

Q What was the condition of the bed in the room? A The bed was made in that room.

Q What was the furniture in that room? A Well, I'm positive there is a maple bureau in there.

Q What else? A I really couldn't say what else; I know there is a maple bureau that Mr. Snedeker went through.

Q Was that the only visit you made to the Marshall house? A That's right.

Q You said you gained access by the use of a key? A That's right.

Q Through what door did you gain access? A Through the rear door.

Q The door that led by way of a vestibule to the kitchen door? A Yes, sir.

Q Was the pane of glass in that door broken when you went in? A I really didn't take notice.

Q When you arrived at the house was there any other person there? A There was not.

Q No other person there? A No.

Q No person was there? A No.

By the Court.

Q Won't you describe to me the condition of the bureau on top? A In what room?

Q Describe what was on it? A In what room?

Q In the rear room; in the rear right room? A There was a little box on the bureau with some beads and a paper here and a couple of papers there and maybe a stack of letters on the other corner.

Q Anything else? A There was a scarf on there, I think.

Q As to the papers, did you see what they were? A I didn't look them over.

Q But did you see what they were from where you looked at them? A I really didn't take notice to anything that was laying around that place.

Q Were there any papers on the mantelpiece? A No, there were no papers on the mantelpiece.

Q Were there any papers on top of the desk? A There were papers on top of the desk.

Q What condition were they in? A I would say they were in order.

Q Before you left were there any papers on the floor? A There were papers all over the house.

Q In this room? A There were papers on the floor before we left.

Q Were the papers there before you came in? A No, sir.

Q Who put the papers on the floor? A Mr. Snedeker. Papers dropped out of his hand on the floor.

Q You didn't take the trouble to put them back? A That's right.

EDWARD NELSON, a witness produced in behalf of the defendant, Robert Jesse Marshall, being duly sworn, testifies as follows:

Direct examination by Mr. Van Blarcom.

Q You are the Chief of Police of Summit? A I am.

Q And for how long have you had that position? A Since the first of October, 1934.

Q On the Saturday morning following Miss Marshall's death, did you have occasion to go to her house with Mr. Snedeker? A I did.

Q What time did you go there? A Just before noon.

Q How did you get in the house? A By key.

Q What did you do when you got there? A I searched around the house to see if I could find any notes she had left.

Q What did Mr. Snedeker do? A He went around with me and looked over papers in different rooms.

Q What did you look through? A Through all the papers we could find.

Q Did you see a will? A No, sir.

By the Court.

Q What were you looking for? A I was looking after notes she might have left saying why she committed suicide; that's what I was looking for.

Q Did Mr. Snedeker tell you what he was looking for? A For wills.

Q Did he tell you that? A Yes.

Q Were there any other papers around the rooms on the floor or mantel or other places when you got there that morning? A There were.

By the Court.

Q Where? A Strewed around the table up in her bedroom.

Q Which one? A The right-hand room upstairs is her bedroom, and it was there on this floor and on this desk.

Q Did you go with this other officer? A No.

Q Did you go before he went or after he went? A After him.

Q What time did you go? A About noontime; about eleven o'clock.

Q That is the time he said he went? A I went the day after, on the 15th.

Cross examination by Mr. Kalisch.

Q What day of the week did you go there? A On the 15th.

Q What day was that, Saturday? A Saturday.

Q That was on Saturday you went there? A That's right.

By the Court.

Q When was she found? A On Thursday evening.

Q At 10:45? A Yes.

Q You went there Saturday? A That's right.

By the Court.

Q When did the officer who was just on the witness stand, go, on Friday? A On Friday.

Q He went with this other officer, did he not—Mr. Snedeker? A I don't know that.

Q Did he go with you? A He did.

Q On Saturday? A That's right.

Q Well, do you know when the other officer went, that has just been on the stand? A I do not; I didn't see him.

Q Are you connected with the police station, that is— A I am.

Q And he was connected with it at that time? A He was.

By the Court.

Q You said he went Friday? Now you say you don't know. Isn't that what you said? A He said he went on Friday; I don't know. I went on Saturday.

Q Did you know he had gone there? A I did not.

Q How did you happen to go there? A Because the Chief sent me with Mr. Snedeker.

Q Did Mr. Snedeker go to the police station? A He did.

Q Were you there at the police station? A Not every day.

Q How do you know he was over with Mr. Snedeker? A He said he was.

Q And how do you know this man was Mr. Snedeker? A He said he was Mr. Snedeker.

Q What did he look like? A He was a tall gentleman; a gray-haired gentleman.

Q Were you in court last Monday? A No, sir.

Q You didn't see him on the witness stand? A No, I haven't seen him since that day.

Q A gentleman representing himself as Mr. Snedeker called on you on Saturday after the death of Miss Marshall? A That's right.

Q Did he ask you to go with him? A He did.

Q Didn't the Chief of Police ask you to go? A The Chief was talking to him first and called me in, and in the course of the conversation—Mr. Snedeker and I went to the house.

Q What door did you go in? A We went in the rear door.

Q And that led where? A Into a vestibule.

Q And the vestibule led into? A Kitchen.

Q Was there another door that led from the vestibule to the kitchen? A There was.

Q Was that locked? A No.

Q Now, from there, after you got into the kitchen, where did you go? A In different rooms in the house.

Q What was the first room you went into? A I don't recall that.

Q Did you go into the living room? A We went into every room in the house, but the first room I went in there, I don't recall.

Q Where is the stairway? A In the front hall.

Q And where is the stairway in relation to where the living room is? A Right opposite.

Q So that you would go to the living room before you went upstairs? A Not necessarily. You could go into the kitchen and from the kitchen from the hall.

Q You don't know whether you went into the living room first? A I went through the whole house in general, but the first I don't know. I answered that before.

Q You went upstairs into this bedroom? A I did.

Q And when you got there you say you saw certain papers lying on the bureau? A Different papers, yes.

Q Did you see any on the mantelpiece? A I don't recall that.

Q Did you see any on a desk? A I did.

Q Did you see any on the floor? A I did.

Q Did you pick them up? A I picked a few up. They were bills and personal letters to Miss Marshall from her brother.

Q Did you read the letters? A I did not.

Q You just saw who the writer of it was? A Yes.

Q Do you know how recent those letters were? A They ranged from years back.

Q Did you look into the desk? A I did.

Q What did you find in there? A Letters and bills.

Q And insurance policies? A Insurance policies.

Q Any other papers?

By the Court.

Q Cancelled checks? A Yes.

Q Were there cancelled checks on the bureau? A They were all around there.

Q You got in by key, in the rear door? A Yes.

Q Did you notice a pane of glass broken? A It was boarded up.

Further cross examination by Mr. Pitney.

Q What was your position on the force at that time? A Captain.

Q You were promoted in October of this year as chief? A That's right.

Q Were you in the police office on Friday, the 14th of that month, the day before you went with Mr. Snedeker? A Was I in the office?

Q Yes. A I don't recall being there.

Q At least you were not there when Officer Grasso left to go to the house? A I don't recall him going there; I didn't see him.

Q Do you recall who was in charge of the office that day? A On Friday?

Q Yes. A Chief Murphy.

Q Were you in the office on that Friday at that time or at any time when anyone came in and asked to go to the house and have an officer go with him? A I don't recall being there.

Q Were any fingerprints taken in that house in connection with this death? A None that I know of.

Q Well, if there were any taken, your office would have a record of it? A They would.

Q Have you examined the records in that office? A We have no such records.

Q There were no fingerprints taken? A No.

NICHOLAS JAMES GRASSO, being recalled by the Court, testifies as follows:

By the Court.

Q Just describe to me the man you went to the house with, the one you understood to be Mr. Snedeker? A He is a tall, elderly man. He always wore a piccadilly collar; he wore one that day.

Cross examination by Mr. Pitney.

Q A collar such as this gentleman has on? (Referring to Robert Jesse Marshall.) A That's right.

Q Such as he is wearing? A That's right.

Q Is that the gentleman you went to the house with on Friday the 14th? A No, sir.

Q What makes you so sure? A He doesn't look like the same man.

Q But it's the same type of collar? A Yes, somethink like that, anyway.

ROBERT JESSE MARSHALL, one of the defendants in this cause, being duly sworn in his own behalf, testifies as follows:

Direct examination by Mr. Van Blarcom.

Q Where do you live? A I live at 2212 Ditmus avenue, Brooklyn.

Robert Jesse Marshall,
fer Defendant Marshall, Cross.

Q You are a brother of Miss Marshall, now deceased? A I am.

Q Which sister died secondly? A Mabel died second; Maude died first.

Q Did you know where Mabel lived? A Yes.

Q Where were you living at the time of her death? A 167 Park Place, Brooklyn.

Q When did you hear of her death? A I heard of it the day of the funeral, the 18th of July.

Q Did you know previous to that that she had died? A I didn't know anything about it.

Q Had you ever seen her will? A Never, never.

Q Did you have a key to the house where she lived? A Never, never.

Cross examination by Mr. Kalisch.

Q Mr. Marshall, where were you when you heard of the death of your sister? A I was coming into the vestibule, unlocking my mailbox and I took out a telegram and letter announcing the death of my sister.

Q Who was the letter from? A The letter was from Mr. Snedeker's nephews and the telegram was from Miss Snedeker

Q Have you got the letter? A No, I haven't.

Q Have you got the telegram? A No, I haven't.

Q Well, when you got this information, what did you do? A I went right upstairs to my apartment and 'phoned to Snedeker's office.

Q Whom did you speak to? A The stenographer. He was out.

Q What did you say? A I said that I had just got in from the Garden City Hotel, Garden

City, Long Island, where I was registered and had been there for ten days, and had just heard of my sister's death, and that I was prostrated, and asked to talk to Snedeker, and the stenographer said that he was out.

Q Then you hung up the receiver? A I asked when he would be in and then I hung up the receiver.

Q Did you call again? A I did.

Q How long after the first call? A Well, I would say it was about, as near as I can recollect, about an hour or a little more than an hour after the first call.

Q What was your conversation then and with whom? A I tried to get some particulars from Mr. Edward Snedeker in regard to my sister's death.

Q What did you say? A Very little. He was—I didn't talk with him more than two or three minutes on the telephone; about three minutes.

Q What time of the day was that? A That was about—well, I would say it was about half-past three o'clock, as far as I can recollect.

Q And where did you telephone from? A From my apartment.

Q Each time? A Each time.

Q Did they tell you when the funeral was going to be? A Yes, they said—the stenographer said that the funeral at the house was at eleven A. M., and that the services now was at the lot in Greenwood Cemetery and was over. It was nearly a quarter of one o'clock.

Q You knew where the cemetery was where she was to be buried? A Most assuredly.

Q Where? A In Greenwood.

Q Do you know how far it is from Summit to Greenwood Cemetery? Do you know how long it would take ordinarily? A I suppose about an hour from Summit to New York and then a hour or an hour and a half to the cemetery.

Q And you spoke with Mr. Snedeker. Did you say anything about your not being able to attend the funeral? A Yes, I did.

Q Did you tell him why? A Yes, I did.

Q What did you tell him? A I told him I had been out of town and this was the first intimation I had of her death.

Q Did you read the newspapers when you were down there? A Every day; read the newspapers every day.

Q Did you look at the death columns at all? A No, I did not.

Q What paper did you read? A The Herald Tribune.

Q It wasn't in that paper? A I don't know; I told you I didn't read the death columns.

Q Now, Mr. Marshall, you say you never had a key to the house? A I never had a key to the house, never.

Q Did you visit your sister up at Summit? A I did.

Q When was the last time you saw her? A The last time I saw her—

Q Before her death? A The last time I saw her, I think, was in the month of May.

Q That is two months before she died? A Yes, sir.

Q How frequently did you see her? A After my sister Maude died I called there altogether eight times, after my sister Maude died.

Robert Jesse Marshall,
fer Defendant Marshall, Cross.

Further cross examination by Mr. Pitney.

Q You say you had been at Garden City? A Registered there on the hotel register.

Q You came back from Garden City to your apartment in Brooklyn on what day? A On the 18th, the day of the funeral.

Q What day of the week was that? A I forget what day of the week it was.

Q You are sure it was the 18th? A I am positive it was the 18th.

Q You left Garden City that morning? A Yes.

Q What time? A I took a train about between eleven and twelve o'clock.

Q You didn't leave Garden City until after eleven A. M.? A Yes, I left after eleven A. M.

Q And how long does it take to come by train from Garden City to your apartment in Brooklyn? A I can't say exactly. Garden City is 23 miles from Brooklyn.

Q Is that the only trip you ever made to Garden City? A No, I have been down to Garden City for dozens and dozens of times. I have been going there 20 years.

Q To and from Brooklyn? A Yes.

Q How long do you say it takes to go from the station in Garden City to your apartment in Brooklyn? A Well, I should think about an hour and a quarter, I should think.

Q Where do you get off the train? A Flatbush avenue.

Q How do you get from Flatbush avenue to the apartment you were living in? A The Flatbush Avenue Car.

Q Trolley car? A Trolley car.

Robert Jesse Marshall,
for Defendant Marshall, Cross.

Q How long does it take you in that trolley car? A Only about eight or ten minutes.

Q So what time did you arrive in the door of the apartment house on this 18th day of July? A Well, I would say it was about—when I got in there, it was about twenty minutes of one o'clock; about twenty minutes of one.

Q How do you explain your testimony given a few minutes ago, that you called the office of the Snedekers at a quarter of one? A Well, when I got up in my apartment I had to open the windows, unlock them, and let some air in. It was summer time and I had to do one or two little things, and after I got up there I had to leave the telegram and read the letters.

Q Opening the windows and doing the one or two little things and reading this telegram and this letter took how long? A Three or four minutes.

Q Then what did you do? A I immediately 'phoned the Snedeker office.

Q What time was that? A It was then about a quarter to one.

Q So you did call up at a quarter of one? A I would say it was about a quarter of one.

Q You called from your apartment after you returned? A Yes, sir.

Q How do you explain then, your testimony, that you got back at twenty minutes after one to your apartment? A I didn't say that.

Mr. Van Blarcom: That is objected to; I don't think he said that.

Q Isn't it your present memory that you testified a few moments ago that you got to the door of the apartment house from Garden City,

at twenty minutes after one? A No, I didn't say that.

The Court: Twenty minutes of one.

A Twenty minutes of one I said.

Q Don't you recall the stenographer telling you that at that moment the funeral was about leaving Summit to go to Greenwood? A No, she never said it.

Q You don't recall that? A No, she never said it.

Q Don't you recall that she said to you that if you left your apartment promptly, you would arrive at the cemetery in time? A No, I don't recall.

Q Don't you recall you said you were afraid you couldn't get to the funeral because you needed some clean linen? A No, I never said it.

Q No such conversation took place? A No, no such conversation took place.

Q When did you first speak to the elder Mr. Snedeker after your sister's death? A I told you that a minute ago. Well, it was about an hour and a half, I think, as far as I can recollect, after I talked with the stenographer.

Q On the same day? A On the same day.

Q Did you call him, or did he call you? A I called him.

Q Where did you get him, at the office? A At his office; he had returned.

Q Did you make a second call to him that day? A No, I think not, as far as I can recollect I didn't call him up again, as far as I can remember; I don't think I did.

Q Is it a fact that after you hung up you immediately called him back and asked him cer-

tain questions? A I don't recollect doing it; if I did I don't remember.

By the Court.

Q What day of the week was it? A It was the 18th day of July; I don't remember the day.

Q So you think you only made one call? A That is all I can recollect, calling him up once.

Q How long did that conversation last? A I would say about three minutes.

Q What, if anything, did you say to him with respect to your sister Mabel's will? A I never mentioned the subject to him; never mentioned it.

Q Don't you recall saying to him, or asking him this question in substance, "What happens if there is no will?" A No, I don't recollect it; no, I don't.

Q Weren't you interested in whether there was a will or not? A Yes, I was.

Q And that vitally affected you, didn't it? A Naturally, her only brother; no sisters, naturally.

Q And you had been familiar with Maude's will, had you not? A Certainly.

Q And under that will you had taken a legacy of $10,000? A Yes.

Q You knew they had made like wills? A I didn't know that until after my sister was dead.

Q I am speaking now as of your conversation? A With Snedeker?

Q With Snedeker? A Yes. No, I didn't when I talked with Snedeker on the 'phone; I didn't know anything about Mabel's will at all, not a thing; she never showed it to me and she never read it to me.

Q I am asking you at the time of your telephone call, when you called up Snedeker on the day of the 18th, whether you didn't know that your two sisters had made mutual wills? A I did not.

Q When did you learn that and from whom?

Mr. Van Blarcom: That is objected to. There is no evidence that they made mutual wills.

The Court: Objection overruled.

A I learned it after my sister Mabel was dead about in respect to the wills, and let me see who told me: as I remember it was my lawyer, Mr. Walter Avery.

Q How long after this conversation with Mr. Snedeker on the telephone was it that you saw Mr. Avery? A The next day. I saw Mr. Avery the next day.

Q The 19th? A The 19th, I called at the office.

Q And when you went to his office, do you mean it to be your testimony in this court that you didn't know that the sisters had made like wills? A I do; that is what I mean.

Q Don't you recall having had a previous conversation with Miss White on the subject? A I do not.

ERNEST P. PATTEN, a witness produced in behalf of the complainants, being duly sworn, testifies as follows:

Direct examination by Mr. Kalisch.

Q Mr. Patten, where do you live? A Summit, New Jersey.

Q You are connected with the Summit Trust Company? A As trust officer.

Q How long have you had that position? A Sixteen years.

Q Did you know both of the Misses Marshall in their life time? A I did not.

Q Neither one of them? A No.

Q Did Mabel have a safe deposit box at the Summit Trust Company? A She did.

Q Do you remember when she died? A The 13th of July.

Q What year? A 1933.

Q After that, did you meet a lawyer from Brooklyn named Snedeker? A I met Mr. Snedeker in the bank twice.

Q What time? A Saturday morning was the last time, and to the best of my recollection it was on a Friday, the day before.

By the Court.

Q What do you mean? When did you first meet him? A On Friday.

Q And then you met him Saturday again? A Saturday morning.

Q The same man? A Yes, sir.

Q And at that time did you open the safe deposit box? A No, the treasurer went out to the vault and opened it. He has the record here.

Q You don't know what was in it? A No.

Q Did Mr. Williams come in while the box was open? A Mr. Williams was present when the box was opened.

Cross examination by Mr. Pitney.

Q You were not present? A No.

Q How do you know Mr. Williams was? A Because we were later appointed administrator, and it was my duty to check up the box.

Q How do you know Mr. Williams was present? A The record of the box showed it.

By the Court.

Q Did you check it afterwards? A Yes.

Q What did you find? A The record of the people that went into the bank in the box.

Q You said you were appointed trustee afterward? A Yes, sir.

Q And it was at that time your duty to check up the contents of the box? A It was my duty to check up the contents of the box, and naturally I wanted to find out who had been in there beside the owner.

Further cross examination by Mr. Van Blarcom.

Q What was in the box at that time? A It is all listed in the inventory.

Q What was there generally? A Some bonds and mortgages and mortgage participation certificates and some jewelry.

Q No will? A No will.

By the Court.

Q Things that were found in the box are listed in the inventory as having been found in the box? A Yes, sir.

Q Have you the inventory here? A I have a copy.

By the Court.

Q Is there a list of the things that were found in the box? A I have a copy of the inventory.

Q Have you a copy of the contents of the box? A The list here doesn't—

By the Court.

Q I want to know whether the things found in the box and listed in the inventory, are listed as having been found in the box? A No, they are specifically specified as found in the box.

Q Did you find a will in the box? A No will, no, sir.

Re-direct examiantion by Mr. Kalisch.

Q Have you got a record of the persons that visited that box or visited the safe deposit vault? A Yes, I have.

Q Have you got it there? A (Witness produces paper.)

Mr. Van Blarcom: If this involves transactions with the decedent, I want to object to it. I understand they have a record of when she was there. I don't want it said we have opened the door by not objecting to it; that is, to the examination of the two complainants.

The Court: What are you objecting to now?

Mr. Van Blarcom: If I don't object I am afraid it will open the door to permit testimony of the complainant to be competent.

The Court: The objection is overruled.

Q Have you got such a list? A I haven't the list here, but it is in the room here with one of our other men of the bank.

By the Court.

Q Have you a list of the articles that you, as trust officer, found in the bank? A No, I haven't.

Q Where is that list? A The deputy comptroller has that.

Q Is he here? A No.

Q Was anything taken from the box at the time you looked at it?

The Court: Do you mean when he took hold as executor?

Q When you went in there after you were appointed? A I went in there after we were appointed.

HANNA M. MAYHEW, a witness produced in behalf of the defendant, Robert Jesse Marshall, being duly sworn, testifies as follows:

Direct examination by Mr. Van Blarcom.

Q Miss Mayhew, were you employed in Mr. Williams' office? A Yes, sir.

Q Where do you live, in Summit? A In Maplewood.

Q Were you acquainted with Mabel Marshall? A Yes.

Q Was she the executrix of her sister's estate? A She was the executor.

Q During the settlement of the estate did you have conversations with her on occasions? A Yes.

Q Did she ever speak of her will? A Yes.

Q What did she say concerning it? A She wanted to change her will.

Q What did she say? A She said she didn't want that will to take effect.

Q Did she ask how the property would go if she left no will? A She asked me what would happen if she died without a will.

Q What did you tell her? A I told her all her property would go to her brother, as he was her only heir.

Cross examination by Mr. Kalisch.

Q Miss Mayhew, did you say you were in the office of Mr. Williams? A Yes.

Q Are you employed by the trust company? A No, by Mr. Williams.

Q And Mr. Williams, is he the lawyer for the Trust Company? A Yes.

By the Court.

Q You were employed in his law office? A Yes.

Q How many times did Miss Marshall call at the office concerning the changes of her will, as you have stated? A That is rather hard to say. She didn't call there concerning the

changing of her will; she called there in connection with her administration of her sister's estate, and it was during the course of that time that she spoke about the changing of her will.

Q Can you fix a time when she made that statement about the changing of her will? A I think it was in the late spring of 1932; it was near the end of the settlement of the estate; we were about through and it was during that time.

Q And that was a little over a year before she died? A Yes.

Q Well, did she bring her will with her when she came? A No, we never saw her will.

Q When she talked to you or Mr. Williams about changing her will, did she bring the will to him? A No.

The Court: She didn't say anything about Mr. Williams.

Q When she had the conversation with you, did she afterwards see Mr. Williams, if you know? Do you know whether she did, about changing her will? A I think it was before that that she spoke to Mr. Williams about changing her will.

Q Were you present? A I am not quite sure, I think—I am quite sure I was there present when she saw Mr. Williams, but I'm not quite sure whether I was there after that.

Q Were you present on any occasion when she talked to Mr. Williams when she spoke about changing her will? A I think not.

By the Court.

Q How did she come to speak to you about it? A She spoke to me about a great many things in connection with the estate,

and she said she wanted to change her will and I tried to advise her to change it right then and there and not to wait or put it off, and she said she wanted to wait until her sister's estate was entirely finished. She said what would happen if she died without a will. I said it would go to her brother. I told her it was better if she died without a will than to die with the will as it stood. I told her that.

Q You said she said she wanted to wait until after the estate was settled? A Yes.

Q I understood you to say a moment ago that this conversation took place at the time that the estate of Maud Marshall was settled? A It wasn't entirely settled. We were just finishing up some odds and ends.

Q You never spoke to her after that concerning the changing of her will? A I did not.

Q That is true? A Yes.

Q Do you know Mr. Marshall, her brother? A Yes.

Q Did you know him at that time? A No, I had never seen him at that time.

Q Had he ever been in the office, to your knowledge? A No.

Further cross examination by Mr. Pitney.

Q Did you tell us the entire conversation with Miss Mabel on that occasion? A As far as I can recall.

Q She just simply said she wanted to make some change in her will? A Yes, sir.

Q That was it? A Yes.

Q Didn't she tell you what the change was? A No.

Q What it was about? A No.

Q And you advised her to make a will then and there? A Yes.

Q And she asked you what would happen if she had no will? A Yes.

Q And you then advised her that the brother would take all? A Yes.

Q Have you been admitted to the Bar? A No.

Q You didn't know anything about the existence of like wills of the two sisters, did you? A She had told me her will was like her sister's.

Q Upon what did you base your advice that she would be better off to die without a will? A She didn't want that will to take effect; she wanted to make changes in it.

Q But she didn't specify what? A She never told me what changes she wanted to make.

Q Didn't tell you that? A No.

Q So you took it upon yourself, without knowing what changes she wanted to make, to advise her that it would be better to die without a will? A Inasmuch as she wanted changes made in that will.

Q You reach that conclusion and gave her that advice, did you? A I did.

WALTER AVERY, a witness produced in behalf of the defendant Robert J. Marshall, being duly sworn, testifies as follows:

Direct examination by Mr. Van Blarcom.

Q You are an attorney and counselor-at-law of the State of New York? A I am.

Q Practicing where? A In Brooklyn.

Q How long have you been admitted? A Nineteen years.

Q Is Mr. Marshall a client of yours? A Yes.

Q Did you know his sisters? A I met his sister Mabel twice; I never knew Maude.

Q Where did you meet her? A It was at her house in Summit.

Q Where did she live? A On Maple avenue.

Q Maple avenue? A Or Maple street.

Q Summit, N. J.? A Yes, sir.

Q Did you have a talk with her? A Yes, both times, and I met her both times at her house in Summit.

Q On either occasion did she mention her will?

Mr. Kalisch: Objected to. When was this?

Q When were the conversations? A I talked with her one time sometime in the middle of August, 1932, and then I went there again the latter part of December a few days before Christmas, in the year 1932.

Q On the first occasion what was said, if anything, about her will? A Nothing at all.

Mr. Pitney: I think he should point out whether he was representing Mabel at that time. We should know that.

A I was not.

Q Did you ever represent her? A No.

Q Nothing was said about a will on the first occasion? A No.

Q And on the second occasion? A There was.

Q What was said then? A The conversation took place between Miss Mabel and her brother. Her brother asked her whether she wouldn't give him a key to the door. It was on a chair that belonged to her grandfather. He had the chain and he wanted the key. She replied she didn't care to give him the key at that time, but she said he would have it eventually, anyhow. Then he had asked her whether she had made a new will since the death of Maude. She said no, she had destroyed her old will but she had not yet made a new one. That was the conversation.

By the Court.

Q What was Mr. Marshall's occupation at that time? A He has no occupation at all. He has not had in many years. He has been living off the income of a trust created by his mother's will.

Cross examination by Mr. Kalisch.

Q Was that the entire conversation? A Oh, no.

Q That is all that was said about the will? A Yes, sir.

Q Where did that take place? A That took place in the living room of Miss Marshall's house on Maple street, Summit.

Q Did you go out with Mr. Marshall to Miss Marshall's house? A I did; I took him out in my car.

Q Did he invite you to go out, or how did that happen? A We went out there to discuss with Miss Marshall two things, one being her resignation as trustee under the trust under her mother's will. He thought it was advisable, be-

cause she was in feeble health. Another matter was the question of her joining as a party plaintiff in an action to clear the title to a piece of property on 58th street.

Q Where? A Which they owned jointly.

Q What time of day was it that you got there? A We got there in the afternoon.

Q And who did the talking, Mr. Marshall or his sister? A The talk was between Miss Marshall and myself. We discussed these two propositions.

Q Was there any mention made by Miss Marshall of her will? A No mention of her will whatsoever.

Q Didn't she say—you said a moment ago that she said she was going to revoke her will. A No, she didn't say that at all. She said she had destroyed her old will and she hadn't yet made a new one. That was exactly the language.

Q How did she come to say that? A To Mr. Marshall in reply to his question.

Q What question? A He asked her if she had made a new will since Miss Maude Marshall died. She said she had destroyed her old one but had not made a new one.

Further cross examination by Mr. Pitney.

Q Do you know this gentleman, Mr. Kessler? A Yes.

Q And after this suit was started you had a conversation with him? A I did.

Q You didn't tell Mr. Kessler that you had had this conversation in which Miss Mabel had told you she had destroyed her will? A I certainly did.

Q What trust fund did you refer to as the trust fund from the income of which he was living? A Mr. Marshall's mother left a will in which she devised three specific pieces of property in Brooklyn to her two daughters as trustees, the income to be paid to Mr. Marshall. It was paid by them during their lifetime.

Q That trust was more of an understanding between the family than any written instrument. Is that correct? A No, not at all. It is a will probated in Kings County.

Q The will of the mother, and it was to Maude and Mabel? A That's right, that's right.

Q Were some other properties that the sisters had received—there were some other properties they had received from their mother by deed? A Not that I know of.

Q How about the Greenwich street property in New York? A I believe that came to them by virtue of their father's will. I don't think they got any property by virtue of any deed, unless it was in Florida.

Q And you are speaking from assumption rather than an examination of the records? A No, I examined the records, then discussed the matter with Mr. Marshall, and my impression is that one property they had got they got by way of deed; that was some lots in Florida. Other than that they got by inheritance, I think.

By the Court.

Q You told Mr. Kessler? A I told him all about this, yes.

Q All about what? A The conversation that Mr. Marshall had with Miss Mabel, that I overheard.

Q But you have no personal knowledge as to the title of 21 Greenwich street? A I haven't examined the title—

Q Then you have no personal knowledge? A No, I have no personal knowledge.

Mr. Van Blarcom: We rest with the exception of one witness, and that is the clerk at the Garden City Hotel.

The Court: Didn't you have some witness or witnesses who were present at the opening of the safe deposit box?

Mr. Van Blarcom: It was inspected twice. On one occasion Mr. English was there with Mr. Williams and, I think, Mr. Snedeker—Mr. Snedeker, Mr. Williams and Mr. English.

CORRA N. WILLIAMS, a witness produced in behalf of the defendant Robert J. Marshall, being duly sworn, testifies as follows:

Direct examination by Mr. Van Blarcom.

Q You are a practicing lawyer in Summit? A I am.

Q You remember the time of Miss Marshall's death, do you not? A I knew of it, yes.

Q After that did you meet a lawyer named Snedeker from Brooklyn? A I did.

Q How long after her death did you meet him? A I think it was the same day of her funeral. I am quite sure of that, that day or the day after.

