New Jersey Court of Errors and Appeals

In the Matter of the Petition to Set Aside the Probate of an Alleged Will of John Edmund Newton Whitehead, Deceased, and for the Appointment of a General Administrator of Said Decedent's Estate.	On Appeal From Prerogative Court

Brief for Respondent

STATEMENT OF FACTS

April 3, 1914, Dr. Whitehead died in Cumberland County, New Jersey, his place of residence.

April 17, 1914, his will was probated before the Surrogate of Cumberland County, and letters testamentary issued to Emma F. Whitehead, his widow.

The will bears date January 27, 1909.

May 17, 1915, testator's daughter applied by petition to the Prerogative Court for an order that Mrs. Whitehead show cause why the order of the Surrogate admitting the will to probate should not be set aside, and the letters testamentary revoked, and the petitioner be permitted to show that the will was the product of fraud and undue influence, and that an order be made requiring respondent to re-prove the will in solemn form, on notice, etc.

July 19, 1915, the application for such order was denied for want of jurisdiction.

July 19, 1915, for the purpose of bringing Mrs. Whitehead into Court so that an appeal might be taken, an order was made requiring her to show cause why the order denying the application for relief should not be set aside.

July 26, 1915, the last mentioned order to show cause was discharged, re-hearing refused and all relief under the petition denied.

November 9, 1915, appeal was taken as to each of the said orders.

If the order of July 26, 1915, is in the same form as printed in the state of the case (p. 32) it is probably not appealable because not properly signed.

ARGUMENT

The sole question involved is one of jurisdiction.

Vice-Ordinary Leaming, in denying the application for a rule to show cause, (*state of case, p.* 17, *In re Whitehead's Estate*, 94 *Atl. Rep.* 796), made such a careful and exhaustive review of the authorities, that very little can be profitably added.

There is no approved precedent for the course of practice pursued by petitioner.

In *Gordon's Case,* 50 *N. J. E.* 397, application for probate was made direct to the Ordinary. Under the peculiar circumstances existing it was deemed advisable to permit probate in common form, and if contest should arise, to thereafter require proof in solemn form. Application being thereafter made to the Ordinary for re-probate in solemn form, he granted the application and, after hearing, revoked the order for probate theretofore made.

In affirming this decree, *Gordon vs. Old,* 52 *N. J. E.* 317, (1894), this Court said,

> "The Ordinary, in admitting the paper to probate on such proof, contemplated that the order for probate should be final only in the event that the paper propounded as a will should stand the test of a controversy if any contest should arise, and the order appealed from was in effect setting aside the order previously made by the Ordinary himself. Of the regularity of the practice and procedure adopted we have no doubt. * * * * * Whether, when a will is admitted to probate in compliance with the statute and the practice of our Courts, the Court, of its own motion, or at the instance of the next of kin or other persons interested, may require it to be proved in what is known in the English law as solemn form, and if so, by what practice and procedure and in what Court such an investigation shall be conducted, we do not decide."

In the later case of *Murray vs. Lynch,* 64 *N. J. E.* 290 (1902), the will of Rachel A. Cartwright was admitted to probate February 9, 1900. No appeal was taken. On March 22, 1901, a petition was presented to the Surrogate, (apparently under authority of *Straub's Case,* 49 *N. J. E.* 264 (1892), affirmed, *Scharer vs. Schmidt,* 50 *N. J. E.* 795, without opinion,) asking that the will be re-proved in solemn form. Citations were issued and the matter coming before Judge Skinner of the Essex County Orphans' Court, the proceedings were dismissed for want of jurisdiction.

His instructive opinion will be found in 26 *N. J. L. J.* 244.

On appeal, his decree was affirmed, 64 *N. J. E.* 290 (1902). Chancellor Magie expressly disapproved the course of practice suggested in the *Straub Case* and held

that a grant of letters testamentary by the Surrogate was a proceeding *in rem*, resulting in a judgment which may not be impeached collaterally, and can only be attacked by appeal.

The resultent decree was affirmed by this Court, on the opinion below, 65 *N. J. E.* 399, and there can be no doubt about the proposition that where a will has been admitted to probate by the Surrogate there can be no review of his order by the Orphans' Court except by appeal within the statutory period.

There can be no review by the Surrogate of his own order, for obvious reasons.

Mellor vs. Kaighn, 96 *Atl. Rep.* 1015.

A Court of equity has no jurisdiction.

Vincent vs. Vincent, 70 *N. J. E.* 272.
Knikel vs. Spitz, 74 *N. J. E.* 581.
Crawford vs. Lees, 84 *N. J. E.* 324.

The only remaining question is whether the decree for probate may be attacked collaterally by a proceeding in the Prerogative Court.

In re Hodnett, 65 *N. J. E.* 329, (1903) Chancellor Magie, after reviewing the *Straub* and *Cartwright* cases, said (p. 336),

> "In delivering the opinion in the *Cartwright Case*, I expressly refrained from considering the power of this court in respect to probates in solemn form of wills produced and probated before the Ordinary. The statutory jurisdiction conferred upon surrogates and orphans courts was deemed not to extend thereto after the time for appeal had elapsed. Whether the Ordinary might not require a will proved before him to be again proved in solemn form, was not decided, and de-

cision upon his power and duty in that respect is now required."

His conclusion was expressed as follows (*p.* 342),

"For these reasons I deem myself possessed of authority to require an executor who has proved a will before me without notice, to prove the same will with notice to all the parties whenever a proper case for such action is presented."

This case does not seem to have been reviewed.

See, however, *Myers' Case,* 69 *N. J. E.* 793, 798.

It goes no further than to hold that there is inherent power in the Prerogative Court, under given circumstances, to review the probate of a will which has been probated before the Ordinary in common form, irrespective of the lapse of time for appeal, and negatives the proposition that such power exists where the will has been probated in common form before the Surrogate or Orphans' Court and the time for appeal has passed.

In *Crawford vs. Lees,* 84 *N. J. E.* 324, 328, it is said,

"Nothing can be said to be more firmly engrafted in our jurisprudence than the principle that in the absence of fraud of the parties a judgment of a court of general jurisdiction cannot be collaterally impeached if the court had jurisdiction of the subject-matter of the controversy and the parties. *White vs. Crow,* 110 *U. S.* 183. Jurisdiction, in the sense thus used, has been defined by our federal supreme court to be 'the power to hear and determine a cause.' In the exercise of the power to hear and determine a cause which has been properly instituted, a court is necessarily called upon to determine matters on which its jurisdiction to proceed and award final judgment depends. It has accordingly been uniformly held that in the application of the principle first stated to cases in which the jurisdiction of a court of general jurisdiction embraces cases of the class to

> which the case belongs and the collateral attack is based upon a claim of want of jurisdiction by reason of an alleged error of the court in determining a question upon which its jurisdiction was dependent, the determination of the court touching matters upon which its jurisdiction was thus dependent is conclusive as against such collateral impeachment, whether or not the court has fallen into error in such determination."

In *Steele vs. Queen,* 67 *N. J. L.* 99, it was held by the Supreme Court that in probating wills the Surrogate of a County acts judicially and holds a court.

In the case at bar the Surrogate, by his decree, (*p.* 6)

> "Adjudged that the instrument offered for probate in this matter is the last will and testament of John Edmund Newton Whitehead, deceased."

This determination is a judicial act, and cannot be inquired into collaterally.

Quidort's, Admr. vs. Pergeaux, 18 *N. J. E.* 475.

In re Evans, 29 *N. J. E.* 571.

In re Cartwright's Will, 26 *N. J. L. J.* 244, 247.

In re Queen's Estate, 89 ***Atl. Rep.*** 290.

In *Myers' Case,* 69 *N. J. E.* 793, Mr. Justice Dixon speaking for this Court said, (p. 798),

> "If no dispute or controversy exists when the will is presented to the Surrogate for probate, then, without notice to any one, probate is granted, and whether granted by the Ordinary, as seems to be required by the act of 1784, or by the Surrogate, as has been permitted since the act of 1820, the probate is conclusive and final, subject only to the right of appeal."

This seems to over-rule the decision in the *Hodnett Case,* (65 *N. J. E.* 329), as to the powers of the Ordinary.

In re Young's Will, 59 *Atl. Rep.* 154, Magie, Ordinary, said, (p. 156),

> "If no caveat had been filed, and the Surrogate had admitted the will to probate, appellant, however aggrieved thereby, would have had no other relief except by an appeal to the Orphans' Court, taken within the time limited by the statute."

