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New Jersey Court of Errors and Appeals

In the Matter of the Application of Frank R. McKinney for the Probate of a Certain Paper Writing Purporting to be the Last Will and Testament of Frederica C. McKinney, Deceased.	*On Appeal from the Prerogative Court.*

Brief for Charles F. McKinney, Respondent.

This is an appeal from a decree advised by Vice Ordinary Howell in the Prerogative Court which affirmed a decree of the Orphans Court of Essex County.

The decree of the Orphans Court refused admission to probate of a certain paper writing alleged to be the last will and testament of Fredericka C. McKinney (Exhibit P. 1, p. 390).

Two grounds were urged by the caveator against the probate of this writing. First, that Mrs. McKinney did not possess testamentary capacity at the time it was supposed to have been executed by her, and, second, that the will, if executed by her, was the product of undue influence of the beneficiaries therein named. Judge Martin in the Orphans Court decided the case upon the first ground, and while he expressed no final opinion on the second ground, indicated that he thought the issue as to the second ground also lay with the caveator.

Vice Ordinary Howell affirmed the proceedings in the Orphans Court upon the ground that the testatrix lacked testamentary capacity at the time

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the supposed will was executed. The opinions of Judge Martin in the Orphans Court and of Vice Ordinary Howell in the Prerogative Court are so thorough and careful as to be a complete vindication of the propriety of the decree in question.

I.

MRS. McKINNEY DID NOT POSSESS TESTAMENTARY CAPACITY AT THE TIME OF THE ALLEGED EXECUTION OF THE PURPORTED WILL.

Inasmuch as the issue involved is entirely one of fact, it is necessary to consider the evidence in the case carefully, not permitting ourselves to be influenced by the version of the testimony which the enthusiasm of the appellants' counsel has produced in his brief.

We respectfully and earnestly submit that the discussion of the testimony in this case which will follow hereafter will be found to be thoroughly borne out by the record itself.

There is one typographical error in the brief for the appellants which should be noticed. On page 19 of the brief a conversation between Annie Rache and Mrs. McKinney is quoted. The punctuation as set forth in the brief makes it appear that Mrs. McKinney first suggested the fact that she had paid $100, whereas the correct version is that Annie Rache suggested this. It should be as follows: "I says, Yes, all right." "I says, That makes a hundred." She says, "Yes, I have given him a hundred dollars now" (p. 243, l. 9).

In Kocher's Orphans Court Practice, p. 32, the general rule is thus stated:

> "While the mind may be to some degree debilitated and the memory enfeebled, yet if testator at the time of executing the will is

> capable of understanding the nature of the business is which he is engaged, if he is able to recollect the property which he means to dispose of, and the distribution which is made of it by his will, to recall the persons who are the objects of his bounty and to discern, recollect and feel the relation, connections and obligations of family and blood, it is sufficient testamentary capacity."

The evidence shows that Mrs. McKinney at this time did not possess the degree of capacity referred to above.

Mrs. McKinney was an elderly lady, between the ages of seventy and eighty years. On Friday, June 19th, 1914, she was stricken with the illness which resulted in her death on Tuesday, June 23d, at about two o'clock in the afternon (p. 58, l. 18). The alleged will was prepared and executed by her on Monday afternoon preceding her death between the hours of six and seven o'clock. The caveator, Dr. Phelan and others testified as to her condition preceding and after the time of the alleged execution of the will. As pointed out by both of the courts below, Dr. Phelan, the family physician, was the only witness who neither because of interest or friendship, had any bias whatever, and who was best fitted for this reason and also because of his training, to testify with reference to her condition. He testified that Mrs. McKinney suffered with edema of the lungs which is the filling up of the lungs with water and results in the eventual drowning of the patient. This condition was complicated by symptoms of Bright's disease. When he saw her on Saturday he had some hope (p. 49). During the time of his attendance, he found Mr. and Mrs. Frank McKinney, Mrs. Rache and Miss Clark about the house. Mrs. McKinney recognized him on Sat-

urday (p. 50). On Monday, the day on which the will was executed, he saw her three times (p. 52). The first time he saw her on that day was at ten o'clock in the morning. He found her a great deal worse, had no conversation with her and could not get her to speak. The second time (p. 53) was at 4.10 P. M. She was then even worse than she had been in the morning. He spoke loudly to her, but she made no response, and he was in the room between fifteen and twenty minutes. She had all she could do to breathe (p. 54), her disease making it extremely difficult for her to breathe and being such as to require the entire effort and attention of the patient in the struggle for breath. At nine o'clock Monday evening he called up the home of Charles McKinney, the caveator, to advise him of his grandmother's condition (p. 56). The third time he saw Mrs. McKinney on Monday was at 9.45 P. M. (p. 57). She was very much lower and obviously unconscious. He heard her engage in no connected conversations on any of his visits (p. 57), and the last intelligent expression he heard from her by word of mouth was on Saturday evening or Sunday morning. He stated it as his opinion (p. 69) that she was not able to conduct any business affairs on Monday afternoon at four o'clock, and, as he expressed it otherwise (p. 71), it was his opinion that she could not do any complicated thinking under the circumstances. The only time Charles McKinney, the caveator, saw his grandmother during her illness was at 11 P. M. on Monday, June 22d. He testified that she was unconscious at this time. The other witnesses who testified as to her condition were Mr. Schotland, the lawyer who drew the will; Miss Weston, the nurse, the persons interested as beneficiaries under the will and some of their friends. To refer to some of their testimony: Miss Weston,

the nurse, was sent for by Frank McKinney. She has been an intimate friend of Frank's wife since childhood (p. 31). After she arrived at the house which was some time on Sunday, she began a chart showing the treatment administered to the patient, with notes as to her condition. She discontinued this chart between 1.30 and 2 o'clock on Monday afternoon (p. 37, l. 1). She said that Mrs. McKinney spoke clearly on Monday morning (p. 35, l. 2). It was necessary to hold one's ear to her mouth to hear her (p. 47). She heard just one sentence from Mrs. McKinney on Monday afternoon (p. 48). Miss Weston said she was at that time too ill for conversations. John Harrigan, a young man who called on Sunday morning, found the beneficiaries present when he arrived (p. 188, l. 9). All that his testimony amounted to was that she asked him and his brother to pray for her (p. 190) and said, "two fine boys." Amelia Clark, an inmate of the house, and one of the beneficiaries of the will, said, with reference to Saturday: "She recognized me, but it was very difficult for her to speak" (p. 199, l. 1). She said, however, contradicting the doctor and the nurse, that between six and seven o'clock on Monday evening when she was called into the room and heard Mr. Schotland question Mrs. McKinney, she heard her answer "yes" very plainly, though she was standing at the foot of the bed. Annie Rache, another of the beneficiaries, testified that on Saturday Mrs. McKinney could hardly speak (p. 241). On Sunday Mrs. Rache was present in the morning and evening. In the evening Mrs. McKinney said to her, "Hello, Annie, how do you do." This remark seems rather extraordinary, in view of the fact that Mrs. McKinney had seen Mrs. Rache that same morning. Annie McKinney, the wife of Frank, was there during practically the entire

illness. Although she was in the room very often, she testifies to very few alleged conversations by Mrs. McKinney. Annie F. Roff, a friend of the beneficiaries, was in the room a quarter of an hour on Monday afternoon some time after four o'clock. All Mrs. McKinney said to her at this time was, "Annie." That she did not see Mrs. McKinney until after four o'clock on Monday afternoon is very significant in view of the fact that she had actually been in the house since Sunday evening and apparently was not permitted to see Mrs. McKinney until after four o'clock. In the evening of Monday she again saw Mrs. McKinney and asked her if she recognized her (p. 304). She says Mrs. McKinney mentioned her name. All of the testimony leaves no doubt whatever that Mrs. McKinney was, to the knowledge of everybody present, on her death bed, and that they realized this on Sunday. That on Monday she had the greatest difficulty in breathing, that she lay there with her eyes half open, and while during the early part of Monday her eye seemed intelligent, that even this gleam of intelligence disappeared by evening, and that she was in a semi-conscious state. While the testimony of the witnesses as stated differs, there are certain uncontradicted circumstances which, in view of the fact that Mrs. McKinney was on her death bed, as the event shows, are most significant. To begin with, she was a very old lady. The doctor made frequent visits, surely an indication that everybody realized the seriousness of her condition. Her friends were summoned by telephone and otherwise to come to see her to say goodbye. Shortly after four o'clock on Monday the priest was sent for to administer the last rites to Mrs. McKinney, she being a very devout Catholic. While she was surrounded during her entire illness by the bene-

ficiaries and others well known to her with whom she would have been likely to have conversations, if these were possible to her, the evidence of these witnesses is most meager as to alleged conversations with her. During all of these days there is evidence of barely a few sentences. The chart showing the condition of her health was discontinued at Monday noon, which is an undoubted sign that at that time the patient was considered by the nurse to be beyond hope, though this was a matter which the nurse was very loathe to admit (p. 362, l. 21).

Mr. Schotland did not know Mrs. McKinney prior to the writing of this will. He was called up on the telephone and talked to somebody who introduced himself as Frank McKinney (p. 6, l. 12) and who said his mother was very ill and wanted her will drawn. In this connection it may be pointed out that Frank McKinney at the hearing invariably called the testatrix his mother, though there was no blood relation, and she had never adopted Frank. Mr. Schotland arrived at the house at six o'clock, found the door open and walked in and Frank called to him from the top of the stairs, "Come right up" (p. 10, l. 10). He found the various persons assembled in the bed room. Frank said to Mrs. McKinney (p. 11, l. 20), "This is the lawyer that I sent for to draw your will. Now you can tell him what you want." Mr. Schotland had to lean over in order to hear what Mrs. McKinney said and it took him three-quarters of an hour, during which time he was alone with her (p. 16, l. 28) to get from her the simple provisions inserted in the will which bears evidence of having been written most hurriedly. He could not make out the name "Clark" as she pronounced it (p. 12) although he had guessed at the correct spelling of the more unusual name of Rache (p.

14). He also says that Mrs. McKinney told him that Frank was her adopted son (p. 15). Mr. Schotland testified that he asked her who Frank McKinney was (p. 16, l. 1), though it should be borne in mind that Mr. Schotland also testified that he had just been called up by Frank McKinney and that Frank had told him over the wire that the person whose will he was to draw was his mother. In response to the following question of Mr. Schotland, "if she had any relatives," she replied, "she had some relatives in Albany." She did not mention Charles McKinney who was her grandson, and heir at law, and who had been the chief beneficiary in her former will. Mr. Schotland testified further (p. 21, l. 10) that he had no idea from any statement made by her what property she was leaving. When the time came for the signature of the will (p. 21, l. 30), he asked the nurse if Mrs. McKinney could write. It is most significant that this question was addressed to the nurse rather than to Mrs. McKinney. It indicates clearly the doubt in Mr. Schotland's mind at the time as to physical rather than scholarly capacity. The nurse said, "that she is unable to write." Mr. Schotland had to hold the pen while the mark was made. As Mr. Schotland left the house, Frank McKinney met him (p. 24, l. 15) and told him that Mr. Monteith had written a prior will favoring Charlie and that, Frank explained (p. 28, l. 10) was "why she was so anxious to draw her will." Frank McKinney testified, though the record shows that no sooner said than he regretted it, that when Mr. Schotland came down he said (p. 344, l. 1), "Here I have got the will."

From all of this testimony we submit that it appears that the conclusion of the Court below was amply justified that Mrs. McKinney did not

possess testamentary capacity between six and seven o'clock on the evening of Monday. That she did not at that time recall the objects of her bounty is clearly indicated by the fact that according to Mr. Schotland, in response to the direct question had she any relatives, she said she had some relatives in Albany, but made no mention whatever of her nearest relative and heir at law, her grandson, who was the chief beneficiary named in her then existing will and whom, it is impossible to conceive, she would have forgotten if in mental condition even approaching the normal. Most significant also is the failure in this devout Catholic to make any mention of a bequest or provision for masses for the repose of her soul. She was very careful to provide for this in the Montieth will (p. 380). The evidence of the haste with which the will was prepared is shown by the absence of formal provision for the payment of debts; by failure to include a power of sale of real estate. The will also omits reference to the testatrix's sister, who had received a bequest in the Monteith will. Nor is there the slightest evidence that at this time Mrs. McKinney was able to call to mind the property which she possessed. Mr. Schotland frankly testified that he was ignorant thereof from anything which she said. From all the evidence, therefore, we submit it is plain that there was a mere seeming compliance with the provisions of the act and that Mrs. McKinney plainly did not possess testamentary capacity.

II.

THE ALLEGED WILL WAS, FURTHERMORE, THE RESULT OF UNDUE INFLUENCE UPON THE TESTATRIX.

This discussion is naturally bound up with that under the foregoing head, but it may be remarked that the question of undue influence always becomes more pressing when it appears that the health of the testator was undermined at the time the will was executed.

As Vice Chancellor Van Fleet said in *Haydock* v. *Haydock,* 3 Stew., 494, affirmed 7 Stew., 570:

> "The question to which I refer is, were these gifts procured by the exercise of undue influence? The determination of this question must always be largely controlled by the state of health and condition of mind of the person alleged to have been unduly or unfairly influenced. A mind naturally weak, or which has become impaired by age, disease or grief, is much more subject to any sort of control than one naturally strong and unimpaired. It is always, therefore, a matter of the first importance to the tribunal charged with the duty of deciding this question, to know fully the situation and surroundings, and the exact condition of mind and state of physical health of the person alleged to have been imposed upon."

One other legal principle is important. It is well settled that when the beneficiaries under a will stood in an advisory capacity to the testator and when some further element appears such as the exclusion from the house of the natural objects of the testator's bounty during the execution of the will, then the burden of proof rests upon the proponents of the will to show that the

will was not the product of undue influence. The facts in this case we submit clearly bring this case within the rule and make it encumbent upon the beneficiaries to show that the will was the free and uninfluenced act of Mrs. McKinney.

In the *Sparks' Case,* 18 Dick., 242, it is said:

> "The mere fact, therefore, that the proponent stood towards the testator as a priest to a parishioner, coupled with the fact that he was the residuary legatee, does not create a presumption against the validity of the legacy given by the will, and throw upon him the burden of establishing the absence of undue influence. If, however, these bare facts are combined with other circumstances tending to show imposition, such a presumption arises, and the burden is cast upon the legatee to rebut it. Such is the case if the evidence shows that the testator was of weak mind. Dale *v.* Dale, 11 Stew., Eq., 274. So also if the legatee selected the witnesses or made an effort to exclude the natural objects of testator's bounty from his society, or to conceal the making of the will, or to conceal the fact that the will had been made. Wheeler *v.* Whipple, *supra.* So, if the will is one which the testator could not make consistently with the claims of duty or affection."

Carroll v. *Hause,* 3 Dick., 269, is in many significant aspects similar to the case at bar. There the testator upon his death bed was induced to make a will, although he had no desire to do so. In the will the preferred beneficiary was his sister with whom he was living and who had charge of him during his last illness. He omitted from the

will any reference to his grandchild for whom he appeared to have affection. The Court said:

> "His condition was one of utter helplessness; he could do nothing for himself; he was dependent on her for everything; no comfort came to him except from her hands; she occupied a position, therefore, where she could dominate his mind and will with little danger of detection; where she could even constrain him to stifle the love he felt for his little grandchild and make just such a will as she says he did make. Against a beneficiary thus having a testator under his control, with power to make his will, the will of the testator, especially in a case where the testator has made an unnatural and unjust disposition of his property, the law wisely presumes undue influence, and puts upon the beneficiary the burden of showing, affirmatively, that when the testator made his will he did not exercise his power over the testator to his own advantage and to the disadvantage of others having an equal or superior claim upon the bounty of the testator."

In this case the decedent at the time he made his will was asked if he had any relatives in this country. He replied none except his sister. He did not mention the grandchild who was excluded from the will.

A recent discussion of this subject appears in *In re Tunison's Will,* 90 Atl., 695, affirmed 93 Atl., 1087. The facts in the case at bar not only fail to dispel the inference of undue influence, but on the contrary, make it irresistible. To begin with, there is a very marked contrast between this will prepared by a lawyer who was a total stranger to her and who was chosen by Frank McKinney and the former will prepared by Mr. Monteith

who had been her legal adviser for many years. This will (p. 380) gives a legacy of $1,000 to her sister, Anna Remmert, residing in Albany, with a provision for its payment to Mrs. Remmert's daughter if the mother should predecease the testatrix. Amelia Clark is given $1,000. The daughter of Mrs. Rache is given $500. Francis Rutherford McKinney is given $100. One hundred dollars is given to St. Bridget's Catholic Church for masses for the repose of testatrix's soul, and the entire residue of the estate is given to her grandson, Charles F. McKinney, the caveator in the present case. All the formal provisions of a carefully prepared will are included. No reason is given for the exclusion of her sister from the will in question, and in view of the very devout character of Mrs. McKinney, no reason can be suggested for her failure to provide for masses for the repose of her soul if she had been in an intelligent condition of mind.

Then we have the failure to notify Charlie of her illness and the concealment of the fact that a will had been drawn, although Frank McKinney saw Charlie in Riker's drug store on the very evening when the will had been drawn, and he then said nothing to him either as to the will or as to his grandmother's sickness (p. 321). While Mr. and Mrs. Frank McKinney had visited but occasionally at Mrs. McKinney's home prior to March 17th, 1914, the evidence is that they practically lived at her house after that time. Mrs. Frank McKinney said that they were there practically every day from March 17th, 1914, up to the time of her death (p. 271 line 12). Most of the time they were there for both lunch and dinner. Another significant element is the failure to send for Mr. Montieth whom they know to be Mrs. McKinney's attorney, but on the contrary the

choice of a stranger by Frank McKinney. His excuse for failing to call in Mr. Montieth is not impressive and Mr. Montieth testified that he had no recollection whatever of having made the remark which Mr. McKinney says was the basis of his failure to communicate with him (p. 365, line 15). If Mr. McKinney had been bona fide in an effort to secure Mr. Monteith, the very least he could have done would have been to try to get him on the telephone, and in this connection it must be remembered that Mrs. Frank McKinney testified that Mrs. McKinney said to her on Sunday, "Don't let me die until I settle my affairs" (p. 294, line 1). If there was any objection to executing the will on Sunday, there was all of Monday during which time Mr. Montieth could have been sent for. He knew the true situation as to the chancery suit between Charles McKinney and his grandmother which will be hereafter referred to; he knew that the suit had been abandoned; he knew and had approved of the offer of compromise which Charles made and he knew the true condition of Mrs. McKinney's feeling towards her grandson. It is obvious that he would have proved an insuperable barrier to the will which these beneficiaries desired to obtain from this woman who lay gasping for breath on her death bed. Although Mr. Schotland testified that no one was present in the room when he wrote the will, that he put it in his pocket and took it away with him from the house and merely told Frank McKinney that he was an executor, Mrs. Rache testified that she knew that very Monday night that she was a beneficiary in the will (p. 248, line 30). Again she said (p. 249, line 33): "I don't know whether they said each an equal share or what, but she had left me something and left the others." While Frank McKinney saw

Charlie in Riker's the evening the will was drawn and apparently was able to bear the sight of him there, he was most abusive, as he himself admits, when Charlie appeared at the house that night to see his dying grandmother. He admits that in her room, and in her presence, when, as he says, she was conscious, he called Charlie a murderer and accused him of being the cause of his grandmother's condition (p. 322, line 3; p. 349, line 1). Then there is the consciousness of guilt exhibited by Mrs. Frank McKinney in her asking in the presence of others who would be possible witnesses, whether or not Charlie was to be sent for. It is quite obvious that this was a hypocritical request since Charlie was not actually notified and they resented his appearance when he came after having been notified by the doctor. Mrs. McKinney testified that she asked this question twice, once in the presence of the priest, who by the way does not so state in his affidavit (p. 367) and again in the presence of Mr. Schotland. She says that upon both occasions Mrs. McKinney said no. Mrs. McKinney when asked why she repeated the question in Mr. Schotland's presence when Mrs. McKinney had already answered in the negative, replied "Simply because I thought it was better to ask her while somebody was there" (p. 301, line 18), and again she said, "Well, because she had made a funny remark about Charlie to me, and I thought that as long as he was not there that he might say we put her up to do something wrong to him" (p. 296, line 35). Frank, we submit, also showed his consciousness of guilt in his gratuitous explanation to Mr. Schotland as he was leaving the house of why she was so anxious to draw her will (p. 28, line 18) and the fact that he at that time told about the former will and of Charlie's connection with it, although apparently there was no reason why he was called upon to do so to Mr.

Schotland who was entirely ignorant thereof. All of these elements combined with the exclusion of the caveator, the natural object of the testatrix's bounty and her heir at law would seem to lead to the necessary conclusion that the will is not the real will of Mrs. McKinney. As against these things, however, the beneficiaries rely entirely upon the alleged hostility to her grandson which was, as they say, occasioned by the chancery suit which he instituted against her in January, 1914, subpoena therein being served some time in March, 1914. The entire record shows, however, that while Mrs. McKinney was, as Mr. Montieth expressed it, disappointed at the fact that her grandson had instituted this suit, which was only an expression of a claim made by him for many years, that nevertheless she retained her affection for him. Mr. McKinney said that the suit was not hostile to his grandmother's enjoyment of the property during her lifetime, but that he hoped, as the result of the litigation, to arrive at some means of increasing her income, in fact, he did make an offer to her which would have resulted in doubling her income. Mr. Montieth testified, and we may remark here that the greatest weight should be given to Mr. Monteith's entire testimony in view of his high standing and absolute disinterestedness in the present controversy, that he told Mrs. McKinney it would be a good thing for her to accept this offer (p. 155). When he made this offer to her she was alone. When she came after that to see him, she was always accompanied by someone else (p. 155), and Mrs. Frank McKinney in Mr. Montieth's office advised Mrs. McKinney not to accept Charlie's offer (p. 164, line 6). Mrs. Frank McKinney denies that she ever advised against the acceptance of this offer, but it is very apparent that Mrs. McKinney must have been advised against accepting this offer, in view of the fact that she did not fol-

low Mr. Montieth's advice in this particular. The suit was never pushed and about three weeks before Mrs. McKinney's death, Charlie advised Mr. Montieth that he would abandon the suit, among other reasons, because, as Mr. Montieth testified, "He said he did not want his grandmother worried" (p. 158, line 7). On the Friday before her death Mr. Montieth said to her (p. 157): "I told her not to worry, Mr. McKinney was going to discontinue the suit." Mr. McKinney had made this claim for at least three years prior to the death of his grandmother (pp. 195 and 333). With the knowledge of this claim therefore for all these years Mrs. McKinney never changed her will in which Charlie was the chief beneficiary. Mr. Montieth testified that upon one occasion, which apparently was in March, 1914, when Mrs. Frank McKinney was present at his office with Mrs. Fredericka McKinney (p. 156), Mrs. Frank McKinney said, "I don't see why he started suit. He will get the property any way." Mrs. McKinney made no dissent from this statement, though Mrs. Frank McKinney would have us believe that Mrs. McKinney was so incensed against Charlie that she turned his picture to the wall and upon one occasion when leaving Montieth's office some time in March she said to Mrs. McKinney what a terrible thing it was for Charlie to have done and "now he will not get ten cents from my property" (p. 276, line 28). Although she had these many conferences in Mr. Montieth's office, she never on any occasion suggested to him any change in her will, nor did she go elsewhere for this purpose. There is conclusive evidence that Charlie remained on friendly terms with his grandmother down to the very time of her death. Fortunately for Charlie he kept copies of two letters which he sent to her in May and which amply show the relationship between them in the very month before she died. These letters were

not produced by the beneficiaries who no doubt found them among Mrs. McKinney's effects at the time of her death, though they did produce a letter written in 1913 which Charlie closed with the words "Yours respectfully." The letters of May refer to an invitation to take dinner which had been given by Mrs. McKinney to Charlie and are both affectionate in tone and are obviously not letters which would have been written between two persons in a state of hostility to each other (pp. 389 and 390). Mrs. McKinney was not a woman who did not know the necessity and use of a will. She already had a will and no explanation is vouchsafed for her making this will and absolutely excluding her grandson after she had been advised by Mr. Montieth that she need not worry because the suit was to be discontinued. She had not made any change in her will during the pendency of the suit and had invited this very grandson to dinner during that time and had been apparently addressed by him with terms of intimate affection. The entire reliance of the beneficiaries is upon the alleged feeling of hostility aroused in Mrs. McKinney because of her grandson's claim. The evidence shows conclusively that this reliance fails. We have pointed out but a few of the significant things in the record. The entire case must be read and having been read, one clearly realizes the atmosphere of the case. The beneficiaries and their witnesses contradicted each other and the impression which all the evidence leaves is that reached by Judge Martin who saw all of the witnesses and was able at first hand to judge of their truthfulness and character, namely, that this will was improperly obtained. Miss Weston, the nurse, was obviously untruthful. Her entire evidence is colored by her evident desire to help the beneficiaries. Amelia Clark contradicted herself in most important particulars. Thus she testified in the morn-

ing that Mrs. McKinney had never spoken to her of a will after the suit had been brought by Charlie (p. 197, line 37) but after recess she testified that after the suit was brought, Mrs. McKinney told her she wanted to make a new will and not leave Charlie a cent (p. 204, line 20). She also contradicted in material respects an affidavit made by her in chancery proceedings relative to the appointment of a receiver. Thus despite the fact that she testified before recess that Mrs. McKinney had said nothing about a will after the suit was started, her affidavit in the chancery suit contains a statement that Mrs. McKinney had spoken about a will and Miss Clark said that she read over the affidavit on the day the hearing before the Orphans Court started (p. 216, *et seq*). So also she testified at the hearing that she did not enter the room at the time the will was being drawn until after Mr. Schotland had called out for Milly to come into the room. Upon the contrary she said in her affidavit in the chancery proceedings that she was in the room before this time, her language being "when the lawyer was ready to ask Mrs. McKinney what she wanted inserted in the will, he asked us all to leave the room and was with her alone" (p. 228). Mrs. Frank McKinney, went on the stand with the apparent purpose of rounding out the case by her evidence. She testifies as to many important circumstances which, if they were true, others of those involved must have witnessed, but which they did not assume to testify about. The circumstances surrounding Mrs. Fredericka McKinney at the time of the execution of the will may be inferred from the testimony of this witness and her husband perhaps as well as anything else in the case. Frank McKinney's testimony is so full of contradictions as to warrant but little credibility for his evidence. He testified, however, that he occupied a confidential relation with Mrs. Mc-

Kinney. Thus, he said, "My mother very seldom did business without consulting me" (p. 324, line 23). His character appears very plainly from the abuse he heaped upon Charles McKinney in the presence of his dying grandmother at a time when he says she was conscious and able to hear what was going on. He also contradicted in many important respects the affidavit which he made in the chancery proceedings. Thus, in connection with the calling of Millie episode, he says that when Mr. Schotland asked who was Millie "I told Millie and Millie went upstairs and I just went two or three steps and she went up and went along the hall to the sick chamber. Q So that you did not go up to the room with Millie? A Absolutely not, no. Q Didn't go into the room? A I didn't go into the room." On the contrary he said in his affidavit that Mr. Schotland called him in, "He then asked us if there was any Amelia and Miss Clark came in and he asked the late Mrs. McKinney if that was the Amelia she meant. She said 'yes,' and Mr. Schotland told us that was all he wanted of us. We went out again" (p. 342). Again he testified at the hearing that Mrs. McKinney did not mention the subject of a will to him between the 17th of March, 1914, and four o'clock on the Monday afternoon on which the will was written. Upon the contrary he said in his affidavit in the chancery proceedings as follows: "She had often told me after Charles F. McKinney had sued her in the Court of Chancery, which was either in March or April of this year, that she intended to change her will and wouldn't leave anything to Charlie McKinney or his mother." When asked to explain the discrepancy between his testimony and his affidavit, the best answer he could muster, and with considerable difficulty, was, "I don't remember" (pp. 346-347). The priest to whom reference is made in the testimony, did not appear as a wit-

ness, but the affidavit which he made in the chancery proceedings was admitted by consent (p. 367). This affidavit is most eloquent in its omissions and in its contradictions of the case made by the beneficiaries. Mrs. Frank McKinney would have it appear that the priest suggested to Mrs. McKinney the inquiry whether or not her affairs were settled. Upon the contrary the priest says, "While I was there the question was asked as to whether Mrs. McKinney wanted to make a will," and the conclusion of his affidavit is most significant. He does not say positively that she replied, but says, "to the best of my knowledge she replied in the affirmative." It is a most guarded statement. All that he says as to her condition is "I found her conscious and administered the sacraments." He is very careful not to say anything as to her state of mind or intelligence, but simply that she was conscious enough to receive the last rites which, in common knowledge, are frequently administered in *extremis*.

III.

WITH RESPECT TO THE PROVISION FOR COSTS AND COUNSEL FEES IN THE DECREE OF THE PREROGATIVE COURT.

Vice Ordinary Howell refused to allow a counsel fee for the unsuccessful appellants upon the authority of the opinion of Ordinary Magie in the case of *Skillman* v. *Lanehart*, 3 Buch. 351, where the course of the litigation had been similar to that in the case at bar. Upon the authority of the same case, we submit, the Court should not have made the allowance to the appellants of $628.69 expenses incurred by them in connection with their appeal from the decree of the Orphans Court. Section 197 of the Orphans Court Act obviously relates to costs and expenses in the Or-

phans Court and cannot be extended to cover the financing of an appeal from the decree of the Orphans Court denying probate. Assuming that there is a duty cast upon an executor named in a will to offer it for probate to the Orphans Court and to endeavor to secure its probate in that court, there is obviously no duty upon him if unsuccessful there to keep on litigating to the highest courts. The estate involved in the case at bar is not a large estate, and with the multiplication of the costs of appeal and counsel fees, there seems very little prospect of anything being left for the parties in interest. The prolonging of litigation of this character should not be favored. In accordance with the rule laid down in *Skillman* v. *Lanehart,* the court below was not only justified in refusing to allow an additional counsel fee, but should have, in addition, refused to permit the appellants' expenses of their appeal to be taken from the estate.

We respectfully and earnestly submit that the decree of the court below should be affirmed with the exception of that portion thereof which adjudges to the appellants the expenses of their appeal. On the merits of the case, the decree is proper, whether we view the situation from the aspect of want of capacity or of undue influence practiced upon the deceased.

Respectfully submitted,

ROBERT H. McCARTER,
ARTHUR F. EGNER,
Counsel for Respondent.

March Term, 1916.

New Jersey Court of Errors and Appeals

IN THE MATTER OF THE APPLICATION OF FRANK R. McKINNEY FOR PROBATE OF A CERTAIN PAPER WRITING PURPORTING TO BE THE LAST WILL AND TESTAMENT OF FREDERICA C. McKINNEY, DECEASED.

Brief of Facts and Law.

Statement.

This was a proceeding brought in the Essex County Orphans Court for the probate of the last will and testament of Frederica C. McKinney, deceased. Testimony was taken for four days, and thereupon immediately the Court announced its finding (p. 367, l. 22). The Court found that the testatrix did not know the nature of the business in which she was engaged and did not have the necessary capacity. It found also that under the Sparks case the burden of proof was shifted and had not been sustained by the proponent. Accordingly probate was refused.

An appeal was taken from the decree refusing probate and was argued in the Prerogative Court before Howell, *V. O.*, who found that there was no undue influence, but having determined that the testatrix was "totally unconscious at each of the calls of the physician on Monday," refused to disturb the decree of the Orphans Court (p. 406-d, l. 37).

We feel that under this state of the record a full analysis and review both of the testimony and of the law should be set out.

Mrs. Frederica C. McKinney was an old lady living on Plane street, Newark, New Jersey, on a piece of property valued at from $15,000 to $20,000 and which property was owned by her and was her sole and only estate.

She acquired her interest in the property under her husband's will (Ex. P. 6, p. 395). The property was mortgaged. The testatrix being obliged to take care of her son (the father of the present caveator), incurred heavy expenses and was unable to keep up the premises. A foreclosure resulted, and the testatrix had the property bought in and gave another mortgage and cleared up the taxes.

Some time ago the testatrix desired to dispose of the property and an agent went to see the grandson to discuss the matter. Some weeks thereafter the grandson filed a bill in Chancery, the original of which was produced in court, and in March, 1914, he issued a subpoena which was served upon his grandmother by the sheriff and at that time he filed a *lis pendens* tying up the property. The testatrix was represented by Mr. John Monteith, whose testimony will be later referred to. He had been her counsel for some time and had drawn a will for her in 1909. After this litigation was instituted, the testatrix announced on frequent occasions and to several different persons that she intended to change her will and that she did not intend to leave Charles one cent. On Friday, the 19th of June, 1914, three days before the last will, the testatrix had gone to the office of Mr. Monteith and paid him the second $50 of his fee. She had gone alone and after returning home, she was taken ill. She was worse on Saturday, the

20th; the doctor was sent for, later a nurse came and then the priest. On Sunday her condition remained much the same and on Monday the doctor realized that she probably could not live much longer and the priest was sent for. Before this, according to the testimony of some of the witnesses and on this same Monday the doctor had informed the testatrix that she probably could not get well and should settle up her business affairs. After the priest had administered to her the last rites, he informed her that she should settle up all her worldly affairs and she then informed him that she wanted a lawyer. He gave that word to Mrs. Frank McKinney, who went downstairs and told her husband. This was between 5 and 5:30 Monday evening. Mr. Frank McKinney, the messenger sent on this errand, secured the services of Mr. Schotland, having been recommended to him by a friend he met on the street. Mr. Schotland arrived at the house about six o'clock.

He is the first witness called. He is a practicing lawyer of the City of Newark, having been a member of the bar in good standing and of unquestioned character and reputation for over fifteen years. He was shown the will in question and stated that he drew it. On page 3 he proves the proper execution of the document in the presence of himself and the nurse, Miss Weston. He received the information as contained in the will from the testatrix (p. 4). Everyone else was excluded from the room while he was receiving the instructions. He took the utmost care in every detail of the testatrix's requests, and testifies fully and squarely that every requirement was observed, that he received no information from any other person or persons regarding the contents of the document and that it was prepared entirely in accordance with the testatrix's expressed wish. Mr. Schotland was

not acquainted with any of the parties in interest previous to the transaction and had never represented any of them in any capacity (page 5, line 29). The cross examination considered many immaterial and hopelessly irrelevant matters, but changed the effect of the witness' testimony in no respect. For instance, the witness is asked to relate the whole conversation as it took place some six months before and he gives the substance of it and is then asked whether so and so took place.

A Yes.

Q Why did you not say so before?

This the witness explains very normally by stating:

> "Well, now, Mr. McCarter, I have told you all that I can recall, but if a question is aimed directly at something it may prod my memory—I may recall something else—but all that I can recall, just reviewing the transaction in my mind, I have given you." (Page 15, line 22.)

Mr. Schotland arrived about six o'clock Monday evening, June 22d, at which time the nurse and Mrs. Frank McKinney were just giving the testatrix some medicine. Someone then said:

> " 'This is the lawyer that I sent for to draw your will. Now you can tell him what you want.' I sat down on a chair alongside of the bed and Mrs. McKinney, Frank's wife, asked the testatrix if she wanted to see Charlie. She said no. I then told all the people to leave the room, &c. * * * As soon as they all left Mrs. McKinney took me by the hand, as I was sitting there alongside of her bed, pulled me over close towards her and began to tell me just what she wanted to do with her estate." (Page 11, line 20.)

The witness found difficulty in understanding the name "Clark" and Miss Amelia Clark was called into the room and recognized and identified by the testatrix (page 12, line 29). The witness repeats that Mrs. Frank McKinney asked the testatrix before the will was executed if she desired Charlie sent for. The testatrix was lying back on two or three pillows with her head and shoulders raised; she had difficulty in breathing, making a little noise, and he put his head down to her and she said:

> "I will tell you just what I want done with my property. I don't want anyone to have anything except Annie Rache, Millie, and Frank McKinney." (Page 14, line 9.)

The witness gives the fullest details as to all that took place and says that he was with her alone for about three-quarters of an hour (page 16, line 27). The witness asked if she had any relatives and she said she had some relatives in Albany (page 18, line 16). Charles had just been mentioned and she had no others.

On page 25, line 24, the witness repeats that he again asked her if she wanted anyone else remembered in the will and on page 25, line 5 he says, "I made sure of what she wanted."

This witness was followed by Helen A. Weston (page 30). She is a graduate nurse, and was the other witness to the will. She was no relation to any of the parties. She states that the testatrix was asked on Monday afternoon if she wanted Charlie there and that the testatrix said no (page 31, line 33). When she was called back to the room the lawyer read the contents of the will, the testatrix being in bed, with her eyes open (page 32, line 32). She was asked if that was what she wanted and she said, "Yes." She was then asked if those three persons were the only ones that

she wanted in the will and she again said "Yes." She testifies to the proper execution of the document (page 33, line 15). A stimulant had been administered to the patient about four o'clock on this day (page 36, line 12). This witness had kept a chart up to about noon Monday when she discontinued it, because the doctor seemed to have no use for it. This chart and its discontinuance seem to have occasioned Mr. McCarter considerable uneasiness and worry, and it takes up a couple of dozen pages of testimony. The doctor, however, called as a witness for the caveator, in no wise questions the nurse's course in this respect, and it is difficult for us to see just what it has to do with the question in controversy. Strychnine was administered about four o'clock and at three-hour intervals, as it had been administered previously (page 40, line 31). The witness said the lawyer came about six o'clock (page 40, line 14). The priest came first. This witness testifies (pages 42-43) very fully and clearly and honestly as to the patient's physical condition. The patient died on Tuesday at about two o'clock in the afternoon, June 23d (page 46, line 11). On pages 46 and 47 the witness again covers the patient's physical condition. At page 48 proponent rested, having proved a clear *prima facie* case.

The caveator called Dr. Phelan, a practising physician, who was called in at noon Saturday, June 20th. He had treated the patient some years before and knew she was over 70. He said that she had difficulty in speaking and breathing; that her throat was hurting her and she had difficulty in swallowing. He diagnosed her trouble as edema of the lung and part of the throat. She was noticing what occurred about her at that time (page 49, line 37); she had difficulty in speak-

ing. He attended her in the evening and found her condition about the same as in the afternoon. On Sunday morning the doctor found that the edema had not progressed very much (page 50, line 35). The doctor thought she was a bit improved (page 51, line 28). The doctor did think the nurse had a chart, but he could not say that he examined it and he says there is little charting that a nurse can do in those cases; that the whole thing is in just examination (page 52, line 2, etc). On Monday the doctor found the condition worse. There was an extension of the lung involvement; her eyes seemed active, but there was no conversation and he could not get her to speak. He was there a little after four Monday afternoon and her heart was getting weaker and he considered her fatally ill (page 53, line 30). He said:

> "The intelligence in those cases probably is all right, but they are so occupied with breathing that they cannot attend to anything else" (page 54, line 8).

Very clearly the doctor had no distinct recollection about the patient's condition on Monday afternoon; he could not even tell whether her eyes were open or shut. She had an anxious look on her face.

On Monday evening about nine o'clock the doctor informed Charles McKinney that his grandmother was sick. In the evening the doctor thought she was unconscious. The first day the doctor called he asked the testatrix how Charlie was and received no answer (page 59, line 17). It was very apparent that she did not wish to answer, for the doctor says, speaking of conversations held:

> "The first visit there she, in a half whisper, said a few things in a halting manner. I couldn't tell what they were."

The doctor did not ask her again if she wanted to see Charlie (page 60, line 4). The doctor was asked (page 61, line 29, etc.):

Q And on Monday morning you found the condition a little worse than it had been Sunday night?

A Yes, sir.

Q But she was still entirely conscious?

A Her eyes were bright.

Q Her eyes were bright and alert?

A Yes, sir.

Q Active? Her eyes were active?

A Yes, sir.

A Indicating definitely the presence of intelligence to you?

A Yes, sir.

Q And her difficulty, you thought was with expressing yourself?—the functioning through her vocal organs?

A Yes, sir.

The zeal of the caveator's counsel then interrupted the proceedings. At page 63, line 15, the doctor admitted that he had no distinct recollection of her physical appearance except difficulty in breathing and her non-response on being spoken loudly to. At page 63, line 22, etc., he was expressly asked, and said that he could not say that she was unconscious at four o'clock on Monday. On page 65, line 22, etc., the doctor states that the disease is a sort of process of gradually shutting off the air, and that there may be a serious clogging and then relief for five or ten minutes or more, and that patients accommodate their breathing to the plugging of the lung and that there is an apparent getting better without really any letting up of the lung plugging; that the process is similar to that of a person very slowly drowning and that there are times where, in the

progress of the disease, the lungs seem to accommodate themselves to the shut-off condition and that there is seemingly a temporary rally, a regaining of vitality (page 66, line 25). On Sunday she had a very bright, sharp eye (page 67, line 5). At page 68, line 10, the doctor had forgotten that he had previously testified that he couldn't remember whether her eyes were open or shut at the four o'clock visit on Monday, and says that they were probably half open. At page 70, line 35, the doctor says that while he was there the patient was not able to transact any business affairs, but that a stimulant would have the effect of keeping her heart up, throwing more blood through the system, which would have an effect upon her consciousness and upon her intelligence and that it would be a favorable effect. The doctor is expressly asked (page 70, line 18, etc.) with reference to this visit on Monday:

"Is there anything that will enable you to say whether she didn't know what she owned at that time?

A No, sir.

Q You couldn't say that?

A No, sir.

Q And there was nothing to enable you to say that she didn't know who were the natural objects of her bounty at that time, was there?

A No, sir."

This proof being conclusive against the caveator's position, the witness is again taken up by the other side (page 70, line 31, etc.) He says that if there was any complicated thinking to do she could not do it under those circumstances. The doctor thought that a stimulant would act upon her heart for probably three or four hours. No stimulant was administered while the doctor was there.

This completes the caveator's testimony entirely and completely, so far as the mental capacity of the testatrix is concerned.

The caveator himself was then sworn (page 72) and testified at considerable length. This testimony needs very little consideration. It is remarkable only for its immateriality, its inconclusiveness, its irregularity and its hopeless inconsistency. This grandson attempts to justify his attack upon his aged grandmother and attempts to show that while he was compelling her whom he knew to be practically penniless to expend her last $100 on counsel fees in the attempt to keep her roof over her head, he was at the same time maintaining friendly relations with her and was *persona grata*. This task was too gigantic even for such a shifty and unreliable intelligence as this witness possesses. In the only important parts of his testimony he is contradicted flatly by Mr. Monteith, the counsel for the testatrix in her lifetime. His own testimony as to the number of times he visited his grandmother is in hopeless confusion, and he brings none who had seen him at the premises for a moment to corroborate him, and all of those who are in a position to know flatly contradict his appearance at the home of his grandmother after the institution of the litigation. The testimony does show (page 78, line 31, etc.) that before he instituted his attack upon his grandmother she had requested him to accommodate her financially. It is too clearly established to be now open to question that conversations with a decedent are not admissible for the purpose of showing undue influence. No question as to the mental capacity of the testatrix at the time of this conversation had been raised, yet the conversations were admitted without hesitancy. In any event, this loving grandson refuses the

$250 needed by his grandmother (page 79, line 34). On page 82, line 7, realizing the hopelessness of his position, if he is to be held responsible for this bill filed against his grandmother, he states that Mr. Monteith suggested the filing of it. It is to be wondered how a man of his intelligence could be led into making a statement so ridiculously false. At page 82, line 24, when asked why so long a time elapsed between the filing of his bill to take the premises from his grandmother and the issuing of the subpoena, he says:

> A Why, I decided not to go ahead with it—rather was—in fact had forgotten about it.

On page 100, line 17, etc., he is asked on cross examination:

> Q And do I understand you that Mr. Monteith advised you to file this bill against your grandmother?
>
> A I didn't say that.

Notice carefully the next few questions and answers.

This loving grandson, in this friendly negotiation—in this friendly suit with his grandmother's counsel—had the sheriff serve his grandmother with a subpoena (page 107, line 16, etc.). He did not ask Mr. Monteith to acknowledge service. It would be hard to imagine that more unsatisfactory testimony could be found than the next 10 or 12 pages. At page 114, after having denied expressly that he ever spoke to his grandmother about the suit after it was brought, he contradicts himself. At page 128 we find the subject of his delay in issuing the subpoena again brought up, and his answers are amusing if not instructive. We think that further consideration of his testimony can serve no possible purpose other than to show that he should under no possible circumstances have expected to be considered as a

natural object of his grandmother's bounty, after his unjustified and unjustifiable attack upon this poor old lady, whose charitable and sympathetic treatment of this boy's father has led to the very situation of which he was attempting to take such unjust and unfair advantage.

John Monteith was next sworn for the caveator. He is an attorney and counselor-at-law of this State, of the highest standing, and his testimony is marked by fairness and accuracy. This witness shows that the testatrix frequently asked him during the last two years whether she could sell this property and was informed that she could (page 151, line 15). She informed him that her grandson had told her that she couldn't sell the property, that she merely had a life interest in it, and immediately upon her attempting to sell it he would restrain her. He asked the grandmother to send the grandson to him and in due course Mr. McKinney came into his office and the matter was discussed. At page 152, line 9, etc., this witness for the caveator swears that he told the caveator that he didn't see as he had any rights in the property. The bill was not filed until a year after this discussion set out at page 153, line 3, etc. This witness informed his client of a proposition of compromise—so called—whereby this ancient lady was to remove from her home and property and turn it over to this kindly disposed grandson, who would pay her the munificent sum of $400 a year. This the testatrix refused. When this kind caveator was informed as to the substance of the answer he asked that it be not filed, saying that he thought he would withdraw the suit (page 157, line 5, etc). On the Friday on which she was taken sick, four days before her death, she brought to her lawyer an additional $50 (page 157, line 32) and received

the consolation not to worry, that Mr. McKinney was going to discontinue the suit.

Q Did she say anything in reply to this?

A No, I didn't have very much time to talk to her then. I went to the outer room, where she was sitting, Mr. Parker. (Page 158, line 8, etc.)

Then comes the remarkable fact that the discontinuance which had been solemnly offered in evidence by the caveator was signed after the death of the grandmother and dated back at Mr. McKinney's request (page 159, line 3, etc.) At page 160, line 13, etc., on cross examination, it develops that the testatrix had had an offer of sale of this property which she wanted to sell and that she didn't accept it because, as she said, her grandson objected and stated that she couldn't sell it.

Q Now, did you suggest that Charles F. McKinney bring suit against his grandmother?

A Not at all.

Q Was the suit that he instituted against his grandmother a friendly suit?

A No. No, it couldn't be friendly when it was an attack upon her title (page 160, line 33, etc.)

Q Had she been worrying about the suit while it was pending?

A Oh, yes; oh, yes.

Q Did she appear to be grieved about it?

A She was disappointed. She was disappointed (page 161, line 12, etc.)

The defense to the suit of the grandson is shown (pages 162-163). At page 164, line 11, etc., it is made clear that the proposition of settlement was not acceptable because testatrix realized that she would have to get out of her home. Exhibit P. 2

for identification was dictated in the testatrix's presence (page 166, line 24, etc.)

The nurse was then recalled for further cross-examination (page 168) and the chart was further considered; and the application of a plaster and the time when it was put on.

The mortgage of July 23, 1888 was offered in evidence (page 173, Exhibit C 10).

The caveator then swore a detective, Whitnall, who testified that he was sent to the house by Charles after the grandmother's death, and he lugs in a conversation in which Frank McKinney called Charles "a contemptible pup," &c. The importance of this testimony is not quite clear to us.

On page 177 Helen Weston, the nurse, was recalled for further cross examination by Mr. McCarter, and further consideration given to the chart, and with that the caveator rested (page 178).

There was no necessity, in our view, for calling any further witnesses or presenting any further case; nevertheless, out of an abundance of caution the following case was presented.

Victor L. Hesse, a real estate agent, was called, at page 178, and swore to having had negotiations with reference to the sale of the testatrix's property, having been referred to Charles McKinney, having been informed by him that he wouldn't allow his grandmother to sell the property, that he always claimed the property as heir and that she could not give a clear title, that the sale did not go through (page 180, line 13). The property was first brought to this witness' attention by Mr. Campton, a lawyer practicing in the city of Newark, and Mr. Campton (page 183) tells of a business transaction he had for the testatrix, when he obtained some money from a savings

bank for her. This was about two years ago. At page 184, line 38, etc., he states that the testatrix informed him that she wanted to sell her property and told him of her grandson's objection (page 185, line 23, etc.) She brought him the papers and he advised her that her grandson could not successfully interfere with her and he spoke of having sent Mr. Hesse to see her and he stated that his client informed him that her grandson always interfered with her; that he told her that his father had something to do with the property and that if she tried to sell it he would prevent her.

Q Do you recall if she said anything else about her grandson? If so, what, giving us the words as near as you can recall them.

A She said, "I have always been good to him and his father, and I don't see why he does this to me now, because he doesn't come to see me very often now only to tell me that I mustn't sell the property" (page 185, line 27, etc.)

The next witness is John Harrigan. He lives on Plane street; is not related to any of the parties; had known the testatrix for twelve years very well and when he was small had been accustomed to leave papers at her house on Sunday, when he called, and he followed the custom up. He had never seen Charles McKinney there any time he called. He called the Sunday before the testatrix died and saw her in the sick room.

Q Tell us what took place as nearly as you can recall it.

A We said "Hello" to her, my brother and I—we greeted her, and she asked for my mother. She complimented us on being two fine boys and then when we were leaving she shook her hand and said to pray for her (page 187, line 16, etc.)

This is after ten o'clock Sunday morning, and is illuminating in contrast to the testimony of the doctor.

John Monteith was then recalled (page 190) and testifies to the receipt of $100 from the poor testatrix, paid for the purpose of attempting to defend her home.

The next witness is Amelia Clark (page 191). This witness had lived with the testatrix fifty-one years as a companion, and had attended to her financial duties; thirty years she worked and paid her board and for the last twenty years she had not been compensated and had received no pay. She attended to the testatrix's business, attended to her employment agency, read all her letters and read the paper and acted as a general companion in every way. The testatrix was unable to read; with very great difficulty she could write her own name. This witness was at the house all of the time except when she had to go out on business, and this was not very often and only when it was absolutely necessary that she should go. She did nothing but attended to the testatrix's business and affairs (page 192, line 32). The witness states that the testatrix was very active up until her return from the lawyer's on Friday afternoon, June 19th. The witness never saw Charles at the house after the suit was started —after March (page 197, line 2, etc.) and at 9.30 in the morning the witness was always there. She said that after the suit had been instituted the testatrix said it was a terrible thing for him to put her in court, to do such a thing to his grandmother (page 197, line 8). She said that at different times. This witness denies (page 198) all undue influence in every way. At page 199, line 13, etc. she proves that the testatrix was conscious on Sunday and recognized her and spoke

to her. On Monday she spoke to this witness several times, asked for milk, for a drink; for the nurse; and complained of a pain in her side and asked this witness if she thought an onion poultice would be good, &c. (pages 199-200). In the two or three years before March, 1914, Charles had been to see his grandmother two or three times (page 203, line 1, etc.). On page 197, line 23, etc., the witness was asked:

> Q Did she speak after that to you of her will? ("That" refers to the litigation in March.)
>
> A She said she wanted to make a will.

After leaving the stand this witness recalled something further that had been mentioned by the testatrix with reference to the will, and after recess she is questioned as to it, and says that after the suit had been instituted testatrix often said she wanted to make a new will and didn't want to leave Charles one cent (page 204). The court then interpolates the substance of a statement which we are unable to find in the testimony (page 205, line 10). Counsel so stated to the court at the time, and a re-reading of the testimony verifies that position.

On cross examination this aged woman is questioned in the most determined and aggressive manner with reference to the exact use of exact words and trivial contradictions, such as must necessarily arise in the testimony of any witness who has not been coached to repeat a story in parrot-like fashion. We respectfully insist that the cross examination in no wise changes the substance and effect of the material portions of this witness' testimony. We cannot lose track of the fact that we are here trying two issues—first, was this testatrix competent to execute a will on the Monday in question at six o'clock P. M., and second, was

this will the result of undue influence. We speak of this because the cross examination seems to have been intimately concerned with almost everything except these two questions. By insisting that a witness testified previously in a manner in which she had not testified at all, it is not particularly difficult for one of the aggressiveness and earnestness of manner of the caveator's counsel to confuse a very elderly lady who had never previously been in court. An instance of the kind is on record at page 212, line 16, etc.:

> Q Do you remember testifying in so many words that you never heard Mrs. McKinney mention the subject of a will after suit was commenced?
>
> A She did, after suit was commenced. She said she wanted to change her will.

The testimony previously quoted from pages 197-198 shows the situation as it really existed. At page 239 this witness corroborates Mr. Schotland as to the instance of her being called upstairs to be identified by the testatrix at the time the will was being prepared and being plainly and clearly identified.

The next witness, Annie Rache, is another of the beneficiaries (page 240). She lives in Irvington and had known the testatrix about forty years and had lived in the house with her from 1880 to 1897 or 1898. While she lived in Newark she called every day and when she moved to Irvington, went once or twice a week. She was treated by the testatrix as though she were her daughter, and indeed she was brought up by her from the time her mother died (page 240, line 29, etc.) She was at that time thirteen. She called the Saturday before the testatrix's death and found her in bed. The testatrix recognized her and told her about her sore throat. Saturday

she went home for lunch and came back in the evening about eight o'clock and stayed until 10.30; she came again Sunday at 10 and stayed until about 12. On Sunday she spoke to the testatrix and the testatrix said: "How do you do, Annie? How is Tom?" She corroborates the coming in of the Harrigan boys. On Sunday evening testatrix again spoke to her (page 241, line 34, etc.). She came again Monday afternoon about 2 o'clock and stayed until 4, when she went for the priest. She shows that the doctor came before the priest, and as the nurse's testimony shows that the priest came while the stimulant was being administered, it is very clear that when the doctor called the stimulant had not yet been given; that is, the one due at about 4 o'clock. The witness knew nothing at all about the lawyer being sent for or anything of the kind. At page 243 she distinctly denies all influence so far as she was concerned. At about 3 o'clock on the day when the will was executed this witness was in the testatrix's room:

> "They were giving her—it was her medicine, I think—and I had my arms around her holding her up in bed. She turned to me. She said, 'Annie, I gave Monteith $50.' She said, 'I went and gave it.' I says, 'Yes, all right,' I says. 'That makes $100,' she said. 'Yes, I have given him $100 now'." Page 243, line 9, etc.

This was about 3 o'clock in the afternoon, just before the doctor came. The doctor got there about 4.

The cross examination which follows in no wise disturbs in the slightest the distinct and definite evidence given by this witness to the effect that the testatrix was mentally competent on the after-

noon in question and that there was no shade of influence, due or undue, used by this witness.

The next witness is Annie McKinney, the wife of Frank McKinney, who is the executor and one of the three beneficiaries (page 253). Before her marriage this witness had been an organist and school teacher; she had known the testatrix for years and she testifies that after the 17th of March she was requested by the testatrix to come see her, and the testatrix told her of the court proceedings and asked her help (page 254, line 30,etc.). She covers the visits to the lawyers and states distinctly that all she did was at the express request of the testatrix. This witness says (page 257, line 2, etc.):

> "Coming from Mr. Monteith's office she said, 'What a terrible thing it is for Charlie to bring me to court. I have made a will and I intended not to forget him. He was well remembered, and lawyer Monteith said it was the cleanest will he had ever written.' 'But,' she says, 'now he will never get ten cents'."

She then describes (page 257, line 10, etc.) the testatrix's taking down a picture of her grandson which had hung in her rooms. She further denies all undue influence or any effort to prejudice her mother-in-law against Charlie. She says that on Saturday her mother-in-law recognized her and spoke to her (page 258, line 10, etc.) She stayed all night Saturday. She speaks of the testatrix's intelligence (page 258). On Monday the testatrix asked her not to leave her, to stay with her and not to let her die until after she settled her affairs. This took place about noon. The doctor came about 4 o'clock Monday and after that the priest came (page 259, line 37). At page 260 she recounts a talk the doctor had with the pa-

tient. She speaks of the priest's being present, and that the testatrix asked for a lawyer to make a will, that she (the testatrix) asked the priest and he turned to her and told her that she (the testatrix) had asked for a lawyer. The witness then went downstairs and so informed her husband, who went upon the errand. The first page of the cross examination tells when the witness began to call the testatrix "Grandma;" the next few pages have to do with her husband's adoption, but there is an entire absence of anything to show that even a question can be raised as to the testatrix's condition of intelligence when the will was executed, or as to any influence being used.

The next witness was Annie Roff (page 303). She had known the testatrix for many years and visited her on the Sunday of her death. On Monday afternoon between 4 and 4:30, after the doctor had left, she went up to see Mrs. McKinney.

> "I said, 'How do you do' and kissed her. She said, 'Annie,' and while I was there somebody there offered her a glass of milk."

About 8 o'clock that evening this witness again went up. She had her hat and coat on and said:

> "You don't know me, Mrs. McKimey. She said, 'Yes, Annie Roff,' and she patted me under the chin and said 'How is your father?' I said he was well."

The cross examination in no wise disturbs this definite and positive testimony as to the mental capacity of the testatrix both before and after the execution of the will.

The next witness is the proponent, Francis McKinney (page 313). He is the executor and one of the legatees under the will. He had been taken

care of by testatrix from the time he was ten weeks old and is the individual whose education had been provided for by the testatrix's husband in his will, which was offered in evidence. This witness saw the testatrix on the 20th of June and had a talk with her (page 316). He says that at about 5 o'clock his wife came downstairs and as a result of what she said he went and secured the lawyer (page 317). He denies emphatically all undue influence or even that he ever asked the testatrix to make her will or ever considered that she would make a will in his favor (page 319, line 17, etc.) He denies having turned the testatrix against Charlie. He says: "After the suit was brought she seemed to be very sad and downhearted and she had always been a happy woman (page 321, line 13, etc.)

Nothing whatsoever was developed by his cross-examination throwing the slightest light on the testatrix's state of intelligence or undue influence. The rent from the premises was $72 a month when everything was rented (page 332, line 36, etc.) The witness stated that he did not go for Mr. Monteith because he had been informed that if he wished to see him, he should come before 3.30 or 4 o'clock, and he repeats this on cross examination (page 338, line 8, etc.) Much of the cross examination and much of the argument by the caveator has gone to the question of the selection of Mr. Schotland to draw the will in this case and not Mr. Monteith, or Mr. Newman or Mr. Van Blarcom, whose names were mentioned at different times, but we are unable to understand the point of the inquiry. It has been stated in open court repeatedly that Mr. Schotland was not charged with bad faith and that no question as to his integrity was raised. He was not the lawyer for any of the parties con-

cerned in the transaction at the time and was a complete stranger. He states that he received his instructions for drawing the will entirely from the testatrix. Can it be gratuitously assumed that the testatrix would have given different instructions to Mr. Monteith? If the argument were to be made that Mr. Schotland fabricated a will and fraudulently secured the signature of the testatrix, all of these inquiries as to why Mr. Monteith was not brought might be relevant. But we have no such question raised here, and it is to be noted that Mr. Monteith (page 365, line 16, etc.) does not deny that he had told Mr. McKinney not to call after 3.30 or 4, but simply that he has no recollection of it (page 365, line 18). Moreover, it clearly appears that he is not in his office after 5 o'clock. This witness upbraided Charlie for his attack upon his grandmother on Monday night, the day before her death, and asked Charlie: "How could you do it?" He says, "Well, Frank, I am sorry." It is to be noted that although the caveator is recalled he does not deny this.

The next witness was Leo. J. McKinney, son of Francis and Annie, who swore that his grandmother, about the 17th of March, had told him that Charles had her in court and that she wanted to see his father and mother as soon as they could get down; and that he so informed them.

Miss Weston, the nurse, was then again recalled and contradicted the doctor as to the testatrix's consciousness. She says that on Monday morning the doctor came about 10 o'clock and when he came in he said, "Well, how are you, Mrs. McKinney?"—A She said, "Ask Nellie, she will tell you how I am." She says that the testatrix did not lose consciousness until after 10 o'clock on Tuesday; that she heard her speak on several occasions. She testifies that she was fixing a hy-

podermic when the priest came (page 360, line 4 etc.) This, we repeat, was after the doctor had been there. She also on this Monday afternoon heard Mrs. Annie McKinney ask Mrs. Frederica McKinney if she wanted Charles: "Do you want Charlie, Grandma?" Mrs. Frederica answered very decidedly, "No." The cross examination does not go to the points of the testimony.

With this the proponent rested and Charles, the caveator, was again recalled, and put in copies of certain letters which he swore he had written to his grandmother, and of which he had kept copies. The nature of some of these letters is such that if he actually did keep copies of them it would be very strong evidence against him, unless he can satisfactorily explain to the Court why he should have solemnly kept in a copy book at his office a letter telling his grandmother that he could not come to take a meal with her.

Mr. Monteith was then recalled and testified that he did not recollect telling Mr. McKinney not to come to his office after 3.30 or 4.

The affidavit of the priest (page 367) was then put in by consent and with the same force and effect as though he were sworn as a witness, and this shows that on Monday afternoon at about 5 o'clock, June 22d, the testatrix was conscious; that the priest administered the sacraments and while he was there the question was asked as to whether Mrs. McKinney wanted to make a will, and to the best of his knowledge she replied in the affirmative.

An analysis of the facts of the case shows that the decree should not be sustained.

The law on the subject is settled beyond question or dispute.

I.

Proper proof of the will was fully made.

It is clearly settled that in ordinary cases where a testator is in health and of ability it is not even necessary to show that the will was read over to him or that he knew the contents of it, but that where it appears affirmatively that the will was not read to the testator it must be shown to the satisfaction of the Court that he was in some other way made acquainted with the contents of the instrument and approved them, and that where a testator is incapable of reading the will it must be shown that he was made acquainted with its contents. This can be shown either by direct evidence or by circumstances. If it is shown that the will in question is substantially in accordance with the testator's instructions, it is considered as sufficient evidence that he was acquainted with its contents. These rules are laid down at length by Chancellor Vroom as Ordinary in *Day* v. *Day*, 3 N. J. Eq., 2 H. W. Gr., 549.

Applying the facts of the case in hand, it is shown by two witnesses whose creditability is unimpeached and unimpeachable that the testatrix was made acquainted with the contents of the will and approved them, and unless Mr. Schotland is to be found guilty of the most deliberate and wilful perjury and of having perpetrated a most outrageous fraud upon persons who are total strangers to him, and with no shred of a motive, then it must be found that he prepared the will strictly in accordance with the testatrix's instructions and that he twice verified this by his painstaking effort and deliberation, in the task he was performing.

Where a testatrix, very old, diseased, feeble, with defective hearing, and unable to read, was

in the presence of an importuning beneficiary and a partner in the law business, it was necessary to show that the testatrix understood the document signed.

> "This knowledge may be drawn from the reading of the will under such circumstances as to reasonably create the belief that the testator heard it or from its having been drawn according to his instructions, the amount and kind of proof depending very much upon the circumstances of each case and being necessarily relative, according to the degree of capacity and suspicion of fraud or doubt of the testator's knowledge of the contents."

Harris v. *Vanderveer's Executor,* Bedle, *J.,* Ct. of E. & A., 21 N. J. Eq., 6 C. E. Gr., 651 (1870).

We have yet to hear the first intimation of a charge of fraud in this case, and the entire uncontradicted testimony of the identification of Millie Clark, as well as a hundred other details, show how hopeless such a claim would be.

Patton v. *Hope,* 37 N. J. Eq., 10 Stew., 522, Runyon, *O.* (1883).

> "But it is urged that, seeing that the testatrix could neither read nor write, it should appear that the instrument was read over to her before execution. The rule on the subject is that when the testator is unable to read or write, it must be made to appear that the will was read over to him or its contents fully known. (Citing Day *v.* Day, *supra.*)
>
> "But the mere fact that a testator is illiterate will not, in the absence of any evidence to induce the court to suspect that he may have been imposed upon, render it necessary for the proponent of a paper purporting to be his will and which he had executed as such, to prove that he knew the contents of

> the instrument when he executed it. The execution of the paper according to law raises a presumption in such a case, as it does when the testator is not illiterate, that he understood its contents, and the proponent is not called upon to produce affirmative proof of knowledge of the contents until fraud or practice of undue influence is charged and supported by at least some evidence."

All the evidence in this case proves that there was no fraud or undue influence; that the testatrix herself gave the instructions for the instrument; that they were followed literally; that the document was then read to her and re-read in the presence of the nurse.

> "If the will can be shown to be substantially in accordance with the instructions of the testator, it will be considered sufficient evidence that he was acquainted with its contents, though he did not read it and it was not read over to him. In the case before me, Mr. Garrick testifies that he drew the codicil in accordance with the testator's directions, which he details."

Kohl v. *Schober*, 35 N. J. Eq., 8 Stew., 461; Runyon, *O.* (1882) at page 466.

Lyons v. *Van Riper*, 26 N. J. Eq., 11 C. E. Gr., 337, Van Fleet, *V. C.*, (1875) at page 339 found that the testatrix fully understood the contents of a will which she executed, it having been drawn in her presence, in conformity to instructions given on the spot.

II.

There was no proof of undue influence.

> "Among the many cases in which the burden of proof has been thrown upon the beneficiary under a will, I do not find one in which confidential relationship with the testator was the sole element which influenced the decision. In such cases, added to proof that the testator's mind was enfeebled so that it was difficult to resist improper influence and the establishment of intimate confidential relationship, there has usually been some other element, such as the initiation of proceedings for the preparation of the instrument or participation in such preparation by the employment of a draughtsman, the selection of the witnesses present at the different stages of the proceedings and the like, or an effort to exclude the natural objects of the testator's bounty from his society or to conceal the making of the will or the instrument itself after it had been made."

Wheeler v. *Whipple,* 44 N. J. Eq., 17 Stew., 141, McGill, *O.* (1888).

In that case the sole beneficiary was the confidential companion and business advisor of the testatrix and had been for several years.

> "Influence to be such as the law denominates undue must destroy free agency and amount to moral or physical coercion; importunity which cannot be and is not resisted."

Elkinton v. *Brick,* 44 N. J. Eq., 17 Stew., 154, McGill, *O.* (1888).

When one examines carefully the facts of the Elkinton will, which was admitted to probate, it

would seem to leave little doubt that the will in the present case must be admitted to probate.

> "Influence acquired by kindness and affection, honestly and fairly bestowed upon an aged person, is not undue, though it may induce testamentary recompense."

White v. *Starr,* 47 N. J. Eq., 2 Dick., 244, McGill, *O.* (1890).

See also on undue influence the excellent definition of Vice-Chancellor Van Fleet in *Earle* v. *Norfolk & New Brunswick Hosiery Co.,* 9 Stew. Eq., 158, 192.

See also *Turner* v. *Cheesman,* 2 McCarter, 243 265, Chancellor Williamson.

Re Alexander's Will, 12 C. E. Gr., 463.

Byard v. *Conover,* 12 Stew. Eq. 244.

Waddington v. *Buzby,* 16 Stew. Eq., 154.

As in the case of *White* v. *Starr, supra* (page 260) "The respondents do not pretend to point out the exact method by which the testator was unduly influenced." Bear in mind that in the case at hand it is distinctly proved that the will was the testatrix's free act, that while she was enfeebled in physical health, even the doctor, the caveator's witness, would not testify that she did not know the natural objects of her bounty, and her property to be disposed of; that none of the beneficiaries were draughtsmen of the will or present at its execution; that no natural object of the testatrix's bounty was excluded from her society when the will was made; that there was no clandestinity—on the other hand, it is most abundantly proved that the testatrix was asked if she wanted the caveator present and that she said emphatically, "No." It is hard to see how undue influence can be even suggested as a factor in this case.

> "The party alleging undue influence must prove it, either directly or by establishing

such circumstances as will warrant a presumption against the instrument, which in the absence of affirmative evidence showing that the paper was the spontaneous act of the testator, must control as a conclusion of fact. The mere fact that a favored legatee openly denounces one who is discriminated against, is not proof sufficient to create a presumption against the instrument.

"It is as much the duty of courts to uphold the right of the owner of property to dispose of it by will according to his favor as it is to see that he is not imposed upon in the exercise of that right."

See also *Dumont* v. *Dumont,* 46 N. J. Eq., 1 Dick., 223, McGill, *O.* (1889). *Den Trunbell* v. *Gibbons,* 2 Zab. 117, 136, Greene, *C. J.*

The Orphans Court in its conclusions at the end of the trial referred to the decision in the Sparks case. This is one of our recent and important cases on undue influence. *In re John Sparks,* 136 Eq., 18 Dick. Ch., 242 (1901), Reed, *V. O.,* considered a case where a testator who was a laborer and who could neither read nor write, made his priest residuary legatee. It was held that the rule which raised presumptions in transactions *inter vivos* did not apply to testamentary gifts and that the mere confidential relation was not sufficient to raise a presumption of undue influence. It further held that additional circumstances to such relation would throw on the beneficiary the burden of proving that the testator's mind was not unduly influenced. In that case the beneficiary had prepared the memorandum from which the will was drawn, and he was accordingly called upon to explain his connection with the execution of the will. This he did and it was held that there was no undue influence proved. The will

was written by a lawyer, at the request of the beneficiary, without consultation with or instructions from the testator, from a memorandum in the handwriting of Father Connolly.

Moreover, the Sparks case hold that the absence of any influence which can be regarded as undue must, in the main, of necessity be proved by the legatee himself, and that the testimony of such legatee, unless contradicted by some other creditable testimony or discredited by its improbability, cannot be arbitrarily disregarded.

A careful review of this decision will show that it might be well cited to support the will offered in this case, but could not possibly be held to support the conclusion of the court below.

See also *Byrnes* v. *Gibson,* 73 N. J. Eq., 617.

One of our late and very well considered cases is that of *Armstrong* v. *Armstrong,* 69 N. J. Eq., 3 Rob., 817, Ct. of E. & A. (1905).

The Court says:

> "Unless I discredit the evidence of the lawyer who drew the will and the other witness thereto, and the silent proof of the instructions in testator's writing, and the lawyer's memorandum, made at the time, I must conclude that testator contemplated and intended to dispose of his property by will, and that he knew particularly what property he had to bestow; that he knew the natural objects of his bounty; that on the day in question he knew of the business he was engaged in and what he intended to do and that he did do so by the will and codicil, and so was presumed of testamentary capacity within the doctrine laid down by Chancellor McGill and approved by the Court of Errors and Appeals." Citing *Wescott* v. *Shepard,* 51 N. J. Eq., 6 Dick., 315.

This is particularly applicable to the case in hand.

In our case it would be necessary to discredit not only the lawyer who drew the will and the other witness thereto, but the evidence of the priest that the testatrix stated that she desired to make a will, the evidence of Annie McKinney that she heard that request made, and proceeded on her mission of informing her husband to go for a lawyer, and all the other facts surrounding the execution of the document.

In re Cooper's Will, 75 N. J. Eq., 5 Buch., 177, Prerogative Court, affirming opinion of Mills, *J.*, is an extremely well considered case. The decision admitting the will to probate is further affirmed by the Court of Errors and Appeals under the name of *Harrison* v. *Axtell,* 76 N. J. Eq., 614.

In re Davis, 74 N. J. Eq., 3 Buch., 617, Magie, *O.* (1907). In this case the will of the testatrix was contested by her grandchild, and on the contest the Orphans Court found undue influence and refused to admit the instrument to probate. The Court said:

> "As it is established that the deceased possessed entire testamentary capacity at the time and that the paper was executed with all the formalities required to constitute it a testamentary disposition of property, there is a presumption that it expressed the will of the deceased and one who contests its validity on the ground that it was the product of influence, must primarily establish that such influence existed as is called undue; that is, such influence as dominated the will of testatrix and produced a testamentary disposition which testatrix would not have made if not coerced by such influence."

In the Davis case the will was executed in the house of the principal beneficiary, who with his wife had brought the testatrix to his house forty-eight hours previous, suffering from a disease from which she died some weeks later. It is interesting to note that in that case so serious was her physical condition at the time that under the advice of the physician who examined her a priest was sent for, who administered to her the last sacrament. The Court found that there was opportunity for the exertion of influence by the proponent and his wife, but the opinion says:

> "The inference of dominating influence will not be drawn alone from proof of opportunity to exert it, nor will influence be deemed to be dominating which may reasonably be inferred to have been produced by kind attentions and services rendered by a beneficiary."

The opinion then shows that statements made by a testatrix either before or after the execution of her will are not admissible as evidence of facts from which undue influence will be inferred.

When one realized that the caveator in the case in hand, with all the declarations and statements of the testatrix offered and considered, could not make even a pretence of a case of undue influence, what can be left of such an abortive effort, with none of the testatrix's statements relevant to that issue?

Another extremely significant fact in the Davis case is that at a previous time the testatrix had made a will in favor of the granddaughter, giving to her about the same benefit that the will offered gave to the proponent and others, in a situation identical with that of the present case. But in the case in hand we have, moreover, the strongest

possible reason for the change to be made. The testatrix had just returned from her lawyer immediately prior to being taken sick, from a visit where she had paid to him her last dollar in the world for the preservation of her home from the grandson's attack. To be sure, she had been told in the one minute interview in the outside reception room of her lawyer not to worry, but that did not return to her her $100. Indeed, the matter of the grandson's discontinuance of the suit had been rung in her ears for so long that all the comfort of such a consummation must long since have passed from her. We ask the Court to keep in mind the pitiable bank book offered in evidence and to realize what this sum of $50 paid on this day must have meant to this poor old woman; for everything is relative in this world, and nothing is great or small save by comparison.

It has been contended that there is an argument to be made against the fact that the testatrix so long put off changing her will, but this, be it noted, is the argument that has been made and re-made in the instance of every death bed will ever yet offered for probate, and our books show that they have been many. Moreover, we may well concede that this testatrix would put off the change to the last possible moment. Mr. Monteith, the caveator's own witness, testifies that the grandmother felt disappointed, and others testify to her having felt hurt by the grandson's unjustified and unjustifiable attack. Nevertheless, we may easily assume that she hoped that the tardy discontinuance, signed a day or two after her death, might come in her lifetime, and that she desired to die leaving the property in question to Charlie. But it requires a great deal of assumption to hold that when the doctor or priest, or both, as some of the testimony would show,

had informed the testatrix on the Monday in question that she could live but a little while, and suggested that she straighten out her worldly affairs, that she desired to die surrounded by those who had protected her and given her love, care and attention at the time when they were most needed in all her life, and leave practically all of her property to this grasping, revengeful, beligerent grandson, whom she had emphatically refused to see on her death bed or to have present while she was giving instructions as to her will.

No possible argument can be made in this case that the grandson was excluded; certainly he could not have been brought in with his grandmother against her will, in her dying condition, and that it was her will and wish that he should not come is abundantly proved by Mr. Schotland, the nurse and Annie McKinney.

Every word of the Davis case is particularly applicable to the case in hand. At page 621 the Court says:

> "An inference of that kind of fraudulent conduct which consists in extorting benefits from a person almost in extremis ought not to be made if another inference not involving fraudulent conduct can reasonably be made. That a fair inference from the facts is that this will was made because of the kind offices then being rendered to the testatrix by proponent and his wife, I think is clear."

