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BRIEF FOR HARRY G. RUNKLE, CAVEATOR.

New Jersey Court of Errors and Appeals

WILLIAM E. R. SMITH, Proponent; ELIZABETH HAINES, EDITH J. ADAMS, GEORGE McM. GODLEY, CARRIE R. SCHOLFIELD, CHARLES P. SCHOLFIELD, THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES, WILLIAM H. HULICK, Legatees, and RANDOLPH RODMAN, named in said Will as Executor, whose name was obliterated,

Respondents,

VS.

HARRY G. RUNKLE,
Caveator-Appellant.

On Appeal from a Decree of the New Jersey Prerogative Court.

IN THE MATTER
OF
The Appeal of GEORGE McM. GODLEY.

IN THE MATTER
OF
The Appeal of CHARLES P. SCHOLFIELD and CARRIE R. SCHOLFIELD.

IN THE MATTER
OF
The Appeal of WILLIAM E. R. SMITH.

Brief for Harry G. Runkle, Caveator.

The four cases referred to in the foregoing title are appeals from a decree of the Prerogative Court affirming a decree of the Orphans' Court of Essex County, which:

(1) Admitted to probate two papers purporting to be the last will and testament of William Runkle and a codicil thereto;

(2) Excepted from probate the ninth paragraph of the second half-sheet of said will, as to which the appellants, Charles P. Scholfield and Carrie R. Scholfield, appeal;

(3) Admitted the will to probate with the words "William E. R. Smith" omitted and the words "Randolph Rodman" inserted in lieu thereof as executor, as to which the said William E. R. Smith appeals;

(4) Admitted to probate the two paper writings designated as the will of William Runkle and the codicil thereto, as to which the said George McM. Godley appeals, claiming that the said appellant Godley was erroneously denied permission by the Orphans' Court to submit proof of a copy of a former will of the said William Runkle, dated April 26, 1911, and that said Court illegally and improperly refused to admit testimony as to the declarations by the testator relative to his testimentary dispositions.

Statement.

William Runkle, a resident of the City of Orange, died January 31, 1914. Two paper writings, one purporting to be a will and the other a codicil, both executed by the decedent, were offered for probate

before the Surrogate of Essex County. Harry G. Runkle, brother of the decedent and his sole next of kin, filed a caveat against the admission to probate of these papers, and the case was heard on oral testimony taken before his Honor WILLIAM P. MARTIN, Judge of the Orphans' Court of Essex County, with the result that a decree was subsequently made admitting to probate the will (with the exception of one paragraph) and the codicil.

The alleged will is dated May 11, 1912; the alleged codicil purports to have been made April 29, 1913.

Both the will and the codicil are in the handwriting of the decedent. The same persons witnessed the execution of the will and the execution of the codicil. Both papers were executed at the Orange National Bank, in the City of Orange.

These two papers at the time of the decedent's death were in a blue envelope, on the face of which was written "Last Will and Testament of William Runkle," in the handwriting of decedent.

A short time before his death Mr. Runkle had placed this envelope in a drawer in his desk in his house, where it remained until after his death. Upon his death Katherine Tully, his housekeeper, in accordance with a request of Mr. Runkle, made shortly before his death, telephoned to William E. R. Smith, whose name appeared written into the will as executor, and asked Mr. Smith to come over to the house, which he did. When Mr. Smith arrived Miss Tully went to Mr. Runkle's desk and got the envelope and two other packages, and delivered them to Mr. Smith, who in due course filed the supposed will and codicil with the Surrogate. In the same envelope was a pencil memorandum in the handwriting of Mr. Runkle stating that his note was in the National Park Bank, and also a

paper that appeared to be a copy of the inventory of his securities.

The document purporting to be the will was written on old-fashioned legal cap paper, as was also the codicil. The will consists of twelve pages of writing. The codicil is all on one page.

The pages of the will from 3 to 13 were fastened together by perforating fasteners known as "Challenge" fasteners; the half-sheet upon which pages 1 and 2 were written was separate, and had not been perforated by any fasteners. The codicil was separate and had not been perforated by any fastener. The first half-sheet and the codicil were attached to the body of the will by two detachable wire clips, known as "Gem" clips, placed over the top and holding the first half-sheet at and in the front of, and the codicil at the back of, the main body of the paper. These wire clips were detachable merely by lifting them off from the top of the paper and could be removed and replaced without leaving any indications of removal or replacement.

The water-marks on the paper constituting the will itself were "Old Berkshire Mills 1908"; the water-marks on the paper constituting the codicil were "Old Berkshire Mills 1910," both being prior to the date of execution of both instruments.

At the top of all the sheets comprising the will and codicil was a nearly perpendicular tear about an inch in length. There was also a tear about the middle of the left-hand side of the sheets which affected all of them.

The detached first sheet of the will was on different paper from the body of the will, as indicated by the difference in the ruling, so that the document consisted of three different kinds of paper, the first half-sheet being one kind, the body of the will, comprising pages 3 to 12, being another kind,

and the codicil being a third kind; similarly, the ink used on pages 1 and 2 is different from that used on pages 3 to 12, which differs from that used on the codicil.

So also, pages 1 and 2 were written with a pen entirely different from that which wrote pages 3 to 12, and the codicil was written with still another pen.

The spacing at the bottom of page 2 appears to have been stretched, so as to use up as much as possible of the page and to leave a minimum amount of space between the end of that page and the top of page 3, notwithstanding which there is considerable unused space between the bottom of page 2 and the top of page 3, and there is a duplication of the figures $50,000, those figures occurring at the bottom of page 2 and at the top of page 3.

It is obvious that a half-page has been torn off from its fastening under the "Challenge" fasteners and the present half-page substituted in its place. At the time the document was filed in the Surrogate's office small fragments of torn paper still remained under the flat part of the fastener, remnants of the sheet which had been torn away.

After the document was left at the Surrogate's office the sheets of the will were taken entirely apart, the "Challenge" fasteners and the "Gem" detachable clips being removed, and the sheets were given out to different copyists to be copied. They were also taken apart and photographed by two experts in handwriting, one for the caveator (Mr. Kinsley) and the other for the proponent (Mr. Osborn).

The signature of the testator to the supposed will was made in the directors' room of the Orange National Bank. Mr. Runkle signed in the presence

of the witnesses, and they signed the attestation clause afterwards.

The supposed codicil was executed at the teller's window in the Orange National Bank. Mr. Runkle brought a document to the bank, as to which he said:

> "I am making a codicil to my will. I want you and Charlie to be witnesses,"

indicating Mr. Burkhardt and Mr. Hasler. The codicil was already signed by Mr. Runkle when he brought it to the bank.

The execution of both documents, as disclosed in the testimony of Messrs. Burkhardt and Hasler, was in accordance with the statute.

Neither of the subscribing witnesses saw or is able to say whether any parts of the document which is now presented, were attached to the will or to the codicil at the time they were executed. The sheet on which the attestation clause of the will is shown was all that the witnesses saw of that document, although they say there was "a bunch of papers" attached to it. When the codicil was signed they saw nothing except the codicil, although that seemed to be attached to a bunch of papers, but what they were or whether they are the same as now contained in the supposed will, they are unable to say, not having seen any part of them. They are not able to say that the codicil was actually attached to the other papers. When he presented the codicil at the teller's window it was folded over back so that one could not see anything except the signature and attestation clause.

The will discloses by internal evidence three distinct alterations—one by mutilation and substitution, one by cancellation and marginal notation, and one by erasure by acid, with superscription and marginal notation.

The first alteration consists of the forcible tearing off of the first half-sheet, comprising pages 1 and 2, and the substitution of another half-sheet in lieu thereof.

The second alteration consists of the cancellation of the ninth paragraph by drawing lines with a pen through the written words and writing in the margin, "Cancelled October 5, 1912, Wm. Runkle."

The third alteration is in paragraph 28 and consists of the attempted erasure by chemicals of the name of Randolph Rodman, and of the word "South" before the word "Orange," and writing over them the name, "Wm. E. R. Smith," and the word "East" before "Orange," and a notation in the margin.

The marginal notations are in the handwriting of the decedent.

There is a further expression of a change or addition in the testamentary mind of the decedent contained in a memorandum, Exhibit P-4 (Record, p. 158), where he expresses his desire to have his certificate of membership in the Lorentian Club given to Austen Colgate, along with his canoe, rods, fishing net, and its contents.

There is another reference to his will in Exhibit P-6b, a letter written January 21, 1914, ten days before his death, to William H. Hulick. In this letter he refers to the fact that in his will Katie (that is, Katherine Tully, his housekeeper) is to have such household and ornamental articles as she may choose, and he expresses his desire that Mr. Hulick will see that she takes certain enumerated articles.

It was shown by the testimony of Charles B. Storrs, Esq., that Mr. Runkle had executed a previous will, dated April 26, 1911, the original unexecuted draft of which Mr. Storrs preserved and

produced. No such will was found among Mr. Runkle's papers.

The original first half-sheet on the supposed will offered for probate has never been found among Mr. Runkle's papers, and it also is presumed to have been destroyed by him. There is no evidence as to anything contained in it.

The provisions of the proposed will and codicil are sufficiently stated in the opinion of Judge MARTIN (Record, pp. 110, 111, 112).

The Orphans' Court of Essex County admitted to probate the will and codicil, with the exception of paragraph 9 of the will, the name of Randolph Rodman as executor being restored.

Appeals from this decree were taken on behalf of Harry G. Runkle, caveator and next-of-kin; Charles P. Scholfield, the legatee named in the ninth paragraph of the will; George McM. Godley, from so much of the decree as admits to probate and establishes as part of the will the first half-sheet; William E. R. Smith, named as executor by the alteration in paragraph 28 of the will.

The Ordinary affirmed the decree of the Orphans' Court in all respects, and from that decree of affirmance the caveator, Harry G. Runkle, takes this appeal.

Argument.

On behalf of the appellant and caveator, Harry G. Runkle, I make the following contentions:

1. That the first half-sheet of the will was removed by the testator and another half-sheet substituted by him in its stead;

2. That the mutilation of the will by the removal of the first half-sheet and the substitution of another, together with the cancellation of paragraph 9 and the alteration of paragraph 28, are by the established rule of law in New Jersey presumed to have been done after the making of the will and after the making of the codicil;

3. That there is no testimony in the cause or any internal evidence upon the face of the documents themselves sufficient to rebut that presumption;

4. That the effect of the mutilation of the will by tearing off the first half-sheet and the attemped substitution in its place of the other half-sheet is to destroy the efficiency of the entire document and operate as an annulment of the will;

5. That the cancellation of paragraph 9 was done with the purpose of cancelling that bequest, and, if the will is otherwise effective, that paragraph cannot be admitted to probate.

Facts Tending to Show the Removal of the First Sheet of the Will and the Substitution of Another Sheet.

1. Pages 5 to 12 are on legal-cap paper of double sheets, unsevered at the top. Pages 3 and 4 are on a half-sheet of legal-cap, the first half of the sheet having been obviously torn off.

2. Pages 3 to 12 have perforations through which fasteners were inserted. These fasteners at the time the will was presented at the Surrogate's office held pages 3 to 12 together, but did not enclose pages 1 and 2, nor the codicil.

3. The top of the fasteners contained bits of paper, showing that one or more sheets had been torn off violently and remnants left under the clamps.

4. Pages 1 and 2 are written on a half-sheet of legal-cap of a different ruling from the remainder of the will.

5. Pages 1 and 2 were written with a different pen and a different ink from the remainder of the will.

6. The bottom of page 2 shows by the spacing that the writer was endeavoring to fill out a page to meet the top of page 3 in a natural, consecutive manner, notwithstanding which there is a repetition of the number "$50,000," so that in paragraph 7 as it now stands $50,000 is written at length once and is stated in figures twice.

These facts indicate conclusively that the first half-sheet of the original document was torn off and another half-sheet—the one which is now there—written and attached by temporary fasteners to the remaining part of the document, but not so as to form a permanent part thereof.

Concluding, therefore, as we must conclude, that this was an alteration made by the testator, the presumption is forced that it was made after the execution of the original will.

No one except the testator ever saw the sheets of the will in its original condition. There is nothing to guide us except the reasonable presumption that the circumstances above pointed out to to be accounted for on no other ground than that the testator tore off a half-page of his will and substituted another in its place.

If it be suggested that the document was in that condition when executed, the answer is, Why, then, was not the first page fastened to the others with the "mushroom" fasteners? It is not reasonable to suppose that the testator would prepare his will and submit it for execution and attestation in such a condition as it now is. It is reasonable to suppose that the apparent change was made afterwards to meet another testamentary intention. Hence we are led to the necessity of determining what the effect of this subsequent alteration was upon the remainder of the will and upon the codicil.

It being evident that the first page of the will as originally written was torn off and the other page substituted for it, the legal presumption is that this was done subsequently to the execution of the will and the execution of the codicil.

The statute law of New Jersey prescribes certain formalities that are essential to the making of a valid will. The statute fixes an inflexible rule

by which to determine the proper execution of all testamentary instruments.

It was said by SIR JENNER FUST in the case of *Willis* v. *Lowe,* 5 *Notes of Cases,* 428:

> "Cases have occurred in which the court has given construction to the statute as far as possible to fulfill the intention of the parties; but the court is under the necessity of looking at the clear intention of the act."

This is cited with approval in *Matter of Will of O'Neil,* 91 *N. Y.,* 521.

And in *Matter of Whitney,* 153 *N. Y.,* 264, it is said by the Court of Appeals that while wills are interpreted so as to carry out the intention of the testator, that rule cannot be invoked in construing the statute regulating their execution, as in the latter case courts do not consider the intention of the testator, but that of the Legislature.

Every heir-at-law has a right to require of a court the strictest enforcement of those statutory provisions that regulate a diversion of property from the natural heir.

The rule as to the presumption or burden of proof where there are material alterations in a will offered for probate is laid down in the leading case of *Cooper* v. *Bockett,* decided by the Privy Council in 1844 (4 *Moore's P. C. C.,* 419). The question before that tribunal was whether the will should be admitted to probate with or without certain changes apparent on its face. Lord BROUGHAM pronounced the opinion. He said that there were two questions:

> "First: At what time were the alterations made? Were they made before or after the attestation?

> Secondly: If that point cannot be ascertained, is the instrument to be read as it originally stood, or are the alterations to be admitted as a parcel of it?"

After reviewing the testimony of the subscribing witnesses, which was to the effect that when the will was executed they observed no changes or alterations, he said:

> "Can anything be more clear than that we ought to know whether the testator executed and the witnesses subscribed this will as it now exists, or a former will; for that is the precise question before us? Whoever propounds an instrument which on the very face of it exhibits grounds of great doubt, *must remove those grounds and clear up the doubts.*"

This decision was followed in 1848 in the case of *Lushington* v. *Onslow,* 12 *Jur.,* 435; 6 *N. C.,* 183. The question in that case was as to the effect of certain alterations in the will upon a codicil attached to it.

It was held that the presumption of law is against the alteration, *since it is reasonable to believe that if the alteration had been made before the execution of the codicil, some notice would have been taken in the codicil of the alteration.*

In *Shallcross* v. *Palmer,* 15 *Jur.,* 837, Lord CAMPBELL, pronouncing the opinion of the Court, declared that certain unattested alterations in a holograph will must be presumed to have been made after its execution. He expressed his approval of the decision in *Cooper* v. *Bockett* (*supra*), and commented upon *the dangerous facility which would be given to a testator, unless*

that doctrine were upheld, to alter his will after execution.

In *Greville* v. *Tylee,* 7 *Moore P. C. C.*, 320, decided by the Privy Council in 1851, there was an erasure apparent on the face of the will, and over that erasure new matter had been written. Dr. LUSHINGTON, in pronouncing the opinion of the Court, said:

> "We apprehend it to be now settled that whoever alleges such an alteration to have been done before the execution of the will is bound to take upon himself the *onus probandi.*"

A case was before the Court of Probate in 1858, where the question arose as to the effect of erasures so complete as to baffle all efforts to ascertain the obliterated words. The Court expressed the judgment that the presumption was that the erasures had been made subsequently to execution, and it was declared that as far as it related to the parts erased, probate should be had in blank.

> *Goods of Elizabeth Stone James,* 1 *Swab. & Triest.*, 238.

In the case of *Williams* v. *Ashton,* 1 *Johns. & H.*, 115, it appeared that over the erasure certain provisions had been written in the handwriting of the testatrix. By the evidence of the attesting witnesses it appeared that the testatrix told them at the time of the execution that she had made some alterations in her will. The will was so folded, however, that they did not see what the alterations were. The Vice-Chancellor held that the onus was cast upon the party who sought to derive an advantage from an alteration in a will to adduce some

evidence from which a Court or jury might infer that the alteration was made before the will was *executed.* He added that the rule of law as to deeds had no application as to wills, and said:

> "There is no crime in a testator choosing to make alterations in his own will, but he cannot reserve to himself a power of making future testamentary gifts by unattested instruments. I apprehend the rule is that those who propound a doubtful instrument must make the doubt clear."

See also:

Gann v. *Gregory,* 22 *L. J. Eq.,* 1059.
Simmons v. *Rudall,* 1 *Simons* (*N. S.*), 115.
In re Goods of White, 30 *L. J.* (*N. S.*), 55.

In the case of *Van Buren* v. *Cockburn,* 14 *Barb.,* 8, there was involved the validity of a holographic will. It was declared by the General Term of the Supreme Court that when it is made clear that a will has been altered or changed, *the presumption that it was the same paper as was executed, disappears.*

The case of *Wetmore* v. *Carryl,* 5 *Redf.,* 544, contains a very able opinion by Surrogate ROLLINS, reviewing the authorities in Great Britain and in the State of New York, and holding that unattested and unexplained alterations appearing on the face of a will are presumed to have been made after execution.

New Jersey Cases as to Effect of Alteration or Mutilation of Will.

Smock v. *Smock,* 3 *Stock.,* 156 (1856).

The will offered for probate in this case was found in a drawer of the desk where the decedent kept all his papers of any value. The name of the testator and the seal were cut off, leaving only the letter "B," the first letter of testator's name, partly remaining. The mutilation was made by scissors or some other sharp instrument, and it was apparent from an inspection of the document that it was the intention of the person who did the mutilating to cancel it and destroy its validity as a will. *Held,* that the testator himself is presumed to have done the act, and the law further presumes that he did it *animo revocandi.* The case of *Moore* v. *Moore,* 1 *Phill.,* 375, is cited and approved as authority.

It is declared by the Chancellor that the will being produced by the proponent in a mutilated condition, the presumption arises that it was canceled by the testator. The fact that it was in his possession when found raises the presumption that he did the cancellation. It was *held that the proponent must overcome the presumption which exists against the validity of the instrument.*

In the Matter of Kirkpatrick's Will, 22 *Eq.,* 463 (1871).

It appeared that two of the legacies in the will were canceled by lines drawn with a pen upon and across the words. It was shown that this cancelling was done by the testatrix. *Held,* that such cancelling of the legacies revokes the legacies so canceled, and does not affect the residue of the will. English authorities are cited. The will, except the canceled parts, was admitted to probate.

In the Matter of White's Will, 25 *Eq.,* 501 (1874).

In this case the alleged will, which was found among other papers of the decedent after her death, showed that the seal had been carefully torn off and the signatures of the witnesses obliterated with heavy pencil marks. *Held,* that the will bears clear evidence of an intention to revoke it, and that from the fact that it was found in the possession of the testatrix in her repository thus canceled, the presumption arises that the cancellation was her act.

Hilyard v. *Wood,* 71 *Eq.,* 214 (1906).

Where the will of the testatrix, written in ink, remained in her possession until her death and was then found with certain parts erased by a lead pencil, *held,* that the erasures were made with the testatrix *animo revocandi,* and the will should be probated with the canceled parts omitted. *Held,* that if a will be found canceled in whole or in part among the papers or under circumstances indicating that it had not been out of the possession of the testator, the presumption is that the alterations were the acts of the testator, done *animo cancellandi.*

Frothingham's Case, 76 *Eq.,* 331 (1909).

Lead pencil marks drawn by a testator through certain clauses of his will with the intent at the time to revoke such clauses, will have that effect given to them, notwithstanding the subsequent employment of the instrument so canceled as text from which a fair copy was to be made. The will was admitted to probate with the canceled parts omitted.

Section 2 of the New Jersey statute concerning wills is as follows:

> "2. That no devise or bequest in writing, of any lands, tenements, hereditaments or other estates whatsoever in this state, or of any estate *pur auter vie, or any clause thereof*, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, *cancelling, tearing* or obliterating the same *by the testator himself* or in his presence, and by his direction and consent; but all devises and bequests of any lands, tenements, hereditaments, or other estates whatsoever in this state, or of any estate *pur auter vie*, shall remain and continue in force until the same be burnt, *canceled,* torn or obliterated *by the testator* or by his directions in manner aforesaid, or unless the same be revoked or altered by some other will or codicil in writing, or other writing of the devisor signed in the presence of three or more subscribing witnesses declaring such revocation or alteration."

The New York statute relating to the same subject is essentially different, and reads as follows:

> "No will in writing, nor any part thereof, shall be revoked or altered otherwise than by some other will in writing or some other writing of the testator declaring such revocation or alteration and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the

> testator himself or by any other person in his presence, by his direction and consent."

It was held by the Court of Appeals in New York in *Lovell* v. *Quitman,* 88 *N. Y.,* 377 (1882), that an alteration applying only to a particular provision or provisions of a will could only be effected in the manner pointed out by that statute.

The rule is quite different under the New Jersey statute.

> *Ward* v. *Wilcox,* 64 *Eq.,* 303 (1902); *affirmed* 65 *Eq.,* 397.

In this case Magie, Ordinary, with reference to the presumption as to time of alteration of a testamentary document, says:

> "The text writers seem to agree that the presumption is of an alteration after execution. *Schouler on Wills,* 135; *Underhill on Wills,* 268; *Page on Wills,* 431, 432; *Taylor on Evidence,* 180, 968; 1 *Jarman on Wills,* 304. The common practice to note at the foot of a will about to be executed any alteration in such manner as that the execution by the testator and the attestation by the witnesses may include and recognize them as theretofore made, will, I think, justify a presumption that unnoted and unattested alterations were made after execution."

In that case the will had been prepared in typewriting by Mr. Guild, and the testatrix, Miss Ward, copied it out in her own handwriting. Prior to the act of execution she told Mr. Guild that she had added to the provision in favor of one of the legatees.

It was held that the statements of Miss Ward, as testified to by Guild, were competent evidence

on the question as to when the alterations on the paper had been in fact made, and that such testimony established the fact that they had been made before execution.

The Ordinary observes, however, that if they had been statements made to Mr. Guild after the execution of the paper, they might have been inadmissible.

As to the Codicil.

There are three particular reasons given by the courts for the presumption of law against unauthenticated alterations in a will. One is that any other doctrine would tend to the perpetration of great frauds. Another reason is, as stated in *Lushington* v. *Onslow,* that it is reasonable to believe that if the alteration had been made before the execution of the codicil, some notice would have been taken in the codicil of the alteration. Another reason, given by Chancellor MAGIE in *Ward* v. *Wilcox,* is that alterations are usually noted in the attestation clause, and the failure to note an alteration indicates that it was made subsequently to the execution of the document.

The codicil in this case, referring, as has been stated, to no particular will, is entitled, "1ST CODICIL." Any alteration or modification of an existing will is in the nature of a codicil. The purpose of a codicil is to change the will in some respect. The testator declared that this was the first codicil, which is tantamount to saying that it was the first alteration in the will. That is the strongest and most conclusive positive testimony that appears on the face of the documents to aid in the enforcement of the legal presumption that the other alterations were made subsequently. *It is incredible that a testator who had already abstracted the two first pages of his will, on which were written six*

different testamentary directions and part of a seventh, should have subsequently drawn and executed a formal codicil of only minor importance, without some allusion to such prior change of much greater importance. If any deduction can be made from the language used by the testator, it is that when he wrote this codicil, it was the first and only change then made in his will. If he had intended to express by enumeration the changes in his will, this should have been numbered at least second codicil, and not first.

It is proper to call attention to the manifest disposition of the testator to vary and fluctuate in his testamentary purposes. First, we have the will drawn by Judge Storrs; then the will here offered for probate; then a substitution of two pages; then a cancellation of paragraph 9 and a change in the name of the executor, together with the expression in the memorandum found in the envelope of his desire to have his share in the Lorentian Club given to Austen Colgate. As to the last, it may be remarked that, according to the theory of the learned Judge of the Orphans' Court, this memorandum, having been in the same envelope with the will, would be assumed to be a part of the will.

It is against the tendency of testators to alter and meddle with their wills in an informal way that the presumption of subsequent alteration is directed. If this will can be sustained, it will be directly in the face of the well-settled law of this State.

As to Effect of Mutilation by Removal and Substitution of Sheets.

See:

Jarman on Wills, 6th Eng. Ed., 147.
In re Goods of Woodward, L. R., 2 *P. & D.,* 207.
Sweetland v. *Sweetland,* 34 *L. J. P. & M.,* 42.
Leonard v. *Leonard, Prob. Rep., p.* 243 (1902).
Clarke v. *Scripps,* 2 *Rob.,* 563.
Treloar v. *Levy,* 14 *P. D.,* 49.
Gardner v. *Gouldthorpe,* 12 *P. D.,* 14.

In *Leonard* v. *Leonard* (*supra*), the first two sheets of the document offered for probate were executed in the year following the execution of the last three sheets, and were not a part of the document as originally executed. There was no evidence as to the contents of the two sheets that were missing. The two sheets that had been substituted contained the ordinary commencement, followed by a revocation clause, and were signed by the testator in the presence of the same two witnesses who had attested the others.

Held, that the destruction of the first two sheets of the original will effected a revocation of the three that remained.

Held, also, that the signing by the testator of the two substituted sheets in the presence of the witnesses was not intended to make them operate as his will, and that the result was intestacy.

Treloar v. *Levy,* 14 *Prob. Div.,* 49 (1889).

After duly executing his will, which was in five sheets, the testator took out three sheets and sub-

stituted three new ones, which he signed, but did not have witnessed. He did not alter the date of the will, nor did he resign it, nor was it reattested. It was held that the whole will was revoked, and probate was denied.

Sweetland v. *Sweetland,* 34 *L. J., P. & M.,* 42.

The testator had made a will of several definite sheets and had signed all of them but the last. It was sought to have that much of the will which preceded the last signature admitted to probate, but it was held by SIR J. P. WILDE that the Court would not be justified in fixing upon a signature in the midst of what the testator intended as his will and treating it as an execution of all that preceded it, and granting probate of so much of the will, to the disregard of the remainder. This, said the Judge, in many cases might produce a testamentary result far from the testator's wishes.

