Testimony

Witnesses for Administrator c.t.a.

Witnesses for Harold C. Geary

Exhibits

Notice of Appeal to New Jersey Court of Errors and Appeals

(Filed July 8, 1938)

NEW JERSEY PREROGATIVE COURT 10

In the Matter of the Appeal from the decree of the Orphans' Court of the County of Essex, decreeing that ORLANDO B. LEVAN predeceased John S. Geary and that the estate of said Orlando B. LeVan be distributed according to the terms of the Will admitted to probate in Essex County on September 30, 1935.	On Petition of Appeal. Notice of Appeal.

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Harold C. Geary, Administrator of the estate of John S. Geary, deceased, hereby appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes from those parts of an order or decree made by the Ordinary on the 26th day of April, A. D. 1938, on the advice of Vice Ordinary Maja Leon Berry, in the above entitled cause, reversing the order or decree of the Essex County Orphans' Court, which order, adjudge and decree:

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(1) That so much of the order of the Essex County Orphans' Court, dated the 16th day of June, 1937, has ordered and decreed that "Orlando B. LeVan predeceased John S. Geary, and

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that the estate of Orlando B. LeVan be distributed according to the terms of the will admitted to probate in the said County of Essex on the 30th day of September, 1935", be and the same is hereby reversed, set aside and for nothing holding.

(2) That the said Orlando B. LeVan survived the said John S. Geary and that the estate of the said Orlando B. LeVan be distributed to the appellant, Joseph H. LeVan, as sole surviving next of kin and heir at law of the said Orlando B. LeVan, deceased, in accordance with the statute of distribution of this State.

(3) That the record and proceedings in this cause be remitted to the said Orphans' Court of the County of Essex for further proceedings according to the terms of said order and the practice of said Court.

Dated: July 6th, 1938.

CAREY & LANE
Proctors for Harold C. Geary
Administrator of the Estate
of John S. Geary, deceased.

HARRY LANE
Of Counsel

I conceive that there is good cause for appeal from those parts of the final decree made and entered in the above entitled cause on the 26th day of April, 1938, referred to in the foregoing Notice of Appeal.

HARRY LANE
Of Counsel with Harold C. Geary,
Administrator of the Estate of
John S. Geary, deceased.

(Copies duly served.)

Petition of Appeal to New Jersey Court of Errors and Appeals

(Filed July 21, 1938)

NEW JERSEY COURT OF ERRORS AND APPEALS

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In the Matter of the Appeal from the decree of the Orphans' Court of the County of Essex, decreeing that ORLANDO B. LEVAN predeceased John S. Geary and that the estate of said Orlando B. LeVan be distributed according to the terms of the Will admitted to probate in Essex County on September 30, 1935.	On Appeal from Prerogative Court. Petition of Appeal.

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

The petition of Harold G. Geary, administrator of the Estate of John S. Geary, deceased, appellant in the above entitled cause, respectfully shows that:

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1. Your petitioner finds himself aggrieved by an Order or Decree made in the Prerogative Court by the Ordinary on the 26th day of April, A. D. 1938, on the advice of Vice-Ordinary Maja Leon Berry, in a certain cause in said Prerogative Court wherein Joseph H. LeVan was appellant and your petitioner and John C. Howe, administrator, with the will annexed, of Orlando B. LeVan, were respondents, in that said Order or Decree orders, adjudges and decrees:

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Petition of Appeal to New Jersey Court of Errors and Appeals

(1) That so much of the Order of the Essex County Orphans' Court, dated the 16th day of June, 1937, as ordered and decreed that "Orlando B. LeVan predeceased John S. Geary, and that the estate of Orlando B. LeVan be distributed according to the terms of the will admitted to probate in the said County of Essex on the 30th day of September, 1935", be and the same is hereby reversed, set aside and for nothing holden.

(2) That the said Orlando B. LeVan survived the said John S. Geary and that the estate of the said Orlando B. LeVan be distributed to the appellant, Joseph H. LeVan, as sole surviving next of kin and heir at law of the said Orlando B. LeVan, deceased, in accordance with the statute of distribution of this State.

(3) That the record and proceedings in this cause be remitted to the said Orphans' Court of the County of Essex for further proceedings according to the terms of said order and the practice of said court.

2. And your petitioner appeals from each and every of said parts of said Order or Decree of the Ordinary upon the grounds that the same is erroneous in that:

(a) That said Order or Decree should not have adjudged and decreed as hereinabove set forth.

(b) The said Order or Decree should not have reversed the Order or Decree of the Essex County Orphans' Court appealed from, but

should have affirmed said Order or Decree of the Essex County Orphans' Court.

(c) The court below erroneously held that Orlando B. LeVan survived John S. Geary and that the estate of Orlando B. LeVan be distributed to the appellant, Joseph H. LeVan, as sole surviving next of kin and heir at law of the said Orlando B. LeVan, deceased, in accordance with the statute of distribution. 10

(d) The court below should have held that Orlando B. LeVan predeceased John S. Geary and that the estate of said Orlando B. LeVan be distributed according to the terms of his Will admitted to probate in the County of Essex on the 30th day of September, 1935. 20

(e) The court below erroneously held that the burden of proving that the said John S. Geary survived the said Orlando B. LeVan was on your petitioner.

Your petitioner therefore prays that the said Order or Decree of the New Jersey Prerogative Court made in the particulars aforesaid be reversed, set aside and for nothing holden, that the Order or Decree of the Essex County Orphans' Court may be affirmed, and that your petitioner may have such additional relief in the premises as this Court may deem proper. 30

Carey & Lane
Proctors for Harold S. Geary,
Administrator of the Estate
of John S. Geary, deceased.

Harry Lane
Of Counsel 40

(Copies duly served.)

Last Will and Testament of Orlando B. LeVan

(Admitted to probate by the Surrogate of Essex County, September 30, 1935)

IN THE NAME OF GOD, AMEN!

10 I, Orlando B. LeVan, of the City of Newark, County of Essex and State of New Jersey, being of sound and disposing mind, memory and understanding, and revoking any and all wills heretofore made by me, do hereby make, publish and declare this my Last Will and Testament, in manner and form following:

First: I direct that my funeral expenses and just debts be paid as soon after my decease as may be convenient.

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Second: All the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever situated, I give, devise and bequeath to my wife, Kate LeVan.

Third: In the event that my said wife predecease me, or that we both die at the same time, or at or near the same time as the result of an accident or illness at the same time, I give,
30 devise and bequeath the residue of my estate to my nephew, John S. Geary.

Fourth: I hereby nominate, constitute and appoint as executors of this my will, William T. Cosgrove and John S. Geary, with full power, jointly or by the survivor of them, to sell and convey any real estate of which I die seized and without bond in any jurisdiction whatsoever.

40 In Witness Whereof, I have hereunto affixed my hand and seal this 21st day of April, 1932.

Orlando B. LeVan (LS)

SIGNED, SEALED, PUBLISHED and DECLARED by the abovenamed testator, as and for his Last Will and Testament, in the presence of us who were all present at the same time, and who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses. 10

DOROTHY I. BRADFORD, Arlington, N. J.
RUDOLPH A. HUEBNER, Newark, N. J.
JOHN C. HOWE, Newark, N. J.

Petition of Administrator of Estate of Orlando B. LeVan 20

(Filed in Orphans' Court)
(Filed December 3, 1936)

ESSEX COUNTY ORPHANS' COURT

In the Matter of the Estate of ORLANDO B. LEVAN, Deceased.	Petition.

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The petition of John C. Howe, administrator with the will annexed of the Estate of Orlando B. LeVan, deceased, respectfully shows that:

1. Petitioner is the administrator with the will annexed of the estate of the abovenamed decedent, and in his capacity as administrator as aforesaid has filed with this Court his final ac- 40

counting, which was approved by decree made herein on the 14th day of July, 1936.

2. The aforesaid decedent, Orlando B. LeVan, died on September 18th, 1935, leaving a last will and testament, wherein and whereby he bequeathed to his wife, Kate LeVan, his entire estate, real, personal and mixed, with a further provision that in the event of the death of his said wife, Kate LeVan, prior to himself, then in that event, he devised and bequeathed his entire estate to one John S. Geary, a nephew of his aforesaid wife, Kate LeVan.

3. The aforesaid Kate LeVan, wife of said decedent, predeceased him, her death having occurred on August 21st, 1935.

4. The said John S. Geary, the surviving and sole beneficiary under the aforesaid will of the abovenamed decedent, died on the same day as the said decedent, to wit, on September 18th, 1935, under such circumstances that it is impossible for your petitioner to determine whether or not the said John S. Geary survived the aforesaid decedent, in which event the estate of the said John S. Geary, who died intestate, would be entitled to receive all of the assets and property of the estate of the abovenamed decedent, which your petitioner now holds as administrator; or whether the abovenamed decedent, Orlando B. LeVan, survived the said John S. Geary, in which event the entire estate of the said decedent, which your petitioner holds as aforesaid, would pass to the sole surviving next of kin and heir-at-law of the said decedent, Orlando B. LeVan, who is a brother, one Joseph H. LeVan.

5. The circumstances and facts surrounding the death of the aforesaid decedent, Orlando B. LeVan, and the said John S. Geary, named as beneficiary under the will of said decedent, are briefly as follows: The said decedent, Orlando B. LeVan, and John S. Geary were murdered in the kitchen of the apartment of the said decedent, Orlando B. LeVan, on the second floor of a four-family apartment house at No. 938 South 20th Street, in the City of Newark, Essex County, New Jersey, on September 18th, 1935, by one Charles Russell Geary, a brother of the aforementioned John S. Geary, who immediately thereafter took his own life. In addition to the foregoing there was also murdered in the said apartment at the said time, one Benjamin F. LeVan, who was a brother of the abovenamed decedent, Orlando B. LeVan. There were no eye witnesses to the aforesaid homicides and subsequent investigation has failed to disclose anything upon which even a conjecture could be made regarding the order and point of time of the deaths of the aforementioned parties. The report of the autopsy made by Assistant Medical Examiner for Essex County, Dr. C. G. Berardinelli, upon the bodies of the foregoing parties, shows that death in each instance was caused by gun shot wounds from a 12-gauge repeating shotgun; in each case death being instantaneous due to a rupture of the heart. The report of the said medical examiner further shows that it is impossible for him to determine which one of the aforesaid parties survived the others, in view of the fact that death was instantaneous in each case.

6. Your petitioner has been unable to determine whether the aforementioned John S. Geary

survived the abovenamed decedent, Orlando B. LeVan, and therefore as sole beneficiary under the aforesaid last will and testament of the said abovenamed decedent became entitled to all of the estate of the abovenamed decedent, in which case the administrator of the estate of the said John S. Geary, one Harold C. Geary, would be presently entitled to all of the assets now in the hands of your petitioner, or whether he died before the abovenamed decedent, in which event the said decedent, Orlando B. LeVan, would have died intestate and the aforementioned Joseph H. LeVan, as sole surviving next of kin and heir-at-law would thereupon become entitled to the entire estate of his said brother, the abovenamed decedent. Because of these facts and circumstances, petitioner has been unable to make distribution or disposition of the assets of the abovenamed decedent now in his hands as administrator with the will annexed, as aforesaid.

Your petitioner therefore prays that:

1. This Court make an order instructing and advising him in what manner he should make distribution of the assets of the abovenamed decedent now in his hands, or permit him to deposit the same with the Clerk of this Court.

2. That this Court make an order directing the aforementioned Joseph H. LeVan and Harold C. Geary, administrator of the estate of John S. Geary, deceased, to show cause before this Court why an order should not be made directing the manner in which distribution of the assets of the estate of the abovenamed decedent should be made; and

Petition of Administrator of Estate of Orlando B. LeVan

That this Court direct the manner and method by which service of the aforementioned order to show cause be made upon the aforesaid parties.

And your petitioner will ever pray, etc.

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JOHN C. HOWE

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

JOHN C. HOWE, being duly sworn, according to law, upon his oath deposes and says:

I am the petitioner in the foregoing petition named, and the matters and things therein set forth are true.

JOHN C. HOWE

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Subscribed and sworn to before me this }
1st day of December, 1936. }

DAVID BERNHEIM
An Attorney at Law of New Jersey.

(Copies duly served.)

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Order to Show Cause Entered in Orphans' Court

(Filed December 3, 1936)

ESSEX COUNTY ORPHANS' COURT

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In the Matter of the Estate of Orlando B. LeVan, Deceased.	Order.

This matter being opened to the Court by John C. Howe, Esq., administrator with the will annexed of the estate of the abovenamed decedent, and it appearing upon reading and filing the petition of the said administrator, that he has made a final accounting in this Court, which was approved by decree entered therein on the 14th day of July, 1936; and it further appearing to the Court that the said administrator has been unable to make distribution of the assets remaining in his hands because of the fact that he is unable to determine whether the same is to be paid over to Harold C. Geary, administrator of the estate of John S. Geary, who was the sole beneficiary mentioned in the will of the abovenamed decedent, or whether the entire estate of the abovenamed decedent is to be paid to Joseph H. LeVan, sole surviving next of kin and heir-at-law of the abovenamed decedent, because the said decedent, Orlando B. LeVan and the said John S. Geary both met their deaths on the same day under such circumstances that it is impossible for him to determine whether or not the said

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John S. Geary survived the abovenamed decedent; and it further appearing that the said petitioner has requested this Court to instruct him as to the manner in which distribution of the assets of the estate of the abovenamed decedent is to be made; 10

It is, thereupon, on this 3d day of December, 1936, Ordered that Harold C. Geary, administrator of the estate of John S. Geary, deceased, and Joseph H. LeVan, next of kin and heir-at-law of Orlando B. LeVan, deceased, show cause before Edward L. Strasse, an Advisory Master of this Court on the 14th day of December, 1936, at ten-thirty o'clock in the forenoon, or as soon thereafter as counsel may be heard, at Room 207, 20 Hall of Records, Newark, N. J., why an order should not be made permitting John C. Howe, administrator with the will annexed of the estate of Orlando B. LeVan, deceased, to deposit all of the assets now in his hands, as administrator as aforesaid, with the Clerk of this Court, or why the Court should not make an order directing to whom, and the mode and manner in which the said administrator with the will annexed should make distribution of the assets of the said estate 30 of Orlando B. LeVan, deceased.

It is further Ordered that true copies of this Order and the Petition upon which the same is based, certified by the said John C. Howe, administrator with the will annexed as aforesaid, be mailed to the said Harold C. Geary, administrator, and Joseph H. LeVan with postage prepaid thereon, at their last known address, within 3 days of the date hereof. 40

Daniel J. Brennan

J

(Copies duly served.)

Advisory Master's Report in Orphans' Court

(Filed June 8, 1937)

ESSEX COUNTY ORPHANS' COURT

In the Matter of the Estates of ORLANDO B. and BENJAMIN F. LEVAN, Deceased.	On Petition for Decrees of Distribution. Advisory Master's Report.

JOHN C. HOWE, Administrator.
THOMAS GLYNN WALKER, proctor for Estate of JOHN GEARY.
RUDOLPH A. HUEBNER, proctor for JOSEPH H. LEVAN.
CAREY & LANE, proctors for ROLAND SHERMAN GEARY.
DEBAUN & WESTERVELT, proctors for ANNA TARBEL.

STASSE, Advisory Master.

The will of Orlando B. LeVan was admitted to probate on September 30, 1935.

By the terms of the will the entire estate was left to John S. Geary, a nephew of the wife, provided Orlando's wife predeceased him, which she did. Geary was also named executor in the event of the wife predeceasing the testator.

The will of Benjamin F. LeVan was admitted to probate on September 30, 1935 also. By its terms the entire estate passed to his brother Orlando provided he survived him, and, in the

event he did not, to his sister-in-law, Catherine LeVan, wife of Orlando.

On September 18, 1935, Orlando B. LeVan, Benjamin F. LeVan, his brother, and John S. Geary were found dead in the LeVan home at 938 South 20th Street, Newark, New Jersey. The body of Charles Russell Geary, a brother of John S. Geary, was also found at the same time in another room of the home. It is practically admitted, and I think there is no doubt, that Charles Geary murdered the other three and subsequently committed suicide.

Charles R. Geary had bought a shotgun from Sears-Roebuck. The purchase memo and the gun itself were produced in evidence. The proof is conclusive that this gun was used in the murder of the three and the suicide of Charles.

The deaths occurred late in the evening of the 18th of September, which was a Saturday. That afternoon Charles had borrowed his son-in-law's, Freeman Smith's, car and had driven from his home in Tobyhanna to Newark, leaving about four p. m.

After the crime Charles' wife found a note in a strong box containing his insurance policies, which was in his handwriting and is as follows:

"Dear Dorothy: Just a few lines to let you know the gun I bought I planned to kill Aunt Kate & Uncle Orlie as they spoiled the lives and happiness of our lives also Johns & Mother & many others. Dont think I went mad. I planned this all only God took Aunt Kate before I got a chance. If she would have lived she would have been shot the day she went to go home. Uncle Orlie with her. They were plan-

ning on moving Beulah after promising Mother to let her lay at Rest beside her. Show this letter to John and ask him not to break his mothers promise. Mother cried many times times the way Aunt Kate and Uncle Orlie were useing John. They did not want him when he had no work and could not use him. Dorothy, when I am dead have Russ Frey bury me in the cloths I have home. Bury me from Tobyhanna. Pine Grove Cottage Coffin like Mothers. No flowers. Look after Kate. Adaliade has a husband. Dorothy, don't weap over me unless you begrudge me the rest. So long all of you. My last wish is that you enjoy yourself as you have been wonderful for putting up with me for as long as you did. Good Bye. Charles Russell Geary."

The wife testified that John S. Geary and Orlando Geary had been up to visit them and that she knew of "no unfriendly feeling between any of them."

Charles arrived at a saloon at 872 Clinton Avenue, in the neighborhood, at about seven o'clock. Benjamin was in the saloon at the time of his arrival seated at a table, where he was joined by Charles. They sat and drank and were engaged in conversation which did not arouse any excitement or disturbance. Walter Becker, the bar tender, knew both of them as former customers and testified that nothing seemed wrong to him.

They moved up to the bar where they stood for about ten minutes. Charles left and Benjamin returned to the table.

Charles came back later and they then went

up to the bar, where Becker overheard some of the conversation. It related to something about moving a body, and Charles said that he would not let them move the body. There was no hostility in the attitude of one toward the other, and they both left together. Neither one returned. Becker's recollection is that they left about 11:30 p.m.

At 12:13 on the 19th, less than an hour later, the telephone operator at police headquarters received a call to the effect "that there had been a shooting at 938 South 20th Street."

Captain Rowe of the Police Department immediately left in his car with Detectives Flynn and O'Malley. They all arrived seven or eight minutes later. The radio car had been contacted with and had arrived just prior, and the ambulance from the City Hospital with Dr. Shulman.

After questioning the occupants of the other apartments in the building, the police decided that the call had come from the apartment occupied by the LeVans, and, as they did not get any response, forced the front door of the apartment from the front hall entrance of the second floor. That opened into the dining room.

The first evidence of any shooting was the dead body of Benjamin LeVan on the floor across the threshold of the doorway leading from the kitchen into the dining room. In back of Benjamin LeVan's body was that of Orlando which which was nearer the center of the kitchen with the feet extended partly under the kitchen table. At the opposite end of the kitchen table and between it and the side wall of the kitchen was the body of John Geary.

On further investigation the body of Charles,

the writer of the note, was found on a couch in the front parlor with the gun lying on the floor alongside the couch.

The gun was the pump type, capable of holding six shells. Each shell contained about nine double 0 buck pellets. Two loaded shells and one exploded shell were found in the gun. Three empty shells were also found on the floor.

Dr. Berardinelli, the Assistant County physician, was summoned and found the bodies in the positions as described by the police. He later performed an autopsy on each. His opinion is that each of the three men died instantaneously from gunshot wounds and that he could not give an opinion as to which died first of the three men found in the kitchen. He would not venture an opinion as to whether or not Charles Russell had died previously or subsequently.

All three found in the kitchen were shot in the back and the exit of the bullets was through the chest. From the powder marks about the wounds where the bullets entered, he was of the opinion that the muzzle of the gun was held from three to six inches from the body of John S. Geary and Orlando at the time they were shot, and from the lack of powder marks on the body of Benjamin, that the muzzle of the gun was more than twelve inches from his body.

The car that Charles had used was found in the rear of the premises. There was a rear stairway and an entrance from it to the kitchen.

From the positions of the bodies of the three found in the kitchen, I am of the opinion that they were shot from a point near the center of the room but towards the back entrance. This

is supported from the evidence that the course of the bullets was toward the dining room, marks on the chair and on the floor, the position of Benjamin's body, and the fact that the muzzle of the gun was within three to six inches from the bodies of John Geary and Orlando. There is no evidence that the bodies were moved. 10

There is no presumption of priority of death. *Union Central Life Insurance Company* vs. *Elizabeth Stock Company,* 119 N. J. E. 505; *Masonic Temple Association* vs. *Hannum,* 120 N. J. E. 183.

There are two questions: Upon whom does the burden rest? and: Has the burden been carried by such evidence "supported according to the usual rules of evidence" and "only that evidence which satisfies the ordinary mind"? 20

"Circumstantial evidence is as good and effective as direct." *Union Central Life Insurance Company* vs. *Elizabeth Trust Company, supra.*

In *Masonic Temple Association* vs. *Hannum, supra,* the burden was on the beneficiary of the policy "to show that she was living at the time of the death of her husband" (the assured).

A will being ambulatory and there being no vested rights therein prior to death, the rule applies with equal if not greater force. It therefore rests upon the representative of the estate of John S. Geary. 30

There is a line of cases holding that as between those who would take by descent or distribution and those who would take under a will, the burden is upon the latter. In *re Wilber,* 37 Atl. 634 (Rhode Island); *Young Women's Christian Home* vs. *French,* 187 U. S. 401; *Carpenter* vs. *Severin,* 204 N. W. 448 (Iowa). 40

When Charles Russell Geary left his home at Tobyhanna on Saturday afternoon he definitely intended to kill Orlando B. LeVan, as evidenced by the note he left, Exhibit D-1. There is no suggestion that he intended any harm to his brother John, the inference from the letter, Exhibit D-1, being that he intended to avenge his brother John and their mother as "Aunt Katie and Uncle Oriel," Orlando LeVan, "had spoiled the lives and happiness of them and our lives." After arriving he met Benjamin LeVan at a neighboring saloon, drank with him, and there was not any evidence of ill feeling toward him. The fragmentary conversation overheard by the bartender indicated that there was one subject preying upon his mind.

Charles Russell Geary undoubtedly entered from the rear and the person directly in his path was Orlando. That he shot him first is most probable and reasonable. I am of the opinion that Orlando was his first victim. The evidence establishes that death was instantaneous.

The probabilities are that from the spot where Orlando fell, with the dimensions of the kitchen, the location of the furniture, the length of the gun, one or two steps were sufficient to bring his gun within a foot or less of the body of his brother when the killing mania broke forth. Turning he shot Benjamin as he attempted to escape into the dining room.

I will advise a decree of distribution of the estate of Orlando B. LeVan according to the terms of the will.

I will advise a decree of distribution of the estate of Benjamin F. LeVan in accordance with

the statute of distribution of intestate estates, all the named beneficiaries in his will having predeceased him.

EDWARD L. STASSE
Advisory Master.

Newark, N. J.
Dated: June 8, 1937.

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Decree of Orphans' Court

(Filed June 16, 1937)

ESSEX COUNTY ORPHANS' COURT

In the Matter of the Estates of ORLANDO B. LEVAN, Deceased.	On Petition, etc. Decree.

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JOHN C. HOWE, Administrator with the Will annexed of the Estate of Orlando B. LeVan, deceased, having duly presented to this Court his verified petition, upon which there issued an Order directing Harold C. Geary, Administrator of the Estate of John S. Geary, deceased, and Joseph H. LeVan, next of kin and heir at law of Orlando B. LeVan, deceased, to show cause before the Honorable Edward L. Stasse, an Advisory Master of the Court, why an Order should not be made permitting John C. Howe, Administrator with the Will annexed of the Estate of Orlando B. LeVan, to deposit all of the assets

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now in his hands as Administrator as aforesaid, with the Clerk of the Court, or why the Court should not make an Order directing to whom and the mode and manner in which the said Administrator with the Will annexed should make
10 distribution of the assets of the said Estate of Orlando B. LeVan, deceased, which Order was returnable on the third day of December, 1936, on which date, and within a short time thereafter, all of the parties appeared, testimony was taken, exhibits introduced and received, briefs filed, and argument made.

The said Advisory Master thereafter filed his report wherein he found as a fact that Orlando B. LeVan predeceased John S. Geary, and by
20 reason thereof, advised a Decree of distribution of the Estate of Orlando B. LeVan according to the terms of the Will.

It is on this 16th day of June, 1937, Ordered, Adjudged, and Decreed, that Orlando B. LeVan predeceased John S. Geary, and that the Estate of Orlando B. LeVan be distributed according to the terms of the Will admitted to probate in this the County of Essex, New Jersey, on the
30 30th day of September, A. D. 1935.

It is further Ordered that a Counsel fee be allowed to Skeffington and Walker, Proctors for the Estate of John S. Geary in the sum of 950 —dollars, and to Rudolph A. Huebner, Proctor for Joseph H. LeVan in the sum of 950—dollars, to John C. Howe, Proctor pro se 950 dollars and to Lane & Carey and Devann & Westervelt—235 —dollars each.

It is also further Ordered that a reference fee
40 be allowed to the Advisory Master, Edward L. Stasse in the sum of 750—dollars, and a steno-

graphic fee be allowed to the stenographer who took and transcribed the proceedings in the sum of 54 40/100 dollars.

It is further Ordered that John C. Howe, Administrator with the Will annexed of the Estate of Orlando B. LeVan, pay said Counsel fees, Advisory Master fee, and stenographic fee out of the Estate of Orlando B. LeVan.

Respectfully advised,

Daniel J. Brennan
Judge.

E. L. Stasse
A.M.

A True Copy

Fred Herrigel, Jr.
Surrogate.

Notice of Appeal to New Jersey Prerogative Court

(Filed June 22, 1937)

ESSEX COUNTY ORPHANS' COURT

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In the Matter of the Estate of ORLANDO B. LEVAN, Deceased.	On Petition of Appeal. Notice of Appeal.

Joseph H. LeVan, sole surviving next of kin and heir at law of Orlando B. LeVan, deceased, hereby appeals to the Prerogative Court from so much of the decree entered herein on the 16th day of June, 1937, as ORDERED, ADJUDGED and DECREED that Orlando B. LeVan predeceased John S. Geary, and that the Estate of Orlando B. LeVan be distributed according to the terms of the will admitted to probate in this the County of Essex, New Jersey, on the 30th day of September, A. D. 1933.

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Dated June 21st, 1937.

RUDOLPH A. HUEBNER
Proctor for Appellant,
Joseph H. LeVan.

(Copies duly served.)

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Petition of Appeal to New Jersey Prerogative Court

(Filed July 20, 1937)

NEW JERSEY PREROGATIVE COURT

In the Matter of the Appeal from the Decree of the Orphans' Court of the County of Essex, decreeing that Orlando B. LeVan predeceased John S. Geary and that the Estate of said Orlando B. LeVan be distributed according to the terms of the will admitted to probate in Essex County on September 30, 1935.	On Petition of Appeal. Petition.

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To the Ordinary of the State of New Jersey:

The petition of Joseph H. LeVan, of the Borough of Minersville, County of Schuykill and State of Pennsylvania, respectfully shows that:

1. Petitioner is the brother and sole surviving next of kin and heir at law of Orlando B. LeVan, deceased. On the 16th day of June, 1937, the Orphans' Court of the County of Essex made its order decreeing that Orlando B. LeVan predeceased John S. Geary, and that the Estate of Orlando B. LeVan be distributed according to the terms of the will admitted to probate in the County of Essex, New Jersey, on the 30th day of September, A. D. 1935.

