NEW JERSEY COURT OF ERRORS AND APPEALS.

Arthur B. Mellor, et al., Executors, &c., *(Plaintiffs in Certiorari) Respondents,* vs. **Joseph Kaighn,** *(Defendant in Certiorari) Appellant.*	**On Appeal from Supreme Court.**

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The parenthetical references are to the printed state of the case.

One William B. Mellor made what purported to be his last will and testament, dated May 26th, 1914, appointing as the executors thereof, Edgar Mellor and Arthur B. Mellor.

There were three subscribing witnesses to this will; namely: William Stauss, William P. Strode and Benjamin N. Faunce.

Mellor died on October 24th, 1914, and a petition for probate was presented to the Surrogate of Cam-

den County on November 4th, 1914 (page 3), probate being made in common form, upon the affidavit of two of the subscribing witnesses, Strode and Faunce, who, in their affidavits, swore that the testator when he made said will was of sound and disposing mind and memory so far as they knew and verily believed. (Page 7.)

At the time that the testator made the will he was insane and without testamentary capacity. The will was prepared by Benjamin N. Faunce, one of the subscribing witnesses, who, in conjunction with the respondents, procured its execution, although all of the said parties knew that the testator was insane and possessed no capacity to make the will.

This will was proposed by the respondents with the intention of deluding the Surrogate into the belief that the testator was sane when he made the will, and upon the false affidavit being presented by the subscribing witnesses, the Surrogate admitted the said will to probate.

On March 16th, 1910, the testator had made another will (page 18) making a different disposition of his property, and appointing appellant executor thereof. At the time he made the first will he was sane, and possessed full testamentary capacity.

A petition embodying the above facts was presented by the appellant to the Surrogate of Camden County (page 12), asking him to revoke the probate of the last dated will and to admit the first dated will to probate. The Surrogate thereupon issued an order upon the respondents herein, requiring them to show cause on December 20th, 1915, why the probate of the will last in point of date should not be revoked, and why the will first in point of date should not be admitted to probate as the true last will and testament of William B. Mellor (page 16).

No answer to the merits was made by the respondents, but a special appearance and answer denying the jurisdiction of the Surrogate to entertain the petition, was filed on their behalf.

A writ of certiorari was allowed by Justice Garrison (page 1) after which and before the service of the writ, the matter came on to be heard before the Honorable Harry Reeves, Surrogate of Camden County. Before, however, the Surrogate assumed jurisdiction, the writ of certiorari was served.

The matter was brought on for a hearing before Justice Garrison sitting as a single Justice under the statute. He was of the opinion that the writ had been prematurely served, and suggested that a motion be made before the Surrogate striking out the answer and special appearance. This was done, and an order was entered by the Surrogate refusing to strike out the answer and special appearance, the Surrogate thereby assuming the jurisdiction, the possession of which the respondents denied him.

The certiorari matter was again brought on for hearing before Justice Garrison, who set aside the proceedings before the Surrogate on the ground that he had no jurisdiction to entertain them.

This appeal is to review the propriety of the decision of Justice Garrison.

GROUND OF APPEAL.

The appellant contends that the Surrogate had full and complete jurisdiction to entertain the petition and to make the order to show cause thereon and that the decision of the Supreme Court that he had no such jurisdiction was erroneous.

ARGUMENT.

I.

The question which is squarely presented, (and, we believe, for the first time in this State) is: Has a Surrogate power to open and set aside his decree of probate where it has been entered or secured through fraud or imposition practiced upon him?

A consideration of this question falls naturally under three heads:

1. Does the Surrogate, in probating wills, granting letters of administration and generally performing the duties and carrying out the powers conferred upon him by statute, exercise judicial functions and hold a court?

2. If so, is this a court of limited, inferior, special or general jurisdiction?

3. Have courts of general jurisdiction the power to open, vacate, modify and correct their decrees, and is this power a statutory one or one inherent in the court because it is a court of general jurisdiction?

II.

As to the first head:

Upon Lord Cornbury, the first Royal Governor, was conferred all the ecclesiastical jurisdiction of

the province of New Jersey relating to "the collating to benefices, granting licenses for marriages and probate of wills," as being prerogatives reserved to the Governor. At an early day, however, the provincial Governors, for the sake of convenience, appointed deputies called Surrogates, residing in different parts of the province. They were at that time mere deputies, subject to the control and supervision of the Governor or Ordinary and removable at his pleasure. The jurisdiction of the Ordinary was concurrent with that of his Surrogates, although they first derived their powers from the Ordinary solely as his deputies. Those powers have been confirmed to them by long usage and successive declaratory acts of the Legislature. The Surrogate has since become an elective officer and notwithstanding the concurrent jurisdiction of the Ordinary, whenever a Surrogate has obtained cognizance of a particular case, the Ordinary cannot interfere *pendente lite.*

By constantly enlarged powers, both with respect to probate matters and by the exercise of jurisdiction conferred upon him over other matters by the Legislature, the Surrogate has become one of the most important judicial officers of the State, and this fact was recognized at an early period in the case of *Quidort vs. Pergeaux,* 18 Eq., 472-477. The Court there said:

> "Like the acts of all other legally constituted "tribunals, the acts of the Surrogate cannot be "impeached collaterally."

This case is cited in *Ryno vs. Ryno,* 27 Eq. 522, 524; and *In re Evans,* 29 Eq. 571, in which latter case the Court, citing *Quidort vs. Pergeaux, supra,* said:

> "That the proceedings of the Surrogate in

"admitting a will to probate are those of a regu-
"larly established court and are to be treated
"accordingly."

The question was definitely set at rest in *Steele vs. Queen,* 67 law, 99; 50 Atl. 668, in which it is stated that the Surrogate in probating wills acts judicially and holds a court, citing *Quidort vs. Pergeaux, supra; Ryno vs. Ryno, supra.*

The Court further stated, in *Steele vs. Queen, supra,* that it was quite clear that prior to the constitution of 1844 the Surrogate was a judicial officer within the jurisdiction conferred by statute, and the Supreme Court in that opinion refers in several places to the "Surrogate's Court." In this case a writ of mandamus was issued against the Surrogate of Hunterdon County as both "Judge and Clerk of the Surrogate's Court" to make a certificate as "P. A. Q. Surrogate and Judge of the Surrogate's Court" and "P. A. Q. Surrogate and Clerk of the Surrogate's Court," and thus legally exemplify a record of his office under the Act of Congress. This doctrine was laid down in many cases both before and since.

Steele vs. Queen, supra; Straub's Case, 49 Eq. 264; 50 Eq. 795; *Buecker vs. Carr,* 60 Eq. 300; *In re Hodnett,* 65 Eq. 329; *In re Queen,* 82 Eq. 583; *Crawford vs. Lees,* 93 Atl. 201; *In re Whitehead,* 94 Atl. 796.

In *Crawford vs. Lees, supra,* which is a very recent case decided in 1915, Vice-Chancellor Leaming, after an extended review of the history and jurisdiction of the Surrogate, held that a "grant of probate and letters testamentary made by a Surrogate which conforms to the requirements of the statute

as to form and proof, is as conclusive as a similar grant made by the Ordinary," upon the ground 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;" that *the Surrogate's Court cannot "be regarded as a court of inferior jurisdiction* when considered in connection with the duties which it is required to perform;" and that "proceedings before *the Surrogate are here placed upon precisely the same plane as those of the Orphans' Court,* or even common law courts of general jurisdiction."

It would extend this brief beyond any reasonable limit to quote all of the matters touching upon the history of the Surrogate in *Crawford vs. Lees,* but this case can be read with great interest as throwing considerable light upon the history of the Surrogate and his jurisdiction.

III.

Mr. Justice Fort, in *Steele vs. Queen, supra,* carefully reviews the more important functions of the Surrogate and states "It would be difficult to set up a more complete line of judicial functions and powers than are given by the statute to the Surrogates."

And yet in addition to the functions enumerated by Justice Fort, the Surrogate has power by statute after taking testimony to declare a man dead, who has been absent from or concealed himself in the State, for more than seven years, Laws 1911, page 538; to determine disputes as to residence of intestates, *In re Russell's Estate,* 64 N. J. Eq., 315, 53 Atl. Rep. 169; to revoke and control letters of guardian-

ship issued by him in certain classes of cases, Sections 38 & 43, Orphans' Court Act, C. S., Vol. 3, pages 3826, 3827, and by recent statutes to declare null and void letters testamentary and of administration under certain circumstances, Laws 1912, page 551; to appoint an officer in a foreign State to take testimony as to the execution of a will, or to deputize certain resident officers to take such testimony in a foreign State, P. L. 1913, page 102; while the Legislature of 1915 extended the Evidence Act as regards the taking of depositions *de bene esse,* or upon interrogatories, to include the Surrogate's Court, P. L. 1915, page 141, and granted the power to the Surrogate to issue subpoenas and to enforce the observance thereof, P. L. 1915, p. 140.

Mr. Justice Fort, in *Steele vs. Queen, supra,* after quoting the Courts of Errors and Appeals as to the power and jurisdiction of the Surrogate in *Ryno's Exr. vs. Ryno Admr., supra,* where it is said that "his decree until reversed, is both conclusive and final," says: "*It is only a court that can make a decree in a proceeding in rem which is conclusive and final,* unless reversed on appeal by a court of appellate jurisdiction."

IV.

Although the jurisdiction of the Orphans' and Surrogate's Courts is limited to the jurisdiction conferred upon them by statute, (*Murray vs. Lynch,* 64 Eq., 290; 65 Eq. 399), yet within those limits it is general and not special and still within those limits the Court is not entirely confined to the powers specially granted by the Legislature, but may exercise the revisory power of its orders and decrees in-

cident, as will be seen below, to all courts of general jurisdiction.

In re Clement's App., 25 Eq., 508.

This distinction between courts of limited jurisdiction and courts of special jurisdiction is clearly pointed out by the Supreme Court in *Obert vs. Hammell,* 18 Law, 73, 78, as follows:

> "I apprehend the term limited jurisdiction "to be somewhat ambiguous, and that the books "sometimes use it without due precision. Our "Supreme Court is limited by Acts of the Leg- "islature; so likewise is the Court of Common "Pleas; and the newly constituted Circuit "Courts; yet each of them exercises a general "jurisdiction. The word limited seems to be "used sometimes carelessly instead of the term "special, for I take the true distinction between "courts to be, such as possess a general, and "such as possess only a special jurisdiction for "a particular purpose, or clothed with special "powers, for the performance of specific duties, "beyond which they have no manner of author- "ity; and these special powers to be exercised "in a summary way, either by a tribunal al- "ready existing for general purposes; or else "by persons appointed, or to be appointed in "some definite form.
>
> "But the Orphans' Court is not organized for "a single purpose, it has a general jurisdiction, "as broad as the Common Pleas or Circuit "Court, or perhaps the Supreme Court itself, "exclusive of its appellate and superintending "authority. That statute of the 16th of De- "cember, 1784, (Patterson 59) though made as "far back as the Revolution, did not create a

"court before unknown; it did no more than "give a new dress to powers coeval with the "province, and which the Ordinary and his Sur- "rogates had always exercised in the Prerога- "tive Court, professing in its title, only to as- "certain, to regulate and to establish. It con- "fers no attribute of a special court for one pur- "pose only but a jurisdiction for the general "administration of justice within certain great "departments.

"Therefore if the Orphans' Court exercises a "limited jurisdiction still it is not a special one, "and is entitled to the same liberal presump- "tions, as any Supreme Court; that what is "done is rightly done until reversed. It is no "special jurisdiction for a particular purpose, "but a permanent court for the administration "of justice; its powers are inexhaustible by ac- "tion; its jurisdiction spreads over vast depart- "ments of matter."