The Court: What was done at the bank?

Q Did you go down to the vault with him? A Yes, they called me up from the bank.

Q Was the safe deposit box opened? A Yes.

Q Who was there at that time? A I was there, Mr. Snedeker and, I think somebody else. I have forgotten that.

Q Was there a will in the box? A There was not.

Q What was there? A There were some securities there.

By the Court.

Q What did you open the box for? A He said he wanted to find a will.

Q Did he look for a will among the papers? A Yes.

Q There was none there? A No.

Cross examination by Mr. Kalisch.

Q You spoke with Mr. Avery about it before you opened the box? A Mr. Avery?

Q Was Mr. Avery there? A No, I didn't know Mr. Avery until several days afterwards.

Q You went there with Mr. Snedeker and someone else? A Yes.

Q You don't know who the other party was? A It was somebody from the bank there.

Q You are an officer of the bank? A I am a director and counsel.

Q For the Summit Trust Company? A Yes.

Q And your object, of course, was to see whether there was a will? A Well, Mr. Snedeker said he wanted to find a will. I didn't know whether there was a will or not.

By the Court.

Q That is what you went for? A That is what I went for, yes. He said he thought there was a will, and we looked in the box and didn't find any will.

Q Did Miss Mayhew—she was employed by you, was she not? A Yes.

Q And did she ever discuss with you the will of Miss Mabel Marshall? A No, sir.

Mr. Van Blarcom: That is objected to as not binding, immaterial and not cross examination.

Mr. Kalisch: He testified he went to look for a will. Miss Mayhew said she was informed by Miss Marshall that the will had been destroyed.

Mr. Van Blarcom: No, she didn't.

Mr. Kalisch: Well, she said she told her that she was going to change her will. Probably that is true.

Further cross examination by Mr. Pitney.

Q You are counsel of record in this case, not alone for the Trust Company, but also for Mr. Marshall, are you not? A Yes, sir.

The Court: Let it go on the record that the Court called the witness.

Q You are also a director of the Trust Company? A Yes, sir.

Q How long have you been such? A Oh, ten years; I think I have, approximately.

Q Did Miss Marshall mention to you one thought of changing her will, as she is said to

have done to your secretary? Just yes or no.
A No, no.

Mr. Van Blarcom: We rest.

Mr. Pitney: We have one witness whom we may have to ask the Court a further day for. There are some things that are new.

The Court: Such as what?

Mr. Pitney: The time and circumstances under which Mr. Marshall learned of the death of his sister. We have a witness, for instance, who said he arrived at the apartment house at 10:30 that morning, so I am informed.

The Court: It is too late. That is part of your main case.

Mr. Pitney: It has also been testified to today that Mr. Snedeker, Sr., made two visits to the house, one with Officer Grasso—

The Court: I don't think that makes much difference.

Mr. Pitney: I think it makes a difference who was there on Friday. And there are certain other features, and the discovery of the time of the funeral, that I would like to go into.

The Court: If there are any more witnesses, put them on.

Edwin Kessler, for Defendant
Brooklyn Bureau of Charities, Direct.

EDWIN KESSLER, a witness produced in behalf of the defendant Brooklyn Bureau of Charities and others, being duly sworn, testifies in rebuttal as follows:

Direct examination by Mr. Pitney.

Q Are you a member of the Bar of the State of New York? A I am.

Q For how long? A About ten years.

Q Where do you practice? A In the City of New York.

Q In the Borough of Manhattan? A In the Borough of Manhattan.

Q Do you know Mr. Avery, a New York lawyer, who testified here a short time ago? A I do. Mr. Avery came to my office—

By the Court.

Q Do you know him? A I do.

Q When did you first meet Mr. Avery? A Mr. Avery came to my office early in 1934.

Q In connection with this Marshall case? A In connection with the action I had instituted in New York in the Marshall case.

By the Court.

Q Answer Mr. Pitney. In connection with this case? A Not in the New Jersey case.

Q You had started some action in New York before Mr. Avery came? A Yes.

Q What action was that, so we will know what it was about?

Mr. Van Blarcom: That is objected to.

A I started an action to impress a trust on real estate situated in New York, on the theory that there was or had been a will which was lost or an agreement which was binding.

Q Mr. Avery represented whom in connection with that action? A He told me he represented Mr. Marshall.

Q He came to your office about when in connection with this matter? A I should say about March.

Q Was that the only conversation you had in your office with him? A The only one.

Q Tell us what that conversation was?

Mr. Van Blarcom: Objected to.

The Court: Objection sustained.

Q I ask you whether Mr. Avery told you, as he has testified here this morning that he told you—

The Court: You may leave out "as he testified here this morning."

Q I will ask you whether or not you can recall that, in substance, Mr. Avery told you of a conversation he had had with Miss Marshall, Miss Mabel, in which Miss Mabel had told him she had destroyed her will and had not yet made a new one, a new will? A He did not.

By the Court.

Q Or anything of that kind? A No.

Q Did you have a conversation with the last witness, Mr. Williams, on the subject of Miss Mabel's will?

Mr. Van Blarcom: That is objected to as irrelevant, immaterial and hearsay.

A I did.

Q Did he tell you whether or not he knew of the existence or non-existence of a will of Miss Marshall?

Mr. Van Blarcom: Objected to.

The Court: Objection sustained.

Q What, if anything, did he say upon the subject of any will of Miss Mabel?

Mr. Van Blarcom: Objected to.

The Court: Objection sustained.

Cross examination by Mr. Van Blarcom.

Q When was it Mr. Avery came to see you? A I believe it was in March, 1934.

Q And was it at your office that he said this to you about Miss Marshall tearing up her will and destroying it or was it— A He never said that to me. He never intimated to me that it was to be destroyed or torn up.

Q Did he ask you? A No.

Q Just a minute. Did he ask you over the telephone? A No, he called up to make an appointment when he could see me in my office.

Re-direct examination by Mr. Pitney.

Q At any time did Mr. Avery, whether on the telephone or at your office, or any other place, make any statement to you that Miss Mabel's will had been destroyed? A No.

Q What did Mr. Avery say to you on the subject of the existence or non-existence of a will, if you know?

Mr. Van Blarcom: Objected to.

Q What did he say on that subject? A He said that he had accompanied Mr. Snedeker to the Pioneer Warehouse, where a search was made for the will, and on the occasion that he mentioned, in December, 1932, when he visited Miss Marshall, he said that he had not participated in the conversation at all.

Mr. Pitney: I would like to advise your Honor what we want to do, in twenty-four hours.

The Court: I will continue the matter to the seventh of January.

Mr. Van Blarcom: We have a witness from Garden City who will be here at two o'clock.

Recess until 2 o'clock.

After Recess.

LAURA GORMAN, a witness produced in behalf of the defendant Robert Jesse Marshall, being duly sworn, testifies as follows:

Direct examination by Mr. Van Blarcom.

Q Where do you live, Miss Gorman? A 57 Laurel avenue, Floral Park.

Q Did you work at the Garden City Hotel, Garden City, Long Island? A Yes.

Q When were you employed there? A From October 31, 1929 to October 31, 1934.

Q What were your duties? A I was the auditor of the hotel.

Q Did you know Mr. Marshall? A I knew him, as an employee of the hotel.

Q Did he stay there one time? A Yes, sir.

Q When? A He stayed there various times.

Q Do you know whether he was there in July, 1933? A Yes, I have the records.

Q Will you produce them, please? What is the record? A I have his registration card when he came in.

Q Did you keep that? A Yes, we keep those in our office.

Q Did you keep it or some other person? A No. They were under my personal supervision.

Q Does it indicate when he came to the hotel and when he went out? In July, 1933? A In July, 1933?

Q Yes. A The registration card will show when he came in and his bills which I got will indicate when he went out.

Mr. Kalisch: I object to this. It is only telling us what is in the record.

The Court: Is there any dispute that he lived at the hotel? Is it a question in the case?

Mr. Kalisch: When he went and when he left.

The Court: Is that a question in the case?

Mr. Kalisch: Yes.

The Court: Go on.

Q What do the bills show as to when he left?

Mr. Kalisch: Objected to.

The Court: Objection overruled.

By the Court.

Q Were there any charges against him for services rendered at the hotel, on your books? A Not now.

Q Did you have any in July, 1933? A Yes, but he paid the bill when he left.

Q Are these the bills which he paid? A That is correct.

Q Were they kept by you? A Yes.

Mr. Van Blarcom: I offer them in evidence.

By Mr. Kalisch.

Q From where did you get this information that you have on these bills? A We started to keep the bills the day he come into the hotel.

Q You say you made up this bill? A That is correct.

Q Where did you get the information that appears on this bill in order to make up the bill? A From his meals and various charges he had. His room rent is on there.

Mr. Van Blarcom: These numbers are 187 and 262 of the Garden City Hotel.

Said bills Nos. 187 and 262 are marked Exhibits C. 5 and C. 6 respectively.

Q Look at these two bills, will you please, and state what was the last date that Mr. Marshall was at the Garden City Hotel? A It

would appear he checked out after breakfast on the eighteenth of July, because there is only a breakfast charge on the bill.

Q You say this other slip No. 7955, is his registration card? A That's right.

Q That has got his signature on it? A Yes.

Q Do you know his signature? A Only from seeing it on various vouchers around the hotel. I would assume it was his signature. I didn't see him sign it.

Mr. Van Blarcom: I offer it in evidence.

Said registration card is marked Exhibit C. 7.

Q From looking at this registration card, when did he come to the hotel? A On the eighth of July.

By the Court.

Q How long did he stay? A Until the eighteenth of July.

Cross examination by Mr. Kalisch.

Q That shows he had breakfast on the morning of the eighteenth? A Yes, sir.

Q And he checked out after breakfast? A I presume so. He may have paid cash for his luncheon, but it wasn't charged to him.

Q What was the plan that he was living on, the European or the American plan? A The European plan.

Q That means that he paid for all his meals, didn't it? A Yes, but if he had checked out after breakfast on the eighteenth and had closed his account, then he would have gone in and paid

for his luncheon like any outside guest would do.

Q But your record only shows he had breakfast? A That is correct.

Q Are there any special hours they have breakfast? A No.

By the Court.

Q Until the luncheon hour comes on? A Yes, sir.

DEFENDANTS REST.

Mr. Pitney: May we have an adjournment until the seventh, as your Honor suggested?

The Court: Yes.

Adjourned to January 7th, 1935, at the same place.

FOURTH DAY.

Testimony taken in the above entitled cause, at the Union County Court House, Elizabeth, New Jersey, on Monday, the seventh day of January, 1935, at 10:30 A. M.

Before Hon. John H. Backes, Vice-Chancellor.

Appearances as heretofore noted.

EDWIN L. SNEDEKER, being recalled, testifies as follows:

Direct examination by Mr. Pitney.

Q Mr. Snedeker, when you were on the witness stand here a week or two ago you were un-

certain whether the visits you made to Summit to the home of the sisters after the death of the second sister, was on Friday the fourteenth or on Saturday the fifteenth, but you testified that you thought it was on Saturday. Have you made an effort to refresh your memory since that time from any written notes or memoranda you may have had? A Yes, sir; from this book (producing book).

Q What do you find to refresh your memory as to which day it was that you were there, Saturday or Friday? A Saturday the fifteenth.

Q It was testified two weeks ago by Mr. Grasso, a member of the Summit Police Force, that he went into the house on Friday the fourteenth with you. Is that so? A No, sir. I went there but once. It is not true.

(Mr. Grasso stands up.)

Q This is the officer who testified he went to the house with you on Friday?

The Court: I think he said he went with somebody whom he understood to be Mr. Grasso. I think that was the testimony.

A I couldn't identify that gentleman, but I think that is the man with whom I went.

Q This is the officer who said he went with you on the fourteenth? A I wouldn't swear to that. I think that is the man I went with once.

Q On what day? A Saturday.

Q Do you know Chief Nelson? A I might be able to identify him.

Q Do you know him? A I don't know him.

Q Where did you meet him? A At the Summit Police Station.

Q On what occasion? A The day I went to the house with the officer.

Q Did you go to the Police Station first? A Yes, sir.

Q And it was there that you saw Captain Nelson? A Correct.

Q Subsequent to that Saturday, the fifteenth, did you make another effort, or did you make an effort to return a second time to the house to make a further search for the will? A I did.

Q Fix that time? A It was after the funeral, and the funeral was on Tuesday. I asked Captain Nelson if I might again enter the house, for I was not sure whether there was a garret, and if there was I hadn't looked in it, and he said, "No, Mr. Williams has forbidden entrance in the house by anybody—

Q So that you were unable to make a further search? A Correct.

Q On or after the death of the second sister, Mabel, on the thirteenth, did you ever go to the house other than that one time, the fifteenth? A Never.

Q Were you there for the funeral? A The funeral wasn't there; it was in Brewster's undertaking establishment.

Q On that day did you go back to the house? A I did not.

Cross examination by Mr. Van Blarcom.

Q When did you first go there, Mr. Snedeker? A Saturday. In this connection, I had been there a year or more before.

Q I mean after the lady's death? A Saturday.

Edwin L. Snedeker (Recalled), Cross.

Q What time did you go there? A In the afternoon.

Q Who was with you, an officer? A An officer detailed by Captain Nelson.

Q This man Grasso? A I don't know his name, but I said I thought it was this gentleman.

Q You think this is the same one? A I think so.

Q How long were you there? A Not over an hour.

Q And that was the time you made this thorough search? A Exactly.

Q Did you go to the safe deposit box with somebody? A No, sir.

Q When did you go back to look— A That was Tuesday.

Q Did you go to the Trust Company on that Saturday? A No, sir.

Q You were there only once? A It was late in the afternoon.

Q But you were there twice, were you not? A I was in Summit twice, the day I went on Saturday and the following Tuesday.

Q You made a call at the bank? A On Tuesday.

Q On Saturday too? A No.

Q You said it was too late to go? A It was too late; therefore I didn't go. I don't think it was in my mind, because of that fact. One thing I am positive of, and that is that following the death of Mabel Marshall I went into that home but once, and then I was accompanied by an officer detailed by Captain Nelson; but once.

Mr. Kalisch: I offer the testimony of the two complainants. In view of the fact that

your Honor has sustained the objection to that testimony by reason of its being in violation of Section 4 of the Evidence Act, which we think it is not. Furthermore, we think it would be competent under Section 6 of the Evidence Act, which provides that the complainant or petitioner in any action or proceeding of an equitable nature in any court, shall be a competent witness to disprove so much of the defendant's answer as may be responsive to the allegations in the bill of complaint or petition. And that the answer of the defendant was a denial of the allegations in the bill, so far as the Summit Trust Company was concerned, and so far as Mr. Marshall, the other defendant, was concerned. It was a denial and also an allegation of the fact that he was the sole heir, and she left no will and died intestate. I say those two facts stated in the answer are in response to allegations in the bill, a denial, as well as setting up new matter. And on that basis we say—

The Court: Section 6 was to enable the complainant who had theretofore been disqualified, to testify in a limited capacity. That does not enable the complainant to testify where he is disqualified under the Fourth Section. That is my notion of the matter now.

Mr. Pitney: We make the same offer with respect to that. And there is another point; and that other point is a feeling that your Honor should reconsider the exclusion of the testimony of the other Mr. Snedeker, the one who is not here this morning, concerning the discussion between the two

sisters, touching the forfeiture clause when they came to draw their like wills in his presence. I not your Honor excluded that testimony of Mr. Snedeker on the ground that the wills would have to speak for themselves. That was not the purpose of the offer, not to aid the Court in the consideration of the language of the will or to seek to change that at all. That is perfectly clear. But my purpose was to show that there was not only a similarity but an exactly identical provision in each will; that it was identical language in each will and that that language was there by agreement between the sisters, in order that the Court might infer, if the Court thought proper, that there was an agreement on that clause, as there was an agreement with each and every other identical provision in the two wills.

The Court: I had no intention of striking out anything that might help me.

Mr. Pitney: That is found on pages 21 to 23 of the first day's hearing. (Mr. Pitney, after reminding the Court that Mr. Snedeker had said that he was the counsel who had drawn like wills, read the record on said pages commencing with the following question: "Was there any discussion between them in your presence with respect to any particular feature of their wills, which comes back to your memory at this time," down to the bottom of page 23, including the entire page.)

My purpose was to indicate that there had been a meeting of the minds of the two sisters, and by considering that clause your

Honor could infer the situation in respect to the other clauses.

The Court: I will consider it.

Mr. Kalisch: There is a witness out of the State, and we should like very much to take his testimony, as throwing light on a very vital part of this controversy.

Mr. Van Blarcom: We object to it.

Mr. Pitney: This is rebuttal testimony, and we expected to have this witness, but he would not come, and I would like to take his testimony.

The Court: What is the testimony?

Mr. Pitney: Concerning Mr. Marshall's movements at the time, or during a few days following the time, of the death and funeral. You will recall that he claimed not to have heard of it; that he claimed to have returned to his Brooklyn apartment on the day of the funeral at twenty minutes of one, and it is a disinterested witness to meet that testimony.

The Court: What effort did you make to get this witness here this morning?

Mr. Klein: We saw this witness, and the man is a janitor, and he has under his care a matter of ten houses, and he is unable to leave the premises for any length of time, and he certainly could not come to Elizabeth, and being in Brooklyn we were unable to subpoena him for this morning. I hoped at the time to induce him to appear here voluntarily.

The Court: We cannot drag this case along. You will take his testimony before Mr. Powis on Friday in Brooklyn. The case

will be continued to the first Monday in February at Elizabeth.

Mr. Van Blarcom: We are willing to call either Chief Nelson or Mr. Grasso to show they were the ones that went there to the house.

The Court: They have already testified to that.

Mr. Van Blarcom: I think they have. May I call Grasso to show that he went to the house with Mr. Snedeker?

The Court: He has already testified to that and Mr. Snedeker has said that he thought he did.

FIFTH DAY.

Proceedings had in the above entitled cause, at the Union County Court House, Elizabeth, New Jersey, on Monday, the eighteenth day of February, 1935, at eleven-fifteen A. M., before Hon. John H. Backes, Vice-Chancellor

Appearances: as heretofore noted.

(Mr. Kalisch reads testimony taken before Samuel Powis, Jr., at the Brooklyn Bar Association Building, Brooklyn, N. Y., on January 12, 1935. The objection made by Mr. Van Blarcom to the first question on re-direct examination on page 12 of the transcript of said testimony is withdrawn.)

100—632.

IN CHANCERY OF NEW JERSEY.

Between	
AGNES CROAKE and ELLEN LOUISE WHITE, *Complainants,*	*On Bill, &c.*
and	*Testimony before Master.*
SUMMIT TRUST COMPANY, *et al.,* *Defendants.*	

Testimony taken by consent and stipulation by and between counsel for the respective parties complainant and defendant in the above cause, at the quarters of the Brooklyn Bar Association, 123 Remsen street, Brooklyn, New York, on Friday, the eleventh day of January, 1935, at three o'clock P. M.

Before Samuel Powis, Jr., Master in Chancery.

Appearances:

Louis E. Klein, Esq., (Harry Kalisch, Esq., of counsel), solicitor for complainants.

Andrew H. Van Blarcom, Esq., representing Messrs. Williams and Williams, solicitors for defendant Robert J. Marshall.

Messrs. Pitney, Hardin and Skinner, by Shelton Pitney, Esq., solicitors for defendants National Newark Building and Brooklyn Bureau of Charities.

Harold W. Walker, for Defendant
Brooklyn Bureau of Charities, Direct.

HAROLD W. WALKER, a witness produced in behalf of the defendant Brooklyn Charities, being duly sworn, testifies as follows:

Direct examination by Mr. Pitney.

Q Mr. Walker, what is your business? A Banking.

Q By what bank or trust company are you employed? A The Brooklyn Trust Company, 41 Flatbush avenue, Brooklyn.

Q Is that the main office of the Brooklyn Trust Company? A The Schermerhorn Branch.

Q How long have you been employed at that branch of the Brooklyn Trust Company? A From 1916. Previous to 1929 when it was—

Q From 1916 to 1929, what was it? A Previous to that it was the Mechanics Bank.

Q Previous to 1929 and from 1916, it was the Mechanics Bank? A Yes, and then it was taken over by the Brooklyn Trust Company.

Q What is your present position there? A Assistant manager.

Q How long have you been assistant manager? A Since 1930.

Q Did you know Miss Maud Marshall and Miss Mabel Marshall? A I did.

Q I will ask you whether or not they had an account or accounts with the Mechanics Bank at that address? A Well, the Mechanics Bank was at 10 Third avenue, but that building was torn down for the new municipal subway and we moved to 41 Flatbush avenue.

Q When was that? A In October, 1929.

Q Did Miss Maude and Miss Mabel Marshall have an account or accounts with the Mechanics at the old address? A My recollection is that

there were three accounts, Maude I Marshall, Mabel V. Marshall and Maude I. and Mabel V. Marshall, trustees for Robert J. Marshall.

Q Did you know, also, Robert J. Marshall? A I did.

Q Over what period of time did you know him? A Oh, I can recollect Mr. Marshall way before I was on the windows.

Q Before you were a teller, do you mean? A Before I was a teller.

Q How long had you been a teller before you became assistant manager? You don't have to be exact. A Well, I worked in the cage about three years before I worked on the window. I have been with the bank practically nineteen years. I have been assistant manager for five years. That's about eleven years.

Q You were a teller for about eleven years? A Yes. That is about sixteen years I can recollect Mr. Marshall.

Q Sixteen years pror to this time? A Yes.

Q Was it over the same period of years that you knew Miss Maude and Miss Mabel? A Yes.

Q Did you tell me that Robert J. Marshall also had an account with you? A I don't remember Mr. Marshall depositing as a depositor. I remember Mr. Marshall used to come and get a change of bills. That I recollect. I have no records with me to show what time he opened an account. He had an account then I think—

Q Will you tell us about the two sisters, whether they came to the bank separately or whether they came to the bank together, or what you remember? A While the two were living they were always together; never separate.

Q And that was so from the first time you first knew them? A Yes.

Q And continued so until when? A Until Maude I. got sick, then Mabel V. used to come in once in a while, not very often—I believe they lived in Jersey at that time—and Maude I. passed on and Mabel V. used to come in.

Q Can you identify the approximate time when Miss Maude became sick? A About three or four years ago.

Q That would bring it back to about 1930? A Not that far; about 1931.

Q I will ask you whether or not you recall an occasion in the summer of 1933 when Mr. Robert J. Marshall came into the bank? A In reference to what?

Q In reference to anything. A Well, Mr. Marshall, after Maude died, Mr. Marshall did come in the bank more often than what he did previous, but so did Mabel V. Marshall come in, but she didn't come in as often; she used to do a lot of her banking by mail. Then about once a month she would come herself.

Q In the summer of 1933, do you recall having had a conversation with Mr. Marshall? A Well, I had several conversations with Mr. Marshall, whether it was in 1933 or not, that I don't know.

Q Do you recall what the last conversation you had with Mr. Marshall was prior to the date of the death of Mabel, which occurred on July 13, 1933? A About two weeks prior to the death of Mabel V. Marshall, I believe it was on Saturday, I'm not sure of it, my recollection is that it was on a Saturday, Mr. Marshall came in and asked me if we had Mabel V. Marshall's will on file.

Q What did you say to him? A I asked him why he wanted to know.

Q What did he say in reply? A He said his sister was causing him a lot of grief, his sister Mabel was causing him a lot of grief and trouble, she was writing letters and distributing them to neighbors where she lived, she seemed to him to be out of her mind and he was afraid if she continued he would have her put in an asylum. In other words, he insinuated that she was mentally unbalanced.

Q Did he describe to you at all the nature of the letters he said she was writing? A No, he said they were very embarrassing to him and were going to his neighbors.

Q Did he tell you the contents of the letters? A He always said they were vile things about him that were untrue.

Q They were vile things about him that were untrue? A Yes, vile things about him that were untrue; that's right.

Q Did you at any time, to your knowledge, have the will of Mabel V. Marshall on file? A Oh, I don't know. I referred Mr. Marshall to the trust department in the main office. They are the ones that have all wills on file.

Q Have we got from you the entire conversation on that occasion so far as you can recall it? A As far as I can recall, yes.

Q How shortly after that was it that you next saw or heard from Mr. Marshall? A About two weeks later.

Q What happened? A About two weeks later Mr. Marshall called, if I recall—Mr. Marshall asked for Mr. Nash and Mr. Nash is the manager.

Q Of the office? A Of the office, that's right. And Mr. Nash was out and Mr. Marshall spoke

to me and informed me his sister Mabel was dead.

Q Did he say when she had died? A I am hazy on that. My recollection is that he said the previous day, but it's over a year ago, and you carry on so many conversations with people, they don't mean anything at the time.

Q Tell me, was this conversation, this last conversation to which you refer, on the telephone? A On the telephone; that's right.

Q How did you know it was Mr. Marshall who was talking to you? A I know Mr. Marshall's voice.

Q Can you remember what day of the week that telephone conversation was, by any chance? A No, it's hard to tell.

Q I will ask you whether that was the last conversation you had with Mr. Marshall, that related to Miss Mabel's health or her death? A That's right.

Q Do you keep a diary at all in your office? Do you keep a diary of telephone conversations such as that, so we can fix the date or day more surely? A No, what we do, I went up and told the bookkeeper, that Miss Mabel Marshall—

Mr. Van Blarcom: I object to what he told the bookkeeper.

A It is the system that when we are informed, whether by telephone or letter or if we read it in the paper, that one of the depositors is dead, we immediately inform the bookkeeper and what we call a stop payment jacket is put over the ledger sheet, and then when the account is closed out we transfer—in this case the account was transferred to the main office, Trust Department, and

then the stop payment jacket is automatically destroyed.

Q Under your practice, is there anything in your bank, or the main office of your bank, which would fix the date on which this telephone call occurred? A No.

Q And that is because that stop jacket was destroyed in the ordinary course of things at the time of the transfer to the main office? A Yes, you see in most cases—

Mr. Van Blarcom: I object to what happens in most cases. I object to the answer. It ought to be confined to this particular case.

Q What is the usual practice in this regard? A How we can usually fix it, we get the short form of the letters testamentary of the letters of administration and we fix the exact date by that, and we have them on file, but this account was transferred to the main office, and we have no papers whatsoever.

Q You mean that is the way you fix the date of death? A Yes.

Q I am not trying to fix the date of death. What I am trying to fix and what I am trying to ascertain, is whether your records will help me fix what date you learned from Mr. Robert Marshall's lips of the death of his sister? A I doubt very much if the records will show that. All the records will show is the date of the transfer to the main office.

Q I wouldn't be interested in that. How shortly after you heard of the death of Mabel from Robert did the transfer follow, roughly speaking? A That I don't know. I haven't looked up the records at all.

Q Is it, then, your best memory at the present time that Mr. Marshall referred to the death of his sister as having occurred the day before? A To the best of my recollection, yes.

Cross examination by Mr. Kalisch.

Q Do you know whether or not Miss Mabel Marshall had a safe deposit box in your bank? A We have no safe deposit boxes in our office. We rent space from the Pioneer Ware House and they have safe deposit boxes on the same floor.

Q Is it under the control of your bank? A No control whatsoever. We are only tenants.

Re-direct examination by Mr. Pitney.

Q To your memory, did you ever have any conversation with Mabel, or while Maude was still alive with both Mabel and Maude in anyway relating to their will or wills?

Mr. Van Blarcom: I object to that as immaterial under the Evidence Act.

A No.

Q I will ask you whether or not either one of them ever advised you what person or institution would be the executor and/or trustee of their will or wills. Do you recall anything on that subject? A You mean definitely. Mabel V. often referred that she would make the Brooklyn Trust Company executor.

Q Mabel? A Yes, sir; never Maude.

Q Was that reference by Mabel after Maude's death? A Yes, after her death. She never

definitely said she had made the Brooklyn Trust Company executor, but it was her intention.

Cross examination by Mr. Van Blarcom.

Q That was after her sister died? A That's right.

Q You know Mr. Snedeker of course? A No, I don't.

Q Isn't he the attorney for the Trust Company? A Cullom and Dykeman are the attorneys for the Trust Company.

Mr. Pitney: I offer in evidence at this time the things referred to before Vice-Chancellor Backes, two things, one being a certified copy of the deed for the Greenwich street property, from Martha A. Marshall, who was the mother of Maude and Mabel to Maude and Mabel. For the record I ask Mr. Van Blarcom whether he will waive an exemplification of this certified copy.

Mr. Van Blarcom: That is all right as far as the waiver goes, but we are here to take the testimony of a witness and not to offer exhibits. I think that ought to be done on the final hearing. I think those things are not to be put in today, but at the final hearing, or they should have been offered before.

Mr. Pitney: I hadn't got them in time to examine them and offer them before the Vice-Chancellor at the last hearing, and I therefore ask that this certified copy of deed by marked in evidence.

Mr. Van Blarcom: I object to the paper going in at the present time. Said certified

copy of deed from Martha A. Marshall to Maude I. Marshall and Mabel V. Marshall, dated the 6th day of March, 1908, and recorded in the Register's office on March 13, 1908, in Liber 177, section 2, of conveyances, page 409, is marked Exhibit DB. 1.

Mr. Pitney: I also offer in evidence at this time a certified copy of the will of Martha A. Marshall, the mother of the sisters.

Mr. Van Blarcom: I object to the offer on the ground that we are not here to offer any exhibits, but to receive the testimony of the witnesses. Said will of Martha A. Marshall dated February 28, 1928, is marked Exhibit DB. 2.

Master's Certificate.

100-632.

IN CHANCERY OF NEW JERSEY.

Between	
AGNES CROAKE, *et al.*, *Complainants,*	*On Bill, &c.*
and	*Master's Certificate.*
SUMMIT TRUST COMPANY, *et al.*, *Defendants.*	

I, SAMUEL POWIS, JR., being the Master in Chancery before whom the foregoing testimony of Harold W. Walker, was taken, pursuant to consent of counsel, Do Hereby respectfully certify and report that on the twelfth day of January, 1935, the said foregoing testimony and proofs were so taken; that the said testimony and proceedings were taken down stenographically personally by me, and reduced to typewriting under my immediate supervision; that the witness was duly sworn by me before the giving of his testimony, and that the foregoing transcript accurately, truly and faithfully sets forth said proceedings.

