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Petition for Probate.

PETITION.

Filed April 14, 1926.

ESSEX COUNTY SURROGATE'S COURT.

In the Matter of the Probate of the Alleged Will of EDWARD McDOWELL, deceased.	*On Petition for Probate.* *Petition.*

To the Surrogate of the County of Essex:

The petition of Montclair Trust Company, who resides at No. 475 Bloomfield avenue, Montclair, New Jersey, respectfully shows that:

1. Edward McDowell, late of the Town of Montclair, in the County of Essex and State of New Jersey, departed this life more than ten days ago, to wit, on the 18th day of February, 1926, having first duly made and executed a paper writing purporting to be his last will and testament, bearing date the 4th day of August, 1925, wherein your petitioner was named as executor thereof.

2. The next of kin and heirs at law of the said testator, with their respective residences or post office addresses and the manner and degree in which they severally stand related to the said testator, so far as the same are known to your petitioner are as follows:

Names.	Residences.	Relationship.
Marie M. McDowell,	Baltimore, Md.	widow

No child or children nor issue thereof surviving.

Father and mother dead.

Beta Claybill-Smith,	Baltimore, Md.	sister

No other brothers or sisters nor issue thereof surviving.

All of the foregoing are of full age.

Your petitioner therefore prays that the said paper writing be admitted to probate as the last will and testament of the said testator and that letters testamentary thereon be granted to your petitioner.

Dated, Newark, N. J., April 14, 1926.

MONTCLAIR TRUST COMPANY,

By HOWARD M. PENDLETON,
Trust Officer.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

HOWARD M. PENDLETON, of full age, being duly sworn according to law, upon his oath deposes and says, that he is trust officer of the Montclair Trust Company, the petitioner in the foregoing petition named and that the matters and things therein contained are true to the best of his knowledge and belief.

HOWARD M. PENDLETON.

Subscribed and sworn to this 14th day of April A. D. 1926, at Newark, N. J., before me,

JOHN C. FINERAN,
Notary Public of N. J.

Will of Edward McDowell.

Probated April 15, 1926.

I, EDWARD MCDOWELL, of the Town of Montclair, in the County of Essex and State of New Jersey, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this to be my Last Will and Testament, as follows:

FIRST: I direct that all my just debts and funeral expenses be paid out of my estate as soon after my decease as convenient.

SECOND: I give and bequeath to my beloved wife, Marie M. McDowell, the sum of Five Thousand Dollars.

THIRD: I give, devise and bequeath all the rest, residue and remainder of my estate, of whatsoever nature and wheresoever the same may be, both real and personal, to the ART STUDENTS LEAGUE OF NEW YORK, at present located at No. 215 West Fifty-seventh street, New York City, in trust, nevertheless, to invest and reinvest the same, and to create a fund in memory of my beloved father, Edward G. McDowell, said fund to be known as the EDWARD G. MCDOWELL TRAVELLING SCHOLARSHIP, and to apply all the net income and profits arising from said fund to the education of one or more deserving and talented art students for study in France, or in such other countries, other than the United States of America, where in the judgment of the Trustees of the said Art Students League of New York, his or her artistic ability can be best developed. In case any such student should marry while receiving any support or assistance under this scholarship, then he or she

shall at once cease to become entitled to receive any further benefit therefrom.

FOURTH: I hereby nominate, constitute and appoint MONTCLAIR TRUST COMPANY, a New Jersey Corporation, sole executor of this my Last Will and Testament, revoking all former Wills by me made.

It is my wish and I do hereby order and direct that my said executor, said Montclair Trust Company, and my trustee, the said Art Students League of New York, be not required to give bonds or other security as such executor and Trustee in this or any other jurisdiction or court wherein proceedings may be required to be taken in connection with this my Last Will and Testament.

I hereby give full power and authority to my said executor and trustee to sell any and all of my real estate, to any person or persons, at public or private sale, at such times and upon such terms as it shall think best.

I authorize my above-named executor and trustee to retain any investments made by me during my lifetime without any liability for shrinkage.

FIFTH: It is my Will and I do order and direct that this Will remain in full force and effect notwithstanding children may hereafter be born to me.

IN WITNESS WHEREOF, I, the said EDWARD MCDOWELL, have hereunder set my hand this 4th day of August, Nineteen hundred and twenty-five.

EDWARD McDOWELL.

Signed, acknowledged and declared by the said EDWARD MCDOWELL, as and for his Last Will and Testament, in the presence of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

HOWARD M. PENDLETON,
122 Christopher St., Montclair, N. J.

ETHEL G. APPLETON,
50 Myrtle Ave., Montclair, N. J.

MICHAEL SPINELLI,
94 Watchung Ave., Upper Montclair, N. J.

PROBATE.

April 15, 1926.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

HOWARD M. PENDLETON, one of the witnesses to the annexed writing, purporting to be the last will and testament of Edward McDowell, the testator therein named, deceased, being duly sworn on his oath says that he saw the testator sign and seal the said annexed writing and heard him publish, pronounce and declare the same as and for his last will and testament.

That at the time of the doing thereof, the said testator was of sound and disposing mind, memory and understanding, as far as this deponent knows and verily believes; that Ethel G. Appleton and Michael Spinelli, the other subscribing witnesses thereto, were present at the same time with this deponent when the said will

Probate.

was signed by the said testator and by him published and declared as and for his last will and testament as aforesaid; and that the said Ethel G. Appleton and Michael Spinelli and deponent subscribed their names to said will as witnesses in the presence of said testator and of each other at the request of said testator.

HOWARD M. PENDLETON.

Sworn April 14, 1926, before
me,

JOHN C. FINERAN,
Special Probate Clerk.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

MICHAEL SPINELLI, one of the witnesses to the annexed writing purporting to be the last will and testament of Edward McDowell, the testator therein named, deceased, being duly sworn on his oath says that he saw the testator sign and seal the said annexed writing and heard him publish, pronounce and declare the same as and for his last will and testament.

That at the time of the doing thereof, the said testator was of sound and disposing mind, memory and understanding, as far as this deponent knows and verily believes; that Ethel G. Appleton and Howard M. Pendleton, the other subscribing witnesses thereto, were present at the same time with this deponent when the said will was signed by the said testator and by him published and declared as and for his last will and testament as aforesaid; and that the said Ethel G. Appleton and Howard M. Pendleton and deponent subscribe their names to said will as witnesses in the presence of said testator and of each other at the request of said testator.

Probate.

MICHAEL SPINELLI.

Sworn April 14, 1926, before
me,

JOHN C. FINERAN,
Special Probate Clerk.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

ETHEL G. WOOLLEY, *nee* Ethel G. Appleton, one of the witnesses to the annexed writing, purporting to be the last will and testament of Edward McDowell, the testator therein named, deceased, being duly sworn on her oath, says that she saw the testator sign and seal the said annexed writing and heard him publish, pronounce and declare the same as and for his last will and testament.

That at the time of the doing thereof, the said testator was of sound and disposing mind, memory and understanding, as far as this deponent knows and verily believes; that Howard M. Pendleton and Michael Spinelli, the other subscribing witnesses thereto, were present at the same time with this deponent when the said will was signed by the said testator and by him published and declared as and for his last will and testament as aforesaid; and that the said Howard M. Pendleton and Michael Spinelli and deponent subscribed their names to said will as

witnesses in the presence of said testator and of each other at the request of said testator.

ETHEL G. WOOLLEY,
Nee ETHEL G. APPLETON.

Sworn April 15, 1926, before
me,

JOHN C. FINERAN,
Special Probate Clerk.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

HOWARD M. PENDLETON, of full age, being duly sworn upon his oath according to law, deposes and says that he is Trust Officer of Montclair Trust Company, a corporation of the State of New Jersey and is its agent for the purpose of making this affidavit; that said Montclair Trust Company is executor of the last will and testament of Edward McDowell, late of Essex County, deceased; that the annexed writing contains the true last will and testament of Edward McDowell, the testator therein named, so far as this deponent knows and as he verily believes; that said Montclair Trust Company will, as executor thereof, well and truly administer the estate of Edward McDowell, first by paying the debts of said deceased and then the legacies therein specified so far as the goods, chattels and credits of said deceased will thereunto extend, and the law charges it; that it will when lawfully required, make and exhibit unto the surrogate's office of the County of Essex, a true and perfect inventory of all and singular the said goods, chattels and credits as far as the same have or shall come

to its possession or knowledge or the possession of any other person or persons to its use or to its knowledge; that it will well and truly account when thereunto lawfully required and that said testator died February 18, 1926.

HOWARD M. PENDLETON.

Sworn April 14, 1926, before
me,

JOHN C. FINERAN,
Special Probate Clerk.

ORDER FOR PROBATE.

ESSEX COUNTY SURROGATE'S COURT.

In the Matter of the Probate of the Alleged Will of EDWARD McDOWELL, deceased.	*On Petition for Probate.* *Order for Probate.*

On reading and filing the petition of Montclair Trust Company for probate of the last will and testament of Edward McDowell, deceased, and for letters testamentary thereon, and the surrogate having inquired into the circumstances and taken proof, and being satisfied of the genuineness of the will produced, the validity of its execution and the competency of the testator and it further appearing that the said testator died on the 18th day of February, nineteen hundred and twenty-six, and more than ten days ago, and that the caveat heretofore filed against the probate of said will has been withdrawn,

Order for Probate.

It is thereupon, on this 15th day of April, nineteen hundred and twenty-six, ORDERED AND ADJUDGED, that the instrument offered for probate in this matter be and the same hereby is established as the last will and testament of the said Edward McDowell, deceased, and the same be and hereby is admitted to probate.

It is further ORDERED, that letters testamentary thereon be issued to Montclair Trust Company, the executor named in the said will upon its qualifying as such executor.

E. GARFIELD GIFFORD,
Surrogate.

STATE OF NEW JERSEY,
ESSEX COUNTY SURROGATE'S COURT.

I, E. GARFIELD GIFFORD, Surrogate of the County of Essex, do certify the annexed to be a true copy of the last will and testament of Edward McDowell, late of the County of Essex, deceased, and that Montclair Trust Company, the executor therein named, proved the same before me, and is duly authorized to take upon itself the administration of the estate of the testator agreeably to the said will.

WITNESS my hand and seal of office,
(L. S.) the fifteenth day of April, in the year of our Lord, one thousand nine hundred and twenty-six.

E. GARFIELD GIFFORD,
Surrogate.

Petition of Appeal.

PETITION OF APPEAL.

Filed October 13, 1926.

ESSEX COUNTY SURROGATE'S COURT.

In the Matter of the Estate of EDWARD MCDOWELL, deceased.	*On Appeal from Probate of Will by Surrogate.* *Petition of Appeal.*

To the Surrogate of the County of Essex:

The petition of appeal of Beata McDowell Clayville-Smith, of the City of Baltimore, in the State of Maryland, respectfully shows that:

1. Your petitioner is a sister of Edward McDowell, late of the County of Essex, deceased, who died on the 18th day of February, 1926, leaving him surviving as his next of kin and heir at law your petitioner, and also leaving him surviving his wife, Marie M. McDowell; and your petitioner on said last mentioned day resided in the said City of Baltimore in the State of Maryland.

2. On the 15th day of April, 1926, the Montclair Trust Company produced before the Surrogate of the County of Essex, a paper writing purporting to be the last will and testament of the said Edward McDowell, deceased, wherein the said Montclair Trust Company was named as the sole executor thereof, and the said surrogate thereupon, on the date last named, made his order admitting the said paper writing to pro-

bate as and for the last will and testament of the said Edward McDowell, deceased, and granted letters testamentary thereon to the said Montclair Trust Company, which letters were duly issued on the date last aforesaid.

3. Your petitioner claims and alleges that the whole and every part of the said order of the said surrogate admitting the said will to probate and issuing letters testamentary thereon to the said Montclair Trust Company as aforesaid, is erroneous, improper and contrary to law, and that your petitioner is aggrieved thereby.

4. Your petitioner further complains and alleges that she is aggrieved by the said order of the said surrogate for that in case of the intestacy of her said brother, she will receive a larger interest under the last will and testament of her father, late of the City of Baltimore, aforesaid, and also in case of such intestacy she will inherit certain interests in real property in the State of Maryland.

5. Your petitioner alleges for grounds of appeal as follows:

a. At the time of the making and of the supposed execution of said paper writing, and for a long time prior thereto, the said Edward McDowell was of unsound mind, and as such incapable of disposing of his estate by will;

b. The supposed execution of the said paper writing is illegal and insufficient under the laws of this State to constitute the same the last will and testament of said Edward McDowell, deceased, for that the said Edward McDowell, did not, at the time of the supposed execution thereof, sign, publish and declare the said paper

writing as and for his last will and testament in the presence of two witnesses, present at the same time, pursuant to the statute in such case made and provided;

c. The Art Students' League of New York mentioned in said paper writing, by its officers, members, agents, and representatives did unduly, illegally and fraudulently influence the said Edward McDowell in respect to the making and supposed execution of said paper writing.

6. The names of all persons concerned in this proceeding are as follows:

Montclair Trust Company, with its principal office in the Town of Montclair, New Jersey, the executor named in said will;

Marie M. McDowell, residing at Baltimore, Maryland, a legatee named in said will;

Art Students' League of New York, located at 215 West Fifty-seventh street, New York City, residuary devisee and legatee named in said will;

Your petitioner, Beata McDowell Clayville-Smith, of Baltimore, Maryland, next of kin and heir at law of the said Edward McDowell, deceased; and

Said Marie M. McDowell, widow of said Edward McDowell, deceased.

Your petitioner therefore prays that the above-named persons concerned in this proceeding, and each of them, may be cited to appear in the Orphans' Court, pursuant to the rules and practice thereof, and that the aforesaid order of the said surrogate and the proceedings thereon may be reversed and set aside by the said Orphans' Court, and that the letters testamentary issued

to the said Montclair Trust Company may be revoked.

Dated, Newark, New Jersey, October 11, 1926.

BEATA McDOWELL
CLAYVILLE-SMITH,
Petitioner.

LUM, TAMBLYN & COLYER,
Proctors for and of Counsel
with Petitioner.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

BEATA McDOWELL CLAYVILLE-SMITH, being duly sworn according to law, upon her oath deposes and says: That she is the petitioner in the foregoing petition named, and that the matters and things therein contained are true to the best of her knowledge and belief.

BEATA McDOWELL
CLAYVILLE-SMITH.

Subscribed and sworn to this
11th day of October, 1926,
before me,

WILLIAM F. GORMAN,
Master in Chancery of N. J.

ANSWER TO PETITION OF APPEAL.

Filed October 26, 1926.

ESSEX COUNTY SURROGATE'S COURT.

In the Matter of the Estate of EDWARD McDOWELL, deceased.	*On Appeal of Probate by Surrogate.* *Answer to Petition of Appeal.*

The answer of Montclair Trust Company as executor of Edward McDowell, respondent, to the petition of appeal of Beata McDowell Clayville-Smith.

1. This respondent, answering, says that it admits the allegations contained in paragraph one of the petition of appeal filed herein.

2. This respondent is advised, believes and submits that the decree admitting to probate the paper writing purporting to be the last will and testament of Edward McDowell, deceased, is just and in accordance with the law and denies that said decree or any part thereof is erroneous, improper or illegal, but on the contrary alleges that said decree and every part thereof is legal, proper and correct.

It therefore prays that the said decree may be in all things affirmed with costs to be adjudged to the respondent.

ROBERT M. BOYD, JR.,
Proctor for and of Counsel
with Respondent.

ESSEX COUNTY ORPHANS' COURT.

Tuesday, February 1, 1927.

In the Matter of the Estate of EDWARD McDOWELL, deceased.	*On Appeal from Probate.*

Before Hon. Dallas Flannagan, *J.*

For the appellant appears Lum, Tamblyn & Colyer (by Ralph E. Lum and Egbert J. Tamblyn, and Tazewell T. Thomas [of the Maryland Bar]).

For the Montclair Trust Company appears Robert M. Boyd, Jr.

For the Art Students' League of New York, Child & Shipman (by Francis Child and Jehiel G. Shipman).

HOWARD M. PENDLETON, sworn in behalf of the proponents.

Direct examination by Mr. Boyd.

Q Mr. Pendleton, you are the trust officer of the Montclair Trust Company? A I am.

Q Were you on the 4th day of August, 1925? A I was.

Q Did you know Mr. Edward McDowell in his lifetime? A I did.

Q How long prior to the 4th of August, 1925, had you known him? A Why, since June 11, 1923.

Q I show you what purports to be the last will and testament of Edward McDowell, and

ask you to look at the signature. Did you see Mr. McDowell sign that document? A I did.

Q On what day? A The 4th of August, 1925.

Q Where was it? A It was in the trust room or trust department of the Montclair Trust Company.

Q In Montclair, New Jersey? A Montclair, New Jersey.

Q Who else was present? A My stenographer, Miss Appleton, and my bookkeeper, Mr. Michael Spinelli.

Q State to the Court what happened on that occasion from the time that you and Mr. McDowell first spoke that morning. A That morning there were only us three in the room at the time Mr. McDowell came in and asked if he could have his will executed and witnessed. I said we would be very glad to, and then he spoke of the fact that the attorney, Mr. Hines, was not in his office, or else he would have gone over there to have it executed. I immediately telephoned to his office to find out if it was agreeable for us to go ahead and have it executed in the trust department, and Mr. Kindle confirmed the fact that Mr. Hines was away, so then we proceeded to have Mr. McDowell execute the will.

Q First state what you said with regard to the will and what he said. Tell the Court exactly what he said? A Why, Mr. McDowell handed me the instrument and I called over from the other end of the room Mr. Spinelli and Miss Appleton and told them—introduced them to Mr. McDowell as witnesses, and I spoke to Mr. McDowell and said, "Do you know what this instrument is?" And he said, "I do," and then I put it to him in this way, which is my customary

way of doing it, "Do you declare this to be your last will and testament, Mr. McDowell?" And he replied, "I do," and I said, "Mr. McDowell, do you wish us three to act as witnesses to that will?" And he said, "I do."

Q Who were present when he said, "I do?" A Why, we three, that is four with Mr. McDowell, we were grouped around my desk in the room.

Q Then, did you see him sign the instrument? A I saw him sign, yes, sir.

Q Who was present when he signed it? A Mr. Spinelli, Miss Appleton and myself.

Q And did you three sign as witnesses? A Yes, sir.

Q Who was present at the time that the three signed as witnesses? A Only Mr. McDowell would be the fourth.

Q I mean to say, when you signed as a witness, who else were present? A Mr. Spinelli, Miss Appleton and Mr. McDowell.

Q And when Mr. Spinelli signed, who were present? A Miss Appleton, Mr. Pendleton and Mr. McDowell.

Q And when Miss Appleton signed, who were present? A Mr. Spinelli, Mr. Pendleton and Mr. McDowell.

Q Were they close enough to hear the questions that you asked Mr. McDowell in regard to the will? A They were.

Q That is, they heard him declare that it was his will? A They did.

Q Were they close enough to hear his request that they act as witnesses? A They were.

Q So far as you could judge, what was the mental capacity, his mind, memory and understanding on that occasion? A Why, I should

say perfect; he spoke of coming to Montclair and he discussed living in Montclair. I told him where I lived and he was talking about the privileges of Montclair, in a general way, and we must have discussed matters for fifteen or twenty minutes before I called the witnesses to the will.

Q Was there anything about his conduct on that day to indicate to you that his mental capacity was not perfect? A None whatever.

Q Was there anything unusual or abnormal in his conduct whatever? A None, none whatever.

Cross examination by Mr. Lum.

Q When, at what stage of the proceedings, was it you first asked him whether he declared this to be his will? A That was the second question, the first question was whether he knew what the instrument was.

Q At what stage of the proceedings did you ask him whether he knew what the instrument was? A That was the first question I put to him.

Q What had taken place at this time? A I summoned the witnesses and we were all grouped around my desk.

Q Nothing yet had been done? A No.

Q You are sure of that? A Positive.

Q Then, what happened, tell me what was done or what was said; what was the next thing done? A The pen was offered to him and he signed the will.

Q Then what was said? A And I asked him if he declared this to be his last will and testament and he answered, "I do."

Q Did you ask him that before he signed? A No, I always have them sign first.

Q You asked him everything before he signed? A No, I don't. I asked him what the instrument is, to know what it is he is signing, and then after he signed, I asked him did he declare that to be his last will and testament.

Q About what time of the day was this? A I cannot say positively, I should say about nine or 9:30 in the morning.

Q Before that day, when had you last seen the testator? A Why, I cannot state positively, but I would say the spring of 1924.

Q Where had you seen him then? A Why, he called at my office and discussed the securities which we held for him.

Q You were holding securities for him? A We were, yes.

Q In a trust? A No, under an agency arrangement.

Q To what extent, what kind of securities? A Why, I should say a par value of about $23,000 at the time.

Q And did you know where he was living then? A No, all correspondence was carried through the office of the Union Trust Company, Sixtieth street and Fifth avenue, New York City.

Q Did you have any correspondence from the Summit Trust Company or any bank in Summit? A Not at that time.

Q When did you first come in touch with that in connection with the matter? A October, 1925.

Q But not before? A Not before.

Q Did you know where he lived that summer of 1925, did you? A No, sir.

Q You have no knowledge of your own? A No, sir.

Q Were the contents of the will discussed at all? A No, sir.

Q You did not notice that he referred in that will to, "My beloved wife," and then proceeded to leave her $5,000 only, did you? A I did not know the contents of the will at the time at all.

Q Then, you were not told, from anything that was said or done, to give you the slightest notion as to whether the man was aware of the property of which he was disposing, or the natural objects of his bounty, were you? A I didn't think that concerned me.

Q You did not give it any thought, you were not concerned with that, were you? A No, sir.

Q Did you notice whether this will attempted to dispose of a very substantial trust fund in Maryland?

Mr. Boyd: I object. He said he did not know the contents at all.

Mr. Lum: He went further and said—

The Court: I will allow it.

Q (Last question read.) A I didn't know anything about it.

Q You did not know whether he remembered that he had such a trust fund or whether he could dispose of this by will? A No, sir.

Q How long, about, was he in your office? A Why, all told, about an hour.

Q Was his wife mentioned while he was there? A No, sir.

Q His wife was not with him? A No, sir.

Q Was his sister or niece with him? A He was alone.

Q He did not mention either his sister or his niece? A No, sir.

Q Do you know where the will came from, who prepared it? A It was prepared by an attorney, Mr. Hines.

Q Do you know when? A I cannot say exactly, no.

Q Or do you know how Mr. McDowell came in touch with Mr. Hines? A I do not.

Q Did you know of Mr. Beale of the New York Bar? A I have met him since Mr. McDowell died.

Q You did not know him before? A No, sir.

Q Was his name mentioned by Mr. McDowell? A No, sir.

Q How many times had you seen Mr. McDowell in his lifetime? A I met Mr. McDowell in 1924 and in 1925 when he executed the will.

Q How many times? A Two times.

Q That is the only time you saw him? A Yes, sir.

Q Who introduced him to you? A Why, nobody introduced him to me. In 1924 he simply came in and said, "I am Mr. McDowell," and I readily remembered that we had an account with him in the Trust Department and naturally spoke to him.

Q When was his account with you in the Trust Department first opened? A That was opened in June, 1923, by his coming to our treasurer, Mr. Severelle, and being introduced by Mr. Cook. I was away on my vacation at the time.

Q Who is Mr. Cook? A Mr. Cook is vice-president of a bank in New York City; I cannot just recall the name of it.

Q Will your books show the record of this trust transaction, this agency transaction which you had? A Yes, sir.

Q When was it closed? A It has not been closed—well, it was closed when we received our appointment as executor under the will.

Re-direct examination by Mr. Boyd.

Q Did I understand, then, that these securities were deposited with the Montclair Trust Company in 1923? A Correct.

Q From that day on down to Mr. McDowell's death, what did the trust company do in connection with those securities? A Why, we cut the coupons and created an account in the Trust Department, and I think it was about the 5th of each month a check was sent to the Union Trust Company in New York for his credit.

Q So, on down to his death you continued to manage these securities for his account? A Yes, until October, 1925, when it was transferred to Summit, and from that time on it was sent there.

Q So from that time on the proceeds of the coupons were sent to Summit to his account? A Yes, sir.

Q Under whose direction was that done? A That was by his personal written direction, in his own handwriting.

Q State as nearly as you can the order in which the signatures on the will were added to it. You have testified that first Mr. McDowell signed. A Yes, sir.

Q Who signed next? A I signed first as a witness, then Miss Appleton was second and Mr. Spinelli third.

ETHEL APPLETON WOLLEY, sworn in behalf of the proponents.

Direct examination by Mr. Boyd.

Q Mrs. Wolley, you are now married? A I am.

Q Prior to your marriage, what was your name? A Ethel Grace Appleton.

Q I show you what purports to be the last will and testament of Edward McDowell, dated the 4th of August, 1925, and ask you if you recognize your signature as one of the witnesses? A I do.

Q Do you recognize the other signatures on that will? A I do.

Q On the 4th of August, 1925, the date of its execution, were you connected with the Trust Department of the Montclair Trust Company? A Yes, sir, I was a stenographer then.

Q Do you remember being called by Mr. Pendleton to the part of the room where Mr. McDowell was? A I do.

Q Now, state to the Court who else were present when Mr. McDowell signed that will, and state also what was said both by Mr. Pendleton, or Mr. McDowell or any of the others in the group. A Mr. McDowell was there himself, Mr. Pendleton and Mr. Spinelli and I, and Mr. Pendleton called us over and asked Mr. McDowell if he knew this was his last will and testament.

Q What did Mr. McDowell say? A He said "Yes," and he asked Mr. McDowell if he declared it was his last will and testament and if he wished us to act as witnesses.

Q What did Mr. McDowell say? A Mr. McDowell said, "Yes."

Q Then, when did Mr. McDowell sign? A He signed before the witnesses, and Mr. Pendleton asked him if he declared it was his last will and testament.

Q At the time he signed the will, who were present? A Mr. McDowell, Mr. Pendleton, Mr. Spinelli and I.

Q And then who signed next? A Mr. McDowell first and Mr. Pendleton after Mr. McDowell.

Q You saw him sign? A Yes, sir.

Q Who else were present when he signed? A Mr. McDowell, Mr. Spinelli and I.

Q And who signed next? A I signed next.

Q Who were present when you signed? A Mr. McDowell, Mr. Pendleton and Mr. Spinelli.

Q Who signed next? A Mr. Spinelli signed.

Q After you? A Yes.

Q And who were present when he signed? A Mr. McDowell, Mr. Pendleton and I.

Q You heard what Mr. McDowell said on that occasion and you observed him, I suppose; you saw him, you knew how he acted? A Yes, sir.

Q Did you observe anything in his conduct on that day in any way abnormal or unusual or different from the action of a perfectly sane person? A No, I did not.

Cross examination by Mr. Lum.

Q Had you ever seen him before? A No, never.

Q You don't know, then, whether he was his usual weight, or whether he was decidedly emaciated at that time? A I had never seen him before.

Q And you did not hear him discuss anything about his property at the time, I suppose? A No.

Q Did you hear him speak of his wife, his sister or his niece? A No, sir.

Q And I suppose you knew nothing about when he had opened a trust account or the reason why he had opened it? A No, I was there when he opened his agency account; I was working in the Trust Company at the time.

Q But you did not see him at that time to talk to? A No, sir.

Q Have you a very distinct personal remembrance of everything that happened on that day? A I can remember standing around Mr. Pendleton's desk and signing, yes, sir.

Q What is it that fixes your mind that you were present at the same time? A Yes—

Q What is it that fixes that in your mind, what is it, if anything, that fixes that in your mind? A Nothing in particular.

Q Well, it might have been then that he had already signed when you came into the room? A I never saw him before.

Q But it might have been that his name was already there? A No, I saw Mr. McDowell sign it.

Q You are sure of that? A Yes, sir.

Q What is it that enables you to remember that Mr. Spinelli was in the room at that time? A I saw him sign his name.

Q Might Mr. McDowell not have gone out at that time? A No, sir, he was sitting there.

Q You are sure of that? A Positive.

MICHAEL SPINELLI, sworn in behalf of the proponents.

Direct examination by Mr. Boyd.

Q Mr. Spinelli, were you on the 4th of August, 1925, connected with the Trust Department of the Montclair Trust Company? A I was.

Q How long prior to that time had you been in that department? A I came into the Montclair Trust Company, April 19, 1923.

Q During that period, from April, 1923, down to August, 1925, you had been employed in connection with the work in the Montclair Trust Company there in the Trust Department? A I was.

Q In connection with estates and wills and accountings? A I was.

Q Had you acted as witness in the execution of wills prior to August, 1925? A I had.

Q How many times? A Well, quite a number of times, so I knew the procedure.

Q You were familiar with the procedure on the execution of a will? A Yes, sir.

Q Do you remember Mr. Edward McDowell, the testator? A I do.

Q Do you remember his coming into the room there in connection with the Trust Department on the 4th day of August, 1925? A I do.

Q How was your attention first called to the fact that the execution of a will was in contemplation? A I was called over to Mr. Pendleton's desk.

Q And when you came over to Mr. Pendleton's desk, who was there? A Mr. Pendleton, Mr. McDowell and Miss Appleton and I were together.

Q The four of you were together? A Yes, sir.

Q You heard some questions asked by Mr. Pendleton? A I did.

Q State what he said and what Mr. McDowell said in reply. A He asked Mr. McDowell if he knew this was his last will and testament and he said yes, and then he signed, and then he asked Mr. McDowell if he wished us to act as witnesses, and Mr. McDowell said yes, and then Mr. McDowell signed and Miss Appleton signed and I signed.

Q Who was present when Mr. McDowell signed? A Mr. Pendleton, Miss Appleton and myself.

Q Who was present when Mr. Pendleton signed? A Miss Appleton and myself and Mr. McDowell.

Q Who was present when Miss Appleton signed? A Mr. McDowell, Mr. Pendleton and myself.

Q So that all four of you were present throughout the interview, and each saw all the others sign? A Yes, sir.

Q At that time did you observe anything unusual or abnormal in the conduct or appearance of Mr. McDowell? A I did not.

Q Did anything occur to indicate to you in any way that he was not of sound mind, memory and understanding? A No, sir.

Cross examination by Mr. Lum.

Q What was said before anyone signed; tell us all that you can recall? A Before anyone signed?

Q Yes. A Mr. Pendleton asked Mr. McDowell if he knew this to be his last will and testament, and that was all that was said, as far as I know.

Q And then what happened? A Then Mr. McDowell signed and then Mr. Pendleton asked Mr. McDowell if he declared this to be his last will and testament and wished us to act as witnesses, and Mr. McDowell said he did.

Q You did not know Mr. McDowell before this date, I suppose? A No, I had never seen him before.

Q He did not mention his wife at that time? A No, sir.

Q He did not mention his trust fund in Montclair or his trust fund in Baltimore, or any of his property? A No, sir.

Q Was there anything inserted in the will at all after you saw it there? A In the body of the will?

Q Yes. A No, sir.

Q Were the dates, "Fourth of August," already filled in? A No, sir.

Q Who filled that 4th of August in? A Mr. McDowell filled it in before he signed his name.

Q In ink? A Yes, sir.

Q Are you sure about that? A Positive.

Q Show me his writing, please, of the date. A You mean the date in ink?

Q The date. A I am not sure about that.

Q You were pretty sure before you looked at it, weren't you? Is there any ink anywhere excepting the signatures of witnesses on the paper? A No.

Q Not anywhere, is there? A No, sir.

Q Then, you were mistaken about it, were you? A Yes, sir.

Q Are you a little more certain about your other testitmony than that? A Yes, sir.

Q Do you know what day the 4th of August fell on? A No, I can't tell you.

Q Do you remember positively the date on which he arrived there? A Positively?

Q Yes. A The 4th of August, 1925.

Q Are you sure that was the date? A Yes, sir.

Q Do you know how the date came to be already filled in when he arrived? A No, I can't tell you about that.

Q Did you see Mr. McDowell come in on the day in question? A Yes, I saw him come in.

Q Do you know how long he had been there when you first saw him? A You mean when I was called to witness the will?

Q Yes. A Not very long, I should imagine around ten or fifteen minutes.

Q Do you know whether any typewriting was done in your department on this will that morning? A There was no typewriting done, no, sir.

Q Are you sure of that? A Yes, sir.

Re-direct examination by Mr. Boyd.

Q During the time that you were in the Trust Department, did you, before the execution of this will, have anything to do with these securities that Mr. McDowell had left with the trust company? A I helped cut the coupons.

Q You knew they were there? A Yes, I knew they were there.

Q And you were familiar with the name of Edward McDowell? A I was.

Q So that when you were called in that day to act as a witness to the will, the name was not entirely strange to you? A No, the name was not strange.

Q Had you ever seen any correspondence between the Trust Company and Mr. McDowell, or have any letters from him? A No, I have not.

Q You don't remember that? A No, I don't remember that.

Q When was it that the securities were first brought to the Trust Company? A Well, I don't remember the exact date.

Q What year was it? A 1923.

Q From that time on do you remember cutting the coupons and making certain entries in the Trust Company books and disposing of the proceeds in accordance with directions from Mr. McDowell, is that right? A I do.

Q In that procedure, under Mr. McDowell's direction, did you ever observe anything unusual or abnormal or different from the usual way of transacting that kind of business? A I did not.

Re-cross examination by Mr. Lum.

Q Now, as a matter of fact, you did not come in touch with him ever until the day this will was drawn, did you? A Not personally.

Q And there wasn't anything for you to observe in all of the transactions with reference to acting as agent for this trust company, was there? A I don't quite get the question.

Q Do you know whether Mr. McDowell gave any direction about the trust fund or the agency account? A No, excepting I was told it was his account.

Q Told by somebody else? A Yes, sir.

Q So you know nothing about Mr. McDowell in connection with it, in the slightest, do you? A No, sir.

Q Now, as a matter of fact, you do know that from the time your bank acted as agent until 1923—until October, 1925—the proceeds were sent to a bank in New York to his account? A Yes, sir.

Q And that from October the proceeds were sent to Summit, weren't they? A Yes, sir.

Q They never were turned over to or remained in any account in Montclair, were they? A No, sir.

Q You don't know of his having any account ever at any time in Montclair, do you? A Except in the Trust Department.

Q Excepting that agency fund that was left there? A No, sir.

Q You don't know why that was left there, do you? A No, sir.

Q You don't know whether that was trying to hide something from somebody, do you? A No, sir.

Mr. Boyd: That is our case.

Mr. Lum: There are two rather vital defects. First, we haven't any proof of the testator's death, and second, we haven't anything to show the jurisdiction of the Court, to show his residence. We will admit the death and deny the residence.

(Argument.)

The Court: Is there any substantial dispute on that subject?

Mr. Lum: Yes, sir, there is. In fact, we haven't any doubt but what the man did not live a day in Montclair, or if he did, his family did not know about it.

The Court: What do you say to that, Mr. Child; do you want to stand on that testimony, or do you want to show proof of his residence at the time of his death?

Mr. Child: All right, we will call Mr. Hines.

JOHN A. HINES, sworn in behalf of the proponent.

Direct examination by Mr. Child.

Q Mr. Hines, were you acquainted with Edward McDowell, the testator? A I was.

Q Was it you who drew this will for him? A I drew his will.

Q And when did you draw it, with reference to its date? A Well, I imagine the will was completed perhaps two or three days prior to its execution.

Q Where was that will drawn? A In my office.

Q Did you discuss with Mr. McDowell the question of drawing a will previous to the actual drawing of it? A Oh, yes.

Q And when did you first have that discussion? A Why, some time prior to the execution of it, I don't recall just when.

Q Well, was it a period of days or months that you first discussed the will? A Oh, perhaps a period of—may I say—I suppose it was a period of perhaps two weeks or so before that time.

Q Where did that discussion take place? A I had two discussions in my office, if not three, and one on the grounds of the Montclair Hotel.

Q Where was Mr. McDowell stopping at that time? A On July 24, he was stopping at the Montclair Hotel.

Q And did you have any talk with him about where he lived or what his intentions were?

Mr. Lum: If the Court please, we object—if that is for the purpose of proving state of mind, we have no objection; any conversation may be given for that purpose.

Mr. Child: We are offering it solely for the purpose of showing by word what his intentions were.

Mr. Lum: It cannot be done that way.

(Argument.)

Mr. Lum: Our cases frequently held that everything said or done by him at any time may be given in evidence, but solely for the purpose of proving his state of mind—

The Court: I will allow the question.

Q What conversation did you have with Mr. McDowell at the Montclair Hotel? A We talked about a number of things, among them his will. He told me at that time that he was going to make Montclair his home. He either stated that he had already seen an agent or was going to get a suitable home. He also told me that he had the nucleus of furnishings somewhere in storage, but he did not tell me where.

Q Did he say anything more about Montclair? A He said he liked Montclair.

Q And at that time, was that the first time you had ever met Mr. McDowell? A No, I think the first time I met him was prior to that when he came in my office and asked me to draw his will.

Q How did you come in contact with him; how did it come about? A I don't know; he just walked in the office and told me he wanted me to draw his will.

Q You don't know why he happened to pick on you? A No, I do not.

Q After the execution of the will, how frequently, if at all, did you see Mr. McDowell? A I never saw Mr. McDowell after the execution of the will.

Q During the interviews that you had with Mr. McDowell, did he say anything which would indicate to you the quantum of his estate or who his relatives were, or anything of that kind? A No, he did not.

Q Did he say anything about any matters in the Montclair Trust Company? A He told me that he either had or was going to place his securities in the Montclair Trust Company. I don't know which.

Q Did you discuss with him anything about the terms of the will? A Before I drew it?

Q Yes. A Oh, yes.

Q During those discussions what, if anything, did he say relative to his estate and what disposition he wanted to make of it? A Why, he simply told me that he wanted to be sure that the clauses in there, wherein he gave to the Art Students' League a trust fund for worthy art students were there. I made perhaps two or three rough drafts of the will for him, which we talked over, and the third, which we definitely completed, and I believe it is just as the will is today.

Q Did he mention anything about his wife? A No, except that he wanted to leave her $5,000; that was all that was said.

Q His wife was with him at the hotel at the time the will was first discussed? A On July 24, yes, I met her. He introduced me to her.

Q Did he mention anything of his other relatives, his sister or any of the others? A No.

Q Did Mr. McDowell say anything about having an interest in any other estate? A He told me he had an interest in his father's estate. He did not tell me what it was, and I did not go into it with him.

Q Did he say where his father's estate was? A I don't think he did.

Cross examination by Mr. Lum.

Q Mr. Hines, you know Mr. Beale of the New York Bar? A No, I do not.

Q Did not ever know of him? A I never met him, no, sir.

Q Didn't know anyone connected with the Art League? A Except when Mr. Adams told me that he was the attorney for the Art Students' League.

Q Who is Mr. Adams? A Mr. Adams, I think he was the attorney—oh, no, I think Mr. Adams told me that Mr. Beale was attorney for Mrs. McDowell, if I remember correctly.

Q What Mr. Adams is this? A He is an attorney in New York.

Q You knew him and have known him for some time? A Oh, no.

Q Only met him since? A Yes, sir.

Q And have you no way of knowing, even by conjecture, how Mr. McDowell just stumbled into your office? A No, I do not.

Q When did you first see him? A When he came into my office and asked me to draw the will.

Q What date? A Oh, I don't know the date, but prior to the execution of the will, I suppose it was a couple of weeks before that.

Q How long was he in your office then? A Oh, I don't know, perhaps a half an hour.

Q Did he have any notes or rough drafts when he came to see you? A I think he did.

Q Did he leave that with you? A I don't recall that.

Q How far did you get in the proceedings that first day? A Oh, I don't know, perhaps just discussed it.

Q And was his mind fairly made up then? A Oh, yes.

Q And there was no change, then, from the time he first came to see you, except as to minor details? A No, no change except as to phraseology, that's all.

Q When did you next see him? A I don't recall when I next saw him, perhaps a few days later, or more; I don't know.

Q And nothing that he said gave you the slightest idea as to the quantum of his estate? A No, sir.

Q Was the word "beloved" when used in connection with his wife his or yours? A Why, I suppose it was mine; I generally use it.

Q Did he object to that? A Oh, no.

Q Did he object to it in any way? A Nothing was said about that.

Q This trust fund, did he indicate to you where it was? A No, sir.

Q Did he indicate to you that it was something in which he had a vested interest? A No, he simply told me that he had an interest in his father's estate.

Q I notice that you make no attempt to dispose of it by the power of appointment. A No, I never knew anything about that at all.

Q And you were not able to ask him whether he had the power of appointment over it? A No, sir.

Q Or whether it was a large sum or a small sum? A No.

Q You did not know whether a $5,000 provision for a "beloved wife" was insufficient or adequate. A I did not know as that was any of my business. I did not go into it at all.

Q Well, if that was an attempt to cut off a wife or make a provision for a wife, do you mean to say, as a lawyer, you did not consider it any of your business? A I did not consider it any of my business. He told me what he wanted, and he seemed to know what he wanted.

Q You mean to tell me that with this man, whom you had never seen before and as to whom you had no knowledge, you would not make it your business to find out whether he was making a will that was a travesty or a farce or whether it was a real, conscientious and honest disposition of his property? Do you mean to say that was none of your business, as an officer of the court? A I don't think so; I did not go into that.

Q You say he came a second time. About how long after the first time? A That I can't tell you.

Q About? A Perhaps a few days.

Q And how far did you go the second time? A I think perhaps I submitted a rough draft of the will to him.

Q You have no distinct recollection of that? A No, they were pretty much all alike when the final draft was made.

Q Where did you see him the third time? A I had two conferences in my office, if not three. Now, if I did not, then I imagine the last time must have been up to the hotel on July 24th.

Q That was the last time you saw him? A That was my last conversation with him.

Q And did you see him with his wife at that time? A Yes.

Q And he introduced you to her? A Yes, sir.

Q Did he seem pleasant and agreeable to her? A Yes.

Q You do not remember anything he said or did at that time to give you the slightest notion that he was substantially disinheriting his wife by this will that you were drawing, did you? A No, sir.

Q Now, how long were you there on that occasion? A In the Montclair Hotel?

Q Yes. A Why, I suppose I stayed out there perhaps an hour.

Q And he gave you the impression that he liked Montclair and was going to make it his home and live there? A In fact, he told me he did.

Q And you never saw him after that time? A I did, if that was the third conversation.

Q You never heard of him in Montclair after that time, did you? A No, sir.

Q You never heard of him opening a checking account in a Montclair bank? A I would not know that.

Q How were you paid? A That I don't recall.

Q By check? A That I don't recall.

Q By whom? A I think I was paid by check of Mr. McDowell.

Q Was the will discussed in the presence of his wife? A No, it was not.

Q Where did you and he discuss it? A We were alone there; we met his wife, and then his wife excused herself and went into the hotel and left us alone.

Q Do you think the will was absolutely completed at that time or not? A That was the last conversation we had.

Q Then, what did you do with it after it was completed? A I left it in my office. I had an appointment with Mr. McDowell, I think, on the day it was executed. I think the hour was about four o'clock, or half-past four. I had to be in Newark on that day and I knew that I would not be able to get back. Miss Kindl, in my office, knew where I was, and I remember distinctly she called me on the wire and told me that the trust department had sent over for the will and that she had given the will to someone, or perhaps it was Mr. McDowell, and I said it was perfectly all right to let them have it, and he stated to Miss Kindl, so she told me, it would be more convenient for him to execute it at that time, rather than at four o'clock in the afternoon.

Q The will was completed in your office, ready for him? A Yes, sir.

Q Did you expect him to execute it that day? A Yes, sir.

Q And was the date filled in? A That I don't recall.

Q That date, the 4th, was that filled in? A That I don't know; you see, I was not in my office at the time this will was delivered.

Q You do not recognize it as work of your own office; do you recognize that "4th" as the work of your own office or not? A I do not.

Q Turning now to the back of the will, I note that the "4th" is filled in there also on the back. Do you recognize that? A No, I don't know anything about that.

Q At any rate, after this date in August you never heard of or saw Mr. McDowell in any way or at any time? A Not that I know of.

Q And you cannot shed the slightest ray of light for us on where he resided at the time of his death? A You asked me if I never heard from him since that time; I think he sent me a check after that date.

Q Shortly after? A Yes, sir.

Q That is unessential, as we both recognize, to the point of my inquiry. You had no knowledge as to where he lived at the time of his death, or from that last time you saw him? A No, sir.

Q You never heard of his having a home in Montclair or anything of that kind? A No, sir.

Q And he never came into your office again? A No, sir, not that I know of.

HOWARD M. PENDLETON, recalled.

Direct examination by Mr. Boyd.

Q Mr. Pendleton, I show you what purports to be a letter signed, "Edward McDowell," dated Summit, October 23, 1925, and addressed to Mr. Howard M. Pendleton. I ask you if you received that from Mr. McDowell on or about its date. A Yes, I remember this letter very well.

Q You know his handwriting, do you? A I do.

Q Is that whole letter in his handwriting? A The whole letter is in his handwriting.

Mr. Boyd: I offer it in evidence.

Mr. Lum: What is the date?

Mr. Boyd: October 23, 1925.

Witness: I have evidence of that time by a reply which I wrote to him.

(The letter is received and marked Exhibit R-1.)

Q Mr. Pendleton, I show you what purports to be a letter signed, "Edward McDowell," dated June 12th, and ask you whether that letter is in Mr. McDowell's handwriting. A It is.

Q It was brought here from the files of the Montclair Trust Company, was it? A Yes, sir.

Q Is there anything on that in any way, by a stamp, to indicate whether it was received? A It was received June 13,1923,because we have a rubber stamp and as the mail is opened in the morning it is noted at the time it arrived.

Q You have seen that letter in the files, have you, during this time? A Yes, sir.

Q I want to call your attention to a reference in this letter reading, "I shall have shipped to you from the Central Union Trust and Safe Deposit Company a small suitcase containing silverware and antique tapestries and will thank you if you will deposit them in your vault while I am abroad." Do you know whether they were received by the trust company? A Yes, sir.

Q And are they still there? A Yes, sir.

Q They were sent to the trust company by Mr. McDowell and never have been taken away? A No.

(The letter is marked Exhibit R-2.)

Cross examination by Mr. Lum.

Q Do you know why it is he did not leave this tapestry and silverware with his wife while he was going abroad? A I do not.

Q You don't know anything about the situation existing then between him and his wife? A No, sir.

Q Or his notions or delusions about his wife? A No, sir.

Q And you knew from those letters that you received at that time that his residence was not in Montclair, didn't you? A Yes, sir.

The Court: What time, Mr. Lum?

Mr. Lum: When the letters were received.

Mr. Child: I object to the witness' characterization of residence.

Mr. Lum: He is your witness and not mine. He has answered the question.

Mr. Boyd: I will ask you to confine your questions to one day at a time.

The Court: He was asked if he knew whether he did not reside in Montclair at that time, and he said he did not.

Mr. Boyd: The question is which time.

By Mr. Boyd.

Q Mr. Pendleton, when you referred to the date, which date did you refer to, 1923 or 1925? A I had in my files two letters that were presented to me.

Q In 1923, where did you understand his residence was? A I did not know where his residence was.

Q He never told you? A No, sir.

Q Did he tell you where it was in 1925? A No, he did not say just exactly.

Q Then kindly explain to the Court, if you knew he did not reside in Montclair, what did you understand by the word "residence"? A Well, the place where you sleep and have your meals. I didn't know where he was staying.

Q Did you know where he was? A I did not know where his abode was at the time.

Q What made you say you knew he did not live in Montclair? A I did not say that—

Q You said you knew he did not live in Montclair. Now I am asking you what made you say that? A I must have misunderstood the question then.

Q What knowledge did you have about his residence? A I had no knowledge of his residence, where he was staying at those times.

By Mr. Lum.

Q You knew that you never communicated with him in Montclair, and never received any communications from him from Montclair, don't you? A Correct.

Mr. Boyd: If the Court please, I am here representing the Montclair Trust Company. We do not investigate the question of residence when a man comes along to execute his will, where he describes himself in the will as of Montclair, and he has put the main part of his property, practically all of his property in Montclair, and has further stated to the attorney who drew his will that he considered Montclair his residence; he liked it and was looking about for a permanent home, and that at that time he was stopping

at the hotel in Montclair. It seems to me that there is a prima facie case of residence.

Mr. Lum: By the very letter they offered in evidence, if they had a hopeless case then, they have it now. If your Honor thinks there is enough, we are willing to go on.

The Court: I think there is enough to make a prima facie case. There are two distinct declarations, one in the will and the other to Mr. Hines, in both of which he declared that he intended to make Montclair his home, and while these letters come from some other place, I don't think they alter that intention, so, so far as the proof now stands, I will hold that there is sufficient to make a prima facie case of residence.

Mr. Lum: Please note our objection to the jurisdiction of the Court.

JOHN MARSHALL GILLAN, sworn in behalf of the appellant.

Direct examination by Mr. Lum.

Q Mr. Gillan, what is your occupation? A Manager of the Hotel Beechwood and proprietor.

Q And the Hotel Beechwood is in Summit, New Jersey? A Yes, sir.

Q Have you the books of the hotel with you? A Yes.

Q Brought here under subpœna? A Yes, sir.

Q You are not interested in this controversy, in any way, directly or indirectly? A No, sir.

Q In what county is Summit? A Union.

Q Did you know the late Edward McDowell? A Yes.

Q When and where did you first meet him? A When he came to the hotel.

Q When was that, about—you may refer to the books, if you desire. A September 18, 1925.

Q And how long did he stay there then? A He remained until the first of October, I believe.

Q What room did he occupy? A He and his wife had a double room with bath.

Q His wife was there all the time with him? A Yes, sir.

Q Do you know where he went in October when he went away? A I understood to New York.

The Court: This is 1925, is it? September 18, 1925?

Witness: Yes, sir.

Q When did you see him again? A Well, when he returned on October 31st.

Q In the meantime, had mail and stuff been sent to him in New York? A I think so, yes, sir.

Q And when he came back on October 31st, was he with his wife again? A Yes, sir.

Q How long did he remain then? A Until the time of his death.

Q What was the date of his death? A Well, I think about the 16th of February.

Q 1926? A Yes, sir.

The Court: Where did he die?

Witness: At the hotel, the Beechwood Hotel in Summit.

Q His wife was with him at the time of his death? A Yes, sir.

Q And had remained with him all of the time while he was in the Beechwood? A Yes, sir.

Q And they occupied the same quarters? A Yes, sir.

Q Two rooms and bath, that is, a room, a parlor and bath? A Part of the stay, the majority of their stay, they were in one room together, but in the latter part of the stay, they had two, a parlor and bedroom.

Q And were your accounts usually paid by check? A Yes, sir.

Q And do you happen to know on what bank, do you remember what bank the check was drawn on? A No, I don't recall that.

Q You don't remember whether it was the Summit Trust Company; do you know whether he had an account there? A Yes, I recollect that he had an account with the Summit Trust Company.

Q And do you know of his having any other residence or living anywhere else from that day in October to the date of his death? A No, sir.

Q You had a chance, I suppose, being there in the hotel, to observe the character of the man somewhat, was he an easy man to get along with, pleasant and delightful with the guests and help or otherwise? A Well, he was a little fussy in the dining room and sometimes a little cranky at the desk, but outside of that, from what I know myself, he was a very nice gentleman.

Q But you did find him fussy and cranky in the dining room and with the help? A Yes, sir.

Q Now, as a matter of fact, almost all of the help had complained to you of him, hadn't they?

Mr. Boyd: I object to that.

Mr. Lum: Question withdrawn.

Q Will you tell me how many of the help made complaints to you?

Mr. Child: I object to that. The help are the best ones to tell that.

The Court: Sustained.

Q From your own observation at the desk and in the dining room, that was the only place you had a chance to observe him, wasn't it? A Yes, sir.

Q And when you observed him there, would you say he was cranky, fault-finding and complaining? A You might call him fussy.

Q Unusually so? A No, sir, not unusually so.

Q As to his health, did you notice whether he was, during that time, from the time you first saw him, well nourished, or was he apparently emaciated and ill?

Mr. Child: I object to that on the ground that the man never knew him before, and how could he tell what his health was, as compared with his previous condition?

The Court: Overruled.

A I should say his health was very poorly from the latter part of his stay.

Q What made you think he was not in good health? A Because he was confined to his room most of the time, and he had a doctor.

Q Dr. Bensley, of Summit? A I think so.

Q And did he ever tell you about his having diabetes or anything of that kind? A No, sir.

Q Will you look at your records from the 14th to the 25th of July and see if Mr. McDowell was not there at that time? A He was not permanently. He may have made a call or something, but we don't keep a record of that.

Q Supposing he had a room there, wouldn't your record show? A No, he didn't have a room.

Q Will you look at your records for a Catherine Ward? A No, I haven't got that.

Q In other words, you have no records there which can show whether they were there or not? A No, sir.

Mr. Boyd: I understood him to say the records showed they were not.

Witness: No, I just brought the sheets of the record showing when Mr. McDowell came that winter.

Q Beginning when? A September 18, 1925.

Q So that those record sheets would not show it? A No, sir.

Q And you have no recollection of it yourself? A No, sir.

Cross examination by Mr. Child.

Q This register shows that on October 31st, Mr. and Mrs. Edward McDowell registered at your hotel, is that right? A Yes.

Q It does not show how long they stayed there, does it? A Yes, I imagine it shows to the time of his death, February 18.

Q You made that entry after his death? A Yes, sir.

Q There is nothing on the register itself to show he had been away in the meanwhile? A No, there wouldn't be.

Q In fact, that would look just exactly the same as if he had only spent one night there, wouldn't it? A We have it in the books here.

Q As far as the record goes, it does not show anything except when he registered? A That's all.

Q You have got to show that by other evidence, whether he stayed there longer or not? A Yes, we have the books for that.

Q So that when you testified, as you did a few moments ago, that Mr. McDowell was not at your hotel on July 25, you got that, not from your register, but from your books, is that right? A I said he might have been there, but I did not bring that record book; just Mr. McDowell; he wasn't registered there at any other time—

Q But when you stated before that as to that date, between the 18th and 25th of July that he wasn't there, you merely meant this register did not show whether he was or not? A But we have other sheets which will show.

Q And you are going to bring those? A Yes, sir.

ISAAC BRODIE, sworn in behalf of the appellant.

Direct examination by Mr. Lum.

Q What is your business? A Head waiter.

Q Where? A Beechwood

Q At Summit, New Jersey? A Yes, sir.

Q How long have you been head waiter there? A Going on three years.

Q And what are your duties, generally, with reference to the dining room? A Well, to meet everybody and to see that everything is going on and see that they get service, just manage the dining room.

Q The matter of service is under whose supervision? A Mine.

Q Do you remember the late Edward McDowell? A Yes, sir.

Q Do you remember that he lived at the Beechwood for some time? A Yes, sir.

Q Do you remember that he died there? A Yes, sir.

Q And will you tell us what you observed with reference to his conduct in the dining room in the matter of complaints and so forth? A Well, he was—oh, he just came in and he wanted to get right out. He never had nothing to say to nobody, if the waiter was not there, he would come to me, somebody would have to wait on him right away to get him out.

Q You mean he was impatient? A Yes, sir, he wouldn't sit two minutes.

Q What about fault-finding and complaining? A That was all.

Q Did you have to change his table often? A Not the table, but the waiter.

Q How often? A Oh, well, I put a waiter on him if his own waiter was not there. If his waiter was out waiting on someone else, they would have to call another waiter and put him right on him.

Q And was he fussy and impatient all of the time? A Yes, sir.

Q And his wife, was she with him? A Yes, sir.

Q And what, if anything else, did you observe with reference to the actions and the conduct of the man? A Nothing else.

Cross examination waived.

THEODORE B. BARRINGER, JR., sworn in behalf of the proponents.

Direct examination by Mr. Child.

Q Dr. Barringer, where do you live? A 112 East Seventy-sixth street, New York City.

Q You are a doctor of medicine? A Yes, sir.

Q And have been practicing for how many years? A Since 1897.

Q And are a graduate of what medical college? A Of the New York University.

Q What hospital experience, if any, have you had? A About sixteen years I have been associate attending physician in the New York Hospital.

Q Were you acquainted with Mr. Edward McDowell? A Yes, sir.

Q How long had you known him? A Well, approximately since 1901 or 1902.

Q Where did you first become acquainted with him? A In my practice.

Q And you treated him professionally at that time? A Yes, sir.

Q And you were practicing then in New York? A Yes, sir.

Q Had you met Mr. McDowell in any other way than as a patient? Did you become socially

intimate with him? A Yes, in those early years I did.

Q And for how many years did your intimacy with Mr. McDowell continue? A Well, for four or five years, in the early part of the century, and then recently, or comparatively recently, I saw him once.

Q Then you knew him intimately, or came in contact with him for many years after you were first acquainted with him? A Well, I should say three or four years.

Q And how frequently would you see him? A Well, that is very difficult to say, that is many years ago.

Q I mean was it once a month or once a week? A Oh, of course, there were times when I saw him frequently; I took care of his wife, and I saw him quite frequently.

Q During these past five years, how frequently did you see him? A Well, to the best of my recollection, I have only seen him once.

Q Do you recall when that was? A Well, if you will permit me, Mr. McDowell, of course, was one of my patients, and his wife, and I was a general practitioner, and in the last ten years I have been specializing and within the year preceding his death, I should say I saw him—he called me up and out of courtesy to him as an old friend and patient, I was glad to see him, although he had nothing the matter with him that I saw particularly or was interested in, and he came over and I saw him for a half an hour in my office, but I did not make any note of what I did, or what I treated him for.

Q And during the years that you have treated him, what was his mental condition, so far as

you know? A Why, I considered him normal mentally.

Q And then there was an interval of some ten years when you did not come in contact with him, and then a year before his death you saw him again? A Yes, within a year previous to his death I saw him.

Q Well, did you observe any change or anything unusual in his mental condition at that time? A No, I did not.

Q So far as your observation, or conversation with him, during the half hour, or whatever time he was there, was there anything to indicate to you that he was in any way out of the ordinary mentally? A No, I saw nothing of that sort at all.

Q What is your specialty, doctor? A I am a heart specialist.

Q What degree of mentality did Mr. McDowell have? Was he a man of intelligence or dull mental faculties, or what were they? A Well, that is a very comprehensive question.

Q Was he a brilliant man, and did he have a good mind, I will change it that way? A Why, yes, I considered that he was a man of our own class, you might say, mentally.

Cross examination by Mr. Lum.

Q You are not an alienist, I believe? A No, counsellor.

Q And have you ever given particlar consideration or study to diabetes? A When I was an interne, yes, sir.

Q Did you know that Mr. McDowell was suffering from diabetes and knew that he was? A No, sir.