Appellant further contends that if no relief can be afforded by reason of the limitation for time of appeal contained in the Orphans' Court Act, such statute is unconstitutional.

No authorities are cited in support of this proposition.

With respect to this contention, the Vice-Ordinary said in the case at bar, (p. 26),

> "Nor can the power of the Legislature to limit the period of appeal in matters of probate without regard to notice to parties in interest be doubted. No one has any right to the personalty of a decedent except such as the laws of the State allow; whether such personalty shall pass under an alleged will or under the statute of distributions is to be determined by reference to the laws of the State alone, and a determination made in conformity with those laws, even if made without notice to individuals interested in the question as would be necessary to bar ordinary rights of property, is conclusive. *Myers' Case*, 69 *N. J. Eq.*, 793, *at p.* 796. As is stated in authorities hereinbefore cited, the proceeding is *in rem*, and a public necessity exists for prompt settlement of estates."

On the same subject, Mr. Justice Garrison said in *Mellor vs. Kaighn*, 96 *Atl. Rep.* 1015,

> "The net result, therefore, of the inquiry as to the alleged fraud upon the Surrogate is merely to alter and increase the statutory right of persons

interested to take an appeal from the probate of the will, a matter that has not been left to judicial discretion, or to be brought about by judicial interference, either by the surrogate or by this Court. If this is not so, there is no time at which an estate resting upon the probate of a will may not be exposed to an attack upon this fundamental ground. To prevent this is the object of the statutory provision as to appeal, the period of which rests wholly in legislative discretion.

Nothing can be gained by the action the surrogate is assuming jurisdiction to take, excepting it be to demonstrate its futility to override the limitations of his authority or to create by indirection a different statute of appeal. The order brought up by this writ must be set aside as a step in the exercise of a jurisdiction that does not exist."

See, also, *Brown vs. New Jersey*, 175 *U. S.* 172.
West vs. Louisiana, 194 *U. S.* 258.

For these reasons, it is respectfully submitted the decree below should be affirmed.

June Term, 1916.

WALTER H. BACON,
Counsel for Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the matter of the application for revocation of letters testamentary on the will of John Edmund Newton Whitehead, deceased, and requiring probate in solemn form.	On Appeal From Prerogative Court.

BRIEF OF APPLICANT.

This is an appeal from an order made by the Ordinary, declining to entertain jurisdiction of an application for revocation of letters testamentary on the will of John Edmund Newton Whitehead, deceased, which will had been proved in common form before the Surrogate of Cumberland County, and requiring probate in solemn form.

John Edmund Newton Whitehead died in Cumberland County, New Jersey, on the third day of April, nineteen hundred and fourteen. He left a widow, by a second marriage, Emma F. Whitehead, and one child, his only issue and next of kin, Carlotta S. Vidal, of Monticello, New York.

On April seventeenth, nineteen hundred and fourteen, the widow presented to the Surrogate of Cumberland County a paper writing purporting to be the last will and testament of said decedent. The will had no attestation clause. It was proved in common form by the deposition of Stuart F. Morris, one witness. The other witness, J. W. Williams, died before the testator.

The daughter of decedent, Carlotta S. Vidal, at the time of her father's death, resided, and from thence hitherto has resided, continuously, in the State of New York. She first learned of her father's death October eighteenth, nineteen hundred and fourteen. She immediately sought to procure counsel to investigate respecting her father's death, and her rights in his property. She filed a petition in the Prerogative Court alleging that the said paper writing is not the last will and testament of the decedent; and praying that the letters testamentary issued thereon by the Surrogate may be revoked, and that the executrix named in the will be required to reprove the will in solemn form, etc. The practice now pursued in that followed *in re Hodnett,* 20 Dick. 329.

The Prerogative Court declined to entertain jurisdiction of the petition, and the petitioner now appeals.

The question now presented is whether the Prerogative Court, exercising a reasonable discretion, has jurisdiction to grant the prayer of the petition.

POINTS.

1. The petition and the affidavit of Mr. Stuart F. Morris annexed to the petition disclose that the probate allowed by the Surrogate on the common printed depositions constituted a fraud on petitioner.

2. No appeal from the Surrogate could have been taken, notwithstanding petitioner is not in laches.

3. The remedy, if one there be in the probate Courts, is by proceedings for revocation of letters testamentary and for re-probate.

4. The Surrogate has no power in the premises.

5. The power of the Orphans' Court may be doubtful, but if it has jurisdiction, that jurisdiction is concurrent with that of the Ordinary; and the jurisdiction of the Ordinary is complete, whether or not the Orphans' Court has power in the premises.

6. If the probate before the Surrogate is now unassailable before the Ordinary by reason of any statute, such statute is unconstitutional because (a) it is in conflict with various provisions of the Federal Constitution and (b) the jurisdiction conferred on this Court by the State Constitution is impaired.

I.

The Petition and the Affidavit of Mr. Stuart F. Morris Annexed to the Petition Disclose that the Probate Allowed by the Surrogate on the Common Printed Depositions Constituted a Fraud on Petitioner.

Mr. Morris' affidavit, annexed to the petition herein, was taken down on a typewriter, from his dictation. Read in its entirety it discloses that the will was not executed lawfully. Construing it most favorably to respondent it impeaches the formal affidavit made before the Surrogate.

II.

No Appeal May Now be Taken, Notwithstanding Petitioner is not in Laches.

The time to appeal elapsed before Mrs. Vidal learned of her father's death. Orphans' Court Act, Sec. 202.

Myers case, 3 Robb. 798.

III.

The Remedy, if one there be in the Probate Courts, is by Proceedings for Revocation of Letters Testamentary and for Re-Probate.

If the probate (before the Surrogate) be irregu-

lar or voidable for any cause, the remedy is by appeal or by proceedings for revocation of the letters testamentary.

Crawford vs. Lees, 93 At. 207, quoting from *In re Evans,* 29 N. J. Eq. 575.

In the case of *Myers estate,* says Vice-Chancellor Emory in *Vincent vs. Vincent,* 4 Robb. at page 275, the right of the Orphans' Court, and of the Ordinary on appeal, to pass upon the question of vacating the probate because of fraud in the proceedings, was acted on without question.

If the probate of a will is irregular or voidable for any cause the remedy is by appeal to the Ordinary or by proceedings for the revocation of the letters testamentary. *Vincent vs. Vincent,* 4 Robb. at page 275 citing *Ryno's ex'r vs. Ryno* 12 C. E. Gr. 525.

Vice-Chancellor Emory in *Vincent vs. Vincent, Id.,* at page 276 said that a proceeding in equity, brought only for a revocation of the probate, would be of no practical effect,

> "Except as incidental to a proceeding to revoke the probate and for re-probate of the will before the Orphans' Court or the Ordinary 4 Robb. 276."

The learned Vice-Chancellor proceeds, on the same page, to suggest that no decision had been referred to showing the lack of power of the Orphans' Court to revoke the probate and order re-probate of the will. 4 Robb. 276. If the Orphans' Court had such power, of course the powers of the Ordinary would be concurrent. See the principles laid down in the matter of Abraham Coursen's will, 3 Gr. Ch. 408.

"By the appointment of Surrogates the Ordi-

nary did not in the least curtail his own jurisdiction. Whilst he held appellate jurisdiction over their acts, his own original jurisdiction remained entire." * * * * Syllabus, 3 Gr. Ch. at page 408.

"The Surrogate and the Orphans' Court, in matters of probate and administration, were left by the Act of 1784, which established the Orphans' Court, to occupy the same relation to the Ordinary which, previous to that statute, the Surrogate alone had occupied." *Id.* at page 409.

Thus it appears that (1) even in cases of fraud on the probate in common form equity will not ordinarily grant relief because the remedy is in the Probate Courts; (2) that remedy is for revocation of the letters testamentary and re-probate; and (3) such application certainly may be made to the Ordinary, even if the Orphans' Court has concurrent jurisdiction.

IV.

The Surrogate has no Power in the Premises.

This seems settled. *In re Cartwright's Will,* (*Murray vs. Lynch*) 19 Dick. 290; affirmed 20 Dick. 399. In that case a will was admitted to probate and letters testamentary issued. After the time to appeal had passed, heirs at law filed a petition with the Surrogate stating objections to the will, and praying that respondents should be required to reprove it in solemn form. This followed the practice which appears to have been outlined in Straub's

case, 4 Dick. p. 464 and adopted in the Gordon case, 5 Dick. p. 795; affirmed 7 Dick. 317, *Gordon vs. Olds.* But it was held in the Cartwright case that the Surrogate had no jurisdiction to entertain the petition and issue citations returnable to the Orphans' Court, and that therefore that Court had no jurisdiction to determine the matter, 19 Dick. 290; 20 Dick. 399.