In re Evans, 29 N. J. Eq. 571.

In the two cases last cited, it is, as has been seen, the jurisdiction of the Orphans' Court that is specifically in question, and that this court is one of general jurisdiction has, indeed, been repeatedly affirmed.

Den vs. Hammell, 18 N. J. L. 73; *Den vs. O'Hanlon,* 21 N. J. L. 582; *Hess vs. Cole,* 23 N. J. L. 116; *Plume vs. Howard Savings Institution,* 46 N. J. L. 211; *Pyatt vs. Pyatt,* 46 N. J. Eq. 285; *Clark vs. Costello,* 59 N. J. L. 234; *Hohokus vs. Erie R. R. Co.,* 65 N. J. L. 353,

but it is obvious that the reasoning of the opinions is equally applicable to the Surrogate; and, indeed,

Crawford vs. Lees, supra, states that proceedings before the Surrogate are on the same plane as those before the Orphans' Court. They are both statutory courts.

V.

In the well-considered case of *Seid's Estate,* 38 N. J. L. J., 377, Surrogate Stickel, of Essex County, reviews at length the right of the Surrogate to revoke his decrees when improvidently granted through fraud, inadvertence or mistake. This opinion shows a great amount of research and careful and logical reasoning.

Reference was made in the argument before the Court below to the case of *In re Henry C. Lees Estate.* This is an unreported case decided by Judge Boyle in the Camden County Orphans' Court.

In that case application was made to the Surrogate to revoke the probate of a will on the ground that there were doubts upon its face, but that notwithstanding this the Surrogate had probated the will. The Surrogate refused to act, and an appeal was taken from this decision. Judge Boyle decided that no appeal would lie; and that further *it was not claimed that the decree* of probate *was vitiated by fraud or imposition practiced upon the Surrogate.*

VI.

It must be held, therefore, as established, that the Surrogate in granting a probate, performs a judicial function and that he holds a court, and that this court, the Surrogate's Court, is a court of general jurisdiction.

VII.

The consideration of the second head is necessarily involved in the consideration of the first and need not be further enlarged upon.

VIII.

This then brings us to the third head, *i. e.*, the power of a court of general jurisdiction to open, vacate, modify and correct its decree and whether this power is a statutory one or one inherent in the court because it is a court of general jurisdiction.

It would seem to require no citation of authority in support of the principle that the power of a court to vacate or open a judgment or to set it aside, is a common law power possessed by all courts of general jurisdiction as a part of their necessary machinery for the administration of justice and for their protection against deceit and imposition. The power is inherent in and to be exercised by the Court which rendered the decree or judgment and to that Court and no other the application to set aside the decree should be made.

In re Straub's Case, supra:

and this power, being inherent, belongs to a court merely as such and does not depend upon a statutory grant of jurisdiction, although, of course, statutory regulations may either enlarge or abridge the common law scope of this inherent power.

23 *Cyc.* 890.

As regards the Surrogate, while there has been no express decision upon the question, and in fact, the Court *In re Evans, supra,* expressly refrained

from deciding it, it is almost impossible to arrive at any different conclusion.

In *Vincent vs. Vincent,* 70 Eq. 272, the Court of Chancery refused to set aside the probate as to a complainant who alleged that his authority to a proctor to acknowledge service on his behalf, had been obtained through fraud, saying:

> "For the further reason that *courts invested "with jurisdiction for probate have general "power to check and revise proceedings for "probate tainted with mistake, fraud, or il- "legality,* a court of equity will not entertain "jurisdiction to set aside a will or the probate "thereof, where the fraud in the probate pro- "ceedings is such that a Probate Court itself "has power to give relief, this court should not "undertake to control the decree for probate by "directing consent to another probate. It is "settled, under our decisions, that the Orphans' "Court is a superior court of general jurisdic- "tion in probate and other special cases, not an "inferior court of limited or special jurisdic- "tion. Where a decree is entered in this court "against a defendant on an unauthorized ap- "pearance of a solicitor, the decree will be set "aside as against the defendant, on motion, and "the same control over its judgments, or de- "crees, by inquiring into the authority of its "attorneys, to appear, may be exercised by "every court of general jurisdiction."

The case of *Whitehead,* 94 Atl. 796, involved the power of the Ordinary to order reproved in solemn form a will which had already been proved in common form before the Surrogate. The Court held that the Ordinary had no such power, but an examination of the case would tend to show that any at-

tack upon the probate must originate before the Surrogate. It refers to the dicta in *Ryno vs. Ryno, supra,* to which reference is hereinafter made. No question of fraud upon the Surrogate was involved in the Whitehead case. This case, moreover, is now under consideration by this Court at the present term on appeal from the reported case.

IX.

Although, as has been said above, there has been no express decision as to the Surrogate's powers to modify or revoke his decrees, there are several dicta which show quite clearly that our Courts take it for granted that he has this power. Reference to this was first made in the case of *Ryno vs. Ryno, supra,* in the following language:

> "If the probate be irregular or voidable for any cause, the remedy is by appeal, or by proceedings for the revocation of the letters testamentary. The decree of the Surrogate is both conclusive and final."

In the matter of *Evans' Will, supra,* the Court referred to the Ryno case and went on to say:

> "Whether the Surrogate may review and set aside his decree when unlawfully made, and where it has been made through fraud or imposition practiced upon him, it is not now necessary to consider."

And in *Straub's Case, supra*:

> "When the time within which appeal may be taken has elapsed, the judgment (of the Surrogate probating the will) is a finality until it be disturbed by a direct attack upon it which should originate before the Surrogate."

This seems to be about as near as the Courts have come to any consideration of the question. Some doubt was expressed by Ordinary Magie *In re Hodnett's Will,* 65 Eq., 329; 53 Atl. 75, but the Ordinary did not directly pass upon the question and, in fact, expressly excepted from his remarks cases in which deception had been practiced on the Court before which the probate of the will was made.

X.

Upon application to the Essex County Orphans' Court for revocation of letters of administration issued by the Surrogate to one Josephine Phillips, Judge Martin decided that the Orphans' Court had no jurisdiction to revoke such letters, and, in the course of his opinion stated as follows:

"The Surrogate holds a statutory court and
"a grant of letters of administration by him is
"a proceeding *in rem* resulting in a judgment
"which may not be impeached collaterally and
"may be attacked in this Court by appeal only.
"It may be proper to apply to the Surrogate to
"revoke the letters of administration, but this
"Court has no jurisdiction at this time in this
"proceeding."

In re Estate of John Phillips, supra.

XI.

Little help can be obtained in the decision of this question from an examination of the decisions of other States, as the constitution and practice of our Surrogate's Court is peculiar to itself.

If, however, authorities from other jurisdictions are desired upon the power of probate courts to open, review, modify, correct, vacate and set aside

their orders and decrees, the doctrine is recognized and affirmed by the overwhelming weight of authority in this country and by a long and unbroken like of precedents and authorities in England.

Gaines vs. Chew, 2 How. (U. S.) 641-646; *Gaines vs. Hennen,* 24 How. (U. S.) 553-567; *Roy vs. Segrist,* 19 Ala. 810; *Vaughn vs. Sugg,* 2 So. (Ala.) 32; *Stevenson vs. Superior Court,* 62 Cal. 60; *Stetson vs. Bass,* 9 Pick. (Mass.) 26-29; *Waters vs. Stickney,* 12 Allen. (Mass.) 1; *Crocker vs. Crocker,* 84 N. E. (Mass.) 476; *Morgan vs. Dodge,* 44 N. H. 255; *Pew vs. Hastings,* 1 Barb. Ch. (N. Y.) 452; *Campbell vs. Thatcher,* 54 Barb. (N. Y.) 382; *George's Appeal,* 12 Pa. St. 260; *Bowen vs. Johnson,* 5 R. I. 112; *Rix vs. Smith,* 8 Vt. 365; *Smith vs. Rix,* 9 Vt. 240; *Adams vs. Adams,* 21 Vt. 162; *Vernson vs. Burnett,* 2 Pinn. (Wis.) 185-189.

Barnesby vs. Powell, 1 Ves. Sr. 284; *Harrison vs. Geldon,* 2 Str. 911; *Nicol vs. Askew,* 2 Moore P. C. 88-92; *Blackborough vs. Davis,* 1 Salk. 38; *Prosser vs. Wagner,* 1 C. B. (N. S.); *Trower vs. Cox,* 1 Adams, 219; *Hayle vs. Hasted,* 1 Curt. Eccl. 240; *Goods of Napier,* 1 Phillin R. 83; *Noell vs. Wells,* 1 Lev. 235; S. C. 1 Sid. 359; *Allen vs. Dundes,* 3 T. R. 125; *Wilkinson vs. Robinson,* 14 Jur. 72; *Carolus vs. Lynch,* 1 Lees Ecc. Rep. 13; *Cornish vs. Cornish,* Id. 14; *Burgis vs. Burgis,* Id. 121; *Ogilvie vs. Hamilton,* Id. 357; *Smith vs. Corry,* Id. 418; *Comyus Dig. tit. Administrator,* B. 8; *Bacon's Abr. tit. Administrator; Wentw. on Exrs.* 48; *Toller on Wills,* 73-74; 1 *Williams on Executors,* 399-508-509-512-521-524 and notes.

There is a two-fold reason for this rule:

1. As has been seen above, this power is and al-

ways has been incident to all courts of general jurisdiction; and

2. Such power is absolutely essential to prevent a failure of justice. As was said in 3 Bac. Abr. 50, speaking in particular reference to the ecclesiastical tribunals of England, with relation to this power,

> "It would be absurd to allow a court jurisdiction herein and at the same time deprive them of the liberty of vacating and setting aside an act of their own which was obtained from them by deceit and imposition."

Indeed, the second of the above reasons necessarily follows from the first, for assuming, as has been shown above, that our probate courts are courts of general jurisdiction whose decrees cannot be attacked collaterally, it follows that if their decrees obtained through fraud, mistake or accident, cannot be reviewed and corrected by them, such decrees must, after the expiration of time in which an appeal may be taken, stand, and cannot be corrected at all, a result which would be intolerable. As was said by the Supreme Court of Massachusetts in *Waters vs. Stickney,* 12 Allen. (Mass.) 1, 15, this power does not make the decree of a court of probate less conclusive in any other court or in any way impair the probate jurisdiction; but renders the jurisdiction more complete and effectual, and by enabling a court of probate to correct mistakes and supply defects in its own decrees, better entitled them to be deemed conclusive upon other courts.

XII.

The fact that the Legislature has seen fit to entrust the judicial office of the Surrogate's Court to one who may be a layman, we think is of little weight. If there is any relief in this respect it must come from the Legislature. Both the common law and the statute for a long period of time entrusted to Justices of the Peace who were almost invariably laymen, wide judicial powers. It has not been a great number of years since laymen sat upon the bench of the Court of Common Pleas and participated in the decision of the cases and passed upon questions of evidence presented to the Court, and we believe that it is a fact that a large minority of the Court of Errors and Appeals of this State may be composed of laymen.

As a matter of fact, this makes it only the more necessary that one who may be faulty in his judgment or easily misled through his lack of knowledge of legal forms should be given the greater opportunity to correct his mistakes when made, or relieve himself and others from impositions which may have been practiced upon him.

Again, still bearing in mind the fact that the Surrogate is usually a layman and that parties who come before him to prove a will in common form are in some cases regardless of the high obligation of an oath, and the proceedings are often carried through in a perfunctory manner, renders it easy for unscrupulous persons to impose upon the Surrogate. It is, therefore, highly important that his revisory power over his decrees should be recognized.

XIII.