We would refer again to the testimony of Leo James McKinney that in March he was told by his grandmother of having been served with a subpoena and of her desire that he should ask his father and mother to come down and see her at once. What could be more natural than that this troubled old lady should have desired to have with her and keep with her every possible hour,

those on whom she relied, in this time of tremendous stress and worry. Can we well imagine anything more pitiable than this poor old, old woman having the tax bills of twenty years hunted up, making out the figures and statements as to the amount which she had expended in feeding and clothing and even burying, the father of the present caveator, and presenting this interesting evidence to her lawyer, Mr. Montieth, as an answer to the grandson's attempt to take from her the very property which he himself shamelessly testifies she had told him would soon be his.

In the Davis case proponent's wife, one of the beneficiaries, was in the room while directions to the lawyer were being given by the testatrix, and there was some evidence of the proponent himself being present.

See also *In re Banvards Estate*, 89 Atl. 1024 (February, 1914), Lewis, *V. O.*, and *In re Tunison's Will*, Prerogative Court, Howell, *V. O.*, 90 Atl. Rep., 695 (May, 1914), Court of E. & A. June 1915, 93 Atl. 1087.

In re Eatley's Will, Prerogative Court (December, 1913) Backes, *V. O.*, 89 Atl., 776, is perhaps the last case that need be considered. It is a very full, extremely accurate and valuable opinion. It considers all the questions involved in the present case. In that case again the Orphans Court refused probate, and again this decree was reversed. In that case, as in this, the testatrix was ill in body but sound in mind until shortly before her death, which occurred on May 8th, 1912. About 11 o'clock in the morning on May 7th she took to her bed; the attending physician was then called, her brothers and sisters were hastily summoned and a lawyer was sent for, who drew the will, making a sister sole beneficiary and executrix. The deceased left surviving a daughter, father,

two sisters and five brothers. As in the present case, the estate consisted practically entirely of house and lot. In that case, as in this, the lawyer who drew the will obtained his instructions from the testatrix, reduced them to writing, and then the document was read to the testatrix and approved and signed by her. Direct testimony was offered in that case by a brother who was present in the room fanning the testatrix when the beneficiary and the lawyer entered the room, that the deceased was practically unconscious all the time the four were present, that she did not recognize him, that she wandered in her talk, that her eyes were closed, etc., and he denies that the testatrix gave directions as to her will. We will not further analyze the decision. Suffice it is to say that it is conclusive against the decree in the case in hand. While the facts were much stronger with reference to relationships between the parties, the Court held that they did not establish a confidential relation, such as is illustrated in the opinions in the Sparks case and *In re Coopers* will.

It would be possible to multiply citations by the dozen, but it would seem hardly to serve any useful purpose. We have covered the field from the early date of our reports to our last decisions, and find a universal trend.

III.

The testatrix unquestionably possessed testamentary capacity.

Confusion seems to have existed in the mind of caveator's counsel as to the difference between physical weakness and intellectual weakness. Let it be distinctly stated that when the will was executed the testatrix was in an extremely weak physical condition; that she was laboring for

breath; that she had the anxious face mentioned; that much of her attention was required in the work of breathing. All of this, however, is of no possible avail to the caveator. The doctor, his friendly witness, the man who called him up to tell him of his grandmother's illness, bringing him to the house where she had said she did not want him, said that the intelligence in such cases was all right; that in the afternoon when he saw her, before the stimulant had been administered he could not say she had not intelligence enough to know the natural objects of her bounty and her property. Every witness in the case, from the little boys who came in on Sunday morning to the priest at 5 o'clock on Monday and Mr. Schotland at 6 o'clock and Miss Roff at 8 o'clock, testify positively and convincingly to the state of the testatrix's intelligence.

A brief review of our cases on the mental capacity necessary to make a will will suffice.

White v. *Starr,* 47 N. J. Eq., 244, a very important and elaborate opinion which has been previously referred to, found that:

> "At the period of time when the disputed will was executed the testator's mind was to some extent impaired by old age and the troubles through which he was passing; second childhood was asserting itself and at times he would momentarily lose complete control of his mental power, but such loss was merely occasional and transitory, and usually he was in full possession of his faculties. It cannot be said that such a man does not possess capacity to make a will. It has been reiterated in our courts that a man's memory may be imperfect and greatly impaired by age or disease, that he may not be able at all times to recollect the names of persons

> or the families of those with whom he had been intimately acquainted, that he may at times ask idle questions and repeat those which he has asked before and which may have been answered, and yet at the time of executing his will may be capable of recollecting the property he is about to dispose of and the natural objects of his bounty, and of understanding the manner in which he determines to distribute his property." Citing list of cases.

The remark of Chief Justice Ewing in *Sloan v. Maxwell,* 2 Gr. Ch., 581, is quoted with approval.

> "The power of disposing of property is an inestimable privilege to the old. It frequently commands attention and respect when other motives have ceased to influence them. How often without it would the hoary head be neglected, deserted and despised."

Elkinton v. *Brick,* 44 N. J. Eq., 154, at 158.

> "The presumption of law is in favor of testamentary capacity and those who insist upon the contrary have the burden of proof."

Can it be argued that against the testimony of a half dozen witnesses, interested and disinterested, the doctor's statement, "If there was any complicated thinking to do she could not do it under those circumstances" (page 71, line 19) can be held to support the burden of proof? In fact, the doctor's own testimony is clear and emphatic to the point that the testatrix did have the intelligence necessary for the act in question.

We refer to the state of intelligence in the following cases:

In re Gahagan's Estate, 89 Atl., 771 (Dec., 1913) Backes, *V. O.*

The codicil there was executed February 1st, 1913; the testator died on the 10th of the month; on the day the codicil was signed he rallied from a night of unconsciousness and his mental powers recovered their tone; although in a critical condition it was found that his mind was clear and he was sensible and comprehending. The evidence abundantly established testamentary capacity.

O'Brien v. *Dwyer,* 45 N. J. Eq., 18 Stew., 689 holds that the point of time at which testamentary competency is to be decided is that of the execution of the will. Antecedent and subsequent conditions of the testator are justly important as bearing upon that epoch.

Pancoast v. *Graham,* 15 N. J. Eq., 2 McCarter, 294, 300, is a case where the testator had been found a lunatic, used liquor to excess, but his mental faculties were subsequently restored. The Court held that it was not to be expected that the mind should resume all its former vigor, but the question was, whether at the time of executing the writing he had recovered that quantom of disposing mind which ought to give the writing effect.

> "Testamentary capacity is established by capability to transact business with sagacity and decision."

Lyons v. *Van Riper, supra.*

In re Gleespin's Will, 26 N. J. Eq., 11 C. E. Gr., 523.

> "By such terms as 'sound and disposing mind and memory' it is not to be understood that a testator must possess these qualities of the mind in the highest degree nor in as great a degree as he may formerly have done for this would disable most men in the decline of life."

Den v. *Vancleve,* 5 N. J. L., 2 South, 589-660.

In re Carter's Will, 51 Atl., 65, Prerogative Court, the will was not set aside for mental incapacity, although the testatrix was 81 years of age, an invalid, unable to read or write, and enfeebled.

> "The amount of mental capacity must be equal to the subject matter with which it has to deal; a man may be competent to make a codicil changing in two or three particulars the prior disposition in his will who would be incompetent for the performance of acts requiring the exercise of far greater intellect and judgment."

Turner v. *Cheesman,* 15 N. J. Eq., 243.

In re Vandeveer's Will, 20 N. J. Eq., 463, Rev. 21 N. J. Eq., 561.

See also *Whitenack* v. *Stryker,* 2 N. J. Eq., 1 Gr. Ch., 8.

> "The memory of a testator may be imperfect and impaired by age or disease, so that he may not be able to recollect the names of persons or the families of those with whom he has been intimately acquainted, and he may at times do childish things, speak disjointedly, abruptly pass from one subject to another or ask idle questions and repeat those which have before been asked and answered, and yet possess capacity to make a will."

Clifton v. *Clifton,* 47 N. J. Eq., 2 Dick. Ch., 227.

Where a testator was incompetent both shortly before and shortly after making his will, it was sustained.

Claffy v. *Ledwith,* 56 N. J. Eq., 11 Dick. Ch., 333.

O'Brien v. *Dwyer,* 45 N. J. Eq., 689, previously referred to, was a case where the will was executed by a consumptive five hours before she died. It was sustained.

See also *Dieffenbach* v. *Grece,* 56 N. J. Eq., 11 Dick. Ch., 365.

The evidence in the present case shows absolutely and conclusively that the testatrix possessed the mental capacity to know and understand the business in which she was engaged, unless all the testimony of Mr. Schotland be found to be either the result of deliberate fraud or perjury. She gave to him his instructions; she mentioned Millie, Frank and Annie; she told him that she had a sister in Albany to whom she desired to leave nothing. She refused to see Charlie. As to the amount of capacity, let it be borne in mind that she possessed but one piece of property, the house in which she lived, the subject of the litigation which doubtless hastened her death. If she had had involved accounts, going business, stocks, bonds and investments, an argument might possibly be urged, but in the present situation we think it must be conceded that the testatrix had testamentary capacity.

The opinion of the Prerogative Court has found that there was no proof of undue influence. But, as to the other ground, it appears to be based on what seems to us a misapprehension of the testimony with reference to the testatrix's mental condition. We have elsewhere herein set out at length an analysis of the testimony of Dr. Phelan. The opinion finds that "during Saturday and Sunday she (testatrix) was in a semi-unconscious condition" (page 406a, line 28). The opinion repeats that the doctor saw the testatrix three times on Monday, and he tells that the condition in which he found her was a condition of unconsciousness (page 406a, line 34). The opinion repeats that the doctor's testimony establishes that "she was not able to conduct any business affairs on Monday afternoon at four o'clock" (page 406b, line 10).

The Court remarked further that a stimulant had been given to her after four o'clock on Monday and that it "might have been sufficient to awaken, to a mild degree, her ability to understand questions that were put to her" (page 406b, line 27); and again the opinion repeats, "She was semi-conscious only on Saturday and Sunday, and she was totally unconscious on each of the calls of the physician on Monday" (page 406c, line 27). The Court states that these facts demonstrated the invalidity of the instrument in question, but we respectfully contend that by no reading of the testimony can these facts be established.

As against this summary from the opinion we refer again to the testimony of Dr. Phelan:

Q Did she recognize you on Saturday?

A Yes, sir (page 50, line 5).

Q How was she on Saturday evening?

A Why, she appeared about the same as in the afternoon.

Q A little bit improved?

A A little bit (page 50, line 25).

Q Was she better or worse on Sunday than she had been on Saturday?

A I think a little bit improved (page 51, line 25).

On Monday morning she was worse, but her eyes were active and the doctor could get her attention, but couldn't get her to speak (page 52, line 32).

It is to be borne in mind that at this time this patient was struggling for breath. She was suffering from edema of the lungs and her lungs were filling up; her breathing was labored and the effort to breathe occupied apparently most of her attention, but the doctor says, "The intelligence in those cases probably is all right, but they are so occupied with breathing that they cannot attend to anything else (page 54, line 8).

The doctor called at the house Monday evening about quarter to ten, and the testatrix was then unconscious (page 57, lines 1-20). The doctor has at no time testified before that she was unconscious, and this was over four hours after the will had been executed.

He says on cross-examination that on Saturday she was perfectly rational (page 59, line 30) and yet when the doctor asked her a question she did not answer him. He repeats that she was perfectly rational Saturday and better on Sunday (page 60, line 10). On Monday morning he found her condition a little worse than it had been Sunday night. He was asked:

Q But she was still entirely conscious?

A Her eyes were bright.

Q Her eyes were bright and alert?

A Yes, sir.

Q Active. Her eyes were active?

A Yes, sir.

Q Indicating definitely the presence of intelligence to you?

A Yes, sir.

Q And her difficulty, you thought, was with expressing herself—the functioning through her vocal organs?

A Yes, sir.

Q And this was about ten o'clock on Monday?

A Yes, sir.

The doctor was expressly asked:

Q You mean to say that she was unconscious at four o'clock Monday; will you doctor?

A No, sir.

Q She had her consciousness?

A I couldn't swear she was unconscious.

Q You couldn't swear she was unconscious?

A No, sir.

Q Can't say that she wasn't conscious?
A No.
Q Is that correct?
A Yes, sir (page 63, lines 20-30).
Q And the first time you saw this patient when she had lost consciousness was when?
A When she had absolutely lost consciousness, at nine o'clock Monday night (page 66, line 29).

On page 70 the doctor was forced to admit that he could not say that on Monday afternoon the testatrix didn't know the natural objects of her bounty and the estate of which she was possessed (page 70, lines 20-30). He simply said that if there was any complicated thinking to do she couldn't do it, under the circumstances (page 71, line 20).

Surely this testimony of the doctor is very widely divergent from the findings of the Prerogative Court that the testatrix was totally unconscious at each of his calls on Monday, &c.

But it must be kept in mind that this testimony of the doctor as to the intelligence of the testatrix, her ability to transact business, her consciousness, &c., is merely a theory or hypothesis; it is nothing but his opinion or conjecture at best, and how can it possibly be permitted to stand against positive, well-established, undisputed facts such as are shown by the testimony of Mr. Schotland?

The Prerogative Court has said that under a stimulant the testatrix might have awakened to such a degree of ability as to be able to "understand questions that were put to her." But this entirely loses track of the points of the case. Nowhere, in any court, any argument, by any counsel, or in the decision of any judge has the conduct of Mr. Schotland been attacked. He is not alleged to be a fraud-doer, a conspirator or anything of the kind, and as we have said before, he is a lawyer of six-

teen years' experience and of the highest standing for integrity and honor. He did not take to this woman's house a will drawn by instruction of some favored legatee, hold her hand when she made her mark and then ask the formal questions, receiving the formal yes or nod of approval. Such was not the situation at all. The undisputed evidence shows that he excluded from the room everyone, including the nurse. He sat down by the testatrix and she pulled him very close to her and whispered to him the definite instructions, according to which he prepared the will (page 4, line 27, &c.). Surely this is proof positive that the testatrix did have the necessary testamentary capacity. The opinion of the Prerogative Court mentions also the testimony of Father Koelhoffer, but seems to disregard it in effect because it is put in in the form of an affidavit. This affidavit, however, is a sworn statement of the priest, who was there at the time, and being in by consent of counsel on both sides, with the same force and effect as though the priest had been sworn in the Orphans Court, it would hardly seem permissible to disregard it because the witness was not subjected to cross-examination. It would hardly seem permissible to disregard this positive, sworn testimony of the priest that the testatrix was conscious at five o'clock on Monday afternoon, June 22nd.

But we ask a brief review again of the following evidence, not mentioned at all in the Prerogative Court, and cumulative to that of both Mr. Schotland and the priest. We refer to the testimony of Amelia Clark, the testatrix's companion for fifty-one years, who spoke to her several times on the Monday in question. She makes it clear that from Saturday on she many times conversed with the testatrix, who recognized her, but found it difficult to speak on account of her throat (page 199, lines 1-5). On the Monday before she died she spoke to this

witness several times (page 199, line 25). She asked her for milk; for the nurse; she complained about a pain in her side and asked the witness if she thought an onion poultice would be good (page 200, line 1, &c.).

Annie Rache, one of the beneficiaries, and a friend of long standing, says that the testatrix complained of her throat on Saturday and said she could hardly speak (page 241, line 10). She called to see her again on Sunday and the testatrix said, "How do you do, Annie; how is Tom?" (page 241, line 35). Monday afternoon about three o'clock this witness was in the room while the testatrix was being given medicine; she was holding her up in bed and the testatrix turned and said, "Annie, I gave Monteith $50," she said, "I went and gave it." I says, "Yes, all right"; I says, "that makes a hundred." She says, "Yes, I have given him a hundred dollars now" (page 243, line 10). This proves positively her memory of her business transactions of several days before, and is conclusive evidence of her rationality.

Annie McKinney, her daughter-in-law, testifies that she was there Saturday, Sunday and Monday; the testatrix spoke to the nurse and she came in; testatrix said she knew the nurse would make her better (page 258, lines 30, &c.). Witness spoke to the testatrix on Monday and the testatrix asked her not to leave her, "to stay with her and do not let her die until after she settled her affairs" (page 259, line 15). She testifies to having been in the room while the priest gave communion (page 260, line 35), and that after his questions as to her having settled her earthly affairs she asked for a lawyer to make a will (page 261, line 6).

Annie Roff, a witness in no wise interested in the controversy, further disposes of any question of unconsciousness all Monday by her testimony that on Monday afternoon between 4:00 and 4:30, after

the doctor had left she said, "How do you do?" and kissed her, and the testatrix said, "Annie" (page 304, line 1, &c.). Then, in the evening, between 8:00 and 8:30, as she was leaving, she went to the room again with her hat and coat on and said, "You don't know me, Mrs. McKinney?" She says, "Yes, Annie Roff," and she patted me under the chin and said, "How is your father?" I said he was well (page 304, line 30; page 305, line 7).

Miss Weston, the nurse, says that on Monday morning the doctor came about ten o'clock and said to the testatrix, "Well, how are you, Mrs. McKinney?" and that she replied, "Ask Nellie, she will tell you how I am." She says that the testatrix did not lose consciousness until Tuesday (page 359, line 15, &c.). She spoke to her several times on Monday; she heard Mrs. Frank McKinney ask the testatrix if she wanted Charlie, and heard her decided answer: No (page 360, line 10).

John Harrigan, who, as a boy, sold papers to testatrix, called Sunday morning, went up to the sickroom and saw her, with his brother, and she complimented them on being two fine boys, and when they were leaving she took their hands and said to pray for her. This was a little after ten on Sunday (page 187, line 10, &c.).

We feel that it is this cumulative weight of evidence as to the testatrix's consciousness and intelligence which did not receive its full weight in the Prerogative Court.

Considering that the testatrix was physically very ill, that her throat was so sore that it was painful to speak, we think that there is as full an accumulation of evidence on this score as could be rationally looked for.

We urge, then, in the first place, that the doctor did not testify that the testatrix was unconscious on all of his visits Monday, and, further, that if

he had done so, his testimony in this respect would be overwhelmingly outweighed.

The appeal is from every part of the decree except the allowance of counsel fees to Mr. McCarter and the allowance of the expenses incurred by the appellants in connection with their appeal from the decree of the Orphans Court.

In other words, the Court refused to allow counsel for the appellants any counsel fee and provided that the taxed costs should be paid by the appellants.

The law on the matter is quite clearly settled. Section 197 of the Orphans Court Act, 3 Comp. Stat., 3885, provides that in cases respecting the probate of a will if probate be refused the Court may order the costs and expenses of the litigation either paid by the person propounding the will or paid out of the estate of the deceased.

The Orphans Court considered that the will was properly offered for probate and allowed the costs, expenses and counsel fee to the proponent.

The matter of allowances in the Prerogative Court is covered in many cases.

In *Bioren* v. *Nesler,* 76 N. J. Eq., 6 Buch., 577, Chancellor Walker considers the subject at length, setting out and reviewing the decisions and sustaining the right. In that case, as in the present case, probate was refused in the Orphans Court. On an appeal to the Prerogative Court the evidence was examined and further evidence taken, and again probate was refused, and allowance of expenses, costs and counsel fee was made to the counsel for the proponent.

In *Hollinger* v. *Syms,* 37 N. J. Eq., 10 Stew., 221, Chancellor Runyon held that where there was reasonably cause for contesting the validity of a will and costs and expenses were awarded, reasonable counsel fees should be allowed.

The case of *Skillman* v. *Lanehart,* 73 N. J. Eq., 3 Buch., 351, does not conflict with the well-established rule, or if it should be held so to do, it would be clearly overruled by *Bioren* v. *Nesler.*

In the present case the proponent was the executor of a will drawn by a lawyer of ability and standing. It would certainly seem to be his duty, as well as his right, to offer it for probate and to attempt, by all lawful means, to secure its admission.

We respectfully submit, then, that the will in question should be admitted to probate and that the decree of the Orphans Court should be reversed, that the costs therein should be ordered to be paid out of the estate and that a counsel fee should be allowed to the counsel for the proponent.

In conclusion, it is respectfully urged that the testatrix did have testamentary capacity, that the will was properly executed, that there was no undue influence, that the burden throughout on every proposition rests upon the caveator, and has in no respect been either sustained or shifted. It is accordingly urged that the paper writing offered be admitted to probate.

LUM, TAMBLYN & COLYER,
Proctors of Appellants.

RALPH E. LUM,
Of Counsel.

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New Jersey Prerogative Court.

BETWEEN
FRANCIS R. McKINNEY,
AMELIA CLARK AND
ANNIE RACHE,
Appellants,
AND
CHARLES F. McKINNEY,
Respondent.

On Appeal from Decree Denying Probate.

CAVEAT.

To Isaac Shoenthal, Esq.,
Surrogate of Essex County:

I, Charles F. McKinney, a lawful grandchild and the next of kin and heir at law of Fredericka C. McKinney, who died on the Twenty-third of June, A. D. 1914, do hereby caveat and protest against admitting to probate any paper purporting to be the last will and testament of the said Fredericka C. McKinney until examination and decree thereon by the Orphans' Court of said County of Essex.

Dated Newark, N. J., June 25, 1914.

CHARLES F. McKINNEY.

Essex County Surrogate's Office.
Filed June 26, 1914.

ISAAC SHOENTHAL, *Surrogate.*

PETITION FOR PROBATE.

To the Surrogate of the County of Essex:

The petition of Francis R. McKinney, 331 South 11th Street, Newark, N. J., the executor named in the last will and testament of Frederica C. McKinney, late of the City of Newark, in the County of Essex and State of New Jersey, respectfully shows that the said testatrix died on the 23d day of June, 1914, and that the next of kin and heirs-at-law of the said testatrix, with their respective residences or post-office addresses, and the manner and degree in which they severally stand related to said testatrix, so far as the same are known to your petitioner, are as follows, to wit:

Charles McKinney, grandson, 83 Central Avenue, Newark, N. J., son of a deceased son, Francis O. McKinney.

Your petitioner, therefore, prays that the aforesaid will be admitted to probate, and that letters testamentary thereon be issued to your petitioner.

Dated Newark, N. J., July 6th, 1914.

FRANCIS R. MCKINNEY.

ESSEX COUNTY, *ss.:*

Francis R. McKinney, above named, being duly sworn, on his oath says that the statements in the foregoing petition contained are true.

FRANCIS R. MCKINNEY.

Sworn before me, July 6th, 1914.

OWEN A. HANRETTY,

Notary Public of New Jersey.

ESSEX COUNTY ORPHANS' COURT,
December 4th, 1914.

In the Matter of the Application of FRANK R. MCKINNEY *for Probate of a certain Paper Writing purporting to be the Last Will and Testament of* FREDERICA C. MCKINNEY, *Deceased.* } On Caveat.

Ralph E. Lum, Esq. (Lum, Tamblyn & Colyer), and *Phillip J. Schotland, Esq.*, Proctors for Proponent.

Robert H. McCarter, Esq., Arthur F. Egner, Esq. (McCarter & English), and *Chauncey G. Parker, Esq.*, Proctors for Caveator.

Phillip J. Schotland, sworn for Proponent.

Direct examination, by Mr. Lum.

Q. Where do you live, Mr. Schotland?

A. 1086 Broad street, city.

Q. And what is your business?

A. Practicing lawyer in this city.

Q. I show you what purports to be the last will and testament of Frederica C. McKinney, dated the 22d day of June, 1914. Do you recognize it?

A. I do.

Q. In whose handwriting is that instrument?

A. All the written parts are in my own handwriting.

Q. Who prepared that will?

A. I did.

Q. How did you come to prepare it?

A. Shortly before six o'clock in the afternoon of the day the will is dated I received a telephone message, and as a result of the information imparted to me over the telephone I went to the home of Mrs. McKinney and there prepared the will.

Q. Did you see that signed?

A. Yes, sir.

Q. Who was present when it was signed?

A. The nurse and myself were the only ones, outside of the testatrix, in the room.

Q. Who signed first, the testatrix or the witnesses?

A. The testatrix.

Q. Then who signed next?

A. Then I signed.

Q. And then who next?

A. Then Miss Weston, the nurse, who was there.

Q. Who were present when the testatrix signed?

A. Miss Weston and I.

Q. And during the transaction did anyone leave the room? I mean during the transaction of the execution, I am referring to now?

A. No.

Q. Where was the testatrix when she signed?

A. In bed, propped up with pillows by the nurse.

Q. Were you present when the nurse signed as a witness?

A. Yes, sir.

Q. And was the testatrix also present?

A. Yes, sir.

Q. Were both present while you signed?

A. Yes, sir.

Q. And will you tell us what was done with reference to publication of the document, if anything?

A. After I had received the information from Mrs. McKinney as to what she wanted put into her will, I wrote it all out. Mrs. McKinney and I were alone when I received the information as to what she wanted in the will, and after I finished writing it out I called for the nurse. Miss Weston came into the room and I then, in Miss Weston's presence, read the entire will to Mrs. McKinney, asked her if that was exactly the way she wanted it, she said, "Yes"; I then asked her if she wanted anybody else remembered in the will; she said, "No." I then said to her, "Is that all you want, that everything that you possess should be divided

into three equal parts, Annie Rache to get one part, Amelia Clark another and Frank R. McKinney another." She said, "Yes." I then asked her if that was—just strike that out—I then asked her who she wanted as executor and she again repeated she wanted Frank McKinney as executor. I then held the will in front of her and asked her if this was her last will and testament; she said, "Yes." I asked here if she wanted Miss Weston and myself to witness her signature to this paper as her last will and testament; she said, "Yes"; and Miss Weston propped her up with pillows—held her up—and I put the will on a book or something—I forget just what it rested on—and handed her a pen and she made her mark, Miss Weston and I both there looking on. I then, right alongside of the bed, in front of Mrs. McKinney and Miss Weston, signed my name and office address as witness, and Miss Weston signed her name right underneath mine, and her address as witness, right alongside of the bed, in front of Mrs. McKinney, who saw us do it and we saw each other do it.

Cross-examination, by Mr. McCarter.

Q. Mr. Schotland, had you ever been in this house before?

A. No, sir.

Q. Had you ever seen the testatrix before?

A. No, sir.

Q. This then was the first piece of business that you had ever done for her?

A. For her or anyone connected with her. I didn't know any of the people.

Q. Just answer my question.

A. Yes, sir.

Q. Now, do not get excited. Answer my question.

A. I am not a bit excited, Mr. McCarter.

Q. Very good. When I ask you whether that is the first piece of business you done for her I want an answer to that and nothing else, please?

A. Yes, sir.

Q. Who sent the telephone message that you received?

A. I don't know who sent it.

Q. Did anybody tell you who was talking to you?

A. Yes, sir.

Q. What was said?

A. The gentleman who talked to me first said he was Mr. Silverstein, an architect; he said that a friend of his, a building inspector named McKinney, wanted to get a lawyer to draw a will and asked me if I had time to go and draw a will. I said, "Yes." He said, "Well, I will put him on the wire." McKinney, or whoever was there, said he was Mr. McKinney; then told me that his mother was very ill, wanted her will drawn, gave me the address and told me to come right over. About fifteen or twenty minutes after that I went over to the house.

Q. You have spoken of Mr. Silverstein, did you know him?

A. Oh, yes, sir.

Q. Who is Mr. Silverstein?

A. He is an architect having an office at 27 Market street—I think the number is—right across the street here.

Q. Had you done business with him?

A. I do not recall whether I had done business for him personally, but I had come in contact with him in a great many cases where he was a witness in cases of mine or was the architect for clients of mine who were building.

Q. You remember making an affidavit in the Chancery suit?

A. Yes, sir.

Q. You didn't mention Mr. Silverstein in that affidavit, did you?

A. No, sir; not that I recall now.

Q. In describing the occurrence with regard to the

first call for this will you stated the following, did you not? I have your affidavit here?

A. I did not catch the last part of your question.

Q. I haven't finished it yet. "I have been retained to represent the defendants in this suit, but am in no way related to anyone of them. Until Monday afternoon, June twenty-second, nineteen hundred and fourteen, I was not acquainted with any of the parties to this suit, except that I knew Charles F. McKinney personally, and Francis R. McKinney by sight, without knowing his name. Between five and six in the afternoon of June twenty-second, I received a telephone call, and was informed by the party at the other end that he was Mr. McKinney, a building inspector of the city of Newark, and that his mother was ill, &c."

A. Yes, sir.

Q. "Desired me to call." Why did you omit in that affidavit reference to the Silverstein incident?

A. As solicitor in that suit I didn't consider it necessary to refer in the affidavit to a conversation with the party who introduced me to Mr. McKinney over the telephone. I simply deemed it necessary, in my judgment, to refer to what actually took place with the parties themselves.

Q. Did Mr. Silverstein introduce you?

A. Over the telephone, in the manner that I have just described.

Q. And that was how?

A. By asking me—just as I described before.

Q. I ask you how he introduced you?

A. He said there was a friend of his there, Mr. McKinney, who wanted a will drawn and if I had time to draw it; I said, "Yes," and he said, "Why, I will put him on the wire and let him talk to you."

Q. What time was this?

A. Between five and six.

Q. How near to five?

A. I couldn't tell you but I believe it was about half-

past five, not from actual recollection, but judging by what I did after the telephone message and knowing the exact time that I arrived at the McKinney home.

Q. This was on the 22d of June?

A. The same day that the will is dated. I do not recall the date except from referring to the will.

Q. Look at it?

A. The will is dated the 22d of June. That was the day.

Q. Of course it was daylight?

A. Oh, yes.

Q. Well, now, after you got that message did you go promptly to the call?

A. No; I went about fifteen or twenty minutes later.

Q. Well, what did Mr. McKinney say to you with regard to his desires?

A. Simply that his mother was very ill and wanted her will drawn. That is all he said at the time, over the telephone.

Q. I notice that in the affidavit to which I have referred you state "that his mother was ill and desired me to come at once to 376 Plane street in the city of Newark to draw her will." Is that right?

A. Yes, sir.

Q. Which is right, the way you stated to-day or the way you stated in your affidavit?

A. Both right.

Mr. Lum—I object to the form of the question. There is no conflict.

Mr. McCarter—I think there is a decided conflict.

The Court—The witness has already answered "They are both right."

Q. They are both right?

A. Yes, sir; as I understood your question.

Mr. Lum—Wait a minute. The confusion has arisen, I think, from the fact that he said—Mr. McKinney in the affidavit said so and so

and in this case he says he did not go at once. It is a question of what he was asked. He was asked about what he did and not what he said.

The Court—He has already answered this question. Now, if you want the advantage of making any objection which you may make the witness ought to pause for a moment to see whether you are going to make it.

Q. Well, whatever the fact was, whether they are both right or unright, Mr. Schotland, I ask you this question now, did the voice of this strange man McKinney tell you to come at once?

A. Yes, sir.

Q. Why didn't you go?

A. I did as soon as I could get things ready in the office.

Q. What did you have to get ready?

A. I had to give instructions to the stenographer and to the boy regarding some matters that were being written out for me in connection with other matters I had pending, and as soon as I got through giving them instructions I went to the form case and took a couple of printed will blanks and went. When I got there I looked at my watch so I know I got there at six o'clock.

Q. You looked at your watch when you got to the house?

A. Yes, sir.

Q. Before you went in or before you got in?

A. After I got in.

Q. And your office at that time was where, Mr. Schotland?

A. In the Union Building.

Q. And 376 Plane street is where?

A. Between Market and William.

Q. On which side of the street?

A. East side.

Q. Who met you at the door?

A. No one.

Q. Walk right in?

A. Walked right in. There was no one there, downstairs, the door was unlocked. It looked like a little store. There was an employment agency sign. So I walked back and I saw stairs back of the store and a little bit to the left. I looked up the stairs—I heard voices upstairs—so I started to walk upstairs, and Mr. Frank R. McKinney, evidently hearing somebody, came to the head of the stairs and saw me and said, "Come right up."

Q. He was the man whose voice you had heard over the 'phone?

A. Yes, sir.

Q. Did he introduce himself to you?

A. Yes, sir. Asked me if I was Mr. Schotland, as I recall it.

Q. Who did he say he was?

A. He didn't say, except that—

Q. He didn't say "Except," now what did he say?

A. I am just trying to recall the exact words. No; he didn't say at all. He says, "Are you Mr. Schotland that came to draw the will?" and I said, "Yes." And I gathered from that that he was the McKinney.

Q. Never mind what you gathered. I asked you what he said.

A. That is all I recollect that he said at the time.

Q. All right. Now, what next occurred?

A. I was conducted—

Q. Did you meet Mrs. McKinney, the wife of this man?

A. What is that?

Q. Did you meet Mrs. McKinney, the wife of this man?

A. A little later.

Q. Go on.

A. I was conducted into the sick chamber.

Q. By whom?

A. By Mr. McKinney.

Q. Where was that sick chamber?

A. That was right at the head of the stairs. As you got to the top of the stairs, and turned around on the landing, there was the sick chamber.

Q. And how large a room was that?

A. I should judge about seven by twelve—possibly eight by twelve—small room.

Q. Small room? Double bed?

A. There was a double bed; yes, sir.

Q. Now, you were conducted into this room by this man McKinney, so-called?

A. Yes, sir.

Q. All right.

A. The nurse and McKinney's wife, Mrs. McKinney, were just finishing giving some medicine or something to Mrs. McKinney as I came in. They finished giving her the medicine and permitted her to recline—they were holding her up while administering the medicine—they permitted her to recline then and in a moment or two one of the people that was there, I think it was Mr. McKinney, said, "This is the lawyer that I sent for to draw your will. Now, you can tell him what you want." I sat down on a chair alongside of the bed and Mrs. McKinney, Frank's wife, asked the testatrix if she wanted to see Charlie. She said, "No." She asked her if she should send for Charlie; she said "No." I then told all the people to leave the room and let me get whatever information Mrs. McKinney wanted to impart as to her will—let me get it from her alone. So they left the room. As soon as they all left Mrs. McKinney took me by the hand, as I was sitting there alongside of her bed, pulled me over close towards her and began to tell me just what she wanted to do with her estate.

Q. Go on.

A. At first I could hardly make out what she was saying and I asked her to repeat, and as she did I understood her clearly, and she told me that she wanted everything she had left to three people and gave me—

Q. Go on. I don't want you to describe it. I want just what she said.

A. Now, it is impossible—

Q. As near as you can?

A. It is impossible for me to repeat the exact words that she used because I do not recall them. I only recall the effect they had at the time on my mind and what I understood from it.

Q. I will be glad to receive that, but I will be glad, as near as you can—without giving your conclusion, give her statement.

A. I am giving the information she imparted to me as near as I can recall it.

Q. Well, was there any effort on her part to explain to you what she wanted to do?

A. She did explain.

Q. What did she say?

A. She told me that she wanted everything that she had to go to Frank McKinney, Annie Rache and Millie —she said "Millie," so I asked her what her full name was. She said, "Amelia." I asked her what the last name was. She gave me the last name, but I couldn't make it out, so I said, "Mrs. McKinney, where is Millie or Amelia?" She said, "Here." So I went to the head of the stairs and called for Millie or Amelia—asked "Who is Millie or Amelia?" Mr. and Mrs. McKinney and Miss Amelia Clark came up, so I called Miss Clark into the room and I asked Mrs. McKinney if that is the Amelia she means. She said, "Yes." I then, in Mrs. McKinney's presence, got the full name, it was Amelia or Amelia F. Clark—I don't quite recall now—and I told them to go.

Q. Pardon me a minute. (Answer read.)

A. I then told them they could go again and remained alone with Mrs. McKinney. I then wrote out all the written-in parts of this instrument. After I got through writing it out I went to the head of the stairs and called for the nurse—asked to have the nurse come in. Miss

Weston came in and then I did what I testified to on direct examination as to the execution of the will.

Q. Now, you didn't know or never had heard of, I presume, Annie Rache, previous to this interview?

A. Never.

Q. You didn't know Amelia?

A. No.

Q. Had you ever seen the nurse before?

A. No.

Q. When did you learn what her name was? 10

A. When she came to my office—no; the first I learned her name was when I saw her sign it.

Q. Who was it that asked if she desired Charlie sent for?

A. Mrs. McKinney, Frank McKinney's wife. I didn't know who Charlie was when they mentioned Charlie. They mentioned no last name.

Q. Now, I understood that the testatrix in describing the three persons spoke in a whisper?

A. Partly in a whisper and partly not. 20

Q. Well, you said she drew you over toward her, she was lying incumbent on her back?

A. She was lying in what?

Q. She was lying on her back?

A. Yes, sir; but there were two or three pillows under her head and shoulders.

Q. Did she have any difficulty in breathing?

A. Yes, sir.

Q. Making a noise as she breathed?

A. A little. 30

Q. Had you inquired what her trouble was?

A. I inquired, but I don't remember whether I inquired before or after. I thought that I recognized what her trouble was.

Q. Well, just in passing, and to add a little amusement to the situation, what was your diagnosis?

A. My diagnosis was that she had dropsy.

Q. Well, you thought that she was a very sick woman, didn't you, Mr. Schotland?

A. I certainly did.

Q. Well, now, after they left the room you said she drew you to her. Did you lean down and put your ears near her mouth?

A. Yes, sir.

Q. Now, what was it she said?

A. She says, "I will tell you just what I want done with my property. She said, "I don't want anyone to have anything except Annie Rache, Millie and Frank McKinney." She called him Frank McKinney.

Q. You had no difficulty in understanding "Annie Rache?"

A. No.

Q. But when you asked her for the name following "Millie" or "Amelia" you couldn't understand her although that was Clark?

A. Yes, sir; I didn't know whether the name was Clark or Bark or Stark. That was my difficulty.

Q. Couldn't make out?

A. I couldn't make out which of the three it was.

Q. How many times did you endeavor to ascertain before you left and went out whether this was Bark or Stark or Mark or Clark?

A. I think two or three times.

Q. You couldn't make out?

A. I couldn't make out which of the three it was and I wanted to get the name exact to put into a will.

Q. Who told you how to spell "Rache"?

A. R-a-c-h-e.

Q. I ask you who told you how to spell it?

A. I don't think I asked anybody how to spell it. I think I just guessed at it. I had seen a family name like that "Rache," spelled that way, and that is the way I spelled it.

Q. Well, now, Mr. Schotland, after you got the information—have you told us all she told you then now?

A. In one of my answers I have.

Q. I beg pardon.

A. In one of my answers I have told you all that she told me.

Q. And you received no further information from her with regard to her desire than you have already told us?

A. That is true.

Q. Who told you then that Frank R. McKinney was the adopted son, as the will states in your handwriting?

A. She did.

Q. Didn't you just tell us that you had told us all that she told you?

A. Yes, sir.

Q. Had you told us that?

A. Well, I don't believe I mentioned that when she referred to Frank McKinney she mentioned the fact that he was an adopted son, but she told me that he was an adopted son.

Q. Now, is there anything more that she told you that you can think of now? Again I ask you to try to tell us everything that she told you?

A. Well, now, Mr. McCarter, I have told you all that I can recall, but if a question is aimed direct at something it may prod my memory—I may recall something else—but all that I can recall, just reviewing the transaction in my mind, I have given you.

Q. Yes. Who told you that "My adopted son Frank R. McKinney" was to be the sole executor?

A. She did, in the manner that I described in my previous answers.

Q. What do you mean by that?

A. When I asked her who the executor was to be, or who she wanted to carry out her will, she said "Frank McKinney," and I asked her if she wanted anyone else, and she said, "No." So I used the language "sole executor." That wasn't her language.

Q. Was it in that conversation that she used the words "my adopted son"?

A. No. When I asked her who Frank McKinney was—when she mentioned the name—she said "my adopted son."

Q. Now, this is new. You haven't told us this before.

A. Well, you are recalling more to my mind now by your questions than I could think of before. I also asked her who Annie Rache was; she said, "My friend."

Q. What?

A. I also asked her who Annie Rache was; she said, "My friend." And who Amelia Clark was, and she said, "Here."

Q. You didn't ask her who Charlie was?

A. Charlie wasn't in it—in the will. I wasn't interested—

Q. You didn't ask her who Charlie was?

A. No.

Q. Did you ask her if she had any children?

A. I did not.

Q. Did you ask her if she had a husband?

A. I did not.

Q. Did you ask her if she had any relatives?

A. I did.

Q. When did you ask her that?

A. Well, during part of the conversation. I was talking with her alone for about three-quarters of an hour.

Q. Well, Mr. Schotland, you have endeavored to describe the whole conversation and I have asked you to give it to us all, and I wish you would tell us what she said.

A. I am doing the very best I can.

Q. So when was it, in the course of your talk with her, that you asked her if she had any relatives and she told you that she had? When was that?

A. Well, now, I can't place just in what part of the

conversation that was, but I gathered—I do not recall the exact language as to that. I gathered—

Q. I don't want what you gathered.

A. I can't recall the exact talk—

Q. I ask you in what part of the conversation it was she told you—

A. I can't place in what part, but it was during the time that I was going over the terms of the will with her and before I had actually written it out—while I was alone with her.

Q. Now, this isn't the only time you have endeavored under oath to state what occurred on this occasion, is it, Mr. Schotland?

A. No; I made an affidavit in the Chancery proceedings.

Q. And in the affidavit in the Chancery proceeding you undertook with particular detail to describe the whole proceeding, didn't you?

A. I undertook to describe all that I deemed necessary and material in that proceeding.

Q. You undertook to describe the incident surrounding the drafting and execution of the will, didn't you?

A. As the affidavit shows.

Q. Yes. Did you in that affidavit say a word with regard to your inquiry of her as to whether she had any relatives and her answer?

A. I didn't undertake—

Q. Did you or did you not?

A. The affidavit speaks for itself. I did not.

Q. You did not, did you?

A. I did not.

Q. No. Isn't it a fact that you stated to-day, and isn't it a fact that you stated in that affidavit, that Mrs. McKinney, or Mrs. Rutherford, the wife of this Frank, so-called, adopted son, asked if Charlie wanted to be present—if she wanted Charlie present?

A. If she wanted to see Charlie or wanted Charlie sent for. Yes, sir; that is a fact.

Q. Now, you mentioned that in this affidavit in Chancery and you mentioned it to-day, didn't you?

A. Yes, sir.

Q. Was it before or after that that she had talked with you as to who her relatives were?

A. That conversation between Frank McKinney's wife and Mrs. McKinney took place before. I was alone with Mrs. McKinney before I did any talking at all.

Q. Well, then, did you learn who Charlie was?

10 *A.* I did not. Not until after the death of Mrs. McKinney did I learn who Charlie was.

Q. Didn't she tell you who her relatives were?

A. She did not.

Q. She didn't tell you. What did she reply to your inquiry as to whether she had any relatives?

A. Well, I started to answer that before. I do not recall her exact reply, but my recollection is this, that she said she had some relatives in Albany.

Q. Albany?

20 *A.* But that she didn't want to leave anything to them. She didn't mention names or what relations they were or anything of the kind. That is my recollection.

Q. She didn't tell you she had a grandson living in Newark?

A. She did not.

Q. Although you asked her who her relatives were?

A. I do not remember the exact form of the question I put to her. I asked her if she had any relatives, is my present recollection.

30 The Court—Did you ask her the other question that Mr. McCarter asked, as to whether or not she had a husband?

Witness—I did not.

Q. Now, I understand that when you went out to find out Millie's name you came into communication with the trio, McKinney, Mrs. McKinney and—or rather the quartette, I guess, to be more accurate?

A. No; the trio responded to my question. No quartette.

Q. Where was the trio resting quietly?

A. I don't know.

Q. Where did you come in contact with them?

A. I went to the head of the stairs, and called out and then they came up and around to the room.

Q. Came upstairs?

A. I didn't see them. I went back to the room and they came in.

Q. They all came in?

A. The three of them came right to the door.

Q. Forth went the dauntless three. They all came in right away?

A. Not into the room.

Q. Although you asked who Millie was the three of them all came in?

A. They came to the doorway.

Q. They all came in?

A. None of them entered the room. They all stood in the doorway of the room.

Q. There wasn't room for them all to get in with you, was there?

A. Oh, yes.

Q. Well, you had to get rid of them again, didn't you?

A. I didn't have to.

Q. But you did?

A. But in my judgment, I thought—

Q. So you excused them, as you said in the Chancery—

A. —that it would be advisable.

Q. So you excused them and they again departed?

A. Yes, sir.

Q. Whether they were inside or outside of the door, you excused them from the presence of the testatrix again?

A. Yes, sir.

Q. Was the door shut?

A. No, sir.

Q. Not shut at all?

A. No, sir.

Q. Are you familiar enough with the layout of that house to know where these people stood while you were in that death chamber with the door open?

A. No; I am not.

Q. And you don't know where they went when you excused them, to use your own phrase?

A. I know they went downstairs, because when I called for the nurse they came to the stairs and came up to ask her to come in.

Q. Had you been introduced to the nurse?

A. No; except that she was in the room when Mr. McKinney conducted me into the sick chamber and said, "This is the lawyer that came to draw the will." Her name wasn't mentioned to me or mine to her.

Q. What was said about her, anything at all?

A. Nothing at all.

Q. As far as you knew she might have been Miss Rache—Mrs. Rache?

A. Well, I didn't have any idea that she might have been Miss Rache at that time.

Q. How did you know she was the nurse?

A. She had the trained nurses' uniform on.

Q. She did?

A. Yes, sir.

Q. Very good. Now, did you, in excusing them from the room follow your usual practice in such cases?

A. Yes, sir.

Q. You knew then that the people that were in the room, or some of them at least, were they who were likely to share under the will?

A. I knew that when I excused them the second time, after having Millie or Amelia identified.

Q. Well, you excused the nurse originally?

A. No, sir. The nurse left of her own accord when,

I entered the room. As soon as she finished administering the medicine, she didn't stay.

Q. Now, Mr. Schotland, so far as you can recall, have you given us all that was said to you by the testatrix in any of the interviews?

A. So far as I can recall now, yes, sir.

Q. Both with regard to the beneficiaries and the property?

A. I think I have.

Q. So that you had no idea at all from any statement she made, did you, what property she was leaving?

A. Positively not.

Q. Then you took up with you from you file case a blank will, did you not?

A. Yes, sir.

Q. And the only manuscript—the only writing that was done at all appears in manuscript?

A. In my own handwriting.

Q. In that plain handwriting which I wish I could imitate?

A. Yes, sir.

Q. I noticed that Mrs. McKinney signed with a mark.

A. Yes, sir.

Q. Do you know whether she could write?

A. I asked the nurse whether she could.

Q. When did you ask that?

A. While the nurse was there at the will there.

Q. Eh?

A. While the nurse was there as I was getting Mrs. McKinney to sign the will, and the nurse says, "No; she is unable to write." So I held it there and held the pen and Mrs. McKinney made the mark.

Q. You haven't told us that before, either. You know I have asked you two or three times to tell us all that you can recall of the incident?

A. I know, but it is just as I told you. When a question is aimed at some particular thing it prods the memory and I recall it.

Q. Very good. Now, have you, so far as you can now recall, told us everything that occurred in the three-quarters of an hour that you were in that room before this will was executed?

A. I think I have.

Q. Well, did it take you three-quarters of an hour to get from this poor sick lady the information that you say she gave you?

A. To the best of my recollection it took three-quarters of an hour for me to talk with her—get the information from her and ask her the questions that I asked her and receive the answers that I received and got everything clear in my mind as she wanted it. That was the best of my recollection, that that took about three-quarters of an hour. Of course that includes the calling up of the Clark lady to be identified, and all that.

Q. Did you have a stylographic pen with you?

A. No, sir. I had my fountain pen.

Q. I mean a fountain pen?

A. Yes, sir.

Q. Did Miss Weston use that pen, too?

A. I couldn't tell. I can't recall. I try not to lend my pen around to be used by others. I do not recall whether I got another pen there or permitted her to use my pen.

Q. What did you do with the document after it was completed?

A. Put it—folded it up in the creases that it now bears and put it in an envelope I had with me, put it in my pocket; told Mr. McKinney that I would take it to my office and put it in my safe, and any time they needed it he could call on me.

Q. You heard, next day, I suppose, she was dead?

A. I don't think I heard—I am not quite sure whether I heard it the next day or two days later.

Q. Who told you?

A. Mr. McKinney called me up on the telephone.

Q. Had he come after the will?

A. No; he called me up on the telephone and then

he came over to see me. He didn't ask for the will. He said—he asked me what would have to be done. I told him he would have to wait ten days.

Q. You told him he would have to wait ten days; no use taking the will. When was it when he called on you?

A. I think it was two days after the date of the drawing of the will.

Q. And when was it he rang you up?

A. That same day. He rang me up before calling on me. Rang me up to see if I was in.

Q. And he told you that she died—

A. He told me she died Tuesday afternoon.

Q. And this is the 22d, the day you were up there, or Monday, wasn't it?

A. Yes, sir.

Q. During those three-quarters of an hour, did Mrs. McKinney tell you that for years her regular counsel had been Mr. Monteith?

A. No, sir.

Q. That Mr. Monteith had drawn a will two years before for her?

A. No, sir.

Q. Did anybody else tell you that?

A. Yes, sir.

Q. Who?

A. Not during the three-quarters of an hour. Afterwards.

Q. Who?

Mr. Lum—I object to as not being within the scope of the direct examination.

The Court—How is that competent, as to what he heard from somebody else?

Mr. McCarter—It seems to me that if the proponent admitted that he knew there was another will we ought to be able to show it, your Honor. The proponent comes with his lawyer and putters around during the whole performance.

The Court—When did you hear it?

Witness—After the will was drawn.

The Court—When?

Witness—That same day.

The Court—I will overrule the objection.

Mr. Lum—The ground of my objection was not that it was not proper in its place, but that it is not within the scope of the direct examination. Of course if they are making this their witness on their own case I wouldn't have any objection.

The Court—Is this within the scope of cross-examination? What is the question?

Mr. McCarter—When and who told you.

Q. Who told you and when were you so told, that there had been a previous will?

A. As I was leaving the house after having drawn the will Frank McKinney told me that her regular counsel was John Monteith, that Monteith had drawn a previous will, and that is the reason—

Q. You have answered my question.

Mr. Lum—And that what?

Mr. McCarter—Wait a minute. I asked for two answers.

The Court—"Her regular counsel was John Monteith." Everything after that should go out.

Mr. McCarter—And that John Monteith had drawn a will.

The Court—And John Monteith had drawn a will. After that all goes out.

Q. You drew the will in the sick chamber?

A. Yes, sir.

Q. Was there a table there?

A. There was a table in that corner of the room which was east of the foot of the bed.

Q. And you drew it on that table?

A. Yes, sir.

Q. Did you read the will to her before you summoned the witness? *A.* No, sir.

Q. How long did it take you to write the will, five minutes?

A. Oh, I don't know. I don't recall that all by itself. I could make an estimate by looking at my writing, if you want that. It wouldn't be a recollection of what it actually took me at the time. I should judge it didn't take me over five or six minutes to write out what is written here.

Q. Then do I understand that you summoned the witness—and what then occurred?

A. When Miss Weston, the nurse, came into the room.

Q. Yes.

A. I read the entire will over to Mrs. McKinney.

Q. That is you took it up and read it.

A. Read it right to her.

Q. Including "In the name of God, Amen," etc.?

A. Word for word, including all the printed language.

Q. Did she have her eyes shut or open?

A. She had her eyes open and was looking at me.

Q. After you had read the will what occurred?

A. I then asked her if that is exactly the way she wanted it; she said, "Yes." Then I asked her the other two or three questions that I have already testified to and the same as is in the affidavit.

Q. Well, what were they?

A. Then asked her if she wanted anybody else remembered in the will.

Q. Now, if you had the will already for execution and were satisfied that you understood her intentions and had the witness ready for its execution, what prompted you to again ask her if there was anybody else?

A. Simply a precaution that I always considered advisable for a lawyer to take in drawing a will for a person who is apparently on a dying bed.

Q. Well, you would to have—had to have altered the will if there had been anybody else, wouldn't you?

A. Certainly.

Q. You hadn't asked her that before?

A. Oh, yes. I made sure—

Q. What?

A. I made sure of what she wanted.

Q. No. Had you asked her that before?

A. Not in those words, no sir; because I hadn't read the will to her before. I hadn't the will written out before that.

Q. Well, when you asked her in the presence of the nurse if there was anybody else that she wanted to have anything her reply was no, you say?

A. Yes, sir.

Q. Is that all that occurred except the formal attestation?

A. No. I then asked her—I made sure again as to the executor.

Q. Well, you had the executor named in the will, hadn't you?

A. Yes, sir. I asked her over again as to that the same as I asked her over again as to every other part of the will.

Q. Well, at the time that you asked her in the presence of the nurse, what did you ask her about that—about the executor?

A. I asked her who she wanted—no; I asked her if that was right, if she wanted Frank McKinney to be the executor of the will or of the estate; she said, "Yes." I said, "Should anyone else be with him." She said, "No." Those are not the exact words. That is the substance.

Q. Yes. Well, I notice that there is the usual revocation clause. Did you put that in of your own motion or did you learn from her that there had been a previous will?

A. I simply left it. That is the printed part of the—

Q. No.

A. Isn't it?

Q. No.

A. To the best of my recollection there was absolutely no talk with her as to previous wills, and I didn't know at the time when I wrote this out that there had been a previous will.

Q. So that, as I suppose, as it quite customary with lawyers, you put that in as a matter of precaution?

A. Well, if it isn't in the printed form—

Q. Right before you.

A. I am giving you my answer as to what I did as a matter of precaution. If it isn't in the printed part I always write it in. There was no talk with her about that portion of it at all.

Q. You didn't add anything to the will as it is now produced after the nurse was called in beyond the formal execution, did you?

A. I am not so sure but what I didn't draw the lines until after the nurse was in. I drew these lines closing it all up before execution, and I think while the nurse was in.

Q. Are you sure about that?

A. I am not sure, but that is my recollection.

The Court—You are referring to the diagonal lines on the first and second and third pages?

Witness—Yes, sir.

The Court—And two horizontal lines on each page?

Witness—Yes, sir.

Q. Now, did you learn from the nurse whether—was the information that the nurse gave you that Mrs. McKinney was not scholar enough to write?

A. At that time I understood from what she said that she didn't know how to write. The nurse explained to me later—

Q. Never mind. That was the impression you got?

A. That was the impression I got at the time of the execution of the will.

Q. Have you been paid yet for your services in this matter? I mean for drawing the will?

A. For drawing the will, no. I have been paid for some services though.

Q. I mean for the services in drawing the will. Have you been paid that?

Redirect.

A. No, sir.

Q. You were saying that in the conversation that Frank had with you after the will was drawn—speaking of another will—and you said, "And that." What was it you were going to say

Mr. McCarter—I object. I do not think that is competent as against us, your Honor.

The Court—Objection overruled.

A. That the reason that she was so anxious to have a will drawn at that time was because Charlie, to whom she left nearly everything in the other will, had sued her and she didn't want to die leaving a will in which she left nearly her whole estate to Charlie, after he treated her the way he had treated her.

Recross.

Q. That was before you left the house that very afternoon?

A. As I was leaving.

By the Court.

Q. Mr. Schotland, when you went there, did anybody tell you or did you learn before you went there from Mr. McKinney that this woman was very likely to die soon?

A. I think I gathered that from the telephone message to begin with and thought so when I saw her.

Q. Now, it took you three-quarters of an hour to transact all of the business?

A. No, sir; I was there over an hour, all told.

Q. It took you three-quarters of an hour to get the information?

A. Yes, sir.

Q. And get ready to write out the will?

A. Yes, sir.

Q. And you wrote out the will in five or six minutes?

A. Yes, sir.

Q. And you wrote it out very hurriedly, didn't you?

A. I wrote it in the usual way that I write.

Q. No. I do not care anything about your usual way. You did write it out very hurriedly?

A. I wouldn't say that.

Q. Well, now, examine the will and consider its apparent lack of the usual verbiage which a lawyer would be likely to employ in a situation of that character, and then let me know whether or not you still think you did not write that out hurriedly?

A. I did not write it out hurriedly. I made it as brief as I could without hurrying.

Further cross.

Q. Mr. Schotland, in this talk that you had with Frank before you left the house, after the ceremony, in which he mentioned this previous will, did he say whether or not he was a beneficiary in the other will?

A. I don't think so. I don't think I entered into any discussion as to what the contents in the other will were. Simply learned, from what he said, regarding the son, Charlie; that is all.

Q. Did he mention if there was any beneficiary other than Charlie in the will?

A. Not in those words. From what he said, that Charlie would get most of it, I supposed there were others to get the balance.

Q. Did he tell you who Charlie was?

A. No, sir.

Q. Did he just call him Charlie?

A. He simply said, "Charlie." He might have said, "Charlie, her grandson," but I don't recall that he did.

Q. Did he tell you he was her adopted son?

A. At some time he did. That was after the Chancery—that was after the fighting started between him and Charlie.

Q. That is after the death?

A. After the death; yes, sir.

Q. But before he did not. Before her death he did not say he had been her adopted son?

A. Not that I recall. I got that information from her, as I recall it.

Q. Didn't he telephone you that his mother was dying?

A. Yes, sir; he called her his mother in the telephone message.

Q. Well, did you ask Mrs. McKinney if Frank was—if she was his mother.

A. I don't think I asked her in that language.

Q. All right, that is all.

The Court—Don't you usually put a clause in a will that directs the payment of all just debts and funeral expenses?

Witness—Yes, sir.

The Court—Don't you usually put a clause in the will, or suggestion at all events, that where the property to be left is real estate that the executors have power of sale?

Witness—Sometimes.

The Court—Not necessarily—not usually?

Witness—I didn't know what the nature of her property was when I drew this.

Helen A. Weston, sworn for for Proponent.

Direct examination, by Mr. Lum.

Q. What is your business, Miss Weston?

A. Trained nurse.

Q. Where did you graduate?

A. St. Mary's Hospital, Passaic.

Q. When?

A. The 11th of February, 1910.

Q. What have you done since?

A. Private nursing.

Q. Are you in any way related to Frank McKinney or his wife?

A. None whatever.

Q. To Annie Rache or Miss Clark?

A. No.

Q. And when did you first see Mr. Phillip Schotland?

A. When I was called in to witness the will.

Q. How long have you known Mrs. Frank R. McKinney.

A. Why, since I was a child.

Q. Had you been acquainted with Mrs. Frederica McKinney for some time?

A. Yes, sir.

Q. How long did you know her before her death?

A. Well, from what I can remember, it might have been about seven or ten years. I don't just remember.

Q. Now, when were you called to attend her?

A. On the 21st of June, Sunday.

Q. Who called you?

A. Frank McKinney.

Q. And while you were in attendance will you tell us whether or not you heard anyone speak to her about a will?

A. No; I did not.

Q. And will you tell us whether the name of her grandson was mentioned?

A. Yes, sir; it was mentioned; Charlie.

Q. Now, what was said?

A. Well, on Monday afternoon she was asked if she wanted Charlie there.

Q. Who asked her?

A. Mrs. McKinney.

Q. What did she say?

A. She said, "No."

Q. Now, what other occasion do you recall when Charlie's name was mentioned?

A. That is the only occasion I remember.

Q. And will you tell us whose signature—do you recognize this signature to this will?

A. Yes, sir.

Q. "Helen A. Weston." Whose signature is that?

A. That is mine.

Q. Do you recall having seen this document before?

A. Yes, sir.

Q. Were you present when it was executed?

A. After it was drawn.

Q. How did you come to go into the room?

A. I was called in.

Q. By whom, do you remember?

A. I think it was Mrs. McKinney that called me in, Mrs. Frank McKinney.

Q. And have you a distinct—very distinct recollection of it?

A. Yes, sir; I think it was.

Q. Now, when you went in the room who did you find there?

A. The lawyer and Mrs. McKinney.

Q. Anyone else?

A. That was all.

Q. And was Mrs. Frank McKinney in the room then?

A. No.

Q. And when you came in the room what took place as nearly as you can recall it?

A. Why the lawyer read the contents of the will.

Q. Where was Mrs. Frederica McKinney at the time?

A. In bed.

Q. And did you see her eyes?

A. Yes, sir.

Q. Were they closed or open?

A. They were open.

Q. After he read the contents of the will what did he say, if anything?

A. Why, he asked her if that is what she wanted and she said, "Yes."

Q. Did he say anything else that you can recall?

A. He asked her if those three persons were the ones that she wanted in the will. She said, "Yes"; Frank McKinney, Annie Rache and Millie Clark.

Q. Did she repeat those names?

A. The lawyer.

Q. The lawyer. What did she say?

A. She said, "Yes."

Q. Now, who signed this paper first, Frederica McKinney, Mr. Schotland or yourself?

A. Why Mrs. Frederica McKinney.

Q. Then who signed?

A. The lawyer.

Q. And then who signed?

A. I signed.

Q. Did anyone leave the room while the signing was going on of you three?

A. No.

Q. And when you signed were the other two present?

A. Yes, sir.

Q. And you and Mr. Schotland were present when Mrs. McKinney signed?

A. Yes, sir.

Cross-examination by Mr. McCarter.

Q. You stated, Miss Weston, that you had known Mrs. Frank McKinney all your life, have you?

A. Yes, sir.

Q. Girls together?

A. Yes, sir.

Q. Frequently stayed at her house?

A. Yes, sir.

Q. Where was your home at this time when you were not working, with her?

A. When I wasn't a nurse?

Q. When you were not working at a case?

A. My home is on Eleventh street.

Q. But you frequently stayed with Mrs. Frank McKinney, didn't you?

A. When I was a child.

Q. And was it through her that you became acquainted with the testatrix?

A. Yes, sir.

Q. Are you a relative of Mrs. Frank McKinney?

A. None whatever.

Q. Now, when you reached there on Sunday, you found Mrs. Frederica McKinney very ill?

A. Yes, sir.

Q. Who was the doctor?

A. Dr. Phelan.

Q. Did you keep a chart?

A. I did.

Q. Have you got it here?

A. No.

Q. Where is it?

A. Home.

Q. Didn't bring that, eh?

A. No.

Q. What is that document you had under your arm when you went up there?

A. I had no document.

Q. I beg pardon. I thought I saw a document.

A. (Indicating.)

The Court—The witness displays a handbag.

Q. What was her trouble, that you discovered?

A. Why, I was told edema of the lungs.

Q. Well, did that agree with your own views of the condition from practice?

A. Yes, sir.

Q. She was very ill indeed?

A. She was.

Q. You knew she couldn't get well from the time you saw her?

A. Well, I didn't know she wouldn't get well.

Q. You knew it as soon as you saw the doctor, didn't you?

A. No; he didn't say so to me.

Q. Didn't say so to you. Now, you knew a lawyer was coming to make the will, didn't you?

A. I didn't know that until later.

The Court—You got there Sunday afternoon.

Witness—I got there Sunday; yes, sir; Sunday noon.

Q. On Monday you knew a lawyer was expected?

A. Not then; no.

Q. Perhaps you don't understand me. You knew on Monday afternoon or evening that a lawyer was expected?

A. Yes, sir; on Monday.

Q. To make a will?

A. Yes, sir; on Monday I did.

Q. Who told you that, Mrs. McKinney or Frank?

A. Why, I don't remember just who told me.

Q. Now, what remedies were you administering to Mrs. Frederica?

A. Why, when I went in I was giving urotropin, as I understood the doctor was giving—

Q. Won't you spell it?

A. I don't know as I can. U-r-o-t-r-o-p-i-n.

Q. Now, that urotropin you administered was being administered when you got there and you continued to administer it?

A. I was going about there and there were a few tablets there and I finished giving those.

Q. When did you finish giving those?

A. They were given every hour. I think there were about two—there may have been one, but no more than two tablets—and I finished giving those. That was all of those given.

Q. When did you stop giving her urotropin?

A. Well, just before she died I administered it.

Q. Is that taken internally by mouth?

A. By mouth.

Q. Now, how long before the lawyer arrived did you hear he was coming?

A. Well, probably about an hour.

Q. And you administered some stimulant to her?

A. Well, I had been giving that—

Q. I didn't ask you what you had been. You administered some stimulants to her?

A. I did. I gave it at four o'clock.

Q. Yes. And you and Mrs. Frank McKinney were in the act of administering the stimulant to her when the lawyer came in, weren't you?

A. No.

Q. What?

A. No; I was not. I gave the stimulant at four o'clock. It was to be given every three hours. The lawyer didn't arrive until six o'clock.

Q. What were you giving her when the lawyer arrived?

A. It may have been the medicine.

Q. I didn't ask you what it may have been. If you don't know say so?

A. I think it was; yes, sir.

Q. Are you sure?

A. Yes, sir.

Q. Will your chart show it?

A. Well, I stopped—

Q. Will your chart show it?

A. No; I stopped keeping up the chart.

Q. Oh. Will you produce that chart after lunch?

A. Yes, sir; I can.

Q. I wish you would. When did you stop keeping up the chart? You got there Sunday and this was Monday. When did you start the chart?

A. I started it as soon as I arrived.

Q. And when did you give it up?

A. I gave it up around half-past one or two o'clock, Monday.

The Court—You got there Sunday, June 21st?

Witness—Yes, sir.

Q. Because you considered the case hopeless?

A. No; not because I considered it hopeless. Because the doctor didn't seem to need it.

Q. Did he tell you to keep a chart originally?

A. No; he did not.

Q. And he didn't tell you to stop it?

A. No; he did not.

Q. But you did, although you started it voluntarily, you stopped it voluntarily, at half-past twelve, Monday?

A. Yes, sir.

Q. Will you produce that chart after luncheon, that you had in connection with that case?

A. Yes, sir.

Q. Now, isn't it a fact that your training requires you to keep a chart?

A. Yes, sir.

Q. And, again, I ask you why you ceased charting that case?

A. Because the doctor didn't seem to need it. I told the doctor everything that happened.

Q. Yes. Very good. Now, you recall the fact that when the doctor entered the room—the lawyer entered the room—that you and Mrs. McKinney were in the act of administering medicine to the patient?

A. Yes, sir.

Q. What was it?

A. I think it was the medicine.

Q. Urotropin?

A. Urotropin.

Q. You think it was?

A. Yes, sir.

Q. Did it require two people to administer urotropin to this patient?

A. No; it didn't require two. I can give it alone.

Q. But there were two people doing it at the time?

A. There were; yes, sir.

Q. And what stimulants had you given her that afternoon?

A. Strychnia. I had been giving that all day.

Q. I asked you what you gave her that afternoon?

A. Strychnia.

Q. Four o'clock?

A. Four o'clock.

Q. When had you been told to give her that?

A. I had started that early in the morning.

Q. On your own initiative?

A. Yes, sir.

Q. Make any note of that?

A. Yes, sir.

Q. Where?

A. On my chart.

Q. Yes. Although the doctor hadn't told you to?

A. No.

Q. The doctor had been there that afternoon, hadn't he?

A. Yes, sir.

Q. What time?

A. About four o'clock.

Q. Before or after you had administered the stimulant?

A. Why, he was there before.

Q. Before?

A. Before I administered it.

Q. Did you tell him that you had administered strychnine on your own initiative that morning?

A. Yes, sir.

Q. Are you sure about that?

A. Yes, sir; I am sure about it.

Q. Did you administer it to her after four that day?

A. Yes, sir.

Q. What time?

A. Seven o'clock.

Q. How soon after the lawyer went?

A. Well, I always give the medicine on time.

Q. No, no.

A. Seven o'clock.

Q. How soon after the lawyer went?

A. Well, it must have been right after he left.

Q. You have no recollection except—

A. No.

Q. Now, the lawyer came in the room. Was he introduced to you as a lawyer?

A. Well, I knew he was the lawyer.

Q. You knew he was the lawyer because you knew he was expected?

A. Yes, sir.

Q. You had never seen him before?

A. Never.

Q. Who told you he was coming?

A. I believe Mrs. McKinney.

Q. Mr. McKinney?

A. Mrs. McKinney.

Q. Mrs. McKinney. Are you sure about that?

A. No.

Q. It might have been mister?

A. It might have been.

Q. When you speak of Mrs. McKinney, you mean Mrs. Frank?

A. Mrs. Frank.

Mr. McCarter—Now, in order to prevent confusion, your Honor, I suggest to all of us that we say Mrs. Frank and Frederica. That will make no confusion.

Q. Either Mrs. Frank or Frank told you the lawyer was coming?

A. Yes, sir.

Q. What time did he tell you that?

A. Well, that was after four. Must have been around half-past four.

Q. Did he tell you who the lawyer was?

A. I didn't know; no.

Q. Did they tell you his name?

A. No.

Q. Did they say that he had been notified to come?

A. Yes, sir.

Q. About half-past four?

A. Around that time.

Q. And that he was coming right away?

A. No; not right away.

Q. Did he get there as quickly as you expected?

A. Well, I don't know.

Q. Eh?

A. Why, he came around six o'clock.

Q. Well, had you tidied up the patient any for the doctor—for the lawyer?

A. Why, no; the patient was all ready.

Q. You hadn't tidied her up then?

A. Why, no; the patient was ready. The priest had been there, and I had the patient all ready.

Q. What time was the priest there?

A. After four.

Q. After you had been told the lawyer was coming?

A. No; the priest came first.

Q. Before you knew the lawyer was coming?

A. The lawyer was coming; yes, sir.

Q. Eh?

A. Yes, sir.

Q. Was the priest there before or after you had given the four o'clock stimulant?

A. Why, the priest was there just as I was going to give it. I asked him to allow me to give it. That was the time it was due—every three hours. I gave it at one; it was due at four o'clock.

Q. The priest came to administer the last rites?

A. Yes, sir.

Q. You are a Catholic, are you not?

A. I am.

Q. Is it customary, just before administering the last rites, to give a patient a stimulant?

A. Any medicine is allowed to be given.

Q. Answer the question. Is it customary, just before a Catholic patient is to have the last rites administered, to give him or her a stimulant?

A. No; it isn't customary.

Q. No. So just before the priest arrived you had given her this stimulant, is that right?

A. He was there when I gave this stimulant.

Q. All right. What was his name?

A. I believe it was Father Williams.

Q. Don't you know?

A. I didn't know him then. I scarcely—

Q. He was a stranger to you?

A. Yes, sir; stranger.

Q. Was he known to Mrs. Frank?

A. I don't know.

Q. As far as you know he was a stranger to the entire outfit, wasn't he?

A. It seemed to be.

Q. "It seemed to be!" Is he in the room here?

A. I haven't seen him.

Q. Don't see him. How long was he there?

A. Well, I couldn't say exactly.

Q. Did you remain in the room while he was there?

A. A short time.

Q. And then left?

A. Then left.

Q. He came, as you understood it, for the purpose of administering Extreme Unction, didn't he?

A. Yes, sir.

Q. How long had he been gone before the lawyer arrived?

A. Well, I couldn't judge at the time.

Q. Did he have a priestly garb on?

A. Well, in administering the last rites he had his stole on.

Q. He had a stole on?

A. Yes, sir.

Q. So you knew he wasn't a lawyer?

A. Why certainly.

Q. Now, did you look at the clock at the time the lawyer arrived?

A. No; I did not.

Q. How do you know it was about six o'clock?

A. Well, I only judged the time.

Q. How long had the priest been gone?

A. May have been gone over an hour.

Q. Eh?

A. An hour.

Q. An hour. Well, he was there about an hour, was he?

A. The priest?

Q. Yes.

A. No; he wasn't there an hour.

The Court—How long was he there?

Witness—Well, I don't know. May have been half an hour.

Q. I don't ask you what may have been. I ask to the best of your recollection.

A. I can't give the time. In a sick room the time passes quickly.

Q. Now, Mrs. Frank and you were in the act of administering something to the patient—you had her lifted up?

A. Yes, sir.

Q. As soon as this administration was completed you laid her back recumbent, didn't you?

A. Yes, sir; I left her comfortable.

Q. Left her comfortable. She was breathing very heavily?

A. Yes, sir.

Q. (Illustrating.) That way?

A. No; she was breathing heavily, but not in that manner.

Q. She made a noise, didn't she, when she breathed?

A. Well, yes.

Q. Perhaps you can imitate the noise better than I as long as you saw her and I didn't.

A. No; I can't.

Q. You can't? It was evident that she had difficulty in breathing, wasn't it?

A. Yes, sir.

Q. And this edema of the lung is a filling up of the lungs and throat with water, isn't it?

A. Yes, sir.

Q. And gradually they become drowned and the patient dies, is that it?

A. Well, I am not a doctor.

Q. Does your education in the training school go that far?

A. No.

Q. It doesn't, eh? All right. Well, the breathing was like when gas or air go through water, wasn't it?

A. Yes, sir.

Q. And her throat gurgled?

A. Yes, sir.

Q. Now, you know that when a person is in that condition their whole attention is upon the breathing, don't you? Have great difficulty and struggle to breathe?

A. Yes, sir.

Q. Had you conversed that afternoon with Frederica?

A. Yes, sir.

Q. Who told you to leave the room when the lawyer arrived?

A. Nobody. I left of my own accord.

Q. Where did you go?

A. Downstairs.

Q. Where?

A. Why down in one of the middle rooms.

Q. I want to know which one of the rooms you went to when you left the room?

A. Why, it looked like the room they called the parlor.

Q. Well, you had been accustomed to go there, hadn't you?

A. No; I had not.

Q. You had known her for eight years?

A. Well, I had never been in her house.

Q. All right. It was the parlor, was it?

A. Yes, sir.

Q. On the first floor?

A. Yes, sir.

Q. You went down there?

A. Yes, sir.

Q. Who accompanied you?

A. Why, I went alone.

Q. Yes. Mr. and Mrs. Frank weren't down there, were they?

A. I don't remember that they were.

Q. Where was Mrs. Rache?

A. Mrs. Rache?

Q. Yes; Mrs. Rache.

A. She wasn't there.

Q. What?

A. She wasn't there.

Q. Where was Miss Clark?

A. She was down with me.

Q. Sure about that?

A. Yes, sir.

Q. All the time?

A. Yes, sir.

Q. Well, did you and Miss Clark converse while you remained down in the parlor?

A. Yes, sir; we were talking.

Q. And what is the next thing you did?

A. Why, I was called upstairs to witness the will.

Q. Who called you?

A. Mrs. McKinney—Frank McKinney.

Q. Frank McKinney?

A. Mrs. Frank McKinney.

Q. Did she come down to the room and ask you to go upstairs?

A. Yes, sir.

Q. Was your door shut or open?

A. Downstairs?

Q. Yes.

A. Why the door was open.

Q. Yes. So you went upstairs and Mrs. Frank and Frank joined you—Frank joined you on the second floor and you all three went in the room?

A. No.

Q. They went to the door, didn't they?

A. No; they did not.

Q. What?

A. No; I entered alone. She just merely informed me that I was to go in.

Q. Didn't the others go in, too?

A. No, sir; they did not.

Q. What had transpired before you don't know?

A. No, I do not.

QQ. You saw Frank on the way up?

A. I don't recall seeing him.

Q. Did Miss Clark leave the parlor while you were there?

A. Why, I don't remember.

Q. Had you known her before?

A. Yes, sir.

Q. A long time?

A. Been acquainted the same time I met Mrs. McKinney.

Q. Mrs. Frank?

A. Mrs. Frederica McKinney.

Q. Frederica, yes. Now, you knew Charlie, I suppose?

A. Yes, sir.

Q. Did you see him there that night?

A. I did.

Q. What time?

A. About eleven o'clock.

The Court—That means Monday night, does it?

Mr. McCarter—Monday night; yes, sir.

The Court—You mean that?

Witness—Monday night.

Q. What time did the patient die?

A. Two o'clock. Five or ten minutes before or after. I cannot recall.

Q. On Tuesday?

A. Tuesday.

The Court—Morning?

Witness—Tuesday afternoon.

The Court—June 23d?

Witness—June 23d.