Master.

Discussion.

Mr. Van Blarcom: I object to the deeds and the will going in.

The Court: What is the purpose of it?

Mr. Pitney: I offer the deed, if your Honor please, to show the ownership of that particular New York property on Greenwich street. I thought it had a bearing on the method of disposition and sustains the point we have made in this case that here was not only an actual mutuality of wills in fact, but evidence of a purpose by the two sisters to create an ultimate disposition of their entire estate in a way which they had agreed upon. I have in mind a distinction which I believe exists between the case at bar and the case of Howell *vs.* Martin. There the Court of Errors and Appeals reversed Vice-Chancellor Ingersol and found that the evidence did not sustain the contention that there was a contract to make like wills. In that case, however, a careful examination of the opinion discloses that all there was was a will by a husband leaving everything to the wife and one from her to her husband. There was nothing to indicate that they were agreeing upon an ultimate disposition of all of their property; and it seems to me that we have such a situation here that the Court did not have before it in that case, and that the disposiion under the will, of this particular Greenwich street property, in the light of the ownership of the property, has a bearing upon that feature.

The Court: I will sustain the objection.

Mr. Kalisch (after argument): Does Mr. Marshall come within Section 4 of the Evidence Act?

Discussion.

The Court: He does not. Jesse Marshall is an individual. He is not being sued in a representative capacity, but the Trust Company is. The objection is made because the Trust Company is being sued in a representative capacity. I rule that the testimony is incompetent under Section 4, because they have an interest in it and the suit is in a representative capacity. I don't think it makes any difference whether I consider that testimony or not. What do you think of it?

Mr. Van Blarcom: I think your Honor is right.

The Court: I am going to consider that testimony, but I don't think it has anything to do with it. I don't think there was anything testified to that bears upon the case.

On the question of the incompetency of the testimony under Section 4, that act differs from what it is now. It is different now from what it was when Chancellor Geern decided his case.

(Further argument.)

Adjourned to Monday, February 25, 1935, at the same place.

Conclusions of Vice-Chancellor.

Proceedings had in the above entitled cause, at the Union County Court House, Elizabeth, New Jersey, on Monday, the twenty-fifth day of February, 1935, at eleven A. M.

Before Hon. John H. Backes, Vice-Chancellor. Appearances, as heretofore noted.

Argument by Mr. Van Blarcom.

The Court: (After oral argument.)

The bill alleges two causes for action, as I recall it, one to establish that these sisters made mutual wills, binding each other that the respective wills should be their last wills; the other cause for action is to establish the supposed lost will of Mabel.

The sisters, aged women, always lived together. They had drawn identical wills in the past. The last will of Maude and the supposed lost will were identical in character. That fact is evidence of an arrangement between these sisters, of their intent. It is evidence of the intent of the sisters to leave the property in an identical manner at their respective deaths, but it is not proof of any binding contract between them that the will of the survivor should continue until her death. It seems to me that the evidence is lacking in this case.

In support and for the support of that compact we have only the evidence of the two complaining witnesses, Mrs. Croate and Mrs. White, and they are materially financially interested in the outcome of this suit; and I hold now that their testimony is inadmissible for the purpose of establishing a compact. I also hold that their

evidence in this suit to establish a lost will is inadmissible for the purpose of showing that the will was lost. If may be that if the will were present they would be competent witnesses to show the mental condition and the execution of the will, but when they attempt to establish in this litigation, in which they are complainants against the administrator of the estate, that this will is lost, their testimony as to conversations and dealings with the intestate, or testate, are inadmissible. And that ends your case if that is the fact and if that is sound law. Mrs. Ralston, I think the name is, is the only other one, but I don't think her evidence has much force. She is a neighbor. She accused this woman of being beyond herself, when both complainants testified that until recently before her death she was mentally sound.

But if we lay aside for a moment the rule of evidence and take into consideration their testimony—and that is what I am going to do—their testimony does not establish, and not by far, a compact or arrangement between the sisters to the making of mutually binding wills. There is just that important element missing from this case which was present in the case which has been referred to. In fact, the testimony of these complainants as to their conversations with Mabel, with the decedent, would indicate that there was no such arrangement. It is much stronger in support of the claim that there was no arrangement than that there was; because she said to them, "That is the will I want—the one I made with my sister; that is the one I want." Well, if she had made a bargain with her sister she had no choice. And other expressions of that kind indicate that she had in mind the right

to make changes—expressions made to the complainants that she thought she had the right to make a change, and from which we may adduce that there was no binding obligation, quite as readily as other circumstances might possibly tend towards such an arrangement. There is the testimony of the lady in Mr. Williams' office. She expressed to her an intention to make a change in the will. To Mr. Avery she said she had destroyed the will.

From those expressions to these outsiders, and the expressions to the complainants, it would appear that this lady thought she had the right, which rather eliminates from the case a consideration that there was a contract binding upon each of the parties, and that the wills themselves being alike, would have a tendency to establish mutually binding wills. I do not see that the deceased's expression can be of any help at all to the complainants. Those that they rely upon are as susceptible of a consciousness of a contract not binding as of a binding contract with the sisters. Now, that cause of action must fail.

Now, as to the lost will cause of action. The wills were drawn by the counsel of the two ladies, both present, both giving him instructions. The scrivener of the wills testified that it was his impression that upon the execution of the wills they were delivered to the makers. Now, that is as much as we have in this testimony in the history of the case as to Mabel's will, his impression that he gave it to her. That would be the ordinary course anyway.

I want to say here, as to the implication that the brother destroyed the will, that it is atrocious. He was not in this neighborhood. He was not

in the house. The deceased apparently committed suicide by turning on the gas. He didn't know of her death until the day of the funeral. Mr. Snedeker, the draftsman of the wills, a friend of the two sisters, and their counsel I think up until the end, hearing of the misfortune of the old lady, came here. He says he was only here once, and went through the house. Two policemen, one the chief and the other a lieutenant, each say that upon different occasions they took Snedeker to the house. He said he was only there once. You will find in the testimony that the cashier of the Trust Company says that he saw Mr. Snedeker twice, Friday and Saturday, but whether Mr. Snedeker has forgotten it or not, it makes very little difference. He is a high class lawyer. He didn't take the will, and it would not be to his interest to take the will.

This lady lived alone in Summit. She is presumed, under and in view of the testimony, to have had that will. She had a strong box. She was a woman of means and had securities. Snedeker entered the home with the police and found that in the deceased's room there were papers on the desk, papers on the mantlepiece, but they were old fire insurance policies and bills; no wills. The deceased did not seem to like the brother; nor did Maude; and they made some limited provision for him in the wills; but the will is gone. The will had been in her possession, and the presumption is that she destroyed it.

Testimony has been offered which, I say, under the statute is to be excluded, but I am considering it, that she expressed herself five weeks before her death concerning the existence

of the will. I think the testimony is that—I don't remember of which lady, whether Mrs. White or Mrs. Croate—in January, February, March, April, May and June, she had spoken of this will and of its existence; and to the other lady she made mention of it I think in March of the year of her death. She had intended making a change in the will. It may have been for some limited purpose. I think there was an intimation here of the creating of an endowment fund for a cemetery lot, or something of that kind, which she did express to the secretary of Mr. Williams, of her intention to make a change. And Mr. Avery said that in December prior to her death in July, she had told him that she had destroyed the will; that she told him in the presence of the brother. The brother, who was there and probably heard it, gave no testimony. It may have been an oversight of counsel; but he makes no mention of it, and that which she said to Mr. Avery is irreconcilable with the statement she made in January, February, March, April, May and June of the following year to one of the complainants. His testimony is wholly speculative as to whether she did or did not destroy this will with the intent to revoke.

The will is gone. She was of a frame of mind, it is said, five weeks before her death, that the will was in existence; but isn't this possible, and maybe probable? She had a violent death. She was desperate when she turned on the gas. She was sufficiently sensible to take that route. Isn't it possible that with her apparent ill-feeling towards the brother, she may have had a change toward the tailend, and destroyed it? I don't know. The burden is upon those who claim the will is in existence, to prove it. The will is

lost. The presumption is it has been revoked. That presumption has not been overcome. The bill will be dismissed.

Counsel fee of $2,500.00 allowed to counsel for Mr. Marshall; $2,000.00 allowed to Mr. Kalisch, $500.00 of latter to be handed over to Mr. Pitney.

Final Decree.

Final Decree.

Filed March 8, 1935.

The above named complainants having filed their bill of complaint in this cause seeking a decree that Mabel V. Marshall, of Summit, N. J. did, in her lifetime, duly execute a last will and testament of July 19, 1928, in the manner and form as set forth in said bill, which is a valid and subsisting will, and that a copy thereof annexed to said bill and forming a part thereof, may be admitted to probate, as to the last will and testament of said Mabel V. Marshall, and that it might be established and decreed that there is a trust imposed upon all the moneys, rights and credits, choses in action, of the property, real and personal, of said Mabel V. Marshall, deceased, which may be in the custody and possession and control of the defendants, or each of them, any or all of them; and the defendants, The Summit Trust Company, Robert Jesse Marshall, and the Brooklyn Bureau of Charities, having filed answers thereto; and the said cause having come on for final hearing before the Chancellor upon the pleadings and proofs; and after hearing arguments of Harry Kalisch, on behalf of Louis E. Klein, of counsel with the complainants, Andrew Van Blarcom, on behalf of Williams & Williams, solicitors of and counsel with the defendants The Summit Trust Company of Summit, N. J. and Robert Jesse Marshall, and Shelton Pitney, of Pitney, Hardin & Skinner, solicitors for the defendant Brooklyn Bureau of Charities; and the Court having considered the same,

Final Decree.

It is, on this 7th day of March, 1935, ORDERED, ADJUDGED and DECREED by the Chancellor of the State of New Jersey, that the said Mabel V. Marshall, at the time of the execution of the alleged will, did not agree with her sister, Maud I. Marshall, to make mutual and reciprocal wills for the benefit of each other, and for the benefit of the devisees and legatees named therein, and that the said Mabel V. Marshall revoked the said alleged will and died intestate.

It is further ORDERED, ADJUDGED and DECREED that the said bill of complaint be and the same is hereby dismissed without costs to either party as against the other, but that the legal fees, including fees to masters, for taking testimony on behalf of the parties in this cause, and for copies thereof, shall be paid by the said The Summit Trust Company of Summit, N. J. out of the moneys in its possession as administrator of the estate of the said Mabel V. Marshall.

It is further ORDERED, ADJUDGED and DECREED that there be allowed a counsel fee of Two Thousand Dollars ($2,000) to Louis E. Kley, the solicitor and counsel of the complainants, and a counsel fee of Five Hundred Dollars ($500) to Pitney, Hardin & Skinner, solicitors for the defendant Brooklyn Bureau of Charities, and a counsel fee of Twenty-five Hundred Dollars ($2,500) to Williams & Williams, solicitors and of counsel for the defendants, The Summit Trust Company of Summit, N. J. and Robert Jesse Marshall, and that the said The Summit Trust Company of Summit, N. J., as Administrator of the Estate of said Mabel V. Marshall, pay said counsel fees to the said counsel out of any moneys now in its hands as such Administrator.

Final Decree.

It is further ORDERED, ADJUDGED and DECREED that the lis pendens filed in the Register's office of Union County, New Jersey, in this cause, be discharged of record by the said complainants or their solicitor.

LUTHER A. CAMPBELL,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

Notice of Appeal.

Filed June 7, 1935.

The complainants, Agnes Croake and Ellen Louise White, hereby appeal from so much of the final decree made in the above entitled cause by the Honorable Luther A. Campbell, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor John H. Backes, on the 7th day of March, 1935, as adjudges that the said "Mabel V. Marshall, at the time of the execution of the alleged will, did not agree with her sister, Maude I. Marshall, to make mutual and reciprocal wills for the benefit of each other, and for the benefit of the devisees and legatees named therein, and that the said Mabel V. Marshall revoked the said alleged will and died intestate"; and that part of the decree ordering "that the said bill of complaint be and the same is hereby dismissed * * *," to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated: April 16, 1935.

LOUIS E. KLEIN,
Solicitor for Complainants.

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

SAMUEL GEORGE COHEN,
Of Counsel with Complainants.

Substitution of Solicitor.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 16th day of April, 1935.

WILLIAMS & WILLIAMS,
Solicitors for and of Counsel with Defendants, The Summit Tr. Co., etc. and Robert Jesse Marshall.

PITNEY, HARDIN & SKINNER,
Solicitors for and of Counsel with Brooklyn Bur. of Charities.

Substitution of Solicitor.

Filed June 19, 1935.

I hereby consent that Saul J. Zucker, Esq., be substituted as solicitor for and of counsel with the complainants-appellants, Agnes Croake and Ellen Louise White, in the above entitled cause.

Dated: May 20, 1935.

LOUIS E. KLEIN,
Solicitor for Complainants-Appellants.

Petition of Appeal.

Filed September 14, 1935.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

AGNES CROAKE and ELLEN LOUISE WHITE,
Complainants-Appellants,

and

THE SUMMIT TRUST COMPANY, *et al.*,
Defendants-Respondents.

On Appeal from Chancery Court.

To the Honorable Court of Errors and Appeals in the Last Resort of All Causes:

The petition on appeal of Agnes Croake and Ellen Louise White, appellants herein, respectfully shows appellants find themselves aggrieved by the entry of the Final Decree entered herein in the Court of Chancery on March 7, 1935, in the following respects, to wit:

1. The Chancery Court upon finding that an agreement on the part of Maud Marshall and Mabel V. Marshall to execute mutual wills had been made (S. C. p. 163, l. 21) erred in failing to decree that the proofs established an agreement on the part of Maud Marshall and Mabel V. Marshall not to revoke the mutual wills made in their respective lifetimes.

2. The Chancery Court erred in failing to find that the proofs established the lost will of Mabel V. Marshall.

3. The Chancery Court erred in excluding:

(a) the testimony of appellant, Agnes Croake, on direct examination, since said testimony was admissible on the ground that it bore directly upon the issue of establishing the lost will of Mabel V. Marshall, and was not excluded by the "Evidence Act":

> "Q Did you have on occasions, conversations with Mabel Marshall concerning the disposition of her estate? A Yes.
>
> Mr. Van Blarcom: I object to that on the ground that it is inadmissible under the evidence act.
>
> The Court: I am going to sustain that objection, but I am going to take the testimony. I am not so sure about it. I am inclined to think it is not admissible, but it is on the border line and I will take the testimony and hear counsel on it later. It doesn't appear by the bill that anybody appears in a representative capacity, does it?
>
> Mr. Van Blarcom: Yes, the Summit Trust Company.
>
> The Court: That company is made a party defendant, but not as administrator.
>
> Mr. Pitney: I think the bill has been amended. I am not sure of it.
>
> Mr. Van Blarcom: They also have a count to establish a contract.
>
> The Court: Yes, but I am not going to decide that at this time;" (S. C. 42-43)

and

(b) The testimony of appellant, Ellen Louise White, on direct examination, since said testimony was admissible on the ground that it bore directly upon the issue of establishing the lost

will of Mabel V. Marshall, and was not excluded by the "Evidence Act":

> "Q Well, that's all right. Go ahead and tell us what the conversation was with Mabel.
>
> Mr. Van Blarcom: That is objected to as immaterial and hearsay.
>
> The Court: The objection is sustained, but I will take the testimony as before;" * * * (S. C. 50).

Conclusions of the Court below:

> "In support and for the support of that compact we have only the evidence of the two complaining witnesses, Mrs. Croake and Mrs. White, and they are materially financially interested in the outcome of this suit; and I hold that their testimony is inadmissible for the purpose of establishing a compact. I also hold that their evidence in this suit to establish a lost will is inadmissible for the purpose of showing that the will was lost. It may be that if the will were present they would be competent witnesses to show the mental condition and the execution of the will, but when they attempt to establish in this litigation, in which they are complainants against the administrator of the estate, that this will is lost, their testimony as to conversations and dealings with the intestate, or testate, are inadmissible" (S. C. 163).

4. The Court of Chancery erred in excluding the testimony of Ellen Louise White quoted in the foregoing paragraph, on the ground that the reasons for said objection relied upon by respondent were insufficient in law (S. C. 50).

5. The Court of Chancery erred in dismissing the bill of complaint, and finding that the bill of complaint had not been sustained by testimony other than appellants themselves, inasmuch as

the Chancery Court failed to take into consideration the testimony of Frances Rockwell (S. C. 68-81); Anne M. Ralston (S. C. 63-64); Leonard N. Snedeker (S. C. 20-35); Edwin L. Snedeker (S. C. 82-90), and Elizabeth Frewen (S. C. 35-36); all of whom established the fact of the execution of mutual wills, and the agreement not to revoke the same.

Your petitioners, therefore, pray that the said Final Decree of the Court of Chancery may, so far as the dismissal of the bill of complaint is concerned, be reversed and set aside to the end that the relief prayed for in the bill of complaint be granted, and that appellants may have such other and further relief in the premises as to this honorable Court may seem just and proper.

Dated: September 14, 1935.

SAUL J. ZUCKER,
Solicitor for and of Counsel
with Complainants-Appellants.

Exhibit C. 1.

Exhibit C. 1.

To the Surrogate of the County of Union

MABEL V. MARSHALL, the Executrix named in the last Will and Testament of MAUDE I. MARSHALL late of the City of Summit in the County of Union, and State of New Jersey, deceased, hereby applies for the probate of the last Will and shows that the deceased died March 17, 1931 and that she was a single woman and the next of kin and heirs at law of the said deceased together with their respective residences or post office address, so far as the same are known or this applicant has been able to ascertain, are as follows:

The deceased left no issue or issue of any deceased issue.

Mabel V. Marshall, a sister of 140 Maple St., Summit, N. J.

Robert J. Marshall, a brother, of 167 Park Place, Brooklyn, N. Y.

Mabel V. Marshall.

Union County, ss.

Mabel V. Marshall above named, being duly sworn on her oath , says that the statements in the foregoing application for probate of Will made are true.

Mabel V. Marshall.

Sworn before me April 13 1931.

Frank D. Jacques.
Special Probate Clerk.

Exhibit C. 1.

I, MAUDE I. MARSHALL, of the Borough of Brooklyn, County of Kings, City and State of New York, do make, publish and declare this my Last Will and Testament, hereby revoking any and all former wills and codicils by me made.

FIRST: I order and direct my executrix, or executor hereinafter named, to pay my just debts and funeral expenses.

SECOND: All my household goods, wares and furniture, silverware, clothing, jewelry, pictures, books and bric-a-brac, I give and bequeath to my sister, Mabel V. Marshall, if she shall survive me, or, if she shall die before me, then to my cousin Martha Whitmore.

THIRD: I give and bequeath the sum of Ten Thousand Dollars to my brother, Robert Jesse Marshall, if he shall survive me, and if he shall die before me, I direct that the same shall fall into and form part of my residuary estate hereinafter mentioned.

FOURTH: All my right, title and interest at my death, of in and to the lands and premises known as No. 416 East 58th Street, in the Borough of Manhattan, City and State of New York, I give and devise to my sister, Mabel V. Marshall if she shall survive me, or, if she shall die before me, then to my brother, Robert Jesse Marshall, and if neither my said sister or brother shall survive me, then I direct that the same shall fall into and form part of my residuary estate, hereinafter mentioned.

M. I. M.

FIFTH: All my right, title and interest at my death, of in and to the lands and premises known as No. 21 Greenwich Avenue (also known as Nos. 128 and 128-A West 10th Street) in the Borough of Manhattan, City and State of New

Exhibit C. 1.

York, I give and devise to my sister, Mabel V. Marshall, if she shall survive me, or if she shall die before me, then I give and devise the same to Brooklyn Trust Company in trust, to hold the same (subject to the power of sale hereinafter mentioned), to collect the rents, issues and profits thereof, and to pay said rents, issues and profits to my brother, Robert Jesse Marshall, for and during his life, and upon his death I give and devise the same, together with all unexpended income thereon, or the proceeds of sale thereof, if the same shall have been sold, to my cousin Albert A. Marshall, if he shall be living at my brother's death, or if he shall then be deceased, then to the child or children of said Albert A. Marshall living at that time, or if neither said Albert A. Marshall, nor any child of his, shall then be living, then to such of the following named persons as shall then be living, to wit: Herbert Marshall, Agnes Croake, Ellen Louise White, J. Dupree Stanard, Benjamin Stanard and Lulu Reed. If neither my said sister, nor my said brother shall survive me, I give and devise said right, title and interest in said last mentioned real property to said Albert A. Marshall, if he shall survive me, or if he shall die before me, then to his child or children me surviving. If neither my said sister, nor my said brother, nor said Albert A. Marshall, nor any child of his, shall survive me, then I direct that said right, title and interest in said last mentioned real property shall fall into and form part of my residuary estate hereinafter mentioned.

SIXTH: All my right title and interest, at my death, of in and to the lands and premises known as No. 47 St. Johns Place, Borough of Brooklyn,

M. I. M.

Exhibit C. 1.

City and State of New York, I give and devise to my sister, Mabel V. Marshall, if she shall survive me, or if she shall die before me then to my cousin Martha Whitmore, if she shall survive me, or if she shall also die before me, then to the child or children of said Martha Whitmore, me surviving; and in case neither my said sister, nor said Martha Whitmore, nor any child of hers shall survive me, then I direct that said right, title and interest of in and to said last mentioned real property shall fall into and form part of my residuary estate hereinafter mentioned.

SEVENTH: All my right title and interest of in and to any real property in the State of Florida at the time of my death, I give and devise to my sister Mabel V. Marshall if she shall survive me, or, if she shall die before me, then to Mary Bell Hunt, if she shall survive me, or if neither my said sister, nor said Mary Bell Hunt shall survive me, then to the child or children of said Mary Bell Hunt, me surviving, and if neither my said sister, nor said Mary Bell Hunt, nor any child of hers, shall survive me, I order and direct that said real property last mentioned shall fall into and form part of my residuary estate hereinafter mentioned.

EIGHTH: All the rest, residue and remainder of my property and estate, real and personal, and wheresoever situate, I give, devise and bequeath to my sister, Mabel V. Marshall, if she shall survive me, or, if she shall die before me, then to such of the following named persons, Herbert Marshall, Agnes Croake, Ellen Louise White, J. Dupree Stanard, Benjamin Stanard, and Lulu Reed, as shall survive me.

M. I. M.

Exhibit C. 1.

NINTH: I nominate, constitute and appoint my sister, Mabel V. Marshall, executrix of this my will. If my said sister shall die before or after me, I nominate constitute and appoint Brooklyn Trust Company executor hereof.

TENTH: If my said sister shall die before me and if the trust in the lands and premises known as 21 Greenwich Avenue, also known as Nos. 128 and 128-A West 10th Street in the Borough of Manhattan, City and State of New York, provided for in the foregoing FIFTH Clause shall take effect, I authorize the Trustee in said Clause named at any time in its discretion during the life of my said brother, and either at public or private sale, and either for cash or part cash and part credit, to sell the real property or interest in real property forming the corpus of said trust, and to execute, and deliver all necessary deeds to convey the fee of the property or interest therein so sold to the purchaser or purchasers and I direct that in case of such sale the proceeds thereof shall continue to be held and invested under such trust, the income collected and paid, and the principal pass and be distributed all in the same manner as said real property or interest therein would have done had the same not been so sold. M. I. M.

ELEVENTH: If any beneficiary under this will shall contest the same, or the probate thereof, then and in that event, I annul each and every legacy or devise by this will made to such beneficiary, and I give and bequeath the property which would otherwise have gone to such beneficiary to Brooklyn Bureau of Charities, and provided further that if the legacy thus annulled shall be a gift of income for life, the said gift M. I. M.

Exhibit C. 1.

of income shall fail, and the property which would have been held to produce such income shall pass under the provisions of my will as though such income beneficiary had died before me.

TWELFTH: I order and direct that no bond or other security shall be required of either my sister or said Brooklyn Trust Company as executrix, executor, trustee *of* in any other capacity whatsoever.

IN WITNESS WHEREOF I have hereunto set my hand and seal the 13th day of July, Nineteen hundred and Twenty-eight.

MAUD I. MARSHALL (L. S.)

Signed, sealed, published and declared by the above named Testatrix, MAUD I. MARSHALL, as and for her last Will and Testament, in the presence of us who at her request, in her presence and in presence of each other subscribe our names as witnesses.

LEONARD N. SNEDEKER,
363 Carlton Ave—Brooklyn, N. Y.

ELIZABETH FREWEN
50 Sterling Place, Brooklyn, N. Y.

EDWIN L. SNEDEKER
429 Washington Ave., Brooklyn, N. Y.

Exhibit C. 1.

STATE OF NEW JERSEY

SURROGATE'S COURT OF UNION COUNTY

In the Matter of the Last Will and Testament of MAUDE I. MARSHALL deceased.	*Order for Probate.*

Application having been made to me by MABEL V. MARSHALL for probate of the last will of Maude I. Marshall, late of Summit, N. J. deceased, and letters testamentary thereon, and no caveat having been filed against admitting said will, and the depositions of Elizabeth Frewen and Edwin L. Snedeker, two of the subscribing witnesses to the same having been duly taken, and it appearing to me upon such proofs that the will produced was duly executed according to law and that more than ten days have elapsed since the death of the testatrix;

It is, on this fourteenth day of April, nineteen hundred and thirty-one, ordered and adjudged that the said will be and the same is hereby established as the last will and testament of said deceased, and that the same shall be and is admitted to probate, and that letters testamentary be issued thereon.

GEORGE H. JOHNSTON,
Surrogate.

Recorded in Union County Surrogate's Office in Book D-3 of Wills, page 370.

CHARLES A. OTTO, JR.
Surrogate.

Exhibit C. 2.

STATE OF NEW JERSEY

UNION COUNTY SURROGATE'S COURT

I, CHARLES A. OTTO, JR., Surrogate and Clerk of the Surrogate's Court of the County of Union and State of New Jersey, do hereby certify that I have compared the annexed copy of the Last Will and Testament of MAUD I. MARSHALL late of the County and State aforesaid, deceased; and the annexed copies of the application for probate, of the order of the Surrogate granting the probate of said Will with the records thereof, now remaining in this office, and have found the same to be a correct transcript thereof, and of the whole of such records.

WITNESS my hand and seal of office, this twentieth day of November in the year of our Lord one thousand nine hundred and thirty-four.

CHARLES A. OTTO, JR.,
Surrogate and Clerk of
(SEAL) the Surrogate's Court.

Exhibit C. 2.

Carbon copy of Will of Maude I. Marshall (1928) printed in full as Exhibit C. 1.

Exhibit C. 3.

I, MABEL V. MARSHALL, of the Borough of Brooklyn, County of Kings, City and State of New York, do make, publish and declare this my Last Will and Testament, hereby revoking any and all former wills and codicils by me made.

FIRST: I order and direct by executrix, or executor, hereinafter named, to pay my just debts and funeral expenses.

SECOND: All my household goods, wares and furniture, silverware, clothing, jewelry, pictures, books and bric-a-brac, I give and bequeath to my sister, Maud I. Marshall, if she shall survive me, or, if she shall die before me, then to my cousin Martha Whitmore.

THIRD: I give and bequeath the sum of Ten Thousand Dollars to my brother Robert Jesse Marshall, if he shall survive me, and if he shall die before me, I direct that the same shall fall into and form part of my residuary estate hereinafter mentioned.

FOURTH: All my right, title and interest at my death, of in and to the lands and premises known as No. 416 East 58th Street, in the Borough of Manhattan, City and State of New York, I give and devise to my sister, Maud I. Marshall, if she shall survive me, or, if she shall die before me, then to my brother, Robert Jesse Marshall, and if neither my said sister or brother shall survive me, then I direct that the same shall fall into, and form part of my residuary estate, hereinafter mentioned.

FIFTH: All my right title and interest at my death, of in and to the lands and premises known as No. 21 Greenwich Avenue (also known

Exhibit C. 3.

as Nos. 128 and 128-A West 10th Street) in the Borough of Manhattan, City and State of New York, I give and devise to my sister, Maud I. Marshall, if she shall survive me, or if she shall die before me, then I give and devise the same to Brooklyn Trust Company in trust, to hold the same (subject to the power of sale hereinafter mentioned), to collect the rents, issues, and profits thereof, and to pay said rents, issues and profits to my brother, Robert Jesse Marshall, for and during his life, and upon his death I give and devise the same, together with all unexpended income thereon, or the proceeds of sale thereof, if the same shall have been sold, to my cousin Albert A. Marshall, if he shall be living at my brother's death, or, if he shall then be deceased, then to the child or children of said Albert A. Marshall living at that time, or if neither said Albert A. Marshall, nor any child of his, shall then be living, then to such of the following named persons as shall then be living, to wit: Herbert Marshall, Agnes Croake, Ellen Louise White, J. Dupree Stanard, Benjamin Stanard and Lulu Reed. If neither my said sister, nor my said brother shall survive me, I give and devise said right, title and interest in said last mentioned real property to said Albert A. Marshall, if he shall survive me, or if he shall die before me, then to his child or children me surviving. If neither my said sister, nor my said brother, nor said Albert A. Marshall, nor any child of his, shall survive me, then I direct that said right, title and interest in said last mentioned real property shall fall into and form part of my residuary estate hereinafter mentioned.

Exhibit C. 3.

SIXTH: All my right, title and interest, at my death, of in and to the lands and premises known as No. 47 St. Johns Place, Borough of Brooklyn, City and State of New York, I give and devise to my sister, Maud I. Marshall, if she shall survive me, or if she shall die before me then to my cousin Martha Whitmore, if she shall survive me, or if she shall also die before me, then to the child or children of said Martha Whitmore, me surviving; and in case neither my said sister, nor said Martha Whitmore, nor any child of hers shall survive me, then I direct that said right, title and interest of in and to said last mentioned real property shall fall into and form part of my residuary estate hereinafter mentioned.

SEVENTH: All my right title and interest of in and to any real property in the State of Florida at the time of my death, I give and devise to my sister, Maud I. Marshall, if she shall survive me, or, if she shall die before me, then to Mary Bell Hunt, if she shall survive me, or if neither my said sister, nor said Mary Bell Hunt shall survive me, then to the child or children of said Mary Bell Hunt, me surviving, and if neither my said sister, nor said Mary Bell Hunt, nor any child of hers, shall survive me, I order and direct that said real property last mentioned shall fall into and form part of my residuary estate, hereinafter mentioned.