Section 202 of the Orphans' Court Act (Comp. Stat. Vol. 3, page 3888), reads as follows:

> "Proceedings of Surrogates respecting the probate of will shall be subject to appeal to the Orphans' Court by any person interested, or other person legally representing him, and to proceedings thereon, as if the will had not been proved; provided, that such appeal be made within three months after such proceedings, before the Surrogate, or within six months after such proceedings in cases where the person appealing resides out of this State at the death of the testator. (P. L. 1898, p. 793.)"

That this section does not limit, abridge or restrict the inherent common law power of the Surrogate to open and vacate his decree, seems to be clear. The section simply confers a right of appeal. If this section could be said to destroy the power of the Surrogate to open his decrees, where they have been secured by fraud, then, because Section 204 of the Orphans' Court Act provides an appeal to the Prerogative Court from the Orphans' Court, and because on such appeal a new trial is had, based upon testimony taken in the Orphans' Court and additional testimony taken in the appellate court when required, the Orphans' Court would lose its right to open and vacate its decrees. That the Orphans' Court possesses this power despite the appeal section, is unquestioned. *Vincent vs. Vincent; Githens vs. Goodwin, supra.* Indeed, if the respondents' contentions are sound, no Court could open or set aside its decrees for fraud where an appeal could be taken or there exists some method of review in an appellate court.

XIV.

It is respectfully submitted, in view of the above, that the power of the Surrogate to review and set aside his decrees when unlawfully made, and where they have been secured through fraud or imposition practiced upon him, can not be doubted.

XV.

Applying these principles, therefore, to the case under consideration, the situation is the same as if the facts set forth in the petition had been conclusively proved before the Surrogate, and we have assumed their truth in the statement of the case contained in this brief. By the certiorari proceedings the respondents admitting their fraud, asked the aid of the Court in carrying it through.

The will, which bore the first date, named the appellant as executor thereof, and its existence first came to his knowledge on the first day of November, 1915. It then became his duty to propose the said will, but being confronted with the probate of a will apparently in due form and having had brought to his knowledge the conditions attending the execution of the said last dated will and the manner in which the probate thereof was secured, he could take no other course than to apply to the tribunal which had been so grossly imposed upon to cure the effect of such imposition. He filed his petition to revoke the probate on the 9th day of December, 1915 (page 12) so that we submit that he acted with due diligence in the premises.

XVI.

We submit that the line of demarcation between the cases which have approached this subject and the present case is drawn by the question of fraud practiced upon the Surrogate. It is not enough that fraud or undue influence may have been practiced upon the testator.

XVII.

We come then to a discussion of the opinion of Justice Garrison.

The first objection consists in the thought that if a fraudulent concealment were proven the Surrogate would still be concerned "with a dispute respecting the execution of the will" and that his only function would be to cite the disputants to appear in the Orphans' Court. We think that Justice Garrison lost sight of the fact that in passing upon the application the Surrogate would consider but one point, viz: whether fraud had been practiced upon him by the tacit representation, which we think must always be made, that there was nothing to the proponents' knowledge affecting the will as a valid testamentary instrument and whether at the time the witnesses to the will gave their testimony and signed their depositions they knew that they were swearing falsely. If the Surrogate found that to be the fact, it would be his duty simply and solely to set aside his decree admitting the will to probate. This would wipe the record clean and the matter would be left as though no application for probate had ever been made. The appellant might offer the will of which he was executor or the respondents might offer the will in which they were concerned, and if no caveat were filed, or dispute created, the

Surrogate might, if he saw fit, probate the will which was proposed, upon proper proof being given of its execution. If, however, a caveat were filed against the probate of either will, then the Surrogate would be met with a dispute concerning the execution of the will, which it would be his duty to certify to the Orphans' Court.

It is not true, as stated in Justice Garrison's opinion, that the Surrogate must necessarily pass upon the thing concerned. He decides simply the question of fraud upon him, and it would only be necessary for him to consider the question of insanity of the testator so far as it would be necessary for him to pass upon the question of fraud. The question of insanity of the testator might come up after the Surrogate had expunged the old decree from his records, but that is a separate and distinct question and should it be raised it would then properly be the duty of the Surrogate to certify the matter into the Orphans' Court, as it would then be a new application.

In *Murray vs. Lynch, supra,* it was held that when a Surrogate has duly acted upon an application for probate and has made an adjudication and decree thereon, the power conferred upon him as to probate has been exhausted, and he cannot thereafter issue citations requiring the parties to appear in the Orphans' Court with respect to any controversy over the will. If, therefore, Justice Garrison is right, a fraudulent decree, or one entered by mistake or inadvertence must remain of record in the Surrogate's Court if the time for appeal has lapsed. We do not think that this can be the law. It would merely mean that if parties interested in perpetrating a gross fraud could conceal it for more than three months, they would be enabled to take advantage of their fraud for all time.

XVIII.

Justice Garrison, also in his opinion, states that if the Surrogate has the power which we claim for him there would be "no time in which an estate resting upon the probate of a will, might not be exposed to an attack upon this fundamental ground." He, however, loses sight of the fact that the probate of a will is in no case conclusive except as to personal property and is subject to attack for seven years after its probate as a conveyance of real estate.

In the case of *Den vs. Ayres,* 13 Law, 153, it was decided that the title to real estate claimed under a will could not be sustained by the proof of its probate and "that the existenec and validity of the instrument as a will of real estate are open for trial in an action in ejectment, notwithstanding any decree of the Orphans' Court either for or against it."

Cited in *Crawford vs. Lees, supra.*

We presume that the same rule would be applied on a bill to quiet title.

We think, moreover, that this consideration has more to do with the application of the Surrogate's power than the existence of the power itself. Whether in a particular case the power should be exercised, is a question of the Surrogate's discretion, and it is doubtful whether he would exercise that power in a case where the rights of third parties had been prejudiced by laches on the part of the parties asking him to exercise this power. This, however, does not negative the existence of the power, but rather recognizes its existence and simply has to do with its exercise.

Again we think the rights of third parties acting in good faith upon the decree of probate would be

saved to them, where the decree was not void *ab initio* but merely voidable for fraud.

XIX.

It is true that some of the cases, among which are the Ryno case and the Evans case, cited above, say that upon a probate of a will the power of the Surrogate is exhausted and his jurisdiction over the subject-matter is at an end. This is probably true of every Court which has rendered a judgment or decree.

Every court when it has proceeded to a final determination has thereby lost jurisdiction so far as its rendering any further judgment or decree is concerned, but we have never heard of a doctrine which precluded any court of general jurisdiction from deciding whether fraud had been practiced upon it and remedying its judgment or decree where it was affected by such fraud. Moreover, the above cases are the very cases which intimate that a direct attack may be made before the Surrogate upon his former acts. Unless the Surrogate has this power in a proper case, a fraudulent decree must remain of record and of binding force in the Surrogate's Court, since the Court of Chancery has no power to set aside the probate of a will obtained by fraud.

Vincent vs. Vincent, supra.

We submit, therefore, that the judgment of the Supreme Court in this case should be reversed and the Surrogate permitted to proceed to a determination of the matters presented before him and act thereon in the exercise of a wise discretion.

STACKHOUSE & KRAMER,
Of Counsel with Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ARTHUR B. MELLOR, *et al.*, Executors, etc., (Plaintiffs in Certiorari) *Respondents,* vs. JOSEPH KAIGHN, (Defendant in Certiorari) *Appellant.*	ON APPEAL. BRIEF FOR RESPONDENTS.

BRIEF FOR RESPONDENTS.

Facts in the Case.

This appeal brings before the Court the action of the Supreme Court in setting aside an order of the Surrogate of Camden County. This order was given under the following circumstances:

The present respondents (plaintiffs in certiorari) had obtained, on November 6, 1914, the probate of the will of William D. Mellor, executed on May 26, 1914, by which instrument the said respondents had been named executors.

S. of C., p. 10.

On December 9, 1915, a petition was filed with the Surrogate by the present appellant, for the revocation of this probate and the admission to probate of another will of the testator, alleged to have been made on March 16, 1910.

S. of C., p. 12.

This petition set forth that the later will, dated May, 1914, had been executed when the testator lacked capacity; and that the attesting witnesses were cognizant of this fact, and in the proceedings for probate swore falsely that the testator was of sound and disposing mind and memory, whereas the fact was that he was insane and unable to make intelligent disposition of his property. The petition concludes by charging a conspiracy on the part of the contesting witnesses to work a fraud upon the Court. The petition then proceeded to set forth the facts concerning the will published on March 16, 1910, which was alleged to have been made when the testator was competent.

To this petition the respondents entered a special appearance and plea to the jurisdiction of the Surrogate. *S. of C., p.* 20. The basis for this plea was the 13th Section of the Orphans' Court Act, 3 *Comp. St.* 3816, which provides that:

> "In case doubts arise on the face of the will or a caveat is put in against the proving of the will, or a dispute arises respecting the existence of a will, the Surrogate shall not act in the premises, but shall issue citations to all persons concerned to appear in the Orphans' Court of the same County, which Court shall hear and determine the matters in controversy."

Furthermore, the petition to revoke had been filed more than a year after the granting of probate, and, therefore, beyond the period prescribed for proceedings directed against the probate of wills. Section 202 of the Orphans' Court Act provides that:

> "Proceedings of Surrogates respecting the probate of wills shall be subject to appeal to the Orphans' Court by any person interested, or other person legally representing him * * * * *provided,* that such appeal be made within three months after such proceedings, before the Surrogate, or within six months after such proceedings in cases where the person appealing resides out of this State at the death of the testator."
>
> 3 *Comp. S.* 3888.

To this answer of the respondents, the petitioner filed a notice of motion to strike out, which order was granted on January 24, 1916. *S. of C., pp.* 26, 27. This dispositive step was taken, after stipulation of counsel, in order that the action of the Surrogate might be properly reviewed by certiorari. Previous to the order and upon the return day of the original order to show cause granted on the filing of the petition, the respondents had served a writ of certiorari on the Surrogate. The writ was served, however, before the Surrogate had made any formal order in the proceedings, and doubts arose as to whether its service had not been premature. For this reason the formal action indicated above was taken under the suggestion of the Court and by agreement of counsel.

S. of C., p. 28.

The affidavit in support of the writ of certiorari

set forth the facts noted above and alleged that the action of the Surrogate in the premises was without jurisdiction.

On argument this view was accepted by the learned Supreme Court Justice, and the order of the Surrogate striking out the special appearance of the respondents was reversed and the plaintiffs in certiorari restored to their former position. *S. of C., p.* 31. The Court held:

> "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."
>
> *S. of C., p.* 33, *ll.* 20-30.

Meritorious Question.

The facts just narrated raise a simple issue. *Can a Surrogate entertain a petition, filed beyond the statutory period of attack, to revoke letters testamentary formerly granted by him, when it is alleged that such letters were obtained by fraud upon his court?*

No power is given the Surrogate's Court, by any statute of this State, to entertain such a petition, or to revise in any way the former proceedings of his court. The application to revoke is made more than six months after the expiration of the period for appeal and so lies wholly beyond the statute. The authority to reverse his former acts must, therefore, be found by implication from the powers specifically accorded him by the statute or inherent in his court.

It should be noted at the outset that this power has not heretofore been exercised by Surrogates of this State, and that the recognition of their jurisdiction in the present instance will add a very considerable degree of authority and power to a Court of very limited statutory jurisdiction.

The question may be approached in two ways: First, by an historical review, and, secondly, in the light of our present statutory law.

We shall show, *first,* that the office of Surrogate, as now established in this State, was borrowed from the English ecclesiastical system, and that it possesses neither the power to ~~revive~~ review its own proceedings nor the attributes of a court of general jurisdiction, whereby it might be permitted to exercise powers of revision.