Q He did not speak of that to you? A Not to the best of my recollection, he did not.

Q He did not discuss with you, I suppose, his family affairs? A No.

Q So that you had no way of knowing whether he was able to rationally consider his wife, his sister and niece, and their relations to his property and the claims of one with reference to the other, were you? A No, sir.

Q You did not know about his various matrimonial experiences, did you? A I knew the first Mrs. McDowell and confined the first Mrs. McDowell.

Q What became of her? A I don't know.

Q You did not know the second Mrs. McDowell? A Yes, sir.

Q You did know her? A Yes, sir.

Q How long had you known her? A Well, that is hard to say, probably a year or so.

Q Before his death? A Yes, sir.

Q Where did you see her? A I met her when he was living in New York, that was between the first period and the second period, and he asked my advice about the second Mrs. McDowell, my professional advice.

Q In what matter? A As to which specialist I would send her to.

Q For what? A For a gynechological matter.

Q And when did he confer with you in reference to that? A I cannot say accurately as to that.

Q Did you make an examination yourself? A No.

Q You knew nothing, then, about the actual condition? A No, sir.

Q Nothing except that he had something of the kind in mind?

Mr. Child: What in mind?

Q That she needed a gynechological examination. A Yes, sir.

Q Were they together when you saw her? A Oh, yes.

Q And the relations seemed pleasant and agreeable? A Yes, sir.

Q Nothing to indicate whatever in his words or actions at the time, that he intended to substantially disinherit her? A No, sir.

Q The man you knew was an artist? A Yes, sir.

Q He was eccentric, was he not? A Well, I don't know that I would term him eccentric.

Q Do you know whether he suffered delusions of poverty at the time he was in control of a quarter of a million dollars? A I did not know that.

Mr. Boyd: It does not appear that he was in control of a quarter of a million dollars.

Q He did not speak to you about his personal property at all? A No, sir.

Q Is there any way that you can give us, with a bit more definiteness, this one occasion on which you saw him a year before his death? A I am sorry, all I can say is that it was within a year before his death. I am rather of the impression it was subsequent to the first of November, 1925, that is my impression.

Q Do you know where he lived then? A He told me he was living in New Jersey.

Q Did he tell you where? A I don't remember whether he did or not.

The Court: What date was that, doctor?

The Witness: Subsequent to November, 1925.

Q It might have been in 1924? A No, he died in 1926, this was 1925.

Q Was that only about three months before his death? A It was during that time—

Q And he didn't write to you? A No, sir.

Q Did he pay you for the visit or not? A Oh, no.

Q You received no check? A No, sir.

CATHERINE B. WARD, sworn in behalf of the appellant.

Direct examination by Mr. Lum.

Q Miss Ward, where do you live? A 208 East Biddle street, Baltimore, Maryland.

Q Are you related to the late Edward McDowell? A Yes, sir.

Q How? A I was his niece.

Q And your mother's name is what? A Mrs. E. Clayville Smith.

Q And she was a sister of Mr. McDowell? A Yes, she was Beata McDowell.

Q And his only sister? A Yes, sir.

Q You say you knew Mr. McDowell in his lifetime? A Yes, sir.

Q Within the last few years, did you visit him at all? A Yes.

Q Where? A In Summit, New Jersey.

Q What date? A On the 14th of July, 1925.

Q Where did you see him? A In the Hotel Beechwood.

Q Did you stay with him and visit? A Yes, sir.

Q For how long? A For one week, from the 14th of July to the 21st of July.

Q Did anyone call on you while you were there, any friends of yours? A No, sir.

Q Did anyone come with you? A Yes, sir.

Q Who? A Miss Redfield.

Q Who is she? A A friend of the family's.

Q Where does she live? A She lives now at Galen Hall, Atlantic City.

Q And where did she live then? A She was staying with our family.

Q And was Mrs. McDowell living there at the time? A Yes, sir.

Q At the Beechwood? A Yes, sir.

Q And did Mr. McDowell have any other residence during the time you were there, excepting at the Beechwood? A No.

Q Tell us what you observed with reference to him and his conduct while you were there? A I noticed he was impatient.

Q Very much so or a little so? A Very much so, I thought.

Q How did you observe that? A I observed it by his impatience with the waiters.

Q Give the details, please, a bit more, what did you observe? A Everything was wrong that was brought to him and if the waiters did not come immediately, he was very impatient and quarrelled.

Q What else did you observe? A I noticed the ridiculing remarks about the people around

him in a loud enough tone for the people to notice it and hear it.

Q Did he seem very popular about the place? A No, he had no friends there.

Q Were you introduced by him to anyone there? A No, no one.

Q Did you have any conversation with him with reference to the study of art and students? A Yes, sir.

Q About when did that conversation take place? A On the night of July 14, 1925.

Q Give us the conversation, please. A I knew a young gentleman at the Maryland Art Institute who had gotten a scholarship, a traveling scholarship for the Fontainbleau School of Art in France, in May 1924, and I spoke of it and he said that traveling scholarships are no good; they are a waste of time and inadequate instruction is given. The student goes all over the place and does not stay long enough to get any education; it is a waste of money and a waste of time, a waste of time for the student, and a waste of money for the man who gives one.

Q Was there anything in that conversation to indicate to you that he normally expected to leave practically his entire fortune for that purpose a week later? A No, sir.

Q Did you ever see him again? A No.

Q Did you ever have any quarrel or any unpleasantness with him about anything at that time? A No, we were very affectionate.

Q Do you know of any reason in the world why he should not have remembered you in his will? A I do not, in fact, I expected him to remember me.

Q Can you give us any other instances at the hotel during your visit? A Well, the day

I arrived, our trunk did not arrive with us and he was very impatient with the management and told them he thought they should hurry up with his niece's trunk; he was very impatient and kept after them, and the trunk did not arrive for several days, and he kept right after them and I thought—

Mr. Boyd: I object.

Q What, if anything, else did you observe? A I did not observe anything at the hotel, not at the Beechwood.

Q Any other place or at any other time? A Yes, sir.

Q Where? A At the Ritz-Carlton Hotel, where he took us to lunch.

Q What day was that? A I don't know the exact day, I think it was a week before.

Q Before the 14th of July? A Yes, maybe over a week.

Q Who was there? A Mr. McDowell, Mrs. McDowell, Miss Redfield and myself.

Q What took place there? A He met us at the hotel there, Miss Redfield and I, and took us into the lunch at the Japanese Garden. We had a lunch ordered for us; we had honeydew melon, and other things, and he made several complaints and he was very impatient with the waiters, and the place was crowded to its capacity, and he was very impatient and finnicky over the slightest detail, and the woman behind him had a purple hat on, and he made very insulting remarks about the hat and the type of person who wore them, and in such a loud voice that anyone around him could have heard, and I am sure the woman heard, and he was also very impatient

with the waiters. We afterwards went to the Metropolitan Museum, where I saw some pieces of sculpture, and we later went home in the subway; he went back to Summit and Miss Redfield and I went back to Montclair where I was staying at the time.

Q Were you interested in art and the study of art? A Yes, sir.

Q And you are now? A Yes, sir.

Q And did he know of your interest? A Yes, sir.

Q And did he seem interested in it? A Yes, and he asked me if I intended to go to Europe to study art; he seemed very much interested in it and in my knowledge of French, and how far I had gotten, he was very much interested.

Cross examination by Mr. Boyd.

Q Tell us why you expected he would leave you something in his will? A Because I was a very near relative of his, and I could see no reason for his not leaving it to me, as he was very affectionate and very kind to me.

Q Did you indicate to him in any way that you perhaps expected that? A No, I did not.

Q Could you judge from his conduct whether he got the idea that you expected it? A No, I did not judge that.

Q When did you first take into your mind that you expected him to leave you something by his will? A I had always expected it.

Q That is as far back as you could remember? A Well, he was about the nearest relative I had.

Q I mean to say from the time that you were quite a little girl you had a general idea that

as you were his niece he would be apt to leave you something? A Yes, I did.

Q And that is what you meant when you said you expected he would leave you something by his will? A Yes, sir.

Cross examination by Mr. Child.

Q How long was it before you saw your uncle in Summit, that you had previously seen him? A I saw him in Atlantic City, I don't know the date, but I was a very little girl; I think I was about six or seven.

Q And you never had seen him since that time? A Yes, I have seen him several times.

Q How many times? A Once at my grandmother's funeral.

Q Did he talk to you at your grandmother's funeral, do you remember? A Yes, I think he did.

Q When was your grandmother's funeral? A At the time when I was seven.

Q And that was the last time he had seen you until you went to the Beechwood Hotel and saw him there? A No, at the Ritz-Carlton for lunch.

Q That was part of your visit, wasn't it? A No, we went to the Ritz-Carlton before I went to the Beechwood.

Q How old are you? A I am seventeen. I was seventeen on the 6th of December, 1926.

Q So, he had not seen you except once in ten years or twice in ten years? A As far as I can remember.

Q Once for lunch and once during the month's visit at the Hotel Montclair or the Hotel Beechwood? A It was a week's visit.

Q Had he ever written to you during all of that period of years? A No, sir.

Q Have you ever written to him? A No, sir.

Q Had he ever sent you any presents, birthday or Christmas presents during those ten years? A No.

Q In fact, he ignored the very fact that he had a niece? A No, he did not.

Q During the ten years? A No, he mentioned me very often in letters to my mother.

Q Your mother has many letters in which you are mentioned? A She has some letters, I don't know how many.

BEATA McDOWELL CLAYVILLE-SMITH, sworn in behalf of the appellant.

Direct examination by Mr. Lum.

Q Where do you live? A 208 East Biddle street, Baltimore, Maryland.

Q Are you related to the late Edward McDowell? A His only sister.

Q What family have you? A My daughter, Catherine Ward, from my first husband, Frank Ward, and Mr. Clayville-Smith, my husband.

Q And did Mr. McDowell have any other relatives? A None at all.

Q Besides you and your daughter? A None at all.

Q Going back for a period of a dozen or so years, what has been the relations existing between you and your brother, friendly or unfriendly? A Most friendly and most cordial relations.

Q Has there been any break in that situation throughout? A My brother last came to Baltimore in 1917, to my mother's funeral, and remarked he would never return until he came in a wooden box, because he did not like Baltimore, and he kept his word, but he wrote very frequently, and I wrote very frequently to him.

Q Were your relations ever strange in the slightest or did they continue one of affection and regard in the normal condition between brother and sister? A Well, always most affectionate.

Q How often did you hear from him in the last two years of his life? A That would be very difficult to say. I had a great many letters over my mother's death. He returned after her funeral to settle the estate, and I had a great many letters, we always wrote at Christmas, and I always wrote him on his birthday and he always answered. I know he wrote me from abroad at the time he went and why he went.

Q Your brother was married more than once? A Yes, sir.

Q About when did he marry the first time? A Well, he was married the first time in 1896.

Q What happened to that marriage? A He obtained a divorce on statutory grounds.

Q About when? A 1903, I think it was, as far as I remember.

Q How long was he unmarried then after the divorce? A He married Marie Joyce, a widow, in October of the year that my father died, I think that was 1913.

The Court: The widow is still living?

The Witness: Yes, sir.

Q Where does the widow live? A In Baltimore with her parents.

Q And do you know whether your brother had any delusive ideas with reference to his wife? A Why, he had a great many.

Q Did he speak to you or write to you on the subject? A He wrote me that he was leaving her, and he left her.

Q When? A In May, 1923, and he sailed abroad without her.

Q He did sail abroad without her in 1923? A She came to me to say he sailed, so I know she was in my house to say he was sailing, and she asked me where he was.

Q Was he a man of many means at that time? A Considerable means.

Q Did he have any interest in any Baltimore property? A Most of his interest, the income which he lived on, was from a share of my father's estate.

Q Did you have the same share? A Yes, sir.

Q And it is how much? A Nearly $200,000.

Q And what did he say as to the reason for going abroad? A He said in his letters to me—

Mr. Child: The letter speaks for itself.

Q Have you the letter? A I destroyed the letter when I went to the hospital, not expecting to live.

Q Did you destroy it purposely, or did you never think it would be of any consequence whatever? A Well, I thought the matter was closed, because he took her back again after he left her.

Q Then you haven't that letter? A I can repeat it to you, for it made a very indelible impression on my mind, sir.

Q Give us the substance of your recollection?

Mr. Child: I object.

The Court: The letter is destroyed, why can't she give secondary evidence.

Mr. Child: I pray an exception.

The Witness: He always called me his "small sister."

The Court: Before you give us the contents of the letter, please give us an idea of the date about when it was.

The Witness: It was the early part of May, 1923, I think May 6th, but I am not positive of that date.

The Court: That is close enough.

The Witness: I can prove the date by another letter which was received by somebody else. "My dear small sister: When you receive this letter I will have sailed for Europe and sailed alone. I have stored all my things and suffice it to say that the laws of the State of New York are written for the wives and not for the husbands. I hope that you will be discreet and when Marie," that is his wife, "appeals to you, that you will not divulge that I have told you I am leaving her." I never told Mrs. McDowell.

Q Give us all the contents of the letter, please? A "Except for wishing to see you again before I die, I don't care very much what happens to me. Most affectionately, your brother, Edward McDowell." It was written on hotel

paper and Mrs. McDowell received a letter on the same hotel paper, evidently written the same day, which she showed me when she called on me the following day.

Q And have you seen that letter of Mrs. McDowell's? A Yes, sir; he wrote her that he was leaving her and she would know why, and he gave her a check in that letter of $200 and gave his banker's address at Morgan-Harjes; he sailed that day and sailed second class.

Q Did she know why he had left her?

Mr. Child: Objected to.

The Witness: She had no idea whatever, not the slightest idea.

The Court: Sustained.

Q When did you next see or hear from your brother? A That was in May. I heard from Paris about six weeks afterwards.

Q And have you that letter? A I have.

Q Where is it? A In that package of letters.

Q Is there anything of moment in it? A That Marie had joined him.

Q You understood from that letter that his wife had joined him abroad? A Yes, sir.

Mr. Lum: I offer in evidence the letter dated, Paris, July 23, 1923.

(Same is marked Exhibit A. 1.)

Q In this letter, I understand you to say—he says that his wife is back with him? A On the first page.

Q Is there anything else in the letter that you wish to particularly refer to? A I don't think so, Mr. Lum.

Q When did you next hear from him or see him? A August 22, 1923.

Q Is there anything you wish to refer to in that letter? A I don't think there is anything in that except that he sends his regards to his niece.

Q Is that an unusual condition, did he always remember her? A Yes, he was very fond of her.

Q Was there any break in that in the slightest? A No, sir.

Q When did you next see your brother? A After he died.

Q You did not see him until his death? A No, sir. He weighed about eighty pounds and I understand from my daughter that he looked the same when he was in Summit—

Mr. Child: I object.

The Court: Strike out that answer.

Q Do you know of your own knowledge whether your brother had any illusion as to his wife's chastity from anything that he ever wrote you? A Yes, sir.

Mr. Boyd: We object, the writing is the best evidence.

Q Have you the writing? A There was so much said, I do not get the question straight. The letter I have quoted certainly states it.

Mr. Child: I move that that be stricken out.

(Consented to.)

Q Is there anything in addition to the writing that you have referred to bearing on that subject? A No, sir.

Q Have you asked the widow to appear here as a witness? A I have.

Q And she was then out of the State? A She was then in Baltimore.

Q And has she remained out of the State? A Yes, sir.

Q And is she unwilling to come? A I asked her to come and she said she could not testify because she was signed up with the Art Students' League.

Mr. Child: I move that that answer be stricken out.

(Consented to.)

The Court: As I understand you, you say that there are certain statements of delusions made by your brother and that those statements are contained in the letter that you recited to us, that you have destroyed, am I right?

The Witness: That all the statements of delusions of my brother are contained in that letter?

The Court: In that letter.

The Witness: No, not all the statements of delusions, not all the delusions that I know my brother had, if that is what you want me to say. If you want me, judge, to point to all the delusions that I know of that my brother had in the letter that I have destroyed, I can do that.

The Court: I am only trying to find out what knowledge you have of delusions, as

I understood you, you said that the only knowledge that you had of any delusions were the statements contained in that letter which you destroyed.

The Witness: I understood Mr. Lum to ask me if the only knowledge I had of delusions he had about his wife were in that letter, is that the question?

The Court: That is my understanding, the only knowledge that you have about delusions concerning his wife are contained in this letter which you destroyed.

The Witness: Yes, sir.

Q What other delusions, if any, did you know of?

Mr. Boyd: I must ask the Court to restrict her statements to facts particularly—

Mr. Lum: Not what the widow told you but what your brother told you.

The Court: That is a pretty general question.

Mr. Lum: I will limit it—derived from what your brother wrote to you.

Mr. Child: I object to the question. I think that the statements by which the witness concludes that they were delusions, are proper evidence, not the delusions.

Q What were the statements, if any?

The Court: Oh, no, if she has any other letters she can produce them, Mr. Lum.

Q Have you any other letters which contain statements which you refer to as delusions? A

I would have to go over these letters. I have a great many from my brother.

Recess for one hour.

After Recess.

BEATA McDOWELL CLAYVILLE-SMITH, resumes the stand.

Direct examination (continued) by Mr. Lum.

Q I show you a photograph. About what period does that represent in your brother's life, how long before his death? A It was taken in the year of about 1899.

Q And this was taken when? A This was taken in 1905, I took it myself.

Q Have you any later photographs of him? A No, sir.

Mr. Lum: I ask to have them marked.

Mr. Child: I object to their materiality as to this man's mental condition.

Mr. Lum: I am only having them marked for the purposes of comparison, to identify them with other witnesses, as to how his appearance compared with this, and with the doctor's.

(The first photograph was marked Exhibit A. 3.)

(The second photograph was marked Exhibit A. 4.)

Q Have you a letter as far back as February 26, 1912? A It is a little difficult to remember exact dates—yes.

Q Was that the usual tone of affection used by your brother to you, as displayed in that letter? A Yes, sir.

Mr. Lum: I offer it in evidence.

Mr. Child: I object to it, it is immaterial.

The Court: I will allow it for the purpose Mr. Lum outlines.

(The same is marked Exhibit A. 5.)

Q Was there ever any change from the affection and love as indicated in that letter of 1912, to the date of his death? A None whatever.

Q Have you a letter of January 13, 1920, from Forest Hills? A Yes, sir.

Q That is your brother's handwriting? A Yes, sir.

Mr. Lum: I offer it in evidence.

(The same is marked Exhibit A. 6.)

Q I ask you if the expression, "old enemy" used in the early part of that letter was ever referred to in any other letters? A A great many times.

Q And do you know to what that referred? A That referred to his disease of diabetes.

Q I ask you if you have a letter of April 2, 1922? A Yes, sir.

Q And that also is your brother's handwriting? A Yes, sir.

Mr. Lum: I offer that in evidence.

(The same is marked Exhibit A. 7.)

Mr. Lum: Many of these are simply to lay a foundation for the further examination

of other witnesses and then for the testimony of the expert.

Mr. Child: I make the same objection to both of these last letters on the ground that they are immaterial.

The Court: The same ruling.

Q Have you a letter of April 4, 1922, in which your brother speaks of his attorney? A Yes, sir.

Mr. Lum: I offer the same in evidence.

Mr. Child: The same objection.

The Court: The same ruling.

(The same is marked Exhibit A. 8.)

Q Have you one of May 6, 1923? A Yes.

Mr. Lum: I offer it in evidence.

(The same is marked Exhibit A-9.)

Q Have you one from Kew Gardens of June 7, 1923? A Yes, sir.

Mr. Lum: I offer it in evidence.

(The same is marked Exhibit A-10.)

Q Have you one of August 21, 1923? A Yes, sir.

Mr. Lum: I offer it in evidence.

(The same is marked Exhibit A-11.)

Mr. Lum: I offer in evidence the letter from the Hotel Lutetia, Paris, dated November 2, 1923.

(The same is marked Exhibit A-12.)

Mr. Lum: And I offer a letter of December 11, 1923.

Mr. Child: I make the same objection to all of these letters.

The Court: The same ruling.

(The same is marked Exhibit A. 13.)

Mr. Lum: I offer a letter of February 6, 1925.

(The same is marked Exhibit A-14.)

Mr. Lum: I offer another letter of May 7, 1925.

(The same is marked Exhibit A-15.)

Q Have you any other letters of Mr. McDowell's there? A Oh, yes, I have a great many of them.

Q From which you wish to refer to anything particularly? A December 2, 1923.

Q Have you been able to find the Paris letter of July 23, 1923? A No, sir.

Q Do you recall having received from your brother in Paris a letter of July 23, 1923? A I think I did.

Q Did you make these extracts from these letters yourself?

Mr. Boyd: I object, unless she can show that she hunted for it and cannot find it.

The Court: You may answer that.

A I think I gave you that letter of July 23, 1923.

Q You yourself made this abstract from the letters? A Yes, sir.

Q And you had the letter before you at the time? A Yes, sir.

Q Then you either have it or have now mislaid it? A Yes, sir.

Q And this is a correct and complete abstract of the letter made by you? A Yes, sir.

Mr. Lum: May I ask that this be marked for identification.

Mr. Boyd: I ask for the whole letter and not the abstract.

(Argument.)

Mr. Lum: The letter itself is actually in evidence, and it is Exhibit A-1. It is my mistake. I offer the letter of December 2, 1923.

(The same is marked Exhibit A-16.)

Q Is there any other letter, particular letter—we don't just want cumulative statements—anything which is not covered by these? A I don't think so, Mr. Lum.

Q Do you know of any reason whatsoever, good or bad, direct or indirect, why your brother should have disinherited either you or your daughter? A I haven't the slightest idea.

The Court: Just answer yes or no.

Witness: No, I know of no reason.

Cross examination by Mr. Boyd.

Q I notice in one of those letters which just happened to catch my eye, that your brother was rather criticizing the management of the estate down at Baltimore, thinking that it ought to be so managed so as to get more income out of it. You remember reading that, don't you? A I don't remember reading that statement, sir.

Q Well, he did, from time to time, complain, didn't he, about the amount of income that he was being allowed to draw from the estate? A He never complained about the amount of income that he was allowed to draw from the estate.

Q Well, he complained in some respects about the management of the estate, didn't he? A I don't believe he complained about the management of the estate.

Q You never had any conversation with him along that line? A No, sir, I never had any conversation with him along that line.

Q You had no correspondence with him in which he made complaint of that sort? A He made no complaint of that sort.

Q I call your attention to this clause in his letter of April 4, 1922, which is Exhibit A-8. "Please don't hesitate to be quite frank and tell me all you know or think—our interest in the prosperity of the company are, as you know, identically the same and any condition would affect us alike. Therefore, anything you write me would, of necessity, be confidential. I have often wished I was not so far away that I might keep better in touch with what is going on. But you are on the spot and also, being a woman (excuse me) can ask more pertinent (or impertinent) questions without the risk of 'violence'. You could glean a good deal which you could report to me and if need be, we could take any steps together, after having good advice. My attorney here is a member of one of the oldest and most distinguished New York firms and a personal friend. I have been unable to understand why Mr. Hinkley has not managed the Franklin street house to better advantage, especially during the time when rents were soaring out of sight

and everyone else reaping a fat harvest. Even the present rental seems ridiculously inadequate." Didn't you understand that to be a complaint as to the management of the estate? A Do you understand it to be a complaint, sir?

Q I will ask you to answer my question.

Mr. Lum: Just answer the question yes or no.

A No, I don't call that a complaint.

Q So that when you said that he made no complaint, he may have written things like that, but you do not call them complaints, is that it? A I do not consider that a complaint of the management of the estate.

Q You, of course, testified, I think, that under your father's will you received the same amount, at any rate the same income, that your brother did? A I did not testify that I received the same income of my father's estate that my brother did.

Q I thought you said one-half of the estate passed to you? A I beg your pardon, sir.

Q What did you say about that? A I did not receive the same income as my brother received, because property came after that made a difference.

Q You mean from your father's estate? A Yes, sir.

Q It was equally divided at the outset, wasn't it? A Yes, sir.

Q And your brother knew, of course, what he was receiving from the estate, from time to time, didn't he? A My brother knew what he was receiving.

Q Didn't the letters from him that you received show that? A Do you find in those let-

ters a mention of what he was receiving from the estate?

Mr. Lum: Don't ask him; answer the questions.

The Witness: Would you mind repeating it?

Q (Question read.) A I presume he did.

Q And he also knew, didn't he, that at the start your share was the same? A It was divided equally in the beginning, if that is what you mean; yes, sir.

Q So, he must have known that you were receiving a substantial income; I think you said the income from a matter of $200,000. A No, I didn't say that.

Q What did you say about $200,000? A I understood the question asked me, did I understand what his estate amounted to, and I answered yes, and I was asked what the estate amounted to and I said about $200,000.

Q That is your father's estate? A No, sir; that is my brother's.

Q Well, how much did your father's estate amount to? A At the time of the division?

Q Yes. A Can I answer that question in another way?

Mr. Lum: You want to get at the quantum of the estate.

Mr. Boyd: Repeat the question; I think it is quite intelligible.

(Question read.)

The Witness: I suppose around $250,000 or more.

Q And your brother knew, through all those years, when he was writing these letters, and up to the time of making his will, that you were receiving income from your share of that estate, is that right? A Yes, sir.

Q So that he knew that you had an adequate, and, in fact, a very handsome income from that source, is that right? A Yes, sir.

Cross examination by Mr. Child.

Q Mrs. Smith, how long before your brother's death was it that you saw him last? A Just after my mother's death.

Q When was that? A 1917.

Q From 1917 to the day of his death you did not see him; is that correct? A Not from the time of my mother's death, when he came over for the funeral, and again about three weeks after that.

Q Were you in good health during those ten years or nine years, whatever the time was, after your mother's death up to the time of your brother's death? A No, I was not.

Q Did you travel around any? A I very seldom left Baltimore.

Q Why didn't you visit your brother? A I never went to New York, and he traveled abroad a good deal and I made two trips to the hospital during that time.

Q You mean on your own account? A Yes, sir.

Q But for nearly nine years, or about nine years, you did not see your brother at all? A Probably three weeks after my mother's death until he was buried.

Q And during that length of time, your brother did not see your daughter except once

during the period of her visit to him in the Hotel Beechwood? A From the time my brother came to Baltimore to assist in settling my mother's estate, after her death, he did not see my daughter Catherine until she went to Montclair to visit. They visited and he took her to lunch and then she spent a week in the Summit hotel.

Q What was the occasion, was your daughter here in the North or in New Jersey at that time, before she visited your brother? I mean, was she visiting here herself? A She was visiting here herself with Miss Redfield in Montclair, and they knew that my brother and his wife had been writing to me, and arranged a call on her, and so they called.

Q Your father was an artist, was he not? A My father was a business man and an artist as an amateur.

Q And your brother was interested in art, was he? A Oh, yes.

Q He was very much interested? A Oh, yes.

Q Your father gave to your brother his opportunity to study art? A Gave him his entire opportunity.

Q And your brother, for many years prior to your mother's death, pursued the occupation of an artist to supplement his income, did he not? A I don't know why he did it, sir, but he did it.

Q He did do it, he sold pictures?

The Court: Who is this?

Mr. Child: Mr. McDowell, the testator.

Q And he was very much interested in all matters pertaining to art? A Yes, sir.

Q Now, down to the time of your mother's death, your brother's income was very little, wasn't it? A Down to the date of what?

Q Down to the date of your mother's death, your brother's income was rather limited, was it not? A Why, no.

Q Was he then receiving as much from the estate of his father as he did after your mother's death? A No.

Q Your income from that estate and his was identical previous to your mother's death, were they not, from your father's estate? A No, not absolutely identical.

Q Was that sufficient to support Mr. McDowell without any effort on his part at all, without any earnings on his part? A Was what sufficient?

Q Was the income from your father's estate that was enjoyed by your brother, previous to your mother's death, sufficient to properly support him? A Why, yes.

Q How much did you say your father's estate was? A That is a very difficult question to answer.

Mr. Lum: Approximately.

Q Was it $250,000, approximately? A Approximately.

Q And that principal increased at the time of your mother's death? A It increased—did it increase at the time of my mother's death? From what?

Q From the time of your father's death. A From my father's death to my mother's death? Yes, it did—that is difficult, to answer that question.

Q Approximately how much? A I don't know; I don't manage the estate myself; I have a trustee who was appointed by my father not only for me but for my brother, and that is the

reason it is difficult to answer questions of that kind.

Q When was it, Mrs. Smith, that you married the second time? A December 20, 1919.

Q And was your brother pleased or otherwise with your second marriage? A My brother wrote the most affectionate letter of congratulations.

Q He never visited your house afterwards? A No, sir; I testified to that.

Q Did he ever ask you and your husband to visit him? A Repeatedly.

Q Why didn't you do it? A Well, I was not very strong; was not very well; I wasn't able to travel around and it was not convenient at the time to make a trip.

Q Have you letters showing the invitation from Mr. McDowell, your brother, to you and your husband to visit him? A I have.

Q Will you produce them, please? A Do you want me to look them up right now?

Q Have you got them there? A Yes, sir.

Q Just what is the date of the last one that you recall? A I will have to find that, sir.

Q I ask you in whose handwriting the 1922 is on this letter? A That is mine.

Q When did you put that on? A When I got it.

Q Did you make it a point to put the year on every letter after you got it? A Yes, sir.

Q Why? A It was not there originally and I put it on.

Q Well, why did you do it? A So that the dates of the letter would be on the letter, the year.

Q You have the envelope of this letter of February 6th, which shows February 6, 1925,

and you went to the trouble afterwards of putting it on the paper itself immediately upon the receipt of the letter? A That is my handwriting, sir; I put it on there to make the date appear, as my brother had written February 6th on it only.

Q Yes, but I am asking you when you did that? A My recollection is I did it when I got it, sir.

Q I am now asking you why it was important to you to put it on. A Well, I do that on letters when I get them that are not dated.

Q Have you the letter congratulating you on your second marriage? A I have a very affectionate letter from him; I think it was turned in. I think it is in one of those letters there; I think it is there, the one from Forest Hill.

Q This Forest Hill letter? A Yes, sir, of May 7—yes, here it is in the first paragraph (referring to Exhibit A. 6).

Mr. Lum: I now refer to a letter of June 4, 1922, which was produced by the witness in response to a request for a letter containing an invitation to visit, and I ask that it be marked.

(The same is marked Exhibit A. 17.)

Mr. Child: That concludes my examination, except this, that there have been many letters offered here, and in order not to take up the time of the Court I would like to have the privilege of further cross examination after I read the letters, if the occasion arises.

Mr. Lum: I offer the letter of January 4, 1924.

(The same is marked Exhibit A. 18.)

JOHN H. EISER, sworn in behalf of the appellant.

Direct examination by Mr. Lum.

Q Where do you live? A Baltimore.

Q Did you know Mr. Edward McDowell in his lifetime? A Yes, sir.

Q For how many years? A Oh, I guess about thirty-five or forty.

Q Did you go abroad in 1923? A Yes, sir.

Q You knew of Mr. McDowell's social and financial standing in a general way, did you not? A Well, I wouldn't put it that way. I knew Mr. McDowell, because I knew him when he was a boy; in fact, when he was going to school. I knew him when he grew up from boyhood to a man, but his social and financial position, that was not my business; I was not interested in that. I knew his father.

Q Was he on the boat on which you went abroad? A Well, I can say this, yes, because I met him on the tender when we were to go ashore. I had not seen him on the boat.

Q Where was this? A In Cherbourg in the English Channel.

Q Did you have a conversation with him? A Yes, sir.

Q And do you know what class he went? A Yes, he went second class.

Q Did you have a conversation with him on the tender? A Oh, nothing more than I simply asked him if he enjoyed the trip, and he asked me where I was going, and I asked him where he was going, and he made an excuse why he traveled second class.

Q Why? A He said he could not get passage in first class.

Q What was his appearance? A Well, Mr. McDowell never was what I would call a robust man. When he was a boy he was very frail and very delicate, and as he grew up to manhood I don't think he was ever what I would say a strong, healthy man.

Q How about his appearance when you saw him there on the tender in Cherborg? A Well, I had not seen Mr. McDowell enough to make any comparison as to what he looked like the last time. He did not appear sickly to me, and I did not ask him that question, whether he was sick or not. I did not ask him what he was going over for, and he looked natural to me, and Mr. McDowell, as I said before, never was a very healthy or strong man.

Q How much did he seem to weigh when you saw him there? A Oh, I should say about 110 or 115 pounds.

Q Did you see him again abroad? A No, sir.

Q Or did you ever see him again after that? A No.

Q That was in the summer of 1923? A It was in June, about the 21st of June, 1923.

Q Was Mr. McDowell alone or with his wife or anyone else at that time? A He was alone.

Q You had the purser's record to show that he was not in the first class? A Yes, I have them, if you would like it.

Q Was the ship full in the first class? A I don't think so; in fact, I might say no.

Cross examination by Mr. Boyd.

Q What ship was it? A The Belgeland.

Q That is pretty nearly the height of the season, isn't it, along in the middle of June? A I

don't know, sir; I am not a steamboat man and I cannot answer that.

Q You say the ship was not full. Do you mean the decks were not crowded? A No, what I mean is that he could have gotten a reservation in first class if he wanted it, and he could have gotten my room, the room I had, because I changed the room I had when I left New York; I changed when I got out to sea.

Q That is after the steamer left? A Yes, he could have gotten it if he wanted to.

Q Mr. McDowell, I understand you to say, was rather slight and rather delicate looking all of his life? A Yes, he was a very small man.

Q He was really what you would describe as a dapper, little man? A No, I wouldn't call him a dapper, little man, but I would call him a little man, because I don't think Mr. McDowell was a very lively man with ambition and push. What I call a dapper man is a fellow who moves quickly and has ambition to be around—I will put it that way—that is what we business men call pep.

Q Of course, you are rather substantially taller than Mr. McDowell was? A Oh, yes.

Q How tall are you? A About five feet five.

Q How tall was Mr. McDowell? A Oh, I guess about five or five feet one, about that. I have never measured him, so I cannot tell you.

Q And it is your guess that this little man of about five feet or five feet one weighed about 110 or 115 pounds? A Yes, sir.

Q Now, Mr. McDowell always had been a man with a great deal of pride, hadn't he? A Well, I don't know, because I never talked that much to him, so I would pay particular attention. It is not like a man whom you see weekly or monthly so you could pay some particular attention to his pride or personal appearance, but if you do not see a man possibly for two or three years you do not pay much attention to his appearance.

Q It did not occur to you when you had that conversation that perhaps his pride was a little touched to have you see him going second class, and so he gave you some little excuse to save his face, as it were? A No, I was very much surprised to see him on the boat and possibly I showed that I was.

Q I am not asking you about surprise. A How could I tell from his appearance whether he was surprised?

Q I did not say surprised; I said his pride may have caused him to make this little excuse to you. A No, I don't think so; it did not appear to me that way; I did not take it that way, anyhow.

Cross examination by Mr. Child.

Q What is your business? A I am president of McDowell & Company. I am president, general manager and buyer.

Q Mr. McDowell received an income from that business, did he? A Yes, but I never gave it to him. I presume he did.

Q What do you do with the income, pay it over to the trustees? A I do nothing with it, sir; I am simply the president of the corporation and the income that is derived, or the profits on the stock, the trustees get that.

Q The trustees receive it? A Mr. McDowell's trustees.

Q Did Mr. McDowell ever have any conversation with you about the affairs of the business or the income? A No, sir.

Catherine B. Ward (recalled), direct.

CATHERINE B. WARD, recalled.

Direct examination by Mr. Lum.

Q Did your uncle have any conversation with you in July, 1925, regarding his trip abroad? A Yes, he did.

Q Did he mention your mother? A Yes, sir.

Q What did he say? A One of the last things he said to me, as we got on the train, Miss Redfield and I got on the train, he said, "Be sure and tell your mother to pack up her things and take Mr. Clayville-Smith and you and join us up here and we will go on a trip to Europe together."

Q Was there anything that you observed in anything that he ever said or did at any time which showed any lack of interest in you or your mother or any hostility whatever? A No, sir.

Q What did you observe as to his personal appearance? A He was very emaciated and did not look very strong and healthy.

By Mr. Boyd.

Q You had not seen him for ten years? A No, I had not.

Q Do you remember now how he looked when you saw him before that period? A I don't remember distinctly, no.

Q So that really the only times you saw him were within that period of about a week or ten days or so, that you testified to, and that he looked rather thin? A Yes, he did, but I had a recollection of him as being a stouter man.

Ernest H. Cook, direct.

By Mr. Child.

Q Why was it that you refrained from or did not visit your uncle for some ten years? A I was never the kind of person who traveled a lot.

Q And did Mr. McDowell ever meet Mr. Clayville-Smith? A Not to my knowledge.

ERNEST H. COOK, sworn in behalf of the proponents.

Direct examination by Mr. Child.

Q Mr. Cook, where do you live? A Montclair, New Jersey.

Q What is your occupation? A Vice-president Bank of New York and Trust Company, New York.

Q Were you acquainted with Mr. McDowell in his lifetime? A Yes.

Q For how long had you known him? A Oh, I think I met him first sometime around 1910 or '11.

Q How frequently did you see him? A Dependent upon his presence in the United States; he traveled a great deal.

Q Well, during the time he was here in the United States, how often did you see him? A Possibly two or three times a month.

Q Was he a customer of the bank with which you were connected? A At that time, yes, the Central-Union Trust Company.

Q You were then connected with the Central-Union Trust Company of New York? A Yes, sir.

Q And what opportunity did you have for observing Mr. McDowell's methods of business

and so forth? A The transaction of his business and his banking affairs?

Q Down to how long before his death did you see him in connection with his affairs? A I think I saw him possibly two or three weeks before his death.

Q And during the year or more preceding his death, about how frequently did you see him? A I really cannot say; I did not see him at any stated periods; he was not doing business in my office in the Bank of New York and Trust Company at that time, during that last year.

Q Did you see him on an average of once a month, as often as that? A Possibly.

Q What was the nature of your conversation that you had with Mr. McDowell? A At what time?

Q At any of these interviews, was it business, or partly business and partly social? A Well, it was both, and we were rather good friends, and always had been.

Q At any time during the years that you have known him, did Mr. McDowell ever display, or did you ever observe anything unusual or out of the ordinary in regard to his mental condition? A No, sir.

Q What sort of a man was he, was he a man of good or poor intellect? A Good intellect, I should say.

Q You saw him, I think you stated, about three weeks before his death? A I am not quite sure, it was somewhere within three weeks before his death, because I was very much surprised to learn of his death, having seen him just a short time prior to it.

Q Did you observe any difference in his mental faculties during the last year or two of his life? A None.

Q Where did you see him a short time before his death, the last time? A In my office.

Q And what was his physical condition at that time? A I think he had a cold, he was complaining about a slight cold.

Q Did his physical condition noticeably change in the last two or three years before his death? A No.

Q Were you in any way responsible for Mr. McDowell's removing his property or securities to Montclair? A Yes, sir.

Q How did that come about? A He was endeavoring to place his property in a different state from New York for the reason that the State Tax Department of New York had been bothering him a great deal with notices requesting him to explain why he made no tax return to the state of New York. He had made, I think, some tax returns in the earlier years, but because of the fact that he was residing in Europe most of the time, he felt that he had no legal residence in New York and wished to make that definite, and he asked me whether I had any suggestion to make. He said he was then in Summit, New Jersey, and I said, "Why not go to some bank in Summit and see them about it, and have some arrangement made for the transfer of your securities and property there?" He said that he knew of no one in Summit and I said, "Well, I live in Montclair, and I know the Montclair Trust Company officials. In fact, one of the directors is a very personal friend of mine, and I think they will be able to take care of you very nicely and properly."

Q Did you subsequently introduce him to the Montclair Trust Company? A I did, I went there with him and introduced him.

Q When you discussed with Mr. McDowell his business affairs, did he display intelligence, or otherwise, in connection with them? A Oh, absolute intelligence.

Q From your observation of him, was there anything at all that you ever observed about his conduct or speech that would in any way lead you to question as to whether he had a sound mind or not? A He never said anything that would indicate or make me infer that he was not entirely of sound mind.

Q Did Mr. McDowell, during the course of his talks with you, ever discuss with you the amount of his estate at all? A No.

Q Did he ever tell you what amount he was bringing out to the Montclair Trust Company, or anything of that kind? A I think he did mention it, and if I remember it correctly, it was somewhere around $20,000, more or less.

Q Did you take up with Mr. McDowell the securities that were brought over, do you remember? A I don't think I saw the securities; I am quite sure that I did not.

Cross examination by Mr. Lum.

Q Do you know what other securities he had? A No, sir.

Q Do you know whether he knew, from anything he ever said to you? A That he had any other securities?

Q Yes. A I never discussed it with him.

Q Did he ever discuss his family with you? A At times.

Q Discuss his wife? A At times, I met his wife.

Q You met them together? A I have.

Q And they seemed to be living happily and congenially? A Yes, sir, absolutely.

Q You had no knowledge that he had suspicions of his wife's fidelity, did you? A Why, he was of a jealous disposition, and he mentioned to me at one time that he was a little bit worried about his wife.

Q Just tell us about that, when was that conversation? A I should say it was two or three years ago.

Q Did he say whether his wife had given him any cause for jealousy? A I did not discuss it with him, because I did not want to go into it in detail.

Q I am anxious to know just what he said to you on that subject. A I can't tell you, it is too long ago.

Q Well, now, you remember that he had a conversation, give us your best recollection as to what he said. A As I recall it, they were going abroad and he said that he was a little worried about his wife. He appeared to be jealous of her; he thought someone was paying her some attention.

Q Did he tell you he was suspicious of a Japanese servant? A No, sir.

Q Didn't ever mention that? A No.

Q Did he mention about any notes written in Japanese that he had pieced together? A No, sir.

Q Did he ever speak to you about his father's estate? A He did, some years ago.

Q Did he say whether he owned it or whether it was vested in him, or whether he had power of appointment, or did he tell you what the situation was? A The only conversation I can recall regarding his father's estate was when he made

the complaint about the trustee. He thought the trustee was not giving proper attention to the sale of some real estate.

Q That was Colonel Hinkley, wasn't it? A Yes, Colonel Hinkley.

Q Did you go into that matter for him at all? A I think I wrote a letter to Colonel Hinkley for him.

Q And did you go about and ascertain the standing of Colonel Hinkley, as to what it was in that community and whom he represented? A That was not part of my affair at the time, I simply wrote a letter, as I remember it, at Mr. McDowell's request.

Q You don't know whether his suspicion of Colonel Hinkley was well founded or not, do you? A No, sir.

The Court: Did he express any suspicion of Colonel Hinkley?

The Witness: He did not, as far as I can recall.

The Court: He was just dissatisfied with the management, as I understand?

The Witness: He was dissatisfied with the management.

Q Do you remember an incident about a check for $1,000 that he thought he had not gotten? A Yes, I do recall that.

Q And do you recall that he thought he had not gotten it and it just mixed up between banks? A No, my recollection of that is that the check was sent abroad, and I think it was sent in care of Morgan, Harjes & Company and he was under the impression that the letter had been delivered to another Mr. McDowell.

Q Do you know that he actually got the check himself? A No, I never found out whether he did or not.

Q He never told you that he did? A No, I was always under the impression that it was lost.

Q And you knew he was disturbed by the incident? A Oh, yes, naturally.

Q And he blamed Colonel Hinkley for that? A He did.

Q Don't you think that that intimated to you some suspicion of Colonel Hinkley? A No, sir.

Q Did he, on any other occasion, speak to you about his wife? A Not that I recall.

Q Did he ever refer to his niece? A I didn't know he had a niece.

Q He never let you know that he had a sister, either, did he? A I knew he had a sister, yes, sir.

Q How did he speak of her? A I don't remember, it is so long ago, and I don't think his sister was mentioned within the last ten years.

Q You did not hear him mention his sister in the last several years? A No.

Q He had been a resident of New York, had he? A Well, I don't know where he lived in New York at all; I never knew his actual address in New York.

Q You said you knew him socially as well as in a business way, and yet you don't know where he lived? A I never visited with him outside of my office; he was simply a good friend, a good business friend and we discussed many things together. For instance, he sent me a very nice etching that he made and one year I think he sent me a picture.

Q So, when you speak of socially, the social end is entirely confined to your office? A Yes,

he would visit with me at my office, and even if he did not do any business with me, he would come in and chat when he came back to New York.

Q Do you know that he always voted in New York and nowheres else? A I don't know where he voted.

Q Do you know on his return from abroad, from a trip around the world, he gave his residence as some little obscure, Japanese village? A No, I do not.

Q When he spoke to you about bringing securities over to New Jersey, when was that? A Several years ago; I don't know the exact date.

Q 1923, about? A Possibly, I should say it was about that time.

Q About the time they were brought over, was it, shortly before? A When he spoke to me about them?

Q Yes. A Yes, sir.

Q And he told you at that time that he was living in Summit? A Yes, I think he was stopping in Summit.

Q Did he tell you he did not know any bank in Summit? A No, he said he knew there was a little bank there, but he preferred not to have it there.

Q And because you knew Montclair, you introduced him to the Montclair people? A I did.

Q And that was his only touch with Montclair, as far as you knew? A So far as I knew.

Q And although you lived in Montclair and knew him socially and in a business way, you never visited him in Montclair? A No, sir.

Q Nor did he ever visit you? A No, he called at my house in Montclair, I think, twice.

Q But you never called on him in Montclair or knew that he was living there? A No, sir.

Q Do you know how much he weighed at the time of his death? A I don't know, I am no judge of weight whatever. When I have seen him, I always saw him, as a rule, in the wintertime when he had his coat on, and I don't believe I have seen him for many years without his coat on.

Q Do you know that he weighed only a little over eighty pounds at the time of his death? A No, sir.

Q When did you see him last? A I cannot say exactly, three or four weeks before his death.

Q Did he know that he was emaciated at that time? A As I say, he may have had a cold and he may have been thinner than usual.

Q You did not personally know Colonel Hinkley? A Yes, I have met him.

Q Didn't you know that he is one of the most respected and admired men in Baltimore?

Mr. Child: I object. We are not trying Colonel Hinkley.

A I should imagine so.

Q How well did you know Colonel Hinkley, what touch had you had with him in a business way?

Mr. Boyd: If the Court please, I really think that is going far afield; it is not cross examination and it has no bearing on the issue in this case.

The Court: Perhaps. Let us just see what he does know.

The Witness: I met him twice, I think, within the last year.

The Court: Where did you meet him?

The Witness: In my office.

The Court: That is the only time you ever saw him in your life?

The Witness: As far as I can recall, yes, sir.

The Court: He had two interviews with him at the witness' office.

Q Do you know what interest he represents? A It had nothing to do with Mr. McDowell's affairs; it was an entirely different matter.

The hearing was thereupon adjourned until tomorrow, Wednesday, February 2, 1927, at 11 o'clock A. M.

SECOND DAY.

Wednesday, February 2, 1927.

Before Hon. Dallas Flannagan, *J.*

For the appellant appears Lum, Tamblyn & Colyer, (by Ralph E. Lum).

For the Montclair Trust Company appears Robert M. Boyd, Jr.

For the Art Students' League of New York, appears Child & Shipman (by Francis Child and Jehiel G. Shipman).

MARIE McDOWELL, sworn in behalf of the appellant.

Mr. Lum: I offer in evidence the will of Edward G. McDowell, of Baltimore, the father of the present testator, and of Mrs.

Clayville-Smith. I am offering a copy with the right of my opponents to object to the accuracy of it. That is in a proceeding in which Mr. Boyd's clients are parties, although I understand they have not participated in it.

(The same is marked Exhibit A. 19.)

Direct examination by Mr. Lum.

Q You are the widow of the testator, Edward McDowell? A Yes, sir.

Q And when were you married to him? A December 4, 1913.

Q And you had known him, I believe, for several years before your marriage? A Yes, sir.

Q Quite from the time you were a young girl? A Yes, sir.

Q And you were very fond of him? A Very fond of him.

Q At all times? A At all times.

Q And still treasure and cherish his memory? A I do.

Q And do you know of any reason whatever for your being practically disinherited by his will? A No, I do not.

Q None was ever given to you by him at any time? A None whatever.

Q Did you ever give him any occasion whatever to doubt your fondness and your loyalty to him? A Never.

Q I believe that Mr. McDowell became ill in the late years of his life? A Yes, sir.

Q And did you know the nature of his disease? A It was diabetes.

Q And did he ever take insulin treatments for that? A No, he did not.

Q He refused to do that? A Well, yes, he did; he did not feel any necessity for it, did not seem to have any interest in it.

Q And do you know whether he for some time tried to treat himself? A Yes, he did.

Q And not going to doctors? A He went to doctors also, but he always treated himself.

Q Now, in the last two or three years of his life, do you know what doctors he went to? A To a Doctor Cornwell.

Q What is his address? A I am not sure of the address.

Q In New York City? A In New York City, yes, sir.

Q When did he go to Dr. Cornwell? A Oh, that I can not remember; I think, perhaps, a year or two before his death, but that I can not remember exactly.

Q How often did he go to him? A I think only once after he came back from Europe, once or twice, perhaps.

Q What other doctors did he go to? A Back in 1922 he went to Dr. Hubert Howe.

Q New York? A New York, yes, sir.

Q And his address? A It is on Madison avenue; I think he changed his address and I am not entirely sure of that.

Q And how often did he go to Dr. Howe? A Two or three times a year, perhaps.

Q For a year or two? A For a year or two, yes, sir.

Q No other doctors that you know of? A No, I do not. Dr. Howe diagnosed his case as diabetes.

Q Now, do you know of any other doctors that he went to? A None that I know of, none that I can think of now.

Q And the disease progressed steadily until the time of his death? A Well, it did not bother him very much, I thought he got better toward the last, because he could take starchy foods, some starchy foods and some sugar, so that his condition improved rather than got worse.

Q Don't you think that that was a matter of disregard of diet? A Well, yes, he did disregard his diet, but I don't think it bothered him very much.

Q And his death was what date? A February 18, 1926.

Q And that was at the Beechwood Hotel in Summit? A The Beechwood Hotel, Summit.

Q How long had you been living at the Beechwood, continuously, before that? A From August, 1925, I think.

Q What time in August? A Maybe it was not August, September, I think.

Q And for the month before September, where had you been living? A Atlantic City.

Q At a hotel there? A Yes, sir.

Q How long were you at Atlantic City? A About six weeks, I think, as well as I can remember now.

Q And where had you and your husband resided before that? A Well, we stayed at Bretton Hall apartments, and we spent part of the summer up on—

Q Bretton Hall, where? A New York City.

Q For how long, about? A Well, we had an apartment there for nearly a year, I think.

Q And then where? A Abroad.

Q And you took a trip around the world? A A We took a trip around the world in 1920.

Q And those are all the residents—you said something about being away all the summer,

where was that? A I am just trying to think of the name of the place.

Q What is it? A I have forgotten entirely the name of the place.

Q Will you give me the name of the state? A That is just what I am trying to think of, but it slipped my mind, absolutely.

Q In New Jersey? A No, it was not New Jersey.

Q Then, up to the time of living in Atlantic City and the time at Summit, he had no residence in New Jersey? A Yes, sir.

Q Do you remember one night you were in Montclair? A Yes, sir.

Q And it was just one night? A Yes, sir.

Q At the Montclair Hotel? A Yes, sir.

Q He was never there with you, or never there before or after that? A He may have been there before that without me, but I am not sure about that.

Q Now, you and he were together constantly from what time? A From the time of our marriage.

Q So that after your marriage he was never there without you? A Unless he went over for the day; he may have done that.

Q I mean overnight. A Overnight, no.

Q Now, this trip abroad, in 1923, by Mr. McDowell, he did not discuss that with you before going, I believe? A Yes, he did. We were supposed to be going together.

Q And when did you know of a change of plan? A Two days before sailing.

Q And that was not discussed with you at any length? A No, sir.

Q What happened to your belongings? A They were put in storage.

Q By Mr. McDowell? A Yes, sir.

Q And you learned, I believe by letter, that he had sailed? A Yes, sir.

Q And how soon did you follow him? A He cabled me on his arrival in Cherborg and about a month after I went over. He cabled and asked me to come over.

Q He did? A Yes, sir.

Q And then you went? A I did.

Q And how did he greet you when you arrived? A Very pleasantly.

Q And treated you kindly? A Kindly, always kindly.

Q Do you know any reason whatever for that sudden move of his in sending your things to storage and going without you? A No, I don't know of any particular reason.

Q Do you remember at one time there was a Japanese servant in your house? A Yes, sir.

Q There was something, I believe, about some little slips of paper written in Japanese that disturbed Mr. McDowell. Do you recall that upsetting him? A Yes, sir.

Q And did you ever see those slips of paper? A No.

Q Mr. Beale spoke to you about them? A I never saw them.

Q No, but Mr. Beale spoke to you about them? A Yes, he spoke to me.

Q Mr. McDowell had discussed them with Mr. Beale? A Yes, sir.

Q Now, Mr. Beale also, I believe, had a letter left with him to be delivered to you after Mr. McDowell's death? A Yes, sir.

Q And did he deliver the letter to you? A Yes, sir.

Q And have you it with you? A No.

Q Where is it? A I don't know where it is.

Q You have not destroyed it, of course? A I have.

Q You have destroyed it? A Yes, sir.

Q Do you recollect the contents of it in a general way, not in detail? I am sorry to be obliged to ask about that, but very briefly, may I ask if it referred to the Japanese servant? A No, sir.

Q Did it refer to man in Switzerland? A Yes, sir.

Q And in a way, briefly, did it indicate a doubt in Mr. McDowell's mind with reference to the question of your conduct?

Mr. Boyd: I object on the ground that he should ask what it said.

Q What did it say, please, will you just briefly give us the contents of it? A Must I say so?

Mr. Lum: I am willing to leave it as the record is now, if Mr. Boyd will withdraw his last objection. I want to save this witness everything in the world I can.

Q Mrs. McDowell, you filed a caveat, originally, against your husband's will, did you not? A Yes.

Q You did that after consulting with Mr. Beale, who is here in court, did you not? A Yes, sir.

Q And then later withdrew it, did you not? A Yes, sir.

Q And that was the result of certain negotiations which took place between the Art League,

who is the beneficiary under this will and yourself, was it not? A Yes, sir.

Q They have agreed to make certain provisions for you as long as you live? A Yes, sir.

Mr. Lum: With that basis, I think I am justified in being permitted to ask these questions.

The Court: Let us see what the question is.

Q (Question read as follows: "What did it say, briefly, will you just please give us the contents of it?")

The Court: I think that is a near-filed question, Mr. Boyd. Of course, he can ask what was said in the letter.

Mr. Boyd: I object to the form of the question.

The Court: Of course, it calls for a conclusion and probably is an improper question. The question really is for the expediency—now, from my standpoint and from all our standpoints, Mr. Lum says that that is all he wants to ask, or do you want to go into detail—

Mr. Lum: I think Mr. Boyd is going to force me, so I will have to.

The Court: I don't believe that it is fair to say that Mr. Boyd is going to force you.

Mr. Child: If Mr. Lum is going to stop at that question, we will stipulate that the letter indicated that Mr. McDowell was jealous of his wife.

Mr. Lum: Jealous of his wife and suspected her conduct, did he not?

The Witness: No, he did not.

The Court: You mean jealous of the wife with respect to receive attentions from men?

Mr. Child: Yes, sir.

The Court: You made it broader.

Mr. Lum: I will leave the subject. Perhaps I may be able to develop it from other witnesses.

The Court: Then, there is no stipulation.

Q Mrs. McDowell, do you recall an examination in New York by Dr. Gallitan? A Yes, sir.

Q And do you remember Mr. McDowell speaking about the matter later as to where he stood? A I don't understand what you mean.

Q Well, he spoke to you about the examination that that doctor had made, did he not? A Oh, on me, you mean?

Q Yes. A Yes.

Q Now, what did he say with reference to where he stood, and how he felt about it? A I don't understand what you mean.

Mr. Child: I object.

Mr. Lum: I don't want to lead any more than I can help.

Q Do you recall any conversation with reference to a drawn revolver? A No, none whatever.

Q Mr. McDowell did not speak to you about having stood outside of the door while you were being examined? A By Dr. Gallitan?

Q Yes. A I believe he did, I do remember now, he did say something about it.

Q Now, just tell us what he said. A He just said I was well protected.

Q And that he stood outside with a revolver in his hand? A Yes, sir.

Q Dr. Gallitan, I believe, is an eminent doctor in New York and a personal friend of Mr. McDowell's? A Of Mr. McDowell's, yes.

Q Do you recall during shopping trips and trips which you made out of the apartment, you were frequently followed by Mr. McDowell? A No, I do not.

Q Did you not make that statement? A I did not.

Q Is it not a fact that you were? A I may have been.

Q You not only may have been, but Mr. McDowell was of extremely jealous nature, was he not? A He was.

Q And didn't want you alone at any time if it could possibly be avoided, did he? A No, sir.

Q Was there anything at any time, Mrs. McDowell, in your conduct, that justified any suspicion? A Nothing.

Q You never gave the slightest cause at any time with any one for the least suspicion? A Not the slightest.

Q Did you know any man in Switzerland whatever to whom you paid the slightest attention? A Not more to any one than to any other. In fact, I knew very few men there at all.

Q Did you know of anyone to whom Mr. McDowell might have had reference to in this letter to Mr. Beale? A No, sir.

Q When he referred to a man in Switzerland, you never had any idea what might have been in his mind? A No, sir.

Q And in Switzerland, was there anything which even remotely gave your husband any grounds for suspicion? A Not the slightest.

Q And this gynechological operation, did Mr. McDowell desire you to mention it as an appendicitis operation? A Yes, sir.

Q And your mother has never known to this day that it was a gynechological operation? A She knows.

Q Your husband did not wish you to mention it? A No, sir.

Q Now, do you recall early in 1923, a certain fall that Mr. McDowell had and where it was? A Yes, sir, it was in Kew Gardens Apartments.

Q About what time, I know you cannot give us the exact date, but generally. A I don't remember exactly.

Q In the spring of 1923? A No, it must have been in the winter, because he had a cold and he was under the doctor's care.

Q Now, describe very briefly the fall. A Why, he was taking medicine which made him very weak.

Q And where did he strike when he fell? A Well, I don't remember, I started to grab him and he fell with me.

Q Do you recall whether he struck his head? A I don't think he did, but I can not remember now.

Q About how long was he sick from that fall? A Oh, the fall did not make him ill at all.

Q He was ill before the fall? A Yes, he had an attack of influenza or grippe, and in coming back from the bathroom he was very much weakened.

Q You have mentioned that fall, of course, yourself, have you not, to someone? A I don't know whether I have nor not, I don't remember.