EIGHTH: All the rest, residue and remainder of my property and estate, real and personal, and wheresoever situate, I give, devise and bequeath to my sister, Maud I. Marshall, if she shall survive me, or, if she shall die before me, then to such of the following named persons, Herbert Marshall, Agnes Croake, Ellen Louise

Exhibit C. 3.

White, J. Dupree Stanard, Benjamin Stanard, and Lulu Reed, as shall survive me.

NINTH: I nominate, constitute and appoint my sister, Maud I. Marshall, executrix of this my will. If my said sister shall die before me or after me, I nominate constitute and appoint Brooklyn Trust Company executor hereof.

TENTH: If my said sister shall die before me and if the trust in the lands and premises known as 21 Greenwich Avenue, also known as Nos. 128 and 128-A West 10th Street in the Borough of Manhattan, City and State of New York, provived for in the foregoing FIFTH Clause shall take effect, I authorize the Trustee in said Clause named at any time in its discretion during the life of my said brother, and either at public or private sale, and either for cash or part cash and part credit, to sell the real property or interest in real property forming the corpus of said trust, and to execute, and deliver all necessary deeds to convey the fee of the property or interest therein so sold to the purchaser or purchasers and I direct that in case of such sale the proceeds thereof shall continue to be held and invested under such trust, the income collected and paid, and the principal pass and be distributed all in the same manner as said real property or interest therein would have done had the same not been so sold.

ELEVENTH: If any beneficiary under this Will shall contest the same, or the probate thereof, then and in that event, I annul each and every legacy or devise by this will made to such beneficiary, and I give and bequeath the property which would otherwise have gone to such beneficiary to Brooklyn Bureau of Charities, and provided further that if the legacy thus annulled

shall be a gift of income for life, the said gift of income shall fail, and the property which would have been held to produce such income shall pass under the provisions of my will as though such income beneficiary had died before me.

TWELFTH: I order and direct that no bond or other security shall be required of either my sister, or said Brooklyn Trust Company as executrix, executor, trustee or in any other capacity whatsoever.

IN WITNESS WHEREOF I have hereunto set my hand and seal the 13th day of July, Nineteen Hundred and Twenty-eight.

MABEL V. MARSHALL. (L. S.)

Signed, sealed, published and declared by the above named Testatrix, MABEL V. MARSHALL, as and for her last Will and Testatment, in the presence of us who at her request, in her presence and in presence of each other subscribe our names as witnesses.

EDWIN L. SNEDEKER
429 Washington Avenue, Brooklyn, N. Y.

LEONARD N. SNEDEKER
363 Carlton Avenue, Brooklyn, N. Y.

ELIZABETH FREWEN,
50 Sterling Place, Brooklyn, N. Y.

Exhibit C. 4.

Transcript of Testimony before Jacques Hecht, Master in Chancery of New Jersey. Printed *ante* pp. 66-81.

Exhibit C. 5.

Exhibit C. 5.

No. 187

THE GARDEN CITY HOTEL
Garden City, New York

M Capt. Marshall
.....
From Bill No.....To Bill No. 262

Room No. 319
Date of Arr.....Date of Dep.....
Rate $.....Weekly
Rate $.....Day

Date 1933	7/8	7/9	7/10	7/11	7/12	7/13	7/14
Brought Forward	..	4.25	9.90	15.60	20.35	25.10	29.95
Rent	3.00	3.00	3.00	3.00	3.00	3.00	3.00
Restaurant	..	..	.60	.50	.50	.60	.60
"	..	.50	.70	1.25	1.25	1.25	1.00
"	..	.75	1.25	..	..	..	1.25
"	..	1.25	..	..	..	..	..
"	..	..	..	..	..	..	..
"	..	..	..	..	..	..	..
Beverages	..	..	.15	..	..	..	..
"	..	..	..	..	..	..	..
Telephone	..	..	..	..	..	..	..
"	..	..	..	..	..	..	..
"	..	..	..	..	..	..	..
"	..	..	..	..	..	..	..
Sundries	..	..	..	..	..	..	..
Valet	..	..	..	..	..	..	..
Laundry	..	..	..	..	..	..	..
Newsstand	..	.15	..	..	..	..	..
Transfer From	..	..	..	..	..	..	..
Total	4.25	9.90	15.60	20.35	25.10	29.95	35.80
Payments	..	..	..	..	..	..	..
Allowances	..	..	..	..	..	..	..
Transfer To	..	..	..	..	..	..	..
Balance Forward ...	..	..	..	..	..	..	..

Bills Payable When Rendered Apt. No.

Exhibit C. 6.

Exhibit C. 6.

No. 262

THE GARDEN CITY HOTEL
Garden City, New York

M Capt. Robert J. Marshall
.....
From Bill No. 187 To Bill No.....

Room No. 319
Date of Arr.....Date of Dep.....
Rate $.....Weekly
Rate $3.00 Day

Date 1933	7/15	7/16	7/17	7/18
Brought Forward	35.80	5.95	11.90	17.35
Rent	3.00	3.00	3.00	..
Restaurant	.60	.50	.60	.60
"	1.00	.85	.50	..
"	1.25	1.25	1.25	..
"	..	..	..	..
"	..	..	..	..
"	..	..	..	..
Beverages	..	..	..	..
"	..	..	..	..
Telephone	.10	..	.10	..
"	..	..	..	..
"	..	..	..	..
"	..	..	..	..
Sundries	..	..	..	..
Valet	..	..	..	..
Laundry	..	..	..	..
Newsstand	..	.35	..	.08
Transfer From	..	..	..	..
Total	41.75	11.90	17.35	18.03
Payments	35.80	..	..	18.03
Allowances	..	..	..	..
Transfer To	..	..	..	..
Balance Forward	5.95	..	..	..

Bills Payable When Rendered Apt. No.

(Rubber Stamp)

B—GARDEN CITY HOTEL—B
Paid JUL 18 1933
Al

Exhibit C. 7.

Exhibit C. 7.

G
H
C THE GARDEN CITY HOTEL No. 7955
Garden City, L. I.

Date 7/8

Name R. J. Marshall
.....
Street 167 Park Pl.
City Brooklyn.

Money, Jewels and other valuable packages must be placed in the safe in the Office, otherwise the management will not be responsible for any loss.

Arrived	Departed	Room	Rate	Clerk	Account No.
		319	3.00	S	187

Remarks

Exhibit DB-1.

I, MAUD I. MARSHALL, of the Borough of Brooklyn, City and State of New York, do make, publish and declare this, my last Will and Testament, hereby revoking all former Wills by me made:

FIRST: I order and direct my Executrix or Executor to pay my just debts and funeral expenses.

SECOND: To my brother, Robert Jesse Marshall, I give and bequeath the sum of One thousand Dollars.

THIRD: All right, title or interest which I have or may or shall have at the time of my death of, in or to the lands and premises in the Borough of Manhattan, City and State of New York, known as No. 416 East Fifty-eighth Street, I give and devise to my sister, Mabel V. Marshall and my brother, Robert Jesse Marshall, in equal shares if both survive me, or the whole of my said right, title and interest to that one of my said sister and brother who shall survive me.

FOURTH: All right, title or interest which I have or may or shall have at the time of my death of, in or to the lands and premises in the Borough of Manhattan, City and State of New York, known as No. 21 Greenwich Avenue (also known as Nos. 128 and 128-a West Tenth Street) I give and devise to my sister, Mabel V. Marshall, if she shall survive me.

FIFTH: If my sister, Mabel V. Marshall, shall predecease me and my brother, Robert Jesse Marshall, shall survive me, I give and devise all right, title and interest which I may or shall

Exhibit DB-1.

have at the time of my death of, in or to said lands and premises 21 Greenwich Avenue (also known as 128 and 128-a West 10th Street) to Brooklyn Trust Company, in trust, to hold the same, to collect and receive the rents, issues and profits thereof, and to pay said rents, issues and profits to my said brother for and during his life; and upon his death after mine, I give and devise all said right, title and interest, so held in trust, to Mabel Sanford and Martha Whitmore (daughters of J. Edwin Connor) equally if both survive my said brother or the whole thereof to that one of them who shall survive him, except that should either or both of them die before my said brother and leave issue surviving him, then the issue of each of them so dying which shall survive my said brother shall take the share to which the parent of such issue would have been entitled if living.

SIXTH: If neither my said sister Mabel V. Marshall nor my said brother Robert Jesse Marshall shall survive me, then and in that event I give and devise all right, title and interest which I may or shall have at the time of my death of, in or to said lands and premises 21 Greenwich Avenue (also known as 128 and 128-a West 10th Street) to Mabel Sanford and Martha Whitmore, equally if both survive me, or the whole thereof to that one of them who shall survive me, except that should either or both of them die before me and leave issue me surviving, then the issue of each of them so dying which shall survive me shall take the share to which the parent of such issue would have been entitled if living.

SEVENTH: All the rest, residue and remainder of my property and estate, real and personal

Exhibit DB-1.

and wheresoever situate, I give, devise and bequeath to my sister, Mabel V. Marshall, if she shall survive me. But if my said sister shall die before my death, then and in that event, I dispose of my said residuary estate, real and personal and wheresoever situate, as follows: (a) I give and bequeath from said residuary estate the sum of Five Hundred Dollars to Ellen Louise White. (b) All my household furniture and furnishings, jewels and jewelry, wearing apparel, pictures, books, bric-a-brac and other chattels, I give and bequeath to Mabel Sanford and Martha Whitmore equally if both survive me, or the whole thereof to that one of them who shall survive me. (c) And the balance thereof to be converted into cash by my executor and distributed among the following named persons, (to whom I give and bequeath the proceeds of such conversion) namely: to Martha Agnes Croake, Albert Augustus Marshall and Mary Belle Hunt, or to such of them as shall survive me, except that should either or any of them die before me leaving issue me surviving then such issue (living at my death) of each of them so dying shall take the share to which the parent would have been entitled if living.

EIGHTH: I nominate, constitute and appoint my sister, Mabel V. Marshall, executrix of this my Will.

NINTH: If my said sister shall predecease me I nominate, constitute and appoint Brooklyn Trust Company executor of this my Will; and I authorize, empower and order it as such executor to sell (either at public auction or private sale and either for cash or part cash and part credit) all real property forming part of my

residuary estate and to convey the same to the purchaser or purchasers thereof in order to make the distribution and division directed by the foregoing Seventh clause in the event of the death of my said sister before mine.

TENTH: I order and direct that no bond or other security be required of either my sister or said Brooklyn Trust Company as executrix or executor or otherwise under this Will.

ELEVENTH: I have made no further or other provision in this my Will for my brother Robert Jesse Marshall, for the reason, among others, that I have given him amply of my time and effort in the management of property from which he derived benefit, never having claimed or taken any commissions or compensation to which I might have been entitled under my mother's Will or otherwise. In case my said brother shall contest this my Will, I order and direct and provide as follows: (1) the legacy of One thousand Dollars contained in the foregoing *Second* clause shall lapse and fail and shall fall into my residuary Estate disposed of by the *Seventh* clause; (2) the provisions of the foregoing *Third* clause shall be revoked and annulled, and the right, title and interest in real property, mentioned in said *Third* clause shall fall into and form part of my said residuary estate; and (3) the foregoing *Fifth* and *Sixth* clauses shall be revoked and annulled, and in place thereof, in case my said sister shall die before me, I give and devise all right, title and interest which I may or shall have at my death of, in or to said lands and premises 21 Greenwich Avenue (also known as 128 and 128-a West 10th Street) to said Mabel Sanford and Martha Whitmore, in equal

Exhibit DB-1.

shares if both survive me, or the whole to that one of them who shall survive me, except that should either or both of them die before me leaving issue then the issue, me surviving, of each one of them so dying shall take the share the parent of such issue would have taken if living.

TWELFTH: Wherever used in this Will, the word issue refers to child or children only, and not to grandchild or grandchildren nor to step or adopted child or children.

IN WITNESS WHEREOF, I hereunto set my hand and seal this day of September in the year Nineteen hundred and twenty-two.

WITNESSES

The foregoing instrument was on the day of its date and in our presence subscribed at the end thereof by Maud I. Marshall, the testatrix therein named, and was then and there in our presence declared by her to be her last Will and Testament; and we thereupon at her request, in her presence and in presence of each other subscribed our names at the end thereof as witnesses.

Exhibit DB-2.

Exhibit DB-2.

I, MABEL V. MARSHALL, of the Borough of Brooklyn, City and State of New York, do make, publish and declare this, my last Will and Testament, hereby revoking all former Wills by me made:

FIRST: I order and direct my Executrix or Executor to pay my just debts and funeral expenses.

SECOND: To my brother, Robert Jesse Marshall, I give and bequeath the sum of One thousand Dollars.

THIRD: All right, title or interest which I have or may or shall have at the time of my death of, in or to the lands and premises in the Borough of Manhattan, City and State of New York, known as No. 416 East Fifty-eighth Street, I give and devise to my sister, Maud I. Marshall and my brother Robert Jesse Marshall, in equal shares if both survive me, or the whole of my said right, title and interest to that one of my said sister and brother who shall survive me.

FOURTH: All right, title or interest which I have or may or shall have at the time of my death, of, in or to the lands and premises in the Borough of Manhattan, City and State of New York, known as No. 21 Greenwich Avenue (also known as Nos. 128 and 128-a West Tenth Street) I give and devise to my sister, Maud I. Marshall, if she shall survive me.

FIFTH: If my sister, Maud I. Marshall, shall predecease me and my brother, Robert Jesse Marshall, shall survive me, I give and devise all right, title and interest which I may or shall have at the time of my death of, in or to said lands

Exhibit DB-2.

and premises 21 Greenwich Avenue (also known as 128 and 128-a West 10th Street) to Brooklyn Trust Company, in trust, to hold the same, to collect and receive the rents, issues and profits thereof, and to pay said rents, issues and profits to my said brother for and during his life; and upon his death after mine, I give and devise all said right, title and interest, so held in trust, to Mabel Sanford and Martha Whitmore (daughters of J. Edwin Connor) equally if both survive my said brother or the whole thereof to that one of them who shall survive him, except that should either or both of them die before by said brother and leave issue surviving him, then the issue of each of them so dying which shall survive my said brother shall take the share to which the parent of such issue would have been entitled if living.

SIXTH: If neither my said sister Maud I. Marshall nor my said brother Robert Jesse Marshall shall survive me, then and in that event I give and devise all right, title and interest which I may or shall have at the time of my death of, in or to said lands and premises 21 Greenwich Avenue (also known as 128 and 128-a West 10th Street) to Mabel Sanford and Martha Whitmore, equally if both survive me, or the whole thereof to that one of them who shall survive me, except that should either or both of them die before me and leave issue me surviving, then the issue of each of them so dying which shall survive me shall take the share to which the parent of such issue would have been entitled if living.

SEVENTH: All the rest, residue and remainder of my property and estate, real and personal and wheresoever situate, I give, devise and be-

Exhibit DB-2.

queath to my sister, Maud I. Marshall, if she shall survive me. But if my said sister shall die before my death, then and in that event, I dispose of my said residuary estate, real and personal and wheresoever situate, as follows: (a) I give and bequeath from said residuary estate the sum of Five Hundred Dollars to Ellen Louise White. (b) All my household furniture and furnishings, jewels and jewelry, wearing apparel, pictures, books, bric-a-brac and other chattels, I give and bequeath to Mabel Sanford and Martha Whitmore equally if both survive me, or the whole thereof to that one of them who shall survive me. (c) And the balance thereof to be converted into cash by my executor and distributed among the following named persons, (to whom I give and bequeath the proceeds of such conversion), namely: To Martha Agnes Croake, Albert Augustus Marshall and Mary Belle Hunt, or to such of them as shall survive me, except that should either or any of them die before me leaving issue me surviving then such issue (living at my death) of each of them so dying shall take the share to which the parent would have been entitled if living.

EIGHTH: I nominate, constitute and appoint my sister, Maud I. Marshall, executrix of this my Will.

NINTH: If my said sister shall predecease me I nominate, constitute and appoint Brooklyn Trust Company executor of this my Will; and I authorize, empower and order it as such executor to sell (either at public auction or private sale and either for cash or part cash and part credit) all real property forming part of my residuary estate and to convey the same to the purchaser

or purchasers thereof in order to make the distribution and division directed by the foregoing *Seventh* clause in the event of the death of my said sister before mine.

TENTH: I order and direct that no bond or other security be required of either my sister or said Brooklyn Trust Company as executrix or executor or otherwise under this Will.

ELEVENTH: I have made no further or other provision in this my Will for my brother Robert Jesse Marshall, for the reason, among others, that I have given him amply of my time and effort in the management of property from which he derived benefit, never having claimed or taken any commissions or compensation to which I might have been entitled under my Mother's Will or otherwise. In case my said brother shall contest this my Will, I order and direct and provide as follows: (1) the legacy of One thousand Dollars contained in the foregoing *Second* clause shall lapse and fail and shall fall into my residuary estate disposed of by the *Seventh* clause; (2) the provisions of the foregoing *Third* clause shall be revoked and annulled, and the right, title and interest in real property, mentioned in said *Third* clause shall fall into and form part of my said residuary estate; and (3) the foregoing *Fifth* and *Sixth* clauses shall be revoked and annulled, and in place thereof, in case my said sister shall die before me, I give and devise all right, title and interest which I may or shall have at my death of, in or to said lands and premises 21 Greenwich Avenue (also known as 128 and 128-a West 10th Street) to said Mabel Sanford and Martha Whitmore, in equal shares if both survive me, or the whole to

Exhibit DB-2.

that one of them who shall survive me, except that should either or both of them die before me leaving issue then the issue, me surviving, of each one of them so dying shall take the share the parent of such issue would have taken if living.

TWELFTH: Wherever used in this Will, the word issue refers to child or children only, and not to grandchild or grandchildren nor to step or adopted child or children.

IN WITNESS WHEREOF, I hereunto set my hand and seal this day of September in the year Nineteen hundred and twenty-two.

Witnesses

The foregoing instrument was on the day of its date and in our presence subscribed at the end thereof by Mabel V. Marshall the testatrix therein named, and was then and there in our presence declared by her to be her last Will and testament; and we thereupon at her request, in her presence and in presence of each other subscribed our names at the end thereof as witnesses.

Exhibit DB-3.

From Marshall
47 St. John's Pl,

Mr. Leonard Snedeker
Ottilie 164 Montague St
corner Clinton.
B'klyn. Boro. N.Y. city

47 St. John's Pl.
B'klyn. Boro. N.Y. city

Mr Leonard Snedeker
My dear Mr. Snedeker;-
We have been thinking it over, & we think we would like to have the enclosed inserted in our wills.
Aug 24th Sincerely,
Maud L. Marshall

In giving a ~~lesser~~ amount ~~to~~ to my brother Robert Marshall than I intend to my sister and Mrs. Marshall, I will say that I have given my services, to my brother Robert Jr. Marshall, for many years, as one of the Trustees of his Real Estate, and have never taken the usual compensation due me for such services to him, thrice over, I consider that he has had a considerable gift of my services time and money for many years

New Jersey Court of Errors and Appeals

Between AGNES CROAKE and ELLEN LOUISE WHITE, *Complainants-Appellants,* *and* THE SUMMIT TRUST COMPANY, *et al.*, *Defendants-Respondents.*	*On Appeal from Final Decree in the Court of Chancery.*

BRIEF ON BEHALF OF APPELLANTS.

(Italics ours, except where otherwise stated.)

Statement.

This is an appeal from a final decree (S. C. p. 169) entered in the Court of Chancery on March 8, 1935, on the advice of the late Hon. John H. Backes, Vice-Chancellor, adjudging that Mabel V. Marshall and Maud I. Marshall, both deceased, did not execute mutual and reciprocal wills, and dismissing the bill of complaint.

The amended bill of complaint (S. C. p. 1) was filed by Agnes Croake and Ellen Louise White, both of whom were cousins of, and residuary legatees under the wills of Mabel V. and Maud I. Marshall, and contained two causes of action:

1. to establish the lost will of Mabel V. Marshall, who died July 14, 1933, at Summit, New Jersey,

2. to establish that Mabel V. and Maud I. Marshall had executed mutual and reciprocal wills in their lifetimes.

The prayer of the bill was to establish and probate the last will of Mabel V. Marshall, and to impress a trust in favor of the legatees under her will upon the assets of her estate in the possession of respondents, Summit Trust Company (administrator of Mabel's estate) and Robert Jesse Marshall, the latter being a brother of the deceased Mabel V. and Maud I. Marshall.

The brother's interest in the estate of his sister, Mabel, is at stake in this litigation. If appellants succeed in establishing either of their causes of action, the brother's share would be limited to $10,000.00 in cash, premises known and designated as No. 416 E. 58th street, New York City, and a life interest in premises known and designated as Nos. 128-128a W. 10th street, New York City (S. C. p. 8, pars. 3-4-5). Otherwise, Robert Jesse Marshall succeeds to the entire estate of his sister, Mabel V. Marshall, upon her intestacy, being the sole surviving heir-at-law and next-of-kin.

The size of the estate involved in this suit is substantial. Its value was set at approximately $200,000.00 (S. C. p. 59, l. 36).

Facts.

Mabel V. Marshall, whose estate is the subject of contest in the present litigation, died in Summit, New Jersey, on July 14, 1933 at the age of 67 years. She, her deceased sister Maud I. Marshall (who had died in March 1931 at the age of 71 years), and her brother Robert Jesse Marshall, one of the respondents herein, constitute the surviving generation of the Marshall family, all of whom had grown up in Brooklyn, New York. The parents of this last generation had left a considerable estate to their children, but

so far as Robert's share was concerned, his interest was held in trust by his two sisters (S. C. p. 152, l. 1, and Ex. DB. 3, S. C. p. 204).

The relationship between the two sisters on the one hand, and the brother on the other, was neither close nor pleasant. Robert has been characterized as being shiftless, irresponsible, and incapable of earning a livelihood (S. C. p. 69, l. 19). Had his parents not had the foresight to establish a trust fund for his maintenance and support, it is quite likely he would have squandered his entire estate just as he had squandered the monies left outright to him by his sister Maud when she died in 1931 (S. C. p. 45, l. 1), and thus become an object of charity either of his surviving sister Mabel, or of the community at large.

In contrast to the strained and hostile relations existing between the sisters and the brother, an extraordnary intimacy prevailed between the sisters. They lived together during their entire lives, their early years and middle age, having been spent in the family home in Brooklyn, and their later years in Summit, New Jersey. They shopped together, and were invariably together when their business took them to the bank (S. C. p. 152, l. 34); in short they were inseparable companions in every phase of their lives. They neither trusted nor liked their brother Robert, and dealt with him as seldom as possible in connection with family affairs.

Among the few persons who shared in the sisters' confidences and affection were their two first cousins, Agnes Croake and Ellen Louise White, appellants herein. These cousins were practically the only relatives whom the Marshall

sisters regarded without suspicion and fear. It was to them that the sisters presented their problems, and with them that they consulted before drawing their wills.

The intimacy existing between these two sisters made it quite apparent that when the one died in 1931, it would only be a matter of a short time when the surviving sister would pass on also. Little wonder that in the disposition of their fortunes the sisters regarded their agreement to mutually testate as a solemn compact, irrevocable except upon their mutual consents.

The events leading up to the execution of the last wills of Maud I. and Mabel V. Marshall, are interesting and extremely pertinent on the issue of whether the sisters, upon the execution of their wills in 1928, definitely and unequivocally agreed that they were executing mutual and reciprocal wills, and would not thereafter revoke the same.

The law is quite clear that, if such an agreement in fact existed, it may be enforced specifically in equity by a residuary legatee in an action instituted to impress a trust upon the assets of the estate wherever found.

The two sisters first consulted the law firm of Snedeker & Snedeker, of Brooklyn, New York, relative to the preparation and execution of their wills (S. C. p. 28, l. 19) in 1922. All of the instructions which were given to Mr. Leonard Snedeker of that firm were while both sisters were present.

One very important provision was reduced to writing, and sent to Mr. Snedeker. This clause related to the reason for providing a relatively small sum for their brother Robert, in both of the wills then about to be executed. The envelope

and letter, mailed August 24, 1922, are in the handwriting of Maud, and the enclosure stating the reason why Robert's share was so small is in the handwriting of her sister Mabel (S. C. p. 61, l. 3). A photostat of this exhibit appears at the end of the record in the state of case, as Exhibit DB. 3. For the convenience of the Court, it is here quoted in full:

(The letter which was in Maud's handwriting reads as follows):

> "Mr. Leonard M. Snedeker: *We* have been thinking it over and *we* think *we* would like to have the enclosed inserted in *our* wills. Sincerely, Maud I. Marshall, August 24, 1928."

(The memorandum which was enclosed with the above letter, and which was in Mabel's handwriting, reads):

> "I am giving a lesser amount to my brother Robert Marshall than bequest to my sister Maud I. Marshall. I will say that I have given my services to my brother, Robert Marshall for many years, as one of the trustees of the real estate, and I have never taken the usual compensation due me for such services to him. Therefore, I consider he has had a considerable gift of my services, time and money for many years."

The letter written by one sister, and enclosing a memorandum written by the other can bear but one interpretation, to wit: that the conclusions were arrived at only after they had been jointly discussed, and pursuant to their agreement that their wills about to be executed would never be changed except by joint action. In Maud's letter she does not speak in the singular, but for herself and her sister. She says, "*we* think *we* would like to have the enclosed inserted in *our* wills." It is most important to bear in mind at this point that even as early as 1922, these two

sisters had in mind the execution of mutual and reciprocal wills by which they were to be forever bound.

In accordance with these instructions, Mr. Snedeker prepared wills for both sisters, which, as we have said, were identical in every respect, except for the transposition of the sister's names in their respective wills. In accordance with their previously expressed intention in the note sent to Mr. Snedeker, the following clause appears in both wills (Exhibit DB. 3, S. C. p. 204):

> "I have made no further or other provision in this my Will for my brother, Robert Jesse Marshall, for the reason, among others, that I have given him amply of my time and effort in the management of property from which he derived benefit, never having claimed or taken any commissions or compensation to which I might have been entitled under my mother's Will or otherwise" (S. C. p. 197, par. 11; p. 202, par. 11).

To further guard against contest by their brother, both sisters inserted a provision in their wills, specifically limited to Robert, providing that if he contested their respective wills, his interest in their respective estates should be forfeited:

> "In case my said brother shall contest this Will, I order and direct and provide as follows: (1) the legacy of One thousand dollars contained in the foregoing *Second* clause shall lapse and fail and shall fall into my residuary Estate disposed of by the *Seventh* clause; (2) the provisions of the foregoing *Third* clause shall be revoked and annulled, and the right, title and interest in real property, mentioned in said *Third* clause shall fall into and form part of my said residuary estate; and (3) the foregoing *Fifth* and *Sixth* clauses shall be revoked and annulled, and in place thereof, in case my said

> sister shall die before me, I give and devise all right, title and interest which I may or shall have at my death of, in or to said lands and premises at 21 Greenwich avenue (also known as 128 and 128-a West 10th street) to said Mabel Sanford and Martha Whitmore, in equal shares if both survive me, or the whole to that one of them who shall survive me, except that should either or both of them die before me leaving issue then the issue, me surviving, of each one of them so dying shall take the share the parent of such issue would have taken if living" (S. C. p. 197, l. 22; p. 202, l. 20).

It thus appears that prior to the execution of the 1922 wills Maud and Mabel had jointly and carefully planned the distribution of their respective estates. In that plan Robert was to share in only a minor degree. The obvious reason for the limitation on Robert's inheritance was that the sisters had no confidence in their brother, and because they felt that if he succeeded to the corpus of their estates, it would not be long before the entire Marshall fortune would be completely dissipated. It is evident that these sisters contemplated mutual and reciprocal wills imposing the legal obligations that those terms imply.

In 1928 conditions had changed somewhat and the sisters agreed to change their wills. At this later date they again consulted Mr. Snedeker. Their conferences were held in precisely the same manner as those which preceded the execution of their 1922 wills. They came to the lawyer's office together (S. C. p. 26, l. 15). No provision of their wills was discussed unless both sisters were present. Each entered into the conversation, and both offered suggestions which were subsequently embodied in both wills. Before any provision was adopted, there was a

mutual acquiescence. When the wills were finally prepared for execution, they were identical in form and verbiage, except again for the interposition of names of the one sister in the will of the other. Both sisters attended at the office of Mr. Snedeker on the same day and executed their wills before the same witnesses. Copies were left with the lawyer, and the originals were retained by the sisters. These actions bear of one interpretation only: that in executing their wills, each sister relied on the other's representation that her will would not thereafter be changed or revoked except upon mutual consent.

Like the 1922 wills, the later instruments executed in 1928, involved a carefully planned distribution of the estates of these two sisters. Like the 1922 wills also, the 1928 wills made no provision for the distribution of the estates beyond the life time of the survivor. That, they each knew, was provided for in the will of whichever sister survived. In effect, if not in actuality, such ultimate distribution was incorporated in the will of each sister by virtue of the agreement to mutually testate and to mutually refrain from revocation.

Neither the sisters, nor their brother ever married, and naturally their estates could not pass to direct descendants. Still feeling that a bequest of a large portion of their estates to their brother Robert would inevitably be squandered, the sisters turned to those near relatives in whom they had complete confidence, and whose affections they mutually shared. An inspection of the 1928 wills discloses that Robert's interest in each will was limited to cash of $10,000.00, premises at 416 E. 58th St., New York City, and a life interest in premises 128-128a West 10th street, New York City. The balance

of the estate went to six persons of which appellants are two (S. C. p. 181, par. 8; p. 188, par. 8).