It will be noted that in Straub's case the single question presented on the appeal was whether the *Orphans' Court* upon a direct application to it can set aside a Surrogate's probate after the time limited by statute for appeal to it has expired. It was *held that* "control of the judgments of the Surrogate is not one of those subjects except it be accomplished by review upon appeal." 4 Dick. at page 265.

It was further held that application to attack the probate must originate before the Surrogate. *Ibid,* citing *in re Evans,* 2 Stew. 571, 574. The Straub case was affirmed for the reasons stated by the Ordinary, 5 Dick., bottom page 795, *Scharer vs. Schmidt.* Yet, in the Cartwright case (*Murray vs. Lynch,* 19 Dick, 290; affirmed 20 Dick. 399, 320) the Ordinary overruled the doctrine expressed in the Straub case, holding the views there expressed that the application for re-probate must be initiated before the Surrogate to be mere dicta, 19 Dick. 301, 302.

V.

The Power of the Orphans' Court may be doubtful, but if it has Jurisdiction, that jurisdiction is Concurrent with that of the Ordinary; and the Jurisdiction of the Ordinary is Complete, whether or not the Orphans' Court has Power in the Premises.

1. Touching the power of the Orphans' Court to entertain jurisdiction to revoke letters testamentary and order re-probate of the will, where fraud is alleged, it would seem by some of the opinions of the Courts that such jurisdiction was vested; but the contrary *seems* to have been held in the Cartwright case (*Murray vs. Lynch*); and the Ordinary, *in re Hodnett,* 20 Dick. at p. 336, said:

> "In delivering the opinion in the Cartwright case, I expressly refrained from considering the power of this (the Prerogative) Court in respect to probates in solemn form of wills produced and probated before the Ordinary. The statutory jurisdiction conferred *upon Surrogates and Orphans' Courts* was deemed not to extend thereto." 20 Dick. 336, and also *in re Evans,* 2 Stew. bottom p. 574.

There are cases which hold that the Orphans' Court has concurrent jurisdiction. *Vincent vs. Vincent,* 4 Robb. 276: but if so the Ordinary has concurrent jurisdiction, upon the principles declared *in re Coursen's will, supra.*

2. That the remedy is by appeal, or by application for revocation of the letters testamentary and re-probate of the will, seems settled. The time for appeal having elapsed, the only remedy now remaining is by application to the Ordinary.

> If the probate of a will is irregular or voidable for any cause, the remedy is by an appeal to the Ordinary or by proceeding for revocation of the letters. *Ryno, &c., vs. Ryno,* 12 C. E. Gr. 522, 525. *Re Evans,* 2 Stew. 575. *Crawford vs. Lees,* 93 At., at page 207.

It was said in the Straub case, 4 Dick. at page 265 that "When a will is proved in common form, the Court, at any time within thirty years after probate, may require the executor, of its own motion, or at the instance of the next of kin or other person interested, to prove the will in solemn form," citing 1 Wms. Ex'rs 334, *et seq.* This language was quoted with approval in the Gordon case, 5 Dick. at page 398. But in the Cartwright case the practice suggested in the Straub case that application should be made to an inferior jurisdiction for revocation and re-probate in solemn form was disapproved, 19 Dick. 302; 20 Dick. 399. In no other way, however, were the remedies and relief declared in the Straub case affected by the Cartwright case; and, touching the principle that the Ordinary, on a proper application, may revoke the letters testamentary and order a re-probate, that principle was affirmed distinctly by Magie, Ordinary, *in re Hodnett,* 20 Dick. at page 343. Chancellor Magie wrote the opinion in the Cartwright case overruling the practice suggested in the Straub case, and he held that the Ordinary had power to direct probate in solemn form in a proper case. He said touching exercise of the power:

"Under our practice, pursuant to which a contest may be raised by any one interested by caveat or appeal, I think probate in solemn form ought not be compelled, except upon some good ground shown. It is manifestly unnecessary to prove that the probate previously granted had been improperly granted by showing that testator did not in fact possess testamentary capacity, or that the will was in fact the product of undue influence, &c. It will be sufficient to justify the Ordinary in requiring probate on notice if there is made to appear to him a fair ground for contesting the validity of the will in respect to its execution, or the testamentary capacity of the testator, or as to the will being the product of undue influence." 20 Dick. pp. 343, 344.

In the Hodnett case the Ordinary, it appears by the report (20 Dick. pp. 345, 332), granted an order to show cause, with restraint, substantially in the form of that now prayed for.

It may be added that according to the only work on this subject available to the writer, Jacob's Law Dictionary, title "Probate," Vol. 5, pages 299-300, it appears that even though a will had been proven *per testes* it was open to attack within thirty years.

"If * * * * letters testamentary are granted to the party who exhibits the will, merely on his oath, by swearing that he believed it to be the last will of the deceased, this is called proving it in common form; and such a probate may be controverted at any time; but if the executor, besides his own oath, produces witnesses to prove it to be the last will of the deceased, and this in the presence of the parties who claim

any interest, or in their absence, if they are summoned, and do not appear; this is termed a probate *per testes,* which cannot be questioned after thirty years. 2 Nel. Abr. 1301."

3. It has been held authoratively in the Hodnett case that the Ordinary may revoke letters testamentary and order re-probate in solemn form, in cases where the will has been proved in common form in the Prerogative Court. If it be the law that this Court may not make like decrees in cases where the common probate was before the Surrogate, then it follows that the probate order of the Surrogate has greater efficiency than the probate order of the Surrogate General; for by no other proceeding may the order of probate made by the Surrogate be revoked. Nor will equity grant relief, it appears.

VI.

If Relief is not Available in this Court Because Barred by any Statute, such Statute is Unconstitutional.

1. It deprives petitioner of property without due process of law, contrary to Article XIV Sec. 1 of the Amendments of the Constitution of the United States.

2. It abridges the privileges of petitioner by taking her property without notice, or trial, or a day in court, contrary to the same section of the same constitution.

3. It abridges the immunities of petitioner by

taking her property without notice, hearing or a day in court, contrary to the same constitutional provision.

4. It impairs the power and jurisdiction of the Prerogative Court established by Article VI Sec. 1, par. 1 and Sec. 4, par. 2 of the Constitution of New Jersey.

For the reasons above stated, the decree of the Ordinary should be reversed, and the order to show cause moved for be allowed, with restraint.

Dated May 4th, 1916.

LOUIS H. MILLER,
Of counsel with Appellant.

INDEX

PETITION.

NEW JERSEY PREROGATIVE COURT.

To His Honor Edwin Robert Walker, Ordinary and Surrogate General of the State of New Jersey:

Your petitioner, Carlotta S. Vidal, nee Whitehead, of Montecello, New York, respectfully shows unto your Honor:

1. That John Edmund Newton Whitehead, late of the Township of Landis, County of Cumberland, in the State of New Jersey, died at the township aforesaid on the third day of April, nineteen hundred and fourteen, leaving him surviving a widow (by a second marriage), Emma F. Whitehead, and one child, your petitioner, the only heir at law of said decedent.

2. On the seventeenth day of April, nineteen hundred and fourteen, the said Emma F. Whitehead, widow of said decedent, presented to and filed with the Surrogate of the County of Cumberland, New Jersey, a petition, a copy whereof is hereto attached; setting forth that the said John Edmund Newton Whitehead died at Landis Township, in the County of Cumberland and State of New Jersey, on the third day of April, nineteen hundred and fourteen, having made and executed his last will and testament; and that she, the said Emma F. Whitehead, was the executrix therein, that the said decedent left him surviving as his heirs at law and next of kin the following named persons:

Emma F. Whitehead, widow, Vineland, New Jersey, R. F. D. #4.

Carlotta S. Vidal, daughter, residence unknown.

And the said Emma F. Whitehead therefore prayed in her petition that said will might be proved and letters granted thereon according to law. The said petition was signed and sworn to by the said Emma F. Whitehead in the usual form.

3. The said alleged last will and testament in said petition for probate referred to was duly produced before and filed with the Surrogate of Cumberland County, New Jersey, and is now on file in his office or on file with the Secretary of State; and your petitioner prays that said pretended will and testament may be produced as this Honorable Court may order and direct. The said pretended will is in the words and figures following, to wit:

"Know all men by these presents, that I, John Edmund Newton Whitehead make this my last will and testament, as follows:

First, I direct that all my just debts and funeral expenses to be paid as soon after my decease as convenient.