As to revocation of codicil by an act revoking the will, see

Matter of Hopkins, 73 *A. D.,* 559 (1902),

where it was held under the circumstances in that case that the codicil was revoked by the revocation of the will.

In *Gardiner* v. *Courthope,* 12 *P. D.,* 14 (1886), a codicil was admitted without the will.

In *Rowley* v. *Merlin,* 6 *Jur.* (*N. S.*), 1165 (1860), Sir CRESSWELL-CRESSWELL, pronouncing judgment, said:

> "It is a presumption in law that all unattested alterations were made subsequently

> to the execution, whether of the will or of the codicil, and from that principle I cannot depart. *The executors are bound to prove by affirmative evidence when it (the alteration) was introduced.* The next of kin have a right to say, 'Show us affirmatively that the marginal note was written before the execution of the will.' * * * I must be satisfied *by affirmative evidence* that the alterations were made previous to the execution of either the will or the codicil."

In *Christmas* v. *Whinyates,* 32 *L. J.,* 73 (1863), the same Judge said:

> "It seems to me that the same principle must be applied to the mutilation of a will; and finding in this case that the will has been mutilated by cutting off a portion and the signature of the testatrix, I must presume that this was done after the execution of the codicil. *So that the execution of the codicil cannot re-establish the will in its present shape."*

In the last edition of *Jarman on Wills* (1 *Jarman,* 133, *6th Ed.,* 1910), the principle is stated as follows:

> "An unexecuted alteration in a will is not rendered valid by a codicil ratifying and confirming the will, *unless in such codicil the alteration be specifically referred to, or unless it be proved affirmatively by extrinsic evidence that the alteration was made before the codicil."*

The same authority (1 *Jarman on Wills,* 157) declares:

> "If there be a codicil to the will and the codicil refers to unattested alterations in the will, this incorporates them in the will. If the codicil takes no notice of them, the presumption is that they were made after the date of the codicil (citing *Lushington* v. *Onslow* and *Rowley* v. *Merlin*), and the same presumptions hold regarding mutilations" (citing *Christmas* v. *Whinyates*).
>
> "If, after a will is executed, the testator attempts to add to or alter it in some material respect, it is clear that the will thus attempted to be altered was not a final and complete expression of the intention of the testator, and that for this reason it ought not to be probated as his last will."
>
> *Underhill on Wills,* § 186.
> *Clancy* v. *Clancy,* 17 *Ohio St.,* 134.

In this last-mentioned case the document offered for probate consisted of three sheets, the first and second pages of which were signed, and the third of which was not signed. Chief Justice DAY, expressing the opinion of the Court, said:

> "It is entirely clear that the first and second pages of the paper, without the third, did not constitute the last will of the decedent."

Hays v. *Harden,* 6 *Pa. St.,* 409, opinion by Chief Justice GIBSON, who said:

> "The argument that all which precedes the signature having once been formally executed, should remain stable, and that the additional matter alone should be rejected

> is plausible, but not sound. It is evident that the testator considered the whole to be one will; we have no reason to believe he would have wished any part of it to stand if the whole did not. We must bear in mind that every executed will is revocable in the testator's lifetime, and when devises are subjoined to it, it is evident that the original paper did not contain the testator's whole counsel."

In a very recent case in Tennessee (opinion not yet published), *Murrell* v. *Rich,* the Court of Appeal in the Civil Cases held that when a so-called will written upon several sheets is offered for probate, it must be shown that all the sheets were parts of the document and were present when the instrument was executed.

In this case it is also laid down as undoubted law that if, after the death of the testator, his will be discovered to be in a mutilated condition, it having been in his custody at the time of his death, the presumption is that he had revoked it, and the burden of removing this presumption rests upon the proponents.

In *Crossman* v. *Crossman,* 195 *N. Y.*, 145, the Court says:

> "If there are any suspicious or doubtful circumstances growing out of the mode of the alteration, the ink in which it was made, the fact that it was in favor of the party holding the instrument, and that it is not noted at the bottom, then these and all the other questions must be submitted as a question of fact to be determined by the court deciding whether the alterations were made before execution or not."

In the light of these authorities, how can the Court say that pages 3 to 12 of this document represent the valid and legal last Will and Testament of William Runkle? A document comprising these pages, with two preceding pages, was once executed, and that did constitute his will. But he did not allow that to remain as it was; he tore off a half-sheet, containing two pages, and substituted another half-sheet, containing two other pages. No one knows or can say what the provisions or effect of the will were as originally executed. The Court cannot presume, and the law will not allow the presumption, that the remaining sheets, if now admitted to probate, would have the same effect in disposing of the estate as they would have had if the first two pages had been left intact.

For illustration, suppose that on the first two pages there had been a provision devising all or certain parts of the estate to "A," provided he outlived the testator, and in case of his death before that of the testator, then in the following manner, that is to say, in accordance with the provisions that now appear on pages 3 to 12. Suppose "A" should be still living. The result would be that a will under which "A" would have taken the whole estate has been changed by this substitution into a will by which "A" takes nothing. Other illustrations will occur, without much thought, of modifications made in the first two pages of a will by which the whole scheme of testamentary disposition is entirely changed. How can the Court say that the testator who made that change, but not in conformity to the statute, meant that so much of the original will as remained should be his will, without regard to the substituted parts? It seems rational to say that when a testator makes such a change as this, he means to revoke his whole will as it originally stood, and to say, as he does say at

the beginning of this will, *"This* is my last Will and Testament," meaning thereby this first sheet and the remaining sheets, taken together and not separated. Any other principle of construction of his act would be fraught with the gravest danger. It might result in testamentary dispositions of great importance, as here, being made without any conformity whatever to the provisions of the statute.

If a testator can lawfully remove one sheet of his will, *why can he not remove all the sheets which precede his signature? How can the Court presume that what is left has the same effect on the disposition of the estate as it would have had if the first sheet had not be removed?*

It is a principle that is at stake: The duty of the Court to uphold the policy of the law and the letter of the statute, and not to open it by a loose construction so that it can be practically violated with ease.

While it is true that an intention to revoke the whole will cannot be inferred from a partial mutilation which does not affect the instrument as an entirety, yet, if it does affect the will as an entirety or destroy that part which gives effect to the whole, it will be held a revocation of the whole.

4 *Cyc.,* 1192-1193.

This case differs from almost every other case, in that there was not only an abstraction of a large part of the will, but also a substitution of new matter. Had the first half-sheet of two pages been removed, a different question might have arisen as to the effect of such removal. But testator did not stop with a removal; he substituted something new. By this new matter he indicated that it was his purpose that the will as it originally stood should no longer be his will, but that the remain-

ing part, taken in connection with the first two pages as rewritten and substituted, should be his will. The animus to revoke is apparent from the expressions on the first page of the substituted sheet, in which testator declares *that* to be his last Will and Testament, and revokes all other wills. It is evident that he did not mean the remaining part of the original will should be his will. He meant to revoke that instrument as a complete instrument and to substitute another instrument consisting of a part of that and of new matter. The substitution of the new sheet makes his intention perfectly manifest.

The case of *Treloar* v. *Levy* (1889) is authority on the point that the substitution of a new sheet after the execution of the document, as it is presumed to have been done, revokes the whole will.

Nor can it reasonably be held otherwise, for a doctrine that would permit a testator at will to remove sheets from his original will, either where the effect was known as fatal to the vitality of the whole document as originally written, or where the Court was bound to presume that effect, as here, would make it possible for a testator to change his will every day contrary to the statute.

Especial attention is called to the case of *Leonard* v. *Leonard, Prob. Rep.,* 243 (1902), a case the nearest in its facts to the present that I have been able to find.

It might be interesting to examine the decisions of the English courts and of other jurisdictions, to determine whether the rule that prevails in this State—to the effect that changes, in the nature of erasures, interlineations, and mutilations in a will, when made by the testator, are presumed to have been made after the execution of the will and after

the execution of any codicil—is derived from or founded on the statute of I Victoria. It would appear that such is not the case. No such reason is given or suggested in the New Jersey cases, which hold that the presumption is as I have stated. Other reasons are given. For instance, Ordinary MAGIE, in *Ward* v. *Wilcox,* states one reason to be the probability that changes made prior to execution would be noted at the end of the will.

In *Cooper* v. *Bockett* the Court said:

> "Can anything be more clear than that we ought to know whether the testator executed and the witnesses subscribed this will as it now exists, or a former will; for that is the precise question before us?"

In *Lushington* v. *Onslow,* the reason given for the presumption against the alteration, was that it was reasonable to believe that if the alteration had been made before the execution of the codicil, some notice would have been taken of the alteration in the codicil.

In *Shallcross* v. *Palmer,* Lord CAMPBELL expressed his approval of the decision in *Cooper* v. *Bockett,* and commented upon the dangerous facility which might be given to a testator, unless that doctrine were upheld, to alter his will after execution.

In *Williams* v. *Ashton,* the Vice-Chancellor stated that there was no crime in a testator choosing to make alterations in his own will, but he could not reserve to himself a power of making future testamentary gifts by unattested instruments.

In *Rowley* v. *Merlin*, Sir CRESSWELL-CRESSWELL gave as a reason that the next-of-kin have a right to say, "Show us affirmatively that the marginal note was written before the execution of the will."

It thus appears from these citations that the reasons upon which the doctrine of adverse presumption is founded are entirely independent of those which arise from a consideration of the English statute.

It is submitted, however, that all such discussion is immaterial, in view of the controlling decisions in New Jersey.

Ward v. *Wilcox.*
Hilyard v. *Wood.*
Smock v. *Smock.*
In re Kirkpatrick's Will.

The greater part of the argument of the learned counsel for proponent was taken up with an attempt to show the erroneous character of the New Jersey decisions. Very little attempt is made to question the effect of the alterations.

As to the Presumptions as Affected by the Facts.

The legal presumptions from the apparent changes in the will are not overcome, nor in any degree weakened by any of the facts. On the contrary, every fact strengthens them.

The fact that the first two pages are written with different ink, on different paper, with a different pen, that they are fastened with temporary fasteners, that there are remnants of a sheet violently removed, showing under the "mushroom" fasteners —these are all facts tending to strengthen and confirm the presumption of subsequent alteration.

In the case of *Crossman* v. *Crossman,* 195 *N. Y.,* 145, which is cited as authority for the proponent, there is a qualification to the effect that if there are any suspicious or doubtful circumstances growing out of *the mode of the alteration, the ink in which it was made, and that it is not noted at the bottom,* then these and all other circumstances must be submitted as questions of fact in deciding whether the alterations were made before execution or not.

In the case of *Goods of Hindmarch,* there was the testimony of an expert that the alterations were written at the same time as the rest of the will, which was considered sufficient to overcome the presumption.

In the *Easton* case, decided by Surrogate FOWLER, reference is made to the fact that the interlineations were made with the same ink, and, apparently, with the same pen.

No case can be found where a loose sheet of paper, written with a different pen and with different ink, with the remainder disassociated from it except by a temporary fastener, has been declared to be contemporaneous with the execution of the document.

In *Bond* v. *Seawell,* 3 *Burr.,* 1773, the will consisted of two sheets of paper in the handwriting of the testator and not pinned together. Lord MANSFIELD considered that sufficient to refer the matter to the jury, to determine whether both sheets were in the room when the will was executed.

No doubt that was a proper decision, but that is not this case. Here the will, comprising pages 3 to 12, was fastened together and originally had

another half-page thereon. The first half-page was taken off, and no other page was fastened in the same manner as the remainder of the will. There can be only one presumption, and that is that the will as originally executed was all fastened by the permanent fasteners.

In *Goods of Braddock*, 1 *Prob. & Div.*, 433, where the codicil was pinned to the original will, it is stated that the attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet, and it was held that fastening two sheets of paper by a pin was not an insufficient mode of connection. That, like the case in Burrows, is entirely different from this case.

In *Rees* v. *Rees,* the papers were tied together with lawyers' tape. Of course, that was evidence that they formed one and the same document at the time of execution. But suppose that it appeared that one sheet had been torn out of its place, away from the tape, and another sheet, not fastened with the tape, written with different ink and different pen, had been inserted. What would have been the presumption then?

In that case, Sir James HANNEN referred to the "plight and condition" of the will as found after the testator's death, as tending to raise the presumption that all the sheets had been so fastened together at the time of execution.

The plight and condition of the will in this case, as it was found after the testator's death, indicate that the sheets were not all together when the will was executed.

If all the document, including the first sheet, were written before execution, how can we account for the use of different paper, different pen, and

different ink in writing the first two pages? It is consistent with the subsequent change of mind and a purpose to revoke the will as it stood, and to create another disposition of his property.

It is suggested by counsel that the testator was weary with writing, and therefore did not take the trouble to refasten the sheet. That does not seem sensible, and there is no evidence that he was weary. This is all pure surmise.

Some Comments on the Opinion of the Orphans' Court.

In the learned opinion of Judge MARTIN, the correctness of the foregoing legal principles seems to be conceded. With reference to the cancellation of paragraph 9, he applies the correct ruling, holding that the presumption is that this cancellation was made subsequently to the execution of the codicil. In reaching that conclusion, he properly ignores the date of the cancellation, which is treated as hearsay.

But when he comes to a consideration of the first half-sheet (pages 1 and 2) he applies the rule differently, and holds that the substitution of that sheet was done prior to the execution of the codicil.

It is submitted that in this respect the learned Court was in error; that the same presumption applies to the alteration made by tearing off the first sheet that applies to the cancellation of paragraph 9.

With the statement of the operation of a codicil upon a will as a republication of the original will, we have no disagreement. It is obvious, however, that the frequent statements of this doctrine refer to instances where the codicil has in some express manner recognized the will. It is usual in codicils to state for identification the date of the will to

which the codicil is to be applied, so that there can be no doubt what it refers to and what it intends to alter. It is noticeable, however, that this codicil refers to no will, either generally or specifically. It is simply entitled, "1st Codicil." Its only association with the will in question is due to the fact that it was found in the same envelope loosely attached to it. Undoubtedly, if the will were otherwise complete and free from doubtful circumstances apparent on its face, the codicil would have the effect of confirming the original, notwithstanding it does not refer to it. But where on the face of the will there are apparent changes and alterations, the presumption, as has been shown, is that they were made, not only subsequently to the execution of the will, but subsequently to the execution of the codicil, and the burden is cast upon the proponent to show the contrary.

How can the Court hold that the cancellation of paragraph 9, apparent on the face of the will, was made subsequently to the execution of the codicil, and that another and much more important change, effected with obviously more deliberation, shall not be judged by the same rule? The learned Judge practically admits that it must be held that the first and second pages of the will were not in that document at the time of its execution, for he says (p. 130):

> "It may be that the half-sheet upon which the first and second pages were written was not in the will at the time of the execution of the will."

He declares, however:

> "That by comparing the first half-sheet with the sheets of the will and codicil, it is

apparent that it was written prior to the execution of the codicil."

We insist that there is no evidence to justify any such judgment; that the circumstances relied upon to support that conclusion are matters of mere fanciful surmise, unsupported by direct opinion of any expert or by any facts apparent in the plight and conditions of the papers.

In the first place, he declares that the worn folds in the first half-sheet are similar to the folds in the half-sheet and two full sheets of the will, and none of the folds of the codicil are so much worn.

In reply to this we call attention to the fact that the folds of the bottom sheet on a file of papers of legal "cap," folded in the legal style, are always less distinct than the folds on the first sheet, because the pressure is harder and more constant, and there is less opportunity for the inner sheet to flare loose from the package. It is also apparent that the folds of the codicil are quite as much worn as the folds of the bottom sheets of the will.

The learned Judge also states that the first half-sheet appears as old and generally as much used as the other sheets of the will, while the sheet of the codicil appears comparatively new.

The will was made *May 11, 1912.* The codicil was made *April 23, 1913.* So that there is not a year's difference in age between the two. If the will existed from *May 11, 1912,* to *January 31, 1914,* the codicil existed from *April 29, 1913,* to *January 31, 1914.* Taking into account the way the papers were taken apart and used by the stenographers and experts in handwriting, it is submitted that no definite conclusion can now be derived from any evidence of this kind.

Allusion is also made to the fact that the pressure marks of the "Challenge" fasteners on the first half-sheet show that the half-sheet was in contact and in a position next to the fasteners for a considerable period of time.

The very simple experiment of placing a half-sheet on the top of "Challenge" fasteners and subjecting it to slight rubbing will indicate how easily and quickly these pressure marks are formed.

The Orphans' Court was of the opinion that there were no marks of the "Challenge" fasteners on the codicil. This was a mistake, as will be apparent from an inspection of the first page of the codicil, where round, circular marks, such as the bottom part of these fasteners would make, are apparent. That they are such marks made by the fasteners will be determined by measuring the distance between the holes made by the staples in the body of the will, and the slight circular marks that appear on the first page of the codicil. The distance is the same to a hair. It is also a fact that the upper side of these "mushroom" fasteners (the part which is composed of five star-like radii) are rougher and protrude more, and consequently make a pressure mark more quickly and more distinctly.

Then some corroboration of the theory adopted by the Court is claimed to be found in the fact that "the first half-sheet contains a bequest to William H. Hulick of the house and furniture, except such articles as Katherine Tully may select, and in the body of the will a bequest is made to her of such articles." It is submitted that there is no significance whatever in this, as the testator would be presumed in remaking the first page of his will to wish to make it consistent with the remaining parts. And that fact would furnish no evidence whatever as to the time when the alteration was made.

On page 131 the learned Judge sums up his conclusions as follows:

> "Without other evidence, the annexation of the first sheet to the body of the will by the same means employed to attach the codicil is entirely consistent with the fact that they were done at one and the same time, and, as the evidence shows, the codicil was annexed before execution, it may be inferred that the first half-sheet was also in position prior to execution of the codicil."

It is respectfully submitted that the evidence does not show that the codicil was annexed before execution. The evidence of the subscribing witnesses does show that the codicil was annexed to some other papers described as a bunch of papers, but there is no proof whatever that the codicil was annexed to this will, nor is there any proof that this will was in the condition that it now is in. The inference and argument of the Court are an argument in a circle.

It is submitted that this conclusion of the learned Court entirely disregards the rule of law governing the case of alterations, which presumes that all alterations were made subsequently to the execution of both will and codicil.

The cases of *Marsh* v. *Marsh* and *Rees* v. *Rees,* cited on pages 134, 135, 136, 137 and 138, are not pertinent.

Marsh v. *Marsh* raised the question whether seventeen pages written on paper of three different sizes, loosely tied together, should be held to be parts of one will. What the Court decided was that where a will is found written on several sheets, and the last only is signed and attested,

although the witness did not observe the others, *prima facie* the presumption is that they were in the room and formed a part of the will at the time of execution. *In that case there was no question of alteration or substitution of any of the pages,* and it was distinctly held by the Probate Court that the case was different from the case of alterations. In its opinion the Court said:

> "Dr. Spinks likened it to the case of alterations; but that differs from the present, for there the Court has evidence before it that the will was originally in a different form from that produced."

And here we have evidence before us that the will was originally in a different form from that produced.

Rees v. *Rees* was a case where the question was whether a page in testator's handwriting included with papers all tied together with tape, enclosed in a packet, was part of the will, or whether another page in existence, written by a scrivener, should be taken as part of the will. The Court, *because the sheets were permanently fastened together,* assumed that the presumption was that the testator had substituted a sheet before execution. There was no evidence in that case of alteration by mutilation and substitution.

We have no difference with the Court as to his declaration that "the principle of law is that sheets tied together, or placed in one receptacle, *prima facie* constitute the will." As a general principle, that is correct, but it is modified by the other principle that where the will, in whatever form it appears, whether in sheets tied together or placed in one receptacle, bears evidence of alteration, the burden of proof is upon the proponent to show that

those alterations were not made subsequently to the execution of the will and codicil.

Again, in the same connection, the learned Judge reiterates his opinion that the first half-sheet was made before the execution of the will, for he says:

> "It would seem in the case at bar that the bits of paper clinging under the mushroom or eyelet end of the Challenge fastener tend to rebut this presumption that the substitution was made before execution of the will, but under all the circumstances of the case it is clear that they do not go to the extent of rebutting the presumption that the sheets are all parts of the whole testamentary paper writings of which the codicil forms a part."

Again, he ignores the rule of law that *manifest alterations* must be accounted for.

The Court has evidently confounded the doctrine of identification of sheets constituting the will with the doctrine of presumption arising from alterations.

This new half-sheet might have been inserted at any time, either before or after execution of the codicil. There is no evidence either way; hence the legal presumption prevails.

Unattested alterations and mutilations raise the same presumption.

> 1 *Jarman on Wills,* 162.
> *Christmas* v. *Whinyates,* 32 *L. J.,* 73.

These presumptions are not to be overcome and rebutted by mere trifling evidence or slight circumstances.

In *Ward* v. *Wilcox,* 64 *Eq.,* 303, Chancellor MAGIE, sitting as Ordinary, said with reference to this:

> "That such a presumption may be overcome and rebutted *by competent and sufficient evidence justifying the conclusion that the apparent alteration did in fact* exist at the time of the execution of the papers is in accord with reason and the authorities cited."

So that it is competent and sufficient evidence to justify a conclusion of fact that is required, and not slight circumstances, which have no compelling force as proof, but which are consistent with the contention of either side.

The learned Court, as support for its conclusion that the first half-sheet was in position prior to the execution of the codicil, declares that the dates of the water-marks *are consistent with* this result. He also declares that, without other evidence, the annexation of the first sheet to the body of the will by the same means employed to attach the codicil *is entirely consistent with* the fact that they were done at one and the same time.

It may be that these circumstances are consistent with the conclusion reached by the Court, but that is not enough; they should be inconsistent with the presumption that the half-page was attached subsequently to the execution of the codicil. The dates of the water-marks are not inconsistent with this presumption. Nor are the means employed to attach the codicil, that is to say, the detachable wire fasteners, inconsistent with the fact that the first half-sheet was attached subsequently to the execution of the codicil. The character of these fasteners is such as to indicate the ability of the testator to remove and substitute at pleasure, without

leaving any evidence of the removal and substitution. The will was put together by permanent fasteners, and the removal of the first half-sheet and the substitution of another half-sheet are apparent from the evidences of tearing the first half-sheet from the fasteners. No inference can be derived from the way the first half-sheet and codicil were attached to the will, except that they were so attached as to permit changes readily to be made by the testator or by a stranger without detection, which fact bears more strongly in favor of the ordinary legal presumption than it does to the rebuttal of that presumption.

The case of *Rees* v. *Rees* has been referred to by the Orphans' Court, and was strongly urged by counsel for the proponent as analogous and controlling in this case, but the facts in that case were entirely different. There the papers were tied together with lawyers' tape. Of course, that was evidence that they formed one and the same document at the time of execution. But suppose it had appeared that one sheet had been torn out of its place, away from the tape, and another sheet, not fastened with the tape, written on different paper, with different ink and different pen, had been inserted? The presumption would then have been the other way, and the case would have been analogous to this case.

For the purpose of showing the uncertainty of the mind of the Judge of the Orphans' Court as to the correctness of the conclusion which he reached, it is interesting to compare the different expressions he used in the opinion.

1

On page 122 he says:

> "There may be little dispute about any of these grounds advanced by caveator, and *it seems that the will as originally written apparently did not contain the first half-sheet now offered.* The question to be determined may be solved by ascertaining when the first half-sheet offered was written and annexed to the body of the instrument. There is no extrinsic, positive and direct evidence to show when it was done."

The opinion then proceeds with a sound and able discussion of the law of presumption in cases of alteration.

2.

On page 130 the opinion states:

> "In the case at bar, it may be that the half-sheet upon which the first and second pages are written was not in the will at the time of execution of the will, but by comparing the first half-sheet with the sheets of the will and codicil it is apparent that it was written prior to the execution of the codicil."

He then proceeds to point out circumstances of a physical nature connected with the document, stating, first:

> "None of the folds of the codicil are so much worn" (as the folds of the will).

Second:

"The first half-sheet appears as old and generally as much used as the other sheets of the will."

Third:

"The sheet of the codicil appears comparatively new."

Fourth:

"The tears in the first half-sheet are the same as in the sheets of the will, and there is a slight tear in the sheet of the codicil."

Fifth:

"The 'pressure' marks of the mushroom or eyelet of the Challenge fastener show that the first half-sheet was in contact with and in a position next to the eyelets for a considerable period of time."

Sixth:

"The first half-sheet contains a bequest to William H. Hulick of the house and furniture, except such articles as Katherine Tully may select * * *," which "two provisions are inter-dependent."

He then declares:

"*Although not altogether satisfactory,* the foregoing facts are some internal evidence that the first half-sheet is a constituent part of the body of the will. Without other evidence, the annexation of the first sheet to the body of the will by the same means employed to attach the codicil is entirely con-

sistent with the fact that they were done at one and the same time, and, as the evidence shows, the codicil was annexed before execution, it may be inferred that the first half-sheet was also in position prior to execution of the codicil. The dates of the water-marks are consistent with this result. Under all the circumstances of the case the Court is constrained to hold as a fact that the first half-sheet, containing pages 1 and 2, was prepared and annexed to the will prior to the execution of the codicil."

3

Again, on page 133 the Court says:

"In the case at bar, if the preparation and annexation of the first half-sheet were not prior to the execution of the will, it is clear that the preparation and annexation were prior to the execution of the codicil."

4.

Again, on page 134 he says:

"The result reached is based upon the fact that an alteration was made by testator before the execution of the codicil. The result is supported upon the theory that sheets fastened together constitute the will. This is the doctrine of identification of sheets constituting the will."

5.

On page 138 he reiterates:

"The principle of the law is therefore that sheets tied together, or placed in one receptacle *prima facie,* constitute the will."

6.

On page 139 he says:

> "It would seem in the case at bar that the bits of paper clinging under the mushroom or eyelet end of the Challenge fastener tend to rebut this presumption that the substitution was made before execution of the will, but under all the circumstances of the case it is clear that they do not go to the extent of rebutting *the presumption that the sheets are all parts of the whole testamentary paper writings of which the codicil forms a part.*"

Comparing the earlier expressions in the opinion with the later, it appears as though the mind of the learned Judge had shifted from the position that the appearance of the papers proves as a fact that the will and the first half-sheet were in existence together at the time the codicil was executed. The later expressions indicate that the mind of the Court was resting on the presumption that sheets found together in one envelope are all parts of the whole testamentary paper writings, of which the codicil forms a part.

If the latter conclusion were sound, there was no reason for the learned Court to attempt to ascertain by an inspection of the papers what their relative age was.