We shall show, *secondly,* that the Orphans' Court Act of this State definitely denies to the Surrogate the power claimed for him by the defendant. The Honorable Justice of the Supreme Court, in upholding the petition in certiorari, assigned this ground for his decision.

I.

It is to be observed at the beginning that, for historical reasons, the New Jersey Surrogate has different functions from those of the same officer in other States. We are limited, therefore, in the discussion of this question to a consideration of the laws and decisions of New Jersey, and of England from whose system the office of Surrogate was borrowed.

History of the Office.

To understand the present scope of the Surrogate's authority, it shall be necessary to review briefly the historical events that led to the establishment of the Surrogate's Court as an independent tribunal.

The office was borrowed directly from the English ecclesiastical system of jurisdiction over the estates of deceased persons. The jurisdiction to grant probate was lodged in the consistory court of every dioscesan bishop; and proof of the will was taken before the Ordinary or his Surrogate. If the property of the deceased was distributed in more than one dioscese—*bona notabilia*—the will was proved before the Metropolitan (the archbishop) by way of special prerogative; hence called the Prerogative Court. 2 *Bl. Com.* 508-509; *Crawford vs. Lees,* 93 Atl. 201, 205. Only one of these courts—the Ordinary's Court—was transferred to New Jersey, there being no need for the Metropolitan's Court. The Ordinary's Court, becoming the high court of probate jurisdiction in this State, was known as the Prerogative Court.

By the royal grant of power to Lord Cornbury in 1702, the functions of the English Ordinary were transmitted to the Royal Governor of the Province of New Jersey. All testaments were to be proved before him and the complete control over disposition of deceased's estates was placed in his hands.

This power, in turn, was transferred by the Constitution of 1776 to the State Governors and remained in them until the Constitution of ~~1884~~ 1844, when the Chancellor was made Ordinary and invested with the Prerogatives of that office.

It was, of course, wholly impossible for a single executive to attend to the routine business of probating wills and presiding over the disputes involving decedents' estates. This, indeed, could never have been intended and inevitable that this business should be turned over to deputies or Surrogates. One of the first acts of the Royal Governor, therefore, was to vest in his deputy the usual responsibilities of the English Ordinary. We quote the following paragraph from Clevenger and Keasbey's "Courts of New Jersey."

> "When Lord Cornbury became Governor of the United Provinces and assumed the duties of an Ordinary, he appointed Thomas Revell, of Burlington, his Surrogate or deputy, and the first will recorded in the Province Book of Wills was admitted to probate by him. * * * * The Surrogate acted for the Governor in admitting this will to probate. He was exercising the jurisdiction of the Lord Bishop of London, which was reserved to the Governor in respect to the probate of wills. A Surrogate in England was a deputy or delegate of an ecclesiastical judge. The Provincial Governors were quite willing to avail themselves of the services of such a deputy in the discharge of their unaccustomed duties as Judges of the Ecclesiastical Court, and they appointed these deputies in different parts of the Province to act in their stead, upon such cases as the people choose to submit to them. In 1720, Michael Reaney was commissioned under the great seal of the Province of New Jersey. Afterwards one was appointed for each division, and, as occasion required, more, sometimes more than one in the same County."
>
> *Pp.* 127-128.

The system evolved by circumstances was that of a court whose business was handled largely by the clerks appointed by its Judge. It must not be lost sight of that while these deputies or Surrogates growing in number as the State grew in population, became more occupied in their duties, they, nonetheless, depended wholly upon the Governor, as Ordinary, for the authority of their acts.

> "When the State was in its infancy, it was inconvenient and almost impossible for our people in all parts of the Province to resort to the Governor; therefore he appointed deputies, called Surrogates, to act for him (as Ordinary). These Surrogates were appointed by commissions under the seal of the province, the commissions setting out the powers given. They were, of course, reversible at the pleasure of the Governor."
>
> *Ibid, p.* 50.

In 1784 the business of the Surrogates had become so extensive that it was found necessary to pass a law to control their operations. This Act, entitled "An Act to ascertain the power and authority of the Ordinary and his Surrogates; to regulate the jurisdiction of the Prerogative Court and to establish an Orphans' Court in the several counties of the State." (*Laws,* 1784, *p.* 135, *Chap.* 70; *Harr.* 297), is the foundation of our present Orphans' Act. This Act limited the authority of the Ordinary to the granting of probate of wills, letters of guardianship and marriage licenses, and to the hearing and final determination of all disputes that might arise thereon. By Section 1 it was provided that the Ordinary should appoint but one "deputy or Surrogate" for each county, and that his power should be

limited to his county. The Surrogate was made the Clerk of the Orphans' Court, thereby created. By Section 15, the powers and duties of the Surrogate, in respect to the probate of wills, were defined in language essentially the same as that contained in our present statute (*See Crawford vs. Lees,* 93 *Atl.* 206.) Subsequent legislation has limited rather than enlarged the functions of the County Surrogate, as shall presently be made to appear.

Nature of Surrogate's Office.

The historical origin of the Surrogate's office having thus been indicated, it becomes our duty to consider the exact nature of his office and its duties. It is evident that his office was borrowed direct from the English ecclesiastical system. In the English Ecclesiastical Courts the Surrogate was a mere clerk. The word is derived from the Latin "*surrogatus*" or "*surrogare,*" meaning "to substitute." It is defined by Bouvier as

> "a deputy or substitute of the Chancellor Bishop or Ecclesiastical Judge appointed by him. He is granted license to hold courts and adjudicate cases to the same extent and with the same authority as his principal, provided his grant of powers has been co-extensive with those possessed by his principal."

and the encyclopedic definition is as follows:

> "The word 'surrogate' in its literal significance means a substitute or one who acts for another. In this sense it was applied in the English law to the Bishop's Chancellor, an officer who usually presided in the bishop's dios-

> cesan court and who, as representative of the Ordinary, performed the judicial duties of that official."
>
> 24 *A. & E. Enc. of L.* 552.

It follows that the Surrogate in New Jersey, when first his office was established, was a mere subordinate of the Ordinary, exercising no independent powers.

It remains to consider what effect, if any, the Act of 1784 and the subsequent legislation whereby the Surrogate was made in a way independent of the Ordinary, had upon the nature of his office.

We submit that, except in certain increased and specific powers, the Surrogate's office retains its original character as that of an inferior court doing justice for a superior court. Thus in *Ordinary vs. Thatcher* (1879) 41 *N. J. L.* 403, Chief Justice Beasley, in discussing, in the Supreme Court, the effect of a guardian's bond given the Surrogate, and sued upon by the Ordinary, decided that "the receipt of the bond on the part of the Surrogate was a mere ministerial act, and in doing it he is the deputy of the Ordinary." When this decision was handed down the Orphans' Act in its present relation to the Surrogate had been passed.

In the leading case of *Abraham Courson's Will,* 4 *N. J. Eq.* 409, the Ordinary (Governor Pennington) said of the New Jersey Surrogate:

> "The Surrogates do not hold to the Ordinary the relation which the English Ordinary held to their Metropolitan. The English Ordinary has exclusive jurisdiction where the goods of the deceased are all situated in his diocese; and the Metropolitan has exclusive jurisdiction where notable goods are situated in two or more dio-

ceses. No relation of this kind subsisted between the Ordinary and Surrogate of New Jersey. The Ordinary retained jurisdiction of all cases. The Surrogate acting as his deputy had also jurisdiction of all cases submitted to him, unless some special restrictions were inserted in his commission."

pp. 413-414.

The Ordinary, in discussing further the Acts of 1784 and 1820, referred to them as merely declaratory of the existing law. *Page* 415.

Further quotations from New Jersey decisions are unnecessary in order to establish the present relation of the Surrogate as a mere deputy of the Ordinary. This was the relation he occupied by the English ecclesiastical law, and this law has determined the present character of the office in New Jersey.

In the decision of Chancellor Magie, sitting in the Prerogative Court, in *In re Hodnett's Will,* 65 *N. J. Eq.* 329 (1903), we find the following discussion of this point:

"It is unquestionable that the jurisdiction, in matters of probate, and administration, which existed in the English Ecclesiastical Courts at the time of the instructions to Lord Cornbury in 1702, were by those instructions conferred upon the Governors of New Jersey. That jurisdiction was exercised by the successive Governors of the Province, or Colony, and of the State after it was established by the Constitution of 1776, and the successful revolution of the United States. By the Constitution of 1844, the same jurisdiction was transferred to the Chancellor, whose appointment was thereby

provided for, to be exercised by him as Ordinary sitting in the Prerogative Court."
337-338.

Vice-Chancellor Leaming, in *Crawford vs. Lees,* 93 *Atl.* 201, 206, in discussing this point, said:

"From the decisions already referred to it is clear that the jurisdiction of probate of wills conferred by our Orphans' Court Act on our Surrogates' Courts, Orphans' Courts and Ordinary, has been uniformly regarded as essentially the same probate jurisdiction formerly exercised by the Ecclesiastical Courts of England, in their administration by the Surrogate, Ordinary and Metropolitan."

The Surrogate's Court, by reason of its origin and of its specified powers, is necessarily one of limited jurisdiction only and exercises only those powers which are directly conferred upon it by the various statutes. In *Bloomfield vs. Ash,* 4 *N. J. L.* 314 (1810), a suit on an administrative bond, in the Supreme Court, Kirkpatrick, C. J., had occasion to remark:

"It may not be amiss to observe that formerly the grant of administration in this State vested entirely in the Ordinary; that inferior courts, lately created by Act of the Assembly, which now participate in that power, possess so much of it, and so much only, as is expressly granted to them, and that the residue still remains where it originally was."

It follows from the above that the Surrogate's Court as existing today, is a court of limited and express powers, created and existing as a branch

of the Ordinary's Court and that the Surrogate, though in his appointment independent of the Ordinary, is, nonetheless, in the performance of the functions of his office, a deputy to the Ordinary. It remains to review briefly those decisions of our Courts which interpret the jurisdiction of the Surrogate.

Judicial Opinion.

The exact issue now under discussion has never been decided by the Supreme Court or the Court of Errors and Appeals. While indirectly before these courts on more than one occasion, in no case as yet has it received judicial determination.

Thus, in *Straub's Will,* 49 *N. J. Eq.* 264, the Ordinary (Magill) ventured the opinion that "the application of the petitioner should have been made to the Surrogate, for it is substantially an application to reprove the will; the method of direct attack upon a probate previously had by proof in common form." (*Page* 266.)

The Court of Errors and Appeals affirmed this decision without comment (*Scharer vs. Schmidt,* 50 *N. J. Eq.* 795). The approval of the decision, however, was not intended to indicate approval of the opinion of the Ordinary, respecting the jurisdiction to require probate in solemn form. *In re Hodnett's Will,* 65 *N. J. Eq.* 329, 335.

Shortly after this decision, the Court of Errors and Appeals in *Gordon vs. Old,* 52 *N. J .Eq.* 317, said, in their *per curiam* opinion:

> "Whether when a will is admitted to probate in compliance with the statute and the practice of our courts, the Court, on 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 English law as solemn form, and *if so by what practice and proceeding and in what court* such an investigation should be conducted, we do not decide."
> *p.* 319.

—thus indicating that the question was entirely unsettled as far as they were concerned.

The decision in *Straub's Case,* moreover, was expressly disapproved by the Ordinary in *Murray vs. Lynch,* 64 *N. J. Eq.* 291.