Second, all my personal property and real estate I give and bequeath to Emma F. Whitehead, my wife, her executors, administrators and assigns, and I appoint her the executor of this my last will.

Witness my hand and seal this 27th day January, A. D. 1909.

Witnesses.

J. W. Williams. J. E. Newton Whitehead,
Stuart F. Morris."

But for greater certainty your petitioner prays

leave to refer to the original document now on file as aforesaid.

4. The said pretended will and testament of the said decedent did not have appended thereto any attestation clause.

5. Upon the filing of said petition and the production of said paper writing the said Surrogate of the County of Cumberland, New Jersey, caused the said Stuart F. Morris to make and subscribe an affidavit in the words and figures following, to wit:

"State of New Jersey,
County of Cumberland, } ss.

Stewart F. Morris of full age being duly sworn upon his oath deposes and says that he has examined the annexed writing purporting to be the last will of John Edmund Newton Whitehead, deceased, and particularly the signature of J. W. Williams appended thereto as an attesting witness. Deponent further says that he was well acquainted with one J. W. Williams, who died since January 27, 1909, and that he is familiar with his handwriting, having often seen him write, having been in the employ of deponent for nine years and was present and saw him sign the annexed will and that deponent is of opinion and verily believes that the said signature is the proper handwriting of the said J. W. Williams with whom deponent was so well acquainted and that the same was written by him.

Stuart F. Morris.

Sworn and subscribed before me this 17th day of April, A. D. 1914.

Frank F. Wallace,
Surrogate."

Which affidavit is now on file in the said Surrogate's Office; and said Surrogate also caused the said Stuart F. Morris to subscribe to a further affidavit in the words and figures following, to wit:

"State of New Jersey, } ss.
Cumberland County, }

Stewart F. Morris one of the witnesses to the annexed writing, purporting to be the last will and testament of John Edmund Newton Whitehead, deceased, the testator therein named, being duly sworn doth depose and say that he saw the said testator sign and seal the same, and heard him publish and declare it to be his last will and testament; that at the time of the doing thereof, the said testator was of sound and disposing mind, memory and understanding, as far as this deponent knows, and as he verily believes; and that J. W. Williams the other subscribing witness thereto was present at the same time with this deponent, and that they together subscribed their names thereto as witnesses, in the presence of the testator and of each other.

Stuart F. Morris.

Sworn and subscribed this 17th day of April, 1915, before me.

Frank F. Wallace,
Surrogate."

Which affidavit is also on file in said Surrogate's Office.

Likewise, at the same time the said Surrogate caused the said Emma F. Whitehead to subscribe to an affidavit in the words and figures following, to wit:

"State of New Jersey, } ss.
County of Cumberland, }

Emma F. Whitehead the Executrix in the an-

nexed writing named being duly sworn doth depose and say, that the said said annexed writing contains the true last will and testament of John Edmund Newton Whitehead, deceased, the testator therein named, as far as she knows, and as she verily believes; that she will, as the executrix thereof, well and truly perform the same, by paying first the debts of said deceased, and then the legacies therein specified as far as the goods, chattels and credits of said decedent can thereunto extend, that she will make and exhibit unto the Surrogate's Office of the County of Cumberland, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased that have or shall come to her possession or knowledge, or to the possession of any other person or persons for her use, and that she will well and truly account when thereunto lawfully required; and that said testator died more than ten days ago, to wit, on the third day of April, A. D. 1914.

Emma F. Whitehead.

Sworn and subscribed this 17th day of April, before me.

Frank F. Wallace,
Surrogate."

Which affidavit is now on file in the office of the said Surrogate.

6. And your petitioner further shows that upon the filing of said petition and the execution and filing of said affidavits without notice whatsoever to your petitioner, the next of kin of said decedent, the said Surrogate of said county made and filed an order for probate of said paper writing as the last will

and testament of the said decedent, John Edmund Newton Whitehead, which order for probate is in the words and figures following, to wit:

"Cumberland County Surrogate's Office.

In the matter of the probate of the alleged will of John Edmund Newton Whitehead, deceased. } Order for Probate.

Application having been made by Emma F. Whitehead for probate of the last will of John Edmund Newton Whitehead, deceased, and letters testamentary thereon, and the Surrogate having inquired into the circumstances and taken proof, and being satisfied of the genuineness of the will produced, the validity of its execution and the competency of the testator and the probate of said will not having been contested, and it appearing that the testator died more than ten days ago, it is on this seventeenth day of April, nineteen hundred and fourteen, adjudged that the instrument offered for probate in this matter is the last will and testament of John Edmund Newton Whitehead, deceased, and the same is hereby admitted to probate; and it is ordered that letters testamentary be issued thereon to Emma F. Whitehead, the executrix named in said will who may qualify thereunder.

(Signed) Frank F. Wallace,
Surrogate."

7. And your petitioner shows that said proceed-

ings were thereupon recorded in the office of the Surrogate of the County of Cumberland, New Jersey, as by the record thereof will appear.

8. Your petitioner further shows that upon said probate in common form of said paper writing the said Frank F. Wallace, Esq., Surrogate of the County of Cumberland, issued a certificate annexed to a copy of said paper writing certifying that the same was a true copy of the last will and testament of John Edmund Newton Whitehead, deceased, late of the County of Cumberland, and that Emma F. Whitehead, the executrix therein named, proved the same before him, and was duly authorized to take upon herself the administration of said estate of the decedent agreeably to said will; which certificate or letters testamentary were dated the seventeenth of April, nineteen hundred and fourteen, and were sealed with the seal of the said Surrogate.

9. And your petitioner shows that after the aforesaid probate in common form of said paper writing and the issuance of said letters testamentary to the said Emma F. Whitehead, she assumed the duties of administering the assets of the estate of the said John Edmund Newton Whitehead, deceased, and as such executrix of said decedent's last will and testament, doth possess assets of said decedent's estate aggregating more than twenty-two thousand dollars ($22,000), among such assets being the following mortgages:

Biglow mortgage assigned by MacGeorge	$ 500.00
Amount brought forward	500.00
Lehman mortgage assigned by Pierce	4500.00
Mortgage assigned by Burns	1650.00

Hopkin mortgage	1750.00
John P. Willey mortgage	1000.00
Edward W. Donahue mortgage	2000.00
George H. Leamon mortgage	500.00
George A. Barberow mortgage	2000.00
Estelle Entrikin mortgage	2000.00
L. M. Dempsey mortgage	2500.00
Ethel Schramm mortgage	3750.00
	$33,350.00

All of which assets of said decedent's estate are shown by the records in the office of the Clerk of the County of Cumberland. And your petitioner avers that she is informed and she verily believes and therefore she charges that said decedent's personal estate in New Jersey and elsewhere aggregates a sum in excess of twenty thousand dollars. And your petitioner shows that all of the assets of said decedent's estate are now in the hands of the said Emma F. Whitehead under color of the grant of said letters testamentary by the said Surrogate of the County of Cumberland.

10. Your petitioner further shows unto your Honor that she had no knowledge of the death of her father or of the aforesaid probate in common form of said pretended will until after the expiration of the time fixed by the Statutes of New Jersey for appeals from said order of the Surrogate admitting the said paper writing to probate as the last will and testament of said decedent; wherefore she filed no caveat against said will and took no appeal from the aforesaid order of probate made by the aforesaid Surrogate; and she avers that as soon as she obtained knowledge of the facts set out in this

petition she proceeded without delay to employ counsel to take proper proceedings to set aside and revoke the said proceedings and probate.

11. And your petitioner further shows that the said paper writing is not the last will and testament of the said John Edmund Newton Whitehead, deceased, because the said paper writing was not executed by the said decedent as his last will and testament in the manner required by the Statutes of the State of New Jersey; and your petitioner says in this behalf that before she decided to contest said will, she caused Mr. Stuart F. Morris, a witness to said pretended will, to be interviewed by her counsel, touching the particulars of the execution of said paper writing and at the interview the said Stuart F. Morris made a statement to petitioner's said counsel which was immediately reduced to typewriting and sworn to by the said Stuart F. Morris; which statement is in the words and figures following, to wit:

"State of New Jersey, } ss.
Cumberland County, }

Stewart F. Morris, being duly sworn on his oath deposes and says:

I live at Vineland, New Jersey, and was one of the witnesses to the will of J. E. Newton Whitehead which was proved in the Cumberland County Surrogate's Court.