Of course, the fundamental error is in ignoring the fact that the substitution of a new half-page was a manifest alteration, which raises a doubt that must be removed by the proponent.

That "the first half-sheet was annexed to the body of the will by the same means employed to attach the codicil," is no proof at all that they were done at one and the same time, for the reason

that the fasteners were not permanent, but detachable at pleasure.

As to the Appeal of George McM. Godley.

In so far as the appellant, Godley, appeals from that part of the order of the Orphans' Court which admitted to probate the first half-sheet of the will, of course, the caveator is in harmony, protesting, however, that not only the first half-sheet, but the whole will with the codicil should have been rejected.

In so far as the appellant Godley appeals because the Orphans' Court refused to permit proof to be made of the will of April 26, 1911, and refused to admit the testimony offered to show declarations by the testator relative to his testamentary dispositions, the caveator opposes his appeal.

In behalf of the appellant, Godley, there was produced the original draft made by Judge Storrs of a will which was executed by Mr. Runkle April 26, 1911. That will has never turned up, was not found among the testator's papers, and, therefore, is presumed to have been destroyed. The doctrine of dependent relative revocation cannot apply to that will, because the presumption of law is, it not having been preserved, but having been destroyed, that the testator absolutely revoked it. Any other doctrine would bring into operation copies of wills retained by draughtsmen as to which the testator had no knowledge and which he supposed he had revoked.

The declarations of the testator which were sought to be introduced in behalf of the appellant, Godley, under the well-established rules were pure hearsay. See *Hilyard* v. *Ward.*

As to the Appeal of Scholfield.

That a legacy may be cancelled by the testator by drawing lines through the words of the legacy has been the settled law of this State ever since *Smock* v. *Smock,* 3 *Stock.,* 156, decided in 1856. In that case the Statute of Wills was referred to, and the term "bequest" in Section 2 was held to apply to legacies.

That decision was followed in *Kirkpatrick's Will,* 22 *Eq.,* 463, in 1871; in *White's Will,* 25 *Eq.,* 501, in 1874; in *Hilyard* v. *Wood,* 71 *Eq.,* 214, in 1906; the last two cases being in the Prerogative Court.

The affirmation of this doctrine is necessarily implied in the decision of the Court of Errors and Appeals in *Frothingham's Case,* 76 *Eq.,* 331 (1909), where legacies drawn through with a pencil by testator were held to have been lawfully cancelled.

An interpretation of a statute that has prevailed so uniformly for sixty years and thus become practically a rule of property ought not now to be disturbed by any more strict construction of the language employed.

As to the Appeal of William E. R. Smith.

The caveator, Harry G. Runkle, insisting that the whole will should be declared invalid, is indifferent as to the contentions between the two claimants to the executorship.

It is respectfully submitted that the decrees below should be reversed and probate denied to the documents purporting to be the last Will and Testament and codicil thereto of the said William Runkle.

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New Jersey Court of Errors and Appeals

William E. R. Smith, Proponent, and others, *Respondents*, *vs.* Harry G. Runkle, *Caveator-Appellant.*	*On Appeal from the Essex County Orphans' Court.*

Brief for Board of Home Missions of the Presbyterian Church and Elizabeth Haines.

This appeal concerns the admission to probate of instruments offered as the last will and testament and a codicil thereto of William Runkle deceased. The questions involved are of importance particularly in view of the amount of the estate which is concerned. The will which was offered for probate is duly signed by the testator and has a proper attestation clause with the signatures of two witnesses. The codicil, which is also in the handwriting of Mr. Runkle, has no attestation clause, but bears the signatures of the same two witnesses who witnessed the execution of the will. The questions which have arisen, and upon which reliance has been placed by the caveator in his attack upon the will and codicil, are as follows:

First. A question arising out of the cancellation of paragraph 9 on page three of the will.

Second. A question arising out of the apparent insertion of the name Wm. E. R. Smith and the word east over an erasure in the twenty-eighth paragraph of the will on page eleven thereof, and

a notation of the words "Wm. E. R. Smith to be executor" in the margin opposite the erasure.

Third. A question relative to the first sheet of the will consisting of pages 1 and 2 thereof, arising out of the contention that this sheet was not part of the will at the time of the execution thereof by the testator.

The objection to the will and codicil in question is purely technical, founded upon an alleged failure to comply with the provisions of the statute concerning wills. There is no possible suggestion of fraud or of anything improper upon the part of any one connected with the application for the probate of the will, nor is any allegation of undue influence or testamentary incapacity made. The entire will, with the exception of the signatures of the witnesses, as well as the entire codicil, with the same exception, are in the handwriting of the testator, and there is and can therefore be no doubt that the instruments proposed, truly show Mr. Runkle's actual intention. The only question left, therefore, is, whether Mr. Runkle, his capacity and actual intention being admitted, exercised his intention in the manner prescribed by law.

There can be no doubt of the correctness of the conclusion reached by Judge Martin in his very thorough and able opinion that the will should be admitted to probate together with the first sheet thereof representing pages 1 and 2. The brief which we herewith submit we offer merely to supplement his reasoning.

Before adverting to the legal principles involved, it will be well to refer to the evidence concerning the execution of the will and codicil and their custody and production after the death of Mr. Runkle.

The witnesses to both the will and codicil are Charles Hasler and John A. Burkardt. These

gentlemen are respectively assistant cashier and receiving teller of the Orange National Bank, a banking institution where Mr. Runkle banked in Orange. Both are high class witnesses and the reliability of their testimony is clear. Both testified that they had known Mr. Runkle for many years (pp. 4 and 21); that upon the day of the execution of the will he came into the bank and stated to them that he wished them to witness his will; that when he made this request, they were in the front banking room of the bank and at that time he held the document to which he referred in his hand. They accompanied him to the directors' room in the rear of the bank, where Mr. Runkle signed first, and in their presence, using pen and ink which were in the director's room. The witnesses signed with fountain pens. As much of the will as they could see, was in Mr. Runkle's handwriting (p. 6) and while the will when they witnessed its execution was folded up so that they could see only the last page, they could see that there were other pages constituting the will (p. 18). The witnesses have also a reasonably clear recollection of the circumstances surrounding the execution of the codicil. This instrument had already been signed by Mr. Runkle when he brought it into the bank and the witnesses who stood side by side after having procured from Mr. Runkle an acknowledgment of the fact that the signature to the codicil was his signature, signed their names as witnesses, in his presence, and in the presence of each other. Mr. Burkardt said that Mr. Runkle came to the window where Burkardt stood with the will in his hand and said, "John, I am making a codicil to my will. I want you and Charlie to be witnesses" (p. 7). Mr. Hasler's recollection of this statement is practically the same. His version is that Mr. Runkle said, "This is a codicil to my will and I want you boys to witness it"

(p. 25). Both witnesses say that the codicil was attached to other papers, the top of the codicil being attached to the last page of another series of papers (pp. 9 and 20). As Mr. Hasler expressed it, the codicil was attached "to a bunch of papers" (p. 26). The witnesses were, of course, unable to say whether the bunch of papers to which the codicil was attached at the time of its execution was the same series of papers which are now produced as the will. They made no particular observation at the time of these papers and are hence unable to say, but this much at least is clear, that the codicil at the time of its execution was annexed to another series of papers which apparently were similar in kind to the page on which the codicil was written. At least there was no dissimilarity in the papers to attract and impress itself upon the minds of the witnesses.

Nothing further appears with reference to the custody of the will and codicil until a very short time before Mr. Runkle's death, which occurred on Saturday afternoon, January 31st, 1914, between four and five o'clock (p. 30). Miss Tully, who was a member of Mr. Runkle's household, and in practical charge of the conduct of the affairs thereof, testified that in the week preceding his death Mr. Runkle brought to the house and placed on the top of his desk in the sitting-room thereof, a leather wallet containing papers. A few days before his death he brought a smaller package home and put the smaller package in the drawer in this desk (p. 34). He told Miss Tully that if anything happened to him she was to call up Mr. Smith and give him these papers. When, therefore, Mr. Runkle died Miss Tully, after notifying Mr. Runkle's brother, his life long friend and associate in business, Mr. Hulick, immediately telephoned to Mr. Smith, and upon Mr. Smith's arrival at the house, Miss Tully handed to him the

leather wallet with its contents as also the smaller package, which had been in the drawer of the desk, as she had been directed by Mr. Runkle. Her testimony is that as far as she knows, these papers, when she handed them to Mr. Smith, were in the exact condition they had been in when Mr. Runkle made his reference to them. She herself had made no change in them (p. 33). Mr. Smith, who is the executor named in the will, saw Mr. Runkle on Thursday of the week preceding his death, or nine days before his death (p. 35). They had some conversation with reference to a friend of Mr. Runkle's, of whose will Mr. Smith was executor, and in the course of this discussion Mr. Runkle said to Mr. Smith, "I didn't intend to tell you, Billy, but you have another" (p. 35). He then said that he had made Mr. Smith his executor and that if anything happened to him, Miss Tully would notify Mr. Smith (p. 36). At the time that Mr. Runkle died, Mr. Smith was in his own home and received a telephone message from Miss Tully, telling him of Mr. Runkle's death (p. 36). He accordingly went to Mr. Runkle's home immediately, asked for Miss Tully and without his making any request therefor, was handed by her the two packages which she had testified about (p. 27). One of these was a blue envelope, upon which was written in Mr. Runkle's handwriting the following: "The Last Will and Testament of William Runkle" (Exhibit P-3). He made no particular examination of these papers at Mr. Runkle's home, but immediately went to his own home, where he examined the contents of the blue envelope. In this envelope were the will and codicil, which were fastened together, as far as observed then, in the same manner in which they were fastened at the hearing, that is, by means of two wire clips known as the Gem Clip (p. 39). There were other memoranda in the envelope, not, however, a part of the

will and testament. These memoranda were offered in evidence. The next day was Sunday, and from Saturday afternoon until Monday morning, the package containing the will and codicil were never out of Mr. Smith's possession (p. 42). On Monday morning the documents were taken to the Fidelity Trust Company and placed in a vault in that company where they remained over night, and on Tuesday morning they were handed by Mr. Smith and his counsel to Mr. Anderson of the Surrogate's office. From that time up to the present time the papers have been in the custody of the Surrogate. Mr. Smith testified positively that the will and codicil were in the same condition when he delivered them to Mr. Anderson as they were when he received them from Miss Tully (p. 44), and that they had never been out of his possession. He further testified that he did not take the sheets of the will apart, and that the fasteners thereon, as far as he knew, never were taken off (pp. 45 and 46). Messrs. Anderson and Finneran of the Surrogate's office, both of whom made an examination of the will and codicil the day it was left at the Surrogate's office by Mr. Smith, testified that when the will and codicil were left at the Surrogate's office they were fastened together by two metal fasteners similar to those on these instruments at the hearing. These are Gem Clips. The tear which is through the top of the will, and which appears in every one of the sheets thereof, were in the will when Mr. Anderson first saw it (p. 57). Messrs. Anderson and Finneran also observed what Mr. Smith had not observed, that the other pages of the will exclusive of pages one and two, which are on the first half sheet, were also fastened together by eyelets which punctured and fastened together the other sheets, said sheets including pages 3 to 12 inclusive, and there were also under the head of these eyelets, and between

the head of the eyelets and page three, small pieces of paper. Exhibit P-7 is an example of these eyelets, and on this exhibit also are small pieces of paper similar in size and character to those which were under the eyelets on the will when it was left with the Surrogate. These eyelets were inadvertently removed and lost by a young lady in the Surrogate's office in making a copy of the will.

To recapitulate, therefore, it is plain that the will, the concluding page of which is page 12 of the will offered for probate, was signed, sealed, published and declared by Mr. Runkle in the manner prescribed by the statute before the two witnesses in question. It is equally clear that the codicil to this will was also properly published and declared by Mr. Runkle before these same witnesses. If, therefore, the fact is, or we must assume the fact to be that the will and codicil at the time Mr. Runkle appeared with them before these witnesses were in the condition in which they are now, then both instruments are entitled to probate in that condition.

The cancellation of the bequest to Charles R. Scofield in the ninth paragraph of the will is a proper cancellation.

The words of this bequest are stricken out by vertical lines in ink. Opposite the paragraph, and in the margin of the will are the words "Cancelled Oct. 5, 1912, William Runkle." The marginal note leaves no doubt but that the cancellation was done by Mr. Runkle himself. Cancellation in this method is permitted by our statute. Situations quite similar to those here involved, have been before our Prerogative Court and Court of Errors and Appeals, and there seems no room for controversy that under the settled law of this State cancella-

tion in the manner done by Mr. Runkle was an effective cancellation.

In re Kirkpatrick, 7 C. E. Gr. 463.
Collard v. *Collard*, 67 Atl. 190.
Hilyard v. *Wood*, 1 Buch. 214.
Frothingham's Case 6, Buch. 331.

This is so, even though the effect of the cancellation may be to increase the residue of the estate and thus incidentally increase the gift to another.

Even if the problem be considered as one of alteration, the proper presumption is in favor of the alterations having been made prior to the execution of the will.

It is contended by the caveator that the presumption with respect to alterations is that they were made after the execution of the will. Such is undoubtedly the law in England, and it has been a somewhat prevalent notion that the same is the law in this country. That such is not the rule in this country is, however, well established, though until recently there has been much confusion on the subject.

There is no authority in this State settling this proposition. Reference will, no doubt, be made to the opinion of Chancellor Magie in *Ward* v. *Wilcox*, 19 Dick., p. 303. In that case an inspection of the will offered for probate disclosed an evidence alteration therein, by which one of the legacies had been increased from $2,500 to $10,500. There was some evidence, though not much, to indicate that this alteration had been made before the execution of the will, and upon this ground the Chancellor admitted the will to probate as altered. The question of the natural presumption was evidently discussed though the Chancellor distinctly said

that it was unnecessary for him to decide the question of what the presumption was since even if there was a presumption, he thought that it had been sufficiently rebutted by the testimony before him. He said:

> "In cases arising upon wills made before as well as after the adoption of that act, the English courts held that where alterations are apparent upon the face of the will the presumption is that they were made after execution. A distinction is made between such alterations in wills and in other documents, on the ground that an alteration of the latter after execution involves either fraud or crime, and no presumption of either can be made, while a testator may alter his will at his pleasure, without committing either fraud or crime. Doe, Shallcross *v.* Ralmer, 16 Q. B. 747; Cooper *v.* Bockett, 4 Moo. P. C. C. 419; Greville *v.* Tyler, 7 Moo. P. C. C., 320; Doe, Tatner *v.* Catomore, 16 Q. B. 745.
>
> Counsel for appellant have not cited to me any American cases upon the subject of the presumption in respect to alterations apparent on the face of a will when offered for probate or relied on for relief. I have not deemed it necessary to spend time in examining our authorities. Text seem to agree that the presumption is of an alteration after execution. Schoul. Wills, 435; Underh. Wills, 268; Page Wills, 431, 432; Tayl. Ev. 180, 968; 1 Jarm. Wills (R. & T.), 304. The common practice, to note, at the foot of a will about to be executed, any alteration, in such a manner as that the execution by the testator and the attestation by the witnesses may include and recognize them as theretofore made, will, I think, justify a presumption that un-noted and unattested alterations were made after execu-

> tion. So, I shall assume, without deciding, that, upon the production of the paper in dispute before the court, with a plainly apparent alteration, a presumption was at once raised that such alteration had been made by Miss Ward after its execution. Nor do I deem it necessary to decide what effect would have been produced if such presumption had been left unrebutted. That such a presumption as I have assumed may be overcome and rebutted by competent and sufficient evidence justifying the conclusion that the apparent alteration did, in fact, exist at the time of the execution of the paper, is in accord with reason and the authorities above cited."

It will be noted that the Chancellor says that the presumption was the same both before and after the adoption of the Wills Act. This statement we respectfully suggest was not justified by the authorities which were cited in the opinion, and it has been the failure to recognize the effect of the Wills Act on this principle of the English law, which has been the cause of much of the confusion which has, until recently, existed in the American cases and in the minds of the text writers generally on this subject. Of the cases which are cited by Chancellor Magie in his opinion, all of them except *Tatner* v. *Catamore,* 16 Adol. & El. new series, *p. 745, were decided after the English Wills Act went into effect. *Tatner* v. *Catamore* did not involve a will, but was a case discussing the presumption where an alteration was found in a deed, and what was said by the court with reference to a presumption in the case of a will was pure dictum, and furthermore was contrary to what seems to have been the well established rule in England prior to the promulgation of the Wills Act, as we shall hereafter show. The provision of the Wills

Act with reference to the subject of alterations is as follows:

> "And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

It is because of this express provision of the English statute with respect to alterations and the manner in which they must be noted, that the English rule has arisen. The New Jersey statute, as the American statutes generally, does not contain such a provision, and therefore in New Jersey the common law as it was before the Wills Act still obtains.

That the presumption under the common law was that alterations were made before the execution of the will, is apparent from the report in the leading case of *Cooper* v. *Bockett,* 10 Jurist. p. 931, 4 Moore P. C. C. 419, which is the leading case after the Wills Act, and which is invariably cited in authorities subsequent to that time. It is also one of the authorities to which reference is made by Chancellor Magie. This was the first case arising after the Wills Act, 1 Victoria, Chap. 28. It was held that the presumption was that the alterations were made after the execution of the will. In the

course of argument by counsel, however, it was conceded by the counsel attacking the will, that prior to the statute, the presumption was in favor of the alteration having been made prior to the execution of the will. Thus it was said by counsel:

> "We admit that prior to the statute 1 Victoria, if an alteration was made in the handwriting of the testator, the presumption was in favor of its having been made prior to attestation; but that presumption was only raised because it was in the handwriting of the testator but how is it since that statute? The effect of that act is to do away with any validity of handwriting. The effect of holding that the old presumption in favor of alterations is correct, would be that a will, duly attested according to the late act, might be altered by an alteration not attested in accordance with that statute."

And again it was said by counsel for another party during the course of their argument:

> "Now before this act of Victoria, the presumption was that wills in handwriting were valid; the act was passed to alter that state of the law and it declares that alterations in handwriting have not any effect."

As stated, all of the subsequent English cases follow *Cooper* v. *Bockett,* and the English law clearly is the result of the express language of the Wills Act.

In the *Goods of Tweedale,* L. R. 3 Probate and Divorce, p. 204, there was a will in the testator's handwriting containing material alterations, about the making of which no information could be obtained, and such will was signed by the testator whilst as a soldier he was employed in actual military service. The alterations were presumed to have been made during the continuance of such

military service, and were included in the probate. The Court said:

> "I entertain no doubt that probate of the will must be allowed under 1 Vict. c. 26, s. 11, as that of a soldier in actual military service, but the question remains whether the alterations are to be presumed to have been also made whilst the deceased was in actual military service. A somewhat similar question has arisen in reference to non-attested alterations in a will dated before the Wills Act came into operation. In the Goods of Streaker (1) Sir C. Cresswell held, on the authority of Pechell *v.* Jenkinson (2), and In the Goods of Pennington (3) that the presumption is, in the absence of circumstances from which the contrary may be inferred, that the alterations were made before the act came into operation. I think that an analogous principle is applicable to the present case, and that it is to be presumed that the alterations in the will were made while the testator was still engaged in actual military service."

Even in England, however, it has been doubted whether it is a correct exposition of the rule to say that the presumption is that the alterations were made after the execution of the will, or whether it is not more proper to say that there is no presumption at all, but that the burden of proof is upon one who propounds a doubtful instrument for probate to produce some evidence as to when the alterations were made.

See

Williams v. *Ashton,* Johns & H. 115.

Goods of Sykes, L. R. 3 Probate and Divorce, p. 26.

And the courts in England invariably say that the presumption, if there be a presumption, is a

slight one, and that any competent evidence may rebut it and lead to the admission of the alterations.

Thus in the case of *Goods of Hindmarch,* L. R. 1 P. & D., p. 307, there were some alterations and interlineations in a will which was a holograph, and there was no evidence whether they were written before or after the execution, except the affidavit of an expert that in his opinion they were written at the same time as the rest of the will. With respect to this the Court said:

> "The evidence of the expert, although if I were asked to criticise the grounds on which he has formed his opinion I should say it is not very strong, is entitled to some consideration, as that of a man accustomed to deal with questions of this kind. Taking this into consideration, together with the facts that the testator was a lawyer, that the alterations are all of a trifling character, and that they bear the appearance of having been written with the same pen and ink as the rest of the will, I think that they may be admitted to probate."

And in the *Goods of Cadge,* L. R. Prob. & Div., Vol. 1, p. 543, the Court, after referring to Cooper *v.* Bockett, said:

> "That, as a general rule, in the absence of evidence, unattested alterations and interlineations must be presumed to have been made after execution. I think that in this case, however, I am not bound to draw that presumption, for I can see that the court is not precluded by the absence of direct evidence of the fact, from considering the nature of the interlineations and the internal evidence, if any, furnished by the document itself."

The text writers generally have stated the rule to be that the presumption is that alterations were made after the date of the will, but on examina-

tion of the text books, it will invariably appear that the cases cited in support of this statement are English cases, and that the text writers generally do not observe the significance of the English statute with reference to the English rule, and where American courts have made the same statement, the same oversight is apparent.

In *Greenleaf on Evidence* and *Best on Evidence,* however, this distinction and the effect of the English statute is observed and commented upon. Thus, in a note to *Greenleaf on Evidence,* Vol. 1, p. 702, it is said as follows:

> "The reporter's marginal notes in Burgoyne *v.* Showler, 1 Robb. Eccl. 5, and Cooper *v.* Bockett, 4 Moore, P. C. C. 419, state the broad proposition, that alterations in a will not accounted for are *prima facie,* presumed to have been made after its execution. But on examination of these cases, they are found to turn entirely on the provisions of the Statute of Wills, 1 Vict. G. 26, §21, which directs that all alterations made before the execution of the will, be noted in a memorandum upon the will, and attested by the testator and witnesses; if this direction is not complied with, it may well be presumed that the alterations were subsequently made; and so it was held, upon the language of that statute, and of the Statute of Frauds respecting wills. In Doe *v.* Palmer, 15 Jur. 836, 839; in which the case of Cooper *v.* Bockett was cited by Lord Campbell and approved upon the ground of the statute."

In *Best on Evidence,* section 229, after stating the general rule as to other instruments, the author says that as to wills, the presumption seems to be the other way:

> "The rule being that, having regard to the statute of frauds, and the Will. 4 & 1 Vict.

> c. 26, s. 21, the onus is cast upon the party who seeks to derive an advantage from an alteration in a will, to adduce some evidence, from which the injury may infer that the alteration was made before the will was executed."

Cooper v. *Bockett* and the subsequent cases are cited, being the same cases which are referred to as authorities by Chancellor Magie in *Ward* v. *Wilcox.*

In a note to *Columbia Law Review,* Vol. 14, note 3, p. 264, it is stated that the English rule is probably justified in view of the provisions of the Wills Act, but that the better view in America is that the English rule does not obtain.

In 25 *Harvard Law Review,* p. 691, there is an interesting discussion of the law relating to written evidence and alterations. The author, after stating the English rule, says, among other things:

> "After a careful examination of many cases I am satisfied that in a large number of our states the law of this country is different from the law of England as to alterations in wills. * * * The statute in this country that usually prevails makes it logical for our courts to presume that apparent alterations in wills in the absence of suspicious circumstances were made before execution. In England, on the other hand, the statute at least suggests that an alteration should be deemed to have been made after execution in the absence of evidence to the contrary."

After referring to the general provisions in the American statutes, the writer continued, p. 700:

> "It will be observed that in this American statute not a word is said about alterations or how they shall be evidenced. It is true that in practice alterations made before exe-

cution or at the time of execution if made under the advice of an experienced lawyer, are usually witnessed on the margin by the initials at least of the testator, or else such alterations are enumerated in the attestation clause after the signature of the testator but before the signatures of the attesting witnesses. Suppose, however, the will is all in the handwriting of the testator, and it discloses alterations but discloses nothing as to when the alterations were made. Is there any reason in the American statute, or in the law of evidence, for determining, in the absence of other evidence, that the alterations were not made before the will was subscribed by the testator and witnessed by the attesting witnesses? I can find none. * * *

In the second edition of his work on evidence, Mr. Jones, discussing this very subject after quoting *Stephen on Evidence,* says:

'As will be seen when the different views are stated, it would be vain to attempt to reconcile the decisions on this subject in the United States. It will be found, however, that the distinction which exists in England with respect to deeds and other instruments is not generally made in this country. The mere fact that there is an interlineation would not seem to call for any explanation provided the appearance of the writing and ink is such as to indicate that the whole was written at the same time and by the same person.' ''

The provisions of the statute in America are quite similar and are all different in this respect from the English statute. The statute in New York and that in Pennsylvania are substantially similar in this respect to the statute in this State. It was formerly thought to be the rule in some of the American states, and in particular, in New York,

that the English rule obtained in this country, but that it does not obtain has been finally settled in New York State, and in such other American states in which there have been recent and well considered discussions of the subject.

Thus, in *In re Potter's Will,* 12 N. Y. Supp. 105, it was said:

> "There are several interlineations and erasures in the instrument, but an inspection of it shows plainly that all the interlineations are in the handwriting of testatrix, and these, as well as the erasures, may well be presumed to have been done by her in the preparation of the will and prior to its execution. The fact that she was her own scrivener and the custodian of the document weigh in favor of this presumption."

In *In re Homes' Will,* 11 N. Y. Supp. 896, the paper offered for probate was found in the private papers of decedent. It then showed that the bottom of the first page had been cut off. The cutting was ragged and uneven, and there was no concealment of the fact that something had been written on the following line. The paper was so folded that the subscribing witness could not say that it had been mutilated since its execution. The first page ended with a perfect sentence, and the second page began with one. Abbott Surrogate said:

> "I do not think the proposition tenable that there is a presumption that the instrument offered for probate was mutilated after execution. No proof has been offered which would warrant any such presumption. * * *
>
> The will was found among the private papers of the deceased, and does not appear to have been disturbed by any one until found by the executor a day or two after the testator's death, and, when discovered, was in form as presented for probate. I think the testator,

finding he had made a mistake in writing the will, cut off the bottom of the first page himself before execution, and I am the more convinced of this from the appearance of the document itself. * * *

The first page ends with a perfect sentence, and the next page begins with one, which could hardly happen if the mutilation had taken place subsequent to the execution."