At the time of the execution of the 1928 wills, the question again arose as to the insertion of a forfeiture clause in order to discourage a contest by their brother Robert (S. C. p. 27, l. 30). The sisters were in mortal fear of their brother, and lest it should appear upon the death of one, that the forfeiture clause was directly aimed at Robert, who under such circumstances would probably have made the life of the survivor quite miserable, it was decided that this clause be directed against any legatee contesting or disputing any provisions in the will. This clause in the 1928 wills reads as follows:

> "If any beneficiary under this will shall contest the same, or the probate thereof, then and in that event, I annul each and every legacy or devise by this will made to such beneficiary, and I give and bequeath the property which would otherwise have gone to such beneficiary to Brooklyn Bureau of Charities, and provided further that if the legacy thus annulled shall be a gift of income for life, the said gift of income shall fail, and the property which would have been held to produce such income shall pass under the provisions of my will as though such income beneficiary had died before me." (S. C. p. 182, par. 11; p. 189, par. 11.)

It is very important to bear in mind that the circumstances leading up to the actual execution of the 1928 wills were practically identical with those which were present when the 1922 wills were executed. Only insofar as the "in terrorem clause" was general instead of specific in terminology, and only insofar as no written communication to their lawyer was necessary, did

the procedure in the preparation and execution of these respective wills, six years apart, differ.

The Court below held that while the sisters had executed similar wills, this was done without any obligation on their part restricting them from thereafter revoking at their pleasure (S. C. p. 163, l. 29). This conclusion seems unreasonably strained, in view of all the circumstances surrounding the preparation of their wills, and the particular caution exercised by both sisters in the method and manner of disposing of their fortunes. If they were not under reciprocal obligations to refrain from changing or revoking their original wills made in 1922, why did they jointly execute their wills in 1928? Why did they always attend at their lawyer's office together? Why did they discuss and determine the provisions of their 1928 wills in the presence of each other? Why were the 1928 wills identical in form and executed on the same day before the same witnesses? Was this all merely a coincidence?

It would be most unusual, and counsel's research has found not one single decision where reciprocal wills by their very terminology state that they are reciprocal and mutual wills. That would be the *unusual* method of ascertaining whether mutual wills exist. It is usual to ascertain the existence of mutual and reciprocal wills from the surrounding circumstances. Counsel can conceive of no stronger circumstances than were present in the case at bar. The learned Vice-Chancellor who sat below, had previously decided *Tooker* v. *Vreeland,* 92 N. J. Eq. 340, aff'd, 93 N. J. Eq. 224, there holding that:

> "The vital question is, Was it agreed by them that the wills should remain irrevocable after the death of either? For the solu-

> tion of this we must look to the extraneous testimony, keeping in mind that, to establish an agreement, the proofs must be clear and convincing. *The contract may be* found in an express promise, or *inferred, as a conclusion of fact, from the circumstances surrounding the parties.*''

Appellants submit that the circumstances surrounding the case at bar, and referred to in detail hereafter, were even stronger than those in *Tooker* v. *Vreeland, supra.* The decisions in these two cases, written by the same Vice-Chancellor, seem inconsistent and irreconcilable. A reversal of the case at bar will bring it in direct accord with the *Tooker* case, which must be regarded as controlling, because of its affirmance in this Court.

Maud I. Marshall died in March, 1931. Her will, drawn by Mr. Snedeker in 1928, was probated in Union County. Under its terms and in accordance with the mutual agreements made by the sisters her entire estate went to Mabel, the surviving sister. That Mabel lived for even two years thereafter is of itself quite surprising, in view of the dependence of each sister upon the other. Mabel continued to reside in the house on Beachwood Road, Summit, New Jersey, which both sisters had purchased in their joint names when they moved from Brooklyn.

After Maud's death, Mabel practically lived the life of a recluse, seeing only appellants who visited her quite regularly, her neighbor Miss Rockwell, and, when necessary in connection with the administration of her sister's estate, her lawyer in Summit. During this period of a little over two years, her brother Robert, according to his own testimony, saw her only eight

times (S. C. p. 113, l. 39). Little wonder that the sisters had no respect or regard for him. Despite what might have happened theretofore, if there had been any bond of affection, or even sympathy between Robert and Mabel, would it not have been most natural for him to pay a little more attention to his surviving sister, realizing that since Maud's death, Mabel was practically alone in the world, with at most but a few years to live, and that she alone had the responsibility of caring for the property which she had lately inherited from Maud, in addition to her own and that she held in trust for her brother? Does this disregard and lack of consideration for his sister, support the presumption of revocation? Is it reasonable to suppose that Mabel had completely changed her feeling for Robert, and had revoked or destroyed her will that he might succeed to her entire estate upon her intestacy? What had Robert done to justify such favor from Mabel? If he had shown himself to be possessed of any feeling for her, or had evinced an intention of assuming some of the burdens entailed in managing her real estate, perhaps in return Mabel would have endeavored to let him share in the whole or a part of her estate. That, of course, would have been contrary to her agreement with Maud in 1928, but there would then at least be some basis for Mabel breaking her agreement.

It is beyond the realm of reason to suppose that, fearing Robert as she did, and receiving no attention from him after Maud's death which would have warranted a change in her regard for him, that Mabel voluntarily destroyed her will in order to permit him to inherit her entire estate upon intestacy.

The final chapter of Mabel's life was written in July 1933 when, worn down by the depression, and apparently feeling that she had nothing further to live for, she took her own life by inhaling gas in the kitchen of her home. As the Vice-Chancellor stated, it was a desperate route to have taken, but nevertheless, indicative of the fact that Mabel was conscious to the end (S. C. p. 167, l. 25).

In view of this finding, and in view of all of the circumstances leading up to Mabel's untimely end, it is difficult to understand the conclusions of the learned Vice-Chancellor. Considerable positive testimony was adduced at the hearing to the effect that Mabel's will might have been stolen and destroyed by her brother Robert or by other persons unknown, but the Court found that the burden of proof in this respect had not been sustained. To say the least, there were plenty of suspicious circumstances. None of them supported the legal presumption of revocation. All of them confirmed the thought paramount in the sisters' minds during the last years of their lives, that Robert was not to inherit their entire estates.

Shortly after the death of Mabel and in the absence of the production of her will, Summit Trust Company of Summit, New Jersey, was appointed administrator of her estate, Robert renouncing in its favor.

In the bill of complaint as originally filed, Summit Trust Company was named as a defendant in its individual capacity. The proceedings below, however, were amended by an order substituting the Trust Company, as Administrator of the Estate of Mabel V. Marshall, deceased, in place and stead of Summit Trust

Company, in its individual capacity. The order to thus amend the proceedings was inadvertently omitted from the printed State of Case.

In connection with the admissability of certain very relevant testimony it is important to note that the Trust Company was made a party because it is in the possession of some of the assets of Mabel's estate. In that position, Summit Trust Company is not unlike a stakeholder, holding the fruits of litigation until it is legally determined which party is entitled to such assets.

The numerous grounds for reversal contained in the petition on appeal suggest the following questions for consideration and determination by this Court:

QUESTIONS INVOLVED

1. What proof is requisite in order to establish the execution of mutual and reciprocal wills?

2. What proof is requisite in order to establish a lost will?

3. In a suit instituted either to establish a lost will, or to impress a trust upon assets of a decedent pursuant to the provisions of an alleged mutual and reciprocal will, is the testimony of residuary legatees of conversations and transactions with the decedent admissible?

Before entering into a discussion as to whether the testimony of all the witnesses was admissible, or whether the admissible evidence sufficiently established the lost will of Mabel, or that Maud and Mabel had executed mutual and reciprocal wills, beyond the power of the survivor to revoke, it should prove helpful to this Court to have before it a summary of the testimony given by the various witnesses, bearing upon the

questions which will be dealt with under a discussion of the law involved in this case:

Leonard N. Snedeker (Appellant's witness):

Mr. Snedeker a practising attorney in Brooklyn, New York, since 1904 (S. C. p. 20, l. 15) is a member of the firm of Snedeker & Snedeker. He was the person who was consulted by Maud and Mabel in 1922 when they first drew their wills. He had known the Marshalls since childhood, as they lived within three or four blocks of his own home (S. C. p. 20, l. 32). It was to him that the letter, Exhibit DB. 3, was addressed when these sisters decided upon inserting in their 1922 wills a reason for limiting the bequest to their brother Robert. Mr. Snedeker told of both sisters invariably attending at his office together, and how both made suggestions for their wills, but that no suggestion was ever adopted unless it was mutually approved (S. C. p. 30, l. 26). Mr. Snedeker told also of similar conferences held in connection with the execution of the 1928 wills (S. C. p. 21, l. 19) and how both sisters insisted that a forfeiture clause be inserted in their wills similar to, if not identical with the forfeiture clause inserted in the 1922 wills which had been specifically directed against their brother.

A reading of Mr. Snedeker's testimony leaves no room for doubt that these sisters were so wrapt up in each other that they intended that their actions constitute an agreement to make and execute mutual and reciprocal wills, binding upon each other, just as if a specific covenant to that effect had been inserted in each will. If the emphasis at that time was less on the obligation than on the performance, it was only because the sisters were in complete accord. The

obligation of the survivor not to change the provisions of her will after inheriting her sister's estate was inherent in the transaction, and should be implied in law.

Mr. Snedeker was completely disinterested. He knew the Marshall family for years and his testimony free from bias or prejudice should re-receive great weight by this Court.

Agnes Everson Croake (Appellant):

This appellant was a first cousin of the Marshalls. Their respective mothers were sisters. Mrs. Croake testified that she had spoken to Mabel V. Marshall, at her home in Summit, in January, February, March, April, May and as late as June 4, 1933, during which time Mabel repeatedly stated that her estate would pass in accordance with the term of her mutual will made with Maud (S. C. p. 44, l. 21). Evidently a confidante of the Marshall sisters, they frequently discussed the provisions of their wills with her (S. C. p. 43, l. 22). Since they had been left a considerable estate by their parents, and had no direct descendants, it was a problem as to whom the estate should ultimately go.

Mrs. Croake testified that prior to 1928, when the wills in question were executed, both Maud and Mabel frequently told her that they were making identical wills, and discussed with her intended provisions (S. C. p. 45, l. 9). Mrs. Croake and Mrs. White, appellants in this case, were not the only relatives who were being remembered by the Marshalls.

After Maud's death in 1931, Mabel had a conversation with Mrs. Croake in which the beneficiaries in Maud's will were discussed. Surprised at learning that Mrs. Croake had a copy

of Maud's will—procured from the Union County Surrogate's Office—Mabel said, "Well, all right then. You have a copy of my will too" (S. C. p. 49, l. 17).

Toward the end Mabel was quite worried and disturbed over the irresponsibility of her brother. She often bemoaned the fact that he had squandered the cash bequest of $10,000.00 he had inherited under Maud's will when she died in 1931 (S. C. p. 45, l. 1). In less than three years Robert had dissipated this entire fund.

It is evident throughout the testimony that the agreement to make an execute mutual and reciprocal wills in 1928 was ratified, re-affirmed and reiterated by the surviving sister, Mabel, on numerous occasions before and after her sister's death, and as late as June 4, 1933, scarcely a month before her death. Her attitude toward her brother which originally gave rise to that agreement continued unchanged to the end.

Ellen Louise White (Appellant):

Miss White was likewise a first cousin of the Marshalls. She said that the sisters had often spoken to her about their wills.

In January 1929, she said that meeting them as they came from Mr. Snedeker's office, Mabel told her that they had been considering making codicils to their wills (S. C. p. 50, l. 31).

A further conversation with Mabel took place the night of Maud's funeral in March 1931. Appellant returned to Mabel's home in Summit with her and was shown a copy of Maud's will. Appellant expressed surprise over seeing the cash bequest of $10,000.00 to Robert, knowing how the sisters regarded Robert's ability to

manage his personal funds. Maud explained this by saying that she and her sister had discussed Robert's bequest upon a number of occasions, and had decided to leave him $10,000.00 to squander. Mabel further told this appellant just as she later told Mrs. Croake, "Now you have read that copy of Maud's will, and, Louise, you know what mine is" (S. C. p. 51, ll. 1-38).

While this appellant did not see Mabel as often as Mrs. Croake, she nevertheless saw her many times from 1931 to the date of her death. Mabel was constantly worried about her brother, and about real estate conditions in general, and craved the companionship of some person in whom to confide her troubles.

On March 21, 1933, Mabel said, "You know Louise, that I have not made any other will. That will that Maud and I made at the same time is what I want" (S. C. p. 52, l. 20).

The fact that these two sisters had made mutual and reciprocal wills was known to Robert, because shortly after Maud's death he called upon Miss White, and said, "Well, I know one thing, and that is that Maud and Mabel had made wills just alike" (S. C. p. 53, l. 39).

Miss White testified that Mabel had told her she was afraid of her brother Robert. He was constantly in financial difficulties, and was repeatedly causing her great concern by his demands for money (S. C. p. 56, l. 17).

It thus appeared from Miss White's testimony, as well as from Mrs. Croake's, that Mabel realized the obligation she was under by virtue of the mutual and reciprocal will which she had executed with her sister Maud in 1928, and that she was perfectly content to abide by its terms. If

her attitude toward her brother had changed in the interim, it was for the worse.

Anne M. Ralston (Appellant's witness):

This witness is a physician, having practiced in Brooklyn since 1900. She testified that in August 1932, she called at Miss Marshall's home in Summit, and requested her to spend a few weeks with her at Manhattan Beach, in the company of herself and Mrs. White, who was then staying with her. Mabel refused, saying she was afraid to leave her house, because Robert had a key to it, and there was no telling what he might do if the place were left unoccupied for two weeks (S. C. p. 64, l. 13). Dr. Ralston's testimony is important, because it shows that the fear which Mabel expressed for her brother Robert was not only mentioned to appellants, but to other friends. This fear was unquestionably something real and present. It shows the improbability of Mabel voluntarily revoking or destroying her 1928 will in order to have Robert succeed to her whole estate.

Frances Rockwell (Appellant's witness):

This witness lived next door to the Marshalls when they moved to Beachwood Road, Summit, and after the death of Maud, saw a great deal of Mabel. Mabel confided to her that she was very lonely, and that the sole surviving member of her immediate family (Robert) was estranged from her, and completely undependable (S. C. p. 69, l. 12). When Miss Rockwell suggested that Robert move out to Summit, and in some degree take the place of Maud, and thus offer some companionship to his surviving sister, Mabel promptly told her that it was impossible, that Robert was absolutely unreliable, had always been a

troublemaker, and that his presence in Summit would only make things worse (S. S. p. 68, l. 21).

Miss Rockwell testified specifically on the subject of the will, that Mabel told her that she and her deceased sister had made a "joint will" in the presence of the family lawyer, and that in order to avoid any trouble which would have undoubtedly arisen had Robert been completely disinherited, they had determined to each leave him $10,000.00 in cash (S. C. p. 69, l. 13). On at least four separate and distinct occasions Mabel repeated that she and Maud had made a "joint will" (S. C. p. 71, l. 31), and that this "joint will" was in existence, and had not been destroyed (S. C. p. 72, l. 1).

Miss Rockwell was a completely disinterested party. She was a neighbor, and it was quite natural that Mabel should have sought her companionship during the intervals when she used to see Mrs. Croake and Mrs. White, and while the brother Robert was offering Mabel no comfort. Great weight should be given to these confidences and admissions made to Miss Roskwell, who stands neither to gain nor lose by this litigation.

Harold W. Walker (respondent's witness):

Mr. Walker was the assistant manager of the Brooklyn Trust Company. He had known the Marshalls for many years. He recalled the accounts kept in his bank by the Marshall sisters individually, and as trustees for their brother Robert. He stated that in the sixteen years that these sisters came into the bank, he never saw them come in, one without the other. They were inseparable (S. C. p. 152, l. 35). His testimony definitely bore out the proofs established by the

other witnesses, that the facts surrounding the lives of these sisters, coupled with the actual preparation of their wills in 1928, constitute the execution of mutual and reciprocal wills.

This witness stated that a week or two before Mabel's death in July, 1933, Robert inquired of him whether the Bank had Mabel's will in their possession (S. C. p. 153, l. 30). This inquiry could not but create grave suspicions in view of the fact that in the preceding December, Mabel is alleged to have said in his presence that she had destroyed her will (S. C. p. 129, l. 20). This discrepancy in Robert's testimony, which makes his evidence entirely valueless, will be adverted to later in this brief.

Robert Jesse Marshall (respondent):

Robert is the sole person to benefit from Mabel's estate, if the decree herein is affirmed.

He admitted that he has only seen his sister eight times in the two years between the deaths of Maud and Mabel. He said that he was not aware of the fact that the sisters had drawn mutual wills in 1928 until he was told about it after Mabel had died (S. C. p. 118, l. 21). This is totally inconsistent with the testimony of his lawyer, Mr. Avery, who testified that Mabel had told Robert, in his presence in December, 1932, that she had destroyed her old will after Maud's death (S. C. p. 129, l. 26). It is totally inconsistent with his inquiry of Mr. Walker, the assistant-manager of the Brooklyn Trust Company two weeks before Mabel's death in July, 1933, when he tried to find out whether the bank had Mabel's will in its possession. What had transpired since the preceding December to lead him to believe that the Brooklyn Trust Company had pos-

session of Mabel's will? This discrepancy was never cleared up.

The only conclusion that can be reached from such discrepancy is either that the conversation in December 1932 had never taken place, or that Robert was fully cognizant of the fact that the sisters had made mutual and reciprocal wills.

Hanna M. Mayhew (respondent's witness):

This witness was employed in the office of Corra N. Williams, a director and officer of respondent, Summit Trust Company. Mr. Williams was handling the administration of Maud's estate.

Miss Mayhew said that in the Spring of 1932, Mabel suggested to her that she might wish to change her will, and had asked what would happen if she died without a will (S. C. p. 125, l. 8). The witness testified that she told Mabel that the estate would go to Robert, and that "it was better to die without a will than to die with the will as it stood" (S. C. p. 125, l. 12).

This testimony is so extraordinary that its only weight with this Court must be to discredit the party affirming it. It was never explained why Mabel should have consulted a stenographer in Mr. William's office relative to changing her will, when Mr. Williams or another lawyer in the office was readily available. The fact that Miss Mayhew endeavored to render legal services, going to the extent of advising that it was better to die without a will than with the 1928 will in existence without knowing Mabel's precise wishes is incredible, to say the least.

One feature of Miss Mayhew's testimony, however, does deserve passing comment. It shows that in the late Spring of 1932, Mabel's 1928 will was still in existence.

Walter Avery (respondent's witness):

This witness is Robert Jesse Marshall's New York attorney. He stated that he and Robert called upon Mabel about Christmas, 1932 (S. C. p. 127, l. 28). He stated that in his presence, Robert had asked Mabel whether she had made a new will since Maud's death, and that Mabel had answered by saying she had destroyed her old will, but had not yet made a new one (S. C. p. 129, l. 28).

As was stated before, the brother Robert, though having had the opportunity of corroborating this testimony, failed to do so. It was a vital issue in the case, on the cause of action to establish the lost will, whether Mabel had ever destroyed her 1928 will. *Robert's failure to corroborate Avery in this respect can only be interpreted as meaning that Robert could not offer any corroboration of this very important fact.*

From a consideration of all of the foregoing testimony—and these witnesses offered the only pertinent testimony in the case—there can be only one inference and conclusion, to wit: that in 1928 Mabel and Maud made and executed mutual and reciprocal wills, and that the failure to find Mabel's will in existence after her death entitles the residuary legatees to have the lost will established, or a trust impressed upon the assets of her estate. Aside from the purely legal questions involved, an unbiased consideration of the facts, as they were brought out by the testimony, completely establishes the causes of action alleged in the bill of complaint.

It was error, therefore, for the Court below to disregard appellants' proofs, and dismiss the bill of complaint.

LAW.

POINT I.

The Court of Chancery erred in failing to decree that Maude I. Marshall and Mabel V. Marshall had executed mutual and reciprocal wills and that appellants were entitled to have a trust in their favor impressed upon the assets of the estate of Mabel V. Marshall.

The evidence conclusively proved that the two sisters intended to leave their property in an identical manner at their respective deaths. That fact is borne out not only by the actual execution of mutual wills in 1922 and 1928, but also by the conclusions of the Vice-Chancellor in referring to the 1928 wills. His findings in this respect were:

> "The last will of Maude and the supposed lost will (of Mabel) were identical in character. *That fact is evidence of an arrangement between these sisters of their intent. It is evidence of the intent of the sisters to leave the property in an identical manner at their respective deaths.* * * *"

It being established that the sisters had agreed to execute identical wills, it must next be ascertained whether that agreement bound each other that their respective wills were not to be revoked. It is in this respect that the legal effect of mutual and reciprocal wills is founded. An examination of the wills fails to disclose the agreement to execute mutual and reciprocal wills and the agreement not to revoke in the wills themselves. It is unnecessary, however, that such an agreement be reduced to writing.

Some jurisdictions go so far as to hold that the mere execution of joint wills spells out the agreement to execute *reciprocal* wills. In *Frazier*

v. *Patterson*, 243 Ill. 80, 90 N. E. 216, 27 L. R. A. N. S. 508 (1909) it was held that a joint will between husband and wife each making the other a beneficiary and to their daughter upon death of the survivor was of itself evidence of a contract to make mutual and reciprocal wills. The Court said:

> "* * * The fact that they made such will is satisfactory proof to our minds that it was done in accordance with their mutual compact to dispose of their property in this manner."

In *Chambers* v. *Porter*, 183 N. W. 431 (Iowa 1921) the Court went even further and held that *the execution of separate wills* by a husband and wife at the same time and with similar provisions was of itself sufficient to prove a contract between them to dispose of their property in the manner indicated in the wills.

Our Courts have not gone as far as the two mid-western decisions just cited. Something more than the mere execution of the wills is necessary.

It has repeatedly been held in New Jersey, that the agreement to execute mutual wills and the agreement not to revoke them may be implied from the surrounding circumstances.

In *Tooker* vs. *Vreeland*, 92 N. J. E. 340, (Chancery 1921), Vice-Chancellor Backes had before him an analogous situation. A husband and wife had executed mutual wills whereby they gave their respective estates to each other for life with remainder over to certain of their kin. The husband died shortly thereafter, and his will was probated by his widow, who enjoyed his estate until her death. After the death of the widow, her mutual will was admitted to probate. Subse-

quently, however, a later will, drawn by the widow was discovered. In the dispute, following the discovery of the subsequent will, Vice-Chancellor Backes sustained the mutual will executed by the wife, and impressed a trust upon the assets of the estate in favor of the residuary legatees. The Court found that the agreement not to revoke need not be expressed in so many words, but could be inferred from the circumstances leading up to and surrounding the execution of the mutual wills. The language of the Court at page 342 is as follows:

> "*The law is well settled, and the proposition is not questioned, that if Mr. and Mrs. Tooker made a compact to dispose of their combined estates, the terms of which find expression in the mutual wills, the contract will be enforced in equity according to its established practice, Equity will not interfere with the probate of the later will, made in violation of the contract, but will enforce the contract against the estate of the survivor by impressing a trust upon the assets.* * * *
>
> "The mutual wills do not on their face purport to be contractual. Their reciprocal provisions indicate that they were the result of an understanding between Mr. and Mrs. Tooker, but an understanding does not necessarily spell contract. *The vital question is, was it agreed by them that the wills should remain irrevocable after the death of either? For the solution of this we must look to the extraneous testimony, keeping in mind that, to establish an agreement, the proofs must be clear and convincing. The contract may be found in an express promise, or inferred, as a conclusion of fact, from the circumstances surrounding the parties.* * * *
>
> Unquestionably, Mr. and Mrs. Tooker's primary concern was each other, and it may well be that they would have provided, one for the other, in the manner they did, wholly thoughtless of a bargain; but be that as it

> may, the fact nevertheless is that they, in consideration of reciprocal bequests to themselves and those of their choice, bound themselves to abide the provisions of the mutual wills, *and Mrs. Tooker having accepted the benefit of her husband's gift became legally and in conscience bound to carry out the obligations she undertook.*"

The *Tooker* case was affirmed by this Court in 93 N. J. E. 224.

Without at this time considering whether or not the testimony of various witnesses was admissible (see Point III), it is important to ascertain the strength of the circumstances surrounding the execution of the 1928 wills in comparison with the facts proved in the *Tooker* case. As was set out earlier in this brief, the proofs from which the execution of mutual and reciprocal wills could be inferred consisted of:

1. Maud and Mabel were both unmarried and had lived together since childhood.

2. They were intensely and completely wrapped up in each other; so much so, that they could have been characterized as possessing a single personality.

3. They both had an extreme fear and dislike of their brother, Robert.

4. In 1922 prior to the execution of their wills at that time, they consulted their lawyer, Leonard N. Snedeker, on numerous occasions, always being present together. No provision was inserted in their 1922 wills until they had first mutually agreed upon it, and their wills were executed at the same time before the same witnesses.

5. In writing to Mr. Snedeker to insert a specific reason for making Robert's bequest so small, they mutually joined in the letter, Maud

writing the letter and addressing the envelope, and Mabel writing and enclosing the memorandum.

6. Before executing their 1922 and 1928 wills the two sisters confided to their first cousins, appellants herein, that they were making mutual and reciprocal wills in which these appellants would share as residuary legatees.

7. Before executing their 1928 wills the sisters went through the same procedure which they had adopted prior to executing their 1922 wills.

8. The 1928 wills were identical in form and executed before the same lawyer on the same date and attested by the same witnesses.

9. After Maud's death in 1931, Mabel repeatedly admitted to her cousins that her will was an identical copy of Maud's will.

10. As late as the Spring of 1932, Mabel stated to respondent's witness, Miss Mayhew, that her will was in existence.

11. As late as June, 1933, Mabel stated to one of appellants that her 1928 will was still in existence.

Appellants submit that no stronger set of circumstances could have been produced to carry so strong a conviction of the execution of mutual and reciprocal wills with the attendant obligations. The background of the lives of these two maiden ladies, their unusual sense of responsibility to see that the family fortune would be inherited by members of their family who would not squander the same, and the actual execution of identical wills on two separate occasions, separated by a lapse of six years, warrants a reversal of the decree below.

The following language of Backes, *V.-C.* in the *Tooker* case, *supra,* (p. 345) precisely fits and applys to the facts in the instant case:

> *"From the testimony, the truth of which is not challenged, it seems to me to be clearly and satisfactorily established that the wills grew out of, not simply the mutual desire of an aged and affectionate couple to gratify the other's wishes, but a solemn promise, an agreement—a contract—to be performed by the survivor. The consideration of the contract we readily find in the inducement held out by the one to the other to mutually testate, in the reciprocal gifts of the life estates, and the principal, if necessary, and the execution of the contract on the part of Mr. Tooker, by his unrevoked will at the time of his death. And in the acceptance and the actual enjoyment of the gift by Mrs. Tooker we also find that part performance which takes the contract out of the Statute of Frauds."*

The case of *Edson* vs. *Parsons,* 155 N. Y. 555, (referred to in *Tooker* v. *Vreeland, supra*), is one of the leading authorities for the proposition that equity will enforce an agreed testamentary disposition at the suit of a third party beneficiary.

The background of that case constitutes a remarkable parallel to that here presented, differing from it only in that in that case the maiden sisters shared a deep attachment for their brother which prompted them to arrange to have him inherit their respective residuary estates, whereas in the instant case the sisters shared an abiding distrust of and lack of confidence in their brother which prompted them to sharply curtail his inheritance and dispose of their ultimate residuary estates to other relatives.

The facts in the case of *Edson* vs. *Parsons*, (*supra*) are well set forth at page 562 of the opinion:

> "The facts brought out upon the trial showed that these two elderly ladies had received each, an estate of some $500,000, in value, from a deceased brother, Tracy Edson, who had died in 1881 and who by his will, had divided his property equally among his sisters and his brother Marmont. A strong attachment subsisted between the brothers and sisters during their lives. Tracy was a single man and lived with his sisters; but Marmont who was married, resided with his family in Brooklyn. *After Tracy's death Mary and Susan continued to reside together in the same house, united by ties of the strongest affection and leading lives of singular uniformity of thought and action. It might be said that their lives ran in one groove and, judging from extracts from their diaries put in evidence, were so blended, that they seemed to experience the same emotions, to view occurrences with the same eyes and to be moved to the performance of common acts. Thus it was, that they spoke of and planned their testamentary dispositions together; together, visited their lawyer and ultimately, executed, on the same day before him and the same witnesses, wills having similar schemes for the distribution of their estates after death should separate them. There can be no doubt, but that their wills evidence a conclusion, which was reached by them after discussion and deliberation, as to the most advisable plan for the disposition of their property and we may fairly infer, from the evidence, that it was prompted by a desire, after making many charitable and benevolent gifts, to keep the surplus in the family by giving it to their brother Marmont. They were plainly, not ordinary wills; for each testatrix undertook to make a testamentary disposition contingent upon the survivorship*

of the other, and it is in that feature that in truth, the contention of the appellant finds its support. That is, that there was a mutual representation that, in consideration of these identical and cross provisions in the two wills, the survivor would adhere to and carry out the provisions of her will; a representation upon which, when one of them should die, it should be presumed that she had placed reliance, and because of which, therefore a court of equity would see to it that the testamentary provisions made should not fail through a diversion of the residuary estate into other hands by a subsequent will."

The rationale of the enforcement of mutual wills as adopted by the New York Court in the *Edson* case, is a perfect reason for impressing a trust upon the assets of Mabel's estate in favor of appellants. When Maud died in 1931 without having disturbed the provisions in her will executed in 1928, it was in reliance of her sister Mabel's representation that her will made at the same time, would never be destroyed or modified. On the strength of those mutual promises, Mabel inherited all of Maud's estate. It would constitute a fraud upon Maud to permit Mabel's estate to be distributed as upon Mabel's intestacy and thus permit their brother, Robert, toward whom both had a positive dislike and fear, to inherit the estates of both.

Howells vs. *Martin,* 101 N. J. E. 275 does not militate against the contention urged by appellants. An examination of the lower court opinion (99 N. J. E. 657) along with the reversal in this Court carries with it the conviction that the reversal was due to the fact that the proofs below failed to establish that the contract sought to be enforced had been duly and properly assigned to the complainant. In that case one of

the two parties alleged to have executed mutual and reciprocal wills was still alive when the suit was instituted. Suit was instituted not by the survivor, but by a person alleged to have been the assignee of the contract to execute mutual wills. The decision could have rested upon the single point that the complainant was not possessed of the cause of action. But the Court went further and held that the facts did not warrant the enforcement of the alleged agreement to make mutual and reciprocal wills. This decision is not in conflict with appellant's contention. On the facts there is a vast difference between the case at bar and the Howells case.