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2. Your petitioner hereby appeals from the following portions of said decree and order:

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From that part of the said decree as ORDERED, ADJUDGED and DECREED that Orlando B. LeVan predeceased John S. Geary and that the Estate of Orlando B. LeVan be distributed according to the terms of the will admitted to probate in this the County of Essex, New Jersey, on the 30th day of September A. D., 1935.

3. Your petitioner complains and alleges that the said decree of the Orphans' Court is erroneous, improper and illegal in the foregoing particulars and your petitioner is aggrieved thereby.

Your petitioner therefore prays that so much of the aforesaid order of said Essex County Orphans' Court as decreed that Orlando B. LeVan predeceased John S. Geary, and that the estate of Orlando B. LeVan be distributed according to the terms of the will admitted to probate in this the County of Essex, New Jersey, on the 30th day of September, A. D., 1935, be reversed, set aside and for nothing holden by this Court, and that he may have such further relief as may be just.

And your petitioner will ever pray, etc.

RUDOLPH A. HUEBNER
Proctor for and of Counsel with
Appellant, Joseph H. LeVan.

Dated, Newark, N. J.
July 19th, 1937.

Petition of Appeal to New Jersey Prerogative Court

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

RUDOLPH A. HUEBNER, being duly sworn, according to law, upon his oath deposes and says: 10

1. I am the proctor and counsel for the petitioner, Joseph H. LeVan, in the foregoing petition, and as such am fully familiar with the facts and statements in the foregoing petition made and have full charge of the management of the appeal herein, and further state that the matters and things contained in said foregoing petition are true to the best of my knowledge and belief.

RUDOLPH A. HUEBNER 20

Subscribed and sworn to before me this }
19th day of July, 1937. }

C. CLIFFORD BRANGS
An Attorney at Law of New Jersey.

(Copies duly served.)

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Answer to Petition of Appeal to New Jersey Prerogative Court

(Filed August 18, 1937)

NEW JERSEY PREROGATIVE COURT

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In the Matter of the Appeal from the Decree of the Orphans' Court of the County of Essex, decreeing that Orlando B. LeVan predeceased John S. Geary and that the Estate of said Orlando B. LeVan be distributed according to the terms of the will admitted to probate in Essex County on September 30th, 1935.	On Petition of Appeal. Answer to Petition of Appeal from part of the Decree of the Essex County Orphans' Court entered on June 16, 1937.

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To the Ordinary of the State of New Jersey:

The Answer of Harold C. Geary, Administrator of the Estate of John S. Geary, deceased, respondent to the Petition of Appeal of Joseph H. LeVan, appellant, shows that:

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1. He has not sufficient knowledge or information to form a belief as to the allegation "Petitioner is the brother and sole surviving next of kin and heir at law of Orlando B. LeVan, deceased.", set forth in paragraph #1 of the Petition of Appeal filed herein, and as to same puts the appellant to his proof.

2. He admits each and every other allegation set forth in said paragraph #1 of the Petition of Appeal filed herein.

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3. He admits the allegations set forth in paragraph #2 of the Petition of Appeal filed herein.

4. He is advised, believes and submits that the Decree complained of is just and in accordance with law, and denies that the Decree or any part thereof is erroneous, improper or illegal, but on the contrary, alleges that the entire Decree is correct, proper and legal. He particularly is advised, believes and submits, that that part of the said Decree as ORDERED, ADJUDGED and DECREED that Orlando B. LeVan predeceased John S. Geary, and that the Estate of Orlando B. LeVan be distributed according to the terms of the Will is just and in accordance with law, and denies that same or any part thereof is erroneous, improper or illegal, but on the contrary, alleges that same is correct, proper and legal.

WHEREFORE he prays that the Decree may be in all things affirmed with costs to be adjudged to this respondent.

SKEFFINGTON & WALKER
Proctors for the Respondent

THOMAS GLYNN WALKER
Of Counsel with Respondent

I, as Proctor for and of Counsel with appellant, Joseph H. LeVan, do hereby request the Court to file the foregoing Answer as of time and waive any and all objections thereto.

RUDOLPH A. HUEBNER
Proctor for and of Counsel with
appellant, Joseph H. LeVan.

(Copies duly served.)

Opinion of Vice Ordinary Berry

Decided April 8, 1938
(123 N. J. Eq. 463)

Syllabus

10 1. A legatee whose right to receive his legacy is dependent upon his survival of the testator must bear the burden of proof touching such survival.

2. The law does not require absolute and direct proof of survivorship, but only such proof as is convincing to the mind of the ordinarily reasonable individual.

3. Where survivorship is sought to be proved
20 by circumstantial evidence, the circumstances upon which the finding of fact is based must lead reasonably and fairly to that conclusion, and to the exclusion of any other equally fair and reasonable result.

4. The circumstances upon which a conclusion is based must themselves be facts; they are of no value if they in turn are based upon a conjecture or assumption.

30 5. The question of whether or not the burden of proof touching survivorship has been sustained depends upon whether or not the evidence, circumstantial or otherwise, is convincing and satisfying to the trier of the fact; and the claimed conclusion must be a more probable hypothesis with reference to the possibilities of other hypotheses.

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40 On Petition of Appeal. On final hearing.

Rudolph A. Huebner, of Newark, for appellant.

Skeffington & Walker, of Newark, for respondent estate of John S. Geary.

John C. Howe, of Newark, pro. se., administrator c. t. a. of the estate of Orlando B. LeVan. 10

BERRY, Vice Ordinary.

This is the most gruesome case ever before me. At 12:13 a. m. on September 19, 1935, the police headquarters telephone operator in Newark received a call and heard a voice say, "I have just killed three men at 938 South 20th Street, come and get me," or words to that effect. Within seven minutes a half-score of policemen, detectives, and physicians were breaking down the door of a second-floor apartment at that address, where they found four men shot to death. Three of them were sprawled on the kitchen floor, and the fourth, the murderer of the other three, was lying on a couch in an adjoining room, a suicide. All had been shot with a sawed-off six-shooter repeating shotgun which was lying on the floor beside the couch on which the suicide murderer lay. The deaths had resulted instantly, and the bodies were still warm. Rigor mortis had not begun. Each had been the victim of one shot fired at close range. There were three empty shells on the kitchen floor; one empty and two loaded shells in the gun. The dead men were Orlando B. LeVan; his brother, Benjamin Le Van; a nephew by marriage, John S. Geary; and Charles Russell Geary, brother of John, who had murdered the other three. There

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were no eyewitnesses to this multiple tragedy, and the first knowledge of it came with the telephone call to the police station.

Orlando left a will naming his wife Kate, or, in the event of her prior death, his nephew John, beneficiary. His only next of kin is a surviving brother, Joseph H. LeVan. John was survived by his brother Charles, who immediately committed suicide, and by his brother Harold, who has been appointed administrator of his estate. Who takes the $20,000 estate of Orlando depends upon whether he or John died first, and that is the sole question to be here determined. If Orlando died first, John's administrator takes; but if John first expired, Orlando's brother inherits. The known *facts* touching this tragedy are that Charles Russell Geary left his home in Tobyhanna, Pa., about 4 p. m. on September 18, 1935, in a borrowed automobile, telling his wife he was going to Newark to see his Uncle Orlando, and that he would return soon. About 9 o'clock that evening he joined Benjamin LeVan in a Newark saloon where they remained talking and drinking until about 11:30 p. m., when they left together. Neither of them was again seen alive. The automobile was found parked in the rear of the LeVan home. A back stairway leads from the yard to the second floor and a small foyer of the LeVan apartment. From this foyer a door opens into the kitchen where the three murdered men were found. The kitchen is about 8x12 feet. The body of Orlando lay sprawled near the center of the room, face downward, in front of the door leading to the dining room, his head under a chair, his unshod right foot under the table and the other doubled under his right

leg. Benjamin was in a partly kneeling position across the threshold of the door leading from the kitchen to the dining room, directly opposite the door from the hall to the kitchen, and a matter of inches from Orlando. John was lying on his face to the extreme left side of the kitchen near the radiator and with his feet and legs entirely under the table. The furniture was not disarranged, and there was no evidence of a struggle. The unexploded gun shells each contained nine buckshot. Both Orlando and John had been shot in the back with a gun the muzzle of which was not more than three to six inches distant, as evidenced by powder marks and burns. Some of the slugs had gone clean through the bodies—others lodged therein. Benjamin was shot in the left side of his chest, a few inches to the left of the left nipple, and some of the slugs had gone clean through his body and out on his right side. The gun was more than a foot distant from his body when fired. There was no powder marks or burns. All had been shot through the heart. The wounds of John and Orlando were of about the same size—one inch in diameter, and were accompanied by like powder marks; that in Benjamin's side was the largest of the three, with a maximum diameter of two and one-half inches, and a minimum of one and one-half inches. Evidently the shots which killed John and Orlando were fired from a point equally distant from both, and that which killed Benjamin was fired a further distance away—not closer than one foot.

Shortly after this tragedy the murderer's widow found, at her home, amongst some insur-

ance papers, an undated letter of which the following is a copy:

"Dear Dorothy:

"Just a few lines to let you know the gun I bought I planned to kill Aunt Kate & Uncle Orlie as they spoiled the lives & happiness of our lives also Johns & Mother & many others. Dont think I went mad I planned this all only God took Aunt Kate before I got a chance. If she would have lived she would have been shot the day she went to go home. Uncle Orlie with her. They were planning on moving Beulah after promising Mother to let her lay at rest beside her Show this letter to John and ask him not to break his Mothers promise. Mother cried many times the way Aunt Kate and Uncle Orlie were useing John. They did not want him when he had no work and could not use him. Dorothy when I am dead have Russ Frey bury me in the cloths I have home. Bury me from Tobyhanna Pine Grove Cottage Coffin like Mothers, No flowers look after Kate. Adaliade has a husband Dorothy don't weap over me unless you begrudge me the rest, So Long all of you. My last wish is that you enjoy yourself as you have been wonderful for putting up with me for as long as you did.

"Good Bye

"Charles Russell Geary."

The letter is in the handwriting of, and signed by, the suicide murderer.

These are all the *known* facts pertinent to this inquiry. It is stipulated that "Charles Russell

Geary fired one or more of the shots in the kitchen in the direction of the wall separating said kitchen from the dining room."

The advisory master to whom this matter was referred by the Essex county orphans' court found that Orlando had predeceased John, and awarded the estate to John's administrator. He based his finding upon the theory that when Charles Russell Geary left his home at Tobyhanna he did so with the definite intention of killing Orlando; that there was no evidence of any intention to harm his brother John; that there was no evidence of any ill feeling toward any one other than Orlando; that the three fatal shots in the kitchen were fired from a point near the center of the room but towards the back entrance; that the murderer "entered from the rear and the person directly in his path was Orlando; that he shot him first is most probable and reasonable—the probabilities are that from the spot where Orlando fell, with the dimensions of the kitchen, the location of the furniture, the length of the gun, one or two steps were sufficient to bring his gun within one foot or less of the body of his brother when the killing mania broke forth; turning, he shot Benjamin as he attempted to escape into the dining room." From the decree of the Essex county orphans' court entered pursuant to this finding an appeal was taken to this court.

In this court, the trial is de novo, notwithstanding it be on the record below. Rusling *v.* Rusling, 36 N.J.Eq. 603; Smith *v.* Smith, 48 N.J. Eq. 566, 25 A. 11; In re Koss' Estate, 105 N. J. Eq. 29, 146 A. 471. Here no additional testimony was submitted, but certain facts were stipulated.

The burden of proof touching the survival of Orlando by John is upon those claiming under him. Masonic Temple Association *v.* Hannum, Executor, 120 N.J.Eq. 183, 184 A. 414; Newell *v.* Nichols, 75 N.Y. 78, 31 Am.Rep. 424; In re Hayward's Will, 143 Misc. 401, 256 N.Y.S. 607, 609; In re Burza's Estate, 151 Misc. 577, 272 N.Y.S. 248, 252; Middeke *v.* Balder, 198 Ill. 590, 64 N.E. 1002, 59 L.R.A. 653, 92 Am.St.Rep. 284. There is no presumption of survivorship in a common disaster. Union Central Life Insurance Company *v.* Elizabeth Trust Company, 119 N.J.Eq. 505, 183 A. 181; Masonic Temple Association *v.* Hannum, Executor, supra. The question of survivorship in such cases is one of fact to be determined according to the usual rules of evidence. The law does not require absolute and direct proof of survivorship, but only such proof as is convincing to the mind of the ordinarily reasonable individual. Union Central Life Insurance Company *v.* Elizabeth Trust Company, supra. While this case is not a common disaster case, the same rules of evidence apply. The deaths of Orlando and John resulted from two separate and distinct acts of a common murderer, albeit from shots fired from the same gun. An interval of time sufficient to direct the aim of the weapon from one to the other necessarily elapsed between the two shootings. As the death of each was instantaneous, the only question to be determined is which was first shot. Who can say with certainty? It must be conceded that the conclusion reached by the advisory master is a permissible one, but it is not exclusive. In re Hayward's Will, supra. There is no absolute

proof, and the result is reached only upon conjecture based upon successive assumptions; but the inferences to be based on permissible assumptions are as strong one way as the other. For instance, it is assumed by the advisory master that Charles Russell Geary entered the apartment from the rear, evidently by way of the back stairway; but the door to this stairway was locked when Officer Flynn tried to enter by that means. It is also assumed that Geary stood near the center of the room when he fired the three shots. Who can say? But assuming that this theory is correct, can there be any positive conclusion as to the direction of the *first* shot? Can the workings of the mind of a murdering maniac be assumed with any degree of certainty? I think not. When a murder-mad man breaks loose, neither reason nor probabilities govern. The evidence shows that the officers had to break down the front door to gain entrance. The back door was also fastened. The four were evidently locked in the apartment when the multiple crime was committed—or did the murderer carefully lock all the doors afterward and before he committed suicide? But upon what basis can it be conclusively assumed that the murderer entered the apartment through the kitchen door? Or that he entered alone with gun in hand and immediately began his shooting? Only about a half hour before, he had left the saloon in company with Benjamin. May they not have entered the apartment together by the front door? May they not all have sat at the table and drunk coffee before the carnage began? There was one coffee cup on the table, others in the sink. Is

it beyond reason that the madman could dissemble at first and then take his associates unawares when his mania burst? True, as the advisory master found, there was no evidence of any intention to harm his brother John—but he killed him; nor Benjamin, but he also fell a victim to the madman's rage. Upon what sure basis can it be said that John was first murdered and that Charles then "turning shot Benjamin as he attempted to escape"? Or that John was shot after Orlando? Given all the admitted facts, we grope blindly for the answer. But it is elusive, and we can only guess what it is. This does not satisfy the law, especially where one guess is as good as another.

The fallacy of the reasoning of the court below is readily seen if we analyze the facts upon which its conclusion is based. The *known* facts have been hereinabove recited. The following assumed facts are mere conjectures:

(1) That Charles entered the apartment from the rear.

(2) That the person directly in his path was Orlando.

(3) That Orlando was first shot.

(4) That Charles took one or two steps from where he stood when he shot Orlando toward his brother John and *then* shot John.

(5) "Turning, he shot Benjamin as he attempted to escape into the dining room."

Obviously, conjecture No. 1 is the foundation for 2, 3, 4, and 5; but there is not the slightest

evidence to support No. 1. If that falls there is nothing left to support the others. True, it is stipulated that "one or more shots were fired in the direction of the wall separating the kitchen and the dining room" and there are certain bullet marks on the furniture and wall indicating that this is so, but it does not follow which of the fatal shots produced these marks.

The circumstances upon which a conclusion is based must themselves be facts; they are of no value if they in turn are based upon a conjecture or assumption. In re Hayward's Will, supra. The conclusion reached by the advisory master depended upon the circumstance, among others, that Charles entered through the back door; but, as previously noted, that "circumstance" is itself a mere conjecture and in no sense a fact from which a conclusion might be drawn.

By a similar process the master might well have come to several different conclusions, had he chosen a different "circumstance" or set of "circumstances" for his original premise. For instance, it is known that Benjamin and Charles left the saloon together at about 11:30 p. m., and that persons in neighboring apartments heard shots fired at 11:45 p. m. Now the question arises, Did Charles and Benjamin go directly from the saloon to the apartment and enter the apartment together? If they did, and the shooting immediately began, as described by the advisory master, how does it happen that Benjamin, as shown by the photographs marked Exhibits 7 and 8, had no coat on when he was shot? Evidently he had been in the apartment long enough to remove his coat—and was the

lone cup on the table one used by him after he came in? The time element suggests that the two must have gone directly from the saloon to the apartment and entered together. If they did, and Benjamin had time to remove his coat, as he unquestionably did, the reconstruction of the crime evolved in the orphans' court has no foundation, for it assumes that Charles started shooting as soon as he entered the back door and that Benjamin was killed as he was trying to escape into the dining room. They could just as well have entered by the front door, and, if they did, who can say in what direction the *first* shot was fired?

From the position of John's body lying on its face between the table and the radiator, how can it be assumed, as it is, that he stood with his face to the left wall when he was shot? Had he been standing in that position how could he have fallen in the position in which he was found without disturbing the radiator cover or the table cover?

The photograph, Exhibit 11, shows that Charles removed his coat before he lay down on the couch where he committed suicide. The coat lies at the head of the couch between it and an ottoman. Upon a cushion on this ottoman is Charles'(?) cap, and plainly visible on the cap is a package of cigarettes. Did Charles, after committing three deliberate murders, calmly lock all the doors, remove his coat, lie down and smoke a cigarette before telephoning the police? And then lie down on the couch and shoot himself?

To return again to Benjamin, it was concluded that he was shot as he was attempting to escape

into the dining room. However, it is equally as probable that when he was shot he was sitting in the chair in the corner between the entrance to the dining room and the door leading to the pantry, and that he fell from that chair in the position in which he was found. As previously noted, he was shot in the left side, some of the slugs passing out through the right side of his body. There appears to be blood on the right arm of the chair; a section of the back of the chair, on the right side, has been shattered by shot, and there is evidence of a bullet hole in the wall to the left rear of the chair. Bearing in mind that but three shots were fired in that room, and that Benjamin was shot in the left side of the chest, had Benjamin been on his way, running, escaping into the dining room when he was shot, as is assumed, no slugs from that shot could possibly have struck the chair and wall at so low an angle. And if Benjamin was in fact seated in the chair, then the whole theory upon which the determination below was based falls, because it can hardly be supposed that he would sit quietly by while Orlando and John were being murdered. And yet if he was shot last, as was found below, and was seated when shot, this is the inevitable, though unbelievable, conclusion to which we are forced. Again, we necessarily revert to the final, inescapable conclusion that no one can determine the sequence of events in that kitchen at the time of the multiple murder, and that one theory is as probable as another. Reconstruction of this wholesale crime affords almost limitless opportunities for inductive reasoning as well as the exercise of the imagination.

While the law does not require absolute and direct proof of survivorship in a cause such as this; and circumstantial evidence, *if convincing,* is as good and effective as direct evidence, Union Central Life Insurance Company *v.* Eliza-
10 beth Trust Company, supra, yet the circumstances upon which the finding of fact is based must lead reasonably and fairly to that conclusion, and to the exclusion of any other *equally* fair and reasonable result. In re Hayward's Will, supra, the rule, quoted from Ruppert *v.* Brooklyn Heights Railway Company, 154 N.Y. 90, 93, 47 N.E. 971, 972, is laid down as follows: "It is entirely true that a material fact in a civil or criminal action may be established by circum-
20 stantial evidence, but the circumstances must be such as to lead fairly and reasonably to the conclusion sought to be established, and *to exclude any other hypothesis fairly and reasonably.* It has been said that circumstantial evidence consists in reasoning from facts which are known or proved, in order to establish such as are conjectured to exist, *but the process is fatally vicious if the circumstance from which we seek*
30 *to deduce the conclusion depends itself upon conjecture.* People *v.* Kennedy, 32 N.Y. 141. In order to prove a fact by circumstances, there should be positive proof of the facts from which the inference or conclusion is to be drawn. The circumstances themselves must be shown, and not left to rest in conjecture; and, when shown, *it must appear that the inference sought is the only one which can fairly and reasonably be drawn from these* facts. People *v.* Harris, 136
40 N.Y. 423, 429, 33 N.E. 65." (Italics mine.)

The quotation is from a criminal case, but

it was quoted in a civil cause involving the fact of survivorship.

Greenleaf, speaking of circumstantial evidence, says: "In civil cases, it is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases it must exclude every other hypothesis but that of the guilt of the party." 1 Gr. Ev. par. 13a.

The weight of modern authority, however, shows that the rule of exclusion is not applied alone in criminal cases. See 10 R.C.L. 1007, Title "Evidence," § 196, and 23 Corpus Juris, par. 1792, and authorities there cited.

Professor Wigmore says: "The claimed conclusion from the offered facts must be a probable or a more probable hypothesis, with reference to the possibility of other hypotheses." 1 Wigmore, 2d Ed., par. 38. (But note that this rule relates to "relevancy" and not to "proof." See par. 31).

In Jackson *v.* Delaware, Lackawanna & Western Railroad Company, 111 N.J.L. 487, 170 A. 22, Err. & App., it was held that, "if circumstantial evidence be such as to afford a fair and reasonable presumption of facts inferred, it is sufficient. The claimed conclusion from the offered fact must be a probable or a more probable hypothesis, with reference to the possibility of other hypotheses." The last sentence was quoted from Wigmore, supra. And in Belyus *v.* Wilkinson, Gaddis & Company, 115 N.J.L. 43, at page 52, 178 A. 181, 186, affirmed 116 N.J.L. 92, 182 A. 873, Professor Wigmore is again quoted, and it is said that "the test is probability rather than certainty." See, also, Hercules Powder

Company *v.* Nieratko, 113 N.J.L. 195, 173 A. 606, affirmed 114 N.J.L. 254, 176 A. 198; Kuczynski *v.* Humphrey, 118 N.J.L. 321, 192 A. 371; Vollkommer *v.* Menge, 118 N.J.L. 360, 192 A. 373. There can be no doubt as to the correctness of
10 the rule of evidence laid down in these New Jersey cases, as applied to the problem therein involved. But it will be noted that all of these cases involved an appeal from a verdict of a jury, and the question presented was whether or not the jury's verdict could be sustained upon the basis of the evidence before it. On such an appeal it is the uniform rule that the verdict of a jury will not be disturbed if there is sufficient evidence to support its findings; and it is quite
20 plain that in such case "the test is probability rather than certainty." But the question here is not—can the judgment of the court below be supported by the facts before it? The hearing in this court is entirely de novo, as in a court of first impression, and the problem involved should be solved without reference to, and uninfluenced by, the action of the court below. The question of whether or not the burden of proof
30 touching survivorship has been sustained depends upon whether or not the evidence, circumstantial or otherwise, is convincing and satisfying to the trier of the fact; and while the conclusion of survivorship need not rest upon an hypothesis which is completely exclusive of every other hypothesis, "the claimed conclusion * * * must be * * * a more probable hypothesis with reference to the possibilities of other hypotheses". Wigmore, supra. This is only another
40 way of saying that the circumstances upon which the finding of fact is based must lead reasonably

and fairly to that conclusion, and to the exclusion of any other *equally* fair and reasonable result.

It seems to me that the evidence here does not satisfy the rule and I am of the opinion that John's administrator has not sustained the burden of proof. Orlando's will was ambulatory until the instant of his death. John's legacy was entirely dependent upon the fact of the prior death of Orlando, and the burden of proving that fact was upon John's administrator.

As was said in Re Burza's Estate, supra, "It is impossible to determine priority of death here and the estate * * * therefore, passed by operation of law to his next of kin." The same statement applies to the estate of Benjamin LeVan. Orlando, or in the event of his death, Orlando's wife, was the beneficiary under Benjamin's will. The burden of proving the survival of Orlando was upon his representative, and that burden has not been sustained. Orlando's wife predeceased both Benjamin and Orlando.

I will advise a decree in accordance with these conclusions.

Decree of New Jersey Prerogative Court

(Filed April 26, 1938)

NEW JERSEY PREROGATIVE COURT

In the Matter of the Appeal from the Decree of the Orphans' Court of the County of Essex, decreeing that Orlando B. LeVan predeceased John S. Geary and that the Estate of said Orlando B. LeVan be distributed according to the terms of the will admitted to probate in Essex County on September 30th, 1935.	5238. On Petition of Appeal. Decree and Remittitur.

This matter coming on to be heard in the presence of Rudolph A. Huebner, proctor and counsel for the appellant, Joseph H. LeVan, and Thomas G. Walker, of Skeffington & Walker, solicitors and counsel for the respondent, Harold C. Geary, administrator of the Estate of John S. Geary, deceased, and John C. Howe, administrator with the will annexed of Orlando B. LeVan, deceased, proctor and counsel pro se, on appeal from the Orphans' Court of the County of Essex, from so much of the decree of said Orphans' Court made in the above entitled matter on the 16th day of June, 1937, as ordered that Orlando B. LeVan predeceased John S. Geary, and that the Estate of Orlando B. LeVan be distributed according to the terms of the will admitted to probate in the said County of Essex on the 30th day of September, 1935, and the court

having considered the records taken in the court below, and having heard and considered in open court the arguments of counsel and the briefs submitted thereon;

It is, on this 26th day of April, 1938, Ordered, Adjudged and Decreed that so much of the order of the Essex County Orphans' Court, dated the 16th day of June, 1937, as ordered and decreed that "Orlando B. LeVan predeceased John S. Geary, and that the Estate of Orlando B. LeVan be distributed according to the terms of the will admitted to probate in the said County of Essex on the 30th day of September, 1935" be and the same is hereby reversed, set aside and for nothing holden; and

It is further Ordered, Adjudged and Decreed that the said Orlando B. LeVan survived the said John S. Geary and that the Estate of the said Orlando B. LeVan be distributed to the appellant, Joseph H. LeVan, as sole surviving next of kin and heir at law of the said Orlando B. LeVan, deceased, in accordance with the statute of distribution of this State; and

It is further Ordered that a counsel fee of Four Hundred Dollars, be allowed to Rudolph A. Huebner, solicitor and counsel for the appellant, together with taxed costs of this appeal, and that a counsel fee of Four Hundred Dollars, be allowed to Skeffington & Walker, solicitors and counsel of the respondent, and that a counsel fee of Two Hundred Dollars, be allowed to John C. Howe, the administrator with the will annexed of the Estate of Orlando B. LeVan and solicitor and counsel pro se; and

It is further Ordered, that the said allowances and costs of this appeal to be taxed be paid out of the Estate of the abovenamed decedent; and

It is further Ordered that the Register of this Court return to the solicitor for the appellant the sum of $100.00 deposit, or the balance thereof, made by him pursuant to the rules of this Court; and

It is further Ordered that the record and proceedings in this cause be remitted to the said Orphans' Court of the County of Essex for further proceedings according to the terms of this order and the practice of said Court.

Luther A. Campbell
C.

Respectfully Advised
Miaja Leon Berry
V. C.

Stipulation in New Jersey Prerogative Court

NEW JERSEY PREROGATIVE COURT

In the Matter of the Appeal from the Decree of the Orphans' Court of the County of Essex, decreeing that Orlando B. LeVan predeceased John S. Geary and that the Estate of said Orlando B. LeVan be distributed according to the terms of the will admitted to probate in Essex County on September 30th, 1935.	Stipulation.

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It is hereby stipulated and agreed that Charles Russell Geary fired one or more of the shots in the kitchen in the direction of the wall separating said kitchen from the dining room.

It is further stipulated and agreed that the attached is a sketch of the floor plan of the kitchen and rear foyer of the premises in question.