The leading case in New York is *Crossman* v. *Crossman*, 95 N. Y. 145. It was there distinctly held that the presumption was in favor of the instrument and against the alteration having been made after its execution where the alteration was fair upon its face. The Court said:

"Where an interlineation or erasure in a will is fair upon its face, and it is entirely unexplained, there being no circumstance whatever to cast suspicion upon it, it would not be proper for any court to hold that the alteration was made after execution; but if there are any suspicious or doubtful circumstances growing out of the mode of the alteration, the ink in which it was made, the fact that it was in favor of the party holding the instrument, and that it is not noted at the bottom, then these and all the other circumstances must be submitted as questions of fact to be determined by the court, in deciding whether the alterations were made before execution or not."

Crossman v. *Crossman* is referred to as properly expressing the law in the subsequent case of *Matter of Conway*, 124 N. Y., 455.

The most recent decision in New York is that of Surrogate Fowler *in the Matter of Peter Z. Easton* reported in the New York Law Journal January 20, 1914. Surrogate Fowler makes a thorough review of the authorities and states that the English rule depends upon the English statute. He refers to the

earlier New York cases of *Wetmore* v. *Carryle,* 5 Red., 544, and *Dyer* v. *Erving,* 2 Dem., 160, and states that they were practically overruled by *Crossman* v. *Crossman.* He said:

> "The so-called presumption that interlineations or alterations in a will, in the absence of proof, were made subsequent to execution grew up, I think, in England only after the Wills Act of 1 Victoria, and I doubt extremely if it is even well rightly termed a presumption of the common law. I am confirmed in this doubt by the statement of that very able man, Sir W. P. Wood in Williams *v.* Ashton (1860), 1 J. & H., 115-118, where he said, in substance, that he did not think the so-called presumption correctly stated the law of England. * * * It seems to me that it is not doubtful that before the statute (C. 26, 1 Victoria) it was an established doctrine of the common law in both England and New York that where there was nothing to show at what time an interlineation or alteration was made in a will, it would be presumed to have been made before execution on the principle *'praesuminiter omnia rite acta fecisse.'* (See note to *Waddilove Digest of Cases* in E. C. C. C. T. S. 33.) Now this statement is the exact contrary of a prevalent notion."

Cases supporting the statement in Waddilove were then cited. He then went on to state that even if there be any presumption, it is a very slight one, and he, therefore, thought he was justified in admitting the will to probate with the alterations which appeared therein. In this connection, he said.

> "With this brief reference to the law of this matter, I proceed to its determination. It is apparent from an examination of this will for probate, that the script is a holograph and this is a matter of some weight (*Matter of Wood,* 144 App. Div. 259) and also that the interline-

ations are made in the testator's own handwriting and with the same ink and apparently by the same pen."

The rule is similar in Pennsylvania. The earliest case is *Wyckoff's Appeal,* 15 Pa. State, 281, where the Court, through Chief Justice Gibson, held that where interlineations or erasures appear in a will, and no mention was made of them at the time of the execution thereof, they will be presumed to have been made prior to the act of execution.

Wickoff's Appeal, 15 Pa., 281, was cited and followed in the subsequent case of *Linnard's Appeal,* 93 Pa. State, 313. In that case the word "five" in a legacy was stricken out, and the word "three" written above it in the testator's handwriting. The will had been followed by two codicils. The Court, after referring to Wickoff's Appeal with approval, said:

"So in the present case it may fairly be presumed that the alterations, admitted to be in the handwriting of Miss Linnard, were made before she appended her signature to the last codicil. If this be so, the testamentary paper as altered, including the codicils, speaks as of that date, and should be regarded as her will, properly executed at that time. It is stated as a fact that the alterations were not made before the original paper was re-signed on December 13th, 1877; but it does not follow from this that they were not made before the last or some of the preceding codicils were executed. Indeed, the fair inference from the paper itself would seem to be that they were made before the second codicil. As has already been observed, the clause stricken out of the first codicil, before it was completed, refers to the cancelled legacy in the second item of the original paper, so that it may be fairly inferred that

this was done before the testatrix signed what now stands as the first codicil; and it is quite probable that the alterations in the original paper were all made at the same time. But, however that may be, the presumption is that she made them before she affixed her name to the last codicil. Her signature to that having been duly proved should, in the absence of evidence to the contrary, be regarded as her final act."

Wickoff's Appeal and Linnard's Appeal are again cited and approved in the recent case of *In re Morrow's Estate,* 54 Atl. (Pa.), 1903, p. 313, and it is expressly stated by the Court that the presumption is that the alterations were made before the execution of the will.

In re Reed's Estate, 74 Atl. (Pa., 1909), 646, which may be cited as establishing a contrary rule in Pennsylvania, does not do so. It is readily distinguishable from the other Pennsylvania authorities upon its facts. There, there was an effort to add to a will, an unsigned and unattested clause, which was obviously no part thereof. The earlier Pennsylvania cases are not cited by the Court and whatever is said in the case as to the general rule is founded entirely on *Underhill on Wills* and *Paige on Wills.*

Wickoff's Appeal is also cited with approval in the recent case of Kiel's Estate, 215 Pa. St., 464.

The same rule has been announced also in other jurisdictions.

In *Jersey* v. *Jersey,* 101 N. W. (Mich.), p. 54, the Court, with reference to this subject, said:

"The alterations, if they are alterations, are not on their face suspicious, and in no way affect the disposition of property. If the word 'death' was omitted when the instrument was first prepared, and its position is some indica-

tion that it was, the reading would have been 'in the event of my before that of my wife.' The word 'my' first occurring is at the end of a line; the word 'before' at the beginning of the next line. The word 'death' is placed ahead of the word 'before' and on the same line, bringing some of the letters to the left of the ruling which is that of ordinary legal cap paper. The natural inference is that upon reading over the will before it was signed the omission of the word 'death' was noticed, and was supplied, apparently by the same hand, using the same pen and ink. It is not possible to tell from inspection whether the words 'signed in the presence of' were written by the person who drew the will or made with the same pen. As in case of the word 'death' they are not suspicious, even though treated and alterations. No one could be benefited or injured by the use or omission of them. The presumption is that they were made before the instrument was executed."

With respect to pages 1 and 2 of the will, however, the question involved is not that of alteration.

It is contended that the first and second pages of the will are not properly to be considered a part of the will, and should be denied probate. This contention is based upon the fact that apparently the first and second pages were written with different ink than the pages number 3 to 12, inclusive; that when the will was originally produced, that while the first sheet, as well as the codicil, were actually fastened to the remainder of the will by means of two Gem clips, that, nevertheless, in view of the fact that pages 3 to 12, inclusive, were also fastened together by two star eyelets, and inasmuch as there

were small scraps of paper between the head of these eyelets and page three, that the indications are that the first sheet was not a part of the will when it was executed, and that hence the first sheet never was published and declared in the manner prescribed by the statute. It is the allegation, therefore that this first sheet must be considered as an alteration of some other first sheet, which was at the time of the execution of the will a part thereof. But before referring particularly to the cases and to the facts in the case at bar, it is well to point out that entirely different circumstances govern the discussion of this question than govern the discussion under the previous head. The question of the identity of the pages of a will offered for probate is entirely different from the question of alterations. This appears clearly and is nowhere stated more effectively than in the English cases themselves. We cannot, therefore, assume that there was another first page at the time of the execution and that alterations were made therein, but the question is, granted that there may have been another first page in existence some time before the execution of the will, was the first page, which is now produced, the first page of the will at the time the will was executed, in other words, was the document, which was executed before the witnesses, the same document, as far as its constituent pages is concerned, as is now produced for probate, and this obviously is a different question from one of alterations, and involves only the questions and presumptions which arise as to the identification of the pages of an instrument.

The distinction which we have expressed is generally followed in the cases discussing this proposition and the English cases clearly show that while under their statute the presumption as to alterations is that they were made after the execution of the will, that as to the identity of the pages making

up the will, the presumption is rather that the pages which constitute the will as found in the custody of the testator at his death constituted the will as executed.

An early case which reaffirmed the rule as to alterations, but at the same time made clear the distinction between the question of alteration and identification of the pages is *Marsh* v. *Marsh,* 1 Swab. Trist., 528. That case was as follows: Testator died leaving a will dated 1856, consisting of 17 pages and written on paper of three different sizes, loosely tied together. The first three pages and the last two of the concluding sheets were in the testator's handwriting, ten of the intermediate pages were parts of a will prepared in duplicate by the testator's solicitor in 1854 (2 years prior) and the two remaining sheets were part of a draft will prepared by another solicitor under the testator's instructions in 1856. Of this document the last two sheets were executed and attested, being dated respectively the 22nd of March and the 19th of May, 1856. The last sheet contained a general revocation of all former wills. The codicil of the 29th of April, 1858, was wholly in the testator's handwriting, and it was found, as more particularly described in the judgment, annexed by a tape to a will of 1851, and a codicil of 1852, and the only important point in respect thereof, raised and determined, was the effect of the annexation, in reviving the testamentary papers to which it was found annexed.

There was an interlineation "situated in the counties of Stafford and Chester" in the codicil.

Two of the questions raised, the Court decided, were (1) whether the sheets, other than the last sheet of the will, were annexed to and formed, together with that sheet, the last will of deceased at the time of the execution of such last sheet, and (2)

whether the interlineations in the codicil was written before execution.

Cresswell, *J.*, says (p. 530):

"Where a will is found written on several sheets, and the last only is signed and attested, although the witnesses did not observe the others, the prima facie presumption is, that they were in the room and formed part of the will at the time of the execution (Gregory *v.* Queen's Proctor, 4 N. C., 620). Is there anything to confirm or rebut that presumption? The last page of the will, as originally executed, on the 22nd of March, 1856, which was written on the second page of a half sheet of paper, began with these words: 'afore trust or in relation thereto,' which was manifestly the conclusion of the sentence which had been commenced on the preceding page; it then proceeded:

'And lastly, I do hereby nominate and appoint my nieces, Eliza Louisa Marsh, Georgiana Amelia Marsh and Rosamond Jane Marsh, executrices of this my last will and testament, and I do hereby revoke all former and other wills and codicils by me at any time heretofore made, and declare this to be my last will and testament. In witness, etc.'

The last page, therefore, of the will, as executed on the first occasion, began with a few words which completed a sentence commenced on the preceding page and which must have been there at the time, being on the same sheet; but that and the eight preceding pages were part of a will prepared for the testator by his solicitor, Mr. Keary, in 1854, and no one page could be separated from the others without leaving the same imperfect. It is, therefore, reasonable to infer that the whole was there so as to make sense. The last page of the will,

as re-executed, began with the same words as before completing a sentence, and was a copy of the last page as it stood when executed for the first time, except the omission of one of the executrices; there can be no reasonable doubt, therefore, that the last page of the will, as before executed, was there; if so, the preceding page must have been there, and if the nine preceding pages were there when it was executed the first time, what reason is there for supposing that any of them were afterwards dis-annexed? * * * The remainder of the will consisted of three sheets, all in the handwriting of the testator, containing the disposition of his real estate and those three sheets have manifestly been prepared at one and the same time. The will then consists of three portions: first, the formal commencement and disposition of real property; secondly, the special claims; thirdly, several provisions and trusts relating to the real and personal estate. It is true that some provisions in the third part are inconsistent with the first, but any one or two of the parts without the rest would be so manifestly imperfect, and the reasons for supposing that the whole was there are so much stronger than any contrary presumptions arising out of the inconsistency of some parts, that I have arrived at the conclusion of fact, that all the sheets now forming part of the will of the 19th of May, 1856, did so at that time. Dr. Spinks likened it to the case of alterations, but that differs from the present, for there the Court has evidence before it that the will was originally in a different form from that produced. * * *

Thus far, I think, two points are established, that on the 19th of May, a will was executed by deceased, consisting of the several

sheets of paper found attached together after his decease, and that all former wills were, by that instrument, revoked."

The Court later decided that the interlineations were made after the execution of the codicil.

An early discussion of this subject by Lord Mansfield is found in *Bond* v. *Seawell,* 3 Burro., 1773. In that case the facts were as follows: Testator made his will, consisting of two sheets of paper all in his own handwriting and signed his name at the bottom of each page. He also made a codicil in his own handwriting upon one single sheet. He called in a person and showed him both the sheets of his will and his signature to every page thereof and he told him it was his will. Later the two witnesses to the will came in and the testator showed them the codicil and the last sheet of the will. The witnesses never saw the first sheet of the will. Both sheets of the will were found with the codicil in the testator's bureau after his death, all wrapped up in one piece of paper; the two sheets of the will were not pinned together. Lord Mansfield said:

"Every presumption ought to be made by a jury in favor of such a will when there is no doubt of the testator's intention. * * * Whether the first sheet of this will was or was not in the room at the time of executing and attesting, the latter may be material to be known. If it was, the jury ought to find for the will generally, and they ought to find all things favorable to the will. If it be doubtful 'whether the first sheet was then in the room or not' we all think the circumstances sufficient to presume that it was in the room and that the jury ought to be so directed. * * * Therefore, we are all of the opinion that it ought to be tried over again and if the jury shall be of opinion that it 'was then in

the room' they ought to find for the will generally and they ought to presume from the circumstances proved 'that the will was in the room.' "

In *1 Jarman on Wills,* *p. 84, it is said as follows:

"A will may be composed of several clauses written at distinct intervals and one memorandum of attestation subscribed to the last part may apply to the whole, including as well what was long before written as what had been recently added, though the antecedent part bears a different date from, and is complete in itself independently of the latter.

Charlton *v.* Griffen, 1 Burr., 549.

And the same general doctrine applies to a will whose contents are distributed through several sheets of paper, which would be adequately attested by a single memorandum, provided all the detached parts were present when the act of attestation took place, and which fact it seems would be presumed unless the contrary be distinctly proved as would also that of the attestation being intended to apply to the whole. Bond *v.* Seawell, 3 Burr., 1775."

Referring to the situation in the case at bar, what is the evidence as to whether the first page constituted a part of the will at the time of its execution. Again in this consideration, we have the authorities in accord everywhere that the presumption is in favor of this first sheet. We have the reliance of the caveator on Mr. Kinsley's testimony. The effect of his testimony is that pages 1 and 2 were written with different ink and with a different pen than pages 3 to 12, inclusive; that apparently the spacing was greater at the conclusion of page two than anywhere else in pages 3 to 12, inclusive. He admitted that pages 1 and 2

were written on paper of the same kind as that on which pages 2 to 12 were written, and paper bearing the same water mark of the same year. He said, however, that sheet number one did not appear to be as of the same stock as the other sheets, but it is uncontrovertible that it is of the same kind of paper and of the same year, and the differences which Mr. Kinsley found are detectable only by means of a microscope, and he admitted that there were also differences in pages 3 to 12, though he said they were not as marked as the difference between sheet one and the remaining sheets. It is common knowledge that in paper of this character, which is comparatively cheap paper, that the rulings, owing to the differences in printing, are apt to vary, but the very significant thing is that this paper is of the same water mark and same manufacture as the other paper, while the paper upon which the codicil is written is of a subsequent water mark. We refer to this fact now only in passing, and shall discuss its effect more at large hereafter.

Again, we have Mr. Kinsley failing to testify that the writing on the first and second pages was more recent than that on pages 3 to 12, inclusive. His failure to so testify, in view of the character and ability of this witness, is eloquent of his inability to do so. Furthermore, the caveator will call attention to the little scraps of paper found under the star eyelets, and to the fact that sheet one was not attached to the remaining sheets of the will by these star eyelets. From this it may be natural to assume that at one time there was another page there, but that does not need the assumption of the fact that the present first page was placed there after the execution of the will. On the contrary, the presumption, as shown, is the other way. As already said, the work of writing the will was a burdensome one, and assuming

there was some reason why Mr. Runkle desired to re-write the first page before execution, there is no reason why he could no do so in the manner in which he did. It is, at all events, plain that he himself attached this first page to the will, and that it was attached for some time is shown by the fact that the impressions of the star eyelets are very much marked at the top of the first page which could only arrive at this appearance after a somewhat extended period. In addition, the Court will observe the crease at the top of the first page and subsequent pages of the will directly underneath the end of the Gem eyelets, which shows that the pages of the will had been handled frequently while attached in this manner. These creases appear very clearly in the photographs offered in evidence and must not, therefore, be thought to have resulted from handling subsequent to the production of the will in the Surrogate's Office. That part of the pages were attached together in two ways does not in any way militate against the fact that all of the pages were attached together in one way. If the testator had done nothing more than place all of the pages in the envelope which he himself designated as containing his last will and testament, there would have been sufficient identification of the pages with each other, but he went further and attached all the pages by means of these Gem clips, which was a method of annexation which seemed sufficient to him. The statute prescribes no method of annexation, and anything which serves the purpose to fasten together is sufficient.

In *goods of Braddock*. L R. 1 Prob. & Div., p. 433, the Court in admitting to probate a will as altered because of the fact that the alterations

were followed by a codicil duly attested, which codicil was pinned to the original will said:

> "But the attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet. No particular mode of affixing one piece of paper to another is prescribed by law, and I cannot say that the fastening of two sheets of paper together by a pin is an insufficient mode of connection, or that it is less effectual than the lawyers' mode of fastening by a tape. Here I am satisfied by the evidence that the papers were connected together, and that in writing their names on the back of the original will, the witnesses intended to attest the signature of the testatrix at the foot of the codicil. That codicil, being duly executed, confirms the will in its altered state, and probate will go accordingly."

Attention may be called to the fact that the figure $50,000 is repeated at the beginning of the third page, although it had been written at the end of the second page. This, however, is a common error and is of no particular significance except that it does show the connection between the third page and the second page, and shows that the beginning of the third page is but the continuation of the bequest made at the bottom of the second page. It serves clearly to connect these two pages in every sense.

All of the pages of the document, including the first sheet, and the codicil, when first examined by anybody were torn at the top in such a way as to indicate that they had all been torn at the same time, which also tends to show that all the pages were together when this tearing was done. Again, we may refer to the fact that the October

5th, 1912, cancellation shows that Mr. Runkle was familiar with the fact that notation of the time at which an alteration was made was important, and this knowledge on his part is inconsistent with the theory that he changed two whole pages of his will subsequent to the execution of the document, when he knew that it was important that such changes should be dated if they were made after the execution of the will. So also the fact that the part of this will upon which the attack is made is the first sheet of the document is significant. While the amount of writing on the second page may indicate that this page now contains less than may originally have been contained on that page, that does not necessarily follow since the original writing might have been begun lower on the first sheet with the heading below the top of the paper which, when copied, as it now appears, might make apparently less matter than originally appeared. It is also true that it is possible that some accident might have happened to the first sheet like the spilling of ink, or defacing it in a manner which would require re-writing and obviously the testator would not have undertaken the burden of re-writing the entire instrument when the re-writing of the first sheet would answer as well.

The inference is made that the handwriting on pages one and two is of a different character and more feeble than that on pages 3 to 12, inclusive, but an examination shows this clearly not to be so. There is as much variation in pages 3 to 12, inclusive, as there is between pages 1 and 2 and pages 3 to 12, inclusive. Apparently no part of the will was written at one writing and even pages 3 to 12 show these differences in the testator's handwriting. This appears most clearly from the comparative photographs which were made by Mr. Osborn and which have been offered

in evidence. It seems very clear that the handwriting of pages 1 and 2 and pages 3 to 12 is similar and it is equally clear that the writing on pages 1 to 12, inclusive, while similar, is quite different from the handwriting in the codicil, a circumstance, the significance of which will also be adverted to hereafter.

Under all these circumstances, therefore, it clearly appears that the first sheet must be considered a part of the will as executed by Mr. Runkle whether we view that from the point of view of presumption or from the point of view of the evidence to be deduced from the condition of the document itself.

There have been many authorities discussing situations like that in the case at bar, and all the well-considered authorities indicate that this first sheet should be admitted to probate.

To begin with, the fact that the will was always in the custody of the testator is significant.

In re. Cooper, 5 Buch., 177, affd., 6 Buch., 615.

In *Webster* v. *Yorty*, 62 N. E. (Ill.), 907, it appeared that the will in question had been properly signed by the testatrix and had thereafter been in her custody. When the will was received by the probate clerk, it appeared that part of the paper containing the signatures had been cut off and re-attached by pasting. There was no evidence as to when this was done, or as to who did it. The Appellate Court held that the mutilation in question raised no presumption against the will and that after its execution had been proved and it had been admitted in evidence, the burden of proof was on the contestant to show that it had been changed.

See *Williams on Executors*, Vol. 1, p. 194.

Schouler on Wills, para. 284, where it is said:

> "The presumption is that papers bound or fastened together, coherent in sense, and constituting the will as found after the testator's death, were so bound or fastened and constituted the will when it was executed and attested."

See also *Palmer* v. *Owen,* 82, N. E. (Ill.), 275.

A recent case of importance is *In re. Wood's Will,* 129 N. Y. Supp., p. 5. In that case, to quote the opinion:

> "The question arises over the alleged alterations and mutilations of this will, it being the contention of the contestant that the will being altered and mutilated, it was for the proponent to establish by evidence that the paper propounded was in the same condition as when executed by the testator. That the alterations and mutilations existed at the time of the execution and were not subseuently made. The will was written out by the testator himself, the attestation clause alone being in the handwriting of a clerk in the office of one of the subscribing witnesses, and there is no suggestion of fraud or collusion or of anything amounting to or suggesting bad faith on the part of any one."

The Court first discussed the alterations, said they were immaterial and that the admission to probate with these alterations had been justified. The fast as to the mutilations were as follows: The will was drawn on legal cap paper, double sheets fastened at the top with a knotted string, the first three pages being written on one side only. The fourth sheet was cut apparently with shears, as the edges were notched, and then the matter ran smoothly to the fifth page except that

the testator closed the fourth page with the provision that "the proceeds therefrom I desire to give to" and the fifth page opens with "to the Methodist Episcopal Hospital &c.," which the Court said was an error which might happen to one more accustomed to drawing instruments than the testator. The sixth page as the same was originally put together, ran the full length of the page, left something over an inch upon which was pasted about half a sheet of the same kind of paper, so that this page was about one and half times as long as an ordinary page and it was filled to the bottom. On the back of this page something over half way down, there was a provision giving to the testator's sister certain matters and then after another space, there was a residuary clause followed by the signature of the testator. The Court said:

> "When it is remembered that there is no suggestion of fraud or bad faith on the part of any one that the testator, a bungler in composition, had laboriously written out this elaborate will, what is there suspicious about these alleged alterations and mutilations? What is there in the fact that one sheet of paper has been cut out and the will continued on the next page and that another sheet of paper had been attached on which the will was continued to arouse suspicion on the part of the court that the testator had made the changes after the execution? * * * It cannot be doubted that the testator had a perfect legal right to cut out the blank sheet of paper or to remove it after it had been written on before the execution of the will."

In view of these circumstances, the Court indicated that it would presume that the will was in this condition when it was executed, and the

Court further said that from the appearance of the paper itself, such as the corrections therein &c., he found evidence to indicate that it had been in this condition prior to its execution. The Court continued:

> "Nothing is more common than for persons to be called upon to witness the execution of wills where they are not permitted to know the contents of the same, and if the presence of a mere correction in the amount of a bequest or in the detail of administration, or the cutting out of a sheet of paper from a bound group of such papers gives rise to the presumption that the paper had been changed after the execution, there are many wills extant which could not be admitted to probate. We do not believe that is the law of this state and particularly where, as here, no suggestion of fraud or bad faith is present."

A most important case quite similar in its facts to the case at bar, though there was more in the case to cast suspicion on the will than there is in the case before us, is *Rees* v. *Rees,* L. R., 3 P. & D., p. 84. In that case the will of the deceased had been engrossed by a law stationer on fifteen brief sheets of paper, consecutively numbered. On the 16th sheet, the testator had written a codicil and on the 18th and last, a schedule of property referred to in the will. On the death of the testator it was found that the original fourth sheet had been removed and placed loose in his desk and that the original seventeenth sheet had been used by the testator in substitution of the fourth. The several sheets were tied together with tape. It was held that the legal presumption that papers bound together and constituting the will as found at testator's death were so bound together at the time of execution and attestation was not rebutted by the circumstances of the case.

The will had been engrossed on fifteen sheets of paper by a law stationer with blanks for the names of the legatees and the amount of the legacies. The blanks were filled up in the handwriting of the deceased. The fourth sheet had been removed and replaced by one in the handwriting of the deceased, but the original sheet had been preserved. The number of the sheet incorporated in the will had been altered from seventeen to four. A son of the deceased testified that his father had been confined to his room for six weeks before his death. That about three weeks before that event, his father called him to his bed and told him to fetch the will from a davenport in the room, giving him a key to do so. He found the will on opening the davenport. He showed the will to his father, who requested him to tie up the tape and replace it. This he did, and at the death of the testator, the will was sealed up in an envelope and opened on the day of the funeral. When opened, it was in the form which it was when presented for probate. The attesting witnesses to the will could not identify the papers which they had seen, but stated that the papers produced to them were a bunch, but they could not identify any particular sheet. The Court (Sir J. Hannen) said that the one question in the case was whether the fourth sheet of the will as it was found at the testator's death was the true fourth sheet of the will as executed, or whether another sheet found loose among the testator's papers after his death and numbered fourth was the true fourth sheet of the will. The Court, after referring to the facts stated above, said:

> "In these circumstances the legal presumption is, that the sheets bound together and constituting the will, as found in the testator's desk, were so bound together at the time

of the execution and attestation. Gregory *v.* H. M.'s Proctor (1); Marsh *v.* Marsh (2). The question is whether this presumption is rebutted by any evidence in the case. The facts chiefly relied upon as tending to rebut the presumption that the testator had before execution substituted the sheet in his own handwriting for the fourth page of the stationer's draft, was that it was numbered seventeen in the testator's figures, whereas the codicil proved to have been executed after the will was on a sheet numbered sixteen in the testator's figures, thus leading to the inference as it was argued, that the removal of page 17 and its substitution for page 4 of the stationer's draft had taken place after or at the time of the execution of the codicil. I am of opinion, however, that neither this nor any other fact proved at the trial does rebut the presumption arising from the plight and condition of the will as found after the testator's death. If any theory consistent with the validity of the will can be suggested, which appears to the Court to be as probable as the theory on which the argument for its validity is based, the will as found must maintained.''

Even if it were to be assured that the substitution of the first page was made after the execution of the will, it is, nevertheless, manifest that this change was made prior to the execution of the codicil, and, consequently, the will, as it was at the time of the execution of the codicil, is entitled to probate.