Q You don't know how I happen to know about it? A No, I do not, I mentioned it to the doctor.

Q Do you remember speaking of the fact that he had struck his head? A No, I don't remember that, I don't say that I did not do so, but I don't remember it now.

Q Now, at this time when your possessions were sent to Baltimore on this sudden notice, in 1923, Mr. McDowell also sent you a check for $200? A Yes, sir.

Q And there had been no discussion of his leaving you? A No.

Q Do you know of any reason in the world why he should about that time have written that the laws of New York state were made for the women and not for the men, or words to that effect? A I don't remember his saying that.

Q I am not asking you that, I am asking you to assume that if he did say that, do you know of any reason why he did say it? A I don't know.

Q Was there any time when you neglected Mr. McDowell? A Never.

Q Was there ever any time at which you could have done anything that you did not do? A There was not.

Q Do you know that Mr. McDowell went second class abroad? A Yes, but that is not an unusual thing, though, many people do that.

Q He was a man of comfortable means, I believe? A Yes, sir.

Q Were you surprised and distressed when you knew that your husband had sailed without you? A Naturally.

Q Very much so, were you not? A Very much so, yes, sir.

Q That your husband had, at about that time, written, "I shall be away indefinitely. I cannot stand it any longer. Suffice it to say that the laws of this state, New York, are made for wives and not for husbands," you had no knowledge of what he may have been referring to? A I have not.

Q And was there any reason whatever for any such belief that he suggested in the letter? A No, sir.

Q Had there been any discussion of legal proceedings at any time? A None whatever.

Q Any threats made by you or by him at any time whatever? A None whatever.

Q Big or little? A No.

Q Now, do you know why he should have written at that time, "I don't care very much whether I ever come back to this country or not. With the exception of seeing you again"—speaking of his sister—"not much matters." A I have no recollection of his having written that.

Q I know, but for the purposes of my question, assume that he had written such a thing. Do you know of any reason why he should have written it? A No, I do not.

Q And would you believe he was his own self if he had written such a thing? A I don't know exactly what you mean. I think if you will explain it a little more—

Q Well, can you give us any theory for his having held that view at that time? A When I went abroad, you mean?

Q When he went abroad, why should he have written that to his sister? A Because he was very much fonder of Europe than he was of America.

Q But that does not explain to us why he should have written that he never wished to return except for the purpose of seeing his sister. Was there any reason that you know of why he should not have been anxious to see you? A No reason at all.

Q And did he give you any reason or make any explanation? A No, sir.

Q Never at any time? A No.

Q And when you got the cable from him and joined him in Cherborg later, you traveled together on the continent? A Yes, sir.

Q All that summer until November? A Yes, sir.

Q And he did not refer to this subject? A No, he preferred not to discuss it.

Q And never gave you any reason for his conduct? A No, sir.

Q Did your husband ever discuss his will with you? A He did, years ago, and told me that he had left me everything.

Q And did you ever know of any reason for any change in that disposition in anything you ever did? A No.

Q Or any attitude that he ever had toward you? A Except that he was very jealous, as I said before.

Q And was that with or without cause? A He was just as jealous of women as he was of men. He was very jealous of my regard for my family. In fact, he would have preferred that I give up my family altogether.

Q He was of a jealous nature? A Yes.

Q And you did everything he wished? A Yes, sir.

Q And conformed your life to his wishes? A Absolutely.

Q Did you know he was making a will that night at the time he was over in Montclair? A I did not.

Q He did not discuss it with you? A No.

Q And so far as you had any conversation with him, you did not know he had made a will, or what he had done about his property? A He did not say anything about it.

Q He did not say a word about it? A No.

Q Now, do you remember when you spoke to your husband abroad in 1923, about his very sudden leaving, and did he mention slips of papers written in Japanese? A No, sir.

Q You don't read Japanese, I believe? A No.

Q And these little pieces of paper that were written in Japanese, did Mr. Beale show them to you? A No.

Q He just told you he had them? A I think so.

Q Did he tell you he had them? A Yes, sir.

Q And did they mean anything to you? A Nothing whatever.

Q And did they give you any basis for any reason for Mr. McDowell disinheriting you? A No.

Q Was there anything whatever in the Japanese servant's conduct which would have justified the slightest degree of suspicion? A Absolutely nothing.

Q Do you know whether Mr. Beale still has those little Japanese slips? A I don't know.

Q What was the Japanese servant's name? A We had about ten Japanese servants, I don't know which one you mean.

Q You did have several? A Ten in one year.

Q Why were there so many? A Because they were all equally bad.

Q Did Mr. McDowell discharge them or did you? A Mr. McDowell usually did the discharging, but, of course, I found many things to object to about them, and they were not as cleanly as they might have been.

Q Were your women friends idiots? A Idiots?

Q Yes. A I should say not.

Q Do you know of any reason why, in 1922, Mr. McDowell should have written, if he did, saying that your women friends were idiots? A He never wrote such a thing.

Q I am asking you to assume that he did. If he did, do you know of any reason for it whatever? A Absolutely none.

Q Would there be any basis in fact for such a statement? A None whatever.

Q Do you recall the visit of Mr. McDowell's niece to Summit in July, 1925? A Yes, not as our guest.

Q No, but she was with her uncle? A Yes.

Q And he treated her very kindly and considerately? A Yes, but he did not put himself out to entertain her in any way. I did most of the entertaining.

Q But that was generally his habit, didn't he do very little entertaining? A Very little, unless he particularly liked a person, and then he put himself out.

Q Catherine sat at your table at the Beechwood, did she not, in July, 1925, with you and Mr. McDowell? A Yes, sir.

Q Did you happen at that time to hear him say anything about traveling scholarships,

whether he thought they were good or not? A No, I don't remember that. I know that he approved of people being educated abroad, of art students being educated abroad.

Q Now, do you remember a little while before Mr. McDowell's death your making a request for some cash? A I do.

Q What was the reply he made to you? A "Oh," he said, "Why, certainly, it will all be yours some day anyway."

Q And about what time was that? A Oh, I can't remember.

Q Well, how long before his death, a month or two or three months? A Perhaps a month.

Q Do you remember whether he made that remark or other remarks of like import more than once? A No, sir.

Q Now, you remember in this last year there at Summit you desired some shoes? A Did I do what?

Q Desired and needed shoes. A I don't remember any such occasion.

Q Let me see if I can't recall it to your recollection. Do you recall that there were some words about shoes and later a boy brought some shoes to the room that had been repaired? A Oh, yes.

Q Now, just tell us that incident, please. A Those were shoes that had been mended for me.

Q What happened? A Why, Lord & Taylor's insisted on sending them C. O. D., when we had a charge account, and they had been told that they should have been put on the charge account, and that was done not only once, but several times, and of course, the last time Mr. McDowell was very furious about it, because he thought it was very unfair—

Q What did he say? A He refused to pay for them, because he had a charge account with Lord & Taylor's and they should not have been sent C. O. D., and it was impertinent on the part of the girl who sent them.

Q How did he show himself furious? A By refusing to pay the man who brought them.

Q Did he throw the shoes at the boy? A Certainly not, he never did that to anybody in his life.

Q And do you recall at that time Mr. McDowell being suspicious of a couple at another table across the room? A Of another couple?

Q Yes, an elderly lady, saying, "Look, Marie, there is something going on between those two," or words to that effect. A Yes, but then, anybody is liable to say a thing of that sort.

Q And did they look to you like an eminently respectable couple? A Yes, sir.

Q And do you know of any reason why he should have said such a thing? A No, except people often say things like that without any reason whatsoever. It was not unusual.

Q Was your husband also suspicious, sometimes of Colonel Hinkley? A Never.

Q Do you recall an incident of a $1,000 check? A You mean a $1,000 check that was lost?

Q Yes. A Yes, sir.

Q And did he think that Colonel Hinkley had failed to properly account for that $1,000? A I think he did.

Q And Colonel Hinkley is the soul of honor, a man of the finest reputation in Baltimore, is he not? A Yes, but he did not send us the check from the bank that he was asked to send it to. It was negligence on his part.

Q The bank that he sent the check to did not have a correspondent abroad, is that it? A Yes, sir.

Q And another check was sent and Mr. McDowell did get the $1,000 check? A No, the one that was lost was never accounted for. It was taken off of his account.

Q Are you sure of that? A Absolutely sure, absolutely.

Q You think that Mr. McDowell was charged with $1,000 that he had not received by Colonel Hinkley? A He most certainly was, it was a forged check, forged by a man in France.

Q Now, Mrs. McDowell, I am going to ask you to tell us about Mr. McDowell's little dog. Do you remember having heard him speak of his little dog? A Yes, but never to the little dog.

Q The little dog died, I believe, before you were married? A Yes, sir.

Q What was his custom with reference to going out walking at night with this little dog? A That was just a—

Q Never mind characterizing it. Just tell us the facts, please. He used to walk out at night with the little dog? A No, he did not walk at night with the little dog.

Q Tell us what the facts were. A We used to pretend, as a sort of a little play, about the dog, because he was very fond of it, and talked about it.

Q Pretended to play with it? A Not to play with it, but pretended that it said things, just like lots of people do that.

Q This particular dog that had been dead before you were married was a sort of play for Mr. McDowell? A Yes, and for me. I kept it up as much as he did.

Q Because of his fondness of it? A Yes, sir.

Q Because it had seemed such a real thing in his life, that is why you did it, wasn't it? A Yes, sir.

Q You heard him, in his notion that this dog, which was dead before you married, was still alive, didn't you? A Yes, but lots of people would do a thing like that.

Q You heard him do it? A I don't know that I heard him do it, I did it as much as he did.

Q But you never saw the dog? A Yes, I had seen the dog. I knew the dog personally, and you can know a dog personally, and he was finer than a great many human beings. The dog was almost human.

Q And didn't he used to take that dog out walking at night, and say to you, "I must take the dog out?" A No, I don't know that he used to take him out walking at night.

Q What did he say about it? A He would say that it did certain things—in fact, I think he could have made a very beautiful story out of it.

Q But he would speak as though the dog was alive and running about? A Yes, sir.

Q Don't you recall his writing a letter in which he said that he would have to close his letter now in order to take a walk with Donnie, Donnie being the dog? A No, he did not use those words.

Q Do you know about how much Mr. McDowell weighed at the time of his death? A I am afraid I do not.

Q Was it more than eighty or eighty-five pounds? A Oh, my, I should say he weighed over a hundred pounds. He must have weighed about a hundred and thirty, I think.

Q At the time of his death? A I think so. Of course, I cannot be absolutely sure of that, but it was not anything like eighty of eighty-five pounds. That would be ridiculous. He wasn't terribly thin.

Q Do you remember that almost during his last conscious moments Mr. McDowell called for his sister? A I do not.

Q You say that he did not? A He did not.

Q He did not mention her at all? A He did not.

Q Did you never make that statement? A I never made that statement.

Q Did not tell Mrs. Clayville-Smith that? A I did not.

Q Were you familiar with his personal property, what he had outside of the trust in Baltimore? A I knew practically what he had.

Q About what was it outside of the Baltimore trust? A Between $20,000 and $25,000, I think.

Q And then he had valuable etchings and paintings and personal property? A Yes, of course, but an etching or a painting is only valuable if you get a price for it.

Q Don't you know that his work had been on display in Knobler's Art Gallery within the last few weeks? A No, I didn't know that.

Q And you don't know how they got there? A No, sir.

Q You don't know what his etchings are bringing now in the market, do you? A I do not.

Q Mr. McDowell was aware of the fact that he had an interest under his father's will, was he not? A Of course.

Q You heard him speak of that? A Of course.

Q And he had power to dispose of that by his will, did he not? A He did.

Q And he knew of that? A He knew of that.

Q Do you know of any reason why, if he remembered it at the time of his will, he should have made no reference to that property? A I don't know of any reason. I suppose he took it for granted that that would be understood.

Q Do you recall, on his return from a trip around the world, what residence Mr. McDowell gave the customs authorities in New York? A I think he gave Japan.

Q A little town in Japan, did he not? A Yes, sir.

Q And how long were you in that little town in Japan? A Six weeks at one time, and we came back and stayed six weeks more, I think, as far as I can remember.

Q That is all that he had ever been in that town? A Yes, sir.

Q Did he own any property there? A No, sir.

Q You knew that Mr. McDowell had an account in a Summit bank? A Yes, sir.

Q And in the New York Bank? A Yes, sir.

Q He had an account in the Summit bank all the time you lived out there in Summit? A Yes, sir.

Q To go back to the letter that Mr. Beale delivered to you after your husband's death, give us very briefly the reference to the man in Switzerland. A Well, I only read it once. I don't believe I would be able to repeat it again. I did not burden my mind with it.

Q Give us the substance, if you recall it. A Well, it was full of jealousy.

Q He was evidently distressed by the fact that there had been some attention paid to you by some man in Switzerland, isn't that true?

Mr. Child: Objected to as leading.

A Yes, sir.

Q And there had been no attention? A No attention.

Cross examination by Mr. Child.

Q Mrs. McDowell, did Mr. McDowell attend to his own business affairs? A No, Mr. Hinkley took charge of that.

Q Yes, but I mean with reference to his own personal securities, aside from the trust? A Oh, yes, indeed.

Q Did he make investments on his own account? A He did.

Q Were those investments made wisely or unwisely? A Very wisely.

Q Was he what you would term a conservative or a reckless man in regard to his investments? A Conservative.

Q Was there anything about his conduct during the many years that you were with him, with reference to his business affairs, that would lead you to think he was in any way mentally incompetent? A Nothing.

Q Did he discuss with you the securities that he had? A He did.

Q Did he discuss with you the kind of securities that he had? A He did.

Q Did he ever discuss with you the relative merits of stocks against bonds? A Yes, sir.

Q And what did he say with respect to the relative merits of stocks as against bonds? A

He said that bonds were safer, that stocks probably brought you more, but the bonds were safer.

Q And were the investments that he made in bonds? A Practically all. He may have had some stock, but they were practically all bonds.

Q For how long a period prior to his death did he discuss the investment and make any remarks about investments and his business? A Oh, within a few months, I think.

Q What kind of bonds did he have, if you know? I don't mean the names of the particular bonds, but the class. A Why, he had railroad bonds, I think, largely.

Q Now, during the years that you were married to him, from 1913 down to the date of his death, did you notice any particular difference in his mental condition, any noticeable change of mentality? A No, I did not.

Q What have you to say as to his general condition of health for practically a year prior to his death, and his condition of health five or ten years before? Did it remain about the same? A No, he was not as well, I guess.

Q And when he died, what did he die of? A Pneumonia.

Q And how long a period of time was he ill? A Eight days, I think it was.

Q What was Mr. McDowell's vocation, if he had one? A Artist.

Q And was he interested in matters pertaining to art? A Absolutely.

Q Was he interested in the matter of artistic education? A Very much interested.

Q Did he ever discuss with you the relative advantages of an education in art acquired in the United States, and an education in art acquired in Europe? A He did, and he considered

an education acquired in Europe so much better in every way.

Q You knew Mr. McDowell's father? A Yes, sir.

Q Was he interested in art also? A Very much; he was an amateur artist himself.

Q Do you know whether Mr. McDowell, your husband, ever studied art at, or was connected as a student with the Art Students' League? A Oh, yes, he studied there.

Q And was he interested in the Art Students' League, do you know from anything he said? A Yes, sir.

Q And did Mr. McDowell ever say to you why he came to New Jersey to live and take up his residence? A Yes, sir.

Q What was the reason that he gave? A To avoid income tax.

Q Was there any other reason why he came to New Jersey, or did he give any other reason? A No, I don't think he did.

Q Do you recall whether he ever stated to you that the doctor had told him that New Jersey was healthier to live in than New York? A Well, yes, he said that Summit was healthy; it was also healthy for me. It is quite high there.

Q So your health was also considered? A Yes, in fact, it was recommended for me by my doctor, Dr. Holland, the digestive specialist.

Q The night that you and he spent at the Montclair Hotel, did he introduce you to anyone on the grounds of the hotel? A Mr. Hines.

Q Did he tell you what Mr. Hines' occupation or business was? A Yes, sir.

Q What did he tell you he was? A A lawyer.

Q Did he tell you that he had deposited his securities with the Montclair Trust Company, did he ever tell you that? A I knew it, but I can't remember—I think he must have told me, but I am not sure.

Q You knew that they were there? A Yes, sir.

Q Now, referring to this fall that Mr. McDowell had while living in Kew Gardens in 1923, was that a serious fall that affected his health any? A No, not in the least.

Q Did the fall necessitate the calling of a doctor, do you know? A I called the doctor, but at the time the doctor came he was all right, he had been ill, as I said, with the grippe, and it was simply a weakness from the medicine that had been given to him.

Q Did you ever notice anything different in his conduct after the incident of the fall in Kew Gardens? A No, sir.

Q Now, when the niece of Mr. McDowell, Miss Ward, came to the Summit Hotel, did she come as Mr. McDowell's guest? A No, sir.

Q She was not his guest? A No, sir.

Q Do you know how it was she came there? A No, she was staying in Montclair and she just said she would come over a few days, that was all.

Q Was it at his invitation that she came over? A No, sir.

Q Did he pay her hotel bill, do you know? A He did not.

Q Now, coming down to the incident of the time you were examined in the office of Dr. Gallitan in New York, did Mr. McDowell say to you that he had stood outside of the door with a revolver, did he mention the revolver? A Yes.

Q You say that you might have been followed by detectives employed by Mr. McDowell. Have you any personal knowledge of ever being followed, your own personal knowledge? A No, I have never seen anybody following me.

Q Was Mr. McDowell, or could Mr. McDowell, during the last ten years of his life, be classed as an invalid, so that he was not able to be about? A Oh, no, I don't think so. Certainly not, when you are traveling abroad you cannot travel abroad when you are an invalid; living there is so difficult in many ways.

Q What have you to say in regard to Mr. McDowell's memory? Did he have a good or a poor memory? A Good for some things, and not so good for other things.

Q Average memory? A Average memory.

Q When he spoke or talked, was his talk of an intelligent kind? A Absolutely. He had a very brilliant mind.

Q You have received many letters from him? A I have.

Q Were those letters always well expressed? A Well expressed.

Q Was Mr. McDowell much of a reader? A A great reader.

Q What class of books did he seem to be interested in? A Well, he was interested in the standard authors, and he liked travel books and the Asia Magazine, and things of that sort.

Q Do you recall any lectures that Mr. McDowell gave while you were married to him, lectures on art? Did he give any lectures on art that you know of? A Not that I know of.

Q Do you recall in Japan he gave a lecture on art? A Yes, sure, he did at a Japanese girls'

school, and he also gave a lecture in an art school there, too.

Q In connection with this incident of the shoes, from Lord & Taylor, was or was not Mr. McDowell's attitude in regard to the shoes reasonable or unreasonable under the circumstances? A I thought it was justifiable, under the circumstances.

Q It was your own attitude, was it not? A It was.

Q Now, we have heard of this incident of the dog. Do you know whether Mr. McDowell ever read a book called, "Where the Blue Begins"? A No, I don't think he did.

Q Did he ever believe that that dog was alive after the dog was dead? A Oh, mercy, no, certainly not. He spoke many times of wanting to write a story of Donnie's life, and he said he thought it would make an exceedingly interesting book for not only children but grown-ups, and I thought it would, too.

Q You engaged in this play of Donnie? A Yes, sir.

Q And for how many years did you keep that comedy up? A Oh, throughout our married life.

Q Did you regard that as any incident that your husband was crazy? A If he was crazy, then I must have been, too.

Q Did Mr. McDowell, so far as you could observe, retain apparently the same mental activities down to the time of his last illness that he had possessed for years before? A Yes, sir.

Q There was nothing to indicate any change? A No.

Re-direct examination by Mr. Lum.

Q Do you know then, of any reason why in 1923, he should have appointed the Montclair Trust Company agent to handle his securities and take care of his business affairs for him? A No.

Q Do you know of any reason why, after 1923, he should not have had something in his hands or done some business? A Because we were traveling abroad a great deal and he needed an agent in this country.

Q When he came back, he did not take his business affairs in his own hands, did he? A No, he left them there.

Q And do you know of his buying or selling anything after 1924? A I am not sure about that.

Q You never heard of it, did you? A No, sir.

Q When he introduced Mr. Hines to you and told you that he was a lawyer, he did not tell you what the lawyer was there for, did he? A Yes, he came to him to find out about his becoming a resident of New Jersey.

Q That is all he told you, is that right? A That is all he told me.

Q You attempted, I presume, in every way, did you not, to reason with Mr. McDowell on the fact that there was no real need for his being suspicious of your conduct, didn't you? A Naturally.

Q Would you say how many times? A Several times.

Q And in spite of all you could do in that respect, he would come back to it again and even up to his death he left you that letter for delivery after his death and he was still harbor-

ing the notion that you were unfaithful? A Yes, sir.

Q And was there anything that you could have said or done that would have changed his mind on that subject? A No, sir.

Q And was there anything that you could have done that you did not do? A No.

Q Mr. Child said something about detectives following you. I did not mention that, but what was it that gave him the idea that detectives were following you?

Mr. Child: You stated it on your direct examination.

Mr. Lum: He followed her, not detectives.

Q Tell me what you understood about detectives following you.

Mr. Child: Not what you understood, but what you know.

The Witness: I was told afterwards about that.

Q By whom, Mr. Beale? A Yes, sir.

DuBOIS BEALE, sworn in behalf of the appellant.

Direct examination by Mr. Lum.

Q Mr. Beale, you are a member of the Bar of New York? A I am, sir.

Q And have been such for many years? A Yes, sir.

Q You are counsel, I believe, for Mrs. McDowell, the widow? A I am.

Q And for her only? A Yes, sir.

Q Are you connected with the Art League of New York? A Not in any way.

Q Either directly or indirectly? A No, sir.

Q And you knew Mr. McDowell in his lifetime? A I did.

Q At one time you drew a will for him? A I did.

Q And you are the man who delivered the letter to Mrs. McDowell? A I did not.

Q Was it delivered to you? A I never received any letter that I know of.

Q You heard her testimony as to her having received a letter? A Yes, but I think she is mistaken.

Q You heard the testimony about the Japanese pieces of paper? A Yes, I can tell you about it if you want to know.

Q Is she mistaken about that, too? A I will be glad to tell you about that.

Q Please answer my questions, sir. A Your question is rather unintelligible, Mr. Lum.

Q You did see the pieces of paper on which Japanese writing was contained, in Mr. McDowell's lifetime? A Yes, sir.

Q And from whom did you receive them? A Mr. Edward McDowell.

Q And he had a notion that they were sort of little love messages written by the Japanese butler to his wife, didn't he? A No, sir.

Q Didn't he say that to you? A No, I will tell you about it gladly.

Q You will answer my questions, and I think you will tell me about it before you get through, if you have to stay here all day. He delivered

these pieces of paper to you, didn't he? A Well, I will be glad to tell you about it. There was one piece—

The Court: Can you answer that question yes or no?

The Witness: I cannot.

Q Then he did or did not deliver a piece or pieces of paper with Japanese writing to you? A I don't consider that an intelligible question.

Q You state you cannot answer that question? A I will answer the question if you will frame it so I can tell you the truth.

Q Did Mr. Edward McDowell deliver a piece or pieces of paper to you? A Yes, sir.

Q How big a piece? A About, I should say, twice the size of an ordinary writing envelope.

Q And did you have the Japanese figures on it translated? A I had it translated.

Q And did you tell Mr. McDowell what the translation was? A I did.

Q Did it show that he had any basis for jealousy of his wife? A No, sir.

Q Did you ever know of any basis of jealousy for his wife? A No.

Q Did he speak to you about his having her followed by detectives? A Yes, sir.

Q More than once? A My recollection is twice.

Q And he frequently did have her followed by detectives? A Yes, sir.

Q But he did not get any evidence, did he? A No, not that I know of.

Q And that did not stop him from having her followed by detectives? A No, sir.

Q Did he discuss with you some man in Switzerland? A No, sir.

The Court: When was the last time he spoke to you about having her followed by detectives?

The Witness: I think about three months before his death.

The Court: Was it longer than three months, or a year?

The Witness: Oh, longer than three months.

The Court: But within the year?

The Witness: Yes, sir.

Q Did you know of his going abroad without his wife? A Yes, sir.

Q In fact, running away from her? A Yes, sir.

Q And then he cabled for her to meet him? A Yes.

Q He told you about that? A Yes.

Cross examination by Mr. Child.

Q You say that you drew a will for Mr. McDowell? A Yes, sir.

Q What did you do with that will? A I delivered the will to Mr. McDowell. I am not positive now whether it was executed in my office, or whether he had it executed elsewhere.

Q Did you make any draft of the will before final execution? A I made several drafts, but he changed his mind once or twice.

Q I show you the draft of the will and ask you if you have ever seen that before? A I have.

Q I notice some lead pencil notations on that instrument, in whose handwriting are those? A In my handwriting.

Q What is that a draft of? A A draft of a will which Mr. McDowell asked me to prepare.

Q Was that will subsequently executed? A I think it was. I cannot be positive whether it was executed in my office or not, but I do remember having made that will ready for signatures.

Q And by a reference to the typewritten date on that draft, can you tell the year in which that paper was drawn? A Yes, I can.

Q What year was it? A May, 1923.

Mr. Child: I would like to have that marked for identification.

Mr. Lum: You may put it in evidence, if you will.

(The same is marked Exhibit R. 4 of this date.)

Q Referring to the draft of the will which has just been marked in evidence, were those lead pencil changes and notations made there at Mr. McDowell's request? A In his presence, as I remember.

Q Well, do you remember whether they were made at his request or not? A Oh, yes.

Q Do you know or did you discuss with Mr. McDowell the reason for his coming to New Jersey? A I did.

Q What were those reasons?

Mr. Lum: He isn't going to contradict what the other witnesses said.

Q Give us the reasons that he gave for coming to New Jersey. A Why, to the best of my recollection, he had had trouble with the New York State Income Tax Department for two years when he was abroad; they insisted upon collecting a tax, and then he also told me that it was healthier for him to get out of New York City; he had been living in Kew Gardens or New York City for some time.

Q Did he discuss with you anything about the New York law in regard to wills, or did you advise him to that effect? A I did.

Q What did you advise him and what did you tell him, with respect to charitable or semi-charitable bequests? A I told him that under the New York State law a man disposing of his property by will could not dispose of more than one-half of such property outside of his natural heir, or to a charity, rather, leaving more than one-half of his property to charity.

Q In what connection did you tell him that or make that remark. A In connection with drawing his will.

Q And what particular clause in regard to the will? A And his leaving the residue of his estate to the Art Students' League rather than to his family—

Q Did Mr. McDowell discuss with you at that time what his estate consisted of? A Yes, he did in a general way.

Q Did he mention the Baltimore property? A He did.

Q Did he, on more than one occasion, mention the Baltimore property? A On what occasions?

Q I mean on the occasions of his visits to you. A Oh, yes, sir.

Q Did he say anything in explanation of why he was leaving the residuary estate to the Art Students' League? A Yes, sir.

Q What did he say with reference to the Art Students' League and why he was making this bequest? A Well, in the first place, he said that his father had been an amateur artist, and he thought he had real talent, but did nothing, and had never had an opportunity owing to the press of business, to develop his talent, but that he had given his son—the father had given his son, Edward McDowell, an opportunity to study by providing for him both during the father's life and by a trust after his death; that he thought that this money, to some extent, was in trust for artistic purposes, at least a portion of it should be given to other people who did not have the same chances that he had. That was one of his reasons. The other reason was that he did not care for his wife's family and did not want them to receive a portion of his property.

Q Did he mention on any of the visits that he made to your office his sister, Mrs. Clayville-Smith? A Yes, sir.

Q What statements, if any, did he make in regard to his sister, Mrs. Smith, that you can recall? A Why, he did not particularly—

Mr. Lum: I object to it. What was said?

The Court: Sustained.

Q State what he said. A He said he had not been in very close touch with his sister in recent years.

Q What else? A That they had had difficulties in the past and there were plenty at present, words to that effect, as I remember it; that's about all.

Q Did he discuss or say anything about his sister's interest in his father's estate? A He said his sister was well looked after under his father's will and would be comfortable for the rest of her life; that she had the same property that he had.

Q Did he ever say anything to you about his niece, Miss Ward? A No.

Q You had an opportunity of observing Mr. McDowell for many years? A For a portion of 1923 and 1925.

Q What would you say as to his mental capacity to appreciate the nature of the act or drawing a will and as to whether he did have a mentality that is ordinarily required to draw such a will? A Why, I should have said that he had perfect understanding of what his property consisted of, and perfect ability to dispose of his property by will.

Q Did you ever have any discussion with Mr. McDowell in regard to the administration of the trust down in Baltimore and as to whether it was bringing sufficient money, or otherwise? A Oh, a great many discussions.

Q During his discussions in regard to that trust, whether regarding income or principal, or whatever it might be, did he display intelligence? A Yes, sir, he did.

Q Was he able, apparently, to comprehend an account, and the various items of an account, that you can recall? A As much as an ordinary person can.

Q Did you ever suggest to Mr. McDowell that if he went to New Jersey that some New Jersey lawyer should redraft his will and redraw it? A I don't think I did.

Q In connection with the Art Students' League, did Mr. McDowell discuss with you in detail how he wanted to have this fund administered? What it should be used for? A To some extent.

Q Did he discuss with you any question as to whether artists of this country are denied the opportunity of being properly trained, or anything of that kind? A I think he did.

Q And what did he say with reference to that? A Why, he felt that an artist with talent needed a European training before they could make the most out of themselves.

Q Do you recall when Mr. McDowell returned to Europe in 1925, any discussion in regard to the Baltimore property? A Why, there were a number of discussions about the Baltimore property in 1925.

Q In regard to an accounting? A I wrote to Mr. Hinkley regarding the account.

Q Did he in that connection, Mr. McDowell, ever say anything to you in regard to his sister's judgment or her marriage, her second marriage? A Yes, he said he thought his sister had not used very good judgment in handling one situation that had arisen with regard to McDowell and Company's business, and he just said he had not seen her second husband, or something to that effect.

Re-direct examination by Mr. Lum.

Q I believe, Mr. Beale, you represented Mrs. McDowell as a widow on the filing of her caveat against this particular will in question, did you not? A I did not file a caveat.

Q I did not suggest you did. You represented her in the matter of that procedure, did you not? A I did.

Q And you received from the Art Students' League a settlement for the widow, did you not? A I did.

Q When Mr. McDowell came to see you about this will, he gave you all detailed instructions that you had here, I am referring now to R. 4, he gave it to you, did he? A To the best of my recollection, yes.

Q And do you know why the name of the wife, Marie M., had to be written in in long hand? A I do.

Q Why is that? A Because Mr. McDowell called me up and talked to me on the telephone and told me, asked me if I would get a draft of a will ready for him, giving me general information about it, and then he stopped in another time and discussed the matter with me and gave me a little more information.

Q Well, then, when he gave you the information that you had when you drew the will, he had not gone far enough to give you the correct name of his wife, is that correct? A He did give it to me once, but I had forgotten it.

Q And you explained to him, I suppose, the laws of New York at the time you drew this will? A To some extent.

Q Nevertheless, he insisted that it be drawn the way it was? A Yes, sir.

Q And you explained to him that the will was not worth a hang in New York, didn't you? A No, sir, I did not.

Q You explained to him that a man could not make such a disposition of his property in New York legally, didn't you? A Yes.

Q Nevertheless, the man insisted upon making such a will? A Yes, sir.

Q And that, in your judgment, is evidence of capacity and judgment to transact his own business? A Yes, sir.

Q You thought that was good judgment, to insist upon making a will which would not be valid under the laws of the State of New York, which he was making, you think that is sound judgment and good reasoning? A Under the hypothetical case that you stated, yes, sir.

Q Because you thought that if he did it, it would result in getting some justice for his widow to whom, under this will he was apparently doing some injustice, is that the reason? A To some extent.

Q And that, in your judgment, is good judgment on the part of the testator over in your balliwick, is that right? A (No answer.)

Q Mr. Beale, did it seem to you evidence of sound intelligence and good judgment to disinherit a wife because you did not happen to like her relatives?

Mr. Child: That is calling for a conclusion.

The Court: He has given his conclusions. Now, he is examining him in regard to it.

The Witness: Yes, sir.

Q Because you thought that would give a wife better ground to break a will, is that your reason there again? A No, sir.

Q Then, tell us how that displays sound intelligence and good judgment on behalf of the testator to disinherit a wife because he does

not like her relatives? A I have always thought that a testator could dispose of his property the way he wished.

Q That is not the question. A I told Mr. McDowell the situation of the law in the State of New York and my reasons for drawing that will were that he did not seem to care particularly whether his wife got half the property, or whether she did not; he seemed to understand that that was the result, and he wanted to make a gesture and leave her $5,000 whether she got the rest of his estate, or half, or not, and he discussed it for some time with great intelligence.

Q And he did not care whether that would not have been valid under the laws of the State of New York? A It would have been valid under the laws of the State of New York.

Q And as to the one-half? A Yes, he understood that clearly.

Q He knew that one-half would go to his wife? A Yes.

Q And you thought that that was evidence of good judgment and clear reasoning power on behalf of the testator?

The Court: Well, is it a question of judgment or clear reasoning power?

Mr. Lum: I would not have gone into this, but they went into it—

Mr. Child: Oh, no, not at all.

Mr. Lum: He went into it, he gave us his opinion, his judgment—told the Court that he thought this man was a man of keen judgment, and now I am proceeding to show what he bases that judgment on—

The Court: It would be all right, Mr. Lum, if you would limit your questions

more particularly as to his judgment and not as to his reasoning powers, because they are very different things.

Q You thought it evidence of good judgment to make a will which would only operate to the extent of fifty per cent. when he could have made one that would operate to the extent of a hundred per cent.? A After discussion with him, yes, sir.

Q You thought it was good judgment to leave nothing to his wife because he did not like her family? A That was his privilege.

Q That is not the question.

Mr. Child: I think the question is unfair. Under the laws of this State a man has the right to do with his own as he wishes, if he is competent. Now, this man, for purposes of his own, and in order to prevent his wife's family from getting anything—any of this money, or income of it, decided to do certain things that may have been harsh or unreasonable, and under the invertness—

The Court: I know, but that is not what we are considering at the present time. The witness has testified that in his opinion he used good judgment. Now, Mr. Lum is asking him upon what he bases that conclusion, that's all.

Q Is it good judgment not to leave a wife, who otherwise would be entitled to his estate, nothing, because Mr. McDowell did not like her relatives? A I don't feel qualified to testify as to whether that is good judgment or not.

The Court: Was there anything said about any difference between the laws of New Jersey and the laws of New York on wills?

The Witness: There was.

The Court: Was there any discussion as to whether this will was going to be executed in New York or New Jersey?

Mr. Lum: He declares himself a resident of New York.

The Court: I know, but I want to find out whether this particular will you have just been talking about, whether you contemplated that that would be executed in New York or in New Jersey.

The Witness: Oh, in New York, he was a resident of New York at that time.

The Court: You say he wanted to make a gesture. Will you explain what he said, Mr. Beale, at that time?

The Witness: His feeling was that he—

The Court: Not his feeling, but what he said.

The Witness: He didn't care so much whether his wife inherited the estate, but he wanted her to know that he had been suspicious of her, and had kept track of her doings and conduct, and conversation and one thing and another of that sort. That is what I mean by gesture.

Q Then, it is my understanding, he made this will this way and told you so, because of his suspicions against his wife? A I would say partly.

Mr. Child: Did you afterwards inform him that this will would be a good and substantial will in New Jersey?

The Witness: I did not know.

Mr. Boyd: I suppose you told him that you were not a member of the New Jersey Bar?

The Witness: I did.

Mr. Boyd: Did you advise Mr. McDowell to come out to New Jersey?

The Witness: No, sir.

IRVING J. SPEAR, sworn in behalf of the appellant.

Direct examination by Mr. Lum.

Q Dr. Spear, where do you live? A Baltimore, Maryland.

Q What is your profession? A Doctor of medicine.

Q Will you please give us your experience, briefly? A I graduated at the University of Maryland, twenty-seven years ago. I have been practicing or studying continuously since that time. I have had experience and practice in this country and abroad; I have been connected with various hospitals where patients affected with mental diseases are treated; I had charge of the one in Baltimore for a year. I have been connected with the University and other hospitals, practically most of the hospitals in the State, in the capacity of an attending or consulting physician in nervous and mental diseases. I am at present the professor of nervous diseases

and clinical psychiatry at the University of Maryland. Author of text books, magazine articles and so forth.

Q Doctor, have you had any experience in the treatment of diabetes? A Only insofar as it occurred in individuals who have mental conditions.

Q And does diabetes have any mental effect on patients, ever? A It is one of the causative factors of mental abnormalities in individuals.

Q And can you give us anything as to the cause lying behind that? A Diabetes is like any other form of intoxication. It lasts over a period of years, two, three, four, five or longer. It affects individuals in several ways. I am not talking about the general physical peculiarities, or the acute mental aspects of it, but I am talking more of the chronic mental manifestations that occur in a person affected with a diabetic condition. In the first place, it may bring about an irritation of the blood vessels which supply blood to the brain or any part of the body, and it is one of the causes, of course, of gangrene. I mean, the blood vessels stop, and a leg or a foot or a toe may drop off from the gangrenous affection due to the closing up of the vessels. Now, this process takes place more or less slowly, and in many instances the blood vessels that go to the brain become smaller than they should be and their calibre becomes partly stopped up, and the brain cells do not get sufficient nourishment, and that often gives rise to mental abnormality. Sometimes it goes so far as to bring about what we know as a comatose condition. That is more or less an acute manifestation, or it may be a primary manifestation. In other individuals, if they have this disease, instead of

bringing about a comatose case, brings about the mental symptoms of an insufficient supply of blood to the brain and among those, of course, are weakness of judgment, irritability, restlessness, often suspicion, often sexual incompetency, impotency, disturbance of memory, and sometimes I have even seen them with paralysis. Other times with convulsions, it depending entirely on the extensiveness.

Q Doctor, you have examined, have you, the letters, extracts from the letters, which have been put in evidence here yesterday, and which are now in your hands, and read the testimony of Miss Ward given yesterday, and heard the testimony of the witnesses this morning? A Yes, sir.

Q Based upon that, what is your opinion as to the testamentary capacity of this testator on August 4, 1925, having in mind that in this State the rule is quite similar to that in Maryland, which involves knowledge of the property which he possessed; the natural objects of his bounty; those who have claims on him by blood and other relationships, and the relations existing between them. Are you able to form an opinion, I will ask you first?

Mr. Child: I object.

The Court: Just answer yes or no.

A Yes.

Q Now, I ask you what is such opinion?

Mr. Boyd: I object on several grounds. First of all, he has no right to ask for that opinion merely from extracts of those letters.

The Court: We don't know what the extracts are. We don't know what he is referring to.

Mr. Lum: I am referring only to the letters which are in evidence.

The Court: I know, but that is too general. It doesn't convey any idea to the Court at all.

Q Assuming that in those letters, beginning from a period back in 1912, one letter, which is in evidence, expressed to his sister the expression, "I wish we were nearer that I might see you oftener and tell you all that is so difficult to write. But I shall be going on again some time soon and hope to see you when I do. Believe me with profoundest sympathy and love, sincerely your brother." Another, coming on down to January 13, 1920, he says, "I am glad that you are so happy. I sincerely hope that you may always be so. Since I wrote you I have been down with my old enemy for a couple of days." (The "old enemy," referring to diabetes.) Again, on April 2, 1922, writing as follows to his sister: "However, if I do get away I shall take train arriving 12:30 and if you don't mind, will go up to your house with you to the funeral. One might think that we could find someone to be with M. (M. referring to his wife) while I am away, but unfortunately all her women friends are idiots. We have a Japanese servant, and would you believe it, not one of them will remain in the house without a man and Nishida is a perfect jewel, the soul of honor, and the kindest little gentleman you could fancy. Yours devotedly, Edward McDowell"; another one on April 4, 1922, as follows: "Dear Beata: My attorney here is a member of one of the oldest and most distinguished New York firms and a personal friend. Yours, Edward McDowell." On March 5, 1923, writing again to his sister, "Dear Beata: Poor M. has just been in bed for nearly two weeks with grippe and feels pretty wobbly as a result. It is a vile complaint and has made a wreck of the poor little lady. Always yours, Edward McDowell." Again on May 6, 1923, "Thank you for your kind letter of greetings. It was indeed good of you to remember my birthday though it made me blush. I am glad that the days of cakes and candles are over, for I should never be able to support the formidable number. I confess I feel old and weary and even plead guilty of having wished that it was finished. Sincerely, Edward McDowell." And again on June 7, 1923, writing, "Just a hurried line to tell you that I am returning your delightful O'Brien books by parcel post today," and so forth. "Thank you very much for the many pleasant hours they have afforded. They are charmingly written and most interesting. I am 'moving out' tomorrow and off to Europe in a few days. I would have 'warned' you before but have had a mountain on my hand. I will write more at length without fail before I go and give you my mailing address." And again a letter written from abroad on July 23, 1923, "My dear Beata: I am very much your debtor for two very kind letters and very much mortified that they had to remain so long unanswered. But you know many things have happened since I last wrote to you. Marie arrived safely and we have been in Paris a little over a week. Perhaps it is best as it is. I am not as young as

I might be and—well, the less said the soonest mended, at least for the present. This sounds very sophisticated, I know, but it is the best I can do at the moment. Marie looks very well. She seemed a bit thin on her arrival but otherwise fit. We are going to Switzerland in a couple of days to remain for the summer, and then to Egypt and India and so forth. Thank you very much for the article on insulin, the new treatment for diabetes. It was extremely interesting and I have consulted a physician here about it. He says that in France as yet it is only in experimental stage and though fine results are obtained and it shows great promise, the doctors here feel that too little time has elapsed to tell what after affects it may have and are therefore cautious about using it except in desperate or very severe cases. My own case is not an advanced one, and so far, responds to treatment and diet so promptly that he says he sees no reason why a cure may not be obtained, * * * However, when I get to Lucerne I shall consult a Swiss and again inquire about insulin. * * * Thank you for your kind offer to take care of me if I wish to go to Johns Hopkins. I shall remember." Again on August 21, 1923, from Lucerne, "We arrived in Lucerne last Friday and it was nice to 'get back' for we had such pleasant recollections of it. We intended staying here until October. We have had such delightful trips and climes. With best love to Catherine and regards to Mr. Smith." And again on November 2, 1923, "There seems to be a lot going on right now in Paris, and we are disgustingly comfortable. Diabetes? Much improved. I carry a little bootle of Fehling's Solution in my grip sack and make my own

tests (thereby saving countless millions of dollars to the doctor) so that I can regulate my diet almost to the ounce. I have been able to increase my starch until I have begun to fatten up a bit, and I was pretty darn thin. And I can take some fruit and my little bottle of Pomard almost every evening for dinner." Again on December 11, 1923, from New York, "I take this opportunity to thank you for your interest and kindness in behalf of my 'sugar troubles' am very much better as I wrote you, so much so that the insulin treatment would be a supererogation, in view of the fact that I have the condition under diet control." And again on May 7, 1925, writing to his sister, "I confess that as the years roll by I have a sneaking desire to forget them, though I don't feel much older as they come along. I was much interested in the little photographs of Catherine's sculpture which you enclosed to Marie not long ago. They show a great deal of character and promise. Tell her to stick to it and search for construction and then more construction and learn it so that she can work from memory. How I wish I had done more of it." Then, going back into June 27, 1923, a letter from the Steamship Garfield to his sister, "Just a few lines before we leave to say au revoir and to tell you how sorry I was not to have found you at home the other day. I had hoped to have gotten in to see you in the morning, but I was too utterly wretched, so I stopped on my way to the train." And a letter which has been testified to, as having been destroyed, written in June, 1923, two days before sailing abroad, in which mention was made, in effect, to running away from his wife and a desire not to return to this country to see any-

one but his sister, and giving his address which was not to be given to his wife. Those are the excerpts referred to in the question. I used them as extracts because most of them are bulky letters, much of which is of no moment, and ask for your opinion based on them.

Mr. Boyd: I object on the ground that that is not a fair question, where certain extracts only have been selected. If he is going to give an opinion, I think he must qualify himself by reading the whole of these letters.

Mr. Lum: My question only refers to the extracts.

The Court: I think that is so, I think counsel may select certain portions as he may see fit. I think he may call attention to these particular extracts and base the doctor's opinion on them alone if he sees fit.

Mr. Child: There is a further objection to that question and that is, as I understand it, the hypothetical question must embody all the facts upon which the witness is to testify. Those facts are not in that question. One of the facts is, merely one that is left out, is the fact that for a period of nine or ten years, he had not seen his sister and she had not been to see him.

The Court: That is in the evidence.

Mr. Child: It is not in the question.

The Court: I think that is in the evidence, but I don't think that has anything to do with it.

Mr. Child: This man has been married before, and there is a changed condition, and it is not in the question—

The Court: Mr. Lum has a right to frame his own question, and if you want any of the other facts in, you may put them in on cross examination, but Mr. Lum may put in such part of the evidence as he thinks favorable to him, and he may omit such portions as are not favorable to him. That is his business. He has a right to frame the hypothetical question in any way he sees fit.

Mr. Child: We haven't the fact that the marital status of this man had changed, and that the marital status of his sister had changed, and he had not seen her for nine or ten years.

The Court: That all goes to the value of the question, but not to the competency of the question. If he leaves out in the question all of the facts that have been testified to and it affects its value, that is for the Court, but it has nothing to do with the competency of the question.

Mr. Lum: I will include that the husband was married before, as testified to by the wife, whose evidence you have here, I will include that in the question, and assume it, and assume that he had written these letters to his sister who had lived in Baltimore, and whom he had not seen for several years before his death.

The Witness: The answer that I would give to that question is that at the time, which I think was August, 1925, when Mr. McDowell made his will, and preceding that for several years, at least, and continuing

throughout, that he was affected with delusions, which prevented him from exercising competent reasoning and judgment.

Q And will you give us the basis of that, particularly?

Mr. Child: I object. I don't know if it is proper for me to object to the answer, but he hasn't answered that question, he said he was suffering from delusions.

Q Was he competent, on August 4, 1925—

The Court: I think he went further, he said he was incompetent, in other words, the doctor concludes that this man, as described by Mr. Lum, was subject to delusions, and those delusions were of such a character as to render him incompetent to make a will.

The Witness: Exactly, I did not go on to explain the different types of delusions.

Q I wish you would, the different nature of delusions, and what delusions affect one's testamentary capacity. A I don't think all delusions would affect one's testamentary capacity.

Q Do you think this one would? A This is the situation: A man may have a delusion which would, in no way, come in conflict with his proper reactions of those who have a claim upon him. Certainly many people who have delusions may have a perfectly competent memory and may act very skillfully in respect to business affairs; and, if a man had delusions that trees do not grow down into the ground, but instead grow up, that would not affect his testamentary capacity as far as his wife and

children were concerned; or, if he thought his wife was plotting against him, or was unfaithful, or that others were doing him some harm, or that the governor or somebody else plotted against him, or if he had delusions of such character, then he could not exercise proper judgment, because his emotions come in conflict with the claims of those who should have a claim against him. That is his idea, and a delusion, of course, is a false belief which is at variance with the usual belief of individuals of the same race, character and station, which is insusceptible to argument or experience. Now, a delusion which is going to come in conflict with your natural emotional reactions, as far as claims are concerned, would, in my opinion, make a man competent to dispose of his property, but certainly if he had delusions about his wife, he could not give her justice, because he feels she is wrong—

The Court: What is the delusion that you have in mind, doctor, that this man had?

The Witness: A delusion that this man's wife was unfaithful; and he was jealous.

The Court: In other words, that this man's wife was unfaithful.

The Witness: Yes, sir.

The Court: And how would that have any bearing on the disposition of his property with reference to his sister?

The Witness: I don't think it would have any with respect to the sister.

The Court: Would you say that the condition of this man's mind, as you infer it to be from the hypothetical question, was such that he could not understand the nature and extent of his property?

The Witness: He might.

The Court: Would you understand and think that he could not tell or appreciate the natural objects of his bounty?

The Witness: No, sir.

The Court: In what respect?

The Witness: The wife certainly has a natural demand on him.

The Court: But he would still be able to understand that she did have a demand upon him.

The Witness: I understand that she did have a demand, but he could not react in a normal way to that demand in respect to his wife.

The Court: Would you say that he would apprehend the fact that he was making a will?

The Witness: There are many types of delusion psychosis who know they are making a will.

The Court: I am asking you about this man.

The Witness: This man, from what I know about the matter, he probably knew that he was making a will.

The Court: Do you think he would be able to know the nature of the disposition of the property he was making by the will, which has been offered in evidence?

The Witness: Well, from the nature of the evidence, I think he did.

The Court: You don't think he would have the capacity to realize that he was leaving $5,000 to his wife and the residuary estate to others?

The Witness: Of course, the thing I am taking into consideration is the first will he made in New York.

The Court: I know, but I am talking about this evidence. I want to get at the real weakness in this man's mentality and in that respect I want to know if you can state by any outside facts recited in the hypothetical question, that he would be able to understand the nature of the will he was making.

The Witness: I don't think so.

The Court: You don't think he would be well enough to know that he was leaving his wife $5,000?

The Witness: Well, the only explanation I can make is this, that here is a man whose—

The Court: Don't let us get off the subject, I am trying to find out whether or not you think this man would know enough to know whether he was leaving his wife $5,000.

The Witness: Yes, sir.

The Court: And wouldn't he have mentality enough to know that he was leaving his residuary estate to a trust for the benefit of art students to go to Europe and be educated?

The Witness: Yes, sir.

The Court: In other words, wouldn't he have mentality enough to understand the nature of the will he was making and the disposition he was making of his property?

The Witness: Well, I think this man knew just what he was doing, knew he was making a will.

The Court: In other words, it comes down to this. You say he would not be able to comprehend the natural objects of his bounty?

The Witness: Yes, sir.

Q A knowledge as to the natural objects of one's bounty, would you say was absolutely essential to a rational disposition of the property? A In our State it is absolutely essential, in order to make a valid disposition or contract.

Mr. Boyd: I object to this witness going into the laws of the State of Maryland.

Q Are you familiar with the law of Maryland—

The Court: We don't care whether he is or not.

Q Doctor, you have heard the testimony of the wife that she was at all times very devoted to every interest of her husband and never gave him even remotely any cause for suspicion. You have heard the testimony that the husband had the wife watched by detectives; that he expressed suspicion of her conduct and that he had a paper with Japanese glyphics on it and brought it to his lawyer; that he ordered a letter to be delivered to her after his death speaking of her improper attention by or to some man in Switzerland, and the testimony that there is no basis whatever either in fact or deed or any suspicion. Will you say that a man who continuously harbored such a notion of his wife was able to make a will in which her claims to his bounty could be justly or fairly or reasonably weighed? A I

would say that that man was absolutely incapable of making a will when her claims are in any way under consideration.

Cross examination by Mr. Child.

Q What caused this mental condition which you say you think existed in Mr. McDowell? A There may be a number of causes. I don't know the causes of why some people have delusions. We have some cases that exist for many, many years, and in spite of the most careful examination, we are unable to find any underlying cause for it.

Q Diabetes, you say, produces gangrene? A It may. It does not in all cases.

Q You said it produces gangrene in different cases, or it may? A It may.

Q Does it produce gangrene of the brain? A Some cases, yes. We have seen waste of the brain in diabetic patients many many times.

Q You have read those letters that you testified to? A Yes, sir.

Q Did you see them in the original writing? A Yes, sir.

Q Those letters were expressed exceptionally well, were they not? A Very well.

Q You yourself could not write, perhaps, as good a letter? A I am quite sure I could not.

Q They are lucid to the last degree, are they not? A They are very clear, yes, sir.

Q And the letters, one of them, refers to the prevailing rate of exchange in France. Do you remember that letter? A No.

Q There isn't a single thing in any one of those letters, or the expressions contained in them, that would in any way indicate that this

man was mentally affected, is there? A In all the expressions—there are some things in some of the letters that indicate that he has remarkably poor judgment.

Q That may be, but I am now talking about the expressions in the letters—many of us have poor judgment—there is nothing in that, is there? A They are very clearly and very nicely expressed.

Q What chronic manifestations, such as you have detailed, are exhibited in the letters that you have read? What is there about those letters that would indicate it? A Some of those letters, or several of them, or at least two of them, show that he was very much depressed. In one of them he says that he wishes it was all over, or, "What is the use of it all?"

Q That is not insanity, is it, that a man who is sick with diabetes should be depressed? A There isn't one thing which you could mention or I could mention as a sign of insanity; there isn't any one thing, but this whole thing—when a man is irritable, he is not insane, but yet, irritability is a marked symptom. His whole make-up, the whole picture is what one requires in order to arrive at a conclusion.

Q You do not consider it, for instance, a mark of insanity to become angry when a C. O. D. package is sent to you and you have a charge account, and you have instructed the people to charge it to that account?

Mr. Lum: He said there wasn't any one thing.

(Last question read.)

Q Do you consider that as an evidence of insanity? A I should consider that evidence of very poor self-control for a cultured person.

Q That is not the question. Please answer the question. A There isn't any one sign or symptom that you may ask me at one time which I would consider as an evidence of insanity.

Q There isn't a single, separate thing that you can testify to as indicating insanity, is that right? A By itself.

Recess from one to two P. M.

After Recess.

IRVING J. SPEAR resumes the stand.

Cross examination (continued) by Mr. Child.

Q Doctor, in considering this man's testamentary capacity, did you consider that the sister was the natural object of this testator's bounty? A I was not at all concerned with what would be the outcome of the situation at all. I was not concerned whether the sister or the niece or the aunt—or the wife—or anyone else at all.

Q The fact that a person had not seen another person for nine or ten years indicates a lack of interest, ordinarily, does it not, when they live close together? A I should think that you would not be very much interested if you had a sister living within two or three hundred miles of you, if you did not see her occasionally.

Q So, the mere omission of a sister would not be an indication of anything unusual with regard to mental condition. A I really do not

see why a sister should necessarily have to be considered by a man making his will. He may have other demands on him. That is for the man to determine for himself.

Q Now, in connection with diabetes from which this man apparently was suffering, is diabetes the cause of any appreciable amount of insanity? A I should say—I am giving you the figures as nearly as I can—certainly less than one per cent., less than probably one-half of one per cent. is directly the cause of the mental condition.

Q One of the symptoms of diabetes is anemia of the brain, is it not, or a condition similar to anemia of the brain? A It may be.

Q And that would be indicated by fainting and falling down, would it not? A No, sir.

Q Isn't fainting caused by a lack of blood to the brain? A Yes, sir.

Q And what other symptoms are there—I think you mentioned a lack of sexual ability, or something of that sort. A I really don't know whether the lack of sexual ability is directly due to the involvement of the brain. I know that that is a very common symptom of diabetes.

Q Paralysis, I think, you also stated was a symptom. A It often occurs.

Q Do you know how old this testator was at the time of his death? A I should judge about fifty-seven or eight.

Q He had suffered from diabetes for how long, according to your understanding? A I don't know how long he had it; all I can say is that there was testimony here that he had written his sister about it for at least two or three or four years, probably.

Q Could the symptoms of brain disturbances such as fainting or coma, paralysis, unwise judgment and so forth, be indicated by expressions in letters such as you have seen here, if the disease had progressed to any extent? A You know very well that you could not indicate in letters a coma or paralysis.

Q No, but as a result of those things. A But you know he would not necessarily—all diabetics do not have coma, nor do they all have paralysis, nor do they all have fainting attacks. Anemia of the brain that occurs in diabetes is quite different than the anemia of the brain that occurs in fainting. In fainting the anemia is due to defective source of circulation to the brain. In anemia of the brain due to diabetes it may be local and may be in one portion and it is due to the fact that the calibre of the blood is such in the diabetic that they have high blood pressure, and they also have a paralytic attack which is caused by the bursting of the blood vessels.

Q But the diabetes in this case had not progressed to any such extent that would affect the testator's mental capacity, as would be evidenced by some physical symptoms or actions, such as marked eccentricity, forgetfulness, and various things of that sort. A May I say this: I do not know why this man had these delusions, whether his diabetic condition was responsible primarily for it or it was some other condition. I merely say this man, from the testimony, had diabetes. He had this delusional state concerning his wife. Now, diabetes may have caused it, and there may be some entirely unknown cause.

Q What is the line between a delusion and suspicion; how would you differentiate the two? A The only way I could differentiate it is by the

reaction to the person who is affected. Now, if I had a suspicion and if I did not have a delusion, there would not be very much difficulty in convincing me of the groundlessness of my suspicion. I mean, if my wife were to do everything for me to show me that she was devoted; if she was with me always, and as Mrs. McDowell has said, she practically has never been separated, except when it was by fault, I should very soon be convinced that it was a suspicion and a groundless suspicion, but if I went ahead, in spite of the fact that my wife was always with me, that she was devoted and she did everything I asked her to do, and then employed detectives or I followed her myself, and in spite of the fact that I could get no evidence, I still believed it, then it would be very definitely a delusion.

Q Did you know that previous to his marriage to the present Mrs. McDowell, Mr. McDowell had a very unfortunate marital experience that resulted in his obtaining a divorce from his wife on what one of the witnesses has testified to be "statutory grounds," and which, in plain English, is adultery? A Yes, sir.

Q Would that, in your opinion, tend to lend a degree or air of reasonableness to a suspicion that might otherwise be unwarranted? A I would be guided entirely by the second woman. I mean, where my suspicion were a suspicion or whether it were a delusion, I would be guided entirely by the type and character and make-up and reaction of the second person.

Q Wouldn't it be the tendency of a man who had had one very unfortunate experience to use what ordinarily would be very unusual precautions to prevent it happening the second time? A It would make him very much more careful of the second lady he would take for his wife.

Q And it would tend to make him suspicious of her, wouldn't it, on the theory that the burned child dreads the fire? A Well, his suspicion would be allayed, if it were suspicion, if his wife devoted herself, as I am sure Mrs. McDowell did.

Q You think then that his previous matrimonial difficulty would in no way account for his attitude toward his present wife, that attitude being, as we all admit, without any basis in fact? A A delusion is a definite thing, and a suspicion is another thing, and a man may be suspicious and he can be convinced, and a man who has delusions cannot be convinced.

Q What would you say as to a man of very highly artistic temperament, presumably high-strung, I think it has been testified to, who had grown suspicious of his wife, and afterwards goes back and lives with her and treats her kindly. Would you say that that was a fixed delusion when he continued to live with her down to the date of his death? A And kept on watching her?