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SKEFFINGTON AND WALKER
Proctors for the Estate of
John S. Geary

RUDOLPH A. HUEBNER
Proctor for Joseph H. LeVan

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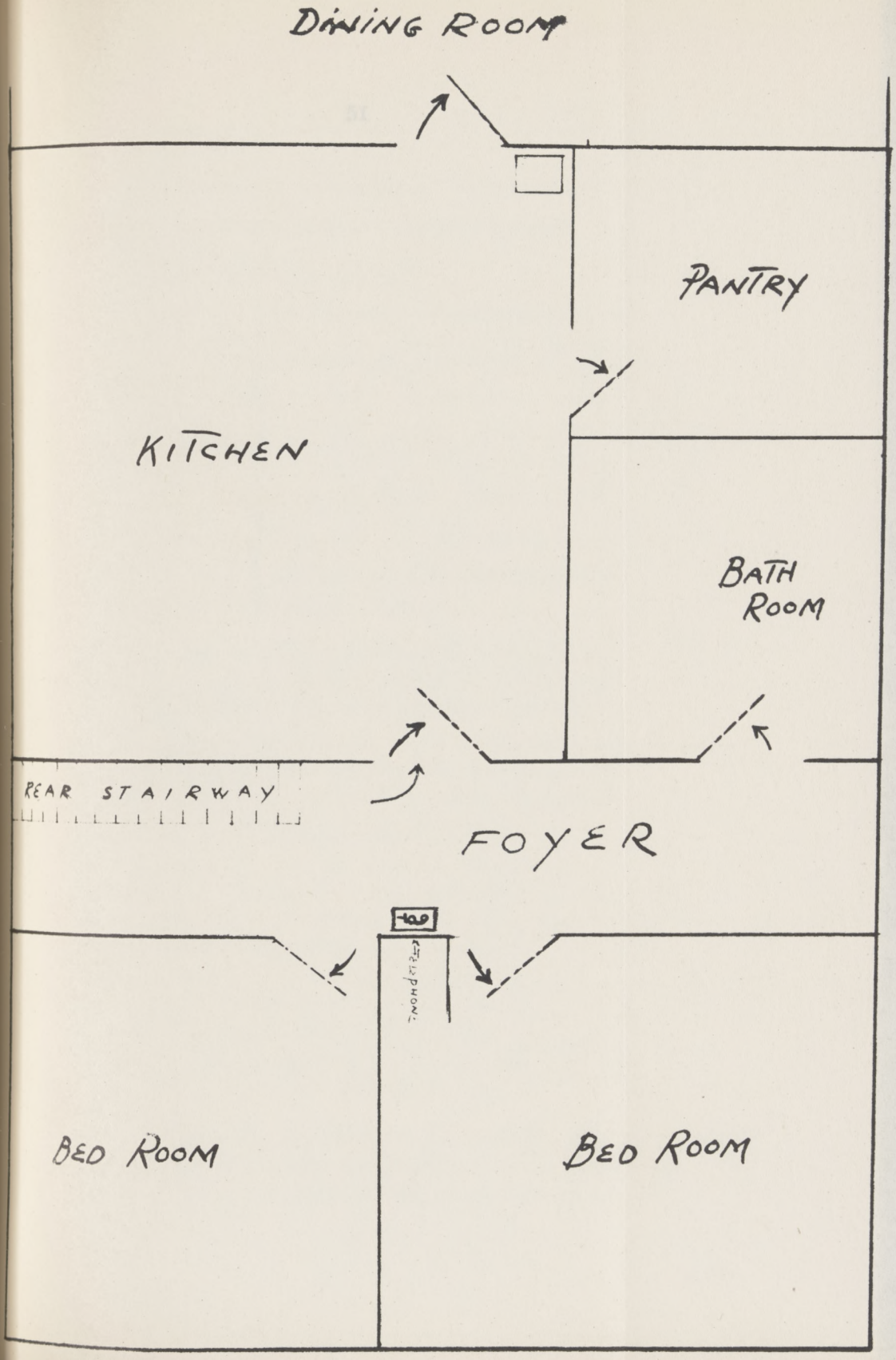
Sketch Annexed to Stipulation

(See Opposite) ☞


DINING ROOM
PANTRY
KITCHEN
BATH ROOM
REAR STAIRWAY
FOYER
TELEPHONE
BED ROOM
BED ROOM

Transcript of Testimony in Orphans' Court

ESSEX COUNTY ORPHANS' COURT

Monday, December 14, 1936.

10 In the Matter of the Estate of ORLANDO B. LEVAN, Dec'd.

In the Matter of the Estate of BENJAMIN F. LEVAN, Dec'd.

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Transcript of testimony taken at the Hall of Records, Newark, New Jersey, on the above date before Hon. Edward L. Stasse, Advisory Master, pursuant to an order of reference signed by the Hon. Daniel J. Brennan, Judge, and in the presence of the following:

JOHN C. HOWE, administrator c.t.a. pro se.

30 THOMAS GLYNN WALKER, proctor for Harold C. Geary.

RUDOLPH A. HUEBNER, proctor for Joseph H. LeVan.

CAREY & LANE (by Daniel C. Knoeptel), proctor for Roland Sherman Geary.

DEVAUN & WESTERVELT (by Jesse B. Leslie), proctor for Anna Tarbel.

Mr. Howe: If your Honor will allow me to 40 enter several stipulations which are agreed upon by counsel here, it will help out the situation.

We won't have to prove them, and I will explain the rest later.

The Advisory Master: Yes.

Mr. Howe: The following stipulations may be entered on the record by consent of Mr. Walker and Mr. Huebner, who represent the two interests in this matter outside of myself as administrator.

Mr. Walker: Could I also have these gentlemen go over those for just one minute so that they will understand?

Mr. Howe: These are the stipulations.

First, that Kate LeVan, wife of Orlando B. LeVan, died August 21, 1935.

2. That I, John C. Howe, was appointed administrator c.t.a. of the estates of Orlando B. LeVan and Benjamin F. LeVan in October 1935, two different dates.

3. That Harold C. Geary was appointed administrator of the estate of John S. Geary, his brother, on December 17, 1935.

4. That the will of Orlando B. LeVan left everything to his wife, Kate LeVan, if she survived him, and if she predeceased him, to her nephew, John S. Geary.

5. That the will of Benjamin F. LeVan left his entire estate to his brother, Orlando B. LeVan, if he survived him, and if he predeceased him, to Kate LeVan, the wife of Orlando B. LeVan.

Now, in order that your Honor might understand briefly what this is all about—

The Advisory Master: Kate—she is out of the picture?

Mr. Howe: She is out except as to the interpretation of possibly one of these wills.

On September 18, 1935, at 938 South 20th Street, Newark, Orlando B. LeVan and Benjamin F. LeVan, brothers, and John S. Geary, a nephew of Kate LeVan, the wife of Orlando B. LeVan, were killed presumably by Charles Russell Geary, brother of John F. Geary.

Kate LeVan predeceased her husband, Orlando B. LeVan. I as administrator c.t.a. of that estate accounted and placed the funds in the estate of Orlando B. LeVan.

According to those two stipulations, Orlando's will left everything to his wife if she survived him, and if not, to her nephew, John F. Geary. She having predeceased him, the question arises as to whether or not the estate of Orlando B. LeVan goes to Joseph H. LeVan, his surviving brother, or to the estate of John F. Geary, the nephew by marriage mentioned in the will.

Benjamin F. LeVan left his estate to his brother, Orlando B. LeVan, if he survived him, and if not, to his brother's wife, Kate LeVan, who was already dead. So the same question arises there, as to whether Benjamin's estate, his brother being dead, goes to the surviving brother or to the estate of John F. Geary, the theory apparently being on the question of who survived.

The Advisory Master: It only goes to John S. Geary by virtue of having gone to the estate—

Mr. Howe: Of Orlando B. LeVan if it did go.

I think that gives your Honor all of the facts. The estate of Charles Russell Geary, the alleged murderer, has nothing to do with this question here at the present time. I believe the proof

will show that Joseph H. LeVan of Minorsville, Pennsylvania, is the sole heir of Orlando and Benjamin.

The Advisory Master: Did John S. Geary die intestate?

Mr. Howe: No, he left a will. Intestate, pardon me, intestate. 10

The Advisory Master: If John S. Geary is entitled, then the alleged murderer would benefit by it, wouldn't he?

Mr. Huebner: He would benefit, his estate.

The Advisory Master: All right. Are there any other facts?

Mr. Howe: Anything that you haven't got quite clear?

The Advisory Master: I understand it so far. 20

Mr. Howe: That is all there is to it. The question that we believe we have to prove is either which one of these murdered men survived, or that we cannot prove that any of them did.

Mr. Walker: If your Honor please, could we enter the appearances at this particular time? Are they already on the record?

The Reporter: Yes, sir. Mr. Thomas, Mr. Walker, Mr. Howe and Mr. Huebner. 30

Mr. Walker: I would also like to have the following appearances entered. They are Daniel C. Knoeptel of Carey & Lane appearing for Roland Sherman Geary, and Jesse B. Leslie of Devaun and Westervelt appearing for Anna Tarbel.

Mr. Huebner: I think, if the Court please, the situation with respect to these latter two appearances is this. As I understand it, one is a sister and the other is a brother of the half-blood of this John S. Geary, and of course they 40

are taking under the estate of John S. Geary, which is represented by Mr. Walker. As far as parties to the record, they do not appear here because the interested parties are not the respective heirs at law and next of kin of John S. Geary, but rather the estate of John S. Geary represented by the administrator, Mr. Harold C. Geary.

The Advisory Master: Well, to simplify the record, I imagine Mr. Walker can confer with the others as to any additional cross-examination that may be necessary.

JOHN L. DAY sworn in behalf of the administrator c.t.a., testifies as follows:

Direct examination by Mr. Howe:

Q. Mr. Day, you are connected with the Newark Police Department, are you not? A. I am.

Q. In what capacity? A. I am official photographer for the department.

Q. For how many years have you been the official photographer? A. Seventeen years.

Q. Did you go to 938 South 20th Street in the City of Newark on September 18th or September 19th, 1935? A. I did.

Q. In your official capacity? A. Yes.

Q. On what date did you go there and at what time? A. I went the early morning of September 19th, shortly after midnight.

Q. Did you take any photographs while you were there? A. I did.

Q. Have you the photographs with you? A. I have.

Q. Did you personally take these photographs? A. Yes, sir.

Q. Did you personally develop them? A. Yes, sir.

Mr. Howe: Is there any objection to marking these?

Mr. Walker: No, I have no objection.

Mr. Howe: I offer these in evidence, your Honor. 10

Q. The six photographs of the individual bodies were made where? A. In Huelsenbeck's Morgue.

Q. On what date? A. The same date.

Q. And the other photographs here were made at South 20th Street on the premises? A. Yes.

(The eight photographs referred to are received in evidence and marked Exhibits P-1 to P-11 inclusive.) 20

Q. I show you Exhibit P-8 and ask you if you know what room of the house that picture was taken in. A. That is the kitchen.

Q. Exhibit P-9. A. Also the kitchen.

Q. Exhibit P-10. A. That is the living room, and a portion of the front parlor.

Q. Exhibit P-11. A. That is the front parlor. 30

Q. I notice in Exhibit P-11 a gun. Did you see that gun there when this picture was taken? A. I did.

Q. Can you identify the body of the man on the bed there? A. No, I don't know him by name.

Q. Can you identify any of these bodies? A. No, sir.

Mr. Howe: That is all.

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Cross examination by Mr. Walker:

Q. Mr. Day, the photographs P-7, P-8, P-9, P-10 and P-11 represent the condition without change as you found it at the time you entered the premises? A. That is right.

10

Mr. Walker: That is all.

Cross examination by Mr. Huebner:

Q. Mr. Day, was this picture taken from the rear entrance to the kitchen facing towards the dining room? A. Yes. This was—

The Advisory Master: Referring to which one?

Mr. Huebner: The interior of the kitchen, P-7.

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A. This was taken off the bedroom door near the rear entrance to the kitchen.

Mr. Walker: Do you want to put the angles of the other pictures on the record, if Mr. Day recalls?

Q. I show you Exhibit P-8. From what point of the kitchen was that photo taken? A. That was a little off the center and closer up. The shot was made in the same direction but a little closer to the dining room or to the front of the house.

30

Q. The same direction as P-7? A. Right.

Q. I show you Exhibit P-8. In what direction was that taken? A. That was taken toward the side of the house and it shows the southerly side of the kitchen.

Q. Showing the kitchen windows? A. Kitchen windows; yes, sir.

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Mr. Huebner: The other pictures, of course, speak for themselves.

Mr. Howe: It has been stipulated that this photograph may be entered as showing the front of the house in which this tragedy occurred, a newspaper photograph. 10

(The photograph referred to is received in evidence and marked Exhibit P-12.)

CARMINE G. BERARDINELLI sworn in behalf of the administrator c.t.a.

Direct examination by Mr. Howe:

Q. Dr. Berardinelli, you are assistant County physician of Essex County, are you not? A. Yes, sir, I am. 20

Q. For how many years have you been assistant county physician? A. Ten years quite.

Q. How many years have you been practicing in the State of New Jersey? A. Thirty-three years.

Q. Thirty-three? A. Yes.

Q. Doctor, were you called to 938 South 20th Street on September 18th, 1935? A. Yes, sir, I was. 30

Q. Do you know at what time, Doctor? A. I went there around eleven o'clock.

Q. Eleven o'clock? A. Or ten-thirty, yes, or about ten-thirty or eleven o'clock, yes.

Q. At night? A. At night on the 18th of September.

Q. When you got there there were a number of policemen there, were there? A. Yes, policemen and detectives. 40

Q. Did you find certain bodies on the second floor of 938 South 20th Street? A. Yes, sir.

Q. In what room did you find them? A. Three in the kitchen and one in the front parlor.

Q. Have you your records here with you? A. Yes, I have.

Q. Of these men? A. Yes, I have.

Q. Will you tell us, Doctor, in what condition you found the three men in the kitchen, and whether or not you can identify any of the bodies? A. Two men were lying between the door connecting the kitchen with the dining room and another body was lying on the floor of the kitchen between the dining table and the radiator, and the wall of the kitchen. Another body was found lying on a couch in the sun parlor. That makes four. Two were lying the near end of the door of the kitchen, one lying on the floor between the dining table and the south wall of the kitchen, and the fourth one was lying on the couch in the front parlor.

Q. Doctor, I show you Exhibit P-7 and ask you if that indicates the positions in which you found the bodies when you arrived on the scene? A. Yes, that is the same position.

Q. Same position? A. Same position, yes.

Q. You can't identify them by name? A. By name, no.

Q. Suppose you tell us what you found upon the examination of the bodies, Doctor. A. One man by the name of Benjamin F. LeVan was shot in the chest in the region of the heart and lungs.

Q. Do you know which body his was in that photograph? A. No, I couldn't tell you this from the photograph. The autopsy on John S. Geary

shows that he was shot through the thorax or through the chest with laceration of the heart and lungs. This Orlando B. LeVan was shot through the chest also with laceration of heart and lungs. And this man committed suicide, Charles Russell Geary. He shot himself through the chest with laceration of the heart, liver and spleen. 10

Q. Do you know in what room that body was found, Doctor? A. This Charles Russell Geary was found in the front parlor lying on the couch.

Q. I show you Exhibit P-11 and ask you if that is the position in which you found that body. A. Yes, that is he. This is the exact position I found him and with the shotgun on the floor. 20

Q. Have you that shotgun with you today? A. Yes, I have it.

Q. What conclusion did you draw as to the manner in which that man met his death? A. By shooting himself through the heart.

Q. What conclusion do you draw as to the manner in which the other three met their deaths? A. That the three in the kitchen were murdered by the man who did commit suicide thereafter. 30

Q. What conclusion, if any, did you draw as to the proximity of the deaths of these individuals to the time of their shooting?

Mr. Walker: I object to that because I think the doctor should tell us what the examination disclosed and it is for the Court to determine.

The Advisory Master: I think he should predicate it on facts, and on the facts that he presents I think he can give an opinion. 40

Mr. Walker: Yes, he could give an opinion.

The Advisory Master: But I think he ought to testify first as to the facts upon which he predicates that opinion.

10 Mr. Walker: Yes.

Mr. Howe: He has already testified as to the manner of the shooting, of the injuries received by the individuals.

The Advisory Master: If that is all that he has, then we will take his opinion for what it is worth. If he has additional facts, I think we ought to have them in the record.

20 Q. Doctor, have you any further facts to give relative to the injuries or the wounds of these three men in the kitchen than what you have already given? A. No. All three were shot through the heart, were shot in the chest and were shot through the heart. All three were lying face down on the floor of the kitchen.

Q. You performed the autopsy, did you not, Doctor? A. In all four.

Q. What was the condition of the hearts of the
30 three men found in the kitchen? A. All three were lacerated.

Q. Lacerated? A. Very extensive laceration in the region of the heart, aorta and the lungs, in all the four cases, even in the man who did commit suicide.

Q. Can you tell from your examination whether or not death in the cases of the three men in the kitchen was instantaneous? A. Yes, it was instantaneous.

40 Q. Can you tell from your examination of the men in the kitchen, together with your autopsies

performed on their bodies, whether or not one man predeceased the other? A. No.

Q. And if so, which man? A. No.

Q. Have you with you the gun which you found at the scene?

By the Advisory Master:

Q. Before you take that, I understand because you say they were shot through the chest, that they were shot from in front and not from in back? A. No.

Q. Is that correct? A. From back and front. For example, I can tell you exactly. Orlando B. LeVan was shot from the back. Point of entrance of the bullets, and the bullets come out through the front. John S. Geary was shot from the back on the right chest and the bullet slugs come out through the left chest, in the front of the left chest, in the front of the left chest. That is John S. Geary.

By Mr. Howe:

Q. You said he was shot? A. In the back.

Q. In the right chest? A. In the right chest, and the slugs came out from the left chest. Benjamin LeVan was shot on the left chest under the armpit.

Q. Doctor, I show you Exhibits P-4 and 2 and 3. Can you from the wounds identify those pictures? A. Yes. This is Orlando LeVan.

Q. This is Exhibit P-4. A. That is Orlando.

Q. Orlando? A. This is Benjamin LeVan. He was shot on the left chest.

Q. Exhibit P-5. A. Under the armpit. This is Benjamin LeVan. And this is Orlando.

Q. This is, Exhibit P-3 is Orlando? A. Yes.

Q. Exhibit P-2. A. This picture is John Geary.

Q. That is P-6. A. P-6, yes.

Q. What is P-2, Doctor, please? A. P-2 is John Geary.

10 Q. Can you identify from your records Exhibit P-1? A. P-1 is Russell, Charles Russell Geary.

Q. Doctor, you have with you the gun which you found on the floor of the sun parlor? A. Yes, on the floor of the sun parlor. What they call a pump gun.

Q. Is this the gun which you found, Doctor? A. Yes.

20 Mr. Howe: May we consider that in evidence, your Honor?

The Advisory Master: Yes.

(The shotgun referred to is received in evidence and marked Exhibit P-13.)

The Witness: These are the slugs.

The Advisory Master: Can we agree as to how many shells that will hold?

The Witness: I don't know how many

30 shells. About six I guess.

Mr. Howe: We will place the police officer on the stand, your Honor.

The Advisory Master: All right.

Q. Doctor, did you find any of the slugs which came from the shells of that gun? A. Yes.

Q. Are they represented by that bottle? A. Yes. There were nine slugs in each one.

Q. Did you take those from an unexploded shell or from the bodies? A. From exploded

40 shells and some from the body.

Mr. Howe: That is all temporarily for me, Doctor.

(The slugs in question, contained in a bottle, are received in evidence and marked Exhibit P-14.)

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Cross examination by Mr. Walker:

Q. Doctor, when you arrived at the premises in question, does Exhibit P-7 show the position in which the bodies were? A. Yes, sir; exactly.

Q. Does Exhibit P-11 show the positions in which the bodies were? A. Exactly.

Q. Did you perform your autopsy upon the premises? A. No.

Q. You removed them where? A. I had to remove the bodies to Huelsenbeck's morgue.

20

Q. It was at the Huelsenbeck's morgue that you performed the autopsy? A. Yes, the next morning.

Q. Now, Doctor, you have identified Exhibit P-1 as that of Russell Geary. A. That is right.

Q. And was Russell Geary killed, in your opinion, with the same gun that was used in killing the other three men? A. What is that?

Q. I say, in your opinion was Russell Geary killed by the same gun which was used in killing the other three men? A. Yes, it is my opinion.

30

Q. Russell Geary's point of entry was at the front of the body? A. The point of entrance, yes, sir, right over the heart.

Q. And it was on the left side? A. Left side, yes.

Q. Did the bullets go through the body, Doctor? A. Not through and through.

Q. They did not go through? A. No.

40

Q. Now, Doctor, I show you the picture Exhibit P-5, which is of Benjamin LeVan. A. Yes.

Q. And the point of entry is on the left side of the body? A. Yes, sir.

Q. Underneath the left armpit? A. Yes, sir.

10 Q. What would be the relation of the point of entry as shown on Exhibit P-5 with respect to the heart? A. The same direction of the heart.

Q. Same? A. Exactly the same direction of the heart.

Q. Now, did you determine the course of the bullets from that point of entry? A. Yes, sir.

Q. May I have the course of the bullets? A. This is Benjamin?

Q. Benjamin LeVan. A. Bullet wound on en-
20 trance three inches below the left armpit and two and a quarter inches to the left of the left nipple.

Q. Two and what? A. Two and a quarter inches to the left of the left nipple. And there were seven wounds of exit on the right side of the chest, seven small wounds of exit on the right side of the chest through and through.

Q. Here is where it entered? A. No, no. The
30 point of entrance was here. The point of exit was here (indicating).

Q. Indicating the left and then the right side? A. Yes.

Q. And there were seven points of exit, is that correct? A. Seven wounds of exit from one-quarter to five-eighths in size with margins everted. One slug was found underneath the skin in the same region.

Q. Now, with respect to the point of entry and
40 point of exit, have you formed an opinion as to the position Benjamin LeVan occupied with re-

spect to Russell Geary at the time Russell Geary discharged the shell at Benjamin? A. Well, maybe was standing and maybe was sitting up in a chair and maybe was lying right there on his right side. We cannot tell exactly.

Q. You have not formed an opinion, Doctor? A. Absolutely not. We cannot say that. I cannot be positive in making my statement. Maybe was sitting up in a chair. Maybe was standing. Maybe was lying on his right side and was shot through the left. We cannot tell.

Q. Can you tell from your examination approximately how close Russell was to Benjamin at the time the gun was discharged? A. Was more than one foot.

Q. More than one foot? A. More than one foot, yes, over one foot.

Q. What enabled you to reach the conclusion, Doctor, that he was more than one foot away? A. Because on the clothes there was not marks of burnings.

Q. On the clothes? A. There were no marks of burnings, and on the flesh, on the skin, there was no impacted powder and no burning.

Q. Doctor, are you able to tell how many feet beyond one foot Russell was from Benjamin at the time of the shot? A. No, we cannot tell that because behind one foot we cannot find no more marks, neither of burnings of the clothes nor of burnings on the flesh, and no darkening, no blackening, no impacted power grain in the skin after one foot.

Q. Doctor, you determined that there were what have been stated to be slugs, that there were nine slugs in each shell. A. Yes, sir.

Q. Considering the point of entry on the body

of Benjamin and the fact that the shell which is alleged to have been discharged from the Russell Geary gun contained nine slugs, have you formed an opinion, considering— A. Yes, I formed an opinion that this shot, Benjamin was shot when he was standing a few feet from the gun, because Benjamin did show a large wound, larger than the others.

Q. Benjamin showed? A. Larger wounds. The wound of Benjamin is two inches and a half by one and one-half at the point of entrance.

Q. Doctor, the farther away the person would be from the discharged gun, the larger the hole at the point of entry, considering the type of shell used, is that correct? A. Well, we have to consider the kind of charge which is in the shell. If he uses a revolver bullet, then the point of entrance is same, but if he used a shotgun, a charge with nine slugs inside, more you are distant from the body, more you have a large wound of entrance, because the bullets, the slugs, when it comes from the barrel, are not together but are large this way, form a kind of a cone with apex at the body, you understand.

Q. These nine slugs would leave the barrel of the gun each a separate slug, wouldn't they, not bound together or fastened together? A. They are bound together in the beginning, and as soon as they come out they are spread.

Q. They are spread? A. Yes.

Q. Have you experimented with the gun in question or with a similar gun and with the same type of slugs to determine the area that the slug, the nine slugs, will cover at respective distances? A. No, I did not make such experiment.

Q. Have you had any experience with them? A. Can I please explain on there?

Q. Yes, Doctor, anything that can help us.

Mr. Huebner: If the Court please, I wonder at this time whether, with all due respect to the doctor's qualifications, whether he is competent to testify as to the ballistics involved in this matter. The police officers are here. They may be more in a position to testify.

The Advisory Master: Have you got the expert from the department of firearms?

Captain Rowe: No. I am not qualified, but there is an expert.

The Advisory Master: I think the doctor's opinion though—

Mr. Huebner: His opinion as to powder marks, yes, certainly, but I mean as to this question of what different guns will do and at what particular distance a gun—

The Witness: No, I cannot tell that.

The Advisory Master: We will take what he has—that is, what he can give us. Then we will have it checked by the experts from the department.

Q. Doctor, you have drawn on the board what seems to be a picture of the muzzle of the gun, is that correct? A. Yes.

Q. At the point of discharge? A. Yes, point of discharge.

Q. And you have drawn lines radiating from the point of discharge, and they are to indicate what, in your opinion, was the course of the

bullet at the time it was discharged? A. Yes, sir.

Q. Doctor, you said that the point of entry on Benjamin measured two and a quarter, is that right? A. Two and a half.

10 Q. Two and one-half. A. Two and one-half by one and one-half.

Q. Well, what is the two and a half? Is that the diameter, Doctor? A. The diameter, yes.

Q. And the one and one-half is what? A. The diameter.

Q. The diameter also? A. The length and width of the wound.

Q. Now, give us on the board if you will a picture indicating the diameter in length and the

20 diameter in width, if you will? A. On the board?

Q. Yes. A. This was the wound. This is the diameter in length. This is the diameter in width, the man standing.

Q. With the man standing? A. Or the man lying on the floor, or seated up on a chair, we have the same picture. It will not change.

Q. The diameter from the head of the man

30 running in the direction of the feet of the man would be one and a half inches, is that correct? A. Yes.

Q. And the diameter running with the man standing from the right side of the man over towards the left side of the man would be two and one-half, is that correct? A. No, you misunderstand me. The wound is large about two and a half inches, and wide one inch and a half, one inch and a quarter.

40 Q. Yes, Doctor, but what I mean: Here is Benjamin LeVan standing, and as you picture

the wound, you picture it on the left side? A. Yes.

Q. As you said, two or a little bit more than two inches away from the left nipple, is that right? A. Yes.

Q. And that wound has a diameter running from the top to the bottom? A. Not from the top. Measure on the chest. 10

Q. That is correct, but I mean if I take it running up and down on the diameter? A. No. It is transverse a little.

Q. What is the diameter of that which is transverse to the body? A. Transverse from the body, because the diameter of the wound is transverse to the body, the maximum diameter. You must take two diameters of this wound. 20

Q. That is correct. A. The maximum and the minimum. The maximum is transverse the body's width. The minimum is this way.

Q. The minimum being the inch and a half. A. What?

Q. I mean, the minimum being the inch and one-half? A. Inch and one-half; yes, sir.

Q. Now, Doctor, I show you exhibits P-3 and P-4, and they are the pictures of Orlando LeVan? A. Orlando LeVan, yes. 30

Q. Now, the point of entry, as you testified, is at the back of Orlando's body? A. That is right.

Q. And on the left side? A. On the left side, yes, sir.

Q. And there is a line of indentation on the photograph which you are now looking at, which is Exhibit P-4, and that line of indentation is the spine of Orlando, isn't it? A. Yes, sir.