It is familiar law that a codicil republishes a will to which it refers or is annexed. There can be no doubt that the codicil in question is a codicil

to the will which is produced. There is no further reference in the codicil itself to the will than the fact that it is the first codicil to Mr. Runkle's will, but that he meant it to be a codicil to this will seems conclusive, especially as there is no evidence to cast any doubt upon that result. The fact that he chose the same two witnesses as he had to his will, the fact that in making the codicil he said that it was a codicil to his will, certainly referring inferentially to the will of which the two gentlemen to whom he addressed this remark had knowledge also point to this conclusion. While the witnesses did not, of course, remember what the papers were to which the codicil was attached when it was executed, they both recall that it was attached to a bunch of papers. At the time of Mr. Runkle's death, the codicil was attached in the manner shown to the will which is now offered. This attaching had been done by Mr. Runkle himself. It was as effective a fastening as has already been shown as if it had been fastened in the manner lawyers are accustomed to fasten such papers. Furthermore, this codicil and this will were enclosed together by the testator in the envelope bearing his own designation of the contents. The Court, it seems clear, must assume that the paper to which the codicil was attached, was the paper to which it was attached when it was executed. There is no doubt but that a codicil republishes a will to which it is attached.

American & Eng. Enc. of Law, Second Edition, Vol. 6, p. 195-197.

Cyc., Vol. 40, p. 1218.

Redfield on Wills, * p. 372.

Camp v. *Shaw,* 52 Ill. App., 241; *aff'd.,* 45 N. E., 211.

Blackett v. *Ziegler,* 133 N. W., 901.

Corr v. *Porter,* 33 Grattan, 278.

Kip v. *Van Cortland,* 7 Hill., 346.
Beall v. *Cunningham,* 3 Monroe, 390.

This has been the law from early times.

Thus in *Attorney General* v. *Downing,* 2 Amb. (Eng. Chan.), 571, the Lord Chancellor, quoting from Rollin's Abridg.:

> "There are two ways by which a codicil operates as a republication of a will. 1. By being annexed to it; 2. By the contents showing the intention."

See also
Hubbard v. *Hubbard,* 64 N. E. (Ill.), 1038.
Tyler v. *Merchants Tailor Co.,* 15 L. R. P. D., 216.

Mr. Kinsley testified that the ink in which the codicil was written was different ink than that in which any other part of the will was written. That it was written with a different pen and that it was much larger than any other writing in the instrument. That the writing is very much larger is obvious to any observer. It would seem quite clear from ordinary observation that the writing in the codicil indicates a later day than the writing on the first sheet of the will. It is not so careful and is more tremulous and is larger. It is, of course, very likely that Mr. Runkle's handwriting became more tremulous and larger as his condition became less strong toward the latter part of his life. Most significant of all, however, is the fact that while the first sheet is of the same kind of paper as sheets upon which the pages three to twelve inclusive are written, and bears the same water mark of 1908, the codicil is upon paper of a similar manufacture, but of considerably later date, bearing, in fact, the water mark 1910. Mr. Kinsley made an attempt to apportion the first sheet to a different lot than the other two sheets bearing the same water mark, but this distinction

cannot be observed without a microscope, and relates to differences which may well be found in the same lot. The significant thing is that it was of the same year of manufacture and was no doubt purchased by Mr. Runkle along with the other paper bearing the same water mark. The fact that the codicil is written on paper water marked 1910 indicates that it was written on paper of a newer stock and later purchase and this circumstance most strongly bears out the inference that the first page was written and annexed to the will certainly prior to the making of the codicil and this circumstance alone, we submit, is enough to entitle this portion of the will to probate. In addition, it will be observed that the crease about an inch below the top of the first page, which as already pointed out, was due to the presence of the Gem clips, is very much marked at the top of the first sheet and at the top of the remaining sheets. It is, though apparent, not so strongly marked at the top of the codicil sheet. Now both the will and the codicil have been, as the evidence shows, always fastened together in this manner, and were no doubt handled frequently by the testator, and the fact that the crease is more marked on the first sheet, as it is more marked on the remaining sheets of the will, indicates strongly that the first sheet was attached to the will for a longer time than the codicil and handled for a longer time in connection therewith.

For this reason, therefore, whatever may be the Court's view with reference to the first two points just urged, under the authorities just noted, and under the facts of this case, the will must be probated in its altered form because of its republication by this codicil, which clearly seems to have been a later act. In relying upon this point with the greatest confidence, however, we do not wish

the Court to think that we abate in any manner our insistence upon the two points preceding.

We therefore respectfully and confidently submit that for the reasons already stated, the entire will should be admitted to probate. The testator's intention is undoubted and every indication is that the Court may follow this intention. It is the contention of the caveator, though such an insistment is directly contrary to the statement of his counsel made at the first hearing, that if the Court should conclude that either the alteration in the case of Mr. Smith or the first page, is not entitled to probate, that then the entire will must fail. In any event, this would not be so. If there was another first sheet in existence at the time of the execution of the will and also at the later time of the execution of the codicil, there has been no proof whatever as to what that first sheet contained. If ever in existence it has been destroyed or lost, and the Court cannot speculate upon what it might have contained, nor even if the Court were to find that there was such a sheet would that fact require the Court to refuse probate to the remainder of the will which remainder embodies the directions as to much the greater part of the estate, merely because the first sheet is gone. It may be argued that there was something on the original first sheet which affected the entire remainder of the will, but obviously this was not so, as may be seen from the nature of the directions in pages 3 to 12 inclusive. Clearly they are all independent and separate dispositions of property and could not have been affected by what may have been on the first page; and if there was a first sheet, which was destroyed by the testator, if he succeeded in doing nothing more, he succeeded in revoking and cancelling what was on that first sheet. We have made a careful search

and have failed to find any authority which would justify the refusal of probate to the remainder of the will whatever might be the Court's disposition of the first sheet, and the alteration with respect to Mr. Smith.

The authorities in this State which we have already referred to in connection with the cancellation of Mr. Scofield's bequest are in point on this proposition also.

See also,

Jersey v. *Jersey,* 110 N. W. (Mich.), 54.

Redfield on Wills, * pp. 315-316.

In *Camp* v. *Shaw,* 52 Ill. App., 241, the rule is thus clearly stated:

> "If made by the testator and not re-attested, interlineations or erasures have no legal effect; but it being presumed that the erasure was intended to be dependent upon the alteration going into effect as a substitute, and the attempted alteration having failed for want of legal authentication, the will, if its original reading can be made out, will stand in force as first written, and if its original wording cannot be determined, it will be enforced in all other parts, the illegal portions being treated as blanks."

In *Burge* v. *Hamilton,* 72 Ga., 568, the Court in admitting part of a will before it to probate said:

> "What was on that missing page, if there when this will was executed? No human being knows. Therefore, the principle that the parts of the will identified woud not fail of probate on account of a missing part, whose contents were unknown, would save much, if not all, of this will. Every special legacy, and all are special but one, is identified by the handwrit-

ing of the testator by his signature on the margin, and by numbers, most of them, all except two, unaltered, and within the numbers one and eleven. Will a court conjecture that this absent page affected them. How could it? The testator made a codicil conceded to be all right, and that did not affect or alter either specific legacy, except as named to add to the college endowment, and to change the legacy to Milton A. Cooley in consequence of his death. Will a court seeking truth presume that others were altered by a missing page on the original will? We cannot think so for a moment."

See also *in re. Steven's Will,* 3 N. Y., Supp. 131.

Goods of Woodward, L. R., 2 P. & D., 206, is a very important case where there is a thorough discussion of the matter by Lord Penzance, as the result of which he held that from the mere cutting or tearing of the beginning of a will, without other circumstances, it could not be inferred that the deceased intended to revoke the whole will and that it must be admitted to probate in its incomplete state.

Upon the whole case, therefore, we respectfully and earnestly submit that the entire will, together with the codicil thereto, should be admitted to probate. This contest has nothing but technical merit, and we therefore have made our argument with all the more assurance, because of our thorough conviction that the matters we urge are in fulfillment of Mr. Runkle's full intentions. We feel that the Court should follow these intentions, if it may, under the statute and the rules of the common law, and that there is ample justification under the statute and under the rules of the common law, for the admission of these instruments to probate in their entirety we confidently submit.

March Term, 1916.

ARTHUR F. EGNER,
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New Jersey Court of Errors and Appeals

William E. R. Smith, *Proponent-Appellant,* *vs.* Harry G. Runkle, *Caveator-Respondent-Appellant.*	*On Appeal from a decree of the New Jersey Prerogative Court.*

Brief on Behalf of Randolph Rodman.

On January 31, 1914, William Runkle, of Orange, died, leaving a holographic will, dated May 11, 1912, and a codicil thereto, also in his own handwriting, dated April 29, 1913. The will and codicil were in his possession and custody up to the time of his death, and were enclosed in a blue envelope, and written thereon, in decedent's handwriting, were the words: "Last will and testament of William Runkle."

Immediately after his death, and according to the testator's instructions, the envelope containing the will and codicil, in the identical condition in which the papers were at the moment of death, was delivered to the appellant, Mr. Smith, by Miss Tully, the testator's secretary.

The will and codicil were offered for probate before the Surrogate of Essex County, and a caveat having been filed against their admission to probate, by Harry G. Runkle, a brother, the case was heard in the Orphans Court, and a decree was subsequently made, admitting to probate the will (with the exception of the ninth paragraph) and the codicil thereto, except that the testator's endeavor to substitute the name of "Wm. E. R. Smith,"

in the place of "Randolph Rodman," as executor, was set aside, and the partially obliterated name of "Randolph Rodman" restored to the will. The decree also provided that letters testamentary should be issued to Randolph Rodman. This decree was subsequently affirmed in all respects by the Prerogative Court.

It was on the eleventh page of the will propounded for probate that the testator wrote the name "Wm. E. R. Smith" over a plainly apparent erasure and attempted obliteration, and, on the same line, also over an erasure and attempted obliteration, the word "East."

The undisputed testimony of Mr. Kinsley, the handwriting expert, and the magnifications and photographic enlargements of this portion of the will, admitted in evidence, show that the name "Randolph Rodman" was originally written in the place now occupied by "Wm. E. R. Smith," and that the word "South" was written in the will before the word "East" was interlined and inscribed over it. The admitted obliteration was effected by chemicals, and the interlined words were written with a different pen and ink from those that were used in the writing of said page eleven and other portions of the will.

Evidence on the face of the will itself shows three distinct alterations: One by mutilation and substitution; one by cancellation; and one by chemical erasure and interlineation, with supplementary marginal notation.

The first alteration of mutilation and substitution consists of the tearing off of the first half sheet of the will, being pages one and two, and the substitution of a half sheet in the place of the same. The second alteration is immaterial from this respondent's point of view; and the third

alteration is that mentioned and described above, relative to the appointment of executor.

The caveator's counsel concedes the testator's testamentary capacity, and also that there was no fraud or undue influence.

The particular phase of the litigation with which this respondent is concerned is as to the executorship. He claims that the erasure of his name and the interlineation of the name of "Wm. E. R. Smith" is invalid and nugatory, and that he is legally entitled to the appointment and the issuance to him of letters testamentary.

I.

SHOULD THE COURT DECIDE THAT THE SUBSTITUTED HALF SHEET, BEING PAGES ONE AND TWO OF THE WILL, IS NOT A PART THEREOF, THE REMAINDER OF THE WILL WOULD STILL BE GOOD AND VALID.

It appears by the testimony of Miss Tully that, a few days before the testator's death, he brought to his home the will and codicil, enclosed in a blue envelope, placed the same in a drawer in his desk, and gave her instructions that in the event of his death she was to summon Mr. Smith and hand the package to him. The envelope, according to the writing on the outside, contained Mr. Runkle's last will and testament. It was in a drawer in his desk, and in his personal custody up to the moment of his death, and after his death Miss Tully, pursuant to instructions, delivered it immediately to the person who, by reason of the change and substitution he had made in the will, Mr. Runkle believed was to act is the capacity of his executor.

The case is, accordingly, seemingly on all fours with the late case of *in re Shaeffer's Estate,* de-

cided by the Supreme Court of Pennsylvania, in 1913, and reported in 240 Pa., 83; 87 Atl. Rep., p. 577.

In that case, the testator, believing himself about to die, told his daughter-in-law where his will would be found after his death, and asked that his executor be informed of its location. This was done. The executor found it in a box at the place stated. When the will was examined it was found that the first page was missing. The Court admitted the will to probate in its mutilated form, holding that the presumption was that the testator himself had removed the first page; that, as he had considered and referred to the remaining part as his will, and stated where it would be found, and instructed that the executor designated in it be told of its location, that was sufficient to rebut the inference that he intended to revoke his entire will by removing the first page and that questions as to whether all its provisions are enforcible in view of the destruction of such page are matters to be considered in later proceedings, not on the submission to probate. The Court said:

> "We conclude that the deceased's lawfully executed will was cancelled only as to the page which he removed subsequently, and that the balance of it as here presented, survives as his will, and as such is entitled to be probated."

II.

REFERRING, NOW, PARTICULARLY TO THAT PHASE OF THE CASE THAT RELATES TO THE ATTEMPTED OBLITERATION OF THE NAME OF "RANDOLPH RODMAN" AND THE SUBSTITUTION OF THE NAME OF "WM. E. R. SMITH," FOUND ON PAGE ELEVEN OF THE WILL.

It may be fairly stated that there is no affirmative testimony or evidence to show that the erasure and substitution were made before execution, attestation and publication of the will, or to fix and determine, in any way, at what time they were made. They were not mentioned or attested in the presence of the witnesses upon the execution of the will itself. They are not mentioned or ratified by any attestation or notation in the codicil. There is no testimony or evidence that, after the alterations were made, the will was ever re-executed or re-published; and the specific finding of fact of the courts below on these matters, stated in the opinion of the Orphans Court, is as follows:

> "The testimony shows that the pen and ink used" (in making these changes) "were different from that of the remainder of the will and codicil; therefore, the alteration was made at a time other than that at which any part of the will or codicil was written or obliteration or amendment or mutilation took place. There is nothing in the evidence, not even a suggestion, or a scintilla of evidence, to show when this alteration was made" (Case, p. 141).

III.

(A)

PRESUMPTION AS TO THE TIME WHEN ALTERATIONS APPEARING IN A WILL WERE MADE.

The general rule as to presumption where alterations appear in a will that is offered for probate is considered in the leading case of *Cooper* v. *Bockett,* (Privy Council, 1844), 4 Moore P. C. C., 419.

The will there contained alterations and erasures, the existence of which at the time of the execution the attesting witnesses could not depose to. Lord Brougham, in deciding the case, said there were two questions to be considered:

> "First. At what time were the alterations made? * * * "Secondly. If that point cannot be ascertained, is the instrument to be read as it originally stood, or are the alterations to be admitted as a parcel of it?" * * *
>
> "Whoever propounds an instrument which, on the very face of it, exhibits grounds of great doubt, must remove those grounds and clear up the doubt."

And it was accordingly held, in that case, in the absence of all direct evidence as to the alterations and erasures, that the presumption of law was that they were made after execution, and probate of the will was granted in its original form.

See also:

> *Doe, Shallcross* v. *Palmer,* 117 Eng. Reprint 1067; *Simmons* v. *Rudall,* 1 Sim. N. S. 115, 61 Eng. Reprint 45.

In this last case, the Court holds, that alterations in a will probated in 1821, before the enact-

ment of the English statute of wills (English Wills Act, 1 Vict., sec. 26) are presumed to have been made after the execution of the will, and that such was the presumption prior to *Cooper* v. *Bockett.*

The American rule is like the English; thus, in 2 Am. & Eng. Enc., p. 280, it is said:

> "The generally recognized rule is that where unattested alterations or interlineations appear upon the face of a testamentary disposition of property, complete without them, they are presumed, in the absence of evidence to the contrary, to have been made after execution.
> (And see cases cited.)

The same rule is also given in *Cyc.,* vol. 40, p. 1275; (and see cases there cited).

In 1 *Underh. Wills,* vol. 1, sec. 268, we read:

> "Unattested alterations in a will, though proved to have been made by the testator, in the absence of any evidence showing when they were made, will be presumed to have been made after execution."

See also same rule in:

> 1 *Jarm. Wills,* (6th ed.), vol 1, p. 151; *Schouler, Wills,* sec. 435; *Redf., Wills,* chap. 7, secs. 23, 24.

In a note appended to the case of *Gardiner* v. *Gardiner,* (N. H., 1890), 8 L. R. An. 383, it is said:

> "Where there is nothing to explain alterations and interlineations appearing on the face of a will, it will be presumed that they were made after its execution."

Citing in support many English and American cases.

In Pennsylvania, in a recent case, *in re Teed's Estate,* 225 Pa. 633; 74 Atl. Rep., 646, involving the question of an alteration in a will, the Court

held, that alterations in a will proved to have been made by the testator will be presumed, in the absence of any evidence, to have been made after its execution. The Court said:

> "In the absence of evidence the presumption would be that such an addition to the will as that here shown was made after the signature of the testatrix and that of the subscribing witnesses had been put upon the paper."

And cites in the opinion, with approval, the following extract from *Page on Wills,* section 432:

> "An alteration in a will is, as a general rule, presumed, in the absence of evidence, to have been made by the testator after the execution of the will. This rule is different from that often said to obtain in the case of other written instruments, for this reason: In the case of other instruments it is a civil wrong, if not a crime, to alter a written instrument. In the case of wills the testator may alter the will as much as he pleases, without wronging anyone."

The following case would appear to be decisive of the respondent's contention on this branch of the case: *Ward* v. *Wilcox,* 19 Dick. (64 Eq.) 303, affirmed on the opinion below, in 65 Eq., 397, the will offered for probate was shown by the evidence to be in the handwriting of the testatrix. Upon inspection there was seen a manifest alteration, which was unnoted. The alteration was made by the erasure of the word "two" in one of the bequests, and by writing over the erasure the word "ten," which was also shown to be in the handwriting of the testatrix. Upon this point the Court (Magie, *Ordinary*) said:

> "By the provisions of section 21 of the English Wills act (1 Vict. c. 26) it is pro-

vided that no obliteration, interlineation or other alteration made in any will after execution shall have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as is required for the execution of the will, and the manner in which they may be done is particularly set forth in that section. In cases arising upon wills made before as well as after the adoption of that act, the English courts held that where alterations are apparent upon the face of the will the presumption is that they were made after execution. A distinction is made between such alterations in wills and in other documents, on the ground that an alteration of the latter after execution involves either fraud or crime, and no presumption of either can be made, while a testator may alter his will at his pleasure, without committing either fraud or crime. Doe, Shallcross *v.* Palmer, 16 Q. B. 747; Cooper *v.* Bockett, 4 Moo. P. C. C. 419; Greville *v.* Tylee, 7 Moo. P. C. C. 320; Doe, Tatner *v.* Catomore, 16 Q. B. 745.

"Counsel for appellant have not cited to me any American cases upon the subject of the presumption in respect to alterations apparent on the face of a will when offered for probate or relied on for relief. I have not deemed it necessary to spend time in examining our authorities. Text writers seem to agree that the presumption is of an alteration after execution. Schoul. Wills 435; Underh. Wills. 268; Page Wills 431, 432; Tyl. Ev. 180, 968; 1 Jarm. Wills (R. & T.) 304. The common practice to note, at the foot of a will about to be executed, any alteration, in such a manner as that the execution by the testator

and the attestation by the witnesses may include and recognize them as theretofore made, will, I think, justify a presumption that unnoted and unattested alterations were made after execution. So I shall assume, without deciding, that, upon the production of the paper in dispute before the court, with a plainly apparent alteration, a presumption was at once raised that such alteration had been made by Miss Ward after its execution. Nor do I deem it necessary to decide what effect would have been produced if such presumption had been left unrebutted.

"That such a presumption as I have assumed may be overcome and rebutted by competent and sufficient evidence justifying the conclusion that the apparent alteration did, in fact, exist at the time of the execution of the paper is in accord with reason, and the authorities above cited."

On appeal to this Court, in a *per curiam* opinion, it was said:

"The decree appealed from is affirmed, for the reasons stated in the opinion of the Ordinary in the court below."

In the opinion quoted above, the Ordinary says that American cases upon the subject of the presumption in respect to alterations apparent on the face of the will have not been cited to him.

Among American cases decided previous to the case of Ward *v.* Wilcox, is the case of *Camp* v. *Shaw,* 52 Ill. App. 241.

In this case, the Court holds, that the presumption as to unnoted interlineations or erasures in a will is that they were made after its execution. If made by the testator and not re-attested, interlineations or erasures have no legal effect, but it

being presumed that the erasure was intended to be dependent upon the alterations going into effect as a substitute, and the attempted alteration having failed for want of legal authentication, the will, if its original reading can be made out, will stand as first written, and if its original wording cannot be determined it will be enforced in all other parts, the illegible portions being treated as blanks.

Another American case, so decided, which follows the English rule, is: *Toebbe* v. *Williams,* 80 Ky., 661.

The appellant, Mr. Smith, quotes extensively from the opinion of the New York Surrogate in the case of *Matter of Easton,* 84 Misc., 1. He, however, fails, despite his generous quotation from the opinion, covering more than five pages of his brief, to include a part of the opinion which seems to indicate that the Surrogate was not altogether satisfied with his reasoning.

For the convenience and information of the Court, I would like to add this further extract from that opinion:

> But "if there is in modern law a presumption that unexplained alterations in wills are made after execution, it belongs in any event to that class of indeterminate presumptions known to common lawyers as 'disputable presumptions,' and to civilians as '*presumptiones Juris*'."

The Surrogate quotes with approval the language of Lord Hatherley, in *Williams* v. *Ashton,* 1 J. & H., 115, 118, who says:

> "I do not think that it is quite a correct mode of stating the rule of law to say that alterations in a will are presumed to be made at one time or another. The correct view is

that the onus is cast upon the party who seeks to derive an advantage from an alteration in the will, and to adduce some evidence from which a jury may infer that the alteration was made before the will was executed."

This, also, seems to be the rule adopted by the Massachusetts courts, for in *Wilton* v. *Humphreys*, 176 Mass., 253-257, the Court says:

"The burden of proof is on the party presenting a will to show that alterations or interlineations in it were made before its execution, and unless there is something in the nature of them, as applied to other parts of the writing, or unless there is evidence to show that they were a part of the will when it was executed, they would be rejected for want of proof." * * * "Apparent alterations in a will are looked upon with some suspicion. The validity of changed portions is not assumed, but there may be evidence to establish it."

But, in the present case, the appellant does not even bring himself within these exceptional rulings, as is pointed out in the opinion of the Court below (Case, p. 141); and, furthermore, to follow this ruling would be to subvert and overthrow the settled practice in the Probate Courts of this State.

It appears, then, to be the rule of general application, both in England and America, that unnoted alterations in a will are presumed to have been made after the execution of the instrument, even in those jurisdictions where there is no presumption as to the particular time when the change was made. It appears to be necessary for him who seeks to derive an advantage from the will to show that the change was made before its execution.

The appellant stands entirely outside of the confines of the prevailing rules. There is, in this case,

absolutely no evidence of any sort to lift or remove the onus that is cast upon him seeking "to derive an advantage from an alteration in the will"; nor is there anything in the testimony from which the Court "may infer that the alteration was made before the will was executed."

(B)

PRESUMPTION AS TO THE TIME OF ALTERATION AND INTERLINEATIONS IN WILLS WITH CODICILS ATTACHED.

In the case of *Lushington* v. *Onslow,* 12 Jur., 465, the question was as to the effect of alterations in a will with a codicil attached. It was held, that the presumption is against the alterations, since it is proper and reasonable to suppose that if the alteration had been made before the execution of the codicil some notice would have been taken of it in the codicil.

In *Underhill on Wills,* vol. 1, p. 363, note 2, it is said:

> "Alterations in a will not mentioned in a codicil will be presumed to have been made subsequently to the execution of the codicil."

In *Jarman on Wills* (6th ed.), p. 141, it is said:

> "An unexecuted alteration in a will is not rendered valid by a codicil ratifying and confirming the will, unless in such codicil the alteration be specifically referred to, or unless it be proved affirmatively by extrinsic evidence that the alteration was made before the codicil."

And the same writer, pages 151-152:

> "If there be a codicil to a will and the codicil refers to unattested alterations in the will, this incorporates them in the will. If

> the codicil takes no notice of them, the presumption is that they were made after the date of the codicil, and the same presumptions hold regarding mutilations."

Upon the facts and under these authorities it is submitted accordingly that the name "Wm. E. R. Smith" is presumed to have been written over the erasure in the will after its execution and after the date and execution of the codicil.

There is, as said before, no evidence in the case that the will, as so altered, was ever re-executed and declared by the testator, in the presence of witnesses, to be his last will and testament; in other words, the alteration is unattested, and, under the statutes of our State respecting the formalities to be observed in the execution of wills, it is invalid, void and of no effect.

IV.

EFFECT OF ERASURE AND SUBSTITUTION.

The testator's attempt to alter or erase—to obliterate and interline—without legal re-execution of his will, must fail, for if the instrument as altered is not executed as required by the statute to make a valid will, and if the erased word is not so obliterated as to be illegible or uncipherable, the will remains intact as before the alteration, erasure or obliteration, and must be read as it originally was written.

In 2 Am. & Eng. Enc., 266, it is said:

> "No alteration in a clause of a will, or in a devise or legacy therein, effected by erasure or obliterations, and the insertion or interlineation of new matter, can avail to alter its disposition, except where evidence cannot restore its original provisions. If the provisions of

the will at its execution are discoverable from the paper, or can be supplied by extrinsic evidence, the will must be admitted to probate as originally drawn. If the parts altered cannot be restored, such portions are to be read blank."

(Citing cases).

This rule is universal in its operation. It applies in all cases where the testator has cancelled or erased, and interlined or inserted, words or clauses in his will after execution, in order to substitute other words or alter its original provisions; thus:

(a) Where the name of a legatee is erased and another name substituted.

Gardiner v. *Gardiner,* 65 N. H., (1890), 230; 8 L. R. An., 383;

In re Knapens Will, (Vt. 1903), 53 Atl., 1003.

(b) Where the name of a devisee is cancelled and another interlined and substituted.

Wolf v. *Bollinger,* 62 Ill., 368.

(c) Where the amount of a legacy is changed.

Locke v. *James,* 11 M. & W., 901;

Short v. *Smith,* 4 East., 417;

Wetmore v. *Carryl,* 5 Redf. (N. Y.), 544;

Kirke v. *Kirke,* 4 Russ. (1830), 435; 38 Eng. Reprint, 868.

(d) Where the name of a person nominated as executor is erased and another name interlined.

Re Goods of Greenwood, L. R. Prob. Div. (1892), 7.