So far as I can recollect the circumstances of the execution of this will they were as follows:

As I remember it he came in there to the store of the Vineland Grain Co., of which I am manager, and he said, 'This is my will and I would like for you gentlemen to sign it,' J. Watson Williams and I were the persons he spoke to. I

thought that he wrote the will before he came in, at any rate he had it there all ready. That was all that he did; and whether he had signed it before he came in there I am not able to say. I am not able to say whether or not I signed first or Mr. Williams signed first. Mr. Williams signed behind the cage or little office in the store—he was in his office. I was on the outside. I don't recollect whether I was on the inside or outside of the office, on a little slab, a marble slab, we have to write on. Mr. Whitehead stood outside of the office. I do not remember whether he came in there and had it all ready signed or whether he signed it in there. I do not remember what Mr. Williams did when I signed. I do not remember seeing Mr. Williams sign; and I do not know whether Mr. Williams watched me when I signed. I am under the impression that Williams signed first before any of us signed. I remember I began to read the paper over and Dr. Whitehead said, 'That is my will.' I don't remember when I looked it over whether he had signed or not. I was out back working when they called me in there and when I came in he and Williams were the only persons there.

I imagine that when I came in there he had already told Williams what he wanted and Williams had signed first. I don't remember seeing Williams sign at all; nor do I remember Whitehead signing at all. All I remember is that they called me in and I signed after I looked it over and then I just stood there and passed the time of day, joking. He was always joking.

I went over to the Surrogate's Office after Dr.

Whitehead's death. Mr. Bowen asked Mrs. Whitehead the regular questions, and I think I made an affidavit. They did not ask me any special questions, nor did they ask me any of the things I have sworn to in this affidavit.

I cannot recollect any other circumstances about the signing of this will, except those I have given above.

Stewart F. Morris.

Sworn to and subscribed before me, this first day of February A. D. 1915.

C. E. Kaeler,
Commissioner of Deeds of New Jersey."

The original of this affidavit is hereto attached and made a part of this petition.

And your petitioner avers that said paper writing was not executed by the said John Edmund Newton Whitehead, deceased, in the manner required by the laws of New Jersey in that the said decedent did not publish and declare the said paper writing to be his last will and testament in the presence of two witnesses who at the same time at his request in his presence and in the presence of each other subscribed their names as witnesses thereto.

12. And your petitioner shows that she is advised that this Honorable Court has power and authority to make an order and decree that the foregoing order of the Surrogate of the County of Cumberland, New Jersey, admitting said pretended will to probate should be revoked and annulled and to restrain the said Emma F. Whitehead from performing any act as executrix of said pretended will; and to grant letters of administration of said decedent's estate and to collect and disburse the assets of said de-

cedent's estate in accordance with the Intestate Laws of the State of New Jersey.

13. Your petitioner shows that if said paper writing be in effect the last will and testament of said decedent, which petitioner denies, then she avers that the same was produced by fraud and the undue influence of the said Emma F. Whitehead, who was at one time one of the family servants of said decedent, and acquired a great influence over decedent during the lifetime of petitioner's mother, and whose influence over decedent for many years before the death of petitioner's mother was meretricious, dominant and improper.

14. Your petitioner prays that the aforesaid order of the Surrogate of the County of Cumberland, New Jersey, admitting to probate the aforesaid pretended will of the said John Edmund Newton Whitehead, deceased, should be set aside; and your petitioner be permitted to prove the facts asserted in this petition and to show that said paper writing has not been executed as the last will and testament of said decedent in the manner required by the laws of New Jersey, and that the same was procured by fraudulent and undue influence of the said Emma F. Whitehead; that the said paper writing be ordered delivered to the Court; that the said Emma F. Whitehead be restrained from performing any act as executrix under her letters testamentary; that general letters of administration of said decedent's estate be issued to your petitioner; and said Emma F. Whitehead be directed to bring in her probate and to prove said paper writing as the last will and testament of said decedent on a day to be fixed by this Honorable Court on notice to your

petitioner and any other persons concerned; that an administrator *pendente lite* be appointed to take charge of said estate pending this litigation; and that your petitioner have such other and further relief as she may be entitled to and the nature of the case may require.

EDWIN F. MILLER,
LOUIS H. MILLER,
Proctors of Petitioner.

STATE OF NEW YORK, }
COUNTY OF SULLIVAN, } *ss.*

CARLOTTA S. VIDAL, being duly sworn according to law, on her oath deposes and says:

I am the petitioner named in the foregoing petition; I have read the same and the facts therein stated are true.

I now reside in Montecello, in the State of New York.

I did not know of my father's death, and I was not informed thereof until Sunday, October eighteenth, nineteen hundred and fourteen. Immediately thereafter, and on the twenty-first of October, nineteen hundred and fourteen, I wrote to the Postmaster at Vineland, New Jersey, asking him to give me the name of a lawyer in good standing in order to ascertain the facts relating to my father's death, and what disposition he had made of his estate. The Postmaster handed my letter to Edwin F. Miller, Esq., of Vineland, New Jersey, who corresponded with me about the matter. In October last I resided in New York City, #59 West 74th Street, but since I have moved to Montecello, New York, where I now reside.

After learning of the probate of the will referred to in the foregoing petition I asked my counsel to find out if it had been properly executed. On interviewing Mr. Stuart F. Morris, one of the witnesses to the said pretended will, he made statement of the facts set out in his affidavit.

I always thought my father was a wealthy man. A hundred thousand dollars would be a very conservative estimate of his wealth according to my information. He always kept from three to five thousand dollars in each of several saving banks. This was a life-long habit and I believe he retained it until his death.

Among his personal effects were two large diamonds, one set in a ring and the other in a stud, each weighing between six and seven carats.

Emma F. Whitehead was formerly one of our family servants—she was the cause of my leaving home. For ten years before my mother's death wherever my mother went Emma would turn up. For ten years my mother was rendered miserable by this woman. At one time my mother and father went to Chicago. My mother hoped that she had left Emma far behind, but she had not been in Chicago but a short time when she learned that Emma was in a medical college in Chicago, as a student, and my father was paying her expenses. At the time of my mother's death I resided in New York and received no word in time to attend the funeral. Emma married my father shortly afterward, I am informed. After Emma was said to have married my father, he ceased to visit me at home, White Lake, N. Y., excepting on three occasions, although theretofore he had always seemed very fond of me, his only child. Three years after their alleged marriage she and he went to a lonely farm in Vineland,

where she continued her complete ascendency over him.

The only facts relating to the execution of the will proved by Emma F. Whitehead before the Surrogate of the County of Cumberland, New Jersey, I have obtained through the affidavit of Mr. Stuart F. Morris, which original affidavit is attached hereto.

CARLOTTA S. VIDAL.

Sworn to and subscribed before me this 3rd day of May, 1915.

GEO H. COOKE,
Notary Public,
in and for Sullivan Co., N. Y.

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

LOUIS H. MILLER, being duly sworn according to law on his oath deposes and says:

On the first day of February, nineteen hundred and fifteen, at the request of my brother, Edwin F. Miller, Esq., I went to the business place of Stuart F. Morris, in Vineland, New Jersey, and inquired of him the facts and circumstances under which he signed as a witness to the will of John Edmund Newton Whitehead, deceased. He related them to me. At my request he accompanied me to the law office of my brother in Vineland, New Jersey, and there he gave a statement, in the presence of my

brother and myself, which was taken down on the typewriter from Mr. Morris' dictation; and Mr. Morris immediately subscribed and swore to it before Mr. Kaeler, a Commissioner of Deeds of New Jersey. The original of this affidavit is attached hereto. The corrections in said affidavit were made by Mr. Kaeler when he read the statement over to Mr. Morris, before execution of the affidavit.

LOUIS H. MILLER,

Sworn to and subscribed before me this 30th day of April, 1915.

THEODORE F. BIRCH,
Notary Public of N. J.

CONCLUSIONS.

NEW JERSEY PREROGATIVE COURT.

In the matter of the estate of JOHN EDMUND NEWTON WHITEHEAD, deceased.

ON PETITION FOR PROOF OF WILL IN SOLEMN FORM. CONCLUSIONS.

LOUIS H. MILLER, ESQ., for petitioner.

LEAMING, Vice Ordinary:

A petition has been filed in this court by Carlotta S. Vidal, as the daughter and sole heir at law of John Edmund Newton Whitehead, deceased, the ultimate purpose of which is to set aside an order of probate and letters testamentary of the will of said Whitehead, which order and letters were heretofore made and issued by the Surrogate of Cumberland County; to that end the petitioner prays that the executor to whom letters testamentary has been issued by the Surrogate, may be required to prove the will before the Ordinary in solemn form. Application is now made in behalf of petitioner for an order directing the executor to show cause why the probate should not be set aside and the executor required to prove the will before the Ordinary in sol-

emn form and an administrator *pendente lite* appointed and the executor restrained from further administrative acts pending the proceedings.