Q. How far was that particular point of entry from the spine of Orlando? A. This wound of Benjamin Orlando was situated— 40

Q. No, not Benjamin. A. Orlando LeVan I mean. Was situated five inches and a half below the nape of the neck, four feet about the left hip, and about one and one-half inch to the left of the spine, to the mid line of the spine, I mean.

10 Q. What was the size of that wound? A. About one inch in diameter.

Q. Did any of the slugs which entered at that point go through the body? A. Yes, though the body, yes.

Q. How many of them went through, Doctor? A. The whole charge.

Q. The whole charge? A. The whole charge.

Q. And they came out of the body where, Doctor? A. Came out, point of exit is left an-

20 terior chest. Found three wounds of exit, one one-half inch above left nipple and two below left clavicle; one here on the left nipple and two underneath the left clavicle.

Q. Did they come out. A. Came out from the front here, front of the chest.

Q. On the same side as they had entered at the rear, is that correct; on the same side? A. Same side as the entrance, on the left chest.

30 Q. Now, Doctor, you say that the diameter was one inch, and is that the length and the width? A. About approximately equal, the length and the width of the wound of entrance.

Q. So far as this particular point of entry is contrasted with that of Benjamin's—it was round? A. Yes, bigger.

Q. You said bigger, Doctor? A. The one of Benjamin.

Q. Benjamin's was bigger? A. Yes.

40 Q. And that, in your opinion, indicated that Russell Geary at the time he fired the gun in

question was farther away from Benjamin LeVan than he was at the time he fired it at Orlando? A. Yes, sir. I can say this positively because in Orlando we found that there was slight burning of the flesh, and the edges of the wound were slightly burned. 10

Q. That is on Orlando? A. On Orlando, yes.

Q. That wasn't on Benjamin? A. Powder marks also, and you can see in the picture powder marks here.

Q. Powder marks on the picture here too? A. On the round here. You see this small point here (indicating).

Q. Indicating on P-4. A. Powder marks around here. Burning at the edges of the wound.

Q. Doctor, how close, in your opinion, was Russell Geary to Orlando LeVan at the time he discharged the gun? A. From three to six inches. 20

Q. Doctor, I show you Exhibit P-2, which is a picture of John Geary. A. Yes, sir.

Q. And I also show you Exhibit P-6, which is a picture of John Geary. A. Yes, sir.

Q. Referring to Exhibit P-6, does that show the point of entry? A. This is the point of entrance. 30

Q. On the body of John Geary? A. John Geary, yes.

Q. May I know just where that point of entry is? A. This point of entrance is right of the mid spine, at the right of the mid spine line; at the line of the spine on the right.

Q. On the back of John Geary, is that correct? A. Behind John Geary.

Q. Did you take a measurement with respect to the nape of the neck? A. About an inch in diameter. 40

Q. Did you take a measurement with respect to the nape of the neck? A. No, that is not shown in my report here.

Q. Did you take a measurement from the hip of John Geary? A. Yes. It is eight inches below the nape of the neck and four feet and one inch above the right hip.

Q. What was the diameter? A. About one inch in diameter.

Q. One inch in diameter? A. Yes.

Q. Now, that point of entry was round as contracted with that of the point of entry on the body of Benjamin? A. Yes.

Q. Did you find any powder marks or burns on the body of John? A. Yes, lots of powder marks. Marked powder marks. The burning of the edges of the wound.

Q. And powder marks? A. And powder marks, yes.

Q. How would you describe the powder marks with respect to the number of them? A. Well, we cannot count it. It was more or less microscopical.

Q. Did you use a microscope? A. No, I did not use it.

Q. You did not ascertain the number of powder marks? A. No.

Q. Did you form an opinion by reason of the examination as to how close Russell Geary was with the gun in question at the time? A. Something from three to six inches.

Q. Three to six inches? A. Less than one foot.

Q. You give the same measurement as you gave with respect to Orlando? A. Yes.

Q. In your opinion then, Russell Geary was as close to John Geary at the time he shot him

as he was to Orlando LeVan at the time he shot Orlando? A. Yes, sir.

Q. Now, Doctor, when you went in and looked at this particular kitchen, can you tell us through which door you came, if you know? A. Yes. Through this door here (indicating). 10

Q. You are now indicating the door which is open and shown in Exhibit P-8. A. Yes. This is the door of the kitchen, connecting the kitchen with the dining room.

Q. So that you reached the dining room before you reached the kitchen? A. Certainly.

Q. How did you arrive at the dining room, Doctor? A. Through the entrance door in the hall.

Q. That was on which floor? A. On the second floor. 20

Q. And you arrived at the second floor in the entrance hall on the second floor from where? The front or the rear of the house? A. From the front of the house.

Q. So that when you entered you came through the front doors which are shown in Exhibit P-12? A. Well, I don't remember exactly the front of the house because it was in the night time. I did not take any look there. I cannot state if this is the house or not anyhow. 30

Q. Then you are sure that when you reached the premises in question you entered at the front? A. Yes, I did enter from the front.

Q. And you went upstairs to the— A. I remember this very well.

Q. —second floor? A. Second floor.

Q. From the hall you entered through a door into the dining room? A. Through a door into the dining room. 40

Q. And from there you went into the kitchen. A. In the kitchen to the left front entrance.

Q. So, Doctor, at the time you entered you were obliged to step over the body which we see crouched in that doorway through which you entered, as shown on P-8? A. Yes, I had to pass over this body here to go over and see other bodies which was between this dining table and the wall of the kitchen.

Q. Now, Doctor, did you make any test for the purpose of determining the hour of death or the time of death of Benjamin LeVan? A. Well, at the time of my examination in the kitchen all bodies were warm.

Q. What is that? A. Bodies were warm. There was no rigor mortis set in. It means that they died some time about one hour, half an hour, about one hour, one hour and a half.

Q. Doctor, medical science has advanced today to the point where it is possible to determine the approximate time of death of a person, isn't that so? A. Not to the time to determine—an account of the condition of the weather, conditions of temperature. For example, according to the rigor mortis of the body when the body got stiff.

Q. So I understand, Doctor, you take into consideration the weather? A. The weather, yes.

Q. That means the temperature? A. Temperature.

Q. And that you take into consideration the condition of the body? A. Certainly.

Q. With respect to rigor mortis? A. Yes.

Q. Now, they determine in your calculation the time of death of the person, don't they? A. Approximately. With approximation.

Q. Are they the only things that enter into

your calculation as to the time of death? A. As to the time of death.

Q. Now, Doctor, was there any difference in the bodies of any one or any two or any three of these persons by reason of which you were able to determine whether or not one died before the other? A. No, sir.

Q. Nothing? A. No.

Q. Doctor, were you able to determine whether or not Russell Geary died before the others or after the others? A. No, sir.

Mr. Walker: That is all.

Cross examination by Mr. Huebner:

Q. Just one question Doctor. In each one of these cases the type of wound with respect to the heart—rather, the result of the wound with respect to the heart was identical, is that right? A. Identical. They went all through the heart.

Q. And ruptured the heart, in other words? A. Laceration of the heart.

Q. Now, is it possible, physically possible, for anybody or person to live any time after such a wound as you found in each one of these three bodies takes place? A. I don't think so.

Mr. Huebner: That is all.

By Mr. Walker:

Q. Is there any doubt in your mind, Doctor? A. No, no doubt.

Mr. Walker: I think we might ask him if he would permit us to mark the records in evidence as to the three, and if there is anything there that would be of assistance at a later date, we would have the advantage of the records.

The Witness: This is the name of John S. Geary. The number of the folder is 17,286.

(The folder referred to is received in evidence and marked Exhibit P-15.)

10

The Witness: The folder of Charles Russell Geary is 17,288.

(The folder referred to is received in evidence and marked Exhibit P-16.)

The Witness: The folder of Orlando LeVan is 17,287.

(The folder referred to is received in evidence and marked Exhibit P-17.)

20

The Witness: And the folder of Benjamin F. LeVan is 17,285.

(The folder referred to is received in evidence and marked Exhibit P-18.)

(The last four exhibits are returned to the witness.)

By Mr. Huebner:

30

Q. There is just one question Doctor. These slugs that were removed from the body of Charles Russell Geary, were they of the same type? A. Same type, same size.

40

THOMAS J. ROWE, sworn in behalf of the administrator c.t.a.

Direct examination by Mr. Howe:

Q. Captain Rowe, were you summoned on September 18th or 19th, 1935 to 938 South 20th Street, Newark? A. I was. 10

Q. Do you recall on what day and at what time you arrived there? A. At twelve-thirteen a.m. September 19th, 1935, our telephone operator received a telephone call that there had been a shooting at 938 South 20th Street. The party on the other end of the wire stated that they had just shot three men. We left immediately and I imagine we arrived there within seven or eight minutes; and about twelve-twenty-five Detectives Flynn and O'Malley, after making inquiries around, they broke down the door on the second floor and broke in. At the time they broke the door I was at the foot of the stairs coming up with the doctor, Dr. Shulman from the City Hospital, and the ambulance driver and one or two radio men. We all entered the room about together at the same time. It was about 12:25 a.m. 20

Q. Captain, did you notice a gun lying on the floor of the sun parlor? A. I did. 30

Q. Could you identify the gun? A. I could.

Q. I show you Exhibit P-13 and ask you if this is the gun. A. Yes. At the time I took the number and all like that and I have it at headquarters. This is the gun.

Q. Can you tell us how many shells this gun holds? A. Six.

Q. Did you examine the gun? A. Yes, sir. I had it unloaded in my presence. 40

Q. What did you find as to the number of shells in the gun? A. One discharged shell and two loaded shells.

Q. That was in the gun? A. In the gun.

Q. How many discharged shells, if any, did you find on the premises? A. Three more.

Q. Indicating that four had been shot and two had not been discharged, is that correct? A. That is right.

Q. Can you identify the contents of the bottle marked Exhibit P-14? A. Only in so far as that they are pellets of the double O. It was double O buck that was used in the gun. Some were picked up on the floor and some of these I imagine were taken from the bodies by Dr. Berardinelli at the autopsy.

Q. But that is the type? A. Yes, double O buck.

Mr. Howe: Do you want to ask any questions in reference to this gun? I will permit the interruption at this time in order that Dr. Berardinelli may leave.

Mr. Walker: No, I don't think so.

(Exhibits P-13 and P-14 are returned to Dr. Berardinelli.)

Q. Can you tell us by which door you entered those premises, Captain? A. Yes, sir.

Q. I mean, do you recall how you got into the house? A. Yes, sir. The front door, up the front hall and in the entrance on the second floor which led into the dining room.

Q. As you went into the dining room from the hallway, will you describe, if you recall, the rooms in that apartment? A. The front—

Q. You entered the living room, did you not? A. We entered the dining room.

Q. What was to the right of the dining room? A. To the right on the front was a living room and a sun parlor.

Q. To the left? A. Immediately to the left was a kitchen with a bedroom; in the rear of that another bedroom, and another bedroom to the left of it, and a bathroom. 10

Q. How many doors or entrances were there to this kitchen? A. Three I believe.

Q. Can you recall to what those doors led out of the kitchen? A. One led into the dining room. One led to the rear bedroom, and the other to the rear hall, I believe, a sort of small foyer there. 20

Q. Where did that hall go to? A. Down the back stairs.

Q. I show you Exhibits P-8 and P-9 and ask you if you identify them. A. Yes, sir; I can.

Q. Do you know whether or not those pictures show the scene as you entered the house? A. They do.

Q. Did anybody precede you into that room, the kitchen? A. Well, Detective Flynn maybe by a couple of feet, and I believe the doctor, Dr. Shulman, from the City hospital. 30

Q. But at the time you and your associates broke in no one else had been in there, had they? A. No, sir.

Q. Prior to that time. Can you identify any of these bodies? A. Yes, sir.

Q. Which is the body lying near the radiator? A. That is the body of John Geary.

Q. Which is the body in the immediate foreground of Exhibit P-8? A. Orlando LeVan. 40

Q. The body in the doorway? A. Benjamin LeVan.

Mr. Howe: That is all.

Cross examination by Mr. Huebner:

10

Q. Captain Rowe, did you make an observation of the side walls and the furniture of this kitchen? A. I did.

Q. Now, are the positions of the bodies and the position of the furniture in that room as indicated or as shown on that picture the same as you found that day? A. They are.

Q. Now, with respect to the walls, will you show on these photos whether there was any evidence of any shells having struck any part of the kitchen or furniture, or from your observation,—not only what is disclosed on the photo, but from your observation did you notice whether any slugs had penetrated the walls of the kitchen, or the furniture? A. Well, a chair here, and in this corner there was three or four different slugs picked up.

20

Mr. Huebner: Do you think we had better have that marked?

30

Mr. Walker: Mark on the photo, will you?

The Witness: I will mark where they were picked up. They were picked up on the floor.

Q. Was there any evidence on the chair? A. I believe there was some marks on this chair, but I can't be sure of that.

Q. With respect to the walls, do you recall whether there were any? A. No, I don't recall at this time.

40

Q. Where were the slugs picked up, Captain? A. Around the floor of the kitchen.

Q. Is that away from the kitchen, the back entrance? A. Well, some went under the table and a couple were picked up over by the radiator, and there is a sort of cabinet or something in this corner here. Some were picked up there.

Q. Now, from your examination made of the premises with respect to these bodies, where you found those slugs and where you saw evidence of the shots or slugs having struck the walls or furniture or cabinet, as you testified, did you determine from which direction those shots were fired? A. I could determine that at least one shot was fired from the rear towards the front of the house.

Q. You mean the rear entrance door? A. Yes.

Q. Were there any shells or slugs found, or any marks on the wall immediately adjoining or along the rear entrance door? That wall isn't shown on this photograph? A. No, not to my knowledge, not to my recollection.

Mr. Huebner: That is all.

Cross examination by Mr. Walker:

Q. Taking Exhibit P-8, Captain, you said there were three doors which led to and from the kitchen. Exhibit P-8 shows two doors. A. Yes.

Q. Will you indicate which door—indicate with the letter one—which door comes from the dining room? A. This door here.

Q. Will you mark it? A. (The witness marks the photograph.)

Q. Now, will you indicate door number two as the door which we see to the right of the

photograph as we look at it and tell us where that leads to? A. That door to the best of my recollection leads to a bedroom.

Q. Will you so mark it? A. Number two?

Q. Number two. A. (The witness marks the
10 photograph.)

Q. Now, will you indicate to the best of your recollection where door number three is? A. Almost directly in a line with this. In the rear is a door leading—

Q. Put it down there on the white part, if you can. A. Here?

Q. Yes. A. I will just make an X there (marking the photograph).

Q. The X at the bottom of the picture indicates
20 the line of the front door, which line, in the opinion of the Captain, is in a straight line. A. Or pretty near so.

Q. Or pretty near so. From the door identified as number one towards the rear of the building, is that right? A. Yes.

Q. Now, Captain, as I understand it, you received a call, and that was a telephone call at headquarters, is that right? A. Yes.

30 Q. Did you personally take that call, Captain? A. No. The telephone operator took it.

Q. Did the person who made the call ask to be connected with anyone, or did that person apparently talk direct to the operator? A. He spoke direct to the operator.

Q. And as a result of the conversation which he had with the operator you left at once, is that right? A. Yes, sir.

Q. And when you left at once you took with
40 you whom? A. Detectives Flynn, O'Malley, Ashe and Arnold.

Q. And you went in the one car? A. No. We went in two cars. They were in one car with the department chauffeur and I followed them in my own car.

Q. Who arrived at the premises identified as 938 South 20th Street first? A. They did. 10

Q. And when you arrived where were they? A. When I arrived Detectives O'Malley and Flynn were on the landing on the second floor, and as I entered the hallway at the second floor they were just breaking down the door, starting to break down the door. I rushed up the stairs and followed them in. Detectives Arnold and Ashe at that time were inspecting an automobile which was in the rear of the premises and looking in the garages. 20

Q. I show you Exhibit P-12 and I ask if that is the house in question. A. Yes, sir; it is.

Q. Can you indicate, if possible, on that particular photograph where the car that you have referred to as being inspected was? A. The car was directly in the rear of the house.

Q. Directly in the rear of the house? A. Yes.

Q. You went up the front way, didn't you, Captain? A. Yes. 30

Q. And when you reached the door on the second landing, that was the door through which entry was gained by reason of breaking down the door? A. Yes, sir. We did not break it down. We forced it in. The lock gave and we forced it in.

Q. Was it locked, Captain? A. It was locked.

Q. Who entered first, Captain? A. Detective Flynn.

Q. You entered into what room? A. We entered right into the dining room. 40

Q. You are of the opinion that Detective Flynn was the first one to enter these premises? A. Yes, sir.

Q. When you went into the dining room did you turn to your left or turn to your right in order to go to the kitchen? A. Turned to our left.

Q. And then you reached the door, and was that door open or closed, do you remember? A. The door to the kitchen?

Q. That is correct. A. The door was open because the body of Benjamin LeVan was lying right in the doorway, midway between the two rooms.

Q. Midway between the two rooms. Which way did the door open? Did it open back into the kitchen or did the door open from the kitchen into the dining room? A. I am not really sure that there was a door there. I don't remember if there was a door.

Q. Well, if we look at Exhibit P-8 we see to the right side of the picture what appears to be the edge of a swinging door. A. Then this door would open into the dining room.

Q. And was the body of Benjamin LeVan in the position that P-8 shows it at the time you entered it? A. It was.

Q. Did you have to step around that, Captain? A. We had to step by it. There was room to step by it.

Q. Did you make your entry into the kitchen first before going to any other part of the house? A. Yes, I did.

Q. And when you went into the kitchen you found Benjamin LeVan in that position? A. Yes, sir.

Q. Orlando LeVan, the one near the foreground of the picture, in the position there between the door which you have identified as number two and the table? A. Yes, sir; in that position.

Q. And looking at that picture now, can you tell us where this John Geary was? A. John Geary,—coming in the door this way John Geary is over to the right just beyond this table and near the radiator with his head towards the rear of the house. 10

Q. Head towards the rear? A. Yes, sir.

Q. He was on the other side of the table? A. Yes, sir.

Q. The table separated him from Orlando? A. Yes. 20

Q. That was in between them. Now, was there any other body in the kitchen? A. No.

Q. From there where did you go, Captain? A. I heard somebody sing out, "Here is another body," and so then I went into the sun parlor and found the other body in there.

Q. In returning to the sun parlor you retraced some of your steps in that you had to pass through the dining room, is that correct? A. Yes. 30

Q. You went to the front of the house? A. Yes.

Q. And it was in the front of the house that you found the fourth body? A. Yes.

Q. And the fourth body was lying on the sofa which has been identified in the picture, P-11? A. That is right.

Q. Now, Captain, after finding that body, did you make a tour of inspection through the house? A. Yes, I did. 40

Q. Did you return to the kitchen? A. Yes.

Q. Did you when you returned to the kitchen leave the kitchen by any door other than the one that you had entered it by; that is, the door from the dining room? A. Well, I was into the bedrooms and I was into the bathroom and I was into the hall.

Q. And where was the hall that you have just referred to? A. It is in the rear, and I imagine that there must be a fourth door leading off the kitchen.

Q. When you went to the hall which is at the rear you have identified a door as number one, another door as number two, and you have indicated with an X the line of door number three. Was it the door which you have indicated with the X as the line of door number three that you went to in that rear hall? Do you know? If you don't know, I think we may have somebody else who might remember. A. I don't know. I don't remember.

Q. I was just interested in having your recollection on what the picture was at the time you entered the premises and made your inspection. Did you go down the stairs at the rear? A. No, I did not.

Q. Did you go to the automobile which was at the rear? A. Yes.

Q. How did you reach the automobile? A. I went around by the driveway.

Q. You went up the driveway? A. Yes.

Q. And that was by coming out the front door? A. Coming out the front door.

Q. You came down the front stairway to the front door out and around the driveway to the rear? A. Yes, sir.

Q. Now, when you reached that automobile, did you make an examination of it? A. I did not; no, sir.

Q. Did you make any inquiry as to whose automobile it was? A. Yes.

Q. Whose automobile did you ascertain it to be? A. Well, through the license number—May I refer to these notes? 10

Q. Certainly. A. We learned that the automobile, the Ford roadster, Pennsylvania license 82-08-L, belonged to Freeman Smith, Tobyhanna, I believe, Tobyhanna, Pennsylvania.

Q. Did you get the street address or the number of Freeman Smith? A. No, sir.

Q. Did you thereafter interview Freeman Smith? A. I did. 20

Q. Where did you interview him? A. At police headquarters.

Q. Had he been about the premises when you arrived there? A. No.

Q. Did you ascertain subsequently where Freeman Smith was, or did he come to police headquarters? A. He came to police headquarters, Newark, the following day. He, if I remember rightly, is a son-in-law of Charles Russell Geary. 30

Q. Had he been in Newark on the night before, to your knowledge? A. No, he had not.

Q. By interrogating were you able to ascertain where he had been the night before? A. Yes. He had been in Pennsylvania and stayed in Pennsylvania.

Q. Did he say how his car left Pennsylvania and happened to be at the rear of the premises in question? A. He said he had about four o'clock in the afternoon or so, he had lent it to Charles Russell Geary, who went to Newark. 40

Q. Upon what date was it, if you remember? A. On the 18th of September.

Q. September 18, 1935 at four p.m. in the afternoon he had loaned his car to Russell Geary? A. Yes, sir.

10 Q. Now, is there anything else that you know about the setup or the facts and circumstances which you think might be of interest to us, Captain? A. No, I can't think of anything more.

Q. I believe you were asked whether or not you made an examination of the different walls of the kitchen to tell whether or not any of the slugs which have been identified were imbedded, or slugs similar to those, were imbedded in the walls? A. I believe there were a few nicks on

20 the wall, but I don't believe there were any imbedded in the walls.

Q. Can you show us where these nicks were? A. No, I couldn't, now now.

Q. You don't know the directions of the shells or slugs before they came in contact with the wall and nicked it, do you? A. No, I don't.

Q. Now, Captain, you have said that one shot came from the rear, and by that you mean the

30 rear of the— A. The rear of the house.

Q. The rear of the house? A. Yes.

Q. From the rear wall of the house with respect to the kitchen, is that so? A. Yes, sir.

Q. And what course? Is there any picture which might show the course of that particular shot? A. I think there is a better picture than this one.

Q. All right. This seems to be a better one, Exhibit P-7. A. The course of this particular

40 shot that I speak about, because over in this corner I believe there was a couple of pellets picked

up there between the body of Benjamin LeVan and the wall. After he was picked up they rolled out. And the woodwork on the floor was nicked on that particular doorway.

Q. And you are now indicating on Exhibit P-7 the right side of that picture as you look at it, and particularly the chair which is shown on the extreme right side of it, and which chair is out on the corner of the kitchen near the swinging door or the door into the dining room? A. That is right.

Mr. Walker: That is all.

By Mr. Huebner:

Q. Just to get the record straight on this point. You at that time, Captain, were in charge of the night detective bureau, Newark? A. Yes, sir.

Q. So that this entire investigation at this time, or at that time of the night, was under your direction? A. It was.

Q. And all these other officers who were with you were under your immediate direction at the time? A. They were.

Q. Do you know whether or not they had touched or done anything before you actually got in the room with them? A. No, they did not.

Q. And everything that they did in the room at that time was done under your direction or instruction? A. Well, they worked pretty fast when everybody got in there. The doctor started to examine the bodies right away, and one went to one body and one went to the other, but as soon as we got straightened out it was under my direction.

Q. Does that picture show the exact position of the bodies in which you found them at the

time—that is, Exhibit P-7, which shows all three bodies, three of the four bodies? A. Three bodies. Everything was the same, the conditions, except we ripped open the shirt to get at the wounds. That is the only change that is
10 made between our entering and the time the picture was taken, for the doctor to put the stethoscope on them.

Q. That is the interne that you have referred to? A. I don't know whether he is an interne. He is on the ambulance. Dr. Shulman is his name.

Q. The doctor who accompanied the City ambulance? A. Yes.

Q. Did you make an investigation, Captain, of
20 the neighbors of the apartment? A. We did.

Q. With respect to whether they had heard or seen anything? A. We did.

Q. What did that investigation disclose? A. That investigation disclosed from another tenant of the house that around 11:45 p.m. on the 18th they had heard some bangings or loud noises which sounded like a door slamming or a backfire, and the people downstairs and across the
30 hall I believe got up, and when nothing developed or they did not hear any outcries or any noise, they went back to bed again, and then they were awakened upon our arrival.

Q. Did your investigation ascertain any eye witnesses to this? A. No eye witnesses; no, sir.

By Mr. Walker:

Q. Captain, did you get the names of these particular persons? A. Yes, we have them.

40 Q. May we have them? A. A gentleman by the name of Charles Westerlund, thirty-four

years old, and lives on the second floor. People downstairs, their names are on record in headquarters, but I don't think they knew very much about it at that time. I can get it and send it to you if you want.

Q. Captain, on Exhibit P-7 you indicated that certain slugs were found in the right-hand corner of the room. Did you notice whether or not there were any slug holes on the left-hand corner of the room in the vicinity of the table or cabinet? A. There is one mark above the table there, but I don't just remember whether that was there or not. 10

Q. Above the table where? On the wall or on the cabinet? A. On the wall.

Q. Do you recall whether there were any slugs in the cabinet? A. No, I don't. 20

Q. Now, you indicated a point directly opposite this dining room door, another entrance to the kitchen, is that correct? A. I did not say directly. I said about in line.

Q. Well, about in line with it? A. Yes, sir.

Q. Do you recall where that entrance led to, the last one you mentioned in a line with the dining room door? A. I think it led into the rear bedroom, the bedroom in the rear of the kitchen. That is my recollection at this time. 30

Q. You also stated that you thought this door to the right of this door was the toilet, did you not? A. It is either the bathroom or another bedroom. There were two bedrooms.

Q. Do you recall seeing a pantry there? A. No, I don't at this time. It is possible there was.

Q. Do you recall where the door was that goes down the back stairs with relation to this dining room door that you can see on Exhibit P-7? A. 40

Well, as you enter the kitchen the door that leads downstairs would be on the left running off from the left wall as you enter the kitchen from the dining room.

Q. On the left? A. To your left. To your left as you walk in.

Q. The door leading to the rear stairway is to your left as you walk into the kitchen? A. That is my recollection, yes.

Mr. Howe: All right, never mind. That is all, Captain.

Your Honor, I am willing to permit the interruption of the case that I am presenting in order that one of Mr. Walker's witnesses may testify and leave.

WALTER BECKER, sworn in behalf of Harold C. Geary.

Direct examination by Mr. Walker:

Q. Mr. Becker, where do you reside? A. 1014 Springfield Avenue.

Q. What is your business? A. Bartender.

Q. On September 18, 1935 where were you working? A. 872 Clinton Avenue.

Q. On that particular day did you see the gentleman whose picture is shown in Exhibit P-1 in that tavern that you were working in? A. Yes, sir.

Q. On that particular day did you see the man whose picture is shown in Exhibit P-3? A. He was not in the tavern.

Q. I show you Exhibit P-5 and ask you if the man whose picture that is was in the tavern. A. He was, yes.

Q. And was there anybody else with those two gentlemen? A. No, sir.

Q. Those two gentlemen, and you have identified the pictures of Russell Geary and of Benjamin LeVan, were in the tavern together? A. Yes, sir. 10

Q. Now, about when did they come into the tavern? A. Well, LeVan, he was there,—Benjamin was there, came in about seven o'clock.

Q. Seven o'clock. Did you know Benjamin LeVan? A. Yes.

Q. How long had you known him? A. About a year.

Q. And during that particular year had he frequented the tavern where you were employed? A. Yes. 20

Q. On occasions? A. Yes.

Q. Were those visits frequent? A. Yes.

Q. And when he came in on September 18, 1935 at about seven o'clock in the evening, was there anybody with him? A. Nobody.