And see also, generally:

1 Underh. Wills, sec. 252 and cases cited. Orphans Court opinion (case, p. 145), and cases there cited.

In *Gardiner* v. *Gardiner, supra,* there was a plainly apparent erasure and interlineation made by the testatrix for the purpose of changing the names of legatees and amounts of legacies, but the erased words were not so obliterated as to be illegible. The Court held, that the act of the testatrix was not a revocation, but an alteration, and that if the instrument as altered was not executed as required by the statute to make a valid will, codicil or instrument of revocation, the will remained intact as before; citing sixteen English and American cases, and also text writers; and the Court adds:

> "In other words, the effect of the alteration is the same as it would have been had it been made by a codicil imperfectly executed."

In re Knapens Will, supra, the testatrix, after the will was executed, drew lines through certain clauses making bequests, but not so as to render them illegible; wrote clauses in the nature of bequests in the margin; drew a line through the name of one of the residuary legatees, and wrote at the end of the clause "share with" (another named person); but did not re-execute the will so as to make such new bequests effectual. The Court held, that the intent to destroy the parts so erased, except on condition of the substituted bequests taking effect, was not manifest, and that the will should be probated as originally executed, the Court saying:

> "The intention to revoke is indispensable to a revocation, whatever the act may be; and

here the acts, taken together, certainly do not imply an intention to revoke absolutely and unconditionally, but only to do so in connection with and dependent upon the making of certain other changes. The intention expressed in such further alterations and additions having been frustrated by failure to comply with the statute, it must be held that there was no revocation. The result is that all the attempted changes, being readily distinguishable and agreed upon, go for nothing, and the will must be established as it was originally executed."

In *Wolf* v. *Bollinger, supra,* the testator, after the publication of his will, caused the name of a devisee to be changed, by drawing lines through the name and writing over it another name, still leaving the name first written legible. As so altered, the will was never re-published. The Court held, that the alteration was void, and that the original devisee took, saying:

"It is believed to be the doctrine, as laid down in Redfield on Wills, 314, 325, 327, and well settled by the authorities, that when the testator makes an alteration in his will, by erasure and interlineation, or in any other mode, without authenticating such alteration by a new attestation, in the presence of witnesses, or other form required by the statute, it is presumed that the erasure was intended to be dependent upon the alteration going into effect as a substitute; and such alteration not being so made as to take effect, the will, therefore, stands in legal force the same as it did before, so far as it is legible after the attempted alteration."

In *Locke* v. *James, supra,* the testator, by his will, duly executed, devised certain real estate to R. N., in fee, subject to and charged with an annuity of six hundred pounds a year, which he gave to his daughter, E. J., for her life, with certain powers. He subsequently erased, with his pen, the word "six," and inserted over it the word "two," leaving, however, the word "six" legible in each place where it occurred; and, on the same day, he added a memorandum or codicil to his will, in the presence of one witness only, recognizing the above alterations. It was held, that the substitution of "two hundred" for "six hundred," under these circumstances, was inoperative, and Park, *B.,* said:

> "The substitution in the will was inoperative, having been made after the subscription of the witnesses, not in their presence, and without re-publication, and the substitution, for the purpose of giving effect to which the erasure was made, thus failing, the law is clear that the erasure fails also. It is treated as an act done by mere mistake, *sine animo cancellandi.* What the testator in such a case is considered to have intended is a complex act, to undo a previous gift for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, the doctrine is that there is no sufficient reason to be satisfied that he meant to vary the former gift at all."

This case was cited and followed in *Doane* v. *Hadlock,* 42 N. E., 75.

In the case of *Re Goods of Greenwood, supra,* the fact appeared that after the execution of the will, the testator directed that the name of Charles Stansfield, who was an attesting witness, as well as nominee for executor, be erased, and the name of William Sutcliffe be written over the erasure.

The will was not re-executed after these alterations were made. It was held, that the name of Charles Stansfield must be restored, both as an executor and attesting witness. The Court said:

> "The erasures and subsequent substitution of names are not attested, and as the will was not re-executed afterwards, the name of Charles Stansfield must be restored, both as an executor and an attesting witness."

In the strong and well reasoned case of *re Penniman's Will,* 20 Minn., 225, where the will offered for probate showed erasure and interlineations, the words originally written being still legible, the Court said (p. 229):

> "Where words or clauses in a will are cancelled in order to substitute others, which fail for want of due authentication, the cancellation will be treated as relative and dependent, or, as is sometimes said, as subsidiary to the interlineation, and the devise or bequest will take effect as originally made. 2 Am. Lead. Cas. (5th ed.), 502."

And, on page 230:

> As "the interlineations and additions cannot be upheld it follows, upon the principles above laid down, that the erasures must fall also, notwithstanding they might operate as a *pro tanto* revocation if they stood alone. 1 Redf. Wills, 326-7, sec. 44, and note."

In re Thomas Will, 76 Minn., 237; (*S. C.,* 79 N. W. Rep., 104), it appeared that, after the will had been published, the name of one of the beneficiaries had been erased and another name inserted. It also appeared that the will had never been republished or authenticated after the alteration, so as to make it effectual. The Court held, that where part of a will is cancelled or erased by the testator, with a view to a new disposition of prop-

erty, and the proposed new disposition fails for want of due authentication, the presumption in favor of revocation by the cancellation or erasure will be repelled, and the will as originally executed will stand so far as it is practicable to ascertain what the original words were. In such case, the proposed revocation will be deemed to have been conditional and dependent upon the efficacy of the new disposition intended to be substituted.

V.

As to the intention with which the alteration was made, I have nothing to add to the admirable summing up, found in the opinion of the Court below (Case, pages 145-147). After lucidly reviewing the facts, the Court reaches the conclusion "that the doctrine of dependent relative revocation applies, and that the name of Randolph Rodman, of South Orange, should be restored" as that of the nominee for the office of executor of this estate.

VI.

After a full review of the facts, the Courts below found the following conclusion of law:

> "The proponent has failed to sustain the burden of proof to show that the name of William E. R. Smith was written in prior to the execution of the codicil."

To uphold the appellant's contention that the erasure of the name "Randolph Rodman," and the substitution of his own name, justifies his claim for appointment as executor of this estate, would be to unsettle and overthrow the long existing and settled practice in the Probate Courts of this State.

Respectfully submitted,

CHARLES B. STORRS,

Proctor and of Counsel with Randolph Rodman.

New Jersey Court of Errors and Appeals

WILLIAM E. R. SMITH, PROPONENT, et al., *Respondents,* *vs.* HARRY G. RUNKLE, CAVEATOR. *Appellant.*	On Appeal of Charles P Scholfield.

BRIEF FOR CHARLES P. SCHOLFIELD.

I.

Statement of the Case.

The ninth clause of the will of William Runkle is as follows:—

> "9. I give and bequeath to my friend Charles P. Scholfield of the City of New York the sum of Twenty-five Thousand Dollars ($25,000)."

These words have ink lines drawn through them. On the margin is written "Cancelled October 5, 1912, Wm. Runkle" (Case, p. 149). The underscoring that appears in the printed book is an error of the printer.

This appeal raises the question whether the legacy to Charles P. Scholfield was revoked in the manner required by law.

The only testimony directed to the point has to do with the handwriting, ink and pen in and with which the words were written. There is no testimony as to the character of the lines themselves. Nor the ink with which they were drawn nor the kind of pen used in drawing them.

The only testimony on the subject is that of William E. R. Smith, proponent (on p. 45):

> "Q. Referring to the third page, the words in the margin 'Cancelled October 5, 1912, William Runkle,' is that the handwriting of Mr. Runkle? A. It is.

And the testimony of William J. Kinsley, the handwriting expert, as to ink (p. 77):

> "On page 3, where we have the cancellation and the words, 'Cancelled October 5, 1912, William Runkle,' I have indicated that ink as No. 3."

And as to pens (p. 78): (The witness is careful to distinguish between the *lines* and the *words*.)

> "The matter of pens. Pages 1 and 2 in my opinion were written with a pen entirely different from that which wrote pages 3 to 12, inclusive. The body writing on those pages, and pages 1 and 2, I have called that pen No. 1; pages 3 to 12, the body writing, I have called that pen No. 2. The *cancellation, or rather the marginal writing* on page 3 opposite paragraph 9, 'Cancelled October 5, 1912, William Runkle,' I think was written with a different pen from either pages 1 and 2 or body of page 3. I have called that pen No. 3. The signature of William Runkle to the will on page 11 I think was made with a pen different from the one which wrote the body of the page, although it would be possible to produce a heavier shaded signature as that is—heavier shaded writing as compared with the body, and do it with the same pen, but I am inclined to think that that is another pen and have called that pen No. 4. In the codicil—the signature to the codicil on page 13 I think was written with still another pen, and I have denominated that pen No. 5."

And as to the varying quality of the handwriting, (p. 82):

> "Q. Now tell us about the characteristics of the handwriting of the codicil as compared—A. The handwriting of the codicil is larger

and coarser than in any other portion of the writing in the document, although page 3, the *cancelled—the date in the margin*—somewhat approximates it, although even there on page 3 it isn't so large and not quite so heavy as in the codicil."

The learned Judge of the Orphans' Court in his opinion (p. 139) disposes of the point in discussion, as follows:

"The ninth paragraph is obliterated (sic?) by lines drawn across the written provisions in favor of Charles P. Scholfield, on page three and the words 'Cancelled October 5, 1912, Wm. Runkle,' are written in the margin.

"It may be considered that the words 'Cancelled October 5, 1912,' are hearsay, in so far as the date of the act is concerned, but in so far as the note describes the linear excision as a cancellation, it may be accepted as a contemporaneous expression of intention to cancel and revoke the bequest. *Goods of Adamson,* L. R., 3 P. & D. 253. If they are not hearsay, the will was republished by the execution of the codicil and therefore the ninth paragraph is eliminated.

"Counsel for Charles P. Scholfield contends that the statute contains three provisions with respect to revocation of wills in whole or in part; 40 C. S., p. 5361, Sec. 2; p. 5865, Sec. 16; p. 5870, Sec. 25. It is contended that Section 2 is a re-enactment of the statute of frauds passed in the reign of Charles II and relates exclusively to estates in land; Section 16 relates exclusively to personal property, and that Section 25 appeared first in the statutes of New Jersey in 1851, when it was first provided that wills of real and personal property should be proved in the same manner, and that it provided a method of revoking wills of real and personal property if the revocation be in writing. It is further contended that the methods of revoking gifts of real estate mentioned in Section 2, such as tearing, mutilating and canceling, do not apply to revocations of personal property which are dealt

with exclusively in Section 16. An interesting argument is presented by counsel seeking to establish these propositions but the matter is not open for discussion at this time.

"The rule that a will and devises and bequests in a will may be revoked by mutilation, and obliteration, or cancellation has been fully recognized in this State. *Smock v. Smock,* 11 Eq. 156; *White,* 25 Eq., 501; *Kirkpatrick,* 22 Eq., 463; *Hilyard v. Wood,* 71 Eq., 214; *Collard v. Collard,* 67 Atl. Rep., 190 *Frothingham,* 75 Eq., 205; Rev. 76 Eq., 331. In the case of *Hilyard v. Wood, supra,* it was held that lead pencil cancellations of a document written in ink work a valid revocation and in *Collard v. Collard* supra it was held that revocation by cancellation of a devise in a will was valid even though the incidental effect increases an estate in remainder to one in fee. The alleged distinction between obliteration and cancellation of a devise of realty and bequests of personalty has been considered in *Kirkpatrick* case *supra,* which repudiated in this contention and settled the law in this State since 1871. In the case of *Frothingham,* 75 Eq., 205; Reversed 76 Eq., 331, and *Hilyard v. Wood, supra,* the point was not discussed, but they held that by cancellation or obliteration of a bequest of personal property, *animo revocandi,* that the revocation is perfected. The ninth provision of the will was revoked by cancellation."

The decree of the Orphans Court recites as follows (p. 163):

"And the Court being further of the opinion that the Ninth paragraph of said last Will and Testament upon the second half sheet thereof was cancelled by the said William Runkle, deceased, prior to his decease."

And the decree orders (p. 164):

"That the said instruments be and the same hereby are established as the last Will and Testament and codicil thereto of the said William Runkle, deceased, with the exception of the said Ninth paragraph of the second half sheet of said Will and Testament."

II.

Grounds of Appeal.

This decree was affirmed by decree of the Prerogative Court (p. 228).

The notice of appeal and the petition of appeal (p. 234) challenge the validity of the decree upon the following grounds:—

(a) "That the said Ninth paragraph of said last Will and Testament, upon the second half sheet, and was not cancelled by the said William Runkle, deceased;

(b) "And that there was no legal evidence before the Court upon which the Court could have found that the said William Runkle, deceased, cancelled the said Ninth paragraph of said last Will and Testament;

(c) "And it appears by the record of this case that the said Ninth paragraph of this Will was not revoked in a manner required by law and the statutes of this State, in such case made and provided;

(d) "That the said decree should have admitted to probate the instrument propounded for probate, including the said Ninth paragraph, as a valid and integral part of said last Will and Testament."

III.

Argument.

Judge Martin's Two Theories.

The gist of Judge Martin's opinion on the validity of this so-called cancellation is found in the following paragraph, which we have already quoted from his opinion (p. 139):

"It may be considered that the words 'Cancelled October 5, 1912,' are hearsay, in so far as the date of the act is concerned, but in so far as the note described the linear excision as a cancellation, it may be accepted as a contemporaneous expression of intention to can-

> cel and revoke the bequest. Goods of Adamson, L. R., 3 P. & D., 253. If they are not hearsay, the will was republished by the execution of the codicil and therefore the ninth paragraph is eliminated."

To say that while the words "Cancelled October 5, 1912" cannot be received to establish the date, they may be used to characterize the "linear excision as a cancellation," is chasing the devil around the stump. It assumes that written words may have a testamentary effect although not attested in the manner prescribed by the statute. This we understand, is precisely what the statute says cannot be done. The use of these words, for the purpose indicated, is attempted to be justified with the statement "it may be accepted as a contemporaneous expression of intention to cancel and revoke the bequest."

There is not a scintilla of evidence in the case that the lines were drawn and these words written contemporaneously. The words themselves, "Cancelled October 5, 1912" are stretched by the Court to read "Cancelled *this* 5th day of October, 1912."

As we have seen, the opinion proceeds:

> "If they are not hearsay, the Will was republished by the execution of the Codicil, and therefore the Ninth paragraph is eliminated."

If they are not hearsay, we submit, the statute provides that "all written revocations of Wills shall be executed in the same manner as Wills are hereby required to be executed and when so made, shall be sufficient to revoke any Will or any part thereof." (C. S. 5870).

All written revocations are merely for the purpose of describing some act of the testator as a revocation. Every written revocation is "a contemporaneous expression of intention to cancel and revoke the bequest."

To read into these words any evidential value,

is to give this marginal note effect as a testamentary act, and that is precisely what the policy and the express words of the statute forbids to be done.

We wonder if the situation would be any different in principle had William Runkle written a letter to Randolph Rodman, a few days before his death, in which he inserted a statement, "On the fifth of October, 1912, I cancelled the Ninth paragraph of my Will, being the bequest to my friend, Charles P. Scholfield."

To hold that such a letter could have any testamentary or evidential value, would be, in effect, to repeal the statute, yet there is no evidence whatsoever to show that this marginal note was not written for such a purpose and at a *time subsequent to the date of the codicil.*

The testimony of Mr. Kinsley, above quoted, suggests that during his last days, Mr. Runkle wrote in a larger hand and that the marginal note was written in such a hand, might well suggest that the marginal note was made just before his death.

It is to be noted that if this revocation is a revocation in writing, it must be attested by two or three witnesses, whether reference be had to the 2nd Section of the Statute of Wills or the 16th Section or the 25th Section, as they appear in the Compiled Statutes. If the revocation is held to be not in writing, we submit that there is no evidence that the lines were drawn by William Runkle, or that at the time the lines were drawn, they were drawn with an intent to revoke the bequest.

It is to be borne in mind that the questions presented by this appeal are pure questions of statutory construction. The intention of the testator that lodestar of testamentary construction, has and can have no bearing on this appeal.

A testator who writes his own will with greatest care and precision, and then executes it with all

solemnity in the presence of one witness, may demonstrate to a certainty, his testamentary intent and his wishes as to the disposition of his property, yet the law intervenes and says that such an instrument is no will and is of no legal efficacy.

So too in the case of a revocation, the statute is just as precise and the requirements are just as technical and just as binding. A solemn revocation of a will, executed in the presence of one witness, is inefficacious to revoke the will.

In re *Frothingham's Will*, 75 N. J. Eq., 218, Chancellor Walker said:

> "We have a statute known as the statute of wills, and testaments can only be validly made according to the formula prescribed by that statute, and those testaments when made can only be revoked according to the provision of that statute. Failing either in the due execution or revocation of testaments, the act of the deceased, no matter how well intended, fails utterly to accomplish his purpose."

While the decree made in that cause was reversed on a 7 to 6 vote, yet the Court of Errors did not criticise but rather approved the point thus made.

Revocations by Cancellation.

We do not propose to discuss the question whether, as the statute law now stands, a *devise of real estate* can be cancelled out of the will by an erasure or obliteration of the words sought to be eliminated by a testator with the intent to revoke the devise, but not to otherwise affect the provisions of the will.

There can be no question but that this was the law prior to 1851, and that Section 2 of the Wills Act, when originally enacted, contemplated permitting such a practice.

The precise condition of the law today upon this point, we do not need to discuss in this brief, be-

cause the gift to Mr. Scholfield is of money and not of real estate, and the law pertaining to revocation of devises of real estate is of a different origin and governed by different principles from that governing bequests of personalty.

We do, however, contend that under the statutes as they exist today, a bequest of personal property cannot be eliminated from a will, except as provided in the 16th and 25th Sections of the Will Act (C. S., p. 5870), and we shall undertake to show in this brief after careful consideration of all the cases on the question, that this Court has not decided a case parallel to the case at Bar, and that the point here made is still open in this court.

The latest reported case on the subject is the Frothingham case, decided by this Court and reported in 76 N. J. Eq. 331.

It appears from the opinion of the Orphans Court, which was followed by this Court, that

> "It was conceded on the argument, that under *Gen. Stat.* p. 3757, * * * a will, or any devise or bequest in it, can be revoked by cancelling the same by the testator himself, or in his presence, and by his direction or consent * * *. The only question for determination in this matter is that of the testator's intention in making the pencil marks upon the will."

It will be seen, therefore, that in the discussion of that case in the Orphans' Court in the Prerogative Court and in this Court, it was assumed without re-examination, that a bequest could be cancelled in the manner indicated.

Nevertheless this Court, in a *per curiam* opinion, went out of its way to say:

> "To extend the scope of such inquiry to subsequent periods, however closely related in point of time with the revocatory act, is but to add a new danger to *a rule that is already from its inherent nature too much exposed to fraud.*"

As far as we have been able to ascertain, this is the only case in which the question has been discussed by this Court, and in this case, the so called rule was mentioned only for the purpose of criticism.

This being so, this Court is free to refuse to follow any dubious or ill considered decisions of the lower courts.

There are three sections of the Compiled Statutes which have or may be thought to have a direct bearing on the question presented. They are the 2nd, 16th and the 25th.

The 2nd Complied Statutes, p. 5861, is as follows:

> **2. Revocation of devises, etc., requirement of writing,** etc.—"That no devise or bequest in writing, of any lands, tenements, hereditaments or other estates whatsoever in this state, or of any estate *pur auter vie,* or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by his direction and consent; but all devises and bequests of any lands, tenements hereditaments, or other estates whatsoever in this state, or of any estate *pur auter vie,* shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator or by his directions in manner aforesaid, or unless the same be revoked or altered by some other will or codicil in writing, or other writing of the devisor signed in the presence of three or more subscribing witnesses declaring such revocation or alteration."

The 16th Section, Compiled Statutes, p. 5865, is as follows:

> **16. Written will not to be altered by oral will.** "That no will or testament in writing concerning any goods or chattels or personal estate, shall be repealed, nor shall any clause,

devise or bequest therein be revoked, altered or changed, by any words or will by word of mouth only, except the same be in the lifetime of the testator, committed to writing, and after the writing thereof, read unto the testator, and allowed and approved of by him or her, and proved to be so done by three witnesses at the least."

The 25th Section, Compiled Statutes, p. 5870, is as follows:

25. Revocation; execution thereof. "That all written revocations of wills shall be executed in the same manner as wills are hereby required to be executed, and when so made shall be sufficient to revoke any last will, or any part thereof."

The 2nd Section on p. 5861 of the Compiled Statutes was first enacted in this State in 1795, being a re-enactment of a section of the Statute of Frauds which was passed in the time of Charles II. It relates exclusively to estates in land.

In fact "The Laws of the State of New Jersey, Revised and Published under the Authority of the Legislature (1800)" (p. 190) printed this second section of the law of 1795, with the note on the margin: "Devises of land how revocable."

The 16th Section on p. 5865 of the Compiled Statutes was also enacted in this State in 1795, and taken from the English Statute of Fraud. It relates exclusively to personal property.

The 25th Section on p. 5870 of the Compiled Statutes, appeared first in laws of New Jersey of 1851, when it was first provided that wills of real and personal property should be proved in the same manner. It relates both to real and personal property and provides a method or revocation, applicable to gifts of both kinds of property, if the revocation be in writing.

The difference which existed prior to 1851, between the provisions of the 2nd Section and the

provisions of the 16th Section of the Statute of Wills, had its origin in the difference that existed between the formalities required for the execution of wills of real estate and execution of wills of personal property. The 2nd Section provides expressly for revocation of a devise in a will "by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his direction and consent."

The distinction between the formalities required prior to 1851, in the execution of a valid will of personal property, and of a valid will of real estate is well stated in Dickinson's Probate Practice, p. 17.

> "Wills of personal estate were not required to be signed or attested in England until 1838 (by statute of wills of 1 Viet.) nor in this state until the Act of 1851, Rev. 'Wills' 22. Before the passing of the Act of 1851, wills of mere personalty, so far as regarded the personal estate, were provable according to the rules of the common law (2 Bl. Com. 501); so that a will might be competent as to the personal estate and incompetent as to the realty Rev. 'Wills' 39."

The citation from II Blackstones' Commentaries, 501 is as follows:

> "As to written wills, they need not any witness of their publication. I speak not here of devises of lands, which are quite of a different nature, being conveyances by statute, unknown to the feudal or common law, and not under the same jurisdiction as personal testaments. But a testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication is good; provided sufficient proof can be had that it is his handwriting. And though written in another man's hand, and never signed by the testator, yet if proved to be according to his instructions and approv-

ed by him, it hath been held a good testament of the personal estate."

II Blackstone's Commentaries, 376:

"To remedy which (innumerable frauds), the statute of frauds and perjuries 29 Car., II c. 3, directs that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction, and be subscribed in his presence, by three or four credible witnesses. And a solemnity nearly similar is requisite for revoking a devise by writing; though the same may also be revoked by turning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence, and with his consent."

p. 378: "A will of lands, made by the permission and under the control of these statutes, is considered by the Courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which land shall be subject. And upon this action, that a devise affecting lands is merely a species of conveyance, is founded this distinction between such devises and testaments of personal chattels."

The purpose of the 16th Section of the Statute of Wills was, no doubt, to prevent a will which had been reduced to writing by a testator, from being cancelled or altered by a mere nuncupative *will.*

As we have seen, a will of personal property did not have to be either signed or attested. When such informality was allowed, it was unnecessary to permit a testator to excise a clause from his will, either by word of mouth or by any stroke of the pen, or any such like act. The whole will could be destroyed and a new one written with so much ease that it was not necessary to insert in the 16th Section, the more elaborate provisions of the 2nd Section.

Such provisions, in fact would have been inap-

propriate in a will relating to personal property, in a way that did not apply to devises of real estate. For, when, prior to 1851 a testator, by an act *in pais* as it were, struck out a devise of real estate from his will, he did not thereby confer upon any other person a greater benefit *under his will.* The land referred to in the devise, fell to the heir and not to the residuary devise.

On the other hand where personalty was the subject of a gift and the gift failed, the personal property fell into the residuary estate and went to the residuary legatee. In other words, in the one case, the heirs took by operation of law; in the other case, the residuary legatee would have taken an additional gift by the testamentary act of revocation.

In *Smith v. Curtis,* 29 N. J. L. p. 352, Mr. Justice Elmer points out this distinction in the following language:

> "By the common law, there was a distinction between a devise of real estate and a legacy of personal property; the latter, in case of the death of the legatee before the testator, going to the residuary legatee, while the former was held to be undevised property, and as such descending to the heir. This distinction was founded principally on the doctrine, that testator was seized when the will was made, being regarded as a conveyance and as taking effect when made. The act of 1851 * * * has done away with this distinction."

In the *Kirkpatrick* case, 22 N. J. Eq. 463, it appears from an examination of the files (which in fact is confirmed by the appearances noted at the head of the case), the legatees whose legacies had been struck out, did not appear and were not represented by counsel.

Chancellor Zabriskie, in his discussion of the case was merely attempting to justify a decree which should give the amounts of these legacies to

Rutgers College. In this attempt, no doubt he was aided by the very distinguished counsel who appeared in the case. All the counsel were agreed that Rutgers College should have the residuary estate increased by the amount of these legacies to which no one else laid claim. In those more leisurely days (1871), the Chancellor apparently had more time to write opinions in unlitigated matters.

The learned Ordinary, in that case, underscored the word "bequest" as it is used in the 2nd Section of the Statute of Wills, indicating that it was in his mind that the word "bequest" could be construed as extending to personal property.

An examination of the Statute in its historical setting, makes it perfectly obvious that the word "bequest" was used correctly and technically as relating to the later words "or an estate *pur auter vie,*" such estates were subject to bequest. It was also used in connection with gifts of real estate in the Statute of Frauds.

I Jarman on Wills, p. 332:

> "In considering this head of revocation, as applicable to wills made before the year 1838, freehold and personal estate must be distinguished. The statute of frauds enacts, 'that no devise in writing of lands, tenements or hereditaments, nor any clause thereof shall be revocable otherwise than by some other will or codicil in writing or other writing declaring the same (or by burning &c.); but all devises and *bequests* of lands and tenements shall remain and continue in force (until the same be burnt &c.); or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same', The same statute (section 22) provides 'that no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise or bequest therein

> be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least."

The whole history and scope of the 2nd Section proves beyond peradventure, that it did not by its terms and was not originally intended to relate to bequests of personal property, which were controlled by altogether different and independent statutory rules. If the 2nd Section governed the revocation of devises of real estate and gifts of personal property, it is hard to explain the continuing existence of the 16th Section.

Why was it written into the Act of 1795? Why written again into the Act of 1846? Why has it been continued on the statute books till this day?