The Court likewise refused in *In re Evans,* 29 *N. J. Eq.* 571, 575 (*Prer. Ct.* 1878) to decide the question, saying:

> "Whether the Surrogate may reverse and set aside his decree when unlawfully made as in the present case, and where it has been made through fraud or imposition, practiced upon him, it is not necessary now to consider."

What is probably the leading case on the constitution of the different courts of probate in this State is *Matter of Abraham Courson's Will,* 4 *N. J. Eq.* 408. This case has already been cited in the preceding discussion in support of our statement that the Surrogate today is a mere deputy to the Ordinary. The case involved a petition to the Ordinary to admit a will to probate which had previously been probated at the instance of another executor before the Surrogate in Morris County. The Court held merely that the jurisdiction of the Surrogate was concurrent with that of the Ordinary and as it had first exercised its jurisdiction its decision would not be disturbed.

In *Ryno vs. Ryno,* 27 *N. J. Eq.* 522, the Surrogate, two years after a previous grant of probate, had revoked the letters granted and allowed a subsequent grant of letters of administration. The validity of this later act came up on a bill of interpleader. The Court held that by a grant of probate the power of the Surrogate is exhausted and his jurisdiction over the subject-matter at an end.

Quidort vs. Pergeaux, 18 *N. J. Eq.* 477, and *Steele vs. Queen,* 67 *N. J. L.* 99, both decided that a Surrogate presided over a court whose decisions cannot be collaterally attacked. These cases, however, decided nothing upon the question under discussion.

The facts in *Murray vs. Lynch,* (Magie, Ordinary), 64 *N. J. Eq.* 290 (*Prer. Ct.* 1902)—also known as *In re Cartwright*—come very near to the facts presented by the plaintiff's petition. In that case, after an alleged will had been probated by the Surrogate of Essex County, and when the period for appeal had expired, certain heirs at law filed a petition with the Surrogate stating objections to the will as not well executed or induced by undue influence. The petition treated the probate of the Surrogate as of common form and prayed that respondents should be required to reprove it in solemn form. The Surrogate issued citations to the parties interested returnable to the Orphans' Court. That Court, however, dismissed the petition and citations for lack of jurisdiction, and its action was affirmed upon appeal.

> "When a Surrogate has duly acted upon such an application and has made an adjudication and decree thereon, *the power conferred upon him has been exhausted,* and he thereafter may not issue citations requiring the parties to appear in the Orphans' Court in respect to any controversy over the probate of the will."

It is submitted that the petition filed by the present defendant before the Surrogate of Camden County is in effect a demand for proof by the plaintiffs as executors of the Mellor will in solemn form. In other words, they ask that a will which has once been proved be reproved at the mere charge of fraud in the proving—at a time long after the statutory period of appeal. They allege fraud in obtaining the letters testamentary and undue influence upon the testator, just as the petitioners alleged in *Murray vs. Lynch, supra.*

The Ordinary held, in the latter case, however, that "the probate by the Surrogate by jurisdiction conferred upon him, is not a mere probate in common form, but an adjudication upon proofs and *in rem,* reviewable only by appeal in the manner provided by the statute."

It was also the opinion of Vice-Chancellor Leaming, sitting as Vice-Ordinary, in *In re Whitehead's Estate,* 94 *Atl.* 796 (Prer. Ct. 1915) that no such jurisdiction existed as is here claimed for the Surrogate by the petitioner. That case involved a petition before the Ordinary for proof of a will in solemn form. The difficulty presented was that the will had previously been probated in common form before the Surrogate and that the period of appeal from the probate had expired. Irregularity in the execution and fraud and undue influence exercised upon the testator were alleged. The Court does not doubt the power of the Ordinary to require proof in solemn form where the instrument had previously been proved before him in common form, but found that the Ordinary had no jurisdiction to interfere with the Surrogate's decree. It was held that:

> "The Ordinary has no jurisdiction to entertain proof of a will in solemn form as a means

of setting aside a decree of probate of a Surrogate who has acted within his original jurisdiction and from whose decree the statutory period of review has expired."

The Vice-Chancellor, in his opinion, made it entirely clear that he regarded the Surrogate as lacking any power to revise his former decree. He said:

"Assuming, as for present purposes it may be assumed, that the matters set forth in the petition are true, it is obvious that relief will be extended to the petitioner in this court if jurisdiction can be found to exist. Especially is this true in view of the circumstances that it has been held that the Surrogate and Orphans' Court are without jurisdiction to entertain a like petition. (Citing *Murray vs. Lynch, supra*) * * * * Unless this Court can entertain the present petition it can well be doubted whether any remedy exists whereby a judicial inquiry can be made touching the validity of the will in question. * * * *"

p. 797.

Lastly, it is of interest to note that the exact question at issue has come up on two different occasions before probate courts of this State.

In *In re Seid* (*Essex County Surrogate,* 1915), 38 *N. J. L. J.* 377, the Surrogate upheld his own jurisdiction to entertain a petition for revocation filed beyond the statutory period.

In another case, however, exactly the opposite conclusion was reached. The question came before the Orphans' Court of Camden County. The Surrogate had refused to revoke a decree previously made by him admitting to probate a certain will. This

order was appealed to the Orphans' Court. That Court answered the question "did the Surrogate have authority to set aside his former decree on the ground set forth in the petition for revocation" in the negative, saying, "the probate of a Surrogate subject to such attacks would be of very little value and emphasizes the importance of the ruling already quoted. *Murray vs. Lynch, supra.*" This decision is on file in the office of the Surrogate of Camden County.

Conclusion.

Without citing any of the other cases that indirectly involved the question at issue, we may say in conclusion that there is no positive authority nor even any indirect authority to sanction the exercise of the jurisdiction claimed by the Surrogate in this case. Indeed, the later cases, particularly *Murray vs. Lynch* and *In re Whitehead's Estate,* are directly opposed to permitting the Surrogate to entertain petitions for the revocation of his official decrees.

We have shown besides that the Surrogate's Court is a court of expressed powers and limited jurisdiction—as said in *Bloomfield vs. Ash, supra,* "the Surrogate's Court possesses so much power and so much only as is expressly granted to it."

Numerous analogies suggest themselves at this point. A Common Council cannot revoke a license which it has previously granted save for the exact statutory reasons allowed. *State vs. Hightstown,* 46 *N. J. L.* 102; *Decker vs. Board of Excise,* 57 *N. J. L.* 603. In what respect does the Surrogate's Court differ in principle from a Council or Excise

Board? It might as well be argued that the licensing agent of the Motor Vehicles Department might annul or revoke for cause a license previously granted by him.

We submit that neither in principle or precedent is there to be found any just basis for the claim advanced of jurisdiction in the Surrogate to revoke his own orders.

II.

The preceding discussion has been a review of the authorities dealing with the implied powers of the Surrogate's Court. We have shown that the Courts have refused to admit any implied power in the Surrogate to revoke or reconsider his own decrees. This has been the negative side of the discussion. There is an affirmative and stronger side to be found in certain sections of the Orphans' Act, which expressly deny to the Surrogate the jurisdiction now claimed for him.

We refer particularly to Section 13 of the Orphans' Court Act, 3 *Com. St.* 3816, which provides that:

> "The Surrogates of the several Counties of this State shall take depositions to wills and admit the same to probate and grant letters testamentary thereon, but in case doubts arise on the face of the will or a caveat is put in against proving a will, or a dispute arises respecting the existence of a will, the Surrogate shall not act in the premises, but shall issue citations to all persons concerned to appear in the Orphans' Court of the same County, which Court shall hear and determine the matters in controversy."

By this section the will of the Legislature is made clear that the Surrogate shall in no event determine any dispute or sit as Judge over any issue. The prohibition is absolute. Where "a dispute arises respecting the existence of a will" the Surrogate "*shall not act in the premises.*" Yet, in the present case, the Surrogate attempted to preside as Judge over a dispute respecting the existence of a will.

The claim of the defendant is that a will formerly probated by the plaintiffs is void and of no effect at law. He contends that he has the right to bring the plaintiffs before the Surrogate and put them to proof of that will which they had formerly established. In view of the plain words of the Act, this contention cannot be upheld.

In *Ryno vs. Ryno,* 27 *N. J. Eq.* 522, the Court of Errors and Appeals decided:

> "If the probate of a will is irregular or voidable for any cause the remedy is by appeal to the Ordinary, or by proceeding for the revocation of the letters."

It was held in *Murray vs. Lynch,* 64 *N. J. Eq.* 290, (*Prer. Ct.* 1902) that:

> "When application is made to the Surrogate to admit a will to probate and grant letters testamentary thereon, jurisdiction is conferred upon him to act thereon, except in three classes of cases, viz., (1) when he finds doubts arising on the face of the will; (2) when a caveat is put in against proving a will; or (3) when a dispute arises respecting the existence of a will. In either of the cases above cited the Surrogate is forbidden to act upon the application, but is required to issue citations to all persons concerned, returnable to the Orphans' Court, to hear and determine the matters in controversy."

The facts in this case have already been set forth and the pertinency of this decision is evident.

The same restriction upon the power of the Surrogate to grant letters of administration is found in Section 26 of the Act. The letters are to be granted by the Surrogate

> "Unless a dispute arises as to the right of administration in which case he shall issue citations to all parties concerned to appear in the Orphans' Court of the same County, which Court shall hear and determine the matter in controversy."

If the present petitioner had in due time filed a caveat to the will proved by the plaintiffs, and had thereby raised the issue of insanity in the testator and the existence of an earlier will, it would have been the immediate duty of the Surrogate to refuse to try the issue and to cite the parties to appear before the Orphans' Court. It is not conceived why a greater jurisdiction should be acquired merely because the same matters are brought up *after* the expiration of the period of appeal.

Another inconvenient result of allowing the Surrogate to review his own judgments, and to sit as a Judge where the issue of fraud is raised, as in the present case, is that a layman might be forced to preside at a trial at law, hear and reject evidence, define the issues and apply the principles of law to the question before him. All this is unprovided for by the Act. It is not required that the Surrogate possess any knowledge of law or experience in its practice. The office is plainly designed for the average business man and does not call for the exercise of legal talents. In New Jersey today, a large number of Surrogates are laymen, unlearned in the

law, to whom the office of Judge presiding at a trial would be a novelty. The circumstance that no provision was made for such an emergency is the strongest evidence that the legislators never intended that an issue of this sort should be decided in the Surrogate's Court.

III.

The previous review of authorities, and in particular the authority of *Murray vs. Lynch,* makes it clear that no right remains in the defendant to raise the issue which they have sought to raise. There is, in fact, no means by which the present will, duly proved before the Surrogate some fifteen months ago, can be attacked, or by which any new papers testamentary can be presented for probate in the case. We do not conceive that this situation involves any substantial injustice. The defendant was given his opportunity to object within the three months following the probate. At the conclusion of that period, no right of objection remained.

It was this consideration that moved the learned Justice of the Supreme Court to reverse the order of the Surrogate.

> "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."
>
> *S. of C., p.* 33, *ll.* 20-25.

We are not at liberty to discuss the reasonableness of the three-months' period allowed by the Act within which to prosecute appeals from a Surro-

gate's decisions. The brief period was established in order to expedite the administration of deceased's estates. As a matter of fact, death is a notorious event and the three-months' period is in the vast number of cases sufficient time to attack an alleged invalid claim of administration. It is inevitable that in some cases it must work wrong. This, indeed, is true of all statutes of limitation. We can concern ourselves only with the validity of a practice or rule of law. We cannot be deterred by the possible inequality of that law's application.

Were the issues raised by this defendant in the Surrogate's Court now before a court of general jurisdiction, unhampered by statutes of limitations, the only question would be that of laches. Has the petitioner been diligent in applying to the court? The court in such case would establish its own period of limitation. But in the present case that period is fixed for the court by the Legislature. Its policy is determined by the letter of the law and there is no room for discussion of its policy.