Appellant deems that a more elaborate discussion of the circumstances surrounding the execution of the 1928 wills is unnecessary, in view of the Vice-Chancellor's findings that the agreement to execute identical wills had been made. The proof to spell out a contract not to revoke in order to justify a reversal is found in the lives and actions of these two sisters.

It is submitted, therefore, that the agreement not to revoke was present, as was the agreement to execute similar wills. That being so, it was error for the Court below to refuse to impress a trust in favor of the appellants upon the assets of the estate of Mabel V. Marshall in accordance with the terms of her mutual will executed in 1928.

POINT II.

The Court of Chancery erred in failing to decree that the proofs established the lost will of Mabel V. Marshall.

The Vice-Chancellor concluded that the presumption of revocation arising upon the failure to produce Mabel's 1928 original will had not been overcome by the proofs.

Authority for the proposition that such presumption of revocation is rebuttable, is found in this Court in *Campbell* vs. *Kavanaugh*, 96 N. J. E. 724 (1924):

> "It is a well established principle that when a will is left in the hands of the testator and is not found at the time of his death, a presumption of a revocation arises. *And it is equally well settled that this presumption may be overcome by proof.*"

Appellants contend that the presumption of revocation was overwhelmingly overcome by the proofs in this case. Every incident in the lives of the two sisters leads irresistibly to the conclusion that they did not wish their brother Robert to inherit their entire estate. The Marshall fortune at one time was valued in the hundreds of thousands of dollars. At the time of Mabel's death it was still estimated to be $200,000.00. The detailed preparation which attended the execution of the 1922 wills, the identical care and caution taken before executing the 1928 wills could not be wiped aside as easily as the lower Court indicated, by presuming that in the last weeks of her life, Mabel had a complete change of attitude toward Robert (S. C. p. 167, l. 35). What had Robert done to justify this complete turn-about on Mabel's part? Had he shown her any affection? Had he offered her any solace or comfort in the last few years of her life?

Quite the contrary. After Maud had died in 1931, leaving Mabel practically alone in the world, Robert's visits to his sister were limited to eight in a period of over two years and upon two of those occasions he attended with his lawyer, Mr. Avery. We need not have been present to know what transpired on those visits. Robert was continually complaining that the income from the trust fund left by his parents, was insufficient for his needs. Notwithstanding his receipt of $10,000.00 in cash when Maud died, he persisted in annoying Mabel with demands for additional funds. On the occasion of his visit to Mabel in December, 1932, just about six months before Mabel died, his principal inquiry was directed to finding out whether Mabel had changed her will since Maud died.

Was it reasonable to suppose, then, that in view of Robert's actions and in view of the circumstances related by the appellants, Dr. Ralston and Miss Rockwell, all to the effect that Mabel had no use for her brother, that Mabel had voluntarily destroyed her 1928 will with the avowed purpose of permitting Robert to inherit her entire estate?

Up to five weeks before her death, Mabel openly admitted that her 1928 will was in existence and effect and that when she died, the provisions in that will would take effect. The unreasonable and illogical course to adopt would be to say that Mabel decided to abandon the conclusions adopted by Maud and herself of many years' standing, repudiate her agreement with Maud, disregard the confidences and promises of appellants, and decided to leave her entire estate to her ne'er-do-well brother.

The Vice-Chancellor refused to consider the testimony of appellants. The admissibility of their testimony will be dealt with later (Point III). Excluding their testimony from consideration, the lower Court turned to and adopted the testimony of Miss Mayhew and Mr. Avery. Miss Mayhew said that in the Spring of 1932 Mabel spoke of changing her will and requested advice of Miss Mayhew. In view of the fact that Miss Mayhew is not a lawyer, but was merely a stenographer employed by Mr. Williams, Director, Officer and counsel for Summit Trust Company, it seems the height of folly to accept Miss Mayhew's testimony as the fact. Miss Marshall had often consulted attorneys before. Attending at a law office was not a new experience for her. Her means were substantial and necessarily she required legal advice on many occasions in the management of her real estate. She had drawn wills before and upon each occasion had consulted a lawyer and not a stenographer in the office. Why then on this particular occasion in the Spring of 1932 did she consult Miss Mayhew on the advisability of changing her will? *The advice which Miss Mayhew gave,* (S. C. p. 125, l. 10) *to wit: that it was better to die intestate than to leave the 1928 will in existence, shows how impossible this interview was.*

Again, the testimony of Mr. Avery, Robert's New York lawyer, to the effect that in December 1932, Miss Marshall stated to Robert in his presence that she had destroyed her 1928 will and had not yet made a new will, must be taken with a grain of salt. On the issue of establishing the lost will, such testimony of Mr. Avery was vitally pertinent because, if it could be established that Mabel's 1928 will had voluntarily been destroyed

by her, then the cause of action based upon establishing a lost will was gone. Yet, despite the importance of this testimony, it was not corroborated by Robert, the very person to whom Mabel was alleged to have made that statement.

Disregarding the testimony of Miss Mayhew and Mr. Avery, it is submitted that the cause of action to establish the lost will of Mabel was amply and completely proved. Assuming that appellants were competent witnesses, the statements made by Mabel to them before she died were proper proof to establish the lost will. If the testimony of appellants was otherwise competent, Mabel's conversations with them were more than sufficient to establish her lost will.

Authority for the propriety of proving the lost will by admissions of the decedent is found in *Campbell* vs. *Kavanaugh*, 96 N. J. E. 724, where this Court unanimously affirmed Advisory Master Rosenberg:

> "Before determining that question, it may be necessary to say a few words on the preliminary questions raised by the defendants as to the admissibility of the evidence adduced before me. The first claim is that the declarations of the alleged testatrix are not admissible. The cases which are cited in support of this point are all cases where the declarations of the testator were offered as to the contents of a will which was actually produced and proved. None of these cases go to the question of the evidence of the testator as to the loss or disposition of a will or the contents of a lost paper. *That the declarations of the testator both before and after the making of the will are admissible in a case such as this was decided in the famous case of Sugden v. St. Leonards, L. R. 1 Probate Division, 154, which has been cited and followed in this state.*"

It is submitted, therefore, that Mabel's lost will was proved and that the refusal of the Court of Chancery to so decree, constituted reversible error.

POINT III.

The Court of Chancery erred in excluding the testimony of appellants of conversations had by them with Mabel V. Marshall relating to her 1928 will.

The Vice-Chancellor held that the testimony of Mrs. Croake and Miss White was inadmissible because they were materially and financially interested in the outcome of this suit. The lower Court was obviously under the impression that the testimony of these witnesses could be excluded by virtue of Section 4 of the Evidence Act which provides as follows:

> "4. *In all civil actions* any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity or as a guardian of a lunatic; *provided, this section shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator, intestate or lunatic while of sound mind, represented in said action, unless the representative offers himself as a witness on his own behalf and testifies to any transaction with or statement by his testator, intestate or ward, in which event the other party may be a witness in his own behalf as to all transactions with or statements by such testator, intestate or lunatic while of sound mind, which are pertinent to the issue.*
>
> When the representative is a national bank, bank, trust company or other corporation, testimony of any officer or employee thereof shall be deemed testimony of the representative within the meaning of this sec-

tion. (Approved April 20, 1931. Laws of 1931 Ch. 163; p. 305.)"

At the outset, let it be said that the foregoing section is inapplicable for a number of reasons.

In the first place, the suit was instituted not to charge Miss Marshall's estate with any liability, but to either establish her lost will or to impress a trust upon her assets in favor of the residuary legatees mentioned in her 1928 will. In the former cause of action, the suit is nothing other than a judicial inquiry and the testimony of appellants would obviously be proper. In the latter cause of action, the suit is not to charge the estate with liability, but solely to carry out the provisions of an agreement to make mutual wills duly and properly entered into by Mabel with her sister Maud.

If the assets of Mabel's estate consisted solely of real estate and had descended to Robert upon her intestacy, it could not be said that in a suit by these appellants against Robert to accomplish exactly what is being attempted in this suit, that their testimony would have been inadmissible. The question of a party being sued in a representative capacity would not have been involved. Should the rule be any different simply because some of Mabel's assets were personalty and happened to be in the possession of Summit Trust Company?

It has been held that *a proceeding to probate a will is not a civil action, but a judicial inquiry* and consequently the testimony of persons interested in the proceeding is admissible and may not be excluded by the legal representative in the proceeding.

In *Veazey's* case, 80 N. J. E. 466, (E. & A. 1912) the Court held that Section 4 of the Evi-

dence Act was inapplicable to exclude the testimony of transactions or conversations with the decedent, Justice Swayze remarking:

> "* * * The statute applies only in the case of civil actions. *Proceedings for the probate of a will are not a civil action, but a judicial inquiry* to ascertain whether the instrument before the court is the last will and testament of the deceased. We think the evidence was properly admitted so far as this objection is concerned."

It has further been held that testimony of transactions with the decedent is admissible in a suit where devisees are sued upon obligations of their ancestors where they have succeeded to his real estate. This point was discussed and decided favorably to appellants' contention, by Vice-Chancellor Berry in *Burr* vs. *Bloomberg,* 101 N. J. E. 615, where the learned Vice-Chancellor said:

> "Under these decisions it is plain that where devisees are sued as owners of land upon which, or in relation to which, equitable rights are claimed, *evidence of transactions with the decedent are admissible.* In Hodge *v.* Coriell, supra, which was a replevin suit at law against one who set up a right as executor, such evidence was held admissible."

But aside from the fact that this proceeding is technically against a party in a representative capacity so far as Summit Trust Company is concerned, appellants submit that their testimony of tranactions with the decedent is never-the-less admissible.

Section 6 of the Evidence Act provides that, in proceedings of an equitable nature, parties to the action are competent witnesses to disprove so much of the defendant's answer as is responsible

to the bill of complaint. The Statute in question provides as follows:

> "6. *The complainant or petitioner, in any action or proceeding of an equitable nature in any court, shall be a competent witness to disprove so much of the defendant's answer as may be responsive to the allegations contained in the bill of complaint or petition,* and any defendant in any such action or proceeding shall be a competent witness for or against any other defendant not jointly interested with him in the matter in controversy (P. L. 1900, p. 363)."

The answer of Robert Jesse Marshall (S. C. p. 13) denied the principal allegations of the bill of complaint. It denied that Mabel's 1928 will was lost, and denied that Mabel had executed a mutual and reciprocal will with Maud in 1928. This completely opened the door to the testimony of appellants to establish their cause of action in response to Robert's absolute denial. See *Laning* v. *Laning's Adm.*, 17 N. J. E. 228; *Williams* v. *Vreeland's Exec.*, 30 N. J. E. 576; *Hesselbrock* v. *First Nat. Bank & Trust Co. of Montclair*, 106 N. J. E. 339.

And if appellants' testimony was admissible against Robert, it must be deemed to be admissible against Summit Trust Company in its representative capacity. The administrator's rights rise no higher than those of the sole beneficiary for whose benefit it was acting as administrator of the decedent's estate. When Robert flatly denied the allegations in the bill of complaint, he let down the bars as far as he was concerned, and he could not thereafter "hide behind the skirts" of the administrator, and urge that appellants' testimony was excluded by virtue of Sec. 4 of the Evidence Act.

Rights of creditors are not here involved. This is a proceeding strictly between Robert and appellants, and regardless of the technical nomenclature of the suit, it still remains a dispute between the residuary legatees on the one hand, and the sole beneficiary succeeding upon intestacy on the other. If Robert voluntarily removed the ban of appellants' disability, the administrator cannot complain. Summit Trust Company stands neither to lose nor gain by the decision in this suit. *The Trust Company is not the real party in interest.* It was made a party to the suit only in order that the decree of the Court could be completely and effectually carried out. Ultimately it would have had to turn the entire estate over to Robert, had these proceedings not been instituted. *For all intents and purposes, Robert is the administrator, and the administrator is Robert.*

It is interesting to speculate whether the responsive answer filed by Robert, and the answer filed by the Trust Company alleging "no knowledge or information," were deliberately framed to achieve a possible strategic position. Both answers were filed by the same solicitors. Perhaps Robert believed that he could definitely disprove the allegations in the bill of complaint, but yet, not wishing to assume too great a burden, he thought he could at the same time exclude appellants' testimony by having the administrator, in whose favor he had renounced, answer by saying it "had no knowledge or information sufficient to form a belief." He would respond to the bill, and the administrator, relying on Sec. 4 of the Evidence Act would object to appellants' testimony.

Fortunately Section 6 of the Evidence Act applies to Robert, and it requires no stretch of

imagination to conclude that the legislature intended it to extend to the administrator in cases such as the one under review. Especially must this be so where the interests of the administrator and the beneficiary are identical.

It is strenuously urged, therefore, that Robert's responsive denial in his answer innured to appellants' benefit to the extent of admitting their testimony not only as against Robert, but also against the administrator.

Again, the present type of action was not such as to charge the decedent's estate with liability, and in the language of one of the Western cases, Summit Trust Company in this proceeding was to be regarded solely as a "stake holder." It was not for them to object to the admissibility of the testimony of transactions with the decedent when their sole function in the suit was to see that the property went to such parties as the Court should direct. Their position is not unlike the holder of a fund sought by adverse claimants, and ultimately decided by an interpleader suit.

The language adopted by the Court in *Sorenson* vs. *Sorenson,* (Supreme Court of Nebraska) 100 Northwestern Rep. page 930:

> "It may be conceded that the witness was interested and the testimony is of conversations and transactions had between the witness and the deceased; yet unless the adverse party is the representative of the deceased person, the evidence is not within the ban of the statute. This question has been considered upon the point in issue in McCoy *v.* Conrad, 64 Neb. 150, 89 N. W. 665 and the court said: 'If a party is so placed in a litigation that he is called upon to defend that which he has obtained from a deceased person, and make the defense which the de-

ceased might have made if living or to establish a claim which the deceased might have been interested to establish if living then he may be said in that litigation to represent a deceased person; but where he is not standing in the place of the deceased person, and asserting a right of the deceased which has descended to him from the deceased (that is where the right of the deceased himself at the time of his death is not in any way involved) and the question is not what was the right of the deceased at the time of his death but merely to whom has the right descended, in such a contest neither party can be said to represent the deceased.' Tested by the above rule it is clear that neither the petitioners nor the cross-petitioners can be said to be the representative of the decedent in this action. But it is insisted that the administration is and as against him the testimony is within the bar of the statute. *The administrator can have no interest by virtue of his office in the result of this action. It will not take from nor add to the Estate. He is now a mere stakeholder and the sum of his official duties is to pay over, that is to distribute the proceed of this estate as the court may direct. The purpose of this action is to ascertain to whom it shall be distributed. As said in the former opinion* (98 N. W. Rep. 837) *'They (the claimants) occupied a position analogous to that of rival claimants for the same fund who have been brought before a court of equity by a bill of interpleader requiring them to interplead for the fund in order that their respective rights may be ascertained and determined and the plaintiff exonerated.' This is not the administrator's controversy. It belongs to the rival claimants and the office should not be used by either party as a rampart to fight behind.*

The witness we think was competent to testify in this action.''

It is urged, therefore, the testimony of the appellants of transactions and conversations with Mabel V. Marshall was admissible. This being so, the lower Court was in error in excluding their testimony from consideration. Had the Vice-Chancellor regarded their testimony as admissible and proper, he unquestionably would have disregarded the weak and contradictory testimony and inferences arising from what Miss Mayhew and Mr. Avery said. This would have led to one of two conclusions: either the establishment of the lost will of Mabel V. Marshall or the impressing of a trust upon the assets of her estate in favor of appellants.

The refusal of the Court below, therefore to accept testimony of Mrs. Croake and Miss White constituted reversible error.

Reservation.

Appellants ask leave to reserve their right to apply for an allowance of costs and counsel fees. Under the procedure approved in the following decisions, this case appears to be precisely one in which this Court will entertain an application for costs and counsel fees for services on appeal:

Sharff v. *Tosti,* 111 N. J. E. 106;
Nobile v. *Bartletta,* 112 N. J. E. 304;
Smith Com'r v. *Monmouth Title,* 115 N. J. E. 497.

Appellants' application will be formally presented, when the opinion herein is filed.

CONCLUSION.

It is submitted, therefore, that for the reasons herein stated that that part of the decree under review in this Court be reversed to the end that a decree may be entered in the Court of Chancery either establishing Mabel V. Marshall's lost will or impressing a trust upon her estate in favor of appellants.

October, 1935 Term.

Respectfully submitted,

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JACOB L. NEWMAN and
LIONEL P. KRISTELLER,
On the Brief.

New Jersey Court of Errors and Appeals

Between AGNES CROAKE and ELLEN LOUISE WHITE, *Complainants-Appellants,* *and* THE SUMMIT TRUST COMPANY, *et als.*, *Defendants-Respondents.*	*On Appeal.*

BRIEF FOR DEFENDANTS-RESPONDENTS, THE SUMMIT TRUST COMPANY, ADMINISTRATOR, AND ROBERT JESSE MARSHALL.

The bill of complaint alleges two causes of action. The first cause of action was designed to establish the lost Will of Mabel Marshall. The second cause of action was designed to impress a trust upon all the property of the late Mabel Marshall in the possession or control of the defendants.

The Summit Trust Company was named as one of the defendants in the original bill which was filed March 13, 1934.

The Court ordered that the title and pleadings be amended so that wherever the words, "The Summit Trust Company," appear, they should be amended to read, "The Summit Trust Company, Administrator of the Estate of Mabel V. Marshall, deceased."

(Counsel for the appellants inform us that the order of amendment was omitted from the

printed record by mistake, and we print a copy of it as an addendum to this brief for the information of the Court.)

In order to succeed under the first cause of action of the bill the complainants were required to satisfy the Court by proofs that were clear and convincing that the Will had been lost, and not destroyed, by the testatrix, *animo revocandi.* The experienced Vice-Chancellor who heard this case found that the complainants had failed in their proofs.

In order to succeed under the second cause of action the complainants were required to establish by clear and convincing proofs that there had been an irrevocable agreement between Mabel Marshall and her sister, Maud, that the Wills which they made and executed on July 13, 1928 (Exhibits C. 1 and C. 3) should never be changed or revoked. This required the complainants to establish an agreement by clear and convincing proofs which was capable of specific performance, for, of course, if there was no such agreement, the Court could not impress a trust in favor of the complainants on the property of the estate in the hands of The Summit Trust Company, Administrator.

The Vice-Chancellor found that the complainants failed in their proofs on this cause of action, also. His opinion is printed on page 163 of the record.

The two sisters, Maud and Mabel Marshall, made identical Wills in 1928. Of the two, Maud died first, and her Will was probated April 14, 1931 (p. 184, l. 27).

Mabel Marshall died on July 14, 1933, leaving no Will. Her sole surviving nearest of kin was

her brother, Robert Marshall, who by operation of law inherited her estate. He can not be deprived of this property, except upon the establishment by proof so "clear, satisfactory and convincing," by proof so "strong, positive and not uncertain," by proof so "strong, positive and free from doubt" as to remove all reasonable doubt from the mind of the Court.

In re Calef, 109 N. J. Eq. 181, page 184; affirmed on opinion, 111 N. J. Eq. 355.

The evidence in the case at Bar, instead of measuring up to these requirements, was confused and conflicting. All of it was parol and the evidence of the complainants could not be considered because of the bar imposed by Section 4 of the Evidence Act.

The Vice-Chancellor gave the complainants the benefit of every doubt. He admitted all the evidence that was offered, but subject to the objection that some of it was not admissible under Section 4 of the Evidence Act (2 C. S. p. 2218).

In reaching his determination he held that the testimony of the complainants could not properly be received; but he also felt compelled to decide against them even on the assumption that their evidence most favorable to them could be considered.

He considered the case in both aspects of the evidence, that is to say, (1) on the assumption that all the evidence was properly admitted; and (2) on the assumption that some of the evidence was inadmissible under Section 4 of the Evidence Act. (See his Conclusions, pp. 163-168.)

The Vice-Chancellor was called on to decide two questions:

(1) Did Mabel Marshall die leaving a Last Will and Testament which should be admitted to probate?

(2) Was there an enforceable agreement between the two sisters, Maud Marshall and Mabel Marshall, binding them to make identical Wills which should never be revoked?

The decisions are uniform that evidence to warrant a Court in either establishing a lost Will or in giving effect to an agreement to irrevocably make mutual Wills, must be clear, convincing and positive, and free from doubt, and further, that a parol agreement of this character is regarded with suspicion and is subject to close scrutiny.

See *Vreeland* v. *Vreeland*, 53 N. J. Eq. 387; *Tooker* v. *Vreeland*, 92 N. J. Eq. 340; affirmed on opinion, 93 N. J. Eq. 224; *Campbell* v. *Smullen*, 96 N. J. Eq. (E. & A.) 724; *In re Willitt's Estate*, 46 Atl. 519; *In re Bernhardt's Estate*, 143 Atl. 92; *Havens* v. *Brown*, 99 N. J. Eq. 75; *Howells* v. *Martin*, 101 N. J. Eq. (E. & A.) 275; *Johnson* v. *Wehrle*, 9 N. J. Misc. 939; *In re Calef*, 109 N. J. Eq. 181; affirmed on opinion, 111 N. J. Eq. 365; *Edson* v. *Parsons*, 155 N. Y. 555; 50 N. E. 265.

Some things may be admitted.

(1) In September 1922 the two sisters, Maud and Mabel, made identical Wills (Exhibits DB. 1, p. 194, and DB. 2, p. 199).

(2) On July 13, 1928 the two sisters, Maud and Mabel, made new and identical Wills (Exhibit C. 1, p. 178; Exhibit C. 3, p. 186).

(3) The two sisters, Maud and Mabel, during their lifetime were devoted and inseparable.

Much of the argument of the appellants is based on those three propositions of fact, none of which is disputed. The testimony beyond those three points is confused and uncertain and full of contradiction, and it is just there that the complainants' case fails.

The identical Wills which the two sisters made contained no agreement or anything indicating an agreement that these Wills were to be irrevocable. Complainants' brief speculates on the facts, and that is just what the decisions say the Courts cannot do. There is no evidence from which the Court could say that each sister understood that the other was irrevocably bound. Such an inference is not to be drawn from the mere fact of identical Wills, and Vice-Chancellor Backes properly held that there was no evidence from which he could say with certainty that each intended and understood that the other was forever bound by the disposition made by the identical Wills of 1928.

Appellants' argument is based on the assumption that the two sisters, Maud and Mabel, both feared and hated their brother, Robert Marshall, and from this assumption of fact they deduce the argument that Mabel Marshall intended that the provisions of her Will of July 13, 1928 should prevail, and that it was unreasonable to expect that Mabel had changed her attitude toward Robert.

There is no sufficient basis in fact for this assumption.

The Vice-Chancellor pertinently observed (p. 167, l. 37):

> "Isn't it possible that with her apparent ill-feeling towards the brother, she may have had a change toward the tailend, and destroyed it?"

the "it" referring to the Will.

If the evidence does not conclusively demonstrate that Mabel did experience a change of heart towards her brother toward the close of her life, it is equally inconclusive that she retained her feeling of hatred to the end of her life.

In a case like this the defendants do not have to conclusively establish that Mabel's attitude changed, but on the other hand, it is obligatory on the complainants to establish by clear and convincing proof that her attitude did not change, particularly since it appears that the original of the Will of 1928 was left with her, and that upon her death it could not be found, after a very thorough search.

In *Tooker* v. *Vreeland*, 92 N. J. Eq. 340, this Court in 93 N. J. Eq. 224 adopted the opinion of Backes, *V.-C.* as its own, and said (p. 343):

> "The vital question is, Was it agreed by them that the wills should remain irrevocable after the death of either? For the solution of this we must look to the extraneous testimony, keeping in mind that, to establish an agreement, the proofs must be clear and convincing."

Vice-Chancellor Backes, who heard the case at Bar, applied those principles in his determination of this case.

The fact is that Mabel Marshall's attitude towards her brother did change after execution of her Will of 1922 (Exhibit DB. 2, p. 199).

Exhibit DB. 3, which is the photostat of a letter from Maud Marshall to Leonard Snedeker, Esquire, to which is attached a memorandum in the handwriting of Mabel Marshall was written, as the postmark shows, in August of 1922 and related to the reciprocal Wills which were executed by the two sisters in September of 1922.

That memorandum is incorporated almost verbatim in paragraph Eleventh of each of the Wills, (Maud's Will, DB. 1, p. 97, l. 15; Mabel's Will, DB. 2, p. 202, l. 14).

In addition, by those Wills of 1922, by paragraph Second, each of the sisters gave to their brother, Robert, the sum of only $1,000 (p. 194, l. 15; p. 199, l. 15).

In addition, there is included in paragraph Eleventh of each of these Wills of 1922 a specific provision that,

> "In case my said brother shall contest this my Will"

(p. 197, l. 22; p. 202, l. 21), the legacy of $1,000. should lapse. The provision in paragraph Third of each Will, that Robert should share with the surviving sister the property on East 58th street, New York, and the provision in paragraph Fifth of each Will, that the life interest in the premises, #21 Greenwich avenue, should go to Robert in the event that he survive both sisters, was also revoked in the event he contested the Wills, and those properties were devised alsewhere.

No penalty in case the Wills were contested was imposed on any other beneficiary.

A casual reading of the Wills of 1922 (DB. 1 and 2) shows the harsh attitude which the sisters then had towards their brother Robert.

When we move on a period of six years and come to the Wills of 1928, that attitude is very considerably softened. By the third paragraph of each Will (C. 1, p. 179, l. 19; C. 3, p. 186, l. 20) the sisters each bequeathed to their brother Robert the sum of $10,000. in place of the $1,000. in the previous Wills. Each Will, also, by paragraph Fourth, gave to Robert, in the event that he survived both sisters, the East 58th street property, and in the event that Robert survived both sisters, placed the property #21 Greenwich avenue in trust with the Brooklyn Trust Company to pay over the rents, issues and profits thereof to him during his life.

In place of the harsh provision in the 1922 Wills singling out Robert for punishment if he contested the Will, paragraph Eleventh of the 1928 Wills (C. 1, p. 182, l. 32; C. 3, p. 189, l. 34), provided that:

> "If any beneficiary under this will shall contest the same, or the probate thereof, then and in that event,"

the legacy to such person so contesting was annulled.

That is very much milder in tone than the provision of the 1922 Wills, singling out Robert alone of all the beneficiaries named for punishment in the event that he contested the Will.

It is apparent from the evidence that Mabel worried over Robert. She was afraid if he had money, he would squander it, but at the same time she felt that he should be taken care of.

Complainants' witness, Miss Rockwell, the next-door neighbor whom appellants characterize in their brief as "a completely disinterested party", testified that shortly after the death of Maud (p. 67, l. 35 to p. 68, l. 4, and p. 69, l. 35 to p. 70, l. 10) Mabel said to her (p. 70, l. 10):

> "I have my brother; I have provided for him in my Will. I could not leave him the money or he would spend it. He would not have anything to live on."

This was some two years before she died, and the language indicates a softening of attitude on the part of Mabel towards Robert. She was afraid that if he had money he would spend it. On the other hand, if she did not leave him money, he would not have anything to live on. In her Will of 1922 she had left him only $1,000. in cash. In her Will of 1928 she left him $10,000. in cash. In her Will of 1922 she had harshly provided that if he contested the Will he should lose everything. In her Will of 1928, instead of singling him out, she broadened that to include any beneficiary.

There is considerable and conflicting testimony in the record with respect to Mabel's mental condition. Miss Rockwell pictures her as more or less of a wild woman after the death of her sister, Maud (p. 75, l. 15 to p. 76, l. 35).

Mrs. White, who is one of the complainants and whose testimony would presumably not be against interest, testified:

> "Up to the time I saw Mabel Marshall the last time she was mentally all right."

(p. 58, l. 15.)

And she testified further that the last time she had seen Mabel Marshall alive was on March 21, 1933. Mabel died by suicide on July 13, 1933.

The Vice-Chancellor observed (p. 167, l. 35):

> "She was desperate when she turned on the gas. She was sufficiently sensible to take that route. Isn't it possible that with her apparent ill-feeling towards her brother, she may have had a change toward the tailend, and destroyed it? I don't know. The burden is upon those who claim the will is in existence, to prove it. The will is lost. The presumption is it has been revoked. That presumption has not been overcome."

In that connection it should be observed that the Will was turned over to Mabel Marshall after she had signed it. Her lawyer, Leonard Snedeker, Esquire, who drew the Will and attended to its execution, testified that he did not know what became of it, and further (p. 25, l. 17):

> "Q You don't know whether you gave it to Mabel Marshall, or what you did with it?
> A I think I did; that is my impression.
> Q You also think you gave the other one to Maud Marshall? A Yes."

There is no suggestion in the evidence that the Will of Maud Marshall, who died first, was retained by anyone other than her. Mr. Snedeker, who drew it, did not probate it (p. 23, l. 35). The observation of the Vice-Chancellor, that it would be the ordinary course for Mr. Snedeker to have handed Mabel her Will (p. 165, l. 37) is quite in point.

The evidence with respect to whether Mabel Marshall destroyed her Will is uncertain and confused.

Leonard N. Snedeker, who drew the Will and attended to its execution, has no knowledge on the subject. All he knows is that he gave it to Mabel Marshall (p. 25, l. 18).

Edwin L. Snedeker, who witnessed the Will and who was of the New York firm of Snedeker & Snedeker, made a search of Mabel Marshall's home at Summit, following her death, in company with certain police officers of Summit, but was unable to locate the Will. He found various papers, such as rent statements, life insurance, checks, etc., (p. 40, l. 20) but no Will. Counsel admitted that a thorough search was made and no Will found (p. 38, l. 5).

The Police Officer Finneran broke into the house and found Mabel Marshall dead in the kitchen. Gas was escaping from the range (p. 93, l. 30). He said he went through all the house (p. 95, l. 5). All he saw in the way of papers was a few milk bills (p. 96, l. 30).

Officer Grasso made a thorough search of the house with Mr. Snedeker (p. 98, l. 33). He said Mr. Snedeker told him he was looking for a Will (p. 99, l. 25). Mr. Snedeker looked over the papers that were there, but found no Will (p. 99, l. 16).