The re-enactment of the 2nd Section in 1846, as a part of the new statute of wills, did not have the effect to extend the scope and intent of this section.

Knight v. Freeholders of Ocean, 49 N. J. L. 487.

> "It has been more than once decided by this court that the incorporation of the existing laws into the body of the revised laws in an unmodified form, does not give to such re-enacted laws the force of original laws passed at the date of the revised laws. Such laws were reenacted with no purpose of giving to them any new efficacy, but simply to the end of bestowing upon their rearrangement a legislative sanction. The laws so adjusted are not to be deemed to have acquired any different efficiency from that possessed by them in their original condition."

The learned Ordinary in the *Kirkpatrick* case, did not claim that the 16th Section permitted revocation of a clause in the manner mentioned, but his argument is merely that it did not *forbid*

such revocation. He does not explain its effect or the purpose of its existence.

In considering the New Jersey cases, it should be noted that it is not necessary to take into consideration cases concerning the revocation of wills by cutting off the signature; these are not written revocations. Such a case is *Smock v. Smock* (11 N. J. Eq., 156), and in re *White* (25 N. J. Eq. 501).

Neither need we take up the time of the Court with cases concerning revocation of devises of real estate. The provisions of Par. 2 of the Act of 1795 may or may not continue in force and allow revocation devises by burning, tearing &c., as to real estate wills.

The Court may hold that the provisions of the Act of 1795, concerning the revocation of wills affecting real estate, continue in effect, without holding that gifts of personal property in wills can be revoked, in some other way than that provided by the Act of 1851 for all revocations in writing.

The *Kirkpatrick* case was followed in *Hilyard v. Wood* (71 N. J. Eq., 214). In this case there were four erased gifts. One of the beneficiaries had died before the testatrix. The object of one of the gifts (a watch) had been disposed of before testator's death. Testator had expressed her dissatisfaction with the two other persons whose legacies were erased. The Vice Ordinary makes no statement of the law concerning revocation, relying upon the authorities which we have already considered.

It is submitted that these last two authorities are the only two cases in the Courts of this State which are contrary to the contention of this brief, and that the earlier of these cases (*Kirkpatrick* Will Case) alone presents any argument, and that argument was, practically, mere *dictum* of the

learned Ordinary and delivered on an *ex parte* hearing.

The importance of exact observance of the statutory requirements for legal revocations of wills has been often insisted upon in the Courts within and outside of this State. A single illustration will suffice.

Boylan v. Meeker (4 Dutcher, 285).

> "No proof of declarations of revocation made by the testator, though proved by a cloud of witnesses to have been made times without number, will avail. The statutory evidence must be had or the intended revocation fails."

Phillip's Evidence (p. 480) treating of the admissibility of Parol Evidence to vary or discharge written instruments.

> "With regard to wills of personal property, it is evident from the 22nd section of the statute of frauds that no unwritten declarations of the testator can be admitted to vary any bequest.
>
> "By written evidence is meant not everything which is in writing, but that only which is of a documentary and more solemn nature."

The Law of this Case.

As we have seen, Judge Martin treated the case as depending upon the use of the words "Cancelled October 5, 1912." He nowhere suggests that without reference to these words, there is any evidence of cancellation. In this, we think he is correct. He followed the lead of the two parties who ordinarily are most interested in a will contest, for he says (p. 119):

> "The *cavetor* agrees with *proponent* that the ninth paragraph was cancelled by the lines *and marginal notations.*"

As we have seen too, testimony was offered to

show that the *marginal notations* were in the handwriting of the testator; were written with an ink different from the body of the will; by a pen different from the body of the will; and in a handwriting that varied from the handwriting of the rest of the will.

It is upon the marginal note that proponent and caveator alike rely. If it was not for the refined metaphysics of the *Kirkpatrick* case, we venture that no man in his right mind would contend that the position taken by proponent and caveator in opposition to Mr. Scholfield, is not in direct contravention of the provision of the statute, "that all written revocations of wills shall be executed in the same manner as wills are hereby required to be executed and when so made, shall be sufficient to revoke any last will or any part thereof."

To graft an exception, so broad as this, upon this rule, is practically to revoke the rule itself.

If we are to assume that the lines were drawn by Mr. Runkle, and the marginal note was made by him, and is to be read in evidence and to be given testamentary effect, what is to prevent a testator who writes his own will from striking a clause from his will with his pen in a deliberative sort of way, then after reconsideration, doing as is sometimes done with manuscript intended for the printer, underscoring the excised portion to indicate that the part struck out is to be printed, not withstanding the attempted erasure, and again making a marginal note such as is here in evidence, and once more striking out the marginal notation?

In that manner a will could be kept in a constant state of change at the whim of the testator regardless of the provisions of the statute.

In the *Frothingham* case, the very latest case on the question (76 N. J. Eq., at p. 335), this Court said:

> "What we wish to emphasize is that in revocations of this nature, there is but one point of time to which the intent of the testator is to have a controlling effect, and that is the time of the doing of the very act that constitutes such revocation."

To consider (1) whether Mr. Runkle drew these lines himself; (2) whether he drew them, if he drew them at all, in the first instance, as a deliberative or as a final act; (3) whether the marginal note is to be read as written, "Cancelled October 5, 1912" or as the Judge chose to read it, "Cancelled this 5th day of October, 1912," raises some very interesting metaphysical questions.

There is no evidence upon which an answer to these questions can be predicated with any degree of confidence.

On the other hand, no one questions the fact that at the time the will was written and solemnly executed before witnesses, Mr. Scholfield was named as a beneficiary. To deprive him of his standing as such, it is incumbent upon the person attacking the gift to him, to prove a legal cancellation by legal evidence. This, we must submit, has not been done.

In the present case, it is to be borne in mind that the party interested to attack this gift to Mr. Scholfield is attacking the whole will itself.

It is a principle of contract law, more especially of insurance law, that where a company cancels a policy of insurance, it affirms the validity of the contract as of the time of the cancellation. It would seem as if the same principle should apply here. If Mr. Harry Runkle takes the position that William Runkle cancelled this bequest out of his will, he must also assume that the will was valid at the time of the cancellation, and conversely his assumption that the will is invalid, closes his mouth to say that the cancellation of a clause out of the will is valid.

Recurring once more to Judge Martin's opinion, it is to be noted that the only objection to the use of the words "Cancelled October 5, 1912" that he discusses, is the suggestion that such use is violation of the *hearsay* rule.

We think we have made it clear that the more serious objection to the use attempted to be made of these words is that it is violative of the provisions of the statute of wills.

Our complaint is not that these words are *hearsay,* but that they are *testamentary,* and not attested in the way that the statute requires a testamentary act to be attested.

The very case cited by Judge Martin, *Goods of Adamson,* L. R., 3 P. & D. 253 (July 27, 1875) presents the argument against the use of these words with clearness and vigor. In that case, Sir J. Hannen said:

> "In the present case there is a total absence of evidence when the alterations were made unless the fact that dates prior to that of the will have been affixed to some of them by the testator are to be deemed such evidence. I have been unable to find any case in which it has been held that a date to an alteration was in itself sufficient to establish that it was made at that time. It is no doubt a general presumption that documents were made on the day they bear date but it may well be that the presumption does not exist with reference to alterations in a will though made by the testator himself, because the legislature in prescribing the conditions necessary for the due execution of testamentary papers intended to guard against certain innocent acts of testators as well as the fraudulent acts of others. The object of the statute, 1 Viet. c. 26 (Statute of Wills) is to obtain the security of the attestation of two witnesses to the fact that the testator has executed the whole instrument sought to be proved. If in the absence of any proof that the alterations in a will

were made before execution, beyond the fact that they bear an earlier date in the testator's handwriting, they were admitted to probate, the security of two witnesses would be wanting and the mere statement of the testator would be acted upon. It has been held that declarations by a testator after execution of a will that an alteration was made before are not admissible in evidence *Doe D. Shallcross v. Palmer,* 16 Q. B. 747, 20 L. J. (Q. B.) 367; but if the date written by the testator be taken as sufficient, his declaration would be accepted without proof whether it was made before or after execution. It may be said that there is little probability of a testator affixing a false date to an alteration in his will, but my experience in this Court leads me to a different conclusion. That I am not alone in deeming it necessary to guard against such practices by testators, is proved by the following passage in the judgment of the Privy Council in *Crocker v. Marquis of Hetford,* 4 Moo. P. C. at p. 367. 'The want of specific identification would of necessity repeal, to a certain extent, the statute; for if a general reference would do why should not a testator write as many codicils as he pleases after the incorporating codicil and by omitting to date them or by antedating them, defeat the provisions of the statute.' For these reasons I am of the opinion that the probate should be granted of the will of November 27, 1873, and of the deed of the 22nd of April, 1864, in its original form; and that all the alterations and additions and separate papers must be rejected."

Except for the marginal note we have no testimony in this case that Mr. Runkle drew the lines. The testimony as to the custody of the Will is not of a kind to raise any presumption in favor of its regularity. Some days before Mr. Runkle died, he brought it into his house and put it into a desk drawer where it lay until his death. After his death, Miss Tully, an inmate of his house took it from the drawer and gave it to Mr. Smith, in pur-

suance of directions received from Mr. Runkle. Mr. Smith received it on Saturday; it was in his overcoat pocket from Saturday till Monday morning, when he took it to a safe deposit box and kept it there for twenty-four hours, taking it the next day to the office of McCarter & English and then to the Surrogate's office. There is no evidence where it was kept before Mr. Runkle brought it home. It was found in an envelope that had been worn bare in service. The Will itself has seen hard usage. This is not the kind of evidence upon which, without the use of the words, a presumption can be based. If the *words are essential* to the revocatory act, we respectfully submit it is trifling with language to say that this is not a written revocation. If it is a written revocation, it fails for want of attestation. In the *Kirkpatrick* case the Ordinary expressly held that there was sufficient evidence without the marginal note (which in fact was of a different nature from the note here) to prove that the act of erasure was the act of the testator. Not so here.

The gift to Mr. Scholfield is in the will and without the words, the case is destitute of proof to take it out. And as we have said, if the words are *essential* to the revocation they must of necessity be *testamentary.* In the *Kirkpatrick* case they were not essential and their use would not, therefore, be testamentary and forbidden by the Statute of Wills.

We respectfully submit that the decree of the Prerogative Court should be reversed and the decree of the Orphan's Court be modified so that the whole will, including the ninth paragraph, shall be admitted to probate.

Respectfully submitted,

CONDICT, CONDICT & BOARDMAN,

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New Jersey Court of Errors and Appeals

WILLIAM E. R. SMITH, Proponent, and others, *Respondents,* *vs.* HARRY G. RUNKLE, *Caveator-Appellant.*	*On Appeal from the New Jersey Prerogative Court.*

Brief on Behalf of George McM. Godley.

This is an appeal from the decree of the Prerogative Court, affirming the decree of the Essex County Orphans Court which admitted to probate instruments purporting to be the last will and testament of William Runkle, deceased, and the codicil thereto.

Several appeals have been taken and by a stipulation all parties go up on a single transcript.

George McM. Godley, one of the parties to this proceeding, appeals from so much of the decree as admits to probate and establishes as part of the last will and testament of the said William Runkle, deceased, the certain paper writing designated in the said decree as "first half sheet" and "second half sheet." (Case, p. 167).

Furthermore, in his petition of appeal said appellant sets forth that the said paper writings designated as aforesaid were not established by the evidence as a part or portion of the said last

will and that the said papers were not executed in the manner prescribed by the statute and that said papers so designated were not established as parts of the last will of the testator; and said appellant further complains that the Orphans Court refused to permit proof to be made of the will of April twenty-sixth, nineteen hundred and eleven, and refused to admit testimony as to the declarations by the testator relative to his testamentary dispositions. In brief, then, the appeal of this appellant is taken to review the action of the Court in admitting to probate as a part of the last will of the decedent the paper writings designated as "first half sheet" consisting of pages one and two.

I.

THE FIRST HALF SHEET CONSISTING OF PAGES ONE AND TWO IS NOT A PART OF THE WILL.

In the first place, it should be noted that this subject matter was the principal one considered by the Orphans Court in the opinion found in the printed case on page 108, *et seq.* Referring now to the said opinion at page 121 of the printed case the Court proceeds and states that the first question is whether or not the first half sheet is a part of the will.

In the course of the opinion the Court proceeds at page 122 and says:

> "There may be little dispute about any of these grounds advanced by the caveator, and it seems that the will as originally written apparently did not contain the first half sheet now offered. The question to be determined may be solved by ascertaining when

> the first half sheet offered was written and annexed to the body of the instrument. There is no extrinsic, positive and direct evidence to show when it was done, whether (1) before the execution of the will, (2) after the execution of the will and before the execution of the codicil or (3) after the execution of the codicil."

In the course of the opinion the Court proceeds to consider the rule as to the presumption or burden of proof where alterations appear in a will offered for probate. After referring to several English cases and text writers, the Court states that the diligence of counsel has produced only one case that touches the question in New Jersey. The case to which reference is made is *Ward* v. *Wilcox*, 64 Eq., 303, wherein the opinion of the Court was rendered by Chancellor Magie, and certain parts of the opinion are quoted in the opinion of the Court below, beginning at page 125 of the printed case. After consideration of the English cases and the case of *Ward* v. *Wilcox* the Court below concluded this matter with the following observation:

> "It is not necessary to make a more extended examination of the cases, because the solution of the question seems to be stated in Ward *v.* Wilcox, *supra* (cases cited). A presumption arises from an unexplained alteration of a will that the alteration was made after execution and that the burden of proof is on any person asserting to the contrary to show that it was made in fact before execution."

Further proceeding the Court below refers to the physical condition of the sheets of paper upon which the will and codicil were written. All the details concerning the folds and other features

of the paper are found in the printed case at pages 130-131. The Court below practically admits that little can be learned from an examination of the papers, for in the course of the opinion it is observed:

> "Although not altogether satisfactory the foregoing facts are some internal evidence that the first half sheet is a constituent part of the body of the will."

It is further observed that the first sheet was annexed to the body of the will by the same means employed to attach the codicil. An examination of the instrument will show that this can have but little weight in a matter of such importance, because the attachments were loosely made and the papers could have been released without any difficulty whatever and replaced in the same condition by anyone and at any time. The Court also in the course of its opinion says:

> "And as the evidence shows the codicil was annexed before execution, it may be inferred that the first half sheet was also in position prior to the execution of the codicil."

Finally on this phase of the subject the Court concludes that "under all the circumstances of the case the Court is constrained to hold as a fact that the first half sheet containing pages one and two was prepared and annexed to the will prior to the execution of the codicil."

Just at this point it is important to consider what evidence there is, if any, which shows that the codicil was annexed to the will before its execution—that is, before the execution of the codicil. The only persons who can give any evidence on this subject are the subscribing witnesses, who were the same persons on each instrument.

In the testimony of Mr. Burkardt, found at page 18 of the printed case, he is asked:

Q Now, at the time the codocil was executed did you again observe the last page of the will to which your former signature had been attached?

The witness attempted to answer the question, but did not fully answer until after some argument with counsel, whereupon he replied, on page 20:

A I know there was a paper attached to the codicil—the codicil was attached to a paper, but I couldn't say it was the will. I couldn't swear it was the will.

Again, on re-cross examination he is asked:

Q You mean by that you did not see the page of the document to which the codicil was attached to be able to say whether any part of it was the paper which you now hold in your hand as the will?

A The way he had it folded I couldn't say.

On further examination by other counsel he is asked:

Q Did you see any other part of the will when you signed as a witness to the codicil?

A No.

The other witness to the will and codicil was Charles Hasler. At page 26 of the printed case, upon cross examination this witness was questioned as follows:

Q Now at the time the codicil was signed did you see anything except what is contained on the sheet on which the codicil is written?

A I saw it was attached to a bunch of papers.

Q But can you say what bunch of papers or identify in any wise what they were?

A No.

Q Can you say whether these papers now attached to the codicil are the same that were attached to it at that time?

A No.

Q You don't even know that this paper on which the codicil is written was actually attached, do you? That is to say, you didn't see any fasteners. You only know that there appeared to be other papers folded back of it?

A I don't remember any fasteners.

In view of this testimony of the witnesses, it certainly does not appear by any evidence whatsoever given by them that the codicil was actually annexed to the will prior to the execution of the codicil.

The further determination of the Court in the course of the opinion is based upon this assumption that the codicil was physically annexed to the will before the execution of the codicil.

In the course of the opinion the Court further proceeds to lay down the proposition that if the will was altered after execution and then republished or confirmed by the codicil, the altered instrument was validated, and proceeds to cite authorities and quote therefrom in support of this doctrine.

Among the cases cited and examined is what is the only New Jersey case in which this subject appears to have been considered, namely *McCurdy* v. *Neal,* 42 N. J. Eq., 333.

The Court's examination of this case, however, shows that it is not so far reaching in its results as some of the English cases cited.

In this McCurdy case it appears that the testator's will, to which he had attached the codicil, was attacked on the ground that it had not been executed in conformity with the statute, and in the course of the opinion Chancellor Runyon made the observations found on page 133 of the printed case as follows:

> "But further, it cannot be denied that the codicil was executed with all due formalities. It is proved to have been so executed. It expressly confirms the will so far as the codicil is consistent with it, and is therefore a republication of the will itself, supplying all omissons and remedyng all defects, if any, in the execution of the latter."

It is interesting to note that in the course of this opinion the Court says that the codicil expressly confirms the will so far as the codicil is consistent with it. It will be noticed here that a mere physical annexation or attachment was not considered at all, but the internal contents of the codicil showed apparently upon its face that it was a confirmation of an instrument already in existence and clearly identified in the codicil.

The Court then proceeds to consider the case at bar, and observes that if the preparation and annexation of the first half sheet were not prior to the execution of the will it is clear that the preparation and annexation were prior to the execution of the codicil, and as the codicil is physically annexed to the will and is described as "1st codicil" is must be to some will, and as that will is the only one presented, it seems to be a codicil to that will. This whole observation is based upon the assumption that it has been clearly proved that the first half sheet was prepared and annexed prior to the execution of the

codicil, and in view of the testimony heretofore produced it is apparent that there is no positive proof in the case to show that this first sheet was annexed to and a part of the bunch of papers which was associated with the codicil at the time of its execution.

Reference was made to the fact that the testator had selected the same witnesses for both the codicil and the will, but surely this of itself is a matter of no particular importance. The mere fact that the codicil was found in the envelope with the will does not of necessity show that the codicil was annexed to the will and the half sheet before execution of the codicil.

Furthermore, it should be noticed that the codicil makes no reference to this particular will or any will, and that it was not such a clear instrument as the codicil referred to in *McCurdy* v. *Neal,* where, to use the words of the Court "it expressly confirmed the will." This particular codicil refers to no will whatsoever, and for that matter has no particular application to any previous testamentary instrument. Finally, in conclusion on this subject the Court says:

> "It would seem in the case at bar that the bits of paper clinging under the mushroom or eyelet end of the Challenger fastener tend to rebut this presumption that the substitution was made before the execution of the will, but under all the circumstances of the case it is clear that they do not go to the extent of rebutting the presumption that the sheets are all parts of the whole testamentary paper writings of which the codicil forms part."
>
> "It seems that the first half sheet offered by proponent, consisting of pages 1 and 2, should be admitted to probate" (Case, p. 139).

It is the insistment of this appellant, however, that there is not in this case as presented, evidence direct or circumstantial as we have hereinbefore pointed out, which would justify the conclusion of the Court in admitting this first half sheet to probate as a part of the will of the testator.

II.

THE WILL WAS PROPERLY EXECUTED.

As to the due execution of the will in compliance with all the statutory requirements there can be no question. In addition to the presumption which arises from the perfect attestation clause we have the testimony of both subscribing witnesses. Mr. Burkhardt testified (p. 3), "Mr. Runkle came in and asked Mr. Hasler and myself to be witnesses to his will. He said, 'This is my will and I want you and Mr. Hasler to be witnesses to it.' Then we went into what we call the director's room and Mr. Runkle signed the will, whereupon we signed as witnesses." Mr. Hasler testified (p. 24), "As I recall, Mr. Runkle came to our window and said, 'Charlie, I want you boys to witness my will,' and I told him to wait a minute, and we went into the director's room, and as near as I can remember Mr. Runkle signed first and we signed afterwards—I signed next and Mr. Burkhardt next." Each testified that testator had the document in his hand when he made this request; that he declared it to be his will; that he requested them to witness it as such; that each saw him sign, after which they each signed, all being present at the same time, and each in the presence of each other.

The only question which might be even suggested as to the formality of this ceremony is whether it was sufficient for the testator to publish and declare the document to be his will and make the request of the witnesses prior to his signing, without reiterating the publication and request after he had signed. But this reversal of the natural order is no valid objection. "The order of the requisities to the *execution* of a will is not material. The testator may declare the 'writing' to be his will before or after or contemporaneously with the making or acknowledging of the signature," the essential being that everything required to be done by him shall precede in point of time the subscription of the witnesses.

Lacey v. *Dobbs* (Ct. Er. & App.), 63 N. J. Eq., 325, at 327; *Mickle* v. *Matlock,* 17 N. J. L., at 88.

III.

THE CODICIL WAS PROPERLY EXECUTED.

The witnesses to the will are also the witnesses to the codicil. Mr. Burkhardt testified (p. 6), "Why, Mr. Runkle had the will in his hand and came up to our window, that is the receiving teller's window—Mr. Hasler was there at the time—he says, 'John, I am making a codicil to my will. I want you and Charlie to be witnesses'." (p. 7), "I noticed that the codicil was signed and I asked Mr. Runkle to acknowledge his signature. In fact I said 'you acknowledge this to be your signature' * * * He says, 'yes, sure'." On page 13 he says he believes the words used by testator were "This is a codicil to my will, and I want you and Charlie

to be witnesses," and that he had the paper in his hand at the time. Mr. Hasler testified to the same effect (pp. 28-29). There is no attestation clause to the codicil, but the proof of execution is complete in the testimony of the two subscribing witnesses. Each testified to a perfect acknowledgment, publication and request, and that they subscribed in the presence of testator and in the presence of each other, all being present at the same time.

IV.

APPARENT ALTERATIONS IN WILL.

From an examination of the document offered for probate it is apparent that the first sheet of the instrument as originally written was torn off and another substituted in its place. The pages were originally clamped together by fasteners. When the document was filed in this court all but the first sheet were still clamped in that manner. Around the edges of the clamps could be seen pieces of paper which were left when the original first page was torn off. The first page of the document filed was not clamped by the fasteners, but rested on top of them. The paper of this loose sheet had taken on the impression of the fasteners from being pressed against them, so that the form of the fasteners showed through on the front of the loose sheet. The testator's handwriting on the first sheet differs radically from that on the remaining sheets; different ink and pen were used, and the paper is different.

> "When a paper presented for probate bears upon its face marks which tend to impair it, the apparent infirmity must be considered by

the surrogate on the affirmative offer to probate. The alleged testamentary writing is offered subject to such infirmity, and, as it is said in such a case, 'the paper speaks for itself.' The surrogate on a probate proceeding is bound to take notice of defects, and also of a non-compliance with the statute of wills, apparent on the face of the papers propounded. An inspection of documents presented to the surrogate for his action is obligatory. Such defects are then a species of real evidence, competent in any tribunal under certain circumstances, and especially competent in the courts of the surrogate where the proceeding to probate is on the paper itself. * * * It is, I think, the rule that defects apparent on the face of a paper propounded as a will must always be taken note of on a probate, and that the surrogate is bound to inquire in the first instance concerning such apparent defects. Re Wilcox, 131 N. Y., 610; Re Barber, 92 Hun., 489; 37 N. Y. Supp., 235; Re Gibson, 128 App. Div. (N. Y.), 769; 113 N. Y. Supp., 266. To be sure such defects may be explained away by competent evidence, but, unexplained, they must be considered by the surrogate *quantum valeat,* and before any probate can be decreed." *Re Francis' Will,* 132 N. Y. Supp., 695.

There is no evidence in the present case to explain the apparent alteration in the will. There is no evidence whatever as to whether the present first sheet was the first sheet of the will at the time it was execued or not, except what can be found on the face of the document itself. Nor is there any evidence as to whether or not the substitution of the first page had been made prior

to the execution of the codicil. (See also point one.)

See also 40 Cyc., 1288 (F), to the effect that the will itself may be evidence on the question of whether it has been altered.

V.

IN THE ABSENCE OF PROOF TO THE CONTRARY IT MUST BE ASSUMED AS A FACT THAT THE PRESENT FIRST SHEET WAS SUBSTITUTED AFTER THE WILL WAS EXECUTED AND AFTER THE CODICIL WAS EXECUTED.

Concerning the time as of which alterations in a will shall be dated where positive evidence is altogether wanting, Schouler says (*Sch. on Wills*, 2nd Ed., Par. 435):

> "Not without some controversy in the courts, it appears at length to have been settled, that unattested and unexplained alterations upon the face of a will shall be presumed to have been made after and not before the execution of the instrument; and such is the rule as now announced both in England and leading American States." Citing Cooper *v.* Bockett, 4 Moore, P. C., 419; 10 Jur., 931; Greville *v.* Tylee, 7 Moore, P. C., 320; Shallcross *v.* Palmer, 16 Q. B., 747, 745; I Wms. Exrs., 130; Wetmore *v.* Carryl, 5 Redf. (N. Y.), 544; Dyer *v.* Erving, 2 Demarest, 160.

To like effect is *Jarman on Wills*, Vol. 1, page 304 (Star page, 143), citing: *Simmons* v. *Rudall*, 1 Sim. (N. S.), 115; *Burgoyne* v. *Showler*, 1 Rob., 5, 8 Jur., 814, 3 No. Cas., 20; *Re Thompson*, 3 No. Cas., 441; *Gann* v. *Gregory*, 3 D., M & G., 777; *In re James*, 1 Sw. & Tr., 238; *In re White*,

3 L. J., Prob., 55; 6 Jur. (N. S.), 808; *Williams* v. *Ashton,* 1 J. & H., 115.

And if there be a codicil to the will, which codicil takes no notice of the alterations, the presumption is that they were made after the date of the codicil. *Jarman on Wills,* Vol. 1, page 304 (Star page 143); citing: *Lushington* v. *Onslow,* 6 No. Cas., 183; 12 Jur., 465; *Rawley* v. *Merlin,* 6 Jur. (N. S.), 1165.

And the same presumptions hold regarding mutilation. *Jarmin, id; Christmas* v. *Whinyates,* 32 L. J. Prob., 73.

Such presumption is also stated as the general use in 40 Cyc., page 1275, and numerous cases are cited.