Q. Did the illness of the patient affect her voice?

A. Yes, sir.

Q. So that she had to whisper or speak very low?

A. Well, she did speak very low.

Q. And had difficulty in speaking?

A. Yes, sir.

Q. And it was somewhat difficult to understand her as well—

A. No; not always. When I arrived—

Q. Sometimes?

A. Yes, sir.

Q. Now, that condition of things was true on Sunday when you arrived and continued to the hour of her death?

A. No; it did not continue.

Q. When did it cease?

A. When I arrived Sunday why her throat was filled with mucous. I couldn't understand what she was saying. Toward evening, after I had been with her and worked with her, why her throat was quite clear. By Monday she could speak very clearly.

Q. So that if she said "Clark" you would have no difficulty understanding her?

A. That was Monday morning.

Q. Oh, Monday morning.

A. Towards afternoon it was changing.

Q. And got no better?

A. Not after that, it didn't get better.

Q. What time in the afternoon did it change?

A. Well, you could understand what she was saying.

Q. What time in the afternoon did it change?

A. Well, it was later in the evening; probably about eight o'clock.

Q. Eight o'clock?

A. Around eight or nine o'clock.

Q. No difficulty in understanding her then until eight or nine o'clock?

A. Yes, sir; there was difficulty, but you could understand what she said after she repeated it a few times.

Q. Few times?

A. Yes, sir.

Q. What was this difficulty? Difficulty in articulation?

A. Yes, sir; it was hoarseness and some mucus in the throat.

Q. The effect of this disease was to make her very hoarse and to fill her throat so that it was difficult to understand what she said?

A. Yes, sir.

Q. And you had to put your ear near her mouth?

A. Yes, sir.

Q. That had been true from what time? It was true at first, then you helped her—

A. Yes, sir; her voice was very clear Monday morning.

Q. —then it got true again Monday afternoon, more or less, and got worse until the time of her death?

A. Commenced gradually.

Q. Yes. Now, notwithstanding that you said you had conversations with her on Monday afternoon?

A. Not exactly conversations. Just one sentence.

Q. I took your phrase, Miss Weston. If you wish to qualify it you can do so?

A. At no time during the illness the patient was too ill to have a conversation—for me to talk to her.

Mr. Lum—I offer the paper in evidence. Will marked *Ex. P-1.*

Proponent rests.

Edward Phelan, sworn for Caveator.

Direct examination, by Mr. McCarter.

Q. You are a practicing physician?

A. Yes, sir.

Q. How long have you been practicing?

A. Since 1892.

Q. In this town—in Newark?

A. Yes, sir; not all the time.

Q. Where were you graduated?

A. Medical University, Montreal.

Q. Were you the attending physician upon Mrs. Frederica McKinney at the time of her death?

A. Yes, sir.

Q. When were you called in?

A. I was called in about between twelve and one o'clock on Saturday, June 20th.

Q. Had you been her physician before that time?

A. Yes, sir.

Q. How long?

A. Probably fifteen years.

Q. When was it, if you can recall, previous to this Saturday, that you had had occasion to see her before?

A. It was a good many years—probably seven or eight or nine years.

Q. Do you know how old she was?

A. I knew she was over 70.

Q. Well, you were called in on Saturday?

A. Yes, sir.

Q. What condition did you find her in? Describe her as fully as you can?

A. She had—she had a—she had difficulty in speaking and breathing. When—she was able to murmur that her throat was hurting her. Whether she meant hurt or just a difficulty in swallowing I could not—

Q. Speak louder.

A. Whether she meant hurt—real hurt—pain—or difficulty in swallowing, I couldn't say, because they sometimes refer to a difficulty in swallowing as pain. The base of her right lung, on listening, showed very moist rales—rales are breath sounds—and on percussion—may I use the word percussion? On percussion it showed areas of specks, with hyperresonance—accentuated sounds; her face had that anxious expression which goes with that condition called air hunger, where the lung cells are partly filled with fluid, and it is more or less of a gasping breathing, what we call of a moist variety.

Q. What did you diagnose her trouble to be?

A. Edema of the lung and part of the throat.

Q. Did you consider her seriously ill at that time?

A. Yes, sir; I did, but her previous illness she seemed—when she was very ill—to make such a good recovery that I had some hopes for the first day.

Q. First day. Who did you find at the house when you went there on Saturday?

A. I found Mr. Frank McKinney and either Mrs. Rache or Mrs. Frank McKinney and Miss Clark, probably the both—either or both of the two ladies.

Q. What was her temperature on this Saturday visit?

A. Temperature was around a hundred.

Q. Was she noticing what occurred around her at that time?

A. Yes, sir.

Q. If she attempted to speak, what happened?

A. She had great difficulty in speaking.

Q. Did you visit her again that evening?

A. Yes, sir.

Q. Did she appear to recognize you on Saturday?

A. Yes, sir.

Q. What time did you get there the second time?

A. Probably half-past nine or ten.

Q. What was her condition then?

A. Seemed to be about the same as in the afternoon.

Q. Was there a nurse present on Saturday?

A. No, sir.

Q. Did you direct the securing of a nurse or was that without your direction?

A. Why, somebody suggested that they had a friend, a trained nurse.

Q. Do you know who that was?

A. I couldn't say.

Q. Mrs. Frank?

A. I couldn't tell you that.

Q. So on Sunday morning you found a nurse there, did you?

A. Either Sunday morning or my second visit on Sunday. I can't say which.

Q. Very good. How was she on Saturday evening, first?

A. Why, she appeared about the same as in the afternoon.

Q. A litle bit improved?

A. A little bit.

Q. Now, how many times did you see her on Sunday?

A. Why, either two or three times.

Q. On Sunday morning what did you find to be the state of the edema as to progress?

A. Why, it hadn't progresed very much.

Q. Did you make an examination of her urine?

A. Yes, sir.

Q. Did you discover anything?

A. Found about—I think one and a half per cent. of albumen.

Q. Indicating the presence of what disease?

A. Bright's.

Q. Bright's. At that time what was your diagnosis as to probabilities?

A. Why the prognosis of a disease like that is always bad, but I have seen them when they have thrown it off, but quite rare for them to do it.

Q. Now, where did her temperature remain about this time? If you have any notes you may look at them.

The Court—Sunday morning?

Mr. McCarter—Sunday morning.

A. Why, I think I couldn't tell you that. The temperature is not a feature particularly of this trouble anyway.

Q. All right. How many times did you see her on Sunday?

A. Twice, I think—

Q. Now, did you see her on Monday?

The Court—What was you going to say?

Witness—I don't start out very early on Sunday usually. I think probably I only saw her a couple of times.

Q. Was she better or worse on Sunday than she had been Saturday?

A. I thought she was a little bit improved.

Q. A bit improved?

A. Either that or the disease hadn't progressed as you would expect it.

Q. Now, the nurse arrived on Sunday, she says. Do you recall the fact that she was there Sunday?

A. Yes, sir.

Q. Did you know her before?

A. No, sir.

Q. Did you see her chart there?

A. I think she did have a chart.

Q. Did you examine it?

A. I couldn't say that. I think I asked her—you know you will ask the nurse how the case is getting along and what has been doing. The reason—I must explain to you the reason for the probable absence of careful charting. There is very little charting that a nurse can do in those cases or tell the doctor when he comes in except the regular giving of the medicine, because the whole thing is in just examination.

Q. What did you prescribe?

A. I prescribed at first an astringent tablet for the throat, and immediately on the detection of the albumen, urotropin, and as the heart becomes weakened with the blood not being aerated, on account of the filled lung, I prescribed a stimulant.

Q. Did you go there Monday?

A. Yes, sir.

Q. How many times?

A. Three times on Monday.

Q. What was the time of your first visit, if you can recall?

A. Probably about ten o'clock in the morning.

Q. What was her condition at that time?

A. Why, it was a great deal worse than Sunday.

Q. Great deal worse than Sunday?

A. There was extension of the lung involvement.

Q. Did you have any difficulty, on your Monday morning visit, in getting her attention?

A. Why, her eyes seemed active, but there was no conversation at all.

Q. Did you try to yell at her?

A. I spoke loudly to her.

Q. Coudn't get her attention?

A. I could get her attention, but I couldn't get her to speak.

Q. No. Now, were you there in the afternoon?

A. Yes, sir.

Q. What time?

A. About ten minutes after four o'clock.

A. Now, won't you describe here condition at that time?

A. The extension of the lung filling, or edema, was quite a bit worse. It extended over a greater area than it had before, and her breathing was much more accentuated; it was more moist and the gurgling sound was a great deal worse.

Q. How was her heart?

A. Her heart was getting a good deal weaker, sir.

Q. Did you arouse her, or yell at her?

A. I spoke loudly to her and no response.

Q. Make any response?

A. No, sir.

Q. How much more of the lung do you think the edema extended over in the afternoon visit of Monday than before?

A. Oh, easily a third in area.

Q. How long were you with her at that time?

A. Fifteen minutes—twenty.

Q. Do you know whether the priest had been there before your visit?

A. I couldn't say, sir.

Q. Did you give directions to have the priest come?

A. I couldn't say, sir. I don't think so.

Q. Did you consider her condition serious at that time?

A. Very serious.

Q. You knew she was fatally ill?

A. Yes, sir.

Q. Now, won't you, as briefly as you can, describe to his Honor, Judge Martin, her condition, how she lay, how she breathed, what attention she gave to you, at this four o'clock visit, and what her condition was. Not in a technical way, but so a layman or a mere lawyer or judge can understand.

A. Why, on account of the blocking up of the lung she had to be propped up considerably to use the extra-

ordinary muscles of breathing that are not used on ordinary occasions, and she was fairly well occupied at getting her breath.

Q. What do you mean by that?

A. Well, she was breathing in such a way that she had all she wanted to do to breathe.

Q. Yes. That it required her energy, you mean?

A. The intelligence in those cases probably is all right, but they are so occupied with breathing that they cannot attend to anything else.

Q. Now, go right on—just describe the whole situation. Did she lay on her back?

A. No; she laid partly on her side, I think, the last visit. She had the habit of turning the back a little bit, of laying this way (indicating).

The Court—To the left side.

Witness—On her left side.

Q. Was her mouth open or closed?

A. Her mouth was partly open.

Q. How did this difficulty in breathing manifest itself as far as noise was concerned?

A. Why, she made a very moist sound.

Q. Yes.

A. I couldn't—I can't compare it to anything else.

Q. Did she recognize you, that afternoon visit?

A. I don't think so; no.

Q. Did she recognize anybody?

A. I couldn't tell you that.

Q. While you were there?

A. I couldn't tell you that, whether she recognized anybody.

Q. How long were you there?

A. Why, in the room, probably ten minutes.

Q. While you were in the room for about ten minutes, did she recognize anybody?

A. No.

Q. Did you say anything to her on that visit?

A. Why, I had the habit of calling to her—asking her how she was.

Q. Now, won't you just explain to the judge the tone of your voice and everything else on that Monday afternoon? It is very important. What you had to do to get her attention?

A. Well, "How are you feeling?"

Q. What did she say?

A. Why, no response.

Q. Any response at all? Did you repeat it?

A. Probably. I don't know. I couldn't say.

Q. Were her eyes open or shut then?

A. They were open in the morning.

Q. In the afternoon I am talking about.

A. I think—I couldn't tell you.

Q. Did she have the stamp of death on her face?

Mr. Lum—I object to it as leading.

The Court—Objection sustained.

Q. What was the expression of her face?

The Court—You ought to leave that topic now, and come back to it later.

Mr. McCarter—I beg the Court's pardon and counsel, too. I will.

Q. Can you describe the expression of her face?

A. Anxious. She had an anxious look on her face.

Q. So that during the afternoon visit, which lasted from ten to fifteen minutes, you were unable to get any sign of recognition or any response to your inquiry.

The Stenographer—Is there any answer?

Mr. McCarter—The witness says "Yes."

Witness—No, sir.

The Court—The witness says the answer is "No, sir."

Q. When did you finally conclude that she was going to die?

A. Monday morning.

Q. Who did you see in the Monday morning visit besides the nurse?

A. Why, I saw Mr. McKinney.

Q. Frank?

A. Frank McKinney, the nurse, Miss Clark, and I couldn't tell you whether Mrs. McKinney and Mrs. Rache or not, or which one.

Q. Do you know whether Frank McKinney goes under any other name than Frank McKinney?

A. I never knew it until now.

Q. Well, now, did you inform the family in the morning that she was going to die?

A. Yes, sir.

Q. Did you notify her grandson, Charles McKinney, that she was sick?

A. Yes, sir.

Q. When?

A. After nine o'clock that night when I was leaving my office.

Q. Was that Monday night?

A. Yes, sir.

Q. By 'phone?

A. Yes, sir.

Q. Did you get him on the 'phone at nine o'clock when you called?

Mr. Lum—I object. I don't see the materiality of this, and I object also on the ground that it is incompetent.

Mr. McCarter—We are going to show it is material. These people never notified the grandson.

The Court—The question is whether this family, knowing this woman was going to die, notified persons who ought to be called upon to be sent there. Objection overruled.

Q. Did you get him personally on the 'phone when you called at nine o'clock, or did you get some other member of the family?

A. I think I got his mother or somebody else—it wasn't him.

Q. Now, did you call Monday evening at the house?

A. Yes, sir.

Q. What time were you there?
A. Probably around quarter to ten.
Q. Did you see her?
A. Yes, sir.
Q. What was her condition?
A. Mrs. McKinney, you mean?
Q. I mean the patient.
A. Yes, sir.
Q. What was her condition?
A. Oh, very much lower.
Q. Eh?
A. Very much lower than it was.
Q. Was she conscious or unconscious?
A. She was unconscious.
Q. What?
A. She was unconscious.
Q. Do you know whether she ever came out of that unconsciousness?
A. No; I don't think she did.
Q. Now, during any of your visits to her from the time that you were called in, did she carry on a connected conversation with you?
A. No, sir.
Q. Did you hear her speak or carry on—did you hear her carry on any connected conversation with anybody during our visits?
A. No, sir.
Q. What kind of words did you hear her utter when she did utter any words—how would you describe them?
A. I couldn't tell you. The first visit there she, in a half whisper, said a few things in a halting manner. I couldn't tell you what they were.
Q. When did you get the last intelligent expression from her of anything, if ever?
A. You mean by word of mouth?
Q. Yes.
A. I think Saturday night or Sunday morning.

Q. After Saturday night or Sunday morning were you able to get any sign of intelligence or recognition or conscious reply from her?

A. No conscious reply, no.

Q. Were you there when she died?

A. No, sir.

Q. Were you there Tuesday?

A. I was there Tuesday morning.

Q. What was her condition at that time, in the morning?

A. Why, she was unconscious.

Q. What?

A. Unconscious.

The Court—What time on Tuesday morning?

Witness—Between nine and ten.

Q. And what time did she die?

A. Two o'clock.

Q. You saw her after death and gave a certificate, didn't you?

A. Yes.

Cross-examination, by Mr. Lum.

Q. Dr. Phelan, how old did you say the testatrix was?

A. Between 70 and 80.

Q. And you had attended her as family physician before?

A. Yes, sir.

Q. How long have you known Charles McKinney?

A. Oh, probably since I was going to the house there. The other brother I knew the best, that died. The other brother that died is the one I attended—the first member of the family.

Q. I want to ask you, Doctor, if you won't kindly answer my questions. Other things that may come into your mind your counsel will bring out. How long had you known Charles McKinney?

A. Fifteen years.

Q. And how long before this illness had it been since you had been to the house?

A. Eight or nine years.

Q. You had not seen Mrs. Frederica then in eight or nine years before this illness?

A. No, sir.

Q. Do you know whether Charles had been in the habit of going to the house?

A. I couldn't tell you.

Q. For some time before?

A. I couldn't tell you, sir.

Q. Did you hear his name mentioned at the house during this last illness?

A. Yes, sir.

Q. You did? Did the testatrix mention his name?

A. No, sir.

Q. Did you mention his name to her?

A. The first day I went there, I asked how Charlie was and received no answer.

Q. What else did you say to her?

A. That was before I knew that she couldn't talk. The very first thing when I went in the room I said that I hadn't seen her in a long while, and asked several questions without—with just—

Q. Well, you spoke to her about Charles?

A. Yes, sir.

Q. This is on Saturday, that you first went there?

A. Yes, sir; Saturday morning.

Q. She was perfectly rational at that time, wasn't she?

A. Yes, sir.

Q. And could speak with diffculty?

A. Yes, sir.

Q. And what did she say about Charlie?

A. Well, she began to describe that her throat was sore.

Q. What did she say about Charlie?

A. She didn't say anything, sir; didn't answer the question.

Q. Did you speak to her again about Charlie?

A. No, sir.

Q. Ask her if she wanted to see him?

A. No, sir.

Q. And you found her Sunday morning a little bit improved over what she had been Saturday?

A. Yes, sir.

Q. And you say she was perfectly rational Saturday?

A. Yes, sir.

Q. And how many times did you go Sunday?

A. Twice, I think, on Sunday.

Q. Now, one and a half per cent. of albumen was not a serious amount with a woman in the condition this deceased was in, was it?

A. Yes, sir.

Q. You thought it was?

A. Yes, sir.

Q. It didn't indicate definitely the presence of Bright's disease, did it?

A. In connection with the dropsy it did, sir.

Q. It was merely a tendency or symptom of it?

A. Symptom of it; yes, sir.

Q. But not—there was not Bright's disease there, was there?

A. Yes, sir.

Q. There was? Dr. Phelan, you made an affidavit in the Court of Chancery in this case, didn't you?

A. Yes, sir.

Q. Do you recall that the affidavit, as typewritten, said that "Also I found one and one-half per cent. of albumen, including Bright's disease," and the "including" is struck out with a pen and "a symptom of" written in in your handwriting? Do you recall that?

A. I couldn't tell you, sir

Q. Is that your handwriting, referring to the words: "a symptom of"?

A. No.

Mr. McCarter—Is that the original?

Mr. Lum—I thought so.

Mr. McCarter—The original is on file, of course. We have the original here.

(Paper produced.)

Q. (Showing witness paper.) Do you recognize that handwriting "a symptom of"?

A. That is not mine.

Q. Do you recall that that was struck out?

A. I think I do, now.

Q. You think you do now, and the word "including" was originally written in, wasn't it?

A. Yes, sir.

Q. You were unwilling to sign that affidavit with the word in "including Bright's disease," weren't you, Doctor?

A. Why, it didn't sound right to me.

Q. What?

A. It didn't sound right to me.

Q. And you preferred to have it state that it was a symptom, merely, of Bright's disease?

A. Yes, sir.

The Court—Did you say Doctor, whether or not the change in the affidavit which you have in your hand was in your handwriting or not?

Witness—I said it was not.

The Court—It was not in your handwriting?

Q. And on Monday morning you found the condition a little worse than it had been Sunday night?

A. Yes, sir.

Q. But she was still entirely conscious?

A. Her eyes were bright.

Q. Her eyes were bright and alert?

A. Yes, sir.

Q. Active. Her eyes were active?

A. Yes, sir.

Q. Indicating definitely the presence of intelligence to you?

A. Yes, sir.

Q. And her difficulty, you thought, was with expressing herself—the functioning through her vocal organs?

A. Yes, sir.

Q. And this was about ten o'clock on Monday?

A. Yes, sir.

Q. And you saw her again at four o'clock on Monday?

10 *A.* Yes, sir.

Q. And you found the condition as to intelligence about the same?

Mr. McCarter—He didn't say so.

A. No, sir.

Mr. Lum—I rather strenuously object to these interruptions by counsel. This witness is able to take care of himself.

Mr. Carter—I do not understand that he said that.

20 The Court—Is the objection upon the ground that the question contains a wrongful assumption of fact?

Mr. McCarter—Yes, sir; that is the idea.

Mr. Lum—Strike out the question.

Mr. McCarter—No, let the question remain.

Q. Doctor, you found this condition of intelligence in the morning at ten o'clock?

A. That condition of sharp eye.

Q. Sharp eye. Indicating to you presence of intelli-

30 gence in the testatrix, you told me?

A. Yes, sir.

Q. And at four o'clock in the afternoon you found the lady's eyes open, did you not?

A. No, sir.

Q. What say?

A. No, sir.

Q. What was the condition of her eyes at four o'clock Monday?

A. Why, they were practically half open, and as near as I remember that is all I can say about it.

Q. When did she last speak a word to you?

A. Saturday sometime.

Q. Saturday. She didn't speak one syllable to you after Saturday?

A. Not that I remember, sir.

Q. And you would be apt to remember if she had?

A. I think so; yes, sir.

Q. And at four o'clock Monday afternoon, how long were you there?

A. Fifteen minutes or twenty.

Q. How do you place the time as four o'clock?

A. Why, that is the average length of a visit.

Q. You have no distinct recollection of these visits?

A. No, sir.

Q. It is merely figuring from the average?

A. Yes, sir.

Q. You have no distinct recollection of her physical appearance at the time, particularly, have you?

A. Except the difficulty in breathing and the non-response on being spoken loudly to.

Q. You mean to say that she was unconscious at four o'clock, Monday; will you, Doctor?

A. No, sir.

Q. She had her consciousness?

A. I couldn't swear she was unconscious.

Q. You couldn't swear she was unconscious?

A. No, sir.

Q. Can't say that she wasn't conscious?

A. No.

Q. Is that correct?

A. Yes, sir.

Q. And, Doctor, when did you first—you say Monday morning that you first realized that the patient couldn't recover?

A. Yes, sir.

Q. Did you speak to any of the family about it?

A. Yes, sir.

Q. To whom?

A. I couldn't tell you, sir.

Q. What did you say?

A. Told them that she was very bad and I didn't know how long she was going to last.

Q. And did you inform her of the fact that she was probably going to die?

A. No, sir.

Q. Are you sure of that?

A. Yes, sir.

Q. Didn't you say anything to Mr. Frank McKinney about it?

A. If he were there, why I did.

Q. Do you remember saying—asking him if she had taken care of her worldly affairs?

A. No, sir.

Q. On Monday afternoon, do you remember saying to Mr. Frank McKinney that you were afraid the old lady was going to die?

A. Yes, sir.

Q. You did say that. Do you remember asking him if she had attended to her affairs?

A. No, sir.

Q. Will you deny that you did say that to him?

A. Yes.

Q. Did you say to him, "I will go back and tell her she is going to die. I would rather be hit or kicked than to tell her;" something of that kind?

A. I don't remember, sir. I don't think so.

Q. Will you say that you didn't use those words or similar words?

A. I might if I were asked to go back and tell her.

Mr. McCarter—The question is whether you remember or not?

Witness—No; I don't remember.

Mr. McCarter—Not to theorize about it.

Q. How do you fix your time at four o'clock?

A. I leave the office at four o'clock, sir.

Q. At four o'clock?

A. Yes, sir.

Q. That is the only way you fix it?

A. I happen to be able to fix that on account of making it the first visit.

Q. Nothing said about the priest having been there when you were there?

A. No, sir.

Q. Nothing said about the last rites having been administered when you were there?

A. No, sir.

Q. Last rites are never administered to one who is not conscious, is it?

A. I do not know, sir.

Mr. McCarter—One moment. He is not an expert.

The Court—He has already answered it.

Q. I understand you, Doctor, that temperature is not at all a feature of this kind of trouble.

A. Not a regular feature, sir.

Q. This disease is sort of a process of gradually shutting off the air, isn't it, Doctor?

A. Yes, sir.

Q. And there may be a serious clogging and then a relief for five or ten minutes or more, is that not true?

A. It is possible.

Q. You frequently find quite a variation, within reasonable limits, in the condition of a patient with this kind of disease in a space of half an hour or hour, is that not true?

A. Not a letting up of it, but they are accommodating their breathing to the plugging of the lung. Do you get me?

Q. Yes.

A. The dropsy doesn't go away, but their breathing is accommodated to it and they are—like Sunday morn-

ing, there was an apparent getting better without really any letting up of the lung plugging.

Q. It is similar, generally, to the process of a person very slowly drowning, is it not?

A. Yes, sir.

Q. And you find sometimes instances where the person apparently—similar to a drowning person—gets a breath again, so to speak, do you not?

A. I couldn't say.

Mr. McCarter—Is he an expert on drowning?

The Court—Counsel for caveator is not being asked the question. Now answer the question, Doctor.

Mr. McCarter—I object to the question.

Witness—Put the question again.

Mr. Lum—Strike out the question.

Q. Doctor, you say this condition resembles that of a person very slowly drowning?

A. Yes, sir.

Q. That is by reason of the fact that the air is shut off in both processes, and you do find times where in the progress of this disease the lungs seem to accommodate themselves to the shut off condition.

A. That occurred Sunday morning.

Q. And there is a temporary rally, so to speak—if not a rally—regaining of vitality?

A. Seemingly; yes, sir.

Q. And the first you saw this patient when she had lost consciousness was when?

A. When she had absolutely lost consciousness, at nine o'clock.

Q. Nine o'clock Monday night?

A. Not nine, but between nine and ten sometime. I leave my office at nine and I couldn't tell you how quickly after nine that I got over there.

Q. And that is the first time you saw her when she had lost consciousness?

A. Absolutely lost consciousness.

Q. You say she didn't speak to you at all Sunday?

A. Not that I remember.

Q. When you spoke to her on Sunday her eyes indicated that she heard you?

A. She had a very bright, sharp eye.

Q. Bright, sharp eye on Sunday. Did you think she recognized you?

A. I think she did in the morning.

Q. Well, how about—

A. Well, just with her eyes.

Q. Well, did she recognize you with her eyes Sunday afternoon?

A. I couldn't tell you that, sir. I do not—I don't know—I don't think so.

Q. Now, have you very much of a recollection of this visit about four o'clock on Monday?

A. Pretty fair.

Q. What did you say to her when you went in?

A. Why, the reason—I can tell you what I usually—

Q. What did you say to her when you went in?

A. "How are you feeling, Mrs. McKinney."

Q. Do you recall those words?

A. Yes, sir.

Q. And how many times did you say them?

A. Probably once or twice.

Q. Do you remember?

A. Yes, sir.

Q. How many times?

A. Once, I will say.

Q. Once. And what was it you said to her?

A. "How are you feeling, Mrs. McKinney."

Q. Do you recall saying on direct examination that you said "How do you do"?

A. No, sir.

Q. It might have been that?

A. Possibly.

Q. You don't recall?

A. Probably it is "How are you feeling."

Q. And what was the condition of her eyes as to being open or shut?

A. At four o'clock in the afternoon, sir?

Q. Yes.

A. Why, they were probably half open. They weren't as bright as they were in the morning at all.

Q. Do you recall saying on direct examination, "I can't recall if her eyes were open on the occasion of that visit"?

A. No, sir.

Q. You can't recall that? You won't say that you didn't say that on your direct examination?

A. That her eyes were open?

Q. That you can't recall whether her eyes were open. What say?

A. I can't understand your question.

Q. Did you say to Mr. McCarter ten minutes ago that on the occasion of this visit about four o'clock Monday that you couldn't recall whether the patient's eyes were open or not?

A. I really do not recall saying that.

Q. Do you remember the Tuesday after Mrs. McKinney was dead having a conversation in the room in which Mr. McKinney and Mrs. McKinney and Miss Clark were present in which you spoke of Charlie's having talked with you over the 'phone?

A. No, sir.

Q. Did you not, on that occasion and place, say to them that Mr. Charlie McKinney had asked you if his mother was—if his grandmother was in proper mental shape to make a will?

A. No, sir.

Q. Didn't Charles ask you that—did you not say that to Mr. Frank McKinney?

A. No, sir; I don't remember any conversation with him pertaining to that.

Q. After the death of Mrs. McKinney, at her home, was the subject of will not mentioned either by you or in your presence?

A. It was mentioned in my presence.

Q. What is that?

A. It was mentioned in my presence.

Q. By whom?

A. I think by Mr. Frank McKinney.

Q. Did you not on this occasion, on Tuesday, in this room, in the presence of Mr. Frank McKinney, Mrs. Frank McKinney and Miss Clark say, "Charles McKinney called me up and asked me if his grandmother was in fit mental shape to make a will, and I told him she was. He didn't ask how she was; he merely asked if she was in mental shape to make a will"?

A. No, sir; no such conversation as that at all.

Re-direct.

Q. On this Monday afternoon, at the four o'clock visit, when you asked her how she was feeling, did she make any response?

A. No, sir.

Q. Did you ask her in a low voice or loud voice?

A. I asked her in a fairly loud voice.

Q. Now, on that occasion, in your opinion, was she able to transact any business affairs Monday afternoon, when you were there at four o'clock?

A. Not while I was there.

Re-cross.

Q. Doctor, the stimulant that was administered would have an effect, would it not?

A. The effect of keeping her heart up, sir?

Q. Keeping her heart up?

A. Yes, sir.

Q. That would have an effect on throwing more blood through her system, wouldn't it?

A. Yes, sir.

Q. Heart acting as a pump?

A. Yes, sir.

Q. And that would have an effect upon her consciousness, wouldn't it, and on her intelligence?

A. Yes, sir.

Q. Until the effect of it wore off?

A. Yes, sir.

Q. It would be a favorable effect?

A. Yes, sir.

Q. The strychnine had not been administered when you were there, had it?

A. The nurse gave it in its regular time. Don't you know, we have a special time?

Q. You do not recall whether it was just before you came or just after?

A. No, sir; I couldn't tell you that.

Q. While you were there at four o'clock do you think that Mrs.—that this testatrix didn't know anybody around her?

A. She was not paying attention to anybody around her.

Q. Is there anything that will enable you to say whether she didn't know what she owned at that time?

A. No, sir.

Q. No, sir. You couldn't say that, could you?

A. No, sir.

Q. And there was nothing to enable you to say that she didn't know who were the natural objects of her bounty at that time, was there?

A. I beg pardon.

Q. There was nothing that would enable you to say that she didn't know who were the natural objects of her bounty at that time?

A. No, sir.

Re-direct.

Q. Well, you said a little while ago that when you were there you didn't think her condition was such as to be able to transact any business. You mean that, don't you?

A. Yes, sir.

Q. Now, I do not know whether you understood the

question that Mr. Lum put to you or not. I ask you whether, in your opinion, from the condition that she was in at the time you were there on Monday afternoon at four o'clock or thereafter—shortly thereafter—this woman, to your best judgment, possessed comprehension and intelligence enough to realize the amount of property she had and the different relatives and the claim that they had upon her?

Mr. Lum—I object. It has been answered directly. The doctor has emphatically said that he cannot say that she could not recognize the objects of her bounty or the property she had.

The Court—I will overrule the objection.

Q. Do you understand my question?

A. If you will let me answer it in my own way.

Q. I want you to answer it. I want you to answer it right—honestly. I want you to answer it intelligently. Therefore I ask you if you understand my question.

A. If there was any complicated thinking to do she could not do it under those circumstances.

By the Court.

Q. How long would the effect of the stimulant last, Doctor?

A. Why, that is on her heart? Probably for three or four hours.

Q. Did you prescribe how frequently the stimulant should be given to her?

A. Yes, sir; every three hours. The nurse forgot that I ordered that stimulation.

Q. Speak up.

A. The nurse said she give the stimulant herself but I order it—she has forgotten—the strychnia to be given. As soon as the heart began to fail why we started to give this stimulant.

Further re-direct.

Q. Was any stimulant administered while you were there?

A. Not in my presence.

Q. How often was this administered, do you remember, every three hours?

A. Every three hours.

Q. Do you remember the hours that that went along at?

A. I couldn't tell you.

Q. Did the nurse tell you that she had administered the stimulant at four?

A. I don't remember that.

Q. Don't remember? Do you recall when the stimulant first commenced?

A. Either Sunday night or—no; Monday morning, I think.

Q. Monday morning?

A. I wouldn't be positive about that, Monday morning.

Charles F. M. McKinney, sworn for the Caveator.

Direct examination, by Mr. McCarter.

Q. You live where?

A. 83 Central avenue, Newark.

Q. Was born in Newark?

A. Yes, sir; same residence—same address.

Q. And you are a member of the bar?

A. Yes, sir.

Q. What relation were you to the late Frederica McKinney?

A. Grandson.

Q. Is she your maternal or paternal grandmother?

A. Paternal grandmother.

Q. When did your grandfather die?

A. In 1883.

Q. And from the time of his death down to the time of your grandmother's death where did she live?

A. My grandmother? At 376 Plane street, Newark.

Q. Did that property belong to your grandfather?

A. Yes, sir.

Q. And he left a will with regard to it?

A. Yes, sir.

Q. And under that will your grandmother claimed?

A. Yes, sir.

Q. How old were you when your grandfather died?

A. He died before I was born. He died in February and I was born in December.

The Court—1883?

Witness—Yes, sir.

Q. Where did you attend school?

A. Well, I first went to the preparatory school which was then on the corner of Washington and Bleecker streets, St. Mary's Academy. After I finished there I went up to St. Benedict's on High street for one year, and from there I went to St. Peter's at Jersey City and took a seven years' course, completing my course in 1905.

Q. During your school boy days in Newark, and while you were at St. Benedict's College on High street, how often would you see your grandmother?

A. While I was at—at the time I went to St. Mary's Academy?

Q. Just pay attention to the question.

A. I didn't quite get that question.

The Court—During your schoolboy days in Newark, how often did you see your grandmother?

Witness—Three or four times a week; then I would spend all Sunday afternoon and evening with her, every Sunday, my mother and I.

Q. When you went over to Jersey City to complete your general education, how often did you see your grandmother?

A. Why every Thursday I would take luncheon with her, because that was a holiday at the college—we had

school on Saturday—and my mother and I would take luncheon with her and spend the afternoon, and, as a general rule, part of the evening with her, and then every Sunday we would do the same. Thursday and Sunday.

Q. When did you finally finish your general education, before you began to study law?

A. In June, 1905.

Q. So that the situation that you have just described continued down to June, 1905?

A. Yes, sir.

Q. Then you came to study law in Newark?

A. Yes, sir.

Q. Did your friendly and intimate relations with your grandmother continue?

A. They did.

Q. How often would you see her?

A. Why, I would drop in there—I would spend every Sunday afternoon and evening. That was a customary practice that my mother and I always made. My grandmother insisted upon it. We would come in the afternoon on Sunday and take supper there and spend the evening, every Sunday; and then I would see her at different times during the week. I would stop in there very frequently—sometimes of an evening and sometimes in the morning.

Q. Well, did she have any other decendant than yourself?

A. No, sir.

Q. You were her sole heir?

A. Yes, sir.

The Court—That is a legal proposition. When did your father die?

Witness—Father died in 1887.

The Court—What was his name?

Witness—Francis O. McKinney. His issue was just my brother and myself. My brother died in 1898 at the age of sixteen, so that leaves just me.

The Court—That is a legal question. There is some question here that she left an adopted son.

Mr. Lum—There is no claim that there was a legal adoption.

Q. Do you know the proponent of this will who sits behind Mr. Lum?

A. I do; yes, sir.

Q. In this paper writing which is called the will he is characterized as "Adopted son." Was he an adopted son of your grandmother?

A. No, sir.

Q. How long have you known him?

A. Well, since—I couldn't state the exact year, but since I was small I remember him.

Recess.

Q. Do you know what his real name is?

A. I do.

Q. What is it?

A. Francis John Rutherford?

Q. When you first knew him was he living at your grandmother's house?

A. Why, for a short time he boarded there, just before his marriage.

Q. And after that time where did he live?

A. In different parts of Newark.

Q. Now, do you know when he married?

A. I don't recall the exact year.

Q. About when?

A. I should—I couldn't say that definitely. I should judge about probably fifteen or sixteen years. Maybe not so long.

The Court—Fifteen or sixteen years ago?

Witness—Yes, sir; as far as I can place it.

Q. Now, I think in the history you have given of your own life you reached the stage where you commenced to study law, Mr. McKinney?

A. Yes, sir.

Q. In whose office did you study?

A. Lindabury, Depue & Faulks.

Q. Regularly matriculated there as clerk and student?

A. Yes, sir.

Q. How closely did your duties in that office require you to attend during the business day?

A. The entire day from nine in the morning until five at night and sometimes a little later.

Q. You went into that office and finished your instructions as student when?

A. I went into the office—I think it was on the 13th of October, 1909. It was the October following the June that I graduated from St. Peter's College.

Q. You pursued the three years' course?

A. I was there until June, 1909.

Q. In Lindabury's office?

A. From October, 1905, until June, 1909.

Q. Now, how much during that period did you see your grandmother?

A. Why, at that time most every Sunday, and then frequently, in going up to the Courthouse I would drop over and see her—just a short block—it isn't a block.

Q. What were your relations with her?

A. Very friendly.

Q. Affectionate.

A. Yes, sir; decidely.

Q. Did she manifest affection and interest in you?

A. Yes, sir.

Q. You, in 1909, were admitted to the bar?

A. Yes, sir.

Q. And commenced to practice in Mr. Parker's office?

A. Yes, sir.

Q. And been there ever since?

A. Yes, sir.

Q. Now, when did you first, if you did at all, notice that Frank and Mrs. Frank were around your grandmother's house a good deal?

A. I noticed that especially the latter part of—say from the time of the early spring, 1910, or late in the winter, if I could put it so, 1909.

Q. When you went to call on your grandmother would you frequently find them there?

A. Almost in every instance.

Q. Both of them? One or both?

A. Sometimes both, and sometimes either one of their family—or some one of their family.

Q. Would they retire and let you see your grandmother alone?

A. No, sir.

Q. How old about was your grandmother when she died?

A. My grandmother, from what she told me, would have been 79 years old on the 17th of July. She told me different times—I can recall two instances when she said she was born in 1835—on the 17th of July, 1835.

Q. Well, what was the source of income—how did your grandmother live?

A. She lived at 376 Plane street, and her income was derived from rents of the rest of the building there and rents from the stable in the rear of 370½ Plane street. It is a U-shaped piece of property, with a driveway on Plane street and stable in the rear. Income from the stables and income from the rest of the building, 376 Plane street.

Q. Did your attention become laterally directed to the fact that she was running behind in her expenses?

A. Yes, sir.

Q. What was the fact?

A. Why, from her own statement—she told me she found it difficult—

Mr. Lum—I object unless the time is fixed. Conversations with her are not competent except for the purpose of showing her mental state.

If they are too remote they would not have a bearing. I ask to have the time fixed.

The Court—It is not proper, of course, to show undue influence—these conversations are not proper to show undue influence. I think you ought to fix the date. Do not lead the witness.

Q. About when was this conversation that you have just referred to?

A. Back to the spring of—about 1910, I noticed it especially.

Q. Well, without referring to any conversations, what information did you acquire, by investigation or otherwise, with regard to the payment by her of the taxes or other charges on this property?

A. You mean from her own statement?

Q. (Question read.)

A. I recall going down to the City Hall one time and inquiring there. I believe I had an unofficial tax search made.

Q. And when was that?

A. I think that was in 1912—around there.

Q. What did you find? Taxes in arrear?

A. Not in arrear, but they hadn't been paid up to that time.

Q. I don't know the difference. Still it had not been paid for how long?

A. Oh, several months. I am not sure about that date. That is my impression, as I recall it, and from what she told me, too.

Q. Did she make any request of you to accommodate her financially?

A. Yes, sir; she did.

Mr. Lum—Objected to as leading.

The Court—It is leading, but I suppose the subject matter has got to be pointed out. He has already answered this question.

Q. When was that?

A. There was several instances of that. One instance was about a year and a half ago, when my grandmother, Frederica C. McKinney, called at the office in company with a Mrs. Ellen Congdon, and the object of the visit, as both of them stated, was—

Mr. Lum—Objected to as incompetent, irrelevant and immaterial; cannot be used to show undue influence, and I cannot see any competency of it—conversation with the grandmother a year and a half ago.

The Court—The point about the situation is evidently going to be that she has disinherited this young man for reasons which were satisfactory to her.

Mr. Lum—Yes.

The Court—And there has been some suggestion—I do not know how it came about—but somebody said that there had been some litigation between this young man and this lady. Now, whether or not they were friendly, and what their relations were, I think, becomes relevant. I will let in this proposition, I think.

Mr. Lum—For our protection I would like to note objection to the conversation.

Q. Go on.

A. I would like to hear the last of that question.

Q. What they stated when this lady and your grandmother came to your office.

A. That this lady stated that she was going back to Ireland and spend the rest of her days there, and she would like to have this note paid off—note of $250.

Q. Whose note?

A. My grandmother's note.

Q. To her?

A. Yes, sir. And Grandmother asked me could I pay it. I said that I couldn't afford to pay it just then. And I wondered why it hadn't been paid off some time ago. It had been running for a number of years. So

nothing more was said about it. They left the office together.

Q. Do you know what the income that she had normally amounted to?

A. I couldn't say exactly, but I always had the impression, from what she told me, that the income was about $100 a month.

Mr. Lum—I object.

The Court—Leave that out.

A. (Continuing.) I can positively say $80 from my own knowledge.

Q. $80? Did she—

A. Pardon me. I wish to just add this: $80 from the rents, plus about $40 a month from a half-uncle of mine, who was boarding there, and rent for his shoe store.

Q. What?

A. He conducts a shoe store there, so that there would be that income plus his board, which makes about $120.

Q. She lived very simply?

A. Oh, yes.

Q. In other words, I don't suppose she kept an automobile, or dined at Sherry's every night?

A. Oh, no; very plain.

Q. Now, were you present on any occasion when you saw your grandmother give Rutherford some money?

A. I was.

Q. When was that?

A. That was about four years ago.

Q. Do you know how much she gave him?

A. I couldn't say how much. Some bills.

Q. During this time did she—do you know whether or not she became in any way responsible for any of Rutherford's obligations?

A. I know that; I can't say definitely; I can't say positively; no.

Q. Well, now, during your early career at the bar, in

1909, did you transact any business for your grandmother?

A. I did.

Q. What?

A. Different—I remember one instance in 1911, where there was—at one time a Mary Flynn who had some trunks stored in the cellar of grandmother's property for a number of years; my grandmother learned that she had died, and there was a bank account in her name; I believe it was the Morristown Trust Company; I can refresh my memory; and she told me that she thought she should be paid the amount of this storage charge.

Q. Did you endeavor to collect that?

A. Endeavored to collect it. So I drew a verified claim and sent it up to the bank. Of course—

Q. Do you know whether your grandmother had any lawyer during her lifetime?

A. I do.

Q. Who?

A. Mr. John Monteith.

Q. How long had he been her lawyer, to your knowledge?

A. For some years; I couldn't say.

Q. Well, something has been said here with regard to some litigation. I show you from the original file a bill of complaint in Chancery of New Jersey between yourself, complainant, and Frederica C. McKinney, personally and as executrix of the last will and testament of John McKinney, deceased. Please look at that and see if you prepared that bill and filed it.

A. I did; yes, sir.

By consent a copy of the bill of complaint was offered and marked *Exhibit C1.*

Mr. McCarter—It was filed January 14th, 1914. The complainant is Charles F. McKinney, the witness, and the defendant is Frederica C. McKinney, your grandmother, is that right?

Witness—Yes. I might add to that individually and as executrix.

Q. Now, before filing this bill, did you have any talk with Mr. Monteith about the matter?

A. I did.

Q. Who suggested the filing of the bill?

A. Mr. Monteith.

Q. Acting for and on behalf of whom?

A. Mrs. Frederica C. McKinney.

Q. I noticed that after the bill was filed, which seems to have been January 14th, 1914, the subpœna doesn't seem to have been issued until the 27th of March, 1914. Do you recall that fact?

A. I do, distinctly.

Mr. McCarter—Subpœna in this cause, attested March 27th, 1914, returnable April 10th, 1914, served by Sheriff Monohan, March 27th, personally upon Frederica C. McKinney, within named defendant, by Otto A. Lieber, Special Deputy.

Q. How did it happen that so long a time elapsed between the filing of that bill and the issuance of the subpœna?

A. Why, I decided not to go ahead with it—rather was—in fact, had forgotten about it.

Q. Were you in treaty during this time with Mr. Monteith?

A. I was.

Q. Many conferences with him?

A. Yes, sir; quite a few.

Q. Did he report to you that he had seen your grandmother about it?

Mr. Lum—I object.

The Court—Objection sustained.

Q. Did you have any other litigation of any kind with your grandmother than this particular one?

A. No, sir; never.

Q. Did you see her after she became aware of this suit?

A. I did.

Q. How often?

A. I couldn't exactly state the number of times, but I would drop in occasionally, either—sometimes in the evening, sometimes during the day, for a short time.

Q. Can you fix any particular time when you saw her after March 27th?

A. I saw her around—did you say March, Mr. McCarter?

Q. March.

A. I saw her twice, as I recall, in May.

Q. In May?

A. In May.

Q. What was her attitude to you?

A. Friendly.

Mr. Lum—I object to it as a conclusion.

The Court—Strike out the answer.

Q. Well, how did she act with you?

A. Friendly.

Mr. Lum—I ask to have it struck out, the answer that she was friendly.

The Court—That will be stricken out. That is a conclusion. State what the fact was.

A. I dropped in and she greeted me in a very friendly manner, and gave me no reason to suspect that it was otherwise than friendly.

Q. Well, did she manifest any displeasure with you?

A. No, sir.

Mr. Lum—I object and ask to have that struck out as incompetent.

The Court—Objection sustained and motion granted. He is a lawyer. Let him state what happened and then if he doesn't state all of it you can add to it by further questions.

Witness—When I went in—

Q. This is in May now?

A. In May.

The Court—Take the first time you went in in May and tell us what happened then?

Witness—I dropped in, just passing—I was coming up to the Courthouse I believe—and she said—I can't say her exact words—but she greeted me very friendly and inquired how my mother was and she inquired how my fiance was, who was quite ill at the time, so I told her her symptoms. I said—told her that she was quite ill and that I had been going up there most every week-end. I didn't think she would ever recover from her illness. She said it was too bad.

Mr. Lum—I ask that that be stricken out.

The Court—This is what he said.

Mr. Lum—I thought he said "I thought she was not going to get well."

Mr. McCarter—That is what he told her.

The Court—This is what you told her?

Witness—Yes, sir. And she sympathized with me and said she had—she thought—or rather she told how she admired her—she had met her one time—she says "Probably everything will come out all right." I said I didn't think so.

Q. I didn't hear a word you said.

A. I said she sympathized as to her illness and said that probably she may get over it. I said I didn't think she did.

Q. Would?

A. Then she said "Hope for the best," and I went out. I don't recall any further conversation.

The Court—How long were you there?

Witness—Probably ten minutes.

Q. Either on this occasion or on any other occasion prior to her death that you saw her, and after March, did she refer to the litigation that had been commenced by you?

Mr. Lum—I object to it as leading.

A. No, sir.

The Court—Objection overruled, because he cannot get a denial except by asking a leading question. Answer the question. At any time after March did your grandmother at any time refer to this litigation?

Witness—No, sir; never.

Q. Did you have any engagement of a social character with her during the month of May? If so, what?

A. I did. I saw her, I believe, on that instance I met her in the street, coming down Market street, and she again inquired how my friend in Albany was.

Q. Your fiance?

A. Yes, sir. I said very poorly, and she said—I don't recall the exact words of the invitation, but something like this, "Can't you come down Sunday and take dinner with me," or "Won't you drop down Sunday?" I said "I will let you know," so I did let her know.

Q. Did you go?

A. No, sir.

Q. How did you let her know whether you would go or not?

A. I wrote her a letter saying that I expected to take advantage of the holiday coming in there, Decoration Day, and go up to Albany for two days, Saturday and Sunday.

Q. So this was the Sunday in conjunction with Decoration Day, that you were to have taken luncheon with her?

A. That is the Sunday.

Q. Did you have any business with her about this time?

A. I did.

Q. What was it?

A. It was in reference to this old matter of the claim against the estate of Mary Flynn. I attended to that for her in 1911. It dragged along and nothing was done further, and so this day I met her—

Q. The same day or another day?

A. The same day. She says "Do you suppose I will ever do anything with that." I said "I will look it up and let you know."

Q. Now, the last time you saw your grandmother was when?

A. Pardon me. I wish to qualify that. I don't recall now whether it was the same day or whether it was evening at the house that that conversation—that I had that conversation. One of those two times.

Q. What evening at the house do you refer to?

A. When she—I think it was in the evening—where she inquired about—the first occasion that is, in May—

Q. Then you were at her house in May?

A. —about my fiance's health and sympathized—when she sympathized with me about—

Q. Yes. When did you last see your grandmother?

A. On Monday evening, June the 22d, at eleven o'clock or probably a few minutes after—the last time I saw her alive.

Q. The last time you saw her when she was well?

A. Was the time I met her on Market street.

Q. At the time she asked you to take lunch with her or dinner with her?

A. Following Sunday.

Q. Sunday following—Decoration Day?

A. Yes, sir.

Q. You said you had been in treaty with Mr. Monteith about the matter of this litigation. I find on file, and produce and show you, a consent to the discontinuance. Please look at it and see if you and Mr. Monteith signed that consent on the day it bears date.

A. Yes, sir.

Mr. McCarter—I will read it. "In Chancery of New Jersey, between Charles F. McKinney, complainant, and Frederica C. McKinney, personally and as executrix, etc., defendant. The above suit is hereby discontinued without preju-

dice to either party and we hereby consent to discontinuance thereof. Dated June 24, 1914. (Signed) Charles F. McKinney, Solicitor *pro se,* John Monteith, solicitor for defendant." Filed June 26, 1914.

Q. Now, at the time that you signed that stipulation, did you know that your grandmother was ill?

A. No, sir; I did not.

Q. How did the fact that your grandmother was ill first come to your attention?

A. In this way. On the evening of June 22—

Q. The very day that this stipulation was filed—signed, I mean?

A. Yes, sir. I came home—I was out that evening—I think I went to the theatre—I got in about eleven o'clock. My mother told me that Dr. Phelan had telephoned about nine. "You better call him right up." So I telephoned the doctor and he said "Your grandmother—"

Q. You heard your grandmother was ill?

A. Yes, sir. He told me she was very ill.

Q. Was that the first information you had that your grandmother was ill?

A. First I knew about her illness.

Q. This was ten o'clock or so on Monday evening?

A. No, sir; few minutes before eleven.

Q. What did you then do?

A. I immediately went down to her residence, 376 Plane street.

Q. Who did you find there?

A. I went in and went up to the room where she—the sick room—and in the room, as I recall, was Mrs. Frank McKinney or Rutherford and Miss Clark, Mrs. Rache, the nurse—the four of them.

Q. And you. Did you see your grandmother?

A. I did.

Q. Where was she?

A. She was lying in bed just as you go in the door,

just to the left of the doorway and her eyes were half closed, and she was breathing very heavily.

Q. Did she recognize you?

A. No, sir.

Q. Now, just go on and tell what occurred?

A. I leaned over the bed and shook her hand, like this. There was no response. She did not open her eyes or show any indication that she recognized me. Just there, as I thought, in a semi-comatose state, gasping. So I went down to the foot of the bed where there is a little wooden table and there was a chair in front of it, so I took a seat there, and I said, "Why didn't you notify me my grandmother was ill?"

Q. Who did you say that to?

A. To all those there.

Q. Yes.

A. And I said, "I never knew she was ill; why didn't you notify me." I said I had just heard about it. So then Mr. Rutherford—Frank Rutherford came, put his head in the room and called me all sorts of names.

Q. Now, I don't want "all sorts of names," I want just what Frank Rutherford said. He said something.

A. As I recall it, he said, "You get out of here." Then he swore, and I couldn't exactly say that he—repeat the exact words, but they were very abusive language all the way through.

Mr. Lum—I ask to have the word "swore" struck out, if this witness can't recall the language.

The Court—It is the utmost trouble for a lawyer to be a witness in any case, but lawyers have got to remember that they must tell us the facts and not tell us what their opinion is about the facts or their impressions about the facts. We want to know their best recollection. When you say that he swore at you or used abusive language, you must tell us what he said to you according to your best recollection. We

want to know the precise words that were used.

Q. As near as you can recall?

A. He said, "You damn little pup, you are the cause of all this; you are a murderer; you killed her—" in a loud tone of voice, and went along there. Then he would go down the hall a few feet and come back and start in again calling me down in that way.

Q. Right in the sick room?

A. Right in the sick room. And then he says, "You come downstairs and get out or I will knock your head off." Words—those very words. So I stood up, and I didn't wish any scene, especially under those circumstances, so I said to Frank, "Come on downstairs, if you have anything to say to me we will discuss it there." I felt very much hurt and surprised under the circumstances.

Mr. Lum—I ask to have that stricken out.

The Court—Strike it out. We do not want your impressions. We want your acts and doings and conversation.

Q. You came downstairs?

A. I came downstairs and he came, and in his company was his wife—his wife came with him. We sat in the rear—the parlor there, and he also abused me then. He said—

The Court—Strike out "He also abused me then."

A. Well, he spoke to me in this way. He called me a murderer; he said that I killed my grandmother and that I was a damn pup; said he would spend every cent of the estate before I got a penny of it, and after awhile he says, "I will fix you yet." Those were his exact words, and Mrs. Rutherford sat right in the room with him.

Q. This was about what time, do you suppose?

A. Well, I should judge I got there a few minutes after eleven. It was about—I was upstairs for possibly ten minutes while this tirade was going on, then I

came down, then I waited around there until about twelve o'clock.

Q. And then you left?

A. I left.

Q. Now, how did you learn that your grandmother was dead?

A. How I learned about her death? Why, when Dr. Phelan telephoned the next evening.

Q. During this talk you had that evening about eleven o'clock in the front room downstairs, was anything said about the will?

A. No, sir; not a word; nothing whatsoever.

Q. And it is in testimony that your grandmother died about two o'clock the next day?

A. Yes, sir.

Q. When did you say was the first information you got of her death?

A. Why the doctor telephoned about—late in the afternoon, as I recall it. I wouldn't say whether—I should judge about six o'clock if I am not mistaken. He says your grandmother is dead.

Q. That was the first notice you had?

A. First notice I had; yes, sir.

Q. What did you do then?

A. I went down—my mother and I went down that evening.

Q. Whom did you see?

A. They were all there, Mr. and Mrs. Rutherford McKinney and Mrs. Rache; Mr. Rache wasn't there because he was quite ill; their respective children were there and a few of the neighbors were in, as I recall. I remember one neighbor that was in there. So my mother and I went down, and my mother's sister and a few relatives were down there.

Q. Did anything occur?

A. Sir?

Q. Anything occur there?

A. No, sir; not that evening.

Q. You saw Frank and Mrs. Frank?

A. I did.

Q. Mrs. Rache?

A. Yes, sir.

Q. Any mention made to you on that occasion of the will?

A. No, sir; none whatsoever.

Q. Did you attend the funeral?

A. I did; both the services at the church and the funeral.

Q. While you were at the funeral did you have any talk?

A. No, sir.

Q. With Frank?

A. No. We, the four of us, were in the first coach.

Q. Who?

A. There was Frank, Miss Clark, my mother and myself. Nothing was discussed at all about it, my grandmother's death or anything.

Q. Nothing said about the will?

A. No, sir.

Q. Well, at the house the day of the funeral and on the occasion of the funeral before you left did anything occur between Frank and you?

A. Yes, sir.

Q. What?

A. As we drove up to the house from the cemetery after the funeral Frank stepped out of the coach with Miss Clark—my mother complained of a sort of fainting spell. She said, "Charlie, would you step in the house and see if you can get some spirits of ammonia or smelling salts." I said, "All right, mother. You just sit quietly on the couch and I will see what I can do." So I attempted to go in the house 376 Plane street and Frank held his arms across the door and refused to let me in.

Q. Say anything?

A. Yes, sir; he says, "You can't get in here."

Q. Now, what steps legally did you take after your grandmother's funeral?

A. I filed a caveat against the administration.

Q. And were you subsequently appointed administrator?

A. I was.

Q. At that time had you any idea of the existence of this will?

A. Never had the least reason to think about it; never heard about it.

Q. You then took some proceedings in Chancery, after you heard of the will?

A. Yes, sir.

Q. How did you learn of this alleged will?

A. The very day I took out the letters of administration I was coming down Bank street and—I believe I took them out in the morning of that day—and this was in the afternoon—I met Mr. Monteith, who was going up to the Courthouse, up Bank street—it was about—it was at the Prudential corner there—he was just going up; he says "I understand your grandmother left a will." I was surprised. I said, "It is the first I knew of it." So it was.

Q. You were given letters and are the administrator?

A. Yes, sir.

Q. Among the effects that came to your hand as administrator, did this document come?

A. Yes, sir.

Paper marked *Exhibit C2.*

Mr. McCarter (reading)—In the name of God, Amen. I, Frederica C. McKinney, of the City of Newark, Essex County, New Jersey, being of sound and disposing mind, memory and understanding, do make and publish this my last will and testament in the manner following; that is to say, first, I direct the payment of all my just debts and funeral expenses as soon as conveniently can be after my decease. Second,

I give to my sister, Hannah Remart, residing in Albany, New York, the sum of a thousand dollars, and should she predecease me then I give said sum to her daughter Amelia. Third, I give to my friend Amelia Clark, who resides with me the sum of a thousand dollars. I give to my Godchild Florence Mary Rache, the sum of five hundred dollars, Fifth, I give to my Godchild Francis Rutherford McKinney, the sum of one hundred dollars. Sixth, I give to St. Bridget's Roman Catholic Church the sum of one hundred dollars for masses for the repose of my soul. Seven, all the rest, residue and remainder of my estate, both real and personal, of whatever kind or wheresoever situated, I give, devise and bequeath to my grandson, Charles M. McKinney, absolutely. I hereby constitute and appoint my grandson, Charles M. Kinney, and my friend, Thomas Rache, sole executors of this, my will, giving and granting unto them full power and authority to sell and dispose of any real estate of which I may die seized and to give good and sufficient deeds therefor. In witness whereof I have hereunto set my hand and seal this twenty-ninth day of September, 1909. Frederica C. McKinney." Witnessed by John Monteith and Margaret Ramage.

Q. Is that your grandmother's signature to that document?

A. Yes, sir; it is.

Q. She could write?

A. Yes, sir.

Q. Now, Mr. McKinney, when did you first know of the existence of this document that I have just offered in evidence?

A. I knew of that after the—after we filed the bill for the appointment of the receiver in Chancery.

Q. That is the Chancery litigation that has been referred to?

A. Yes, sir.

Q. During your grandmother's lifetime, what, if anything, had she ever said to you touching the disposition of her property?

A. She told me on numerous occasions that—

Mr. Lum—I think the time should be fixed.

The Court—Yes. Fix the time.

Witness—I can only do that approximately, your honor. About a year ago. She told me—

Mr. Lum—Is "about a year ago" as near as you can fix the time?

Witness—Well, it is either—say about ten months or a year. I think a year would be—

Mr. Lum—I object as being too remote to make it competent as to mental conditions and I fail to see how it could be competent for any other purpose.

The Court—Objection overruled. It is admissible under the Ready case.

A. (Continuing.) She told me on that occasion, as well as numerous other occasions prior to that time, that "this property will all be yours. I intended it for your brother John and you," but, of course, my brother died in 1898. She said, "Now, after I am gone—after I am dead—take down all these old stable sheds—wagon sheds in the stable yard and put up something that will look worth while." She said, "They are really a nuisance. They do not pay what they should," and all that. I said, "Grandmother, if—I don't—

Mr. Lum—I object to what he said to her.

The Court—Objection overruled. Perfectly proper. We want the effect of the whole conversation.

A. (Continuing.) "The main thing that I have in mind is for you to keep well, and I am not looking forward to getting possession of the property, that will all

come up in due course." Then she made further statements about Mr. Rutherford. She said that "He is always bothering me for money and annoying me, and I am afraid of him;" she says, "If anything happens to me, look out for him. He is dangerous and he is bound to make trouble. I feel that he will make trouble." I said, "There is no use of worrying about that;" I says, "Wait until the time comes,"—and I don't recall my exact words, but what my idea was was not to cross a bridge until you come to it.

Mr. Lum—I object to what his ideas were.

The Court—Leave out your ideas. That will go out.

Q. I noticed that in this will, *Exhibit C 2*, the will that is dated the 29th of September, 1909, a bequest is made to my sister Hannah Remart, residing in Albany. Is she living or dead?

A. She is still alive. That is she was about two weeks ago.

Q. Amelia Clark is the Amelia Clark named in the will in dispute?

A. Yes, sir.

Q. Rache is the same—Florence Mary Rache, who is she?

A. She is a daughter of Annie Rache.

Q. Daughter of Annie Rache. Is she living yet?

A. Yes, sir; as far as I know.

Q. St. Bridget's Church. Was that the church your grandmother attended?

A. Yes, sir.

Q. Is that still going?

A. Oh, yes.

Q. Now, when did you first see the disputed will?

The Court—What is the bequest in there to St. Bridget's Church?

Mr. McCarter—$100 for the repose of her soul.

Witness—St. Bridget's Church.

Mr. McCarter—Roman Catholic Church.

The Court—Was Father Williams connected with that church?

Witness—No, sir; he is up at St. Mary's, I think.

Mr. Lum—He was the visiting priest, Judge Martin.

Q. When did you first see the disputed will?

A. About ten or eleven days after my grandmother died. I went up to the Courthouse—

Q. And saw it in—

A. I had heard of it prior to that by Mr. Monteith, so I looked it up and saw it when the ten or eleven days had expired. Ten days—about the eleventh day after.

Q. What property had she, your grandmother?

A. I beg pardon.

Q. What property had your grandmother?

A. Real property.

Q. What was that property?

A. It consisted of the premises at 370½ Plane street and 376, adjoining lands.

Q. Any mortgages on them?

A. Yes, sir.

Q. How much?

A. Two mortgages in the aggregate amount of $2,800.

Q. Have you any idea of the value of that property?

A. I really couldn't say as an expert. I should judge off-hand, the property is worth probably $20,000—$25,000.

Q. Now, what personalty did she have?

A. Well, she had a number of old—number of pieces of old furniture, and some were antique furniture. It wasn't in the very best condition, but on account of the associations connected with that it was very precious to both of us.

Q. Did she have any bank account?

A. Why, I couldn't—I have learned since that she has.

Q. It came into your possession as administrator?

A. Yes, sir.

Q. How much.

A. As I recall there was only a balance left of something around a dollar—two dollars.

Q. Very small?

A. Very small.

Q. Who, at the time that you became administrator, had her books, papers and documents?

A. Who had them?

Q. Yes.

A. Why, as far as I know, Mr. Rutherford had them—Frank.

Q. Who occupied the property after her death?

A. Why, he was there for awhile—in fact he was there the whole time, up to maybe a month or so afterwards. I couldn't say that positively, but I know he was there after the funeral for some time, and Miss Clark remained there.

Q. Have you the original deed to your grandfather here of this property?

A. I have.

Q. I wish you would produce that, and copy of his will.

Mr. McCarter—I suppose we can probably agree that a short time after the death and the appointment of Mr. McKinney as administrator a bill was filed by our firm in the Court of Chancery to have a receiver appointed and that such proceedings were had that the Vice Chancellor made an order directing Mr. Rutherford to give bond.

Mr. Lum—Not quite entirely in that way, but that is substantially correct. That suggestion was made by Mr. Frank McKinney.

The Court—Did the Vice Chancellor make an order?

Mr. McCarter—Yes. Twentieth of October, 1914. (Reading.)

Mr. Lum—We made that offer in the answering affidavits to the court.

Q. Now, what was the name of your grandfather?

A. John McKinney.

Q. I show you two deeds, one from James F. Bond and wife to John McKinney, dated August 27, 1855, acknowledged same day before Samuel W. Bond, Commissioner of Deeds, recorded in the Essex County Register's Office, in book 217 of deeds, page 271–272, and the other from Samuel W. Bond and wife to John McKinney, dated October 1, 1849, and acknowledged on the 14th of November, 1849, before Amos R. King, Commissioner of Deeds, and recorded in book C7 of deeds, page 318, and ask you if they are the deeds for these pieces of land on Plane street that you have been talking about?

Mr. Lum—I object to the offer. I don't see how these are competent.

The Court—What is the trouble with them?

Mr. Lum—We cannot try the question of title. I do not see that these deeds have anything to do with the question before the court.

The Court—He can state whether or not what he has understood to be his grandfather's property is the property which is described in those deeds. The question is whether or not this woman knew what property she had at the time she executed this instrument, and the persons who are entitled to her bounty, and whether or not she knew what she was doing at that time. Now, this is simply a step to show that she owned or had control or was thought to own this property. Objection overruled.

Q. The answer is yes?

A. Yes, sir.

Papers marked *Exhibits C3 and 4.*

Mr. McCarter—I next offer the will and testament of John McKinney, deceased, certified copy—subject to correction.

Paper marked *Exhibit C5.*

Mr. McCarter—I next offer letters testimentary, issued to Frederica C. McKinney by Surrogate Rollands, dated the 1st of May, 1883.

Paper marked *Exhibit C6.*

Mr. McCarter—I then offer letters testamentary in this State.

Q. Were letters issued, too, to your grandmother?

A. Yes, sir.

Mr. McCarter—We will produce them later. We will offer them here chronologically.

Last mentioned paper to be marked *Exhibit C7* when produced.

Mr. McCarter—I offer deed from Edwin W. Hine, Sheriff, to Frederica C. McKinney, dated the 23d day of July, 1888, for the premises in question.

Paper marked *Exhibit C8.*

Cross-examination, by Mr. Lum.

Q. Mr. McKinney, what day did you take out letters of administration on this estate?

A. I believe it was—could I refresh my memory on that, your Honor? I have a certificate.

Q. Look at the paper, if you have it.

A. On June 25th.

Q. You had yourself appointed administrator the day before your grandmother was buried, did you?

A. Yes, sir; she was buried on the 26th; that is right.

Q. Didn't let any time go by, I see. You had been quite interested in your grandmother's property for some time?

A. What do you mean by interested?

Q. Just interested?

A. I don't understand the question, your Honor, what Mr. Lum means.

The Court—Tell him so.

Q. You don't understand what I mean by whether you had been interested. Well, concerned then, about your grandmother's property?

A. I don't understand what you mean by concerned.

Q. You hadn't been worried about your grandmother's property sometime before her death?

A. I don't know that it would necessitate worry.

Q. I didn't ask whether it necessitated it. There may be a great deal that wasn't necessitated. Will you kindly tell me whether you were or not?

A. No, sir.

Q. And do I understand you that Mr. Montieth advised you to file this bill against your grandmother?

A. I didn't say that.

Q. He suggested it, you said.

A. Yes; in a way—in another way he didn't. I will qualify that answer.

Q. You want to qualify your testimony given on direct examination, do you?

A. No.

Q. What do you want to qualify?

A. Why you just asked was it on his suggestion—at his suggestion.

Q. What did you want to qualify?

A. I want to qualify the answer I am going to give now.

Q. Want to qualify it before you give it?

A. Couldn't do that very well.

Q. What do you mean by qualifying the answer you are going to give?

A. Well, it wasn't—I mean by this that it wasn't upon his advice but was upon his suggestion.

Q. He suggested you file this bill against your grandmother, did he?

A. In order to determine what our relative rights were; yes, sir—if I wished to determine what our relative rights were; yes, sir.

Q. You had been making claims that you were the owner of this property in which your grandmother was living?

A. Never.

Q. What is that?

A. No, sir; never.

Q. You claimed to be the remainderman? 10

A. I claimed to be one of the remaindermen.

Q. One of the remaindermen?

A. One of the two remaindermen.

Q. And you claimed that the other remainderman had released his rights, had you not?

A. No; I never made that claim.

Q. Who was the other remainderman?

A. Half uncle of mine by the name of William J. McKinney.

Q. Did he release his interest? 20

A. I couldn't swear to that.

Q. Did you not so state in your bill filed in Chancery?

A. The reason that was done—

Q. No. Answer the question. Did you or did you not?

A. Well, I think—I don't recall now whether I did or not, but if I did I can explain it.

Q. You do not recall now whether you stated in your bill in Chancery that your uncle had released his equity in this property or not? 30

A. I do not recall now, Mr. Lum. If that is in the bill I can explain—if I did put it in.

Q. Why did you put it in the bill?

Mr. McCarter—He does not say that he did.

A. I don't say I did.

Q. You don't know whether you did or not?

A. I don't remember now whether I put that in the bill or not. If I read over the bill I could tell.

Q. You wouldn't put it in the bill unless it was a fact, would you?

Mr. McCarter—Let it appear whether it did go in the bill first.

The Court—Call his attention to what you have in mind in the bill.

Q. Did you not state in the bill filed against your grandmother in the Court of Chancery that you were the sole heir-at-law and remainderman of premises known as 376 Plane street, as well as the sole owner of premises known as 370½ Plane street?

A. I would like to see the bill, your Honor. I do not recall. That is so long ago, I would like to see it.

Q. On page three, third paragraph.

The Court—The witness is examining the paper marked *Exhibit C1.*

Witness—This is a true copy of the bill. I recall now my reason in putting that in.

The Court—He didn't ask you for the reason. He asked you if it is there.

Witness—It is there; yes, sir.

Q. And why did you state in this bill that you were the sole remainderman and state to use on your oath here on my cross-examination that you were one of two remaindermen?

A. Well, the reason of that is this: My grandmother told me frequently that William J. McKinney had assigned his equity in the property over to her. I never saw any such assignment or conveyance of his equity.

Q. You stated in the bill, did you not, that William J. McKinney had released his equity acquired under the will?

A. I say under that statement, what my grandmother told me.

Q. (Showing witness *Ex. C1.*)

A. That is the same as that other point. From what my grandmother told me. I had no other reason to believe it.

Q. Then why do you, after what your grandmother told you, believe now here to-day that you are one of two remaindermen?

A. Well, I wouldn't believe that until I actually saw such an assignment.

Q. You believed it sufficient to state in this bill, but not sufficient to swear to it here, is that it?

A. Beg pardon?

Q. Mr. McKinney, you say that you made a claim to this property occupied by your grandmother as remainderman during her lifetime, did you not?

A. You say I made claim?

Q. Yes.

A. Do you mean by this bill?

The Court—At any time in any way.

Witness—No, sir.

Q. Never at any time in any way?

A. Made the claim to her? I don't think I quite understand just what Mr. Lum means.

Q. The question is quite simple, if you will listen to it. Please read it. (Question read.)

A. No.

Q. I understand you then that you never at any time or in any way during the life of your grandmother ever made a claim to an interest in the property occupied by her?

A. To anyone?

Q. What say?

A. In this bill I did.

Q. In this bill you did. That was one way?

A. Yes, sir.

Q. Why did you say you never did at any time or any way?

A. I said, I think, when I answered the question before that—I said outside of that bill I never made any claims as being a remainderman. I knew that I was though. Felt that I was.

Q. How did you come to go to Monteith about it?

A. I knew that Mr. Monteith was counsel for my grandmother.

Q. You knew that?

A. And I went over—I knew that her money seemed to be dwindling away somewhere from what she told me, and I tried to help her out. I tried to increase her income. My idea was to—

Q. Just suppose you answer my question.

The Court—One moment. Now, what is the question. (Question read.) Finish the answer.

Q. I didn't ask for the conversation.

A. I knew that Mr. Monteith was her counsel.

Q. That is how you came to go to him?

A. Yes, sir.

The Court—You didn't say that. You said that you also knew that her income was dwindling.

Witness—Oh, yes, sir; yes, sir; I said that.

Q. You knew that?

A. Yes, sir.

Q. And is that why you made a claim for the property?

A. In one way. I wouldn't say a claim, but I wanted to increase her income.

Q. By establishing your right as remainderman?

A. No. My idea was to have a garage built in the stable yard.

Q. Never mind about that.

The Court—You have asked him about it. Go on and answer the question.

Q. Was there trouble with the title so you couldn't mortgage the property, is that it?

A. No, sir. You see the situation was I wanted to increase her income. I didn't have any idea of endeavoring to take the property from her. Never thought of it. But I wanted to increase the income—her income—so that we could put up a garage in the stable yard and she would get double the income from

the stable that she got at that time. That was my plan, and I went over to see Mr. Monteith to suggest that to him. It was no income to me.

Q. And he suggested to you that if you filed a bill in Chancery against your grandmother, that would enable you to put up a garage, did he?

A. No, sir; he didn't say that.

Q. What was discussed between you two?

A. He says the only way you could establish that claim, that your grandmother had a life estate merely— you should file a bill and get a *lis pendens* on record.

Q. She denied that you were remainderman and she claimed the entire property herself, did she not?

A. Never to me.

Q. Didn't Monteith for her claim that she was the owner of the entire property and that you had no interest in it?

A. He said there was a question whether she was or not.

Q. Did he say there was a question or did he say that she owned it all and there was no question?

A. No.

Q. What is that?

A. No.

Q. He never, for her, admitted that you had any right in this property, did he?

A. I don't recall whether he did or not.

Q. What? You don't recall whether her lawyer admitted that you had a right in her property?

A. I do not.

Q. What do you mean by that?

A. Just what I said.

Q. Is your memory very bad?

A. Well, I always thought I had a very good memory.

Q. And yet you cannot recall whether your grandmother's lawyer admitted that you had an interest in that property or not?

A. Do not recall the exact statement to that effect. No man—

Q. Don't you recall that he denied distinctly that you had any interest in that property?

A. I do not.

Q. And didn't he say to you if you think you have got any right in this property you will have to try it out by bill in Chancery?

A. That is what I said before.

Q. He did say that, did he?

A. No. He didn't say "if you think you have any right." He said, "To determine your rights in the property the only way you could do it would be to file a bill and get a *lis pendens* on it."

Q. And you did that?

A. After I made the proposition to him three months before.

Q. What proposition?

A. I issued my subpœnas three months after the bill was filed. As soon as the bill was filed I sent to Mr. Monteith a copy and he spoke to my grandmother about my proposition.

Q. What is that?

A. He spoke to my grandmother.

Q. How do you know he did?

A. Well, I didn't see him. He told me so.

Q. Then what you mean is that he told you he had seen your grandmother?

A. Yes, sir.

Q. And she wouldn't recognize any rights of yours in the property?

A. What is that?

Q. (Question repeated.)

A. Didn't say that.

Q. Didn't he say that?

A. No.

Q. He said to you you would have to file your subpœna, didn't he?

A. Have to file my subpœna?

Q. Yes.

A. I don't recall him saying that.

Q. He didn't mention subpœna to you, did he?

A. I wouldn't swear that he did or didn't; don't remember.

Q. Don't remember?

A. It is a long time ago. Whole lot has happened since that.

Q. Mr. McKinney, this is only March, 1914. You have been talking back in 1910, and 1911 a whole lot. You don't mean to say your mind is any better—

A. That may be very true but I don't just recall clearly enough to swear to it that he made that particular statement.

Q. You did have the sheriff serve your grandmother with a subpœna, didn't you?

A. I did.

Q. Did you ask Mr. Monteith to acknowledge service?

A. No. No, but I think, as I recall, I told him I was going to issue a subpœna. I am not sure about that.

Q. Don't remember that, eh?

A. That is my recollection, that I did.

Q. You will swear that you told Mr. Monteith that you were going to serve your grandmother with the subpœna?

A. I wouldn't swear to it.

Q. And you don't know whether you did ask Mr. Monteith to acknowledge service or not, do you?

A. I don't remember now, Mr. Lum.

Q. Did you tell your grandmother you were going to send the sheriff there to serve her with the subpœna?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. And she never spoke to you of the fact that the sheriff had been there and served here with the subpœna, did she?