Chief of Police Nelson went through the house the Saturday following Mabel Marshall's death (p. 104, l. 36). He says that Mr. Snedeker was with him (p. 104, l. 38). The Chief was looking particularly for suicide notes (p. 105, l. 15). He saw various bills, personal letters and other papers (p. 108, l. 40); also cancelled checks and insurance policies (p. 109, ll. 1 to 15). They found no Will.

Mabel Marshall had a locked box in The Summit Trust Company which was opened in the presence of the late Corra N. Williams, Esquire, and in the presence of Mr. Snedeker (p. 132, l. 10). There was no Will in the box (p. 132, l. 15; p. 133, l. 5).

Mr. Williams' firm were solicitors of record for the defendant, but he was called to the stand by the Court (p. 133, l. 33).

The box contained valuable papers but no Will (p. 120, ll. 35-40).

Up to this point in the evidence it must be admitted that after a thorough search in every conceivable place where Mabel Marshall might have kept her Will, no Will was found.

The presumption, of course, is that she had destroyed it.

The appellants' argument that she had not destroyed it, but intended it to stand, is necessarily built up on speculation in view of the confused state of the evidence on this subject.

What is the evidence?

The complainant, Mrs. Croake, testified that Mabel Marshall told her, apparently shortly after Maud's death, that in Maud's Will "you have a copy of my Will too" (p. 49, l. 17). And again on June 4, 1933 (p. 43, l. 30) that

> "she had not changed her will" (p. 44, l. 7).

The complainant, Mrs. White, who last saw Mabel Marshall on March 21, 1933 (p. 52, l. 25) said that she had never seen Mabel Marshall's original Will, and that she had never shown it to her or offered to show it to her (p. 57, ll. 30 to 35), and that up to the last time she saw Mabel Marshall she was mentally all right (p. 58, l. 16).

Mrs. White says that Mabel Marshall told her in January of 1929 that they (presumably, she and her sister) had just come from their lawyer's office

> "and had consulted their lawyer in regard to adding a codicil to their will" (p. 59, l. 35).

There is no corroboration of that from either of the Messrs. Snedeker, who was their counsel, nor from any other witness in the case, nor was any copy of a codicil produced.

Mrs. White says that on March 21, 1933, which was the last time she saw Mabel Marshall, she stated to her:

> "I have not made any other will. That will that Maud and I made at the same time is what I want" (p. 52, l. 20).

Offset against these statements is the testimony of Miss Mayhew, the Secretary for Mr. Williams. Mr. Williams had acted as counsel for Mabel Marshall as Executrix of the Estate of her sister, Maud, and Mabel Marshall was frequently in Mr. Williams' office. On one of the occasions when she was there, while waiting for Mr. Williams she talked to Miss Mayhew, who testified as follows (p. 123, l. 10):

> "Q During the settlement of the estate did you have conversations with her on occasions? A Yes.
>
> Q Did she ever speak of her will? A Yes.
>
> Q What did she say concerning it? A She wanted to change her will.
>
> Q What did she say? A She said she didn't want that will to take effect.
>
> Q Did she ask how the property would go if she left no will? A She asked me what would happen if she died without a will.
>
> Q What did you tell her? A I told her all her property would go to her brother, as he was her only heir."

This is quite inconsistent with other statements attributed to Mabel Marshall by Mrs. Croake and Mrs. White.

Miss Rockwell, an elderly neighbor who was timid about telling her age (p. 81, l. 30), gives

negative testimony which is of no value whatever, namely, that Miss Marshall never said that she destroyed her will, and never said that she had lost her will (p. 73, l. 20).

Walter Avery, a member of the New York Bar and the New York counsel of Robert Marshall, says he met Mabel Marshall at her home in Summit and talked with her there on two different occasions (p. 127, ll. 1 to 17), once in the middle of August 1932, and again in the latter part of December 1932 (p. 127, l. 25). In the first conversation nothing was said about the Will. He describes the second conversation as follows (p. 128, l. 1, etc.).

> "Q What was said then? A The conversation took place between Miss Mabel and her brother. Her brother asked her whether she wouldn't give him a key to the door. It was on a chair that belonged to her grandfather. He had the chain and he wanted the key. She replied she didn't care to give him the key at that time, but she said he would have it eventually, anyhow. Then he had asked her whether she had made a new will since the death of Maud. She said no, she had destroyed her old will but she had not yet made a new one. That was the conversation."

This testimony that Mabel Marshall said she had destroyed her old Will is utterly at variance with other testimony in the case, particularly that of the complainants, Croake and White, and merely serves to emphasize the confused and contradictory character of the proof.

At the hearing some effort was made by the complainants to prove that the brother Robert had destroyed the Will.

The proof utterly failed and the Vice-Chancellor characterized the implication as "atrocious"

(p. 165, l. 39). No effort is made in the brief in this Court to establish such a thesis.

The Vice-Chancellor properly applied the law that the proofs must be clear and convincing in order to establish a lost Will, or an agreement to make mutual and irrevocable Wills. *Tooker* v. *Vreeland,* 92 N. J. Eq. 340, p. 343; affirmed on opinion 93 N. J. Eq. 224.

The presumption that the Will had been destroyed by Mabel Marshall was not overcome.

In dealing with this phase of the case the Vice-Chancellor referred to the uncertain and speculative character of the testimony as to whether Mabel Marshall did or did not destroy her Will, with the intent to revoke (p. 166, l. 25; p. 167, l. 30) and concluded (p. 167, l. 36):

> "Isn't it possible that with her apparent ill-feeling towards the brother, she may have had a change toward the tailend, and destroyed it? I don't know. The burden is upon those who claim the will is in existence, to prove it. The will is lost. The presumption is it has been revoked. That presumption has not been overcome."

This determination under the confused state of the evidence here, was entirely correct.

So strict is the rule of law that even the possibility of access to the lost Will must be excluded.

In *Campbell* v. *Smullen,* cited in the appellants' brief as *Campbell* v. *Kavanaugh,* 96 N. J. Eq. 724, this Court adopted as its own the opinion of Advisory Master Rosenberg. It was proved in that case that on or about March 1, 1915, Mr. and Mrs. Campbell had executed their Wills. In 1919 Mrs.

Campbell handed her lawyer a copy of her husband's Will, saying:

> "that she had lost her Will, and he thereupon prepared two Wills, one for her and one for her husband" (p. 725).

At the hearing the carbon copy of the Will of 1915 and the draft of the Will of 1919 were produced in evidence (p. 725). It turned out that Mr. and Mrs. Campbell never executed the proposed new Wills of 1919 and the Will of Mrs. Campbell of 1915 was never found (p. 726). The Court stated the question to be:

> "Can this Will of March, 1915, be established as a lost Will?"

The Advisory Master concluded on this question as follows, and this Court adopted his opinion (p. 726):

> "On the whole case, and on the entire evidence that has been produced, I am of the opinion that the will of March 1st, 1915, cannot be established and proved as a lost will, and I may say that I have come to this conclusion after great hesitation and much to my regret.
>
> It is a well-established principle that when a will is left in the hands of the testator, and is not found at the time of his death, a presumption of a revocation arises. And it is equally well settled that this presumption may be overcome by proof.
>
> All the cases, however, are in accord, that where the will is lost or destroyed while in the possession of the testator, the loss or destruction must be without his knowledge, or the presumption of revocation is not overcome. *Sugden* v. *St. Leonards, supra; McBeth* v. *McBeth,* 11 Ala. (N. S.) 596; *Dawson* v. *Smith,* 3 Hous. (Del.) 335; *In re Deaves,* 21 Atl. Rep. 395."

The Court then commented on the fact that Mrs. Campbell, never having executed a new Will, knowing that her 1915 Will was lost,

> "must be presumed to have had a good reason for not executing it" (p. 727).

In *In re Bernhardt's Estate,* 143 Atl. (not officially reported) 92, the Orphans' Court had admitted to probate a copy of a lost Will. On appeal to the Prerogative Court the decree of the Orphans' Court was reversed. Fallon, *V.-O.,* said (p. 95, first column):

> "*Loss* of the alleged will of July, 1924, was not established by proof; and certainly not by proof *clear, satisfactory,* and *convincing* to the court. In *Coddington* v. *Jenner,* 57 N. J. Eq. 528, 41 A. 874, affirmed 60 N. J. Eq. 447, 45 A. 1090, it was held that the execution and contents of a lost will may be established by evidence aliunde, but the proof must be clear and convincing. If the testimony of Mr. Solinsky that he gave the alleged will of July, 1924, to Mr. Bernhardt immediately after its execution (and considering no proof was adduced in the case that Mr. Bernhardt returned said instrument to Mr. Solinsky or placed same upon his desk or table) be regarded as reliable, it may reasonably be presumed when said instrument has not been found, though diligent search was made therefor after Mr. Bernhardt's death, he destroyed it with the intention of revoking it. In *Campbell* v. *Smullen,* 96 N. J. Eq. 724, 125 A. 569, 926, the court referred to the well-established principle that, when a will is left in the hands of a testator, and is not found at the time of his death, a presumption of revocation arises."

In *In re Willitt's Estate,* 46 Atl. (not officially reported) 519, the application was to admit a lost Will to probate. Reed, *V.-O.,* reviewed in detail the facts of the case which were confused and conflicting. It appeared that the decedent

had executed a Will, that it had been put in a wooden box and the box taken to the home of his Father, that about ten days before his death he asked to have the box brought to his house, which was done, and it was put under his bed, where it remained until his death. After his death the box was opened, and the Will was not there. The question was, assuming that the Will had been executed (p. 521, first column),

> "Was that will destroyed by the act of any person other than Theodore S., (the testator) without his consent?"

The Court said (p. 521, bottom of second column):

> "But, assuming the existence of that instrument on February 3rd, I am satisfied that such will was destroyed by the testator himself. The rule of evidence controlling the probate of a lost or destroyed will is that the existence of a duly executed will, and its contents, must be proved with clearness and certainty. *Wyckoff* v. *Wyckoff,* 16 N. J. Eq. 401; *Davis* v. *Sigourney,* 8 Metc. (Mass.), 487. When such a will is proved to have been executed, and it cannot be found at the testator's death, if the will remained in his custody, or after its execution he had ready access to it, the fact that it cannot be found after his death raises the presumption that he had destroyed it, animo revocandi. *Brown* v. *Brown,* 8 El. & Bl. 876-886; *Eckersley* v. *Platt,* L. R. 1 Prob. & Div. 281; *Finch* v. *Finch,* Id. 371; *Loxley* v. *Jackson,* 3 Phillim. Ecc. Judge, 126; *Betts* v. *Jackson,* 6 Wend. 173; *Schultz* v. *Schultz,* 35 N. Y. 653; *Collyer* v. *Collyer,* 110 N. Y. 481, 18 N. E. 110; *Newell* v. *Homer,* 120 Mass. 277. This presumption is rebuttable, but the circumstances proven do not, in my judgment, disprove it, but, rather, fortify it."

The Will had been executed in a fit of anger at his wife (p. 522, second column). The Court

pointed out that after that his attitude and mode of conduct toward his wife changed, and that he cautioned his nurse to keep an eye on the box (p. 522). The Court then said (p. 522, second column):

> "But it is urged that in his feeble condition, during the last two weeks of his life, watched as he was almost constantly by his wife and his nurse, he could not have opened the box and destroyed the will without their knowledge. There is undoubtedly much to be said for this view, and yet he was sometimes alone, and he was able to get from his bed and to move from his bed to a chair and back again. It was, therefore, not impossible for him to have got the paper."

In *In re Calef*, 109 N. J. Eq. 181, affirmed on opinion, 111 N. J. Eq. 355, the application was to probate a lost Will. The execution of the Will was admitted (p. 182) and a copy was produced. The Will was never found after decedent's death (p. 183). Berry, *V.-O.*, observed (p. 184) that the law applicable is well settled, and cited many cases, including those cited, *supra*. He then said (p. 184):

> "The rule of law with which we are most concerned is succinctly stated by Vice-Chancellor Reed in *In re Willitt's Estate, supra,* as follows:
>
> 'The rule of evidence controlling the probate of a lost or destroyed will is that the existence of a duly executed will, and its contents, must be proved with clearness and certainty, * * * When such a will is proved to have been executed, and it cannot be found at the testator's death, if the will remained in his custody, or after its execution he had ready access to it, the fact that it cannot be found after his death raises the presumption that he had destroyed it *animo revocandi.* * * * This presumption is rebuttable.'

> The presumption is one of law in some jurisdictions. *Schultz* v. *Schultz,* 35 N. Y. 653; and of fact in others. *Williams* v. *Miles,* 63 Neb. 851; 94 N. W. Rep. 705; 62 L. R. A. 383, and note; *Paten* v. *Poulton,* 1 Swab. & T. 55; 164 Eng. Rep., Full Reprint 626. And the presumption of revocation must be overcome by 'strong and positive evidence.' *Thomas* v. *Thomas,* 129 Iowa 159; 105 N. W. Rep. 403. The proof on all points must be 'clear, satisfactory and convincing.' *Wyckoff* v. *Wyckoff, Coddington* v. *Jenner* and *In re Bernhardt's Estate, supra;* 'strong, positive and not uncertain,' 2 Schoul. sec. 788; 'strong, cogent and convincing'; or 'clear, full and satisfactory,' I Underh. sec. 275; or 'strong, positive and free from doubt,' *Newell* v *Homer,* 120 Mass. 277; although it has been said that the proof need not be such as to remove all reasonable doubt from the mind of the court (1 Underh. sec. 275), but the line of demarcation between what is 'clear, satisfactory and convincing' and that which removes 'all reasonable doubt' is more fanciful than real."

The proponent of the Will claimed that Mrs. Calef had delivered the original to him to keep (p. 185),

> "that he retained custody of it continuously thereafter until it was lost";

and that he thought he still had possession of it until the day before Mrs. Calef died (p. 185),

> "when he discovered that it was not in the place where he usually kept it; and that subsequent search for it has been fruitless."

He claimed further (p. 185):

> "that after delivery to him the will was never returned to Mrs. Calef; that she never had access to it, and that, therefore, the presumption of revocation by her does not arise. While admitting that the burden of proof is upon him to establish the execution of the will and its contents and the fact of its loss,

> he claims that possession of the will being shown to be in him as custodian, and not in Mrs. Calef, the burden is upon the respondents to trace the will back into the possession of the testatrix. But the rule is not quite as broad and exacting as is contended by counsel for proponent. The text in 2 Greenl. Evid. sec. 681 is:
>
> 'If the will is proved to have been in the testator's possession, and cannot afterwards be found, it will be presumed that he destroyed it, *animo revocandi;* but if it is shown out of his possession, the party asserting the revocation must show that it came again into his custody, or was actually destroyed by his direction.'
>
> But this must be qualified by the rule of access, or opportunity of repossession, and possibility, not probability, of such access is controlling. *In re Willitt's Estate, supra; In re Ascheim's Will,* 135 N. Y. Supp. 515; 75 Mis. (N. Y.) 434. Our law, as I understand it, does not require an *actual tracing* of the will back into the possession of the testatrix, but is satisfied by a showing of access, that is, opportunity of repossession, and upon such showing the presumption of revocation remains until rebutted by evidence which is clear, convincing and satisfactory."

The case at Bar is stronger against the complainants than was the *Calef* case because there is no suggestion in the evidence that anyone other than Mabel Marshall had custody of her Will. In the *Calef* case the Court further observed (p. 186):

> "it has been held that proof necessary to rebut the presumption of revocation must be sufficient to exclude every possibility of a destruction of the will by the testator himself. *In re Ascheim's Will, supra.* There the court said:
>
> 'Petitioner offered perhaps the best evidence obtainable, but it was insufficient to

exclude every possibility of such destruction by the testatrix herself, unless I had also found a want of capacity to revoke. It is apparent in the record that there was a period when the testatrix might have visited the probable repository of the will, and at such time she had it in her power to take the will away with her if she chose. It was necessary for the petitioner to exclude every possibility of a destruction of her will by the testatrix herself. The petitioner has not excluded every opportunity of the testatrix to destroy her will, and therefore has not overcome the presumption.'

In re Willitt's Estate, supra, Vice-Chancellor Reed said:

'But it is urged that in his feeble condition, during the last two weeks of his life, watched as he was almost constantly by his wife and his nurse, he could not have opened the box and destroyed the will without their knowledge. There is undoubtedly much to be said for this view, and yet he was sometimes alone, and he was able to get from his bed and move from his bed to a chair and back again. *It was, therefore, not impossible for him to have got the paper.'* (Italics mine.)

The proponent's case may fail because of the weakness of his own proofs, rather than the strength of that of the respondent, if that weakness leaves the mind of the court unconvinced and uncertain. And the decision may turn upon the credibility of a witness. *Davenport* v. *Davenport* and *In re Bernhardt's Estate, supra.* In *Davenport* v. *Davenport,* the first head note is: 'That a last will and testament has been legally executed and published by the testator, will not be decreed upon uncertain and unreliable testimony.'

There positive evidence of due execution of the will was given by a disinterested witness who, the court said, spoke in good faith and endeavored to tell the truth; but be-

> cause of the variance in his several statements his testimony was deemed unreliable and fatal to the proponent's cause. Here the whole case depends upon testimony which, in my judgment, is uncertain, unreliable and equally fatal to proponent's cause."

The Court then analyzed the testimony at length.

In the case at Bar, after its execution in 1928 Mabel Marshall's Will was in her custody. Although there is no proof to this effect, she presumably kept it in her locked box in The Summit Trust Company. In any event, she had access to the Will at all times. The situation in the case at Bar was not like that in *In re Calef's Will,* where custody had been left with some third person and the defense was remitted to establishing the possibility that the testator could have had access to the Will. Here, the Will was always in the custody of the testatrix. In addition to that is the unimpeached testimony of Miss Mayhew, Mr. Williams' Secretary, that Mabel Marshall said she didn't want that Will to take effect (p. 123, l. 15) and of Mr. Avery, that Mabel Marshall said she had destroyed her old Will, and she hadn't yet made a new one (p. 129, l. 22).

The testimony of the complainants, Mrs. Croake and Mrs. White to the contrary, results in one of two situations, either it leaves the testimony conflicting and uncertain, which must result in upholding the determination of the Vice-Chancellor, or, the testimony of the two complainants must be ignored altogether by reason of Section 4 of the Evidence Act.

The alleged contract between the two sisters, Mabel and Maud Marshall, to make mutual irrevocable Wills was not proved.

The Vice-Chancellor commented on this phase of the case in his conclusions, (pp. 163-165) and, after discussing the evidence, said that there was evidence (p. 165, l. 5)

> "from which we may adduce that there was no binding obligation, quite as readily as other circumstances might possibly tend towards such an arrangement. There is the testimony of the lady in Mr. Williams' office. She expressed to her an intention to make a change in the will. To Mr. Avery she said she had destroyed the will.
>
> From those expressions to these outsiders, and the expressions to the complainants, it would appear that this lady thought she had the right, which rather eliminates from the case a consideration that there was a contract binding upon each of the parties, and that the wills themselves being alike, would have a tendency to establish mutually binding wills."

In his conclusions the Vice-Chancellor referred (p. 164, l. 30) to

> "the case which has been referred to."

That case was *Tooker* v. *Vreeland*, 92 N. J. Eq. 340; affirmed on opinion, 93 N. J. Eq. 224.

The case is relied on by the appellants in their brief.

The Vice-Chancellor was quite right that there was

> "that important element missing from the case at Bar which was present"

in the *Tooker* case (p. 164, l. 29), and that was, the clear and convincing character of the evidence. In the *Tooker* case there was no dispute

about either the agreement to make mutual Wills or the irrevocable character of it.

The testimony on the subject came from William A. Lord, Esquire, an honorable counsellor at law of this State for many years,

> "whose rectitude as a witness was conceded," (p. 343)

and he was corroborated by one of the complainants (p. 345).

Mr. Lord described how Mr. and Mrs. Tooker had come to him together and had stated that they wanted to dispose of their property according to their mutual desires. Mr. Lord testified further as stated by the Court at page 344:

> "I asked Mr. Tooker, who owned the bulk of the property; 'Oh,' he said, 'that doesn't make any difference; we are both one—I and my wife are both one—what is hers is mine and what is mine is hers also—just as much hers as it is mine.' He said that he wanted to leave everything to her during her life; she wanted to leave everything to him during his life, and upon their death that the property be—go to certain designated legatees. He said that he wanted it to be a final disposition of the property and he did not care if it was in one will or two wills; * * *"

Note that the unimpeached testimony was that the mutual Wills Mr. and Mrs. Tooker then made, was "to be a final disposition of the property." The result was that there was no dispute in the testimony. It was clear and convincing and the Court was able to find without any question that the contract for the making of mutual and irrevocable Wills by Mr. and Mrs. Tooker was established.

The case at Bar is very different.

Leonard N. Snedeker, the New York lawyer of Maud and Mabel Marshall, who drew their Wills, was not able to give any such testimony. His testimony was (p. 21, l. 32):

> "Q Now, then, do you recall the conversation, any conversations, you had with them or either of them, in connection with the will, as to what disposition was to be made of the estate? A I recall the conversations were had with both of them together, and they were on the subject of the making of these two wills. Specifically what was said, I can't recall, but the substance of it was what the wills say in themselves."

Mr. Snedeker attended to the execution of the Wills and kept copies. The originals were evidently taken by the sisters because his office did not probate the Will of Maud when she died (p. 23, l. 35) and when asked if he gave Mabel Marshall her will he said

> "I think I did, that is my impression" (p. 25, l. 28).

In *Eggers* v. *Anderson,* 63 N. J. Eq. 264, this Court pointed out that (p. 267):

> "a will is in its very nature ambulatory, subject to revocation during the life of him who signs it. 1 Jarm. Wills ch. 2; *Reid* v. *Shergold,* 10 Ves. 370, 379. Irrevocability would destroy its essence as a will. *Hobson* v. *Blackburn,* 1 Ad. Eccl. 278."

And then said (p. 267):

> "From this mutability of wills it follows that if the whole scope of any arrangement is fulfilled by the mere making of a will, then nothing legally binding upon him who signs the instrument is contemplated, the obligatory force of a contract is not intended, and he remains at liberty to change his mind. The claim that a legal obligation is assumed must be supported by something beyond the consent to make a will."

Any such contract must be capable of specific enforcement in equity. The cases were collected and cited by Vice-Chancellor Backes in the *Tooker* case (92 N. J. Eq. at p. 342) as follows:

> "Many of the cases are gathered by Vice-Chancellor Garrison in *Deseumeur* v. *Rondel,* 76 N. J. Eq. 394. The early English cases are *Dufour* v. *Pereira,* 1 Dick. 419; 2 Harg. Jur. Arg. 304; *Lord Walpole* v. *Lord Orford,* 3 Ves. Jr. 402. See also for collection of cases *Stevens* v. *Myers,* 91 Org. 114; 177 Pac. Rep. 37. An interesting discussion of the subject is to be found in *Edson* v. *Parsons,* 155 N. Y. 555. See also *Rastetter* v. *Hoenninger,* 136 N. Y. Supp. 961; *Herman* v. *Ludwig,* 174 N. Y. Supp. 469. An early case in this state on the subject of enforcing contracts to bequeath is *Johnson* v. *Hubbell,* 10 N. J. Eq. 332, and the leading case is *Duvale* v. *Duvale,* 54 N. J. Eq. 581; 56 N. J. Eq. 375. See also *Lawrence* v. *Prosser,* 88 N. J. Eq. 43.
>
> That such a contract be enforceable it must be, like all other contracts specifically enforceable in equity, founded upon a valid consideration, certain and defined, equal and fair, and sufficiently proven—qualities to which Lord Loughborough said in *Lord Walpole* v. *Lord Orford, supra,* he knew no limitations."

It must be remembered that the effort here is to take from Robert Marshall the property which is indubitably his by operation of law, and to give it to other persons on the theory that Mabel Marshall entered into a compact with her sister, Maud, to make an irrevocable Will.

The proof offered, in addition to being confused and uncertain, is all parol evidence. There is nothing in the mutual Wills which were made in 1928 to indicate that the Will of Mabel Marshall was to be an irrevocable one, or to indicate such compact as is claimed in this case.

The alleged agreement, therefore, was a parol agreement, and, hence, must be regarded with suspicion.

In the leading case of *Vreeland* v. *Vreeland,* 53 N. J. Eq. 387, Chancellor McGill considered the law where equity will specifically enforce a parol contract at the instance of a complainant who has completely performed (p. 389), but with respect to the character of the proof he said (p. 390):

> "But a parol agreement of this character, because of the situation and relations of the parties to it and the consequent opportunity for the perpetration of fraud, is regarded with suspicion, and, when its enforcement is sought, is subjected to close scrutiny. It must not only be mutual, but also definite and certain, both in its terms and as to its subject-matter, and it must be clearly proved. *Cooper* v. *Carlisle,* 2 C. E. Gr. 529, and *Brown* v. *Brown,* 6 Stew. Eq. 657. So, also, it must plainly appear that that which is alleged as part performance is referable to and was consequent upon the contracts alone, for the purpose of carrying it into effect. *Eyre* v. *Eyre,* 4 C. E. Gr. 102; Pom. Spec. Perf. sections 108, 109."

This doctrine, as laid down in the *Vreeland* case, has been frequently approved by our Courts. It was reiterated and approved by this Court in *Howells* v. *Martin,* 101 N. J. Eq. 275, p. 278, where the passage above quoted is set forth in full.

In *Havens* v. *Brown,* 99 N. J. Eq. 75, Backes, *V.-C.,* said (p. 81):

> "The contract sued upon rests entirely in parol. To guard against fraud upon estate the law requires that such contracts must be clearly proven. To justify a decree of specific performance, which in this case

> would take from the Brown estate and give to the complainants' property, worth $100,000 and upwards, the proof must be certain, definite, reliable and convincing. *Vreeland* v. *Vreeland,* 53 N. J. Eq. 387; *Cooper* v. *Colson,* 66 N. J. Eq. 328; *Midmer* v. *Midmer Executors,* 26 N. J. Eq. 299; *Cutler* v. *Tuttle,* 19 N. J. Eq. 549."

In *Johnson* v. *Wehrle,* 9 N. J. Misc. 939, the effort was to enforce a verbal contract to leave property at death in consideration of personal service. Backes, *V.-C.* dismissed the bills. He said (p. 945):

> "At the hearing, the testimony of the principal witnesses did not ring true, and, after reading the transcript, the then impression stands unmodified, that a contract with either complainant is not made out clearly, definitely and convincingly as the law demands in circumstances where temptation to perjury and the opportunity of fraud is so inviting and with little danger of detection. *Vreeland* v. *Vreeland,* 53 N. J. Eq. 387; *McTague* v. *Finnegan,* 54 N. J. Eq. 454."

In *Howells* v. *Martin,* 101 N. J. Eq. 275, this Court reversed the Court of Chancery whose opinion is reported in 99 N. J. Eq. 657.

Counsel for appellants cite and quote from *Edson* v. *Parsons,* 155 N. Y. 555; 50 N. E. 265. They said that that case furnishes "the rationale of the enforcement of mutual wills." and the part they quote sounds favorable to them. As a matter of fact, the case is squarely against them. There, as in the case at Bar, two elderly ladies, sisters, were most devoted to one another and acted in unison and harmony, very much as did the two Marshall sisters. The effort there, as here, was to establish that mutual wills which had been made by the two sisters were made pursuant to a contract that their

respective estates should be disposed of in the manner set forth in these mutual wills (50 N. E. p. 265). After the death of one of the sisters, the other made a new and different will. The trial court found for the defendant. That case differed from the one at Bar in that it was stronger for the appellants than here, because the evidence was not at all disputed, and the defendants rested upon it without offering any proof on their part (50 N. E. p. 267, bottom of first column). But the Court of Appeals was unwilling to have the case decided on the inferences even from the undisputed facts and sustained the judgment for the defendants. The Court said (50 N. E. p. 267):

> "Now, it was essential for the plaintiff to make out a clear proof that the two sisters had made the agreement under which he asserted his rights to equitable relief; for otherwise, as will be noticed hereafter, he would be in no position to claim that Mary's legatees and legal representatives under her subsequent will were bound, in a trust capacity, to apply the property received by them to the purposes of that original agreement. The argument of the appellant is not that Mary, by such an agreement, had incapacitated herself from making another will, but that her estate and her legal representatives were bound by an antecedent obligation assumed by her, namely, a contract entered into with her sister, Susan, to the effect that, in consideration of each leaving by will to the other all of her property remaining after the deduction of certain gifts, the one surviving would make the brother Marmont the residuary legatee of what she should be possessed of at her death. The evidence given upon the trial was of facts which were not disputed. It was wholly offered by the plaintiff, and the defendants rested upon it, without deeming it necessary to offer any on their part. It was not

direct as to the making of any agreement, but consisted in the facts relating to the execution of the wills, and to the lives and habits of the testatrices, and their relations to the property. But these apparent and admitted facts cannot be said to be such as presented a pure question of law, for they left it to inference whether any such contract had been made by the two sisters. The trial court might infer from the evidence that the wills were made in pursuance of, and evidenced, with the surrounding circumstances, such a contract, or it might, as it did, infer that the simultaneous execution of similar wills was a coincidence, or, more correctly speaking, was merely an act in these sisters' lives, without stronger significance than to illustrate how closely bound up they were in common habits of thought and of conduct. Conflicting inferences were furnished by the proofs upon the trial as to the fact in issue of any agreement, which were to be decided by the trial court. I know of no absolute rule of law which impresses upon wills, similar in their cross provisions, that mutual character, by force of which the survivor's estate comes under a trust obligation. I understand that something more is needed to warrant equitable intervention, and, in the absence of an express agreement, that it must be found in circumstances which so surround the transaction as imperatively to compel the conclusion that the parties intended and undertook to bind themselves and their estates irrevocably in the event of the prior death of one."