Q No, I am just asking you that. A I would say, then, that in spite of the fact that he had a definite delusion, and in spite of the fact that he was convinced in his mind that things were not as they should be, that he went back, why, I don't know, but I have never seen a person who has a fixed delusion, lasting over a period of time, in whom the delusion did not persist. Now, what happens very often is that a certain amount of deterioration takes place, they react less to those delusions. I see this often in older people who are very active and violent in their reactions, but later on when the mentality begins to fail they are not so very much.

Q According to the testimony here, his mentality did not fail, there was no appreciable diffence in his mentality to a time shortly before his death than it had been for many years previous. What would you say of a man who had suspicions of his wife and who had followed her and had her followed and went so far as to leave her at one time, going to Europe, and then returned to her and apparently lived happily with her?

Mr. Lum: I object. The question contains assumptions that are contrary to the evidence in this case. He left a letter to be delivered after his death in which he charged her with giving attention to a man in Switzerland, and he made the will after he returned from abroad, when he disinherited her. The assumptions are not borne out by the testimony, but are rather contradicted by it.

(Question read.)

The Court: You say there is no testimony that he lived happily with her?

Mr. Lum: The testimony of the wife is that the suspicions continued on down, and he left a letter to be delivered after his death.

The Court: Mr. Child does not say the suspicions were continued; he merely says they lived happily. I will allow the question.

Mr. Lum: The testimony of the wife is that she devoted herself entirely to him.

The Court: I understood her to say they lived very happily. I will allow it, anyway.

The Witness: I should say that this man who did go back, yes, certainly he still had his delusions.

Cross examination by Mr. Boyd.

Q Doctor, I think in response to Judge Flannagan's questions, you testified that in your opinion the testator might have had a knowledge of what he had to leave, and he might have had a knowledge of the natural recipients of his bounty, but that because of his mental attitude toward his wife, he was incapable of remembering her as he should in his will, is that right? A That's correct. I said that I thought from the testimony I have heard here, and that is my basis.

Q You don't mean by that that he did not remember that he had a wife? A No, absolutely. He knew he had a wife, sure.

Q He did remember her? A Positively.

Q And you knew, did you, that he left her something in his will? A I understood so.

Q Then, as I take it, your conclusion as to his delusions, the fact that he must have had a delusion, because he did not leave her more, is based on the amount that he left her, and not on any inability on his part to know that she was a natural recipient of his bounty, is that correct? A He could not weigh—

Q No, please.

Mr. Lum: Answer the question as you started to, doctor.

The Court: If you can not answer it yes or no, say no, otherwise answer it yes or no.

The Witness: I will say he should have known that she was the natural recipient of his bounty.

The Court: That is just what I told you not to do. I told you to answer it yes or no, and if you could not, to say so.

The Witness: I cannot answer, yes or no.

Q (Question read.) A I said I cannot answer it yes or no.

Q Well, I will put it this way, doctor, if he had left her, say, one-half of his estate, there would't have been any evidence in this case, so far, to indicate to you that he was suffering any delusions, would there? A Why, surely.

Q There would have been just the same evidence? A Why, of course.

Q And if he had left her his entire estate, you still would have said he was suffering under a delusion? A Surely.

Q What delusion? A A delusion of infidelity on her part.

Q Then, that delusion would then not have been any motive which affected his conduct, would it? A Why, I can't tell you what might have happened.

Q No, but if he had left her all of his estate, you would not claim that he lacked mental capacity by reason of the delusions which did not affect his conduct, would you?

Mr. Lum: I object. It is purely trivial and utterly irrelevant. I further object on the ground that he did have a delusion, as the doctor has indicated. Now, trying another case is not going to help us.

The Court: I think Mr. Boyd is simply trying to find out what extent the fact that this will only left $5,000 for the wife affected the doctor's answer.

Mr. Lum: The doctor said that a man in this condition, with this delusion, could not weigh the claims of the natural objects of his bounty, and now, if we are going to—

The Court: No, Mr. Boyd is trying to find out to what extent the doctor's mind is swayed in coming to the conclusion he did by the fact that he only left his wife $5,000.

Q (Question read.) A It would not make a particle of difference to me whether he left her so much, I would still say that his delusion would influence his conduct.

Q Then, your reasoning is something like this, as I take it, not because of the way that he left the will, but because of something in these letters and in the testimony here today, you conclude that he had a delusion, is that right? A I cannot take anything except that he had a delusion, but if he had a delusion or if he did not have a delusion, one of the two—

Q Has the fact that in his will he only left her $5,000 any bearing whatever upon your conclusion that he had a delusion? A Absolutely not.

Q None whatever? A I will say it would not make a particle of difference to me, as far as the will or no will. When he has a delusion of infidelity of his wife, his judgment is influenced in his reactions of that woman, and his care of that woman and how he is to going to look out for her. Now, what he does with his money or in

his will is a matter that does not concern me a bit.

Q Then, entirely apart from the will itself, you find in these letters which have been read, and in the testimony here today, unmistakable evidence that he had a delusion which rendered him incapable of making a will, is that correct? A Rendered him incapable of exercising the proper amount of consideration for his wife.

Q And you would say that just the same—

The Court: Won't you please answer the question. Repeat the question.

(Question repeated as follows: Then, entirely apart from the will itself, you find in these letters which have been read, and in the testimony here today, unmistakable evidence that he had a delusion which rendered him incapable of making a will, is that correct?)

The Witness: Yes, sir.

By Mr. Child.

Q Now, doctor, I suppose that when a belief comes to a point in a man's mind where it amounts to a delusion, that that really in a sense dominates his mind, isn't that correct? A Well, I think it does.

Q And where it continues for years it is uppermost in his mind, at least, at frequent intervals, is that it? A Yes, sir.

Q And consequently dominating his mind and being uppermost in his mind, it, at frequent intervals, is almost sure to crop out in his conversation, isn't it, at times? A It is very likely to.

Q And when he writes letters over a series of years, isn't it almost certain that that delusion will crop out in the letters? A It might.

Q Well, isn't it almost sure to do so?

Mr. Lum: It does.

Q Isn't it almost sure to do so? A I cannot tell you; I would like to say it would be just as apt to crop out in a letter to someone in whom he had great confidence as it would in his conversation with someone in whom he had not great confidence.

Q You understand, do you, that so far as the evidence here shows, that the only person to whom Mr. McDowell imparted his thoughts about his wife, was his lawyer.

Mr. Lum: I object to that. Their banker witness here yesterday said that he complained of it to him, and the letters to his sister in 1923 speak of it, and his running away from his wife, and if they brought a few more witnesses, I would probably have a lot more.

(Question read.)

The Court: Do you want to get the doctor's understanding?

Mr. Boyd: I am trying to find out what he bases it on.

The Witness: The only thing I heard here is, of course, what Mrs. McDowell said, and what Mr. Beale said, and these letters that I have read. Now, that is the only knowledge I have. Of course, now, whether he told anyone else, I don't know, and if he did not tell anyone else, I don't know.

The Court: Let me get something straight. I want to know, doctor, is your opinion based upon the hypothetical question as propounded to you, or is it based on your recollection of what you heard here in the court room?

The Witness: My opinion is based upon the question that Mr. Lum asked me, assuming certain things being true, what is my opinion.

The Court: Now, based on that question alone, or do you go outside of the question?

The Witness: The only thing I went outside of the question was when I heard Mrs. McDowell say—the letters which he read abstracts from, and what I heard Mr. Beale say. Those are the things which I had to take into consideration as being true.

The Court: I don't think they are involved in the question at all. I have the question here, and I find no reference to that.

Mr. Lum: I asked him about what he heard in court.

The Court: I won't allow that. I rule that you have to state in your question the facts on which your hypothesis is to be based. I understood your question undertook to do that. You first asked the doctor whether he heard the testimony and I would not allow that, and then you propounded a hypothetical question, and now it appears that the doctor did not take the hypothetical question but introduced into it other things which were not included.

Mr. Lum: I think the whole thing is covered by the testimony very fully. There cannot be anything added to it.

The Court: I know, Mr. Lum, but it is impossible to attack a hypothetical question and an expert's conclusion on it, unless it is reduced to concrete form, and unless we have something definite to proceed upon.

Mr. Lum: Well, I cannot include anything, then, until Mr. Boyd is finished.

The Court: Will, you, doctor, kindly read that hypothetical question and let me know if that hypothetical question is the basis of your answer. I am handing you a copy of the hypothetical question furnished to me by the stenographer from the record. I don't want you to answer except on the basis of the hypothetical question. That is the hypothesis submitted to you, not your recollection about the testimony.

The Witness: This question deals only with the letters.

The Court: It deals alone with the letters, Mr. Lum.

Mr. Boyd: Since the witness now says his answer was not based on the hypothetical question, I will ask that it be stricken out.

The Court: Very well, I will strike it out. We will make a fresh start.

By Mr. Lum.

Q Doctor, assuming the letters, the extracts of which are referred to at length in the testimony, read to you this morning, and assuming that a wife who had devoted herself to the constant interest and concern of her husband, and

was a devoted and faithful wife, was suspected by the husband of improper conduct; that he caused detectives to watch her; that he spoke of her conduct and of his suspicion to a man in a bank in New York, and to his lawyer; that he took a piece of paper with Japanese glyphics on it to his lawyer; that he wrote a letter which was delivered to his lawyer and which was to be delivered to his wife after his death, charging her with improper conduct with a man in Switzerland, would that in your judgment be such a delusion as would interfere with the testator's ability to weigh the natural objects of his bounty and to consider their just claims?

Mr. Boyd: I object to the form of the question. He uses the word "delusion" such a delusion. There is no evidence of delusion.

Mr. Lum: I have in my question assumed that it is false, that does make a delusion, doesn't it?

Mr. Boyd: Not necessarily; false suspicion, that's all.

Q Was that in your judgment, a delusion, these suspicions I have given to you? A I cannot answer that, because you do not put enough in it. I mean about the delusion part.

Q Assuming also that the man was suffering from diabetes and that although his—

The Court: I would suggest that you take this question as far as it goes, and then add on to it anything which you feel you may have omitted. Won't that simplify it? Then, the doctor could really have most of it in writing.

Q All right, doctor, take the question as you have just read it, and assume also the testimony of the widow which you heard this morning yourself as to the suspicions of her husband, as to his conduct toward her, and her conduct; assume also the testimony of Mr. Beale as to the husband having spoken to him of having her watched by detectives, and so forth.

The Court: You wish him to assume, then, that he stated to his wife from time to time that he had suspected her fidelity; that he stated to his lawyer that he suspected her fidelity.

Q And he stated to a man in the bank that he suspected her fidelity.

The Court: All of which statements and all of which suspicions were unjust and unfounded.

Q Would you say as to whether or not the man had delusions?

Mr. Boyd: I object to the question because it is asking this witness to give an opinion on a vague, undetermined amount of testimony; some of which he may have heard, and some of which he may not. It is not all in the question.

The Court: Oh, yes, I think it is. Mr. Lum changed it at my suggestion. He said, first from the testimony of the widow and then he changed that by inserting what the testimony of the widow was.

Mr. Boyd: But he did not insert in it any of Mr. Beale's testimony, although he

asked him to give an opinion with that in mind.

The Court: He stated it by referring to him as "his lawyer."

Mr. Boyd: Just the mere fact that he stated it?

The Court: Just the mere fact that he stated it. That is all we have. Then, the whole question, as I understand it, Mr. Lum, is this: the question originally propounded, that is, the former question, which commences in this way, "Assuming that in those letters, beginning from a period back in 1912," and the former question, which ends in this way, "I used them as extracts, because most of them are bulky letters, much of which is of no moment." Now, then, added to that is this, and assuming further that the testator stated to his lawyer that he suspected his wife's fidelity; assuming further that he stated to a banker that he suspected his wife's fidelity; assuming further that he left a letter, suspecting his wife's fidelity, to be delivered after his death, assuming those things, can you state whether or not this man had an insane delusion?

The Witness: Yes, sir.

Q And that is the answer? A I can state that he did have.

Q Would that delusion be of such a character as to be likely to influence his testamentary disposition? A Quite likely to.

By Mr. Boyd.

Q Now, doctor, this statement to the lawyer, I suppose would indicate suspicion, wouldn't? A Very serious suspicion.

Q And that in that connection he desired to have the facts investigated, tried to get further facts so as to satisfy himself one way or the other that would show quite clearly that it was a mere suspicion, wouldn't it? A A very serious suspicion.

Q But a suspicion, nevertheless, is that right? A Yes, sir.

Q Now, if the banker with whom he talked had been a rather close friend, as I understand the banker testified, and the discussion between them related to certain phases of business, do you consider that his statement of his suspicions to this banker was anything more than a suspicion? A It was also a very serious suspicion.

Q Now, there is a difference, isn't there, between a delusion and a suspicion?

Mr. Lum: I object to repetition. Mr. Child asked the question and got a very lucid, clear answer. I think it ought to satisfy Mr. Boyd, too.

Mr. Child: I understood all of that testimony was to be stricken out.

The Court: I think so. I think we will have to regard it as all stricken out, and, doctor, as I understand it, of course, you are assuming that these suspicions were groundless.

The Witness: Yes, and I will explain in a moment why I think they were groundless.

The Court: Well, that doesn't make any difference.

Q (Question read as follows: Now, there is a difference, isn't there, between a delusion and a suspicion?) A Yes, sir.

Mr. Lum: May we have the same answer read again into the record that we had, in order to save time?

Mr. Boyd: I am not asking him for the same answer. I am asking him to answer my question now, and I am entitled to have it.

Q It is a fact, isn't it, according to your understanding, doctor, a suspicion may or may not have a foundation in fact, that is so, isn't it? A Positively so.

Q So that no matter how strong the suspicion is, it is still only a suspicion, whether or not it has a foundation in fact? A It would remain a suspicion until it is proven or disproven.

Q Now, so long as there is something in the situation which actually exists, which might be a foundation for that suspicion, it remains a suspicion, does it not? Isn't it a fact that it becomes a delusion only when the man has a fixed idea in his mind without any foundation of facts, or a foundation of facts so improper and impossible as to be absurd. Now, isn't that the case, isn't that the distinction between a suspicion and a delusion?

The Court: In other words, a suspicion based on good ground is no delusion?

The Witness: Absolutely not.

Q Now, whether it is based on what you would consider complete grounds or not, if there wasn't

some basis of fact for it, it still remained a suspicion, isn't that so? A Are you trying to get me to tell the difference between a suspicion and a delusion?

Q I am trying to get you to commit yourself, to be perfectly frank about it, that either you had no basis or saw no basis. A Well, I had a basis—

Q Well, tell us. A It remains a suspicion whether it has basis or not until evidence is brought to the individual that it is impossible for such a situation to exist. Yet, in spite of all the reasoning and the evidence and the influence which was brought to bear upon that person, that person who believes it, if he does, he is incapable to reasoning, expression or argument, then it becomes a delusion, provided it is such a thing as a person in his station and race accept.

Q Then, until there is a complete destruction of the suspicion, so that it is impossible any longer to conceive of it as being other than absurd, it remains a suspicion, is that right? A Oh, I suppose so.

Q Now, tell us what there is in this case in the way of a suspicion rendering it so impossible to believe that it would be absurd to believe it, which led you to conclude that this was not a suspicion on Mr. McDowell's part, but was a delusion.

The Court: That is part of the hypothetical question. It is assumed in the hypothetical question that these suspicions were without foundation.

Mr. Boyd: He does not assume that there was a complete destruction of that brought to his mind.

The Court: No, there is nothing about that.

Mr. Lum: You should have cross examined the widow on that, Mr. Boyd.

The Court: He is only assuming that they were without foundation. Now, if you are assuming that there was a foundation—

Mr. Boyd: No, that is not my thought. My thought was to show that if a common, every-day suspicion was brought to Mr. McDowell's mind it would remain in his mind as only a suspicion.

Q What is there in the state of the case, as you understand it, to show that there was such proof brought to Mr. McDowell's mind that he was bound either to drop all suspicion or that it showed that he had a delusion?

The Court: I don't think that that is a very fair question, because a delusion may be based on a false suspicion, that is to say, as I understand it, doctor, a man who assumes a thing to be true, believes it to be true, without anything whatever to base it on, is suffering from a delusion, isn't that correct?

The Witness: Yes, sir.

The Court: And that is the hypothetical question. The hypothetical question did not deal with any subsequent proof brought to bear.

Mr. Boyd: If the Court please, with all due respect, I cannot agree that that is the actual description of a delusion.

The Court: We are not debating that question.

Mr. Boyd: Then, if the Court please, his understanding of what a delusion is, and his testimony is based on that, if we cannot show that that is not a completed situation, it is a different matter, of course.

The Court: Does the presence of a delusion depend on proof that the assumed facts on the part of the subject are untrue or can an insane delusion arise out of the belief on the part of a patient, based upon no proof whatever, or no facts whatever which would justify such belief?

The Witness: Delusions are usually based on absolutely unfounded situations just like this one. You don't have to have a thing.

The Court: And the matter of the truth or falsity of the situation comes under the head of fixed delusions or not fixed delusions, is that right?

The Witness: Yes, sir.

Q Now, doctor, you have been asked these questions with regard to the series of letters. When, within your experience, doctor, where a man is, either from his disease, or from other causes, in such a mental condition, that he cannot comprehend sufficiently to have testamentary capacity and to make a will that he would ordinarily make—would he in writing so many letters show a certain degree of incoherency in speech? A No, sir.

Q Wouldn't he be apt to? A I will answer that by saying absolutely not at all. We have many individuals who have marked delusions lasting over years, who have no physical appearances or disturbances in speech, or paralysis or

anything else. I mean they look like anybody else that you would see on the street—

Q I didn't ask you how they looked. A Looked and acted.

Q What I am asking you is whether a man in that condition, who has delusions, which I understand means that certain false beliefs control his mind to such a degree as to dominate his actions, would a man who is in that condition, as you say, almost always, when they are writing a letter, for example, at some point in that letter this delusion would make its appearance, would show itself? A No, sir.

Q Do you consider that the power of concentration, even with such a delusion as that, which dominates his mind, would be sufficient to enable him to write a long letter on various subjects without in any way indicating that the delusion was in his mind? A He certainly could.

Q And do you think that over a period of years he could write a long series of letters without once in a way indicating in those letters his state of mind with regard to that delusion? A He would be very apt to indicate it sooner or later in a series of letters.

Q Now, you say sooner or later in a series of letters that run over a period of years he would be very apt to indicate it? A Very likely, yes, sir.

Q Isn't it almost certain that he would? A I would not like to use the word "certain." I would say it would be very likely.

Q Now, in a short conversation of fifteen minutes or a half hour, I suppose he could keep that in the back of his mind sufficiently by willpower so that he would not disclose it in the conversation? A It depends on who he had

the conversation with, or what would be the purpose. He might well go to a person to discuss this affair and at other times he might discuss an art subject and it would never come to his mind at all.

Q And yet, in a long conversation or in a series of conversations, where that is uppermost in his mind, and is so strong as to dominate his actions, isn't it almost certain that he would in the conversation indicate it? A It depends entirely upon with whom he has his conversations. Then, another thing you have to take into consideration, you must take the make-up of the people. Certain gentle people, I mean people well born, do not express their opinions freely to everybody without exercising a certain amount of restraint. What we expect in one group of individuals, we do not get in others.

Q Doctor, have you ever known of a case in your experience where a person with a fixed delusion, which dominated his mind, did not disclose it to anyone in the course of a whole series of long conversations?

Mr. Lum: I object. There isn't any evidence in this case that he did not. The only people who have been on the stand, who have talked with him, are those who told of his having spoken about it.

Mr. Boyd: You forgot his wife, who said he was always talking to her—

The Court: I think she did say he was jealous not only of men, but of her whole family.

Q (Question read.)

Mr. Lum: It is not proved in this case that it was a fixed delusion which dominated his mind.

The Court: According to the testimony, of course, he did disclose a delusion. I will allow it.

The Witness: I never have seen a person who had a delusion which could be found out without his telling somebody. The only way you can find out is by his telling somebody. He has got to tell somebody that he has those things in mind.

Q You have had conversations, I suppose, with people whom you think might have delusions, and have been able to ascertain their ideas, haven't you, doctor? A Have I ever seen anybody with delusions?

Q Have you had conversations with persons who may have? A Oh, yes, very many of them, but you must remember the object of my having a conversation with a person who might have a delusion is because they have spoken about it to a wife or to a brother or to a lawyer, and then come to me to find out what the difficulty is.

Q But in your experience have you had a case where there was a fixed, strong delusion, sufficient to dominate the action of the patient, who was able to keep you from discovering that over a series of say a half a dozen conversations? A Able to keep me from discovering it?

Q Yes. A I don't think I ever had a conversation, half a dozen conversations, with a person who had delusions that we were not able to get it out of him, because I was endeavoring to.

Q Doctor, as I take it, your reasoning is something like this: Under the state of facts as shown

by these letters, which as you state and the symptoms which you state, do not any one of them indicate insanity or a delusion, you conclude that the man was in a state of mind where he was not capable to make a sound will, is that right? A I have answered that question.

Q Now, isn't it a fact that in coming to that conclusion you bore in mind, you were influenced, at least in part, by the will that he had made? A I must differ from you; I am never influenced by influences like wills or the results. I am only influenced by these people as people. That is the only thing that interests me. I am influenced only by the facts as I know them, and that this man was, in my judgment, as a result of taking into consideration all of the facts that I know, and it is a matter immaterial to me one way or another, what he did in his will. He might have made a perfect will and it would not influence my judgment at all. People make wills and I don't know how they make them.

Q Doctor, you were asked in the hypothetical question two or three times, "Assuming that he disinherited his wife or that he did disinherit his wife," that is a part of the question, isn't it?

Mr. Lum: I don't think so.

The Court: I don't believe it was.

The Witness: No, sir, that was not in it at all.

Q So that your contention is, very briefly, that the state of facts as presented to you in this hypothetical question are such as to make it clear, beyond reasonable question in your mind, that this man had a fixed delusion which rendered him incapable of making a valid will and that

you would say that without knowing what was in his will at all. A Positively.

Mr. Child: I am not certain whether your Honor is striking out all of the testimony subsequent to the first question.

Mr. Lum: I object to the testimony being stricken out, and ask to have it noted, so it may go in the record in any event, because if the case goes further, the Prerogative Court has the right to take further testimony, and I think there are many things in the testimony which Mr. Child has examined him on which were not based on the hypothetical question at all.

The Court: I don't know about that, but anyhow, Mr. Child's cross examination was supposed to be cross examination upon an answer, which answer was stricken out, and that answer having been stricken out, the examination goes out with it. You may cross examine this witness to the full extent right now.

Mr. Child: The Court directed to the witness a question as to the effect of the delusion as to the sister in this case. Your Honor will recall that question.

The Court: Yes, I remember that.

Mr. Child: I will ask that question.

The Court: That question was asked by me as information by me, not as a matter of cross examination, but only a question of information, and that is not stricken out.

Mr. Child: Your Honor asked particularly what extent, in this witness' opinion, it affected the testator's mental capacity—

The Court: Yes, but that is not a part of the cross examination, that remains in the record.

By Mr. Child.

Q It appears from your testimony that you considered the testator was incapable of making a valid will. I am asking you if you think that he knew who his heirs were, those naturally to be benefited. A I have to assume in answering that question that what I heard here was true this morning; also I have to assume that Mrs. Smith, and the testimony I read of Catherine Ward, and the widow, and so forth, were all so—

Q Yes. A Now, assuming all those things to be so, I certainly think he knew; he certainly knew he had a sister and he certainly knew he had a wife and a niece.

Q And do you claim that he did not know the amount of his estate, that his mind was in such a condition that he did not know it? A I don't know, but if you should ask me what these people said, I should judge he knew, he talked to his wife about these bonds and things. I judge he knew what he had. I had not heard anything to the contrary here.

Q In other words, he comprehended, he had sufficient mentality, in your opinion, to comprehend the amount of his estate and those who were the natural objects of his bounty, is that right? A Why, yes, he knew he had these people, and I have heard nothing to the contrary, that he did not know that he had so much money, and he had so many people.

By Mr. Lum.

Q And do you think he knew the natural claims of the object of his bounty?

Mr. Child: I object that, under the laws of our State, is not in question.

Mr. Lum: Oh, indeed it is, the claims of those by either blood or other relationship.

The Court: That is another way of saying that he knew the natural objects of his bounty. What you mean, then, is that he did not recognize them as individuals.

Mr. Lum: That would be that he did not know the natural object of his bounty; that is the test, but the cases go further; he must know his property and know the natural objects of his bounty and know the claims by either blood or marriage.

(Question read.)

Witness: He may have known all except his wife, and where his wife was concerned, his delusions, as far as she was concerned, prevented him from exercising judgment as to her proper claim on him.

By Mr. Child.

Q In connection with this delusion or suspicion, whatever it might have been, do you take into consideration, in forming that conclusion, the fact that some ten years previous to his second marriage, the testator had had a very unfortunate matrimonial experience, in which he was compelled to, or did divorce his first wife on the ground of adultery. Have you taken that into consideration in considering this delusion or suspicion? A Since I have answered the question

the second time, I don't think anybody asked me anything about that, and I cannot take anything into consideration except that which was asked.

Q Would the fact that a man had a previous unfortunate experience tend to make a suspicion, which otherwise would be unreasonable, somewhat reasonable, or form the basis for that suspicion? A It might make him more suspicious, but if he were a normal individual, that suspicion would be just as easily set aside as it would be in an individual who did not have the experience. It might start him out with being more careful.

Q That is the basis of the suspicion? A It starts him out with a suspicion, it makes him more careful, but if he were a normal person, that would soon disappear.

Q So that he had an original reason for his suspicion; it was not a mere stigment or thing of air? A Oh, no, if he had a very unfortunate experience, if what you tell me is true, which it is, of course.

By the Court.

Q Doctor, I want to ask you just a few questions and I want to ask you to confine yourself to just exactly what is in the hypothetical question. In other words, I want you to put yourself in this condition: let us assume that you received this hypothetical question through the mail and you were asked to give your opinion on it and you never had heard anything about the case. That is the condition which we are in now. Here is a hypothetical question which comes through the mails and you are asked to give your opinion on it. A Yes, that is the situation which I have to solve very frequently.

Q Now, I understand you, taking such a man as is pictured in the hypothetical question, taking the facts as set forth, you feel that that man would understand the nature and extent of his property? A I think so; there is no reason why he should not, from the letters he had written, and from the hypothetical question.

Q Now, I think I understood you to say that such a man would, in your opinion, know that he was making a will; that he was actually making a will? A Yes, sir.

Q And I further understood you to say that such a man would know the disposition of his property that he was making in the will? A Why, really, I think so, yes, sir.

Q But I understood you to say that you did not think that that man would understand the natural objects of his bounty? A That is correct, yes, sir.

Q And I understood you further to say that the particular in which he would not understand the natural object of his bounty would be this, that he would not be able to correctly estimate his obligation to his wife? A That is correct, sir.

Q But he would be able to correctly estimate the obligations to his sister? A I think so. He had no delusions as far as his sister was concerned, or his niece, or anybody else.

Q To put that in another way, these things which are referred to in the hypothetical question would not affect this man's testamentary disposition toward his sister? A Yes, sir.

Q Doctor, will you tell me, if you know, the difference between jealousy and a delusion? A Jealousy is the natural reaction between people who care very much for each other, and who suspects that the person for whom they care is a

little more attentive than they should be to someone else, that is the reaction of love. Now, a delusion, on the other hand, does not necessarily have to be connected with affection at all. It is an idea which a person gets, whether it is a wife or stranger or the Governor, or anybody else, it is an idea which cannot be corrected by argument, reasoning or experience, and would not be accepted by people of the same type, racial characteristic and standing in society. That is the definition of a delusion.

Q Now, jealousy is not based on reason, is it? A Well, it is usually unreasonable, but it has a basis in fact and can be very clearly dissipated by explanation and by proper action.

Q In other words, you think jealousy can be dissipated by reasoning and proof? A Oh, absolutely.

Q And a delusion cannot be? A No, sir.

By Mr. Boyd.

Q Do you mean to say that you have never known a case where a jealous man cannot have his jealousy dissipated? A No.

Q Haven't you often heard of a case of a man who was always jealous down to his death? A Oh, yes, but different individual beliefs are very easily dissipated. When a wife comes out and makes an explanation, then they are just as happy as they always were.

Q Your experience with human nature, then, is that no one continuously remains jealous? A Continuously, no, sir.

By Mr. Lum.

Q You mean unless there was a continuing cause? A Yes, sir.

Q You mean if the cause did not stay the jealousy would not? A If the cause were removed, the jealousy would disappear, until some new cause arises.

Q And if it did not, it would— A Well, if it were unreasonable and could not be dissipated by explanation, it would become a benign thing and be malignant.

MAYNARD G. BENSLEY, sworn in behalf of the appellant.

Direct examination by Mr. Lum.

Q Doctor Bensley, you are the doctor who treated Mr. McDowell in his last illness? A I am one of them.

Q And he died from pneumonia, I believe? A Yes, sir.

Q When were you called in on this sickness? A I don't remember the exact date; it was the early part of February, 1926.

Q And did you ever attend him for anything before that? A I had seen him once or twice before.

Q For a cold? A I don't remember the first time I saw Mr. McDowell, whether it was for himself or his wife. They were both in the office.

Q Did he tell you that he was being treated for diabetes? A He did.

Q You did not treat him, however, for that? A I did not.

Q Doctor, what experience have you had? A I was graduated from the University of Buffalo in 1915; then I was in the army until—I did hospital work until 1917.

Q And in active practice after that? A Yes, sir, and in 1917, I went into the army and did not get out of the army until 1919, a little over two years in the army. Then I started in practice in Summit, and I have been the attending surgeon there at the Overlook Hospital for the past three years.

Q Doctor will you tell me whether, in your judgment, one who conceives an idea of unchastity or infidelity or doubtful conduct of his wife, which idea persisted, although there was no basis for it, and although effort was made to dispose of the idea in his mind, had his wife followed by detectives, and who left a letter to be delivered to her, dealing with the question of her conduct with a man in Switzerland, the letter to be delivered after his death, would be likely to be influenced in the testamentary disposition, by such an idea?

Mr. Boyd: I object. The doctor, with all respects, is a surgeon, and not an alienist. There is no proof of his qualifications as an alienist.

The Court: Can you tell, doctor, whether from that state of facts this man would have a delusion or not.

The Witness: I cannot say definitely whether he would have or not.

Q What would be your opinion?

The Court: Are you qualified to give an opinion from that state of facts or not?

Q Do you feel qualified or not, doctor? A Not on that evidence.

Q You mean because of your lack of general experience in mental cases or because the question does not include sufficient facts? A I feel that the question does not, as you give it, give enough facts.

Q The objection now is as to your qualifications. Have you had sufficient experience to deal with the subject of the mental type of patients?

Mr. Boyd: I object. He can state what his experience is.

Q Very well, give us all the mental cases that you have had. A I have had comparatively little mental experience; that is, experience with mental cases; just as I come in contact with them in general practice.

Q And in the army, did you not have experience in that type of work? A I had a certain amount of it in the army.

Q Have you come in contact with individuals who have had delusions? A I have.

Q Is it sufficient so that you can give an opinion as to whether or not a man has a delusion?

Mr. Boyd: I think he ought to qualify it by showing what positions he had and the experience he has had.

The Court: You are asking him now as to his opinion?

Q You are a general practitioner, are you not? A I have general practice and I am attending surgeon at the hospital.

Q But you have a general practice? A Yes, sir.

Q Dealing with patients of all types and conditions? A All types and conditions.

Q And you have had your usual hospital practice? A I do.

Q And that causes you to deal with all types, including mental cases, does it not? A Yes, sir.

Q And in the army you have had all types, including mental types, have you not? A All types.

Q And based upon this general practice and experience, in the hospitals, army and in your profession, your private practice, can you give us the opinion—

Mr. Boyd: I object on the ground that he is not qualified as an expert in alienist matters.

Mr. Lum: I purposely called a practitioner of this kind because, in my judgment, it is of broader value than one who has a narrower type of experience.

The Court: I will allow the witness to answer, because his qualifications go to the weight of his testimony, as a general practitioner, his testimony will be taken on that theory.

Mr. Child: May I ask the witness if he treats cases of mental disorder?

The Court: You may cross examine him on his qualifications, if you desire.

By Mr. Child.

Q Doctor, do you, in the course of your practice, treat persons who have mental disorders, other than persons suffering merely from nervous prostration? A Yes, sir.

Q Do you attempt to treat, and do you treat persons who are insane? A I treated and have treated people who are not entirely sound mentally.

Q I am asking you whether you treat persons who are suffering from or who have insane delusions? A Yes, sir.

Q Or do you send those patients to a specialist? A I have treated a great many and I am now treating several of those patients.

Q How many have you treated in all? A I cannot give you the number.

Q Many or few? A Well, that depends on what you mean by many or few.

Q Well, about how many since 1919? How many mental cases, cases of insanity or insane delusions have you treated, not merely looked at or sent to somebody else, but actually treated? A That I ever had in my own practice and treated? Perhaps fifty.

Q And you feel, based upon those fifty cases, you are sufficiently experienced to testify as to the matter of insane delusions? A In certain types.

By Mr. Lum.

Q Doctor, will you give us your definition of a delusion? A Well, a delusion—I don't know as I can give you a definition of a delusion. It is an idea, abnormal idea, which is fixed and is not dissipated or thrown off with any reasonable ease.

Q And would one who had a delusion as to his wife's chastity or fidelity be likely to be influenced by that delusion in his testamentary disposition? A I believe he would.

Cross examination by Mr. Child.

Q You knew Mr. McDowell quite well, did you not? A Not very well.

Q How frequently did you see him? A Well, I have seen him three or four times during January of 1926, and then from the date of his illness, in fact, I saw him several times a day until the day of his death.

Q He died of pneumonia, did he not? A He did.

Q Do you recall when you first treated him? A I don't remember the exact date, it was in the early part of February, 1926.

Q During the time that you treated him, was there anything about his conduct or appearance or actions that would lead you to believe that he did not have sufficient mentality to understand that he was making a will or to appreciate the amount of his estate or to recall who the natural objects of his bounty were? A No, sir.

Q He was a highly intelligent man, was he not? A He seemed to be.

Q At no time during the time you saw him, did he appear to have any of the symptoms of insanity, did he? A No, sir.

Cross examination by Mr. Boyd.

Q He told you that he had diabetes. Were you able to judge how far advanced the subject of diabetes was in his case? A I was not able to tell that. I asked him about his condition and he said he was under treatment by a specialist in New York, and I asked him if he was having his urine examined, if it was being taken care of, and he said that it was.

Maynard G. Bensley, re-direct.

Q And your treatment of him covered a period of how long? A I don't remember the exact number of days, but it was about a week.

Q And during that period you did not notice any difference in his condition so far as the diabetes went? A That was not tested.

Q You did not notice any particular shrinkage in weight during that week other than such as any patient with pneumonia might have? A No, not different than any patient with pneumonia would have.

Q And you had, of course, some little conversation with him from time to time on his condition, I suppose; that was the limit of your conversation with him, wasn't it? A That was about all.

Re-direct examination by Mr. Lum.

Q You found he was living in the same quarters with his wife, was he not? A Yes, he was.

Q And was there anything whatever in the way he treated her, or she treated him, to indicate an anticipation that he had then in existence a will practically disinheriting the wife? A No indication.

Q The subject of her conduct was a matter that he never went in with you, isn't that true? A Never with me.

APPELLANT RESTS.

The hearing was thereupon adjourned until Thursday, February 3, 1927, at eleven A. M.

Christopher C. Beling, direct.

THIRD DAY.

Thursday, February 3, 1927.

Before Hon. Dallas Flannagan, Judge.

For the appellant appears Lum, Tamblyn & Colyer (by Ralph E. Lum.)

For the Montclair Trust Company appears Robert M. Boyd, Jr.

For the Art Students' League of New York appears Child & Shipman (by Francis Child and Jehiel G. Shipman).

CHRISTOPHER C. BELING, sworn in behalf of the proponents.

Mr. Lum: The qualifications are admitted.

Direct examination by Mr. Child.

Q Dr. Beling, you are an alienist by profession, you have specialized in mental disorders as a physician? A Yes, sir.

Q And have been for many years in Newark? A Yes, sir.

Q Have you examined the letters that were offered in evidence in this case, written by Mr. McDowell, the testator? A Yes, sir.

Q And covering a period of some fourteen or fifteen years previous to his death? A Yes, sir.

Q Is there anything in those letters that would indicate to you, the letters standing alone, that the writer of those letters was suffering from any mental disturbance? A No.

Q Is there anything in those letters, either in the writing itself or in the structure of the sentences, and the continuity of thought, that would indicate that the writer of them was not a man of intelligence and in full possession of all of his faculties? A No, sir.

Q Mental faculties, I am now talking about. A Yes, sir.

Q Are or are not the letters well expressed? A They are.

Q Assuming that the writer of these letters had been previously married and had been divorced in 1903 from his first wife on the ground of her adultery, and assuming that he was a man of what might be termed artistic temperament, suffering for some years previous to his death from diabetes; that his disposition exhibited jealousy, not only of his wife receiving attentions from men, but also jealousy of her association with other members of her family, male or female and others; assuming that he was intensely interested, and that his father had been intensely interested in art, sculpture and paintings and all that goes to make up art; that the testator, the writer of the letters, had been an artist by profession and had been enabled to pursue his profession by reason of receiving independent means from his father in the pursuit of that profession, and assuming that he was jealous of his wife; assuming that he, at times, suspected his wife's fidelity and that that suspicion, so far as we know, was not occasioned by any act of hers; assuming that he had not seen his sister for some nine years previous to his death and assuming further that he left a letter suspecting his wife's fidelity, to be delivered after his death, can you state whether that man had an insane delusion? A Yes, I can state.

Q Did he or did he not, in your opinion, have an insane delusion? A I don't think he had an insane delusion.

Q Many persons exhibit toward their wives a marked and unreasonable jealousy, do they not? A Well, some people do, some men do.

Q And the mere fact of marked jealousy, coupled with suspicion of wrong-doing, or the possibility of wrong-doing, is not in itself an insane delusion, is it? A No, sir.

Q In arriving at your answer, you have considered the letters and the contents of those letters, have you, doctor? A Yes, sir.

Q Assuming further that the testator stated to his lawyer and to an intimate friend of his, a banker, that he suspected his wife's fidelity, can you state whether that would amount to an insane delusion? A I would say that if he suspected his wife's infidelity that it would not be any insane delusion.

Cross examination by Mr. Lum.

Q Doctor, do you consider the factors all separately or together? A I took them all together, Mr. Lum.

Q You have, doctor, testified in many cases, haven't you? A I believe I have, yes, I have.

Q And you have, on the witness stand in this county, in many will contests, testified that a husband who harbored ungrounded suspicions of his wife's chastity, suffered from delusions? A Yes, if he believed it.

Q If you have a case—and this is regardless of whether you are an alienist or what you are, just a matter of plain, common sense—if you have a case in which a man, without a shred or

basis, without the least foundation, considers a chaste wife, unchasted or guilty of infidelity, and that idea persists, though he had her followed by detectives, and though, nevertheless, continued to live with her, and showing her devotion and fidelity, he persists, nevertheless, in that idea, then it is a delusion, isn't it? A No, I wouldn't say that it is a delusion, I would say it may be a delusion.

Q Doctor, what in the name of common sense could it be if it was not a delusion? A He may have just a suspicion that he was trying to verify.

Q Doctor, I am going to ask you to assume this case: That that suspicion existed back in 1923, it existed so firmly that he, having made plans to go abroad with his wife, whom he had known from the time she was a little girl, suddenly changed that plan and sent a check of $200 to her, and sent her possessions on down to her, she being then with her mother for the day before they were to sail, and at that time wrote his sister saying he was sending these things to his wife, and asking the sister not to let the wife know where he had gone; saying he did not care very much whether he ever came back to the country or not, and with the exception of wishing to see his sister, "nothing much mattered," and that he then sent for her to come and meet him, and she went abroad shortly thereafter and traveled with him all over Europe and elsewhere, and that they returned in the fall, lived together, occupying the same rooms, though he put detectives upon her track; that he was suspicious even of his Japanese servant, and although she could read no word of Japanese, he took a little slip of

paper with Japanese characters on it to his lawyer; assuming further that the man with whom he talked was not an intimate friend, but was a young man in a bank who had never talked with him socially outside of his office, and that he said to that man that he was suspicious of his wife's fidelity, and assuming that he talked to this lawyer about his wife's fidelity; assume further that he made in New York a will calling her "my beloved wife" practically disinheriting her and leaving the bulk of a very substantial fortune to a charity; assume that he was advised at the time he did that that the will was ineffective to carry that fortune to the charity; that under the laws of New York the wife must share in one-half of the residue, and assume that he said, "No, I want to do it as a gesture," knowing that that would be an insult to be carried to the wife, to become effective only after his death, and assume further that he left a letter to be delivered to her after his death, in which letter he made charges of misconduct with an imaginary individual, a man in Switzerland, a man that the widow had never heard of, do you mean to say that confronted with that complete state of facts, you would say that man was not suffering from a delusion? A With the facts that you have given me, Mr. Lum, I would be inclined to think that he had a delusional state of mind.

Q And if he had, would you think it would be such a delusion as would be likely to influence his testamentary disposition? A It may.

Q Doctor, jealousy is in itself one of the most distressing and destructive of all emotions with which you have to deal with as a psychiatrist, is it not? A It is, I would say, a paranoid emotion.

Q It is a combination, would you say, of two of the most deadly of the destructive emotions, namely, fear and anger, isn't it? A No, I wouldn't say that.

Q Wait a minute, did you ever strike a case of jealousy in which you did not find the two emotional elements, fear and anger blended, if so, which one was absent and what took place? A You asked me whether it is composed of those two elements.

Q No, I have asked you another question. (Question read as follows: Wait a minute, did you ever strike a case of jealousy in which you did not find the two emotional elements, fear and anger blended, if so, which one was absent and what took place?) A Well, fear and anger may be expected in the manifestations of jealousy, but the fundamental thing in jealousy is, that you must have, first of all, a sense of ownership, that which belongs to you, coupled with tender feeling. Now, when a third party steps in to deprive you of that ownership and it injures your tender feelings, then you react to it, and you react to the person who interferes with your ownership, that is the idea of jealousy.

Q All you have said is that there is a possessive sense present? A Yes, a sense of ownership.

Q And there is the fear of losing that which one desires to possess, and anger against that which one conceives is taking the possession away. That is a very simple statement of it, isn't it? A Yes, sir.

Q There is a border line between jealousy and delusion, there isn't any clear, marked place where you can say a thing is one or another, is there? A I don't quite grasp what you mean,

that there is a border line between jealousy and a delusion, I would say that between—taking the jealousy as the basis, there is a border line between a sane and insane delusional state.

Q Now, doctor, if you strike one who does not have a delusion and you find the existence of jealousy, that jealousy is dissipated by finding that there is no possible cause for the jealousy, isn't there? A Not necessarily.

Q If you find a case where, in spite of all of the facts, in spite of all of the reasoning, in spite of everything shown to the man, which should convince a rational mind there is still a holding on to and harboring of the idea of the unchastity, you then have a fixed idea and a delusion, do you not? A Yes, sir, Mr. Lum.

Q Doctor, you observed this widow yourself in the court room, didn't you? A Yes, for a short period of time.

Q Did you talk to her at all? A I did not talk to her.

Q You are in the habit of making deductions from the appearance of people in your study of them, are you not? A Yes, I make deductions from the study of people.

Q Now, she seemed to be a mild type of woman, didn't she, this widow? A Yes, sir.

Q Would you say she was a negative type? A No, I wouldn't say that.

Q What would you say she looked like—was she lady-like? A Yes, sir.

Q And cultured? A I cannot say that she was cultured.

Q She looked like a lady? A Yes, they sometimes all do.

Q She looked modest and dressed in her widow's weeds she seemed observing and pleasant in the court house, didn't she? A Yes, sir.

Q Now, doctor, assuming that she was a devoted and faithful and loyal, conscientious wife, and that she devoted herself to her husband as her main and practically only ideal in life; that she knew no men whatever to whom she had ever paid the slightest heed in Switzerland; that she had lived with her husband practically all of the time, every day of their married life; that there had never been anything, so far as shown by the evidence, not even the slightest trace, or a real basis for any jealousy; that this husband having had his wife followed by detectives, having complained to his banker friend, if he was a friend, to his lawyer, having been told continually by the wife of her fidelity and that there was no basis for suspicion, still continued to harbor that idea and carried it so far as to have it brought home to her after his death, would you, without hesitation, say that that was a delusion of a fixed and serious type? A I would say that he had a delusional state of mind; I would say that and what it was based upon from the hypothetical question is that I have, his previous experience, his first marriage, led him to be very suspicious because of the natural feeling of jealousy, and he was constantly trying to protect that which belonged to him, and he would even at times, to make sure he was not going to lose his wife—

Mr. Lum: I haven't ask you any question, doctor, what are you giving this lecture for?

The Witness: Whenever you want me to stop, Mr. Lum, I will stop.

By Mr. Child.

Q Finish your trend of thought, if you can, doctor. A If he believed that his wife was untrue and accused her, and he did that without a basis of fact, and could not get that idea out of his head, then he had a delusion, there is no question about it, but, if that was based upon his previous experience of safeguarding his interest, I would say he did not have a delusion.

Mr. Lum: Doctor, you understand also that this man was of an irritable nature?

The Witness: Yes, sir.

Q They do not prove delusions, but you frequently do find them as factors in a delusional mind, do you not? A Yes, and you see that in diabetes very commonly.

Q Despondency does not prove mental incapacity, but despondency is one of the factors which you would look for when you are dealing with a case of delusion or insanity? A Yes, I always do.

Q You looked for it, didn't you? A Well, we may look for other processes in some delusional state. In some we have despondency and in others we have other emotions, the emotional state alone does not mean anything. In this case I might look upon his despondency as being a direct result of his diabetes, which is a very common thing in diabetes, and if he had delusions, it may be directly due to that, or it may be due to just his emotional attitude.

Q But, doctor, when you find an artist who has all of the comforts of life, and who has an adequate income, and a wife who is devoted to him, giving her entire time to him, and you find him running away from her without any cause, and you find him writing his sister that he does not care if he ever returns again, that life had

no value to him, that indicates a serious despondency to you, doesn't it? A Well, yes, I would say that he was in that mental state, and made an effort to get away from a situation and then comes back to it again.

Q That shows an intelligence which is a kind of evidence of mental unstability? A Not necessarily, a man often quarrels with his wife and comes back and makes up.

Q There must have been something happening in the meantime to cause him to change his actions? A Yes, and in this case, but probably because of the suspicions of his wife, he was constantly suspecting her, probably because of what I have already stated, he felt he wanted to have his wife for himself, and that was manifested not only toward males, but toward females and everybody.

Q Oh, doctor, you do not mean to sit there and say that that would account for a man making a gesture with an ineffective will, which on its face disinherited his wife, although he was told that legally he could not do it, nor would it account for his leaving a grossly insulting letter to be delivered to her after he was dead and gone, that would have nothing to do with that position, would it?

Mr. Child: I think Mr. Lum is under a misapprehension with regard to the New York will. The testimony was not that it was void, but that one-half would go to the widow. Now, he said he had disinherited her, and giving her half of a $200,000 estate is hardly disinheriting her.

Q (Last question read.) Answer that yes or no. A I cannot answer that yes or no.

Q Would that indicate, or have anything to do with the desire to keep possession of the woman, grossly insulting her after his death? A After he is dead, he can have no possession of the woman, and that is a provision for after his death—

Q Then, this idea of jealousy that you have spoken of, that is a sense of possession so far as it refers to these acts to take effect after his death, they would be without foundation, would they not? A I would say what he had in his mind with regard to the disposition of his property has nothing to do with his wife as far as possession of her is concerned. The provision he made for her, or what he intended to do when he left the money to the Art League, I can't say anything about that, but I can say this, that if he had knowledge of the fact that his wife was going to benefit and for that reason he made a gesture, I would think that that would speak against a delusion because he would be providing her with $100,000; that would speak against the delusion, because he says, "Well, it is all right," it could not have been deep, if it was deep and he said, "No, I won't do that, I will do this and deprive her."

Q Doctor, isn't the act itself almost convincing to you, as an alienist, of an absolute delusion, for a man to execute a document that would likely go contrary to what he says on the face of it? A I cannot tell you what the state of his mind was with regard to that.

Q But it seems to indicate to you a very highly-delusional state of mind, as a common-sense matter, doesn't it? A I don't know, I cannot answer that question.

Christopher C. Beling, cross.

By Mr. Child.

Q If a testator continued to live with his wife after a suspicion of his wife's fidelity, would you say that such conduct indicated a belief in his wife's fidelity? A Well, it may or may not.

Q Jealousy frequently arises without any cause or under what might be termed unnatural conditions, such as the jealousy of a husband or a wife to the attention of one or the other to their children; that frequently happens, does it not? A Yes, any third party coming in and interfering with the tender feelings of a person is apt to raise up or bring up a natural jealousy.

Q And that jealousy is what you might term, without ground where the third party is a natural person to receive attention, is it not? A Well, you would not say it is without ground, it is really what I would describe as an instinctive process, that is, something that we do without reasoning.

By Mr. Lum.

Q Doctor, if the husband continued to live with the wife, it indicated that he thought there was no reason for his suspicions, do I understand you to say that? A No, I didn't say that.

Q What did you say to Mr. Child in response to his question as to what his continuing to live with his wife did indicate? A I said it may or may not indicate delusional state of mind.

Q And though he continued to live with his wife, and he died in the same room in which they were living and he left a will practically disinheriting her, and he left a letter grossly insulting her—

Christopher C. Beling, cross.

The Court: I have heard you refer to that letter as grossly insulting her. What is your understanding with respect to that letter?

Mr. Lum: I asked the wife about it and she said she destroyed it immediately, and the wife said that that letter charged her with infidelity with a man in Switzerland who she did not know. Now, if that is not grossly insulting her—

The Court: Yes, I remember the testimony about that letter was very meagre.

(Argument.)

Q Last question read as follows: And though he continued to live with his wife, and he died in the same room in which they were living and he left a will practically disinheriting her, and he left a letter—questioning her chastity, would you then say, of course, that there was more than a mere matter of jealousy and that there must be either a foundation in fact or an insane delusion, would you not? A I would say that if he believed it, and he believed that she was unfaithful and accused her of being unfaithful, and his belief, through the period he entertained it, was not susceptible of dissipation by argument or reasoning, that that was delusional, that he had an insane delusion, but that if he had a mere suspicion, and that he had no belief in it, why, I would not say it was a delusion, an insane delusion, but that he was questioning it and was trying to verify it.

By the Court.

Q Now, whether the impression of her infidelity is a delusion or mere jealousy depends

upon the evidence before the husband of its existence or non-existence. A What he may have—

Q Now, wait, see if this is not true, what I have said, whether or not this impression he had of her infidelity was jealousy or a delusion depends on the evidence before him of the existence or non-existence of her infidelity? A Yes, I would say so.

Q Every person is subject to jealousy and the question as to whether it is jealousy or an insane delusion depends entirely upon the evidence before them, and the existence of infidelity, or whatever it may be that that person has been guilty of, isn't that true? A Yes.

Q In other words, it is impossible for you to tell whether any person suffering from a delusion, or jealousy, only as you know of the circumstances that influence the conclusion they reach? A Exactly.

Q In answering Mr. Lum, what did you understand that this letter left to be read after this man's death contained? You said at the conclusion of Mr. Lum's question that this man was suffering from a delusion. Now, in reaching your conclusion, I want to know what you understood the letter to be read after his death contained? A I made this provision, I said if he believed that his wife was unfaithful, without any foundation of facts and if that belief could not be shaken, then I would say that he had a delusion, unequivocally, but if he did not, it was a mere suspicion, if he was suspecting his wife.

Q Now, suppose the letter merely expressed uncertainty of her fidelity, that would be one thing, but if the letter accused her definitely of infidelity with a certain man, that would be an

entirely different thing, would it not? A Yes, it may be different, that goes more toward the weight of the delusion.

Q In other words, it would be a stronger evidence of a delusion if he accused her of infidelity with a definite person, of whom she had never heard, than if he had expressed an uncertainty as to her fidelity? A Yes, sir.

Q What is there in this hypothetical question that would indicate to your mind any more than an uncertainty in this man's mind about his wife's chastity? A I would say, taking the hypothetical question as a whole, I would say that there was an uncertainty in his mind.

Q In other words, he was in a state of uncertainty, other than in a state of conviction? A Yes, sir.

Q In other words, he was not under a conviction that she was unfaithful, but his mind was in an uncertain condition whether she was unfaithful or not? A Based upon his previous experience, yes, sir.

Q That is correct? A Yes, sir.

Q Now, this man had a sister, as you understand from the hypothetical question, who lived in Baltimore. What effect would any delusion as to his wife's fidelity have upon his testamentary inclination toward his sister? A I don't think it would have any.

TESTIMONY CLOSED.

Exhibit A. 1.

Exhibit A-1.

HOTEL LUTETIA
Paris

Paris, le July 23, 1923.

Always care Morgan, Harjes & Co.
14 Place Vendome.

Dear Beata:

I am very much your debtor for two very kind letters—and very much mortified that they have had to remain so long unanswered. But as you know many things have happened since I last wrote you.

Marie arrived safely and we have been here in Paris a little over a week. Perhaps it is best as it is—I am not as young as I might be—and—well the less said the soonest mended—at least for the present. This all sounds very sophysticated I know, but it is the best I can do at the moment.

Marie looks very well—she seemed a bit thin on her arrival—but otherwise fit. We are going to Switzerland in a couple of days to remain for the summer and think of spending the autumn at Lake Como and perhaps drifting down to Egypt or India for the winter. However, this is all in the air and hangs on *many* possibilities, and we may return to Paris sooner than we think.

Thank you very much for the article on insulin the new treatment for diabitis—it was extremely interesting and I have consulted a physician here about it. He says that in France as yet it is only in experimental stages—and though fine results are obtained and it shows great promise—the doctors here feel that too little time has elapsed to tell what after affects it may have and are

Exhibit A. 1.

therefore cautious about using it except in desperate or very severe cases. My own case is not an advanced one—and so far—responds to treatment and diet so promptly that he says he sees no reason why a cure may not be obtained though it may and often does take a good while—sometimes a matter of years. I do not suffer constantly—nor severely, except at times and though I have lost a good deal of flesh—I rather hail this as an improvement.

However, when I get to Lucerne I shall see a Swiss—and again inquire about insulin. It was very good of you to send the clipping—I had seen some slight mention of it in the papers but your inclosure was extremely interesting so much so that if I should become considerably worse I should of course go to London and try to obtain treatment or even return to New York for that purpose.

Your plan to turn your house into apartments and come to Europe for a while sounds attractive, though in view of coming events I am wondering if it would be practical or even wise—at least for a few years. But I have often wondered why you have not traveled more and seen more of the world—there is a lot to be seen of wonder and interest—certainly more interesting than Baltimore! And it is not difficult nor does it require the purse of a millionaire if you know how to go about it and keep people from robbing you. Of course now is the time to travel in France—the exchange is so absurdly low—if you give a servant a tip of twenty five cents he almost dies of apoplexy!

Let me hear from you when you can—always through Morgan, Harjes & Co. Thank you for your kind offer to take care of me if I wish go

Exhibit A. 5.

to John Hopkins—I shall remember—Kind regards to Mr. Smith and Catherine—believe me—

Always sincerely,

Edward McDowell.

Exhibit A-3.

Photograph of Mr. McDowell.

Exhibit A-4.

Photograph of Mr. McDowell.

Exhibit A-5.

Carnegie Studios.
Feb. 26, (1912.)

Dear Beata:

The circumstances were such that I was unable to see you again while I was in Baltimore—so I am writing just a line or two to offer you my sympathy—which I feel sure you know is heartfelt and sincere.

It will always be the keenest regret to me that I never knew the poor little man—every one speaks of his charming little personality, his manly little ways and gentle disposition—and I shall feel the loss almost as much as if I had known him.

I would wish to offer you only words of comfort in your grief—to help you bear the loss that has come to you—to all of us. To help you

Exhibit A. 6.

realize that the little man has not gone far and that in memory he will speak to you every day as long as you live. Try to realize that he is really with you in spirit and will be the first to greet you when it comes time for you too to go.

Open your heart to the dear Old Folks and let your misfortune bring you nearer to them—for I wonder if you realize how deep is their love for you—and how absolutely your grief is shared by them. Let them help you in any way they will—not only for your own good, but for the Sweetness it will bring to them as well—you little dream how much they love you.

I wish we were nearer that I might see you oftener and tell you all that it is so difficult to write. But I shall be going home again sometime soon and hope to see you when I do.

Believe me, with profoundest sympathy and love,

Sincerely,
Brother.

Exhibit A-6.

FOREST HILLS INN
Forest Hills Gardens, L. I.

Jan. 13 (1920)

Dear Beata:

Thank you for your letter—I am glad to hear that the wedding was such a success and that you are so happy. I sincerely hope that you may always be so.

Since I wrote you I have been down again with my old enemy for a couple of days—but am about again and feeling much better. It seems

Exhibit A. 6.

to prefer snowy weather—but is even willing to put up with a plain rainy day now and then—specially if long drawn out.

However, the skaters too must have their day—and they are enjoying it to the utmost. The tennis courts have been flooded and form a superb rink out of doors—lighted at night with long strings of bulbs—and are usually crowded. The famous West Side Tennis Club is here—as you probably know—where all the championship games are now played—right next to the Inn. There are 48 courts—so you can fancy I have enjoyed reviving my old enthusiasm and M has reaped a lot of fun as well.

The Inn is packed full—a long waiting list—and not an apartment to be had until late next fall. We came out here because we simply could not get servants. It got to be a matter of paying $90.00 a month for Bolchiviki masquerading as cooks and maids and even then M had to do most of the work. So I decided she should not do it any longer—and we shall not go to housekeeping again until the matter improves.

With our best wishes for the New Year.

Yours always,

Edward McDowell.

Exhibit A. 7.

Exhibit A-7.

Kew Gardens Apartments.
Apr. 2, (1922)

Dear Beata:

Your telegram brought us a terrible shock and the keenest distress. When I last saw Dr. Thomas I remember thinking how fit and well he kept himself—and to be cut off in his prime—so suddenly is indeed a misfortune.

Please let me thank you for letting me know at once and also for your kind offer of hospitality to us. But unfortunately Marie is in bed, and has been for several days, with influenza. After all our care when the epidemic was here it seems the way of fate for her to have it now. I am going to N. Y. tomorrow on Tuesday to Baltimore in time for the funeral—which your second wire states is 2:30—and I assume is at the home, if M. is well enough for me to leave, and come back by afternoon train. Otherwise we should be glad to avail ourselves of your kindness.