I have been unable to reach the conclusion that the Ordinary has jurisdiction to grant any part of the relief sought, and have accordingly declined to issue an order to show cause, either with or without restraint.

The petition, which is duly verified, sets forth that John Edmund Newton Whitehead died at his home in Cumberland County April 3, 1914, possessed of personal estate in that county and leaving a widow by his second marriage and petitioner as his only child and sole heir at law, and that on April 17, 1914, the Surrogate of that county on petition of the widow, admitted to probate decedent's will and granted letters testamentary to the widow who has been acting as administratrix since that date, and who, by her inventory thereafter filed, disclosed personal assets of testator to the amount of over $22,000. These proceedings of probate are set forth in full in the petition and are admittedly regular on their face. The petition further avers that while the affidavit made before the Surrogate by the surviving subscribing witness to the will discloses that the will was executed in accordance with the requirements of the statute, in truth it was not so executed, and in verification of that averment there is annexed to the petition an affidavit since made by the same witness, at the instance of petitioner, which, if true, indicates that the will was not executed by testator in the presence of two witnesses present at the same time. The petition further avers that by the terms of the will decedent's entire estate is given to his widow, and also that the will was the product of fraud and undue influence of the widow.

It is also set forth in the petition that the petitioner is a resident of the State of New York, and did not hear of her father's death until after the period of appeal from the probate had expired.

Assuming, as for present purposes it may be assumed, that the matters set forth in the petition are true, it is obvious that relief should be extended to petitioner in this court if jurisdiction for that purpose can be found to exist; especially is this true in view of the circumstance that it has been held that the Surrogate and Orphans' Court are without jurisdiction to entertain a like petition, (Murray vs. Lynch, 64 N. J. Eq. 209; Aff. 65 N. J. Eq. 399), and it has also been held that the Court of Chancery has no jurisdiction in matters of this nature. See Trustees vs. Wilkinson, 36 N. J. Eq. 141, and cases there collected, to which may be added Ellis vs. Davis, 109 U. S. 485, 494, and I Williams on Executors, #450, *et seq.* Unless this Court can entertain the present petition it may well be doubted whether any remedy exists whereby a judicial inquiry can be made touching the validity of the will in question, except as to any real estate which may have been owned by decedent at the time of his death.

In re the Will of Hodnett, 65 N. J. Eq. 329, it was determined that the Ordinary has jurisdiction to require a will which has been proven before him as Ordinary in common form, and by him admitted to probate, to be reproven before him in solemn form. It is there recognized that the jurisdiction of the English ecclesiastical courts in matters of probate and administration was conferred by royal commission upon Lord Cornberry as Governor of the province of New Jersey in 1702, and was by like authority exercised by successive Governors of the province, and thereafter by the successive Governors of

the State, as Ordinaries or Surrogates General, under the Constitution of 1776, and by the Chancellor, as Ordinary or Surrogate General, under the Constitution of 1844; that jurisdiction, so conferred and exercised, is there found to have included the power above stated and to remain unimpaired by any legislation. But it will be observed that the present petition invokes the exercise of a similar power upon the part of the Ordinary over an order of probate and grant of letters testamentary made by a Surrogate, and the exercise of the power is sought after the statutory period of appeal from the action of the Surrogate has expired.

It is pointed out in re Coursen's Will, 4 N. J. Eq. 408 at page 414, that prior to the Act of Dec. 16, 1784, which created an Orphans' Court, (Patterson's Laws 59) the jurisdiction exercised by the Ordinary's Surrogate not only included granting of probate of wills, but also hearing and deciding disputes touching their validity and disputes touching rights of administration, and that the Act of 1784 in creating the Orphans' Court transferred from the Surrogates to the Orphans' Court the powers theretofore exercised by the Surrogates in hearing and determining such disputes. After the passage of that Act, in the absence of doubts arising on the face of a will, or dispute respecting the existence of a will, or a caveat against proving a will, the Surrogate probated the will; when such doubts or disputes arose or caveat was filed, the Surrogate was by that Act forbidden to further proceed and was required to transfer the matter to the Orphans' Court. These provisions of Section 15 of that act have been preserved in all essential features to this time. By that Act an appeal was given from the Orphans' Court to the Prerogative Court

if demanded within one month after the sentence or decree of the Orphans' Court; an appeal was also given from proceedings of the Surrogate to the Prerogative Court. By Act of June 13, 1820 (Pennington, 776), it was provided that the Surrogate should not proceed to prove a will until ten days from the death of the testator and appeals from the Surrogate to the Prerogative Court were required to be taken within six months. By Act of March 17, 1855, (Laws 1855, p. 342) an appeal from a Surrogate's probate was required to be made to the Orphans' Court, and six months for residents and one year for non-residents was prescribed as the limit of time for such appeals. By Act of March 29, 1874, (Rev. p. 791) the period for appeal from a Surrogate's probate was shortened to three months for residents and six months for non-residents. The Act of 1874 remains unchanged in that respect. While this legislation may be appropriately deemed to have in no way modified or curtailed the ancient jurisdiction of the Ordinary insofar as that jurisdiction authorized him to entertain an application for original probate or to set aside a probate which he had granted, yet it cannot be overlooked that the legislation provided a specific method for review by the Ordinary of all cases over which either the Surrogate's or Orphans' Court had exercised original jurisdiction, and specifically limited the period within which the right of review should be exercised. It seems impossible to regard such legislation as reserving to the Ordinary the power to set aside or review in any other manner a proceeding in which the inferior tribunal should have acted within its complete original jurisdiction, if indeed such power had at any time been exercised by the ordinary in any manner other than by appeal. This

view is, I think, entertained by the learned Ordinary in Coursen's Will, *supra,* in which the following appears: "Notwithstanding the complete original jurisdiction which the Ordinary has in all cases of probate and administration, his jurisdiction is concurrent with that of his Surrogates. These officers have long been recognized by the laws, and although they at first derived their powers from the Ordinary, as his deputies, those powers have been confirmed to them by long usage and successive declaratory Acts of the Legislature; and the Ordinary cannot now resume them at will, nor supersede their proceedings under and by virtue of those powers. And it follows as a necessary consequence, that whenever a Surrogate has obtained cognizance of a particular case, the Ordinary cannot interfere *pendente lite.* He may review the Surrogate's proceedings by appeal, but in no other way."

The courts of this State have given uniform recognition to the view that the proceedings of the Surrogate, in admitting a will to probate, are those of a regularly established court in which the Surrogate exercises judicial functions, and that such proceedings can only be reviewed by appeal. In Quidart's Adm'r vs. Pergeau, 18 N. J. Eq. 472, 477, Chancellor Zabriskie says: "The granting administration is exclusively with the Ordinary and his Surrogates. The grant is a proceeding *in rem,* in the strict sense of that term. It constitutes the person to whom it is granted the administrator, whether rightfully or wrongfully granted; and it cannot be inquired into here collaterally. The Act of the Surrogate can only be reviewed by appeal to the Orphans' Court, or Prerogative Court. Like the Acts of all regularly constituted tribunals, the Acts of the Surrogate cannot be impeached collaterally." In

Ryno's Ex. vs. Ryno's Adm. 27 N. J. Eq. 522, 524, our Court of Appeals quotes the views above expressed by Chancellor Zabriskie with approval. In a subsequent part of the opinion of the Court in that case the following language is used: "If the probate of the will were irregular or voidable for any cause, the remedy of the husband was by appeal to the Ordinary, or by proceedings for the revocation of the letters;" and in re Evans, 29 N. J. Eq. 571, 575, Chancellor Runyon sitting as Ordinary, quotes that language; but in neither case was the power of the Ordinary to revoke a probate of the Surrogate, except on appeal, in the slightest degree involved or specifically considered. Again, in Steele vs. Queen, 67 N. J. Law, 99, the Surrogate is said to hold a court and act judicially in probating wills; and in Murray vs. Lynch, 64 N. J. Eq. 290, 302, the Surrogate is again declared to exercise judicial functions in probating wills; and the same view is made the basis of decision in Crawford vs. Lees, (N. J. Ch.) 93 Atl. Rep. 201.