A. My grandmother?

Q. Yes.

A. No, sir.

Q. Did she speak to you about her having gone to Mr. Monteith after she was served?

A. No, sir.

Q. And did she say anything to you about the expense she had been under by reason of your bringing this suit?

A. No, sir; not a word.

Q. Didn't mention one word of it?

A. No, sir; not a word.

Q. She seemed to be mentally competent when she was talking to you on the street in May?

A. Well, apparently so.

Q. Apparently so—when she asked you to come to dinner she seemed to be apparently sane?

A. Apparently so.

Q. Was this just a friendly suit against your grandmother, to test out the title?

A. It was certainly in every respect a friendly suit.

Q. It was?

A. It was.

Q. And you understood that Mr. Monteith so believed?

A. Well, I assure you, Mr. Lum, I cannot read another man's mind, what his convictions or beliefs are.

Q. Then it was friendly on your side but you don't know whether it was friendly on your grandmother's side?

A. I couldn't say that.

Q. What is that?

A. I know—as far as I know her attitude was always friendly. Very friendly. In fact she never mentioned it.

Q. She didn't resent your trying to take this property away from her at all, did she?

A. Not to my knowledge, because I wasn't trying to take the property away from her and she knew it.

Q. You were claiming that she hadn't the right to dispose of this property by her will, but that it was already yours as remainderman, wasn't it?

A. I said, partially mine as remainderman, and under the terms of my grandfather's will she was merely a life tenant. That is my contention.

Q. Your claim was she was merely a life tenant and you were the sole heir-at-law. That was your claim, wasn't it.

A. Yes, sir; heir-at-law.

Q. Yes.

A. Well, the other—you see there were two parcels there.

Q. I am asking you about your claim?

A. As to 376?

Q. Yes.

A. Yes, sir; a life tenant; as to 370½, heir-at-law.

Q. Who was heir-at-law of 370½?

A. I was—I am.

Q. You are. You claim it now, and in this friendly suit you made demand that your grandmother should pay to you all the rents received from the property and to cancel a certain mortgage on it, didn't you?

A. I would like to see the bill.

Q. Can't you recall that?

A. No; not sufficient—so much has happened since. I think I should see the bill, your Honor, to refresh my memory.

The Court—Answer the question. Can you recall that?

Witness—Not definitely, no.

Q. What can you recall with reference to it?

A. As to the relief prayed for?

Q. Yes?

A. For an accounting, and—let me see. That is all

I recall, as to the accounting. Praying for an accounting.

Q. Your memory is quite bad, isn't it, Mr. McKinney?

A. I wouldn't say so, Mr. Lum.

Q. Is your memory much clearer as to events in 1910 and 1911 than as to things that happened six or eight months ago?

A. Some instances make a more vivid impression than others.

Q. Conversation on the street in which your grandmother asked you to come to the Sunday dinner makes a more definite impression upon you than the claims you made against her as to property which you thought was your own. Won't you explain why?

A. It does. I have a reason for it.

Q. What is the reason?

A. I wrote a letter shortly—around that time.

Q. Is that the only reason?

A. Well—

The Court—You are asked your reason. Give the whole thing.

Witness—I wrote her about that time saying that I couldn't take dinner with her that Sunday, that I expected to take advantage of the holiday. It was Decoration Day; came on the 30th of May.

Q. Usually.

A. So that that was Saturday and Sunday, and I went out of town, up to Albany for those two days.

Q. That is all the answer you have to give?

A. My fiance was very ill at that time. In fact dangerously ill. So I would go up two days instead of a Sunday.

Q. Now, you claim that your grandmother had without authority put a certain mortgage on this property, didn't you?

A. I do.

Q. And did you ever discuss that with her?

A. Let me see. No; I never did as far as I remember.

Q. Never spoke to her about it?

A. No.

Q. You were very friendly with her?

A. Yes; but I did not think that would be a respectful thing to do, to bring up a matter of that kind. She understood—she understood it and she was always friendly.

Q. You thought it was more respectful for the sheriff to serve her with a subpœna at the end of a bill in Chancery than that you should discuss this with your friendly grandmother?

A. I wouldn't call either one disrespectful, Mr. Lum.

Q. Why did you say a moment ago that you thought it would be disrespectful?

A. Well, it would mean a—probably either wouldn't both agree or one would disagree, generally on statements of that kind.

Q. That is what you meant when you said you thought it would be disrespectful?

A. Not that we would both disagree. I didn't want to bring it up.

Q. What did you mean?

A. I simply meant I didn't bring up the talk.

Q. Why?

A. What my reasons were I can't state, and can't state now.

Q. You don't remember what your reasons were?

A. No, aside from the fact that it wasn't probably the most agreeable thing to bring up.

Q. Did you think it was more agreeable to bring it up in a bill of Chancery filed against her?

A. That was a friendly suit.

Q. Friendly suit? Was it more agreeable to do it that way than to speak to her about it?

A. The reason—

Q. Just answer the question, please.

A. Well, I don't know as I could make a comparison. I thought—I didn't think it was at all disrespectful and she didn't show any animosity towards me.

Q. Who made this a friendly suit?

A. What?

Q. How did this come to be a friendly suit?

A. Just to determine that she had a life estate.

Q. What makes it a friendly suit? You constantly refer to it as that—you characterize it?

A. Well, there was no endeavor on my part to take the property away from her.

Q. But you don't mean what you said in the bill?

A. Whatever my prayer in the bill was, why it was meant as a bill in a friendly suit to determine that she had merely a life estate.

Q. Did you ever tell her at all that you were going to bring suit against her?

A. Did I ever tell her?

Q. Yes?

A. No.

Q. You never told her about it?

A. Not to my knowledge.

Q. Now, why didn't you?

A. I couldn't say why.

Q. What is that?

A. I couldn't give any reason for that.

Q. Don't remember?

A. No.

Q. In this friendly suit, you demanded that your grandmother should make a full and true discovery of all and singular moneys received as income from the premises known as 370½ Plane street, Newark, New Jersey, since the year 1888, and pay the same to your orator as well as pay and cancel a mortgage which said defendant placed on the premises known as 376 Plane street in the amount of $1,000, did you not?

A. I did if it is in the bill.

Q. Don't you remember that it is in the bill?

A. Yes, sir; I believe I remember that clause.

Q. You think you remember it now, do you?

A. I would like to see the bill if I may.

Q. If such a statement is in the bill is that a friendly claim?

A. That was the only motive I had—a friendly motive and friendly claim.

Q. But you didn't tell your grandmother about this friendly motive?

A. No, sir; I did not.

Q. What is that?

A. I don't recall telling her.

Q. You didn't indicate the kindliness and friendliness of your motive to her in any way, did you?

A. The reason that was done—

Q. Just answer my question.

A. I told her that I wouldn't go ahead with it one time I was down there. I said, after she was served, I said, "That matter of mine, that suit of mine, why, oh, we will drop it, let the thing go." That was—I had waited probably three months after issuing my subpœnas, after the bill was filed, and then it ran along long after the time to answer. I never took a decree in it.

Mr. Lum—I ask to have the answer struck out as not responsive; I ask to have the question read again, and ask to have the question answered.

(Question read.)

The Court—Both motions are denied.

Q. Before you brought this suit you never spoke to your grandmother at all, did you?

A. About the suit?

Q. Yes?

A. Not that I know of.

Q. Didn't you tell us—tell me just a few moments

ago that you never spoke to your grandmother about this suit nor that she never spoke to you about it?

A. I said we never discussed the suit, the way I put it.

Q. Did you not tell me that you never spoke to her about this suit, nor that she never spoke to you about it?

A. No; I never told you that.

Q. Are you sure?

A. Yes, sir; I didn't tell you that.

Q. And you did speak to her about the suit then, did you?

A. In this way.

Q. Just a moment. Yes or no, you answer that.

A. Well, I wish—

The Court—Answer it yes or no.

Witness—Yes, sir.

Q. You did speak to her. On what occasion?

A. Shortly after she was served with the subpœna.

Q. Where?

A. Now, let me finish my answer, please. I stopped in there—I don't know whether it was two weeks or so; just stopped in there one morning—I think it was in the morning—and I said "This other matter still on, why let it go, we won't bother with it." Now, whether she knew that I meant the suit—I didn't mention anything—I said "this other matter on, why forget about it."

Q. You said that to her?

A. Yes, sir.

The Court—What was the other matter?

Witness—What I meant was this friendly suit.

Q. You were at that time taking care of the Flynn matter for her?

A. Yes, sir—no—yes. Let me explain.

Q. Yes or no will cover it.

A. This was 1911 when I spoke to her about the Flynn matter. That was in May.

The Court—He asked you if shortly after the subpœna was served the Flynn matter was still on.

Witness—It was still pending; yes, sir.

Q. And so, when you spoke of "that other matter" you didn't designate what matter was meant?

A. The Flynn matter wasn't spoken of then.

Q. Was any matter spoken of by name, then?

A. No.

Q. No is the answer?

A. Just dropped in a minute to inquire how she was.

Q. Who was present?

A. Why, I don't recall as any one was present there.

Q. Where was she?

A. She was in the—they had a dining-room down in the basement—as I went down there—I think it was just shortly after she had her breakfast—she was down there.

Q. What was the date?

A. I can't fix the date.

Q. What was the month?

A. I think it was sometime in—the month the subpœna was issued.

Q. What was that month?

A. I think it was April

Q. You think the subpœna was issued in April, do you?

A. I am not sure of the date. I would like to see the subpœna.

Q. You haven't any memory on that again?

A. I can't remember.

Q. Do you remember it was spoke of as March, here in this room to-day?

A. It may have been March.

Q. You have no memory of it?

A. I can't remember definitely. The subpœna will speak for itself.

Q. I have no doubt the subpœna will speak for itself. The question is as to your recollection?

A. I think about that time. I couldn't give any definite, fixed date.

Q. You don't know whether it was before the subpœna was issued or not?

A. Quite sure it was after.

Q. Quite sure it was after. How long after?

A. Well, I should say about two or three weeks.

Q. Who let you in?

A. I walked right in. There is an office door which is generally open, in the front. It may have been open or it may have been closed. It wasn't locked. I would always walk in.

Q. Do you remember whether it was open or closed?

A. It was open.

Q. You are sure it was open?

A. Yes, sir; otherwise I would have to go around the hallway—ring the bell.

Q. You just told me a minute ago you didn't know whether it was open or closed, didn't you?

A. I didn't say that; I said my impression was that it was open, because I went in that door. I always go in that door.

Q. Do you have any recollection of whether it was open or closed?

A. It was open, or I couldn't get in. Nobody let me in. I walked right in, through the house, downstairs.

Q. Saw no one else but your grandmother?

A. That is all.

Q. How long were you there?

A. Oh, probably—I don't think I was any more than probably five minutes. You see, coming up to the Courthouse I would stop in. I didn't have very much time. Just dropped in.

Q. What time in the morning was it?

A. I couldn't say.

Q. About what time?

A. As far as I remember I should think probably around half-past nine.

Q. About half-past nine?

A. I should think around nine or ten.

Q. What was your grandmother doing?

A. I can't recall that. She was walking around the kitchen, doing something or other. I couldn't say what she was doing.

Q. Didn't you just tell us a moment ago she was at breakfast?

Mr. McCarter—No; he did not.

A. She was in the kitchen.

Q. Did you not say that she was just finishing her breakfast?

A. I did not.

Q. Did you use the word breakfast?

A. I did.

Q. What was the reference to breakfast?

A. Just after breakfast, I thought.

Q. Just after breakfast, and half-past nine in the morning?

A. I should judge about that time.

Q. You were on your way to the Courthouse? You are sure of that?

A. Yes, sir; I am sure.

Q. And when was the time before that you were at your grandmother's?

A. Well, I can't say definitely, Mr. Lum. I used to drop in—sometimes I would be downtown and drop in in the evening just for a minute or two, various intervals.

Q. I am asking you to give your best recollection as to when you were at your grandmother's house, the time before this occasion that you have just referred to about half-past nine in the morning?

A. I can't give the exact date.

Q. What month?

A. I couldn't give the month. I would drop in at various times.

Q. What year?

A. From 1909 up to shortly before her death—yes, practically up to the time of her death—that is before I knew she was ill—I would drop in at infrequent intervals. I mean by that that sometimes I would drop in at evening; sometimes Miss Clark would be there; sometimes I would drop in in the morning.

Q. In this present year, 1914, how many times did you call at your grandmother's house?

A. Probably about five times—five or six times.

Q. About six times?

A. Five or six times.

Q. Who did you see on any of these occasions?

A. Well, I saw Miss Clark on several of the occasions.

Q. How many times?

A. I couldn't say exactly. I know several times my grandmother was alone.

Q. How many times did you see your grandmother alone?

A. I couldn't say exactly how many times.

Q. Can't remember that?

A. I couldn't say positively, no.

Q. How many times did you call on your grandmother after you brought this suit?

A. I couldn't say. I was there around in May—I should judge about twice.

Q. Twice after this friendly suit?

A. Just let me think a minute. No; more than that. The bill was filed in January, as I recall, the subpœna was issued in March, returnable—yes, March, returnable the 9th of April, as I remember it. I don't know positively, but I was in to see my grandmother between the time the bill was filed and the time that the subpœna was issued. How many times, I don't know.

Q. Between the time the bill was filed and the time the subpœna was issued you were there, but you don't know how many times?

A. I couldn't say.

Q. Was the suit mentioned during any of those times?

A. Not, except on the occasion here in May, when I dropped in.

Q. Will you listen to the question? Between the time of the filing of the bill and before the serving of the subpœna?

A. Was the suit mentioned?

Q. You say you were at your grandmother's house twice?

A. Well, as far as I remember, about twice.

Q. And was the suit mentioned on either of those occasions?

A. Not by me.

Q. Was the suit mentioned on either of those occasions?

A. Not by either one of us.

Q. Was it mentioned by anyone else?

A. Not to my knowledge. I didn't hear it.

Q. Now, Mr. McKinney, after the subpœna, you didn't tell your grandmother—let her in on the secret of this friendly suit, did you?

A. Well, I would like to explain that. Mr. Monteith—

Q. Did you or not?

A. Not personally.

Q. Not personally? And so far as your own knowledge went the first she knew of this friendly suit was when the sheriff called at the door, wasn't it?

A. No, sir.

Q. So far as your knowledge goes?

A. No, sir.

Q. Of your knowledge had she any further information about the suit?

A. As to knowing when the bill was filed?

Q. From your knowledge, yes?

A. Yes, sir; she knew it.

Q. How do you know she knew it?

A. Mr. Monteith told me.

Q. That isn't of your own knowledge, is it?

A. Well, I see. No, except from what he told me.

Q. So from your own knowledge, then, the first she knew of this suit was when the sheriff presented himself at the door, wasn't it?

Mr. McCarter—He didn't speak to her about it.

Q. Yes or no.

The Court—Mr. Monteith is the agent of Mrs. Frederica. It is her knowledge when Mr. Monteith knew, isn't it. You have got that. You have got that up to the time of the filing of the bill there was nothing said and between the time of the filing of the bill and issuance of the subpœna nothing was said.

Q. Now, Mr. McKinney, you called at the premises to see your Uncle William, did you not?

A. Not to see him alone, no. I dropped in to see him while I was there—just on my way out I dropped in to see him a minute.

Q. Isn't it a fact that you saw him and not your grandmother on one or two of these occasions?

A. No, sir. Every time I went there I saw both of them.

Q. That is a fact, is it?

A. Except, I think, one instance I went to see grandmother and as I was coming out I stopped in in the shoe store and the door was locked—I suppose he was out somewhere—when I came away. I generally say "How are you" and make a remark or so about the weather, and that is about all I spoke to him about.

Q. Didn't discuss the suit with him then? What is that?

A. No, sir; never.

Q. And after this subpœna had been issued, how many times did you see your grandmother before her death?

A. I saw her twice in May and I—I remember one instance where I met her in April.

Q. Where did you meet her in April?

A. It is down near this drug store on the corner of Washington and Halsey street—Washington and Market on the northwest corner there.

Q. Riker?

A. Riker. This side on Market street. I was coming around the corner.

Q. In April?

A. It was in April; yes, sir.

Q. You spoke to her?

A. Yes, sir; I was in a hurry. I just said—

Q. What is that?

A. I just asked her how she was—said I was in a hurry and was going up to the Courthouse.

Q. Did she speak of this suit?

A. No, sir.

Q. Did you speak of it?

A. No, sir.

Q. She didn't say anything about that thousand-dollar mortgage?

A. No. She inquired about the—about my fiancé, how she was then, and my mother. I said, "We are all pretty well, but," I said, "Up at Albany, Katherine"—I mentioned her name—"she is very ill." She always asked—

Q. This was in April?

A. In April.

Q. Is that the first time you saw her after the subpœna was served?

A. I couldn't say. I have a faint recollection that I met her or stopped in there after the subpœna was

served. I think I met her. I think I met her twice that month.

Q. Faint recollection, is that all you have of it?

A. I saw her twice. Just whether I—the second time —whether it was at 376 or in the street—

Q. I didn't get the answer.

A. The second time, I don't remember which—whether it was at 376 or somewhere in the street.

Q. When was the second time?

A. The time I just mentioned. I don't recall the exact date. Later part of April, somewhere.

Q. Later part of April, somewhere. Please keep your voice up.

A. Later part of April. I have got a severe cold.

Q. When did you see her the next time?

A. In May.

Q. Where did you see her then?

A. I saw her once at the house and I met her once over in front of the Post and Flag old building there.

Q. What time in May, did you see her at the house?

A. I don't recall just when that was.

Q. How do you fix the date?

A. On account of this invitation to take dinner on the Sunday after Decoration Day.

Q. That was the first time, was it?

A. No, that was the second.

Q. That is what I am asking you about, the first time?

A. It wasn't very long before that, Mr. Lum. It was probably ten days or two weeks; I don't recall.

Q. That would make it about the middle of May?

A. Middle of May?

Q. Yes.

A. No; Decoration Day was on the last of May. You mean about the middle of May?

Q. Yes.

A. Sometimes, I suppose—the first time I saw her was sometime in the early part of May and the second time around the middle of May.

Q. Where did you see her about the middle of May?
A. I don't recall.
Q. What say?
A. Don't recall.
Q. Don't recall where you saw her? Don't recall the conversation?
A. I used to meet her—I would go along—
Q. Don't recall. Do you recall the conversation?
A. No.
Q. No?
A. Aside from inquiries into the—
Q. As to your fiance?
A. Yes, sir.
Q. That is the only thing she inquired about that you can recall. She said nothing about the suit?
A. No, sir.
Q. You didn't explain to her your attitude with reference to the suit?
A. No.

Adjourned until Monday, December 7th, 1914, at ten o'clock A. M.

SECOND DAY.

Appearances as before.

Charles F. M. McKinney resumed the stand for further cross-examination by Mr. Lum.

Q. Mr. McKinney, will you kindly tell us now how many times you were at your grandmother's house after March 14th?
A. The subpœna was issued the 27th of March—
Q. Answer the question please.
A. Just wait a minute.
Q. Never mind about that. How many times?
A. Up to what time? From the time—
Q. From March, 1914, to the date of her death.
A. I saw her—

The Court—Now you answer the question,

Mr. McKinney, to the best of your ability, and remember that the question is how many times were you there at your grandmother's house after March and during the time that she was alive?

Witness—About five times, including the evening of the 22d of June.

Q. What was the date of the first time?

A. The latter part of April.

Q. Latter part of April?

A. Yes, sir.

Q. How late in April?

A. Well, I should say about the third week or so.

Q. About the third week in April?

A. Yes, sir.

Q. What time of day?

A. It was 9:30 in the morning.

Q. 9:30 in the morning?

A. About 9:30 in the morning.

Q. Who was there?

A. I was going up to the Courthouse—

Q. Who was there?

A. My grandmother was alone.

Q. How long were you there?

A. About ten minutes.

Q. The matter of this suit was not mentioned by either of you?

A. Not by her. I mentioned it.

Q. When did you see her next?

A. I met her.

Q. At the house?

A. No.

Q. When did you see her next at the house?

A. The same month—no; not the same month. I saw her next at the house in May.

Q. What date in May?

A. The week prior to the 19th, about the 12th. I remember that by the letter.

Q. What time?

A. That was in the morning. I think it was in the morning. I am not sure about that.

Q. Who did you see besides your grandmother there?

A. I say my grandmother was alone at that time.

Q. Didn't see anybody else?

A. No, sir.

Q. Either going in or coming out or around the premises at all?

A. I think that was the day I knocked at the shoe store door and my uncle was out—my half uncle.

Q. Did she mention the suit at that time?

A. No.

Q. Did you?

A. No.

Q. When did you see her the next time at the house?

A. I saw her the next—the last time I saw her was on Market street.

Q. (Read that question, please.) Answer, please.

(Question read.) *A.* The next time at the house was the evening I first knew about her illness; that was the 22d of June.

Q. When did you next see her at the house alive?

A. I didn't see her after that.

Q. You told me just two minutes ago that you saw her at the house five times after the subpœna was issued. You now make it three. Which is correct?

A. No; I said I saw her, Mr. Lum, five times between the time the subpœna was issued and her death. At the house I saw her three.

Q. I distinctly asked you, Mr. McKinney, how many times you saw her at the house after the subpœna was served. You said five. I will ask you the question again. How many times did you see her at the house after the subpœna was served?

A. About three times.

Q. What is that?

A. About three times.

Q. What enables you to fix the date of the first time as about the middle of April?

A. In this way. I was to Mr. Monteith shortly after that, and I kept in constant touch with him because he was representing her, and I knew that she didn't understand the technicalities of what we claimed, and I was negotiating with Mr. Monteith right along.

Q. That is what fixes the date as the middle of April, what you have just told us?

A. Yes, sir; I guess it is.

Q. Yes. Why did you tell Mr. McCarter on direct examination that you were at the house twice only, and those—both occasions in May?

A. Well, he asked me in May. He didn't ask about April in his question.

Q. You told him you were there on two occasions in May. Did you recall an occasion when you were testifying for him that you don't remember now?

A. Yes, sir. In April—I met her once in April that I didn't testify to, too, which I thought of later, in front of—on Market street—Post and Flag office.

Q. Visits at the house. Confine yourself entirely to the matter of visits at the house. You stated to Mr. McCarter that you visited your grandmother at her house twice in May. Is that a fact?

Mr. McCarter—What page is it, please?

Q. Did you hear the question?

A. Yes; I heard the question.

Mr. McCarter—I asked what page it was on.

Mr. Lum—On page 14, fifth question down. I saw her twice, as I recall, in May.

A. In May. In May.

Q. Yes.

A. I saw her once in the street and once in the house.

Mr. McCarter—I thought you were mistaken about that. I asked him how often he saw her. I did not say at the house.

The Court—You are trying to have him say that he said he saw her at the house twice.

Q. Did you ever see her at any time other than the morning at the house?

A. I do not understand your question. You say other than the morning. What do you mean, April or May or when?

Q. At any time after the subpœna was served?

A. Twice in the morning.

Q. Yes? At the house?

A. I dropped in one morning going up to the Court-house—

Q. Other than the morning?

A. The morning at half-past nine, I refer to.

The Court—Other than that, he says.

Witness—Other morning than that morning?

Q. No. Any other time, afternoon or evening?

A. I don't understand, Mr. Lum, what you mean.

Q. It is quite simple. Did you ever call at your grandmother's house after March 14th, in the evening?

A. No.

Q. Do you recall being asked on direct examination, page 14, "Did you see her after she became aware of this suit? *A.* I did. *Q.* How often? *A.* I couldn't exactly state the number of times, but I would drop in occasionally, either—sometimes in the evening, sometimes during the day, for a short time"?

A. Yes, sir; I will tell you what I mean by that.

The Court—After the suit?

Q. That is after March?

Mr. McCarter—No, it isn't. This suit was commenced in February or January, as I understand it.

Witness—January.

The Court—It was commenced by the filing of the bill.

Mr. McCarter—And Mr. Monteith had a copy of it.

Mr. Lum—That wasn't the commencement of the suit. Sending the bill to the attorney.

The Court—Isn't it? Filing the bill?

Mr. Lum—If it is filed, yes. I understood he simply sent a copy to the attorney.

The Court—No.

Witness—The very day that the bill was filed.

Mr. Lum—Very well; strike out the question.

Q. Mr. McKinney, why did you delay so long after filing the bill before issuing the subpœna?

A. For this reason. I wasn't—I didn't intend to push the suit, and I had, as soon as I filed the bill—I gave Mr. Monteith a copy and we entered into negotiation—arangement—I wanted to save my grandmother from herself. This money was dwindling—this income—and I had no intention of taking the property from her, and I told Mr. Monteith—we talked it over—and we came to the conclusion—he suggested that she would deed the property to me and I would execute a mortgage back to her, so that I would pay sufficient interest which would warrant her—double her income—which would double the income which she was receiving, and which Mr. Monteith was negotiating it with her.

Q. When was it that you did not intend to push the suit?

A. Why, from the very first my idea was to file a bill and come to some arrangement. There was no income to me at all.

Q. Now, the question is, what was the occasion for the delay in filing the subpœna?

A. My intent not to proceed.

Q. Why did you file it then?

A. The bill?

Q. Why did you file the subpœna then—serve the subpœna?

A. The reason the subpœna was served, as I recall—it wasn't that I had any intent to proceed with the suit, but it was—I filed it anyhow and had it served.

Q. How is that?

A. I had the subpœna served and I filed it, but I had

even then no intent to proceed with the suit, because it ran along long after the time to answer and I never took a decree in the case.

Q. I ask you again, why did you have the subpœna served if what you have formerly stated is true?

A. I still maintain that I did not intend to proceed with the suit even when the subpœna was served, and my grandmother knew that shortly after.

Q. The question is, then, why did you have a subpœna served?

A. I had no specific reason signifying that I had intended to proceed with the suit, even though the subpœna was served.

Q. Then it isn't a fact that you had forgotten about it?

A. I had no intention, Mr. Lum, whatsoever, of pushing that suit.

Q. Will you just answer my question?

A. Forgotten about it?

Q. That is what I asked.

A. Well, I hadn't forgotten specially about it. I had no idea of proceeding with the suit though. I knew there was a bill filed, but I was negotiating with Mr. Monteith right along, very often, as to this arrangement with my grandmother, and I didn't think it necessary to go and explain all the details to her because he was her counsel, representing her.

Q. Did you in this friendly negotiation pay Mr. Monteith's services, or did you let your grandmother do that?

A. I paid him nothing, Mr. Lum.

Q. You didn't?

A. No, sir. He was my grandmother's counsel.

Q. You knew your grandmother at that time was low in her finances, you say?

A. Through the money which she gave to—

Q. Did you know it?

A. I knew what her income was.

Q. Did you know at that time, at the time you instituted this suit, that your grandmother was low in her finances?

A. I knew that her finances—

Q. Yes or no.

A. In a way; yes. I mean by that that her income was dwindling merely, and the reason that was done was to save her—increase her income—to prevent this leakage.

Q. If you will answer my question we will get along a great deal quicker. I will ask you once more and I want you to listen.

A. Yes, sir.

Q. You knew your grandmother was low in her finances at that time, didn't you?

A. Yes, sir.

Q. And you didn't offer to pay the charges to be made by her lawyer as a result of this suit, did you?

A. Well, he wasn't my counsel, he was her counsel.

Q. It was your action which was necessitating counsel by her, wasn't it?

A. No. If she—

Q. It was your action which necessitated counsel, was it not?

A. I repeat, no.

The Court—Isn't that entirely argumentative?

Q. Mr. McKinney, the filing of this bill necessitated the services of Mr. Monteith or some other counsel by your grandmother, did it not?

A. No, sir.

Q. You mean by that she might have let the matter go by default and your taking the rents?

A. I would have never taken a decree in the case, Mr. Lum, and she knew it.

Q. Is that why she went to a lawyer and paid him $100, because she knew it?

A I took this up with Mr. Monteith before the bill

was filed—long before the bill was filed, and I talked to her a number of times.

Q. As a result of this litigation instituted by you against your grandmother, whose finances, you say, you knew at the time were low, she incurred an indebtedness of a hundred dollars for this counsel, did she not?

A. I couldn't say. Mr. Monteith never told me his fee.

Q. You know that he received a fee?

A. I couldn't say that.

Q. You didn't offer to pay him the expenses that your grandmother would be put to, did you?

A. Because, Mr. Lum—

Q. Answer yes or no.

A. No; he was her counsel.

Q. And as her counsel you knew that he was expecting to be paid for taking care of this litigation, didn't you?

A. Not necessarily; no.

Q. You presumed that Mr. Monteith was gratuitously going to take care of the interest of your grandmother in this case, did you?

A. He understood it was a friendly bill.

Q. What is that?

A. He understood it was a friendly bill, and he said he would negotiate with her.

Q. Do you mean to say that Mr. Monteith understood that this was a friendly suit?

A. He did, I think he did. He had every reason to, as far as I know.

Q. You had no knowledge until I acquaint you with the fact, now, that Mr. Monteith receive $100 from your grandmother for his services in this litigation?

A. Oh, no. I knew he received $50, Mr. Lum.

Q. When did you know he received $50.

A. Why, Mr. Monteith told me that she had paid him $50. It wasn't so very long before her death. I knew that $50. I didn't see the $50 paid. I was told.

Q. Did you know that she paid him $50 additional on the Friday before her death?

A. That is the $50 I mean.

Q. And didn't he tell you that he had received $50 before that?

A. I couldn't say that he did positively; no, sir. No; I don't remember, Mr. Lum. I remember that $50. That was spoken of.

Q. Well, when you knew—when he told you about this $50 didn't you tell him that in such a friendly suit your grandmother shouldn't pay him?

A. Mr. Lum, I recall this—

Q. Just answer my question if you will.

A. Just repeat that question.

Q. You do not listen to my question in the slightest?

A. If you would only talk a little slower, Mr. Lum, I could follow you better.

Q. If you pay attention you would follow better?

A. I try to.

Q. (Question read.)

A. Did I tell him that? No. It was his own—

Q. You have answered it.

The Court—You have answered it. The moment you add something to the proposition then you open up a field that suggests further questions. That is one of the reasons for the trouble.

Q. Did you ever call at your grandmother's house in the evening after this suit was instituted?

The Court—What do you mean by that?

Mr. Lum—After January, 1914.

A. I did; yes, sir.

Q. What date?

A. That was sometime around—shortly after New Years. Not in January, no—not New Years. It was—the suit—I remember I was up to Albany and I—

Q. Answer the question.

Mr. McCarter—He is trying to.

A. (Continuing.) I can refresh my memory by this. I was up to Albany the latter part of February. I stopped in to see my grandmother's sister, an elderly lady, up there, and I came back and stopped in one evening.

Q. Who was there?

A. Miss Clark was there.

Q. Miss Clark. That was in 1914?

A. 1914. That was in February.

Q. In February?

A. Yes, sir.

Q. Now, your grandmother, you say, sometime in May, invited you to come to dinner?

A. Yes, sir.

Q. And you wrote her a letter saying you couldn't come?

A. I did.

Q. Mr. McKinney, your grandmother could only write her name and nothing else, is that not a fact?

A. Well, I couldn't say. If she wrote her name she could probably write.

Q. Did you ever see any specimen of her handwriting other than her name, in your life?

A. Oh, I think yes, frequently, as a child.

Q. Where and when?

A. I remember as a child, and even up to when my brother was alive, in 1898, she used to spend a great deal of her time with us and take us around.

Q. Where and when?

A. And different times she would sit down and write. That is short. I haven't seen her write recently, not of late years, except her name, which I saw written in 1911 on an affidavit.

Q. Since 1911, you haven't seen her name written to anything, then, have you?

A. Since 1911 I haven't seen anything but her name written to anything?

Q. Yes.

A. No.

Q. How long ago was it you saw her write?

A. 1911.

Q. Write anything but her name?

A. Yes, sir. No; that is when she wrote here name to this affidavit.

Q. But any other writing which you ever saw her do was how long ago?

A. Prior to my brother's death, and that was in 1898.

Q. Mr. McKinney, did you ever see a letter in your life written by your grandmother?

A. No. Letter to me or to anybody?

Q. To anybody at any time?

A. I never saw her write a letter. I never saw a letter which was written by her that I could swear to. In other words, I never saw her sit down and write a letter

Q. Miss Clark used to write for her?

A. Sometimes.

Q. Miss Clark always used to read for her, didn't she?

A. She could read.

The Court—Who, Miss Clark?

Witness—No.

Q. Could your grandmother read?

A. She always pretended—she said she could. I never heard her read aloud, but I have seen her with glasses on looking over the paper and remark on the different news articles.

Q. Don't you know perfectly well that your grandmother couldn't read at all?

A. No, sir; I do not, Mr. Lum. It is a big surprise to me to learn that she couldn't. First I knew that.

Q. Don't you know that she could write nothing but her name?

A. No, sir; I do not.

Q. You say Miss Clark used to do her writing for her, do you not?

A. Yes, sir.

Q. And Miss Clark used to always do all her reading for her, did she not?

A. She used to—

Q. Answer the question yes or no.

A. Not all her reading. I have seen her a number of times with newspapers. She would put on her glasses and sit down and be seemingly interested for ten or fifteen minutes over it

Q. You never heard her read a word?

A. I never heard her read aloud, no.

Q. When was your fiance first taken ill?

A. Oh, she was ill, Mr. Lum, for three years before her death.

Q. In your direct examination, Mr. McCarter, page 18, asked "What evening at the house do you refer to? *A.* When she—I think it was in the evening—when she inquired about—the first occasion that is in May." You recall now, do you, after having heard that read, that you did testify on direct examination that you had visited your grandmother at her house, in May, in the evening?

A. That was the week prior.

Q. In the evening?

A. The week prior to the 19th. About the 12th. If I testified so it is so.

Q. What is that?

A. If I testified to that on my direct it is so.

Q. Now, you testified on the cross it was half-past nine in the morning. Is that so, too?

Mr. McCarter—Now, Mr. Lum, I think you want to be fair. I know you do. Just read that question; "Now, the last time you saw your grandmother was when? *A.* Pardon me. I wish to qualify that. I don't remember now whether it was the same day or whether it was in the evening that I had that conversation. One of those two times." Then you say "What evening?"

Mr. Lum—It isn't me. You are saying it.

Mr. McCarter—I say "What evening at the house do you refer to? *A.* I think that was in the evening." He has already said he wasn't sure it was daytime or evening.

Mr. Lum—I think he has.

Q. You have no recollection whether you called there in the evening or not, have you, in May?

A. I think it was evening. I won't swear to it.

Q. You now think it was evening. Who was present on this occasion in May, in the evening?

A. Miss Clark was there.

Q. Miss Clark. Did you talk to Miss Clark?

A. Why, I don't know as I carried on any conversation with her. She was sitting there, either that room or the other room.

Mr. Lum—Now may I see the stipulation—the discontinuance?

Mr. McCarter—That is read in evidence. The original papers are not here.

Mr. Lum—Haven't you the original discontinuance here?

Mr. McCarter—I have the copy that was offered in evidence.

The Court—Have you a copy of what was offered in evidence?

Mr. McCarter—No; I haven't a copy of that.

The Court—Dated June 22, Mr. Lum.

Q. I am going to ask you to think carefully and tell us how many days after June 22 this paper was signed? This discontinuance?

A. Why, that, as I recall, was signed on the 22d of June.

Q. Now, Mr. McKinney, have you a distinct recollection about it?

A. I wouldn't swear to that, but that is my firm conviction. I say, as I remember, it was signed the 22d of June.

Q. Who drew this discontinuance? Who dictated that?

A. Mr. Monteith?

Q. In his office? Think carefully.

A. Now, let us see—no; I think I had those—I could tell by the type of the machine probably.

Q. Well, don't you remember?

A. On second thought I think I drafted those. I drafted that—I think I did—yes. Then I executed it and gave it to Mr. Monteith to file. I think that is how it was.

Q. Drafted it in your own office?

A. Yes, sir.

Q. Made carbon copies?

A. I don't now. I may have a carbon copy among our papers, but looking among them I didn't find a carbon copy.

Q. Did you sign it first?

A. Yes, sir.

Q. And then sent it over to Mr. Monteith?

A. That was on the 22d. I didn't even know she signed it right there.

Q. Signed it in his office?

A. Yes, sir.

Q. Mr. McKinney, at the time you and Mr. Monteith signed this discontinuance, you both knew of your grandmother's death, did you not?

A. That was on th e22d. I didn't even know she was ill.

Q. The question is, at the time you and Mr. Monteith signed this discontinuance you both knew of your grandmother's death, did you not?

A. Not as I remember, Mr. Lum.

Q. What is that?

A. Not as I remember. This is on the 22d. I didn't know until that evening that she was ill, if it was signed on the 22d.

Q. Mr. McKinney, do you remember that the discon-

tinuance was originally dictated by you without any date upon it, and that the date was later added?

A. I don't remember that.

Q. What is that?

A. I don' recall that.

Q. Have no recollection now of it?

A. No.

Q. I show you this copy. Is that your signature?

A. That is.

Q. It is quite apparent to you that the type striking the date—"dated June 22, '14"—is different from any other type on that paper, is it not?

Mr. McCarter—That is not the original stipulation.

Mr. Lum—The question is it is apparent to him.

Witness—Yes; it is the original, I guess.

Mr. McCarter—I don't suppose he is an expert on it. The type will speak for itself. I can't say it is different.

The Court—The question is, are they different type, not whether one is the original record and the other is a carbon record, but are they different type, and is it apparent to you?

Witness—It looks the same type to me, your Honor.

Q. And does it look as though both were made at the same time?

A. Well, I don't know. That isn't the original.

Q. What is that?

A. This seems to be an original, dated June 22, 1914, and the other looks like a carbon. But that was executed in Mr. Monteith's office. I remember that distinctly.

Q. You say one looks to you like an original—a carbon body and the date looks like the original?

A. Yes, sir.

Q. Will you explain to us why there should be this difference on the face of this paper?

A. I know that I drafted that, as I remember, and brought it over to Mr. Monteith, and we both signed it, and he attended to the rest.

Q. Did you not ask Mr. Monteith to date that paper back to a date before your grandmother's death?

A. I don't recall that at all, Mr. Lum.

Q. Will you swear that you didn't ask Mr. Monteith to date that paper back to a date before your grandmother's death?

A. I wouldn't swear to it, but I know that—I am quite sure that I didn't. That is as far as I remember, I didn't do that.

Q. Will you swear that you didn't ask Mr. Monteith—

A. No; for I don't remember.

Q. Don't remember. Is your memory so bad? Now, didn't you have some little difficulty with your grandmother, before you began this suit, about her selling the Plane street property?

A. I think I can explain that very well.

Q. Then the answer is what? Yes or no?

A. No difficulty.

Q. Explain the situation.

A. For a long time prior to her death we would discuss things. She would tell me that the property would all be mine after her death; I would say, "Grandma," for the sake of the argument, "I think you have a life estate in this property". "Well, no; I don't think I have; but whether I have or not"—that has been said a number of times, just in good-natured talk—she would say, "Whether I have or not this will be your property." That was a number of times.

Q. You frequently told your grandmother then that she only had a life estate in this property?

A. Oh, yes; before the suit.

The Court—Go ahead, Mr. McKinney, you have been asked a question.

Witness—Yes, sir; I am willing to answer.

The Court—You have given us a little part of the answer apparently. Now, if you will keep your mind on the subject and go on and finish your answer, then you will get to the point. Now, the question is whether there was any trouble between you and your grandmother about selling the property, and you answered "No," and then you were asked to explain that.

A. (Continuing.) At different times before the bill was filed—in fact for years back—we would discuss the property at different times, and she would tell me what improvement she wanted made on it after her death. She would say, "Now, you are my own flesh and blood" —she has used that expression different times—"and you come first. I want you to keep this property up. Tear down those stables in the rear, and put up something which looks worth while. They are really a nuisance, so many different tenants in the stables," and so on—they are all rented to different tenants, you know, the stables—and I told her that I wasn't looking for the property, when the time came all those things would come up; and we would argue—not argue, exactly, but I would say "Grandmother, I think under grandfather's will you have merely a life estate in this property." She said, "I don't think I have. I think it is mine because I bought it in under—I have a sheriff's deed for it." There was never any argument about it, but she said different times, Mr. Lum, "But whether I have it by sheriff's deed or not, you are my own flesh and blood, and the nearest I have, and it will be yours" —different times.

Q. You told her then that she had only a life estate in that property?

A. Yes, sir.

Q. She had, Mr. McKinney, after you had given her that interesting information, practically arranged for a sale through Schlesinger's office, had she not? Yes or no will do.

A. I don't know who arranged for a sale. She wanted to sell it.

Q. What say?

A. She wanted to sell it. She wanted to sell the rear, I believe.

Q. She wanted to sell a part of the property and had a deal on through Schlesinger's office that you know about; is that not true?

A. I couldn't swear there was a deal on, but there was some talk about it. Some talk she would like to sell it. I never saw any agreement of sale or anything of that kind.

Q. You heard the talk that she wanted to sell the property?

A. Yes, sir.

Q. And do you remember your saying you would file a suit restraining her from selling?

A. At that time?

Q. At any time.

A. No. When I heard about that Schlesinger matter I said she had merely a life estate in it. I didn't threaten to start suit.

Q. Why did you ask, "At that time?" My question is you threatened to restrain her. You said, "At that time?" Did you at any time?

A. I never threatened to restrain her by legal proceedings from disposing of the property, Mr. Lum.

Q. Why did you threaten to restrain her?

A. Didn't threaten her. I simply told her at different times that she had merely a life estate under my grandfather's will.

Q. And she didn't have any right to sell it. You told her that?

A. Yes, sir.

Q. She said she did?

A. She said she always thought she did. I said, "Grandmother, that is where we differ;" she says,

"Whether I have a life estate or not why it is yours—it will be yours after my death."

Q. Now, it was as a result of your threat to stop her sale of the property, that she referred you to Mr. Monteith, isn't it?

A. No. She didn't refer me to Mr. Monteith. I knew he had been representing her for many years, so I went over to see Mr. Monteith. I wanted to increase her income.

Q. Will you swear that your grandmother didn't refer you to Mr. Monteith?

A. That is rather a peculiar—hard question to answer. I don't remember her referring me to him. I am quite sure I went myself. I often heard her speak of Mr. Monteith.

Q. Will you swear that your grandmother didn't refer you to Mr. Monteith. That is all the question is.

A. How could I swear when I am not certain.

Q. Then she may or may not?

A. I knew he had represented her for years.

Q. You say you cannot swear that she did not refer you to Mr. Monteith, I understand you. Do you remember a conference with Mr. Monteith in which he informed you as to his interview with your grandmother about the preparation of an answer? Do you not?

A. I remember—

Q. Mr. McKinney—(Read the question. Question read.)

A. It ran along for three months.

Q. Just answer.

A. I told Mr. Monteith that he could have any length of time to answer; I didn't want to go ahead with the suit, it had run over the time, and I didn't take a decree. He had a month over the time to answer.

Q. (Question read.)

A. I remember one interview when he told me that my grandmother came in with either Mrs. Rutherford

or Mrs. Rache, and that he broached the proposition to her, and they told him, as I recall, "Well, go ahead and get the answer ready." Then he told me, "Well, will you give me further time to answer?" I said, "Certainly, I will. I will give you as long as you want. I will give you six months if you want it, because I am not going ahead with it." It was then within a day or two of the time. He says, "I have so many days, three or four days to answer, will you give me further time." I says, "You can have six months, if you want it. I am not going ahead with it."

Q. Now, Mr. McKinney, is it not a fact that you was the one who was requesting Mr. Monteith not to answer because you said it cast some reflection upon you and your family?

A. No, sir; no reflection, because everything is open.

Q. The question is—

A. No, sir.

Q. Did you?

A. No, sir.

Q. Now, did you, before you applied for letters of administration, ask Mr. Monteith if your grandmother had left a will? Yes or no, please?

A. Yes, sir.

Q. When did you ask Mr. Monteith?

A. Why, before—it was after the bill was filed. We were discussing the title—

The Court—Why don't you keep your mind on the subject, Mr. McKinney. You are asked if between the time you knew your grandmother was dead and the time that you made application for letters of administration, you asked Mr. Monteith if there was any will?

Witness—No.

The Court—You are going ahead and answer about some proceedings in Chancery that, so far as we know, must have been begun somewhat after that.

Witness—No, sir; I did not. For this reason.

The Court—You have answered. He did not is the answer.

Re-direct.

Q. Do you recall when it was with regard to the filing of the bill that you saw Monteith? How long before the bill was filed, about?

A. I was in continual treaty—session with him at different times.

Q. Well, had you seen him just before the bill was filed?

A. Oh, yes; few days.

Q. So far as you know did your grandmother ever see a copy of the bill?

A. Not to my knowledge; no, sir.

Q. How many times between the time when you sent Monteith a copy and the time when this discontinuance was signed do you suppose you saw Monteith about the matter?

A. Oh, fully a dozen times.

Q. You said, I think, something about a proposition, that the property should be sold. Was it your grandmother's view as expressed to you by Mr. Monteith that that question could be settled without a law suit?

A. Read the question please. I didn't quite hear it.

Q. The ability to sell the property (Question read).

A. Why, yes, sir.

A. Why, then, was the suit filed?

A. No; I wish to change that answer. No.

Q. If you pay attention to the question and try to think a little better you will do a great deal better, Mr. McKinney. Just try to comprehend every question before you make an answer. Do you recall the fact that after the bill was filed—you said you filed a *lis pendens,* did you?

A. *Lis pendens*?

Q. Yes. That you ascertained that in order to make that *lis pendens* effectual you had to have a subpœna?

A. Yes, sir.

Q. Do you remember the Chancery act?

A. Yes, sir.

Q. Yes. Now, after you got your bill filed and got your *lis pendens* filed, and after you got your subpœna filed, so that your *lis pendens* was effectual, what was the nature of the talks you had with Mr. Monteith?

Mr. Lum—I think we had this on direct examination.

A. That I wasn't going ahead with it, that I had no desire to go ahead.

Mr. Lum—Mr. McKinney, I am objecting, if you please. I object on the ground that this was covered on direct examination.

The Court—Objection overruled.

Q. Now, Mr. McKinney, you say you had several conversations with him. I want to find out what the nature of those conversations was, what you said to him and what he said to you. Did you report any talks with your grandmother?

A. Yes, sir.

Q. Just try to recall.

A. I recall very clearly—

Q. Forget you are on the witness stand?

A. I would drop in there frequently to see Mr. Monteith and I have told him different times—he would say "Well—"

Q. Now, just hold on now. Wait a minute. You are an intelligent man. You are a lawyer. And you are telling Judge Martin what you would go in to see Mr. Monteith for. You say, "I have told him different times—he would say 'Well' ". That don't make any sense. Just try to think. Forget you are on the witness stand and just talk to Judge Martin as if you saw him in his back room here. You were taking the

trouble to go to see Monteith. Now, what did you go to see him for?

A. I dropped in frequently and asked him had he seen my grandmother and what her—whether they were willing to take up that proposition.

Q. What proposition?

A. To deed the property to me and then I would execute a mortgage to increase her income.

Q. You had made that proposition?

A. Why, yes, and I said, "I am not anxious to go ahead with this suit, Mr. Monteith." "I would just as leave drop it. I don't care to antagonize her—worry her," I said, "at her age. If I felt she was worried I would drop the thing."

Q. What did Monteith say when you would ask what her attitude was?

A. Well, he would say she seemed to favor it but those that would come in with her seemed to antagonize her against it.

Q. Did you learn from Monteith who was with her?

A. I did.

Q. Who?

A. It was either Mr. Rutherford—Mr. Rutherford was with her or Mrs. Rache or Mrs. Rutherford.

Q. Yes.

A. Told me that she never came alone to see him.

Q. Now, how long before the stipulation was signed, whenever it was signed—don't care anything about the date now—forget the date—how long a time elapsed, if any, in your judgment, between the time that you and Monteith had agreed to settle this suit and the actual discontinuance was signed?

A. Oh, probably two or three weeks. I told him I would drop the thing. He never filed any answer—"I would drop—let the thing go," I said.

Q. Now, I think you said on cross-examination, to Mr. Lum, that previous to the commencement of the suit you had discussed with your grandmother the fact

of your construction of the extent of your interest in that property?

A. I did, sir.

Q. Is that a fact?

A. That is true. A number of times before the bill was filed.

Q. I mean before the bill was filed. So that she knew your contentions in that regard before you filed your bill?

A. She did, years before.

Q. About how long?

A. Years before. Even when I was at college we would speak of it. I would go down there every Thursday and the same topic would come up.

Re-cross.

Q. Mr. McKinney, what was it that Mr. Monteith said with reference to you grandmother's attitude with reference to your claim?

A. That she seemed willing to accept it only those with her told her—seemed to antagonize her against the idea.

Q. When did he tell you that?

A. They would help her to fight it.

Q. When did Monteith tell you that?

A. Different times.

Q. How many times did he tell you that?

A. I don't know exactly. He told me that at least four times—four or five times.

By the Court.

Q. You stated generally, when you were in college and when you got through and became a lawyer, that you and your mother used to go up there and see your grandmother every Sunday?

A. Yes, sir.

Q. And that you would occasionally drop in during the week?

A. Yes, sir.

Q. Did anything happen to your mother to prevent her going?

A. I can explain that, your honor.

Q. Did anything happen to your mother to prevent her going?

A. Yes, sir.

Q. What was that?

A. There were different rumors circulated which mother heard of and said to me, "Well, Charlie, it would be very embarassing if I went down there, because the whole—all the parties would be there, Rutherford and his wife and Mrs. Rache, and" she said, "I wouldn't find it very pleasant to go there and spend an afternoon or evening."

Q. When did those visits of you and your mother upon your grandmother, on Sundays, stop?

A. Oh, about a year ago. That is, every Sunday, regularly, about a year ago.

Q. When did they stop irregularly?

A. Before that we were going—before that we would go pretty near every Sunday. I might say, your honor, if I may say this—

Q. I am only asking you about the question of time?

A. There was no animosity in that.

Q. I am not asking you about any reasons or anything of the sort. Now, I understand from your testimony that you and your mother used to call on your grandmother pretty frequently—almost every Sunday?

A. Yes, sir.

Q. Now, the question is, when did that stop?

A. Going every Sunday, about a year ago.

John Monteith, sworn for Caveator.

Direct examination, by Mr. Parker.

Q. You are an attorney and counselor-at-law of this State?

A. Yes, sir.

Q. Practicing here in Newark?

A. Yes, sir.

Q. And have practiced here for a good many years, haven't you?

A. Yes, sir.

Q. Were you acquainted with the late Frederica C. McKinney, in her lifetime?

A. I was.

Q. Your acquaintance ran back a good many years, didn't it?

A. Five or six years, I think.

Q. Did you act for her in any special capacity?

A. I did.

Q. How many years?

A. Well, I suppose for the last five years she has been coming out and in the office.

Q. Do you recollect drawing a will?

A. I do.

Q. You saw the paper that was exhibited here on Friday last?

A. Yes, sir.

Q. That is the paper, isn't it, that you drew for her?

A. Well, I just saw it handed to the witness. I might say that I had forgotten about the drawing of that will until it was called to my attention a short time ago.

Q. I show you a paper which has been marked *Exhibit C 2* and purports to be the will of Frederica C. McKinney. It seems to have your signature as one of the witnesses to the will?

A. That is my signature.

Q. And did you draw that paper for her?

A. It was drawn in my office. The body of it is not in my handwriting. It is in the handwriting of my stenographer.

Q. I know, but then, can you say whether or not you are the person who actually was the architect to that will after you had received instructions from the testatrix?

A. I am.

Q. You are. And you are a witness to its execution, aren't you?

A. I am.

Q. Will you tell me what took place on the execution of that will?

Mr. Lum—I object to the proof of this as the will in these proceedings. It seems to me immaterial.

The Court—Objection overruled.

A. After the drawing of the will I read it over to Mrs. McKinney and asked her if that was correct and she said yes. Now, Mr. Parker, I have no definite recollection in this particular case, but I am simply speaking, now, in my custom, what I do inevitably.

Q. Is there an attestation clause to that will?

A. There is.

Q. Did you read it at the time that the will was executed?

A. I did.

Q. Does it refresh your memory as to what took place upon the execution of the will?

A. Yes, sir. I called my stenographer in.

Q. What do you mean by your stenographer?

A. The other witness.

Q. What is her name?

A. Margaret Ramage.

Q. Now, what was said with reference to the publication of the will by Mrs. McKinney?

A. I asked Mrs. McKinney if she declared this to be her last will and testament in the presence of Miss Ramage and myself—that was after the signature—she said she did. I asked her if she requested us to sign it as witnesses. She said she did.

Q. And then what happened?

A. We signed as witnesses in her presence. After she had first signed it in our persence we signed it as witnesses in her presence and in the presence of each other.

Q. What became of the paper after it was executed? Did it remain in your possession, do you know?

A. No. I must have given it to Mrs. McKinney.

Q. Now, did you see Mrs. McKinney on business matters from time to time after this will was executed down to the time of her death?

A. I did.

Q. How often would she come to see you?

A. I do not recall, but a great many times; particularly during this past two years.

Q. Do you recollect what was the subject of the business on Mrs. McKinney's visits?

A. Yes, sir.

Q. What?

A. She asked me frequently whether she could sell this property. I told her I saw no objection to it.

Q. Well, now, did she say anything about her grandson with reference to that?

A. She did.

Q. What was it?

A. She said that her grandson told her that she couldn't sell it, that all she had was a life interest in the property, and immediately upon her attempting to sell it he would restrain her.

Q. Well, were you acquainted with the grandson?

A. Not at that time.

Q. Did you make his acquaintance?

A. Subsequently to that; yes, sir.

Q. And what were the circumstances under which you made his acquaintance?

A. Why, Mrs. McKinney had been in the office quite frequently telling me that her grandson was protesting against it and I asked her to send her grandson to me. Whether she did or not I don't know, but Mr. McKinney did come into the office to see me about it.

Q. Did you have a talk with Mr. Charles McKinney?

A. Yes, sir.

Q. On the subject of this claim that you had heard of from the grandmother?

A. Yes, sir.

Q. Now, in that conversation was the right of Mr. McKinney to restrain Mrs. McKinney from selling the proeprty discussed between you?

A. It was.

Q. And what did you say to him?

A. I told him that I thought that his grandmother had an absolute title in fee to that property, and that I didn't see as he had any rights in it.

Q. Now, what else did you say to him?

A. We discussed it as lawyers would discuss it. I said she has asked me frequently whether she could sell the proeprty. I have told her yes, as here is a property with a mortgage on which was foreclosed back in the neighborhood of twenty years ago, there has been no claim against it in that time; there has been no attempt to set any deed aside; the records show her to be the owner in fee, and I certainly thought that she had title to the property, and I said that I would—that nothing would convince me to the contrary only any action by the Court that would upset the deed.

Q. Well, now, didn't you say at that conversation something more with reference to the way in which—the only way in which Mrs. McKinney could be prevented from selling that property?

A. Why, I said this to him, Mr. Parker. I said, "You are a lawyer, Mr. McKinney. You know perfectly well that this deed never having been attacked, that your grandmother certainly has an unqualified right to sell the property and until she is restrained by some Court order—until there was a bill filed and a *lis pendens* Mrs. McKinney could certainly dispose of that property."

Q. Now, was a bill filed?

A. It was.

Q. Do you recollect how long it was after this con-

versation that you have last related before the bill was filed?

A. Oh, I should say it must have been a year after the matter first came up.

Q. About what? A year after the matter first came up, but how long after the last conversation in which you told him that nothing would prevent Mrs. McKinney from selling the property except a bill filed and *lis pendens* or restrained?

A. That occurred in the first conversation that I had with him, Mr. Parker, between a year and two years ago.

Q. And in the later conversations, too?

A. It occurred in every conversation I have had with him in discussing the rights of his grandmother to the proeprty.

Q. Do you recall the time of the filing of the bill?

A. I do.

Q. Could you say about when it was that you got notice of it?

A. Why, I should say it was about January or February. Sometime around that.

Q. Did you get a copy of the bill?

A. I did.

Q. As early as January or February?

A. Well, I am not sure when I got the copy of it.

Q. Was it before the issuance of the subpœna?

A. It was.

Q. And who brought it to you?

A. Mr. McKinney sent it to me, I think. I think he mailed it to me or sent it over.

Q. Did you have any talk with Mr. McKinney as to the attitude which she took with reference to the litigation?

A. In what way?

Q. Well, as to what his—what he really wanted?

A. Well—

Mr. Lum—I object. I think we should have the conversation.

The Court—Objection sustained.

Mr. Parker—Your Honor thinks that is too leading?

The Court—Yes.

Q. Did you have a conversation with Mr. McKinney after the bill was given to you?

A. Yes, sir.

Q. How often?

A. Very often.

Q. What was the substance of those conversations—what was the subject of those—

A. Trying to effect a compromise.

Q. Did Mr. McKinney suggest a compromise?

A. Yes, sir.

Q. And what was the character of the suggestion?

A. Why, he said that he could arrange a compromise so that the income to his grandmother would be, in all probability, at least double what it was.

Q. Had you given Mrs. McKinney a copy of the bill of complaint?

A. No.

Q. When you received a copy of it from Mr. McKinney had you notified her of the suit?

A. Some time afterwards.

Q. Well, how much longer?

A. I couldn't say. I could not say. The subpœna hadn't been issued but it was some time after that I sent for Mrs. McKinney.

Q. But before the issuance of the subpœna, was it?

A. Oh, yes.

Q. Had any proposition of compromise been made to you at that time?

A. Yes, sir.

Q. And when Mrs. McKinney came in was she alone or accompanied?

A. She was alone the first time she came in.

Q. Now what happened in your talk then?

A. I went over the situation of a compromise.

Q. Now, what did you say?

A. I told her—I told Mrs. McKinney that Mr. McKinney had been to see me and that he had suggested a way by which her income could be materially increased and I personally thought it would be a good thing if it could be done, she was an old lady between seventy and eighty—nearly eighty, I guess,—and if she was relieved of the responsibility of handling that property and her income materially increased, I thought it would be a good thing for her.

Q. Well, what did she say to that?

A. Well, she said she would think over it and let me know.

Q. Did she come in again?

A. She did.

Q. How soon, if you know, after this first talk that you have last related?

A. I don't recollect—recall. I imagine within a week of it.

Q. Was she alone or accompanied?

A. She was accompanied.

Q. Do you know who it was that was with her?

A. I think it was Mrs. Frank McKinney.

Q. Now, what happened in that conversation?

A. The question of compromise was gone over again and I thought it would be a good thing. Mrs. Frank McKinney—at least the lady I took to be Mrs. Frank McKinney—

The Court—Is she here, Mr. Monteith?

Witness—The lady with the light—

The Court—Is that the lady (indicating)?

Witness—I think that is the lady that was in.

The Court—She is Mrs. Francis McKinney?

Mr. Lum—Yes.

Witness—I won't swear positively, but that is my impression, that she is the lady. She said

to me at the time, "Well, I don't see why he wanted to start this suit anyway, because Mrs. McKinney is an old lady and can't live so very much longer and he will get everything anyway on her death".

Q. Well, did Mrs. McKinney say anything about this proposition of compromise?

A. It was not acceptable.

Q. It was not acceptable?

A. Not then.

Q. When Mrs. Frank made this remark about how she didn't see why the grandson should make—should have started this suit because he would get this property anyhow, did Mrs. McKinney hear it? Was it said in her presence?

A. Oh, yes. They were both sitting right close to one another. She must have heard it.

Q. Did she make any denial?

A. No.

Q. Or comment on it?

A. No, sir.

Q. How much income did Mr. McKinney say that he would guarantee to his grandmother in case of this compromise?

A. Well, the early start of it he thought that he could produce about $900, but he changed his mind on that and thought that couldn't be done. I think there was some sort of a proposition that had been made to him for a lease and that fell through; but I told Mrs. McKinney—Mrs. McKinney had told me—that is the old lady—that she had had great trouble with the property, that the house was old and that it was a constant—there was constant repairing necessary, taxes and one thing or another; it only produced to her between two and three hundred dollars a year, I think. I told her then that Mr. McKinney could double that or possibly give her close on to $500 a year.

Q. Now, after the subpœna was issued—after suit

was commenced, either before or after subpœna issued, was there any talk between you and Mr. McKinney as to putting in an answer? *A.* There was.

Q. When did that occur, if you know?

A. Shortly after the issuance of the subpœna, Mrs. McKinney came into the office with, I think, Mr. Francis R. McKinney, and I went over the whole situation with Mrs. McKinney to get the matter for the answer. After that Mr. McKinney came into the office to see me—some time after that—and I told him that I certainly would fight the bill, and I told him the substance of the answer that I would file. He then said to me, "Now, don't file the answer, because I think I will withdraw the suit."

Q. Did you file any answer?

A. I did not.

Q. Do you recollect any conversation with Mrs. McKinney, shortly before her last illness?

A. I do.

Q. Can you state when that took place?

A. I think the Friday before she died.

Q. Now, that date happens to be the 19th of June on the calendar hree.

Mr. Parker—We can agree on that, I think.

Mr. Lum—Yes.

Q. Did she come in to see you alone, or some one else?

A. She came alone.

Q. And did you have any conversation with her?

A. Very short conversation.

Q. Just state what it was?

A. She came in to bring me $50. I then told her not to worry, Mr. McKinney was going to discontinue the suit.

Q. Why did you tell her that Mr. McKinney was going to discontinue the suit?

A. Because Mr. McKinney had told me he was going to do it.

Q. When?

A. He had told me—oh, well, from the time I told him the substance of my answer. He told me then that he thought he would discontinue the suit, but I imagine a week or two before she died he told me he was going to discontinue. He said he didn't want his grandmother worried.

Q. Did she say anything in reply to this?

A. No. I didn't have very much time to talk to her then. I went out into the outer room, where she was sitting, Mr. Parker.

Q. And have you related all the conversation on June 19th?

A. The substance of it, as I recall.

Q. Was an agreement for a discontinuance of the suit signed?

A. Not that day.

Q. Was an agreement of discontinuance signed after that day?

A. There was.

Q. One has been presented here, bearing date June 22, 1914. Is that the one that you have in mind?

A. Yes, sir.

Q. Now, did you see the original discontinuance on Friday?

A. No.

Q. You can't say whether or not the date was in writing?

A. I don't know.

Q. Or typewriting?

A. I can't say.

Q. Was that executed at the day it bore date?

A. I don't think it was.

Q. What makes you think not?

A. I don't recall the date, just now, of Mrs. McKinney's death.

Q. I know, but I asked you whether the stipulation that you signed, Mr. Monteith, and which bears date June 22, 1914, was signed on the day when it bore date?

Mr. Lum—He said he didn't think so.

Witness—I don't think so.

Q. Why?

A. Because I think it was signed after Mrs. McKinney's death.

Q. Why do you think that?

A. I recall the signing of the paper, and Mr. McKinney requested that it be dated back.

Q. When was that done?

A. I think it was after the date of Mrs. McKinney's death, Mr. Parker. Now, I do not recall the date of Mrs. McKinney's death.

The Court—June 23d. It was dated June 22d.

Witness—It was not signed then on the 22d.

Q. What day was it signed then?

A. After Mrs. McKinney's death.

Q. Well, that isn't an answer.

A. Well, I am not sure whether it was the day of her death or the day following. It was either one of those days, I know.

Q. And accordingly it was dated as it appears, I suppose now, was it, do you remember, by you or him?

A. I don't recall that.

Q. I will ask you another question, Mr. Monteith. You related one visit when she came in and you discussed the subject of the suit, the first time, then, you said that she was alone?

A. Yes, sir.

Q. And you told of another visit on Friday, the 19th of June, and you say that she was alone on that occasion, also?

A. Yes, sir.

Q. Now, on the visits in between, were there more than two—you have spoken of two, I think?

A. Oh, there was always somebody with her.

Q. Were there more than two visits in between those two?

A. Oh, yes.

Q. And was anybody accompanying her on those visits?

A. Yes, sir. There was the lady I took to be Mrs. Rutherford, Mr. Rutherford—Mr. McKinney—I beg pardon, Mr McKinney. Mrs. McKinney has been different times.

The Court—You mean Mrs. Frank and Mr. Frank?

Witness—Yes, sir. And at another time three was some other lady with her. I don't recall who it was.

Cross-examination, by Mr. Schotland.

Q. Mr. Monteith, at the time that Mr. McKinney same to see you regarding the estate Mrs. McKinney had in that Plane street property, do you know whether or not there were any negotiations pending for a sale of it?

A. There was.

Q. What did Mrs. McKinney tell you about the sale of the property or proposed sale of it?

A. She told me that she had an offer for the property. I do not recall the amount. It was either ten or twelve thousand dollars, I think. I am not sure.

Q. What else did she say about it?

A. That she was willing and wanted to sell it.

Q. Did she say why she didn't sell? Why she didn't accept the offer?

A. She told me that her grandson objected and stated that she couldn't sell it.

Q. How soon after that was it that her grandson called to see you?

A. Sme time after that.

Q. Now, did you suggest that Charles F. McKinney bring suit against his grandmother?

A. Not at all.

Q. Was the suit that he instituted against his grandmother a friendly suit?

A. No. No; it couldn't be friendly when it was an attack upon her title.

Q. You testified in direct examination that when Mrs. McKinney came to see you shortly before her death—the Friday before her death—you told her not to worry. Why did you tell her that?

A. That Mr. McKinney was going to withdraw his suit?

Q. Why did you tell her not to worry?

A. Because there was no need of worrying any further about her title.

Q. Had she been worrying about the suit while it was pending?

A. Oh, yes. Oh, yes.

Q. Did she appear to be grieved about it?

A. She was disappointed. She was disappointed.

Q. Now, after the bill was filed and after the subpœnas were served, did you ever ask for an extension of time to file the answer?

A. When I told Mr. McKinney the substance of my answer, he said, "Don't file it, I will think about withdrawing—about that suit I think I will withdraw it" and —well, now I said, "Here. I don't want to be caught napping. If you are going to do that I want a stipulation that I can file the answer any time." Mr. McKinney said, "Certainly."

The Court—Did you get one?

Witness—Not that day, Judge. There was one some time subsequent to that, but we understood each other that I could file that answer at any time.

Q. Did Mr. McKinney give you any reason why he thought he would withdraw the suit?

A. Yes, sir; he said he didn't want to cause his grandmother any annoyance if she was worried about it. I had told him she was worried.

Q. Give any other reasons?

A. Well, yes. When I told the substance of my

answer, he said that he didn't think that would look nice on the record and he didn't want it to go in.

Q. What did he refer to as not thinking it would look nice on the record—didn't want it to appear?

A. Well, the defense. Do you want me to go into that whole feature of it?

Q. Not very fully. If the other side want it in full, I wish you would.

Mr. Parker—I think you better.

A. Under the will of Mrs. McKinney's husband she was left a life interest in this particular property. Sometime subsequent to his death the Howards Saving Institution foreclosed this mortgage and Mrs. McKinney bought the property in. Mr. McKinney, that is Charles McKinney's claim was that because of her neglect in not paying the fixed charges against the property, that was the cause of foreclosure, she didn't get any better title under the sheriff's deed than she got by the will. Another way his claim was that she simply had a life interest in the property although the deed appeared to have been in fee. I told him that his grandmother had told me that it was impossible for her to pay the fixed charges against the property because his father had lived in that property and would not pay her rent; that he had lived there for some years and that she had kept—this was Mrs. McKinney's claim I am speaking of—she had kept the family, that the house was old and badly in need of repairs, and that because she couldn't get rent out of the property, out of Mr. McKinney's father, because she had to keep Mr. McKinney's family, had to keep his brother and pay the undertaker's bill when the father died and when his brother died; because of these things it was impossible for her to pay these fixed charges, and at the time of his death the taxes were four or five years in arrears, that is, at the time of her husband's death, the taxes were way in arrears, and the debts were against him; these things had to be paid; so that the substance of

the answer was practically that the foreclosure was not occasioned by any neglect on her part, but was occasioned by an inadequate income from the property to keep up these matters. That is why I refer to as Mr. McKinney not liking to see an answer of that kind filed.

Q. And that is what he referred to when he said he didn't like to see that in print?

A. Yes, sir.

Q. Now, Mr. Monteith, the first time that Mrs. McKinney called to see you after you had received a copy of the bill of complaint, was that one of the occasions when she came alone or accompanied by someone?

A. She came alone the first time.

Q. Was there any offer of compromise submitted to her on that occasion?

A. By who?

Q. By you as having received it from Mr. McKinney?

A. Yes, sir.

Q. What was the offer that was submitted to her at that time?

A. That Mr. McKinney would take the property and would guarantee, I think, between four and five hundred dollars a year, net income.

Q. Was she to deed the property to McKinney?

A. Yes, sir. I think—I think if that thing was brought about I insisted on a mortgage large enough to produce that income, for protection.

Q. To secure her?

A. Yes, sir.

Q. And you so advised her?

A. Yes, sir.

Q. Did she agree to accept that proposition?

A. No; she said she would think about it.

Q. Now, she came to see you, I understand, about a week after that?

A. I am not sure of the day.

Q. Sometime after that?

A. Sometime after that.

Q. And then she was accompanied by Mrs. Frank McKinney?

A. Yes, sir; I think it was.

Q. That was the occasion when Mrs. Frank McKinney came with her?

A. Yes, sir.

Q. Well, now, what was Mrs. McKinney—Mrs. Frederica McKinney say about the proposed compromise?

A. It wasn't acceptable.

Q. Did she give you any reason?

A. No—yes, she did. I recall she says, "I suppose that means I will have to get out of the house." I said, "I suppose it will." Now Mr. McKinney never told me that, that he would ask her to vacate the house. He never told me that. That was simply the thought, that that was involved in it.

Q. No, but when she asked you if accepting that compromise meant that she would have to get out of the house, you advised her that you thought it would?

A. Yes, sir.

Q. Well, was that advice based on any information as to any use McKinney was going to make of the property?

A. Not at all.

Q. Simply your supposition, and that was her strong objection to accepting the compromise?

A. No, no. I don't want to say that. I don't know. She simply said that it wasn't acceptable to her.

Q. Did the lady that was with her interfere any way with what she was saying, as to what she would do or wouldn't do, or make any suggestion to her in your presence?

A. Well, the lady that was with her was not favorable to the compromise. She did say that, yes, sir.

Q. What did she say?

A. She advised her not to take it. She said she thought she ought to handle her own property.

Q. When was the next time that she called on you after that?

A. Shortly after that. You see she was getting information for me, you know, on which to base the answer, Mr. Schotland; getting various points, looking up bills and one thing or other.

Q. She was gathering that up?

A. Gathering data.

Q. For you?

A. Yes, sir.

Q. And intending to fight this suit?

A. Oh, yes.

Q. Was there any further talk of compromise?

A. I talked two or three times to her about it, but then I talked to Mr. McKinney about it, and told Mr. McKinney—

The Court—You mean Mr. Charles?

Witness—Mr. Charles; yes, sir. I told Mr. McKinney to get me the best offer that he could, that that other offer wasn't acceptable, and to get me the very best offer that he could and I would submit it to her again. He said he would.

Q. The first offer was $900 a year income?

A. He mentioned that he thought he could get $900 out of it, but before I submitted that that proposition had been knocked in the head because he couldn't get it.

Q. How was he going to get that $900, did he explain to you?

A. I think it was something about the erection of a garage, or something or other.

Q. Did Mr. Frank R. McKinney ever call on you alone regarding the arranging for a compromise?

A. I don't think he did.

Q. Do you recall whether he ever called on you and told you that you had better arrange a compromise if you could, providing the old lady could remain in the house?

A. No. Mr. McKinney did say—he mentioned the

fact that the old lady would be very much disappointed if she couldn't remain in the house. He said that wouldn't be satisfactory, but he didn't ask me to sub- the old lady remain in the house?

Q. I am not asking you as to whether he asked you to submit an offer, but simply whether he didn't suggest that you arrange a compromise, if you could?

A. No.

Q. Providing the old lady could remain in the house?

A. No. I have no recollection of such a suggestion.

Q. All that he spoke about was the desire to have the old lady remain in the house?

A. No; that was—well I don't know whether he said that. He did say that it would break the old lady up if she had to go out of the house.

Q. How many times did he call with the old lady at your office?

A. Once or twice, and he called alone once and brought me information relative to taxes.

Q. Did you have written out the information imparted to you by Mrs. McKinney for purposes of an answer?

A. I had.

Q. Is this a copy of the information she gave you (showing witness paper)?

A. It is.

Q. That was written out in your office?

A. It was.

Q. At your dictation?

A. It was; yes, sir. It was dictated right in her presence.

Q. Right in Mrs. McKinney's presence?

A. Yes, sir.

Paper marked *Exhibit P2* for identification.

Q. Is this your office copy of the discontinuance of the Chancery suit of Charles McKinney?

A. Yes, sir.

Paper marked *Exhibit P3* for identification.

By the Court:

Q. Mr. Monteith, when the first will, *C2,* was prepared and completed, you say that you didn't keep it and you must have given it to Mrs. Frederica McKinney. Is your recollection clear about that? Did you give it to her? Put the question in another way. Is your recollection clear that you did not give the will to Mr. Charles McKinney as administrator?

A. Oh, positively.

Q. He did not get it from you?

A. Oh, no; not at all. I don't know where he got it.

Q. And since her death you haven't seen it?

A. I have not.

Q. Except as it has been produced in Court?

A. No, sir.

Q. You do not recall having seen it since the time it was executed?

A. Not at all. In fact it had escaped my recollection, the drawing of the will at all, and I told Mr. McKinney that I didn't recall drawing a will.

Q. When did you tell him that?

A. I told Mr. McKinney that right after Mrs. McKinney's death, before, I think, he was appointed administrator.

Further cross:

Q. Mr. Monteith, on the occasion when Mrs. McKinney called the Friday before her death, what was her mental condition as far as you could observe?

A. Oh, she was—

Mr. McCarter—I object.

The Court—Objection sustained.

Q. How did she act with reference to the matter she came to see you about?

Mr. McCarter—I object.

The Court—You cannot have him characterize a person's conduct. She can tell us what she

did and what she said and we may then draw your own inferences.

Mr. Schotland—I will withdraw the question.

Helen Weston, recalled for further cross-examination, by Mr. McCarter.

Q. Have you found the chart that you used, Miss Weston, at the bedside of Mrs. Frederica?

A. I have.

Q. Produce it, please.

A. (Witness produced papers.)

Mr. McCarter—The witness produces two papers printed "Clinical notes." I would like to have them marked.

Papers marked *Exhibit C9* for identification.

Q. What time did you commence your official work as nurse on Sunday, can you recall?

A. At twelve o'clock. I arrived at noon.

Q. So that you noted on here "Twelfth hour." That meant the time you started?

A. Yes, sir.

Q. Is this the original of your chart or a copy?

A. That is the only chart I got.

Q. And you made all the entries on here down to 1 P. M. on Sunday?

A. On Monday morning.

Q. Monday noon, I mean. I ask you why you stopped making entries after 1 P. M. Monday noon when you had entered observations, and remarkes and statements at twelve o'clock on Sunday, at two o'clock, at four o'clock, at five o'clock, at 7:15, at eight, at eleven, at two A. M. Monday, at four A. M., at five A. M., at seven A. M., at eight A. M., at ten A. M., at 10:30, at eleven, at 11:30, at twelve, at 12:30 and one?

Mr. Lum—I object unless your Honor wishes it. It is repetition. Witness has testified why she did not.

The Court—Objection overruled.

Q. Why did you stop making any entries at one o'clock on Monday?

A. That was the last time I had given the strychnine hypodermically. Before two I went to bed to lie down. I had been up all night. The patient had been very anxious that I should have some sleep; and furthermore the doctor didn't seem to need the chart, even when I started it. That was the reason I gave it up then.