Q. Did somebody thereafter join him? A. Only Russell.

Q. About what time did Russell come in and join him? A. Nine o'clock. 30

Q. And when Russell came in and joined Benjamin LeVan, where was Benjamin LeVan? A. He was sitting on a chair.

Q. Was that at one of the tables in the place? A. Yes, sir.

Q. When Russell joined him did Benjamin LeVan leave where he was to go to another place or did Russell sit at the place where Benjamin was? A. Russell stayed about half an hour.

Q. And did they sit at that particular point where Benjamin was? During that particular 40

time did they engage in conversation? A. They were talking at the table.

Q. Did you overhear the conversation? A. Not at the table. I heard nothing.

Q. Did you overhear any part of the conversation at the table? A. No, sir.

Q. What was their attitude one with respect to the other while they were at the table during the time they stayed at the table? A. Oh, did not seem nothing wrong to me.

Q. Now, did they leave the table? A. Yes.

Q. And where did they go after they left the table? A. Up to the bar.

Q. And when they came to the bar did they stand at the bar? A. For about ten minutes.

Q. During that time were they engaged in conversation? A. They were talking together.

Q. Did you hear the conversation? A. Not at that time, no. I heard none of it.

Q. Did they leave the bar and go any place? A. Russell left the bar and went out.

Q. And when Russell left the bar and went out, where did Benjamin go? A. He sat down at the table again.

Q. And thereafter was he joined again by Russell? A. Later, yes.

Q. Was he joined by anybody else? A. Nobody else.

Q. And when he was joined by Russell the second time, did they stay at the table or did they come up to the bar? A. Came up to the bar again.

Q. And when they came up to the bar, can you tell whether or not the appearance of Russell had changed, or the appearance of Benjamin? A. No, I couldn't say that.

Q. Did anything take place when Russell came back the second time? A. No.

Q. They came up to the bar at the time of Russell's second visit? A. Yes.

Q. And did they engage in conversation then? A. Yes, they were talking. 10

Q. Did you overhear the conversation at that time? A. There was only one thing I heard, because I was busy, and the only thing I heard him talking about was,—because I was busy.

Q. Now, we are interested in knowing what you heard them talking about. A. Well, I heard them talking about,—it was something about a body, and whose I don't know.

Q. And what did they say about that body? A. If I can remember right, it was something 20 about moving a body.

Q. Moving a body, and who made the statement? To whom was it made? A. Russell said it to Benjamin.

Q. Now, think for a few minutes because it is rather important. We are anxious to know just what Russell said as nearly as you can remember it, to Benjamin. A. I couldn't say the words. I don't remember so clearly because I wasn't 30 paying so much attention to it.

Q. In substance what was it as you recollect it? A. This Russell said in a way that he wouldn't let them move somebody. That is all.

Q. That he, Russell, wouldn't let them move somebody, and that was directed to Benjamin, was it? A. That is all.

Q. Now, thereafter did Russell leave the place? A. He went out with Benjamin.

Q. Did they leave together? A. Yes. 40

Q. And during the time that they were there

did their attitude seem hostile, one as to the other? A. Not to me.

Q. They appeared to be carrying on normally? A. Yes. That is why I paid no attention. Just the same as they always are.

10 Q. Had you seen Russell in there before? A. Yes.

Q. Did you know Russell by sight? A. Yes.

Q. And had he been there on occasions prior to this particular night with Benjamin? A. Yes.

Q. Had he been there on occasions with anybody else? A. Nobody.

Q. The only one he had ever come there with, to the best of your recollection, was Benjamin? A. That is right.

20 Q. Now, when they left, they both left together, you say? A. Yes.

Q. And that was the last time you saw Benjamin alive? A. Alive.

Q. Was it the last time you saw Russell alive? A. Yes.

Q. Benjamin did not return to the saloon; nor did Russell return to the saloon? A. No.

Mr. Walker: Cross-examine.

30

Cross examination by Mr. Huebner:

Q. What time was that, Mr. Becker, that they left the last time? A. As near as I could remember, I guess it was around half-past eleven.

Q. About 11:30? A. Eleven-thirty, eleven o'clock, between eleven and eleven-thirty.

Q. Did Russell Geary have anything in his arm? A. Nothing at all.

Q. Nothing like a shotgun wrapped up? A.

40 No.

Q. Or no bag or anything? A. He had nothing.

Q. Did you know his brother, John S. Geary? A. I don't know his brother, John.

Q. Did you know Mr. Orlando LeVan? A. I met him twice. 10

Q. But he did not frequent this place? A. No.

Q. The only two persons you saw—that is, of the parties mentioned here—are Russell Geary and Benjamin LeVan? A. Yes.

Q. You don't know what they were talking about? A. No.

Q. As a matter of fact, you weren't interested? A. No. I just kept on doing my work.

Q. This was just a casual conversation between the two men, was it, as any two men were 20 having in the place? A. Just the two men. They were talking. There was a lot of other men talking, but they were talking too.

Q. There was nothing about the conversation that would move you to listen? A. No.

Redirect examination by Mr. Walker:

Q. You went up to the house after the shootings, didn't you? A. Yes. 30

Q. That is, up to the premises in question. Do you know about the time you arrived there? A. It was after midnight.

Q. And when you arrived there, who was there ahead of you? A. Quite a few detectives and police.

Q. Did you go up to the rooms that they occupied? A. Yes.

Q. I show you Exhibit P-7 and I ask if the position of the bodies as shown in that picture 40 is the position of the bodies on the date and at

the time when you arrived? A. That is about. This one here I did not see.

Q. You are now indicating the body of John Geary. A. This body here, I didn't see that. John Geary, no, I didn't see him.

10 Q. Whose body is that half way through the door into the dining room? A. That is Benjamin.

Q. And whose body is this near the foreground of the picture on the right side? A. That is Orlando.

Q. Where did you stand at the time you saw the bodies? A. Right here, right at the door, inside this door, right here.

Q. Right inside the doorway, and you are now indicating a door which has been identified by 20 Captain Rowe as doorway number one, and you were within that doorway and into the kitchen proper, is that correct? A. I was right here (indicating).

Q. Now, had you ever been in that kitchen before? A. No, sir.

Q. First time you had been in it? A. Yes.

Q. And when you came up, which way did you come up? A. Front entrance.

30 Q. And when you came up the front entrance, you came by the stairway to the second floor and then through a door into the dining room, is that correct? A. Yes.

Q. When you entered the dining room, it was from the dining room that you came to the kitchen? A. Right.

Q. When you left how did you go? A. Front. Front entrance down again.

Q. You don't recall the position of the doors 40 that were in the kitchen and leading from the

kitchen at the time of your visit, do you? A. No, sir.

Q. You don't recall whether or not the body of John Geary was there? It is just that you did not see it? A. I did not see that body.

Mr. Walker: That is all. 10

Recross examination by Mr. Huebner:

Q. Did you see the body of Russell Geary? A. Yes.

Q. In another room? A. Yes. That was the first body I saw.

Q. As a matter of fact, you don't know whether that other body was there or not? A. I didn't see that body at all. 20

By Mr. Walker:

Q. May I know how you happened to go to the house? A. Why, it seems they heard that they were over to the tavern. They seemed they didn't know this Russell, and two detectives came over and took me there.

Q. For the purpose of having you identify Russell? A. Yes, very possibly.

Q. And this is the body which you saw first as pictured in P-11? A. That is right. 30

Q. Did you recognize it? A. Yes, sure.

Q. And identified him? A. Yes.

Q. And you identified him as Russell Geary? A. Yes.

40

CHARLES I. O'MALLEY sworn in behalf of the administrator c.t.a.

Direct examination by Mr. Howe:

Q. O'Malley, did you in answer to the telephose call to police headquarters go to 938 South 20th Street, Newark, on September 18th, 1935? A. I did.

Q. About what time did you get there? A. About 12:25 a. m.

Q. 12:25 a. m.? A. A. M., the 19th of September.

Q. The 19th? A. The 19th.

Q. Can you identify Exhibit P-12 as the house which you entered? A. Yes, that is the house.

Q. Which way did you enter the house? A. Entered the front door.

Q. Which apartment did you go into? A. Second floor on the right.

Q. Facing the house? A. Yes, sir.

Q. How did you get into the apartment? A. Into the apartment on the second floor?

Q. Yes. A. We forced the door, Detective Flynn and I.

Q. When you forced the door, were there any other persons moving about in there? A. No, sir.

Q. I show you Exhibits P-9, P-7 and P-8, and ask you if you identify them as picturing the condition which you found as you entered. A. Yes, sir.

Q. Looking at Exhibit P-8 facing the door marked number one, where did that door enter? A. Entered the dining room.

Q. And the door number two. Do you recall

what that entered? A. No, I don't. No, I don't recall.

Q. Do you know whether or not there was any other exit out of this kitchen besides door number one to the dining room? A. No, there was not. The dining room? 10

Q. Out of the kitchen. A. Out of the kitchen?

Q. Yes. A. Well, to the bedrooms there was an entrance, and to the foyer leading to the back way was a doorway.

Q. Do you recall that there was a small foyer directly opposite to this dining room or almost in the straight line from the dining room entrance? A. No, I don't.

Q. Do you recall the entrance this way? A. No, I don't. 20

Q. Do you know whether or not there was a back entrance leading to this apartment? A. No, sir.

Q. What? A. No, I don't.

Q. Do you know whether or not there was a back stairs or not? A. I know there was a back stairs. That goes to the back yard.

Q. Do you recall whether there was a back entrance then into this apartment? A. No, sir. 30

Q. So far as you know, when you entered this room, these three bodies which you saw here was in exactly those positions? A. Same position as they are there; yes, sir.

Q. And upon your entering, was there a doctor with you from the City Hospital? A. There was an interne from the City Hospital, Captain Rowe, Detectives Arnold, Ashe, Flynn.

Q. Do you recall seeing any bullet holes in any part of the wall of the kitchen? A. No, I don't. 40

Q. Do you recall seeing any bullet marks on any of the furniture? A. No, sir.

Mr. Howe: That is all.

Cross examination by Mr. Walker:

10

Q. Detective, did you go in the car driven by a man from headquarters? A. I did.

Q. Who else was in that car with you? A. Detectives Flynn, Ashe and Arnold.

Q. There were four of you plus the man from headquarters? A. Yes, the chauffeur. Chauffeur Rule.

Q. When you arrived you were the first there, weren't you? A. Yes. We arrived there first.

20

Q. You got there before Captain Rowe? A. Captain Rowe was directly behind us.

Q. When you arrived, did you drive up to the front of the house? A. Right directly, yes.

Q. And when you arrived there did you make any inquiry before going to the second floor, or did you go direct to the second floor? A. We met radio police officers outside and we made inquiries and we couldn't locate where the trouble had been. On the second floor Mr. Westerlund told us that he had heard what sounded like the back firing of an automobile; also informed us that there was two bachelors living across the hall and that he had not seen them. We thinking perhaps they may have committed suicide, we broke into there.

30

Q. You broke in there? You broke in the dining room? A. I did.

Q. When you went into the dining room, did you then go to any part of the house? A. I went to the front of the house.

40

Q. What if anything did you find in the front of the house? A. I found one man lying on a couch.

Q. That is the body of Russell Geary? A. That is the body of Russell Geary.

Q. From there did you go to any other part of the house? A. I called Captain Rowe. He had been in the kitchen. 10

Q. And he came to the front? A. Yes.

Q. You stayed there with him? A. Yes.

Q. After he saw the body of Russell Geary, where did you go? A. Why, I stayed there and he told me to look around and see if I could find any motive there for the crime, and we found a note.

Q. Where did you find the note? A. In Russell Geary's cap. 20

Q. Have you got that note with you? A. No. It was just a note notifying the undertaker. It is in police headquarters.

Q. Detective, is this the note that you found in the cap? A. Yes, this is it.

Q. Where was the cap? A. Was on a chair next to the table, I think it was.

Q. I show you Exhibit P-11. A. Yes, on this. 30

Q. And that shows the position of the cap, doesn't it? Yes.

Q. Was it lying upright—that is, with the inside of the cap showing to the ceiling—at the time you came there? A. Yes, sir.

Q. And with the cigarettes? A. Yes, sir.

Q. Lying there? A. Yes, sir.

Q. Was that the position of Russell Geary with the gun as shown in P-11? A. Yes, sir.

Q. Just at the time that you ran in. Was this hand, which is the right hand of Russell Geary, 40

in the position that the photographs show it? A. Same identical way.

Q. Now, the note which you hold in your hand was resting inside of the cap? A. Yes, sir; in that cap.

10 Q. Exposed to your view without your searching for it, is that correct, at the time of entry? A. Yes.

Mr. Walker: Do you want to put this in evidence?

(The note in question is received in evidence and marked Exhibit P-19.)

Q. Detective, after you had found the note and after Captain Rowe had inspected the body,
20 you say you went around looking for clues for the purpose of establishing a motive. Did you find any other clues other than this note? A. No, no others.

Q. Did you find anything else? A. No, nothing.

Q. Is there anything that you can remember that took place on that night that you have not now told us and which, in your opinion, will help
30 us in any way at all? A. No, there is not.

Q. Did you go to the back part of the house after? A. I went to the kitchen and the bedroom, yes.

Q. Did you leave the premises? A. No.

Q. You stayed there, and when you did leave the premises, which way did you leave? A. By the front door.

Q. Did you make any trip around the back? A. I went around to the back alleyway with
40 Captain Rowe to examine the car.

Q. Did you examine the car? A. Yes.

Q. That is the car that was identified? A. Yes.

Q. Did you find anything in the car? A. No, we did not.

Q. Did you find any additional shells anywhere around the place? A. No, sir. 10

Q. Loaded shells but not discharged, other than in the gun? A. No, sir.

Q. Now, when you went there and you went into the kitchen, do you recall what this is (indicating), and I am now pointing out something which appears on the table in Exhibit P-8? A. It is a light socket, I believe.

Q. A light socket? Was the reading light in the position that you see it? A. Yes. There was a lamp on the table. 20

Q. And there was a paper open, wasn't there? A. A paper open.

Q. And you say at the time previous— A. It was evidenced that they had eaten before the crime was committed.

Q. What evidence was there to indicate that? A. Well, there was the dishes and there was some tea remaining, or coffee. 30

Q. And were they on the table, Detective? A. Yes.

Q. Were they removed from the table? A. Not when we entered there; no, sir.

Q. Where were these dishes at the time of your entry? A. Well, the same as now. This cup there contained a small portion of tea or coffee or some liquid.

Q. Was there more than one cup? A. No. Just on the sink. 40

Q. On the sink there were other cups, is that right? A. Yes, sir.

Q. Now, there is something here which appears to be a handkerchief. That is what it looks like. Do you know what that is? I am referring to the table as shown in Exhibit P-9. A. No, I don't. I can't identify that.

Mr. Walker: Thank you, Detective.

FRANCIS E. FLYNN sworn in behalf of the administrator c.t.a.

Direct examination by Mr. Howe:

Q. You are from police headquarters in Newark, are you not? A. I am.

Q. On September 18th or September 19th, 1935, at about midnight, did you go to 938 South 20th Street, Newark? A. I did.

Q. Do you remember which of those two dates? A. We received the call at twelve-thirteen a.m. on the 19th.

Q. About what time did you get there? A. Well, I would say it took us seven or eight minutes to get there. I don't remember just what time.

Q. Can you identify Exhibit P-12 as the house which you entered? A. Yes, that is the house.

Q. Which way did you enter? A. Through the front door.

Q. To what apartment did you go? A. Second floor right.

Q. I show you Exhibits P-9, 8 and 7, and ask you if they disclose the picture which you saw upon entering the house. A. Yes, they do.

Q. Are the bodies as set out in these pictures

exactly as you saw them when you entered, or have they been changed in any way? A. No. Exactly as they are in the picture.

Q. In Exhibit P-8 do you identify the door marked number one? A. Yes, sir.

Q. Where does that lead to from the kitchen? 10
A. To the dining room.

Q. Do you recall the door marked number two? A. Yes, I do.

Q. Do you recall what was behind that door? A. Pantry.

Q. Is there any other exit from the kitchen other than those two doors marked one and two? A. Yes. There was a door going into the foyer.

Q. With relationship to the door marked number one, where was that door going into the 20
foyer? A. That would be almost directly opposite towards the rear of the house.

Q. Now, can you describe this foyer to us? A. Well, it wasn't very large, but as you leave the kitchen going from the kitchen to the foyer, there was a door on the right going downstairs. Then almost directly opposite the door from the kitchen to the foyer there was one to the bedroom, one bedroom, and a little to the left of that 30
was another bedroom, and on the other side just to the left of the door going out of the kitchen there was another door going into a bathroom, I think it was, or a toilet or something there.

Q. Then these two doors, the door going to the dining room and the door going out to this foyer, were almost opposite each other, were they not? A. I would say about opposite each other.

Q. And this foyer was large enough to have 40
leading from it a door to the kitchen, a door to

the back stairs, a door to the two bedrooms and a door to the bathroom, is that correct? A. Yes, sir. I am not sure about the bathroom. I think there was a little bathroom or toilet or something there.

10

Cross examination by Mr. Huebner:

Q. You were a member of the party with Captain Rowe that went there that night? A. I was.

Q. The positions of the bodies are the same as disclosed—that is, the positions of the bodies at the time that you went there, the same as disclosed on these photographs? A. They were.

By Mr. Howe:

20

Q. Do you recall noting any slug marks about the walls or furniture in the kitchen? A. No, I don't, only on the chair that was over Orlando. That was marked up a little. I don't recall recovering any slugs. I don't think we did.

Q. Do you recall any marks on any part of the walls of the kitchen or on any other piece of furniture than that chair? A. No, I don't recall.

30

Q. Do you know whether there were any slug marks to the right of the room entering the dining room directly in back of this chair which is marked here? A. I don't recall, no.

Q. Do you recall whether there were any slug marks on this metal cabinet across the table? A. No, I don't.

Cross examination by Mr. Walker:

Q. Detective, were you in the car with Detective O'Malley? A. I was.

40

Q. And you arrived just ahead of Captain Rowe? A. Yes.

Q. When you arrived, you say the radio police were there? A. Yes.

Q. Had the radio police been in the property? A. They had been in there, the building, but not in that apartment.

Q. They had not found out as yet that whatever took place had taken place, had they? A. No. 10

Q. Then you made a canvass of the building, and as a result you determined that it might be the second floor; right? A. That is right.

Q. Where the two bachelors lived? You went in there? A. Yes.

Q. By reason of breaking or forcing the door? A. Yes.

Q. And when you entered, did you enter close to Detective O'Malley, who was one of the first to go in? A. Well, yes. We both went in together. 20

Q. And when you went in did you go to the front or to the rear of the house? A. No. I went to the rear.

Q. And Detective O'Malley went to the front? A. Detective O'Malley went to the front.

Q. Do you know if you were the first one to enter the kitchen? A. Yes, I was. 30

Q. When you entered the kitchen, the picture identified as Exhibit P-7 shows the position of the bodies as you found them? Is that correct? A. Yes.

Q. Was Benjamin LeVan half way through the door which led from the dining room to the kitchen? A. Yes.

Q. And as indicated, was it a swinging door which swung into the dining room? A. I think it was. I don't remember. I know there was a 40

door there, but I don't remember just which way it was swinging at the time.

Q. The body of Orlando—and that is Orlando in the foreground, is it not? A. Yes.

Q. Is as seen in this picture? A. Yes.

10 Q. And the body of John,—and you identify this person as John Geary, do you not? A. Yes.

Q. Was over by the radiator against the side wall of the kitchen? A. Yes.

Q. Now, is that side wall there on the outside of the house or is it on the inside between this apartment and the apartment which is on the left? A. On the outside.

Q. Detective, taking this doorway here as the 20 doorway through which you would enter if we draw it over this way, and then from there, that indicating, as apparently it is here, the swing of the door out that way, and having this as the dining room, and I have drawn the door from the kitchen into the dining room as opening into the dining room only because the picture, Exhibit P-8, shows that to be opening that way (indicating)— A. Yes.

Q. —with the body of Benjamin over the 30 threshold of these two rooms? A. Yes.

Q. Now, taking that as the wall which we are able to see because of these pictures, will you show me how we can reconstruct that room? We have over here, haven't we, the cabinet, which is there? A. Yes.

Q. And then we have a hall with a window—

Mr. Howe: Your Honor, if I may interrupt Mr. Walker, if he will permit me 40 to do so during the lunch hour, I will draw an exact picture of the room.

Mr. Walker: Fine. That will be good.

Mr. Howe: I have it drawn on a piece of paper here, but I can put it on the board for you.

Mr. Walker: Fine. That will help us. Suppose we hold the testimony of the detective until after that has been put on the blackboard.

(At one o'clock p.m. a recess is taken until 2:10 o'clock p.m.)

After Recess

FRANCIS E. FLYNN resumes the stand.

Redirect examination by Mr. Howe:

Q. Mr. Flynn, you say you went down the back stairs? A. I did not go down. I came up. I tried to get in.

Q. Were you in the foyer of this floor at all, the foyer leading between the kitchen and the bedrooms? A. Oh, yes.

Q. Does this drawing on the wall look anything like the foyer as you saw it as you recall it. A. Yes, only a little large compared to the—

Q. That is, this is a little large? A. Yes.

Q. It is a little out of proportion. A. Yes, that is what I mean, compared to the rest.

Q. Do you recall that there was an entrance from the kitchen almost opposite this entrance to the dining room, which led into this foyer? A. Yes.

Q. Do you recall that to the left as you come out of the kitchen there was a door leading from the stairway down to the back? A. To the right.

Q. To the right? A. Yes.

Q. And then that practically opposite the kitchen door there were doors into two bedrooms here in the rear? A. Yes.

Q. You also recall that the bathroom was over
10 in this corner of the foyer? A. Yes.

Q. So that there are one, two, three, four, five doors leading off of that foyer? A. That is right.

Q. And the door from the kitchen into the foyer is almost opposite the door from the kitchen into the dining room, is that correct? A. Yes.

Q. And that this door, which was incorrectly stated as leading to a bedroom, leads to a pan-
20 try? A. Pantry, yes.

Q. Do you recall a china closet here? A. Yes.

Q. There was a chair in the corner here as indicated by the picture, was there not? A. Yes.

Q. And a table over here with two chairs? A. Yes.

Q. Or, rather, this chair wasn't here at that time, according to the picture. Now, do you recall this cabinet? A. Yes, a cabinet in the
30 corner.

Q. This is the radiator which they mention as the radiator near which the body of John Geary was lying. A. Yes.

Q. Over here was the sink. A. Yes.

Q. And here a stove. A. Yes.

Q. That is pretty nearly the layout of the kitchen? A. Yes.

Mr. Howe: Except for the proportions. That is all.

40

(During the testimony just taken Mr. Howe was referring to a drawing on the blackboard.)

Mr. Howe: That is all.

Cross examination by Mr. Walker: 10

Q. Detective, as the picture is shown in the picture P-7, it extends rather a distance out into the room. Well, there are just a couple of feet in between it and the chair which is up against the wall, isn't that so? A. Yes.

Q. And it has two chairs, one that was against this back wall? A. Yes.

Q. And that is the wall separating the kitchen from the dining room; and one chair which was over here near the two windows? A. Yes. 20

Q. A chair on this side. Now, Detective, when you entered, of course you entered through the doorway from the dining room? A. Yes.

Q. And you went around the kitchen, I suppose, and saw what was there? A. Yes.

Q. And then you did go down the backstairs or you came up the backstairs. A. No, I did not go down the backstairs at all. Before we entered the front door into the dining room I had tried 30 to get into the kitchen there from the back and I couldn't get in. That is when we went around and came in the front door.

Q. You went around to the front door? A. We forced the other door.

Q. And then after that did you go through the kitchen door at the rear at any time? A. Not to go downstairs.

Q. Did you go downstairs and come up the rear stairs and enter the kitchen at any time 40 thereafter through that kitchen door? A. No.

Q. The picture here, or rather, the diagram which has been placed on the board, has a rectangle here against what would be the wall of the kitchen nearest the rear of the house. A. Yes.

10 Q. Nearest to the rear of the house. What was that, Detective? Do you remember? A. I think that was a stove, a gas range.

Q. What is this circle which connects the gas range with that which is to the left as you look at it? A. I don't know what that would be.

Q. Do you know what this is? A. That is the sink.

Q. But does the sink run from the wall out? The gas range extended from the wall farthest
20 away from the dining room out into the kitchen? A. Yes.

Q. By how many feet? A. From the rear wall you mean?

Q. That is right? A. Out into the center of the kitchen?

Q. Out towards the center of the kitchen. A. Oh, I would say two feet, maybe a little more than that.

30 Q. That is from here to the back wall (indicating)? A. Yes.

Q. And then there was a chair, apparently from the picture, which was against the gas range, is that right? A. Yes.

(Mr. Walker marks the diagram.)

The Witness: I would put it over this way more, between the gas range and the sink.

40 Q. There is something which goes down on the left side of this picture, P-7, as you look at it.

It is just blurred slightly. Do you know what that is Detective? A. No. This is back of the chair.

Q. That is part of the gas range, isn't it? A, I don't think so. I think it is part of the chair. It may not be. 10

Q. You say you push it over about how far? (Indicating) A. Yes, I would say about between the two.

Q. There (Indicating)? A. Yes.

Q. Then there was another chair next to that, wasn't there, according to the picture? A. Yes, there were two chairs right close together.

Q. And alongside of the radiator was the body of John? A. Yes.

Q. And that body had the face towards the 20 sink with his head towards the sink? A. The head towards the sink.

Q. And the feet towards the cabinet back here? A. Yes.

Q. Now, is there anything other than what you have already testified that you observed in and about the premises which might be of assistance, Detective? A. I don't think so, no.

Q. About how close would you say the doorway 30 leading to the rear stairs was to the rear wall of the kitchen? A. Oh not more than a foot, I don't think.

Q. Just about one foot away from there (indicating)? A. Yes.

Q. In other words, you would come to the rear wall of the kitchen and just about one foot beyond that would be the doorway which led down to the rear of the building? A. Yes.

Q. And the foyer was a narrow foyer, wasn't 40 it? A. Yes, it was quite narrow.

Q. With these doors opening like a small hallway, so to speak? A. Yes.

Q. With the doors opening into the rooms. Now, you have got this marked O. B. L. That is Orlando B. LeVan, isn't it? A. Yes.

10 Q. Did you go into his room? A. Yes, I did.

Q. Did you notice anything in there? A. Why, I don't remember now.

Q. This other room, do you know whose room that was, and I am now referring to the room without initials? A. I think that was Ben's. Of course that is just my information. We didn't know, but from the clothes and things that were in there.

20 Mr. Walker: From that you assumed it was Ben's. That is all, Detective.

Mr. Howe: Your Honor, in order to more definitely establish the picture which is drawn here by me, I would like to offer myself as a witness, and also to testify as to the status of the estate.

JOHN C. HOWE sworn in behalf of the ad-
30 ministrator c.t.a.

The Witness: For the purpose of the record, I accounted as administrator c.t.a. of the estate of Orlando B. LeVan on July 14, 1936, and after said accounting have made some small expenditures for the protection of the property, insurance, and so on, which leaves in my hands at present approximately the following amounts:
40 Checking account, $459.13; savings account, $6,580.14; building and loan cer-

tificates, $6,363.61; a total of $13,402.88. This is approximate because of the fact that there is interest due on the savings account, and probably on the building and loan certificates, and there are some expenses of filing the papers, and so on, in this hearing.

In addition to that sum of approximately $13,000 there is a house at Tobyhanna, Pennsylvania, assessed at $1,500 by both the local assessing authorities and the Transfer Inheritance Tax Bureau of the State of Pennsylvania, appraised by a real estate dealer at $1,500 and $2,000.