And again, in discusing the facts (p. 267):

"They constituted, by their terms, no mutual contract, however reciprocal their provisions might appear. Whether they were reciprocally binding depended upon the existence of an agreement or a clear understanding to that effect, and that was, of necessity, left to inference from all the facts which the plaintiff could collate. There en-

tered into the consideration of the question the probability or improbability of so mutual and far-reaching a contract having been made between these sisters. Their closeness of union and mutual affection would seem to negative the idea that each proposed to give to the other upon condition, and to restrict the future disposition by the survivor of her estate, in all the contingencies which might affect her in her future relations to the world about her, and even to the brother, who was proposed as the residuary legatee of the surivor. These were considerations which would contribute to the doubt upon the correctness of the plaintiff's contention. It became the delicate and responsible task of the trial judge to make that inference from the facts, which he believed, upon carefully weighing them, that they, on the whole, supported. They did not compel, in my opinion, a different conclusion than that reached. The burden upon the plaintiff was not shifted by merely giving evidence which was susceptible of different inferences. She had made no conclusive case until she had given such proofs as permitted but the one inference of an agreement. Until then, the possibility of there having been no agreement whatever was not excluded. I think we are bound to hold that the facts were such as to support the finding of the trial court, that no agreement was proved, and that it is impossible for us to say that there was but a question of law, upon the undisputed evidence, open to our review upon original considerations."

The Court discussed the decisions with great learning, particularly, *Dufour* v. *Pereira*, 1 Dickens 419, (p. 268, bottom of second column) and Lord Walpole's case (p. 269, first column) and said further (p. 269):

"The wills were similarly made, and hence showed concert of action and similarity of purpose, but not necessarily a binding agree-

ment of such solemnity and far-reaching consequences as the appellant claims. To argue upon the basis that they are mutual wills, begs the question. That is a fact to be established by evidence showing that such was the understanding and the deliberate agreement. The scheme was clear, but what shows conclusively that each sister understood that the other was irrevocably bound? Is such an inference the only one warranted by the situation and circumstances? This cannot quite be likened to that class of cases where a devise has been made upon the faith of a promise which equity will enforce when founded upon a sufficient consideration, or where a fiduciary relation exists, which procures the devise to be made upon representations without which the devisee would not have taken. The wills in question were not made, evidently, to accomplish a family settlement, but a general disposition of the estates of the testatrices. They were bound by the closest ties of blood and affection, and their lives were bound up in the most intimate intercourse. In giving to the other the bulk of her estate, each yielded to the natural dictates of an unbounded affection which entitled the other to the first consideration, and to an unlimited confidence, in the use and disposition of her property. Hence the testamentary gift was absolute, and untrammeled by any limitations. The only condition of the gift was that the other should survive the proof of the will,—not without some degree of significance, in my opinion, of the intended absoluteness of the taking by the survivor. How can we say with certainty that each intended and understood that the other was forever bound by the disposition then made, and which undoubtedly did seem to them at the time the better and wiser to be made? Was the surviving sister not to be free, in all the contingencies of life, with all the possible mutations in her relations to others, or in the worthiness of the destined objects of their

> bounty, to make such other testamentary dispositions as might seem wise, or in better accord with her sentiments? These are most serious questions for consideration upon the plaintiff's appeal to a court of equity for relief. They had their proper place in the judicial mind, in determining upon the existence of the contract, in enforcement of which the plaintiff was asking the equitable interference of the court. Giving full effect to the equitable rule which recognizes and enforces agreements under which mutual and reciprocal wills are made, and which lays hold of all circumstances to enable the court to carry it out when it would be inequitable to defeat it, my conclusion is that the facts of this case were not of a character that compelled the inference of an agreement, and that they supported the adverse determination made below."

It isn't often that a reported case comes so close to the case at Bar as does this case of *Edson* v. *Parsons*. The parallel as to the facts is striking. The case is stronger against complainants here than in the Edson case, because there was no conflicting testimony there as in the case at Bar (the defendant having rested on the plaintiff's evidence), and the argument which the plaintiffs advanced in that case, and which the Court refused to sanction, was based on inferences from undisputed facts. Nevertheless, the three New York Courts, the trial court, the Appellate Division, and finally, the Court of Appeals, as reported in the cited case, refused to yield to the speculative inferences to be drawn from the undisputed facts in that case and stood squarely on the sound, legal proposition that the Court, not being able to say, with certainty, that each sister intended and understood that the other was forever bound by the disposition then made, no agreement to make irrevocable Wills was made out or could be upheld.

The same principle applies to the case at Bar, even more strongly, because here we have contradictory and uncertain evidence, and it is equally possible to draw diametrically opposite inferences from different parts of the proofs as set up in the record.

The evidence of the complainants, Mrs. Croake and Mrs. White, was incompetent under Section 4 of the Evidence Act (2 C. S. 2218, Amended, P. L. 1931, Chapter 163).

Sec. 4 reads as follows:

> "In all civil actions any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity * * *; provided, this section shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator * * * represented in said action, unless the representative offers himself as a witness on his own behalf and testifies to any transaction with or statement by his testator * * * in which event the other party may be a witness on his own behalf as to all transactions with or statements by such testator * * *."

Where the act operates to bar the evidence, it cannot be considered. Thus, this Court in *Howells* v. *Martin,* 101 N. J. Eq. 275, said (p. 277):

> "In connection with this the competency of the testimony of Robert Daley is attacked. The evidence was not competent under section 4 of the Evidence act, and the conveyance by deed and bill of sale to respondent for nominal considerations did not make Robert Daley a competent witness. *Platner* v. *Ryan, Executor,* 76 N. J. Law 239; *Moosbrugger* v. *Swick,* 86 N. J. Law 419.
>
> The learned vice-chancellor in his conclusions gave no consideration to this testimony, and rightly so.

> Excluding the testimony we are unable to reach the conclusion that an irrevocable contract to make mutual wills was established."

The most recent expression of this Court on this question is found in *Ward* v. *McLellan*, 117 N. J. Eq. 475. In that case one Ringle died, leaving a Will wherein he left all his property in trust, the income

> "or so much thereof as may be necessary for the support, comfort and maintenance"

to be paid to his wife during her life. Mrs. Ringle filed a claim against the estate and thereafter executed an assignment to her daughter, Emilie M. Ward. The consideration of the assignment was for the daughter

> "to provide food and shelter for the party of the second part (Mrs. Ringle) for the rest of her natural life" (p. 476).

It was contended that Mrs. Ringle was disqualified by the statute from testifying. The Vice-Chancellor who heard the case admitted the evidence, but this Court reversed and said, by Mr. Justice Case (p. 478):

> "It may be more comprehensively stated that the assignor remains incompetent if and so long as he retains a substantial interest in the outcome of an action on the claim. A payment of value to the assignor does not, we think, conclusively meet the situation against which the statute is directed. Until a living party to a transaction with a decedent has entirely divested himself of his stake in the result of an action thereon so that the magnet of self-interest no longer pulls upon him, he has not, in our opinion, ceased to to be a 'party' as that word is used in the statute. If it becomes necessary, for the purposes of the record, to bring in as a party (*Cullen* v. *Wolverton*, 65 N. J. Law 279) one who is not so named but who by that definition should be, a court order

to that effect may be made. *Platner* v. *Ryan, Executor, supra,* and *Moosbrugger* v. *Swick, supra.* Indeed, formerly the assignor was a necessary party to a suit brought by the assignee in equity. *Harris* v. *Esperanza Mining Co.*, 91 N. J. Eq. 163, 167.

The circumstances in proof lead to the conclusion that the assignment before us was motivated solely by the purpose to make Mrs. Ringle competent to testify. When such a purpose is apparent, we consider that the burden is upon the one who produces an original party to the transaction as a witness to satisfy the court that the witness has been divested of all disqualifying interest in the outcome."

Applying the doctrine of that case to the case at Bar, both of the complainants, Mrs. Croake and Mrs. White, were strongly pulled by "the magnet of self-interest" in giving their testimony, in addition to the fact that each of them is a party complainant to the suit. The Vice-Chancellor was quite correct when he said (p. 163, l. 35):

"In support and for the support of that compact we have only the evidence of the two complaining witnesses, Mrs. Croake and Mrs. White, and they are materially financially interested in the outcome of this suit; and I hold now that their testimony is inadmissible for the purpose of establishing a compact. I also hold that their evidence in this suit to establish a lost will is inadmissible for the purpose of showing that the will was lost."

The bill was originally filed against The Summit Trust Company in its individual capacity, but, as amended, it is against The Summit Trust Company as Administrator. The amendment was made on August 14, 1934. (See addendum to this brief.) The hearing was on December 17, 1934 (p. 19, l. 25). The Summit Trust Company,

therefore, appeared on the record as the representative of the decedent. See *McKinley* v. *Coe,* 66 N. J. Law 70, p. 74. This brought the situation squarely within Section 4 of the Evidence Act. Mrs. White and Mrs. Croake, as parties to the action, could not testify to any statement made to them by Mabel Marshall whose estate was represented in the action by The Summit Trust Company, Administrator. No officer or representative of the Administrator testified to any transaction with or statement made by Mabel Marshall.

In *Hoffman, Executor* v. *Maloratsky,* 112 N. J. Eq. 333, this Court by Mr. Justice Heher said (p. 335):

> "The design of the rule of evidence prescribed by section 4 of the Evidence act is to produce equality between the parties, by silencing the one who may, by his own mouth, be able to testify to transactions and conversations with the decedent, possible to the disadvantage of his estate, unless the representative of that estate should, by his own conduct, remove the interdict. *Woolverton* v. *Van Syckel,* 57 N. J. Law 393. Our courts will not lend assistance to efforts to escape the bar of the statute. *Snyder* v. *Harris,* 61 N. J. Eq. 480; *Platner* v. *Ryan,* 76 N. J. Law 239.
>
> No relief can be had in equity. The fact that the rules of evidence will not permit appellants to avail themselves of the only existing proof to establish the cause of action stated in the counterclaim, does not entitle them to relief in equity. *Linn* v. *Neldon's Administrator,* 23 N. J. Eq. 169."

With the testimony of Mrs. Croake and Mrs. White eliminated, we have only the negative testimony of Miss Rockwell for the complainants, that Mabel Marshall never said that she had destroyed her Will, and never said that she

had lost her Will (p. 73, ll. 20 to 25) and we have the positive testimony, uncontradicted, of Miss Mayhew, that Mabel Marshall said she wanted to change her Will, that she did not want it to take effect, and inquired what would happen if she died without a Will, and was informed that the property would go to her brother as he was her only heir (p. 123, ll. 15 to 25). We also have the positive testimony of Mr. Avery, that Mabel Marshall said that she had made no new Will since the death of her sister, Maud, that she had destroyed her old Will, but had not yet made a new one (p. 128, ll. 12 to 16).

In addition, we have the fact that the Will cannot be found, and that the testatrix, Mabel Marshall, had access to it at all times. The presumption, not overcome by proof, is, she destroyed it *animo revocandi.*

The bar of Section 4 of the Evidence Act to the testimony of the complainants is not overcome, as argued by the appellants.

(1) Counsel argues (Appellants' Brief p. 38) that Section 4 of the Evidence Act does not apply because the proceeding before the Court is not a civil action, but is a judicial inquiry.

This allegation is made on the authority of *Veazey's Case,* 80 N. J. Eq. 466.

The complete answer is, that this proceeding is not one for the probate of a Will. The Court of Chancery is not a Probate Court. The bill is filed under the well recognized Chancery practice, (a) to establish a lost Will; and (b) to impress a trust.

The suit, therefore, is a civil action.

(2) Counsel argues (Appellants' Brief p. 39) that Section 4 of the Evidence Act does not apply because they say that

> "testimony of transactions with the decedent is inadmissible in a suit where devisees are sued upon obligations of their ancestors where they have succeeded to his real estate."

Obviously, this is not that kind of a suit.

Burr v. *Bloomsburg*, 101 N. J. Eq. 615, is cited. That suit was in the nature of an equitable replevin to recover a diamond ring of peculiar sentimental value (p. 616). The ring had been in possession of one George Bloomsburg until his death (p. 618). In the course of his opinion Berry, *V.-C.* discussed the contention of the defendant, that (p. 624)

> "notwithstanding the executrix of George Bloomsburg is not, as such, made a party defendant, she, as devisee under his will, stands in a representative capacity and that therefore, under section 4 of the Evidence act, no evidence of any transaction by the decedent is admissible."

He cited cases and said (p. 624):

> "Under these decisions it is plain that where devisees are sued as owners of land upon which, or in relation to which equitable rights are claimed, evidence of transactions with the decedent are admissible. In *Hodge* v. *Coriell, supra,* which was a replevin suit at law against one who set up a right as executor, such evidence was held admissible."

(as quoted in the Appellants' Brief p. 39).

He disposed of the contention on the ground that the executrix was not a party on the record. On this he said (p. 624):

> "In the *McKinley Case* Vice-Chancellor Emery said that the court of errors and

> appeals had held that the test of representative capacity was 'whether one party or the other appeared *on the record* as a representative of the decedent.'"

Here, The Summit Trust Company is a party as Administrator on the record, in addition to the expansion of the meaning of Section 4 of the Evidence Act as recently laid down by this Court in *Ward* v. *McLellan*, 117 N. J. Eq. 475. It is interesting to note that the *McLellan* case was decided January 10, 1935, and the Vice-Chancellor announced his conclusions February 25, 1935, and very evidently had the *McLellan* case in mind when he said that the two complainant witnesses, Mrs. Croake and Mrs. White,

> "are materially financially interested in the outcome of this suit; and I now hold that their testimony is inadmissible for the purpose of establishing a compact."

(p. 163, l. 36)

In the *McLellan* case this Court held (117 N. J. Eq. at p. 478):

> "Until a living party to a transaction with a decedent has entirely divested himself of his stake in the result of an action thereon so that the magnet of self-interest no longer pulls upon him, he has not, in our opinion, ceased to be a 'party' as that word is used in the statute."

(3) Counsel argues that the present suit is not such as to charge the decedent's estate with liability, but that the Administrator must

> "be regarded solely as a 'stakeholder'"

(Appellants' Brief p. 42).

The duty of the defendant Administrator of this estate is much broader than that of a mere stakeholder. As Administrator it is its duty to collect the assets, pay the debts and turn over the estate to the heir-at-law. The payment of

the debts necessarily involves serious duties with respect to transfer inheritance taxes to the State of New Jersey and estate taxes to the United States Government, the value of the estate being approximately $200,000.

In the bill of complaint paragraph 5 of the First Cause of Action (p. 2, l. 34) it is alleged that

> "letters of administration upon the said estate were granted on the 21st day of July 1933 to The Summit Trust Company of Summit, New Jersey, which took upon itself the burden of administering the said estate."

The same allegation is repeated in the Second Cause of Action, paragraph 6 (p. 5, l. 14).

The complainants, by the very language of the bill of complaint admit that defendant, The Summit Trust Company as Administrator is more than a mere stakeholder, and that it has the burden of administering the estate.

It cannot be said, therefore, that the defendant Administrator is a mere stakeholder.

Nor does the Nebraska case of *Sorensen* v. *Sorensen,* 100 N. W. 930, cited in the brief, apply.

That case came before the Supreme Court of Nebraska four times and is reported, respectively, in 77 N. W. 68; 94 N. W. 540; 98 N. W. 837; and 100 N. W. 930, cited in appellants' brief.

Originally, the question was whether Hans C. Sorensen had died, unmarried, or had left a widow him surviving. It was finally decided that he did not leave a widow. See 77 N. W. 68; 98 N. W. 837.

When the case came before the Court, as reported in 100 N. W. 930, the situation was that an Administrator had been appointed. See 98 N. W. p. 837; 100 N. W. at p. 931.

The contest, as reported in 98 N. W. 837 and 100 N. W. 930, was not, as here, between a claimant and the administrator, but was between two sets of heirs as claimants. (Note in the case at Bar that the complainants are *not* heirs of Mabel.) A question arose as to which of the parties had the right to open and close, and the Court in 98 N. W. 837, said (p. 838, bottom of first column):

> "The question before the trial court was not, which of the parties actually before it was entitled to a decree, but whether either of them was, and, so far as the right to open and close is concerned, they were on equal footing. They occupied a position analogous to that of rival claimants for the same fund who have been brought before a court of equity by a bill of interpleader requiring them to interplead for the fund in order that their respective rights may be ascertained and determined and the plaintiff exonerated."

This same language is quoted by the Court in 100 N. W. 930. The particular point which the Court adjudicated upon there was, whether the Mother of one of the rival claimant heirs should be permitted to testify. It was the Mother who was referred to in the opinion as quoted in the appellants' brief (p. 42), where it is said:

> "It may be conceded that the witness was interested."

That particular proceeding, as the Court pointed out, was not the Administrator's controversy because, as the report shows, the litigation

was provoked by one set of rival claimants and heirs filing a petition in the Probate Court for the distribution of the estate to them. The other claimant and heir filed an answer and cross-petition, in which he prayed for a decree of distribution. See 98 N. W. 837, p. 838, top of first column; 100 N. W. 930, p. 931, first column. The Court very properly held that they were substantially rival claimants for the same fund.

The situation there was totally different from that in the case at Bar. The complainants are not heirs, and do not contend against Robert Marshall on any such basis.

In this connection it is interesting to note that when this *Sorensen* case first came before the Court, as reported in 77 N. W. 68, the application was for letters of administration on the estate of Hans C. Sorensen, on behalf of certain nephews and nieces. The alleged widow appeared and claimed that she was entitled to administration. One of the questions in that case was, whether the widow, Mrs. Ferguson, could testify to conversations with the decedent. Since the proceeding was a contest over the right to appoint an Administrator, there was no Administrator party before the Court, but the Court said (77 N. W. 68, p. 69, bottom of second column):

> "But the term 'representative,' in this section of the Code, is not limited to legal representatives, but applies to any person or party who has succeeded to the rights of the deceased, whether by purchase, descent, or operation of law. *Wamsley* v. *Crook,* 3 Neb. 344; *Kroh* v. *Heins,* 48 Neb. 691, 67 N. W. 771. The heir at law, then, in the proceeding in which Mrs. Ferguson testified, appeared on the record as the representative of the deceased."

The Court then said at p. 70 (middle of first column):

> "The true test is, as it was at common law, will the witness gain or lose by the direct, legal operation and effect of the judgment or final order rendered in the proceeding in which the testimony is offered, or will the judgment pronounced in that proceeding be legal evidence for or against the witness in some other action? 1 Greenl. Ev. Sec. 390. If the direct effect of the judgment rendered in the proceeding would be to devest the decedent's representative of real estate, and vest it in the husband of the witness, then her testimony would be incompetent (*Wylie* v. *Charlton,* 43 Neb. 840, 62 N. W. 220), because the moment her husband became invested with the title to real estate the witness would become entitled to an inchoate right of dower therein (*Butler* v. *Fitzgerald,* 43 Neb. 192, 61 N. W. 640)."

This is very much in line with the ruling of the Court in *Ward* v. *McLellan,* 117 N. J. Eq. 475, p. 478.

Section 6 of the Evidence Act does not overcome the effect of Section 4 of the Evidence Act in this case.

Section 6 reads as follows:

> "The complainant or petitioner in any action or proceeding of an equitable nature in any court, shall be a competent witness to disprove so much of the defendant's answer as may be responsive to the allegations contained in the bill of complaint or petition, and any defendant in any such action or proceeding shall be a competent witness for or against any other defendant not jointly interested with him in the matter in controversy (P. L. 1900, p. 363)."

This section has been construed to have a very limited scope in *Connors* v. *Murphy,* 100 N. J. Eq. 280, where this Court by Mr. Justice Trenchard said (p. 284):

> "Finally, the complainant contends that the vice-chancellor erred 'in excluding the testimony of the complainant, Thomas Connors, regarding transactions with the deceased Bridget English,' the intestate of the defendant administratrix. We think not.
>
> "The complainant now relies upon section 6 of the Evidence act. Comp. Stat. p. 2223. But this section only renders a complainant, otherwise incompetent, competent to a limited extent, and does not allow him to testify generally. His evidence must be limited to the disproof of so much of the defendant's answer as is responsive to the allegations of the complainant's bill. *Lanning* v. *Lanning,* 17 N. J. Eq. 228; *Marlatt* v. *Warwick,* 19 N. J. Eq. 439; *Williams* v. *Vreeland's Executors,* 30 N. J. Eq. 576."

Other cases construing or referring to Section 6 are:

> *Hesselbrock* v. *First National Bank,* 106 N. J. Eq. 339, p. 340;
>
> *Lanning* v. *The Administrator of Lanning,* 17 N. J. Eq. p. 233;
>
> *Marlatt* v. *Warick and Smith,* 19 N. J. Eq. 439, p. 444;
>
> *Williams* v. *Vreeland's Executors,* 30 N. J. Eq. 576, p. 578.

In *In re Broderson,* 112 N. J. Eq. 532, Bigelow, *V.-O.* construed Section 6 of the Evidence Act. Although that case was in the Prerogative Court, he held, it

> "stands on the same footing as if she had sued in Chancery" (p. 535).

He stated the point of law as follows (p. 534):

> "The appellant produced the notes and testified that she was the holder thereof. Testimony by her as to the consideration for the notes would have brought in conversations or transactions with the deceased, and upon objection by the exceptants, was excluded. The ruling was correct, if section 4 of the Evidence act (Comp. Stat. p. 2218) governs. But appellant contends that her testimony should have been received pursuant to section 6 of the Evidence act (Comp. Stat. p. 2223)."

He then gave the following interesting and informative construction of Section 6 (p. 535):

> "To understand section 6 of the Evidence act, we must look back many years. The equity practice which we inherited from England required that the answer to a bill should be sworn to. So much of the answer as was strictly responsive to the bill was, upon the final hearing, evidential of the facts therein stated. It was not until 1867 that the legislature permitted a complainant to call upon the defendant to answer without oath, and provided in such case that the statements in the answer, whether responsive or not, should not be evidence against the complainant upon the hearing. P. L. 1867, p. 166; Comp. Stat. p. 417, Sec. 19. It was also the law in the courts both of equity and of law, that a party to a cause was not a competent witness. This rule was modified by successive enactments. By P. L. 1849, p. 265 and P. L. 1852, p. 256 (Comp. Stat. p. 2218, sec. 2), a party in an action was made an admissible witness when called by his adversary. Lastly, by P. L. 1859 p. 489 (now embodied in Comp. Stat. p. 2218, sec. 4), a party was in general admitted as a witness in his own behalf. The section on which appellant relies became law in 1855. P. L. 1855, p. 668. At that time, a complainant in equity was under the disadvantage that his testimony was not admissible while the de-

> fendant's evidence contained in the answer was admissible. The obvious purpose of the statute was to place the parties on a parity and to permit a complainant not to testify generally, but merely to disprove so much of the answer as is responsive to the allegations of the bill, and therefore evidential. This section was not authority for the reception of appellant's testimony in the present cause."

The bill in the case at Bar does not pray that the defendants answer under oath, and the answers are not under oath.

Section 19 of the Chancery Act, 1 C. S. p. 417, provides as follows:

> "The complainant may in any bill in Chancery pray that the defendant answer without oath, in which case the answer need not be sworn to and the allegations and statements therein, *whether responsive or not, shall not be evidence against the complainant,* except upon a motion to grant or dissolve an injunction on which motion the statements and denials in an answer duly sworn to shall have the same effect as heretofore."

The complainants in the case at Bar are not called on to overcome a sworn answer. The allegations in the answer as filed are not evidence against them. They have the general statutory right as parties to testify, subject only to the limitations of Section 4. There is no occasion, therefore, to invoke Section 6, the object of which was, as Vice-Chancellor Bigelow said, "to place the parties on a parity."

Moreover, the allegations of the answer are not "responsive" to the bill in the sense that that phrase is ordinarily used.

The first cause of action alleged by Par. 3 (p. 2), that the Will could not be found. To this

the defendant, Robert Marshall, answered, "this defendant denies the allegations" (p. 13, l. 36).

The first cause of action by paragraphs 9 and 10 (p. 3) alleged on information and belief that Mabel Marshall never revoked her Will and did not execute a subsequent Will. To this the defendant, Robert Marshall, answered, that "he denies the statements of paragraphs 9 and 10" and says that the said Mabel Marshall died intestate leaving this defendant as her only heir at law (p. 14, l. 10).

The second cause of action by paragraph 1 (p. 4) alleged an agreement of the two sisters to make mutual and reciprocal Wills for the benefit of each other and for the benefit of the devisees and legatees named in paragraph 6 of the first cause of action, which included the two complainants.

The defendant, Robert Marshall, answered denying the statements, and he further answered alleging that Mabel Marshall died intestate leaving him as her only heir at law (p. 14, l. 30).

The defendant, Summit Trust Company, as administrator, answered the first and second causes of action that it had no knowledge or information sufficient to form a belief as to the statements therein, except that it admitted that it had been appointed administrator of the estate of Mabel Marshall (p. 15).

The answer of Robert Marshall is in effect a general denial. This cast on the complainants the duty of proving the allegations of their bill in the first instance, and would not have opened the door to them, even under the sworn answer practice, to testify contrary to the bar of Section 4 of the Evidence Act.

Thus, in *Buttrick* v. *Holden*, 13 Met. (Mass.) 355, the Court said (p. 357):

> "It is for the plaintiff to prove the allegations in the bill which are denied by the answer."

In Story's Equity Pleadings, 5th Edition, Section 849-A, the author says:

> "An answer which contains facts which are not responsive to any allegations or interrogatories in the bill is not evidence for the defendant."

To the same effect are the earlier cases in our books dealing with the old practice under sworn answers.

See:

Hutchinson v. *Tindall*, 3 N. J. Eq. 357, p. 364 (1835);

Black v. *Lamb*, 12 N. J. Eq. 108, p. 123 (1858);

Lanning v. *Administrator of Lanning*, 17 N. J. Eq. 228, p. 233, (1865).

In *Hesselbrock* vs. *First Nat. Bank*, 106 N. J. Eq. 339, there was no objection to the testimony from the executor (p. 340).

It does not appear whether the observations of this Court in *Connors* v. *Murphy*, 100 N. J. Eq. 280, p. 284, were directed to a sworn or unsworn answer. The situation in this case is quite similar to that in the *Murphy* case in that there is nothing in the record sent up to indicate that any suggestion was made in the Court below that the evidence of the complainants, Mrs. Croake and Mrs. White, was competent to disprove any part of the defendant's answer. The language of Mr. Justice Trenchard in the

Murphy case is quite apt here (100 N. J. Eq. at p. 285).

> "At the trial there was apparently no reliance upon that section, and no suggestion—not even the slightest—that the evidence tendered was competent as disproof of any part of the defendant's answer which was responsive to the complainant's bill. And our examination of the record, in the light of complainant's argument here, fails to disclose that any excluded testimony was competent for the reason now for the first time suggested."

That remark applies equally to the case at Bar.

This whole discussion, however, is really academic because the Vice-Chancellor, as already pointed out, gave the complainants the benefit of every doubt and considered their case on the theory that the testimony of the complainants, Mrs. Croake and Mrs. White, was competent. See the conclusions of the Vice-Chancellor, page 124, line 22, where he said

> "if we lay aside for the moment the rule of evidence and take into consideration their testimony—and that is what I am going to do—their testimony does not establish, and not by far, a compact or arrangement between the sisters to the making of mutually binding Wills."

He was compelled to this conclusion because of the uncertain and contradictory state of the proofs.

As against the testimony of Mrs. Croake, that Mabel said when she learned that Mrs. Croake had a copy of Maud's Will,

> "Well, alright, then you have a copy of my Will, too,"

(p. 49, l. 17), and the testimony of Mrs. White to the same effect (p. 51, l. 38), we have the totally

contradictory and unimpeached testimony of Miss Mayhew, in the late Spring of 1932 (p. 124, l. 11) that Mabel

> "had told me her Will was like her sister's,"

(p. 126, l. 15) and that

> "she did not want that Will to take effect. She wanted to make changes in it."

(p. 126, l. 18), and also the unimpeached testimony of Mr. Avery that Mabel told him in the latter part of December 1932 (p. 127, l. 27) that

> "she had destroyed her old Will, but she had not yet made a new one."

(p. 128, l. 15).

With the state of the proofs in this condition growing out of this conflict of testimony, besides all the other elements in the case creating doubt and uncertainty, including the fact that Mabel always had possession of her Will and that it could not be found after her death, and giving the complainants the benefit of their testimony without reference to Section 4 of the Evidence Act, the Vice-Chancellor had no choice under the strict rules as laid down by this Court, but to dismiss the Bill.

Giving effect to Section 4 of the Evidence Act, which must be done in this case, the testimony of Mrs. Croake and Mrs. White is ruled out, and the testimony of Miss Mayhew and Mr. Avery stands without contradiction, which again with the other elements in the case, necessarily results in a dismissal of the Bill.

Reservation.

Respondents ask leave to reserve their right to apply for an allowance of counsel fees and costs.

It is respectfully submitted that the decree dismissing the Bill is right and should be affirmed.

WILLIAMS & WILLIAMS,
Solicitors for The Summit Trust Company, Administrator, and Robert Jesse Marshall.

CONOVER ENGLISH,
Of Counsel.

Addendum.

IN CHANCERY OF NEW JERSEY.

Between

AGNES CROAKE and ELLEN LOUISE WHITE,
Complainants,
and
THE SUMMIT TRUST COMPANY, ROBERT JESSE MARSHALL, ALBERT A. MARSHALL, J. DUPREE STANARD, BENJAMIN STANARD, LULU REED, MARTHA WHITMORE, BROOKLYN BUREAU OF CHARITIES and THE BROOKLYN TRUST COMPANY,
Defendants.

100/632.
On Bill, etc.
Order.

On motion of Louis E. Klein, Esquire, solicitor for complainants, before the Honorable John H. Backes, the Vice-Chancellor of this Court, to whom this cause has been heretofore referred for hearing:

It is on this 14th day of August, 1934, ORDERED that the title and pleadings heretofore filed in the above cause be amended so that wherever the words "The Summit Trust Company" do appear, they shall be amended to read "The Summit Trust Company, administrators of the estate of Mabel V. Marshall, Deceased."

LUTHER A. CAMPBELL,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

The entry of the above order is hereby consented to.

WILLIAMS & WILLIAMS,
Solicitors for the Defendants,
The Summit Trust Company
and Robert Jesse Marshall.

PITNEY, HARDIN & SKINNER,
Solicitors for the Defendant,
Brooklyn Bureau of Charities.