Q. When did you come out of your sleep and resume your duties on Monday?

A. I told the—

Q. No, no. When did you resume your duties?

A. The doctor arrived about five minutes to four.

Q. Will you answer my question? On Monday—

A. On Monday; that is when I resumed my duties.

Q. Well, five minutes to four were you called?

A. I was called.

Q. To see the doctor?

A. I had left word—

Q. To see the doctor?

A. Yes, sir.

Q. To report to him?

A. Yes, sir.

Q. Yes; and did you report to him?

A. Naturally, I went in the room.

Q. What?

A. Yes, sir.

Q. Well, you saw the doctor again that night, didn't you?

A. Yes, sir.

Q. Now, he didn't tell you to stop making your entries, did he?

A. No.

Q. No. And she lived until about two o'clock the next day, that is, Tuesday, didn't she?

A. Yes, sir.

Q. So that she lived about twenty-five hours after you ceased making the notes?

A. Yes, sir.

Q. I notice that at twelve o'clock on Monday, June 22d, your memorandum says "Mustard poultice applied to region of the heart." Do you observe that?

A. Yes, sir.

Q. What was that for?

A. Because the doctor told me to put it on. She complained of a pain around her heart.

Q. When was it she complained of pain around her heart?

A. Around five o'clock in the morning.

Q. And when had the doctor told you to put it on?

A. The doctor came at ten o'clock.

Q. Yes. Well, why didn't you put it on then, as soon as the doctor told you to put it on?

A. I did put it on.

Q. What?

A. I did.

Q. At ten o'clock?

A. No—yes; put it on at ten o'clock.

Q. Sure of that?

A. Yes, sir.

Q. Now, you are quite sure you put it on at ten o'clock?

A. Yes, sir.

Q. Why didn't you note it on your chart?

A. Well, I put that further down.

Q. What?

A. I just merely put that further down.

Q. Yes. Now, look at this chart and tell me if it isn't true that there is an observation on the same line with almost every hour that you note here?

A. Yes, sir.

Q. Remarks—orders and remarks—and under that column are these observations?

A. Yes, sir.

Q. At ten o'clock you say you saw the doctor?

A. Yes, sir.

Q. On Monday, June 22d, and you say it was then that he told you to apply the mustard plaster around the region of her heart?

A. Yes, sir.

Q. You have a remark at ten A. M.? "Visited by Dr. Phelan," haven't you?

A. Yes, sir.

Q. You have a remark at 1 : 30, "Raised large amount of gas"?

A. Yes, sir.

Q. You have a remark at 11 :30, "Very restless." Have you not?

A. Yes, sir.

Q. You have a remark at twelve, "Mustard poultice applied to region of heart," is that right?

A. Yes, sir.

Q. And that is the time it was applied?

A. No.

Q. What?

A. I applied it after the doctor left.

Q. Why didn't you enter it then when you made these other entries?

A. Because that was a matter of minor importance, about that mustard poultice.

Q. Nevertheless, it was important enough to put it down out of place?

A. Well, I couldn't put them all on the same line.

Q. But you, on the previous page, had written several lines?

A. Yes, sir.

Q. Where you hadn't room on one line, hadn't you? What was there to prevent, after you put down, at ten o'clock, "Visited by Dr. Phelan," "Mustard plaster —mustard poultice applied to region of heart?" What was there to prevent that?

A. Well, I often chart that way for a matter like that.

Q. Oh, I see. You think, then, that the application of the mustard plaster to the cardiac region was a mere trifle, eh?

A. The doctor told me to put that on because she asked for a poultice.

Q. I didn't ask you what the doctor told you. I asked you if that was a mere trifle?

A. Well, it pacified her mind. She wanted a poultice. I told the doctor when he arrived about her asking for a poultice.

Q. I asked you what you thought, Miss Weston. Simply whether you thought it was a trifling or important thing, not what the doctor said or what she said. What was the fact? What did you think?

A. Well, it would relieve her.

Q. Now, you spoke the other day of having administered stimulants to this patient. Do you recall that?

A. Yes, sir.

Q. And I think you said that a short time ago, if I am not mistaken, you said that the reason why you stopped at one P. M. on Monday with your entries was the fact that that was the first time that you had hypodermically administered—

A. No, sir; I didn't say it was the first time. I had given the hypodermic at one o'clock. After that I retired.

Q. Didn't you say that was the first time you had given it hypodermically?

A. No, sir; I didn't say it was the first time I gave that hypodemically.

Q. Well, in fact, you had given a hypodermic injection of strychnia at ten o'clock that morning?

A. I did. I gave it at seven.

Q. At ten o'clock that morning?

A. Yes, sir.

Q. At seven that morning?

A. Yes, sir.

Q. Had you given her any hypodermics of strychnine previous to seven o'clock Monday, June 22d?

A. No.

Q. You had given her no stimulant before that?

A. No, sir.

Q. So that all the stimulant you gave her, then, was hypodemically?

A. Hypodermically.

Q. Didn't you tell us the other day it was internally?

A. No, sir.

Q. By mouth?

A. I did not.

Q. Sure of that?

A. I am sure.

Q. Who supplied you with these clinical notes or charts?

A. I buy them.

Q. You took this with you when you were called?

A. I always do.

Mr. Parker—I wish to offer in evidence a mortgage made by Mrs. Frederica C. McKinney to the Howard Savings Institution, July 23, 1888, $2,850, which was the same day upon which she received the deed from the sheriff on the foreclosure of the previous mortgage to the Howard Savings Institution. Copy.

Mr. Lum—Objected to as immaterial, irrelevant, and incomeptent to this issue.

The Court—You do not object on any ground of competency. Your objection relates to the question of relevancy. You do not object because it is a copy or because it is not certified?

Mr. Lum—No, sir.

The Court—Objection overruled.

Paper marked *Exhibit C10.*

Charles Whitnall sworn for Caveator.

Direct examination, by Mr. Parker.

Q. What is your business?

A. Conducting a bureau of civil and criminal investigation.

Q. In June, 1914, were you requested by Mr. Charles

F. McKinney to do anything for him at the premises known as 370 Plane street?

A. Yes, sir.

Q. Do you remember what day it was?

A. June 26th.

Q. And what occasion was there upon that day?

A. He asked me to go down to 376 Plane street and take a man with me—

Mr. Lum—I object to conversations that he may have had with Mr. Charles McKinney.

Q. You do not answer the question. Was there a funeral or anything going on that day?

A. Yes, sir.

Q. Do you know whose?

A. Yes, sir.

Q. Whose was it?

A. Frederica C. McKinney.

Q. And did you on that occasion meet Mr. Frank McKinney who sits over here?

A. Yes, sir.

Q. And talk with him?

A. Yes, sir.

Q. Was it before or after the funeral?

A. After.

Q. What did Frank McKinney say with reference to Charles McKinney and his grandmother?

A. I can't remember his exact words. I can give you the substance of it.

Q. Well, you have got to testify to your recollection.

A. Yes, sir. He did say that Charles McKinney was a contemptible pup; said he had no use for him; never had had. He said that he was—he had caused his grandmother's death by his disagreeable manner towards her. He said that at one time he himself had suggested that $2,000 be raised by mortgage for the further maintenance and comfort of the old lady—he referred to her as—but that Charlie McKinney had objected to its being done, and that he had incurred the enmity of the old lady in so doing.

Q. Did you notice when—were you there when Charles McKinney returned after the interment?

A. I was.

Q. Was Mr. Frank McKinney there then?

A. Yes, sir.

Q. Did you see him do anything, with reference to Charles McKinney?

A. Yes, sir.

Q. What?

A. At the entrance to the house he sperad his arms out in trying to prevent Mr. Charles McKinney from entering the house.

Q. Were there any words between Charles and Frank?

A. Yes, sir.

Q. What?

A. Frank asked me, or asked him—the question was directed either to myself or Charles McKinney, I don't know which—or to both of us—what we were doing, and I answered saying that I was there to prevent—that I had been asked to come there by Mr. Charles McKinney to prevent anyone entering the apartment during the absence of the tenants at the funeral. Then Charles McKinney said he wanted to get some smelling salts or some whiskey, or something of the sort, to revive his mother who was in a depressed condition, and as I recollect he finally gave him admittance to the house.

Q. Did you hear anything else said by Charles—by Frank after they got into the house?

A. Yes, sir.

Q. What?

A. He says, "You damn contemptible little pup," he says; "Why do you come here at this time," he says, "and create a disturbance here in this house, while the mourners are here—haven't even left."

Q. Anything else?

A. Did you want Charlie's answer?

Q. Yes.

A. He said that he hadn't come here for any such purpose at all, that he come there with the best intention. It was the furthest from his mind to create any trouble at that time.

Q. Anything further said by Frank?

A. I can't recollect specifically, any more than his general language was abusive.

Cross-examination, by Mr. Lum.

Q. You were employed by Mr. Charles McKinney to go to the premises and engage Mr. Frank McKinney in conversation, were you?

A. No, sir.

Q. What was the nature of your employment?

A. To guard the house during the absence of the attendants at the funeral; to see that no one entered who had no right to.

Q. You had a conversation with Mr. Frank McKinney, you say?

A. Yes, sir.

Q. When?

A. At his arrival from the funeral.

Q. What is that?

A. At his arrival from the funeral.

Q. Who was present?

A. Mr. Charles McKinney, Mr. Van Blarcom, my assistant.

Q. Any one else?

A. No, sir; not at that time, that I recollect.

Q. Where did the conversation take place?

A. At the entrance to the house—the building.

Q. Are you quite accurate in your recollection of the conversation?

A. I believe I am; yes, sir.

Q. Now, are you sure that he said that he never had had any use for Charles?

A. No, Mr. Lum, pardon me. That did not occur

at his arrival from the funeral. That occurred after and in the absence—

Q. That conversation, I am talking about.

A. That had occurred after Mr. Charles had left the premises and gone uptown, he said, to keep a business appointment, and I remained, and that is when Mr. Frank told me these things.

Q. On the return of the funeral you kept everyone out of the premises, did you not, or attempted to?

A. After the return from the funeral? 10

A. No, sir. There were others who entered the house after that.

Q. Did you not stop Frank McKinney from going into the house?

A. I didn't stop him. I didn't know who he was and I asked him who he was—no; I don't think I asked him who he was.

Q. Told him he couldn't go in?

A. I don't know that I told him that, but I objected to—I don't know that I even objected to him. I didn't 20 know whether he had a right in the house or not, and I stood in sort of a—perhaps a questioning manner. I don't know how else to describe it.

Helen Weston, recalled for

Further cross-examination, by Mr. McCarter.

Q. Miss Weston, I notice that this chart has three columns, T. P. and R. That means temperature, pulse and respiration?

A. Yes, sir. 30

Q. And that in the column, temperature, you have a memorandum of Rect. That means that the pulse was always a rectal pulse. You have several instances—in fact all, I think, where there is any temperature noted, it is accompanied by the phrase "Rect." What does that mean?

A. Rectal.

Q. Rectal. Why did you examine her pulse rectally

—temperature—rectally rather than under the arm or in the mouth?

A. We usually—because this is a more accurate temperature.

Q. That is the only reason?

A. No.

Q. I asked you why?

A. Because usually a person in her condition, their mouth is partially open sometimes.

Q. Yes. Yes. Then the fact was her mouth was

A. Not always open; no. Sometimes.

Q. Well, every temperature you took was a rectal temperature?

A. Rectal temperature, yes, sir.

Q. Every one?

A. Yes, sir.

Q. Now, why do you say that was, about the mouth being open? What is your point about that?

A. Sometimes the mouth is open and it cools the mouth.

Q. To have it open?

A. Certainly.

Q. Did that have anything to do with the fact that in this case that on every instance you took a rectal pulse?

A. No. When I start to take a rectal temperature I continue to take a rectal temperature.

Mr. McCarter—I offer the chart in evidence.

Paper marked *Ex. C9* by striking out the words "for Identification."

Caveator rests.

Victor L. Hesse, sworn for Proponent.

Direct examination, by Mr. Schotland.

Q. What is your business?

A. Real estate.

Q. With whom are you connected?

A. With Mr. Louis Schlesinger.

Q. Did you enter into any negotiations with the late Mrs. McKinney regarding the sale of the Plane street property?

A. I did at a certain time.

Q. When was that?

A. As near as I can recollect, about two years ago.

Q. Was Mrs. McKinney anxious to make the sale?

The Court—How is that competent, counsellor, and why waste time on it? What she did and what she said, not his judgment about what he thinks.

Mr. Schotland—I just want to get the witness' mind down to the actual point.

The Court—I know what you want to get your witness' mind to and the Court distinctly calls your attention to the fact that that is incompetent, and counsel ought to know it.

Q. What did Mrs. McKinney do?

The Court—You cannot ask questions now as to this particular branch of the subject at this time. Go off on some other subject first and come back later.

Mr. Schotland—If the court please, this is the only point on which I want to examine the witness.

The Court—Let him get off the stand for awhile and call somebody else.

Q. Did you have a conversation with Mr. Charles McKinney?

A. I did.

Q. When was that?

A. Well, as near as I can recollect a year ago September, about that time.

Q. Just give us what took place at that conference as near as you can remember?

A. Well, as near as I can remember I went to him to see whether there would be any objections to our making a sale of that property.

Q. How did you come to go to him?

A. I went there because she said that—she said that he probably would—Mr. McKinney would probably interfere with any business that she transacted.

Q. And what did he say when you had your conference with him as to interfering with that business?

A. Well, he said he wouldn't allow her to sell it, that he always claimed the property as heir; that she could not give a clear title. Something of that effect.

Q. He claimed the property was whose?

A. That he had a claim on the property; that she couldn't give a clear title.

Q. Did the sale go through?

A No, sir.

The Court—Now you can ask him about the other matter is you want to.

Mr. Schotland—I think that is sufficient.

Cross-Examination, by Mr. McCarter.

Q. Mr. Hesse, have you done anything to refresh your recollection as to when this talk with Charles took place?

A. No; I haven't had time since this morning to go over my books, but I should judge it was about a year ago last September.

Q. What makes you think it was then?

A. Well, I recollect about that time. If I looked over my books probably I could get the dates exactly.

Q. Who first brought the matter of this property to your attention?

A. A Mr. Campton brought the attention of the property to my attention.

Q. Harry Campton, the lawyer?

A. Yes, sir.

Q. On whose behalf?

A. Well, he said that he knew of a lady who wanted to sell some property in Plane street, in conversation, and I said that I thought I had a customer who probably might be interested in property of that kind.

Q. Did he tell you who the lady was?

A. Yes, sir.

Q. Mrs. McKinney?

A. Yes, sir.

Q. So you went to see her?

A Yes, sir.

Q. And at that interview, as I understand you, she said that her grandson, Charles, said that she hadn't any title—couldn't give title. Is that what she said, or words to that effect?

A. She said if she tried to sell it that probably he would interfere. He wouldn't allow her to give title to the property, and she told me stories, of course—

Q. Now, let me ask you this. See if this letter is signed by you and if it will refresh your recollection as to the date of your call upon Charles?

A. June 24, 1913. That is about the time.

Q. What?

A. About the right time. It was before that time.

Q. Now, one moment.

A. Before.

Q. One moment. Please read that letter, and now tell us when it was that you called upon Charles and had this interview?

A. Well, I have read the letter. It was a little before June 24th.

Q. What did you say to him this day?

A. I had been to see him, I think, a day or two, and I think he was very busy and then I wrote him that letter, and he said he would let me know.

Q. It was then about June 24, 1913, that you saw him?

A. Yes, sir.

Q. And not September?

A. Well—

Q. That is the fact, isn't it?

A. Yes, sir.

Q. All right. Very good. Now, did he explain to you the nature of her title as he perceived it?

A. What is that?

Q. Did he explain to you the nature of her title as he viewed it?

A. Well, he went over some little conversation there.

Q. You are not answering my question at all. Did he or did he not explain to you—

A. Yes, sir; I believe he did say that she couldn't give title to it.

Q. Yes. You know Frank Rutherford or McKinney, don't you?

A. No; I don't know as I do.

Q. This—(indicating.)

A. I don't know as I do know him. I just probably from sight, that is all.

Q. This gentleman coming in and sitting down here?

A. No; I don't know him.

Q. Don't know him? Well, you, as I understand it, were not sure that you had any absolute purchaser for this particular property?

A. Yes, sir; I had some people that were interested in the property. Hadn't made me no offer, but I had people interested in it.

Q. In Plane street property or this particular tract?

A. This particular part because it covered the front and stables and an alley for egress, to come in and out with freight. It was—I don't mind telling you who the people are.

Q. I don't care anything about that. I ask you if you had people who were—

A. I had people who were interested in the peculiar combination of this property.

Q. As soon as Campton mentioned that possibly that property could be had, you went to see the party he said owned it?

A. Yes, sir.

Harry Campton, sworn for proponent.

Direct examination, by Mr. Lum.

Q. You are a practicing lawyer, Mr. Campton?

A. Yes, sir.

Q. Did you know Mrs. Frederica McKinney in her lifetime?

A. Yes, sir.

Q. How did you first come to meet her?

A. She came to my office, and I think she was sent there by Mr. Monteith in relation to a matter of her own. Should I tell you what that was?

Q. If you will, please?

A. She claimed and she had in her possession a bank book of the Howard Savings Institution in which there was a deposit of something like $300 or a little more. She claimed that the book had been given her by an old servant who she had befriended many times, and that it was a gift *cum causa mortis,* and that she wanted to get the money.

Q. Do you remember the name of the old servant?

A. I do not. I could tell if I had my papers, but I was requested to come her this morning and never thought about it. When I was doing that business for her—and I did obtain the money and she had it—she told me about the property in Plane street.

Mr. McCarter—I think we ought to know when this was.

Q. When was this?

A. I can't recollect. It must have been—it seems to me it is two years ago, but I can't recall.

Mr. McCarter—A little more?

Witness—Or not quite as much. I don't know. If I had my papers I could tell.

Q. Well, did you communicate with Mr. Hesse at about that time?

A. Well, afterwards I did, because after I had given her the money I think she told me more about her property and said she would like to sell it.

Q. What do you mean by giving her the money?

A. When I gave her the $300—obtained the $300 from the bank—after all my proceedings were through.

Q. What bank had you received that money from?

A. From the Howard Savings Bank of which John Monteith is one of the counsel, but, of course, I had to see Pitney, Hardin & Skinner, the head counsel, to obtain the money in the proper way, to have my paper approved and the bonds that I gave and all that sort of thing.

Q. Well, now, Mr. Campton, you did see Mrs. McKinney, you say, after this with refernce to the property?

A. Yes, sir.

Q. Now, what did she say to you?

A. She told me that she wanted to sell the property and then explained that her—

Mr. McCarter—I object.

Q. What did she say?

A. She said that her grandson objected.

Mr. McCarter—One moment. Haven't I a right to object? I object to declarations and statements by Mrs. Frederica so long ago. The fact that she wanted to sell the property I have not objected to, but a long story—a talk with Mr. Campton, does not seem to be relevant, your Honor. The fact that she offered the property for sale we have not objected to. We think that is proper under the circumstances, but further than that I do not think we ought to go.

The Court—You are going to argue that she knew all about the claim of Charles, that she made the Monteith will, and until June 22, never changed it.

Mr. McCarter—Yes, sir.

The Court—Now, I think her declaration of intention would be competent. I do not think it it is too remote. Answer the question.

Witness—What is the question, please?

Q. What did she say at that time?

A. She said that she wanted to sell the property, but Mr. Charles McKinney, a nephew—a grandson—

would object to it, and I asked her to tell me then if she meant the lawyer, and she said she did, and I said then I know him very well and I says "Why does he object?" "Because," she says, "he claims that his father has an interest in it." I said "I don't know about that. How long have you had it?" and she said she would bring me her papers and she did, and I looked them over and I said, "Well, I can't tell much about all this unless I make a search and that might cost you a little money, but it seems to me you own this property and can do as you please with it." She says, "That is what I claim. That is what I have been told by other people." Well, I said I did. After that I think I saw her again. I said, "Did Mr. Hesse come and see you about the property?" She says, "Yes." I said, "That is the man I told about it."

Q. What did you say, if anything, about her grandson at that same interview?

A. Why, she said things in a way that would make you think—

Mr. McCarter—Now come, come.

Q. What did she say?

A. She said "He always interfered with me and he has always told me that his father had something to do with the property, and that if I tried to sell it he should stop me from selling it." Now, she said that.

Q. Do you recall if she said anything else about her grandson, if so, what, giving us the words as near as you can recall them?

A. She said, "I have always been good to him and his father too, and I don't see why he does this to me now, because he doesn't come to see me very often now only to tell me that I musn't sell the property."

Cross-examination, by Mr. McCarter.

Q. Have you any way to fix the date of that conversation—the last one you have just referred to?

A. Yes, sir; I could fix it because I am quite sure

that it happened almost directly after I gave her the money and I think I had a copy of the order that was made by the Court of Chancery about this gift of the hand book.

Q. Was it before or after you sent Hesse to her?

A. Well, it was both before and after, I am sure.

Q. This last conversation, I am referring to.

A. Oh, the last conversation was after, because I know I got her deeds after that and the sherif's deeds and some tax certificates and quite a lot of papers. She brought them—I seen them—I had them in my possession.

Q. You said that when she came to see you she claimed that she had been given this bank book by a gift *causa mortis.* Was that he phrase?

A. No, I said that.

John Harrigan, sworn for Proponent.

Direct examination, by Mr. Lum.

Q. Where do you reside, Mr. Harrigan?

A. 441. Plane street.

Q. Are you in anywise related to any of the parties in this matter?

A. No, sir.

Q. Did you know the late Frederica C. McKinney?

A. Yes, sir.

Q. How long had you known her?

A. Twelve years.

Q. Well or not?

A. Very well.

Q. And will you tell us whether or not you often called at her house?

A. Yes, sir.

Q. How frequently?

A. Why almost every Sunday.

Q. Almost every Sunday?

A. I used to leave the paper there when I was small and I followed the custom up.

Q. During the last couple of years how many times have you seen Mr. Charles McKinney at Mrs. Frederica McKinney's house on Sunday?

A. I used to be there on Sunday morning. I never saw him there.

Q. And when did you last call on her?

A. Sunday before she died.

Q. And where was she when you called?

A. Upstairs is the bedroom where she was sick.

Q. And where was she?

A. In the sick room.

Q. Up or in bed?

A. In bed.

Q. And did you speak to her at all?

A. Yes, sir.

Q. Tell us what took place as nearly as you can recall it?

A. We said hello to her, my brother and I—we greeted her, and she asked for my mother. She complimented us on being two fine boys and then when we were leaving she shook her hand and said to pray for her.

Q. Did she recogsize you?

A. Yes, sir.

Q. What time Sunday was this?

A. Why, about twenty minutes after ten in the morning.

Cross-examination, by Mr. McCarter.

Q. Did you know she was sick when you went in there?

A. Yes, sir.

Q. Who told you?

A. My little brother told me.

Q. William?

A. No, sir; smaller brother.

Q. What is his first name?

A. Matthew.

Q. Matthew, Mark, Luke and John. Now then, was Matthew there that day?

A. No, sir.

Q. You and William were?

A. Yes, sir.

Q. Go arousd for the purpose of seeing her?

A. Yes, sir.

Q. And who else did you see?

A. Why Miss Clark and Mrs. Rache, Mrs. Francis McKinney and Mrs. McKinney.

Q. Mr. Frank McKinney?

A. Yes, sir.

Q. Where were they, upstairs in the sick room or—

A. Mrs. Rache was in the sick room.

Q. Mrs. Rache was in the sick room at the time?

A. Yes, sir.

Q. You had heard she was very ill, had you?

A. Yes, sir.

Q. So much so that Matthew told you?

A. Yes, sir.

Q. You didn't see her grandson Charles there that mornisg either, did you?

A. No, sir.

Q. Well, did you ask if she was too sick to see you?

A. I asked—they said I could go up and just see her and not stay long.

Q. Who said that?

A. Why, Mrs. Francis McKinney.

Q. Just go up and see her and not stay long?

A. Yes, sir.

Q. Was the nurse in there then?

A. No, sir.

Q. Well, she laid there with her mouth open, did she?

A. No; she had to get herself up to speak to her.

Q. What?

A. She almost sat up.

Q. Propped up?

A. Just a little.

Q. You are describing it. I wasn't there.

A. Why, she just lifted herself up to speak to us, to look at us.

Q. Was she propped up with a pillow?

A. There was a pillow under her head as far as I could see.

Q. Was your brother William with you?

A. Yes, sir.

Q. Went up together?

A. Yes, sir.

Q. Well, how long were you in the room?

A. About three minutes.

Q. Yes. And did anybody go with you besides you and William?

A. Mrs. Rache stood in the doorway.

Q. She stood in the doorway?

A. Yes, sir.

Q. And where did Mrs. Frank stay after she told you that you could see her if you wouldn't stay long?

A. She stayed downstairs.

Q. Downstairs?

A. Yes, sir.

Q. And where did Mr. Frank stay, downstairs, too?

A. Yes, sir.

Q. When did you see Mrs. McKinney before; the old lady?

A. About three Sundays before that.

Q. Well, she was very weak, wasn't she?

A. Yes, sir.

Q. How do you know she was weak?

A. Why, she was a pretty old lady and I thought she was weak.

Q. I didn't hear that. What did she do or how did she look that made you satisfied she was very weak?

A. I would think anybody that was sick was weak as far as I know. I am no doctor.

Q. Yes. Did she talk out loud or in a whisper?

A. She talked plain—just as plain as she ever talked.

Q. No trouble in talking?

A. No, sir; not then.

Q. Did they tell you what the trouble was?

A. No, sir.

Q. They knew you had been told to come to see her?

A. That was the custom. I always went to see her.

Q. No, no; they knew you had been told to come to see her?

A. Yes, sir.

Q. Matthew told you she was very sick?

A. Yes, sir.

Q. You came and told them that, didn't you?

A. Yes, sir.

Q. Now, you say she complimented my brother and me on being two fine boys. Is that what she said, "I compliment you on being two fine boys?"

A. No, sir; she didn't use "compliment." She said "two fine boys."

Q. "Two fine boys?"

A. Yes, sir; that is what she said.

Q. Had you been to church that day?

A. Yes, sir.

Q. She asked you to pray for her when you went to church again?

A. Yes, sir.

Q. You made up your mind she was a very sick woman?

A. Yes, sir.

John Monteith recalled for further cross-examination by Mr. Lum.

Q. You spoke of having received $50 from Mrs. Frederica McKinney on the Friday before her death?

A. Yes, sir.

Q. Had you received any other payment in connection with your services in this bill in Chancery?

A. I had previously received $50.

Q. Making $100 in all?

A. Yes, sir.

Redirect, by Mr. Parker.

Q. When did you get your first payment?

A. I don't know.

Q. Who gave it to you?

A. Mrs. McKinney.

Q. The old lady?

A. Yes, sir.

Recross.

Q. Was she alone when she paid you?

A. No; I don't think she was.

Amelia Clark, sworn for Proponent.

Direct examination, by Mr. Lum.

Q. Where do you live?

A. 376 Plane.

Q. How long have you lived there?

A. About 51 years, pretty near.

Q. Did you know the late Mrs. Frederica C. McKinney?

A. I do.

Q. How long have you known her?

A. About 51 years, altogether.

Q. Did you live with her any of that time?

A. I lived with her all the time.

Q. All of the 51 years?

A. All of the 51 years.

Q. In what capacity?

A. As a companion and attending to her financial duties.

Q. Were you compensated during any part of this time?

A. Well, for twenty years I have not been compensated. Thirty years I worked and paid my board. For twenty years I received no pay.

Q. And what did you do for her around the house?

A. Well, I attended to the business. I attended to her employment agency. I read all her letters and read

the paper and acted as a general companion in every way.

Q. And for 20 years you received no compensation?

A. I received no compensation.

Q. Now, you say you read to Mrs. McKinney?

A. I did.

Q. Was she able to read to herself?

A. She was not.

Q. Did you ever see her write anything beyond her name?

A. I did not. With very difficulty she could write her name—with very great difficulty.

Q. How much of the time were you at the house?

A. I was at the house all the time excepting when I had to go out on business.

Q. On an average, how many times—how much of the day would you be away from Mrs. McKinney in the last four or five years?

A. Well, not very much, unless it was absolutely necessary that I should go.

Q. Well, in the ordinary week, give us some idea. Would you be away for five minutes, or five hours, or more?

A. Well, sometimes, two hours—three hours. I couldn't exactly say.

Q. Two or three hours in a day or a week?

A. Well, in a day, sometimes an hour, and sometimes more. I couldn't exactly say how many—how much of the time.

Q. Did you have any duties of your own aside from living there?

A. I did not, only attending to her business—all of her affairs.

Q. Did anyone besides you ever read her letters to her?

A. Only myself.

Q. Do you remember her receiving a letter from Mr. Monteith?

A. I did.

Mr. McCarter—I object unless she has got the letter.

Q. Have you the letter?

A. I have not.

Q. Who has it?

A. Well, I don't know where it is.

Q. Letter received from Mr. Monteith?

A. Oh, from Mr. Monteith?

Q. Yes.

A. No. There was a letter came, but it was for her to go to Mr. Monteith's office.

Mr. McCarter—I object.

Q. Have you got the letter?

A. I haven't got it here just now.

Q. Where is it, at your home?

A. I don't know whether the lady has got it or not. I think Mrs. McKinney has it.

The Court—Mrs. Frank McKinney?

(Witness—Mrs. Frank McKinney.

The Court—What does the testimony show as to what Charles McKinney said on the witness stand about where he got the will. My recollection is that he was asked the question, "Did you get this will as administrator?" And he said, "Yes." Now, was he asked specifically where he got it?

Mr. Parker—I think it came out that it was handed over to Mr. McKinney by the persons representing Frank.

Mr. Lum—Mr. Schotland gave it to him.

Mr. Schotland—It didn't appear in the testimony, but the fact is that I personally gave him that will.

The Court—I suggest to counsel the advisability of tracing the possession of that first will.

Mr. Lum—I think it will be well.

Q. I show you a letter dated March 10, 1914, ad-

dressed to Mrs. Frederica C. McKinney, 376 Plane street, city, signed John Monteith. Did you ever see that before?

A. I haven't my glasses here with me.

Q. Did you ever see that before?

A. No, I never did. I don't remember seeing that.

Q. That letter from Mr. Monteith?

A. Well, I can't exactly say unless I had my glasses, and I haven't them with me. The letter that I saw was from Mr. Montieth to go to his office, that he had something of importance.

Mr. McCarter—I object.

Mr. Lum—Never mind until you get your glasses. Will you bring your glasses when you return this afternoon?

Witness—I will; yes, sir.

Q. Now, Miss Clark, did you ever see—ever read to Mrs. McKinney in May of last year a letter from her grandson, Charles, with reference to his coming to dinner?

A. Never. I never saw any letters.

Q. And you are not related to any of the parties?

A. No, sir.

Q. And will you tell us whether or not the late Mrs McKinney was very active?

A. She was up to the time of her last sickness; very active.

Q. How long was she ill?

A. Well, she was ill from Friday night until the time she died, 23d of June.

The Court—Friday, June 19th?

Witness—Friday, June 19th.

The Court—Is that the Friday?

Mr. Lum—That is the Friday you mean?

Witness—Friday evening she complained, but not before.

Q. Not before?

A. After she came home from the lawyers.

Q. Where had she been that day, do you know?

A. She had been to the lawyers in the afternoon.

Mr. McCarter—I object. That is hearsay.

The Court—Objection sustained.

Q. Did you go anywhere with her that day or did she go alone?

A. I did not. She went alone.

Q. Did she speak to you about where she had been?

A. She spoke to me and said she was going.

Q. Going where?

A. And went to the lawyers about three o'clock in the afternoon.

Q. Did she say with reference to what?

A. She said she was going to the lawyers.

Q. Did she say what about? Why she was going to him?

A. She was going to pay him the $50. That is what she said.

Q. Did she say what for?

Mr. McCarter—Please do not lead.

The Court—I suppose it is competent for the purpose of showing her condition of mind on that Friday, but it certainly isn't competent for the purpose of proving .that she went there That is absolutely immaterial because the caveator's own witnesses proved that she was there on that day.

Mr. Lum—It wa smerely for the purpose, as your Honor has said, of showing the state of mind. We will prove clearly what the facts were.

Q. Did she ever speak to you about any suit against her?

A. She did.

Q. When?

A. Well, about three years ago she told—

The Court—You have answered it. Three years ago.

Witness—About. She wanted to sell the property.

The Court—That is all, Miss Clark. When you have finished the answer, that is all.

Q. What suit was it she spoke to you about three years ago?

A. That he had hindered her from selling her property, and he told her she—she couldn't.

Q. And now when did Mrs. McKinney first go to bed ill?

A. Friday night she complained of her throat being sore.

Q. Did she get up Saturday?

A. She did not.

Q. Who called the doctor?

A. She got up but went back to bed.

Q. I see. Who called the doctor?

A. I did.

Q. And now, to your knowledge, when did Mr. Charles F. McKinney last call upon his grandmother?

A. Well, he didn't call on her the last time—no—let me see, three months ago when he put her in Chancery he never called on her.

Mr. McCarter—What is that?

Witness—He had called on her before that but it was only on business. There was no sociability.

The Court—I think the answer better go out.

Mr. Lum—Yes.

Q. Listen to the question and answer one question at a time, Miss Clark. We would get along a good deal quicker. When did you last see Charles McKinney at his grandmother's house?

A. About a year and a half.

Q. About a year and a half ago?

A. About a year and a half ago.

Q. Now, do you remember that a suit was started against her some time ago?

A. The suit was started—let's see—since March.

Q. Since March?

A. Since March.

Q. After that time did you see him at the house at all?

A. I did not.

Q. And at half-past nine in the morning were you usually at the house?

A. I was there every morning.

Q. Can you recall being away any morning at half-past nine?

A. I do not.

Q. And now, after this suit was instituted by Mr. McKinney in Chancery, as you have testified, do you know —did Mrs. Frederica McKinney speak of her grandson to you?

A. Well, she did, in a way.

Q. Yes or no.

A. Yes, sir.

Q. She did. What did she say. Give her words as nearly as you can recall them.

A. Well, she said it was terrible for him to put her in Court—to do such a thing to his grandmother.

Q. Did she say that—on how many occasions?

A. She said that different times to me. It was a terrible thing.

Q. Did she speak after that to you of her will?

A. Well, she said she wanted to make a will.

Q. Did she say anything further in reference to it?

A. No; she did not.

Q. Just said she wanted to make a will?

A. She was going to make a will and she told me she had made a will, but I wasn't interested in that at all.

Q. When did she tell you that first?

A. Well, she told me about that about—let's see—I couldn't recall; about two years ago.

Mr. McCarter—How long?

Witness—Three years ago.

Q. About three years ago?

A. Two years ago.

Q. Now, after suit was brought in March, 1914, did she speak of a will to you?

A. No, sir; she did not.

The Court—When did she say it was terrible for Charlie to put his grandmother in Court?

Witness—After he did it.

Q. Did you, after Mrs. McKinney was ill, suggest to her anything about a will?

A. I did not.

Q. Did you hear anyone else suggest to her anything about a will?

A. I did not.

Q. Did you ever request her to make a will in your favor?

A. I did not.

Q. Now, do you remember when the lawyer arrived to draw the will on Monday before—Monday the 21st?

A. No; I don't—I didn't know when he was in the room, only when he called me.

Q. What is that?

The Court—"I didn't know when he was in the room only when he called me."

Q. Do you remember who called you?

A. Well, I don't remember hardly. Someone called me and I went upstairs.

Q. And then what was said?

A. And he called me in the room and he asked me—he asked Mrs. McKinney if that was the "Millie" she meant and she said, "Yes."

Q. Then what did you do?

A. I walked out of the room and went downstairs.

Q. Now, did you have any conversation with Mrs. McKinney—Frederica McKinney—on the Saturday that she was ill?

A. I did.

Q. How many times?

A. Well, different times.

Q. Will you tell us whether or not she recognized you?

A. She recognized me, but it was very difficult for her to speak.

Q. How many times did she speak on that day to you?

A. Well, she didn't speak very much on account of her throat.

Q. How many times do you think that day?

A. Well, I couldn't exactly say, four or five times.

Q. Four or five times?

A. Yes, sir.

Q. Now, coming to Sunday, the next day, did she speak again on that day?

A. Yes, sir; she recognized me.

Q. How do you know?

A. Well, because she spoke.

Q. What did she say? Give us all the conversation you had with her on that Sunday.

A. Well, I didn't hold any conversation with her because I didn't want to disturb her.

Q. Will you tell us any words that she said that day then?

A. Well, she said she wasn't any better.

Q. Who did she say that to?

A. She would say it to me; but I didn't hold any conversation with her. I didn't want to annoy her. She was very sick.

Q. What was the state of her consciousness on that day?

A. Well, she was conscious all the time almost up to the time until she passed away.

Q. When did she first become unconscious?

A. Well, she wasn't any time unconscious. That is to say—of course it was her throat. She couldn't speak very much. Her throat was very much swollen.

Q. On Monday, the day before she died, did she speak to you?

A. She did; several times.

Q. What did she say?

A. Well, she told me—I went up several times and she asked me for milk—for a drink of milk, also the nurse—and I gave her a glass of milk, and she set up in bed and drank it and she complained during the—towards noon about having a pain in her side and she asked me if I thought an onion poultice would be good, and I told her—the nurse was down in the kitchen preparing some food—something—and I went and asked the nurse and the nurse said that—

Mr. McCarter—Never mind what the nurse said.

Witness—She put a poultice, mustard poultice—

Q. Not what the nurse said.

The Court—Not what the nurse said, but you can tell us what you did.

The Witness—I didn't do anything.

The Court—You can tell us what you saw done.

Witness—Well, I saw her—I saw her put a mustard poultice on her side. That is all I know.

Q. Do you remember who called on the Monday before Mrs. McKinney's death?

A. Who called on Monday?

Q. Yes. Did the doctor call?

A. Well, the doctor called.

Q. What time, first?

A. Well, I couldn't exactly say the time.

Q. Do you know how many times he called on Monday?

A. On Monday?

Q. If you can remember.

A. I think it was twice. I am not certain.

Q. Not certain?

A. No, sir; because I was downstairs most of the time.

Q. Do you know whether or not the priest called on that day?

A. Yes, sir.

Q. The priest. About what time?

A. The priest called. The priest called—let me see —yes; the priest called. He called on Tuesday, too—yes; he called on Monday—called on Monday.

Q. And about what time?

A. Well, I think it was in the afternoon. I am not certain.

Q. Do you remember whether it was just before the doctor or just after the doctor?

A. Well, I am not sure of that.

Q. Were you in the room while the priest was there?

A. Some of the time I was, but not all of the time.

Q. Were you there when the last rites were administered—were you in the room?

A. I was in the room after he had given her—at the time he gave her the Communion.

Q. Did she say anything about that time—any words at all to any one?

A. I didn't hear her.

Q. And do you know what the rental income of the real estate owned by Mrs. McKinney was?

A. Well, it was $71, I believe.

Mr. McCarter—What?

Witness—The rental; all together you mean?

Q. Yes.

A. Oh, the stables and all, a month, I think was $71. I am not sure.

Q. That is when they were all rented?

A. When they were all rented, stables and house and all.

Q. Now, do you know Mrs. Charles McKinney's mother? Do you?

A. I do.

Q. When did she last call upon Mrs. Frederica McKinney, to your knowledge?

A. Well, about three years ago—she called once in three years.

Q. Called once in three years?

A. Once—about once in three years.

Q. How long ago was that?

A. Well, that is about two years ago, I should say, or a year and a half ago; somewhereas about that, but not to see Mrs. McKinney exactly.

Q. Who did she call to see, then?

A. Well, she called to see her with regard to her sister she had been visiting, and her sister requested her—

Mr. McCarter—I object to conversation between the sister and this—

Q. Were you present?

A. I was present.

The Court—You can state what was said by Mrs. McKinney, the mother of Charles, to Mrs. Frederica.

Witness—There was no conversation carried on at all.

The Court—Well, did anybody say anything to the other?

Witness—I didn't hear much of anything said. She was there only about five minutes.

Q. Now, tell us, if you can, about when you last saw Charles at the house?

A. Well, it was after Mrs. McKinney's death, he called there, but not before she died.

Q. And then, before that, do you remember his being there?

A. Not at all.

Q. For how long?

A. Well, since March.

Q. Since March?

A. Since March.

Q. Now, go back before March. When had he been there before March?

A. Well, two or three times; that is all.

Q. Well, in how long? Two or three times in a week or year or more?

A. Well, couple of years; in that time.

Q. You think in two years before March you had only seen him there two or three times?

A. That is all.

Q. How long would he be there on those occasions?

A. Not very long.

Q. Do you know whether or not his grandmother changed towards him in any way after the suit was brought?

A. She did.

Mr. McCarter—I object.

The Court—Strike out the answer.

Mr. Lum—Because it is leading or immaterial?

The Court—Because it is not testimony at all. You are testifying and not the witness. The technical difficulty is that it is leading.

Q. Miss Clark, I am going to ask you if you can recall anything that was said—do you remember when Mrs. Frederica McKinney first knew about the suit being brought?

A. I did.

Q. Did she, at that time, say anything about Charles, if so, what? Think of it and give us the conversation as fully as you can?

A. Well, all she said was it was a terrible thing to do such a thing to his grandmother.

Q. When did she say that?

A. Several times to me.

Q. Did she have much money to spare at that time?

A. She did not.

Q. Did she speak of the payments made to Mr. Monteith?

A. She did.

Q. Do you know whether—did she speak to you about more than one payment made to Mr. Monteith?

A. She did. Two payments.

Q. Who else lived at the house besides you and Mrs. McKinney?

A. Her stepson.

Q. What was his name?

A. William McKinney.

Q. William?

A. William.

Q. How long did he live there—or does he still live there?

A. He still lives there.

Recess.

Q. Miss Clark, you say that Mrs. McKinney spoke to you about three years ago and said that she had made her will?

A. Yes, sir.

Q. After that did she speak to you again about a will?

A. No; she didn't until after Charlie put her in the Court of Chancery, and then she said that—she often said she wanted to make a new will and didn't want to leave him one cent.

Q. On how many different occasions did she make that—

A. On several occasions she said it to me.

Mr. McCarter—I want to call your attention to the fact that you are not continuing your examination where you left off. You left off "Who lived in the house with Mrs. McKinney."

Mr. Lum—It was called to my mind that I hadn't asked this question.

Mr. McCarter—She had already testified to that.

Q. You testified this morning, I believe, that Mrs. McKinney didn't speak to you about the subject of a will after the suit was brought. Did you understand my question or do you desire to change your testimony?

A. What is it? I didn't understand you.

Q. This morning you made the statement, I believe, in your testimony, that Mrs. McKinney didn't speak to you about the subject of a will after the suit was brought?

A. Well, she wanted to change her present will after she was brought into Court. She wanted to make a new will and she didn't want to leave him anything. That is all she said.

The Court—Now, this morning you said that three years ago he threatened to disturb her if she was going to sell the property and that she said she was going to change her will and she told you she had changed her will. Is that so?

Witness—She hadn't changed it then, if I remember. She was about to change her will.

Mr. Lum—I did not so understand the testimony this morning.

The Court—That is my impression of what she said.

Q. Miss Clark, who lives in the house? You have testified I believe—

A. Yes, sir.

Q. —as to that?

A. Her stepson.

Q. And you and Mrs. McKinney?

A. Yes, sir.

Q. What, if anything, did you ever say to Mrs. McKinney with reference to her leaving you any property?

A. Well, I never said anything to her about leaving me anything.

Q. What, if anything, did you ever say to her with reference to her making a will favoring you?

A. Well, I never said anything. She always said that she would always see to me and leave me well provided for.

Q. And what, if anything, did you say to her about her making a will?

A. I didn't say anything to her about a will—about making a will.

Cross-examination, by Mr. McCarter.

Q. Miss Clark, are you a married woman or single woman?

A. Single woman.

Q. Now, I understand for half a century or so you have lived in the same house with Mrs. McKinney?

A. I did—I have; yes, sir.

Q. And that for a portion, perhaps half or so of that time you were paid, and that since then you have not been paid?

A. I have never been paid. Twenty years I attended Mrs. McKinney's business and attended to all her—

Q. Weren't you paid in the first part?

A. I was not. I received no salary. She couldn't afford to.

Q. Then you never had anything from her?

A. I might have had a little church money, but I don't call that wages.

Q. Well, yes.

The Court—She says that she paid board for the first thirty years.

Witness—I paid board for thirty years. Twenty years I worked for Mrs. McKinney; I attended to her business, her outside affairs, read her letters—

Q. When was it she first said to you that she was going to remember you in her will?

A. She said it all along.

Q. Twenty years?

A. For the last twenty years.

Q. Yes. Now, you told us before luncheon that about three years ago she spoke of having made a will in which she had remembered you?

A. Well, I couldn't exactly say, I think it was near, as far as I can remember—

Q. I hadn't finished my question yet.

A. Yes, sir.

Q. It might have been four years?

A. No; it wasn't as long as that.

Q. What?

A. It was not as long as that.

Q. How do you fix when it was?

A. Well, it might be—well, I couldn't exactly tell. It is about two or three years. I couldn't—

Q. How do you fix when it was?

A. Well, as far as my recollection goes; that is all.

Q. Did she tell you she had just made the will?

A. She told me—no; she didn't.

Q. Did she tell you she had just made the will?

A. She did not.

Q. She said she had made a will?

A. She had made a will.

Q. In which you were taken care of; is that right?

A. Well, I don't know anything what was in the will.

Q. Won't you please answer my question and stop talking. She told you she had made a will in which you were taken care of; is that right?

A. She didn't mention me. She said she had made a will; that is all she told me.

Q. Did she tell you after she told you she had made a will that she was going to take care of you as she had for twenty years back?

A. Well, she didn't mention anything about that, no.

Q. When was the last time she told you she was going to take care of you?

A. Well, she told me all along that she was going to leave me well provided. I don't know. Different times she said it.

Q. Inside of three years?

A. Inside of twenty years; all the time.

Q. You are not so stupid as you appear to be, Miss Clark, I would be glad if you would just answer my questions. Did she tell you inside of three years that she had taken care of you, or was going to take care of you?

A. Well, she said that too, inside of three years and before that.

Q. Exactly. Now, how often had you heard her speak of the fact that Charles claimed that she really didn't own this property—fifteen times?

A. Well, she spoke of it different—I couldn't say how many times.

Q. Well, great many times?

A. Great many times; yes, sir.

Q. And how long ago do you suppose is the earliest you ever heard her mention that?

A. Well, she always claimed it was her own property.

Q. Oh, I understand that. Now, the point I am asking you is—please pay attention to my questions—how long do you suppose it was, four or five or six years ago, ten years ago?

A. About three years ago.

Q. About three years ago. How do you fix that?

A. Because she mentioned it to me.

Q. I know, but how do you fix the three years ago? Could it have been four years ago or two years ago?

A. I think about three years ago. Three years and a half. Somewhere along there. I couldn't say exactly.

Q. Are you able to fix the time?

A. About three years ago.

Q. Is there anything to fix the time beyond your mere—

A. Well, I didn't put any time down.

Q. No. Your best recollection is three or three and a half years ago?

A. About three or three and a half years.

Q. Was it about that time she spoke of having made a will?

A. I don't remember that.

Q. Don't remember that?

A. No. I don't think so.

Q. Well, now, you say that you did the reading and the writing for her; is that right?

A. I did.

Q. Did you take charge of her papers?

A. I took charge of them; yes, sir.

Q. What?

A. Anything that came in reading matter I read them for her.

Q. Did you take charge of her papers?

A. Well, I didn't take—she took charge of them herself, but I read them to her.

Q. Who received the mail.

A. What is it?

Q. Who received the mail?

A. I did, and sometimes she did.

Q. Yes. Anybody else?

A. No; I don't remember anybody was there. Sometimes the stepson and sometimes persons—that is about all.

Q. Sometimes Mr. Frank McKinney sometimes received the mail?

A. I generally did.

Q. Will you answer my question? Did he sometimes receive the mail?

A. He wasn't there to receive it.

Q. Never there?

A. Sometimes; yes, sir. He was there to call in; yes, sir.

Q. Yes. Would he sometimes receive the mail?

A. If he happened to be there he would.

Q. You will get along a great deal better if you will only answer my questions.

Q. Now, you said you received no letter in May, 1914, from Charles?

A. Well, I couldn't tell. I didn't have my glasses with me this morning.

Q. Oh, no; I am not speaking about the letter from Mr. Monteith. That is another letter. But you testified this morning, if you do not forget it, that you received no letter from Charles McKinney in May,

1914, saying he could not come to dinner. Do you remember testifying to that?

A. I did not receive no letter; no.

Q. You didn't see such a letter or hear of such a letter?

A. I didn't see such a letter at all.

Q. How is that?

A. I didn't see such a letter at all.

Q. See if you ever remember receiving a letter of which this is a copy: "May 25, 1914. Mrs. Frederica C. McKinney, 376 Plane street, Newark, New Jersey. Dear Grandma. I would like very much to take dinner with you on Sunday but I have arranged to spend Decoration Day and Sunday in Albany, as Katherine is dangerously ill and has been for some time, as you know. I trust you are well. Your loving grandson Charlie."

A. I never received that letter.

Q. Never received it. That must be one of the letters that Mr. McKinney got from the postman?

A. I never heard him say.

Q. Never heard him say. You never saw that letter among her effects?

A. I never saw that letter.

Q. Did you go over her papers after her death?

A. I did not.

Q. Didn't? Who did?

A. I don't know.

Q. You don't know?

A. Who went over the papers after her death? I didn't see any papers.

Q. Where were her papers?

A. Well, I didn't—I wasn't interested after her death.

Q. Do you think that answers my question? I ask you "Where were her papers?" and you say you weren't interested.

A. I suppose they were in her drawer.

Q. Don't you know where they were?

A. I suppose they were in her drawer.

Q. Did McKinney—did Rutherford know where they were?

A. I don't know whether he did or not.

Q. Well, he went over them, didn't he?

A. Yes, sir.

Q. How did he know where they were? Didn't you show him?

A. I suppose the papers were given to him.

Q. Who gave them to him? Did you?

A. No; I did not.

Q. Well, who did?

A. I don't know.

Q. You don't know; no. Now, you have been in that house for the last 50 years, haven't you?

A. I have.

Q. You were her—shall I call it secretary—attended to her business for her the last twenty years?

A. I attended to her business; yes, sir.

Q. You read her letters and wrote her letters?

A. I did; yes, sir.

Q. You know where she kept her papers?

A. Yes, sir; I did.

Q. Now, I want to know who gave them to this man Rutherford to go over after her death, if you didn't?

A. She gave them to him herself, before she was taken sick.

Q. Eh?

A. She must have given them to him herself, for all I know about it. I don't know anything about it.

Q. Do you mean that, that she did give them to him after she was taken sick, or before her death?

A. No, sir; not this time. Before he was made her executor.

Q. What is that?

A. After he was made executor of the estate. Before that she gave him—

Q. Now, Miss Clark, just keep cool now. Remember you are under oath. I am not trying to bull-doze you. I want to be polite to you. You are a lady. You are entitled to be treated as such. I want to know when it was that Mrs. McKinney, this old lady, gave this man Rutherford her papers?

A. Well, I couldn't say.

Q. What did you mean a moment ago when you said before her death and after he was made executor? What did you mean by that?

A. Well, I suppose the papers was given to him. I don't know anything about it at all.

Q. Well, now you testified before we went out to lunch, didn't you?

A. I did.

Q. Do you remember testifying in so many words that you never heard Mrs. McKinney mention the subjection of a will after suit was commenced?

A. She did, after the suit was commenced; she said she wanted to change her will.

Q. Yes. Now, that is not the question I asked you at all. I asked you if you remember testifying before lunch, when you were sitting where you are now, that she never mentioned the subject of will after suit was commenced. Do you remember testifying that way?

A. Well, I believe I did, but I made a mistake.

Q. Now, who spoke to you about it while lunch was on?

A. Who spoke to me about it?

Q. Yes.

A. Well, it came to my recollection.

Q. Who spoke to you about it?

A. Nobody spoke to me about it.

Q. Nobody spoke to you about it at all?

A. About the will?

Q. Nobody spoke to you while you were out at lunch about the fact that you had made a mistake?

A. Well, it came to my own memory; no.

Q. Sure; but didn't anybody speak to you about it?

A. Nobody spoke to me about it; because it came back to my recollection. I thought of it myself after I left the stand.

Q. You thought of it yourself?

A. I thought after—

Q. About testifying. Did you speak of this thing that had come back to you?

A. Well, I spoke to the lawyer about it.

Q. Who, Mr. Lum or Mr. Schotland, or both of them?

A. Mr. Lum.

Q. Where?

A. Right here.

Q. Right here. You then recalled the fact that you had solemnly said to Judge Martin here this morning that after suit was commenced the will wasn't mentioned by her, and then it come to you all of a sudden, after you had left the stand, that you had made a mistake and that she had mentioned the subject of a will several times, and said every time that she wanted to leave Charlie out. Is that what you want his Honor to believe?

A. Yes, sir; she said so then.

Q. Did you read over your affidavit you made in the Court of Chancery before you went on the witness stand?

A. I did; yes, sir.

Q. When did you read that over?

A. I read it after I had taken my affidavit.

Q. Did you read it over either yesterday or Saturday or Friday when you were here, or this morning again?

A. I did Saturday; yes, sir.

Q. Saturday, yes. And was that affidavit correct?

A. It was as far as I know.

Q. What?

A. As far as I know it was.

Q. Do you remember swearing in that affidavit as follows—this affidavit that you said you read over on Saturday—no—(scratch that out) before I ask that question, you also remember saying this morning that you didn't know the lawyer was there until a voice came and said "Amelia, where is Amelia," do you remember telling us that this morning?

A. I do; yes, sir.

Q. Were you right or wrong about that?

A. Well, I was right.

Q. You were right?

A. Right there.

Q. Now, you stand by that, do you? That was all that you—

A. I knew he was going to be there, but I didn't see him until he called me.

Q. Didn't you say this morning you didn't even know the lawyer was going to be there?

A. No; I didn't say that.

Q. Or that he had come?

A. I said we expected there was going to be a lawyer there.

Q. Who told you he was was coming?

A. She wanted to see a lawyer.

Q. Who told you the lawyer was coming?

A. I don't remember who told me.

Q. You don't remember?

A. I don't remember that.

Q. Wasn't it McKinney?

A. Well, he was—I don't remember; no.

Q. What?

A. He was to go for a lawyer, but I don't know he went for the lawyer.

Q. I asked you who told you. Who told you that a lawyer was coming? Can't you remember?

A. She wanted to see a lawyer. That is all I know.

Q. I am not asking you what she wanted. I am asking you who told you. Did Mrs. McKinney tell you?

A. No; she didn't.

Q. She did not. Did Mrs. Rache tell you?

A. I think one of them told me. I think it is Mrs. Rache.

Q. Oh, you think it was Mrs. Rache.

A. That the lawyer was coming. I didn't see—

Q. When did Mrs. Rache tell you that the lawyer was coming?

A. She wanted to see the lawyer.

Q. What?

A. She wanted to see a lawyer.

Q. When did Mrs. Rache tell you she wanted to see a lawyer?

A. On Monday.

Q. Yes, and what time Monday?

A. It was about four o'clock—five o'clock.

Q. Well, which was it?

A. Four, I think.

Q. About four?

A. About four. He didn't come until six.

Q. Sure? What did Mrs. Rache say?

A. Well, I don't recollect—remember, but she wanted to see the lawyer; that is all.

Q. Now, you say Rutherford didn't tell you that?

A. I don't remember.

Q. You didn't see him go out to get a lawyer?

A. I saw him there, but I didn't see him go out to get—

Q. Did you see him go out to get a lawyer?

A. I did not.

Q. Didn't Mrs. McKinney tell you that a lawyer was coming?

A. She might have told me, but I have forgotten.

Q. And had the priest been there when you were told about the lawyer?

A. The priest was there.

Q. He was there at the time?

A. Yes, sir; before that.

Q. And was Mrs. McKinney there all day Monday?

A. She was.

Q. Was Mr. McKinney there all day Monday?

A. Off and—yes; he was.

Q. All day Monday?

A. Not all day. Off and on.

Q. Which was it?

A. Part of the day he was there.

Q. What time did he get there and what time did he leave?

A. He was there in the afternoon.

Q. He wasn't there in the morning, was he?

A. No; I didn't see him in the morning.

Q. Did you see the lawyer arrive?

A. He was—no, sir; I didn't. He was upstairs.

Q. Now, you say—you told us this morning, before lunch—that she had not said anything to you about a will after the suit was commenced by Charlie in March—in January—and you also say that on Saturday morning, as I understood you, you read over your affidavit made in the Chancery suit. If you read over the affidavit in the Chancery suit on Monday—on Saturday—I ask you how you then testified this morning to the effect that you had never heard Mrs. McKinney say anything about a will after the suit was commenced, when the affidavit contains this statement, which I will read to you: "During the short period that Mrs. McKinney was ill, I was in the house constantly, and know of my own knowledge, that neither I nor anyone else suggested to the late Mrs. McKinney that she should make a will or how she should make one. The only reason that the lawyer was sent for on the Monday afternoon before her death was because she urged that she wanted to change her will before her death, and was very uneasy about the old will standing with the provisions in it that she didn't now want. When the lawyer arrived to draw the will, Frank R. McKinney, his wife, the nurse, and myself were in the house, but neither

Anna Rache, nor any other person was there, and when the lawyer was ready to ask Mrs. McKinney what she wanted inserted in her will, he asked us all to leave the room, and was with her alone." Now, how do you reconcile the fact that if you read that affidavit on Saturday morning containing that story that I have just read to you, that nevertheless on your oath, solemnly here this morning you said that she never mentioned the will to you until—since the suit was commenced?

A. Well, she did.

Q. How do you account for the fact that you testified that way?

A. Because she wanted to change her will.

Q. How do you account for the fact that you testified the way you did?

A. Well, I was not thinking what I said then.

Q. Oh, I see. Now, you will try and think what you are going to say the rest of the time, won't you?

A. I will try.

Q. You will do that, won't you?

A. Yes.

Q. You said that you were generally home every morning?

A. Every morning.

Q. And you also say that Charlie came there in March?

A. In March?

Q. March. Last March. Do you remember that?

A. In March?

Q. Didn't you testify that here before luncheon?

A. Yes, sir; he came there in—March?

A. No; I don't remember in March.

Q. Didn't you testify before luncheon that he was there in March, once?

A. No; I don't remember saying that.

Q. Well, was he there?

A. March? I don't remember seeing him.

Q. Between the first of the year and the time of her death?

A. From the time he put her in the Court of Chancery he wasn't there to my recollection. I hadn't seen him there. March. That is in March—

Q. Wait a minute. That is after her death. I want to know whether Charlie was there at the house between New Year's Day of this year and the time of her death?

A. I never saw him.

Q. Never say him at all?

A. No.

Q. So that if you testified this morning that Charlie was there once in March, you were mistaken in that, too, were you?

A. No; I am not mistaken.

Mr. Lum—I object. She didn't so testify.

Witness—He wasn't there. I didn't see him.

Q. What?

A. I haven't laid my eyes on him since he put her in the Court of Chancery.

The Court—He didn't ask you that. He says since the first of January down to the time of her death?

Witness—I didn't see him at all.

Q. You didn't see him?

A. No.

Q. Didn't see him. Was he there the night before she died?

A. Yes, sir; he was there the night—that Monday night—night before she died.

Q. That is one time you did see him?

A. I saw him then; yes, sir; before she died.

Q. Had you forgotten that?

A. Well, she was sick in bed then.

Q. Had you forgotten it when you said you didn't see him at the house from the time he put her in Chancery?

A. Before she was taken sick.

Q. Oh, yes. You were there the night before her death when Charlie was there about eleven o'clock, weren't you?

A. I was downstairs.

Q. You saw him in the house, didn't you?

A. I saw him come in; yes, sir.

Q. Did you see him downstairs, too, afterwards?

A. He passed through the room and went upstairs.

Q. Yes; did he come down?

A. Yes, sir; I saw him come down.

Q. Hear him talk to Mr. Rutherford or Mr. McKinney?

A. Yes, sir; I saw him talking to Mr. McKinney.

Q. Yes. Same room with you?

A. No; they passed through—went into another room.

Q. Yes. Now, she was complaining Friday night, was it?

A. Friday night.

Q. She had been out Friday?

A. She was out Friday afternoon to the lawyer's.

Q. Who went with her, Mr. McKinney?

A. Nobody.

Q. Sure about that?

A. I am sure she went out alone.

Q. And where did she get the money that she paid the lawyer that day, do you know?

A. I didn't ask her.

Q. I asked you if you knew who gave her the money. Did Rutherford give her that money?

A. No; I don't know.

Q. What?

A. She had money herself.

Q. You said she had very little money.

A. Well, she had very little money. She gave the last money she had, $50.

Q. Do you know where she got the money?

A. I suppose she got it in the bank.

Q. Do you know?

A. I couldn't exactly say where she got the money.

Q. Did she tell you?

A. No. She didn't tell me, but she paid the lawyer $50.

Q. She was complaining during the evening on Friday?

A. Well, Friday evening, yes; she did complain of a little sore throat, but no more than that.

Q. Sore throat? What time did you send for the doctor?

A. About ten o'clock.

Q. Saturday morning?

A. Saturday morning.

Q. Had Mr. and Mrs. McKinney arrived yet?

A. Not until the doctor—not until after the doctor came—went away—the doctor had gone.

Q. The doctor had gone before they came?

A. Yes, sir.

Q. Who sent for them, or did they come without being sent for?

A. They were telephoned for.

Q. Who telephoned for them?

A. Well, I don't know. I guess Mrs. Rache.

Q. Did you tell Mrs. Rache to telephone for them?

A. I did not. She said she would.

Q. She said she would?

A. Yes, sir.

Q. How did the doctor—how was the doctor notified, by telephone?

A. By telephone.

Q. Who notified him, you or Mrs. Rache?

A. I did.

Q. You did. At any rate the doctor got there?

A. He did.

Q. Now, who determined to send for the nurse?

A. Well, Mr. McKinney spoke about the nurse.

Q. On Sunday morning?

A. On Sunday morning.

Q. She was so much worse?

A. Well, yes; she wasn't any better.

Q. No. Did the doctor direct that a nurse be sent for?

A. I don't think he did. I don't remember that.

Q. And who selected the nurse, Mr. McKinney?

A. Mr. McKinney.

Q. Yes. You knew the nurse, didn't you?

A. Well, yes, sir; I was slightly acquainted with her; yes, sir.

A. Now, I understood you to say that the nurse got there Sunday and that on Monday, towards noon, while the nurse was down in the kitchen getting lunch ready, or dinner ready, Mrs. McKinney and you had a talk about a pain around her heart, do you remember that?

A. Yes, sir; she complained to me.

Q. Complained to you?

A. Yes, sir.

Q. And she said something or other about an onion poultice?

A. She said it to me; yes, sir.

Q. This was about twelve o'clock, was it?

A. About twelve o'clock.

Q. And then you went down and told the nurse, and the nurse came up and put on the mustard plaster, didn't she?

A. Yes, sir.

Q. It wasn't ten o'clock in the morning, was it?

A. Ten o'clock?

Q. The chart was right. The chart was right?

The Court—I don't know what the answer is on the record.

Q. Now, you were in the room when the clergyman arrived, Monday afternoon?

A. In the afternoon.

Q. Monday afternoon?

A. I was in the room part of the time; yes, sir.

Q. How long a time elapsed between the clergyman's visit and the lawyer's visit?

A. Well, I couldn't exactly say the hours—a short time.

Q. Five minutes or half an hour?

A. Longer than that. About half an hour.

Q. Half an hour?

A. Or hour.

Q. How much of the visit—how long was the clergyman with her?

A. Well, long enough to take her confession and receive communion.

Q. That may be very plain to you, but it may not be very plain to me. I am not of your faith, you know. I ask again, how long was the clergyman with her, about?

A. I should say about half an hour.

Q. Monday afternoon?

A. Monday afternoon.

Q. Did you send for the clergyman?

A. No. Mrs. Rache went for him.

Q. Mrs. Rache did that, eh?

A. Went for the clergyman, in the afternoon.

Q. Yes; she sent for the clergman?

A. Went after him.

Q. What time was the clergyman sent for?

A. Well, I think to the best of my memory it was in the afternoon of Monday.

Q. What time?

A. Well, I couldn't say exactly the time either, between two and three—three and four.

Q. Had the nurse reported that she was worse?

A. She wasn't any better.

Q. The clergyman had not been sent for before, had he?

A. When she was first taken, Saturday morning, I went myself.

Q. Did he come?

A. He came.

Q. And then this turn for the worse took place and you sent again for him on Monday afternoon, is that right?

A. Well, we thought it was necessary to have him.

Q. What?

A. We thought it was absolutely necessary to have the clergyman again.

Q. That was on Monday afternoon?

A. Yes, sir.

Q. Because you thought she was going to die, didn't you?

A. We wasn't sure.

Q. You thought so, didn't you?

A. No; I didn't give up hopes.

Q. Well, the reason you thought it was necessary to have him was that you were afraid if she died without him, according to your belief, it wouldn't be right, is that it?

A. It is customary in our church to do that.

Q. You thought she was going to die and you thought it was necessary to have him?

A. Yes, sir; I did.

Q. And so you directed that the physician be sent for?

A. Yes, sir.

Q. The clergyman be sent for. Now, was that her regular clergyman?

A. Well—

Q. Did the clergyman that you sent for come?

A. He was here on—just a short time in our church, the clergyman that came.

Q. Did the clergyman that you sent for come, or did you send for any clergyman?

A. Anyone at all; it didn't make any difference.

Q. He was there again the next day, was he?

A. He was.

Q. What time?

A. Well, he was there when she—before she died.

Q. What time?

A. He was there, the last visit—when she died was two o'clock on Tuesday.

Q. He was there when she died?

A. Yes, sir; before she died and after she died.

Q. And while she died?

A. Yes, sir.

Q. He was there at her death?

A. Yes, sir.

Q. Was he sent for or did he come voluntarily?

A. He came voluntarily the last time.

Q. Did he give her Communion on Tuesday?

A. He gave her Communion on Monday.

Q. You observe you do not answer my question. Did he give her Communion on Tuesday?

A. No; I don't remember Tuesday, but I do on Monday.

Q. Do you mean to say he didn't, or you do not remember?

A. I don't remember Tuesday. He was there just to call in, Tuesday.

Q. Did he have his stole on on Tuesday?

A. I think he did; yes, sir.

Q. Yes. Now, you say that the rentals from this property, all told, amounted to $71 a month?

A. About that.

Q. I took your figures. What are you speaking of now, when all the barns were rented?

A. Everything.

Q. That included what?

A. Stables and the house rentals.

Q. What was rented in the house? When you had everything rented how much of the house was rented?

A. Well, there was $13 on each floor, two upper floors and six in the back.

Q. Well, they were not rented all the time, were they?

A. Most—well, with the exception of one stable, it was not rented for three or four—four months. That brought in six dollars.

Q. Was the full house rented all the time?

A. For the last two or three years; yes, sir; it has been rented.

Q. Did the stepson pay board?

A. He paid four dollars a week board. He paid the rent, too, $10, including—with all the rest.

Q. When did you first notice her difficulty in speaking in this last illness on Saturday or Friday?

A. On Saturday morning.

Q. Did she breathe hard?

A. No; she didn't breathe very hard. She was conscious all the time.

Q. I didn't say anything about her consciousness. I understand she was conscious all the time.

A. No; she didn't breathe hard at all.

Q. I am asking you about her breathing.

A. Her breathing was not hard.

Q. Was not hard?

A. No.

Q. Breathe very easy?

A. Well—

Q. What?

A. Not very easy either, because it was difficult. She had—her throat was swollen.

Q. You knew her throat was filling up with water didnt' you?

A. Well, I noticed it.

Q .When did you first notice that?

A. Well, I noticed that on Saturday night.

Q. About what time?

A. Well, in the evening.

Q. Did you sit up all night with her Saturday night?

A. I did.

Q. And then, I suppose, Sunday morning, when the nurse arrived you went and took some sleep?

A. No; I didn't sleep. I was up.

Q. Did you sleep Sunday night?

A. I was up and down all the time, but I didn't go in the sick room very much on account of the nurse attending her.

Q. Did you sleep on Saturday night?

A. I did not.

Q. Did you sleep on Sunday night?

A. Well, I might have laid down for a few hours, but no more.

Q. Didn't regularly go to bed?

A. No; did not go to bed regularly.

Q. Now, what was the first mention of the lawyer that you heard?

A. First mention of the lawyer? Well, he called me in the room.

Q. Who did?

A. I don't know who it was called me. Somebody called me and told me the lawyer wanted to see me.

Q. Who first mentioned that the lawyer was coming?

The Court—Who first talked about the lawyer coming?

Witness—Well, the priest, I think, spoke to her about settling up her affairs.

Q. Did you hear that?

A. I did not.

Q. I only wanted to know who first suggested to you a lawyer—about the lawyer coming?

A. Nobody. I don't remember anybody suggesting it.

Q. I beg pardon. Don't remember anything about that, is that right?

A. Not about getting a lawyer; no.

Q. Now, you say, she was very candid with you. Did she ever tell you that she talked with Mr. Campton about her affairs—Lawyer Campton?

Mr. Lum—I object to it as not cross-examination.

Mr. McCarter—I want to see how accurate her knowledge of her affairs was.

Witness—I don't remember.

The Court—Wait until the Court rules upon the question. Objection overruled.

Q. Did she ever talk to you about having consulted Mr. Campton, the lawyer?

A. I don't remember that at all, whether she told me that or not.

Q. You knew who her other lawyer was, Mr. Monteith, didn't you?

A. I knew of him.

Q. What?

A. I knew of Mr. Monteith, but I had never seen him.

Q. Did you know who she had consulted about this claim of Charlie's, was it Lawyer Monteith?

A. It was Lawyer Monteith. She told me so.

Q. Who had she paid $50?

A. Lawyer Monteith.

Q. She told you that?

A. Yes, sir.

Q. Did it strike you funny that Lawyer Monteith was not sent for to draw the will?

Mr. Lum—I object.

The Court—Objection overruled.

Q. Did it?

A. Well, no. I never thought anything about that.

Q. Not at all; why no. Had you ever met Mr. Schotland before?

A. I did.

Q. When?

A. When I took my affidavit.

Q. I mean before that day that he came there to draw this will?

A. No. I never saw Mr. Schotland before that; no.

Q. Where were you when he came in the house?

A. I was downstairs.

Q. Who was with you?

A. Why, I don't exactly know who was with me. I can't recall that, but I was somewhere in the house, as I had my duties to perform.

Q. Yes; exactly. And do I understand that you didn't know that he had come?

A. Well, no. I didn't know—I knew the priest spoke to her about settling her affairs.

Q. Not what he said. You weren't there now, Madam?

A. No.

Q. I want to know if you want to be understood now as saying you didn't know when Mr. Schotland arrived?

A. I didn't know he was in the room.

Q. "I didn't know" what?

A. I didn't know he was upstairs at the time until he called me.

Q. Had you been upstairs with him before that?

A. Not before that, no.

Q. You had not?

A. No, sir.

Q. You hadn't been in the sick room with him when he first arrived?

A. No.

The Court—Are you sure about that?

Witness—I am sure. I didn't know until he called me in.

Q. Then why did you state in this affidavit as follows: "When the lawyer arrived to draw the will, Frank R. McKinney, his wife, the nurse and myself were in the house, but neither Anna Rache, nor any other person, was there, and when the lawyer was ready to ask Mrs. McKinney what she wanted inserted in the will, he asked us all to leave the room, and was with her alone."

Mr. Lum—There is no contradiction there.

She was in the house.

The Court—Objection overruled.

Q. Why did you say that if you didn't know the lawyer was there until you were sent for to find out who "Millie" was, that he had previously asked you, among the others, to leave the room—why did you say that, Miss Clark.

Mr. Lum—I object. It doesn't appear that she so stated.

The Court—It so states, precisely, in the affidavit. In the affidavit she swears that he arrived and that he asked us all to leave the room. Objection overruled.

Q. Why did you say that?

A. Well, there wasn't anybody—everybody went out of the room.

Q. Why, then, if it is true as you have testified today, did you further swear in this same affidavit, "He then called some time later for us to come in, and pointing to me, asked the late Mrs. McKinney whether that was the Amelia that she meant and she said 'yes.' "

A. I was the only one that he called in. There wasn't anybody in the room when he called me in.

Q. Now, I will ask you again now, what the fact was. Were you upstairs in the room with the lawyer and with Frank McKinney and Mrs. Frank, and were you told to leave the room?

A. No. Mr. Frank McKinney wasn't there at the time. I didn't see him.

Q. He wasn't there at the time?

A. He wasn't.

Q. You didn't see him. Well, now, I will ask you again. Were you and Mrs. Frank—never mind looking there, look at me or look at the Judge—were you and Mrs. Frank and Mrs. Rache in the room and did the lawyer tell you all to leave the room and then did you all go out and then pretty soon did the lawyer come out and ask for you to come in, and pointing to you, ask Mrs. McKinney if you were the Amelia; is that right?

A. I don't remember seeing Mrs. Rache, but Mrs. McKinney was downstairs. I didn't see anybody in the room when I went in.

Q. Had you been in the sick room with the lawyer before the lawyer asked Mrs. McKinney if you were the Amelia?

A. I was not.

Q. You were not.

A. I was not.

Q. Then, Miss Clark, why did you swear in the Chancery suit, "When lawyer arrived to draw the will Frank R. McKinney, his wife, the nurse, and myself were in the house, but neither Anna Rache nor any other person was there, and when the lawyer was ready to ask Mrs. McKinney what she wanted inserted in her will, he asked us all to leave the room, and was with her alone. He then called sometime later for us to come in, and pointing to me asked the late Mrs. McKinney whether she was the Amelia that she meant, and she said 'yes' "? Why did you testify to that?

A. I don't remember testifying to that because I didn't see anybody in the room when I went in.

Q. Well, did he then request you to go out again?

A. I walked out.

Q. Did he request you to go?

A. No; he did not. I went out myself.

Q. I notice that your affidavit continues: "He (the lawyer) then again asked use to leave the room, and asked to have the nurse sent in. I was not in the room when the will was made out or signed;" is that correct?

A. No; I wasn't in the room when the will was made out.

Q. Did he ask "us" to leave the room and ask to have "the nurse" sent in?

A. I don't remember that, but there was no one in the room when I went in. That is all I know. They were all downstairs somewhere.

Q. So you now say, whatever you said before, that

the first time you saw the lawyer was when he came out and asked for Amelia?

A. Yes, sir.

Q. That is the first time you saw him?

A. Yes, sir.

Q. You didn't know he was there before?

A. No. I never seen him there, I believe—

Q. What?

A. No; I didn't know he was there then. I didn't know he had come.

Q. How long before that had he been sent for to your knowledge?

A. Well, about a couple of hours or so, I guess. I don't know. I can't just exactly remember the time.

Q. Now, you say, since lunch, that after Charlie put Mrs. McKinney in the Court of Chancery she said she wanted to make a new will?

A. Yes, sir.

Q. When did you first hear her say that?

A. She said it right along after he put her in the court, she wanted to make a new will and she didn't want to leave him one cent.