In the case of Benjamin F. LeVan I accounted on May 12, 1936 as administrator c.t.a. and have an approximate balance in the checking account of $260.48, savings $507.50, and a total of $767.98 approximately.

If it will be of any help to the Court I would like to explain this chart which I myself drew from memory, and which is correct as to location but not as to dimensions. As administrator I spent fully five days on the premises cleaning out the same and getting together the personal belongings and the selling of them.

This is the kitchen. There was one door here to the dining room, and this door, which was incorrectly described, entered the pantry. Here was a china closet. There was no door here from the kitchen to this foyer. It was an open space taking the place of a door. From this foyer there were four doors leading one here to

the back stairway, this one into the room of Orlando B. LeVan, this one into Benjamin's room, and this one here to a bathroom. There was a closet here containing blankets and other materials. A telephone table between the two doors of the bedrooms, and an umbrella rack here with some umbrellas.

In the kitchen from this wall was the range, a hot-water boiler, a sink and a drain board, the radiator, a metal cabinet, table, and several chairs. Somewhere on the top of this table there was a bullet hole showing that a bullet had grazed; and there was a bullet through this cabinet, and one in the wall. There were also a considerable number of shots that had practically destroyed the back of this chair, as can be seen in the picture. I merely give this to be of help to the Court.

Cross examination by Mr. Walker:

Q. Judge, could I get on the record your best recollection of the dimensions of the kitchen? A. The kitchen I would say was approximately twelve feet long and eight feet wide on a guess. It was longer than it was wide. It was an ordinary moderate-sized kitchen, not a large kitchen.

Q. You have before you the photograph P-8, which Captain Rowe has marked with the numerals one and two, and the letter X. The numeral one identifies the door leading from the dining room to the kitchen. A. Yes, sir.

Q. The numeral two identifies the door which leads from the kitchen into the pantry. A. Yes.

Q. He incorrectly described that door as leading into the bathroom? A. That is incorrect.

Q. And the X which he placed down at the bottom of the picture in a direct line with the door leading from the kitchen to the dining room was placed there to indicate the line of the door which was at the rear of the kitchen and from which one went into the foyer, is that correct? A. That is correct. That would be that entrance to the foyer right there (indicating).

Q. That entrance to the foyer was on a straight line or approximately straight, with the doorway leading from the dining room to the kitchen, is that right? A. Yes. This picture apparently shows also the spot at which I found a dent in the table made by a bullet, a hole through the cabinet and a spot in the wall. Something had hit here and bounced back there.

Q. Do you want to just put an ink mark and identify those three spots? Or they are visible so maybe it is not necessary to so identify them. A. O. K.

By the Advisory Master:

Q. That telephone stand, you say that was in the foyer near the entrance to the bedroom? A. Between the two bedrooms there is a little stretch of wall there.

Q. And the sun parlor is here on the other side? A. Yes, the dining room here, and then a living room and then a sun parlor up above that.

By Mr. Huebner:

Q. With respect to the windows shown in the kitchen, what side of the house is that on? The

southerly side? A. This would be south here, Clinton Avenue.

Mr. Walker: Suppose you put an arrow there so that we have the advantage of the points of the compass.

10 (The witness marks the drawing.)

By Mr. Walker:

Q. Could I ask you just one more question, if you don't mind? A. Yes.

Q. Was that telephone the only telephone in the premises? A. It is the only telephone I saw. It was on a stand.

Q. There was no other telephone in that apartment at any other point? A. No, sir; there was

20 no other 'phone in there.

JOSEPH H. LeVAN sworn in behalf of the administrator, c.t.a.

Direct examination by Mr. Howe:

Q. Mr. LeVan, you are related to Orlando B. LeVan and Benjamin F. LeVan? A. Yes. I am

30 the last survivor of the family.

Q. How are you related? A. Orlando was born July 4, 1868, my brother.

Q. Just give us your relationship. A. Well, he was a brother, full brother.

Q. Are there any other brothers or sisters living? A. None whatsoever; no, sir.

Q. Mother or father living? A. Mother died. Do you want the dates? Mother and father are dead, both dead. If you want the dates I will

40 give you the dates.

Q. Are there any children of deceased brother or sister living? A. None whatever.

Q. Then upon the deaths of Orlando and Benjamin, you were the last survivor of that family, were you not? A. Yes, positively.

Q. Was John S. Geary a nephew of Orlando B. LeVan or of his wife, Kate LeVan? A. He was a nephew of his wife, Kate LeVan. No relation to me at all, or my brother; that is, by blood. 10

Mr. Howe: That is all.

Cross examination by Mr. Walker:

Q. Mr. LeVan, Kate LeVan was the wife of Orlando B. LeVan? A. She was, yes.

Q. And he was married only once during his lifetime? A. Only once, yes. 20

Q. And she predeceased him by how long? A. Oh, approximately four weeks or a month.

Q. Four weeks to a month? A. I don't know the exact time.

Q. But it was very close? A. It was very close.

Q. She died before, a short time before he did? A. A short time before he did, yes. 30

Q. And John Geary was, as you say, her nephew? A. Her nephew, yes.

Mr. Walker: That is all.

The Advisory Master: How about Russell? What relation was he?

Mr. Howe: He is a brother of John.

Now, your Honor, that is all that I have to present to the Court. I think everyone here concerned realizes that my position in this matter is to present such evidence 40

as I can to the Court in order to give the Court an opportunity to instruct me as to the procedure to be followed by me in the distribution of the estate, and that I personally have no interest in the matter.

10 Mr. Walker: May I at this time put several witnesses on?

The Advisory Master: Surely.

HAROLD C. GEARY sworn.

Direct examination by Mr. Walker:

Q. Mr. Geary, where do you reside? A. 458 Chestnut Street, Arlington.

20 Q. You are a brother of John Geary? A. I am.

Q. And you are the newly appointed and qualified administrator of the estate of John Geary? A. I am.

Q. Have you been so appointed by the Surrogate of this county on December 17, 1935? A. That is right.

Q. Do you have in your possession a letter?

30 A. Yes.

Q. This letter is in the handwriting of— A. Charles Russell Geary.

Q. Charles Russell Geary. And this letter was obtained by you from whom? A. From his wife, from Russell's wife.

Q. She is in court at the present time? A. Yes.

Mr. Huebner: May I cross examine on this?

40 Mr. Walker: Yes.

Cross examination by Mr. Huebner:

Q. Do you know when this letter was written, Mr. Geary? A. That I do not.

Q. This was given to you by— A. By his wife. 10

Mr. Huebner: Under those circumstances I do not believe that at this time this letter is properly presented for proof here.

The Advisory Master: Let him identify it as to handwriting if he can.

By Mr. Walker:

Q. Do you know the handwriting of Russell? A. Yes. 20

Q. Is this his handwriting? A. Yes, this is his handwriting.

Q. Is that his signature? A. Yes.

The Advisory Master: Mark it for identification.

(The letter referred to is marked D-1 for identification.)

30

FREDERICA LOUISE GEARY sworn.

Direct examination by Mr. Walker:

Q. Mrs. Geary, your full name? A. Frederica Louise Geary.

Q. Were you married? A. Yes, sir.

Q. To whom were you married? A. Charles Russell Geary.

Q. When did you marry him, and where? A. February 28, 1915. 40

Q. Where? A. Well, it was from the Union Methodist Church, but I don't just know whether it was Elm or Walnut Street.

Q. In what town? A. Newark.

Q. After your marriage did you live together
10 as man and wife? A. Yes.

Q. Were any children born of that marriage? A. Yes.

Q. How many children? A. Two.

Q. What are their names? A. One is dead.

Q. When did the child die? A. January 15, 1922.

Q. What was the name of the child who died? A. Beulah M. Geary.

Q. At what age did the child die? A. Five
20 years old.

Q. The name of the other child? A. Catherine Gertrude.

Q. And her age? A. She is sixteen now.

Q. Where does she reside? A. 466 Fourteenth Avenue.

Q. In what city? A. Newark.

Q. Now, after your marriage, where did you take up your residence? A. With my mother-
30 in-law.

Q. And where was that? A. On Kinney Street, Newark.

Q. After residing there for awhile, you moved out of the State, did you? A. Yes, I did.

Q. When did you move out of the State? A. It was twelve years ago in June.

Q. And when you moved out of the State you moved out with your husband and how many children were alive at that time? A. Two.

40 Q. And the two children. You moved to where? A. Tobyhanna, Pennsylvania.

Q. When you went to Tobyhanna, Pennsylvania, whose property did you go to? A. Mrs. O. B. LeVan.

Q. Who was Mrs. O. B. LeVan? A. My husband's aunt.

Q. What do these initials O. B. stand for. A. Orlando Burnside. 10

Q. And Mrs. O. B. LeVan was the wife of Orlando B. LeVan? A. Yes, sir.

Q. And she, you say, was your husband's aunt? A. Yes.

Mr. Walker: I think we can stipulate at this particular time that this is the property which is in the estate, it having been owned by Kate LeVan at that time.

Mr. Howe: No. 20

Mr. Walker: Wasn't it?

Mr. Howe: No. It was a joint tenancy by the entirety.

Mr. Walker: Owned by Kate LeVan and Orlando B. LeVan.

Q. Now, was that a one-family house? A. Yes.

Q. Did you live there with your husband and your two children alone without any others in the family? A. No, and my mother-in-law. 30

Q. And with your mother-in-law? A. Yes.

Q. In other words, your mother-in-law and you and your husband and your two children were all of the persons who occupied the premises? A. Well, and my husband's uncle.

Q. What was his name? A. Arthur Koken.

Q. Now, you lived there, as you say, for twelve years? A. Yes, sir. 40

Q. During that time were you visited by Mrs.

Kate LeVan, because that is Mrs. Orlando LeVan's name, isn't it? A. Yes.

Q. And by her husband, Orlando B. LeVan? A. Yes.

Q. Were any members of the family buried upon that particular plot? A. Yes. My little girl is buried there on that.

Q. Anybody else? A. My mother-in-law.

Q. Where is she buried? Do you know? A. Alongside of my little girl.

Q. How big a plot of ground is it there? A. Room for six bodies.

Q. How large was the entire tract of land, if you know, upon which the house stood, and that which was adjacent to the house? A. Almost five acres, as far as I know. I am not sure.

Q. And your husband lived there with you right down to the time he made the trip on September 18, 1935? A. Yes, sir.

Q. For the purpose of coming to Newark? A. Yes, sir.

Q. Did you see him off at the time he left? A. Yes, I did.

Q. Did you know where he was coming? A. Yes, I did.

Q. Had he told you where he was going? A. Yes.

Q. Whereabouts was he going to? A. He said he was going down to see Uncle Orlie and ask him about things that belonged to the little girl that died and my two children's bank books.

Q. What else, if anything, did he say? Do you know? A. That is about all he said, that he would be back soon, you know.

Q. When he left do you know how he left? Did he leave in an automobile? A. Yes, he did.

Q. Whose automobile was it? A. My son-in-law's.

Q. When he left in that automobile was there anybody with him? A. No, sir.

Q. Was that the last time you saw him alive? A. Yes. 10

Q. What was the next you heard, if anything? A. Well, the next thing I heard, I heard something—The lady, the man across from me called from Geary, and naturally I just woke out of a sleep and I answered, and he said—

Q. Well, as a result of that telephone call, what did you do? A. Well, then I came to Newark.

Q. When you came to Newark where did you go? A. Courthouse. 20

Q. And when you arrived here, what day was it and about what time? A. The 19th around somewheres between ten and half-past.

Q. In the morning? A. Yes.

Q. After you arrived here, what did you do thereafter? A. Well, I went to the courthouse, and from the courthouse up to Judge Howe's office.

Q. And after that did you return to Pennsylvania? A. Yes. 30

Q. Did you subsequently find this letter which has been marked for identification as D-1? A. Yes, I did.

Q. And where did you find it? A. In my husband's insurance policies.

Q. And where were they? A. Upstairs, in well, it is a grease can. He just kept it for a strong box like.

Q. And that letter was amongst the insurance papers in that can? A. Yes. 40

Q. Now, is the letter in the handwriting of your husband? A. Yes, sir.

Q. All of it? A. Yes, sir.

Q. And the signature? A. Yes, sir.

Q. Is that your husband's signature? Has that letter been in your possession except for the time that you delivered it to Mr. Geary? A. Yes, sir. I had it there before.

Mr. Walker: I offer it.

Mr. Huebner: Well, at this time, if the Court please, I object to this letter. Of course, we have not a jury and so it makes little difference. I mean, you will know the contents of the letter anyway. You will have to read it. The letter purports to show that this man evidently had some animus or ill will towards his uncle and aunt.

The Advisory Master: Why not mark it in evidence and we will accept it for what it is worth?

Mr. Huebner: Except I would like to object. I would like my objection noted on the ground that it is incompetent and immaterial to disclose or shed any light on the question of who survived in this particular tragedy.

The Advisory Master: We will admit it and you may have an exception.

(The letter referred to is received in evidence and marked Exhibit D-1.)

Q. Mrs. Geary, have you remarried? A. No, sir.

Q. You are still the widow of Russell Geary? A. Yes, sir.

Q. There are just you and your daughter? A. Yes.

Q. And you reside together? A. Yes, sir.

Mr. Walker: That is all.

Cross examination by Mr. Huebner: 10

Q. Mrs. Geary, to get the record straight, this daughter and son-in-law referred to, the son-in-law is a husband of a daughter of a prior marriage? A. Yes.

Q. And this child that you have referred to, you only have one child from Mr. Russell Geary? A. Yes.

Q. Between the time that the aunt died in September, or, rather, in August, and September, had your husband ever visited or been visited by either Orlando LeVan or John Geary? A. Yes. They were up the house. 20

Q. They were up the house, both of them? A. Yes.

Q. How many times were they up there? Do you know? A. They were up once after Aunt Kate died.

Q. Was John Geary up there more than once or was he up there once? A. They were both up once, Uncle Orlie and John. 30

Q. What was the feeling between them at the time they were up there? A. Same as any other time.

Q. You mean there was a friendly feeling between them? A. Same as any other time that I ever noticed.

Q. So that up to the time that you had last seen your husband, as far as you knew there was no unfriendly feeling between any of them? A. No. 40

Mr. Huebner: That is all.

Redirect examination by Mr. Walker:

Q. Mrs Geary, you mean that there was to you no ill feeling evident between Orlando LeVan
10 and your husband, Russell Geary? A. No, there was not.

Q. And was there any ill feeling evident between your husband, Russell Geary, and John Geary? A. No, sir. Never no ill feeling between John and Russell.

Q. Had they been, to the best of your knowledge and observation, on friendly terms? A. Always on friendly terms.

Q. And likewise with Orlando B. LeVan? A.
20 Yes.

Q. With respect to your aunt—that is, your Aunt Kate, the wife of Orlando B. LeVan, how was the feeling among them, if you know? A. Well, you can understand my husband worshipped his aunt. You can understand the feeling, the way I have been trying to express it.

Q. Did Benjamin LeVan ever visit the property? A. Yes. Ben came up most every time
30 the rest came? Ben came along.

Q. How was the feeling between your husband Russell and Benjamin LeVan? A. Good friends.

Q. So that all three and your husband were apparently on very friendly relationship? A. Yes, sir.

Q. You didn't have any knowledge of your husband's intention to do what he apparently did do when he arrived? A. No, sir.

Q. Or, rather, after arriving at Newark? A.
40 No.

Q. Did not say anything to you about it? A. No.

Q. There was not anything done which might lead you to— A. No, sir.

Q. You did not see him with the gun? A. No, I did not. 10

Q. You didn't know that he had that gun, did you? A. No.

Mr. Walker: That is all.

By Mr. Huebner:

Q. Just one question, Mrs. Geary. Do you know whether your husband knew that John Geary was the beneficiary under the will of Orlando and Aunt Kate? A. No, I didn't know it. 20

Q. Do you know whether your husband knew the contents of his Aunt Kate's will? A. No.

Q. So that so far as you know, he had no knowledge of anything pertaining to these estates, or, rather, the estate of Aunt Kate at that time? A. No, he did not as far as I know.

Mr. Huebner: That is all.

(Counsel argue.) 30

Testimony Closed.

40

Exhibit D-1

Letter of Charles Russell Geary to His Wife

Dear Dorothy:

10 Just a few lines to let you know the gun I bought I planned to kill Aunt Kate and Uncle Orlie as they spoiled the lives and happiness of our lives also Johns and mothers and many others. Don't think I went mad I planned this all only God took Aunt Kate before I got a chance. If she would have lived she would have been shot the day she went to go home. Uncle Orlie with her. They were planing on moving Beulah after promising Mother to let her lay at 20 rest beside her. Show this letter to John and ask him not to break his mothers promise. Mother cried many times times this way Aunt Kate and Uncle Orlie were useing John. They did not want him he had no work and could not use him. Dorothy when I am dead have Russ Frey bury me in the clothes I have home. Bury me from Tobyhanna Pine Grove Cottage coffin like Mothers. No flowers. Look after Kate. Adelaide has a husband. Dorothy don't weap 30 over me unless you begrudge me the rest. So long all of you. My last wish is that you enjoy yourself as you have been wonderful for putting up with me for as long as you did.

Good Bye

Charles Russell Geary

Exhibit P-1

40

(See Opposite) ☞

Exhibit P-2

(See Opposite)☞

Exhibit P-3

(See Opposite)☞

Exhibit P-4

(See Opposite) ☞

Exhibit P-5

(See Opposite) ☞

Exhibit P-6

(See Opposite) ☞

Exhibit P-7

(See Opposite) ☞

Exhibit P-8

(See Opposite) ☞

Exhibit P-9

(See Opposite) ☞

Exhibit P-10

(See Opposite) ☞

Exhibit P-11

(See Opposite) ☞

Exhibit P-12

(See Opposite) ☞

Where Four Were Slain in Family Tragedy

Ev. P-1

Home of Orlando Le Van was the upper apartment at right in four-family house at 938 South 20th street.

New Jersey Court of Errors and Appeals

In the Matter of The Appeal from the decree of the Orphans' Court of the County of Essex, decreeing that ORLANDO B. LEVAN predeceased John S. Geary and that the estate of said Orlando B. LeVan be distributed according to the terms of the Will admitted to probate in Essex County on September 30, 1935.	On Appeal from Prerogative Court.

BRIEF OF APPELLANT

This is an appeal from those portions of a decree of the New Jersey Prerogative Court bearing date the 26th day of April, 1938, which ordered and decreed that so much of the order of the Essex County Orphans' Court, dated the 16th day of June, 1937, as ordered and decreed that "'Orlando B. LeVan predeceased John S. Geary, and that the Estate of Orlando B. LeVan be distributed according to the terms of the will admitted to probate in the said County of Essex on the 30th day of September, 1935' be and the same is hereby reversed, set aside and for nothing holden"; and which "further ordered, adjudged and decreed that the said Orlando B. LeVan survived the said John S. Geary and that

the Estate of the said Orlando B. LeVan be distributed to the appellant, Joseph H. LeVan, as sole surviving next of kin and heir at law of the said Orlando B. LeVan, deceased, in accordance with the statute of distribution of this State."

The Advisory Master to whom the matter was referred by the Orphans' Court, filed a report in which he found as a fact that the evidence disclosed that John S. Geary survived Orlando B. LeVan (pp. 14-21). This report, by decree of the Orphans' Court, was confirmed (pp. 21-23). An appeal from this decree was taken to the Prerogative Court by Joseph H. LeVan, sole surviving next of kin and heir at law of Orlando B. LeVan. The matter was considered by the Prerogative Court on the evidence taken before the Orphans' Court, plus a sketch of the floor plan of the kitchen and rear foyer of the premises in which the murders occurred, which was stipulated in evidence (pp. 49-50.) Vice Ordinary Berry, in an opinion filed by him (pp. 31-45), held that the administrator of the estate of John S. Geary (the appellant here) did not sustain the burden of proving that Orlando B. LeVan predeceased John S. Geary, and advised a decree (pp. 46-48) reversing the decree of the Orphans' Court, and decreeing that Orlando B. LeVan survived John S. Geary, and that the estate of the said Orlando B. LeVan be distributed to Joseph H. LeVan, his sole surviving next of kin and heir at law. From this decree this appeal is taken.

Grounds of Appeal

The Grounds of Appeal are contained in the Petition of Appeal printed in the record at pages 3-5. Briefly, they can be stated as follows:

1. That the decree of the Prerogative Court was erroneous in that it should not have reversed the decree of the Essex County Orphans' Court and should have affirmed said decree of the Essex County Orphans' Court.

2. That the Prerogative Court erroneously held that Orlando B. LeVan survived John S. Geary, and that the estate of Orlando B. LeVan be distributed to the appellant, Joseph H. LeVan, as sole surviving next of kin and heir at law of the said Orlando B. LeVan, deceased, in accordance with the statute of distribution.

3. That the Prerogative Court should have held that Orlando B. LeVan predeceased John S. Geary and that the estate of said Orlando B. LeVan be distributed according to the terms of his last will and testament.

4. That the Prerogative Court erroneously held that the burden of proving that the said John S. Geary survived the said Orlando B. LeVan was on appellant.

Statement

The main question involved in this case is as to whether on the evidence in this case it should be determined that John S. Geary survived Orlando B. LeVan. In the event that John S. Geary survived Orlando B. LeVan, the estate of the said Orlando B. LeVan should be distributed in accordance with his last will and testament.

Under the will of Orlando B. LeVan, p. 6, (his wife, Kate LeVan having predeceased him), his entire estate was devised and bequeathed to his nephew, John S. Geary. In that event, appellant, as the administrator of the Estate of said John

S. Geary, is entitled to all of the assets of the estate of Orlando B. LeVan.

In the event that John S. Geary did not survive Orlando B. LeVan, then the estate of Orlando B. LeVan should be distributed to Joseph H. LeVan, as his sole surviving next of kin and heir at law.

On the evening of September 18, 1935, or early morning of September 19, 1935, one Charles Russell Geary, a brother of the aforementioned John S. Geary, murdered his uncle, Orlando B. LeVan, his uncle, Benjamin LeVan, a brother of Orlando, and his brother, John S. Geary, a nephew by marriage of Orlando. The said Charles Russell Geary was a nephew by marriage of Orlando. The question to be determined, as stated before, is as to who survived as between Orlando B. LeVan and John S. Geary.

ARGUMENT

Facts

On September 18, 1935, Charles Russell Geary, a resident of the State of Pennsylvania, visited Orlando B. LeVan (widower), Benjamin LeVan (bachelor), and John S. Geary (bachelor), who lived together at 938 South 20th Street, Newark, New Jersey.

On September 19, 1935, at 12:13 A. M. (p. 79, l. 13) the police telephone operator received a telephone call, the party on the other end of the wire stating he had just shot three men (p. 79, l. 18). Policemen left immediately, and when they broke into the second floor apartment of 938 South 20th Street, they found the body of Ben-

jamin LeVan lying between the kitchen and the dining room of the second floor apartment, the body holding the dining room door open (see Exhibit P-8). They found the body of John Geary over near a radiator (p. 81, l. 33) as shown upon Exhibit P-8, and the body of Orlando B. LeVan, as shown in the immediate foreground of Exhibit P-8. All three were dead, and in the opinion of Dr. Berardinelli, death was instantaneous (p. 62, l. 32).

Orlando B. LeVan was shot from the back (p. 63, l. 12). Benjamin LeVan was shot on the left chest, under the armpit (p. 63, l. 25). John S. Geary was shot from the back (p. 63, l. 15).

The body of Charles Russell Geary (Exhibit P-11) was found on a sofa in the Sun Parlor at the front of the house. He was shot at the front of the body, the point of entrance being right over the heart (p. 65, l. 30). A pump gun was found on the floor of the Sun Parlor (p. 64, l. 10).

In the opinion of Dr. Berardinelli, Charles Russell Geary was killed with the same gun that was used in killing the other three men (p. 65, l. 27), and the police and Dr. Berardinelli were unanimous in the opinion that Charles Russell Geary had shot Orlando B. LeVan, Benjamin LeVan, and John Geary, then made the aforesaid call to police headquarters, after which he committed suicide.

We are of the opinion that at this point it would be helpful to bring before the court just how the bodies of Orlando B. LeVan and John S. Geary give evidence of the manner in which Charles Russell Geary perpetrated the crime, and how Exhibit D-1, letter written by Charles Russell Geary, discloses a pre-conceived plan on his part to kill Orlando B. LeVan.

Orlando B. LeVan

(Exhibits P-3 and P-4)

The shot entered the back of the body of Orlando five inches and a half (5½″) below the nape of the neck, and four (4′) feet about the left hip, and about one and one-half inches (1½″) to the left of the spine (p. 72, l. 1). The size of the wound being about one inch (1″) in diameter, a whole charge passing through the body, having three wounds of exit, one, one-half inch (½″) above the left nipple, and two below the left clavicle (p. 72, l. 25). The diameter of the wound at the point of entry was smaller than that of Benjamin's, and this indicated to the doctor that Charles Russell Geary, at the time he fired the gun in question was farther away from Benjamin LeVan, than he was at the time he fired it at Orlando (p. 73, l. 1). There was also a slight burning of the flesh of Orlando, and the edges of the wound were slightly burned. There were powder marks also, and the doctor indicated on Exhibit P-4 said powder marks (p. 74, l. 15).

In the opinion of the doctor, Charles Russell Geary was from three to six inches of Orlando LeVan at the time he discharged the gun (p. 74, l. 30).

Benjamin LeVan

(Exhibit P-5)

The shot entered the body of Benjamin three inches (3″) below the left armpit, and two and one-quarter inches (2¼″) to the left of the left nipple (p. 66, l. 15). There were seven wounds of exit on the right side of the chest, indicating a course from the left to the right (p. 66, l. 20).

Charles Russell Geary was more than a foot away from Benjamin at the time the gun was discharged (p. 67, l. 15). Dr. Berardinelli reached this conclusion because there were no marks of burning on the clothes, and on the flesh and on the skin there was no impacted powder and no burning (p. 67, l. 20). The doctor, however, was unable to tell how many feet beyond one foot, Charles Russell Geary was from Benjamin at the time of the shot (p. 67, l. 25).

John S. Geary

(Exhibits P-2 and P-6)

The shot entered the back of John Geary at the right of the mid-spine line (p. 73, l. 30). It was eight inches (8″) below the nape of the neck, and four feet and one inch (4′ 1″) above the right hip. Diameter about one inch (p. 74, l. 5). There were lots of powder marks and burning of the edges of the wound (p. 74, l. 15). In the opinion of the doctor, Charles Russell Geary was from three to six inches of John S. Geary at the time of the shot (p. 74, l. 30). The same distance that he was from the back of Orlando at the time he fired the shot which killed Orlando (p. 74, l. 35).

Reconstruction

Exhibits P-7, P-8, P-9, P-10 and P-11 show the condition of the kitchen and Sun Room as found by the police.

Exhibit P-7 shows the interior of the kitchen as does Exhibit P-8, except Exhibit P-7 was taken from a point closer to the rear wall of said kitchen.

The kitchen measured twelve (12) feet long and eight feet (8) in width (p. 120, l. 30).

Captain Rowe of the Police Department, marked Exhibit P-8 (p. 84, l. 16) on the white part at the bottom of the photograph to show that the rear door of the kitchen leading to the back stairs was in a line with the door leading from the kitchen into the dining room, which door was held open by the body of Benjamin. He further testified, that one shot came from the rear of the house (p. 90, l. 25), and that certain slugs penetrated a chair indicated by him on Exhibit P-8, the chair being in the right-hand corner of said picture near the entrance from the kitchen into the dining room (p. 82, l. 20).

Judge John Howe also identified a dent in the kitchen table made by a bullet, a hole through the cabinet shown by Exhibits P-7 and P-8, and a spot in the wall, and a considerable number of shots practically destroyed the back of the chair near the dining room (p. 120, l. 10).