We submit that the Surrogate's Court, as constituted in New Jersey, has no inherent jurisdiction to entertain a petition asking the revocation of a former decree of the Court; and that, in addition, the exercise of such jurisdiction is prohibited by the Orphans' Court Act. We ask, therefore, that the appeal of the defendants in certiorari be dismissed.

WILSON & CARR,
Attorneys for Plaintiffs in Certiorari.

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WRIT OF CERTIORARI.

NEW JERSEY, *ss.*

The State of New Jersey to Harry Reeves, Surrogate of the County of Camden;

[SEAL]

GREETING: We being willing, for certain reasons appearing by the affidavit of Arthur B. Mellor, filed in this cause, to be certified of a certain order to show cause, made by you on the ninth day of December, A. D. nineteen hundred and fifteen, and of the petition filed with you by Joseph Kaighn, upon which said order is based, and by which said order you require Edgar Mellor and Arthur B. Mellor, executors of the last will and testament of William B. Mellor, deceased, to show cause before you, on Monday, the twentieth day of December, A. D. nineteen hundred and fifteen, why the probate of said last will and testament of William B. Mellor, deceased, should not be set aside and revoked, and also why a certain other paper writing, bearing date the sixth day of March, A. D. nineteen hundred and ten, signed by said William B. Mellor, should not be admitted to probate, by you, as the last will and testament of the said William B. Mellor, deceased.

We command you, that the said order to show cause and said petition, together with all matters touching and concerning the same, as fully and entirely as before you they remain, to our Justices of our Supreme Court of Judicature, at Trenton, on the 5th day of January next, you certify and send,

together with this writ, that therein may be done what of right out to be done according to the laws of this State.

Witness, the Honorable William S. Gummere, Chief Justice of our said Supreme Court, at Trenton, this sixteenth day of December, A. D. nineteen hundred and fifteen.

WM. C. GEBHARDT,
Clerk.

WILSON & CARR,
Attorneys.

RETURN.

(Filed January 4, 1916)

CAMDEN COUNTY SURROGATE'S OFFICE.

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

In obedience to the mandate of the within writ, I hereby return the Order to Show Cause and Petition together with all matters concerning and touching the same as fully and entirely as before me they remain as in and by the said writ I am commanded.

Witness my hand and seal of office, this third day of January, A. D. one thousand nine hundred and sixteen.

HARRY REEVES,
Surrogate.

(SEAL)

Petition for Probate.

(Filed Nov. 4, 1914)

To Harry Reeves, Esquire, Surrogate of the County of Camden, New Jersey.

In the matter of the Probate of the last will and testament of William B. Mellor, dec'd.	Petition for Probate and Letters Testamentary.

The petition of Edgar Mellor and Arthur B. Mellor;
2849 No. Baily St., 625 Miller Street
Philadelphia, Pa.
respectfully showeth that they are the Executors named in the last will and testament of William B. Mellor dated the twenty-sixth day of May, A. D. 1914. That said William B. Mellor, of Audubon, departed this life at Audubon in the County of Camden, and State of New Jersey, on Saturday the twenty-fourth day of October, A. D. 1914, at 5.30 o'clock A. M. leaving him surviving as his heirs at law and next of kin the following-named persons, to wit:

	Kin.	P. O. Address
Edgar Mellor	Son	Phila., Pa.
Arthur B. Mellor	Son	Phila., Pa.
Frank M. Mellor	Son	Phila., Pa.
Gertrude E. Mellor	Daughter	Phila., Pa.

That said testator was possessed of personal property to the value of $5,000.00. Therefore the said Edgar Mellor and Arthur B. Mellor doth respect-

fully apply for probate of the last will and testament, and for letters testamentary thereon.

Dated November 4th, 1914.

Edgar Mellor
Arthur B. Mellr.

State of New Jersey, } ss.
Camden County }

Edgar Mellor and Arthur B. Mellor, the petitioners, being duly sworn according to law, did depose and say that the matters and things set forth in the above application are true to the best of their knowledge and belief.

Edgar Mellor
Arthur B. Mellor

Sworn and subscribed to before me at Camden, the fourth day of November, 1914.

Harry Reeves,
Surrogate.

Will.

In the Name of God, Amen.

I, William B. Mellor, residing at No. 132 Beloit Ave., Audubon, Camden Co., N. J., do make and publish this my last Will and Testament hereby revoking any and all wills by me at any time heretofore made.

Item:—I direct that all my just debts and funeral

expenses be paid out of my estate as soon after my death as may be.

Item:—I give, devise and bequeath unto Mrs. —— Church with whom I am now living the sum of Five hundred dollars.

Item:—I give, devise and bequeath to my four children Edgar Mellor; Arthur B. Mellor; Frank M. Mellor and Gertrude E. Mellor all the rest, residue and remainder of my estate whether real, personal or mixed, in equal parts and shares, share and share alike, their heirs and assigns forever.

I hereby nominate and appoint my sons Edgar Mellor and Arthur B. Mellor, Executors of this my last Will and Testament.

In witness Whereof, I have hereunto set my hand and seal this twenty-sixth day of May, A. D. 1914.

Wm. Mellor.

Signed, sealed, published and declared by the above testator William B. Mellor as and for his last Will and Testament, in the presence of us, who in his presence and in the presence of each other and at the testator's request, have subscribed ourselves as witnesses hereto.

William Stauss,
307 8th Ave., Haddon Heights, N. J.
William P. Strode,
211 Wyoming Ave., Audubon, N. J.
Benj. N. Faunce,
Phila., Pa.

Proof by Subscribing Witnesses.

State of New Jersey,
Camden County, } ss.

William P. Strode and Benjamin N. Faunce, two of the subscribing witnesses to the within and foregoing last Will and Testament, being by me duly sworn, did depose and say that these deponents and William Stauss, the other subscribing witness to the last Will and Testament were present at the same time and did see William B. Mellor the testator therein named, sign his name to the said last Will and Testament and seal the same, and did hear him publish, pronounce and declare the within and foregoing writing to be his last Will and Testament and that at the time of the doing thereof the said William B. Mellor the testator aforesaid was of sound and disposing mind and memory, so far as these deponents know and as they verily believe, and that these deponents and the said William Stauss, the other subscribing witness did sign their names as witnesses to the said last will and testament at the same time, at the request and in the presence of the said testator and in the presence of each other.

William P. Strode,
Benj. N. Faunce.

Sworn and Subscribed at Camden, the fourth day of November, in the year of our Lord one thousand nine hundred and fourteen before me, the Surrogate of the County of Camden.

Harry Reeves, Surrogate.

Affidavit of Executors.

State of New Jersey,
Camden County, } ss.

Edgar Mellor and Arthur B. Mellor, the Executors named in the within and foregoing last Will and Testament being by me duly sworn did depose and say that the within and foregoing writing contains the true last Will and Testament of William B. Mellor, deceased, the testator therein named, so far as these deponents know and as they verily believe; that they will well and truly perform the said last Will and Testament, by paying, first, the debts of the said deceased, and then the legacies in the said last Will and Testament specified, so far as the goods and chattels, rights and credits of the said deceased can thereunto extend; that they will make and exhibit into the Surrogate's office of the County of Camden, within the time required by law, a true and perfect inventory of all and singular the goods and chattels, rights and credits, of the said deceased that have, or shall come to their knowledge or possession, or to the possession of any other person or persons for their use, and render a just and true account when thereunto lawfully required; and also to diligently and faithfully regard and well and truly comply with the provisions of the Act relating to the Collateral Inheritance.

Edgar Mellor
Arthur B. Mellor.

Sworn and Subscribed at Camden, the fourth day of November, in the year of our Lord one thousand nine hundred and fourteen, before me,

Harry Reeves,
Surrogate of the County of Camden.

Executors' Bond.

Know All Men by these Presents, That We Edgar Mellor, and Arthur B. Mellor, principal, and United States Fidelity and Guaranty Company, surety, are held and firmly bound unto the Ordinary of the State of New Jersey, in the sum of Ten thousand Dollars to be paid to the said Ordinary or his assigns; to which payment, well and truly to be made we bind ourselves and each of us jointly and severally our and each of our heirs, successors, executors and administrators.

Sealed with our seals, and dated the fourth day of November in the year of our Lord one thousand nine hundred and fourteen.

The condition of this obligation is, that whereas, William B. Mellor, late of Camden County, New Jersey, deceased, in and by his last Will and Testament, duly proved before the Surrogate of said County, did appoint Edgar Mellor and Arthur B. Mellor the executors thereof, and whereas the said Edgar Mellor and Arthur B. Mellor executors as aforesaid, residing in the State of Pennsylvania required to give security as such foreign executors,

Now, therefore, if the said Edgar Mellor and Arthur B. Mellor shall well and faithfully perform the duties devolving upon them as such foreign executors according to law, and shall make a just and true account of their administration within twelve calendar months from the date of this obligation, and all the rest and residue of the goods, chattels and credits which shall be found remaining in their hands upon the account of the said administration, the same being first examined and allowed by the Orphans' Court of the County of Camden, or other

competent authority, shall deliver and pay unto such person or persons, respectfully, as is, are or shall be, by law be entitled to receive the same, then the above obligation to be void and of none effect, or else to remain in full force and virtue.

Edgar Mellor (L. S.)
Arthur B. Mellor (L. S.)
The United States Fidelity & Guaranty Company.
By Walter R. Carroll, Attorney-in-fact. (L. S.)

Signed, Sealed and Delivered, in the presence of C. M. Powell Quicksall, as to E. Mellor and A. B. Mellor.

[ENDORSED]

Foreign Executor's bond.
In the matter of the administration of the estate of William B. Mellor, deceased.
Dated, November 4th, 1914.
Filed November 6th, 1914, and recorded in book "L" of miscellaneous bonds, page 367.

Harry Reeves,
Sur.

State of New Jersey,
Camden County, ss.

I, Harry Reeves, Surrogate of the County of Cam-

den, (L. S.) do certify that the last will and testament of

William B. Mellor

late of the County of Camden, New Jersey, deceased, was admitted to probate Edgar Mellor and Arthur B. Mellor, The Executors named therein proved the same before me on the sixth day of November, A. D. 1914, and are duly authorized to take upon themselves the administration of the estate of the testator agreeably to the said will.

Witness my hand and seal of office, the sixth day of November, in the year of our Lord, one thousand nine hundred and fourteen.

Harry Reeves, Surrogate.

Order for Probate.

Camden County Surrogate's Office.

In the matter of the probate of the alleged will of William B. Mellor, deceased. } Order for Probate.

Application having been made by Edgar Mellor and Arthur B. Mellor, executors for probate of the last will and testament of William B. Mellor, 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 sixth day of November, A. D., 1914, adjudged that the instrument offered for probate in this matter in the last will and testament of William B. Mellor, deceased, and the same is hereby admitted to probate and it is ordered that letters testamentary be issued thereon to Edgar Mellor and Arthur B. Mellor, the executors named in said will, who may qualify thereunder.

Harry Reeves,
Surrogate of the County of Camden.

[ENDORSED]

Last Will and Testament
of

Deceased.
Order for Probate
Filed ————A. D. 19—— and recorded in Book —— of Wills, page —— &c., in the Surrogate's Office of the County of Camden, New Jersey.
———— Surrogate.

Petition to Revoke Probate.

(Filed Dec. 9, 1915)
Camden County Surrogate's Office

In the matter of the probate of the last will and testament of William B. Mellor, deceased.	Petition to revoke Probate, &c.

To the Honorable Harry Reeves, Surrogate of the County of Camden, New Jersey.