Q. As early as March?

A. Various times. She said it all along.

Q. I know, but I want to find out the first time you heard it. As early as March?

A. Right away—in March.

Q. In March? Before March?

A. No; not until he put her in court.

Q. Do you know when he put her in court?

A. In March.

Q. What do you mean by "Put her in court"?

A. Well, he wanted to take her property, is all I know.

Q. I am asking you what you personally mean by putting her in court. Were you there when the sheriff came?

A. I was not.

Q. You weren't there at that time? So far as you know the sheriff never came there?

A. I couldn't say.

Q. That must have been the one occasion in fifty years that you were not in?

A. I couldn't say anything about that.

Q. Didn't know that?

A. I know she was put in court.

Q. Well, it was before—you had heard of the suit before you heard the sheriff was there, had you?

A. I heard he was there, yes, sir.

Q. You had heard of the suit before that, too?

A. Yes, sir.

Q. You heard her talk about it. She had been to see Monteith about it, hadn't she?

A. Yes, sir.

Q. Now, was it after her first visit upon Mr. Monteith that you heard her say that she was going to make a new will?

A. She said it all along.

Q. I know, but I am trying to find out the first time she said it.

A. She said it from the time the suit was started against her.

Q. Well, did she ever tell you why on these numerous visits on Mr. Monteith she didn't make that new will?

A. No; she did not—

Q. She didn't ever say anything about that?

A. —say about that.

Q. No. I think you told us a little while ago you didn't know where she got the money to pay Mr. Monteith?

A. I suppose she had saved a little money. She didn't have much. She had all she could do to get along.

Q. Was it in the closet or in her stocking or where was the money she paid Monteith?

A. I think it was in the bank.

Q. In the bank?

A. $50. That is all she had.

Q. Yes. Did you know that she had paid him $50 before that?

A. I did.

Q. And did you know that Mr. Rutherford gave her that money?

A. No. He never gave her any money that I know of. I don't remember Mr. McKinney ever given her any money.

Q. When did you first see this will of 1909?

A. When did I first see it?

Q. Yes.

A. I didn't see it.

Q. Have you never seen it?

A. No. She told me she had made—

Q. No. Have you never seen it?

A. No; I didn't see the will.

Q. Not since her death, either?

A. No; didn't see her will in 1909.

Q. Is this the first time you have ever laid eyes on this document (showing witness *C2*)? Have you got your glasses?

A. No; I didn't see it.

Q. Never saw that before?

A. No; I did not. I know she said she made a will. That is all I know about it.

Q. Where she kept it you don't know?

A. She kept it in one of her drawers amongst the papers, I suppose.

Q. I ask you if you know?

A. No; I don't know. I wasn't interested in it.

Q. Of course you weren't interested in it, but I asked you if you knew where she kept it?

A. No. She kept it in the drawer; that is all I know about it.

Q. How do you know she kept it in the drawer?

A. Because she kept all her papers in the drawer.

Q. What drawer?

A. Bureau drawer.

Q. Did you tell McKinney where she kept her papers?

A. I did not.

Q. Did he know where she kept her papers?

A. I don't know anything about that.

Q. How did he get this document, do you know?

A. I couldn't tell you anything about it.

Q. Now, did you ever do any shopping, Miss Clark?

A. I did for Mrs. McKinney. I went to the store for her and done nearly all of her shopping.

Q. Did you ever go out in the morning and do any shopping for her?

A. I did.

Q. Where would you go shopping?

A. Different places. I went to the store often.

Q. What store?

A. Different stores.

Q. Which ones?

A. For anything she wanted.

Q. Which one? We will do a little advertising now. Bambergers?

A. Yes, sir; I went to Bambergers frequently.

Q. Bee Hive?

A. Sometimes.

Q. Hahnes?

A. Sometimes.

Q. Did you ever go down to Mr. Monteith's with her?

A. Never.

Q. You remember when Mr. McKinney went down there with her, don't you?

A. Well, I heard they—I think he did—I don't know anything about that.

Q. Did Mr. McKinney spend Saturday at the house—night before she died—Saturday?

A. Night before she died?

Q. Saturday before she died?

A. Saturday before she died. I think he did.

Q. Did you spend Sunday night there?

A. I don't remember; no.

Q. Now, try and collect your memory. Didn't he?

A. I don't think so.

Q. He did, didn't he?

A. I don't remember if he was there.

Q. Where did he live?

A. He lived in South 11th street.

Q. Yes. I suppose Mrs. McKinney was quite frank with you, wasn't she? Told you everything?

A. Yes, sir; she told me nearly everything. I was her constant companion.

Q. Do you remember the day that she was down there on Friday when she paid him that $50?

A. I do.

Q. Did she tell you she had been down there?

A. She did.

Q. That she paid him $50?

A. She did.

Q. Did she also tell you that at that occasion Mr. Monteith had said that she need not worry, that Charlie was going to discontinue the suit?

A. She didn't say anything when she came in—excepting—

Q. I am not asking you when she came in. I am asking you, after that visit, having told you that she paid Mr. Monteith $50—

A. No; she didn't.

Q. She didn't tell you that?

A. No, sir; she didn't tell me that.

Q. It is the first time you heard that?

A. It is the first time.

Q. Never heard that before to-day?

A. No.

Q. That was the day that McKinney was with her at the lawyer's office, though, wasn't it?

A. I don't remember that at all. I don't remember anything about that.

Q. Don't remember?

A. No.

Q. Now, in any previous talks with Mrs. McKinney after her visit to Mr. Monteith's office did she ever report to you that it was suggested and that he had recommended—Monteith had recommended—that the property be sold and that she be given a mortgage back to secure her income upon that property? Did she ever make that report to you?

A. I didn't hear her say it.

Q. Never heard that before?

A. No.

Q. And that Mr. McKinney—Mr. Frank McKinney objected—or Mrs. Frank—never heard that?

A. I never heard it.

Re-direct.

Q. Miss Clark, I show you again a letter from Mr. Monteith. Put on your glasses. Do you remember seeing that before?

A. I do.

Q. Who read that to Mrs. McKinney?

A. I did. March 10th.

Letter marked *Ex. P3.*

Mr. Lum (reading): "Mrs. F. C. McKinney, 376 Plane street, City. March 10, 1915. Dear Mrs. McKinney. Please call to see me at once. It is very important that I see you. Yours truly, John Monteith."

Q. Miss Clark, I show you a letter dated April 19th, 1913, from Charles F. McKinney, addressed to Mrs. Frederica C. McKinney. Did you ever see that letter before?

A. I did.

Q. Who received that letter?

A. I did.

Q. Who received that letter?

A. I did.

Mr. Lum—I will read it into the record. "April 19, 1913. Mrs. Frederica C. McKinney. 376 Plane street, Newark, N. J. In re Mary Davey note. Dear Grandma: In reference to the above matter I beg to state that I have written Miss Davey and she will call to see me at the office on next Monday. Shall report to you the result of my interview with her. Trusting you are well, I remain, respectfully, Charles M. McKinney."

Do you recall any other letters received from Charles McKinney excepting this in the last year?

A. I do not.

Re-cross.

Q. What became of this letter that has just been read?

A. What became of it?

Q. Yes. After you read it to Mrs. McKinney?

A. Well, she kept it.

Q. When have you seen it since?

A. Well, I haven't seen it lately until now. The first time I received it—she received it.

Q. Well, this letter seems to be dated April 19, 1913. You haven't seen it since she got it?

A. No; I did not.

Q. Well, now, do you remember of receiving it?

A. I do.

Q. What is there about it that recalls it to your mind?

A. What is it?

Q. What is there about the letter that brings back its receipt to your mind?

A. Well, I remember the matter that it was about—some money that Mary Davey had given Mrs. McKinney at the time she bought the alley, $200, I believe,

and she wanted the money, and she went to Charles McKinney's office to see about it, and he said he wouldn't pay it, or something. She wanted it paid. She thought it ought to be paid.

Q. Now, I want you to listen to this letter and see if this isn't the one you are thinking of: "May 12, 1914. Mrs. Frederica C. McKinney, 376 Plane street, Newark, New Jersey. Dear Grandma: In re Mary Flynn Estate. In reference to the claim made by you against the above estate which you placed in my hands some time ago and in which you recall having made an affidavit, I beg to state that I have looked into the matter further as promised when I talked to you last week, and find that the New Jersey Laws of 1898 provide that if no application is made for letters of administration for 60 days after the death of a nonresident, anyone having a legal claim may apply for the same to be granted to another person. Trusting you are well, I remain, your loving grandson, Charlie." Is that the letter you have in mind?

A. No; I do not remember—

Q. Well, do you remember receiving that letter?

A. I do remember that now.

Q. Now, that comes back to you. That was last May, wasn't it?

A. I think it was. I didn't keep the time. I don't know what the date was. I couldn't say now.

Q. What became of that letter?

A. I don't know anything about it.

Q. The letter that says, "Your loving grandson, Charles." That isn't produced, is it? You didn't see that letter since?

A. I don't remember seeing it. I might have seen it, but I have forgotten, for all I know.

Q. Now, did she tell you that she had seen Charlie on the street a week before that letter?

A. She did not.

The Court—Why don't you make a copy of

the letter and agree that it is a copy and produce that as a substitute?

Q. Had you seen this letter dated April 19, 1913, until Mr. Lum showed it to you, since it was received? I mean until Mr. Lum showed it to you on the stand here a moment ago?

A. Yes, sir; I saw that.

Q. When did you last see that before you saw it on the stand here?

A. When it came; April 19th, it was dated.

Q. Eh?

A. April 19, 1913, a year ago.

Q. A year ago—a little more than a year.

The Court—He asked you if you saw it between the time you read it to this letter and the time you see it now?

Witness—No; I did not.

By the Court.

Q. When you went into the room Mr. Schotland said "Is this "Millie" or "Amelia"?

A. He said, "Mrs. McKinney, is this the Millie you mean?"

Q. "Is this the Millie you mean"?

A. And she said, "Yes."

Q. And she said yes?

A. And I walked out.

Q. And you were standing alongside of the bed?

A. I was standing in the room alone.

Q. Where, at the foot of the bed?

A. Yes, sir; at the foot of the bed.

Q. And did she say it right out loud?

A. She said it out loud.

Q. So you could hear it very plainly where you stood at the foot of the bed?

A. I could hear it.

Q. Is that so?

A. Yes, sir.

Q. Are you sure of that?

A. Yes, sir; I am sure.

Annie Rache, sworn for Proponents.

Direct examination, by Mr. Lum.

Q. Mrs. Rache, where do you live?

A. 114 Murtyle avenue, Irvington.

Q. And is your husband alive now?

A. No, sir; he is dead.

Q. When did he die?

A. Thanksgiving day.

Q. Did you know Mrs. Frederica McKinney in her lifetime?

A. Yes, sir.

Q. How long have you known her?

A. About forty years.

Q. Did you ever live with her?

A. I lived with her from 1880 to 1897 or 1898—in the house with her.

Q. And after you moved away what was the relationship between you and Mrs. McKinney?

A. Well, when I left—after we went to housekeeping after I was married, I went down there every day or of an evening, when I lived in Newark. Three years ago, when I moved to Irvington, then, of course, I couldn't get down as often. I went once or twice a week.

Q. And how were you treated by her?

A. The same as if I was her own daughter. She brought me up from the time my mother died.

Q. How old were you when your mother died?

A. I think I was about 13. She died January 14, 1880.

Q. May I ask how old are you now?

A. Me? I am 50 the 25th of next January.

Q. On Saturday before her death did you call at the house?

A. Excuse me. I don't hear what you said.

Q. On Saturday before the death of Mrs. McKinney did you call at her house?

A. Yes, sir. I was telephoned for and I came right down.

Q. Do you know who telephoned for you?

A. Miss Clark.

Q. And where was Mrs. McKinney when you got there?

A. In bed, up in her room.

Q. Will you tell us whether or not she recognized you when you came in?

A. She recognized me and told me her throat was sore. I asked her what was the matter. I says, "Where does it hurt you?" She says, "My throat." Of course she could hardly speak.

Q. And how long were you there on that Saturday?

A. I think I got there around ten or a little after, and I left about half-past eleven, as I had to go home to get lunch for my father.

Q. Didn't you go back again that night?

A. I didn't come back then until in the evening about eight o'clock.

Q. How long were you there then?

A. I was there until about half-past ten or between ten and half-past ten, and then I returned home.

Q. Sunday, did you come there?

A. I came Sunday about ten o'clock in the morning and stayed until five minutes to twelve. I had to go up—my husband was in a sanitarium—I had to go up and see him, and I returned again about six o'clock in the evening and stayed until quarter after seven.

Q. Now, on Sunday when you got there did Mrs. McKinney speak to you or not?

A. Oh, yes; she spoke to me. I went up in the room—

Q. Tell us just what took place?

A. She said, "How do you do, Annie; how is Tom?" And then the two boys came in, and I was in

the room when they came in and she turned and spoke to them while I was there in the room.

Q. And on Sunday evening?

A. Sunday evening—no; she didn't have anything to say to me only just "How do you do" or "Hello, Annie."

Q. And how long were you in the room on Sunday evening?

A. Well, I left the house—

Q. No. In the room.

A. Oh, in the room. I couldn't say. I guess I got there—back at six o'clock again—and I guess I was in the room most all the time until quarter after seven, until I was leaving to go home.

Q. Where you there at all on Monday?

A. Yes, sir. I was just thinking what time I come down. I didn't come down Monday morning. I came down Monday afternoon about two o'clock.

Q. How long were you there?

A. I stayed until four; until I went for the priest.

Q. Did you go for the priest?

A. I went for the priest.

Q. Did you come back?

A. After I had left the doctor came. Four—

Q. Were you there when the priest came?

A. No, sir. I was not. After I left the call I went home.

Q. Were you there when the lawyer came?

A. No, sir; I was not.

Q. And what, if anything, did you know about the will being drawn?

A. I didn't know anything about it until I came back. I think it was eight o'clock Monday evening. They said the lawyer had been there. That is the first that I knew or had any idea that a lawyer was going to be sent for. They had never spoken about a new will, any of them, in my presence.

Q. Can you tell us whether or not you ever requested Mrs. McKinney to favor you in the will?

A. No, sir; I never did.

Q. Did Mrs. McKinney speak to you before you went for the priest? *A.* No, sir; not to go for a priest or any thing.

Q. No; but did she speak to you before—just before?

A. Yes, sir; about three o'clock.

Q. What did she say?

A. I was up in her room with her and they were giving her—it was her medicine, I think—and I had my arms around her, holding her up in bed. She turned to me. She said, "Annie, I gave Monteith $50," she said, "I went and gave it." I says, "Yes; all right." I says, "That makes a hundred." She says, "Yes, I have given him a hundred dollars now." That was about three o'clock in the afternoon, just before the doctor came. The doctor got there about four.

Cross-examination, by Mr. McCarter.

Q. Are you a relative of—

A. No, sir; no relation whatever.

Q. And you haven't lived with her since 1898?

A. No, sir.

Q. Did you leave her when you got married, is that it?

A. We boarded with her about a year after we were married. When I went to housekeeping—about two years we boarded with her.

Q. Had you worked for her before you married?

A. No, sir, I worked in the store and paid my board. My father paid—

Q. Boarded at her house?

A. Yes, sir. Well, when I first went there my father paid my board. I was a child. When I went to work myself I paid my own board.

Q. Yes. Now, on Saturday morning was the first you knew she was ill?

A. Yes, sir.

Q. Miss Clark telephoned you she was very ill, you were to come right up?

A. No, sir. The telephone rang and the party says, "Who is this at the 'phone?" And I says, "Mrs. Rache." They said, "Hold the wire a minute"—

Q. I don't care about this preliminary.

A. Millie didn't telephone first. Someone telephoned for her.

Q. Who telephoned, Miss Clark?

A. She did then.

Q. What did she say?

A. "Is that you Annie? Are you busy? Are you very busy?" I says, "No, not very." She says, "Can you come down?" "Is mother sick?" just like that. She says, "She doesn't feel very well, I would like to have you come down." I said, "All right, I will come down as soon as I can get ready," and I got ready and went right down.

Q. You got there about noon Saturday?

A. No, sir; I got there about ten o'clock or a little after.

Q. Had the doctor been there?

A. No sir.

Q. Not yet?

A. No sir.

Q. At that time she was so hoarse she could hardly speak?

A. She wasn't hoarse. Her throat was swollen. She wasn't hoarse.

Q. What?

A. She said her throat was sore. That is all she told me.

Q. Now, you went up there Sunday morning?

A. Yes, sir; I was there Saturday morning and Sunday morning both. I went back again Saturday evening.

Q. You must have concluded that she was pretty sick to go back there and stay until half-past eleven?

A. I thought as much of her as my own mother.

Q. I don't care anything about that. You thought she was very ill?

A. Yes, sir; I thought she was very ill.

Q. So much so you went and stayed until eleven o'clock Saturday night?

A. I got there about eight o'clock in the evening and stayed until ten or half-past ten.

Q. Saturday night. Who was with you

A. Who came with me?

Q. Yes.

A. No one; not with me.

Q. And you were there about Sunday ten o'clock again, were you not?

A. Sunday morning I stopped in there before I went up to see my husband.

Q. Just answer my question. I don't care about that.

Q. You were there about ten o'clock Sunday morning?

A. Ten o'clock or a little after. Somewheres around that time; yes, sir.

Q. And you were there six o'clock Sunday night?

A. I came back from the sanitarium around about six o'clock at night.

Q. And you stayed an hour and a quarter?

A. I stayed until I went up to get some hot-water bags for the nurse at my house.

Q. Yes. Now, I understood that in the evening she said, "Hello, Annie, how do you do."

A. Either "hello" or "how do you do."

Q. Which was it?

A. I wouldn't say which.

Q. Did she say either?

A. Yes, sir; she spoke to me.

Q. You don't remember which?

A. No, sir.

Q. What time of evening was that? Had you been sitting there awhile?

A. That was a little after six.

Q. After you had been sitting there awhile?

A. After I had been up in the room.

Q. Eh?

A. No. When I first went in the room, little after six o'clock, when I got back from the sanitarium.

Q. She had already seen you that morning, hadn't she?

A. Certainly.

Q. Now, Monday, about two o'clock, you got there and four o'clock you left?

A. Yes, sir.

Q. You thought she was very seriously ill?

A. I didn't have any idea she was so sick until the doctor came down and said so.

Q. When you went for the priest did you think she was seriously ill, or didn't you?

A. I was trying to answer your question. I said not until the doctor said he didn't know whether she would recover or not. That was the first I had any thought she was dying.

Q. Then right away you went for the priest?

A. Yes, sir.

Q. So you went for the priest and he administered—you wanted the priest to come and do what thing?

A. Yes, sir—for the sick call.

Q. That meant that he was to come prepared to administer the last rites?

A. I don't know what he was to administer.

Q. What?

A. Yes, sir.

The Court—Are you a Catholic?

Witness—Yes, sir.

The Court—Then don't you know?

Witness—She had been anointed on Saturday, and she wasn't able to—he was to come over to call that day because she wasn't able to

swallow, and that is why he was sent for Monday so that he could give her that.

Q. Who told you that she had been anointed on Saturday?

A. Why Miss Clark, when I came down Saturday evening, said that the priest had been there and she had been anointed.

Q. The same priest?

A. I don't know whether it was the same priest that come or—

Q. This is the first we have heard of this. Are you sure the priest had been there on Saturday?

Mr. Lum—It was testified to by the last witness.

Mr. McCarter—That was Tuesday.

Mr. Lum—Saturday.

Witness—Saturday afternoon or Saturday morning she was anointed. They said the priest had been there and anointed her. That is all I know.

Q. Well, now, you felt sure that she was a very sick woman and ought to have a priest—afraid she would die without one, weren't you?

A. Well, someone asked me to go for the priest. I couldn't say who. I didn't go of my own—I had no intention of going until I was told to go for the priest.

Q. You can't say who told you to?

A. No, sir; I don't know who it was. I don't remember. Someone said "Will you, Annie, go for the priest," after the doctor had said he didn't think she would recover.

Q. Did you see the doctor there?

A. At four o'clock, Monday afternoon; yes, sir.

Q. It was after that you went—

A. It was after that I went for the priest; yes, sir.

Q. Now, you got back there about eight o'clock that evening?

A. Yes, sir; after supper. After I went home.

Q. Who told you the lawyer had been there?

A. Well, now, I wouldn't say who told me—whether it was—

Q. Try and think?

A. I couldn't say which one told me.

Q. Well, you said "they told me a lawyer had been there"?

A. Some of the parties that was there. I don't know whether it was Frank or whether it was Annie or whether it was Millie. I wouldn't say that. I wouldn't swear to it.

Q. Who was Annie?

A. Mrs. Frank McKinney.

Q. And who was Millie?

A. Miss Clark.

Q. Either Millie or Annie or Frank told you that the lawyer had been there?

A. That the lawyer had been there.

Q. Did they say a will had been made?

A. Sir?

Q. Did they say a will had been made?

A. Yes, sir; I think they said—

Q. What else did they tell you. Let us have the whole story?

A. That is what they said, that she had asked for a lawyer and that she had made a will.

Q. Did they say who the lawyer was?

A. No, sir.

Q. Did they tell you that you were left something in this will? They did, didn't they? Now, try to think.

A. I am trying to think. Yes; I think that they did say that she had left me something.

Q. Who told you that?

A. I couldn't really say which one told me.

Q. Well?

A. I wouldn't want to say Frank told me, because

I am not sure. I wouldn't want to say that Mrs. McKinney told me or—

The Court—Or who?

Witness—I say I wouldn't want to say it.

Q. Now, try and think which one it was who told you that you had—

A. I really have been trying to think, but I really couldn't say which one told me, because if I say one it might be the other, for I don't know which one. When I came in they said the lawyer had been there and she had made a will—she had made another will.

Q. Who was present when this remark was made?

A. I couldn't say if they were all there or only one was there.

Q. Where was it? What part of the house?

A. In the little room. What we call the front room.

Q. Downstairs?

A. Downstairs; yes, sir.

Q. And they told you right away that the lawyer had been there and you had been left something in the will?

A. I don't know that they told me right away, as soon as I got in or not, but it came anyhow while I was there.

Q. Did they tell you you had a third?

A. No, sir; they did not.

Q. Did not?

A. No, sir.

Q. When did you first learn that?

A. Not until the will was—

Q. Eh? When did you first learn that?

A. When the will was probated or when it was—at least when it was—affidavit said she had taken and left us all something. I don't know whether they said each an equal share or what, but she had left me something and left the others—

Q. You learned sometime that you had a third of this property?

A. I couldn't say that.

Q. You learned that some time?

A. I couldn't say.

Q. Can't you remember when you were told that?

A. No, sir; I cannot.

Q. You cannot?

A. No, sir.

Q. Was it before she was buried?

A. I wouldn't say whether it was before or after.

Q. Can't you tell when you first learned that you were to share a third in this property?

A. No, sir; I don't remember a third share or not.

Q. What?

A. No, sir; I don't remember.

Q. Well, when was it that you learned that the property was to be divided between the three of you first? That night?

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

Q. Well, now, I understand that on Monday afternoon, about three o'clock, you went into the sick room. This is before the doctor arrived.

A. I was there from two, in the sick room.

Q. This was before the doctor arrived?

A. Yes, sir.

Q. And you went over and she made a remark to you?

A. Yes, sir.

Q. Had you heard that she had paid Monteith $50 before she told you?

A. No, sir; but she knew she—

Q. One moment. You say you had not been told that she had paid Monteith $50 before she told you?

A. Not by Mrs. McKinney; no.

Q. I didn't ask you that or who had told you. Who told you that Monteith had had $50 of her money?

A. Miss Clark, I think, said she went down Friday and gave Monteith $50 more.

Q. Who told you that?

A. Miss Clark.

Q. Miss Clark, yes. When did she tell you that?

A. Saturday or Sunday.

Q. Saturday or Sunday?

A. Yes, sir. I wouldn't say which.

Q. Downstairs?

A. Yes, sir; downstairs.

Q. So on Monday, somewhere around three o'clock, you went into this sick room and you went over and you put your ear down to her mouth—

A. No, sir. Excuse me.

Q. What?

A. No, sir. I didn't put my ear down to her mouth.

Q. Did she call you to her?

A. I was holding her up while they were administering a drink or something to her—I was holding her in the bed while the others—

Q. Who was administering the drink?

A. Mrs. Frank McKinney.

Q. Mrs. Frank McKinney was administering a drink?

A. Yes, sir.

Q. Who else was there?

A. Nobody; the two of us.

Q. Oh. You were in the act of administering a drink?

A. I didn't say that. I was holding her until she got the drink and she turned around to me—I was on this side—and she turned around and she said, "Annie, I gave Monteith $50." She knew she hadn't seen me to tell me since she had been down as I hadn't seen her since the Wednesday before.

Q. Well, you had seen her Saturday and Sunday?

A. When she was in bed, yes. I mean while she was well.

Q. Did she know she hadn't seen you since the Wednesday before, or didn't she know it? What is the truth about it?

A. She knew she had seen me, certainly, Saturday and Sunday, but she knew she hadn't told me.

Q. So that after she had taken this medicine you say she turned around to you and said to you she had given Monteith $50.

A. Yes, sir. I don't know whether it was before she took the medicine or after.

Q. Which was it?

A. I couldn't say. It was while I was holding her up in bed.

Q. You said "Yes" you heard about it?

A. Sir?

Q. Did you reply—

A. I didn't say to her—

Q. Did you reply?

A. I said "All right." She says, "I gave Mr. Monteith $50;" I says, "All right;" I says, "That means you have given him $100" and she says, "Yes; that is it."

Q. Who told you she had given him $100?

A. She had told me herself when she gave him the other $50.

Q. When was that?

A. After she had paid it. I couldn't tell you the date.

Q. When was that?

A. I couldn't really tell you the date, but after she had paid it she told me she had gone down and given Mr. Monteith $50 and that she owed him some more.

Q. Florence Marie Rache, who is that?

A. She is my daughter.

Q. Is she still living?

A. Yes, sir.

Q. Did you know that your intimate friend Frederica had made a will in 1909 in which she had left Florence something?

A. Yes, sir; she had told me so.

Q. When did she tell you that?

A. She made the will about eight years ago.

Q. When did she tell you?

A. After she made this will. I couldn't tell you the

date because she never showed me the will, but she merely said "Annie, I have had another will made. I have left everything the same only I left my sister and Maria more."

Q. And when was that, Mrs. Rache?

A. I really couldn't say that.

Q. About?

A. I don't know when the will was made. After she made it she said, "I have made another will."

Q. Was it about four or five years ago?

A. No, sir.

Q. This seems to have been made in 1909?

A. I didn't know when it was made. I couldn't tell you, but since she made it.

Q. Were you and Mrs. Frederica very warm friends?

A. Yes, sir.

Q. Had been ever since you lived in the house?

A. Ever since—before.

Q. What is that?

A. Before I was there.

Q. Even before?

A. Yes, sir.

Q. That continued right down to the time of her death?

A. To the time of her death; yes, sir.

Annie McKinney, sworn for Proponent.

Direct examination, by Mr. Lum.

Q. You are the wife of Mr. Frank McKinney?

A. I am.

Q. When were you married?

A. In 1896.

Q. Before you married did you have any vocation?

A. I was organist and school teacher of St. Bridget's Roman Catholic Church, Plane street.

Q. And did you know Mrs. Frederica McKinney before you married?

A. I did.

Q. How long have you known her?

A. I have known her, altogether, twenty years, to the best of my knowledge.

Q. Now, how frequently—or in March of 1914, do you recall whether or not you were sent for by your mother-in-law?

A. I was.

Q. Give me the date, as near as you can fix it?

A. As near as I can fix it, it was about the 17th of March, 1914.

Mr. McCarter—That is St. Patrick's Day, isn't it?

Witness—17th of March, that is all I remember.

Mr. McCarter—I asked you as a matter of curiosity whether that is St. Patrick's Day?

Witness—I say that is as near as I can remember. I don't know for sure.

Q. And did you go?

A. I did.

Q. When?

A. The following morning.

Q. And who did you see when you got there?

A. I met Miss Clark as I entered the house and my mother-in-law came down later from upstairs.

Q. Did your mother-in-law tell you later why she sent for you?

A. Yes, sir.

Q. Tell us the conversation.

A. She said she wanted my husband and I to go with her to her lawyer as Charlie had brought her to court.

Q. What did you say?

A. I said I would.

Q. Did you ever go to the lawyer's with your mother-in-law?

A. That was the first time I ever went with her.

Q. When?

A. Well, as near as I can remember the 17th of March.

Q. And who went with you?

A. I went—my husband and I and my mother-in-law went together that afternoon.

Q. Do you remember how your husband was introduced to the lawyer?

A. As her adopted son and I his wife.

Q. Do you recall the conversation that took place there?

A. She asked my husband—she asked the lawyer to please explain things to my husband in regards to the case.

Q. And did the lawyer explain?

A. He did.

Q. And give us briefly the conversation?

A. Well, it related to Charlie trying to put her home in the Court of Chancery.

Q. What else was said, if anything?

A. Well, he said that Charlie told me she couldn't put it in—Charlie told her she couldn't sell the property—told him rather that his grandmother couldn't sell the property, that she had only a life interest in the property; that is 376, and the alley belonged to him.

Q. Did you go on another occasion to the lawyer with your mother-in-law?

A. I did.

Q. About when was that?

A. I can't just recall. A few days later.

Q. At whose request did you go?

A. At hers.

Q. Do you know why she went? Did she say why she went?

Mr. McCarter—I object.

The Court—Let her state the whole conversation first and then if anything is left out you can specifically direct the witness' attention.

Q. Give us the conversation on the second visit as near as you can do it?

A. She asked Lawyer Monteith what he was going to charge her and he said $100, and she wanted to know if he would be satisfied with half and later she would pay him the other half—if he would be easy with her to pay it—and he said yes.

Q. Now, did you go again after the second visit to the lawyer's office with your mother-in-law? Did you go again? Yes or no.

A. I did go again.

Q. When was the third occasion on which you went?

A. The third occasion was when she called to my house that night and said that she was to the lawyer's that morning or that afternoon, rather, and that Charlie —she called to my house to ask us to go down the next day to the lawyer's with her as Mr. Monteith had a roll of papers and they were all complaints against her and Mr. Monteith wouldn't read them to her until she brought her son and I with her.

Q. What else was said? Anything about "answer"?

A. I said, "We would go." I went down the next morning and we went that afternoon.

Q. Do you know whether the bill of complaint—your mother-in-law ever saw the bill of complaint?

A. She didn't tell me she ever saw it until that day when Lawyer Monteith read it to her.

Q. Did Lawyer Monteith read it to her?

A. He did.

Q. You were present?

A. I was present.

Q. Could your mother-in-law read or write to your knowledge?

A. She could not to my knowledge.

Q. Tell us whether or not you ever heard your mother-in-law speak of Charlie after this litigation was instituted?

A. Speak of Charlie after?

Q. Yes.

A. She did.

Q. What did she say?

A. Coming from Mr. Monteith's office she said "What a terrible thing it is for Charlie to bring me to court. I have made a will and I intended not to forget him; he was well remembered, and Lawyer Monteith said to me that it was the cleanest will he had ever written, but," she says, "now, he will not get ten cents." That is what she said to me and I didn't keep up the conversation.

Q. Mrs. McKinney, will you tell us whether or not— there was a picture of Charles at his grandmother's house, you say?

A. I do.

Q. Did you ever see the grandmother do anything with reference to that, and if so, what?

A. I did.

Q. Tell us the incident?

A. She took it from the wall and put it on the floor.

Q. Were you there at the time?

A. I was there just as she did it and she told me what she had done.

Q. What did she say?

A. She said "What do you think," she says, "of that fellow bringing me to court, and I so good to him?"

Q. Now, tell us whether or not you ever requested your mother-in-law to favor you or your husband in the will?

A. Never. Never spoke of the will.

Q. Will you tell us whether or not you ever attempted to prejudice your mother-in-law against Charlie?

A. Never.

Q. Did you ever hear your husband do so?

A. Never.

Q. Now, Mrs. McKinney, did you see your mother-in-law on the Saturday that she was taken sick—she was in bed—Saturday before her death?

A. I was there Saturday.

Q. Were you there all day?

A. Yes, sir. I was there all day from the time I was sent for. I didn't reach there until two or half-past two.

Q. In the afternoon?

A. In the afternoon.

Q. Will you tell us whether or not your mother-in-law recognized you when you came in?

A. She did.

Q. What, if anything, did she say?

A. She put her hand up. I shook hands with her, and I said, "What is the matter, Mother?" She said, "My throat," but not very loud.

Q. What day?

A. That was on the 20th; Saturday the 20th of June.

Q. How long did you stay Saturday?

A. I stayed all night, until Sunday night.

Q. You were there Sunday?

A. Yes, sir.

Q. Will you tell us whether or not she recognized you on Sunday?

A. She did.

Q. What, if anything, did she say to you?

The Court—"Recognized" is a conclusion. Let her state what happened.

Witness—On Sunday?

Q. What have you to say?

A. Sunday?

Q. Yes; Sunday.

A. When I asked her at different times how she felt she would say a little better.

Q. Do you know whether or not she spoke to anyone else on Sunday while you were present?

A. She spoke to the nurse when she came in. I was present.

Q. Do you recall what she said to her?

A. Well, I said to her that the nurse is going to make her better, and she says, "I know she will." I recall that just as the nurse came in.

Q. And did you stay there Monday also?

A. I stayed there all night Saturday night—sat up with her.

Q. The question is did you stay Sunday night also?

A. No. I went home Sunday night.

Q. Did you come back again Monday?

A. I come back again Monday morning.

Q. And what time did you reach there Monday?

A. Well, I couldn't say just the hour it was. Before dinner.

Q. Did she speak to you on Monday, and if so, what did she say?

A. On Monday?

Q. Yes.

A. She said, not to leave her. To stay with her and do not let her die until after she settled her affairs.

Q. What time did she say that to you?

A. She said that to me—well, that was around noon. I can't say how soon before or how soon after, but it was around that time—shortly after I went in, and I didn't reach there—well to the best of my knowledge it must have been near noon, but I can't say how near.

Q. And were you there when the doctor came Monday?

A. Monday? Yes, sir; I was.

Q. What time did he come first? Oh, you didn't get there until about noon. What time did the doctor come Monday while you were there?

A. Monday? That was the second visit. In the afternoon.

Q. About what time?

A. I should judge around four o'clock.

Q. Now, do you know whether or not the priest was there Monday afternoon?

A. The priest was there Monday afternoon.

Q. Before the doctor or after?

A. Why, after the doctor.

Q. After the doctor. Do you know whether or not

the doctor spoke to your mother-in-law at all on that Monday?

A. Well, he had a conversation with my husband and I and from there he went back and spoke to my mother-in-law.

Q. Were you present when he spoke to her?

A. Was I present when he spoke—

Q. When he spoke to her?

A. No; I wasn't in the room when he spoke to her.

Q. All right. Did you hear what he said?

A. I did.

Q. Did she reply?

A. Well, her voice—she couldn't speak very loud, and where I was standing I didn't expect to hear her voice.

Q. Then you didn't hear her voice?

A. I didn't hear her voice.

Q. What did the doctor say to you?

A. The doctor stood at the head of the stairs with my husband and I and he told us Mrs. McKinney wasn't so well as she was in the morning when he had been there and he asked if her affairs were settled, and we said as far as we knew they were not; so he said, "I would rather be kicked," he says, "than to go back and tell her to fix up her affairs." So he went back and we heard him from the room saying, "Now, Mrs. McKinney—now that you are able to, it is better for you to fix up your affairs. I do not say you are going to die, but it is better that you do it now."

The Court—This is Monday afternoon?

Witness—Monday afternoon.

Q. Mrs. McKinney, were you there in the room while the priest was there?

A. I was.

Q. Will you tell us very briefly what took place?

A. After the priest had given her Holy Communion he stood up and he said, "Mrs. McKinney, I have prepared you for a happy death, and if there is anything

that you want to fix up it is best to do it now and not leave those you leave after you to get in trouble."

Q. Did she reply?

A. She said "Yes; she would do it."

Q. And did she give any instructions then?

A. She asked for a lawyer to make a will.

Q. Who did she ask?

A. She asked the priest.

Q. And what did he do?

A. He turned to me and told me that she asked for a lawyer.

Q. Did you speak of her request to anyone? Did you?

A. I did.

Q. To whom?

A. I went downstairs to my husband and told him—as he wouldn't come upstairs at all—he wasn't needed, and he didn't come upstairs.

Q. Will you tell us whether or not you were there when the priest was there Saturday?

A. Saturday?

Q. Saturday; yes?

A. The priest just went in ahead of me.

Q. Saturday?

A. Yes, sir.

Q. About what time was that?

A. Well, that was about, as I told you—I could only judge from the time being two or half-past two—he went in ahead of me.

Q. About what time—do you remember the lawyer coming on Monday?

A. I do. I was in the room when he came in.

Q. At about what time do you fix it?

A. Well, I should judge around half-past five or six.

Q. And what request did he make, of any of the people there?

A. Well, I didn't wait to be requested to leave the room. I turned around to go out, but before going

out, in the presence of the lawyer, I asked if she wanted me to send for Charlie? She said no.

Q. Are you sure about that?

A. I am sure about that.

Q. And who else was in the room when the lawyer arrived?

A. The nurse.

Q. The nurse. Will you tell us whether or not anyone staid in the room with the lawyer while the will was being prepared?

A. Not to my knowledge. I wasn't in.

Cross-examination, by Mr. McCarter.

Q. I notice you have spoken two or three times of grandma. Did you always call Mrs. McKinney—

A. I always called her grandma, from the day I got married.

Q. A little bit previous, wasn't it?

A. What?

Q. A little previous, that was, wasn't it, call her grandma from the day you got married?

A. Well, no; not from the day I got married. I made a mistake there.

Q. Well, you are under oath, Mrs. McKinney. I want to know if it is true that you called her grandma from the day you got married?

A. I am just a little hard of hearing and I didn't understand just what you said to me.

Q. Oh, I see. How long had you called her grandma?

A. When my first child was born.

Q. When was that, the day you got married?

A. No, sir; it was not.

Q. Well, was your husband her son?

A. She always called him her son.

Q. She did, eh? Never heard her call him anything else?

A. No; I never did.

Q. Always write of him as her son as well as speak of him as her son?

A. She always spoke of him as her son and called him her son to me.

Q. Did you ever see this will of 1909?

A. Never.

Q. Never did?

A. Never did.

Q. Are you aware that she speaks of him there as her godson?

A. I don't know. Godson?

Q. Yes.

Mr. Lum—Are you aware of it?

The Court—Do you know?

A. I don't know anything that that will consists of—nothing.

Q. Never knew of this will?

A. Never knew of it.

Q. When did you first see it?

A. I never seen it. That is the first I seen it, now in your hand.

Q. Didn't ever see it here the other day?

A. I did not.

Q. Had your son ever been adopted by her?

A. Well, she told he that he wasn't legally adopted, because his father didn't give him up to be legally adopted, but it was his mother's request that she should adopt him.

Q. Yes. Well, now, when did you first hear, to the best of your recollection, that Charlie claimed that she didn't have a full title to that property. How many years ago?

A. The first I remember of them saying that she didn't have a full title, they said it in my own house, both him and his mother, so that she couldn't sell the property. That is over three years ago.

Q. Over three years ago. Can you put it more definitely than that, Mrs. McKinney—Rutherford? Do you call yourself Rutherford or McKinney?

A. I call myself McKinney.

Q. All right. I will endeavor to do the same. Now, Mrs. McKinney, are you able to place that time any nearer than a little over three years ago? Are you able to point to any event or any act?

A. Yes, sir; I am.

Q. Will you try to do so?

A. Simply because I had been sick at the time, and supposed to go under an operation, and I put it off until the following year, and it is two years this last June since I went under the operation, so I know. I didn't go the year before that as I ought to have done.

Q. So at least three years—probably a little more than three years—

A. To the best of my knowledge.

Q. That she said that Charlie said she didn't own that property?

A. Yes, sir.

Q. And did she tell you that?

A. She told me that; yes, sir.

Q. At your own house?

A. At my own house.

Q. Did she explain how it was, or didn't she go into the details about it?

A. She didn't go into the details to me because I didn't understand it. She directed the conversation to my husband.

Q. Oh, and you overheard it?

A. I overheard it.

Adjourned until to-morrow morning, at eleven o'clock.

THIRD DAY.

Appearances as before.

Annie McKinney resumed the stand for further cross-examination, by Mr. McCarter.

Q. Now, Mrs. McKinney, Mrs. Frederica was a very devout Roman Catholic, wasn't she?

A. She was.

Q. Had she in fact made a convert of Miss Clark?

A. She did.

Q. Was she pretty regularly a churchgoer?

A. To the best of my knowledge she was.

Q. What church did she attend?

A. St. Bridget's Roman Catholic Church.

Q. Where is that, over in Plane street?

A. On Plane street.

Q. Now, did you know her prior to your marriage?

A. I did.

Q. When were you married?

A. I was married in 1896.

Q. And since your marriage where have you and your husband lived?

A. Why—

Q. Different places in Newark?

A. Yes, sir.

Q. And have you any children?

A. I have.

Q. How old is the oldest child?

A. My oldest boy, he was seventeen the 8th of September.

Q. I am curious to know why it was that yesterday you told us that you called Mrs. McKinney grandma from the date of your marriage.

A. Well, on account of being in the habit of calling her grandma. I didn't just stop to think at that time.

Q. Well, now, in what you say in the rest of your evidence try and stop and think and mean what you say. Be careful, won't you? Don't say things carelessly like that. How long had you been accustomed to go and see Mrs. Frederica?

A. How long before I was married?

Q. No; after you were married?

A. After I was married. Well, it was a custom for me to call on her at least three or four times a year.

Q. Three or four times a year?

A. Yes, sir.

Q. Latterly you had gone more frequently, hadn't you?

A. Yes, sir; I had.

Q. For about how long a time do you have in mind when I said latterly—a year or two?

A. I have been going very frequently since the 17th of March, around.

Q. 17th of March?

A. Yes, sir.

Q. From the 17th of March you went very frequently?

A. I did.

Q. Is that St. Patrick's Day?

A. I said around the 17th of March. I didn't say just on the 17th of March, but around that time, was the best that I could recollect, that I went for the first time.

Q. Went for the first time?

A. The first time—I am speaking of now about around the 17th of March.

Q. Now, try and think what you say and be careful, remembering you are under oath here. I ask you when it was that you commenced your frequent visits?

A. Around the 17th of March.

Q. Around the 17th of March. How do you recall that particular day? What makes you say 17th rather than 15th, 12th or 20th?

A. For the simple reason I pay my rent on or about that time as my husband don't get paid until the 16th, and I had just sent the rent and I don't just remember whether it was sent on the 16th or the 17th, or the day after, but I remember I just paid my rent.

Q. Shortly after you paid your rent in the month of March what occurred? What was it occurred?

A. My boy went in to see his grandmother and she sent for my husband and I.

Q. And was it that same day that you went down to see Mr. Monteith?

A. No, sir.

Q. Now, your husband and you seemed to have gone very frequently with her to Mr. Monteith?

Mr. Lum—I object to that because it contains an assumption that the husband went very frequently. There is no proof before the Court.

Q. Did your husband and she and you go down the first time?

A. My husband, my mother-in-law and myself went to Mr. Monteith the first time together.

Q. Yes. Did your husband go again?

A. He did. At her request.

Q. Of course. Now, just answer my question. I will assume it was all at her request. You need not lug that in every time. How often did he go to Mr. Monteith with her ?

A. I don't remember how many times he went.

Q. Did you go without him?

A. I went once—I went without him with my mother-in-law; yes, sir.

Q. More than once?

A. The second time I went with her alone.

Q. Why did she say she wanted him to go down the first time? She wanted his advice?

A. What is that, lawyer?

Q. She wanted his advice?

A. No; she wanted him to go with her so Lawyer Monteith could explain the case to him.

Q. Had he up to that time transacted any business for her?

A. Transacted any business for her? Nothing only she asked him to go to the lawyer.

Q. Oh, of course. I asked you though, if prior to that time, this March 17th, your husband had ever transacted any business for Mrs. Frederica any time. Never mind giving—

A. I don't remember.

Q. Don't remember. Was this the first time he had ever done anything for her that you know of?

A. In the line of business.

Q. In the line of business. Well, so for the first time about the 17th of March, last year—this year—1914—your husband and you were sent for to transact the first piece of business that had ever been transacted for Mrs. Frederica, is that right?

A. First time ever I did any for her.

Q. Your husband either?

A. Well, I can't speak for him. I don't know.

Q. Don't know? She said she wanted him to go down and hear what Mr. Monteith had to say?

A. She did.

Q. And you went down together?

A. I did.

Q. Did Charlie—did Mr. Monteith tell you at that time that Charlie proposed to have the property sold and a mortgage given to secure the income to Frederica?

A. He spoke of the—he spoke of it.

Q. He spoke of that?

A. Yes, sir.

Q. Yes. That was the very first time you were down?

A. That was when he was explaining it to my husband.

Q. Yes, I see. Well, did Frederica take your husband's advice about that?

A. He didn't give her any advice on the question.

Q. Did she ask him anything about that afterwards that you heard?

A. Not that I know of.

Q. What?

A. Not that I know of, if I understood you rightly.

Q. Well, did you ever hear her speak of that fact, that Mr. Monteith told you that Charlie's proposition was to have the property sold and a mortgage given

back to secure to Frederica the income. Did you ever hear that discussed after this one interview with Mr. Monteith?

A. I hadn't heard him speak about it. Well, the day that he spoke—the first day that we were there—that Mr. Monteith spoke to my husband about it—spoke to my mother-in-law and myself in the court room, I hadn't paid much attention, because the conversation wasn't directed to me. It was to Mrs. McKinney and my husband.

Q. Yes; but you have described a good deal about the conversation?

A. I told you what I heard.

Q. You certainly heard it that day. Now, I ask you if you heard Mrs. Frederica speak of that proposition later at any time?

A. I heard her speak over what Mr. Monteith had told her.

Q. When did you hear her speak again, after Monteith's office, at the first interview that occurred there—when did you hear her speak again of the proposition that Mr. Monteith had spoken of, namely, that the property should be sold and that a mortgage should be given back to secure her for the income?

A. Why, I heard her speaking different times, because she said, "It is a terrible thing" to bother her about the property that belonged to her—that she should be brought to anything like this.

Q. Did she speak to your husband about that?

A. She spoke to all in the room.

Q. Did you think it was a terrible thing?

A. Did I think it was a terrible thing?

Mr. Lum—I object to what the witness thought.

The Court—Objection overruled.

Q. Did you think it was a terrible thing?

A. I didn't think it was a very nice thing.

Q. You thought it was a terrible thing, too, didn't you?

A. Well, I would call it a terrible thing.

Q. And you told her so, didn't you?

A. No; I didn't.

Q. Never told her that?

A. I didn't tell her it was a terrible thing.

Q. Did you ever tell her you thought it was a nice thing?

A. I told her one time when she told me of a visit to Monteith's—I said it was too bad—

Q. No, no. I ask you if you ever told her what you thought about it?

A. When she told me what it was I said it was too bad, and I dropped the conversation.

Q. Too bad, and you dropped the conversation. Did you ever hear your husband talk about it?

A. I never did.

Q. Never once?

A. I never did.

Q. So far as you know he never spoke to her about it?

A. No, sir; he did not.

Q. Eh?

A. He did not.

Q. Did he walk back with you and her to the house that day, the first visit?

A. The first visit he did.

Q. Yes. The subject was not discussed going up to the house?

A. The first time?

Q The first time.

A. No; it was not.

Q. Did you go into the house after you got there?

A We did.

Q. Take supper there?

A. We did.

Q. Spent the evening there?

A. I can't say how long.

Q. Well, you spent some of the evening there?

A. Yes, sir.

Q. Now, from that time down, as I understand your evidence, your visits became quite frequent?

A. They did.

Q. How frequently would you and your husband go there after that; two or three times a week?

A. Well, at her request.

Q. Oh, certainly. I will assume it is her request. You needn't repeat that every time, but answer the question. How often did you and your husband go there after that; two or three times a week?

A. I myself was there almost every day from the 17th of March.

Q. Mostly every day. What time would you get there in the morning?

A. I got there around half-past eight.

Q. Half-past eight?

A. Yes, sir.

Q. And how long would you stay, all day?

A. I would stay all day.

Q. And take dinner, and supper at night?

A. I did.

Q. Would your husband come in to supper?

A. He used to come in for me to take me home in the evening.

Q. Take you home in the evening. Madam, I suppose you keep no servant.

A. I do not.

Q. How many children have you?

A. I have four.

Q. How old are they?

A. My oldest boy, is, as I told you, 17.

Q. And the youngest?

A. Around ten.

Q. Around ten. You keep house, don't you?

A. I do.

Q. Very good. Now, what would you do through the day, all day, down at Mrs. Frederica's house after the 17th of March? What would you be doing there?

A. Why, if she had any papers that she wanted me to go over, that she wanted me to give to Mr. Monteith, she brought down the papers to me and asked me to read them to her and she would select what she wanted from the bundle of papers, and if it was necessary to bring it to Mr. Monteith she brought them there.

Q. So that was the business you would be attending to, is that right?

A. Well, she asked me.

Q. Now, what papers did you go over and where were the papers that you went over?

A. She brought the papers downstairs to me.

Q. Downstairs. You don't know where she got them?

A. She told me she had them upstairs in a drawer.

Q. In the drawer. And after she brought them down you and she would go over them and you would read them to her, you say?

A. Yes, sir.

Q. You say she couldn't write—did you ever see her write her name?

A. I never did.

Q. You never knew until you saw this paper that she could write her name—this other will?

A. I didn't know she could write her name. To the best of my knowledge she couldn't write.

Q. When you said on the stand the other day that she couldn't write you meant to be understood as saying from your knowledge that she couldn't even write her name so far as you knew?

A. I never seen her sign her name.

Q. No. If you hadn't been shown—look at that signature (referring to *Exhibit C2*) before you saw that you didn't know she could even write her name, did you?

A. I never knew she could write her name, but in the papers were a note that had been returned to her

—party loaned her fifty dollars and when she paid they returned the note, and I came across that note in her papers. She asked me what that was and I told—read it to her, and she said, "Yes, that is my name," and I see the name there. I recognized it from that note.

Q. So she had signed that note then?

A. Well, I wasn't there when she signed it.

Q. But she said that was her signature?

A. She said it; yes.

Q. So that you did know she could write her name?

A. She told me that she could, but to my knowledge I never seen her write her name.

Q. Well, now would your husband come around to Frederica's house any during the day time since the 17th of March?

A. He might have come at noontime once or twice.

Q. Yes; to take—

A. And left after dinner.

Q. Take his midday meal there. Take his midday meal?

A. At noon; yes, sir.

Q. I suppose Miss Clark was there all this time, wasn't she?

A. She was.

Q. During the dinner would you discuss this dreadful thing?

A. She seemed to be very much grieved. She would say, "I can't help think," she says "what Charlie has done to me;" she says, "It has worried me very much," she says.

Q. And you would discuss it?

A. I didn't discuss any of her business.

Q. Didn't discuss any of her business?

A. No, sir; only just the question she put to me.

Q. And Miss Clark would—and you and your husband and she would talk about this matter, wouldn't you, during these meals?

A. I don't remember anything about it.

Q. Can't remember. Then where would your husband get his supper?

A. Why, if he didn't call in to my mother-in-law's for supper he went home for supper.

Q. But he would frequently take supper there, wouldn't he?

A. Not always.

Q. Frequently?

A. Frequently; yes, sir.

Q. Again, I suppose this subject would be discussed?

A. Well, we wern't always talking on that subject.

Q. But you talked about it some, didn't you?

A. Well, we did some; yes, sir.

Q. Yes. Did you ever hear your husband express his views on the subject?

A. I never did outside of saying that he never looked for any of the money that his mother had, that he never meddled with her or her property or never looked for anything she had.

Q. When did you hear him say that? Before her death or afterwards?

A. I have heard him say that for years.

Q. For years?

A. Yes, sir; that he never looked for any of her money.

Q. Then he knew she had property, didn't he?

A. Yes, sir; well, of course, he knew she had property.

Q. But you heard him say for years he never looked for any of her property?

A. Yes, sir; I did.

Q. It must have been a great shock to him when he discovered he was left some property in the will?

A. I don't know that.

Q. He didn't faint away, I imagine?

A. What is that?

Q. He didn't faint from the information?

A. I don't know how he took it.

Q. Of course, he had never been looking for it. Well, now, did you ever hear your husband speak, either to you or Mrs. Frederica in your presence, with regard to this proposition that Mr. Monteith had spoken of?

A. I never did.

Q. Never did?

A. No.

Q. She would talk of it, but he never opened his lips?

A. She could talk with him about it. I wasn't with them all the time when she was speaking to him. I might have been in some other part of the room.

Q. You would hear them discussing it?

A. I don't say I did. She was talking to him at times. I wasn't listening to what they were saying always.

Q. Now, when was it that your husband went down to Mr. Monteith's the second time?

A. To the best of my knowledge the second time was when my mother-in-law came up that evening to the house and said she had been to Mr. Monteith's and he had a roll of papers.

Q. I didn't ask you what she said. I asked you when that was. I remember about the roll of papers?

A. That was the second time, to the best of my knowledge, that my husband went to Mr. Monteith's.

Q. Are you able to tell us when that was with reference to the 17th of March?

A. It was the latter part of March or April, to the best of my knowledge. I can't just place it. I know it was after I had been there the second time with my mother-in-law.

Q. You had been down in the meantime to Monteith's?

A. I was down the second time—I was down the second time with Mrs. McKinney alone.

Q. First was the 17th of March or thereabouts?

A. Yes, sir.

Q. When you and your husband and she went?

A. Yes, sir.

Q. Secondly, you had been down with her alone?

A. Yes, sir.

Q. Now, this is the third trip, was it?

A. Yes, sir.

Q. And it was some time the latter part of March or early April?

A. April, to the best of my knowledge.

Q. And something said about a bundle of papers?

A. Yes, sir.

Q. What reasons did Mrs. Frederica give for wanting your husband to go along this time?

A. Why, she told us that Mr. Monteith said that he wouldn't read that to her until she brought her son with her, and to come the next day as he wanted to make an answer to the complaint.

Q. Can you fix the date of that visit about?

A. Well, it all occurred, as I say, around the 17th of March—it all occurred from around the 17th of March until around the early part of April. I can't fix the date.

Q. So they were within two weeks of one another, the three visits?

A. They might be a little more; I can't just say.

Q. Now, when—with reference to which visit was it that going home Mrs. Frederica said, "what a terrible thing this is" for Charlie to have done, and now he will not get ten cents of my property?

A. I think it was the second visit when I was alone with her.

Q. Where was that remark made?

A. It was made on the street.

Q. What street?

A. As we came out of the lawyer's office.

Q. What street?

A. Clinton street.

Q. Had you gotten on the street or were you still in the building?

A. No; we were out on the street when she said it.

Q. So that must have been within a very few weeks or a fortnight—within a week, after the 17th of March, wasn't it?

A. Well, I can't just place when it was. I didn't keep dates.

Q. You said the third visit was within a very short time. How long a time elapsed between the first and second visit, to the best of your memory?

A. Not more than two or three days.

Q. Two or three days. And how soon was it after that trip that this picture incident occurred?

A. Well, that was—it was after Mr. Monteith had read the complaint.

Q. And that was the third visit?

A. It was after the third visit.

Q. What kind of a picture was this?

A. It was a large picture.

Q. Yes. She had had his picture—Charles' picture—up in the house?

A. It always hung there.

Q. Where was it hanging?

A. In the parlor.

Q. Yes. What did you say she did with it?

A. She had it in her hand when I went in the room, just about off the wall, and she pushed it one side, to the corner and—shall I continue? And she said, "What a terrible thing for that fellow to bring me to court and I been so good to him."

Q. And then what did she do with the picture?

A. She stood it against the wall on the floor.

Q. On the floor?

A. On the floor.

Q. Did it remain there until the time of her death?

A. It did.

Q. Which room was that in?

A. That was in the parlor.

Q. Down in the lower—

A. Downstairs.

Q. There at the time of her funeral?

A. No; it had to be removed for the undertaker.

Q. Who removed it from that place?

A. I couldn't say for sure.

Q. Well, who did remove it according to your knowledge?

A. I don't know.

Q. Why did it have to be removed for the undertaker?

A. For the simple reason that the corpse was laid there.

Q. How big was this picture?

A. Well, I can't just give the dimensions of it.

Q. Well, I know. Was it that—(indicating).

A. About like that (indicating).

Q. That is three feet long.

A. And about like that square (indicating).

Q. How was it framed?

A. It was an oak.

Q. Oak frame?

A. Yes, sir.

Q. Was it a photograph?

A. Photograph; yes, sir.

Q. And you say she put it right in the corner?

A. She did.

Q. Now, where was the corpse—where did the coffin stand?

A. Well, it was—laid alongside of the wall where the picture hung over it.

Q. What?

A. The corpse was laid just on that side where she had taken the picture down from the wall.

Q. And you say this picture couldn't stand there in this corner with reference to where the body lay in the coffin?

A. Well, right at the corner there. The undertaker wanted that for to put the candlesticks, and he had to remove it from that corner; he had to make that corner free there.

Q. Did you see him do it?

A. I did not. I wasn't in the room with the undertaker.

Q. You are not speaking then of your own knowledge?

A. You asked me why it had to be removed on account of the corpse.

Q. What became of it after that?

A. It was put out in one of the other rooms.

Q. Where?

A. It is out in the office.

Q. In the office?

A. Yes, sir.

Q. Who put it there?

A. I don't remember.

Q. Where is it now?

A. It is in the office yet.

Q. Now, had you ever seen this picture hanging on the wall?

A. I did.

Q. How was it attached?

A. With a wire or cord. I don't know which.

Q. To a hook upon the top?

A. A nail or something.

Q. A nail. Yes. You couldn't reach the nail from the floor, could you?

A. Not I.

Q. No. Had it been taken from the nail by Mrs. McKinney?

A. I didn't see her just taking it off the hook, but she had it in her hand down off the nail when I went in.

Q. Picture two feet long?

A. I am not just saying the dimensions, because I can't tell that.

The Court—You don't know whether she took it down or not.

Witness—She told me she took it down.

The Court—You don't know whether she took it down or not?

Witness—I seen it in her hand and she said she took it down.

The Court—Did you see a stepladder there?

Witness—There was a chair right beside it.

The Court—Did you see a stepladder in the parlor?

Witness—It wasn't a stepladder, it was a chair.

Q. Were you there on Friday before she died?

A. The Friday before she died? I was not.

Q. You didn't go to Mr. Monteith's with Frederica on Friday, did you?

A. I did not.

Q. When did you learn that she paid Monteith $50?

A. I heard her telling it, and when she was sick in bed repeating it to Mrs. Rache while I was there present.

Q. What time did you get there on Friday, yourself?

A. I wasn't there on Friday at all.

Q. Oh. What time did you get there Saturday?

A. Between two and half-past two to the best of my knowledge.

Q. Were you sent for?

A. I was.

Q. You were told she was ill?

A. I was.

Q. Who sent for you?

A. Mrs. Rache 'phoned to my husband and he came home and told me.

Q. So what time was this that he came home and told you?

A. Well, as far as I can judge it was between two and half-past two that I got there, and it wasn't very

many minutes before that, because I wasn't long getting ready.

Q. And did your husband come up and take dinner before you went or did you and he go right down?

A. Why, we went right down to the best of my knowledge.

Q. Can you remember?

A. I don't think we had our dinner. Well, it was after dinner. I had mine, but I don't know about him.

Q. Did you hurry down in a trolley?

A. No; I didn't hurry.

Q. Did you go in the trolley or walk?

A. I have got to go in a trolley because it is a long ways to my house.

Q. Well, your husband came up on purpose to tell you, didn't he?

A. No; that was about—Saturday—he was getting home.

Q. What?

A. He was coming home after his day's—half day's work.

Q. But he told you that he had word that she was quite sick?

A. Yes, sir.

Q. So you both went down there about half-past two?

A. Yes, sir.

Q. Now, you didn't either of you leave there, did you, until after she died?

A .I stayed all night Saturday night, all day Sunday, and I went home Sunday night.

Q. Yes. Returned on Monday morning?

A. On Monday morning.

Q. And stayed there until after the funeral?

A. I stayed there until—I went home Tuesday night.

Q. Yes. Now, your husband stayed there Saturday —Saturday night, didn't he?

A. Saturday night? Friday night—no, he didn't.

Q. What time did he leave Saturday night?

A. I don't remember just the time.

Q. Well, he was there Sunday?

A. He was there Sunday, yes, sir.

Q. Stayed Sunday night?

A. No; he came home with me.

Q. What?

A. Sunday night I went home and he came home with me.

Q. He went with you? Was he there Monday?

A. He was there Monday.

Q. Stayed Monday night?

A. Monday night? Monday night? Yes, sir; he stayed all night Monday night.

Q. And he stayed until after the funeral, didn't he?

A. Well, I can't just remember about him.

Q. What?

A. I can't just remember.

Q. Try and think whether he went home with you between the time of Frederica's death and the funeral. He didn't, did he?

A. He came home with me on Sunday night, I know.

Q. I know. I said between Frederica's death and the funeral, he didn't go home, did he?

A. He only stayed Monday night to my knowledge, at that time.

Q. Do you say he was home between the time she died and her funeral?

A. Between the time she died—yes; he was home.

Q. When?

A. Well, he came home—Monday night—I can't remember about Tuesday night. Do you mean by it Tuesday night?

Q. I said between the time of the death and the funeral?

A. Well, he went home.

Q. When?

A. Why, he went home—he went home Tuesday morning or Tuesday. He wasn't there—

Q. Well, what time did she die Tuesday? Two o'clock, didn't she?

A. She died around two o'clock.

Q. Wasn't he there when she died?

A. He was.

Q. Yes. He had been there all day Tuesday, hadn't he?

A. I can't account for the—for what time he came in on Tuesday.

Q. He had been there all day Monday, hadn't he?

A. Not all day, Monday.

Q. Well, what time did he get there Monday?

A. I don't recall when he got there Monday.

Q. Well, he was there in the afternoon, wasn't he?

A. He was there Monday afternoon; yes, sir.

Q. Now, what time did the priest get there Monday afternoon?

A. Well, to the best of my knowledge the priest got there around—I should say between four and five.

Q. Do you know what time Mrs. Rache had left to get him there?

A. I don't know just the time.

Q. The doctor had been there, hadn't he?

A. The doctor had been there first.

Q. Now, the priest got there, you think, some time before five?

A. I should judge about that time.

Q. Put on his stole?

A. He did.

Q. Did you attend the entire conversation or entire interview that occurred between him and the sick lady?

A. What is that, please?

Q. Were you present all the time he was in the sick room?

A. I was.

Q. All the time?

A. No; not while he was taking confession.

Q. Be careful what you say. Then you were not present all the time?

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A. Not when he gave her confession.

Q. Did you meet the priest—did you meet him?

A. When he came in the room?

Q. Who let the priest in?

A. I don't know.

Q. Who was in the room when he came in, you and the nurse?

A. I was there. I can't remember anybody else. I was there myself. I can't speak for anybody else. I was only there myself. I remember being there myself but I don't remember—

Q. You don't know who let him in?

A. He was let in downstairs. I don't know who let him in.

Q. You don't know where he robed himself?

A. Right in the sick room.

Q. In the sick room?

A. In the sick room.

Q. Who brought him up to the sick room?

A. I don't know. I was in the sick room when he came in.

Q. How long was he in the sick room, to the best of your judgment?

A. Well, I can't just say, but I should think about half an hour. I can't just say.

Q. After he left the sick room, did you go out with him or did you see him outside?

A. I am not sure.

Q. What?

A. I am not sure whether I went downstairs with him or not and show him the way.

Q. Was your husband there at that time?

A. My husband was not there then.

Q. Had he been there that afternoon?

A. My husband was there that afternoon.

Q. He had been there?

A. Yes, sir.

Q. And left?

A. My husband had been there when the priest was there, downstairs, to the best of my knowledge.

Q. That is what I am talking about? When the priest arrived, your husband was there, wasn't he?

A. I can't say was he there when he arrived. I can't say that, but I know he was there while the priest was upstairs.

Q. How do you know that?

A. Because he spoke up to me that he was there, He spoke up to me from downstairs.

Q. You heard his voice?

A. I heard his voice.

Q. When he left the room did you go downstairs with your husband?

A. With my husband? No; I didn't go down.

Q. Where did you stay?

A. When I left the room with the priest?

Q. Yes.

A. When I left the room with the priest, I showed him downstairs, how to go out.

Q. Now, what is that? What did you say then?

A. I went down to show him how to go out.

Q. You left the room for the priest to remain in there alone, didn't you?

A. I did.

Q. Where did you go then?

A. I can't remember. There are other rooms on the floor.

Q. I suppose there are a great many others. You can't remember?

A. I can't remember just where I went.

Q. Whom did you see then, while the priest was in there with her?

A. No one that I can recall.

Q. What?

A. No one that I can remember.

Q. Where was the nurse?

A. I don't know where the nurse was.

Q. Where was Amelia?

A. I don't know where she was.

Q. Where was your husband?

A. He was downstairs, to the best of my knowledge.

Q. Downstairs. Now, when you went down with the priest to show him the way out, you and the priest and your husband had a talk, didn't you?

A. No.

Q. What?

A. No.

Q. No talk at all?

A. Not downstairs.

Q. Where did you have a talk?

A. After the priest had given my mother-in-law Holy Communion—

Q. I didn't ask you about the priest. I asked you where the priest had the talk—you and the priest and your husband?

A. I didn't have any talk with the priest myself.

Q. Who did have it, your husband?

A. No.

Q. Who did have it?

A. I can't explain unless you let me speak about upstairs, how it happened.

Q. I am asking you with whom the priest had any talk after he came out of the sick room?

A. After he came out of the sick room, I believe he met the nurse downstairs and spoke about—

Q. Met the nurse?

A. He was talking to the nurse about a patient that she had that he attended to a short—quite awhile ago.

Q. Yes. Did he talk with anybody else besides the nurse?

A. Not that I know of.

Q. So that the priest alone spoke to the nurse?

A. He spoke to the nurse while I was there, but I left then. I don't know where I went then.

Q. Did he have any talk with you after he came out?

A. No; he did not.

Q. Eh?

A. No, sir; he did not.

Q. Not a word? Not a word?

A. Not after he left the sick room, he didn't.

Q. Before he left the sick room, did he?

A. When he spoke to her my mother-in-law told him she wanted a—

Q. One moment. I didn't ask you what your mother-in-law said. I asked you if the priest spoke to you before he left the sick room?

A. Before he left the sick room? He did not. No. Before he left the sick room all he said—

Q. One moment. Will you answer my question? Did the priest speak to you before he left the sick room?

A. Nothing, only to say that he—

Q. One moment. Can't you answer yes or no to that?

A. Yes, sir.

Q. He did?

A. Yes, sir.

Q. You now recall that he spoke to you before he left the sick room, do you?

A. Yes, sir.

Q. Who was in the sick room besides yourself and the patient and the priest; anybody?

A. I think the nurse was there.

Q. And the nurse. She had come in, had she?

A. Well, this was before he went downstairs, I am speaking about.

Q. I understand. She left during the time the priest was there alone; of course, didn't she?

A. She did.

Q. Now, she had come in, you say? She had come in, had she?

A. She came in when the priest was going to give Holy Communion.

Q. She did. All right. And you were there?

A. I was there when he gave—

Q. Anybody else in there besides you two, now, and the priest?

A. I don't remember anybody else.

Q. Now, while you were both in the room and after the priest had given Holy Communion you say the priest said something to you, did he?

A. Yes, sir.

Q. Now, had the doctor been there yet?

A. The doctor had been there before the priest.

Q. Yes. And had the lawyer been sent for?

A. He was.

Q. He had already been sent for; is that right?

A. Well, what time—lawyer, do you mean? I can't tell you that.

Q. What?

A. The lawyer was sent for.

Q. I asked you at the time that the priest and you and the nurse were in the sickroom just after the Eucharist, the lawyer had been sent for at that time?

A. While the priest was there.

Q. Before the priest left the room the lawyer had been sent for?

A. Yes, sir.

Q. Eh?

A. The lawyer had been sent for before the priest left the room.

Q. Had the lawyer been sent for before the priest got there?

A. No, sir.

Q. Eh?

A. No, sir.

Q. When had the lawyer been sent for then? In what stage of the proceedings to your knowledge?

A. Why, my mother-in-law told the priest—

Q. Won't you please answer my question?

The Court—She is attempting to answer it. Go on.

Witness—Why, my mother-in-law told the

priest that she wanted a lawyer to make a will, and he—

Q. Did you hear her say that?

A. I did.

Q. Right out loud?

A. Loud enough to be understood.

The Court—He didn't ask you that. He asked you whether it was out loud.

Q. Right out loud?

A. Well, not out so loud.

Q. You were at the foot of the bed, weren't you?

A. I was not. I was right at the door.

Q. What?

A. The priest was at the head of the bed and I stood right this side of the head, at the door.

Q. At the door?

A. Yes, sir.

Q. And you heard Mrs. Frederica tell the priest that she wanted a lawyer?

A. I did.

Q. To draw the will?

A. She said she wanted a lawyer to make a will.

Q. To make a will. Had the priest been talking to her before that?

A. About her affairs? I don't know.

Q. You don't know? How long was this after the Holy Communion had been administered?

A. Well, not very many minutes.

Q. Well, five minutes?

A. Well, between three and five minutes.

Q. Yes. Well, after, as you say, she told the lawyer—the priest—in a tone loud enough for you to hear standing at the door that she wanted a lawyer to draw her will or make her will, who sent word—sent for the lawyer, you?

A. I did not.

Q. How do you know he was sent for?

A. The priest turned to me and told me.

Q. What?

A. The priest told me and I went downstairs—is that all right?

The Court—Go ahead.

A. (Continuing.) I went downstairs and I told my husband that the priest told me that she had told him she wanted to make a will.

Q. And to go for a lawyer?

A. That she wanted a lawyer to make a will.

Q. Did you tell your husband to get Mr. Monteith?

A. She didn't mention any names.

Q. Did you tell your husband to get Mr. Monteith?

A. I did not.

Q. Did not. Well, did you go upstairs again?

A. I did.

Q. After your husband had left for the lawyer?

A. I did.

Q. What time was this, now?

A. Well, as I say, it was between four and five that the priest was there, and it was after I left him downstairs that I went right back.

Q. Who is this priest? What was his name?

A. Father Williams.

Q. Where is he? Is he in the room, here?

A. He is not.

Q. He is in Newark, isn't he?

A. No; he is in Manchester.

Q. Manchester, what?

A. Manchester. I don't know whether it is Manchester, Ohio, but he is in Manchester.

Q. How do you know he is?

A. Well, I inquired.

Q. Inquired of whom?

A. I inquired from one of the Fathers.

Q. Which Father?

A. At the house.

Q. Where?

A. Where he was stopping.

Q. When? When did you make that inquiry?

A. Now, I can't tell just the day.

Q. As near as you can?

A. But if I am not mistaken I think it was the day before this trial started.

Q. What do you say his name was?

A. Father Williams.

The Court—Is that last Thursday?

Witness—Yes, sir.

The Court—December 3d?

Witness—The day before the trial. I am quite sure it was the day before the trial.

Q. His name was Father Williams?

A. Father Williams.

Q. You understand that his Christian name is Williams?

A. That is what they call him in religion.

Q. What?

A. That is what they call him in religion, Father Williams.

Q. When did you see him last?

A. I have never seen him since the day he administered the last rites to Mrs. McKinney outside of him reading mass on the altar, but I haven't had any conversation—any talk with him after.

Q. When did you see him reading mass on the altar last?

A. I seen him—I seen him different times.

Q. Well, the last time?

A. Well, in July.

Q. Not since then?

A. Well, I don't always go to that church.

Q. Not since then?

A. No; I don't remember having seen him since then.

Q. All right. Very good. Had you ever been to see him, to call on him?

A. Had I ever been to see him?

Q. Had you ever been to call on him?

A. I was—did call on him.

Q. What?

A. I did call on him.

Q. Yes. When was that?

A. I can't recall just when it was that I went to call on him.

Q. In the evening?

A. I was there in the evening; yes, sir.

Q. Been there more than once, haven't you?

A. Been there more than once?

Q. You know, surely, Mrs. McKinney, whether you have been to see that priest more than once since this difficulty arose?

A. I went to see him after my mother-in-law died, I remember now, but not lately, only the day before the trial.

Q. Did you go more than once?

A. I did.

Q. How often have you been to see him?

A. Twice to my knowledge.

Q. How many?

A. Twice.

Q. Husband with you both times?

A. No, sir.

Q. Once he was, wasn't he?

A. Once.

Q. Now, I understood you to say on your direct examination when the doctor was there that afternoon before the priest arrived that the doctor asked you if she had settled her affairs; is that right?

A. Yes, sir.

Q. And you said she hadn't, is that right?

A. He asked both my husband and I.

Q. And your reply was that she had not; is that right?

A. I didn't say that.

Q. What did you say? When he asked if she had settled her affairs—when the doctor asked if she had settled her affairs what was the reply?

A. Well, of course, I can't just remember who spoke first, but the answer was that we didn't think she had.

Q. Didn't think she had. Didn't you say that as far as you knew she had not?

A. Well, something to that effect, that she had not, or thought not—I can't just remember the words.

Q. By settling her affairs, what did you understand the doctor to mean and what did you mean when you said as far as you knew she hadn't—what affairs had she to settle?

A. Well, I thought—

Q. Eh?

A. I knew that the doctor knew she had property to settle and I knew that, too.

Q. Oh, how did you know she had property to settle?

A. Because she told me she had property.

Q. When had she told you that?

A. Why she always told me it was her property.

Q. And when had she told you she wanted to settle it?

A. She didn't say when she wanted to settle it; she only asked me.

Q. What?

A. She only asked me to stick to her until after this court trial was over with Monteith. That is why I went so frequently.

A. Yes; exactly. But during those times she would tell you she wanted to settle these properties?

A. She said to me on one occasion when she was sick—she said "don't leave me and don't let me die until I fix my affairs." That she said to me when she was sick abed.

Q. What day was that that she said that?

A. Well, I know she said it to me on Sunday.

Q. On Sunday?

A. And on Monday, too.

Q. On Monday, too?

A. She said it to me different times while she was sick.

Q. How many times did she say to you while she was sick "Don't let me die until I settle my affairs?"

A. She said that to me more times than once. I can't just recall how many times.

Q. Well, now; you say she said it to you Sunday?

A. Yes, sir.

Q. And she said it to you Monday?

A. Yes, sir.

Q. Who was present when she said it on Sunday?

A. There was somebody else in the room but I don't remember who they were.

Q. Said it right out loud, did she?

A. Well, she didn't speak very loud.

Q. Well, were you leaning over?

A. No; I was just sitting on the side of the bed. I wasn't leaning over her.

Q. Did she say it Monday?

A. She did.

Q. What time Monday? Before the priest came?

A. Before the priest came; yes, sir.

Q. Yes. Why didn't you send for a lawyer, then, right away?

A. We didn't send for a lawyer right away?

Q. I ask why you didn't, if she said that to you Sunday and Monday?

A. Well, it wasn't any of my business to ask her to send for a lawyer. I didn't consider that my business to speak about it.

Q. So your statement, now, is that while she had said to you on Sunday and said to you on Monday, "Don't let me die before I settle my affairs," you nevertheless, did not send for a lawyer on either occasion, did you?