But she has had fever for the past two days and is so uncomfortable that it has required me on the deck most of the time. If she still has a temperature on Tuesday I should be afraid to leave her.

However, if I do get away I shall take train arriving 12:30 and if you don't mind will go up to your house and with you to the funeral, if this will not disarrange any of your plans. If it does, you can tell me or leave word for me on arrival. and I can easily manage otherwise.

Might I beg a favor? Could you order some flowers to be sent to the home for us—whatever you might think wise in the matter of design—

for which I inclose card to be sent with them. I am also inclosing check to defray the expense.

One might think that we could find some one to be with M. while I am away but unfortunately all her women friends are *idiots*! We have a Japanese servant and would you believe it—not one of them will remain in the house without a man! And Nishida is a perfect jewel—the soul of honor and the kindest little gentleman you could fancy.

Thanking you again for your kindness and with kindest regards in which M. cordially joins me,

Yours truly,

Edward McDowell.

P. S.

If you should see Lena would you mind explaining how matters stand and that I shall surely come over if it is at all possible for me to leave M.

Exhibit A-8.

Kew Gardens Apartments.
Kew Gardens, L. I.
Apr. 4, (1922)

Dear Beata:

Thank you for your letter of Apr. 2.

Poor Marie is quite miserable this morning. Her temperature is higher than it has been at all and the doctor says she must be watched with care, so that I could not think of coming in as you will readily understand, as I telegraphed you this morning. So many people have drifted into pneumonia from just such conditions here

that I realize that every precaution should be taken and am a good deal worried.

Thank you for telling me about Henry Thomas. It was indeed terrible and I feel the keenest sympathy for Lena and the boys.

From what you say, he seems to have over taxed his strength very heavily which is greatly to be regretted, though I have no doubt it was largely due to his kindness of heart and desire to do all he could. It was indeed sad that he should have decided to take the much needed rest when it was too late.

Thank you again for your kind offer to take us in and I wish we might have availed ourselves of it, for I should have liked above all things to be present at Henry's funeral.

You speak of McDowell & Co.'s business, and say that the "condition is serious." Won't you write me and tell me just what you mean? Hinkly only wrote me that they had had a very bad year owing to the general business depression and that the income from the estate would of course be a good deal reduced.

Please don't hesitate to be quite frank and tell me all you know or think. Our interests in the prosperity of the company are, as you know, identically the same and any condition would affect us alike. And therefore anything you write me would of necessity be confidential. I have often wished I was not so far away, that I might keep better in touch with what is going on. But you are on the spot and also, being a woman (excuse me) can ask more pertinent (or impertinent) questions without the risk of "violence." You could glean a good deal which you could report to me and if need be, we could take any steps together—after obtaining good

advice. My attorney here is a member of one of the oldest and most distinguished New York firms and a personal friend.

I have been unable to understand why Mr. Hinkley has not managed the Franklin St. house to better advantage—especially during the time when rents were soaring out of sight and every one else reaping a fat harvest. Even its present rental seems ridiculously inadequate.

However, in whatever you do, for pity sake move in such a way as not to cause suspicion or antagonize the trustees—at least until you and I can act together and on undoubtedly solid ground.

Thanking you again for your letter and with kindest regards to Mr. Smith and Catherine.

Yours

Edward McDowell.

Exhibit A-9.

Kew Gardens
May 6, (1923.)

Dear Beata:

Thank you for your very kind letter of greetings. It was indeed good of you to remember my birthday—though it made me blush. I am glad the days of cakes and candles are over for I should scarce be able to support the formidable number. I confess I feel old and weary and even plead guilty to having wished that it were finished.

Thank you also for the O'Brien books to which I look forward with keen pleasure. I was much interested in the clipping attached to a leaf in

the "White Shadows"—a personal note quite romantic.

We shall take the best of care of them and bear in mind our manners in the length of time we keep them.

No, I did not see "Rain"—we have had so many disappointments at the theatre these days—there seems to be so little that is worth going across the street to see—that we scarcely can trouble to go unless invited.

I am astonished and sorry to hear about the condition of Walter's collection—it was a fine one when I saw it last and a pity to allow it to run down.

I am indeed distressed to hear of the death of Mrs. Redmond's son—what a horrible thing! She has had a tragic life.

Kew is all a-leaf and a-blossom and looking its prettiest. It is a pleasure to get back from town from the snorting automobiles and filthy smells with which they fill the streets to this clean air scented with blossoms.

Kindest regards to Catherine and Mr. Smith and thanking you again for your kind thought of me in my "declining years."

Sincerely

Edward McDowell.

Exhibits A. 10, A. 11.

Exhibit A-10.

Kew Gardens—
June 7—(1923)

Dear Beata:

Just a hurried line to tell you I am returning your delightful O'Brien books—by Parcel Post today—with apologies for the clumsy packing—but I had to take the materials at hand—

Thank you very much for the many pleasant hours they have afforded—they are charmingly written and most interesting—

I am "moving out" tomorrow and off to Europe in a few days—I would have "warned" you before—but have had a mountain on hand—

I will write you more at length without fail before I go—and give you my mailing address—

With best regards and apology for rush.

Yours

Edward McDowell.

Exhibit A-11.

HOTEL SCHWEIZERHOF
LUCERNE. Address
c/o Morgan Harjes & Co.,
Paris—
Aug. 21—(1923)

Dear Beata:

Sometimes my memory works with startling embarrassment to me and this happened to me a few days ago when it brought to mind the vision of a letter I had from you long, long ago in which you stated you had had a bill from Barret & Nephews, or Dugan & Nephews or somebody &

Exhibit A. 11.

Nephews—for appraising the old home on Franklin St.—and that my just share therein was * * * and here is when my mind drops into oblivion again. Any way I have looked over several thousand (?) old check books and can find no record of having canceled any such debt—and all I can do is to blush and apologize!

When you wrote me, I know you will realize that I had a good many things to think about and some of them were anything but pleasant. Won't you let me have a memorandum of what my share of the transaction was and I will send you a check, with keen regrets that it has been so long delayed.

We arrived in Lucerne last Friday and it was nice to "get back"—for we held such pleasant recollections of it—specially of the Schweizerhof and its fine table. Well—we have the same room as two years ago—with beautiful out look on the lake from our balcony and all the courtesy and attention we could wish from the proprietor down—*but*! The *table* is still "good," but by no means what it was heretofore and so brief that at times it is startling. The prices of course are increased—and Jews—Americans and otherwise, constitute at least three fourths of the clientele—actual fact! So that we are writing for rooms at several other places and shall move on as soon as we can make satisfactory arrangement and bid adieu to the Schweizerhof for all time. This gives us keen regret for it was one of the finest hotels we have ever stayed in. There are almost no Americans—Gentiles—in Lucerne—and the Jews are everywhere—which I feel sure—together with the lowering of the standard of all the hotels—accounts for that fact. For, Americans don't mind paying big

prices but they will not stand being "done" beyond a certain point. It is patent to me that the Swiss hotels have decided to take "advantage" of the influx—but it has amounted to fleecing and I think next season they will find that they have killed the proverbial goose.

We intended staying here until October and then to Lake Como—but if we remained I am sure we should be too weak to go further! It is really too bad—fancy being served with coffee in the morning at the Schweizerhof which is so bad and weak that you can't drink it!

The lake, however, is as lovely as ever—the mountains as grand, and we have had some delightful trips and climbs. Today it rains and the mountains are veiled with festoons of clouds—a phase to me as lovely as any other.

I hope this finds you all well and happy and that you will let me cancel my indebtedness when you have time to send a line.

With best love to Catherine and regards to Mr. Smith

Yours always
Edward McDowell.

Exhibit A-12.

HOTEL LUTETIA
Paris
Square Du Bon Marche 43, Bould. Raspail, 43.

Paris, le Nov. 2, 1923.

Dear Beata:

Thank you for your letter of Oct. 19—which I received a few days ago. As you had said in it that Mr. Smith would cable me and as no cable

arrived I cabled *you.* And then in about two hours—strange to relate—Mr. Smith's cable reached me!

Marie and I are sincerely distressed that your little girl did not live for we know how grieved and disapponted you both are and I cabled you at once to express our sympathy—which no doubt you received some time today. However, we are glad to know that you came through the ordeal satisfactorily and are in no danger. I hope you will go on improving and soon be well and strong again. But I know what a keen disappointment it is to you and am sorrier than I can say.

Marie begs me tell you that she has annexed a rotten cold and is in the cross and crabbed stage —but in a day or so will write you herself.

I am delighted to learn from your letter that Catherine is studying modeling and shows progress and interest in it. It must give you great satisfaction.

What you say about "117" and its changes at various prices is quite enough—but I *am* astonished that the Hebrews were able to "put anything over" on the Frances White family in regard to their country place.

I wish I might see old Waldhim again even in its modern (?) desolation—every tree was an old friend and only to walk round the old porch again would bring back my boyhood.

You say Dugan sent you a bill for $15.00—as I understand it so I inclose check for $7.50—is that my share—or did you mean that $15.00 was my share? If so let me know and I will send you more.

We got back from our summer trip about a week ago—and Marie looks a bit refreshed—as we so managed that we did not have any hot

days to endure at all—and hot weather is not her long suit.

I don't remember where I wrote you from last —but I think it was Lucerne so if I repeat just remember I am not Shakespeare. We went from there to Chamonix—which as you know is at the foot of Mt. Blanc—the highest peak in Europe. We stayed there until the season closed—and almost until the hotel itself did—then wandered on to Aix les Bains for a couple of weeks—and as it began to get cold—went down to the Riviera —first to Nice then to Mentone and then to Monte Carlo. M. was enthusiastic over Monte Carlo.—and it is really rather a dream of a place—semi tropical with long avenues of palms, century plants in bloom to say nothing of the Casino with its gambling salons and perhaps the less said of them the better? Then—well we had absolutely nothing to wear—our gowns were mere rags and you know that is not quite decent —so we just had to come back to Paris before everything was bought up—you know how it is —and I long ago learned it myself.

Although we enjoyed Chamonix—pleasant walks and a fine hotel—we were a bit disappointed. The village—for it is nothing more is a dirty little hole and strange to relate—so close at the foot of Mt. Blanc that you can't see the mountain. Actually all you can see is a little nubbin of snow which you know is the highest point in Europe. And there is no point to which to go to get a view of the whole thing—indeed we did not even see it from the train after getting away from it a bit as we hoped—for—alas it was a foggy day of departure.

Aix we enjoyed—it is of course ultra-fashionable and spattered all over with counts and countesses—and the little lake is charming.

The Riviera is of course wonderfully lovely—but I believe you yourself have been there and know it as well as we.

Our summer has been something of a spree in a way—owing to the tremendous advantage in the French exchange rate we have lived on the fat of the land. The Swiss exchange was quite easy too—so that we sported at not only the best but at the hotels "de luxe" as they call them—with a big room and bath and still our monthly expenses have come to an absurdly low figure. At this hotel we have a big comfortable room and bath—with three meals quite as good as the Plaza Hotel table in N. Y. for all of which we pay $8.00 day only! And that is not the pension rate which is even lower.

India? I am not so sure now. M. is not quite so free from her digestion antics—though she is better in other ways. However—if we manage it I'll let you know. There seems to be a lot going on in Paris right now—and we are disgustingly comfortable—for they know us pretty well at this hotel and are pretty "white."

However—there is no knowing—this wanderlust is a queer thing.

Diabetes? Much improved. I carry a little bottle of Fehling's solution in my gripsack and make my own tests (thereby saving countless millions of dollars to the doctor!) so that I can regulate my diet almost to the ounce. I have been able to increase my starch till I have begun to fatten up a bit—and I was pretty darn thin—and I can take some fruit and my little bottle of Pomard *almost* every evening for dinner. So I'as'apes.

I had no idea this letter was reaching such appalling dimentions—it is garrulous old age.

I hope when this reaches you will be strong and well again and that you will let me hear from you when you can.

M. will write you herself and would send her love except that she has gone to sleep before I finished my letter—I hope you won't do likewise!

Best love to you all from both of us.

Yours faithfully

Edward McDowell.

Exhibit A-13.

HOTEL EMPIRE
Broadway at 63rd St.
New York City.

Dec. 11. (1923)

Dear Beata:

I found your letter of Dec. 2 at the bank yesterday and hope you received mine—written on the same date, acknowledging your telegram received on my arrival and thanking you for your very kind invitation to go over and stay with you.

M. went over yesterday to visit her parents and will see you while she is there.

Sorry your letter of Nov. 5 did not catch me before I left Europe—but it will doubtless be forwarded and I take this opportunity to thank you for your interest and kindness in behalf of my "sugar troubles." I am very much better—as I wrote you—so much so that the insulin treatment would be a supererogation—in view of the fact that I have the condition under diet control—and from all I can gather the insulin

does no more. It is seldom that a complete cure is effected with either method and treatment either way must be continued indefinitely. However—I get all I need to eat on my diet and have demonstrated a distinct improvement by test—namely that I can assimilate more sugar than before—though the starch is still to be avoided—and every potato which comes on the table seems to have a hurt, reproachful expression on its face!

However—I am very grateful for your kind offer to "put me up"—as the British say—should I have decided to take the insulin treatment.

I think it would be a good idea—as I wrote you—for you to take a long trip abroad—but I believe with you that it would be much wiser to wait until you are quite strong enough and had been able to arrange your "affairs" satisfactorily so that you might remain away as long as you like. In what traveling I have done I have been much impressed by the fact that there is an enormous amount to see the world over—and though I hate the actual traveling like poison and am bored to death we both dearly love to see new places. We Americans—I think—have a tendency to be obsessed with the soaring eagle to such an extent that we have grown rather provincial. But I fully believe that those who can afford it—should see all of the world they can. We have but a short life in a way and to miss all the pleasure and profit to be gained by globe trotting a bit is a loss beyond description.

My own plans at present are uncertain—that is as to whether we shall go back to France or remain here for the rest of the winter. How-

Exhibit A. 14.

ever, I will let you know as soon as I do myself—I have a lot of things to attend to here and it is therefore on the knees of the gods.

Thanking you again for your kind letter and invitation for both of us and with regards to the home bodies

Yours faithfully,

Edward McDowell.

Address me c/o Central Union Trust Co. as I may move from here.

Exhibit A-14.

Feb. 6—(1925)

Dear Beata:

I have your letter of Jan 28—and am indeed sorry to hear of the death of Miss Redfield's sister. Will you not offer her my sincere sympathy—I am glad you are with her and are going to take her back with you for a rest and recuperation—and have no doubt she will benefit by it.

The storm seems to have been everywhere—indeed here it clears only to snow or rain again—and the streets are more like a marsh than anything else. The only thing that the department seems to think of is to squirt the hose on the mess with the result that the liquid mud piles up and flows over onto the side walks!

Marie was sorry not to have seen you when she was in Baltimore—but was so miserable most of the time that she tells me she hardly left the house—as it was rather an undertaking to get about in the snow.

Exhibit A. 15.

Thank you, I manage to keep fairly fit—my "old enemy" seems to be under control—indeed better—as long as I stick to the spelling book—and I suppose I have no business to expect to ever entirely recover. However, I am quite content on a very reasonable diet and have no complaint to make for it might be much worse.

Remember me to Catherine and to Mr. Smith if they are with you—Marie joins me in kindest regards,

Yours always

Edward McDowell.

Exhibit A-15.

Button Hall—
May 7—(1925)

Dear Beata:

Thank you for your very kind letter wishing me good wishes—it was very good of you to remember my birthday—and I keenly appreciated it.

I confess that as the years roll by I have a sneaking desire to forget them—though I don't feel much older as they come along—

Sorry about that gray hair and glad you pulled it out. But if I pulled all mine out I should not have many left!

I was much interested in the little photographs of Catherine and sculpture which you included to Marie not long ago—They show a great deal of character—and promise. Tell her to stick to and search for construction and then more construction and learn it so that she can work from *memory*—how I wish I had done more of it!

Exhibit A. 16.

Marie seems better—I hesitate to predict—as she has hardly had time for much. But she seems encouraged herself and, I do hope, with reason— She sends her love—

Thanking you again for your very kind wishes —believe me

Ever yours

Edward McDowell.

Exhibit A-16.

HOTEL MC ALPIN
NEW YORK.

Dec. 2. (1923)

Dear Beata:

Thank you for your very kind telegram inviting us to go over and stay with you—which we found at the dock awaiting us on our arrival yesterday—

It is very good of you and I wish it might be our good fortune to accept. But, M. is not going over to Baltimore for some days yet having various and sundry with the dentist to say nothing of incidentals—and has a previous invitation to stay at "Joyceville". And for myself—much as I should enjoy being with you—I am loaded up with a thousand and one things which must be attended to here—which will keep me away for heaven knows how long.

We had a most unusual crossing—almost no motion at all and fine weather most of the time. The captain said he had not known of such a quiet sea at this season for many years. So M. was in luck for she is not a very good sailor.

Exhibit A. 17.

The first cabin was very "scarce" so we had the boat to ourselves—and—barring the Jews—enjoyed the room and freedom—as I am an old "customer" (!) of the company we were given the use of a vacant cabin communicating with ours so we had a fine place to hang our frocks (!).

We were supposed to dock at 9 A. M. and breakfasted at 7—though I had "me doots"— As a matter of fact we docked at 12:30 and didn't get away until nearly 2 o'clock.

M. sends love and begs me thank you for her share of your kind invitation— With regards to the household and renewed thanks for mine— believe me

Yours faithfully

Edward McDowell.

Francs are going up—hurray!

Exhibit A-17.

Kew Gardens Apartments
Kew Gardens, L. I.

June 4 (1922)

Dear Beata:

Thank you for your very newsy letter and its inclosure— Glad to have the photograph of Catherine, specs and all though I don't believe they really decorate her little face.

I also appreciate the clipping about Marshall Smith and feel heartily sorry for Dora. I had heard that he had bad tendencies but had no idea they were anything but sharp business dealings—what a pity he should have made such a mess of himself!

Exhibit A. 17.

I was also interested in your news of Edward Morris—I met him with his wife on the street shortly before we left for our wanderings—otherwise we have rather lost touch with each other—as it got so that I never saw or heard of him except when he wanted something.

I am inclosing clipping which you so kindly sent me before, with apologies—but it escaped my memory else you should have had it long ago.

Yes, Lena approached me on the subject of several portraits of Dr. Thomas—and I wrote her—stating my prices, which I reduced in her favor an amount which I thought was a good deal for these "parlous times." But she wrote that she couldn't afford it just at present.

What you write about McDowell & Co. interests me a good deal and much of it is news to me. I think it well worthy of looking into. Some of the things I can't quite understand and I wish as you say, that we might talk it over together. I can't get away as I am rushed to death to get out some etchings for a man who has to have them as soon as I can print them—and there is not a decent printer in this great and noble country. So I have to do it myself.

Can't you run over next Friday and spend the week end with us—and talk over the situation with me? Bring Catherine with you if she would care to come and you don't mind "doubling up"—as we have but one guest room. I should be delighted to have Mr. Smith too if it were not for the above limitations. I mention next Friday as we are expecting guests the following week and I think it would be well for us to get together on McDowell & Co. as soon as possible. So try and come over and send

Exhibit A. 18.

me a line as to train etc.—M. will meet you at the station in New York and bring you out.

M. joins me in best love and says she hopes you will not be too busy to run over Friday to see us.

With kindest regards to Catherine and Mr. Smith—

Yours always—
Edward McDowell.

Exhibit A-18.

HOTEL LUTETIA
43 Boulevard Raspail
Paris.

Address—as before—
c/o Morgan Harjes & Co.—
14 Place Vendome.

Jan. 24—(1924)

Dear Beata—

I received your letter and inclosures of Dec. 30—and was glad to learn that you had concluded to defer your trip until you were stronger. This is really no time of the year to go—our crossing was a wild one—a three days gale and though the Geo Washington is a good big boat and wonderfully steady nearly everything on board got away from its moorings. One evening in the social hall every article of furniture with the people on them started from one side and slid entirely across piling the men and women in a heap on the other! I have never seen this before—though I have experienced some gay seas. Some of the women were quite seriously in-

Exhibit A. 18.

jured and one man got an awful crack on the head. Fortunately M. was on the "receptive" side—on a lounge—saw them coming and got her feet upon it in time to prevent a broken leg!

I was interested in Catherine's sketches—though, of course, it would be impossible to gather anything from which to criticise from "two-minute" sketches. One could only deduce from a drawing in which she had had some time to search and indeed it would not be fair for me to say anything about them. However—the practice of such quick sketching is excellent but should follow as adjunct to more serious work. The anatomy lectures too if properly presented with its relation to *art*—are fine and should familiarize her with construction early, much to her advantage. Her keen interest in it, which you mention—will carry far—but tell her for me that there is much real work to be done—work that requires unflinching erasure when it is wrong—in order that she may in time give her hand the facility to do with ease and fidelity all that she finds now so difficult and slow. But oh! how glorious it is when that facility arrives —and how well worth the work—when the hand almost instinctively follows the beautiful lines and delicate modeling which build up on your canvas the real thing that is before you! There is *no other* joy in the world like it. Marie is busy with tons of dressmaking (I forgot to tell you she was *not* seasick this time notwithstanding the racket!) as we are getting ready to run down to Algiers and Tunis for the rest of the winter. It is very mild here though damp as always in winter—and the franc is going lower every day and the prices higher!

Exhibit A. 19.

Paris is gay and every one seems in good humor—I am told there are a lot of Americans here but I do not see so very many. An occasional Britisher bustles about and claims attention but the Britishers—like the poor—we have always with us.

M. sends her best love and with my own best regards to the assembled believe me—

Always faithfully

Edward McDowell.

Exhibit A-19.

I, Edward G. McDowell, of the City of Baltimore in the State of Maryland, being of sound and disposing mind, memory and understanding, do make this my last Will and Testament in manner and form following, intending hereby to dispose of my entire estate, real, personal and mixed and wheresoever situate, and to execute all powers of disposition which I may have under any deed or will or in any other manner whatever, hereby revoking all Wills and Testaments at any time heretofore made by me.

FIRST: I give all my furniture, silver, pictures, ornaments and household goods of every kind to my wife, my son and my daughter absolutely in equal shares, but subject to the provisions of the eighth clause of this will.

SECOND: I give to Wilton Gordon, my butler, if he is living and is in my employ at the time of my death, the sum of One hundred dollars ($100.—)

THIRD: I direct that the foregoing legacies shall be paid clear of any collateral inheritance

tax or legacy taxes of any sort, which taxes are to be paid out of the residue of my estate.

FOURTH: I give, devise and bequeath all the rest and residue of my estate of every kind to the Fidelity Trust Company of Baltimore and my friend John Hinkley, and the survivor of them and their successors in office upon the following trusts, that is to say:

To divide said rest and residue into three equal parts, the dwelling house No. 208 East Biddle Street to be included in that part hereinafter given in trust for my daughter for her life and to be valued in the division at Six thousand dollars ($6,000.—)

IN TRUST as to one of the above named parts of my estate, to collect the rents, income and profits thereof and after payment of all expenses properly chargeable thereto, to pay the net income to my dear wife Beata McDowell during her life and with full power to her to dispose of the same or any part thereof by last Will and Testament. And in case of the death of my wife without having validly executed the power of disposition by last Will and Testament hereby given to her, I direct that my said wife's trust share shall be added to the trust shares of my son and daughter in equal shares to be held upon the same trusts as said son and daughter's original share is held, if said son or daughter is living respectively; and in case either my son or daughter has previously died, I direct that my said son or daughter's portion of my said wife's share shall pass in the same manner and subject to the same powers, provisions and limitations to the persons living at the death of my said wife who would take said son or daughter's trust share respectively.

IN TRUST as to another of the above named parts of my estate, to collect the rents, income and profits thereof, and after payment of all expenses properly chargeable thereto, to pay the net income to my son Edward McDowell during his life, said net income to be paid over directly to him in quarterly instalments as the same shall accrue without liability as to said income to be seized or taken upon any attachment, execution or other legal proceedings at the instance of any creditor whom he may have, and without any power on his part to anticipate such income or to alienate the same in advance. And after the death of my said son, I direct that his share shall be equally divided among his children born of any marriage solemnized after the date of this will, the children or descendants of any deceased child of my said son born of such marriage then living to take per stirpes the share of their parent, but so that any share passing to a child of my said son under twenty-one years of age shall continue to be held in trust by my said trustees and the survivor of them and their successors in office until such child attains the age of twenty-one years or dies under that age. In case of the death of any child of my said son having a trust share, I give such child's trust share to his or her children if any absolutely, and if none, I give the same to the other children of my said son born of such marriage then living, and the children of any such children as may have previously died, per stirpes. But so that all shares thus accruing to any child of my said son under twenty-one years of age shall continue to be held upon the same trusts as such child's original share. And should my said son Edward McDowell die without leaving any

child or descendant born of any marriage solemnized after the date of this will, then I empower him to dispose of said part of my estate or any part thereof by last Will and Testament.

In case of the death of my son without leaving any child or descendant born of any marriage solemnized after the date of this will living at the time of his death, and provided also that my said son has not validly executed the power of disposition by last Will and Testament hereby given to him as to his share; or in case of the death of the last surviving child of my son born of such marriage after the death of my said son and under twenty-one years of age without leaving any such child or descendant of my said son then living; I direct that my said son's or such child's trust share shall be disposed of as follows: One-half thereof shall be added to the trust for my wife if she be living and the other half, or the whole if my wife has previously died, shall be added to the trust share of my daughter, to be held upon the same trusts as her original share is held if she be living, or in case she has previously died, I direct that the same shall pass in the same manner and subject to the same powers, provisions and limitations to the persons then living who would take said daughter's trust share.

AND IN TRUST as to the remaining one of the above named parts into which I have directed the residue of my estate to be divided including said dwelling house No. 208 East Biddle Street as part thereof at a valuation of Six thousand dollars ($6,000.—), to collect the rents, income and profits of said part and after payment of all expenses properly chargeable thereto, to pay

the net income to my daughter Beata McDowell Ward, wife of Frank A. Ward, during her life. And it is my will that the income from said part of my estate shall be paid to my said daughter personally and upon her receipt alone, free, clear and discharged of any claims of her present or any future husband. And after the death of my said daughter I direct that her share shall be equally divided among her children, the children or descendants of any deceased child of my said daughter then living to take per stirpes the share of their parent, but so that any share passing to a child of my said daughter under twenty-one years of age shall continue to be held in trust by my said trustees and the survivor of them and their successors in office until such child attains the age of twenty-one years or dies under that age. In case of the death of any child of my said daughter having a trust share, I give such child's trust share to his or her children if any absolutely, and if none, I give the same to the other children of my said daughter then living, and the children of any such children as may have previously died, per stirpes. But so that all shares thus accruing to any child of my said daughter under twenty-one years of age shall continue to be held upon the same trusts as such child's original share. In case of the death of my daughter without leaving any child or descendant then living; or in case of the death of the last surviving child of my daughter after the death of my said daughter and under twenty-one years of age without leaving any child or descendant of my said daughter then living; I direct that my said daughter's or such child's trust share shall be disposed of as follows: One-half thereof shall

be added to the trust for my wife if she be living and the other half, or the whole if my wife has previously died, shall be added to the trust share of my son, to be held upon the same trusts as his original share is held if he be living, or in case he has previously died, I direct that the same shall pass in the same manner and subject to the same powers, provisions and limitations to the persons then living who would take said son's trust share.

In case all the contingencies hereinbefore provided for shall fail to happen, or in case of the death of the last surviving person holding a trust share under the preceding provisions of this will without leaving any child or descendant of my daughter then living or any child or descendant of my son capable of taking thereunder then living, then I direct that such trust share or property shall be equally divided among the children of my niece Helen C. Thomas then living absolutely, the children or descendants of any deceased child of my said niece to take per stirpes the share of their parent.

FIFTH: I give to my said trustees and the survivor of them and their successors in office full power to administer, deal with, and dispose of the whole or any part of my said trust estate in their best judgment and discretion looking to the preservation and investment thereof, including at their discretion power to sell, lease, exchange, dispose of and convey any part or all of my estate for the purpose of either making or changing investments, redeeming ground rents or making disposition or payment of any part of the trust moneys or property among those entitled, and the purchaser shall not in any case be bound to see to the application of

the purchase money or other consideration therefor.

SIXTH: I desire my said trustees and the survivor of them and their successors in office to administer the trusts of this will under the jurisdiction of one of the equity Courts of Baltimore City, and to give bond for the faithful performance of their duties, but such bond is not to exceed the sum of Fifty thousand dollars for my entire estate.

SEVENTH: I hereby declare that said John Hinkley may upon my death become a director of McDowell & Company, Incorporated, to represent my interests in such corporation, and upon his ceasing to be one of my trustees by death or otherwise, it is my will that Dr. Henry B. Thomas shall succeed him as such director and as trustee of my estate.

EIGHTH: It is my will that my wife in case she survives me shall be allowed to occupy my dwelling house No. 117 West Franklin Street in Baltimore City, if she desires to do so, for one year after my death free of rent, and that the taxes, water rent, insurance and other expenses including ordinary current repairs on the house during such year of occupancy shall be paid out of my estate; and that she shall also be allowed to retain and use all my furniture, silver, pictures, ornaments and household goods for the same length of time.

NINTH: I have left a letter to my executors and trustees giving my wishes as to the way in which they can draw the income from McDowell & Company, Incorporated.

LASTLY: I constitute and appoint said Fidelity Trust Company of Baltimore and said

John Hinkley, executors of this my last Will and Testament and desire that they shall not be required to give bond as executors in an amount exceeding Fifty thousand dolalrs.

IN TESTIMONY WHEREOF I have hereunto set my hand and seal this fifteenth day of March in the year nineteen hundred and ten.

Edward G. McDowell (Seal)

Signed, Sealed, Published and Declared by the above named testator, Edward G. McDowell, as and for his last Will and Testament, in the presence of us, who at his request, in his presence, and in the presence of each other have hereunto subscribed our names as witnesses thereto.

Frederick J. Singley
Henry B. Norton
Henry Edw. Spamer.

Exhibit R. 1.

Address
c/o Central Union Trust Co.
60th St. & Fifth Ave., N. Y.

Summit—Oct. 23 (1925)

Mr. Howard M. Pendleton,
Montclair Trust Co.

Dear Mr. Pendleton:

It has occurred to me that it might be well to leave with the Montclair Trust Co. in your charge—certain papers which might be of use to the Trust Co.—my executor appointed in my will—to facilitate their efforts in my behalf, such

as inventory of furniture, accounting of my father's estate for checking up on the trustees, and one or two other papers which may help them.

I at first thought of getting a deposit box at the Montclair Trust Co. for that purpose—but, should I be traveling abroad and have need to consult any such papers, it would be impossible to get at them in that case.

I am therefore writing to ask if it would be possible for you to make such arrangement as I suggest and take them for safe keeping—to be held—of course, strickly without access to any one else except by my order. If so will you kindly advise me.

It gives me great satisfaction that I have definitely become a resident of New Jersey and am looking about for a little home in which we can have our belongings about us, and where I expect to end my days.

Yours very truly

Edward McDowell.

Exhibit R. 2.

Exhibit R. 2.

Hotel Wolcott. June 12. (1923)

The Montclair Essex Trust Co.

Dear Sirs:

I write to confirm my request made to you today.

Will you kindly hold for me while I am abroad my bonds—to the amount of $23,000.00 which Mr. Ernest Cook left with you in my presence today—collect the interest as it falls due and deposit the same in your bank to my credit until I have occasion to request any further disposition of it.

I shall have shipped to you from the Central Union Trust Safe Deposit Co. a small suit case containing silver, and an antique tapestry and beg that you will deposit them in your vaults while I am abroad.

Yours very truly

Edward McDowell.

Exhibit R. 4.

Exhibit R. 4.

I, EDWARD McDOWELL, of the City and State of New York, do make, publish and declare the following as and for my Last Will and Testament, hereby revoking all other Wills and Codicils by me at any time made.

FIRST: I give and bequeath to my wife *Marie M.* McDowell, the sum of five thousand dollars ($5,000).

SECOND: I give, devise and bequeath all the rest, residue and remainder of my estate to the *of New York* *215 West 57* ART STUDENTS LEAGUE, of the City of New York, in trust, to invest and reinvest the same, and to form therewith a fund to be known as the EDWARD G. McDOWELL TRAVELLING SCHOLARSHIP, and to apply the income and profits arising therefrom to the education of one or more deserving and talented art students, with the request that such student or students be given the opportunity to study in France, or in such country other than the United States where in the judgment of the Trustees of the Art Students League his or their artistic ability can be best developed. *I direct that should any student marry while receiving any support under this scholarship then he shall at once cease to be entitled to receive any further support or assistance therefrom.*

I authorize the said Art Students League to retain any investments which I may have at the time of my death, in the same form in which it then is. I also authorize it to invest in other securities than those prescribed by law for the investment of trust funds, without being accountable for any losses which may occur on account of such investments. I also authorize ~~my said~~ *the Art Students League of the City of New York* ~~Trustee~~ to sell, grant, convey, mortgage, lease, or otherwise encumber the whole or any portion of any real estate which I may own or to which I may be entitled at the time of my death.

Exhibit R. 4.

SECOND: I hereby appoint the CENTRAL UNION TRUST COMPANY, of the City of New York, as my Executor, and I authorize my said Executor to retain any investment which I may have at the time of my death, in the same form in which it then is, and also to sell, grant, convey, mortgage, lease, or otherwise encumber the whole or any portion of the real estate of which I may die seized or possessed, as in its best judgment and discretion it may deem necessary to the best advantage of my estate.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this day of May, in the year nineteen hundred and twenty-three.

.....

The foregoing instrument, consisting of two sheets of paper, typewritten on one side only, was on the day of its date, *McDOWELL,* signed by the testator EDWARD ~~McGOWN,~~ and by him declared to us to be his Last Will and Testament, in our presence, and we, at his request and in his presence and in the presence of each other, have signed our names hereto as assisting witnesses.

The words printed in italics are the interlined lead pencil changes and notations.

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OPINION.

Filed May 16, 1927.

ESSEX COUNTY ORPHANS' COURT.

In the Matter of the Estate of EDWARD McDOWELL, decd. } *Opinion.*

Ralph E. Lum, proctor for appellant.

Child & Shipman, proctors for respondent, Art Students' League.

Robert M. Boyd, Jr., proctor for respondent, Montclair Trust Company.

Syllabus:—A next of kin or other interested party will not be permitted to set aside the will of a monomaniac where it is shown that his insane delusion did not affect the decedent's testamentary disposition as to such objector, though it did affect provisions of the will as to another person who was a next of kin but who interposed no objection to the will.

FLANNAGAN, *J.*

This is an appeal from the probate by the Surrogate of Essex County of the alleged last will and testament of Edward McDowell, deceased. The alleged will was executed August 4, 1925. The ground of appeal is that the deceased lacked testamentary capacity.

The deceased was a man of considerable means, possessing some $25,000 in personalty and having the power under his father's will to dispose, by his own will, of the income of some $200,000 which income he himself enjoyed thereunder during his lifetime.

He was in poor health, had little occupation, did some painting, was much interested in art and spent a large part of his time in travel with his wife, who was his devoted and almost constant companion.

To those with whom he came in ordinary contact he betrayed no mental peculiarity amounting to any disorder; he ordinarily attended to his own investments and went about his daily affairs in a way which might be called irritable, finnicky, suspicious and perhaps eccentric but nothing more.

He was, however, a monomaniac, the subject being his wife's loyalty.

The testator was twice married. His widow, whom he married in 1913, was some years his junior, being his second wife. His first wife he had divorced on the ground of adultery and he was under the fixed delusion that his second wife was inconstant in her affection and loyalty to him.

He had told his wife that she was to succeed to his wealth but without indicating to her any change in his intention, he employed a stranger, who was a New Jersey attorney, to make the will in question without her knowledge, cutting her off with $5,000 and leaving the remainder of his estate to the Art Students' League of New York in memory of his father and in trust for the education of deserving and talented art students abroad and providing that this disposition should stand notwithstanding the birth thereafter of any children.

At one time, suddenly leaving his wife, he secretly went to Europe and wrote his sister not to disclose his whereabouts. Nevertheless, immediately upon his arrival in Europe he cabled his wife to join him there, which she did.

At a time when a physical examination by a physician of his wife was required he stood outside the door with a drawn revolver; he employed a lawyer and caused his wife to be frequently shadowed by detectives; caused certain slips of paper, written by a Japanese servant in that language, to be translated, suspecting that they concerned his wife; discussed his wife's fidelity with an officer of the bank with which he did business, and left a letter to be delivered to her after his death referring to a man in Switzerland and indicating his jealousy of her in respect to attentions from him or others.

It is not maintained that there are any facts upon which any suspicions or accusations against his wife could be rationally founded. She was constant in her affection and loyalty and in spite of all her reasoning he persisted in harboring his insane notion against her.

The deceased died childless, possessed of no real estate and leaving his widow as his only next of kin. There is no doubt but that deceased's monomania affected his will as to the provision concerning his wife and that it was the direct cause of those provisions.

There is no objection raised, however, by the widow to the probate of the will but the appeal is taken by decedent's married sister, Mrs. E. Clayville-Smith, who is the sole objector to its probate.

The sister claims to be interested because under the provisions of her father's will the income from the $200,000 above referred to, passes to her in the absence of the exercise by her brother (the deceased) of the power of disposition thereof. If no valid will by him exists, then no power of disposition has been exercised.

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In May, 1913, some two years prior to the making of the instant will the deceased had employed a New York lawyer, who was his regular counsel, to prepare a will. The draft of this will (which apparently was never executed) made no provision for the sister and left her nothing, as does the instant will. The sister was already well provided for by her father's will, enjoying the income upon some $200,000 for life and though she lived in Baltimore and the deceased was ordinarily unoccupied and was frequently in or about New York City, they had not seen each other for a period of some nine years before deceased's death though writing to each other from time to time. The only occasion during the nine years preceding his death when the deceased saw any member of his sister's family was a recent one when the sister's daughter was in New York and was invited with a friend of hers, to luncheon by decedent, and when at or about the same time, she, with the same friend, stopped for a week at the hotel in Summit, New Jersey, where the deceased was staying, not as his guest but at her own expense.

It is quite manifest that the deceased had no desire to leave his sister anything. If he had, it would have been reflected in the draft of one or the other of these wills. The natural result of the monomaniacal delusion, which excluded the wife from any substantial part of his bounty, would be to invite a testamentary disposition favorable toward the sister rather than to prejudice or repel one. Moreover, it was not altogether unnatural that the decedent who had studied art at the Art Students' League, who was himself an artist, interested in art matters and whose father was interested in art before him, should have

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preferred to create from his father's estate a trust in memory of his father for the education of art students, rather than to further enrich a sister who was married, well provided for in her own right, and whom he had not seen, or made the slight effort necessary to see, for a period of nine years before his death.

I am fully satisfied that although his partial derangement affected the mind of the deceased adversely to his wife and rendered him incapable of right reason as to her he was fully competent to reason rightly in regard to his sister and that his monomania had no adverse effect whatever upon his testamentary attitude towards her.

Under these circumstances the question is whether the Court will refuse probate of the will at her instance alone.

Two views are suggested: First, that if a will is affected by an insane delusion, then it is the product of an insane mind, hence is invalid, and any heir, next of kin or interested party is entitled to have it so declared. Second, that an insane delusion to be fatal to a will of a monomaniac must not only affect the will but must adversely affect the objector.

The objector in the instant case (the sister, Mrs. Clayville-Smith) takes the first view while the proponent urges the second, contending that the presence of the delusion against the loyalty of the wife, not having adversely affected decedent's disposition towards the sister, does not entitle the sister to set aside the will in the absence of objection on the part of the wife.

A single case, that of *Stackhouse* v. *Horton*, 15 N. J. Eq. 202, is cited by proponent in support of that contention. That case was decided in the Prerogative Court by the then Ordinary, Chancellor Green.

In the Stackhouse case the will of one Esther Horton was attacked on the ground of testamentary incapacity due to an alleged insane delusion applicable to her nephew, Silas Horton, and no one else. Silas Horton was not an heir at law or next of kin but the testatrix was under a moral obligation to devise to him a certain farm and up to the time of the occurrence out of which the supposed delusion was alleged to have arisen, she had recognized such obligation and declared her intention to fulfill it. She, however, in her will excluded Silas entirely. The case, as I read it, was decided upon three grounds. First; that a court will not refuse probate to a will unless by so doing it can restore the caveator to the position which he has lost by the intervention of the instrument. That the caveator Silas Horton not being an heir at law, it would therefore be of no avail to him to set the will aside and it would therefore not be done at his instance. Second; that as to the caveators, who were heirs at law, since it was shown that the insane delusion against Silas Horton did not operate to affect the decedent's testamentary disposition toward them, the instrument would not be set aside at their instance. Third; that no insane delusion actually in fact existed in the mind of testatrix since there were facts and circumstances before her from which as a foundation the conclusions she drew could rationally be drawn, though such conclusions may have been erroneous.

If the decision in the Stackhouse case is based upon the second ground, it is controlling on this Court in the instant case. It is contended it was not a ground of the decision.

The discussion by Chancellor Green in connection with the second ground is interspersed

in the opinion with the discussions of other grounds. I will, for clarity, attempt to separate, as far as possible, the language discussing the second ground, as follows: (All italics ours.)

> "In examining this question it is important that we should consider the connection which existed between Esther and Silas Horton, and ascertain how the fact of Esther Horton's partial derangement, confined to her nephew, can legally affect the disposition of the decedent's estate; for a person may me a monomaniac—the subject of a partial derangement toward a particular individual—and this derangement may be the cause of depriving such individual of the bounty of a testator which he otherwise would have enjoyed and yet the will be valid and obnoxious to no principle of law. Instance the case of an individual having two sons, his only heirs at law, and a nephew to whom he is under peculiar moral obligations to leave a liberal portion of his estate. He acknowledges his obligations and he intends that his nephew shall be an object of his bounty and shall share with his legal heirs his whole property. He suddenly conceives the notion that his nephew has become a king or an inheritor of immense wealth and under this vain delusion he makes his will leaving his whole estate to his sons, to one of them two thirds and the remaining third to the other, the proportion between the two sons being in nowise affected or having no connection with the delusion towards the nephew. Can the validity of such a will be questioned? *Cui bono?* Not by the nephew * * * *Nor can the son who takes the lesser portion of the estate impeach the will for the delusion in no way affected the disposition made to him.* * * * Silas Horton is not an heir at law of the decedent. The inquiry is therefore a proper one, what interest has Silas Horton in the question; *and as to the other caveators, did the delusion if any existed*

> *toward Silas Horton, affect in any way the dispositions made by the decedent of her property in respect to them? * * *"* (pp. 225-226.)

The Court taking up the first ground then shows how the delusion affected the interest of Silas Horton but that to set aside the will would be of no avail to him. Continuing the Court says:

> *"Does anyone else show that such delusions affected his interest in the decedent's estate?*
>
> "Susan McCallum (an heir at law), who caveats against this paper, is a sister of decedent. It is proved that Esther Horton's state of mind toward Silas has in no manner affected her interest. She gets by this will, if sustained, one hundred dollars. By four other wills executed by the decedent and cancelled, one as early as 1843, nothing was given to his sister. Aaron Horton, a brother and heir at law, gets one hundred dollars by this will. Nothing has been given to him by any of the prior wills. Curtis Coe, another heir at law, being one of the children of a deceased sister, who also has filed a caveat, takes nothing by this will. Neither he, his mother nor any of the family had been mentioned in any of the wills of decedent. It is proved as clearly as any such fact can be established, that the feelings of Esther Horton towards her nephew did not in any way affect these caveators. I feel perfectly satisfied in coming to the conclusion that if the derangement or monomania towards Silas Horton did exist, as contended for, it is no objection to admitting this writing to probate" (p. 227).

Could this language have been used by the Ordinary unless it was the Court's intention to hold as one of the grounds of the decision that the caveators, heirs at law, were not entitled to

have probate of the will refused where it appeared that the alleged monomaniacal delusion did not concern the testatrix' testamentary inclination towards them? I am of opinion, that the answer must be in the negative.

It is argued for appellant, that the Stackhouse decision turns upon the question whether the delusion affect an heir at law or person who can be restored to the position he has lost by the intervention of the instrument. This is, of course, true as to the first ground of the decision but as to the second ground the decision plainly turns upon the question whether or not the delusion affects adversely the objector who seeks to set it aside. It is plain that the insane delusion, as assumed, affected Esther Horton's will and that but for such delusion she would have made a very different one; nevertheless, as the heirs at law, who filed caveats, were not affected adversely by the delusion they were not permitted to have the will set aside on the ground, that the delusion affected the will. The appellant attempts to distinguish the Stackhouse case on the further ground that the monomania in that case was with respect to a person who had no interest, whereas in the instant case the wife against whom the monomania existed is interested, being a next of kin. The test is not, that the delusion be with respect to an heir at law or next of kin. This is plain without illustration, but a modification of the illustration used by Chancellor Green furnishes an instance which makes this obvious. In the Chancellor's illustrations, a nephew, who is not an heir at law or next of kin, was insanely believed by testator to be "a king or an inheritor of immense wealth." He was therefore excluded by testator from his bounty. Let us

modify the illustration by assuming the monomania to have been, that the nephew, who was in fact a king and immensely wealthy, had suddenly become a pauper and that under that vein delusion testator left him substantially his entire fortune. It is patent that either of the decedent's sons would then have been entitled to set the will aside though the monomania was with respect to one not an heir at law or next of kin.

It would seem from all that was said in the Stackhouse case that in order to set aside the will of a monomaniac the following situations must coincide:

(1st) The delusion must be of such a character as to have affected or been an operating cause of the testamentary disposition made.

(2nd) The Court must be in a position to restore the objector to an advantage or position, which he has lost by the interposition of the instrument.

(3rd) It must not appear that the delusion did not affect testator's testamentary disposition toward the objector.

The appellant cites in re Long 89, N. Y. Supp. 555, a case decided by the Surrogate of Kings County, New York, in 1904. The case is entirely in point and sustains the appellant's present contention, though one passage in the opinion somewhat weakens it. This passage suggests that the opinion may have been based to some extent, upon the particular statute of New York under which the Surrogate was proceeding. The Surrogate says:

> "By Code Section 2622 the Surrogate is required, even if there is no contest, 'to inquire particularly into all the facts' showing an intention to only admit a will of a perfectly sane person to probate" (p. 559).

The Surrogate further says,

> "As the contest is always made by the party disinherited, I am unable to find any case similar to this" (p. 559).

Counsel for the respective parties now before this Court seem to find themselves in a very similar position as the Surrogate did, since the only cases cited, which seem to me in point, are the two already referred to. An examination by the Court has proved equally unsuccessful.

I find that the Stackhouse case has been frequently cited in the courts of our State; six times by the Court of Errors and four times by the Prerogative Court. While never of course cited upon the precise point now before this Court, it has always been cited with approval. Entertaining the views above expressed as to the holding of our Prerogative Court in that case, the appeal herein must fail and the will must be admitted to probate.

DALLAS FLANNAGAN,
Judge.

Dated May 12, 1927.

DECREE CONFIRMING ORDER OF SURROGATE.

Filed May 27, 1927.

ESSEX COUNTY ORPHANS' COURT.

In the Matter of the Estate of EDWARD MCDOWELL, deceased.	*On Appeal from Probate of Will by Surrogate.* *Decree Confirming Order of Surrogate.*

Beata McDowell Clayville-Smith, sister of Edward McDowell, late of the County of Essex, deceased, having duly presented her petition of appeal from an order of the Surrogate of the County of Essex made on the 15th day of April, 1926, admitting to probate a certain paper writing purporting to be the last Will and Testament of the said Edward McDowell, deceased, and granting letters testamentary thereon to Montclair Trust Company, a corporation of the State of New Jersey, the executor named therein, and it appearing that said Edward McDowell died childless, leaving a widow, Marie M. McDowell, him surviving as his only next of kin and that citations were thereupon duly issued by the Surrogate of the County of Essex to all persons concerned therein to appear before this Honorable Court upon the hearing of said appeal and that said citations were returned duly served on the persons to whom they were respectively directed; and the date for said hearing having been fixed

as February 1, 1927, and upon said date Robert M. Boyd, appearing as counsel for the executor, Lum, Tamblyn & Colyer, appearing as counsel for appellant and Child & Shipman, appearing for Art Students' League of New York, a corporation legatee and residuary devisee named in said Will and Alfred B. Van Houten appearing as counsel for Marie M. McDowell, widow of decedent and legatee; and not opposing probate and not appealing, and the Court having taken testimony and heard the allegations of the parties herein and being satisfied that the said paper writing was duly executed by the said Edward McDowell as his last Will and Testament in manner and form prescribed by the statute in such case made and provided, and that the said will was not the product of undue influence and that at the time of making said will the said deceased was of sound and disposing mind and memory as to all persons and on all subjects except one, to wit: that he was partially deranged adversely to his wife, having a fixed delusion on the subject of her loyalty and fidelity to him and that his said delusion on that subject rendered him incapable of right reason as to his said wife only, and that his said monomania had no adverse effect upon and did not effect in any way his testamentary attitude toward the appellant herein, but that he was capable of right reason as to appellant and was of sound and disposing mind and memory as to her and that the said appellant is not entitled to have probate of said alleged will set aside or refused by reason of the delusion with respect to his said wife alone;

It is thereupon on this 25th day of May, 1927, ORDERED, ADJUDGED AND DECREED that the aforesaid decree of the Surrogate of the County of

Decree Confirming Order of Surrogate.

Essex admitting to probate said paper writing as and for the last Will and Testament of Edward McDowell, deceased, and directing that letters testamentary thereon issue to Montclair Trust Company, the executor therein named, be and the same is hereby in all things ratified and confirmed and that the said paper writing is the last Will and Testament of the said Edward McDowell, deceased.

And it is further ORDERED, that a counsel fee of Five Hundred ($500) Dollars be allowed to Robert M. Boyd, Esq., proctor for proponent, and the Court being satisfied that the appellant herein had reasonable cause for contesting the validity of the said Will; it is further ORDERED that a counsel fee of Twenty-Five Hundred ($2,500) Dollars be allowed to Lum, Tamblyn & Colyer, proctors for the appellant, the aforesaid counsel fees to be paid by the said Montclair Trust Company, the executor named in said Will, out of the estate of the said testator, and that a counsel fee of Twenty-five Hundred ($2,500) Dollars be allowed to Child & Shipman, proctors for Art Students' League of New York, legatee and residuary devisee.

DALLAS FLANNAGAN,
J.

Notice of Appeal to Prerogative Court.

NOTICE OF APPEAL.

Filed June 2, 1927.

ESSEX COUNTY ORPHANS' COURT.

In the Matter of the Estate of EDWARD McDOWELL, deceased.	*On Petition of Appeal.* *Notice of Appeal.*

Beata McDowell Clayville-Smith, sister of Edward McDowell, deceased, and his next of kin and heir at law, hereby appeals to the Prerogative Court from so much of the decree entered herein on the 25th day of May, 1927, as orders, adjudges and decrees that the decree of the Surrogate of the County of Essex admitting to probate a certain paper writing as and for the last Will and Testament of Edward McDowell, deceased, and directing that letters testamentary thereon issue to Montclair Trust Company, the executor therein named, be ratified and confirmed, and that said paper writing is the last Will and Testament of the said Edward McDowell, deceased.

Dated, Newark, N. J.,
June 1, 1927.

LUM, TAMBLYN & COLYER,
Proctors for Appellant.

RALPH E. LUM,
Of Counsel.

Acknowledgment of Service.

ACKNOWLEDGMENT OF SERVICE.

Filed June 6, 1927.

ESSEX COUNTY ORPHANS' COURT.

In the Matter of the Estate of EDWARD McDOWELL, deceased.	*On Petition of Appeal.* *Acknowledgement of Service of Notice.*

Service of a copy of the notice of appeal in the above cause is hereby acknowledged this 3rd day of June, 1927.

ROBERT M. BOYD, JR.,
Proctor for Montclair Trust Company.

CHILD & SHIPMAN,
Proctors for Art Students' League of New York.

ALFRED B. VAN HOUTEN,
Proctor for Marie M. McDowell.

Petition of Appeal.

PETITION OF APPEAL.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Appeal from the Decree of the Orphans' Court of the County of Essex admitting to probate a certain paper writing as the Last Will and Testament of EDWARD McDOWELL, deceased.	*On Petition of Appeal.* *Petition of Appeal.*

To the Ordinary of the State of New Jersey:

The petition of Beata McDowell Clayville-Smith, of the City of Baltimore, in the State of Maryland, respectfully shows that:

1. Petitioner is the sister, next of kin and heir at law of Edward McDowell, late of the County of Essex, deceased. On the 25th day of May, 1927, the Orphans' Court of the County of Essex made its order admitting to probate a certain paper writing purporting to be the last Will and Testament of the said Edward McDowell, deceased.

2. Your petitioner complains and alleges that so much of said decree as adjudges that the decree of the Surrogate of the County of Essex admitting to probate a certain paper writing as and for the last will and testament of Edward McDowell, deceased, and directing that letters testamentary issue to Montclair Trust Company, the executor therein named, be in all things ratified and confirmed, and that said paper writing is the last Will and Testament of said Edward Mc-

Dowell, deceased, is erroneous, improper and illegal, and your petitioner is aggrieved thereby.

Your petitioner therefore prays that the aforesaid order of the said Orphans' Court may be in the particulars aforesaid reversed by this Court.

Dated, Newark, N. J.,
June 1, 1927.

LUM, TAMBLYN & COLYER,
Proctors for and of Counsel
with Appellant.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Appeal from the Decree of the Orphans' Court of the County of Essex admitting to probate a certain paper writing as the Last Will and Testament of EDWARD MCDOWELL, deceased.	*On Petition of Appeal.* *Answer to Petition of Appeal.*

The answer of Art Students' League of New York, a corporation, respondent to the petition of Beata McDowell Clayville-Smith, appellant:

1. This respondent admits the allegations of paragraph one of the petition of appeal.

2. This respondent is advised, believes and submits that the decree of the Orphans' Court of the County of Essex, made on the 25th day of May, 1927, admitting to probate a certain paper writing purporting to be the last Will and Testament of the said Edward McDowell, deceased, and directing that letters testamentary issue to Montclair Trust Company, the executor therein named, and that said paper writing is the last Will and Testament of said Edward McDowell, deceased, is just and in accordance with law, and denies that said decree or any part thereof is erroneous, improper or illegal; but on the contrary, alleges that said decree, admitting said paper writing to probate is legal, proper and correct.

It therefore prays that the said decree, admitting said will to probate and directing that letters testamentary issue to Montclair Trust

Answer to Petition of Appeal.

Company, the executor therein named, and that the said paper writing is the last Will and Testament of the said Edward McDowell, deceased, may be in all things affirmed with costs to be adjudged to this respondent.

Dated Newark, N. J., June 30, 1927.

CHILD & SHIPMAN,
Proctors for and of Counsel
with Respondent.

Order substituting McDermott, Enright & Carpenter as proctors of record for Art Students' League of New York in the place and stead of Child & Shipman, filed July 14, 1927.

Exhibit R. 1—Bill for Divorce.

EXHIBIT R. 1.

Nov. 10, 1927.

TESTIMONY IN PREROGATIVE COURT.

Edward McDowell
vs
Estelle Emily McDowell

In The
Circuit Court No. 2
of Baltimore City.

Bill for Divorce

To the Honorable, the Judge of Said Court:

Complaining shows your Orator Edward McDowell:

I

That he is now and has been for more than two years last past a resident of the City of Baltimore and the State of Maryland.

II

That on the 30th day of June 1898 he was married in the City of New York by the Rev. W. F. Bruch to the Defendant Estelle Emily McDowell who is now a non-resident of the State of Maryland.

III

That the said Defendant Estelle Emily McDowell within the year last past has committed repeated acts of adultery and by way of specification of this charge your orator alleges that one of said acts of adultery was committed with a certain Herman Bohn on April 1, 1905 at Mohawk Apartment Hotel, 379 Washington Avenue, Brooklyn, New York, and that she again committed adultery with said Herman Bohn on May 9th, 1905 at No 732 Nostrand Avenue, Brooklyn, New York, and that she has repeatedly committed

adultery with him from time to time within three months next preceding June 1st, 1905 at said No 732 Nostrand Avenue.

That just prior to the 1st of June 1905 the Defendant moved from No 732 Nostrand Avenue, Brooklyn, New York, where she had resided for more than a year thereto, to Freeport, Long Island, where she is now living, said Herman Bohn being represented and passing and being introduced by her as her husband Mr. McDowell, and where your orator charges she is now living with him in constant adulterous intercourse.

IV

Your Orator is advised that by reason of said adultery he is entitled to a divorce a Vinculo Matrimonii from said Estelle Emily McDowell.

He accordingly prays:

First That, inasmuch as said Estelle Emily McDowell is a non-resident of the State of Maryland, an Order of Publication may be passed, according to the course of the Court in such cases, giving notice to the said non-resident Defendant Estelle Emily McDowell, of the substance and object of this bill and warning her to be and appear in this Honorable Court on a day therein named to show cause, if any she has, why a decree shall not be passed as prayed divorcing your Orator *a Vinculo Matrimonii* from the said Defendant, Estelle Emily McDowell.

Second That a Decree may be passed divorcing your orator *a Vinculo Matrimonii* from said Estelle Emily McDowell.

Third. And that your orator may have such other and further relief as his case may require.

And as in duty bound, etc.

JOHN P. POE & SONS (signed)
Solicitors for plaintiff.

Edward McDowell
vs
Estelle Emily McDowell

In The
Circuit Court No. 2
of Baltimore City.

Order of Publication.

The object of this bill is to obtain a decree divorcing the Plaintiff *a Vinculo Matrimonii* from the Defendant.

The Bill states that the Plaintiff has been for more than two years a resident of the City of Baltimore, State of Maryland. That he was married to the Defendant on the 30th of June 1898 in the City of New York by the Rev William F. Brush. That the Defendant within a year last past has been guilty of repeated acts of adultery and by way of specification states the times and places of such adultery, and further charges that the Defendant is now living in adulterous intercourse. And that she is a non-resident of the State of Maryland.

It is thereupon this 9th day of June 1905 by the Circuit Court No 2 of Baltimore City ordered that the Plaintiff give notice of the object and substance of this bill by causing this Order to be published in some daily newspaper printed and published in the City of Baltimore once a week for four successive weeks prior to the 10th day of July 1905, warning the Defendant to appear in this Court on or before the 26th day of July 1905 to show cause, if any she has why a decree shall not be passed divorcing the Plaintiff *a Vinculo Matrimonii* from her.

I Upshur Denny (Signed)

Exhibit R. 1—Order for Publication.