We therefore, respectfully contend that the proof establishes Charles Russell Geary as being at or near the rear door of the kitchen when he caused Orlando B. LeVan, John S. Geary, and Benjamin LeVan to turn their backs to him. Orlando B. LeVan was directly in front of him, and he stepped up to within three to six inches and fired. The shot, to repeat again, entered on the left side of the spine, the point of exit being in the left anterior chest. *This shows that the gun was held in a straight line with Orlando directly in front of the barrel.*

The exhibits show that John S. Geary was to the left of Orlando. In fact, on the other side of the kitchen table, and so, Charles Russell Geary turned from Orlando, who would have been in

his way if he had gone after John or Benjamin first, and who was now removed, being dead, and he brought his gun to within three to six inches of the back of John Geary, and, to repeat again, the shot entered the back to the right of the midspine, and as can be realized from the exhibits, Charles Russell Geary had to walk some distance from a point three to six inches in back of Orlando, to a point three to six inches in back of the right side of John Geary. And it is at this point, and after John Geary had been shot, that Charles Russell Geary turned and killed Benjamin. He was more than one foot away from Benjamin, how many feet Dr. Berardinelli was unable to tell, but one thing is definite, he was to the left of Benjamin at an angle. The shot as fired, to repeat again, entered not the back of Benjamin, but entered the left side of Benjamin, three inches below the left armpit and two and one-quarter inches to the left of the left nipple. The shot made seven wounds of exit, all on the right side of the chest, showing a course from left to right, and proving conclusively, it is contended, that Russell moved from the back of Orlando to the back of John and from there, at an angle, he shot Benjamin, the course of the shot conclusively proving his position, which position he could not have occupied if Orlando had been permitted to remain alive. It was a position that put Charles Russell Geary with John Geary in a corner, and both Benjamin and Orlando could have turned upon him jeopardizing his purpose.

In further support of the foregoing, we have Exhibit D-1 (p. 130, l. 30), a letter from Charles Russell Geary to his wife, disclosing a preconceived plan to kill Orlando B. LeVan. It is cogent evidence of a malicious hatred harbored

by Charles Russell Geary for his uncle. The conclusion is inevitable, that when he entered, he first killed the man he had planned to murder. There would be no point in killing John first and risk the possibility that his intended victim might get away or repulse him with the possibility of escape.

Exhibit D-1

"Dear Dorothy:

Just a few lines to let you know the gun I bought I planned to kill Aunt Kate and Uncle Orlie as they spoiled the lives and happiness of our lives also Johns and mothers and many others. Don't think I went mad I planned this all only God took Aunt Kate before I got a chance. If she would have lived she would have been shot the day she went to go home. Uncle Orlie with her. They were planing on moving Beulah after promising Mother to let her lay at rest beside her. Show this letter to John and ask him not to break his mothers promise. Mother cried many times times this way Aunt Kate and Uncle Orlie were useing John. They did not want him he had no work and could not use him. Dorothy when I am dead have Russ Frey bury me in the clothes I have home. Bury me from Tobyhanna Pine Grove Cottage coffin like Mothers. No flowers. Look after Kate. Adelaide has a husband. Dorothy don't weap over me unless you begrudge me the rest. So long all of you. My last wish is that you enjoy yourself as you have been wonderful for putting up with me for as long as you did.

Good Bye

CHARLES RUSSELL GEARY"

As Vice Ordinary Berry said in his opinion at page 36, line 21, "The law does not require

absolute and direct proof of survivorship, but only such proof as is convincing to the mind of the ordinarily reasonable individual''. The Vice Ordinary held (p. 36, l. 37) that: ''It must be conceded that the conclusion reached by the Advisory Master is a permissible one, but is not exclusive.'' We respectfully contend that the Advisory Master's conclusion was the only reasonable conclusion that could be arrived at, and that the proofs in the case and the necessary inferences to be drawn from them, were of such a *pursuasive nature* as to convince any reasonable man that the conclusion arrived at by the Advisory Master was the only *reasonable conclusion* that could be arrived at.

The Vice Ordinary questions the conclusion arrived at by the Advisory Master that Charles Russell Geary entered the apartment from the rear. That it could be determined from the evidence just as well that he entered the apartment through the front door. From the proofs, we submit that the only reasonable inference from the evidence is that he entered the apartment from the rear.

It would not only be not reasonable, but absolutely fantastic, to conclude that this man who has this shotgun to use in a preconceived plan to murder Orlando B. LeVan, would enter the kitchen from the dining room door to the front of the kitchen, and walk past the three men in the kitchen, carrying the shotgun. Under all the reasonable inferences to be drawn from the proof, Charles Russell Geary unquestionably entered from the rear entrance. The Vice Ordinary said that all the conclusions arrived at by the Advisory Master in the Orphans' Court depend on whether ''Charles entered the apart-

ment from the rear" (p. 38). We contend that is not so. We feel that unquestionably he did enter the rear from the rear entrance, but whether he did or not, *the proofs conclusively* show that when he shot the gun he was in or toward the rear of the kitchen. The bullet marks on the furniture and wall separating the kitchen and the dining room indicate that this is so.

Charles certainly did not shoot from the entrance from the dining room to the kitchen or from the direction of the dining room. Charles could not have shot Orlando in the back, with the muzzle of the gun only from three to six inches from Orlando, while Charles was standing at or near the dining room door. From the position of Orlando's body, Charles must have been standing in the rear of the kitchen when he shot Orlando. Certainly, he must have been standing in the rear of the kitchen when he shot John with the muzzle of the shotgun within three to six inches from John. Likewise there is no possibility of Charles standing at or near the dining room door when he shot Benjamin. If that is where he was standing, then the burnt flesh marks would have been on Benjamin's body rather than on the bodies of the other two. The bullet marks on the wall separating the kitchen and the dining room and on the chair in the corner near it, indicate that the shots were fired from the rear of the kitchen, in the direction of the wall separating the kitchen and the dining room.

At page 41 Vice Ordinary Berry says that if Benjamin was attempting to escape into the dining room when he was shot, no slugs from that shot could possibly have struck the chair and wall at so low an angle. That if Benjamin

was in fact seated in the chair when he was shot, it can hardly be supposed that he would sit quietly by while Orlando and John were being murdered. We feel that the Vice Ordinary lost sight of the quickness with which these three murders were unquestionably committed. It is entirely probable, and in fact convincing, that when the shooting started Benjamin was sitting in the chair in the corner; that Charles shot Orlando and immediately thereafter shot John. It is entirely probable that at first Benjamin was stunned when he heard these two shots, and that when he saw Charles shoot John immediately after shooting Orlando, he decided to escape and started up out of his chair to run into the dining room. He was undoubtedly in a great hurry, and the probability is that he attempted to get out of the chair and run into the dining room *in a crouching position.* It is not to be assumed that under strenuous circumstances like these, while attempting to escape from being shot, he would rise up to his full height before starting for the dining room. The position of his body (Exhibit P-8) indicates that Benjamin was in a crouching position when he was shot and fell. There is nothing whatever improbable in the fact that the left side of his chest was in line with the chair, and that the points of exit of the bullets from his body were on a level with the bullet marks on the chair and the wall, particularly so when we take into consideration that Charles was undoubtedly standing at the time of the shooting. The fact that the bullets entered the body of Benjamin three inches below the left armpit and two and a quarter inches to the left of the left nipple, and that the point of exit was on the right side

of the chest indicates that Benjamin, who had been sitting in the chair facing Charles, was shot while in the act of turning toward the dining room in a crouched position.

The Vice Ordinary, at page 40, said that the time element suggests that Charles and Benjamin must have gone directly from the saloon to the apartment, and entered together, and that if they did, and Benjamin had time to remove his coat, as he unquestionably did, the reconstruction of the crime evolved in the Orphans' Court has no foundation. The fact that Benjamin had time to remove his coat before the shooting, in our opinion, is further corroboration of the determination of the Advisory Master. A reasonable inference to be drawn would be that when Charles went to the saloon and met Benjamin he left the shotgun in his automobile, and when he and Benjamin went back to the apartment, that Benjamin entered first while Charles went over to his automobile and got the shotgun and then followed Benjamin through the rear entrance into the kitchen.

The Vice Ordinary at page 42 stated that the law does not require absolute and direct proof of survivorship in a case like this, "and circumstantial evidence, *if convincing,* is as good and effective as direct evidence."

We respectfully submit that the evidence is convincing that the conclusion of the Advisory Master in the Orphans' Court that John S. Geary survived Orlando B. LeVan was correct, and that no other conclusion could reasonably and fairly be arrived at.

Law

There is no doubt that the murderer had but one gun, and that his three victims were killed with the same gun. They could not have been shot simultaneously, but necessarily, one was shot after the other. This fact is of the utmost significance, because, as the authorities we shall cite indicate, the killings were NOT A COMMON DISASTER.

The case is not a common disaster case. It is rather a case which depends upon basic fundamental principles of proof. There is no room for fictional presumptions because there is present evidence of what really did happen.

In passing we submit that this is not a case *where direct evidence can be obtained but is not produced.*

In *Union Central Life Insurance Company* vs. *Elizabeth Trust Company,* 119 N. J. Equity 505 Vice-Chancellor Berry dealt with a situation which disclosed that a man murdered his wife and child and then killed himself. There was no direct evidence which of the three persons died first. That question was important for the purpose of determining who was entitled to the proceeds of a life insurance policy. Vice-Chancellor Berry in holding that this state of facts was not a common disaster, even as to the wife and child, said:

> "* * * But the three deaths which here occurred and which are the subject of this inquiry cannot be said to have resulted from the 'same disaster.' While they occurred at approximately the same time, they resulted respectively from separate, distinct, and succeeding acts of the perpetrator of the crimes. * * *"

The learned Vice-Chancellor next considered what kind of proof of survivorship would be

deemed sufficient to warrant the Court to come to some conclusion on that subject. In doing so he set at rest the notion that circumstantial evidence such as we have adduced is not sufficiently persuasive. The learned Vice-Chancellor said:

> "On behalf of the defendant Rolston, administrator of the estates of the murdered wife and child, it is insisted that positive proof of the exact time of the death of both insured and beneficiary must be produced; that there being no eyewitnesses to this tragedy, and no proof except circumstantial evidence, there is lacking that proof which the law requires; that therefore the burden of proof has not been sustained; and that the legal representatives of the beneficiary are entitled to the fund involved. In support of this argument, the language of the Lord Chancellor in Underwood *v.* Wing, 4 DeGex, M. & G. 333, 'we may guess, or imagine, or fancy, but the law of England requires evidence,' is quoted. But the law requires not absolute and direct proof, but only such proof as is convincing to the mind of the ordinary reasonable individual. The question is purely one of fact (Greenleaf on Evidence, *supra*) to be supported according to the usual rules of evidence. Only that evidence which satisfies the ordinary mind is required. Circumstantial evidence, if convincing is as good and effective as direct evidence. Sometimes it is more reliable than that of eyewitnesses. In the instant case, the court, sitting as both judge and jury, can require only that evidence which is satisfactorily convincing, and I think that the evidence here leaves no room for doubt as to which of these victims of the tragedy survived the others. * * *"

The learned Vice-Chancellor had much less before him than there is presented here. The shots were heard by a neighbor and the police were called.

The bodies of the wife and child were lying in bed, each with two bullet holes in the head. The bed covers under which they slept were not disturbed. The body of the husband was lying crosswise on the bed over the other two. He had one bullet hole in his head from the .38-caliber revolver which was lying on the bed. From that revolver only one shot was discharged. The wife and child were killed with a .32-caliber revolver found on a dresser, from which 5 cartridges had been shot. Thus far there was no evidence of survivorship. In fact, the husband having been shot with a .38-caliber revolver and the wife only with a .32-caliber, the inference might be gathered that he, suffering a larger wound, would expire more quickly than his wife who suffered a smaller wound. But the Court found that the wife died first and upon evidence of physicians who examined the bodies when all three persons were undoubtedly dead. One doctor testified that the wounds of the three victims would be sufficient to produce instant death, and that the wife could not have survived for some period of time and that her death was a matter of seconds—something within a minute. Another testified that the great probability was that the wife died instantly. But another doctor refused to testify as to the probability of instant death, and still another doctor, who testified on the basis of the other medical testimony which he had heard in open Court, said that the death of the wife was a question of not over two minutes. He fixed the outside limit of her survival as twenty minutes. But the Court found that this testimony was of very little value, and although, as it is evident, there was not complete unanimity among the physicians, so as to indicate clearly that the wife did not survive her

husband, the probabilities to be gathered from the testimony were to that effect. An indication of the slight circumstances which induced the finding of the Court is to be gathered from the following language of the Vice-Chancellor:

> "The testimony which is here entitled to the most weight is that of Dr. Crabtree and Dr. Brokaw, who saw the bodies of the three victims immediately after death, and while they were still in the positions in which they died. Indicative also of the instantaneous death of Mrs. McCallum is the fact that the bed covers had not been disarranged; there was no evidence of her having made the slightest movement after she was shot, and there was no expression of fear, fright, or, indeed, of any agitation, on her face; she appeared 'just as if she was sleeping, very calm and peaceful.' "

Thus, circumstances pointing to a greater probability of one conclusion than of another are deemed sufficient in cases of this kind to support a finding as to survivorship.

In *Broome* v. *Duncan,* 29 So. 394 (Miss.), a husband and his wife went into a certain timber between eleven and twelve A. M., the husband carrying a rifle, and shortly thereafter two reports were heard. Their bodies were found about six P. M., the wife shot through the body from behind, while the husband was in a squatting position, with his rifle across his knees, and the top of his head blown off. It was conceded that the husband had shot the wife, either accidentally or intentionally, and then committed suicide. The evening was rainy, and was nearly freezing. Two heirs of the wife and another witness testified that the body of the wife was warm at six o'clock, and that there were leaves and grass in her hands,

as if she had struggled in dying. One witness for the heirs of the husband testified that he reached the bodies at eight P. M., and that they were both cold and stiff, and there were no signs of a struggle. It was held that the evidence was sufficient to show that the wife survived the husband, and his property descended to her. Here again is a case where the Court seized upon slight circumstances as warranting a conclusion of survivorship. And it will be observed that undoubtedly the wife was shot first and the husband afterwards, and the circumstantial evidence was deemed sufficient to show that the wife survived him.

In the instant case we have not merely one indication of survival, such as the leaves and grass found in the hands of the wife in the Broome case. We have the positions of the bodies with respect to the killer's entrance into the room; his preconceived design to kill Orlando B. LeVan; the evidence of instantaneous death showing that LeVan and Geary died at the places in the room where the shots were fired into them—all indicating, together with the other evidence to which we have referred, that Charles Russell Geary entered the room and shot down the man he intended to kill and then passed around the kitchen table to John S. Geary who was standing beyond Orlando B. LeVan and kill him then, after Orlando B. LeVan met instantaneous death with the discharge of the shotgun into his back.

Another case of this type is *Evans* v. *Halterman,* 165 N. E. 869 (Ohio). The evidence and conclusion of the Court are indicated in the syllabus which reads:

> "Where a husband and wife were murdered at or about the same time, the evidence dis-

> closing that the husband had been shot in the back and head and his body found some distance from his house, fully clothed, that he had *probably* been engaging in doing his morning work about his farm, and that the wife had been beaten about the head, and her body found near the house, partially clothed, the noise of shots *presumably* having caused the wife to hastily leave the house in aid of her husband, the *probabilities* are, in a suit to determine descent and distribution of their property, that the husband died first, when the above facts are considered with the further circumstances that the husband must have been instantly killed, as there were no signs of a struggle, and there was no flow of blood until his body was moved, indicating that his heart stopped instantly, while the profusion of blood around the body of the wife, and the evidence of a struggle, would indicate that her death was not sudden. The fact that the wife's body, when found, was colder than that of the husband, does not justify an inference that she died first, when considered with the facts that her body was very thinly clad and she had lost a great amount of blood." (Italics ours.)

It is to be observed that the Court reconstructed what had happened from probabilities—probabilities drawn from slight circumstances. Any one of these circumstances might have warranted a different inference, but *together* the Court found them sufficient to produce its conclusion. So also in the present case, we submit that the various circumstances must be considered *together,* and their cumulative effect will be seen to show that John S. Geary survived Orlando B. LeVan. But, even if these circumstances show only a probability of such survival, under the cases that is sufficient.

Still another decision of this kind is *In re. Marttinen's Estate,* 214 N. W. 469 (Minn.). The Court said:

> "This litigation springs from a tragedy which occurred at a farm home near Virginia, in St. Louis County, when the husband shot his wife, and, after a short interval, turned the gun against himself, inflicting a mortal would. * * *"
>
> * * * * * *
>
> "There was evidence tending to show that, between the time the husband shot at his wife and the time he shot himself, he went downstairs and wrote a few lines on a tablet. * * *"
>
> * * * * * *
>
> "The vital point in the appeal is whether the evidence sustains the verdict, approved and incorporated in the findings of the Court, that Hilda Marttinen survived her husband Walter Marttinen. The only living witness of the tragedy was one Ano, who served as a first target for Walter's fusillade. His wounds and fright temporarily dazed him, and his testimony as to when life ceased in either of the two who died from the burns fired is of little or no value. The jury had to determine the question submitted almost wholly upon the medical experts' opinions based upon the wounds inflicted and the testimony as to bleeding. Their unanimous conclusion was that the husband's death followed almost instantaneously the self-inflicted wound; but that the wounds received by the wife and the bleeding resulting indicated that death did not come to her for quite a period after being shot. The time estimated varied from 30 minutes to 2 hrs. Without going into more of the gruesome details of the wounds or the circumstances of the shooting, it may be said that there is ample evidence to sustain the jury's finding that the wife survived the

> husband; indeed, there is hardly any basis for a contrary finding."

Here the Court based its conclusion solely upon the medical testimony, despite the fact that there was unboubtedly an interval of some time between the murder and the suicide. *It is to be observed that the Court did not say that it found itself without sufficient evidence to satisfy it one way or the other. The Court recognized that it was its obligation to reach a conclusion as to survivorship upon the circumstantial evidence which was presented. In other words, it is the policy of the Courts to decide these questions of survival and not to let them go undecided simply because the evidence is circumstantial or opinion evidence of expert witnesses.* As stated in *Pell* v. *Ball,* 15 S. C. Eq. 99:

> "Where there is any evidence whatever, even though it be but a shadow, it must govern in the decision of the fact."

Even in common disaster cases the same rule is applied. In such cases the established principle is that there is no presumption whatever. Vice-Chancellor Berry in *Union Central Life Insurance Co.* v. *Elizabeth Trust Co., supra,* pointed out that this was the common law rule but did not find it necessary to decide whether the common law rule applied in New Jersey. He did observe that common law rules, in preference to those of the civil law, are uniformly followed in this State.

In *Masonic Temple Association* v. *Hannum,* 120 N. J. Eq. 183, Vice-Chancellor Sooy held that the common law rule applies in New Jersey, saying:

> " 'At common law there is no presumption of survivorship arising from the age, sex, etc., of persons who perish in a common disaster,

so that any claimant upon whom the law places the burden of proving that one of the persons survived the other will fail in his claim unless he can prove survivorship by circumstances, witnesses, or otherwise.' See annotation to McGowin *v.* Menken, 223 N. Y. 509, 119 N. E. 877, 5 A. L. R. at page 797.

"In 8 R. C. L. p. 716, sec. 12: 'In England and also in the United States, with the exception of those states which have codes embodying certain presumptions of survivorship, the common law doctrine applies, that where two or more perish in the same disaster, and there is no fact or circumstance to prove which survived, there is no presumption whatever on the subject.' "

* * * * * *

"Inasmuch as the only states in the Union which follow a rule differing from that at common law are the states of Louisiana (Napoleon Code) and California (statute), this rule of the common law is the law of this state."

The decisions applying this principle establish that where there is any circumstantial evidence inferences drawn from such evidence must control the decision of the case. The purport of the authorities is stated in 17 *C. J.* 1180, as follows:

"Where there is no direct evidence as to which of two persons survived a common disaster, circumstantial evidence, including such general considerations as age, health, nature of injuries, etc., may be considered, especially where expert opinion has been given that consideration of these matters is material in determining the survivorship. Inference from such circumstantial evidence is not the same thing as a presumption in the absence of all evidence. But where there is any evidence as to the surivvorship between two persons who perished in a common disas-

> ter, it must govern in the decision of the facts."

A great many decisions illustrate this doctrine, among them being *Sporrer* v. *Ady,* 132 A. 376 (Md.); *Smith* v. *Croom,* 7 Fla. 81; *Matter of McInnes,* 104 N. Y. S. 147; *Robson* v. *Lyford,* 117 N. E. 621 (Mass.); *Matter of Herrmann,* 136 N. Y. S. 944; affirmed 140 N. Y. S. 743; *Ehle's Estate,* 41 N. W. 627 (Wisc.); *Pell* v. *Ball,* 15 S. C. Eq. 99; *St. John* v. *Andrews Institute for Girls,* 102 N. Y. S. 808, modified on other grounds 83 N. E. 981, appeal dismissed 214 U. S. 19.

Burden of Proof

The Vice Ordinary held that appellant has the burden of proof in this case. We submit that this is not so under the circumstances in this case. The proceedings were initiated by the administrator with the will annexed of the estate of Orlando B. LeVan, deceased. Appellant was brought into the Orphans' Court as a respondent to the order to show cause entered in that court.

This is not a case of common disaster, as was the situation in the case of *Masonic Temple Association* v. *Hannum, Executor,* 120 N. J. Eq. 183, and other cases cited by Vice Ordinary Berry. There is no question but that as between Orlando B. LeVan and John S. Geary one survived the other. Under the cases cited above, it is the duty of the court to determine which survived, without regard to any burden of proof.

Conclusion

It is respectfully submitted that the decree of the New Jersey Prerogative Court was erroneous, and should be reversed, and the decree of the Orphans' Court affirmed.

Respectfully submitted,

Carey & Lane,
Proctors for Appellant.

Robert Carey,
Harry Lane,
Of Counsel.

To be argued by Harry Lane.

New Jersey Court of Errors and Appeals

IN THE MATTER of The Appeal from the decree of the Orphans' Court of the County of Essex, decreeing that ORLANDO B. LEVAN predeceased John S. Geary and that the estate of said Orlando B. LeVan be distributed according to the terms of the Will admitted to probate in Essex County on September 30, 1935.	*On Appeal from Prerogative Court.*

BRIEF OF RESPONDENT
Joseph H. LeVan

This is an appeal from so much of a decree of the New Jersey Prerogative Court dated the 26th day of April, 1938, as ordered and decreed that so much of the order of the Essex County Orphans' Court, dated the 16th day of June, 1937, as ordered and decreed that " 'Orlando B. LeVan predeceased John S. Geary, and that the Estate of Orlando B. LeVan be distributed according to the terms of the will admitted to probate in the said County of Essex on the 30th day of September, 1935, be and the same is hereby reversed, set aside and for nothing holden"; and which "further ordered, adjudged and decreed that the said Orlando B. LeVan survived the said John S. Geary and that the Estate of the Said Orlando B. LeVan be distributed to the appellant, Joseph H. LeVan, as sole surviving next of kin and heir at law of the said Orlando B. LeVan deceased, in accordance with the statute of distribution of this State."

Vice Ordinary Berry, in the opinion filed by him (pp. 31-45), reversed the decree of the Essex County Orphans' Court and held that the administrator of the Estate of John S. Geary (the appellant here), did not sustain the burden of proving that Orlando B. LeVan predeceased John S. Geary, and advised a decree (pp. 46-48) reversing the decree of the Orphans' Court, and decreeing that Orlando B. LeVan survived John S. Geary and that the Estate of the said Orlando B. LeVan be distributed to Joseph H. LeVan, his sole surviving next of kin and heir at law. It is from this decree, that the appeal before this Court is taken.

GROUNDS OF APPEAL

The appeal is predicated upon two grounds; first, that the Prerogative Court erroneously held that Orlando B. LeVan survived John S. Geary, and that the Estate of Orlando B. LeVan should be distributed to Joseph H. LeVan, (the respondent in this cause) as sole surviving next of kin and heir at law of the said Orlando B. LeVan, deceased, in accordance with the statute of distribution; and second, that the Prerogative Court erroneously held that the burden of proving that the said John S. Geary (the sole legatee) survived the said Orlando B. LeVan (the testator) was on the appellant. The first question is one of fact; the second a question of law.

STATEMENT

Orlando B. LeVan, the testator, and John S. Geary, his sole surviving legatee, were murdered in the kitchen of the home of the said testator, Orlando B. LeVan, who left him surviving as his

only next of kin and heir at law, a brother, Joseph H. LeVan, the respondent in this cause. The sole question at issue before the Prerogative Court in this matter, was whether John S. Geary (whose administrator is the appellant in this appeal) survived Orlando B. LeVan. The Prerogative Court held that the evidence did not establish that John S. Geary had survived Orlando B. LeVan, the testator, and therefore, the Estate of the said Orlando B. LeVan, devolved upon Joseph H. LeVan, the respondent, as his sole next of kin.

FACTS

The facts are clearly and concisely stated by Vice Ordinary Berry in his opinion (pp. 31-34).

At 12:13 a. m. on September 19th, 1935, the Police Headquarters telephoned operator in Newark received a call and heard a voice say, "I have just killed three men at 938 South 20th Street, come and get me", or words to that effect. Within seven minutes a half-score of policemen, detectives and doctors were breaking down the door of a second-floor apartment at that address, where they found four men shot to death. Three of them were sprawled on the kitchen floor (Ex. P-7, p. 146) and the fourth, the murderer of the other three, was lying on a couch in an adjoining room, a suicide. All had been shot with a sawed-off six-shooter repeating shotgun which was lying on the floor beside the couch on which the suicide-murderer lay. (Ex. P-11, p. 154). The deaths had resulted instantly and the bodies were still warm. (p. 62, l. 36-40). *Rigor mortis* had not begun (p. 76, l. 19-20). Each had been the victim of one shot fired at close range. There were three empty shells on the

kitchen floor, one empty and two loaded shells in the gun. The dead men were Orlando B. LeVan; his brother, Benjamin LeVan; a nephew by marriage, John S. Geary, and Charles Russell Geary, brother of John, who had murdered the other three. There were no eye-witnesses to this multiple tragedy and the first knowledge of it came with the telephone call to the police station.

Orlando left a will naming his wife Kate, or, in the event of her prior death, his wife's nephew John S. Geary, beneficiary. The wife Kate, predeceased the testator and his only next of kin is a surviving brother, Joseph H. LeVan. John was survived by his brother Charles, who immediately committed suicide, and by his brother Harold, who has been appointed administrator of his estate.

The known *facts* touching this tragedy are that Charles Russell Geary left his home in Tobyhanna, Pennsylvania, about 4 p. m. on September 18th, 1935, in a borrowed automobile, telling his wife he was going to Newark, to see his Uncle Orlando, and that he would return soon. (p. 128, l. 30-40). About nine o'clock that evening he joined Benjamin LeVan in a Newark saloon where they remained talking and drinking until about 11.30 p. m., when they left together. (p. 98, l. 20-21). Neither of them was again seen alive. The automobile was found parked in the rear of the LeVan home. A back stairway leads from the yard to the second floor and a small foyer of the LeVan apartment. From this foyer a door opens into the kitchen where the three murdered men were found. The kitchen is about 8x12 feet. The body of Orlando lay sprawled near the center of the room, face downward, in front of the door leading to the dining room, his head under a chair, his unshod

right foot under the table and the other doubled under his right leg (Ex. P-8, p. 148). Benjamin (whose death is not the subject of this appeal) was in a partly kneeling position across the threshhold of the door leading from the kitchen to the dining room, directly opposite the door from the hall to the kitchen, and a matter of inches from Orlando. (Ex. P-8, p. 148). John was lying on his face to the extreme left side of the kitchen near the radiator and with his feet and legs entirely under the table. (Ex. P-9, p. 150) The furniture was not disarranged and there was no evidence of a struggle. The unexploded gun shells each contained nine buckshot. Both Orlando and John had been shot in the back with a gun the muzzle of which was not more than three to six inches distant as evidenced by powder marks and burns. Some of the slugs had gone clean through the bodies—others lodged therein. Benjamin was shot in the left side of his chest, a few inches to the left of the left nipple and some of the slugs had gone clean through his body and out on his right side. The gun was more than a foot distant from his body when fired. There were no powder marks or burns. All had been shot through the heart. The wounds of John and Orlando were of about the same size—one inch in diameter, and were accompanied by like powder marks (Ex. P-4, P-6, pp. 140-144) ; that in Benjamin's side was the largest of the three, with a maximum diameter of two and one-half inches, and a minimum of one-and one-half inches. Evidently the shots which killed John and Orlando were fired from a point equally distant from both, and that which killed Benjamin was fired a further distance away—not closer than one foot.