A. No. No, sir.

Q. No. Who heard the remark made on Monday?

A. I don't remember who was in the room.

Q. What time was it made on Monday?

A. Why, on Monday I didn't get—I went home Sunday night and I didn't get there until Monday near noontime. I can't say how near it was to noon.

Q. So it must have been afternoon, some time?

A. Well, it was between—before dinner that I got there.

Q. What?

A. Before dinner I got there, but I can't tell how soon before.

The Court—You mean dinner in the middle of the day?

Witness—Yes, your Honor.

Q. You can't say how soon after dinner it was?

A. I cannot.

Q. Who was in the room then?

A. I can't remember who was in the room.

Q. She spoke that so that you heard her distinctly?

A. I did, but not very loud.

Q. Were you there when the doctor was there in the afternoon on Monday?

A. I was.

Q. Were you in the room when the doctor was there?

A. I was not.

Q. Did you hear him ask her—yell at her "How do you feel?" and she made no response? Were you there then?

A. You didn't have to yell at her at all.

Q. I ask you if you were there when he yelled at her, asking her how she felt, and she made no response. You were not in the room there?

A. He didn't yell at her while I was there.

Q. Were you in the room when he was there?

A. I was not.

Q. Now, she had already told you, you say, coming back from Mr. Monteith's office, that she was not going to leave Charlie ten cents?

A. She did.

Q. She had already told you it was a terrible thing, what Charlie proposed, hadn't she?

A. She did.

Q. She had already, according to you, taken that picture and put it face in at the corner, hadn't she?

The Court—She hasn't said that.

Q. Well, put the picture down in the corner?

The Court—How was that picture taken down; was the face turned towards the wall?

Witness—When she had it in her hand it was facing—

The Court—I ask you when it was put down, how was it?

Witness—When she left it out of her hands?

The Court—Yes; down on the floor, leaning against the wall; was the fact in or out?

Witness—The face towards the wall.

Q. Yes. Now, that had occurred, too, hadn't it?

A. Yes, sir.

Q. Now, I understand you that on that Monday afternoon when the lawyer was there you knew she was very seriously sick, didn't you?

A. On Monday, I did.

Q. Very seriously sick?

A. She was.

Q. Knew she was going to die, judgment of the priest and judgment of the doctor?

A. Well, from what the doctor said, that is all I know.

Q. Why did you ask her if she wanted Charlie sent for?

A. Why did I ask her?

Q. Yes.

A. Well, for reasons of my own.

Q. Well, I asked you what those reasons were?

A. Well, because she had made a funny remark about Charlie to me and I thought that as long as he wasn't there that he might say that we had tried to put her up to do something wrong to him.

Q. Oh.

A. And I offered to go to Charlie for her.

Q. So the thought did flash across your mind that if Charlie wasn't there he might think it was kind of queer, didn't it? When did that thought first flash across your mind? While you were sitting there in the room?

A. When she got sick and—

Q. What?

A. When she got sick and I knew that she was going to send for a lawyer.

Q. Well, you hadn't thought enough of Charlie to send for him up to this time, had you?

A. I was always a friend of Charlie's.

QQ. I didn't ask you that. You didn't telephone Charlie to come and see his sick grandmother, did you?

A. Because it was her request.

Q. You didn't telephone him, did you?

A. I did not.

Q. And yet, when everybody was there, and they were getting ready to draw the will, you did say to her, "Shall we send for Charlie," did you?

A. I said that in the presence of the priest.

Q. What?

A. I said that in the presence of the priest and in the presence of the lawyer.

Q. You repeated it twice?

A. I did.

Q. You didn't tell us that before?

A. I repeated it before the priest and before the lawyer.

Q. Eh?

A. I repeated it twice; both times.

The Court—You mean to say that you told it to us or that it happened? You haven't told us, have you, until this time, that you made that remark when the priest was there?

Witness—Well, I was afraid I couldn't continue speaking and I just answered our lawyer.

Q. Well, now, it appears for the first time, Mrs. McKinney, that you say that you made that remark to her in the presence of the priest?

A. I did.

Q. Well, the lawyer wasn't there then, was he?

A. No; he was not.

Q. What had occurred just before you made that remark to her in the presence of the priest?

A. Before? Well, that was when he was after giving her Communion.

Q. After Communion?

A. After he gave her Communion. It was after that I spoke. When she turned to him and said she wanted a lawyer, and then, before going downstairs, I asked her did she want to see Charlie or would I send for Charlie and her answer was no, and the priest was there when I asked her.

Q. Why didn't you tell us about that on your direct examination?

A. Well, I didn't know whether I could keep going ahead and I spoke of those things—

Q. What?

A. I just answered you just as you put the question to me, and I didn't know—

Q. I wasn't asking you.

The Court—That was your direct examination.

Mr. McCarter—When Mr. Lum was asking you?

The Court—Mr. Lum didn't stop you off, as you thought, did he?

Witness—Stop me off what?

The Court—Stop you off from telling what the story was.

Witness—Nobody stopped me off from telling anything.

The Court—Even Mr. McCarter didn't do it, is that it?

Witness—He says "Answer my question." That is because I was so afraid to go along, only what he put to me.

Q. Mrs. McKinney, was the nurse present while the priest was there, when he made that remark—when you made that remark?

A. I can't say for sure, but I think she was, when I asked if I should send for Charlie.

Q. Was Amelia there?

A. No, sir; she was not.

Q. Hadn't Amelia been there during the Communion?

A. That I couldn't say—we were kneeling.

Q. You can't remember?

A. We were kneeling down as he was giving her Holy Communion. I don't remember who was around the room.

Q. Were you still kneeling down when you wanted to know whether Charlie was to be sent for?

A. No, sir; I was standing up.

Q. Where, at the door?

A. At the door, right at the head of the bed.

Q. How many times after the conversation on the street, in which she said she wasn't going to leave Charlie ten cents, did you go with her to Monteith's office, two or three?

A. After she made that remark, to the best of my knowledge, I think I only went once more.

Q. Once more?

A. That is all.

Re-direct:

Q. When you were at the doorway—in the doorway—how far were you from your mother-in-law's head, a foot or five feet?

Mr. McCarter—Don't lead her.

Q. More or less.

Mr. Lum—I certainly won't. I say a foot of five feet, more or less. Do you understand the question in spite of the interruption, Mrs. McKinney?

Witness—About how many feet?

Q. Yes.

A. I was from her when I stood at the door?

Q. Yes.

A. I don't think more than two feet.

Q. Well, will you tell us whether or not—how many times you saw Charlie at the house after March 17th?

A. I never saw Charlie there once in all the time I have been there from around the 17th of March until three days before Mrs. McKinney got sick, with the exception of Sundays. Those were the only days I wasn't there.

Q. Did you ever see him when you were there, is the question, not whether you saw him when you weren't there? Did you see him when you were there, and, if so, how many times?

A. You mean from around the 17th of March?

Q. Yes.

A. I never seen him there.

Q. Until what time?

A. Until the Monday night when his grandmother was sick, when he came in and went upstairs.

Re-cross:

The Court—When was it that he was there, three days before she got sick, you said?

Witness—No. It was myself. I said I had been there three days—every day with the exception of three days before she got sick.

The Court—Now, when you made this remark in the presence of the priest, "Do you want me to send for Charlie?" that was after Mrs.

McKinney had said that she wanted a lawyer, wasn't it?

Witness—Yes, sir; yes, your Honor.

The Court—And then she said, "No," she didn't.

Witness—She said "No"; she didn't want to see Charlie.

The Court—Didn't want to see Charlie?

Witness—She did.

The Court—Did she say it decisively so that you knew that she didn't want to see Charlie?

Witness—She was provoked at my putting the question to her.

The Court—She was very much provoked?

Witness—Provoked.

The Court—Then why is it that you asked the question again when Mr. Schotland came?

Witness—Well, simply because I thought it was better to ask her while somebody was there.

Q. You wanted somebody to hear you ask her, is that it?

A. I did.

The Court—What was the matter? Did you have a consciousness of a guilty purpose in this thing?

Witness—I didn't think I was guilty of anything at all.

The Court—Then why did you try to have the piece of information given out then?

Witness—Well, because she called him a conniver, and then the thought struck me that if he wasn't there that he might say that my husband or I or somebody else in the house had influenced her, and such a thing as a will I never spoke to my mother-in-law about—never.

Q. Well, you didn't ask her if you should send for Mr. Monteith, did you?

A. No; I didn't. She only said she wanted a lawyer.

Q. And when was it you made up your mind you wanted somebody to hear you say this—when did that cross your mind before you said it to the priest?

A. Well, I didn't think she was so sick.

Q. No, no. Now, please answer my question. You are no fool, at all. You understand. When was it you first made up your mind that you wanted somebody to hear you say that before you said it in the presence of the priest?

A. When I said it before the priest?

Q. What?

A. When I said it before the priest. It came to me she might want to send for Charlie.

Q. You don't understand me apparently. When was it you made up your mind you wanted to have somebody hear you do that. Thought it would be a good thing to have somebody hear you do it? When did you make up your mind to that?

A. Why, just as soon as I knew she was going to make a will.

Q. That was when the priest made the remark—

A. Yes, sir; when the priest was there.

Q. So then right away you thought—

A. Asked her if I would send for Charlie.

Q. You thought it would be a good thing to say that in the presence of somebody?

A. Because I hadn't any hard feelings to Charlie.

Q. So you said it in the presence of the priest?

A. I did.

Q. So he would be a witness to it; is that right?

A. I wasn't thinking just about the witness part.

Q. Then you said it again in the presence of the lawyer?

A. I did.

Q. And the nurse?

A. Well, the nurse was there one time when I said it.

Q. Eh?

A. The nurse was there one time when I said it, I believe, when the priest was there.

Annie F. Roff, sworn for Proponent.

Direct examination, by Mr. Lum.

Q. Where do you live?

A. 29 Miller street, Nutley, New Jersey.

Q. Did you know Mrs. Frederica McKinney in her lifetime?

A. Quite some years.

Q. How long had you known her?

A. Some years before her death.

Q. When had you visited her before her death?

A. The last time?

Q. Yes.

A. Monday evening.

Q. And when before that?

A. Oh, I beg your pardon. I meant Monday evening I saw her last. I visited her Sunday evening before her death.

Q. When did you first know of her sickness?

A. Sunday afternoon, I think.

Q. Then when did you go down?

A. Right after dinner.

Q. Had you had dinner in the middle of the day?

A. In the evening.

Q. In the evening?

A. I got there between six and half-past.

Q. On Sunday evening?

A. On Sunday evening.

Q. Did or did she not recognize you?

A. I didn't see her Sunday evening.

Mr. McCarter—I object.

The Court—Objection sustained.

Mr. Lum—I insist on the record that did or did not is not a leading question, in that form.

Witness—I didn't see her Sunday evening. I staid all night.

Q. You didn't see her Sunday?

A. I said I wouldn't disturb her Sunday night, because I was going to remain to see if I could help any.

Q. When did you see her?

A. Monday afternoon, between four and half-past, I should judge.

Q. State what happened.

A. Well, after the doctor left—perhaps half an hour after—I went up to see Mrs. McKinney. The nurse was there, but who else I don't know. I said, "How do you do," and kissed her. She said, "Annie"; and while I was there somebody—the nurse—offered her a glass of milk.

Q. What happened?

A. She drank it. She lifted it up to her mouth herself.

Q. Did she speak again?

A. No. I didn't speak to her again. I left the room shortly after.

Q. How long were you in the room?

A. How long? I should judge maybe a quarter of an hour—a little over.

Q. And did you see her again?

A. Monday evening.

Q. At what time?

A. Between eight and half-past.

Q. Did she speak upon that occasion?

A. She did.

Q. What was said?

A. Well, I was leaving then—may I say it in my own words?

Q. Yes; as near as you can recall.

A. I wanted to return to Nutley and didn't want to leave too late, so I put my hat and coat on and was waiting for Mrs. Rache to return, to hear about my uncle, her husband, who was very ill. She came in around eight o'clock, so I said I would go up.

Mr. McCarter—Never mind. Get to the point.

Witness—I went upstairs to bid Mrs. McKinney good nigh

Q. What happened?

A. I had my hat and coat on and didn't know as she would recognize me, being so ill. I says, "You don't know me, Mrs. McKinney;" she says, "Yes; Annie Roff," and she patted me under the chin and says, "How is your father;" I said he was well.

Q. And what hour was that on Monday?

A. Between eight and half-past.

Q. Are you any relation to any of the parties here?

A. None whatever—oh, am I related?

Q. To any of the parties?

A. Yes, sir; I am related to Mrs. McKinney—first cousin—I am related to Mrs. McKinney because I am his first cousin and he married her.

Cross-examination, by Mr. McCarter.

Q. Now, as I understand you, you got down there Sunday evening about what time, Mrs. Roff?

A. As far as I can recollect it was between six and half-past six. It was daylight yet.

Q. You had had your dinner?

A. I had my dinner at home.

Q. At Nutley?

A. Yes, sir.

Q. What time do you have dinner?

A. Well, usually on Sunday evening about five o'clock.

Q. Did you have it that time on that occasion?

A. I think so. I don't know as we varied.

Q. Eh?

A. I think so.

Q. Now, how long a time had elapsed between them and the last time you had seen Mrs. Frederica?

A. The Sunday before.

Q. You learned she was ill, did you?

A. No; perfectly well then. Oh, the Sunday I heard it was that Sunday that I went down.

Q. Had you learned she was ill?

A. Yes, sir.

Q. Who told you?

A. Mrs. McKinney's little daughter Florence.

Q. That is Mrs. Frank McKinney's?

A. No, Mrs. Thomas—or rather Mrs. Thomas Rache's daughter.

Q. Florence Rache?

A. Florence Rache.

Q. Had told you that she was ill. Had she telephoned you?

A. No. Her mother sent her up because she had to go to see her husband who was sick.

Q. I don't care about these reasons. Don't talk so much, for heaven's sake. Florence Rache had told you that she was ill?

A. Yes, sir.

Q. On Sunday?

A. Yes, sir.

Q. Very ill?

A. Said she was sick.

Q. Very ill. You got down there about six or half-past?

A. She didn't say very ill.

Q. Eh?

A. She didn't say very ill. She said she was sick.

Q. Sick. Sick enough for you to come down and spend the evening?

A. I didn't know that until I got there.

Q. So sick you didn't see her that night?

A. So sick I didn't disturb her when I heard how sick she was.

Q. Yes. Was the doctor there that night?

A. Not that I know of.

Q. Did you learn what her trouble was?

A. I couldn't exactly say. When I saw her Monday I saw.

Q. Oh. Did you learn that Sunday?

A. No; I did not.

Q. Have any curiosity to find out what the trouble was?

A. I may have been told.

Q. I am asking you did you learn what her trouble was?

A. I couldn't say that I did.

Q. Who was there Sunday night?

A. Sunday night? Miss Clark, Mrs. McKinney, and the nurse, as far as I could say.

Q. Nobody else?

A. There may have been.

Q. Well, was Mr. McKinney there?

A. He may have been.

Q. Don't you know he was?

A. Not that I recollect.

Q. You spent the night there?

A. Yes, sir.

Q. And you didn't go in to see her Monday morning, did you?

A. No, I don't think so.

Q. And after the doctor had been there on Monday afternoon you saw her for the first time?

A. As far as I can remember.

Q. Yes. Had you seen the doctor?

A. Yes, sir; I did see the doctor.

Q. So it must have been after four o'clock?

A. Yes, sir.

Q. Were you there when the lawyer came?

A. Didn't know it.

Q. What?

A. I didn't know that he was there?

Q. Did you know he had been sent for?

A. Not that I remember.

Q. Well, we will come to that later. Now, you went up in the room after the doctor had been there for the first time?

A. Yes, sir.

Q. Were you there when the priest was there?

A. I don't know.

Q. What?

A. I don't know. I didn't see him.

Q. Are you a Romanist?

A. I am.

Q. You can't say whether the priest was there when you were there or not?

A. I couldn't say.

Q. Do you know whether she had had her last Communion that afternoon before you left?

A. I don't know. I was down in the basement.

Q. Basement?

A. There is two flights of stairs; she was on the third and I was down in the basement.

Q. You mean to tell me you don't know whether the priest had been there that day?

A. I do not.

Q. Don't know. Now, you did hear that the lawyer had been sent for, did you?

A. Not that I remember.

Q. Will you swear you didn't hear that the lawyer had been sent for?

A. I can't swear to anything I don't remember.

Q. Do you recall the fact that Mr. McKinney went out that afternoon for a lawyer?

A. I was there when the lawyer went downstairs but I didn't know he was there or sent for, because I came up from the basement—it must have been while he was up—but I did see him go away.

Q. Oh, yes. How soon after the doctor left did you go into the room for the first time?

A. As far as I can remember it may have been a half an hour. I don't really know how long.

Q. Did you see him go?

A. I was in the room downstairs.

Q. What?

A. I was in the room downstairs.

Q. You observe you haven't answered my question yet. Did you see the doctor go?

A. Yes, sir.

Q. And did you go up immediately?

A. No.

Q. Had Frank gone out before you went upstairs? He had, hadn't he?

A. I can't remember.

Q. What?

A. I can't remember. I don't remember him being there at that time.

Q. Well, who suggested that you should go upstairs at that time?

A. I don't know as anyone did. I said I would go up and see her most likely.

Q. Go up to see her yourself. You hadn't suggested going up before? Been there now twenty-four hours. How did it happen that just at that mystic moment you determined to go to see this lady?

Mr. Lum—I object to the characterization.

Mr. McCarter—We will leave out the mystic.

Q. How did it happen just at that moment, while you had been there nearly twenty-four hours, you determined that now you would go upstairs?

A. I don't know.

Q. Don't know?

A. No.

Q. Well, you were in there and you thought this—

A. I knew I was busy downstairs.

Q. What?

A. I was busy downstairs all the morning helping Millie downstairs.

Q. Helping what?

A. Helping Miss Clark down in the kitchen.

Q. Mrs. McKinney was there, wasn't she—Mrs. McKinney?

A. May have been upstairs. Not downstairs very often.

Q. Well, you know she was there in the house?

A. In the house? I don't know she was there right then. I couldn't say.

Q. Couldn't say. No. Well, now, where had you been just before you observed the lawyer going away?

A. Down in the kitchen.

Q. How did you know he was a lawyer?

A. When he went away I was upstairs but it must have been when he came I was in the kitchen. I came up in the meantime.

Q. How do you know he was a lawyer? You do not answer my question?

A. Somebody must have remarked that he was a lawyer.

Q. Who was that?

A. I couldn't tell you.

Q. Where was he when the remark was made that he was a lawyer?

A. I couldn't tell you that. I was sitting right near the door in the office as you come in when he went out and that is the first I saw him.

Q. Did you hear him have a talk with Frank?

A. How?

Q. Did you hear him have any talk with Frank?

A. No; I did not.

Q. Did you hear him say to Frank that the reason the old lady was to have her will made—did you hear Frank say to him that the reason why the old lady was so anxious to have her will made was because Charlie had commenced suit against her?

A. No.

Q. Didn't hear that? Did you hear any remark made?

A. No, sir.

Q. Did you hear Frank tell the lawyer that there had been another will?

A. I didn't hear any conversation.

Q. Who told you it was a lawyer?

A. I must have heard the remark when he went out

that he was a lawyer. There was somebody in the office there with him, but I couldn't tell you who it was.

Q. Now, on the evening between four and 4:30 of Monday, after the doctor had left, when you had your first audience in the sick chamber, did you go over to the pillow—

A. I was right in front of her. Standing right up in front of her.

Q. See if I have the geography of that room correctly. You entered into a door from the hall in the rear of the room, didn't you?

A. Say that again, please.

Q. You entered into the sick room through a door that is in the rear of the sick room?

A. What do you call the rear of the sick room?

The Court—Back away from the street.

Witness—No. I should think I would call it towards the front, because as you go in the door—well, this was the sick room. The only way I can explain it—I don't understand.

The Court—Tell us your best recollection.

Witness—I say, as the table is here, I come in the door here (indicating). Mrs. McKinney's head is right at the head here (indicating). She couldn't see me until I got right by her without she turned around, which she did, kind of turned her head.

Q. Well, now, see if we can understand this. See if this is right. The bedroom was on the second floor, wasn't it?

A. Yes, sir.

Q. Now, you come upstairs like that (indicating) and you walk back down the hall?

A. Yes, sir.

Q. Now, the door is at the rear of the room walking back that way?

A. You come up this way and here is the door right here (indicating).

Q. Where?

A. Why, at the end of the hall. There is a door this way and a door this way (indicating). Mrs. McKinney was in the door, as you come up, to the left.

Q. She was in the room the door of which is on the left as you come up?

A. Yes, sir.

Q. All right. That is right now. Now, the door is towards the end of the room, isn't it?

A. End of the hall.

Q. And the end of the room as well?

A. Yes, sir.

Q. You enter the bedroom and the bed lay—

A. Just to the left.

Q. To the left as you enter?

A. As you enter.

Q. Now, how much space do you say there was between that bedstead and the door jam?

A. I couldn't point out that, for I don't know much about it, but I should say—you are right near the bed when you get in.

Q. I know; but two or three feet?

A. I wouldn't like to answer that because I wouldn't be sure. I can explain it better.

A. Never mind. If I should ask you if it was as far —is the door jam as far from the bed as you are from this gentlemen, here?

A. No, sir.

Q. Eh?

A. No, sir; not quite; I don't think.

Q. Well, as far as from you to that lamp?

A. It might be there (indicating).

The Court—Indicating about three feet.

Witness—That is the bed. She was over there; over in the bed.

Q. Is this a double bed?

A. That I couldn't say either.

Q. Couldn't remember. She lay in the bed?

A. Yes, sir.

Q. Some distance over?

A. Not lying. She was sitting up. She had a pillow at her back—propped up.

Q. When you went up Monday evening, about eight o'clock, you never expected to see her again alive, did you?

A. Certainly did.

Q. You did?

A. I did.

Q. Now, you were a little sceptical as to whether she would recognize you when you went up Monday evening?

A. I thought she had never seen me in the coat and hat, and that is why I asked her.

Q. Never seen you?

A. Never seen me with that suit on. That is why I asked her if she recognized me.

Q. You mean to say she had never seen you with a coat and hat on?

A. Oh, yes; but not with the ones I had on. They were pretty heavy and I thought perhaps she being sick that she wouldn't recognize me. I don't know why I put the question. It wasn't because I thought she wouldn't recognize me.

Q. What?

A. It wasn't because I thought she wouldn't know me.

Q. I don't suppose anybody suggested that you should go up with your hat and coat on to see if she would recognize you?

A. No, sir; they did not.

Francis Rutherford McKinney, sworn for Proponent.

Direct examination, by Mr. Lum.

Q. You are the husband of Mrs. Annie McKinney who was just on the stand?

A. Yes, sir.

Q. And you are the individual mentioned in the will of Frederica McKinney's husband?

A. Yes, sir.

Q. And you are also the person mentioned as executor in the will of Frederica C. McKinney?

A. Yes, sir.

Q. You are not a blood relative of hers, I believe?

A. No, sir.

Q. How long have you known her?

A. Well, from what I judge I went there when I was about ten weeks old, or ten months old.

Q. Then, is the answer all your life?

A. All my life.

Q. That will be easier?

A. Yes, sir.

The Court—How old are you?

Witness—Forty-five.

Q. You know Charles McKinney?

A. Yes, sir.

Q. Do you know Mr. Monteith?

A. Yes, sir.

Q. Did you ever go to Mr. Monteith's office with your mother-in-law?

A. I did.

Q. With your—

A. My mother.

Q. Mother, as we will call her in the record. On how many occasions?

A. Well, I think on three occasions or—

Q. How did you come to go with her?

A. Why, my boy—

Q. How did you come to go with her to the lawyer's office?

A. By her request.

Q. How long have you known Charles McKinney?

A. Why, since he was born. I attended him many a time.

Q. Did you ever do any work about the premises where your mother lived?

A. Yes, sir; I practically done all the repairs that was ever done there in the line of carpenter or masonry, or anything like that.

Q. Do you recall hearing about a suit instituted by Charles?

A. Yes, sir.

Q. When did you first hear of it, as near as you can remember?

A. Well, when my mother sent my boy up to tell me to come down, that she wanted to talk to me.

Q. Did you go?

A. I did.

Q. And did your grandmother ever speak to you about the suit; did your mother ever speak to you about the suit?

A. She did.

Q. Do you know whether or not this suit was much in your mother's mind?

Mr. McCarter—How can he know?

Mr. Lum—Strike it out.

Mr. McCarter—Let us have the facts.

The Court—I do not think it is fair to make a declaration "Do you know that your mother was antagonistic," and then go on and examine on that point.

Mr. Lum—May I have the record?

The Court—That is the crucial point in your story.

Mr. Lum—May I have the record, Mr. Salmon? I have no desire to be unfair.

The Court—The Court don't entertain that opinion, that you are intentionally unfair about it, but the Court says that, having made that statement, it now becomes unfair to go on with that branch. Drop that and go on with something else.

Q. Do you remember the last illness of your mother?

A. I do.

Q. And when was she taken ill?

A. She was taken ill, I believe, on the 20th of June.

Q. Did you see her on the 20th of June?

A. I did.

Q. Did she speak to you?

A. Yes, sir.

Q. What was said to you?

A. When I came in I kneeled down alongside of her, and she put her arm around my neck, and she pointed to her throat, and she said, "Oh, my throat." "Why," I said, "Mother," I said, "your throat is pretty bad, ain't it?" It was quite swollen, and she said—then she turned her head away, you know—kind of filled up, don't you know. I said, "Never mind, Mother, we will fix you up all right," I said. "Now, the doctor has been here and you are taking medicine, you will be all right. It is only a cold." That is all.

Q. Did you see her the next day?

A. Yes, sir.

Q. Did she recognize you?

A. Oh, yes; she recognized me.

Q. Did she speak to you?

A. Yes, sir.

Q. What was said?

A. Well, I asked her how she felt, and she said a little better, and I remember one time going into the room—it was on Monday—and she was taking a drink of milk, and I says, "Now, Nellie will fix you up all right, and you will be all right in a little while. You will be down again in a little while. You have been sicker than this."

Q. What did she say, if anything?

A. Just smiles, you know.

Recess.

Q. Now, coming to Monday. Did you attend to your work that day?

A. Yes, sir.

Q. And Sunday night, did you stay at your mother's house?

A. No; Sunday night I went home.

Q. What time did you first see your mother on Monday?

A. Why, before I went to work, I believe.

Q. Now, were you there when the priest came there Monday?

A. Yes, sir.

Q. Were you in the room while he was giving the last rites?

A. No.

Q. And do you remember whether anything was said to you about a will on that day by anyone?

A. Now, my wife came downstairs—

Q. Do you remember, the question is?

A. Yes, sir.

Q. By whom?

A. My wife.

Q. When?

A. Why, I should judge it was around five o'clock.

Q. As a result of what your wife said to you what did you do?

A. Why, I went out and went down Plane street to Market and down Market. I was going after a lawyer.

Q. What lawyer were you going after?

A. Well, I had in my mind—I thought about Monteith, but Monteith had always said to be there at half-past three or the latest four o'clock, and I thought it was pretty late to get any lawyer, and I thought about going in the Lawyer's Building. I had had dealings with Jakie Newman, Van Blarcom and Mr. Raymond at one time—well, I thought of Jakie Newman mostly. I was going in there for a lawyer, and on my way on Market street I met Michael Silverstein, an architect.

Q. As a result of what he told you what did you do?

A. Why, we went into Dwyer's saloon, I believe it is Dwyer's—I don't know—it is the saloon there near

Halsey street—and he called up Schotland. Before that he told me—I asked him if he knowed where I could get a good lawyer—

Q. Never mind.

A. Well, he called up Schotland, and what I heard him say—he said "This is building inspector McKinney and his mother is ill and she wants to make a will." Then he put me on the wire and I spoke to Mr. Schotland; told him my mother was ill and asked him if he could come over."

Q. Now, about what time did Mr. Schotland arrive as you fix it?

A. Well, near six o'clock, I guess.

Q. Were you in the room while the lawyer was with your mother?

A. I had been up near the room and I was coming downstairs and I heard a noise—somebody down there or something—and I came down and met Mr. Schotland. At that time I didn't know Mr. Schotland to see him, or to know him, you know, by meeting him, but I knowed of him, to hear of him, you know, and I said, "Are you Mr. Schotland;" and he said, "Yes;" and I said "Come upstairs," and I went up and said "Now, mother, here is the lawyer."

Q. Did you stay in the room while the lawyer was there?

A. No; I came out then.

Q. When did you next hear the lawyer say anything or do anything?

A. Why, when he was going away. I don't just recall the exact words, but I told him that there was a Chancery case or something in the Court and that—and Charlie—I don't just exactly recollect the words—but it wasn't anything wrong, you know?

Mr. McCarter—I object.

Q. Do you recall the words?

The Court—Strike out "anything wrong."

Witness—You know what I mean.

The Court—I do not know what you mean. You must tell us.

Witness—As near as I can remember I told him that Charlie had his grandmother in Court, and that—I don't know—I know something to that effect. I can't recall the exact words. I know there was some conversation over the case.

Q. Did Mr. Schotland tell you the contents of the will at the time?

A. No.

Q. Do you remember hearing the word "Amelia" spoken while the lawyer was there?

A. I heard—I couldn't exactly say it was the lawyer. I heard them say downstairs "Where is this 'Millie,'" and I called Millie and I went part way up the stairs and Millie went the rest and I went down."

Q. Did you ever have any conversation with your grandmother previous to this with reference to a will; if so, what?

A. No; I had no conversation about no will.

Q. What, if anything, did she say to you about a will?

A. Well, nearly nothing; only that Charlie—she felt sore—sorry because Charlie would do anything to her. I always cheered her up and said, "Why, mother, Charlie isn't going to do anything;" and I really didn't think he would until the subpœna was served.

Q. The question is this, what did your grandmother say to you about a will. That is the question.

A. Why she said nothing to me about a will.

Q. After she took sick did she say anything to you about a will?

A. No.

Q. What did you say to her about making a will, if anything?

A. Never—never—nothing in my life have ever I in any way, shape or manner ever asked her to make

a will or ever considered that she would make a will in my favor.

Q. Mr. McKinney, did your grandmother mention Charlie to you—your mother?

A. At what time?

Q. After the suit was brought?

A. Only in that general way that—

Q. Well, what was that?

A. About Charlie? She didn't see why that he should bring her into Court.

Q. What did you say to her?

A. I said, "Why, mother, he won't do it. I don't see how—" I says, "Charlie must be—must be told to do this somehow or other," I says, "Charlie don't intend to do you any harm and he won't put you in the street." She always said that Charlie was going to put her in the street.

Q. When she said that to you what did you say to her?

A. I said, "Why, mother, he wouldn't do anything like that," and in all my going to Mr. Monteith I always went there with the intention that they shouldn't put her up.

Mr. McCarter—Never mind what your intention was. What you did is what we want. Not what your intention was.

Q. Just answer the question.

A. Yes, sir.

Q. Did she ever speak to you about a proposition that Charlie had made with reference to settling the suit?

A. In reference to what?

Q. Settling the suit?

A. No. Did she say it?

Q. Yes.

A. No; she never—she said that Charlie wanted to give her four hundred dollars and sign the property over to her.

Q. To her?

A. I mean to say to sign the property over to him.

Q. Did you say anything to her about it?

A. Why, no. That was conversed before now with Mr. Monteith.

Q. Did he say anything to her about it?

A. Why, no. I didn't say—but I did say one time in Monteith's office—I said, "Can my mother stay in the house if she takes the $400," and Mr. Monteith said "No."

Q. How many times—how often were you at the house after the middle of March until the death of your mother?

A. Well, I was there different times to call for my wife and cheer up my mother. She seemed to be very sad and downhearted, don't you know, and she was always a happy woman.

Q. During the times that you were there how often did you see Charles after March?

A. I never seen him.

Q. Now, the night before the death of your mother, did you see Charles?

A. Yes, sir.

Q. Where?

A. In Riker's drug store.

Q. Where?

A. Riker's drug store.

Q. Speak to him?

A. Well, he—I was with Mr.—man lives in the house with us—we were in the drug store trying to get a prescription filled.

Q. Did Charles come to your mother's house on that night?

A. That is the night. He came right after that. He was in the house when I arrived home from the drug store.

Q. He has testified that you swore at him on that occasion? Did you or did you not?

A. Well, I told him—"Charlie," I says, "come out

of there," I says, "now, you have done enough trouble here," I says, "it is on your account that that poor old lady is laying there"; I said, "really, you are a murderer." I didn't talk very loud and I went out and Charlie came down with me. When we got downstairs, why I says to Charlie, "Why, in the world did you do anything like this"; he says, "Well, Frank," he says, "I am sorry." And he said, "Now, if you only knew who told me to do this," he says, "you will be surprised." I says, "Who, your mother?" and he says, "Now, leave my mother out of this"; I says, "Well, who?" He says, "Mr. Monteith."

Cross-examination, by Mr. McCarter.

Q. Were you born in Newark, Mr.—

A. Yes, sir.

Q. And were you christened Francis John Rutherford?

A. No. sir; I was confirmed Francis John Rutherford-McKinney, I mean.

Mr. McCarter—I moved that that be stricken out.

The Court—Motion granted.

Q. Answer the questions. Do you remember John McKinney, the husband of Frederica?

A. Yes, sir.

Q. Did you ever see his will?

A. Yes, sir.

Q. He knew you, didn't he?

A. Yes, sir; he certainly did.

Q. Yes. I notice by the ninth clause of that will it is provided "It is my wish and I order and devise that the orphan boy, Francis John McKinney, alias Rutherford, shall be carefully instructed and educated at the expense of my estate until having arrived at the age of sixteen years." Was he mistaken in speaking of you that way?

A. Well, I don't think so.

Q. What is your name?

A. Well, my name is Francis Rutherford McKinney.

Q. Was John ever your name—Francis John?

A. John I took in confirmation.

Q. What?

A. John I took in confirmation.

Q. I ask you what your name is?

A. Francis John Rutherford McKinney.

Q. Your father's name was Rutherford?

A. Yes. Well, I don't know my father. I never seen him.

Q. When you said you never saw Charles at Mrs. Frederica's house are you speaking of any time or only since the 17th of March?

A. Oh, I saw Charles many times in the house before the 17th of March, but not since, only on the 22d of June.

Q. Yes. That is what I supposed you meant. You said that you used to do the chores, like carpentering and masonry and so forth for Frederica. How long a time had that been true?

A. Why, when my father died the property was only bringing in—

Q. Answer my question.

A. Why, from the time that I was sixteen years old.

Q. Were you a carpenter by trade?

A. I learned the carpenter trade, and while I was serving time why her and I built the stables that are in the yard, we altered the building there—her and I always worked together. She worked just as good as I did.

Q. You are speaking now of Frederica?

A. Frederica McKinney.

Q. You built the stairs?

A. We built the stables.

Q. You were married about twenty years ago?

A. I am married—no, nineteen years ago.

Q. Now, after you were married, how frequently would you go down to see Frederica?

A. Why, every time I would come out I used to somehow steer down to Plane street some way, until I got used to it that I was living in another house.

Q. Do you think that answers my questions?

A. Well, I don't know. I suppose quite frequently.

Q. Quite frequently?

A. I just can't remember.

Q. Once a week?

A. I suppose so; yes, sir.

Q. Take your wife along with you?

A. Well, no, not—my wife wasn't along with me, not all the time.

Q. Well, latterly, towards—I mean now before the 17th of March, did your visits become more frequent?

A. After the 17th of March?

Q. No, no; before?

A. Oh, now, I wasn't a very frequent visitor before that time.

Q. Had you looked after her affairs—done any business for her, beyond these chores prior?

A. Why, yes; my mother very seldom did business without consulting me. Different things like—now for instance, there was a tenant in the rear that caused her a little troube and I went down to the District Court—she had her put out—I was down with her.

Q. Do you mean to say she was accustomed to consult with you then on business matters from time to time?

A. Once in a while; yes, sir; she did.

Q. Took your advice?

A. I don't know; she wouldn't take anybody's advice.

Q. She would consult with you about—

A. She was a very determined woman.

Q. What?

A. My mother was a woman—

Q. Would she consult with with you—

A. —you couldn't influence.

Q. —about her affairs or not, Mr. McKinney, I am asking you?

A. Well, yes, at times; yes, sir.

Q. Yes. So that you were not surprised that she called upon you to go down to Mr. Monteith's office in March, last?

A. Well, no; I wasn't surprised. My mother—

Q. You have answered my question. When anything came up that required advice she relied upon you, did she?

A. I don't know how much she relied upon me.

Q. She took your advice anyway?

A. No.

Q. Asked your advice?

A. She never took anybody's advice to my knowledge.

Q. Did she ask your advice?

A. No; she never asked my advice. Might talk over something.

Q. What?

A. She might talk over matters or something, but taking anybody's advice, I don't believe she would take anybody's advice.

Q. No. Never took anybody's advice?

A. I can't believe so.

Q. Why did she say that she wanted you to come down to Monteith's office?

A. Well, she said that Charlie had put her in court —or put her home in court. That is the way she said it, I believe, and was going to take it away from her. I said, "Nonsense, mother."

Q. Never mind what you said. Why did she say she wanted you to go along?

A. Well, I don't know why. She just asked me to go and see what Monteith had to say.

Q. Why did you take your wife?

A. Why, because my boy, when he asked for me to

go down to my mother's, he asked for my wife to go also.

Q. Were you there?

A. Yes, sir; I was there when he told us. My boy, he works next door to my mother's house on Plane street.

Q. Now, do you remember distinctly the day you went down the first time about this matter to Mr. Monteith's office?

A. Why, yes, sir.

Q. Do you remember that Monteith told you and Mrs. Frederica and your wife that Charlie had suggested that this property should be sold and that he should give a mortgage back to secure rents for $400—an income?

A. He never mentioned selling or mortgage at that time to my knowledge.

Q. He spoke of $400, which meant an income of $400, didn't he?

A. Well, he said, that Charlie would double the income. He says, " Now, your mother is only getting about two hundred dollars a year and that would be about $400 that she would get."

Q. Yes; which made $400 a year. You didn't mean $400 at once?

A. $400 a year.

Q. And when was it you first heard the suggestion that the property—that this income—whatever it was —should be secured by a mortgage; later?

A. That was later; yes, sir.

Q. When was that?

A. That was, I think, on the last visit. I had seen Mr. Monteith alone and to the best of my knowledge I told him that—

Q. Never mind. I haven't asked you about that.

A. Well?

Q. When was it that you heard about the proposition to secure the income?

A. I think that was the last visit.

Q. When was the last visit?

A. I think the words were: "I think I can get Charlie to give $900."

Q. Secured by mortgage?

A. I wouldn't exactly say.

Q. Secure by mortgage?

A. Yes, sir; I believe he said—and he says, "I will look after the old lady's interest. I will see that it is secured." I says, "Maybe he will only get it one year and won't get it any more." He says, "I will see to that, that she shall get it."

Q. And was that the time she said it would break her heart to sell the property?

A. Yes; it would break her heart to sell the property. She never had any intention to sell the property.

Q. Did you know that Mr. Schlesinger had been trying to get a purchaser for the property?

A. No, sir; I did not.

Q. When did you first learn that?

A. When did I first learn that? Well, I think today—yesterday, when they were here.

Q. Did you know that she had contemplated selling the property and sent an agent to see Charlie about it, to see whether he still claimed that she couldn't do it?

A. Well, I believe about a year and a half ago—

Q. Answer my question.

A. What is it?

Q. Did you know that?

A. What did I say?

Q. What are you doing up there, listening to the questions, or what are you trying to do? Listen please. Listen to the question.

A. I just tried to explain it to you.

Q. (Question read.)

A. No.

Q. Didn't know that?

A. No; I didn't.

Q. Did you never hear her speak of selling the property?

A. Well, now, it seems to me that I did hear my mother say something about that she—now, wanted to sell the property and Charlie said no, that she couldn't sell it.

Q. Her heart wasn't breaking about that time, was it?

A. Eh?

Q. Her heart wasn't breaking about that time, was it, when she wanted to sell it and Charlie wouldn't let her?

A. Well, I don't know about her heart breaking.

Q. Now, how many times were you down to Monteith's office?

A. I believe about four times.

Q. How many times with her, and how many times alone?

A. Well, I think three times with her and once alone.

Q. Go at her directions?

A. Eh?

Q. At the time you went alone, did you go at her direction?

A. What do you mean, "Go at her direction"?

Q. At the time you went alone, did you go at her direction?

A. Why certainly. I brought papers to Monteith.

Q. What papers did you bring down?

A. Why the taxes—arrears.

Q. Tax bills?

A. Taxes.

Q. Tax bills?

A. The arrears of taxes before the property was sold.

Q. What do you mean that you took down there, tax bills or tax searches?

A. No. I went to the City Hall at her request to get—I told Mr. Monteith, too, at that time—

Q. Go on, now.

A. I went to the City Hall and got the tax—arrear taxes from, I believe now, 1873.

Q. The tax search, was it?

A. Yes, sir.

Q. Showing the arrears of taxes on that property?

A. Yes, sir.

Q. Now, when was that, Mr.—

A. That was nearly—I should judge that was about the eighth of April or sixth of April; somewheres around there.

Q. Sixth of April?

A. Yes, sir.

Q. Do you remember how much the taxes were in arrears?

A. I think they were eight years arrears before my father died.

Q. And how much since?

A. Well, altogether I think it was ten or eleven years. I think it was 1867. I just can't—around there —1867. And when I brought that to Mr. Monteith—

Q. Never mind. You have answered the question. Now, did you take any other papers down, besides the tax search?

A. Yes, sir.

Q. What?

A. I brought a paper down—well, some papers. I don't know—I think it was a Martin Act deed, or something, of the alley.

Q. Where did you get that?

A. Off my mother.

Q. Eh?

A. Off my mother.

Q. She gave it to you?

A. Yes, sir. Oh; she gave me—

Q. Where did she keep it?

A. She gave me all the papers. I was doing everything under her direction.

Q. She gave you all the papers?

A. Well, when she would pick out some papers and have them—when I would go in at dinner time or when I went in at night to call for my wife, why she would show me these papers. Some of them were deeds of New York property and different other property or something, and I merely picked out what Mr. Monteith told me would be necessary to make out an answer to the bill of complaint.

Q. Did you know where she kept her papers?

A. Why, yes, I knowed where she kept them.

Q. Where?

A. In her bureau drawer.

Q. In her bedroom?

A. In her bedroom; yes, sir.

Q. When did you become aware of that?

A. Why, I knew that since I was a boy.

Q. You have seen that will there, that old will?

A. The old will?

Q. The old one?

A. Yes, sir; I saw that will there after my mother was dead.

Q. That is the first time you had seen it?

A. That is the first time I seen it.

Q. Well, you knew that before that, didn't you?

A. Well, in a general way. I never knew it from my mother. Some general talk about that—she said to me that she had taken good care of Charlie—I don't know—but that is a long time ago.

Q. Yes. How soon after your mother's death did you first see *Exhibit C2?*

A. Well, I think two or three days after my mother was dead. I first went—can I explain?

Q. No. Answer my question, please. Before she was buried or afterwards.

A. Before she was buried.

Q. Yes. And did you take it in your possession at that time?

A. No, sir.

Q. When did you take it in your possession?

A. Why, I left everything—can I explain how, your Honor?

Mr. Lum—Answer the question. You will get along better. Listen to the question and answer the question. Never mind explanation.

Witness—Why, I didn't touch the will—disturb the will or anything else in the house.

Q. Until when?

A. Until after my mother was buried.

Q. Then what did you do?

A. Why, then I asked Counsel Monteith—

Q. Never mind what you asked counsel. What did you do?

A. I brought the papers to my counselor.

Q. Mr. Schotland?

A. Schotland.

Q. Immediately after the funeral, the next day?

A. Well, I think so.

Q. Now, after your first visit to Mr. Monteith, your wife has testified that she spent every day at Mrs. Frederica's house. Did you take, generally, your dinner and supper there as well?

A. No.

Q. What?

A. At four o'clock when I would step over there we would have a lunch and then I would go home with my wife.

Q. Have a lunch at your mother's, as you call her?

A. Yes, sir.

Q. Then you would go down again in the evening?

A. Oh, no; never in the evening.

Q. And would you take dinner there?

A. I just took a lunch, like a cup of tea or something, you know, before we would be going home, to the best of my knowledge.

Q. Did you hear your wife's testimony this morning on this point?

A. I don't know.

Q. Did you or didn't you? You were here, weren't you?

A. I was here, but to the best of my knowledge I don't remember of eating any single meal there, any more than lunch if I stopped in at noontime or stopped in at four o'clock to take my wife home. My wife is a very—

Q. It isn't your recollection, then, that every night she took dinner and you took dinner and then she would take you home in the evening?

A. Oh, no.

Q. That isn't so?

A. Not to my—

Mr. Lum—I object to the form of the question. She did not so testify. You can ask this witness if it was a fact.

Mr. McCarter—I asked him if it was so.

Q. It isn't a fact, eh?

A. No, sir.

Q. Now, how often would you go down there, every day, after the 17th of March?

A. Oh, no; not every day.

Q. What?

A. No, no. When I went there my wife was ready to go home. I only stayed a few minutes after, and I used to try to cheer up my mother because she seemed downhearted.

Mr. Lum—Just answer the question, if you will.

Mr. McCarter—You are not asked to make a long speech. You are asked to answer the question.

Q. What income did your mother get from the property?

A. $72 when everything is rented.

Q. Was it always rented?

A. Since I have been there, three months, the stable has not been rented.

Q. I don't care anything about now. I am talking about when she was alive?

A. When she was alive, $72.

Q. Always rented?

A. Practically pretty near all the time rented.

Q. Now, when was the first time you ever heard that Charlie claimed that she didn't own that property out and out, some years ago?

A. Why, I believe I heard Charlie himself say, and his mother—I don't believe I did hear them say it—they said it in my house—that their grandmother—his grandmother couldn't sell that property.

Q. Now, do you think that answers my question? Again I ask you how long have you known that Charlie had that idea?

A. About three years.

Q. About three years. Did you ever talk to her, that is the grandmother, about that before Charlie commenced the suit?

A. Before? No. I always was friendly with Charlie and always stuck up for Charlie.

Q. Will you stop and answer my question. I presume you were awful friendly.

The Court—Mr. McKinney, you have been requested by both counsel to answer questions and now you are directed by the Court to answer questions, and not give us any of your cogitations or thoughts or explanations. You answer the questions. The rest of it will come out later.

Q. Did you ever hear Frederica say, before the 17th of March or thereabouts, that Charlie claimed that she didn't own that property out and out?

A. Yes, sir; I believe—yes, sir; I did.

Q. Hear that as long as three years ago?

A. Well, I heard something to that effect that Charlie said she couldn't sell the property.

Q. Three years or so ago?

A. Yes, sir—well, I wouldn't say three years. Two years and a half or three years; something like that.

Q. Now, when was the last time you were at Mr. Monteith's office about this matter?

A. About the 9th, I think—I believe—8th or 9th of April.

Q. Were you alone?

A. No. I believe that was the third visit with my mother.

Q. Third visit with your mother. She visited him later, did she?

A. Yes, sir—well, I don't know whether she did or not.

Q. Now, coming down to her illness, were you at the City Hall when you heard she was ill?

A. No.

Q. Where were you?

A. I stopped in a club that I belong to on South Orange avenue and they told me that a telephone call had came there for me that my mother was sick.

Q. So a telephone had followed you to the club or at least gone to the club for you?

A. Where they telephoned.

Q. What time was that?

A. That was around one o'clock.

Q. When had you seen her last?

A. Thursday, I believe it was Thursday.

Q. You say that you don't know that she had been to see Mr. Monteith on Friday?

A. I said I didn't know personally. She told me that she saw Mr. Monteith.

Q. When did she tell you that?

A. I believe that was Friday.

Q. Where?

A. In front of her house.

Q. I thought you just now—

A. I believe. I don't know just now for sure but

I think that was Friday. I had brought—I had been up to Verona with Mr. Rache.

Q. Now, one moment, Mr. McKinney. Please do not go into these long rig-a-ma-roles. I asked you when and where you learned that she had been to Mr. Monteith's office on Friday?

A. Well, I learned that Friday or Saturday. I know I heard that she—

Q. Who told you?

A. I can't remember.

Q. Eh?

A. I can't remember.

Q. Well, at any rate you told us just now, haven't you, that you didn't see her after Thursday until you saw her sick abed on Saturday?

A. I told you I didn't think so.

Q. What?

A. I don't know whether it was Friday or Thursday.

Q. Don't know whether it was Friday or Thursday. I again ask you who told you and where were you told that she had been to Monteith's office on Friday?

A. Well, I just can't recall.

Q. Made an affidavit in the Chancery suit, didn't you?

A. I did.

Q. Yes. Do you remember swearing as follows: "On the Friday preceding her death she was out attending to business herself and told me that she had been to the bank drawing some money and had paid Mr. Monteith, her attorney, $50 in the case which Charles McKinney had brought against her in the Court of Chancery." Do you remember testifying to that in your affidavit? Eh?

A. I am just trying to place that.

Q. Do you remember testifying to that in the Court of Chancery?

A. Yes, sir. If it is there I certainly testified to it.

Q. Is that true?

A. It is either Saturday that I heard it—either Saturday or Friday. Now if you would let me tell—

Q. Did she tell you on Saturday in her death bed? She was in bed when you got there Saturday, wasn't she?

A. Yes, sir.

Q. She didn't tell you then, did she?

A. No; she merely said, "Don't let me die."

Q. Oh, yes; we will come to that later. We will come to that later. I want to know when it was that she told you that she had been to Monteith's and been to the bank to get the money—when it was she told you. You say in your affidavit it was Friday, is that right?

A. Well, I can't just recall.

Q. Why did you tell us a little while ago that you hadn't seen her since Thursday?

A. I didn't tell you that I hadn't seen her.

Q. You didn't, eh?

A. I said I didn't think I had seen her since Thursday. Thursday I remember distinctly shaking hands with her as I was bringing Mrs. Rache up to Verona to the sanitarium up there.

Q. At any rate you became aware somehow or other that she paid Mr. Monteith $50. You can't tell us when?

A. I never seen her pay Mr. Monteith anything.

Q. What?

A. I never seen her pay Monteith anything.

Q. You became aware somehow, and you can't tell us now when you became aware, can you?

A. Not just now, and tell the truth—

Q. All right. Now, I think you have sufficiently described what took place between you and her on Saturday when she was ill and on Sunday when she was ill. Were you aware that the priest had been sent for on Monday?

A. It was me that told Mrs. Rache to go for the prest.

Q. It was, eh? You felt she was very ill, didn't you?

A. The doctor told me that she was.

Q. Will you answer my question.

A. Yes, sir.

Q. You felt that she was going to die, didn't you?

A. That is what the doctor said.

Q. What time did you tell Mrs. Rache to get the priest?

A. About four o'clock, I guess.

Q. What time had you reached there?

A. About four o'clock.

Q. Did you see the doctor?

A. As I came in I saw the doctor; yes, sir. The doctor was just about leaving.

Q. What time did the priest get there?

A. What time did the priest get there? Well, I can't just exactly tell what time.

Q. What was this priest's name?

A. Father Williams.

Q. That is what you called him in the affidavit. That is what you understood the name is, Father Williams?

A. Yes, sir.

Q. Do you know the gentleman?

A. No, sir.

Q. Now, did you talk with this priest after he came out of the room?

A. When he came out of the room I was not there.

Q. You had gone to the lawyer's?

A. Yes, sir.

Q. What time did you leave for the lawyer?

A. As soon as my wife came down and—

Q. What time was that?

A. Five o'clock.

Q. Did you look at your watch?

A. No; I have no watch.

Q. Now, you say you went down Market street having Mr. Monteith in mind. You knew Monteith had a telephone, didn't you?

A. Yes, sir.

Q. Do you see Mr. Monteith sitting here?

A. Yes, sir.

Q. Do you again say that Mr. Monteith had told you that he was not accessible after 3:30 or four o'clock?

A. I didn't say that.

Q. You didn't?

A. I didn't say that he wasn't—I told you that Mr. Monteith said to try to get there between half-past three and four, and at the time that I went alone to see Mr. Monteith, Mr. Monteith was just leaving the office —just coming out into the main office going home—or going away.

Q. Going home?

A. Going away. Where he was going, I don't know.

Q. What time was that?

A. That was four o'clock. I leave the City Hall always at four o'clock.

Q. Well, you know that Jake Newman had a telephone, didn't you?

A. Well, I don't know. I don't use the telephone an awful lot.

Q. Don't, eh?

A. I wasn't thinking much about the telephone.

Q. Where did you meet Mr. Silverstein?

A. Below Washington street.

Q. On Market?

A. On Market.

Q. You just came out from Plane into Market, and stumbled across Silverstein, below Market?

A. Below Washington.

Q. Below Washington, towards Broad?

A. Yes, sir.

Q. And you and he then went into a saloon?

A. Yes, sir.

Q. Did you tell him you wanted a lawyer to draw a will?

A. Yes, sir; told him my mother was very sick—

Q. Very sick?

A. —and I wanted a lawyer to draw a will. I wanted an honest lawyer.

Q. Honest lawyer? About how far were you from the Lawyer's Building, where Mr. Van Blarcom, who I suppose is honest, has his office? How far were you?

A. Why about—

Q. Half a block?

A. Middle of the block—next block.

Q. Yes. How far were you from Jakie Newman's office?

A. That is Jakie Newman's office, I believe; that is what it was when I knew him.

Q. Did you know where Mr. Schotland's office was?

A. No, sir; absolutely not.

Q. So rather than step on half a block more to the Lawyer's Building, where Mr. Newman and Mr. Van Blarcom were, both of whom had occurred to you, you went into the saloon and got hold of some lawyer you didn't know and didn't know where his office was; is that right?

A. I know him by reputation. I have always heard of Mr. Schotland.

Q. You didn't know him, and didn't know where his office was, did you?

A. Absolutely not.

Q. Now, you told Schotland, after you got him on the 'phone what?

A. I told him my mother was very sick, that she wanted to make a will, and I asked him if he could come over.

Q. And have you told us now all?

A. What?

Q. Have you told us all that you told him?

A. That is all, to the best of my knowledge.

Q. Did you tell him where to come to?

A. Yes, sir.

Q. I want to find out what you told him. Now, repeat again what you told him?

A. I told him that my mother was very sick, and she wanted to make a will, and asked him if he would come over to 376 Plane street, and he said he would as soon as he could.

Q. 376 Plane street. Did you tell him your mother's name?

A. No.

Q. Eh?

A. No; I did not.

Q. Did not?

A. I did not.

Q. So that when he got there, so far as you know, he didn't know her name—her first name or last name?

A. As far as I know, no.

Q. Did you see him before he went in the room?

A. I seen him at the foot of the stairs and I brought him up.

Q. Did you tell him anything then?

A. No, sir.

Q. Did you tell him her name?

A. No, sir.

Q. How did he learn her name?

A. Absolutely, I don't know.

Q. Did you walk upstairs with him?

A. I did.

Q. Where was your wife?

A. I just can't—I believe that she was in the room.

Q. Where was Miss Clark?

A. I don't know.

Q. I understood you to testify that you took Mr. Schotland upstairs and said to your mother, "Here is the lawyer," and then you came out.

A. Yes, sir.

Q. Now, is that right?

A. That is absolutely right.

Q. Absolutely right. There is no mistake about that?

A. That is right; I brought him up and said, "Mother, this is the lawyer," and I came out.

Q. Did you hear him talk to her about the will?

A. No, sir.

Q. Sure about that?

A. Positive.

Q. Not one word?

A. Not one word.

Q. As soon as you had introduced him you left the room?

A. I left the room and went downstairs and went out and into the office.

Q. Then, if that is accurate, Mr. McKinney, I ask you why, in your affidavit in the Chancery proceedings, you said this: "Mr. Schotland arrived about six o'clock, and when he began to talk to the late Mrs. McKinney about her will, and what she wanted written in her will, he asked all of us to leave the room, and staid in the room alone with Mrs. McKinney for about twenty minutes"?

A. Well, I left the room when I introduced the lawyer.

Q. Well, was it or was it not true on the 31st of July, last, that Mr. Schotland, when you swore to this affidavit that Mr. Schotland—you there say that Mr. Schotland arrived about six o'clock and when he began to talk to the late Mrs. McKinney about a will and what she wanted written in her will, he asked all of us to leave the room and staid in the room alone with Mrs. McKinney for about twenty minutes?

A. Well, I left the room. I heard no conversation about no will nor—

Q. Well, now, I understood you to say on your direct evidence that after you had introduced the lawyer to your mother, that you immediately went out of the room? What became of you?

A. I went downstairs.

Q. And stayed down there?

A. Went downstairs there and stayed down there until I heard somebody say, "Where is this Millie?"

Q. Go on.

A. And I went—"Who is this Millie;" and I told Millie and Millie went upstairs, and I just went two or three steps, and she went up and went along the hall to the sick chamber.

Q. So that you did not go up to the room with Millie?

A. Absolutely not; no.

Q. Didn't go into the room?

A. I didn't go into the room.

Q. And Mr. Schotland didn't make any remark after he made the remark—

A. He says, "Who is this Millie."

Q. No, no. After that, I mean. After Millie got in the room?

A. Not that I can remember; no.

Q. Then why did you testify as follows in this same affidavit, "He then asked us if there was any Amelia, and Miss Clark came in, and he asked the late Mrs. McKinney if that was the Amelia she meant; she said, 'yes,' and Mr. Schotland told us that was all he wanted of us. We went out again."

A. Well, I wasn't thinking an awful lot about Amelias or anything else.

Q. What?

The Court—"I wasn't thinking an awful lot about Amelias or anything else." You are asked a question. You are not asked what you are thinking about.

Witness—What is the question?

Q. Why?

A. Well, that is the best of my knowledge. That is the way it happened. They called down the stairs for Amelia and I went a few steps up the stairs. Now, a few steps is right in the room almost, you know; you can look right into the room when you are going up the steps.

Q. Now, Mr. McKinney, who prepared this affidavit that you made in Chancery, Mr. Schotland?

A. Mr. Schotland.

Q. He was present during all the transaction, wasn't he? He was present in the room there when it occurred; he was there, wasn't he?

A. In what room?

Q. In the sick room?

A. I guess so.

Q. Eh?

A. I suppose he was.

Q. I ask you once again to explain to his Honor, Judge Martin, why it is that last July you said you were in the room after he called for Amelia, and you heard some of the conversation about Amelia with your mother, and that then that at Mr. Schotland's request you all left, including yourself. Now, why did you say that?

Q. I don't remember why I said that.

Q. Were you in the room with Amelia?

A. No, sir; I was not.

Q. You were not?

A. No. But if you would have a plan of the conditions of that building you could see possibly how I mean—how you could be very near that room—

Q. "In" means in, don't it?

A. Yes, sir; I wasn't in.

Q. And "out" means out?

A. Yes, sir.

Q. Don't need any plans for that. Now, going down —or rather where were you when you saw Mr. Schotland after he came out of the room?

A. Down in the parlor.

Q. Did he come in the parlor?

A. He would have to pass through the parlor on the way out.

Q. Pass through. Did he sit down?

A. No; he just merely buttoned up his coat, and he says, "Here, I have got the will."

Q. Did he have an overcoat on?

A. No—I don't know—he didn't have no overcoat but he had a coat, and put some papers in his pocket, and he said "Now I will take the will."

The Court—Did he say, "I have got the will or I will take the will"?

Witness—Well, "I got the will."

The Court—You are testifying and you first said "I got the will." Now did he say that or "I will take the will"?

Witness—"I will keep the will" or something to that effect, and you are the executor.

The Court—Did he say "I got the will"?

Witness—"Well, I will keep the will."

The Court—You just said a moment ago that he said "I have got the will." Now, did he say that?

Witness—Well, no; I believe he said, "I will keep the will."

Q. I understood you to say a moment ago that also he told you that you were the executor?

A. Yes, sir.

Q. He told you that?

A. Yes, sir.

Q. Is that all he told you?

A. That is all he told me.

Q. You also told him about some other will, didn't you?

A. Well, I don't recollect. I said to him about there is a will.

Q. What?

A. And Charlie has brought his mother into the Court of Chancery and something to that effect. I don't just exactly—

Q. I think I can recall what Mr. Schotland says about that, and I will see if that refreshes your memory. I

have my associate's notes of what Mr. Schotland said and it is this, and I only repeat it to you to see if it refreshes your recollection. Mr. Schotland testified that Mr. McKinney, that is you, at this conversation that we are now speaking about, said, that John Monteith was Frederica's regular counsel?

A. Yes, sir.

Q. And that John Monteith had drawn a will in which Charlie had been favored, or words to that effect. Do you now recall it?

A. Well, I recall something about talking—telling Mr. Schotland that there was a will.

Q. Then you knew that John Monteith had drawn a will, didn't you?

A. Yes, sir.

Q. Then you had seen that document, hadn't you?

A. No, sir; I never seen the will.

Q. Did she tell you that John Monteith had drawn the will?

A. I know that John Monteith was her counsel.

Q. Did she tell you that John Monteith—

A. I can't remember.

Q. How did you know that John Monteith had drawn the will?

A. I absolutely can't tell you how I know.

Q. And you also told him at the same time that the reason that Mrs. Frederica was so anxious was because Charlie had sued her, didn't you?

A. Charlie had her in Chancery.

Q. You told him that?

A. Yes, sir.

Q. You didn't ask whether or not you had any interest or your wife had any interest in the will?

A. No, sir; I did not.

Q. You didn't ask him why he told you you were executor?

A. I don't know why he told me.

Q. Now, you told Mr. Lum, as I understood you—

I want to be sure about it—that after the 17th of March, down to the day the priest was there, your stepmother—your mother—Mrs. Frederica, had never mentioned the subject of will to you. Was I right about that?

A. Yes, sir.

Q. Now, you are right about that?

A. Now—well, I don't remember anything about a will—that she ever mentioned a will to me at all.

Q. Well, now, what do you say then? I will ask you. Mr. Lum has asked you, and I understand the answer I have given you. I will ask again. Did she mention the subject of will to you between the 17th of March and the time that the priest was there?

A. No.

Q. She did not. Why, then, in your affidavit made in the Chancery proceedings did you say as follows: "I did not at any time influence or try to influence the late Mrs. McKinney to leave her property or any of it to me or to any other person, but, on the contrary, never suggested to her anything about the disposition of the property, but she had often told me after Charles F. McKinney had sued her in the Court of Chancery, which was either in March or April, of this year, that she intended to change her will and wouldn't leave anything to either Charles McKinney or his mother." Why did you say that?

A. I don't know. She said that she wasn't going to have anything to do with Charlie or his mother, or something to that effect, different times, and I always changed the subject. I always said, "Why"—

Q. You are not answering my question.

The Court—Speak up. Do not whisper so that the Court is the only person who can hear what you have got to say.

Witness—Well, I can't remember all that she has said.

The Court—You are asked why it is that in the Court of Chancery you made the statement

that she did tell you she was going to change the will, and you say here she didn't say anything about it. That is the question.

Witness—Well, I don't know. I don't recall her talking about wills.

The Court—It isn't a question of her at all. The question is why do you say that in the Court of Chancery and something else here? That is the question.

Witness—Well, I don't remember.

The Court—"I don't remember" is the answer.

Q. All right. Now, when had you seen Charlie at Frederica's house before the 17th of March?

A. When had I? Two or three years, I guess.

Q. Will you say it was two years?

A. I believe so. I don't just remember when it was. It was a long time.

Q. Did Charlie and his mother and some others of the family, and grandmother, attend a function at your house a year ago last January?

A. Charlie and his mother? Yes, sir; two years ago last January.

Q. Two years ago last January?

A. Yes, sir; two years ago—or two years from this—

Q. Coming January?

A. Yes, sir.

Q. Two years this coming January?

A. Yes, sir.

Q. Now, you had seen him in the house about that time?

A. That was my house.

Q. I know, but you had seen him around his grandmother's around that time?

A. No.

The Court—Answer the question. Had you seen him? Listen to the question.

Witness—No.

Q. How long before then had you seen him at the house?

A. Well, I couldn't say; quite a little while.

Q. Eh?

A. Quite a little while.

Q. Well, were you there on Sunday when the Harrigan boys were sent for?

A. Yes, sir.

Q. Were you there when Mrs. Roff was sent for?

A. She wasn't sent for to my knowledge.

Q. Did you speak to Charlie in Riker's drug store Monday night?

A. Now, I was with Mr—

Q. Did you speak to Charlie?

A. Yes, sir—no; I didn't speak to him; no.

Q. Did you tell him his grandmother was very ill?

A. No.

Q. When you got up home you found Charlie had arrived, did you?

A. Yes, sir.

Q. And was up in the sick room?

A. Yes, sir.

Q. Who told you he was there?

A. Amelia.

Q. You went right up?

A. I went right up?

Q. And you immediately began to chastise him for being there, didn't you?

A. When I come in Millie said that Charlie—

Q. You immediately began to chastise him?

A. I said—yes—"Charlie, come on out here; you have done enough."

Q. Come out of here, you are a murderer?

A. No; I said, "You have done enough trouble here; you have put the old lady where she is now"; I says, "Why you are a murderer. Get out of here."

Q. Was the old lady conscious?

A. Yes, sir; she was conscious.

Q. She was conscious?

A. Yes, sir.

Q. And in the presence of the old lady, who was conscious, you told Charlie he was a murderer, did you?

A. I didn't talk loud. I said, "Charlie, get out of here."

Q. Didn't you say in the presence of the old lady, who you now say was conscious, that he was a murderer?

A. Not in a loud voice. I can explain why I said that.

Q. Answer my question.

A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. What else did you say?

A. I said, "Come downstairs," and I went downstairs and Charlie came down after me.

Q. What did you say downstairs?

A. I said, "Charlie, how could you do anything like this, to bring your mother—grandmother into court," I said, "and she likes you so much," I said, "how could you do it"; he says, "Well Frank, I am sorry."

Q. Well, but you had told her many times, you have told us, before her illness that Charlie didn't mean anything wrong?

A. I did.

Q. That Charlie was only trying to help her?

A. Nor I never thought Charlie did mean anything wrong.

Q. What changed your mind?

A. Why, that subpœna.

Q. What?

A. The subpœna that she got from the sheriff.

Q. That was way back on the 17th of March, on St. Patrick's Day?

A. No; that was long after that.

Q. How long after?

A. I don't know. It must have been—

Q. How long after?

A. Oh, a long time. I couldn't just say. More than a month, any how, or more.

Q. What?

A. More than a month.

Q. More than a month after the 17th of March?

A. Yes, sir.

Q. Well, you are very much mistaken?

A. I don't think so.

Q. Didn't you say on your direct examination that every time she talked to you about Charlie before she was taken ill that you kept explaining to her that Charlie was all right; that he didn't mean any harm, and that she mustn't feel that way about him; that he was a nice fellow and he meant to do her good? Didn't you testify that way?

A. Why—

Q. Eh?

A. I always told her that Charlie—it wasn't Charlie that done it.

Q. No. Then why did you, in her conscious presence, as you say she was conscious, suddenly change your story and tell him he was a murderer when he was in to see his dying grandmother?

A. Well, I was very much hurt.

Q. You were very much hurt. What were you hurt about?

A. When Charlie said—

Q. What were you hurt about?

A. That he should treat his grandmother that way. I thought more of that woman than anything in this world.

Q. Then you were deceiving her all of this time when you were telling her that Charlie didn't mean any harm, that somebody else was probably doing it?

A. I merely wanted to cheer her up, make her feel good.

Q. Cheer her up?

A. Yes, sir.

Q. Had the doctor told you that this edema of the lung was due to Charlie commencing that suit?

A. Well—

Q. Had he told you that?

A. Yes, sir.

Q. When?

A. At one conversation that we had—we had several—he said my mother on account of this trouble was in a receptive condition, if not she might have avoided that cold, something to that effect.

Q. When and where was that conversation?

A. Why, I had different conversations with the doctor.

Q. When was that—that particular conversation?

A. I just can't tell just when it was. I think at Sunday night, or Sunday sometime.

Q. Yes. And you were so hurt about the terrible way that Charlie had treated his grandmother, that when she lay there at eleven o'clock at night, in the condition she was in, although she was conscious, you called him a murderer?

A. Well, when I come in downstairs—

Q. Answer my question. Is that right?

A. I did; yes, sir.

Q. Because you felt so badly for her?

A. Can't I answer?

Q. You felt so badly on account of her?

A. Yes, sir; and that he was—

Q. All right. Did you have any talk with Mrs. McKinney after this interview with Charlie?

A. With who? What Mrs. McKinney?

Q. Frederica?

A. No.

Q. So that after Charlie and you went downstairs, when you called Charlie a murderer, you didn't have any talk with Frederica about the matter?

A. I had no talk; no; but I heard of a talk.

Q. Did you go back to the room?

A. I staid down with Charlie.

Q. Was it while you were down there that you heard the talk upstairs?

A. No. I was told about the talk upstairs. That is all I know. Hearsay.

Q. When were you told about the talk upstairs; right that night?

A. Why, I believe it was that night, or the next day.

Q. Who told you about it?

A. My wife.

Q. Who?

A. My wife, I believe it was.

Q. What did she say?

A. I think it was.

Q. What did she say?

A. She says, "Grandma asked what was the matter," and she said, "Nothing"—or whoever it was said "Nothing." My mother had noticed it. Now, we didn't talk loud.

Q. I want to know what your wife told you?

A. Well, something to that effect. I don't exactly—

Q. Say it again. What was it your wife told you?

A. Something that my mother asked what was the matter, and they told her nothing.

Q. Nothing. That is all?

A. Something to that effect. I didn't hear it. I heard of it.

Q. Then why did you testify in the Chancery proceedings, as follows: "At the time of Charles F. McKinney's visit the late Mrs. McKinney was not unconscious, but asked after I ordered him out what the trouble was, and it was explained to her."

A. Well, that was only—it wasn't asked to me—I merely meant that—that I had been told that way.

Q. Is that the best explanation you can give?

A. I am sure I never said that that way.

Q. Well, here is the copy of the affidavit served on us.

A. I might have taken it that that was all right, what I heard.

Q. Is that the best answer you can give? Eh? You can read the affidavit there, right at the bottom of the page. (Handing witness paper.)

A. Well, when he asked me was she unconscious I said "No," and I suppose I put that in there that somebody had told me.

Q. That is the best explanation you can give?

A. That is as near as I can—

The Court—Now, what is the answer?

Witness—How must I make answer—that I didn't say it?

The Court—You are whispering something. I want to know what you said?

Witness—I didn't hear her say that, no.

Q. Did you read over this affidavit that you signed last July?

A. I read it over at that time; yes, sir.

Q. Mr. Schotland prepared it, didn't he?

A. Yes, sir.

Q. This was on proceedings to have a receiver appointed. You knew that? You were trying to prevent a receiver being appointed, wern't you?

A. Well, if a receiver got it, there wouldn't be no estate.

Q. Will you answer the qestion?

A. Yes, sir.

Q. And Charles had made an affidavit describing, as he swore, the scene in his mother's room?

A. Yes, sir.

Q. And has stated that your mother was unconscious in that affidavit, hasn't he?

A. In his affidavit?

Q. Yes.

A. I don't know whether he did or not.

Q. And this was your answer to that, wasn't it?

A. Yes, sir.

Q. Yes. Well, now were you there when the old lady died, the next day, at two o'clock?

A. Yes, sir.

Q. Did you send for the undertaker?

A. Yes, sir.

Q. Who else did you notify? You didn't notify Charles, did you?

A. No; Charles was coming in—

Q. What?

A. Charles was coming in and out.

Q. Charlie?

A. Charlie.

Q. Had he been in since late last night when you turned him out?

A. I didn't turn him out. We made up friends, and we were very friendly and everything was all right. I said, "Charlie, as long as you are sorry, we will forget everything. It is all right; you can come in here and out as much as you like, and he did."

Q. Well, after Charlie and you made up, you say his grandmother was conscious, did you go upstairs—tell him to go upstairs and see his grandmother?

A. No; but he was at perfect liberty to go up.

Q. You called him a murderer in her presence?

A. We made up after that. We made up and we was good friends.

Q. When was he in there again after that before her death?

A. I don't know.

Q. Why did you say a moment ago he was in and out?

A. He had been in. I am positively sure he had been in on Tuesday.

Q. Will you say he was in that house again from the time that—

A. Well, there was nothing to stop him.

Q. Will you say so?

A. No. I know he was there Tuesday.

Q. You do?

A. I am quite sure. I believe he was. I know we wasn't bad friends.

Mr. Lum—That is not the question.

Q. Now, you had made up with him, had you? So far as you were concerned, you and he were good friends?

A. Yes, sir; we had made up.

Q. Do you remember coming back from the funeral?

A. Yes, sir.

Q. Do you remember his trying to get in the house, and you keeping him out?

A. When we come back from the funeral he had two detectives there—wouldn't allow anybody to go in.

Q. Answer my question. If you had made up with him, I ask you why it was when you come back from the funeral, and he tried to enter his grandmother's house, you tried to keep him out?

A. I certainly did not.

Q. You did not?

A. I did not.

Q. Now, I direct again your attention to this affidavit and ask you if what appears in the affidavit which I am going to read to you is true: "I learned at one P. M. on Saturday, June 20th, 1914, that she was ill, and immediately called on her, and remained in attendance until her death." Is that true?

A. I was in attendance.

Q. Is that true?

A. How? Sure it was true.

Q. All right. You told us a little while ago—

A. I didn't stay there.

Mr. Lum—Never mind. You have answered the question.

Q. Listen again: "After Dr. Phelan had talked with Mrs. McKinney Monday afternoon, June 22d, 1914,

and after Father Williams had given her the last rites of the church, my wife, who was in the room with Father Williams, came out and told me that Mrs. McKinney wanted to have a lawyer sent for, so as to draw her will. Mrs. McKinney had told me the previous day not to let her die without giving her an opportunity to change her will." Is that correct?

A. She told me different times not to let her die—

Q. Is that correct?

A. Well, partly it is correct.

Q. Had she told you on the previous day not to let her die without giving her an opportunity to change her will?

A. She told me not to let her die until she had arranged things.

Q. Had she told you on the previous day not to let her die without giving her an opportunity to change her will?

A. I don't know about "will." I didn't—

Q. What?

A. I don't know. She mentioned no will.

Q. You swore to it, didn't you?

A. If it is there, I suppose I did.

Q. Yes?

A. My mother never mentioned about changing her will.

Mr. Lum—Never mind. You have answered the question.

Q. Now, in view of the fact that, you concede, you told Mr. Schotland, in the parlor, as he was leaving the house, that Monteith was her lawyer, and had drawn a will in which Charlie was favored, and in view of this statement in your affidavit that Mrs. McKinney had "told me the previous day not to let her die without giving her an opportunity to change her will," do you still say, Mr. McKinney, that you did not know of the existence of that old will?

A. I knew it in a general way. I had never seen it—never seen the will.

Q. When did you give that will to Charles?

A. When? Why, I didn't give it to Charles. I gave the papers all to Mr. Schotland.

The Court—How old are you now?

Witness—Forty-five.

The Court—And you lived there in this house of Mrs. McKinney until you were married?

Witness—I lived there until I was married, only on different jobs that I worked, one in Morristown—I worked in Morristown for awhile, and I worked in Providence, Rhode Island. In Morristown I came home every Saturday night, but in Providence I didn't.

The Court—You work for the city now?

Witness—Yes, sir.