I have been unable to ascertain from such examination as I have been privileged to make of the works on practice in the English ecclesiastical courts whether a probate granted in common form by a deputy of an Ordinary or Metropolitan could be thereafter reviewed or set aside through the medium of proof in solemn form before the Ordinary or Metropolitan, nor have I been able to ascertain with certainty whether our provincial Governors, under their probate authority bestowed by royal instructions, assumed in that manner to review or supersede probates allowed by their Surrogates; but, as already noted, the Act of 1784 establishing our Orphans' Court specifically provided an appeal to the Prerogative Court from proceedings of the

Surrogate, and this appeal from probates of the Surrogate has uniformly included the investigation of the very issues presented by the present petition. It is stated in Griffith's Treatise, at pages 191, 192 and 209, (published in 1796) that the practice in procuring letters testamentary in uncontested cases by means of proofs before Surrogates was that the executor "should attend, with the will and witnesses to its execution, at the Surrogate's Office in the county where the testator died, who will administer the proper qualifications, and procure the letters testamentary and copy of the will from the register's office in due season." The oaths of the subscribing witnesses were endorsed on the back of the will by the Surrogate and the will, so endorsed, was forwarded to the register's office, where letters issued. These letters, so issued in the name of the Ordinary by his register, though issued on proofs taken before a Surrogate, would seem to be necessarily regarded as probates granted by the Ordinary and appropriately subject to his control. This practice, however, could not have continued later than 1803. By the provisions of an Act of November 9, 1803, (Bloomfield, 96) the Surrogates were provided with seals of office and books of record, and were required to issue probates of all wills before them proved, and a form of letters testamentary to be issued by them in their name and under their hands and seals of office was prescribed by the Act; they were also required to record in the books provided for that purpose all wills proved before them, together with the proofs thereof and all letters testamentary granted by them and the records were given the same force, validity and effect as the like records in the registry of the Prerogative office. These provisions were embodied in the revised Or-

phans' Court Act of 1820, and have since been retained.

It thus appears that while the present petition invokes the exercise by the Ordinary of that part of his jurisdiction which impowers him to entertain proofs of wills in solemn form the exercise of that jurisdiction is here sought as a means to set aside and supersede a decree of probate of another judicial tribunal which has acted within its original jurisdiction and from whose decree the statutory period of review has expired.

It is urged in behalf of petitioner that the legislation already referred to cannot be deemed to deny to the Ordinary the exercise of the remedy here sought without encroachment on the powers of the Ordinary as confirmed to him by our Constitutions of 1776 and 1844, respectively. I am unable to adopt that view. As has been already suggested, it is specifically pointed out in re Coursen's Will (*supra*) that the original Orphans' Court Act of 1784 removed from the Surrogate's Court to the Orphans' Court that portion of the jurisdiction theretofore exercised by the Surrogates in "contentions" matters and thus made the two courts share the jurisdiction theretofore exercised by the Surrogates, and provided an appeal to the Ordinary from the proceedings of each of the two courts, and subsequent legislation has limited the time for appeal and also provided that the appeal from the Surrogate should be to the Orphans' Court and thence to the Ordinary. If prior to the establishment of the Orphans' Court the Ordinary in fact exercised the right to set aside probates which had been granted on proofs made before the Surrogate through the procedure of allowing or ordering proofs of such wills to be made before him in solemn form (of which practice I have found no evidence),

or through any procedure other than by appeal, legislation which provided an appeal to the ordinary from "all proceedings of Surrogates" can not be properly regarded as an invasion of that part of the jurisdiction of the Ordinary already referred to, for by such appeal an unlimited scope of investigation touching the validity of a will was preserved to the Ordinary. The effect of such legislation extends no further than the domain of mere procedure, and the subsequent statutory limitation of the period for such appeals must be regarded as of the same nature; legislation defining the procedure or limiting the time within which a writ of certiorari may be issued by our Supreme Court has never been regarded as an encroachment upon the jurisdiction of that court.

Nor can the power of the Legislature to limit the period of appeal in matters of probate without regard to notice to parties in interest be doubted. No one has any right to the personalty of a decedent except such as the laws of the State allow; whether such personalty shall pass under an alleged will or under the statute of distributions is to be determined by reference to the laws of the State alone, and a determination made in conformity with those laws, even if made without notice to individuals interested in the question as would be necessary to bar ordinary rights of property, is conclusive. Myers Case 69 N. J. Eq. 793, at page 796. As is stated in authorities hereinbefore cited, the proceedings is *in rem,* and a public necessity exists for prompt settlement of estates.

These views lead me to decline to issue the order to show cause which is sought by the petition.

Submitted: May 17, 1915.
Determined: June 3, 1915.

ORDER DENYING ORDER TO SHOW CAUSE.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Petition to Set Aside the Probate of an Alleged Will of JOHN EDMUND NEWTON WHITEHEAD, Deceased, and for the Appointment of a General Administrator of said Decedent's Estate.	ORDER DENYING ORDER TO SHOW CAUSE.

The petitioner having filed her petition herein and application being made on the seventeenth day of May, nineteen hundred and fifteen, for an order that Emma F. Whitehead, the respondent named in the said petition, show cause before the Ordinary and Surrogate General why the order of the Surrogate of the County of Cumberland, State of New Jersey, made on the seventeenth day of April, nineteen hundred and fourteen, admitting to probate a paper writing purporting to be the last will and testament of John Edmund Newton Whitehead, deceased, and granting letters testamentary thereon, should not be set aside, and said letters testamentary be revoked, and the petitioner be permitted to prove the facts

set forth in her petition, and to show that the said paper writing was procured by fraud and undue influence; and that an order be made requiring said respondent to reprove said will in solemn form on notice to the petitioner and any other person interested; and why letters of administration should not issue to the said petitioner, and that an administrator *pendente lite* be appointed forthwith; and why said respondent should not be ordered to deliver to the Court the said paper writing and that she be restrained from performing any acts as executrix under her letters testamentary; and an order be made directing said respondent to turn over to said administrator *pendente lite* or a general administrator of said estate, if appointed, the personal assets of said estate in her hands; and that in the meantime and until the further order of this Court, the said Emma F. Whitehead, individually and as executrix of the last will and testament of John Edmund Newton Whitehead, deceased, be restrained from assigning, transferring or satisfying of record any of the mortgages of said estate now in her hands, and from checking out, drawing on or transferring any of the moneys of said estate deposited to her credit as executrix or deposited to her credit as an individual if the same were derived from the estate of said decedent; Provided, nothing in said order contained should restrain the said respondent from collecting and receiving any debts due or owing to the said decedent's estate including interest on mortgages; or that petitioner have such other order or relief in the premises as the Court might deem proper, touching the matters set out in said petition: And the Court having considered said petition and having read the affidavits thereto annexed and having heard and considered argument of counsel

thereon touching said application; and it appearing to the Court that this Court has no jurisdiction to grant any relief whatsoever touching the matters in said petition alleged or prayed for in said petition, and that, therefore, said application should be denied,—

It is, therefore, on this nineteenth day of July, nineteen hundred and fifteen, by the Court, Ordered and Decreed that the aforesaid application, for said order to show cause herein and all other relief to petitioner prayed in said petition be, and the same hereby is, denied.

E. R. Walker,
Ordinary.

Respectfully advised,
E. B. Leaming,
V. O.

ORDER TO SHOW CAUSE.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Petition to Set Aside the Probate of an Alleged Will of JOHN EDMUND NEWTON WHITEHEAD, Deceased, and for the Appointment of a General Administrator of said Decedent's Estate.

ON APPLICATION TO SET ASIDE ORDER DENYING ORDER TO SHOW CAUSE.
ORDER TO SHOW CAUSE.

The petitioner having filed her petition in this matter, and the Court, by its order entered herein bearing date on the 19th day of July, nineteen hundred and fifteen, having denied the application herein referred to; and the petitioner now applying to the Court to set aside said order made by the Court and praying a rehearing on her said application; and the Court having again considered the petition and affidavits herein, and the argument of counsel made hereon, and for good cause shown to the Court.

It is on this 19th day of July, nineteen hundred and fifteen, on motion of Louis H. Miller, of counsel with petitioner, ordered that Emma F. Whitehead, the respondent named in the said petition, show cause before the Ordinary and Surrogate General at the

Court House, in the City of Camden, New Jersey, on the 26th day of July, nineteen hundred and fifteen, why the aforesaid order made by the Ordinary bearing date on the 19th day of July, nineteen hundred and fifteen, should not be set aside, and a rehearing had on the merits of the application in and by the aforesaid order of this Court denied.

It is further ordered that the petitioner serve on the respondent within two days from the date hereof a copy of this order and of said petition and the affidavits accompanying the same, as well as a copy of the said order of this Court made on the 19th day of July, nineteen hundred and fifteen, and that for the purpose of such service, copies certified by one of the proctors of the petitioner may be used.