Edward McDowell	In The
vs	Circuit Court No. 2
Estelle Emily McDowell	of Baltimore City.

Order of Publication

The object of this bill is to obtain a decree divorcing the plaintiff *a vinculo matrimonii* from the defendant.

The bill states that the plaintiff has been for more than two years a resident of the City of Baltimore, State of Maryland. The he was married to the defendant on the 30th of June, 1898, in the City of New York, by the Rev. William F. Brush. That the defendant within a year last past has been guilty of repeated acts of adultery, and by way of specification states the times and places of such adultery, and further charges that the defendant is now living in adulterous intercourse, and that she is a non-resident of the State of Maryland.

It is thereupon, this 9th day of June, 1905, by the Circuit Court No. 2 of Baltimore City, ordered, that the plaintiff give notice of the object and substance of this bill by causing this order to be published in some daily newspaper printed and published in the City of Baltimore once a week for four successive weeks, prior to the 10th day of July, 1905, warning the defendant to appear in this court, on or before the 26th day of July 1905, to show cause, if any she has, why a decree shall not be passed divorcing the plaintiff *a vinculo matrimonii* from her.

J. UPSHUR DENNIS

THOMAS A. ROBINSON
Clerk.

Exhibit R. 1—Decree Pro Confesso.

True copy—Test
je10, 17, 24 jyl.

THE DAILY RECORD

Baltimore, July 1st, 1905.

We hereby certify that the annexed advertisement of Order..... Circuit Court No. 2 of Baltimore City, Case of Edward McDowell vs Estelle Emily McDowell was published in The Daily Record, a daily newspaper published in the City of Baltimore, once in each of four successive weeks before the 10th day of July 1905. First insertion June 10th, 1905.

THE DAILY RECORD
Per Ernest R. Crapster

THE DAILY RECORD

Filed 27th day of July 1905
27th July, 1905

Edward McDowell	In The
vs	Circuit Court No. 2
Estelle Emily McDowell	of Baltimore City.
	July Term, 1905.

[*Decree Pro Confesso*]

The Defendant.....having been duly (notified by Order of Publication) to appear to the Bill of Complaint and having failed to appear thereto, according to the exigency of the (said Order).....

It is thereupon this 27th day of July in the year of nineteen hundred and five by the Circuit Court No. 2 of Baltimore City, ADJUDGED ORDERED and DECREED that the complainant is entitled to relief in the premises, and that the Bill

Exhibit R. 1—Petition.

of Complaint be and is hereby taken pro confesso against said defendant..... But because it doth not certainly appear to what relief the plaintiff is entitled, it is further ADJUDGED and ORDERED, that one of the Examiners of this Court take testimony to support the allegations of the Bill.

Thomas S Baer

Filed 27 day of July 1905

Edward McDowell vs Estelle Emily McDowell — In The Circuit Court No. 2 of Baltimore City.

Petition

To the Honorable, the Judge of said Court.

The Petition of Edward McDowell, the plaintiff in this case, respectfully shows:

That he desires to take the testimony of Edward G. McDowell, a competent witness who is now temporarily absent from the City of Baltimore at Kettery Point, in the State of Maine, and he respectfully prays that a commission may be issued to a suitable commissioner to take his testimony and he names Horace Mitchell, Kittery Point, Maine, as such suitable commissioner.

And he files herewith the interrogatories to be propounded to said Edward G. McDowell under said Commission.

And as in duty, etc.

John P Poe (signed)
Solicitor for Plaintiff.

Let the commission issue as prayed, this 3rd day of August 1905.

Henry D. Harlan (signed)

Exhibit R. 1—Interrogatories.

Edward McDowell vs Estelle Emily McDowell — In The Circuit Court No. 2 of Baltimore City.

Interrogatories to be propounded to Edward G. McDowell

Witness produced on behalf of the Plaintiff.

1Q State your name age residence and occupation.

2Q What is your relationship to the Plaintiff, where was he born and how old is he?

3Q Where does the Plaintiff now reside and how long has he resided in his present place of residence?

4Q Did he at any time reside in the City of New York?

5Q When did he go there to reside and how long did he continue to reside there?

6Q State, if you know, the circumstances under which he left New York, and came back to Baltimore to reside, giving the date and your means of knowledge of this intention to then become a resident of the State of Maryland.

7Q Do you know the Defendant, Estelle Emily McDowell and how long have you known her.

8Q Is she a resident or a non-resident of the State of Maryland? Was she a resident or non-resident of Maryland on June 9th, 1905, when the Bill in this case was filed.

General Question:

Do you know or can you state any other matter or thing which may be of benefit or advantage to the parties to this cause or either of them, or that may be material to

the subject of this your examination, or the matters in question between the parties? if yea, state the same fully and at large in your answer.

Notice of time and place of taking this testimony of above named witness Edward G. McDowell waived

John P. Poe,
Solicitor for Plaintiff.

Edward McDowell — In The
vs — Circuit Court No. 2
Estelle Emily McDowell — of Baltimore City.

Interrogatories to be propounded to Edward G. McDowell,

Witness produced on behalf of the Plaintiff.

1Q State your name age, residence and occupation.

2Q What is your relationship to the plaintiff, where was he born and how old is he?

3Q Where does the Plaintiff now reside and how long has he resided in his present place or residence?

4Q Did he at any time reside in the City of New York?

5Q When did he go there to reside and how long did he continue to reside there?

6Q State, if you know, the circumstances under which he left New York and came back to Baltimore to reside, giving the date and your means of knowledge of his intention to then become a resident of the State of Maryland?

7Q Do you know the Defendant, Estelle Emily McDowell and how long have you known her?

8Q Is she a resident or non-resident of the State of Maryland Was she a resident or non-resident of Maryland on June 9th 1905, when the bill in this case was filed?

General Question.

Do you know or can you state any other matter or thing which may be of benefit or advantage to the parties to this cause or either of them, or that may be material to the subject of this your examination, or the matters in question between the parties? if yea, state the same fully and at large in your answer.

True Copy Test.

Thomas A. Robinson,
Clerk.

Notice of the time and place of taking the testimony of above named witness Edward G. McDowell waived

John P. Poe
Solicitor for Plaintiff.

Edward McDowell — In The
vs — Circuit Court No. 2
Estelle Emily McDowell — of Baltimore City.

At the execution of the annexed commission, issued out of the Circuit Court No 2 of Baltimore City, and to me directed, empowering me to examine witnesses in the above entitled case, I, Horace Mitechell, the Commissioner in the said

commission named, having first duly taken oath to the said commission annexed, met on the fourth day of August, in the year of our Lord, nineteen hundred and five at two o'clock, and notice of time and place having been duly waived, I then and there proceeded to take the following deposition, that is to say:

Edward Goodwin McDowell, a witness of lawful age, produced on behalf of the Plaintiff, being first duly sworn in due form of law, being examined on the following interrogatories to him propounded in that behalf deposeth and saith as follows, that is to say:

First Interrogatory:

State your name, age, residence and occupation.

1. Answer

Edward Goodwin McDowell, 68 years, Baltimore, Merchant.

Second Interrogatory:

What is your relationship to the Plaintiff, where was he born and how old is he?

2. Answer

I am his father. He was born in Baltimore, Md. May 1, 1866.

Third Interrogatory:

Where does the Plaintiff now reside and how long has he resided in his present place of business?

3. Answer

He resides in Baltimore, Md. and has done so since May 2nd, 1903.

Fourth Interrogatory

Did he at any time reside in the city of New York?

4. Answer

He did, for about thirteen years prior to May 1902.

Fifth Interrogatory:

When did he go there to reside and how long did he continue to reside there?

5. Answer

He went there in 1890 and remained there about thirteen years.

Sixth Interrogatory:

State, if you know, the circumstances under which he left New York and came back to Baltimore to reside, giving the date, and your means of knowledge of his intention to then become a resident of the State of Maryland.

6. Answer

I know that my son came back to Baltimore to live on May 2, 1903, and has lived in Baltimore continuously ever since. He told me at the time of his coming that he never wanted to see New York again on account of his domestic unhappiness while there, which had ruined his life and his career there. He took a studio in Baltimore as soon after he came there as he could get one and has always said he intended to remain, and since May 2, 1903 has had no other home but in Maryland.

Seventh Interrogatory:

Do you know the Defendant, Estelle Emily McDowell, and how long have you known her?

7. Answer

I know her and have known her for about three years.

Exhibit R. 1—Interrogatories.

Eighth Interrogatory:

Is she a resident or non-resident of the State of Maryland? Was she a resident or non-resident of Maryland on June 9th, 1905, when the bill in this case was filed?

8. Answer

She is not a resident of Maryland, and never has been.

General Question.

Do you know or can you state any other matter or thing which may be of benefit or advantage to the parties to this cause or either of them, or that may be material to the subject of this your examination, or the matters in question between the parties?

If yea, state the same fully and at large in your answer?

Answer

No.

No other witness being named or produced to me, I then closed the said commission, and now return it closed under my hand, on this fourth day of August, in the year of our Lord, nineteen hundred and five, at the Town of Kittery, in the State of Maine.

Horace Mitchell
Commissioner

Exhibit R. 1—Commission to Take Testimony.

Commission to take Testimony.

THE STATE OF MARYLAND.

To Horace Mitchell Esq. Kittery Point, Maine Commissioner named on the part of the Complainant , and Defendant

KNOW YE, that you are appointed Commissioner to Examine Witnesses in a case depending in the Circuit Court No. 2 of Baltimore City, between

Edward McDowell
Complainant

and

Estelle Emily McDowell
Defendant

Therefore you are requested, after having taken the oath hereunto annexed, that at such time and place as to you shall seem convenient, you cause to come before you all such witnesses as shall be named or produced to you, by the Complainant, and that you examine them upon their corporal oaths, to be by you administered in due form of law touching their knowledge or remembrance of any thing that may relate to the cause aforesaid; and having reduced the depositions of the witnesses so taken by you into writing, you send the same with this commission, closed under your hand and seal, to the Judge of the said Court, with all convenient speed.

WITNESS, The Hon. Henry D. Harlan, Chief Judge of the Supreme Bench of Baltimore City, the 10th day of July 1905

Issued the 3rd day of August 1905

John P. Poe & Sons Esq.,
Complainant's Solicitor

Thomas A. Robinson
Clerk.

Exhibit R. 1—Commission to Take Testimony.

COMMISSIONER'S OATH.

You shall, according to the best of your skill and knowledge, truly, faithfully, and without partiality to any or either of these parties, take the examinations and depositions of all and every witness and witnesses produced and examined, by virtue of the commission hereunto annexed, upon the interrogatories now, or which may hereafter, before the said commission is closed, be produced to and left with you, by either of the parties—So help you God.

Horace Mitchell

State of Maine
York County

August 4th 1904

Sworn to and subscribed this day before me

Moses A. Safford,
Notary Public.

87 B
1905

Ct. Ct. No. 2
No. 14 Docket

Edward McDowell
vs.
Estelle Emily McDowell
Commission to
Horace Mitchell Esq.
To take Testimony
Filed 7 day of Aug 1905

Exhibit R. 1—Testimony of Allan H. Jennings.

Edward McDowell
vs
Estelle Emily McDowell

In The
Circuit Court No. 2
of Baltimore City.

A Decree Pro Confesso having been passed in said cause and notice having been given me by the Solicitor for the Plaintiff of a desire to take testimony in the same I A. deRussy Sappington, one of the Standing Examiners of the Circuit Courts of Baltimore City, under and by virtue of an order of the above named Circuit Court, passed in said cause on the 27th day of July, 1905, met on the 27th day of July in the year nineteen hundred and five at my office in the City of Baltimore, in the State of Maryland, and assigned the 27th day of July in the same year at two o'clock in the afternoon and the office of Messrs John P. Poe & Sons in the City and State aforesaid, as the time and place for such examination to witnesses in said cause, at which last mentioned time and place I attended, due notice of such meeting having been given, and proceeded in the presence of the Solicitors of the respective parties to take the following depositions, that is to say:

Allan H. Jennings, a witness of lawful age, produced on behalf of the Plaintiff, having first been duly sworn deposeth and saith as follows, that is to say:

By the Examiner.

1Q State your name, age, residence and occupation?

A Allan H. Jennings, 38 years old, Talbot County. Maryland, Farmer.

2Q Do you know the parties to this suit?

A I do.

Exhibit R. 1—Testimony of Allan H. Jennings.

By Mr. Poe.

1Q Do you know both of them?
A I do.
2Q How long have you known the Plaintiff?
A Twenty or twenty one years.
3Q Where does he now reside?
A In Baltimore, Maryland.
5Q How long, to your knowledge, has he resided there?
A Since June 1903.
6Q Since what time in June?
A Since the early part of June.
7Q Do you know where he lived before June 1903?
A He lived in New York City.
8Q Do you know that he had returned to Maryland sometime prior to June 1903?
A I should say that I knew he was a resident of the State of Maryland prior to June 1903, I only saw him personally in Maryland early in June.

Allan H. Jennings.

General Question:

Do you know or can you state any other matter or thing that may be to the benefit or advantage of the parties to this suit or either of them, or that may be material to to the subject of this your examination or the matters in question between the parties. If so, state the same fully and at large in your answer?

A No.

Allan H. Jennings. (Signed)

Exhibit R. 1—Testimony of Jacob G. Hamberger.

The taking of testimony was then adjourned until Friday July 28th, 1905, at the office of John P. Poe, Esq at 3 o'clock P M. at which last mentioned time and place I attended and in the presence of the Solicitors of the Plaintiff proceeded to take the following depositions that is to say.

By the Examiner.

1Q State your name, age, residence, and occupation?
A Jacob G. Hamberger, Thirty eight, 160 St John Place, Borough of Brooklyn, County of Kings, State of New York, Licensed State Detective.
2Q Do you know the parties to this suit?
A I know Mrs McDowell, and I have to-day for the first time met Mr. McDowell, the Plaintiff.

By Mr. Poe.

1Q Were you employed on behalf of the Plaintiff, Mr. McDowell, to trace Mrs McDowell's movements and behavior? If so, about when did you begin to shadow her?
A It was about the middle of December, 1904.
2Q What discoveries did you make, if any, in regard to her actions and associations with any man or men?
A On May 9th., I saw Mr. Herman Bohn, who resides at 125 Park Place, Brooklyn Borough go in the apartments of Mrs McDowell, 732 Nostrand Ave., Brooklyn, at Eleven O'Clock, P M. I heard Mr. Bohn say to Mrs McDowell, "It is getting late, let us go to bed now" This was at 11.30 P. M.

we heard them in bed talking about renting a house in the country, and leave the city of Brooklyn, Again on May 14th 1905, I heard them in bed at the same address. They were talking about buying a horse and carriage.

On June 3rd., 1905, I saw Mr. Bohn and Mrs McDowell in Freeport, Long Island at their new home. They occupied the rear room, second floor. They were the only two people occupying said house during that time. I also saw them disrobing on the 4th of June. On the morning 5th., I followed Mr. Bohn from Freeport to his Brooklyn home, 125 Park Place, where I left him.

Previous to this on May 9th., Mrs McDowell entered the Lafayette auction rooms at 10.30 A. M. and there met Mr. Bohn who was waiting for her. They bought one white enamel bed, one white bed, one ice cream freezer, one baby nursery chair, one white table, one lamp, basket of junk, one small mirror and one white chair. From the auction room they entered Cowperthwaite's furniture store and remained a short while, came out and returned to her home 732 Nostrand Ave with Mr. Bohn left her at 6.20 P. M.

3Q How did you happen to be so near Mrs McDowell and Mr. Bohn as to hear that conversation?

A There is a closet on the floor on which they lived, just outside the door of Mrs McDowell's room at 732 Nostrand Ave. Where I and Mr. William H. Doyle were concealed and there heard all the conversation,

having been given the use of the first floor, which was vacant, by the Janitor.

4Q How did you come to know Mrs. McDowell's mother?

A From Miss Ruth Addison who is a sister of Mrs. McDowell I had several conversations with her. While talking to her on one occasion, her mother Mrs Addison came along and says Ruth I want you to go out to the park with me," and I says to Mrs. Addison, "This is a bright little girl of yours" She said "Yes I have two more" That ended the conversation and in this way I knew she was the mother of Mrs. McDowell, having seen Mrs McDowell Ruth and her mother on numerous occasions.

5Q Upon how many occasions did you see the Defendant Mrs. McDowell and Mr. Bohn together?

A At least forty times.

6Q You say that Mrs. McDowell and Mrs Addison are now living together in Freeport?

A I do, Mrs Addison and her three daughters, Mrs McDowell, Ruth Addison, and Elsie Addison, are all residing now at Freeport, Long Island.

8Q When did they move there and from what place?

A They moved from 732 Nostrand Ave., Brooklyn on or about the 28th day of May 1905, removing part of their furniture and taking the balance the middle of June, leaving their home without paying their rent or informing their landlord that they intended to move away.

9Q About how frequently, if at all, have you seen Herman Bohn at the Freeport House.

A Twice on June 3rd and 4th, and on the morning of June 5th

10Q What knowledge have you of any acts of adultery committed by the Defendant Mrs McDowell and Bohn?

A I have the knowledge of hearing them and knowing them to be in bed together as already stated.

11Q You said that "we Heard" the defendant and Bohn talking, whom do you mean by "we"?

A Superintendent of the Hamburger Detective Agency, Brooklyn, New York.

13Q Was he acting with you in tracing Mrs McDowell's movements and conduct?

A He was.

14Q Can there be any doubt from what you saw and heard of the adultery of the defendant?

A There is absolutely no doubt of the adultery between Mrs. McDowell and Herman Bohn.

15Q Have you any knowledge from information or otherwise of Mrs McDowell representing Mr Bohn as Mr McDowell?

A I have none of my own knowledge, but Mr Doyle has.

16Q The Bill charges that the defendant committed the act of adultery with Herman Bohn at Mohawk Apartment Hotel at 379 Washington Ave., Brooklyn, in April 1905. What do you know of this?

A I know nothing of my own knowledge.

17Q Can you state how you come to know the woman whom you call Mrs McDowell is Mrs Estelle Emily McDowell, the Defendant?

A From a photograph furnished me by Mr McDowell's representative and having

called at the house 732 Nostrand Ave. and made inquiry for Mr. Dowd, I was informed by Mrs. McDowell that there was no one by that name living there, and that she (Mrs McDowell) her mother, two sisters and Mr Bohn were the only persons occupied that floor and that no Mr. Dowd ever resided there.

18Q Do you remember about when you first saw the Defendant Mrs. McDowell to know her as McDowell?

A The latter part of December 1904, or the first part of January 1905.

19Q Can you give any further details of the associations and connection of Mrs McDowell and Mr Bohn on the 9th of May 1905 to which you have referred.

A On May 9th, we, that is Mr. Doyle and myself, entered the closet on the hall of 732 Nostrand Avenue, about 2.45 P. M. About 4 O'Clock Mr. Doyle and myself heard Mr. Bohn and Mrs McDowell lying in bed conversing.

20Q Where was Mrs Addison at that time.

A Mrs. Addison and Ruth and the baby went to the park, leaving Mrs. McDowell and Mr. Bohn in the room. Frequently when Mr. Bohn would enter the room we could hear Mrs. McDowell say "Hello Dutch" He in answer to her would say "Hello Mick." We would occasionally hear the little girl singing a song to Mrs. McDowell entitled "Back to Baltimore" Mr. Bohn is in business with his father at 50 Washington Avenue, Borough Brooklyn, City of New York, I also, as above stated on the same day between the hours of 11 and 12

at night heard them in bed at the same house 732 Nostrand Avenue.

21Q Look at Mr. Edward McDowell, the Plaintiff, who is now before you and state whether you ever saw him before to-day?

A I see Mr. McDowell in the City of Baltimore for the first time to-day July 28th.

22Q Is it possible that the man whom you saw with Mrs. McDowell on the occasions which you have mentioned and who you have stated was Mr. Bohn was the plaintiff, Mr McDowell.

A He was not.

23Q Have you stated all the specific acts of adultery committed by Mrs. McDowell that you can testify to of your own personal knowledge?

A I have.

24Q Can you state about how long the Defendant and Bohn remained in bed together on the occasions to which you have referred?

A We would watch them from time to time until one o'clock at night and would then leave them there being only two beds in the flat, one being occupied by the mother and the two small children and one by Mrs. McDowell and Mr. Bohn and a lounge on which another one of the children comprising the entire house.

25Q Of what house are you speaking?

A 732 Nostrand Avenue.

26Q Were there any boarders in the house of which you know?

A There was no boarder other than Mr. Bohn who was known as the star boarder.

27Q Known to whom?

A Known to me as the star boarder.

28Q How did he come thus to be known to you?

A The sister of Mrs. McDowell when she would see him coming in and out during the day would say "there goes the star boarder" I would frequently talk to her and endeavor to find out what she saw or heard.

29Q Did you ever hear her say anything about where her sister was with Bohn in the house?

A On one occasion in May I asked Ruth where her sister was. She said "Which sister do you mean, my lady sister or Elsie" I asked her why she called one sister her lady sister and the other Elsie. She replied that the lady sister did nothing but lay in bed and hug and kiss her fellow, and that she had another fellow who lived in Baltimore for whom she did not care anything and from whom she had secured a divorce and was going to marry Mr. Bohn. She also informed me that her lady sister (meaning Mrs. McDowell) would always drive her out of the house with her other sister whenever her mother was out with the baby so that she could be alone with her friend Herman Bohn. That is about all I learned from the child.

30Q Ever since you have seen Mrs. McDowell has she been a resident of Brooklyn or Long Island?

A Yes Sir.

31Q Give the dates of the several acts of adultery witnessed by you?

A On May 9th 1905 at Nostrand Avenue, on May 14th 1905 at 732 Nostrand Avenue, on May 14th at Nostrand Avenue and May

16th 1905 at 732 Nostrand Avenue, On June 3rd, and 4th, 1905 and on the morning of June 5th at Freeport Long Island I saw him leave the Freeport house.

32Q Did you have, from where you were stationed and located opportunity to see and know of these acts of adultery of which you have spoken?

A That is nothing in any possible way that could obstruct our view.

33Q And you are speaking of what you personally saw and heard on these occasions?

A Of what I heard and saw That is correct.

34Q Look at the picture which I now show you and state whose picture it is?

A It is a likeness of the Defendant, Estelle Emily McDowell, the woman whom my associate, Mr. Doyle and myself have been testifying about and who, as I have stated resided at 732 Nostrand Avenue, Brooklyn, and who is now residing at Freeport, Long Island, It was furnished to me by the counsel of the plaintiff in order to enable us to positively identify her.

General Question:

Do you know or can you state any other matter or thing that may be to the benefit or advantage of the parties to this suit or either of them, or that may be material to the subject of this your examination or the matters in question between the parties. If so, state the same fully and at large in your answer?

Answer

I have stated everything to my knowledge.

Jacob G. Hamburger (signed),

William H. Doyle, a Witness of lawful age, produced on behalf of the Plaintiff, having first duly sworn deposeth and saith as follows, that is to say.

By the Examiner.

1Q State your age, name, residence and occupation?

A William H. Doyle, twenty five, 104 81st Street New York City, State Detective.

2Q Do you know the parties to this suit?

A I do.

By Mr. Poe.

1Q Do you know Mr. Jacob Hamburger who has just given his testimony?

A Yes Sir.

2Q Were you present and associated with him in watching the conduct and behavior of the Defendant, Mrs McDowell?

A I was

3Q Where did you come to know Mrs McDowell?

A She was pointed out to me by Mr. Hamburger?

4Q Were you given to understand for what purpose you were to follow her?

A I was.

5Q Now then did you watch and follow her.

A I did.

6Q Alone or in company with Mr. Hamburger or both?

A Both

7Q Sometimes with him and sometimes alone?

A Yes Sir.

8Q Do you know anything or any acts of adultery committed by Mrs. McDowell?

A Yes sir.

9Q State what personally you know and saw?

A On april 25th, 1905 she come out of the house, 732 Nostrand avenue at 8.30 and there had been a gentleman with a grey mustache standing on the corner of Park Place and Nostrand Avenue. She walked over to him and they boarded a Nostrand Avenue car, but they did not speak until she got a block away after the car started? They then engaged in conversation and he paid her fare. They transferred to a Green and Gates Ave. car and went to the Mohawk Apartment Hotel, on the Corner of Washington Avenue and Green Avenue. They walked through the lobby and entered the elevator and went up stairs to the 4th floor. Getting out on the 4th floor, he opened the door of a room with a key and both entered. I went up to the 7th floor and walked down and went on the outside. The parties came out at 10.30 A. M. and both boarded a Green and Gates Avenue car where Mrs. McDowell left party in front of Loeser's at Fulton Street and Bond. Mrs McDowell went shopping through Loeser's and returned back to her house at 732 Nostrand Avenue about two O'clock.

10Q Are you able to state whether she and this party, this man, were locked in the room at the apartment Hotel

A He opened the door with a key and went in and closed the door. They were there

from nine until 10.30 an hour and a half. It took them three quarters to get there.

11Q What kind of a Hotel is this.

A Apartment Hotel.

12Q Do you know the man?

A No Sir I do not.

13Q Have you any personal knowledge of any act of adultery committed by the Defendant. If so, state the date and the particulars of your knowledge and your means of knowledge.

A On May 9th 1905, Mr. Hamburger and myself concealed ourselves in the closet of the top floor.

14Q On the top floor of what?

A On the top floor of 732 Nostrand Avenue, this closet was occupied by a ladder extending to the roof. We heard Mrs. McDowell and Mr. Bohn in bed together.

15Q How did you know it was Mrs. McDowell and how did you know it was Mr. Bohn.

A Because they were the only two people in the flat.

16Q Are you sure it was not this gentleman now presented to you Mr. McDowell, the Plaintiff?

A I am positive it was not. I made an inspection of the flat previous to this as a gas inspector and got acquainted with Mrs. McDowell. She told me on that occasion that her husband was complaining of gas that he could not read in his room. I had a dozen or more four foot burners in my pocket which I took in the room which she said she and her husband and herself occupied and placed a four foot burner on. I was disguised in overalls and my face

blackened with grease as a gas man and a false mustache.

17Q State any other acts of adultery?

A On May 14th, we left them in bed at night together we heard them in bed through the door, we left the hall at half past twelve.

18Q Where were they at the time you left?

A In Bed in the room.

19Q What house was this?

A 732 Nostrand Avenue.

20Q On what date?

A May 14th and again May 16th.

21Q What occurred then?

A We found them upstairs in bed again.

22Q What time and on what night?

A About 11'o'clock at night.

23Q How did you know they were in bed together?

A They had a argument about putting on their night dresses, saying it was awful hot, and Bohn said he was not going to wear anything, She insisted on his putting on his pajamas and he said he was not going to wear anything. On June 3rd 1905, in Freeport we located their room on the second floor at the back of the house which has nothing but a shade and a wire screen in the window. The back of the house faced a lot of fields and before going to bed they lowered the shade a little and began to undress and about the time they were ready to put on their night dresses they turned out the light and we could see no more. On the night of the 4th of June it appeared the same and we remained all night and saw Bohn coming out of the house, Dr. Lambert's House which Mrs.

McDowell was occupying and catch the 7.05 train. On other occasions I have seen them out together, with the baby on some occasions, he was carrying the baby and sometimes buying cake for the baby, they were together at the Lafayette auction rooms buying furniture he paying for it, also buying a horse and carriage at Vantassel's auction room 13th street between 3rd. and 4th Avenues.

24Q The man you say you saw Mrs. McDowell with and whom you spoke of as Herman Bohn, are you sure he is not the same man as Mr. McDowell now before you in this room.

A Yes Sir, I am sure that he is not.

25Q How many times can you say that you saw Mrs. McDowell and Mr. Bohn together in the way in which you have described.

A On an average I have seen them every day, but committing adultery, about five or six times. Some days Mr. Bohn would enter the house at 732 Nostrand Avenue, at seven o'clock in the morning and remain there until eleven or twelve o'clock at night.

26Q I understand you to say that you and Mr. Hamburger were not always together?

A No sir. Mr. Hamburger was with me at night, but not during the day

27Q Was this Mr. Bohn constant and frequent in his attentions to Mrs. McDowell?

A Yes Sir.

28Q About how many times would you say that you had seen them together?

A On an average of every day from the time I started to work on this matter about the first of the year.

29Q The Bill charges an act of adultery on the 9th of May 1905, is that one of the dates? Yes sir one of the specified dates.

30Q And from where you and Mr. Hamburger were located, can there be any fair doubt of the commission of adultery?

A No sir.

31Q At the times and places mentioned?

A No sir, When we entered the house to go up, we had on a pair of felt shoes called creepers.

32Q Could you overhear conversations between Mrs McDowell and Bohn while they were in bed together?

A Yes sir, talking about different things that had taken place during the day, that had happened and after things were quiet in the room Mr. Hamburger would start down stairs and I would follow.

33Q Did you ever have any conversation with Mrs McDowell's sister Ruth in regard to her relations with Bohn?

A Yes Sir.

34Q State what you remember and what she said?

A Ruth told me on several occasions that Stella and Herman were upstairs lying down together and hugging and kissing one another, Elsie, younger sister, told me that Herman Bohn and Estelle were to be married very soon. That she had a fellow in Baltimore but was divorced from him and whenever Herman would have an argument with her he would sing "Back, Back to Baltimore" On different occasions of their meeting, they would address one another as "Hello Dutch" and "Hello Mick". Her

sister would sing "Back to Baltimore to her? They would all sing it to get her mad. Elsie also informed me that her father kept a paper business in New York a news stand, and he would only come home on Saturday night and Sunday night and on these occasions Estelle's fellow would have to go home.

35Q Do you know anything about occurrences on May 12th 1905,

A Yes sir.

36Q Then tell us what occurred on that day?

A Mrs. McDowell did not leave the house all day. Mr. Bohn entered the house 732 Nostrand Avenue about 1 P. M. and remained there until 6 P. M. at 3.30 one day Mrs Addison came out of the house leaving Mrs. McDowell and Mr. Bohn alone during that time.

37Q What do you know if you know anything of a removal from 732 Nostrand Avenue down to Freeport.

A They moved from 732 Nostrand Avenue to Freeport, Long Island.

38Q Did you ever see Herman Bohn Down at Freeport house? A Yes Sir.

39Q Did you ever see him with Mrs. McDowell down there?

A Yes sir.

40Q Tell all you know about their being present at the Freeport House?

A On the night of the 3rd and on the night of the 4th of june as I have already testified.

41Q Did he occupy a separate room from her or the same room on these nights?

A I saw her undressing in the same room with him.

42Q On both these nights?

A Yes sir.

43Q How did you manage at the Freeport House to come near enough to see what you have testified to.

A They occupied the second floor back room that faced a lot of fields and the window was open and nothing but a shade partly drawn down and a wire screen to the window there was nothing to obstruct the view as I have already testified to that.

44Q And that was the way you were enabled to see them.

A Yes Sir.

45Q Do I understand then that you are testifying to these acts of adultery from what you and Mr. Hamburger personally saw and not from what you heard from anybody?

A Yes sir From what we personally saw.

46Q Do you think you can be mistaken as to the commission of adultery on these occasions by Mrs McDowell?

A No sir, I do not.

47Q Can you tell how you came to know who he (Mr Bohn) was?

A I investigated. After he left Mrs. McDowell one night I followed him to 125 Park Place, Brooklyn, and found he was Mr. Bohn.

48Q Did you hear his name from any of the inmates of the Addison House?

A Yes sir, from Elsie and Ruth.

49Q Do you remember about when you first saw Mrs. McDowell?

A Along about the latter part of December 1904.

50Q Do you know anything of Mrs. McDowell introducing Mr. Bohn or representing Mr. Bohn as Mr. McDowell if so, what?

A Only what I heard. I visited Libby's real estate exchange at Freeport, Long Island, and was informed by the woman in charge that Mr. McDowell had rented Dr. Lambert's farm house on Grafflin Place between Broadway and Grand Avenues.

51Q Was it after that you saw Mrs. McDowell and Herman Bohn together at that Freeport House?

A Yes Sir.

52Q Did you ever take any further steps to verify the information that house was taken in the name of Mr. and Mrs. McDowell.

A No further No Sir.

53Q Look at the picture which I now show you and state whose picture it is?

A It it a likeness of the Defendant, Estelle Emily McDowell, the woman who my associate Mr. Hamburger and myself have been testifying about and who, as I have stated, resided at 732 Nostrand Avenue, Brooklyn, and who is now residing at Freeport, Long Island, It was shown to me by Mr. Hamburger in order to enable me to positively identify her.

General Question:

Do you know or can you state any other matter or thing that may be to the benefit or advantage of the parties to this suit or either of them, or that may be material to the subject of this your examination or the

matters in question between the parties. If so, state the same fully and at large in your answer?

Answer

I have nothing further to state.

Wm H. Doyle (signed)

The Taking of testimony was then adjourned until Tuesday Evening, August 1st 1903 at 3 o'clock P. M. at the offices of John P. Poe, Esq., at which last mentioned time and place I attended and in the presence of the solicitor for the plaintiff, proceeded to take the following depositions, that is to say.

Edward McDowell, the plaintiff in this case, produced on his own behalf, having first been duly sworn deposeth and saith as follows: that is to say.

By the Examiner.

1Q State your name, age, residence and occupation.

A Edward A. McDowell, Age 39, I have resided in Baltimore since May 2nd, 1903, Occupation, Artist.

2Q Do you know the parties to this suit?

A I am the plaintiff and my wife Estelle Emily McDowell is the Defendant?

By Mr. Poe.

1Q When, where and by whom were you married to the defendant, Estelle Emily McDowell and what was her maiden name and age.

A I was married to the Defendant on June 30th, 1898, in New York City by the Rev. W. F. Brush Her maiden name was Estelle Emily Addison. Her age 18.

2Q Are you or not living with her now?

A I am not living with her now.

3Q When did you go to the city of New York to live?

A I went to the city of New York in the fall of 1890.

5Q How long did you live there and what was your profession?

A I lived there until the 2nd of May 1903 when I left and came to Baltimore and took up my residence here My profession was and is that of an artist. I studied my profession here in Baltimore where I was born and in 1890 as I have said went over to New York to live and practice it.

6Q When did you cease to reside in New York.

A I ceased to reside in New York on May 2nd. 1903, and took up my residence on that date in Baltimore with my parents.

7Q State fully and particularly the circumstances which led you to give up your residence in New York and return to Baltimore, Maryland and your intention as to your residence in Baltimore.

A I left New York and discontinued my residence there because my profession was broken up by my wife's bad behavior and I, myself rendered so distressed by it that it would have been impossible to remain. I found that I was the victim of constant trickery and deception on the part of my wife. That she was indulging in clandestine meetings and engagements with young men

and corresponding with them in the same manner. I did everything in my power to persuade her to behave herself properly and to entertain her men friends at our own apartments in a proper way, but her excuse was that she did not feel free to say what she pleased in my presence. Finally on the last day of April, 1903, my wife told me that she no longer loved me in fact that she loved another man, and that she wished that I would get a divorce. I therefore told her, as I could no longer endure her behavior, I would do so and felt that I had done all that could have been expected of me, as I was worn out in mind and body, She at once returned to her mother in Hoboken and I determined to leave New York and make my home in Baltimore? where I proceeded on May 2nd 1903, and afterwards opened my studio here and have been residing here until the present date.

8Q Does the Defendant reside in Maryland, Did she reside in Maryland when the bill to this case was filed?

A My wife does not reside in Maryland and did not reside in Maryland when this bill was filed.

9Q State whether or not the Defendant ever had any conversations with you touching her feeling of love or otherwise for you and also touching the subject of a divorce by you from her. If so state such conversation fully. State also whether at any time you mistrusted the fidelity of your wife to you and the reasons of your mistrust?

A My wife had on several occasions conversations with me in regard to her lack of love for me and not only confessing that she did not care for me but stating that I was too "slow" for her and that she could not love any one who was so ungainly and as I have stated she asked me to obtain a divorce. I very gravely suspected her of infidelity to me on several occasions. Once when she stayed away over night and told me she went to her mother's I found afterwards that she had stayed at the house of a young man friend. The young man's mother was at home, but was herself not a very refined person. As the house in which she remained was only a few blocks from our apartments I saw no reason why it was necessary for her to remain over night nor for the secrecy involved. I remember there were several other such occasions on which I suspected of her infidelity, but cannot now recall the details.

10Q What do you know, if any, in regard to her correspondence with men after her marriage, Was this correspondence carried on with your knowledge and consent.

A I know that she corresponded constantly with several young men and was at one time in the habit of receiving her mail at a small stationery store under the assumed name of Hester Allen. The correspondence was carried on without my consent. I objected to it as soon as I discovered it.

11Q What conversation or conversations did you have with her on that subject? Answer fully.

A I several times reproached her for this and begged her to desist. She would promise and then I would find her indulging again almost immediately afterwards? For example. I at one time objected to her intimacy with a man whom I knew to be very undesirable. She gave her word never to have any more to do with him and begged me to forgive her. I seemingly left the apartment to go to my studio, shutting the door noisily to deceive her and remained for ten minutes or so in the hall way. On entering the little parlor I surprised her at the desk writing to the young man above mentioned, the half finished letter beginning "Dearest" and containing other endearing terms and suggesting a plan to outwit me.

12Q Do you know the witness Allan H. Jennings?

A I know him well, he is one of my most intimate friends

13Q Do you remember seeing him in June 1903, if so, where?

A I remember very well seeing him in June 1903, out at my father's country place in Walbrook, Baltimore, where I was then residing and where I had been residing since my return to Baltimore on May 2nd. 1903.

14Q After you left New York as you have stated may 2nd. 1903, and came to Maryland to reside, did the defendant come here to Baltimore to see you?

A She did.

15Q Did she come upon your invitation?

A Yes sir.

16Q Where did she come?

A To my father's residence at Walbrook, Baltimore City.

18Q How long did she remain here with you at your house in Baltimore City.

A I should say about two weeks.

19Q Did you and she then go to any watering place from your home at your father's house in Baltimore?

A Yes sir, we went to Cape May about August 2nd or 3rd 1903

20Q Do you remember the day you and she left Cape May?

A I do very distinctly.

21Q Look at the letters which I now show you, marked respectfully, "Plaintiff's Exhibit E. M. Nos. 1 and 2 and state when and how they came into your possession?

A I suspected her of having taken a box at the post office by her actions in the morning, as she seemed desirous of getting rid of me, so I excused myself and went to a store directly opposite the Post Office and watched from the interior of the store and she came along about twenty minutes after I had gotten there and went into the Post office. I saw her go to the window where the boxes are and I saw the woman at the window hand her a letter. I walked straight across to the post office and demanded the letter. She was very much frightened and astonished and gave me the letter at once. The letter marked Exhibit E. M. No. 1 is the letter I then received. I told her that this was the last and that I wished her to come down to the beach with me. The address on the envelope of the letter "Miss

Estelle Addison'' is my wife's maiden name. I found therefore that she had taken a box without my knowledge in her maiden name. When I got to the beach I proceeded to open the letter and she told me that if I did so the man who had written it would kill me. I told her I had no fear of that in the least? I opened and read the letter but I did not show it to her and have never done so. After reading the letter I told her I could not stand it any longer and we would have to part for the last time. That as it was late in the day she would have to go back to her mother the next day in New York The next day, on the morning of August 8th 1903, I suspected that there might come another letter to her, so before she came down to her breakfast, I went to the post office and asked for and obtained this other letter ''Exhibit E. M. No 2 I opened and read the letter but said nothing to her about having received it and she never found out from me that I had received it.

(These two letters are now filed with the Examiner Marked Exhibit E. M. Nos 1 and 2.)

23Q Do you know the name of the writer of these letters?

A I found out who the writer was His name is Edward Cutler Lane.

24Q Where did you and she then go?

A On the morning of August 8th 1903 we left Cape May for Philadelphia together and when we arrived at Broad Street Station, Philadelphia, she took the train for New York. I took the next train for New York

and went to Kettery Point Maine, where my parents were then spending the summer.

25Q Have you ever seen the Defendant since you parted with her at Broad Street Station on the Morning of August 8th 1903.

A I have never seen her since.

26Q Is the defendant a mother?

A She is of one child.

27Q Are you the child's father?

A I am not.

28Q When was the child born?

A On March 5th 1904

29Q What is the name of the child?

A Robert.

30Q Did you give it that name or consent to its being given?

A I did not.

31Q You say that you came away from New York on May 2nd. 1903, because you could no longer remain there and practice your profession, was the defendant pregnant at the time you left her and came to Baltimore to reside.

A She was not.

32Q You say that subsequently at your invitation she came to Baltimore to your home about the 15th of July 1903, was she pregnant at that time?

A She told me that she was and the birth of her child on March 5th 1904 proves that she was.

33Q Was she pregnant by you?

A She certainly was not.

34Q Why do you say this?

A The dates make it clear, the child must have been begotten between May 2nd, 1903 when I left New York and July 1903, when

on my invitation she came to Baltimore as I have stated. She made me believe that she had become pregnant before I left her on May 2nd 1903 but she deceived me in this and it was because she had deceived me that I asked her to come to Baltimore in July 1903. When the child was born March 5th 1904, I became convinced that she had become pregnant between May 2nd, 1903, and the time she came to visit me in July 1903 I did not see her in the interval between May 2nd, 1903 and July 15th 1903, except twice for a few minutes each time in the public office of the Martha Washington Hotel, New York.

35Q Do you know anything as to whether the child was a full born and matured child?

A I was informed that the child was a fully matured child when born.

36Q Have you taken or caused to be taken any steps to discover her behavior within the last year or so?

A Yes sir, I have. I had reason to suspect her and I directed her to be watched in order to ascertain whether my suspicions were not well founded and the reports of the detective employed to shadow her have fully satisfied me of her adultery.

37Q Look at the photograph now shown you filed by J. G. Hamburger in his testimony and state whose photograph is it

A It is the photograph of the Defendant Estelle Emily McDowell.

38Q Did you ever see this photograph before and how did Mr. Hamburger get it?

A I have seen it before. It is the photograph which I furnished him through my counsel.

39Q Is the defendant as far as you know the owner of any real or personal estate?

A She had no property of any kind that I know of when I married her as far as I know she has not acquired any since.

40Q Are you possessed of any real or personal property?

A I have no property of any kind and have no means other than what I may earn from my profession of artist.

Solicitor for the Plaintiff here files photograph mentioned in these proceedings as Plaintiff's exhibit E. M. No. 3.

General Question:

Do you know or can you state any other matter or thing that may be to the benefit or advantage of the parties to this suit or either of them, or that may be material to the subject of this your examination or the matters in question between the parties. If so, state the same fully and at large in your answer?

Answer

I have nothing further to state.

Edward McDowell (signed)

No other witnesses being named or produced me I then at the request of the Solicitors for the Plaintiff closed the depositions taken in said cause, and now return them closed under my hand and seal this seventh day of August in the year of Our Lord nineteen hundred and five at the City of Baltimore, in the State of Maryland,

A deR Sappington (Seal)
Examiner

There are three exhibits with these depositions, to wit Plaintiff's Exhibits E. M. Nos 1 2 and 3

A deR Sappington
Examiner

I A deRussy Sappington, the Examiner before whom the aforegoing depositions were taken, do hereby certify that I was employed in assigning a day, and taking the said depositions upon four days, all of which I was employed by the Plantiff and on none by the Defendant

A deR Sappington
Examiner.

Letter addressed to
Miss Estelle Addison
Cape May, N. J.

My Dear Estelle,

Yours from Cape May at hand this P. M. I have a lot to write you about, sweetheart so here goes, I think perhaps a few explanations first. The first Monday following the Saturday we said good-bye in Jersey City I pulled out for South Norwalk, that morning I received your letter which you wrote on the train. The next my brother brought to me when he came up the Saturday of the week. It was too late then to get anything in the H One of your postal cards the first one, mother sent me in one of her letters which for some reason was held a week in Norwalk before it was given to me at the General Delivery Window. The rest of your letters and the other postal I received a few days later than I would if I had been in Mt V. I imagined I read

reproach between the lines of that last postal. I want to tell you again Estelle as I have told you a hundred times before that you must not try to imagine there is any girl in this world for me but you and to you I will keep my betrothal vow as sacredly as it is possible for me to, as I construe your love for me. I want you to keep a cool head honey, while we are playing this game and think of me as the boy who used to put off your good night kiss as long as the clock would allow, and then go tearing through the station for the 12.04

I called on Miss A in South Norwalk only to find she had gone to New London? How much have you told her? If absolutely necessary could I get a line to you through her. The next time you find a way to receive mail from me if possible let me know the latest date I can address you at the given place.

The night before I went to S. N. I put your locket in my pocket to have a chain put on my wrist, but when I went to look for it I could not find it anywhere. Please send me another one a little longer than the first. I will have your picture put in it, will get as strong a chain as possible have the end links welded and won't take it off until I see you again. Until brown eyes look into blue eyes again and say Estelle I love you

Honey if you knew what your letters meant to me but then I know you do as you seem to know everything.

While camping I used to look at the pole star and the constellation to the eastward of it and dream of the days gone by, then look south towards the Verge and think of days to come

when I can call the best little girl in the world mine.

My mother went to the mountains this morning, so I have the house to myself for the next month. I will come down to breakfast mornings and there is some one else there. It will be a pleasure I assure you

I had my usual run of luck while at S. N. came home with finger twice its usual size. The result of a blister being broken and a little dirt Doc cut about half an inch each way, probed and found it had gone to bone, but not injured it in any way. Another five days will find it just good as a new one. It gave me an opportunity to have a few more interesting conversations with M. D.

Estelle I love you love you love you I would give anything to have you to-night myself

I am going to say good-night to you now, and will write you more in the morning

Cheer up honey and don't get the blues have a good time, be your own dear natural self, and jolly old Columbia men, but be good to anybody you happen to meet with an E on his sweater.

Twolips E
———=—= Ans More than ever, yours
0 3 Ted.

Letter addressed to
Miss Estelle Addison
Cape May J. N. Box 808

My Dear Sweetheart:

Good morning honey, just got down stairs, had my breakfast so here goes for a line to the best little girl in the world. I am off for New York this morning to do some shopping and have a talk with the chap I was camping with. I expect a bid to go out in one of the Pilot boats, they are out anywhere from five to ten days, it is good sport just the right kind of off shore sailing.

I am quite certain of Exeter next fall at least at least the mater says so and thats half the game.

Some how I feel surer than ever of you after your letter of yesterday. There is one clause in Cadet regulations that has been running through my head for some time "The marriage of a cadet is considered as his resignation" That is the only thing that can keep us apart after two years.

I am having your last picture framed tomorrow it goes over the head of my bed to stay It remains with you how long.

I am feeling in first rate condition, my leg does not bother me the least bit. I think this fall I will say good-bye to sciatica.

I wish you were to go with me to the Yacht races, I will go stay as I will have to go to a lot of things during the coming year

They are all dead ones after you anyway and besides if I am alone I am in good company. That is good philosophy is it not.

Exhibit R. 1—Report of Master.

It is time for me to go to the doctor, so I will say aurevoir, till next time. I will get a line from you some time to-day

Your own boy

Ted.

Edward McDowell
vs
Estelle Emily McDowell

In The
Circuit Court No. 2
of Baltimore City.
July Term, 1905

This case being submitted, without argument, it is ordered by the Court, this 28th day of August, 1905 that the same be and is hereby referred to Alexander H. Robinson, Esq., Auditor and Master, to report the pleadings and the facts, and his opinion thereon.

Pere L Ulricks

Report of Auditor and Master

Bill filed by husband against wife for a Divorce A Vinculo Matrimonii on the grounds of adultery Code A W 16-5-36
Order of publication against defendant as a non-resident no appearance Decree Pro confesso
Proof show a Marriage, Residence of the Complainant, the non-residence of the Defendant, and the adultery of the defendant
Case ready for decree

Alexander H. Robertson,
Auditor & master

Exhibit R. 1—Decree of Divorce.

August 30th, 1905

Edward McDowell
vs
Estelle Emily McDowell

In The
Circuit Court No. 2
of Baltimore City.
July Term, 1905

Decree of Divorce.

This cause standing ready for hearing and being duly submitted, the proceedings were by the Court read and considered.

It is thereupon, this 30th day of August, Anno Domini, one thousand nine hundred and five by the Circuit Court No. 2 of Baltimore City, *Adjudged, Ordered and Decreed,* that the said Edward McDowell the above named complainant be, and he is hereby DIVORCED A VINCULO MATRIMONII, from the defendant, Estelle Emily McDowell

And it is further Ordered, that the said Complainant pay the cost of this proceeding.

Pere L. Ulricks

I, JOHN PLEASANTS, Clerk of the Circuit Court No. 2 of Baltimore City, do hereby certify that the above is a true copy of the decree taken from the record of proceedings in said cause.

In Testimony Whereof, I hereunto set my hand and affix the seal of the said Court, this 26 day of January 1927

John Pleasants

(seal) Clerk Circuit Court No. 2 of Baltimore City.

Exhibit R. 1—Clerk's Certificate.

State of Maryland,
City of Baltimore

I John Pleasants, Clerk of the Circuit Court No 2 of Baltimore City, do hereby certify that the above are true copies of the original
Bill for Divorce Filed June 9th 1905
Order of Publication Filed June 9th 1905
Certificate of Publication Filed July 27th 1905
Decree pro Confesso Filed July 27th 1905
Petition and Order Filed August 3rd 1905
Petition for Commission and interrogatories to Edward G. McDowell and order filed August 3rd. 1905
Commission to Horace Mitchell, Kittery Point, Maine to take testimony filed August 7th 1905
Depositions Filed August 7th 1905
Exhibit E. M. No. 1 Filed August 7th 1905
Exhibit E. M. No 2 Filed August 7th 1905
Order of Reference and Report Filed August 28th 1905
Decree of Divorce Filed August 30th 1905.
Now on file in this office in the cause therein entitled Edward McDowell Vs Estelle Emily Mcdowell.

In Testimony Whereof, I hereto set my hand and affix the seal of said Circuit Court No 2 this 26th day of January 1927.

John Pleasants
Clerk

(SEAL)

I, Robert F Stanton one of the Associate Judges of the Supreme Bench of Baltimore City, and by assignment, presiding Judge of the Circuit Court No. 2 of Baltimore City, in the Eighth Judicial District of the State of Maryland, do

Exhibit R. 1—Clerk's Certificate.

hereby certify that JOHN PLEASANTS, who has given the preceding certificate, was Clerk of the said Circuit Court No. 2 at the time of so doing, and that his attestation is in due form, and his signature thereto is genuine.

Given under my hand this 26 day of January, A. D. 1927.

Robert F. Stanton
Associate Judge,
Supreme Bench of Baltimore City.

STATE OF MARYLAND,

CITY OF BALTIMORE, SCT.

I, JOHN PLEASANTS, Clerk of the Circuit Court No. 2 of Baltimore City, do hereby certify that the Honorable Robert F Stanton one of the Associate Judges of the Supreme Bench of Baltimore City, and by assignment, presiding Judge of said Circuit Court No. 2 of Baltimore City, who has certified and signed the above attestation, was at the time of so doing, Judge of the said Court, duly commissioned and qualified; and that to all acts done by him in that capacity, full faith and credit are due and ought to be given; and that his signature hereto is genuine.

In Testimony Whereof, I hereunto subscribe my hand and affix the seal of the Circuit Court No. 2 of Baltimore City, on this 26 day of January A. D. 1927

John Pleasants
Clerk of the Circuit Court No. 2
(SEAL) of Baltimore City.

OPINION OF VICE-ORDINARY.

Filed February 3, 1928.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Will of Edward McDowell, deceased. } Opinion.

On appeal from the Orphans' Court of Essex County, admitting the will to probate. Flannagan, *J.* Affirmed.

A delusion springs up spontaneously in the mind. A false belief resting upon extrinsic evidence is not proof of delusion.

For appellant, Lum, Tamblyn & Colyer.

For appellees, Robert M. Boyd, Jr., John M. Enright.

Backes, Vice Ordinary.

Edward McDowell, deceased, left a last will and testament in which he bequeathed to his widow $5,000, and the balance of his estate to the Art Students League of New York. His estate amounted to $25,000, plus the right to dispose of, by will, some $200,000, share of his father's estate. The widow filed a caveat, but withdrew it after a settlement with the League. A sister of the deceased, who would take the testator's share of his father's estate upon his failure to exercise the power of disposition, contested probate. The Orphans' Court found the testator to be a monomaniac, obsessed of a delusion that his wife was unfaithful, but admitted the will to probate, holding that only the

wife could resist probate because of the delusion, and that the sister had no standing to object. The sister appealed.

The general competency of the deceased to make a will is not open to question. He was well educated; had traveled extensively; was an artist, temperamental and taciturn; suffered from diabetes, and was cranky at times; was a gentleman of culture and ease who troubled himself little about business or finances, but that little with sensible care. Plainly he was normal to the standard of his station in life. At the age of thirty-two he married a girl of eighteen, who went wrong, and he divorced her. In 1913 he married the present widow, then eighteen; he was forty-seven. They lived happily; he treated her kindly. She was good to look upon and he was intensely jealous of her.

These incidents are relied upon to support the charge of delusion: (a) That during a gynocological examination of his wife the testator stood outside of the door of the operating room revolver in hand. (b) That he said to a friend (Mr. Cook) that he was a little worried about his wife. He appeared to be jealous of her; he thought that some one was paying her some attention. (c) That he had his wife shadowed by detectives; once recently before his death. (d) That he left his widow but $5,000, as a "gesture" to let her know that he had been suspicious of her and had kept track of her doings and conduct and conversations. (e) That he left a letter addressed to his widow to be delivered after his death which "was full of jealousy"; that in it he referred to a man in Switzerland. (f) That he had arranged to go abroad with his wife in the summer of 1923; but sailed alone and upon ar-

rival cabled to her to join him, and she followed. (g) That the will provided that it shall stand as against afterborn children. (h) That the will's provision for the wife is unjust.

The testimony, to establish the incidents, is meagre, fragmentary—sketchy; much of it is suggested and most of it is so saturated with subtle insinuations of zealous counsel that its evidential value is difficult to measure.

The proof that the testator stood with revolver in hand outside the operating room while his wife submitted to an examination rests upon his statement. He told her he did, and that she was well protected. Whether he was stating fact or indulging in fancy is conjectural. The circumstances under which he told her—the humor he was in—are not given. It may have been casual in conversation, for apparently it left but slight impression upon her, judging from the suggestive manner in which it was uncovered at the trial. And so with the proof of what the testator said to Mr. Cook which was told in the few words just recited. No details are given, and from what appears it may have been some isolated utterance which left the witness with the impression of jealousy. It is not clear from the lawyer's (Beale) testimony whether he knew from experience, that the testator had his wife trailed by detectives, or that he was told so by him. And so with his explanation of the testator's motive for the paltry $5,000 gift to the widow. He says, that in May, 1923, shortly before testator sailed for Europe alone, he had the witness draw a will, substantially like the one in dispute, and upon being told that under the laws of New York (then the testator's domicile) not more than one-half of a testator's es-

tate could be given to charity, the testator wanted to make a gesture by leaving his widow but $5,000, and in explanation of what the witness meant by "gesture" he stated, in answer to the Court's insistence upon knowing what the testator said, that "he (testator) did not care so much whether his wife inherited the estate but he wanted her to know that he had been suspicious of her and had kept track of her doings, conduct and conversation and one thing and another of that sort." It is apparent that the "gesture" was the witness' figure and that he gave his interpretation of the conversation rather than the testator's words. The scant examination of this most important witness leaves the picture half painted. There is little of the letter the testator left for the widow. She destroyed it. It was full of jealousy, she says, and it referred to a man in Switzerland, and she assented to the suggestion of counsel that it indicated that he had been disturbed by some attention paid to her by some man in that country.

Now none of this evidence imports with any degree of assurance a fixed belief by the testator that his wife was unfaithful. Taking his statement of the revolver incident at face value, his suspicion appears to have been against the physician, not the wife, not her chastity. It would seem that he was apprehensive of an assault upon her person, not of submission by her to the physicion's embrace, for it would appear, as he said, that he was prepared to protect her. And, like the cry to Mr. Cook, that he was worried about his wife and the attention some one was paying to her, his anguish, if it was that, was over the conduct of others towards her, not of misgivings of her. And so with the post mortem letter.

Counsel twists the widow's statement of its contents, that it was full of jealousy, and that the testator was distressed over the attentions paid to her by a man in Switzerland, into an accusation of infidelity, altogether overlooking the widow's resentment of his unwarranted insinuation, and her denial, that there was anything in it in any way reflecting upon her conduct. And, if it be the fact that the testator had detectives on his wife's trail, permissible deductions, in view of his kindly personal treatment of her are, that he was assuring himself of his faith in her, or that he was suspicious that her affections were inflected, or being deflected by others, or, in its worst aspect, that he feared, or even suspected, that she might have digressed from marital rectitude, and that he was checking up. And assuming that the lawyer gave the substance of the testator's stated reason for the $5,000 gift in the will of 1903, is it to be translated into more than the witness' interpretation, that the testator wanted his widow to know that he had been suspicious of her and had kept track of her doings, conduct and conversation and one thing or another of that sort.

The widow can give no reason for the testator sailing for Europe without her, but something, undoubtedly, piqued him; something trifling, for he quickly got over his huff, regretted his rashness, and sent for her. They traveled together and it was never adverted to. Would he have sent for her had he believed her to be an adulteress? Much is made of the letter which the sister says she received, to establish that testator left his wife because of the delusion that she was untrue. It is not produced. The sister says she destroyed it, because the incident was closed—

her brother had taken his wife back, although she kept many others, less gossipy. She read it into the record from memory "My dear Small Sister." When you receive this letter I will have sailed for Europe, and sailed alone. I have stored all my things and suffice it to say that the laws of the State of New York are written for the wives and not for the husbands. I hope that you will be discreet and when Maria (his wife) appeals to you that you will not divulge that I have told you that I am leaving her. Except for wishing to see you again before I die I do not care very much what happens to me." She also gives from memory a letter she says the wife showed her at that time, written by her husband, "That he was leaving her and she would know why;" and that he enclosed to the wife a check for $200, and gave his banker's address as Morgan and Harjes. That the witness gave an accurate recital of the contents of either letter instead of her court-day impression, may well be doubted, and as to this it need but be noted that she recalls that the one to her was addressed to "My dear Small Sister," as, she says, he always called her, when in the fourteen letters she kept, and offered in evidence, he addressed her as "Dear Beata"; and as to the accuracy of her recollection that the letter to her said that he was leaving his wife, it is singular that he should have given his wife the foreign address of his bankers, if he did. But the interesting question is where is there anything in these letters that the testator was abandoning his wife or that his leaving was due to a belief that the wife had betrayed him?