The petition of Joseph Kaighn, of the City and County of Camden and State of New Jersey, respectfully shows:—

1. That on or about the 26th day of May, 1914, one William B. Mellor made and executed a certain paper writing purporting to be his last will and testament, bearing date the day and year aforesaid.

2. That in and by said alleged last will and testament of the said William B. Mellor, he appointed Edgar Mellor and Arthur B. Mellor executors thereof.

3. That the subscribing witnesses to the said alleged last will and testament were three in number, to wit: William Stauss, William P. Strode and Benjamin N. Faunce.

4. That on the 24th day of October, 1914, the said William B. Mellor departed this life, and on the 4th day of November, 1914, the said Edgar Mellor and Arthur B. Mellor presented a petition to your Honor for the probate of the said alleged last will and testament.

5. That at the time of the application for such probate, William P. Strode and Benjamin N. Faunce, two of the subscribing witnesses to the alleged will, made oath that the said William B. Mellor at the time of making of such will was of sound and disposing mind and memory so far as they knew and they verily believed.

6. That at the time of the making of the said alleged will, the said William B. Mellor was not of sound and disposing mind and memory and the subscribing witnesses to the said will well knew this fact, and that as a matter of fact, at the time of the execution of said last will the said William B. Mellor was insane and unable to make any intelligent disposition of his property and was without testamentary capacity.

7. That the said will was prepared by the said Benjamin N. Faunce, one of the subscribing witnesses to said will, who in conjunction with the said Arthur B. Mellor and Edgar Mellor procured its execution, although all of the said parties knew that the said William B. Mellor was insane and without testamentary capacity.

8. That the statement in the affidavit by the said William P. Strode and Benjamin N. Faunce upon which the said alleged will was admitted to probate,

was false to the knowledge of the said William P. Strode and Benjamin N. Faunce, and the said Edgar Mellor and Arthur B. Mellor, at the time that they applied for the admission of the said alleged will to probate well knew that the said William B. Mellor was insane at the time of the execution thereof.

9. That relying upon and in pursuance of the said application for probate, and the proofs thereon, your Honor admitted the said alleged will to probate on the 6th day of November, 1914.

10. That it was the intention of the said Benjamin N. Faunce, William P. Strode, Edgar Mellor and Arthur B. Mellor to induce your Honor to believe that at the time of the execution of the said will, the said William B. Mellor was of sound and disposing mind and memory and the said parties conspired together for that purpose, and the application for the probate of said will and making of the proofs thereon was a gross fraud and imposition upon your Honor.

11. That on or about the 16th day of March, 1910, the said William B. Mellor made, published and declared a paper writing, purporting to be his last will and testament, a copy of which is hereunto annexed, marked Schedule A and hereby made part hereof.

12. That in and by said last mentioned will, the said William B. Mellor appointed your petitioner executor thereof.

13. That the existence of the said last mentioned will first came to the knowledge of your petitioner on the first day of November, 1915.

14. Your petitioner avers that at the time of the making of said last will and testament, the said William B. Mellor was of sound and disposing mind and memory and had full testamentary capacity, and was in possession of all of his faculties and fully competent to make such will.

15. Your petitioner further avers that the will first above mentioned is not the last will and testament of the said William B. Mellor, but that the will lastly above mentioned is the true last will and testament of the said William B. Mellor.

16. That the said William B. Mellor left him surviving as his heirs at law and next of kin the following named persons, to wit:

Edgar Mellor	Son	Philadelphia, Pa.
Arthur B. Mellor	Son	Philadelphia, Pa.
Frank M. Mellor	Son	Philadelphia, Pa.
Gertrude E. Mellor	Daughter	Philadelphia, Pa.

17. That the said William B. Mellor was possessed of personal property to the value of about five thousand dollars.

18. Your petitioner therefore prays that the said last will and testament dated the sixteenth day of March, A. D. 1910, may be duly admitted to probate by your Honor, and that your petitioner may be granted letters testamentary thereon, and that the probate of the alleged last will and testament dated May 26th, 1914, may be revoked and set aside, and that your petitioner may have such further relief in the premises as may be proper.

Stackhouse and Kramer,
Proctors for Petitioner.

State of New Jersey,
Camden County, } ss.

Joseph Kaighn, of full age, being duly sworn according to law on his oath says, that he is the petitioner in the foregoing petition and that the matters and things therein set forth are true to the best of his knowledge, information and belief.

Joseph Kaighn.

Sworn and Subscribed before me, this first day of December, 1915.

William A. Forman, Jr.,
Notary Public of N. J.

Order to Show Cause.

(Filed Dec. 9, 1915)

Camden County Surrogate's Office.

In the matter of the probate of the last will and testament of William B. Mellor, deceased.	On Petition to Revoke Probate. Order to Show Cause

Upon reading the duly verified petition of Joseph Kaighn, praying to be relieved touching the matters therein contained;

It is on this ninth day of December, 1915, on motion of Stackhouse & Kramer, Proctors for Joseph Kaighn, ordered that Edgar Mellor and Arthur B.

Mellor, executors under the alleged last will and testament of William B. Mellor, deceased, show cause before the undersigned, Surrogate of the County of Camden, on Monday the twentieth day of December, nineteen hundred and fifteen, at ten o'clock in the forenoon, at the Court House, Camden, New Jersey, why the probate of a certain paper writing purporting to be the last will and testament of William B. Mellor, dated May 26th, 1914, should not be revoked, and set aside, on the ground set forth in the petition, and also why a certain other paper writing dated March 6th, 1910, signed by said will and testament of the said William B. Mellor.

It is further ordered that a copy of this order and said petition, which need not be certified, be served upon said Edgar Mellor and Arthur B. Mellor, or their proctors, within five days from the date hereof, and that service upon said Edgar Mellor and Arthur B. Mellor may be made either personally or by leaving the same at their dwelling house or usual place of abode.

And it is further ordered that the parties and each of them have leave to take testimony before me at such time and place on the return day of this order.

Harry Reeves,
Camden County Surrogate.

[ENDORSED]

Camden County Surrogate's office.
In the matter of the Probate of the last will and testament of William B. Mellor, deceased.

William B. Mellor should not be admitted to probate as the last

On petition to Revoke Probate
Order to Show Cause.
Stackhouse & Kramer,
Proctors for Petitioner,
503-05 Market St.,
Camden, N. J.

Received Dec. 9, 1915; and recorded in the Surrogate's office of the County of Camden, in Book B. of Surrogate's orders page ....

Harry Reeves, Surrogate.

Schedule A.

I, William B. Mellor, of No. 23 Beloit Avenue, in the Borough of Audubon, County of Camden, and State of New Jersey, being of sound mind and memory, do make, publish and declare this my last will and testament, as follows:

First: It is my will and I do hereby order and direct that all of my just debts and funeral expenses be paid out of my estate as soon as conveniently may be after my decease.

Second: I give and bequeath unto my son Arthur B. Mellor the sum of Four Hundred Dollars.

Third: I give and bequeath unto my son Frank Mills Mellor the sum of Four Hundred Dollars.

Fourth: I give and bequeath unto my daughter Gertrude Elizabeth Mellor the sum of Four Hundred Dollars.

Fifth: All the rest, residue and remainder of my estate both real and personal, of whatsoever kind and wheresoever situate, I give, devise and bequeath unto Mistress Rosa Church, now residing at No. 23

Beloit Avenue, in the Borough of Audubon, County of Camden and State of New Jersey, her heirs and assigns forever.

Sixth: If any legatee or devisee herein named shall die before me, I give and devise the legacy or devise intended for him or her, to his or her heirs, executors and administrators, to be applied as if the same had formed part of the estate of such legatee or devisee at his or her death.

Lastly: I do hereby make, constitute and appoint Joseph Kaighn executor of this my last will and testament with full power to sell any and all real estate either at public or private sale, at such time and for such prices as he may think best, in as full and ample a manner as I could do if living; hereby revoking all former wills by me heretofore made, and declaring these presents only to be and contain my last will and testament.

In witness whereof, I have hereunto set my hand and seal this sixteenth day of March, in the year of our Lord one thousand nine hundred and ten.

William B. Mellor, (S.)

Signed, sealed, published and declared by William B. Mellor, the above named testator, as and for his last will and testament, in the presence of us, both being present at the same time, who in his presence, and at his request and in the presence of each other, have hereunto subscribed our names as witnesses thereto.

Isaac Seligman
117 Market St.,
Camden, N. J.
Wm. A. Forman, Jr.,
#414 Pearl St., Camden, N. J.

[ENDORSED]

Camden County Surrogate's Office.
In the matter of the Probate of the last will and testament of William B. Mellor, deceased.
Petition to revoke probate, &c.
Stackhouse & Kramer,
Proctors for Petitioner,
503-05 Market St.,
Camden, N. J.
Filed Dec. 9, 1915.
Harry Reeves, Surrogate.

Special Appearance.

CAMDEN COUNTY SURROGATE'S OFFICE

In the matter of the probate of the last will and testament of William B. Mellor, deceased.	On petition to revoke probate. Special Appearance.

Arthur B. Mellor and Edgar Mellor, executors of the last will and testament of William B. Mellor, deceased, hereby enter a special appearance in the above stated proceeding for the sole and only purpose of objection to the jurisdiction of the Surrogate of Camden County to entertain said petition or to make any order thereon, other than to dismiss said petition for lack of jurisdiction.

Arthur B. Mellor and Edgar Mellor,
Executors of William B. Mellor,
deceased.
By Wilson & Carr, Proctors.

[ENDORSED]

Camden County Surrogate's Office
In the matter of the Probate of the last will and testament of William B. Mellor, deceased.
On Petition to Revoke Probate.
Special Appearance.
Wilson and Carr, Attorneys,
Fourth and Market Streets,
Camden, New Jersey.
Filed Dec. 17, 1915.
Harry Reeves, Surrogate.

Answer.

CAMDEN COUNTY SURROGATE'S OFFICE.

In the matter of the probate of the last will and testament of William B. Mellor, deceased.	On petition to revoke probate. Answer of Arthur B. Mellor, and Edgar Mellor, executors of William B. Mellor, deceased.

Arthur B. Mellor and Edgar Mellor, executors of William B. Mellor, deceased, having entered a special appearance for the sole and only purpose of objecting to the jurisdiction of the Surrogate of Camden County, to entertain the said petition or make any order thereon other than to dismiss said petition for lack of jurisdiction, hereby answer said petition:

1. They deny that the Surrogate of Camden County has jurisdiction to entertain said petition or to make the order to show cause thereon, which he did.

2. They deny the jurisdiction of the Surrogate of Camden County to determine the matters set forth in said petition or to make any order whatsoever on said petition except to dismiss the same for lack of jurisdiction.

3. They deny the jurisdiction of the Surrogate of Camden County to grant the relief prayed for in said petition or to proceed thereon in any manner whatsoever.

Wilson & Carr,
Proctors for Arthur B. Mellor and Edgar Mellor, Executors of William B. Mellor, deceased.

[ENDORSED]

Camden County Surrogate's Office
In the matter of the probate of the last will and testament of William B. Mellor, deceased.
On petition to revoke probate.
Answer of Arthur B. Mellor, and Edgar Mellor, executors of William B. Mellor, deceased.
Wilson & Carr, Attorneys,
Fourth and Market Streets,
Camden, New Jersey.
Filed Dec. 17, 1915.
Harry Reeves,
Surrogate.

Statement by Surrogate.

CAMDEN COUNTY SURROGATE'S OFFICE.