The Court—How long have you been building inspector?

Witness—Eight years.

Leo James McKinney, sworn for Proponent.

Direct examination, by Mr. Lum.

Q. Leo, you are the son of Mr. Francis McKinney?

A. Yes, sir.

Q. And grandson of—did you always call Frederica C. McKinney your grandmother?

A. Yes, sir.

Q. Do you recall seeing her in the early spring of last year—of this year?

A. Yes, sir.

Q. Where?

A. At her home.

Q. Fix the time as near as you can.

A. It was around the 17th of March.

Q. How do you fix that time?

A. Well, around that time the rent is due, and I was down to pay the rent.

Q. To whom?

A. Mr. White, 91 Broome street.

Q. And did your grandmother say anything to you that day?

A. She told me Charles had her in Court and she wanted to see my father and mother as soon as they could get down.

Q. What did you do then?

A. Well, when I went home, about six o'clock, and father and mother were home, and I told them.

Not cross-examined.

Helen Weston, recalled, for Proponent.

Direct examination, by Mr. Lum.

Q. Miss Weston, will you tell us whether or not you heard Charles' name mentioned at all while you were in the sick room?

A. I heard it mentioned once.

Q. By whom?

A. By Mrs. McKinney—Frank McKinney.

Q. Who was present?

A. Father Williams.

Q. Will you tell us how much of the time you were in the room while the lawyer was there?

A. After the will was drawn up I signed as witness.

Q. Is that the only time that you were in the room?

A. That is the only time.

Q. Miss Weston, were you in the room on Sunday or Monday while the doctor was present?

A. Yes, sir.

Q. On either day did you hear the doctor speak to Mrs. McKinney—Mrs. Frederica McKinney?

A. Yes, sir.

Q. On which occasion?

A. He spoke—he came Sunday at eight o'clock—around eight o'clock—made his visit.

Q. And what, if anything, took place while he was in the room between himself and Mrs. McKinney?

A. I only remember him asking how she felt.

Q. About what time was that?

A. Eight o'clock.

Q. Sunday morning?

A. No; Sunday evening.

Q. Sunday evening. What, if anything, was replied?

A. I can't remember her answer.

Q. Did she answer?

A. She answered, but I don't remember what did she answer.

Q. Did the doctor call Monday?

A. Yes, sir.

Q. What took place then?

A. Monday morning he came at ten o'clock. When he came in the room he said, "Well, how are you, Mrs. McKinney?"

Q. Did she reply?

A. Yes, sir.

Q. Do you remember her reply?

A. Yes, sir.

Q. What was it?

A. She said, "Ask Nellie, she will tell you how I am."

Q. Who was Nellie?

A. I.

Q. Will you tell us when Mrs. McKinney first lost consciousness?

A. She first commenced to lose consciousness about —after ten o'clock on Tuesday morning.

Q. And how many different occasions did you hear her speak on Monday?

A. I can't remember all the occasions.

Q. Well, about how many?

A. Oh, there were several.

Q. Were you in the room while the priest was there, Miss Weston?

A. Yes, sir.

Q. All of the time or part of it?

A. No; I was in the room when the priest came in.

Q. How long did you stay in the room while the priest was there?

A. When he came in I was fixing a hypodermic of strychnia and asked him to let me give the stimulant before he commenced. I administered the stimulant and left the room.

Q. Now, while you were there state what you heard said about Charles and by whom.

A. I heard Mrs. McKinney ask Mrs. Frederica McKinney if she wanted Charlie—"Do you want Charlie, grandma?"

Q. What was said, if anything, in reply?

A. Mrs. Frederica said, very decidedly, "No."

Q. And now this chart of yours seems to have occasioned Mr. McCarter trouble. Will you explain the situation with reference to this poultice or plaster?

Mr. McCarter—She has already done it.

Q. Did you have anything to do with an onion poultice?

A. No; I did not.

Q. And referring to the chart just what time would you say the poultice was applied as near as you can fix it?

A. I applied the poultice after ten o'clock—after the doctor left.

The Court—You were asked what time you applied it.

Q. Fix the time as near as you can.

The Court—You say "After the doctor left."

Witness—That was between ten and half-past ten.

The Court—And you told us the other day that it was half-past two, did you not?

Witness—No, sir; your Honor.

Mr. Schotland—That was the point of the argument. The chart said twelve and she said ten, as I recall the testimony.

Cross-examination, by Mr. McCarter.

Q. Now, I think you told us the other day, Miss Weston, that the reason why you stopped keeping that chart at one o'clock was because that was the last hypodermic you administered, didn't you?

A. No; it wasn't the last. I didn't say it was the last hypodermic.

Q. What did you say about that?

A. I said I had given that hypodermic at one o'clock. That was the time it was due—seven, ten, one, four and seven; every three hours.

Q. Why didn't you note on the chart the fact at four o'clock that you gave a hypodermic as you had noted at one o'clock, at ten o'clock and seven o'clock that you had done it?

Mr. Lum—This has been testified to very fully by this witness.

The Court—You have opened it.

Q. Why did you do it?

A. Because I discontinued keeping the chart.

Q. Have you got your subpœna with you here?

A. I wasn't subpœnaed.

Q. Who asked you to come?

A. Why I was informed by Mr. and Mrs. McKinney.

Q. Did you leave a case to come?

A. No; I did not.

By the Court.

Q. Do you call that a "connected conversation," to say that "Do you want Charlie, grandma," and she said "No" emphatically? Would you call that a connected conversation?

A. That is what I heard asked.

Q. No. Would you call that a connected conversation?

A. Connected?

Q. Yes.

A. I don't understand what you mean. She answered right after "No." That was connected. The answer came right after.

Q. Then that is a connected conversation, isn't it?

A. Yes, sir.

Further cross.

Q. You say you were educated at what training school?

A. St. Mary's Hospital.

Q. And is it part of your training as a trained nurse to keep a record of the illness of a patient down to the patient's death?

Mr. Lum—I object as repetition.

The Court—Objection overruled.

A. It is.

Q. Yes. And don't you ordinarily carry out that teaching? Don't you ordinarily carry out that teaching?

A. Yes, sir; I ordinarily carry it out, if the doctor wants the chart.

Q. One moment. Do you sometimes, when the patient is hopelessly ill, so that there is no hope—all hopes abandoned—do you sometimes stop keeping the chart then?

A. Yes, sir; I sometimes do.

Mr. Lum—I ask for the production from Mr. Charles McKinney of the bank book.

(Book produced.)

Mr. Lum—Is that the only savings bank account received?

Mr. Frank McKinney—Yes.

Mr. Lum—I offer this in evidence.

Book marked *Ex. P4.*

Mr. Lum—I also offer in evidence a receipt on the letterhead of Phillip J. Schotland, dated September 25, 1914, signed by Charles F. McKinney, acknowledging the receipt of the last will of Frederica C. McKinney, dated February

29, 1909, among a long list of other papers and deeds.

Paper marked *Ex. P5.*

Mr. Lum—I offer in evidence probate copy of the last will and testament of John M. McKinney referred to herein.

Paper marked *Ex. P6.*

Proponent rests.

Charles F. McKinney, recalled for Caveator.

Direct examination, by Mr. McCarter.

Q. Mr. McKinney, two letters in your letter book were referred to yesterday as having been—appearing to be dated respectively May 19, 1914, and May 25, 1914. Were those letters duly copied in your letter book?

A. They were.

Mr. Lum—I object. There has no notice to produce been given in this case and I object to the proof as secondary evidence.

Mr. McCarter—Will you produce them? It has already appeared that you had not found them.

Q. Have you looked for the original letters among any papers?

A. I have, among the papers that I have received.

Q. Don't find them?

A. No, sir.

Q. I now ask you if you in due course sent to your grandmother, Mrs. Frederica C. McKinney at the address 376 Plane street the two letters of May 19, 1914, and May 25, 1914, as they appear to have been pressed in your letter book?

Mr. Lum—I object.

A. I did.

Q. Postage prepaid?

Mr. Lum—I object.

A. Postage prepaid.

Mr. Lum—Will you kindly wait until my objections are made so that I can get a ruling on it.

The Court—What is the objection?

Mr. Lum—I object on the ground previously stated, that it was not the best evidence and that no notice to produce has been given.

The Court—Objection overruled. There was a demand in open court for them, was there not?

Mr. McCarter—Yes. In addition to that we are the administrators. We are supposed to have the papers.

The Court—Miss Clark testified and Mr. and Mrs. McKinney, and everybody else who appeared to have been in the household, all were asked about it, as I recall the testimony.

Mr. McCarter—That is right, your Honor. I would like to have these copies marked instead of the book.

The Court—It is agreed that the papers presented are copies of what appears to be in the book?

Mr. McCarter—Yes.

Papers marked *Exhibit C11.*

Q. There has been offered in evidence a receipt, *Exhibit P5,* dated September 5, 1914. Please look at it and see if you remember giving that receipt at that time?

A. Yes, sir; I guess that is the date. I do.

Q. Now, had you been given any papers belonging to this estate before September 25, the date of that receipt?

A. I believe—yes; I received a few of them.

Q. When?

A. Just a short time before that.

Q. Well, how long before?

A. Probably about about two weeks, as I remember it.

Q. Had you made a demand for the papers?

A. Right from the very week after my grandmother's death.

Q. Did you give a receipt for the first batch that you got?

A. No, sir.

Q. Was any reason given you that time why the will was not given to you?

A. No reason at all. I said I would like to have the will, but as I recall it no reason was given.

Q. By the will I mean *C2*.

A. The will of 1909.

Not cross-examined.

John Monteith, recalled for Caveator.

Direct examination, by Mr. McCarter.

Q. Did you ever tell Mrs. Frederica McKinney or Frank McKinney, in her presence, not to bother you or to come after you after 3:30 or four o'clock?

A. I have no recollection of it.

Q. Is it a fact that you do leave your office at 3:30 or four o'clock?

A. No, sir.

Q. How late are you ordinarily there?

A. As a rule until five. Occasionally I have appointments that take me out before that hour.

Q. Do you remember, or have you investigated Monday the 22d of June, 1914, about your movements that day?

A. Yes, sir.

Q. Are you able to state where you were that day, in the afternoon?

A. I had no appointment, so I must have been in the office.

Cross-examination, by Mr. Lum.

Q. Do you live out of town, Mr. Monteith?

A. No, sir.

Q. Live in town, now?

A. Yes, sir.

Q. How long have you been living in town?

A. About three years.

Q. And it is you custom, you mean, to be in your office until five o'clock?

A. As a rule.

Q. As a rule, not after?

A. Seldom. Very rarely after five o'clock.

Q. And do I understand you that you did not say to Mrs. Frederica McKinney or Mr. Francis McKinney not to call after 3:30 or four, or that you have no recollection of telling them?

A. I have no recollection of it.

Adjourned until to-morrow morning, at ten o'clock.

FOURTH DAY.

Appearances as before.

(Summing up.)

Recess.

The Court—By consent of counsel it is stipulated that the priest, William Koellhoffer, would testify in accordance with his statements made in his affidavit filed in Chancery, and it is produced.

Mr. Lum—I think it better be read right into the record, it is short.

"IN CHANCERY OF NEW JERSEY.

BETWEEN

CHARLES F. MCKINNEY, INDIVIDUALLY AND AS ADMINISTRATOR, &C., OF FREDERICA C. MCKINNEY, DECEASED,

Complainant,

AND

FRANK R. MCKINNEY, ALIAS, &C., ET AL.,

Defendants.

On Bill, etc.
Affidavit.

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

William Koellhoffer O. S. B., of full age, being duly sworn on his oath, says:

I am a priest connected with the Catholic Church and particularly with St. Mary's Abbey.

In June of this year, representing Father Hedges, of St. Bridget's Parish, I was called upon in my official capacity to visit the late Frederica C. McKinney, and I visited her on Monday afternoon, June 22, around five o'clock, at her home, 376 Plane street. I found her conscious and administered the Sacraments. While I was there, the question was asked as to whether Mrs. McKinney wanted to make a will and to the best of my knowledge she replied in the affirmative.

REV. WILLIAM KOELLHOFFER, O. S. B.

Affirmed and subscribed to before me this third day of August, A. D. 1914.

JOSEPH J. PALLITTA,
Attorney-at-Law of New Jersey."

(Continuation of summing up.)

The Court—In view of the fact that the case is now clear in my mind, and as I have reached a definite con-

clusion, I find no difficulty in disposing of it at this time. I am satisfied from the testimony that the requirements of the statute as to the due execution of the will were not complied with, and that the testatrix did not know the nature of the business in which she was engaged and did not have the necessary testamentary capacity properly to make a will. On the question of undue influence—assuming that possibly, technically, the will was apparently executed in accordance with the statute, I have grave doubt. I appreciate the force of the argument in relation to that question, and I think that under the decision in the Spark's case, in view of the confidential relation, there are present some of the unusual circumstances that shift the burden of proof and that the parties have not exonerated themselves. The testatrix was kept separate and apart from her relatives in so far as they were capable of so doing. Frank McKinney selected the lawyer, and while he was not physically present in the room, he was practically present, within the reason of that decision.

I have given the matter very careful consideration, and, under the circumstances, am unable to permit a decree to be entered admitting this paper writing to probate as the last will and testament of the decedent.

If it becomes necessary by reason of an appeal, the Court will file a formal opinion.

ESSEX COUNTY ORPHANS' COURT.

In the Matteer of the Application of FRANCIS RUTHERFORD MCKINNEY for the Probate of a Certain Paper Writing, bearing date the 22d day of June, 1914, as the Last Will and Testament of FREDERICA C. MCKINNEY, Deceased. } On Caveat.

OPINION.

Mr. Ralph Lum (Lum, Tamblyn & Colyer), of counsel, and *Mr. Philip J. Schotland,* Proctor for Proponent.

Mr. Robert H. McCarter and *Mr. Arthur F. Egner* (McCarter & English), of counsel, and *Mr. Chauncey G. Parker,* Proctor for Charles F. M. McKinney, next of kin, caveator.

MARTIN, J.

Frederica C. McKinney, late of Newark, died Tuesday, June 23d, 1914, possessed of real estate known as 376 Plane Street, and certain adjoining land in Newark. A paper writing bearing date June 22d, 1914, purporting to be her last Will and Testament, was presented by Francis Rutherford McKinney (proponent), to the Surrogate for probate. A caveat was filed by Charles F. M. McKinney, a grandson of the decedent, and nearest of kin surviving. There is also a sister, Hannah Ramage, residing in Albany, New York. The Surrogate issued citations to all parties interested and after a hearing the case was submitted for determination.

On the 29th day of September, 1909, the decedent made and duly executed her last will and testament, in which she (1) directed payment of debts and funeral expenses, (2) gave to her sister Hannah Ramage, residing in Albany, the sum of one thousand dollars, (3)

gave to Amelia Clark one thousand dollars, (4) gave to her godchild, Florence Mary Rache, five hundred dollars, (5) gave to her godchild, Francis Rutherford McKinney, one thousand dollars, (6) gave to St. Bridget's Roman Catholic Church the sum of one hundred dollars for masses for the repose of her soul, (7) gave the remainder to her grandson, Charles M. McKinney, and appointed him and Thomas Rache executors with full power and authority to sell and dispose of the real estate. The will was signed by testatrix. The will was prepared by Mr. Monteith, a well-known lawyer, who had acted for a considerable period of time as the trusted advisor of the decedent and continued so to act up to as late as Friday, June 19th, 1914, when she was taken ill of the disease which finally resulted in her death.

The decedent was seventy-nine years of age and lived upwards of fifty years at 376 Plane Street and had as her companion Miss Amelia M. Clark. Francis Rutherford McKinney was taken into the household in his early youth and treated practically as a son. After his marriage, in 1896, he established a separate home. Mrs. McKinney could not read nor write except her own name. Miss Clark generally did her reading and writing. John McKinney, the husband of decedent, formerly owned the property wherein deceased resided, and died about 1898, leaving will disposing of the same. Sometime in March, 1914, the decedent was served with a writ of *subpœna ad respondendum* out of the Court of Chancery in an action brought by Charles F. M. McKinney, alleging certain rights under the will of his grandfather, John McKinney, to the said real estate and demanding an accounting. About this time, Francis Rutherford McKinney, the proponent and his wife began to be very intimate with the decedent, visiting her almost daily until her last illness. No answer was filed in the Chancery case, and Charles F. M. McKinney informed Mr. Monteith, the solicitor for decedent, that he would discontinue the suit. Mr. Monteith informed

the decedent Friday, June 19th, that she need not further concern herself about the suit as Charles was going to discontinue it. Notwithstanding that it was earnestly urged upon the Court that Mrs. McKinney became highly incensed at the conduct of her grandson in suing her she took no action to change her will although she saw Mr. Monteith on several occasions.

On Saturday, June 20th, Francis Rutherford McKinney and his wife were sent for and were almost constantly present at the house until the death of the decedent on the following Tuesday. On Sunday morning, June 21st, shortly before noon, the services of a trained nurse were required and the younger Mrs. McKinney called in an old friend of hers, who is a nurse, to act in that capacity.

The physician in attendance testified that on Sunday morning, June 21st, the decedent was very ill and that Sunday afternoon he thought she was very much worse. On Monday, June 22d, at ten o'clock in the morning, the physician in attendance examined decedent and found her suffering great pain and much worse than the day before. Her illness consisted of an edma of the lungs—a dropsical condition in which water forms on the lungs, eventually drowning the patient. The physician further testified that she was suffering terribly from lack of air and had the greatest difficulty in breathing. At four o'clock in the afternoon on Monday, June 22d, the physician found decedent with her eyes half open and could get no response from her in answer to his questions and could in no manner secure any recognition; that at nine o'clock Monday evening and about nine o'clock Tuesday morning, her condition remained practically the same and so continued until her death, which occurred Tuesday at two o'clock in the afternoon. The physician testified that the last intelligent expression he was able to obtain from Mrs. McKinney was Saturday night or Sunday morning and that he was unable to secure any sign of intelligence or

recognition or conscious reply from her. Shortly after four o'clock on Monday a priest was called to administer the last rites to decedent. His affidavit in another proceeding was admitted by consent as stating what he would say if called as witness. It is very unsatisfactory because he was not examined and cross-examined in the presence of the Court. In this short affidavit he says merely that she was conscious and he administered the Sacraments and that while he was present she was asked if she desired to make a will and that to the best of his knowledge she replied in the affirmative. Apparently this testimony is contradictory of that of the physician, because, the last rites, it was argued, might only be administered to a conscious person, but the priest refers to consciousness merely sufficient to warrant the administration of the last rites and evidently was not alluding to that consciousness which is sufficient to make a will. It probably is true that the priest misconstrued some movement as a sign of consciousness, and his statement that when she was asked if she wanted to make a will that "to the best of his knowledge and belief she replied in the affirmative" is uncertain and unsatisfactory.

Francis Rutherford McKinney, shortly before five o'clock on Monday, June 22d, upon receiving information from his wife that the decedent desired to change her will, as he says, went out to Plane Street and down Market Street to find a lawyer. He knew that Mr. Monteith had been the regular lawyer and was the trusted advisor of the decedent, but he did not go to Mr. Monteith. He met a Mr. Silverstein and was directed to the lawyer who subsequently prepared the paper writing in dispute. The lawyer went to the home of the decedent about six o'clock and was ushered into the presence of the decedent. The nurse was administering some medicine to the decedent at the time.

The lawyer testified that he directed all persons to leave the room. He stated that decedent spoke with

great difficulty and only between gasps for breath and that he could not understand her at first, but by leaning over the bed finally understood her to say that she desired to make a will. He asked her if she had any relatives and she said she had some in Albany. No reference was made by her to her grandson (the caveator). She was asked to whom she desired to leave her property and she stated that she wanted to leave it to "Frank McKinney, Annie Rache and Millie Clark or Bark or Mark," the lawyer could not make out the name, so he went out of the bedroom and called for "Millie" and Miss Amelia M. Clark appeared and went into the room with him and he asked testatrix if Miss Clark was the one to whom he alluded and she answered in the affirmative. The lawyer testified that he had no conversation with anyone before he went into the room and that no one told him how to spell the name "Rache" which would naturally be spelled as an English name R-a-i-s-h or as a German name R-o-e-s-c-h, and that he merely happened to write the name R-a-c-h-e because he had searched a title involving that name. The decedent could not spell it. This remarkable coincidence is not otherwise explained. He also stated that the decedent spoke of Frank McKinney as her adopted son, but it appears from the testimony that the decedent had never legally adopted proponent as her son and usually referred to him as her godchild. The lawyer testified that he then wrote out the paper writing in question. It is on a sheet of legal cap, at the top of which is printed, "In the name of God, Amen. I." He here inserted the name "Frederica C. McKinney." Then follows, in print:

> "Being of sound mind, memory and understanding, do make and publish this my last will and testament in manner following, that is to say."

Here the lawyer inserted in his handwriting:

> "I give, devise and bequeath everything I die

seized of whatsoever it may consist of in equal shares to my friends, Amelia Clark, Annie *Rache,* and my *adopted son,* Frank McKinney."

On the second page is written:

"I hereby constitute and appoint my adopted son, Frank McKinney, sole executor of this my last will and testament and hereby revoke all former wills by me made."

On the third page the words appear:

"In witness whereof I have hereunto affixed my hand and seal, this 22d day of June, 1914."

The name "Frederica C. McKinney" is written by the lawyer with a cross between "Frederica" and "McKinney," and the word "her" over the cross and the word "mark" under the cross, although as stated before she could sign her name. At this point there follows the usual attestation clause and the signatures of the lawyer and the nurse as witnesses. The absence of any bequest for saying of masses for the repose of her soul in such a devout Catholic, the absence of technical words and the use of the crude expression employed by the draftsman, a lawyer skilled in the terminology usually employed in the preparation of wills, all indicate that the instrument was drawn in very great haste.

The lawyer says that he called in the nurse, and he and the nurse testify that the will was then read over to decedent in her presence and that he then said substantially that he wanted to know if she made this as her will and desired to leave her property to Frank McKinney, Annie Rache and Amelia, and they both say that she said "yes." Thereupon she made a cross, with the assistance of the lawyer. She did not sign her name.

At eleven o'clock that night Charles F. M. McKinney, the caveator, having been notified by the physician in attendance and not by any member of the household nor by Francis Rutherford McKinney, appeared and saw the decedent, his grandmother. At that time she

was gasping for breath and unable to recognize him. Francis Rutherford McKinney called Charles F. M. McKinney "a murderer" and the cause of his grandmother's death, in the sick chamber. Francis Rutherford McKinney testifies that the decedent could hear what was said.

Charles F. M. McKinney was not notified of the death of decedent by any of the household.

A considerable amount of testimony was taken tending to show that Frank McKinney and Amelia M. Clark were in confidential relations to the decedent, and it was contended that the selection of the lawyer by Frank McKinney, the presence of the persons in interest in the house at the time of the alleged execution of the instrument in question, the failure to procure Mr. Monteith, the usual and trusted advisor of the decedent, the surrounding of the decedent with people of their selection, the exclusion of the grandson, the consciousness of guilt exhibited by the younger Mrs. McKinney in testifying that she asked the testatrix in the presence of other persons whether she desired the grandson to be present so as to make evidence of that fact, and other circumstances were sufficient to shift the burden of proof and that it thereupon became the duty of proponent to show the absence of undue influence which the proponent has failed to do.

The testimony relating to the alleged formal execution is not satisfactory and does not go to the extent of showing that the part said to have been performed by the alleged testatrix was voluntary and intelligent. It is not therefore necessary to determine the question of undue influence. It appears affirmatively by the testimony that the decedent did not possess the degree of mental capacity requisite to understand the nature of the business in which she was engaged.

The understanding and intellectual powers which are necessary to enable a person to make a valid testament are usually denominated as "sound and disposing

mind and memory," but it is not essential that the testatrix's mind should be unbroken, unimpaired and unshattered by disease or otherwise, nor is it necessary that the testatrix should possess these qualities of mind in the highest degree or even in as great a degree as she may formerly have done. A person of very moderate capacity may make a valid will, while the mind may be to some degree depleted and the memory enfeebled, yet if the testatrix at the time of executing the will is capable of understanding the nature of the business in which she is engaged, if she is able to recollect the property, which she means to dispose of, the distribution which is made of it by her will and to recall the persons who are the objects of her bounty and to discern and recollect and feel the relations, connections and obligation of family and blood it is sufficient testamentary capacity. Kocher, p. 32.

In this case there is testimony from a disinterested source, the one best qualified by experience and capacity for observation, the physician in charge, who appears to have no bias of any kind in connection with the transaction, he visited her on Monday, the 22d, the day on which the will was executed, in the morning and again in the afternoon at four o'clock and in the evening between nine and ten o'clock. The will, as will be remembered, was executed at six in the evening. He says that he found her unconscious and was unable to obtain any reply from her on any of the above foregoing visits. This testimony in connection with that of the nurse, in which she says that she had no connected conversation with decedent on Monday and that about one o'clock on Monday she ceased to enter on her clinical chart the condition of the patient, which evidently was because her condition was utterly hopeless, the administration of the last rites and the testimony of the lawyer, that she did not recall her grandson, who would naturally be one of the objects of her bounty, is convincing evidence that the testatrix was incapable of understanding the business in which she was engaged.

There is the testimony of the nurse and lawyer possibly showing a form of an attempt at compliance with the requirements of the statute as to the technical execution of the instrument, but this was an empty form as she did not know nor understand what she was doing.

Under these circumstances the Court believes that it has been affirmatively shown, and finds the fact so to be, that the testatrix did not possess even that meagre degree of mental capacity required by law for the execution of a valid will.

WM. P. MARTIN, *J.*

Essex County,
Surrogate's Office.
Filed Feb. 11, 1915.
Fred. G. Stickel, Jr.,
Surrogate.

ESSEX COUNTY ORPHANS' COURT.

In the Matter of the Application of FRANCES RUTHERFORD MCKINNEY *for the Probate of a Certain Paper Writing bearing date the 22d day of June, 1914, as the last Will and Testament of* FREDERICA C. MCKINNEY, *Deceased.* } On Caveat.

SUPPLEMENTAL OPINION AS TO PAYMENT OF CERTAIN EXPENSES.

Ralph E. Lum, Esq. (Lum, Tamblyn & Colyer), of counsel for and proctor with proponent.

Arthur F. Egner, Esq. (McCarter & English), of counsel and proctor for Charles F. McKinney, next of kin and caveator.

MARTIN, *J.*

This is an application to open the decree denying the probate of the paper writing offered for probate, in so far as it provides that the sum of $225 shall be paid to proponent for expenses, and to strike the said item out of the decree and insert in lieu thereof the amount of the expenses incurred by the proponent up to the close of the hearing.

The Court, at the hearing, stated orally its conclusions in reference to the merits of the controversy, and suggested that it would receive applications for counsel fees, allowances and a reasonable sum for reimbursement of expenses necessarily incurred in connection with the contest. The Court personally observed that counsel for the proponent seemed to have a stenographic copy of some of the testimony, and understood at the time that a very considerable quantity of the testimony had been written out by the official stenographer for the proponent's use during the hearing. Under the circumstances the Court was then willing, and so directed, that the testimony should be completed and the charge for the full amount allowed. It now transpires that the Court was laboring under a misapprehension in believing that a very large part of the testimony had already been written out, and that, in point of fact, only a very small amount of the testimony had been transcribed.

The amount to be paid to proponent for his expense will be fixed at the sum of $15.70, and an order making the necessary changes in the decree will be signed.

In this action the Court is not to be understood as intending to express any opinion upon the propriety of the appeal, but merely that it is not proper under the circumstances for the Court to direct the successful caveator practically to finance the appeal of the proponent.

WM. P. MARTIN, *J.*

Essex County.
Surrogate's Office.
Filed Feb. 11, 1915.
Fred. G. Stickel, Jr.,
Surrogate.

ABSTRACT OF EXHIBIT C-1.

BILL OF COMPLAINT, in Chancery of New Jersey, filed Jan. 14, 1914, in which Charles F. McKinney was the complainant and Fredericka C. McKinney, personally and as executrix of the Last Will and Testament of John McKinney, deceased, was the defendant.

The bill complains in substance as follows: That John McKinney, the grandfather of the orator, died seized in fee simple of a certain house and tract of land, situate in Newark, and known as 376 Plane Street; that under the will of John McKinney his widow, Fredericka C. McKinney, acquired a life estate in the premises known as 376 Plane Street in full lieu and settlement of dower with provisions that she pay all duties and taxes due or accruing on said premises. The defendant, having wholly failed and neglected to pay said duties and taxes due, allowed the premises to be sold under foreclosure on the tenth day of July, 1888, and did then bid in the premises at the Sheriff's sale for $1500.00. At the time of John McKinney's death, the Howard Savings Institution of Newark held two mortgages upon the premises known as 376 Plane Street in the aggregate sum of $1800.00. After the death of John McKinney and before the sale under the foreclosure proceedings, the defendant mortgaged the said premises in the amount of $1000.00 to the Howard Savings Institution. The orator further sets forth that he is the sole heir at law and remainderman of the said premises known as 376 Plane Street, as well as the sole owner of premises known as 370½ Plane Street. The orator further shows that the defendant had collected all the rents from both of these premises since the year 1888.

The complainant asks, therefore, that Fredericka C. McKinney make a full and true discovery of all and singular the money received as income from premises known as 370½ Plane Street, since the year 1888 and pay the same to the orator, and that she pay and cancel

the mortgage of $1000.00 placed upon premises known as 376 Plane Street.

EXHIBIT C-2.

In the name of God, Amen:

I, Fredericka C. McKinney of the City of Newark, Essex County, New Jersey, being of sound and disposing mind, memory and understanding do make and publish this my last will and testament in manner following, that is to say:

First: I direct the payment of all my just debts and funeral expenses as soon as conveniently can be after my decease.

Second: I give to my sister Hannah Remmert residing in Albany, New York, the sum of One Thousand Dollars and should she pre-decease me than I give said sum to her daughter Amelia.

Third: I give to my friend Amealia Clark who resides with me the sum of One Thousand Dollars.

Fourth: I give to my god-child Florence Marie Rache the sum of Five Hundred Dollars.

Fifth: I give to my god-child Francis Rutherford McKinney the sum of One Hundred Dollars.

Sixth: I give to St. Bridgets Roman Catholic Church the sum of One Hundred Dollars for masses for the repose of my soul.

Seventh: All the rest and residue of my estate both real and personal of whatever kind and wheresoever situate I give, devise and bequeath to my grandson Charles M. McKinney absolutely.

I hereby constitute and appoint my grandson Charles M. McKinney and my friend Thomas Rache sole executors of this my will giving and granting unto them full power and authority to sell and dispose of any real estate of which I may die siezed and to give good and sufficient deeds therefore.

In Witness Whereof I have hereunto set my hand and seal this twenty-ninth day of September, Nineteen Hundred and Nine.

FREDERICA C. MCKINNEY.

Signed, Sealed, Published and Declared by the said Fredericka C. McKinney as her last will and testament in our presence who at her request in her presence and in the presence of each other have hereunto subscribed our names as witnesses.

John Monteith, 9 Clinton St., Newark, N. J.
Margaret Ramage, 268 Garside St., Newark, N. J.

EXHIBIT C-3.

Samuel W. Bond and wife (Mary A.) To John McKinney.	Deed, Warranty, Dated, Oct. 1, 1849 Ack. Nov. 14, 1849. Rec. Nov. 19, 1849. Con. $1400. Bk. C. 7, p. 318.

Conveys land in City of Newark, County of Essex and State of New Jersey.

Beginning in the Easterly line of Plane Street at the Northwesterly corner of the said lot, which corner is distant sixty-one feet Southwest from—Vance's line. Thence running South seventy and a quarter degrees East One hundred feet to the line of a certain Ten foot alley; thence along the line of said alley South Westerly, parallel with Plane Street Twenty-five feet; Thence North Seventy degrees and fifteen minutes West One Hundred feet to Plane Street aforesaid; Thence along the line of Plane Street Northeasterly Twenty-five feet to the Beginning corner. Together with the privilege of entering in and through a certain alley opened from

Plane Street to reach the rear alley aforesaid, And that privilege for the use of the Lot above described only. Being the same premises conveyed to the said Samuel W. Bond by James Hewson, Assignee, &c., by deed bearing date 17th day of November 1843 and recorded in Book Z 5 of Deeds for Essex County on pages 243 etc.

(Note:—#376 Plane Street.)

EXHIBIT C-4.

James F. Bond and wife (Caroline) To John McKinney	Deed,—Quit Claim Dated, August 27, 1855. Ack. Aug. 27, 1855 Rec. January 10, 1856 Con. $1.00 et al. Bk. 217, P. 271.

Conveys lands in City of Newark, County of Essex and State of New Jersey.

Beginning in the Easterly line of Plane Street at the Northwesterly corner of the said lot which corner is distance sixty-one feet Southwest from—Vance's line; Thence running South seventy and a quarter degrees East, One hundred feet, to the line of a certain Ten foot alley; Thence along the line of said alley South Westerly parallel with Plane Street Twenty-five feet: Thence North seventy degrees and fifteen minutes West One hundred feet to Plane Street aforesaid; Thence along the line of Plane Street North Easterly Twenty-five feet to the place of Beginning.

(Note:—#376 Plane Street.)

EXHIBIT C-6.

The people of the State of New York by the Grace of God, Free and Independent. To all Whom These Presents Shall Come or May Concern: Send Greeting.

KNOW YE that at the County of New York, on the First day of May, in the year of our Lord one thousand eight hundred and eighty three before DANIEL G. ROLLINS, ESQ., Surrogate of our said County, the LAST WILL AND TESTAMENT of John McKinney, late of Newark, New Jersey, deceased, was admitted to probate upon the production of a duly authenticated copy thereof from under the seal of the court in which the same was proved and the said John McKinney not being at the time of his death a resident of but leaving personal property situate within the County of New York, by means whereof the proving and registering said will and the granting Administration of all and singular the goods, chattels and credits of the said Testator and also the auditing, allowing and final discharging the account thereof, doth belong unto us, the Administration of all and singular the goods, chattels and creditors of the said deceased, and any way concerning his Will is granted unto Frederica C. McKinney of Newark, N. J. the Executrix in the said Will, named, she being first duly sworn faithfully and honestly to discharge the duties of such executrix.

In testimony whereof we have caused the Seal of the Surrogate's Court to be hereunto annexed.

[SEAL.] Witness Daniel G. Rollins, Esq., Surrogate of our said County, at the City of New York, the 1st day of May in the year of our Lord one thousand eight hundred and eighty three and of our Independence the one hundred and seventh.

ARTHUR PURTSELL,
Clerk to the Surrogate's Court.

EXHIBIT C-7.

ESSEX COUNTY, *ss.:*

George Fitzpatrick one of the witnesses to annexed writing purporting to be the last will and testament of John McKinney the testator therein named, deceased, being duly sworn, on his oath, says, that he saw the testator sign and seal the said annexed writing, and heard him publish, pronounce and declare same as and for his last Will and Testament. That at the time of the doing thereof the Testator was of sound disposing mind, memory and understanding, as far as this deponent knows and as he verily believes, that James McCloud the other subscribing witness thereto was present at the same time with this deponent and together with him subscribed his name thereto as a witness in the presence of the Testator and of each other at the request of the Testator and that said Testator died more than ten days ago.

GEORGE FITZPATRICK.

Sworn, March 13, 1883 before me

C. MEYER ZULICK.

ESSEX COUNTY, *ss.*—Fredericka C. McKinney, the executrix in annexed writing named being duly sworn on her oath says, the annexed writing contains the true last Will and Testament of John McKinney the testator therein named, deceased, as far as she knows and as she verily believes, that she will, as the Executrix thereof, well and truly perform the same, first by paying the debts of said deceased then the legacies therein specified, as far as the goods, chattels and credits of said deceased will thereto extend, and the law charges her that she will make and exhibit unto the Surrogate's office of the County of Essex, a true and perfect Inventory of all and singular the said goods, chattels and credits as far as the same have or shall come to her possession or

knowledge, or to the possession of any other person or persons to her use, to her knowledge, And that she will well and truly account when thereunto lawfully required, and that said Testator died on the 13th of February last.

FREDERICKA C. MCKINNEY.

Sworn March 13, 1883, before me.
C. MEYER ZULICK *Surrogate.*

Probate of the foregoing Will was duly issued as follows:

I, C. Meyer Zulick, Surrogate of the County of Essex, do certify the annexed to be a copy of the last Will and Testament of John McKinney late of the County of Essex, deceased, and that Fredericka C. McKinney the executrix therein named, proved the same before me, and is duly authorized to take upon herself the administration of the Estate of the Testator agreeably to the said will.

Witness my Hand and Seal of Office the Thirteenth day of March in the year of our Lord one thousand eight hundred and eighty-three.

C. MEYER ZULICK.

EXHIBIT C–8.

Edwin W. Hine, Sheriff
to
Fredericka C. McKinney

Sheriff's Deed G 24–109
Dated July 23, 1888
Proved Aug. 2, "
Recd. " " "
Cons. $1500.
G & H in fee

Conveys prem in the City of Newark, Essex Co. N. J.

Beg in the Ely line of Plane St. at the NWly cor of sd lot wh lot corner is dist 61′ SW fr Vances line; thence rung S 70¼° E 100′ to the line of a certain 10′

alley; thence along the line of sd alley SWly = wi Plane St. 25′; th N 70° 15′ W 100′ to Plane St. afsd; the alg the line of Plane St. NEly 25′ to the beginning course together with the privilege of entering in and through a certain alley opened from Plane St to reach the rear alley afsd, this privilege for the use of the lot above described only. Being the same premises conveyed to said John McKinney by deed recd in Bk C 7 of Deeds pages 318 &c.

Sold by virtue of a writ of Fi. Fa. issued out of the Court of Chancery of N. J. in a cause wherein The Howard Savings Institution was complainant and Fredericka C. McKinney as devisee and executrix of John McKinney, deceased, William J. McKinney and Francis O. McKinney, devisees and heirs at law of said John McKinney, Emma L. McKinney the wife of Francis O. McKinney, Margaret McKinney, the Rev. George H. Doane, St. Mary's Orphan Asylum, The State of New Jersey and Henry Quackenbush were defendants on foreclosure of mortgages made by John McKinney to complainant and respectively registered in Book O X of Mortgages (Page 169).

Due complainant $1834.36, costs $127.56.

Decree dated April 25, 1888, writ dated May 7, 1888, James C. McDonald, Solicitor.

EXHIBIT C 9.

CLINICAL NOTES.

Name, Mrs. McKinney

Sunday, June 21/14.

Diagnosis.....

Hours.	*T.*	*P.*	*R.*	*Medicines.*	*Nourishments*	*U.*	*D.*	*Temp. of Room*	*Orders and Remarks.*
	rect.								
	3								
12 N.	103	120	34	℞					Pulse intermitt.
				Tab. i	Water ʒ i				Very restless.
				q 1 h.	" "				Throat swollen & red.
2 P. M.				℞	" "				Raised large amt. mucus.
				Mixt. ʒ i	" "				
				q 3 h.	" "				Sponge bath, Alcohol rub given.
		reg.			" "				
	4								
4	103	130	34		Water ʒ ii				
5				℞ Mixt. ʒ i	" "				
					" "				
7:15					" "				Pt. turned on side, left.
					" "				Skin moist, cold.
	3								
8	103	128	34	℞ Mixt. ʒ i	" "				Visited by Dr. Phelan.
					" "				
11				℞ Mixt. ʒ i	" "				Sleeping at short intervals.
				Monday, June 22/14					
2 A. M.				℞ Mixt. ʒ i	Water ʒ ii				Skin moist.
3	rect.				" "	ʒ iv			Complains of nausea.
	4				" "				
4	102	126	34		" "				
5				℞ Mixt. ʒ i	" "				Complains of pain in region of heart, heat applied.
					" "				
7				Strych. gr. 1/60	" "				
	2			(Hypo.)	" "				
8	101	122	36						
				℞ Mixt. ʒ i					

Nurse.....

Physician's Directions

Memoranda for Nurse

Exhibit C 9—*Continued.*

CLINICAL NOTES.

Name, Mrs. McKinney Diagnosis.....

Monday June 22/14.

Hours.	*T.*	*P.*	*R.*	*Medicines.*	*Nourishments*	*U.*	*D.*	*Temp. of Room*	*Orders and Remarks.*
10 A. M.				Strych. gr. 1/60 (Hypo.)	Milk ℥ iv				Visited by Dr. Phelan.
10:30					" "				Raised large amt. of gas.
11				℞ Mixt. ℥ i	Water ℥ ii				
11:30					Milk ℥ iv				Very restless.
	rect.								
		irreg.							Mustard poultice applied to region of heart.
	3								
12	102	134	36						
12:30					Milk ℥ iv	℥ iii			
1 P. M.				Strych. gr. 1/60 (Hypo.)	Water ℥ iii				Nurse.....

Physician's Directions

Memoranda for Nurse

EXHIBIT C–10.

Frederica C. McKinney (widow) to The Howard Savings Institution	Mtge. o 9–329 Dated July 23, 1888 Ackd. " 26, " Recd. " " " Cons. $2850.

Mtge to secure the paymt of $2850. in 1 yr wi int at 5% on prem in the City of Newark, Essex Co. N. J.

Beg in the Ely li of Plane St. at the NWly cor of sd lot wh cor is dist 61′ SW fr Vances line; th rung S 70¼′ E 100′ to the li of a certain 10′ alley; th alg the li of sd alley SWly = wi Plane St 25′; th N 70° & 15′ W 100′ to Plane St. afsd; th alg the li of Plane St. NEly 25′ to the Beg cor together with the privilege of entering in & thru a certain alley opened from Plane St to reach the rear alley afsd, this privilege for the use of the lot above des only. Being the same premises conveyed to Frederica C. McKinney by Edwin W. Hine, Sheriff, by deed of even date herewith, this mtge being given to secure the paymt of part of purchase money in sd deed mentioned, wh has been advanced by party of the second part hereto.

EXHIBIT C–11.

May 19, 1914.

Mrs. Frederica C. McKinney,
#376 Plane Street,
Newark, N. J.

DEAR GRANDMA:— (In re Mary Flynn Estate)

In reference to the claim made by you against the above estate, which you placed in may hands some time ago, and in which you recall having made an affidavit, I beg to state that I have looked into the matter further, as promised when I talked with you last week,

and find that the New Jersey laws of 1898 provide that if no application is made for Letters of Administration for sixty days after the death of a non-resident, anyone having a legal claim may apply for same to be granted to another person.

Trusting you are well, I remain,

Your loving grandson,

CHARLIE.

May 25, 1914

Mrs. Frederica C. McKinney,
#376 Plane Street,
Newark, N. J.

DEAR GRANDMA:—

I would like very much to take dinner with you on next Sunday, but I have arranged to spend Decoration Day and Sunday in Albany, as Katherine is dangerously ill, and has been for some time as you know. I trust you are well.

Your loving grandson,

CHARLIE.

EXHIBIT P–1.

In the name of God, Amen.

I, Frederica C. McKinney, being of sound mind, memory and understanding, do make and publish this my last Will and Testament in manner following, that is to say: I give, devise and bequeath everything I die seized of whatsoever it may consist of in equal shares to my friends Amelia M. Clark, Annie Rache and my adopted son Frank McKinney.

I hereby constitute and appoint my adopted son Frank McKinney sole executor of this my last will and testament and hereby revoke all former wills by me made.

In witness whereof I have hereunto affixed my hand and seal this 22nd day of June, 1914.

her
FREDERICA C. × MCKINNEY (LS)
mark

Signed, sealed, published and declared, by the said Frederica C. McKinney the testator to be her last Will and Testament in our presence, who in her presence and at her request and in the presence of each other, have hereunto subscribed our names as witnesses.

Philip J. Schotland, 9 Clinton St., Newark, N. J.
Helen A. Weston, 196 So. 11th St., Newark, N. J.

EXHIBIT P–2.

STATEMENT BY MRS. MC KINNEY.

There were four or five years' taxes due upon this property at the time of my husband's death. My husband owed about $100.00 at the time of his death which I paid some time afterwards. The funeral expenses of my husband amounted to about $200.00 which I paid. The property was largely in need of repair—was in a very dilapidated condition and the total rents received by me were

My son Francis occupied part of this property at this time and I could never get any rent out of him. In addition to this I had to support his children besides himself. I occupied the rear rooms on the first and second floors and a part of the office on the first floor. My son Francis occupied half of this office. The rooms which I occupied would not rent for more than $15.00 a month including the office. I put the house in a tenantable condition—It was necessary for me to expend the sum of

I know what the total rents received by me during the period from 1883 to 1888 was not sufficient to pay the debts of my husband and keep the property in repair. I therefore could not pay any taxes during these years because there was no money to pay them. Money that I earned in my employment business was demanded from me by my son Francis and I gave him many hundreds of dollars during that period.

The premises described as 370½ Plane St. in the bill of complaint includes an alley. This property was heavily encumbered by taxes and had been sold for taxes. I gave my son the money to purchase this property and I assumed that he purchased it for me. The amount which I gave my son to purchase this property was $200. and I personally paid all arrearages of taxes upon this property. I assumed all along that this property belonged to me and not to my son. My son never in his life time nor any person since his death has ever made any claim upon me for this property and I was surprised to learn that the complainant in this suit claimed to own this property. My possession of it has been undisputed and undisturbed since before my husband's death. There is a stable and sheds on this property and I built these out of my own money with the assistance of my adopted son.

My son Francis McKinney died in 1888 and he left two children one of whom is this complainant and the other named John Joseph. John Joseph at the time of his father's death was six years old. I had the sole care of him after his father's death until he died. He lived about eight or ten years after his father's death and I had the sole care of him all that time. I paid the funeral expenses of my son Francis amounting to $200.

EXHIBIT P–3.

IN CHANCERY OF NEW JERSEY.

Between:
Charles F. McKinney,
Complainant,
and
Fredericka C. McKinney, personally and as executrix, etc.,
Defendant.

The above suit is hereby discontinued without prejudice to either party, and we hereby consent to the discontinuance thereof.

Dated June 22, 1914.

CHAS. F. McKINNEY,
Solicitor pro see.
JONATHAN SMITH,
Solicitor for Deft.

EXHIBIT P–5.

PHILIP J. SCHOTLAND
Counsellor at Law,
9 Clinton St., Newark, N. J.

Sept. 25, 1914.

Received from Philip J. Schotland the following papers:

Letters testamentary granted to Frederick M. Kinney dated May 1, 1883.

Deed dated May 18, 1848 from Eliza Dunn to James Hargan.

Deed from Richard J. Hutchinson and others to James Kargan dated June 1, 1847.

Quit-claim Deed from James F. Bond & wife to John McKinney dated August 27, 1855.

Deed from Samuel W. Bond & wife to John McKinney dated October 1, 1849.

Deed Bargain & Sale from J. A. Cox & wife to Catharine T. Hargan dated July 22, 1879.

Deed from Daniel Hargan & wife to Catharine T. Hargan dated Sept. 30, 1879.

Mortgage cancelled from John McKinney and wife to The Newark Savings Institution.

Deed B & S from Joseph P. Hargan to Catharine T. Hargan dated May 12, 1881.

Last Will of Fredericka C. McKinney, dated September 29, 1909.

Bill of E. E. Bond & Co. dated May 22nd, 1911 to Mrs. F. McKinney, for $10.

Deed from Phineas Coriell & wife to James Hargan.

Certificate of Sale No. 1159 recorded in Bk. E page 11.

Deposit Book No. 59808 Howard Savings Institution.

Paper signed by Sarah Pierson looks like part of Deed.

Certified Tax Search dated Nov. 20, 1882 on premises rear 372-374, 376 Plane St.

Letter of Title Guarantee & Trust Co. to Mrs. F. McKinney dated July 1, 1912.

Paper page 2 addressed to Mrs. F. McKinney written by Jno. G. Steffee, for company, two copies.

Letter of E. E. Bond & Co. dated May 22, 1911, containing appraisal.

Letter of William G. Ross dated Nov. 19, 1881, containing appraisal of New York City property.

CHAS. F. MCKINNEY.

EXHIBIT P–6.

The last will and testament of John McKinney, of the City of Newark.

I, John McKinney, of 376 Plane Street in the City of Newark, County of Essex and State of New Jersey, being of sound and disposing mind, memory and understanding, make and publish my last Will and Testament as follows: I give to God my soul who gave it, and my body to the earth, rottenness and worms.

I direct all my just debts and my funeral expenses to be paid as soon as may be reasonable after my decease.

I give, bequeath and devise the house and lot of land known as No. 376 Plane Street in the City of Newark, County of Essex and State of New Jersey, where I now reside with all the appurtenances thereunto belonging or appertaining together with the furniture therein contained to my beloved wife Frederica C. McKinney to be used and enjoyed by her during the term of her natural life or widowhood.

I give, bequeath and devise all the rest and residue and remainder of my estate of whatsoever name and nature and wheresoever situated, real, personal or mixed, which shall belong to me, or be owned by me at the time of my death, to my said wife, and I hereby direct and declare that the devises and bequests made in and by this my last Will and Testament to my said wife are to be by her received in full and in lieu of dower at her own request.

I give, bequeath and devise to my said wife the full power and authority to let and receive the rents of such apartments in my said house as she may think proper for her own use and to enable her to pay all just debts and taxes due or accruing due on same, and to collect and sue for any just debt or debts due to my estate.

I order and direct that a plain headstone be placed on my grave without either pomp or show.

After the decease of my said beloved wife I bequeath and devise to my beloved sons William J. McKinney and Francis Owen McKinney, my said House and Lot share and share alike or to their lawful heirs. Subject to the following payments.

It is my will and I order Margaret McKinney to receive the sum of Three Hundred from my said estate to be paid to her by the said William J. McKinney and Francis Owen McKinney or their executors as soon as they shall become possessed of said estate and if she die previous to that time The said William J. McKinney are to pay said Three Hundred Dollars to Very Rev. Father Doane for the benefit of St. Mary Orphan Assylum, Newark.

It is my wish and I order and devise that the Orphan Boy Francis John McKinney (alias Rutherford) shall be carefully instructed and educated at the expense of my estate until having arrived at the age of sixteen years by the said William J. McKinney, and Francis O McKinney (if my said wife should die sooner).

And I constitute and appoint my said wife Frederica C. McKinney sole Executrix of this my last Will and Testament, without security.

In Witness Whereof I have hereunto set my hand and seal this 21st day of July, 1875.

JOHN MCKINNEY [L. S.]

Signed, published and declared by the said John McKinney to be his last will in the presence of us, who were present at the same time and subscribed our names as witnesses in the presence of the testator.

James McCourt Baldwin St. No. 125.
George Fitzpatrick Plane St. 373.

Subscribed by John McKinney the Testator named in the foregoing Will in our presence and at the time of making such subscription declared by the Testator to be his last Will and Testament, and each of us signed

his name as a witness at the end of the Will at the request of the Testator, and in his presence.

JAMES MCCOURT.
GEORGE FITZPATRICK.

STATE OF NEW JERSEY.
ESSEX COUNTY SURROGATE'S OFFICE.

I. C. Meyer Zulick, Surrogate of the County of Essex, do certify the annexed to be a true copy of the last Will and Testament of John McKinney late of the County of Essex, deceased, and that Fredericka C. McKinney the Executrix therein named proved the same before me, and is duly authorized to take upon herself the Administration of the Estate of the Testator, agreeably to the said will.

Witness my hand and seal of office, the Thirteenth day of March, in the year of our Lord One thousand eight hundred and eighty-three.

[SEAL] C. MEYER ZULICK, *Surrogate.*

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER OF THE ESTATE OF FREDERICA C. McKINNEY, DECEASED. } On Caveat to Probate of Will.

DECREE DENYING PROBATE.

A certain paper writing, bearing date the twenty-second day of June, Nineteen Hundred and Fourteen, having been offered for probate as the Last Will and Testament of Frederica C. McKinney, Deceased, and a caveat having been filed against the probate of said instrument by Charles F. McKinney, and citations having been duly issued, and returned served, and the matter

coming on to be heard in the presence of counsel for the proponents and for the caveator, and the court being satisfied that the instrument in writing offered by proponents for probate as and for the Last Will and Testament of Frederica C. McKinney, Deceased, was not duly executed by the said Frederica C. McKinney as and for her Last Will and Testament, and that the said Frederica C. McKinney at the time of executing the said instrument was not competent to execute the same,

It is thereupon, on this Seventeenth day of December, Nineteen Hundred and Fourteen, on motion of McCarter & English, Proctors for the Caveator, ordered, adjudged and decreed that the said instrument is not the Last Will and Testament of the said Frederica C. McKinney, Deceased.

And it is further ordered that the probate of said instrument as the Last Will and Testament of Frederica C. McKinney, Deceased, be denied.

And it is further ordered that a counsel fee of four hundred and fifty dollars be allowed to Ralph E. Lum, Esquire, counsel for the proponents, and that a counsel fee of One Hundred Dollars be allowed to Philip J. Schotland, Esquire, of counsel for the proponents, and and a counsel fee of Five Hundred and Fifty Dollars be allowed to McCarter & English, of counsel for the caveator, and that a counsel fee of Two Hundred and Fifty Dollars be allowed to Chauncey G. Parker, Esquire, of counsel for the caveator, and that such counsel fees, together with the costs in this matter to be taxed, be paid from the estate of the said Frederica C. McKinney, Deceased. It is further ordered that Ralph E. Lum counsel for proponents be allowed the further sum of Two Hundred and Fifty Dollars as his expenses incurred in this matter to be paid from the said estate.

WM. P. MARTIN, *J.*

Essex County. Surrogate's Office.
Filed Dec. 17, 1914,
Fred G. Stickel, Jr., Surrogate.

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER OF THE ESTATE OF FREDERICA C. MCKINNEY, DECEASED. } On Caveat.

NOTICE OF APPEAL.

The proponents, Francis R. McKinney, Amelia M. Clark and Annie Rache, hereby appeal from so much of the decree made in this court in the above-entitled matter on the seventeenth day of December, nineteen hundred and fourteen, as adjudges that the certain paper writing bearing date the twenty-second day of June, nineteen hundred and fourteen, offered for probate herein is not the last will and testament of the said Frederica C. McKinney, deceased, and denies probate of said instrument as the last will and testament of the said Frederica C. McKinney, deceased, to the Prerogative Court of the State of New Jersey.

Dated December 22, 1914.

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

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

RALPH E. LUM,
Of Counsel with said Proponents.

Essex County. Surrogate's Office.
Filed Dec. 26, 1914.
Fred G. Stickel, Jr., Surrogate.

NEW JERSEY PREROGATIVE COURT.

BETWEEN FRANCIS R. MCKINNEY, AMELIA M. CLARK AND ANNIE RACHE, *Appellants,* AND CHARLES F. MCKINNEY, *Respondent.*	On Appeal from Decree Denying Probate.

PETITION ON APPEAL.

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

The petition of Francis R. McKinney, Amelia M. Clark and Annie Rache, the appellants in the above stated matter respectfully shows that on or about the Twenty-third day of June, Nineteen hundred and fourteen, Frederica C. McKinney departed this life in the City of Newark, County of Essex and State aforesaid, possessed of certain real and personal property; that thereafter a certain paper writing bearing date the twenty-second day of June, Nineteen hundred and fourteen, purporting to be her last will and testament, was presented by your petitioners to the Surrogate of the County of Essex for probate; that a caveat was filed against the probate of said instrument by one Charles F. McKinney; that the said Surrogate of the County of Essex issued citations to all parties interested citing them to appear before the Orphans' Court of the County of Essex, wherein the controversy involved was submitted for determination.

And your petitioners further show that on or about the Seventeenth day of December, Nineteen hundred and fourteen a decree was made in the said Essex County Orphans' Court wherein and whereby it was,

amongst other things, ordered, adjudged and decreed that the said instrument was not the last will and testament of the said Frederica C. McKinney, deceased, and that the probate of said instrument as the last will and testament of Frederica McKinney, deceased, was denied.

And your petitioners complain that the said Essex County Orphans' Court, after the said matter had come on to be heard and upon the proofs taken, determined that the said instrument in writing offered by proponents for probate as and for the last will and testament of the said Frederica C. McKinney, deceased, was not duly executed by her as and for her last will and testament, and it further held and determined that the said Frederica C. McKinney at the time of executing the said instrument was not competent to execute the same; but your petitioners complain and allege that the proofs taken and presented to the said court sufficiently established the due execution by the said Frederica C. McKinney of the said paper writing as and for her last will and testament and also duly established the competency of the said Frederica C. McKinney at the time of executing the said instrument, to execute the same, and that the said instrument should have been duly admitted to probate as the last will and testament of the said Frederica C. McKinney, deceased; and they further complain and allege, for the above and divers other reasons, that the said decree of the Orphans' Court in the respects aforesaid is erroneous and improper and contrary to law, and your petitioners are aggrieved thereby; and that your petitioners humbly appeal therefrom to this Honorable Court upon the grounds aforesaid.

Your petitioners therefore pray that the said decree of the said Essex County Orphans' Court may in the respects aforesaid be reversed and set aside and for nothing holden and that the said paper writing offered for probate as aforesaid may be duly admitted to pro-

bate as the last will and testament of Frederica C. McKinney, deceased, and that your petitioners may have such relief in the premises as to this Honorable Court may seem meet.

LUM, TAMBLYN & COLYER,
Proctors for and of Counsel with Appellants.
RALPH E. LUM,
Of Counsel with Appellants.

NEW JERSEY PREROGATIVE COURT.

BETWEEN
FRANK R. McKINNEY, AMELIA M. CLARK AND ANNIE RACHE,
Appellants,
AND
CHARLES F. McKINNEY,
Respondent.

On Appeal from Decree Denying Probate.

ANSWER TO PETITION OF APPEAL.

The answer of the respondent, Charles F. McKinney, to the petition of appeal of appellants.

1. This respondent admits the averments of the first paragraph of the petition of appeal.

2. This respondent admits the averments of the second paragraph of the petition of appeal.

3. This respondent says that the determination of the Essex County Orphans' Court, referred to in the third paragraph of the petition of appeal, that the said instrument offered as the last will and testament of Frederica C. McKinney was not duly executed by her, and at the time of executing the said instrument she was not competent to execute the same, is in all respects proper. This respondent denies that the proofs taken and presented to the court sufficiently establish due execution by the said Frederica C. McKinney of the

said paper writing as and for her last will and testament or her competency at the time of the execution thereof, or that the said instrument was a true valid last will and testament.

And this respondent denies that the said decree is in all respects erroneous and improper, and says that the same should be affirmed and the appeal of the appellants dismissed, with costs.

McCARTER & ENGLISH,
Proctors for and of Counsel with Respondent.

NEW JERSEY PREROGATIVE COURT.

BETWEEN FRANCIS R. McKINNEY, AMELIA M. CLARK AND ANNIE RACHE, *Appellants,* AND CHARLES F. McKINNEY, *Respondent.*	On Appeal from Decree Denying Probate.

ORDER EXTENDING TIME FOR FILING TRANSCRIPT.

It appearing to the Court that further time is required on the appeal in the above cause for the preparing and returning to this Court of the transcrip of the proceedings before the Essex County Orphans' Court;

It is, thereupon, on this nineteenth day of January, A. D. nineteen hundred and fifteen, ordered that the time for preparing and returning the transcript in the above cause to this Court be extended twenty days.

E. R. WALKER,
Ordinary.

NEW JERSEY PREROGATIVE COURT.

BETWEEN FRANCIS R. MCKINNEY, AMELIA M. CLARK AND ANNIE RACHE, *Appellants,* AND CHARLES F. MCKINNEY, *Respondent.*	On Appeal from Decree Denying Probate.

ORDER EXTENDING TIME FOR FILING TRANSCRIPT.

It appearing to the Court that further time is required on the appeal in the above cause for the preparing and returning to this Court of the transcript of the proceedings before the Essex County Orphans' Court;

It is, thereupon, on this fourth day of February, A. D. nineteen hundred and fifteen, ordered that the time for preparing and returning the transcript in the above cause to this Court be further extended twenty days.

E. R. WALKER,
Ordinary.

NEW JERSEY PREROGATIVE COURT.

BETWEEN FRANCIS R. McKINNEY, AMELIA M. CLARK AND ANNIE RACHE, *Appellants,* AND CHARLES F. McKINNEY, *Respondent.*	On Appeal from Decree Denying Probate.

ORDER OF REFERENCE.

The proctors for the respondent consenting hereto, it is on this 11th day of March, nineteen hundred and fifteen, on motion of Lum, Tamblyn & Colyer, proctors for and of counsel with the appellants, ordered that the above stated cause be referred to Hon. J. E. Howell, one of the Vice Ordinaries, to hear the same for the Ordinary and to report thereon to him and to advise what order or decree shall be made therein.

E. R. WALKER,
Ordinary.

We hereby consent to the entry of the above order.

McCARTER & ENGLISH,
Proctors for Respondent, Charles F. McKinney.

Endorsed:

"Filed Mar. 16, 1915,
DAVID S. CRATER,
Register."

New Jersey Prerogative Court.

Between

FRANCIS R. MCKINNEY, *et als.*,
Appellants,

and

CHARLES F. MCKINNEY,
Respondent.

On appeal from the Orphans Court of Essex County.

Mr. Ralph E. Lum for appellants.

Mr. Arthur F. Egner and Mr. Robert H. McCarter for the respondent.

MEMORANDUM.

HOWELL, *V. O.*

This is a contest over the validity of a document purporting to be the last will of Frederika C. McKinney, who died on June 23, 1914. A caveat was filed against its probate by Charles F. McKinney, the respondent, and the cause was thereupon heard by the Essex County Orphans Court. By the decree the probate of the will was denied, and this proceeding is an appeal therefrom.

I am satisfied from a careful study of the evidence brought up by the appeal that the decree which was entered in the Orphans Court is correct and that it should be affirmed in this court. I am satisfied that all the statutory requirements for the execution of wills were complied with in this case.

One of the reasons alleged against the probate of the will was that the instrument was the product of undue influence on the part of the persons who profit by its terms. I fail to find in the evidence anything which would justify me in rejecting the will on this ground. In other words, I have been unable to find any evidence of anything which would be sufficient, standing by itself, to invalidate the instrument on the ground of the exercise of undue influence by anybody on the testatrix.

But in my opinion the testatrix at the time she executed the document did not possess testamentary capacity, and the lack of it is fatal to the validity of the instrument.

I can state my reasons very shortly. The testatrix at the time the will was executed was nearly eighty years of age. She apparently had been in very good physical and mental condition down to the Friday prior to her death. On that day she was attacked by a disease known as oedema of the lungs, which consists of the accumulation of water in the lungs and air passages, which eventually produces asphyxiation, or death by drowning. During Saturday and Sunday she was in a semi-unconscious condition, and apparently her disease during those two days made great inroads upon her physical and mental strength. The will was executed on Monday about six o'clock in the afternoon, and it is to the condition of the patient at that hour on that day which demands our attention. The physician, Dr. Phelan, saw Mrs. McKinney on Monday three times. He appears from his testimony to be entirely disinterested, and he gave his testimony, as it appears upon a reading of it, without bias and without feeling. His first visit was early in the forenoon; he came again about four o'clock in the afternoon, and again late in the evening; he saw her on each of these occasions, and he tells the condition in which he found her; it was a condition of unconsciousness. When

he attempted to communicate with her he could get no response. He gives it as his opinion that she was unfit for transacting any business or carrying on any conversation which required continued and connected thought; he says that the last intelligent expression that he heard from her was on Saturday evening or Sunday morning, but that she was not able to conduct any business affairs on Monday afternoon at four o'clock, the hour at which he saw her. About this hour a priest was called in who administered to her the last rites administered to dying Catholics. The priest who attended at this event thought that she was conscious at the time of the administration. His testimony was not given in open court, and he was not cross examined. His evidence, therefore, is very unsatisfactory and is of such a character that I would be unwilling to accept it in the face of the antagonistic statements made by the physician from his personal examination. It appears that the nurse who was in attendance administered a stimulant to the testatrix shortly after the doctor's visit on Monday afternoon, and it seems to me that there is a possibility that the effect of the stimulant so administered might have been sufficient to awaken to a mild degree her ability to understand questions that were put to her, and it may be that such was the situation at the time she was interviewed by Mr. Schotland; but if a person is aroused from a semi-unconscious condition and awakened and enlivened by the administration of stimulants, who can say whether a will then executed was the product of the mind of the testatrix, or whether it was superinduced by the stimulating dose which may have aroused her to some slight extent from her stupor. Under these circumstances I do not see how the testatrix could be said to have had a sound and disposing mind and memory.

Chief Justice Kirkpatrick in Den *v.* Van Cleve, 2 South. 589, at page 660 says with regard to the

phrase "a sound and disposing mind and memory," "By these terms it has not been understood that a testator must possess these qualities of mind in the highest degree; otherwise very few could make testaments at all. Neither has it been understood that he must possess them in as great a degree as he may have formerly done, for this would disable most men in the decline of life. The mind may have been in some degree debilitated, the memory may have become in some degree enfeebled, and yet there may be enough left clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair and just testament; but if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory."

I do not think that the testatrix at the time she executed the supposed will had mind enough left "clearly to discern and discreetly to judge" of all those things and all those circumstances which enter into the nature of a rational, fair and just testament. She was semi-conscious only, on Saturday and Sunday; she was totally unconscious at each of the calls of the physician on Monday; she did not regain her consciousness prior to her death, which occurred on Tuesday.

These facts demonstrate to me the invalidity of the instrument in question. No written document executed as this was ought to be permitted to transmit the title to property real and personal.

For these reasons, and for those to the same point found in the opinion of Judge Martin, I am satisfied that the instrument ought not to be admitted to probate as the will of Frederika A. McKinney.

I will advise a decree affirming the decree of the Orphans Court.

Decree of Affirmance.

Filed.

New Jersey Prerogative Court.

In the Matter of the Estate of Frederica C. McKinney, Deceased.	*On Appeal from the Essex County Orphans' Court.*

DECREE OF AFFIRMANCE.

This matter being brought to hearing upon appeal in the presence of Messrs. Lum, Tamblyn & Colyer, counsel for the appellants, and Messrs. McCarter & English, counsel for the respondent, and the arguments of counsel having been heard, and the matter having been duly considered, and the court being of the opinion that the decree of the Essex County Orphans' Court should be in all respects affirmed,

It is, on this 18th day of January, 1916, on motion of McCarter & English, proctors for the respondent, Ordered, Adjudged and Decreed that the decree of the Essex County Orphans' Court made on the 17th day of December, 1914, denying probate to the alleged last will and testament of Frederica C. McKinney, dated the 22d day of June, 1914, be in all things affirmed.

And it is further ordered that a counsel fee of two hundred and fifty dollars be allowed to Messrs. McCarter & English, counsel for the respondent, together with their costs to be taxed and that such

counsel fee be paid from the estate of the said Frederica C. McKinney, deceased, and that such taxed costs be paid by the appellants.

It is further ORDERED, ADJUDGED and DECREED that the sum of six hundred and twenty-eight dollars and sixty-nine cents, being expenses incurred by the appellants in connection with their appeal from the said decree of the Orphans' Court to this court, be paid from the estate of the said Frederica C. McKinney, deceased, and that counsel for the appellants be denied any counsel fee in this court.

And it is further ORDERED, ADJUDGED and DECREED that the record be remitted to the Essex County Orphans' Court to proceed thereon according to law and the practice of the said court.

E. R. WALKER,
O.

Respectfully advised,

J. E. HOWELL,
V. O.

Notice of Appeal of Francis R. McKinney and Others.

Filed January 24, 1916.

New Jersey Prerogative Court.

In the Matter of the Estate of Frederica C. McKinney, Deceased.	*Notice of Appeal.*

The proponents, Francis R. McKinney, Amelia M. Clark and Annie Rache, hereby appeal from the decree of affirmance entered in this court in the above stated cause on the eighteenth day of January, nineteen hundred and sixteen, and from the whole and every part thereof, except in so far as said decree allows to Messrs. McCarter & English, counsel for the respondent, a counsel fee of two hundred and fifty dollars, directing that same be paid from the estate of the said Frederica C. McKinney, deceased, and orders that the expenses incurred by these proponents, amounting to six hundred and twenty-eight dollars and sixty-nine cents, be paid from the estate of the said Frederica C. McKinney, deceased, to the New Jersey Court of Errors and Appeals, in the last resort in all causes.

Dated January 19, 1916.

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

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

RALPH E. LUM,
Of Counsel with Proponents.

Petition of Appeal of Francis R. McKinney and Others.

Filed February 2, 1916.

New Jersey Court of Errors and Appeals

In the Matter of the Estate of Frederica C. McKinney, Deceased.	*On Appeal from Decree of the Ordinary Affirming Decree of the Essex County Orphans' Court.*

PETITION OF APPEAL.

To the Honorable Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Francis R. McKinney, Amelia M. Clark and Annie Rache, the proponents, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Prerogative Court by His Honor Edwin Robert Walker, Ordinary of the State of New Jersey, bearing date the eighteenth day of January, nineteen hundred and sixteen, wherein the said Francis R. McKinney, Amelia M. Clark and Annie Rache were appellants and Charles F. McKinney was respondent in the following respects, to wit: That the said decree of said Prerogative Court in all things confirms said decree of said Orphans' Court

and adjudges that a certain paper writing bearing date the twenty-second day of June, nineteen hundred and fourteen, purporting to be the last will and testament of the said Frederica C. McKinney, deceased, and presented by your petitioners to the surrogate of the County of Essex for probate was not the last will and testament of the said Frederica C. McKinney, deceased, and that the probate of said instrument as the last will and testament of said Frederica C. McKinney, deceased, was properly denied and that the said instrument in writing offered by your petitioners for probate as and for the last will and testament of Frederica C. McKinney, deceased, was not executed by her as and for her last will and testament and that the said Frederica C. McKinney at the time of executing said instrument was not competent to execute the same, and in this that said decree directs that these petitioners pay the taxed costs of the respondent and denies counsel fees to the counsel of these petitioners.

And your petitioners appeal from the whole and every part of said decree of said Prerogative Court except in so far as said decree allows to Messrs. McCarter & English, counsel for the respondent, a counsel fee of two hundred and fifty dollars ($250.00), directing that same be paid from the estate of Frederica C. McKinney, deceased, and orders that the expenses incurred by these petitioners be paid from the estate of the said Frederica C. McKinney, deceased, upon the grounds that the said decree should have reversed, set aside and annulled said decree of said Orphans' Court and adjudged that the proofs taken and presented to said Orphans' Court sufficiently established the due execution by the said Frederica C. McKinney of the said paper writing as and for her last will

and testament and also duly established the competency of the said Frederica C. McKinney at the time of executing said instrument, to execute the same and that the said instrument should have been duly admitted to probate as the last will and testament of the said Frederica C. McKinney, deceased, and should have directed that the taxed costs of both the respondent and these petitioners and a reasonable counsel fee to the counsel for these petitioners be allowed and be paid out of the estate of the said Frederica C. McKinney, deceased, for the above and divers other reasons the said decree of said Prerogative Court and every part thereof except in the particulars specified above is erroneuos.

Your petitioners therefore pray that the said decree of said Prerogative Court may be wholly reversed, set aside and for nothing holden except in the particulars set forth above, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

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

RALPH E. LUM,
Of Counsel with Proponent.

Service acknowledged this 29th day of January.

McCARTER & ENGLISH,
Proctors.

Answer to Petition of Appeal of Francis R. McKinney and Others.

Filed.

New Jersey Court of Errors and Appeals

In the Matter of the Estate of Frederica C. McKinney, Deceased.	*On Appeal from Decree of the Prerogative Court.* *Answer.*

Appeal of Francis R. McKinney and Others.

The answer of Charles F. McKinney, respondent, to the petition of appeal of the above named appellants:

This respondent, not acknowledging any or all of the matters which in the said petition of appeal are contained to be true, for answer, nevertheless, says and admits that a decree was on the 18th day of January, 1916, made and entered in the Prerogative Court in the cause for that purpose mentioned in the said petition, as is therein stated, but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced, and this respondent is advised and believes that the said decree, in the particulars where in error is alleged in the said petition of appeal, is according to law and he prays that the said decree may in these respects be affirmed with costs to be adjudged to this respondent.

McCARTER & ENGLISH,

Proctors for and of Counsel with Respondent.

Notice of Appeal of Charles F. McKinney.

Filed.

New Jersey Prerogative Court.

IN THE MATTER OF THE ESTATE OF FREDERICA C. McKINNEY, Deceased.	*Notice of Appeal.*

The caveator, Charles F. McKinney, hereby appeals from so much of the decree of affirmance entered in this case on the 18th day of January, 1916, as directs that the expenses incurred by the proponents upon their appeal from the Orphans' Court to the Prerogative Court, amounting to $628.69, be paid from the estate of the said Frederica C. McKinney, deceased, to the New Jersey Court of Errors and Appeals, the last resort in all causes.

Dated January 26th, 1916.

McCARTER & ENGLISH,
Proctors for and of Counsel with Caveator.

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

ARTHUR F. EGNER,
Of Counsel with Caveator.

Service acknowledged January 28, 1916.

LUM, TAMBLYN & COLYER.

Petition of Appeal of Charles F. McKinney.

Filed.

New Jersey Court of Errors and Appeals

In the Matter of the Estate of Frederica C. McKinney, Deceased.	*On Appeal from Decree of the Prerogative Court.* *Petition of Appeal.*

To the Honorable, the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Charles F. McKinney, caveator, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Prerogative Court by his honor, Edwin Robert Walker, Ordinary of the State of New Jersey, bearing date the 18th day of January, 1916, wherein Francis R. McKinney, Amelia Clark and Annie Rache were appellants and Charles F. McKinney was respondent, in the following respect, to wit., that the said decree orders and directs that the expenses incurred by the proponents upon their appeal from the Orphans' Court to the Prerogative Court, amounting to $628.69, be paid from the estate of the said Frederica C. McKinney, deceased.

And your petitioner appeals from so much of the said decree of said Prerogative Court as directs as aforesaid upon the ground that the said decree should not have imposed the expenses incurred

by the proponents upon their appeal from the Orphans' Court to the Prerogative Court upon the said estate.

Your petitioner therefore prays that the said decree of the said Prerogative Court made in this respect be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable court may seem meet.

McCARTER & ENGLISH,
Proctors for and of Counsel with Appellant.

ARTHUR F. EGNER,
Of Counsel with Appellant.

Service acknowledged February 14, 1916.

Answer to Petition of Appeal of Charles F. McKinney.

Filed Feb. 16, 1916.

New Jersey Court of Errors and Appeals

In the Matter of the Estate of Frederica C. McKinney, Deceased.	*On Appeal from Decree of the Prerogative Court.*

Answer of Francis R. McKinney, Amelia Clark, and Annie Rache.

The answer of Francis R. McKinney, Amelia Clark and Annie Rache respondents to the petition of appeal of Charles F. McKinney the above named appellant:

These respondents not acknowledging all or any of the matters which in the said petition of appeal are contained to be true for answer thereto nevertheless says and admits that a decree was on or about the 18th day of January, 1916, made and entered in the Prerogative Court of the State of New Jersey in a cause for that purpose mentioned in the said petition as is therein stated but as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced.

These respondents deny that said petitioner is in any wise aggrieved by the said decree of the New Jersey Prerogative Court, entered on or about the 18th day of January, 1916, from which this appeal is taken, and these respondents are advised

and believe that the said decree is agreeable to equity in the matters in said petition of appeal complained of and these respondents pray that the same may be confirmed in these respects as against the said petitioner with costs to be adjudged to these respondents.

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