E. R. WALKER,
Ordinary.

Respectfully advised,
E. B. LEAMING,
V. C.
(Copy)

ORDER DENYING REHEARING, &c.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Petition to Set Aside the Probate of an Alleged Will of JOHN EDMUND NEWTON WHITEHEAD, Deceased, and for the Appointment of a General Administrator of said Decedent's Estate.

ON APPLICATION, &c.
ORDER DENYING REHEARING, &c.

The order to show cause herein bearing date July 19, 1915, having been brought on for argument in the presence of Louis H. Miller, of counsel with the applicant, and Walter H. Bacon, Esq., of counsel with the respondent, Emma F. Whitehead, and it appearing to the Court that the said order to show cause should be discharged:

It is, on this twenty-sixth day of July, nineteen hundred and fifteen, ordered that the said order to show cause be, and the same hereby is, discharged, and a rehearing on the application in said order to show cause referred to is hereby refused, and all relief to the petitioner under her said petition is denied by the Court.

Respectfully advised,

E. B. LEAMING,
V. C.

(Copy)

NOTICE OF APPEAL.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Petition to Set Aside the Probate of an Alleged Will of JOHN EDMUND NEWTON WHITEHEAD, Deceased, and for the Appointment of a General Administrator of said Decedent's Estate.	NOTICE OF APPEAL.

The petitioner, Carlotta S. Vidal, doth hereby appeal to the Court of Errors and Appeals in the last resort in all causes from (1) the whole and every part of the order made by the Ordinary on the nineteenth day of July, nineteen hundred and fifteen; whereby it was ordered and decreed, that the application of the petitioner, for an order to show cause herein and all of the relief to petitioner prayed for in her petition be denied; and (2) said petitioner also appeals to the Court of Errors and Appeals in the last resort in all causes from the whole and every part of the order made by the Ordinary bearing date July twenty-sixth, nineteen hundred and fifteen, whereby it was ordered that the order to show cause herein bearing date July nineteenth, nineteen hun-

dred and fifteen, be discharged, and that a rehearing on the application in said order to show cause referred to was refused and all relief to the petitioner under her said petition denied by the Court.

Dated Millville, N. J., November 9th, 1915.

LOUIS H. MILLER,
Proctor of Appellant.

I conceive that there is good cause for the foregoing appeal on the part of the petitioner in the above matter.

LOUIS H. MILLER,
Of Counsel with Petitioner.

[ENDORSED]

Service of the within notice of appeal is acknowledged Nov. 15, 1915.

Walter H. Bacon,
Proctor, Emma F. Whitehead,
Respondent.

PETITION OF APPEAL FROM THE PREROGATIVE COURT.

NEW JERSEY
COURT OF ERRORS AND APPEALS.

In the Matter of the Petition to Set Aside the Probate of an Alleged Will of JOHN EDMUND NEWTON WHITEHEAD, Deceased, and for the Appointment of a General Administrator of said Decedent's Estate.	PETITION OF APPEAL FROM THE PREROGATIVE COURT.

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

The humble petition of Carlotta S. Vidal, appellant in the above-stated cause, respectfully shows that your petitioner finds herself aggrieved by two certain orders made in the New Jersey Prerogative Court by the Honorable Edwin Robert Walker, Ordinary of the State of New Jersey, in the above matter, one thereof bearing date July nineteenth, nineteen hundred and fifteen, whereby it was ordered

and decreed that the application therein referred to and all other relief to petitioner prayed for in her petition be denied; and the other thereof bearing date July twenty-sixth, nineteen hundred and fifteen, whereby it was ordered that a certain order to show cause herein dated July nineteenth, nineteen hundred and fifteen, be discharged, and a rehearing on the application in said order to show cause referred to was refused and all relief to petitioner under her said petition herein was denied by the Court; in these respects, to wit:

1. On the facts alleged the New Jersey Prerogative Court had jurisdiction to set aside the order of the Surrogate of the County of Cumberland, New Jersey, admitting to probate the pretended will of John Edmund Newton Whitehead, deceased, and to permit your petitioner to prove the facts asserted in her petition and to show that said paper writing had not been executed as the last will and testament of said decedent in the manner required by the laws of New Jersey, and that the same was procured by fraudulent and undue influence of Emma F. Whitehead, and ordering that the said paper writing be delivered to the Court, and to grant the relief prayed for in petitioner's petition; and yet the said Prerogative Court adjudged that it had no jurisdiction in the premises, and unlawfully denied to petitioner all relief in her said petition prayed for.

2. The Prerogative Court by its said order and decree denied that it had jurisdiction to grant to petitioner any relief on the facts alleged in the petition and affidavits thereto annexed; whereas, the said Court had full and ample jurisdiction in the premises.

3. The Prerogative Court adjudged that it had no power to set aside the order of the Surrogate of the County of Cumberland, New Jersey, granting probate of the will of John Edmund Newton Whitehead, deceased, upon the facts alleged and grounds stated in petitioner's petition; whereas, the Prerogative Court had full and ample jurisdiction in the premises.

4. The Prerogative Court decided that by virtue of the provisions of Section 202 of the Orphans' Court Act (3 C. S. 3888) the Prerogative Court had no jurisdiction to grant the relief prayed for in petitioner's petition, which decision and the decree entered thereon was unlawful because:

(1) The particular application set out in the petition is in substance and effect an appeal to the Prerogative Court permitted by Section 203 of the Orphans' Court Act, and

(2) If Section 202 of the Orphans' Court Act has the intendment, meaning and effect of depriving the Prerogative Court of jurisdiction to grant the relief prayed for in the petition, then said Act is unconstitutional, because (a) it invades the constitutional powers vested in the Prerogative Court by Article VI, Sec. I, para. 1, and by Article VI, Sec. IV, para. 2, of the Constitution of New Jersey, and (b) it provides for the taking of petitioner's property without due process of law, contrary to the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

And your petitioner humbly appeals from the said orders of said Court made July nineteenth and July twenty-sixth, nineteen hundred and fifteen, on the ground that the same are erroneous, and that, for the reasons aforesaid, the Ordinary should have decided and decreed that the order of the Surrogate of the County of Cumberland, New Jersey, admitting to probate the aforesaid pretended will of John Edmund Newton Whitehead, deceased, should be set aside, and your petitioner be permitted to prove the facts in her petition and to show that the said paper writing has not been executed as the last will and testament of said decedent in the manner required by the laws of New Jersey, and that the same was procured by fraudulent and undue influence of Emma F. Whitehead, named in the petition, and that the said paper writing be delivered to the Court; and that the said Emma F. Whitehead be restrained from performing any act as executrix under her letters testamentary, and that letters of administration of said decedent's estate be issued to your petitioner; and said Emma F. Whitehead be directed to bring in her probate and to prove said paper writing as the last will and testament of said decedent on a day to be fixed by said Prerogative Court on notice to petitioner and any other persons interested; and that an administrator *pendente lite* be appointed to take charge of said estate pending this litigation.

Your petitioner, therefore, prays that the said orders of the Ordinary dated respectively July nineteenth and July twenty-sixth, nineteen hundred and fifteen, be set aside and for nothing holden, and that

your petitioner shall have such further relief in the premises as to this Honorable Court may seem meet.

LOUIS H. MILLER,
Proctor for and of Counsel with Appellant.

[ENDORSED]

Service of the within petition of appeal on the respondent, Emma F. Whitehead, is hereby acknowledged, November 13, 1915.

Walter H. Bacon,
Proctor of Emma F. Whitehead, &c., Respondent.

ANSWER.

NEW JERSEY
COURT OF ERRORS AND APPEALS.

In the Matter of the Petition to Set Aside the Probate of an Alleged Will of JOHN EDMUND NEWTON WHITEHEAD, Deceased, and for the Appointment of a General Administrator of said Decedent's Estate.	ON APPEAL FROM THE PREROGATIVE COURT. ANSWER.

The answer of Emma F. Whitehead, respondent, to the petition of appeal of Carlotta S. Vidal, appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that two certain orders were made in the New Jersey Prerogative Court by the Honorable Edwin Robert Walker, Ordinary of the State of New Jersey, in the above-stated matter, one thereof bearing date July 19, 1915, and the other thereof bearing date July 26, 1915, 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 orders and each of them are agreeable to equity and she prays that the same may be affirmed, with costs to be adjudged to this respondent.

WALTER H. BACON,
Proctor and of Counsel with Respondent.