An incident to which allusion should be made, and which counsel has exaggerated into evidence

of delusion, is that the testator once asked his lawyer to have a Japanese note translated, presumably written by one of his butlers; the testator had at different times ten Japanese butlers. Without a modicum of proof or justification this request is distorted into suspicion or belief by the testator of clandestine correspondence between the butler and his wife. The imputation is in counsel's questions to the lawyer, whether the note showd "that he (testator) had any basis for jealousy of his wife"; and whether the testator "had a notion that they were little sort of love messages written by the butler to his wife," and it is pressed in the argument, although the lawyer distinctly testified that the note showed no basis for jealousy, and that the testator had no such notions, as counsel intimated in making the request for the translation.

All the evidence adduced, such as it is, is proof of a jealous suspicious mind but it is far short of proof of a fixed belief by the testator that his wife was unfaithful. He never charged her with sinning, to her or to any one else, and a complete refutation of the imputation, it would seem, is their constant communion and always sharing the connubial bed. The natural reactions to a fixed belief of adultery is separation; but he clung.

A well recognized characteristic of a fixed delusion is spontaneous outbursts by the victim whenever the subject of the delusion is touched upon or the opportunity is inviting. To give vent to the delusion is irresistible. The testator was not given to expressing his feelings, and he did not, except once to his friend Cook and another time to his lawyer.

The testator's unfortunate experience with his first wife furnishes the background for his jealous attitude towards the second. This one was to be kept from wordly temptation; he was to be her guardian, and he held her as with a leash; he craved her affection and rebelled against seeming digression or rivalry, and the appearance of either offended deeply, for, as the wife said, he was jealous of woman as well as man, and even of her family. The pride of possession naturally begot jealousy, and to that emotion and a fear of loss all the incidents can be reasonably attributed. His jealous nature was easily aroused by slight imprudence, or, by conduct of the wife that he might regard as indiscreet or unbecoming. "Trifles light as air are to the jealous confirmation strong as Holy Writ." That there were many innocent occurrences that excited this jealous mind may well be assumed. And who knows what the detectives told him to earn their pay? True, the wife says that she was always circumspect and her conduct seemly, and so it was, but that does not meet the question of how the testator in his jealous mood viewed her deportment, or that of others towards her. That she met gentlemen in Switzerland, she admits, and unquestionably with perfect propriety, but that her jealous husband, nevertheless, was grievously hurt is shown by his letter.

Now, if we should assume that the testator's conduct evinces more than mere suspicion, and that he believed in his wife's guilt, as the contestant contends, if the belief was in response to what he observed or what was told him concerning his wife, however that may have been misconceived or misconstrued, and it is not to be assumed that he did not so see and hear, in the

absence of proof that he did not, the false belief would not be proof of a delusion justifying the conclusion that his mind was diseased and that he was incompetent, "For," as was said by Chancellor Green in *Stackhouse* v. *Horton,* 15 N. J. Eq. 202-228 "if there was actual ground for suspicion of an injury, though in fact not well founded, and disbelieved by others, the misapprehension of the fact will not be considered mental delusion, and a will made by a party affected by such suspicion may be valid." And in *Middleditch* v. *Williams,* 45 N. J. Eq. 726, 734, it said that "It is only a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of extrinsic evidence of any kind, that can be regarded as furnishing evidence that his mind is diseased or unsound; in other words, that he is subject to an insane delusion. If, without evidence of any kind, he imagines or conceives something to exist which does not in fact exist, and which no rational person would, in the absence of evidence, believe to exist, then it is manifest that the only way in which his irrational belief can be accounted for, is that it is the product of mental disorder. Delusions of this kind can be accounted for upon no reasonable theory except that they are the creations of some derangement of the mind in which they originate." To justify the rejection of a will because of delusion the evidence must establish that the false belief is the figment of a deranged mind and not the result of impression produced by extraneous circumstances, and the burden is on the caveator to prove the non-existence of extrinsic evidence upon which the belief rested. For illustration: In *re Henry Will,* 167 Iowa, 557, the testator believed that his wife

had been unfaithful and that he was not the father of their youngest child. The Court held that it was not enough for the contestant to show an erroneous belief on the part of the testator, in order to establish an insane delusion, but that an erroneous belief was a circumstance which may properly be considered as tending to the proof of testator's delusion, but of itself was not sufficient for that purpose. The record did not show whether the evidence which the testator claimed to have of the infidelity of his wife was credible or plausible; all that he ever said on the subject was said to two or three close friends and to the wife herself, and the Court observed that whether the evidence, therefore, which satisfied his mind was such that no rational person would be likely to believe it, or was such that no person could believe and yet be rational, is quite beyond the possibility of proof. In the absence of such proof some other evidence than mere erroneous belief is essential to the contestant's case." In *Potter* v. *Jones,* 20 Oregon 239, S. C. 12, L. R. A. 161, the testator was a man of sensitive disposition and of a nervous and jealous temperament; early after his marriage he became suspicious of his wife's chastity and entertained the belief that she was intimate with a man who met her near a certain spring for adulterous purposes, and that two of his children (one of them the contestant) were the offspring of such adultery. The Court said: "Our conviction from the evidence is that his (testator) wife was a chaste woman and faithful to her marriage vows, and that the two children named were not the spurious product of her adulterous embrace with another man; but the fact remains, according to the testimony of those to whom he confided his domestic

troubles, that he always furnished some grounds for his belief. He identified the party and place, and described the clandestine manner in which their improper meeting was effected. That such things could occur or have occurred under less probable circumstances will not be denied. They are only rendered improbable in the present instance by the absolute confidence expressed in her marital fidelity by her acquaintances. While, therefore, we shall regard this suspicion or belief of her infidelity to her marriage bed with its attendant circumstances as unjust and unworthy of belief, we cannot disregard the fact that there was the opportunity for the parties to have met at the spring, and it might have occurred in reality for perfectly proper and innocent purposes, or without evil design or any concert of action; yet, to a man of testator's sensitive and jealous disposition, a trifling circumstance of this kind or a slightly imprudent act would incite his distrust and fill him with jealous suspicions." In *Clapp* v. *Fullerton,* 34 N. Y. 190, it was held that "It is not sufficient to justify the rejection of a will that a testator, in other respects competent, entertained the mistaken idea that one of his daughters was illegitmate, if it was not the effect of insane delusion, but of slight and inadequate evidence acting upon a jealous and suspicious mind."

In the instant case the caveatrix has not excluded the probabilities or possibilities of extraneous facts that may have induced the testator's belief, if he believed, that his wife was untrue.

It is pointed out and argued as evidence of delusion that the will provides that it shall be unaffected by after-born children. The testator

was a diabetic and probably sterile, if not impotent. This provision, perhaps, reflect the testator's experience with his first wife, who had a child seven or eight months after they separated, the parentage of which is denied, and to a possible recurrence he closed the door. If this be a correct surmise, it was an unjust reflection, not one born of delusion, but of a fact.

That the will is cruelly unjust to the widow is admitted on all sides, and the testator's explanation to his lawyer, as the latter relates it, that the gift of the estate to the Art League was because of his tender regard for his father's sentiment as an amateur artist is attenuated. The disowning of the wife is irreconcilable with the testator's generosity towards her in his lifetime and is inexplicable, particularly in view of his statement to her, recently, before his death, that all his property would be hers some day, except upon the theory that he had a latent mean and vicious streak in his makeup. But whatever his motives were in leaving his widow practically destitute after a life of ease and plenty cannot be of concern to the probate court once it is established that the testator was competent to make a will. "A will may be contrary to the principles of justice and humanity, its provisions may be shockingly unnatural and extremely unjust, nevertheless, if it appears to have been made by a person of sufficient age to be competent to make a will and also to be the free and unconstrained product of a sound mind, the courts are bound to uphold it." *Middleditch* v. *Williams, supra.* Unfairness is a proper consideration in determining competency, but the futility of an effort to attribute unfairness or prejudice to derangement of the mind is pointed out by

Opinion of Vice-Chancellor.

Chancellor Green in *Stackhouse* v. *Horton, supra,* (p. 228) in quoting Lord Kenyon's charge to the jury in the Greenwood case "a multitude of instances there have been where men have taken up prejudices against their nearest and dearest relations; it is the history of every week in the year, and the history of almost every family, at one time or other, that harsh dispositions have been made—that unreasonable prejudices have taken place—that one child, standing equally near in blood has been preferred to another; and if we once get into digressions of that kind, then we get upon a sea without a rudder. Where will you stop? What partiality will you give way to, and say the will is good? These are questions which the most correct and acute mind that ever addressed himself to the consideration of questions will not be able to settle."

The conclusion reached is that it is not established that the testator entertained an insane delusion of his wife's infidelity, and that the will is the result of such delusion.

The decree admitting the will to probate is affirmed.

DECREE CONFIRMING ORDER OF ORPHANS' COURT.

Filed March 2, 1928.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Estate of Edward McDowell, deceased.	On Petition of Appeal from Probate of Will by Surrogate. Decree Confirming Order of Orphans' Court.

Beata McDowell Clayville-Smith, sister of Edward McDowell, late of the County of Essex, deceased, having duly presented her petition of appeal from a decree of the Essex County Orphans' Court made on the 25th day of May, 1927, ratifying and confirming a decree of the Surrogate of the County of Essex admitting to probate a certain paper writing purporting to be the last Will and Testament of the said Edward McDowell, deceased, and granting letters testamentary thereon to Montclair Trust Company, a corporation of the State of New Jersey, executor named therein, and Montclair Trust Company, the executor named in said will, having filed its answer to said petition of appeal and this cause having come on for hearing in the presence of Lum, Tamblyn & Colyer, proctors for said appellant, and of Robert M. Boyd, Jr., proctor for said Montclair Trust Company, executor, and John M. Enright, proctor for the Art Stud-

ents' League, residuary beneficiary under said will respectively and the Court having read the state of the case on such appeal and having heard argument and having duly considered the matter and being satisfied that the said paper writing was duly executed by the said Edward McDowell as his last Will and Testament in manner and form prescribed by the statute in such case made and provided, and that the said Edward McDowell at the time of making said will was of sound and disposing mind, memory and understanding and that said will was not the product of undue influence,

It is thereupon on this 14th day of February, 1928, ORDERED, ADJUDGED AND DECREED that the aforesaid decree of the Essex County Orphans' Court ratifying and confirming said decree of the Surrogate of the County of Essex admitting to probate said paper writing as and for the last Will and Testament of Edward McDowell, deceased, and directing that letters testamentary thereon issued to Montclair Trust Company, the executor therein named, be and the same is hereby in all things ratified and confirmed and that the said paper writing is the last Will and Testament of the said Edward McDowell, deceased.

And it is further ordered that the right to apply for counsel fees is hereby reserved.

E. R. WALKER,
Ordinary.

Respectfully advised,

JOHN H. BACKES,
V.-O.

NOTICE OF APPEAL.

Filed March 15, 1928.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Estate of Edward McDowell, deceased.	Notice of Appeal.

Beata McDowell Clayville-Smith, sister of Edward McDowell, late of the County of Essex, deceased, the appellant herein, hereby appeals from so much of the decree made by the Ordinary on the advice of Vice-Ordinary Backes in the above-entitled cause on the fourteenth day of February, 1928, as adjudges that the decree of the Essex County Orphans' Court ratifying and confirming the decree of the Surrogate of the County of Essex admitting to probate a paper writing as and for the last Will and Testament of Edward McDowell, deceased, and directing that letters testamentary thereon issue to Montclair Trust Company, the executor therein named, be ratified and confirmed and that said paper writing is the Last Will and Testament of said Edward McDowell, deceased, to the Court of Errors and Appeals in the last resort in all causes.

Dated the seventh day of March, 1928.

LUM, TAMBLYN & COLYER,
Proctors for and of Counsel with Appellant, Beata McDowell Clayville-Smith.

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

EGBERT J. TAMBLYN,
Of Counsel with Appellant.

PETITION OF APPEAL.

Filed March 21, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter of the Estate of Edward McDowell, deceased. Beata McDowell Clayville-Smith, Appellant, vs. Montclair Trust Co. et al., Respondents.	On Appeal from the Prerogative Court. Petition of Appeal.

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

The petition of Beata McDowell Clayville-Smith, the appellant in the above stated cause, respectfully shows that your petitioner finds herself aggrieved by a final decree made by the Ordinary on the advice of Vice-Ordinary Backes in the above-entitled cause, bearing date the fourteenth day of February, 1928, affirming the decree of the Orphans' Court of the County of Essex admitting to probate a certain paper writing as the Last Will and Testament of Edward McDowell, deceased, and directing that letters testamentary therein issue to Montclair Trust Company, the executor named therein.

And your petitioner humbly appeals from that part of the decree of the Ordinary which decrees as aforesaid, upon the ground that the same is erroneous in that the Court held that the said

Notice of Appeal.

Edward McDowell was at the time of the making of said will of sound and disposing mind, memory and understanding and that said will was not the product of undue influence.

And your petitioner therefore prays that the said decree of the said Ordinary affirming the decree of the Orphans' Court of the County of Essex admitting to probate said paper writing as the last will and testament of Edward McDowell, deceased, and directing that letters testamentary therein issue to Montclair Trust Company, the executor therein named, be in the particulars aforesaid reversed, set aside and for nothing holden and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

LUM, TAMBLYN & COLYER,
Solrs. for and of Counsel with Appellant.

RALPH E. LUM,
Of Counsel with Appellant.

Endorsed

Filed March 21, 1928.

JOSEPH F. S. FITZPATRCK,
Clerk.

Petition of Appeal.

STATE OF NEW JERSEY.

Department of State.

I Joseph F. Fitzpatrick, Secretary of State of the State of New Jersey and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, DO HEREBY CERTIFY that the foregoing is a true copy of Petition of Appeal as the same is taken from and compared with the original Petition of Appeal now remaining on file in my office

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal of said Court at Trenton, this twenty-second day of March A. D. 1928

JOSEPH F. S. FITZPATRICK,
(SEAL) Secretary of State.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter of the Estate of Edward McDowell, deceased. Beata McDowell Clayville-Smith, Appellant, vs. Montclair Trust Co., et al., Respondents.	On Appeal from the Prerogative Court. Answer to Petition of Appeal.

The answer of the respondent Art Students' League of New York to the petition of appeal of the above named appellant:

This respondent not acknowledging all or any of the matters which in said petition of appeal are contained to be true, for answer thereto nevertheless says and admits that a decree was on the 14th day of February, 1928, made and entered by the Ordinary in the Prerogative Court for the purpose mentioned in said petition, as is therein stated; but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said decree is just and in accordance with law and prays that the same may be affirmed with costs to be adjudged to this respondent.

McDERMOTT, ENRIGHT & CARPENTER,
Proctors for and of Counsel
with Respondent Art Students'
League of New York.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter of the Estate of Edward McDowell, deceased, Beata McDowell Clayville-Smith, Appellant, vs. Montclair Trust Company, et al., Respondents.	On Appeal from the Prerogative Court. Answer to Petition of Appeal.

The answer of Montclair Trust Company as executor of Edward McDowell, respondent, to the petition of appeal of Beata McDowell Clayville-Smith, appellant:

This respondent is advised, believes and submits that the final decree made by the Ordinary on the advice of Vice-Ordinary Backes in the above entitled cause, bearing date the 14th day of February, 1928, affirming the Decree of the Orphans' Court of the County of Essex admitting to probate a certain paper writing as the Last Will and Testament of Edward McDowell, deceased, and directing that letters testamentary thereon issue to this respondent, Montclair Trust Company, the executor therein named, is just and in accordance with law, and denies that said final decree of the Ordinary, or any part thereof is erroneous, improper or illegal, and denies that the said Edward McDowell was at the time of the making of said will not of sound and disposing mind, memory and understanding and denies

that said will was the product of undue influence.

It therefore prays that the said final decree of the Ordinary admitting said will to probate and directing that letters testamentary issue to Montclair Trust Company, this respondent, the executor therein named, and adjudging that the said paper writing is the Last Will and Testament of the said Edward McDowell, deceased, may be in all things affirmed with costs to be adjudged to this respondent.

Dated Montclair, N. J., March 27, 1928.

ROBERT M. BOYD, JR.,
Proctor for and of Counsel with Respondent.

New Jersey Court of Errors and Appeals

In the Matter *of* The Estate of Edward McDowell, deceased. Beata McDowell Clayville-Smith, Appellant, *vs.* Montclair Trust Company, *et al.*, Respondents.	ON APPEAL FROM THE PREROGATIVE COURT.

BRIEF FOR RESPONDENT ART STUDENTS' LEAGUE OF NEW YORK.

This is an appeal from a decree of the Prerogative Court advised by Vice-Ordinary Backes, affirming a decree of the Orphans' Court admitting to probate the Will of Edward McDowell.

Testator left him surviving a widow as his sole next of kin.

He also left him surviving a sister, the present appellant, Beata McDowell Clayville-Smith.

The widow does not contest the Will, the sole contestant being the sister.

The Orphans' Court found that the deceased was of sound and disposing mind and memory "as to all persons and on all subjects except one, to-wit: that he was partially deranged adversely to his wife, having a fixed delusion on the subject of her loyalty and fidelity to him and that his said delusion on that subject rendered him in-

capable of right reason as to his said wife only, and that his said monomania had no adverse effect upon and did not effect in any way his testamentary attitude toward the appellant herein, but that he was capable of right reason as to appellant and was of sound and disposing mind and memory as to her and that the said appellant is not entitled to have probate of said alleged will set aside or refused by reason of the delusion with respect to his said wife alone'' (p. 259).

On appeal by the caveator to the Prerogative Court, the latter Court considered the evidence taken in the Orphans' Court, and, in addition thereto, the record of testator's divorce from his first wife, and arrived at the conclusion that there was no sufficient evidence of the supposed insane delusion of the testator, and, therefore, sustained the probate of the Will, without considering or discussing the legal question whether an insane delusion respecting the wife was available to the sister in the absence of a contest by the wife.

The burden of the appellant's brief in this Court is a criticism of the opinion of the Vice-Ordinary in his analysis of the evidence, and a contention that the finding of the Orphans' Court is more reliable inasmuch as the latter Court had the benefit of seeing and hearing the witnesses.

It will be observed that the trial took place before the Orphans' Court on February 1, 1927, and the opinion therein was not filed until May 16, 1927, during which time whatever benefit is supposed to attach to the living impression of the witnesses would have largely disappeared.

The summation of facts upon which the Orphans' Court based its conclusion of delusion, in certain important particulars is without support in the evidence, the Court having plainly been led into error by statements appearing in the brief of counsel.

We note from appellant's brief moreover that he does not contend that there is any conflict of evidence, but he contends ''we are concerned mainly with the inferences to be drawn from facts clearly and definitely proved'' (p. 2 brief).

We agree that there is little conflict of evidence, and, in the absence of such conflict, the importance of seeing and hearing the witnesses largely disappears.

We submit, however, that few of the facts supposed to be of importance are ''clearly and definitely proved.''

On the contrary, the following observation of the Vice-Ordinary is abundantly justified upon a reading of the whole case:

> ''The testimony to establish the incidents, is meagre, fragmentary—sketchy; much of it is suggested and most of it is so saturated with subtle insinuations of zealous counsel that its evidential value is difficult to measure'' (p. 320, line 10).

In any event, since it is not contended that there is a conflict of testimony but the issue is one of deduction to be drawn from facts supposed to be proved, we submit that the Prerogative Court had a certain advantage in arriving at the correct result, since it must, of necessity, depend wholly upon the evidence, without being influenced by what counsel states was the ''atmosphere'' of the trial.

The Status of the Parties and Certain Facts in the Case.

Testator's estate at the time of death consisted wholly of personal property of the value of between twenty and twenty-five thousand dollars (p. 118).

This has since been depleted by counsel fees allowed in the Orphan's Court amounting to $5,500 (p. 260), so that the net estate to be distributed in case of intestacy will be considerably less than $20,000.

In addition thereto, testator had the power of appointment under the Will of his father, Edward G. McDowell, of a trust fund said to amount to about $200,000.

The father's Will provided that in the event of the son's death without valid execution of this power of appointment, the corpus of the trust fund should go to the donor's daughter who is the present appellant, Beata McDowell Clayville-Smith (pp. 237, 238).

The Will of the elder McDowell creates a similar and equal trust fund in favor of his daughter, Mrs. Smith.

By no possibility can this appellant receive any part of the estate of her brother, Edward McDowell.

Her sole interest in the latter's Will is to nullify the same as an exercise of the power of appointment given by her father's Will, in which event she will automatically take the trust fund created for her brother, not as next of kin of her deceased brother, nor in any way derivative from him, but as a direct legatee under her father's Will.

By no possibility can the widow of Edward McDowell, the younger, receive any part of this trust fund even though probate of her husband's Will is denied.

The disputed Will leaves a legacy of $5,000. to the widow and the residuary estate to the Art Students' League of New York.

It appears, however, that the Art Students' League, which is the residuary legatee under the disputed Will, has agreed to make a certain provision for the widow as long as she lives (p. 105 line 5).

The amount of this life interest does not appear, but it does appear that the widow had the benefit of counsel in making the arrangement, and is now presumably satisfied.

As the case now stands, if probate is sustained, the widow will receive her legacy of $5,000. under the Will, plus an income for life under arrangement with the residuary legatee which is satisfactory to her.

If the Will is set aside, she will receive no benefit whatever from the trust fund under the Will of the elder McDowell, and will receive, at most, the entire personal estate of her husband, which, with depletion of counsel fees, is now less than $20,000., and is subject to the expenses of administration and litigation subsequent to the trial in the Orphans' Court.

It is, therefore, apparent that the interests of the widow for whom the appellant expresses such solicitude, will not be served by a denial of probate to the Will.

As between the sister who already enjoyed a fortune under her father's Will, and the Art Students' League for which testator had reason for attachment, Judge Flannagan, in his opinion in the Orphans' Court, says that it was not altogether unnatural that the deceased "should have preferred to create from his father's estate a trust in memory of his father for the education of art students, rather than to further enrich a sister who was married, well provided for in her own right, and whom he had not seen, or made the slight effort necessary to see, for a period of nine years before his death" (pp. 250, 251).

The harshness of the Will toward the widow loses its point in consideration of the fact that she has been satisfied by agreement with the residuary legatee, and the obvious calamity which would follow the setting aside of the Will and the limita-

tion of her interest to the small estate of her husband.

Circumstances of Testator's Life Bearing Upon the Making of the Will and the Alleged Delusion.

Testator's father, Edward G. McDowell, was a successful business man in Baltimore, Maryland, who left a substantial estate of which an important part evidently consisted of his interest in McDowell & Company, Inc.

The father was an amateur artist as well as a business man (p. 80) and gave his son the artistic education which he himself had been denied, part of that education being under the Art Students' League (p. 122).

The son evidently considered that it was a misfortune that his father never had the opportunity to develop his artistic talent, and considered that the fund which he controlled under his father's Will was a trust for artistic purposes (p. 133).

The son was born in 1866 as appears from his testimony in the Baltimore divorce case (R-1). From the same record it appears that he was first married June 30, 1899, at the age of thirty-two years, to a young woman of eighteen years.

He left this wife May 3, 1903, because of her clandestine meetings and correspondence with young men and her declaration that she no longer loved him (pp. 301, 302).

Shortly afterwards she wrote him that she expected a child by him, and he, accordingly, asked her to rejoin him in Baltimore (p. 308).

Shortly thereafter he intercepted certain letters which were convincing evidence of her deception and he sent her away (p. 306).

Thereafter a child was born to her at a time which convinced him that he could not have been

the father, and he employed detectives who discovered evidence upon which he secured a divorce on the ground of adultery (p. 308).

The divorce decree was entered August 30, 1905 (p. 315).

He married his second wife, who survived him, December 4, 1913.

He was forty-seven and his wife was twenty-two years old at the time of the marriage.

The printed record is silent as to the wife's age but by agreement in Court before the Vice-Ordinary the fact was admitted, subject to verification.

There is practically no evidence from which one would be justified in forming a conclusion respecting the circumstances of their sex life. They had no children and traveled a great deal, and, if they had any intimate friends or acquaintances, the same are not produced or referred to. The few witnesses who ever saw husband and wife together testified that their attitude was cordial and they appeared to be on the best of terms.

This, however, has no great significance, since they were both gentle, wellbred people, who would normally keep their troubles, if they had any, to themselves, certainly upon such casual contacts as are the subject of testimony.

The testator is pictured by a life-long acquaintance, Mr. Eiser, as never a strong or healthy man (p. 85); as a rather slight and rather delicate looking man all his life (p. 86, line 15); as a small man about 5 feet or 5 feet 1 inch tall (p. 86), weighing in 1923 about 110 or 115 pounds (p. 85, line 20).

In the later years of his life he was afflicted with diabetes, but his wife says that this did not bother him much (p. 101), and was not the cause of death which resulted from pneumonia (p. 198).

Testator's age, his physical weakness, his experience with his first wife, his artistic temperament, his idleness or lack of stimulating contact

with people and affairs, and his inevitable contrast with his wife's youth, all must have contributed to make him extraordinarily sensitive to his wife's reactions in their intimate family life, and who can say that the ungenerous provisions of his Will, as it affected her, were not the result of what he considered her own lack of generosity or responsiveness to him.

He was undoubtedly of a suspicious nature and was undoubtedly predisposed to suspicion of his second wife because of his experience with his first wife.

His widow denies that she gave him any cause for suspicion, but people often innocently give ground for suspicion of which they are unaware and, whether such ground is innocent or otherwise, they invariably deny it.

The most powerful influence in creating or destroying a husband's trust in his wife is her sex reaction to him, and this certainly is an external fact which would normally influence testator's belief. Concerning this fact there is absolutely no evidence in this case.

Undoubtedly something definite happened between these people in May of 1923, which made Mr. McDowell very unhappy and resulted in a temporary separation.

They had planned to go to Europe together, but before the time fixed for going, Mrs. McDowell left her husband and went to her own people in Baltimore.

There is no evidence in the case as to the circumstances which preceded her going.

It is established that at this time Mr. McDowell consulted a lawyer and had a Will drawn containing substantially the same provisions as the disputed Will.

It does not appear that this Will was ever executed, but the lawyer's draft shows that it was

prepared for execution some time in the month of May, 1923 (Ex. R-4, p. 246).

On June 7, 1923, testator wrote to his sister:

> "I am 'moving out' tomorrow and off to Europe in a few days—I would have 'warned' you before—but have had a mountain on hand" (Ex. A-10, p. 220).

Testator's sister says that the wife (who was then staying with her relatives in Baltimore) came to her and exhibited a letter which she had received from testator, in which he said that he was leaving her, and she would know why, and he enclosed a check for $200. in that letter and gave his banker's address at Morgan-Harjes (p. 67, line 10).

The sister says she also received a letter from testator (which she claims made such an indelible impression that she remembers it verbatim), in which he said:

> "When you receive this letter I will have sailed for Europe and sailed alone. I have stored all my things and suffice it to say that the laws of the State of New York are written for the wives and not for the husbands. I hope that you will be discreet and when Marie appeals to you, that you will not divulge that I have told you I am leaving her. Except for wishing to see you again before I die, I don't care very much what happens to me" (p. 66).

Neither of the last two letters is produced, and obviously too much dependence cannot be placed upon the witness's interested recollection.

Since a great deal is made of the latter letter by the appellant, it is fair to say that the witness is certainly mistaken in the month, since it is certain from the context that it must have followed the proven letter of June 7, 1923 (Ex. R-4). It is further significant that her counsel assumed to ex-

amine Mrs. McDowell from the text of the supposed letter and the text which he used for the purpose of examination of Mrs. McDowell quite materially differs from the version which Mrs. Smith assumes to give as her certain recollection. (The variations will be perceived by comparing pages 66 and 110.)

Furthermore, the form of address and subscription to which she testifies is different from that usually adopted by the testator in writing to his sister, as shown by such actual letters as were produced, involving a more affectionate form of address than that ordinarily used.

Indeed, it seems rather unlikely that the testator, after writing the letter of June 7, 1923 (Ex. R-4), announcing to his sister that he is "off to Europe in a few days," would have immediately written her the other letter announcing the same fact, viz., his intended departure.

The statement in the letter R-4, that he had "a mountain on hand," evidently refers to some event in the family life of these people the nature of which has not been disclosed.

Following this break, testator sailed for Europe alone, but, upon his arrival, is said to have cabled his wife to join him and she did so in about a month.

Neither the cablegram nor any other communication during this interval is in evidence. If produced, presumably the communications leading up to the reunion would throw some light upon the circumstances of the parting.

The most reliable evidence of the man's nature and mentality, we think, is to be found in the letters which he wrote to his sister, Exhibits A-1, p. 210; A-5, p. 212; A-6, p. 213; A-7, p. 215; A-8, p. 216; A-9, p. 218; A-10, p. 220; A-11, p. 220; A-12, p. 222; A-13, p. 226; A-14, p. 228; A-15, p. 229; A-16, p. 230; A-17, p. 231; A-18, p. 233.

They exhibit him as intelligent, observing, sensitive, and much inclined to the artistic and poetic side. They plainly indicate that he was not a particularly robust or virile character, and indeed they indicate a certain pettiness and narrowness in his makeup, and his rather melancholy musings concerning his advancing age unmistakably indicate a discontent with that condition.

It is said that he was of a jealous nature and these recurring comments upon his own age suggest that underlying it was a jealousy of youth, particularly his wife's youth.

However, where practical affairs were concerned he showed common sense, judgment and restraint.

The general balance of his mind is well indicated in the letter A-8, p. 216, in which he advised his sister with respect to their common interest in the management of the firm of McDowell & Company. His sister was apparently greatly dissatisfied with the management of the concern, and, in substance, his advice was to investigate, but in a way so as not to create suspicion which would defeat investigation; then seek the best legal advice available, and then to act but only when they could do so on "undoubtedly solid ground".

We submit that no one can read this letter without conviction that the man was possessed of a sound and logical mind.

The Vice-Ordinary says:

> "The general competency of the deceased to make a will is not open to discussion. * * * Plainly he was normal to the standard of his station in life" (p. 319).

The alleged facts relied on to show delusion are summarized by the Orphans' Court Judge as follows (p. 248):

(1) "Secretly" going to Europe and writing his sister not to disclose his whereabouts and immediately on arrival cabling to his wife to join him;

(2) Alleged standing outside of the door to a physician's office with a drawn revolver during a physical examination of his wife;

(3) Employing a lawyer and causing his wife to be frequently shadowed by detectives;

(4) Causing slips of paper written by a Japanese servant in that language to be translated, "suspecting that they concerned his wife";

(5) Discussing his wife's fidelity with officers of the Bank where he did business;

(6) Leaving a letter to be delivered to his wife after death, referring to a man in Switzerland and indicating his jealousy of her in respect to attentions from him or others.

The catalog of alleged incidents relied on in the Prerogative Court was substantially the same (p. 319).

The evidence with respect to these incidents is not correctly summarized either in the opinion of the Orphans' Court or in appellant's brief.

The European trip was not secret. Husband and wife had planned to take the trip together. Some time prior to the proposed departure, however, she went to her relatives in Baltimore without her husband, for reasons and under conditions which are not disclosed in the evidence. While there she received a letter from her husband announcing his intended departure. The letter is not produced but the appellant, Mrs. Smith, says it was exhibited to her by the wife, and that the letter stated "that he was leaving her and she would know why, and he gave her a check in that

letter of $200 and gave his banker's address at Morgan-Harjes" (p. 67, line 10).

The sister says that she received a letter from her brother dated June 7, 1923, among other things saying

> "I am 'moving out' tomorrow and off to Europe in a few days—I would have 'warned' you before—but have had a mountain on hand——.
>
> I will write you more at length without fail before I go—and give you my mailing address" (Ex. A-10, p. 220).

The sister testifies that she received another letter which she destroyed, written immediately before sailing, in which he said

> "I hope you will be discreet and when Marie appeals to you that you will not divulge that I have told you I am leaving her" (p. 66).

This evidence cannot support the conclusion of the Orphans' Court that testator secretly went to Europe, and certainly shows that he did not write his sister not to disclose his whereabouts. He distinctly gave to his wife information as to his whereabouts and the only sort of forwarding address which travelers customarily give. The only secrecy involved was the request to the sister, according to her version of the destroyed letter, that she should not disclose to the wife that he had informed the sister respecting their domestic difficulty.

Although he cabled his wife to join him immediately upon his arrival in Cherbourg she apparently took her own time in so doing.

> "He cabled me on his arrival at Cherbourg and about a month after I went over. He cabled and asked me to come over" (p. 103, line 10).

Neither the underlying reason for the wife's trip to Baltimore alone, nor for the husband's sailing alone, is disclosed by the evidence.

Concerning the sailing, appellant's counsel asked the widow

> "Do you know any reason whatever for that sudden move of his in sending your things to storage and going on without you? A. No, I don't know of any *particular* reason." (p. 103.)

The witness's careful distinction of a "particular" reason was not further developed. There was a reason of some sort, of course, and this reason was evidently known to the sister, as would appear from testator's letter from Paris of July 23, 1923, Exhibit A-1, p. 210. In this he says:

> "But *as you know* many things have happened since I last wrote you.
>
> Marie arrived safely and we have been here in Paris a little over a week. Perhaps it is best as it is—I am not as young as I might be—and—well the less said the soonest mended—at least for the present."

Again on August 21, 1923, he wrote his sister, apologizing for having overlooked a payment to her and stating:

> "When you wrote me, I know you will realize that I had a good many things to think about and some of them were anything but pleasant." (Ex. A-11, p. 220.)

Here again is a veiled reference to his domestic trouble, in a way which his sister would understand without direct statement. The significance of the episode depends largely upon the causes leading up to it and of these causes there is no proof.

Another incident to which great importance is attached is the episode of the Japanese note. The

Orphans' Court opinion says that he caused the note to be translated, suspecting that it concerned his wife (p. 249). Appellant in his brief, page 6, says that testator took the Japanese writings to his lawyer "suspecting that they had something to do with his wife."

There is nothing, however, in the evidence which shows how the Japanese writings came into Mr. McDowell's possession or what thought Mr. McDowell had with respect to them, nor his motive in having the papers translated. There is no word of evidence to justify the statement that testator thought the Japanese writing in any way related to his wife. The following is the wife's testimony:

> "Q. Do you remember at one time there was a Japanese servant in your house? A. Yes, sir.
>
> Q. There was something, I believe, about some little slips of paper written in Japanese that disturbed Mr. McDowell. Do you recall that upsetting him? A. Yes, sir.
>
> Q. And did you ever see those slips of paper? A. No.
>
> Q. Mr. Beale spoke to you about them? A. I never saw them.
>
> Q. No, but Mr. Beale spoke to you about them? A. Yes, he spoke to me.
>
> Q. Mr. McDowell had discussed them with Mr. Beale? A. Yes, sir" (p. 103).

When Mr. Beale was called as a witness by the appellant he was held down to specific answers with respect to the Japanese note, although he several times offered to give a full explanation. On page 128 his testimony is

> "Q. You did see the pieces of paper on which Japanese writing was contained, in Mr. McDowell's lifetime? A. Yes, sir.
>
> Q. And from whom did you receive them? A. Mr. Edward McDowell.

Q. And he had a notion that they were sort of little love messages written by the Japanese butler to his wife, didn't he? N. No, sir.

Q. Didn't he say that to you? A. No. I will tell you about it gladly.

Q. You will answer my questions, and I think you will tell me about it before you get through, if you have to stay here all day. He delivered these pieces of paper to you, didn't he? A. Well, I will be glad to tell you about it. There was one piece——

> The Court: Can you answer that question yes or no?
> The Witness: I cannot. * * *

Q. Did Mr. Edward McDowell deliver a piece or pieces of paper to you? A. Yes, sir. * * *

Q. And did you have the Japanese figures on it translated? A. I had it translated.

Q. And did you tell Mr. McDowell what the translation was? A. I did.

Q. Did it show that he had any basis for jealousy of his wife? A. No, sir."

> Q. Did it show that he had any basis for jealousy of his wife? A. No, sir."

This is the entire testimony concerning the Japanese note. There is not a word of evidence to show that the Japanese note has any relation whatever to any issue in this case or that the testator had any belief that it had.

The evidence respecting the episode at the physician's office is clearly disposed of by the comment of the Vice-Ordinary.

Although the Orphans' Court listed the employment of a lawyer in connection with the shadowing by detectives as one of the facts evidencing delusion, there is no evidence that the two employments had any relation to each other.

Mr. Beale was employed in May of 1923 to draw a will.

In testator's letter of April 4, 1922 (Ex. A-8), he speaks of having a lawyer as follows:

> "My attorney here is a member of one of the oldest and most distinguished New York firms and a personal friend" (pg. 218).

This letter, however, has to do wholly with correspondence then going on between himself and his sister respecting their interest in their father's estate, and particularly the affairs of McDowell & Company.

This witness Beale knew about Mr. McDowell's going abroad without his wife (pg. 130, line 20) and the correspondence of time between the employment for the draft of the first Will and the trip abroad, would indicate that the two events had some relation to each other.

Mr. Beale's testimony would indicate that he had nothing to do with the employment of the detectives, and that his knowledge with respect to such employment was rather casual.

Mr. Beale also advised with testator respecting the administration of his interest in his father's estate (pp. 132, 134-line 25, 135).

(It does not appear what was contained in the reports which the detectives made to the testator.)

The evidence respecting testator's conversation with his banker friend Mr. Cook, does not have the significance attached to it.

Mr. Cook was not merely an employee of a bank with whom the testator had the casual contact of a bank customer. He was more of a personal friend and Mr. McDowell continued his contacts with him even when he was not doing business with his bank. Mr. Cook says: "We were rather good friends and always had been" (p. 90). In fact, it was upon Mr. Cook's advice that Mr. McDowell established his legal residence in New Jersey and he personally introduced him at the Montclair Trust Company (p. 91).

Mr. Cook was also acquainted with Mrs. McDowell.

The testimony respecting Mr. McDowell's statements about his wife is as follows:

> "Q. You had no knowledge that he had suspicions of his wife's fidelity, did you? A. Why, he was of a jealous disposition, and he mentioned to me at one time that he was a little bit worried about his wife.
>
> Q. Just tell us about that, when was that conversation? A. I should say it was two or three years ago * * *.
>
> Q. Well, now, you remember that he had a conversation, give us your best recollection as to what he said. A. As I recall it, they were going abroad and he said that he was a little worried about his wife. He appeared to be jealous of her; he thought someone was paying her some attention" (page 93).

It would seem that this conversation had reference to the time when Mr. McDowell went to Europe alone.

Mr. McDowell also advised with Mr. Cook concerning his interest in his father's estate, and, at Mr. McDowell's instance, Mr. Cook wrote a letter to the trustee, with whom he was personally acquainted (pp. 94, 97-line 20).

Evidently the relation between the two men was friendly and confidential so that it was but natural that Mr. McDowell should speak to Mr. Cook about his worries concerning his wife.

There is nothing in this testimony to show that Mr. McDowell had any settled belief in the matter but simply that he was worried concerning attentions which he believed she was receiving. The ground for this belief does not appear.

The evidence respecting the letter delivered to the widow after death shows nothing more than jealousy. The letter was distasteful to the widow and she destroyed it.

The widow says that the letter did not show that her husband suspected her conduct (p. 106,

line 1). The letter referred to a man in Switzerland (p. 104, line 15).

> "Q. Did you know any man in Switzerland whatever to whom you paid the slightest attention? A. Not more to any one than to any other. In fact, I knew very few men there at all" (pg. 107, line 30).

All the witnesses agree as to testator's general competence: Mr. Pendleton, the trust officer who attended to the execution of the Will (p. 19); Mr. Gillan, the manager of the hotel where the McDowells lived for a time at Summit, N. J., called for appellant (p. 47, line 35); Dr. Barringer who treated him intermittently over many years, who says he was normal mentally; "I considered that he was a man of our own class, you might say, mentally" (p. 54, line 25); Mr. Cook, Vice-President of the Bank of New York & Trust Company, who knew him socially and in business transactions, and who defines him as of "good intellect, I should say" (p. 90, line 30); Mr. Beale, his lawyer, who says: "* * * he had perfect understanding of what his property consisted of, and perfect ability to dispose of his property by will" (p. 134, line 20); Dr. Bensley, called by appellant, who treated him in his last illness and says there was nothing about his conduct or appearance or actions which would lead him to believe that testator did not have sufficient mentality to understand that he was making a Will or to appreciate the amount of his estate or to recall who the natural objects of his bounty were.

> "Q. He was a highly intelligent man, was he not? A. He seemed to be.
>
> Q. At no time during the time you saw him, did he appear to have any of the symptoms of insanity, did he? A. No, sir." (p. 193, line 25).

Dr. Spear, an alienist from Baltimore, who never saw testator, assumed to testify to delusions based upon a hypothetical question so hopelessly confused and inaccurate that his testimony is valueless and is not discussed by the Vice Ordinary. The confusion of the hypothetical question is admitted in appellant's brief (p. 26).

To sum up the matter, we have the case of a somewhat decrepit man, married to an attractive young wife twenty-five years his junior, of whom he was quite naturally jealous. He had lost his first wife through her adultery and was naturally disposed to be suspicious. He was evidently a mild man not given to quarrels and violence of any kind. Notwithstanding outward appearances, it is apparent from his letters, from the episode of his trip abroad alone, the post-mortem letter and the Will itself, that his marriage was a disappointment to him. He undoubtedly desired to know whether his wife was misconducting herself, and, therefore, employed detectives. Obviously he had no conviction or settled belief, else he would have acted. He was jealous of a man in Switzerland, apparently without sufficient ground. The wife says, however, that she did know a few men in Switzerland but that she did not pay attention more to any one than to any other. However, while such acquaintance seemed to her harmless, and no doubt it was, it was an external fact arousing Mr. McDowell's natural jealousy to the extent that he made it the subject of a letter to be delivered to his wife after his death. Plainly his love was mixed with the bitterness of his jealousy, and in his death he wanted his wife to know something of the bitterness of his own disappointment.

It may be admitted he had a mean and cruel streak in him, and that he made a mean and cruel Will, but the fact remains that there is no proof of insanity, delusional or otherwise.

Precedents and Authorities.

We come now to the application of the law on this subject to this state of facts. There are four fundamental legal propositions which we think are applicable to this case.

(1) The delusions which are asserted as evidence of testamentary incapacity must be *insane* delusions.

(2) An insane delusion which will render one incapable of making a valid will may be defined as a belief spontaneously arising in the testator's mind in things which do not exist and which no rational mind would believe to exist and which is so firmly fixed that neither argument nor evidence can convince him to the contrary.

(3) The insane delusion must have operated to cause the production of the will which is under attack.

(4) The person asserting the partial insanity of the testator must show that he has been prejudiced by it.

The case of *Middleditch* v. *Williams,* 45 N. J. Eq. 726, is a leading case in this State and a very instructive one. There it was shown that the testator was a believer in spiritualism, and the proofs show that the testator had said that he had been asked by the spirit of his dead wife to make provision for his mother-in-law in his will, which he had done to the exclusion of his only child. The Court said that this was not evidence of insanity, the learned Vice-Ordinary Van Fleet said: "I strongly suspect that the testator was duped (by his mother-in-law). It may also be true that he was unduly influenced. * * * *The question, however, whether or not the paper in question is the*

will of the testator must be decided by the evidence before the Court." The following principles were established by this decision:

> "A will may be contrary to the principles of justice and humanity—it may be both unnatural and unjust; yet if it appears to have been made by a person of sufficient age to be competent to make a will, and also appears to be the free expression of a sound mind, the courts must uphold it.
>
> "If a testator possesses sufficient mental power to take into account all the considerations necessary to the making of a proper will, though he is subject to an insane delusion, yet if it appears that such delusion neither influenced him, nor was calculated to influence him in making his will, his will must be upheld.
>
> "Where a person is induced by false evidence or false statements to believe a fact to exist which does not exist, or where, in consequence of his faith in evidence which is true, but which is wholly insufficient to prove the truth of what he believes, he believes a fact to exist which in reality has no existence, his belief may show want of discernment, or that he lacks ordinary power of discrimination, and is consequently easily duped, but not that his mind is unsound."

A New York case is very similar to the instant case in its facts, only the sexes being changed. In that case one of the grounds upon which the will was contested was that the testatrix labored under delusions as to the conduct of her husband in reference to his supposed relations with other women, and also as to the want of affection of her children and their desire to place her in a lunatic asylum. It was proved that the testatrix had once publicly struck her husband for looking at another female, and the Court held that there was no proof establishing any infidelity on the part

of the husband and the Court was willing to assume that the deceased acted upon an unfounded suspicion as to his fidelity. Nevertheless the Court of Appeals of New York refused to consider that this amounted to delusional insanity, which would render the testatrix incapable of executing a last will and testament, agreeing with Shakespeare that:

> "Trifles light as air
> Are to the jealous, confirmations strong
> As proofs of holy writ."
>
> (*Cort* v. *Patchen,* 77 N. Y. 533.)

In *Davenport* v. *Davenport,* 67 N. J. Eq. 320, the complainant (charged with having given the testator overdoses of poison) testified that she did not overdose the testator. The Court said:

> "It may be true that she did not, but it does not follow that his belief that she did was an insane delusion. He may have been mistaken in his conclusion that she had purposely overdosed him, but the facts on which he based his opinion actually existed. They were not vain imaginings created by a diseased and insane mind."

The definition of an insane delusion was laid down in this case as follows:

> "An insane delusion is a fixed belief based upon supposed facts, which exist only in the diseased imagination of the deluded person, persisted in against indisputable evidence of its falsity."

We may remember at this point that owing to the way in which the case at bar was tried, counsel for the contestant evidently contenting himself with raising little doubts here and there, and counsel for the proponents evidently being satisfied that there was no case made out which called for an

exhaustive rebuttal, the Court is not in possession of the facts upon which the decedent's jealous suspicions of his wife arose. It cannot be said that they were vain imaginings which spontaneously arose in a diseased imagination, and it certainly cannot be said that they were persisted in against indisputable evidence of their falsity, for there is no evidence that anybody tried to reason him out of his opinion or belief other than the evidence of his widow that she assured him that her conduct had been quite impeccable.

In *Hollinger* v. *Syms,* 37 N. J. Eq. 221, it appeared that the testator had strange if not insane views and convictions in regard to his physical condition and the cause thereof; he was given to excessive dosing with purgative medicines and once he undertook to bleed himself, and cutting an artery in his wrist well-nigh bled to death; and he was addicted to an evil practice eminently deleterious to physical and mental health. His own physician regarded him as a monomaniac—and proposed his removal to a lunatic asylum; eventually he took his own life. And yet, in the face of this sinister array of evidence, the Court did not find this history incompatible with the possession of testamentary capacity, and following *Stackhouse* v. *Horton,* 15 N. J. Eq. 228, and *Banks* v. *Goodfellow,* L. R. (5 Q. B.) 549, gave judgment in favor of the will. In this case the caveator was a brother for whom the testator had a profound distrust and dislike.

In an interesting case which arose in Pennsylvania, *Hemingway's Estate,* 195 Pa. S. 291, the testatrix was a widow and left to survive her two sons and a daughter. By her will she disinherited her sons and gave the bulk of her estate to the daughter. There had been trouble between her and her sons over the settlement of her husband's estate some years before, and she charged her sons

with trying to rob her, and persisted in the belief that they had robbed her down to the time of her death. There was not the slightest foundation for these suspicions and the appellant, one of the sons, contended that they were the result of delusions which should invalidate the will. The Court, however, held that such a delusion was not one that would justify the Court in setting aside a will that passed over the sons, and found that even if it be considered that the testatrix was laboring under a delusion, the burden still rested upon contestants to show that the will was the result of the delusion. It appeared from the evidence that the testatrix had sought a reconciliation with her sons, that they had neglected her and that she had bitterly complained of this neglect.

A California case illustrates very well in the instructions which were given to the jury, before whom the case was tried, the principle which must govern the findings of fact in a case like this. The case referred to is that reported under the title *Estate of Kendrick,* 130 Cal. 364, and it has added significance and importance from the fact that in it the Court bases its legal conclusions on those which were laid down by the New Jersey Courts in *Middleditch* v. *Williams* and *Stackhouse* v. *Horton.* In that case it was held:

> (1) "An instruction that if testatrix was under the belief that her sister had tried to kill her and that there was no foundation for such belief, and that she was incapable of being reasoned out of it, she was laboring under an insane delusion and the verdict should be for contestant, was erroneous in not stating that the will must be caused by the insane delusion."
>
> (2) "An instruction that if the deceased was under any delusion regarding the contestants or any of them, she cannot be regarded as mentally sane in making said will

so far as the contestants or any of them are concerned, though she might be mentally sane as to the rest of the world is erroneous. It is not any insane delusion regarding the contestants or any of them, it is only an insane delusion which operated to the injury of the contestants to produce the will in question which would justify the jury in declaring that the will was the product of an unsound mind."

(3) "Nor is every delusion an insane delusion. Whenever one's mind is tricked or deceived into a false opinion or belief it has been played upon; it is deluded. But an insane delusion is the spontaneous production of a diseased mind leading to the belief in the existence of something which either does not exist or does not exist in the manner believed; a belief which a rational mind would not entertain, yet which is so firmly fixed that neither argument nor evidence can convince to the contrary. Moreover such an insane delusion must have operated to cause the production of the will which is under attack."

The Court of Appeals of the State of New York laid down a rule in a slightly different phraseology, but it comes to the same thing. That Court said:

> "Where one persistently believes supposed facts which have no real existence except in his perverted imagination against all evidence and probability and conducts himself, however logically upon the assumption of their existence, the delusion is insanity. But where there are facts, insufficient though they may be in reality, from which a prejudiced, narrow or bigoted mind might derive a particular idea or belief, it cannot be said that the mind is diseased in that respect. The fact that the belief is illogical or preposterous is not evidence of insanity." *Matter of White,* 121 N. Y. 406.

And in another New York case, *Dobie* v. *Armstrong,* 160 N. Y. 584, the same Court, writing in

a case where the testator had disinherited his son in favor of a college, said that though a testator may have received some unjustifiable impressions which had actuated him in making his will, does not warrant calling it a delusion. In that case the Court also called attention to the fact that the will was not the result of a sudden impulse, but rather of a definite purpose formed in prior years. So we may say here that the purpose of this testator Mr. McDowell to leave the bulk of his property to the Art Students League to found a scholarship in memory of his father and to give his wife only Five Thousand Dollars was formed as long before his death as May, 1923, when the first draft of his will was drawn by Mr. Beale (Exhibit R. 4), this will being precisely similar in its terms to the will offered for probate. It would appear that two years and three months had elapsed since the testator had determined to make his will in that form.

Clapp v. *Fullerton,* 34 N. Y. 190.

> "It is not sufficient to justify the rejection of a will that a testator, in other respects competent, entertained the mistaken idea that one of his daughters was illegitimate, if it was not the effect of insane delusion, but of slight and inadequate evidence acting upon a jealous and suspicious mind."

Another case which is very instructive on the question which we are considering is *In Re Henry Will,* 167 Iowa 557. Under the will in this case the testator gave to his three children Five Hundred, Five Hundred and Twenty-five Dollars respectively. At the time of his death he was worth about Fifty Thousand Dollars. Testator and his first wife had separated because of his belief that his wife had been unfaithful and that he was not the father of their youngest child.

Held:

> "It was not enough for the contestant to show an erroneous belief on the part of the decedent, in order to establish an insane delusion. Erroneous belief is a circumstance which may properly be considered as tending to the proof of decedent's delusion, but of itself is not sufficient for that purpose. No other circumstance is shown in this record as tending to prove that the mind of the decedent was diseased and his belief a delusion. * * * Whether the evidence which decedent claimed to have of the infidelity of his wife was credible or plausible does not appear. * * * All that he ever said on the subject was said at the beginning to two or three close friends and to the wife herself. Whether the evidence, therefore, which satisfied his mind was such that no rational person would be likely to believe it, or was such that no person could believe and yet be rational, is quite beyond the possibility of proof. In the absence of such proof some other evidence than mere erroneous belief is essential to the contestant's case."

The language of this opinion might be applied with great force to the case at bar. It is quite beyond the possibilitiy of proof whether the evidence which Mr. McDowell had and which evidently made him uneasy about his wife was such that no rational person would be likely to believe it.

In a Wisconsin case, *Will of Cole,* 49 Wis. 181, it was

Held:

> "That a belief of the deceased in the unchastity of his wife was not an insane delusion."

And if we compare the judgment in this case with that of *Barbo* v. *Rider,* 67 Wis. 598, where

the delusion was on the same subject and was such as caused the will to be set aside, we will see the difference between a mere doubt or erroneous belief and a fixed and insane delusion which arose spontaneously in the testator's mind without any reason.

Potter v. *Jones,* 20 Oregon 239, S. C. 12, L. R. A. 161. This case is as nearly like the instant case as two cases can be. The evidence before the Court showed that the testator was a man of sensitive disposition and of a nervous and jealous temperament; that early after his marriage he became suspicious of his wife's chastity and entertained the belief that she was intimate with a man who met her near a certain spring for adulterous purposes and that two of his children (one of them the contestant) were the offspring of such adultery. This belief, however, was not proclaimed from the housetop or to everyone, but, with few exceptions, and those intimate friends, it was only communicated to his brothers. The Court said, reviewing this evidence:

> "Our conviction from the evidence is that his wife was a chaste woman and faithful to her marriage vows, and that the two children named were not the spurious product of her adulterous embraces with another man; but the fact remains, according to the testimony of those to whom he confided his domestic troubles, that he always furnished some grounds for his belief. He identified the party and place, and described the clandestine manner by which their improper meeting was effected. That such things could occur or have occurred under less probable circumstances will not be denied. They are only rendered improbable in the present instance by the absolute confidence expressed in her marital fidelity by her acquaintances. While, therefore, we shall regard this suspicion or belief of her infidelity to her marriage bed

with its attendant circumstances as unjust and unworthy of belief, we cannot disregard the fact that there was the opportunity for the parties to have met at the spring, and it might have occurred in reality for perfectly proper and innocent purposes, or without evil design or any concert of action; yet, to a man of testator's sensitive and jealous disposition, a trifling circumstance of this kind or a slightly imprudent act would incite his distrust and fill him with jealous suspicions."

The Court in the course of its long and able opinion laid down the following principles of law, which we think are amply supported by the great weight of opinion, both in this country and in England:

(1) "Delusions are conceptions that originate spontaneously in the mind without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis. They have no foundation in reality and spring from a diseased or morbid condition of the mind."

(2) "Where a person persistently believes supposed facts which have no real existence in his perverted imagination and against all evidence and probability and conducts himself, however, logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion, and delusion in that sense is insanity. But where the belief or aversion *to the contestant* was formed on an apparent cause, leading on his part to a view unjust and erroneous, this only shows an unfortunate error of judgment or a want of reasoning power, but not an absolute want of intellect on the subject. It is not enough that a delusion may exist, but its connection with the will must be made manifest, and shown to have influenced its provisions before the will can be set aside and declared void."

(3) "Where it was claimed that the testator was the subject of an insane delusion, but admitted to be of sound mind on all other subjects not connected with such delusion, but which delusion the evidence disclosed was not present influencing him when he executed the will,

"Held:
"That the will was valid."

We come now to a discussion of the particular principle of law upon which the Orphans' Court decided this case. That Court held that the presence of a delusion against the loyalty of the wife not having adversely affected the decedent's disposition towards his sister, does not entitle the latter to set aside the will, and relied upon the authority of *Stackhouse* v. *Horton,* 15 N. J. Eq. 202, in support of that proposition. There were four caveators in that case, the other three being all next of kin, and after the Court had disposed of Silas Horton's claim it took up the claims of the others and asked: "Did the delusion if any existed toward Silas Horton, affect in any way the dispositions made by the decedent of her property in respect to them?" One of the caveators was Susan McCallum, a sister of the decedent, and the Court says: "It is proved that Esther Horton's state of mind toward Silas has in no manner affected her interest." And so with regard to the other caveators, the Court concluding:

"It is proved as clearly as any such fact can be established, that the feelings of Esther Horton towards her nephew did not in any way affect these caveators. I feel perfectly satisfied in coming to the conclusion that if the derangement or monomania towards Silas Horton did exist, as contended for, it is no objection to admitting this writing to probate."

The Orphans' Court was able to find no other case in point save the case of *Long,* 89, N. Y. Supp. 555, which was decided by the Surrogate of Kings County, New York, in 1904, and thought this was probably because, as was said by the Surrogate in the last case cited: "The contest in these cases is always made by the disinherited party."

As we read *Merrill* v. *Rush,* 33 N. J. Eq. 537-540, that case comes to the same conclusion as the *Stackhouse* case. Speaking of the will of an old woman over 83, who had made an unjust and unfounded accusation against a person who had no natural claim upon her bounty, and the claim of the caveatrix, the granddaughter, that these amounted to delusions which should invalidate the will, Vice-Ordinary Van Fleet said:

> "The hallucinations, if such they may be called, had no reference, however, to any person who had reason to expect to be a recipient of her bounty, or who had any claims by nature upon her in the distribution of her estate. There is no evidence that they in any wise affected her testamentary disposition of her property, and if there were evidence that it had done so, probate of the will would not be denied on that account, where the denial would not avail those, who but for the delusion, would have been recipients of the testator's bounty."

The position of the contestant here is that if the testator had not had a delusion about his wife he might have made a will in favor of his sister, but it would be more logical to assume that if he had not had a delusion about his wife he would have left all of his property to her. It is difficult to see how in any aspect of the case the sister could show that if her brother had not had the so-called delusion about his wife, she would have been his residuary legatee.

The *Oregon* case which we cited above is also in line with the *Stackhouse* case, in that part of the opinion where it said: "It is not enough that a delusion may exist, but its connection with the will must be made manifest, and shown to have influenced its provisions before the will can be set aside and declared void". In discussing this proposition the Court uses the expression: "An aversion to the contestant".

And we submit that this is what is meant by all of the authorities when they say that it must not only be shown that the testator had an insane delusion but also that "the will must have been the product of such insane delusion".

There are many cases which hold that the insane delusion being about some perfectly extraneous subject, like religion or politics, could not possibly have affected the testamentary disposition towards any of the objects of the testator's bounty, and he being shown to be of sound and disposing mind and memory, the will has been sustained. There are other cases, not a few, where it has been held, that assuming the delusion to have been an insane delusion, yet since it was not directed at or toward the contestant, the latter was not in a position to say that it affected the testamentary disposition toward him or her.

We conclude, therefore, that the learned Court below was eminently sound in its decision on this point, and that both on reason and authority the Court below should be sustained.

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New Jersey Court of Errors and Appeals

In the Matter of the Estate of EDWARD McDOWELL, Deceased.