Shortly after the murder, the murderer's widow

found at her home, an undated letter in the handwriting of the murderer, indicating that "the gun I bought I planned to kill Aunt Kate and Uncle Orlie" (Ex. D-1, p. 134).

The proof adduced in this matter, indicates the following facts: There were no surviving witnesses to the murders; the deaths of John S. Geary and Orlando B. LeVan resulted from two separate acts of a common murder—shots fired from the same gun; the death of each was instantaneous; the medical proof offered showed that it was impossible to determine which expired first as both bodies were warm and rigor mortis had not yet set in. The only documentary evidence besides the letter above mentioned and a sketch of the kitchen where the killings took place, were photographs taken of the kitchen showing the positions of the bodies when the police found them and photographs of the bodies of the murdered men showing the wounds. As Vice Ordinary Berry tersely remarked in his opinion: "the only question to determine is which was first shot."

RECONSTRUCTION

It would be idle as well as futile to attempt to reconstruct a version of how or in what manner or order these shootings occurred, because such a story would be based upon pure speculation and conjecture. As many versions of this tragedy can be conjured up as the fertile mind of a fiction writer might produce. We do not know how the murderer got into the house; whether his victims were taken by surprise or whether he visited with them first, either under friendly or acrimonious circumstances; we do not know whether the bodies

of the victims had been moved or disturbed by the murderer after the killings; we do not know whether the positions of the furniture had been disturbed. All we have are the photographs taken by the Police photographer showing the positions of the bodies when the police arrived upon the scene.

A careful examination of the positions of the bodies of John S. Geary and Orlando B. LeVan (Ex. P-7, p. 146) will leave great doubt as to where the men were when they were shot. Orlando's body is in a position into which it would seem impossible to have fallen. The left leg is crossed under the right, which in turn is under the table. His head is entirely under a chair, the rung between the front legs across the neck, straddle-fashion. John's body is between the table and radiator, with feet under a chair, yet neither the table, table-covers or newspapers upon the table are disturbed. How could John have fallen in this position if he were shot facing the windows as the appellant contends? Was the table moved or disturbed? The very fact upon which the appellant seeks to formulate a hypothesis, is itself only a conjecture. Assuming the bodies had not been disturbed, how can we ascertain the positions in which John and Orlando were standing or sitting when shot?

From the crumpled positions of the bodies and the distorted positions in which they were found, it is utterly absured to attempt to state exactly where and in what position they were at the time the fatal shots were fired. And to presume to state which one was first shot is pure speculation, entirely unwarranted in fact and law.

LAW

Where two or more persons perish in a common disaster, there is no presumption of survivorship and this applies whether the common disaster was an accident or the murder of several persons at the same time.

The appellant in his brief argues that this case was NOT A COMMON DISASTER and therefore "there is no room for fictional presumptions." But the appellant not only quotes no law to support his position, but disregards a long line of decisions against this contention. (p. 15 of appellant's brief).

It has been uniformly held in England and all of the United States, except Louisiana and California, that there is no presumption of survivorship, in the case of persons who perish by a common disaster, in the absence of proof to show the order of death. Young Women's Christian Home v. French, 187 U. S. 401 (U. S. Sup. Ct.); In re Wilbor, 37 A. 634 (Rhode Island); Carpenter v. Severin 204 N. W. 448 (Iowa); Newell v. Nichols 75 N. Y. 78 (N. Y. Court of Appeals); Middeke v. Balder 198 Ill. 590 (Ill.); Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 785, L. R. A. 1915 C, p. 328; Masonic Temple Ass'n. v. Hannum, 120 N. J. Eq. 183.

This rule applies equally, whether the deaths of two or more persons arise out of a common disaster resulting from an accident or the murder of several persons at the same time. Wall v. Pfanschmidt 265 Ill. 106, L. R. A. 1915 C. 328, Ann. Cas. 1916 A, 674.

In Wall v. Pfanschmidt 265 Ill. 106, the Supreme Court of Illinois in dealing with a question of survivorship arrising out of the murder of several persons at the same time said:

> "The rule that where two or more persons perish in a common disaster there is no presumption, under the common law, of survivorship, and if survivorship is claimed it must be proved, *applies whether the common disaster was an accident or the murder of several persons at the same time.* (Italics ours.)

Vice Ordinary Berry, in the case below, adopted the same views, saying:

> "While this is not a common disaster case, the same rules of evidence apply." (State of case p. 36, l. 27-29).

The reason for the rule is obvious, for, as the New York Court of Appeals indicated in the case of Newell v. Nichols 75 N. Y. 78, even in cases of common disaster, there is little likelihood that both deaths occur, in point of fact, simultaneously. In Newell v. Nichols 75 N. Y. 78, the Court of Appeals at page 88 said:

> "Indeed it may be conceded that it is unlikely that they ceased to breathe at precisely the same instant and as a physical fact it may be inferred that they did not. But that does not come up to the standard of proof. The rule is that the law will indulge in no presumption of balancing probabilities, either that there is a survivor, or who it was. In this respect the common law differs from the civil******. We may guess, or imagine, or fancy, but the law requires evidence.********
>
> At most the difference can only be a few brief seconds. The scene passes at once beyond the vision of human penetration, and it is as unbecoming as it is idle for judicial tribunals to speculate or guess whether during the momentary life struggle one or the other may not have ceased to gasp first, especially when the transmission of title to property depends upon it, and hence in the absence of other evidence the fact is assumed to be unascertainable, and property rights are disposed of

> as if death occurred at the same time. This is done not because the fact is proved or that there is any presumption to that effect, but because there is no evidence, and no presumption to the contrary. The authorities are uniform upon this doctrine*******.

This therefore leads to the question: Upon whom does the Burden of Proof rest?

The Burden of Proof is upon the Appellant, the adminstrator of the Estate of John S. Geary, to show by a preponderance of evidence, that John S. Geary survived Orlando B. LeVan, in order to claim the estate of Orlando B. LeVan under his will.

The Appellant in his brief, submits that the Prerogative Court was in error in holding that the burden of proof was upon the estate of John S. Geary, but relies upon no authorities to support his claim (Brief p. 24), although the proposition of law above cited and enunciated by Vice Ordinary Berry is definitely established in law.

In a recent case, Masonic Temple Ass'n v. Hannum 120 N. J. Eq. 183, the Court of Chancery was called upon to decide this very point in a case involving the right to the proceeds of certain "Certificates of Indebtedness". The certificates were payable to Jennie H. Hannum, his wife, if living, otherwise to the legal representatives of said Philip George Hannum. Both Hannum and his wife were killed in a common disaster. As in the case at bar there was no evidence from which it is possible to ascertain which of the two died first. It was conceded as here, that both deaths were instantaneous. The legal representatives of both husband and wife claimed the proceeds of the certificates. The first point that Vice Chancellor Sooy determined was that

there is no presumption of survivorship under the laws of New Jersey. The next point and the one dispositive of the case was "upon whom does the burden of proof rest". The court found that the burden of proof rests on the representatives of the wife to show she was living at the time of the death of her husband, and having failed in this, decided the fund must be paid to the Estate of the husband.

In a case on all fours with the case under consideration here, the Illinois Supreme Court in Middeke v. Balder 198 Ill. 590, 64 N. E. 1002, 59 L. R. A. 653, 92 Am. St. Rep. 284, speaking of the burden of proof said:

> "Then comes the question: On whom does the burden of proof rest to show whether the wife did or did not die in the testator's lifetime? I think, the principle once being admitted that the prima facie title is in the next of kin, that it must rest on the person who claims the property under a bequest giving it to him in that event. *It is not for the next of kin* to show that the wife did not die in her husband's lifetime, but the person who claims under the disposition must show, not *that probably* it might be one way or the other, but that that state of circumstances did in fact occur which entitle him, according to the language of the will, to say that the wife did die in her husband's lifetime. The result therefore, is that, there being a will giving away the property in one state of circumstances—namely that the wife died in the husband's lifetime—and it not being proved that that state of circumstances existed, the property is not given away at all, and must be distributed among the next of kin as upon an intestacy. (Italics ours).

The same rule was also applied in Newell v. Nichols, 75 N. Y. 78.

Again In re Burza's Estate 272 N. Y. S. 248, in a similar situation, the Court found:

> "It is impossible to determine the priority of death here and the estate of the husband, therefore, passed by operation of law to his next of kin.

In St. John v. Andrews Institute for Girls, 102 N. Y. S. 808, "The undisputed evidence shows that the testator and wife perished in the destruction of their house by fire and that Mrs. St. John (the legatee) died within a few minutes after being rescued from the fire in an unconscious condition and without having regained consciousness". The Court on page 813 said:

> "Proof of these facts in the absence of evidence that Mrs. St. John survived the testator, was sufficient to establish that the legacy never vested in her, and that unless otherwise devised and bequeathed under the will, it went to the next of kin of the testator * * * * * * * * * * when therefore evidence was adduced showing that they all met death in the same conflagration, it was incumbent upon the Administrator of Mrs. St. John, in order to entitle him to receive the legacy under the will, to prove facts or circumstances tending to show that she survived the testator; *and the burden of proof of establishing the fact, upon which the right of legacy depended, was upon him.* (Italics ours).

See also In re Wilbor 37 Atl. 634 (Rhode Island); Young Women's Christian Home v. French, 187 U. S. 401; Carpenter v. Severin, 204 N. W. 448, (Iowa).

This rule applies with greater force in the case of a will since a will being ambulatory there are no vested rights therein prior to the death of testator.

In Moultrie v. Hunt, 23 N. Y. 394, the New York Court of Appeals remarked:

> "It is of the essence of a will that until the testator's death it is ambulatory and revocable. No rights of property or powers over property were conferred upon any one by the execution of the will."

The law likewise prefers the next of kin to strangers in the descent of property. Here the next of kin is Joseph H. LeVan, a brother. The parties who take under the estate of John S. Geary are total strangers to the said Orlando B. LeVan. John S.Geary himself was no blood kin of the testator. In the case of Carpenter v. Severin, 204 N. W. 448 (Iowa) hereinbefore cited, the Supreme Court of Iowa held:

> "It is recognized that kin is to be preferred to strangers in the descent of property. The heir of the testator takes directly from him—the person who had title at the time of the disaster.

The appellant in his brief infers that the burden of proof is not on the appellant because the proceedings were initiated by the administrator with the will annexed. Again he refers to no authorities to support this contention; but entirely overlooks some of the very cases cited by him in his own brief which hold to the contrary. If it is true that the appellant did not institute the proceedings, it is equally true that the respondent did not.

It is well to note that the cases dealing with questions of survivorship fall into two categories; first, those dealing with the proceeds of insurance policies; and second, those involving the disposition of decedents' estates. In the first class of cases, namely, those dealing with insurance policies, the

proceedings are generally initiated by the insurance companies on interpleader bringing in the representatives of the deceased insured and the deceased beneficiary. In all of these cases the burden of proof is upon the representatives of the beneficiary to show he or she survived the insured. This very point was decided in the case of Masonic Temple Ass'n v. Hannum, 120 N. J. Eq. 183, *the only authority cited by the appellant.* See also Middeke v. Balder 198 Ill. 590; McGowin v. Menken 223 N. Y. 509; Sporrer v. Ady, 132 A. 376 (Md); Modern Woodmen of America v. Parido, 167 N. E. 52.

The reported decisions dealing with questions of survivorship involving the disposition of decedents' estates all have been brought before the court by the initiation of proceeding by the executor of the estate of the testator, and have likewise universally held that the burden of proof is upon the person claiming under the will and not the next of kin. Middeke v. Balder 198 Ill. 590; Newells v. Nichols, 75 N. Y. 79; St. John v. Andrews Institute, 191 N. Y. 254; In re Laffargue's Estate, 140 N. Y. S. 743; In re Gerdes Estate 104 N. Y. S. 147; Evans v. Halterman 165 N. E. 869 (Ohio); Young Women's Christian Home v. French, 187 U. S. 401. All of the foregoing cases were brought before the court by the executors seeking instructions as to whom distribution should be made. This is precisely the manner in which this cause was initially brought before the court, and it is clear that there is no merit to this inference on the part of the appellant.

Since it is clear that the burden of proof rested upon the appellant to show by a preponderance of proof that John S. Geary did survive Orlando B. LeVan, the next question logically presents itself:

Did the appellant sustain his burden and show by a preponderance of evidence that John S. Geary did in fact survive Orlando B. LeVan in the court below?

The appellant failed to show by a preponderance of proof that John S. Geary did in fact survive Orlando B. LeVan.

The appellant, in support of his contention that the evidence was sufficient to prove that John S. Geary survived Orlando B. LeVan, cites four decisions: Union Central Life Insurance Company v. Elizabeth Trust Company, 119 N. J. Eq. 505 decided by Vice Chancellor Berry, who rendered the opinion which is the subject-matter of this appeal; Broome v. Duncan 29 So. 394 (Miss.); Evans v. Halterman, 165 N. E. 869 (Ohio); In re Martinen's Estate, 214 N. W. 469 (Minn.). A brief survey of these cases, however, will demonstrate that they have no bearing upon the case at bar.

There is no direct evidence in this case bearing upon the question of survivorship. It is definitely established that there were no eye witnesses to the killing; that both parties met instantaneous death as a result of the same type of gunshot wounds, at the same time and at the same place. We have also in this case the absence of any medical assistance in determining this question. Dr. Berardinelli, Assistant Medical Examiner of Essex County, testified definitely that the death in each case resulted from the same type of wound, was instantaneous and that it was impossible to determine medically which of the two expired first. And this is conceded by the appellant. (p. 19 of brief).

The case of Union Central Life Ins. Co. v. Elizabeth Trust Co., 119 N. J. Eq. 505, cited by the appellant, affords little assistance in the determination of this litigation. That case was also decided by Vice Ordinary Berry, sitting as Vice Chancellor; there the question presented was to determine who survived as between the husband and wife. *It was conceded by the parties that it was a case of murder and suicide.* The husband shot the wife and then took his own life. Not only was this fact admitted by the parties, but the circumstances surrounding the findings of the bodies were such that any other inference would have been impossible. The bodies of the wife and the child were lying on the bed, each with two bullets in their heads made by a 32-cal. revolver. The bed covers under which they slept had not been disarranged. The body of the husband was lying across the bed over the bodies of the wife and child. There was a bullet in his head made with a 38-cal. revolver. Near the side of the bed on which the body of the child lay was found a 32-cal. revolver from which five cartridges had been shot. Upon the bed near the husband was lying a 38-cal. revolver from which only one cartridge had been shot. The medical testimony was that the wounds of all victims were equally fatal; that rigor mortis had not yet set in and that death was instantaneous in each case. Under this state of facts that Court concluded that it was obvious that there was no room for doubt that the husband killed his wife and child and then committed suicide.

Although the brief of the appellant devotes four pages to the Union Central Life Ins. Co. v. Elizabeth Trust Co., it overlooked the most important fact—that it was conceded the wife was murdered

by the husband and therefore as a physical fact was shot before he took his own life. This together with the medical testimony made the decision obvious. But we have no such situation here. The contrary is true. As Vice Ordinary Berry remarked: "As the death of each was instantaneous, the only question to be determined is which was shot first" (p. 36 l. 35-37).

We have no such posture of proof however, in this case. Here we are presented with two victims of a murder. It is obvious that if the question here were as between the deaths of the "murdered" and the "murderer" we would have the facts presented in the Union Central Life Case and the solution would be obvious, but that is not so in this case.

For the same reason the case of Broome v. Duncan 29 So. 394 (Miss.) also cited by the appellant affords no assistance to us in this matter. That case is also one where a husband killed his wife and then committed suicide. His wound was such as produced instantaneous death; part of his head was torn away and his brains scattered on the ground. The wounds of the wife showed profuse bleeding. There was testimony that shortly after the husband and wife had gone down a path into the woods (he carrying a rifle) two reports of a gun were heard in the direction from which they had gone. There was also testimony of witnesses who came upon the bodies six hours later that that of the wife was warm and limber; that blood was still coming from her wounds and that there was dirt and leaves in her hand, as though she had struggled in her death. From this positive evidence the court concluded the wife survived the husband.

Evans v. Halterman 165 N. E. 869 (Ohio) also

cited by the appellant is another decision which has no bearing upon this situation. In that case a husband and wife were murdered by the husband's half-brother. He was found slain, fully clothed near his barn. He was shot in back and through the head. The medical testimony disclosed that the latter wound would have produced instant death. The body of the wife was found near the house. She was only partially dressed, that is, she had on a bathrobe and over-shoes. She had been beaten about the head. There was a great mass of blood around her, showing she bled freely. There was also evidence showing there had been a scuffle between the wife and the killer. From these facts the court found that the husband had been shot from behind (this happened early in the morning) and the wife hearing the shot ran out of the house only partially dressed where she surprised the killer, who then beat her, from which she died. In addition the confession of the murderer introduced in the criminal case was offered in evidence, but the court rendered its decision without passing upon its admissibility.

In, In re Martinen's Estate 214 N. W. 469 (Minn.) the court properly found that the wife survived her husband. In that case there was an eye witness to the shooting. It was testified that the husband shot his wife and after a short interval turned the gun on himself. The medical proof showed that the husband's wound was one which produced instant death, while the wife's wound and bleeding resulting therefrom, indicated that she lived for quite a period after being shot, ranging in time from 30 minutes to 2 hours.

In all these cases cited by the appellant, there

was positive evidence, medical or otherwise, pointing conclusively to the survivor. We have here, on the contrary, no such evidence. All the appellant relies upon is the position of the bodies when found by the police as shown on the photographs, and an undated letter.

The appellant contends that because the murderer left a note before coming to Newark (and there was no proof offered as to when this was written), in which he purported to express an intention to kill Orlando B. LeVan, therefore, that he shot Orlando first is most reasonable and probable. There was no other evidence whatever to support this finding. Even were it conceded that Charles Russell Geary came to Newark with the express intention of taking Orlando B. LeVan's life, yet, we find that he also in the same room, and at the same time, took the lives of his own brother, John S. Geary, and that of Benjamin F. LeVan in whose company he had been from nine to eleven o'clock on the night in question, drinking in a tavern in the vicinity of the LeVan home. It was testified by Mr. Becker, the bartender that they were friendly, drank and conversed and left the tavern together. (pp. 95-97). These facts alone nullify any effect which the letter may have, for certainly he had no quarrel whatever with Benjamin LeVan and if he had a preconceived plan to take the life of Orlando B. LeVan alone, would not have waited until after eleven o'clock in the evening until Orlando B. LeVan, his brother John and Benjamin F. LeVan were in the room at the same time.

A careful reading of the letter in question, raises a serious question as to what the said Charles Russell Geary really intended. Nowhere in the letter does he express an intention of coming to

Newark or of killing Orlando. It mentions in the past tense that he bought a gun with which he planned to kill his "Aunt Kate and Uncle Orlie" but that his Aunt Kate died before he had the chance. The letter is undated and there is no evidence whatever in the case to show when this letter was written or to connect it in any way with the trip which the said Charles Russell Geary made to Newark at the time the tragic killings occurred. This letter was found by the wife sometime after the shooting. At best, it can fairly and reasonably be construed as a note left by a person intending to take his own life—nothing more.

The circumstances of the killing certainly do not coincide with the sentiments expressed in the letter regarding the brother John; nor does it explain why Benjamin F. LeVan was also murdered if the sole intention on the part of Charles Russell Geary was to kill the Uncle. As the Court below remarked: "Can the workings of the mind of a murdering maniac be assumed with any degree of certainty? I think not." (p. 37 l. 18-21).

It is from the positions of the bodies of both the testator Orlando B. LeVan and John S. Geary as discovered by the police, and the letter (Ex. D-1), that the appellant seeks to reconstruct a version of what occurred in the kitchen of the LeVan home on the night of the tragedy. From the positions of the bodies as found by the police, the appellant contends that Charles Russell Geary, the killer, was near the rear door of the kitchen when he caused Orlando B. LeVan and his brother Benjamin, to turn their backs to him; that Orlando B. LeVan was directly in front of him and that he stepped up to within three inches and fired; that he then turned to the left, brought his gun to

within three inches of John, fired, and then turned and killed Benjamin. The fallaciousness of this reasoning is apparent. It is based entirely on conjecture. As Vice Ordinary Berry aptly observed in his opinion, "this is founded upon nothing but supposition". Upon what basis of fact can it be that Orlando was shot first; then John; and then Benjamin? How did the killer get into the house? Were the parties taken by surprise? Upon what probable basis can it be advanced that John was first murdered and that Charles then "turning, shot Benjamin as he attempted to escape?" Or that John was shot after Orlando?

It is true that the law does not require absolute and direct proof of survivorship, in a cause such as this; and circumstantial evidence, if convincing, is as good and effective as direct evidence, yet, the circumstances upon which the finding of fact is based, must lead reasonably and fairly to that conclusion, and the exclusion of any other equally fair and reasonable result.

The circumstances upon which the conclusion is based, (and these are all conclusions) must themselves be facts. They are of no value if they in turn are based upon conjecture.

Speculations and probabilities do not suffice for factual proof. Bierbrauer v. Moran, 279 N. Y. S. 176 at 178.

In re Hayward's Will, 256 N. Y. S. 607, the Court, speaking of circumstantial proof in a cause similar to this, quoted from Ruppert v. Brooklyn Heights Railway Company, 154 N. Y. 90, 93, as follows:

> It is entirely true that a material fact in a civil or criminal action may be established by

> circumstantial evidence, but the circumstances must be such as to lead fairly and reasonably to the conclusion sought to be established, and *to exclude any other hypothesis fairly and reasonably.* It has been said that circumstantial evidence consists in reasoning from facts which are known or proved, in order to establish such as are conjectured to exist, *but the process is fatally vicious if the circumstance from which we seek to deduce the conclusion depends itself upon conjecture.*"

It is submitted that the inferences to be drawn from the positions of the bodies *do not exclude any other hypothesis fairly and reasonably, that John S. Geary did not survive Orlando B. LeVan.* In fact, innumerable versions of what might have occurred can be fairly and reasonably drawn to the contrary.

In Jackson v. Delaware, Lackawanna & Western Railroad Company, lll N. J. L. 487, 170 A. 22, the Court of Errors & Appeals, held that:

> "If circumstancial evidence be such as to afford a fair and reasonable presumption of facts inferred, it is sufficient. The claimed conclusion from the offered fact must be a probable or a more probable hypothesis, with reference to the possibility of other hypotheses."

Applying the law relating to the degree and kind of proof necessary to establish the case of survivorship, such as that presented in this appeal, it is clear that the appellant did not carry forward the burden imposed upon him of proving by the preponderance of evidence, that his intestate, John S. Geary, survived Orlando B. LeVan.

The sole question before this court is to determine whether the finding of the Prerogative Court was warranted by the evidence under the law, and not whether a different conclusion may also have been arrived at from the proof.

The hearing before the court below was a trial de novo, notwithstanding that it was submitted on the record below. As the learned Vice Ordinary remarked: he heard the matter as a court of "first impression". Rusling v. Rusling, 36 N. J. Eq. 603; Smith v. Smith, 48 N. J. Eq. 566, 25 A. 11; In re Koss' Estate, 105, N. J. Eq. 29, 146 A. 471. Therefore the findings of the Orphans' Court are in nowise involved in this appeal.

In re Strang 109 N. J. Eq. 523 at 525, the Court of Errors and Appeals said:

> "It was in the discretion of the Prerogative Court to decide the matter upon the evidence presented in the Court below or to take additonal proofs."

The findings of the Prerogative Court upon the question at issue are final and binding upon this court if there is any evidence whatever to sustain the conclusion. Ward v. Harrison, 97 N. J. Eq. 309; Shauinger v. Apter 96 N. J. Eq. 302; Friese v. Nagle Packing Co., 110 N. J. L. 588;

Friese v. Nagle Packing Co., 110 N. J. L. 588, was an appeal from a decision of the Supreme Court on an appeal from the findings of the Workmen's Compensation Court. In sustaining the finding of the Supreme Court, the Court of Errors and Appeals said:

> 'The competent evidence supports the judgment of the Supreme Court upon a factual finding, and, therefore, the Court will not reverse" Zober v. Turner, 106, N. J. L. 86.

In Shauinger v. Apter, 96 N. J. Eq. 302, an appeal from the findings of the Court of Chancery, the Court of Errors & Appeals through Justice Trenchard, page 307, said:

> "On appeal, the duty of this Court, is to inquire whether there is any error in the judgment or order or decree appealed from, and not whether the reasons given for the conclusion reached are tenable."

Again in Ward v. Harrison, 97 N. J. Eq. 309; this court had before itself, a review of the findings of the Prerogative Court, The ground of appeal in that case was that the findings or conclusion of the Court, was at variance with the evidence and the law. This Court, in disposing of the matter held that regardless of the reasons given by the Prerogative Court, the decision would not be disturbed, so long as the evidence legally supports the finding of the court, saying at page 314:

> "It is argued on behalf of the appellant that the reasons assigned by the Vice Ordinary, in his opinion, confirming the decree of the Orphans' Court, are at variance with the well-settled law of this court. But be that as it may, we are only concerned whether *the result reached by the Court below was warranted by the evidence*, under the application of correct legal principles. We think that the result reached was a correct one." (Italics ours).

As has been already observed, we are not concerned with the reasons which induced the Court to reach the conclusion that it did, so long as it appears that, under the law and the evidence, the result reached was warranted. The brief of the

appellant, is almost entirely devoted to probing and criticizing the reasons of Vice Chancellor Berry in reaching his conclusion. However, it is respectfully submitted that this Court is not interested whatever in the reasons which motivated the learned Vice Ordinary in arriving at his conclusion. Nor is this Court interested in whether a different result may have been arrived at from the evidence. The sole question before this Court is, whether the result reached by the Court below was warranted by the evidence under the application of correct legal principles.

In Ward v. Harrison, 97 N. J. Eq. 309, the substance of the appeal was that the Court disregarded the testimony of two witnesses who were outstanding members of the Bar of New Jersey, and whose character and standing was beyond reproach. However, the Court of Errors and Appeals, in sustaining the findings of the Prerogative Court, observed that it was not concerned with the question of the greater value of the testimony of the witnesses, but solely with the question of whether the evidence submitted in the lower court, justifid the findings.

The learned Vice-Ordinary who heard the case below, sitting as the ultimate judge of the facts, was not convinced from the proofs submitted that the appellant had sustained the burden of proving the fact that Orlando B. LeVan predeceased John S. Geary, the appellant's intestate, by evidence convincing and satisfying and therefore, it is respectfully submitted that this court should not disturb the findings of the Prerogative Court, even though, it may have come to a different conclusion, for it is not the function of this court to determine the factual issues involved in this controversy.

CONCLUSION

It is respectfully submitted that the decree of the New Jersey Prerogative Court was not erroneous and should be affirmed.

Respectfully submitted,

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To be argued by Rudolph A. Huebner.

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INDEX

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