Upon the return day of the Rule to Show Cause, attorneys for the respective petitioners appeared before me at the Camden County Court House, Messrs. Stackhouse & Kramer, representing the petitioner; Joseph Kaighn, and Walter R. Carroll, Esq., of Messrs. Wilson & Carr, representing Arthur B. Mellor and Edgar Mellor, executors of William B. Mellor, deceased, the respondents.

The proctors for the petitioner stated orally the object of the proceedings. Mr. Carroll stated that an answer and special appearance objecting to the jurisdiction of the Surrogate to entertain the proceedings, had been filed, and called upon me to decide at that time whether I would assume jurisdiction over the proceedings.

I stated that I would reserve the question of jurisdiction for the present, but if the petitioner desired, I would proceed to hear the testimony and pass upon the question of my jurisdiction in the matter later. Mr. Carroll then served upon me the writ of certiorari and further proceedings were suspended.

Harry Reeves,
Surrogate Camden Co., N. J.

Certification.

STATE OF NEW JERSEY,

County of Camden.

I, Harry Reeves, Surrogate of the County of Camden, do hereby certify that the foregoing is a true copy of the petition to revoke Letters Testamentary, Rule to Show Cause, Answer and Special Appearance in the matter of the estate of William B. Mellor, deceased, also copy of Petition for Probate, Last Will and Testament, together with the proofs thereof, upon which Letters Testamentary were granted unto Edgar Mellor and Arthur B. Mellor, the Executors named therein, November 6th, A. D. 1914, also copy of Foreign Executor's Bond. And the same would be held as legal evidence in the Courts of the State of New Jersey.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at Camden, this third day of January, A. D. 1916.

(Seal) Harry Reeves, Surrogate.

REASONS.

(Filed Jan. 15, 1916)

NEW JERSEY SUPREME COURT.

ARTHUR B. MELLOR and EDGAR MELLOR, Executors of William B. Mellor, deceased,
Plaintiffs in Certiorari,

VS.

JOSEPH KAIGHN,
Defendant in Certiorari.

ON CERTIORARI.
REASONS FOR REVERSAL.

The said prosecutors by Wilson and Carr, their attorneys, come and pray that a certain order to show cause made by the Surrogate of Camden County on the ninth day of December, A. D. nineteen hundred and fifteen, based upon a certain petition filed with said Surrogate by Joseph Kaighn, and the proceedings of said Surrogate had upon said order to show cause and said petition, may be set aside, reversed and for nothing holden, for the following reasons:

1. That the Surrogate of Camden County is without power and jurisdiction to hear and determine the matters and things in said petition averred and set forth and to grant the relief prayed for in said petition.

WILSON & CARR,
Attorneys of Prosecutors.

NOTICE OF MOTION TO STRIKE OUT SPECIAL APPEARANCE, ETC.

(Filed Jan. 24, 1916)

CAMDEN COUNTY SURROGATE'S OFFICE.

In the matter of the Probate of the Last Will and Testament of William B. Mellor, deceased.	On Petition. Notice of Motion to Strike out Special Appearance, Etc.

To Messrs. Wilson & Carr, Proctors for Edgar Mellor and Arthur B. Mellor, executors, etc., of William B. Mellor, deceased:

Take Notice that we will apply to the Surrogate of the County of Camden, on Monday, the 24th day of January, 1916, at the hour of 10 o'clock, A. M., at the Court House, Camden, New Jersey, to strike out the special appearance filed for the said Edgar Mellor and Arthur B. Mellor, executors, etc., and the answer denying jurisdiction of the Surrogate to entertain the petition to revoke probate and the order to show cause thereon in the above matter, on the ground that the said Surrogate has full, adequate and complete jurisdiction to entertain the said proceedings.

Stackhouse & Kramer,
Proctors for Joseph Kaighn, Petitioner.

ORDER STRIKING OUT SPECIAL APPEARANCE, &C.

(Filed Jan. 24, 1916)

CAMDEN COUNTY SURROGATE'S OFFICE.

In the matter of the Probate of the Last Will and Testament of William B. Mellor, deceased.	ON PETITION. ORDER STRIKING OUT SPECIAL APPEARANCE, &C.

This matter coming on to be heard upon motion on behalf of Joseph Kaighn, petitioner, to strike out special appearance of Edgar Mellor and Arthur B. Mellor, executors of William B. Mellor, deceased, and the answer filed by them alleging lack of jurisdiction by the Surrogate to entertain the petitions revoke the probate of the alleged last will and testament of the said William B. Mellor, deceased, on the ground stated in the said petition, and it appearing to the Surrogate that he has jurisdiction to entertain such petition and to proceed to a hearing to determine the controversy between the parties.

It is on this 24th day of January, 1916, on motion of Stackhouse and Kramer, proctors for Joseph Kaighn, petitioner, Ordered, that the said special appearance and answer of the said Edgar Mellor and Arthur B. Mellor, executors, &c., of William B. Mellor, deceased, be and the same is hereby struck out for the reasons aforesaid.

HARRY REEVES,
Surrogate.

STIPULATION.

(Filed Jan. 30, 1916)

NEW JERSEY SUPREME COURT

ARTHUR B. MELLOR, *et al.*,
Executors of William B. Mellor, deceased,
Plaintiffs in Certiorari,

vs.

JOSEPH KAIGHN,
Defendant in Certiorari.

STIPULATION.

Whereas, a writ of certiorari was heretofore allowed in the above-stated cause by the Honorable Charles G. Garrison, one of the Justices of the Supreme Court of New Jersey, returnable on January fifth, A. D. nineteen hundred and sixteen, to review certain proceedings of the Surrogate of Camden County, in the matter of the probate of the last will and testament of William B. Mellor, deceased; and

Whereas the matter of said writ was noticed to be argued before the Honorable Charles G. Garrison at chambers for January twenty-seventh, A. D. nineteen hundred and sixteen, on which day counsel for the parties in the above-stated cause appeared pursuant to said notice; and

Whereas when the matter came on to be argued Mr. Justice Garrison suggested that the said writ

had been prematurely served inasmuch as said Surrogate of Camden County had not made any formal order in the proceedings before him which could be reviewed by said writ; and

Whereas, counsel for the defendant in certiorari upon notice duly given then applied to said Surrogate of Camden County to strike out the answer and special appearance filed by the plaintiffs in certiorari in the proceedings before said Surrogate, and wherein said plaintiffs denied the jurisdiction of said Surrogate to entertain the petition before him on which said proceedings were based, and to make any order thereon except to dismiss said petition for lack of jurisdiction; and

Whereas, said Surrogate upon said application made an order bearing date the twenty-fourth day of January, A. D. nineteen hundred and sixteen, striking out said answer and special appearance on the ground that he had jurisdiction to entertain said petition and grant the relief therein prayed for:

It is, on this twenty-eighth day of January, A. D. nineteen hundred and sixteen, stipulated and agreed by and between Wilson and Carr, attorneys for the plaintiffs in certiorari in the above-stated cause, and Stackhouse and Kramer, attorneys for the defendant in certiorari, as follows:

1. That said writ of certiorari shall be deemed operative and effective to review the aforesaid order of said Surrogate, notwithstanding the fact that said order was made and entered subsequent to the return day of said writ:

2. That a copy of the notice served by the defendant in certiorari on the plaintiffs in certiorari of the application to be made before said Surrogate to strike out said answer and special appearance, and the copy of the order of said Surrogate shall be at-

tached hereto and filed herewith, and shall be deemed and taken to constitute part of the return made by said Surrogate to said writ of certiorari.

3. That said writ of certiorari and the return thereto and all proceedings had upon said writ shall be deemed amended in conformity with this stipulation.

WILSON & CARR,
Attorneys for Plaintiffs in Certiorari.
STACKHOUSE & KRAMER,
Attorneys for Defendant in Certiorari.

AMENDMENT TO WRIT.

(Filed February 7, 1916)
NEW JERSEY SUPREME COURT.

ARTHUR B. MELLOR, *et als.*, Executors of William B. Mellor, deceased, *Plaintiffs in Certiorari,*

vs.

JOSEPH KAIGHN, *Defendant in Certiorari.*

AMENDMENT TO WRIT.

In pursuance of this stipulation it is ordered that the return day of the writ be altered to January 25, 1916.

C. G. GARRISON,
Jus. Sup. Ct.

A True Copy,
WM. C. GEBHARDT,
Clerk.

RULE FOR REVERSAL.

(Filed February 10, 1916)

NEW JERSEY SUPREME COURT.

ARTHUR B. MELLOR, *et als.*,
Executors of William B. Mellor, deceased,
Plaintiffs in Certiorari,

vs.

JOSEPH KAIGHN,
Defendant in Certiorari.

IN CERTIORARI.
RULE FOR REVERSAL.

The Court having inspected the transcript and proceedings of the Surrogate of Camden County, returned with the certiorari in this cause, the reasons for reversing the order of said Surrogate, and having heard the arguments of counsel thereon and having duly considered the same, does order that the order of the Surrogate of Camden County, made and entered by him on the twenty-fourth day of January, A. D. nineteen hundred and sixteen, in the matter of the probate of the last will and testament of William B. Mellor, deceased, be reversed, set aside, made void and for nothing holden, and that the said plaintiffs in certiorari be restored in all things wherein they have lost by reason of said order, with costs.

February 10th, 1916.

On motion of

WILSON & CARR,
Attorneys for Plaintiffs in Certiorari.

Let this rule be entered.

CHAS. G. GARRISON,
Justice of the Supreme Court.

OPINION OF SUPREME COURT.

NEW JERSEY SUPREME COURT.

ARTHUR B. MELLOR,
vs.
JOSEPH KAIGHN.

MEMORANDUM.

GARRISON, J.

The Surrogate by his order striking out the answers to the petition assumes jurisdiction to set aside the probate of a will after the statutory period of appeal has passed if he shall determine that the testator was without testamentary capacity and that such fact although known to the attesting witnesses was fraudulently concealed when the will was admitted to probate.

If such fraudulent concealment be proved to the satisfaction of the Surrogate he would still, as a probate officer, be confronted, on the question of capacity, with "a dispute respecting the existence of the will" with respect to which his only function would be to cite the disputants to appear in the Orphans' Court, unless it is held that by indirection the Surrogate is clothed with a power that is expressly denied him by statute. Moreover, in passing upon the question of fraudulent concealment he must necessarily pass upon the thing concealed, viz: the insanity or incapacity of the testator which is the very matter of dispute as to the existence of the will with respect to which the statutory mandate is that "he shall not act in the premises." This he must decide

against the proponents before it can come up as a dispute respecting the existence of the will he has probated and when it does so come up he is powerless to decide it, but can only cite the persons interested in the Orphans' Court to appeal out of time from the original probate. 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 there is not, so there is no time of 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.

NOTICE OF APPEAL.

(Filed April 25, 1916)

NEW JERSEY SUPREME COURT.

ARTHUR B. MELLOR, *et al.*, executors, &c., (Plaintiffs in Certiorari) *Respondents*,

vs.

JOSEPH KAIGHN, (Defendant in Certiorari) *Appellant*.

ON APPEAL FROM SUPREME COURT. NOTICE OF APPEAL.

The appellant in the above-stated cause hereby appeals from the judgment of the New Jersey Supreme Court, entered in the above cause on the tenth day of February, 1916, to the Court of Errors and Appeals in the Last Resort in all Causes, on the following grounds:

1. The Supreme Court decided that the Surrogate had no jurisdiction to entertain the proceedings to set aside the probate of the alleged last will and testament of William B. Mellor, deceased, when, as a matter of fact, under the circumstances of the case the said Surrogate had full and complete jurisdiction so to do.

STACKHOUSE & KRAMER,
Of Counsel with Appellant.

[ENDORSED]

Service acknowledged April 24, 1916.

WILSON & CARR,
Attorneys for Respondents.