BEATA McDOWELL CLAYVILLE-SMITH,

Appellant,

vs.

MONTCLAIR TRUST COMPANY, *et al.,*

Respondents.

On Appeal from the Prerogative Court.

BRIEF IN BEHALF OF APPELLANT.

This is an appeal from a decree of the Prerogative Court, affirming a decree of the Orphans' Court admitting to probate the will of the late Edward McDowell.

The Orphans' Court, before whom the witnesses all appeared in person, and who had the full benefit of the appearance of the witnesses, their manner of testifying and the whole atmosphere of the trial, found with no difficulty that a clear delusion had been established. This delusion extended to the view of the testator that his wife was an object of suspicion, of jealousy and perhaps even of infidelity. The Orphans' Court, however, having found this fact, admitted the will to probate because it conceived that the case of *Stackhouse* v. *Horton,* 15 N. J. Eq. 202, was authority for the proposition that as the delusion did not extend toward the appellant, the appellant could not take advantage of the delusion.

The appeal was taken by a sister of the testator, who was concededly a proper party because

approximately $200,000.00 passed under a power of appointment under the will of Edward G. McDowell, the father of the decedent and of the sister who appealed. This will appears as Exhibit A. 19, pages 235-237.

The Prerogative Court, before whom the witnesses did not appear, found that a delusion had not been established by the testimony, and on that ground affirmed the admission of the will to probate.

In other words, the first court that heard the witnesses held that the appellant was right on the facts but wrong on the law. The Prerogative Court in effect or by reasonable implication from the opinion, holds that we were right in law but wrong on the facts.

The opinion of Flannagan, *J.*, appears at page 247. The opinion of the Prerogative Court, Backes, *V.-O.*, appears at page 318.

The Case.

We are dealing with a case in which we find almost no conflict of facts, and we are concerned mainly with the inferences to be drawn from facts clearly and definitely proved. We are not concerned with the question of general competency. Clearly the testator was a well educated, traveled, artistic, temperamental and taciturn person, suffering from diabetes, and he was cranky at times. Some years before his death, he had turned over his stocks and bonds to the Montclair Trust Co. to act as agent and business adviser for him, and he concerned himself little or not at all with ordinary business affairs.

Some twenty-five years ago, the testator had married a young woman whom he later divorced

on the ground of infidelity. This record, injected in the case for the first time in the Prerogative Court, appears in full at page 267. The divorce was granted in 1905. (Testator died February, 1926.) He married his present wife in 1913 and they apparently lived happily and he treated her kindly throughout their entire married life.

The Prerogative Court criticizes counsel as being over-zealous and having insinuated evidence in the case. We call attention to the fact that the Orphans' Court, before whom the case was conducted and which had a thousandfold better opportunity to make valid judgments of this sort, held no such view, and we feel confident that the Prerogative Court would never have made the suggestions contained in his opinion if he had had the advantage of attendance at the actual trial.

We ask this Court to keep clearly in mind the fact that the widow had filed a caveat against the probate of this will and that the Students' Art League, who received the entire estate, less a noble legacy of $5,000. to the "beloved wife," secured the withdrawal of the caveat, on the basis of some settlement the terms of which have never been revealed to any court and which remain a mystery throughout the case. The widow was represented by Mr. Beale, whose testimony appears at page 127. Mr. Beale sat at the counsel table with counsel for the Art League and had never spoken to or met the appellant's counsel until the time of the trial.

At the end of the first day's testimony, page 98, the widow, Marie McDowell, not having appeared in court, an application was made for a commission to take her testimony, whereupon she was, on the following day, February 2nd, pro-

duced. While she was placed upon the stand by us, it was apparent at once that she was a very delicate, sensitive, refined and cultured woman, who as a young girl had married her artist husband of whom she was very fond at all times; whose memory she still cherished and treasured, and it further appeared that she intended to do everything possible to protect his memory, peculiarities and obsessions.

The trial court permitted the examination to proceed on the basis of our examining a hostile witness—really not only a hostile witness, but one whose sensitiveness and distaste for publicity and the exposure of her husband's attitude toward her was most painful. The testimony of this widow was five times as convincing to the trial court as that given by a witness filled with hostility toward the decedent, or one who was loquacious and greedy, or one who showed a willingness or desire to say anything that would serve the purpose of upsetting the will. From the testimony of this witness, who had to be handled almost with the delicacy of fragile glass, we extracted (not insinuated) evidence that she had never given the testator any occasion whatever to doubt her fondness and loyalty to him; that the parties had lived together continuously in the closest possible relationship from the time of the marriage until the time of the death, at the Beechwood Hotel, Summit, in February of 1926, with the single exception of an occasion when as we will later show his delusion drove him to the point of running away from his wife and taking a trip abroad in 1923. They took a trip around the world in 1920; lived usually in a single room in a hotel, or a room and bath or small apartment, spending a single night in a Montclair Hotel on the occasion when the testator executed

the will in question in which he designated himself as a resident of Montclair.

The widow clearly and unequivocally established the fact that the parties were supposed to be going together on this trip abroad in 1923 (page 120, l. 32.) The testator wrote to his sister in June, 1923, of the contemplated trip (Exhibit A. 10, p. 220, l. 15). The widow went to Baltimore where her mother lived and while there received a letter telling her that he was sailing without her. At the same time the sister received a letter from her brother which she destroyed because of its peculiar nature, when she went to the hospital for an operation. She recalled the contents of the letter; also the letter to the widow which was shown to her (pp. 66-67). The widow knew of no reason whatever for this action. She had given no cause whatsoever for the amazing conduct of her husband. Her testimony to this effect was clear and unequivocal, and not one word to the contrary is offered or suggested.

The opinion of the Prerogative Court suggests possible motives and that there may have been unpleasantness between the husband and wife preceding this. This suggestion is found in the brief of the respondent, but there is not even an innuendo or a suggestion of any such thing throughout the entire testimony.

The sister's recollection of the letter is criticized because she says that it started, "My dear, small Sister," whereas the other letters in evidence address her "Dear Beata." Clearly if the sister intended to commit perjury and fabricate a letter, she would have done a more perfect job. Moreover, the particular letter referred to which was destroyed was entirely different from the

friendly exchange of ordinary letters which were put in evidence for the sole purpose of showing the continued relationship of regard and esteem and cordial friendship between the brother and sister.

The trip abroad was discussed between the widow and her husband and they were supposed to be going together (p. 102, l. 34). The widow knew of the change of plan two days before sailing. It had not been discussed with her. Her belongings were put in storage by the testator (p. 103, l. 1) and the widow learned by letter that he had sailed. On arriving at Cherbourg, he cabled her and she went over and says that the subject was not discussed; that he greeted her very pleasantly; treated her always kindly. She knew of no particular reason for his sudden move in sending her things to storage (p. 103, l. 20).

There had been a Japanese servant in the house; many of them in fact. The husband found some little slips of writing in Japanese which upset him. He apparently took them to his lawyer, Mr. Beale, suspecting that they had something to do with his wife. Mr. Beale had them translated and informed Mr. McDowell of the fact, and said that they showed no basis for any jealousy of his wife (p. 129, l. 24). The wife testified (p. 103, l. 31) that Mr. Beale spoke to her about them.

Mr. Beale was in court throughout this case, although the widow did not appear until the application was made for taking her testimony by deposition, the second day. He sat with counsel for the proponent. We had assumed that he was interested for the Art League and he was called by us (p. 127) without ever a word with him, as a result of the widow's closing statement about

her husband having had her followed with detectives (p. 127). He was not even questioned about these Japanese notes on cross examination and we earnestly contend that we are entitled to the fullest possible inferences that can be drawn from the evidence relating to them.

This is the same Mr. Beale who delivered a letter to the widow after Mr. McDowell's death (p. 103, l. 4). The widow destroyed the letter (p. 104, l. 2). We were laboring under the great disadvantage of no possible interview with the witness who was tremendously pained by testifying, but by careful questioning the fact was developed that it referred to a man in Switzerland. The widow was asked:

> "Q What did it say, please? Will you just briefly give us the contents of it? A Must I say so?" (p. 104, l. 22.)

There was an offer by the counsel for the proponent to stipulate that the letter indicated that Mr. McDowell was jealous of his wife (p. 103, l. 8) with respect to her receiving attentions from men (p. 106, l. 4). The subject was then abandoned because of the very apparent distress of the witness, but it was returned to after another subject had been introduced. The widow stated that she knew of no one to whom her husband might have had reference in his letter to Mr. Beale—she had no idea what might have been in his mind (p. 107, l. 35).

> "Q And in Switzerland was there anything which even remotely gave your husband any ground for suspicion? A Not the slightest." (p. 108, l. 1.)

Not by one sentence of any witness is it even remotely suggested that this is not absolutely true, or that the widow by anything said or done, at any time, ever gave the slightest ground for

suspicion or jealousy. We do not feel that it is fair to suggest that there might be some witnesses somewhere in the world who could have proved that there was such a basis. Concededly and under the peculiar nature of this case, the evidence produced shows a mind filled with suspicion—a suspicion for which there was no basis; a suspicion which could not be dissipated by any facts or anything that was said or done. If this is not a clear delusion, we fail to understand what delusion can be, and we respectfully insist that it cannot be dissipated by conjectures as to what might be shown if evidence had been produced proving a basis or a real ground for a properly conceived suspicion.

A gynecological operation was performed on the widow by Dr. Gallatin, who is certainly one of the most eminent doctors in New York and who was a personal friend of Mr. McDowell's (p. 111, l. 2). The husband had stated to the wife that he stood outside of the door of Dr. Gallatin's office while the wife was being examined:

> "Q And he stood outside with a revolver in his hand? A Yes, sir." (p. 107, l. 1.)

He told the widow that she was well protected. It is suggested that this testimony is proved by the husband's own statement. We do not believe that it will be suggested that the widow was lying as to an event of the husband's actually doing the amazing thing of standing outside of the door of a close personal friend and one of the most eminent surgeons in the world, while an operation was being performed on her, and if he did not do so, but said he did, the evidential value is the same. It proves a mind not sane on the subject of his wife's conduct. The opinion of the Prerogative Court suggests that the husband may have had in mind the desire to protect the wife

from the doctor's embrace. We doubt if it justifies an inference of sanity, even if it were shown that there was a suggestion of such a fear, under such circumstances as existed here.

The husband was of an extremely jealous nature (p. 107, l. 18) and he did not want the wife to be alone at any time if it could possibly be avoided. There was nothing in the wife's conduct that justified any suspicion.

> "A Nothing." (p. 107, l. 24.)

We repeat again, at the risk of being tedious, that nowhere in this case is there even an innuendo to suggest that there was anything whatever in the wife's conduct to justify any suspicion.

The husband desired the gynecological operation to be referred to as an appendicitis operation (p. 108, l. 4). The wife knew of no reason in the world why the husband should have mentioned in the letter to his sister the fact that the laws of New York were made for women and not for men (p. 109, l. 20). The sister, whose credibility is not impeached or attempted to be impeached, has testified to her brother having written that to her.

The widow never at any time neglected her husband (p. 109, l. 27) and there was never anything which she could have done which she did not do. She was surprised and distressed that her husband sailed without her—very much so (p. 109, l. 38). There had never been any discussion whatever of legal proceedings at any time, nor any threats, big or little (p. 110, l. 12). Her husband never gave any reason or made any explanation about having written as he did, or having acted as he had by sailing in 1923 (p. 110).

The husband discussed his will with his wife and told her that he had left her everything. That was years ago (p. 111, l. 20) and a month or so before his death, when the wife asked for some money for some little purchase, he told her that everything was hers anyway (p. 114, l. 10). The widow knew of no reason for any change in the disposition of her husband's property. She did everything that he wished and conformed her life to his wishes, absolutely (p. 111, l. 38). The widow did not know that he was making a will in Montclair. He did not discuss it with her (p. 112, l. 1). When Mr. Beale told the widow about the piece of Japanese paper, they meant nothing whatever to her (p. 112, l. 25). There was nothing whatever in the Japanese servant's conduct that would justify the slightest degree of suspicion.

"A Absolutely nothing." (P. 112, l. 32.)

The difficulty of bringing out the true facts through the widow is beautifully illustrated on page 115, where it manifestly appears that the suspicion of this poor, deluded artist led him to suspect misconduct on all sides. Observing an elderly lady conversing with some one at another table, he was apparently suspicious of their conduct. Although they looked like an eminently respectable couple, he remarked to his wife, "Look, Mary, there is something going on between those two," or words to that effect. The wife's effort to justify is apparent by her saying that anybody is likely to say such a thing; that people often say things like that without any reason whatever.

Only one who was actually in court during the trial of this case and who could observe the attitude of the witness in giving her testimony, could

readily understand why the trial court had no difficulty in finding clear proof of a delusion.

The testator pretended to play with a little dog which had been dead many years. This also the wife fully seeks to justify (bottom p. 116, p. 117). He would speak as though the dog was alive and running about (p. 117, l. 28). On his return from a trip around the world, he gave his address as a little town in Japan, where he had stayed but six weeks and owned no property there (p. 119). Although he had never lived in Montclair, and been there apparently but one night and lived in Summit and had his bank account there, his securities were still left in Montclair and in his will he nominated himself as a resident of Montclair.

At the bottom of page 119 we returned again to the letter delivered to Mr. Beale, referring to the man in Switzerland. The widow avoids touching the subject with all her power, but she admitted that it was full of jealousy and that the husband was evidently distressed by the fact that some one had been paying her attention there. There had been no attentions paid her there by anyone (p. 120, ll. 1 to 15).

Cross examination is taken up at page 120 and realizing the fineness of the woman, her nature and the actual situation, such an experienced trial counsel as Francis Child never even attempted to develop the fact that there could be any basis for the suspicion or jealousy, and yet we find the opinion of the Prerogative Court based upon that very possibility. The revolver incident at Dr. Gallatin's office is brought out again (bottom p. 123). On re-direct it is brought out that at the time the will was executed the testator informed his wife that he was talking to

the lawyer to find out about becoming a resident of New Jersey.

"Q You attempted, I presume, in every way, did you not, to reason with Mr. McDowell on the fact that there was no real need for his being suspicious of your conduct, didn't you? A Naturally.

Q Would you say how many times? A Several times.

Q And in spite of all you could do in that respect, he would come back to it again and even up to his death he left you that letter for delivery after his death and he was still harboring the notion that you were unfaithful? A Yes, sir.

Q And was there anything that you could have said or done that would have changed his mind on that subject? A No, sir."

"Q And was there anything that you could have done that you did not do? A No" (pp. 126 and top of 127).

It was then developed that Mr. Beale had told the witness that her husband had had her followed by detectives and with that slight clue, we immediately called Mr. Beale (p. 127).

Mr. Beale swore that he was the counsel for the widow and had been counsel for Mr. McDowell in his lifetime, and drew a will for him. His attitude is beautifully shown by his attempt to parry and fence on the question of the Japanese writing. He does admit under pressed questions that Mr. McDowell gave him little pieces of paper on which Japanese writings were contained (p. 128). He had it translated and told Mr. McDowell that it did not show any basis for jealousy of his wife and that he never knew of any basis for jealousy of the wife; that the testator spoke to him about having his wife followed by detectives and that he frequently had her followed by detectives; that he did not get any evidence, but that did

not stop him from having her followed by detectives (p. 128, ll. 25 to 40). The testator spoke about having his wife followed by detectives three months before his death. This witness knew of the testator's going abroad without his wife—running away from her and then cabling her to meet him. He was told about this by the testator (p. 130, l. 20). Note here again that there is not the slightest effort on cross examination to prove the least possible basis for suspicion or jealousy, or anything whatever of the sort. On the other hand, we find developed on cross examination, the amazing fact that this poor deluded man had a will drawn in New York —one quite similar to the one before the Court —under which he left his wife $5,000 and the balance, in excess of $200,000 to the Art League, although he was told by his lawyer that such a will was ineffective to accomplish that result, as he could not dispose of more than one-half of his property outside of a natural heir (p. 132, l. 20). It is suggested that one reason for this amazing will was that he did not care for his wife's family and did not want them to receive a portion of his property (p. 133, l. 22). In that event, he could have of course made a very proper life provision for his wife, remainder to the Art League. He did not suggest to Mr. McDowell his becoming a resident of New Jersey (p. 130, l. 40). Cross examination ends page 135.

On re-direct, Mr. Beale was asked if he represented Mrs. McDowell on the filing of her caveat against the particular will in question, and he answered "I did not file the caveat" (p. 135, l. 40). When being pressed in the next question, he admits that he represented her in the matter of that procedure.

The amount or terms of the settlement were never suggested to the Court, from which we can only infer that they must have been so unfavorable that it was desired that the terms should not appear.

He admitted that he explained to the testator the laws of New York when he drew the will, but that the testator insisted that it be drawn that way (p. 136, l. 30). Pressed as to his attempt to justify the ridiculous New York will (p. 137, l. 1) he admits that he thought it was all right because as it would defeat itself, it would to some extent give justice to the wife (p. 137, l. 15). He wanted to make a gesture to leave her $5,000, whether she got the rest of the estate or not (p. 128, l. 12). He knew the other one-half of his estate would go to his wife (p. 138, l. 22).

> "He didn't care so much whether his wife inherited the estate, but he wanted her to know that he had been suspicious of her, and had kept track of her doings and conduct, and conversation and one thing and another of that sort. That is what I mean by gesture."

(p. 140, l. 30).

> "Q Then, it is my understanding, he made this will this way and told you so, because of his suspicions against his wife? A I would say partly."

We do not feel, in the light of this testimony, that the opinion of the Vice-Ordinary is justified. This testimony is not "meager, fragmentary—sketchy" or the "result of subtle insinuations of zealous counsel." It is clear and unequivocal testimony from hostile witnesses showing a deluded mind.

The Prerogative Court observed that the testimony of the revolver incident at Dr. Gallatin's

office rests upon the testator's statement. But he and the wife were there and the wife inside the door. What other testimony would reasonably be available for such proof? We cannot be concerned with the circumstances under which the testator told her of the revolver incident outside the door of Dr. Gallatin—the humor he was in. If assumptions are to be made, however, we can readily assume that it was the mood of a man who lived daily with a devoted, loving attentive, fine woman, and nevertheless picked up scraps of paper left by Japanese servants, took them to his lawyer to have them translated, having his mind filled with suspicion that they were messages to his wife. No other inference is possible from the testimony as to the Japanese writing, or as to his having his wife watched by detectives, and who on being told that there was no evidence continued to have detectives dog her step, although they were living together in the same room or suite, he with no vocation—an amateur artist, home all day, and yet continuing the watching operations almost down to the last few months of his life; or his seeking to carry his unfounded suspicions beyond the grave by leaving an insulting letter to be delivered after his death, or who, as a gesture, makes an abortive will on the face of which he leaves a wife $5,000 knowing that she will receive more than twenty times that much. In the absence of cross examination developing for the proponents of the will the fancy or mood the husband was in, a court does not need leave the record to find such permissible, in fact, inevitable inferences.

The Court criticises the suggestive manner in which evidence was uncovered in the trial. A careful reading of the record discloses that unwilling witnesses were induced with the utmost

difficulty to supply that which was obtained, and that although the widow and her counsel were most patently in the camp of the other side, not one word of cross examination attempts to shake by a different form or admission of questions, the evidence that "was uncovered." The Court's opinion criticises the fact that no details are given by Mr. Cook. Mr. Cook was a witness called by the proponents (p. 89). We had never seen him or heard of him until he appeared in court. Armed with the positive conviction that the testator was deluded, we felt it probable that he did talk with those with whom he came in touch in such a way as to uncover the delusion. The testator had called on Mr. Cook, the banker, at his house in Montclair a couple of times (p. 96, l. 38). He was a good friend—a good business friend (p. 96, l. 32). He discussed his family with Mr. Cook at times; that at times Mr. Cook had met Mrs. McDowell (p. 92, l. 35). They seemed to be living happily and congenially.

"A Yes, sir; absolutely" (p. 93, l. 1).

The witness then on cross examination admits that the testator was of a jealous disposition and had mentioned to this banker friend that at one time he was a little bit worried about his wife.

> "Q Did he say whether his wife had given him any cause for jealously? A I did not discuss it with him, because I did not want to go into it in detail.
>
> Q I am anxious to know just what he said to you on that subject? A I can't tell you, it is too long ago." * * *
>
> "As I recall it, they were going abroad and he said that he was a little worried about his wife. He appeared to be jealous of her; he thought someone was paying her some attention" (p. 93, l. 22).

We observe again that this is a witness of the proponent's and we fail to realize why we should lose the effect of this most excellent testimony because as the Court below says, no details were given.

It is observed by the Court below that from Mr. Beale's testimony it does not appear whether the testator had had his wife trailed by detectives, or whether the testator had told him that he did. In either event, that the mind of the testator was that of one obsessed on the subject is manifestly clear. If there had been the slightest basis for suspicion, experienced trial counsel such as handled this case below, would have proved it by the widow, by Mr. Beale, by Mr. Cook or by some one open to them to inject at least a suspicion—an odor of evidence of misconduct. Yet we find none.

With reference to Mr. Beale, the Court said, "The scant examination of this most important witness leaves the picture half painted" (p. 321, l. 17). It is not a clear reason for the Court making the deduction that half-painting should not be given the fullest possible credence. We are dealing with an unwilling, hostile witness, and the half we obtained is more valuable than a much greater quantity with a different type of witness. Must we not assume that the half-painting was left by our opponents because they dreaded the full picture? The Court assumes that the testator's suspicion was against Dr. Gallatin and not the wife (p. 321, l. 30). That he had suspicion against the wife is overwhelmingly proved by the reference to detectives, by the Japanese notes, and by his conversation with Cook. Why eliminate all this and fashion suspicion on a man so eminent and distinguished as the surgeon, Dr. Gallatin?

The Court distorts the suspicion as indicated to Mr. Cook, as not concerned with the conduct of the wife, but the "conduct of others toward her." Was this, we wonder, the reason why in his New York will he made a gesture disinheriting her and insulting her memory by the abortive will? Was the fear of "conduct of others" the reason for leaving an insulting post-mortem letter? Frankly, we do not believe that the testimony can be thwarted and the inferences inverted as has been done in the opinion of the Prerogative Court.

The Court suggests at the top of page 322, that the widow resented counsel's unwarranted insinuations of the husband's belief of infidelity.

> "Q And in spite of all you could do in that respect, he would come back to it again and even up to his death he left you that letter for delivery after his death and he was still harboring the notion that you were unfaithful? A Yes, sir" (p. 126, bottom).

We do not think that this is by the widow a "denial," as suggested (p. 322). The Court further suggests that the use of detectives was to assure the testator of his faith in his wife. In that event, we doubt if he would have had the effort continued until four months before the time of his death—a time when he was living in one room with his wife, in a hotel in Summit.

The Court assumed with reference to the sailing for Europe that something might have piqued the testator. The evidence is utterly bare even of any such suggestion. Plans were all made for the widow to sail and there is no effort made in the testimony to shake her unequivocal statement that she knew of no reason whatever for his running away from her as he did. The fact that subsequently they traveled

together and the incident never referred to thereafter is the clearest possible proof of the fact that it was a matter without basis. The Court asks if he would have sent for her if he would have believed her to be an adultress. In other words, the Court attempts to suggest rational, logical reasoning for a mind clearly obsessed. It was a matter not of belief that she was an adultress, but of unfounded, unbased suspicion and jealousy, which had the effect of producing the abortive will in question in precisely the same way as though she had been an actual adulteress. The letter to his sister after the wife's arrival in 1923 (Exhibit A. 1, p. 210)—July 23rd, from Paris, said: "Mary arrived safely and we have been here in Paris a little over a week. Perhaps it is better as it is—I am not as young as might be and—well, the less said the soonest mended—at least for the present," and is, we contend, evidence of the state of the man's mind. If in this case we found any evidence, even though false, to suggest possible basis for any belief even as to the wife's indiscretion, we would be met by a different situation. This admitted letter of the brother confirms the sister's testimony as to the letter destroyed.

The Court below asks whether there is anything in the letters indicating that the testator was abandoning his wife or leaving her, due to a belief that the wife had betrayed him (p. 323). That of course is not the question. Unfounded jealousy and suspicion may produce identically the same effect as actual adultery and in fact did in the present case. The letters, followed by the actual occurrence, are clear proof as to the state of the testator's mind.

The Court criticizes our exaggeration of the Japanese note. We are content to leave the matter to the testimony. For what conceivable purpose could the testator have taken to his lawyer bits of Japanese writings and have had the lawyer have them translated? The lawyer informed him thereafter what the translation was and that they did not show any basis for jealousy. The absolute absence of one word of cross examination of Mr. Beale, who had left his seat beside proponent's counsel to take the stand, was a matter perhaps more significant to the trial court than to the appellate court. What inference can be made from the Japanese notes different from the inference with regard to the post-mortem letter regarding the man in Switzerland, the observations to Mr. Cook, the running away abroad alone, the gesture of the abortive wil? Each bit, when properly oriented, fits into its place with a perfection of a chinese puzzle, and establishes conclusively and convincingly a mind deluded on the subject of the wife's conduct.

The Court observes that the natural reactions to a fixed belief of adultery is separation, but the testator clung. It is not a question of fixed belief of adultery, but of jealousy, suspicion, distruct and a false, unreasonable and unsound state of mind which was sufficient to and actually did produce the unjust and unfair will with which we are dealing.

The Court observes the absence of the testator's expression of his feelings, except to Mr. Cook. Perhaps if the other side had called more witnesses who had been lifelong friends and acquaintances of the testator, we would have had more such admissions. Every witness who had any understanding of the testator for any

period of time who appears in the case, establishes definitely the testator's state of mind. Why the testimony of Mr. Beale, the widow, Mr. Cook and the sister should be disregarded in the absence of any evidence offered by the proponent of any witness who had talked to the testator for any period of time without getting the reaction of jealousy and suspicion, we do not understand.

The testator's unfortunate experience with his first wife may easily have furnished reason for a first suspicion, but if the conduct of the wife was such as appears absolutely by the evidence in this case, then the continuation of that jealousy could only be the result of delusion. The Court says that the husband's jealous nature was easily aroused by slight imprudence. The difficulty with the case is that it is absolutely bare and naked of even a suggestion of imprudence in behalf of the wife, slight or serious. No similar case that we know of in our records, can be found.

The Court suggests that there were many innocent occurrences that excited this jealous mind which might be well assumed (p. 325, l. 20). In the light of the definite evidence of an unimpeached witness that there were none, we wonder why there arises any necessity for any such assumption.

The Court asks who knows what the detectives told the husband in order to earn their pay? The evidence of Mr. Beale tells us that. Although the husband had the wife frequently followed by detectives, he did not get any evidence, but that did not stop him from having her followed (bottom p. 129). May we not assume, if assumptions are in order, that if the

detectives had given the testator even a suggestion of a basis of suspicion, that the testator would have mentioned that to his lawyer, Mr. Beale? The Court finally states, as did the trial court below, that the conduct of the wife was seemly and circumspect.

With that established as evidence, and with no basis for the fixed belief of the husband, are we not driven to the acceptance of delusion as the sole and only possibly way in which the will in question can be accounted for? What possible protection has any chaste, innocent, dignified, courteous, refined lady, if assumptions such as are indulged in in the present case can justify her disinheritance and post-mortem insults leveled at her?

The Court (bottom of p. 325) suggests that the belief of the husband might have been in response to what he observed or was told concerning his wife, and that consequently the belief not being false, there was not proof of delusion. But there is not one word of evidence that the husband ever saw anything or heard anything in any way reflecting upon even the discretion of the wife. In other words, there is in this case not a scintilla of actual ground for suspicion of an injury such as Chancellor Green dealt with in the Stackhouse case; not a question of the belief being well founded or ill founded. There isn't a suggestion in the entire record that can support the state of mind definitely proved to exist in the husband. If the delusion had not sprung up spontaneously in this case, in the mind of the testator, we know of no case in which a delusion can be proved.

In the Middleditch case and in almost every other case in which a delusion is disproved, it is

shown that there was extrinsic evidence of some kind. In the present case, there is no extrinsic evidence of any kind to justify, explain or account for the testator's state of mind, except delusion pure and simple. Without evidence of any kind, he imagined and conceived something to exist which did not in fact exist and which no rational person would in the absence of evidence believe to exist. That is the definition of delusion.

What impression produced by extraneous circumstances can be relied upon in the present case by the proponent to justify the will in question? All the cases referred to in the brief of the other side and in the opinion of the Court are cases where there was evidence to justify the belief. In the present case we have none, and it is unimportant whether the belief extended to the extreme of unchastity or extended to conduct which was indiscreet. There is no evidence to justify any belief as to any of these things, and the proponents could readily have produced such had it been in existence.

The criticism should not be against the slightness of our proof, but against the absence of proof on behalf of proponent. Our witnesses must be believed, until something is shown to the contrary. In the cases in our books, the testator always furnishes some ground for his belief. That is all negatived in the present case. Slight and inadequate evidence, acting upon a jealous and suspicious mind has been held sufficient, but assumptions and possibilities have never before been permitted to take the place of the entire absence of any evidence, however slight and inadequate.

The Court says in the present case that the caveatrix has not excluded the probabilities or

possibilities of extraneous facts which may have induced the testator's belief (p. 329, l. 22).

If that test is to be adopted, delusion may as well at once be eliminated as a ground for upsetting a will, for proof of it is in every case impossible. The Court also assumes that the testator was probably sterile, if not impotent. We are lead to wonder what would be our chances of success in having such an assumption made on this testimony if we were concerned with the issue of legitimacy. There is, of course, not even a question asked on the subject from the many doctors who testified. The testator's unfortunate experience with the first wife should not be permitted to justify delusion against a second wife, apparently as chaste as the first was unchaste.

The Court below does admit at least that the will is cruelly unjust to the widow and holds that the disowning of the wife is irreconcilable with the testator's generosity towards her in his lifetime, and is inexplicable, particularly in view of his statement to her, recently, before his death, that all his property would be hers some day, except on the theory that he had a latent, mean and vicious streak in his make-up. There is no word of evidence anywhere that he had any latent, mean or vicious streak in his make-up. None of the witnesses who knew him suggest the possibility of such a thing. We wonder why it should be necessary to resort to that of which there was no evidence, when the simple assumption of delusion perfectly accounts for the whole thing.

Of course, a will may be contrary to the principles of justice and humanity, but such things are sufficient to weigh the balance where there is some evidence to show delusion and none to oppose it.

It is to be observed that Mr. Hines who drew the will in question (p. 33) suffered from no curiosity whatever regarding the testator's estate, his relationship to his wife or anything else; he seems to have considered it none of his business (p. 38). The night before the will was executed, he met the testator and his wife at the Montclair hotel and observed nothing in their relations to indicate to him that the document to be executed the next day was in effect to disinherit the wife (p. 39, l. 15). The testator's mind was made up when he first saw Mr. Hines (p. 37, l. 18). The witnesses to the will were practically entire strangers to the testator and he said to them nothing that could account for the amazing document. Of course, with the fixed idea of his wife's unreliability and the view that she was a suspicious character, nothing could probably have changed his mind under any circumstances.

The testator was familiar with his father's will, under which he had a power of appointment, but he had not the business judgment or intelligence to refer specifically to the power of appointment; it is not even mentioned in the draft of his will in New York.

The testator's niece, Catharine B. Ward, (p. 57) visited him about the time of the execution of the will. She testified to certain peculiarities of temperament and says that he told her that he considered scholarships abroad a waste of time (p. 59). He treated his niece affectionately and was interested in her art. That appears frequently from his letters in evidence. She was his only niece. She, as her mother, seldom visited him because they traveled little and he did not like Baltimore. The letters in evidence, however, show affectionate regard

which continued to the time of his death, as to both the sister and niece, and they were, of course, natural objects of his bounty in the event for any reason he wished to disinherit his wife.

The sister testifies to continuing cordial relations with her brother (p. 63). The normal relationship continued (p. 62). Requests of the sister and niece to visit, as testified to by the sister and niece, are confirmed by the testator's own letters (p. 232, l. 30; Exhibit A. 17).

It is particularly significant that it is not proved that Mr. Hines explained to the testator that the laws of New Jersey were different from the laws of New York, regarding one-half only being disposable to charity. The subject was apparently not touched by him, although he must have had a copy of the New York will. It may well be that the testator died laboring under the belief that the widow was in any event to receive one-half of his estate.

Dr. Spear, page 141, was an unusually finely equipped doctor. He gave his extensive qualifications; told of the pathology of diabetes, of the many cases he had treated and of the progress and process of the disease; its effect upon blood vessels that go to the brain, its effect in weakening judgment, producing irritability, restlessness, suspicion, disturbance of memory, etc. (p. 142). Confusion arises in the record at this point regarding the hypothetical question having been based in part on letters. This is all later cleared up in full (p. 171). The witness' testimony was clear and convincing to the effect that the testator, when he made the will, was affected with delusions which prevented him from exercising competent reasoning and judgment (p. 149, l. 15). The doctor defined and explained delusions in general and the one existing in the present case in particular and conclusively, established the fact that the delusions which the testator had were of such a nature that he could not do justice to his wife.

The witness, in reply to questions from the Court, admitted that the delusion with reference to the wife, would not necessarily have any bearing on the disposition of property to the sister. The Orphans' Court sustained the will solely on this ground. The witness made it clear that a testator suffering from a delusion such as was proved in this case, could not deal with or appreciate the natural objects of his bounty (p. 150).

The doctor was asked squarely, whether a man who continually harbored such thoughts of his wife, as were proved in this case, would be able to make a will in which the claims of his bounty could be justly, reasonably and fairly dealt with and his answer was:

> "A I would say that that man was absolutely incapable of making a will when her claims are in any way under consideration."

The witness did not think that the testator's experience with his first wife would account for the delusion. The witness, after long examination and after explaining the pathology of the disease, nature of delusions, etc., expressed his clear opinion that beyond reasonable question Mr. McDowell had a fixed delusion which rendered him incapable of making a valid will (p. 149, l. 35).

Dr. Bensley (p. 188) testified that the testator had diabetes; that he died of pneumonia; that he had treated a great many people suffering

from insane delusions and he defined a delusion as an abnormal idea, fixed—not dissipated or thrown off with reasonable ease, and he was asked the question:

> "Q And would one who had a delusion as to his wife's chastity or fidelity be likely to be influenced by that delusion in his testamentary disposition? A I believe he would" (p. 192, l. 35).

The doctor found the testator living in the same quarters with his wife up to the time of his death and nothing in the way he treated her lead him to suspect that there was in existence a will practically disinheriting her (p. 194).

The proponents called Dr. Beling for rebuttal, but on cross examination he was a strong witness for the appellant under the facts clearly proved in this case (p. 199). He was asked a hypothetical question based upon the exact facts proved in this case, from which he was inclined to think that the testator had a delusional state of mind which might be likely to influence his testamentary disposition (p. 199). He presented for us, on the record, a picture of the widow, whom he studied in court. He said that she seemed to be a mild type of woman, looked lady-like; that she was modest in appearance and he repeated that the conditions found in this case proved that the testator had a delusion.

It has been, and will, we believe, continued to be admitted that there is not a scintilla of evidence to show the slightest trace of any basis for jealousy, let alone belief in infidelity. If the testator believed his wife was unfaithful without any foundation of fact, and if that belief could not be shaken, then the proponents' medical expert believed that the testator had a delusion, unequivocally (p. 201). The testator did believe his wife unfaithful. There was no foundation of fact whatever for this belief and that question should not even be disputed.

We rest then with the clearest possible case of proved delusion, as is found by the Judge of the Orphans' Court; with a will unjust on its face, very clearly the evidence of an insane or deluded mind. We respectfully contend that the will must be set aside. In setting it aside, the Court is not concerned in the slightest with the consequences. If it is not a sane and sound testamentary disposition, it cannot be proved. The attack goes to the instrument itself, not to a part of it and the Court is concerned merely with the question as to whether the party initiating the appeal is a party in interest.

Definition of delusion. *Middleditch* v. *Williams,* 45 N. J. Eq. 726, has been much quoted in our reports. The Prerogative Court there said "When a person conceives something extravagant to exist which, however, has no existence but is the creature of his imagination, and when, at the same time having once so conceived he is incapable of being permanently reasoned out of such conception, such person it is safe to say is subject to an insane delusion." The will in that case was rightly sustained because a belief in spiritualism was not held to be evidence of mental unsoundness. The case is a very well considered one dealing with the original situation as it existed in England, where any degree of mental unsoundness, however slight, prevented a valid testamentary disposition. The case then shows the later rule in which the delusion must be such as would be calculated to influence the testator in making his will, the question being whether the transaction would

be affected by the delusion. The Orphans' Court lost track of this important fact and dealt with the case as though the sole question was whether the person initiating the proceeding was the one as to whom the delusion existed.

The question is whether the delusion was of such a character as was likely to influence the testator and where that is shown, the will should be declared invalid.

We are fortunate in having practically no complication of facts in this case. Mr. Beale, a very unwilling witness, testified that the testator made a New York will quite identical with the New Jersey one and mentioned to him that he was doing so because of his views of his wife's conduct. Clearly and without question, a delusion as to a wife's chastity must affect a testamentary disposition. We have here the testimony of a testator's own declaration that he in fact did have such a delusion—he conceived something extravagant to exist which had no existence save in his own imagination. Having conceived it, he was incapable of being reasoned out of that conception and under these facts we have the true test or criterion of insanity. See Middleditch case, page 733.

All the evidence in this case as to the conduct and nature of this wife would leave no rational person capable of believing in her bad conduct or unchastity. The supposed facts that the testator believed had no real existence, excepting in his perverted imagination and against all evidence and probability he held to his morbid delusion. A delusion in that sense is insanity. Middleditch case, page 34.

If in this case we had false evidence or false statements made to the testator on which he

might have relied; if there was any basis for the belief; if the observations of detectives, translation of the Japanese notes; if the fact that he was constantly in the presence of his wife, she devoting her entire life to him, caring for him, nursing him, devoting her every moment to him, was not sufficient to change his mind, he was then the subject of a fixed idea that naturally would have crystallized in the unjust and abnormal will with which we are now dealing.

An insane delusion is a fixed belief based upon supposed facts which exist only in the diseased imagination of the deluded person, persisted in against indisputable evidence of its falsity. *Davenport Will,* 67 N. J. Eq. 320. In that case, there was evidence from which the testator might have believed an attempt was made to poison him. It was a case of mistaken conclusion, but if there had been no basis whatever for the belief, the will in that case would have been set aside.

There can be no such thing as a delusion founded upon facts, but the record in this case puts any fact as to the wife's infidelity or any possible grounds for jealousy or suspicion, entirely out of consideration. The distinction between delusions and mistake is clearly set out *in re Landis,* 24 N. J. L. J. 488. If it was proved in this case that there was actual ground for suspicion, even though not well founded and disbelieved by others, we would have a situation similar to that of *Stackhouse* v. *Horton,* 15 N. J. Eq. 202.

Smith v. *Smith,* 48 N. J. Eq. 556, repeats the definition of a delusion as established in this State. The case restates the proposition that it is one of the requisites of testamentary ca-

pacity in this State that at the time of making the will the testator should possess ability to recognize those who appear the natural objects of his bounty and appreciate the duty which recommends them for consideration. In the Smith case, it was proved that there were no delusions but that the statements by the husband were a clear device upon his part to avoid certain responsibility and to justify a course of treatment towards his relatives and family which would otherwise not have been justifiable. The *Haness Case,* 98 N. J. Eq. 645, properly holds that stupidity in reasoning, or reaching a wrong conclusion from established facts is not proof of lack of testamentary capacity. In the present case, if Mr. Beale had told Mr. McDowell that the detectives reported suspicious circumstances, or that the Japanese figures indicated a love message from the butler, or if the wife was shown to have been away from home a great deal without accounting for her absence, there might have been a basis for suspicion or belief, but every such idea is definitely negatived at every point and we are beyond question driven to the acceptance of delusion as the only possible theory applicable to the case in hand.

In re Doyle, 95 N. J. Eq. 682 (Court of Errors and Appeals), the will was set aside because the testator lacked testamentary capacity.

The opinion of the Orphans' Court indicates that there was no difficulty whatever in finding that the testator was clearly suffering from delusions, but the Court sustained the will because the testator didn't think that the sister was unchaste or trying to poison him or was dead or something of the kind. In this we believe the Court was clearly in error.

The existence of a delusion directed towards a natural object of a testator's bounty must lead to the refusal of probate.

In re Casey, 24 N. J. L. J. 465, the present Justice Trenchard, then Judge of the Cumberland Orphans' Court (1900), dealt with a similar situation. He held that the testatrix's delusion, which was that she had a husband inducing her to make him a beneficiary and leave him some property, compelled the refusal of probate. In that case the sister, who was a caveator, was not a beneficiary and the testatrix had not seen the sister for twenty years. The Court properly, however, held that it was of no importance that the testatrix didn't think that the sister was her husband or that the delusion did not extend in any way toward the sister, and held that the will should not be admitted to probate.

If this opinion of the Orphans' Court could be sustained, we would need to rewrite every definition of testamentary capacity ever laid down heretofore in this State. The question would be not whether the testator knew the natural objects of his bounty; not whether he was able to reason on the problem of making a will and deal fairly with the just desserts of the natural objects of his bounty, but whether the particular person who filed a particular appeal was the subject of the particular, specific delusion. To state the proposition is to establish its falsity.

In re Long, 89 N. Y. Supp. 555, 43 Misc. 560, was we affirm with confidence, rightly decided on principle by the Surrogate of Kings County, in New York, in 1904. The Orphans' Court admits that it entirely sustains our contention, but he thinks that it is weakened by the passage in the opinion referring to Section 2622 of the New

York code. One who will compare that section with the established requirements for a valid will in New Jersey will see that it in no way weakens the opinion whatever.

The Orphans' Court considered that the case of *Stackhouse* v. *Horton,* 15 N. J. Eq. 202, controls. We respectfully urge that the case is no authority whatever for admitting the present will to probate. In the first place, the Court found that there was not a delusion so far as the nephew was concerned, but that there was a basis in fact for the opinion of the testatrix and that the will was justified by reason. In the second place, the Court very properly decided that if a delusion existed toward the nephew, whose father was living, nothing that the Court could do could remedy the situation. It could not make a new will and setting aside the will would not in any way help the nephew. In other words, the decision on principle turns on the point that the nephew was not a party in interest so far as that particular will was concerned. In legal effect that case was no different so far as any language used is concerned, nor on any principle involved, than if a delusion had existed with regard to the Prince of Wales. It is true, as the Orphans' Court suggests, that the Stackhouse case has been frequently cited in the courts of our State, but never even remotely for any such proposition as would justify admitting the McDowell will to probate.

Taking the first, second and third propositions which the Court below establishes (p. 256), we would say, first, the delusion was of such a character as definitely affected and was an operating cause of the testamentary disposition made. Who can doubt for an instant that if

the delusion as to the wife's chastity had not existed, that the testator's will would have been utterly different?

Second, the Court is in a position to restore the objector to an advantage or position which will be lost to her by the interposition of the McDowell will.

Third, it is utterly immaterial whether the delusion extends toward the objector or to some other natural object of the testator's bounty—to some one who will be benefited by the refusal of probate of the abortive document.

There is no way of avoiding the conclusion that if the Orphans' Court is sustained, that the test in this State is not whether or not a delusion exists which prevents the testator from doing justice to the natural objects of his bounty, but whether the particular delusion extends toward the particular person who happens to file the particular caveat or appeal. The Court is in the first instance concerned with whether the case is properly brought before it; that is, whether the machinery is put in motion by a person in interest, and then the question is a simple one of applying the tests so long established as to testamentary capacity.

When carefully analyzed, the language of the Stackhouse case shows that the Court considered the question as to whether or not the delusion adversely affected the objector who sought to set the will aside, merely because in the very long, exhaustive, rather rambling opinion the Court was at the same time concerning its mind with the question as to whether any delusion at all existed (and he found that none did); second, whether the delusion toward a person not an object of the testator's bounty, not an heir-

at-law, not to be benefited by the setting aside of the will, should be given effect in refusing probate. If the Court in the Stackhouse case had found that a delusion did exist; that it existed toward Silas Horton; that he was an heir and one who would take an interest if the will was set aside; if it had happened that the caveator had been some relative properly in interest, it is inconceivable that probate would have been allowed. The delusion in the Stackhouse case did not affect any one in any way interested in the estate legally. That point completely distinguishes it from the case in hand.

In *Merrill* v. *Rush,* 33 N. J. Eq. 537, we had in this State another case of delusion affecting some one who would not be affected by setting aside the will. The question is, first, delusion; second, its relation to the document.

To restate the proposition—one might be suffering from a clear delusion that Roosevelt was the present President of the United States and yet know perfectly the natural objects of his bounty, the property of which he was possessed and the claims of his kin upon him, so that he could make a valid will, but if he supposed that one of his children was dead or that his wife was insane or unfaithful and such was a clear delusion, it would be a clear miscarriage of justice to sustain the will because forsooth the caveat was filed by one other than the one affected by the delusion, or because it was not filed by the wife.

In *Revard* v. *Revard,* 109 Mich. 98, 66 N. W. 681, a testator sane upon every subject except the belief that his daughter was a bad woman or not his offspring, and that his son was a drunkard, was held not capable of making a

valid will. An insane delusion entertained by a testator regarding his wife's fidelity was sufficient to upset a will *in re Gannon,* 21 N. Y. Supp. 960, affirmed 139 N. Y. 654.

Johnson v. *Johnson,* 27 L. R. A. N. S. 78, 105 Md. 81, 65 Atl. Rep. 918, is the well considered case of an insane delusion regarding the chastity of testator's wife and the paternity of his children. See *re Shaw,* 2 Redfern, 107, in which it was held that it was sufficient to set aside a testamentary disposition if the testator had unsound delusions as to any one relative. *Rush* v. *McGee,* 36 Ind. 69, holds that where a testator acts under the influence of a delusion which affects his judgment in relation to those who would be supposed to be the natural objects of his bounty and which prevent him from arriving at rational conclusions in regard to them, his testamentary disposition must be set aside.

Buchanon v. *Belsley,* 72 N. Y. Supp. 601, 65 Appellate Division 58, holds that where an insane delusion exists and can be traced into the will, it will invalidate it. *American Seamen's Friends Society* v. *Hopper,* 33 N. Y. 69, was a case of delusion regarding a wife's chastity and it was held to show a lack of testamentary capacity. This case is cited with approval in the Middleditch case. See also *re Jenkins,* 36 Misc. 681, 80 N. Y. Supp. 664; *Dews* v. *Clark,* 3 Adams Eccl. Rep. 79.

We believe that the language used in the Merrill case, 35 N. J. Eq. 537, page 540, confirms our view as to the meaning of the Prerogative Court in the Stackhouse case. If the Court in the Merrill case had shared the view of the Orphans' Court in the present case, the matter would have been disposed of in an entirely different manner and method.

The question, in its concise form is, did the delusion affect the testamentary disposition under consideration and not did the delusion run against the particular person who had initiated the contest. Where a testator is possessed of a delusion concerning a near relative, a natural heir and a natural object of his bounty, it follows inevitably that he is not possessed of the mental capacity requisite to make a testamentary disposition of his property that will meet the tests laid down for so many years in this State. How can a mind full of delusions concerning one's own kindred be said to conform to the rules established in this State as to mental capacity to make a will? If a part of the will is a result of incapacity, it follows logically that the whole will must fall for the reason that the testator does not possess the mental capacity, by our rules, to make a valid testamentary disposition.

In Jessup's Surrogate Practice, 2nd edition, page 444, cited in the Long case in New York, it is stated that in a matter of this kind two facts must be shown; one, the existence of an insane delusion; two, that such insane delusion operated in making the particular will in question. There is no reason why that should be departed from—no reason on principal, justice or logic. The Court in the Long case further says: "It seems to me that if the will is a product of an insane delusion it makes no difference who is present in the contest or who brings that fact to the attention of the Court. * * * If the testatrix was therefore essentially mad in respect to one of the objects of her bounty, her will should not be admitted to probate, no matter who in particular does or does not contest the same, because it stands to reason that madness pervades her entire testamentary act." This New York case

stands practically on all fours with the case before the Court and is not disturbed in the slightest by anything in the Stackhouse case.

The Casey case in 24 N. J. L. J. 465, would not seem good law or good justice if Justice Trenchard had there held that because the sister who had not seen the testatrix for twenty years did not show that any delusion extended toward her, that therefore the will would be admitted to probate.

In re Triers Will, Appeal of Taylor, 30 Atl. Rep. 1053, Supreme Court of Pennsylvania, January 7, 1895, we find the subject of partial insanity dealt with. It is held that partial insanity is enough to defeat a will where the will is a result of such mental condition (*Tawney* v. *Long,* 76 Pa. 106). By partial insanity is meant not some intermediate stage in the development of mental derangement but disturbance at some particular point not involving the mind at any other point. A person thus affected is said to be under the influence of a delusion. A will made under the influence of such a delusion is the result of the particular form of insanity generally spoken of as partial insanity; and when the fact is clear that the will was so made, its probate will be refused. "The question in any given case is therefore whether the act under investigation was done upon consideration of existing facts or under the influence of a delusion that controlled the will of the doer, and destroyed his freedom of action."

If the opinion of the Orphans' Court in this case should be held to be good law, then it is certain that there are scores of pages of useless and needless learning set out in reports of this State. *In Lozear* v. *Shields,* 23 N. J. Eq.,

page 509 at 510, Chief Justice Beasley, speaking for that court, said that "Mania does not, *per se,* vitiate any transaction, for the question is whether such a transaction was affected by it. Where a pure defence of mental incapacity is interposed, I think the true test, in this class of cases is, whether the party had the ability to comprehend, in a reasonable manner, the nature of the affair in which he participated."

In *Bannister* v. *Jackson,* 45 N. J. Eq. 702, McGill, Ordinary, said at page 705, reaffirming *Waddington* v. *Busby* in the same volume, page 173, "The test of testamentary capacity in this State is, that the testator can comprehend the property he is about to dispose of, the objects of his bounty, the meaning of the business in which he is engaged, the relation of each of these factors to the others and the distribution that is made by the will."

Clearly, under the evidence of the present case, the testator lacked testamentary capacity. Clearly, the matter is brought before the Court by a party in interest so that, in effect, the Orphans' Court opinion holds that not only must there be a lack of testamentary capacity, but that that lack much be concerned with, turn against or about the very person who files an appeal. Vice-Ordinary Van Fleet in *Middleditch* v. *Williams,* 45 Equity 726, states the rule using different language. He reviews the old English cases, starting with *Banks* v. *Goodfellow,* which he says held that the testator must possess sufficient mental power to take into account all the considerations necessary to the proper making of a will; that though he is the subject of some delusion, yet if it appears that such delusion did not influence him and was not calculated to influence him in making his will, his

will is entitled to be regarded as a valid testamentary act and should be upheld.

In the present case, the proof is overwhelming that the delusion did influence Mr. McDowell and must have been calculated to have influenced him.

Again in *Smith* v. *Smith,* 48 Eq. 566, McGill deals with testamentary capacity and delusions. In the opinion he recognized the right of an individual to make an unjust, unfair and capricious will, but he repeats the requisites for capacity to be that the testator shall possess the ability to comprehend those who appear as the natural objects of his bounty and appreciate the duty which recommends them for consideration. In the Smith case, if the testimony had convincingly established that a delusion actually existed in Mr. Smith's mind that children who were unquestionably and properly his own were not his own, the will would never have been sustained, and it would certainly have made no difference to the Ordinary in that case whether the appeal was brought before him by one person or another, so long as the case was rightly before him. Jurisdiction and the powers of the Ordinary are confirmed and reaffirmed in the Smith opinion, which quotes again the Rusling case.

In conclusion, we with deference suggest that the Prerogative Court failed to catch the atmosphere that surrounded the case in the Orphans' Court, and that due consideration was not given to the fact that the widow was a hostile witness and Mr. Beale a hostile, clever and unwilling one; that Dr. Cook was a witness produced by the proponent and that there was an utter absence of any basis for even a suspicion of the wife on any ground.

We have the very highest and finest regard for the very great ability of the Vice-Ordinary in this case, but feel that the assumptions of his opinion when placed beside the justified inferences from the testimony, cannot be sustained.

It is respectfully insisted that the Orphans' Court was in error as to the law and that the will in question should be denied probate.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

In the matter of the estate of EDWARD MCDOWELL, deceased, BEATA MCDOWELL CLAYVILLE-SMITH, *Appellant,* *vs.* MONTCLAIR TRUST COMPANY, *et al.,* *Respondents.*	*On Appeal from the Prerogative Court.*

BRIEF OF RESPONDENT-EXECUTOR.

Respondent is executor, etc. of Edward McDowell, deceased. Appellant is his sister. The widow of deceased does not contest the probate.

Testator was more or less eccentric. Most people are. The old Quaker said, "Janet, all the world is queer but thee and me and sometimes I think thee is a little queer." The hotel mananger, Gillan, summarized the character of testator by saying, "you might call him fussy."

> Q Unusually so? A No, sir, not unusually so (p. 48, l. 21).

He was impatient. The delays at the hotel table annoyed him (p. 51, l. 25). Many people are impatient in the same way when living at a hotel. They pay for service and they want it. His own family physician considered him mentally normal and observed no change during the ten years prior to his death (p. 54, l. 1). He was a man of intelligence and fine mentality.

He apparently had some special motive in declaring himself a resident of New Jersey. This

probably had some relation to the vexing question of taxes. The population of Florida has largely increased during the last few years because so many people feel the same way. His first marriage was unfortunate and left him in a suspicious and jealous frame of mind. This lasted through life, although his mental attitude in this respect varied from time to time, and apparently most of the time he got on pleasantly with his wife and did not permit his suspicion or jealousy to interfere with his happiness. He did, however, from time to time keep watch on his wife and her relations and resented any attention paid her by anyone.

This proves the contrary of a delusion. If he had had a delusion his mind would be made up on the subject. His mental attitude would have been settled once for all. Instead of trying to get evidence one way or the other he would have been fixed in his idea, regardless of evidence.

In these respects testator was not unusual. Common experience tells us that many men have a similar mental attitude of suspicion in regard to their business partners, their investments, motives of their social acquaintances and the purpose behind any statement made or proposal offered to them. The ancient saying, "the burned child dreads the fire," and the old adage, "If a man cheat thee once shame on him; if he cheat thee twice shame on thee," are the result of many ages of human experiences.

It happened that apparently shortly before his death something occurred, perhaps a chance remark of his wife which he misconstrued, and this caused him to write the letter concerning which much is said by appellants. He evidently was a very impulsive man, as was indicated by his

starting for Europe alone on one occasion; but he was evidently capable of taking a second thought and correcting his impulses, as indicated by his wiring to his wife to rejoin him in Europe, and apparently not referring to the subject again.

The opinions of the experts for appellants appear to have been colored by their professional zeal. This was carried to such an extent in the case of the appellant's principal expert, Irving J. Speer, as to lead to a *reductio ad absurdum*. He did concede that anyone obsessed by delusion would be unable to conceal it through a half dozen conversations; and yet a long series of letters extending over a number of years (forming part of appellant's case), indicate a placid mind with a sense of wit and humor, capable of justly weighing the various incidents of life, and they disclose no persuasive indication of a delusion. Yet from the slight testimony with regard to the man's peculiarities, Dr. Speer testifies that it was clear beyond reasonable question in his mind that testator had a fixed delusion and he was incapable of making a valid will (pp. 181-182). "He would say that without reading the will at all." He said that if a testator had made a will strongly in favor of his wife there is nevertheless conclusive evidence that he was not capable of making a will (p. 184). This expert in order to sustain this remarkable conclusion is driven to say (p. 185) that mere suspicion will not account for the incidents set forth in the testimony, and that if testator had been a normal person suspicion would "soon disappear" (p. 185).

Common experience tells us that this is not the case, but that suspicion once planted in the mind will linger indefinitely and is almost impossible to eradicate. He maintains that jealousy can be

in every case dissipated by explanation and by proper action and that it can be made to disappear by proof (p. 187). This is so contrary to the observation of all of us that the doctor's opinion may be dismissed without further comment. His opinion that this testator had a delusion seems to be based entirely upon the idea that jealousy is prompted by reason and so can be dispelled by reason, and that no one continuously remains jealous (p. 187).

A monomania, it is respectfully submitted, involves a belief not merely false but permanent and incapable of being altered by any new facts, and strong enough to dominate the mind harboring it, so as to affect the mental attitude in the ordinary affairs of life *continuously,* and so powerful that in spite of efforts at concealment it obtrudes itself in the speech and action of the individual. If this is an approximately correct understanding it is impossible to conclude that this testator was a monomaniac. Inasmuch as the opposing experts completely differ in their conclusion on this point common sense would dictate the necessity of applying the test of everyday experience to their testimony. The law presumes everyone to be sane until he is *proved* to be insane, and in this case we look in vain for such proof. Many a will contains provisions which superficially might appear to be unjust and yet a fuller understanding of all the circumstances will often show that the supposed injustice involves a highly enlightened decision.

In the present case the testator apparently knew the motives which actuated his father in making the earlier will and felt a sense of trusteeship in carrying out his father's wish. Particularly where his own interest in art was so deep and constant, his action was natural and

we should be slow to criticize it. The evidence with regard to the earning capacity of the wife and of her private means is very meager. The jealousy which he exhibited towards her relations may have been based upon his knowledge of their circumstances and perhaps on the feeling that they were better able to provide for her than he was.

The following cases are cited in appellant's brief:

Middleditch v. *Williams,* 45 N. J. Equity 726;
Davenport Will, 67 N. J. Equity 320;
In Re Landis, 24 N. J. Law Journal 488;
Stackhouse v. *Horton,* 15 N. J. Equity 202;
Smith v. *Smith,* 48 N. J. Equity 556;
Haness Case, 98 N. J. Equity 645;
In Re Doyle, 95 N. J. Equity 682.

It is submitted that the reasoning in these cases applied to the facts in the present case must lead to the probate of the will.

In Re Casey, 24 N. J. Law Journal 465, presented an entirely different set of facts. There the testatrix was under the delusion that she had a husband and, of course, such a belief was the controlling motive in making the will. In the present case the testimony of the experts on both sides agrees on the point that the mental state of the testator with regard to his wife would have no effect adverse to the sister upon his capacity and ability to recognize her as a subject of his bounty, nor did it have any effect upon the will which he actually made so far as the sister was concerned. Since the sister alone is contesting the will her attack upon it must fail.

As to the analysis of the facts and the application of the law proponents are content to rest

upon the masterly exposition of both contained in the opinion of the Vice-Ordinary forming part of the state of the case herein.

Respectfully submitted,

ROBERT M. BOYD, JR.,
Proctor of Executor.