Though most of the cases deal with obliterations and interlineations, the same reasoning and principle would necessarily apply to the substitution of pages. To tear out a page and substitute another is the same in effect as to cross out lines or paragraphs and interline others in their stead.

As has already been observed, the propounded document itself proves conclusively that the first sheet was written at a different time from that on which the other sheets were written. The first sheet has not in anywise been identified as a part of the document which testator signed before the subscribing witnesses. The very face and condition of the will offered raise a presumption to the contrary, which presumption has in no way been rebutted.

The fact that the codicil makes no mention of the alteration also raises a presumption that it was made after the execution of the codicil, for otherwise the natural course would have been to leave the will proper unaltered and embody all desired changes in the codicil.

The presumption that the alteration was made subsequently to the execution of both the will and the codicil is binding by the settled rule of law above mentioned, and is strengthened by the facts appearing upon the face of the document itself.

VI.

EVEN IF IT COULD BE ASSUMED THAT THE ALTERATION HAD BEEN MADE AFTER THE EXECUTION OF THE WILL BUT BEFORE THE EXECUTION OF THE CODICIL, STILL THE CODICIL WOULD NOT BE A SUFFICIENT EXECUTION OR REVIVAL OF THE ALTERED WILL.

The codicil is merely loosely attached to the will offered. It makes no reference whatever to the will. In fact the only indication on the face of it that it is a codicil is the designation written at the top "1st Codicil." It does not directly or indirectly refer to, ratify or confirm any other will or writing. There is no evidence that at the time it was executed it was attached to the will which is now offered or to any other will. The witnesses say that when they subscribed there were other papers folded back, but they did not see them and did not know what they were.

If a will is altered after execution *and then republished and confirmed by a codicil,* the altered instrument might be validated, if it be shown that the alterations were made before the execution of the codicil. *Schouler on Wills,* Par. 434; *Burge* v. *Hamilton,* 72 Ga., 568; *Tyler* v. *Merchant Taylors' Co.,* 15 P. D., 216; 40 Cyc., pages 1218-1219. But mere physical annexation

of the codicil to the will is not sufficient to so validate the altered will. The intention would have to appear by the contents of the codicil. 1 *Jarman on Wills,* page 307 (Star page 146); 40 Cyc., 1218-1219; *McCurdy* v. *Neall,* 42 N. J. Eq., 333 at 336.

VII.

THE ATTEMPT TO ALTER THE WILL BY A SUBSTITUTION OF THE FIRST SHEET FAILED AND WAS OF NO EFFECT IN LAW, SO THAT THE WILL IN THE ORIGINAL STATE, SO FAR AS ITS CONTENTS CAN BE PROVED, SHOULD BE PROBATED.

> "The statute attestation of an original will is not the attestation of the will as altered. And if there is no sufficient attestation of the will as altered, the alteration (as by interlining or striking out and substituting) cannot take effect, *but the will stands as before.*" Schouler on Wills (2nd Ed.), Par. 432, citing: Jackson *v.* Holloway, 7 Johns, 399; Doane *v.* Hadlock, 42 Me., 72; Penniman's Will, 20 Minn., 245.

By virtue of the presumptions and circumstances above noted it must be assumed as a fact that the substituted first sheet was never executed and attested in compliance with the requirements of our statute. It cannot, therefore, stand as a testamentary disposition.

It may be conceded that if testator had merely torn off or cancelled the first page of the will as it was originally executed with intent to revoke the provisions contained on that sheet, it would have been a sufficient partial revocation, and the remainder only would be entitled to probate. *Re*

Frothingham's Will, 76 N. J. Eq., 331, reversing 75 N. J. Eq., 463.

But this case does not involve a mere partial revocation. It involves an attempt on the part of testator to substitute certain testamentary dispositions in lieu of others, by tearing off one sheet and substituting an entirely new one in its stead, under the manifest misapprehension that the substitution would be effective. There is not here involved an absolute and unqualified revocation of a part, but rather a *dependent relative revocation.* It cannot be gratuitously assumed that testator would have chosen to cancel the whole first page of his will, if he had not been under the misapprehension that the attempted substitution would be effective.

> "Intention to revoke must have something more than a conditional existence. It must be an intention to revoke at all events. And if the act of tearing, &c., be done with the deliberate and sole intention of setting up and establishing some other testamentary paper for which the destruction of the paper in question is designed only to make way, the act does not operate as a revocation, unless the other testamentary paper is set up or established. This doctrine is known as that of dependent relative revocation." 40 Cyc., p. 1188; Day *v.* Day, 3 N. J. Eq., 549.
>
> "Where the testator alters certain legacies by erasing and interlining, and then acknowledges the same in the presence of witnesses without signing again, this is not to be pronounced a revocation total or partial, for it was not thus intended. * * * The addition of something which is imperfect, by reason of informal execution and the like, should not at all events, have the effect of

revoking that which was perfect, so as to distort the testator's real meaning. In all such cases the testator's obvious purpose is regarded; and if cancelling or mutilating was part of a transaction intended by him to operate an express change of disposition, or not for the purpose of simply striking out some part of the original will, the failure of this transaction to take full effect leaves the will as originally executed. * * * In short, alterations are considered as a whole; and where something is stricken out simply that something else may be substituted, the failure of the substitution through informality involves the failure of the striking out." Schouler on Wills, par. 431; citing: Heise *v.* Heise, 31 Penn. St., 246; 15 Penn, St., 281; Short *v.* Smith, 4 East, 419; Wolf *v.* Bollinger, 62 Ill., 368; Jackson *v.* Holloway, 7 Johns, 394; Stover *v.* Kendall, 1 Coldw., 557; Linnard's Appeal, 93 Penn, St., 313.

To the same effect is 1 *Jarman on Wills,* page 295 (Star page 136), citing: *Bethell* v. *Moore,* 2 Dev. & B. L., 311; *Barksdale* v. *Barksdale,* 12 Leigh, 535; *Semmes* v. *Semmes,* 7 Harr. & J., 388; *Means* v. *Moore,* 3 McCord, 282; *Pringle* v. *McPherson,* 2 Brevard, 279; *Hairston* v. *Hairston,* 30 Miss., 276; *Banks* v. *Banks,* 65 Mo., 432; *McPherson* v. *Clark,* 3 Bradf., 92; *Holman* v. *Riddle,* 8 Ohio St., 384; *Youse* v. *Forman,* 5 Bush., 337.

A revocation by alteration induced by an assumption of fact or of law which turns out to be false is inoperative because the *animus* is wanting, 40 Cyc., p. 1196. *Smock* v. *Smock,* 11 N. J. Eq., 156; *Mundy* v. *Mundy,* 15 N. J. Eq., 290.

The whole will is not necessarily revoked by the destruction of a part. It is the *animus* which must govern the extent and measure of opera-

tion to be attributed to the act, 40 Cyc., p. 1191; *Re White,* 25 N. J. Eq., 501.

> "When a will is informally altered by the testator, without the statutory requirements, the legal effect is not to make the will void, but to establish it in probate as it stood before the change was made." Schouler on Wills (2nd Ed.), par. 434, citing: Schouler Exrs., par. 84; Wheeler *v.* Bent, 7 Pick., 61; Jackson *v.* Holloway, 7 John., 394; Re Prescott, 4 Redf., 178; Jarman on Wills, p. 303 (Star page 142).

Matter of McCabe, L. R., 3 P. & D., 94; 42 L. J. P. & M., 79; 29 L. T. Rep. N. S., 249; is a leading case on this subject of probating the will as it was originally executed where obliterations, &c., have been made as dependent relative revocations. The court said, "I am at liberty to have recourse to any means of legal proof to establish what the obliterated words were." Probate was directed with those words restored which were proved to the satisfaction of the Court, and other substituted words which were not accounted for were rejected.

In *Brooke* v. *Kent,* 3 Moore, P. C., 334; 13 Eng. Reprint, 136, the English statutes identical with ours were considered. The Court held:

> "The testator did not intend to revoke absolutely—he meant to revoke by substituting different sums from those originally demised. The alteration cannot take effect because not executed according to the statute; therefore, in conformity with old-established principles, and a long train of decisions, the revocation is ineffectual, and the will must stand in its original state."

VIII.

REGARDLESS OF WHETHER THE WILL PROPER STANDS OR FALLS IN WHOLE OR IN PART THE CODICIL IS ENTITLED TO PROBATE.

A codicil executed according to the formalities of the statute is a final testamentary disposition, and, if so complete in itself as to be capable of execution, will stand, though there be no prior existent validly executed will. *Re Emmons,* 96 N. Y. Supp., 506.

> "The mere name of 'codicil' had no deterrent effect on its probative quality. Any writing may be a will if executed pursuant to the statute of wills *animo testandi.*" Re Francis' Will, 132 N. Y. Supp., 695.

> "They are physically two separate papers or instruments, and the validity of one is not so interdependent upon the validity of the other as that neither can stand alone. In some cases a codicil is a complete testamentary disposition in and of itself. * * * It is probably true that not every codicil can be probated as a will in and of itself, but whether it can or cannot depends upon the circumstances of the case." Osborn *v.* Rochester Trust Co., 136 N. Y. Supp. 859.

> "The later bequest is so absolute and without condition, so surely intended to stand by itself and indicate its own effect, that it may be operative whether the earlier provision is known or unknown." Re Beckett Will, 103 N. Y., 167.

> "This word is derived from the Latin word *Codicillus,* which is a diminutive of *codex,* and literally imports a little code or writing —a little will." Schouler on Wills, par. 7.

If the provisions in the codicil are independent of the will and capable of subsisting separately, and there is no evidence of a revocation of the codicil, the tendency is to sustain the codicil even though the will may have been revoked. *Schouler on Wills,* par. 439; 1 *Jarman on Wills,* p. 299 (Star page 139).

IX.

THE FACT THAT THE FIRST SHEET AS ORIGINALLY EXECUTED GAVE THE HOUSE AND $300,000 TO GEORGE McC. GODLEY, AND THE CODICIL GIVES HIM ALSO $50,000 ARE NOT INCONSISTENT, AND THE DISPOSITION MADE IN THE CODICIL DOES NOT REVOKE THE DISPOSITION IN THE WILL, BUT IS IN ADDITION THERETO.

"It is a fundamental maxim that no codicil shall revoke a prior will more than is absolutely necessary at all events to give its own provisions effect." Schouler on Wills, par. 437; citing: 1 Jarm. Wills, 176; Duffield *v.* Duffield, 3 Bligh. N. S., 261; Beckett *v.* Haren, 4 M. & Sel., 1; Evans *v.* Evans, 17 Sim., 86; Tilden *v.* Tilden, 13 Gray, 103, 108; Wetmore *v.* Parker, 52 N. Y., 450; Lemage *v.* Goodban, L. R. 1 P. & D., 57; Brant *v.* Wilson, 8 Cow., 65; Johns Hopkins *v.* Pinckney, 55 Md., 365; Bradley *v.* Gibbs, 2 Johns, Eq., 13; Quincy *v.* Rogers, 9 Cush., 291.

"Whether provisions under a later will or codicil are intended for substitution, or as something additional and cumulative to the gift by the earlier one, must be determined by comparing the instrument to discover their true intent. But in case of doubt an addi-

tional gift is presumed rather than revocation; unless, indeed, resort may be had to parol evidence outside the instruments for assisting the conclusion." Schouler on Wills, par. 438; 1 Wms. Exrs., 167, 185; Bartholomew *v.* Henley, 3 Phillim., 316.

"And even where the times of the actual execution of the respective papers are known, so that, if they are inconsistent, there can be no difficulty in determining which is to be preferred, the courts will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier so far only as it is clearly irreconcilable with the later paper." 1 Jarman on Wills, 341 (Star page 174).

"It is an established rule not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil, as will appear from the following adjudications, which have been selected from a large mass of cases that might be cited in illustration of the principle." 1 Jarman on Wills, 343 (Star page 176) and cases cited. See also 40 Cyc., 1182-1183.

X.

THE EVIDENCE OFFERED SHOULD BE ADMITTED TO THE EFFECT THAT SHORTLY AFTER MAY 11TH, 1912 (THE DATE OF THE WILL PROPOUNDED, Exhibit P. 1), TESTATOR STATED THAT HE HAD MADE HIS WILL AND LEFT HIS HOUSE AND $300,000 TO GEORGE McM. GODLEY.

This evidence is admissible, first, as further proof that the present first sheet was substituted in place of the original first sheet after the will

had been executed, and, secondly, as evidence of the contents of the first sheet as originally executed. *Schouler on Wills,* par. 436; *Jarman on Wills,* p. 304. See also sections V and VII of this brief and the authorities cited thereunder.

> "When the question arises as to whether alterations on the face of the will were made before or after execution extrinsic evidence is admissible for the purpose of showing when they were made." 40 Cyc., 1288 (F).
>
> "The declarations of a testator made after the execution of his will are admissible to prove the existence and contents of a lost will." 40 Cyc., 1314 (V). And likewise they would be admissible to prove the contents of the original first sheet.

XI.

THE "STORRS WILL."

If for any reason the mutilated will should be denied probate, then the prior will, called the "Storrs Will," would stand. Moreover, the "Storrs Will" should be considered as some evidence of the contents of the original first sheet.

Conclusion.

The will propounded and the codicil thereto have both been proved to have been duly executed in compliance with all the statutory requirements.

It appears from the face of the will itself that the first sheet of the will, as originally drawn, was torn off and a different sheet substituted in its place, which apparent infirmity must be con-

sidered *quantum valeat* before any probate can be decreed.

By settled rule of law a presumption arises that the present first sheet was substituted after the will was executed and after the codicil was executed, which presumption is strengthened by the facts appearing upon the face of the document itself, and in the absence of proof to the contrary it must be assumed as a fact in this case that the substitution was made after execution.

The contents of the codicil itself and the proofs as they stand would not warrant a finding that the altered will was ratified and confirmed, and thereby validated, by the execution of the codicil, even if it should be assumed that the alteration in the will had been made prior to the execution of the codicil.

The attempt, then, to alter the will by a substitution of the first sheet failed, because the legal presumption is that the alteration was not executed in compliance with our statute of wills, and therefore cannot stand as a testamentary disposition.

Such informal alteration does not, however, make the whole will void but the unaltered portions are clearly entitled to probate.

The tearing off of the first sheet of the will as originally executed, cannot be deemed to be a revocation of the dispositions which were contained therein, for manifestly the destruction of the original first page was conditioned and dependent upon the substitution of the present first page in its stead. By the well established doctrine of dependent relative revocation, the effect of the destruction of the original first page and the ineffectual attempt to substitute the present first page in its stead is to establish the will in

the condition and form in which it was originally executed.

If the contents of the original first sheet cannot be proved then the will should be probated with the first sheet in blank. If any part of the contents of the original first sheet can be proved, then probate should be decreed of the will with such part of the first sheet, probate of the remainder of the first sheet being decreed in blank.

Regardless of whether the will proper stands or falls in whole or in part, the codicil is entitled to probate, for it is a final testamentary disposition, so complete in itself as to be capable of execution independently of the prior will.

The fact that the codicil contains a bequest of $50,000 to George McM. Godley cannot be taken as a revocation of the disposition in the first sheet of the will as originally executed, which gave testator's house and $300,000 to George McM. Godley. The provisions of the original first sheet and of the codicil are not inconsistent. By well established rule of law the codicil is presumed to contain an additional gift rather than a revocation of the original gift to Godley, and nothing in this case appears to the contrary.

The evidence offered should be admitted, to the effect that shortly after May 11th, 1912 (the date of the will propounded, Exhibit P. 1), testator stated that he had made his will and left his house and $300,000 to George McM. Godley, first, as further proof that the present first sheet was substituted in place of the original first sheet after the will had been executed; and secondly, as evidence of the contents of the first sheet as originally executed.

If for any reason the mutilated will, Exhibit P. 1, should be denied probate, then the prior will called the "Storrs Will" would stand. Moreover the "Storrs Will" should be considered as some evidence of the contents of the original first sheet.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

WILLIAM E. R. SMITH,
Proponent-Appellant,

against

HARRY G. RUNKLE,
Caveator-Respondent-Appellant.

Brief on Behalf of William E. R. Smith, Proponent and Appellant-Respondent.

William Runkle, late of East Orange, died on the 31st day of January, 1914 (p. 30, l. 20 *et seq.*) possessed of a very large estate (Ex. P. 5, p. 159-160), and leaving as his nearest next of kin his brother, Harry G. Runkle, the caveator-appellant (p. 165, ll. 10-20).

He left a last will and testament dated May 11th, 1912 (Ex. P. 1, p. 148-156, and a codicil thereto dated April 29, 1913 (Ex. P-2, p. 157).

The will and codicil are both in the handwriting of the testator (p. 40; p. 41, ll. 1-20; p. 72, ll. 20-30).

They were in his custody immediately prior to his death (p. 33, l. 40; p. 34, ll. 1-30). folded together and enclosed in a large unsealed envelope endorsed in his own hand "Last Will and Testament of William Runkle" (pp. 37-40).

Immediately after his death, and pursuant to instructions given by the testator himself, the envelope containing the will and codicil was delivered to Mr. Smith by Miss Tully, testator's secretary (p. 30, ll. 10-20; p. 32, l. 30 *et seq.;* p. 33,

ll. 1-30); and Mr. Smith promptly filed them in the Surrogate's office (p. 42, l. 20 *et seq.;* p. 43), in precisely the same condition as they were when he received them (p. 44, l. 10).

Upon the hearing below it was conceded by caveator's counsel that there was no question whatever as to the testator's testamentary capacity, and no suggestion of fraud or undue influence (p. 71, ll. 10-20).

Mr. Runkle, a well known citizen of East Orange was the President of the Warren Foundry & Machine Co. (p. 63, l. 40; p. 64, l. 1), and was actively engaged in business almost down to the day of his death (p. 35, l. 10 *et seq.*).

His will is sensible, natural, just and generous. In it he generously remembers many friends and gives large sums to numerous worthy charities.

With respect to his brother, the caveator, he creates a large trust for his benefit, and also constitutes him his residuary legatee (Ex. P-1, p. 153, ll. 1-20; p. 155, ll. 10-30).

The will and codicil, written entirely in his own hand, are expressed in clear and unambiguous language, disclose a good general knowledge of law, and show him to be a man who knew precisely what he wanted to do and how he wished to dispose of his large properties.

There is no mistaking the *actual* intent of *this* testator.

It cannot be claimed that William Runkle did not actually intend each and every provision of the two instruments precisely as they read and in every particular.

But the claim is made that these, his manifest intentions, cannot be given effect because of certain alleged irregularities with respect to the execution of the instrument.

It is not indeed contended that both the will and the codicil were not duly signed, published, declared and attested according to the letter of the statute; but it is imputed that he made certain alterations in the will after execution, viz.: by substituting a new sheet containing the first two pages of the will, by cancelling the legacy to Charles P. Schofield and by erasing the name of Randolph Rodman as executor, and inserting that of William E. R. Smith in its place.

The Orphans Court, however, has admitted the first two pages to probate as a part of the will, and held that the Schofield legacy was legally cancelled; in fact, has upheld the entire will except for the appointment of Mr. Smith as executor (pp. 162-164).

From so much of the decree as excludes his name, and directs that letters issue to Mr. Rodman, as executor, the proponent himself appealed to the Ordinary.

Harry G. Runkle, the caveator, appealed from the entire decree (p. 165).

Charles P. Schofield appealed from so much of the decree as holds his legacy to have been cancelled (p. 166).

George McM. Godley, a legatee under the codicil, appealed from so much of the decree as admits to probate the first two pages of the will (p. 167). The Ordinary, having affirmed the decree of the Orphans' Court, the foregoing parties now take their respective appeals to this court.

These several appeals have been consolidated and come upon one record.

Preliminary Considerations.

The court below has held that two out of the three alterations in this will, and we shall contend that all of them, were made before the execution of the codicil.

It is quite immaterial, therefore, whether they were, all or any of them, made after the execution of the original will.

The republication of a will by the execution of a codicil thereto, validates all changes which may have been made in the will.

McCurdy v. *Neal,* 42 N. J. Eq. 333.
Hubbard v. *Hubbard,* 64 N. E. 1038.
Burge v. *Hamilton,* 72 Ga. 568.
Beal v. *Cunningham,* 42 Ky. 390.
Camp v. *Shaw,* 52 Ill. Appeal 241.
Kip v. *Van Cortland,* 7 Hill 346.
Linnard's Appeal, 93 Pa. St. 313.

It is sufficient that the codicil was annexed to the will which it republishes.

> "A codicil to operate as a republication of a will must either be annexed to or endorsed upon it at the time of execution or expressly confirm it."
>
> Cyc. Vol. 40, p. 1218.
>
> *Hubbard* v. *Hubbard,* 64 N. E. 1038.
>
> *Beal* v. *Cunningham,* 42 Ky. 390, and cases cited by the court below in the opinion.

In the case at bar the will and codicil were found, at the testator's death, attached together and enclosed in an envelope endorsed "Last Will and Testament of William Runkle;" and the evidence shows that when the codicil was executed other papers (the will) were attached to it, though folded over so that their contents could not be seen by the witnesses (pp. 32-34; 37-39; 14; 26).

Moreover, the codicil describes itself as "first codicil," which must be to some will, and of course can be none other than the one to which it was physically attached.

And moreover, the subscribing witnesses who were the same as the witnesses to the original will, testified that Mr. Runkle said—"this is a codicil to my will," or "I am making a codicil to my will" (p. 7, ll. 10-20; p. 13, ll. 1-10), which is a statement contemporaneous with, and part of the *res gestae* of the execution of the codicil.

The execution of this codicil, therefore, republished this will, and validated all changes made in it prior to the execution of the codicil.

The findings of fact of the court below that the first two pages were written, and the Schofield legacy was cancelled, before the codicil was made, and were therefore validated by it, should be affirmed.

But the findings of fact and ruling of the court, in the respect to the appointment of William E. R. Smith as executor, should be overruled.

We shall show that the evidence identifies the writing of Mr. Smith's name with the writing of the first two pages, and that both of these changes were made at or about the same time.

Mr. Smith's appointment as executor, therefore, stands in the same case as the first two pages, which have already been admitted to probate as part of the will by the decree of the Orphans Court.

We will first consider the matter of pages 1-2 and then pass on to the main points of our own appeal.

POINT I.

The decision of the Court below sustaining the first two pages on both the law and the facts should be affirmed.

Under the doctrine of identification, we start with a presumption that the first two pages, being in fact attached to the will and the codicil, formed a part of the will at the time of the execution of the will and of the codicil.

Marsh v. *Marsh,* 1 Swab. & Trist., 528.
1 *Jarman on Wills,* p. 116.
Bond v. *Seawell,* 3 Borro. 1773.
Carlton v. *Griffen,* 1 Burr, 549.
Schuler on Wills, Par. 284.
Palmer v. *Owen,* 82 N. E. 275.
40 Cyc. 1093-1228.
Walsh v. *Gorty,* 62 N. E. 907.
1 *Williams on Executors,* p. 19.
In re Woods Will, 144 A. D. 259.
Rees v. *Rees,* L. R., 3 P. & D. 84.

It will be contended that this presumption, in so far as the original will is concerned, *i. e.,* the presumption that the first two pages were a part of the *will* before its execution, is rebutted by the circumstances that pages 1-2 show differences in handwriting, ink and pen, from pages 3-12 of the will; that pages 3-12 were fastened together with "Challenge" fasteners, whereas the first half sheet was attached to them by "Gem" clips only; that little pieces of paper were found under the heads of "Challenge" fasteners on page 3; that the figures "($50,000)" are duplicated at the bottom of page 2 and top of page 3, and by the fact of the increased spacing at the bottom of page 2.

While these matters may be relevant upon the question of the relative dates of the first two pages and the rest of the *will,* and may tend to rebut

the presumption that the first two pages were a part of the will before execution of the *will,* they have no bearing, and throw no light whatsoever upon the question of the relative dates of the first two pages of the will and the *codicil,* and do not rebut the presumption that the first two pages were part of the instrument at the time of the execution of the *codicil.*

There are no facts that we know which in any way tend to rebut this latter presumption, and therefore, in the absence of any further facts, such presumption would stand, and the first two pages must be admitted as a matter of *law.*

But the court below has found, *as a matter of fact,* that the first two pages were prepared and attached to the will before the execution of the codicil.

The evidence upon which this finding of fact is based is, of course, circumstantial evidence.

In cases of this kind the courts must commonly rely upon the circumstances disclosed by the instrument itself, its handwriting, physical condition and like matters, aided, when necessary, by expert testimony; for it is too much to expect direct evidence or any great amount of evidence of any sort, as to the contents of a holographic will, which even the subscribing witnesses have not seen, and no third party has had access to prior to the testator's death.

But the evidence of this character, while not apt to be extensive in any given case, nevertheless possesses the merit of being free from all suggestion of design, and for this reason must carry the greater weight.

The first matter we shall mention is the matter of water mark of the paper.

The paper of pages 3-12 of the will is all water marked "Old Berkshire Mills 1903;" the paper of the first two pages of the will is also water marked "Old Berkshire Mills 1908."

The paper of the codicil on the other hand, bears the water mark "Old Berkshire Mills 1910" (pp. 50, 51; 77, ll. 10-20).

This use of the paper of the *same* manufacture in *both* the will and the codicil, but the *earlier paper* in the *earlier instrument*, and the *later paper* in the *later instrument*, is most significant.

If the first two pages had been written *after* the codicil, is it not highly probable that the paper used would have been of a *later date than the codicil paper?*

Legal cap is but little used (p. 51, ll. 30-40), and a man of Mr. Runkle's position certainly could not have had occasion to use it very often.

There can hardly be any question but that he bought this paper in small quantities only, and as he needed it, for the particular purpose to which we find him actually putting it; and being paper of the *same manufacture*, but bought at *different times*, the chances are that it was all bought at *the same place;* for it could scarcely happen that a man would get the same paper on two different occasions almost a year apart, unless he bought it all of the same dealer. While, on the other hand, he would be apt to get the same make of paper at the same place as often as he happened to go there; and if he made three purchases as has been suggested, instead of two, the probability of it all being bought at the same place is all the greater.

Would Mr. Runkle buy the 1910 paper until after he had used up his 1908 paper; and if it

was all he bought at the same place *could* he have bought 1908 paper after he had bought 1910 paper?

Either supposition is highly improbable.

We cannot but feel that if the chronology of the papers and documents had been reversed so as to show the first two pages written on 1910 paper and the codicil on 1908 paper, very great significance would have been attached to that fact; and equal significance should be attached to the facts as they are.

And this, in spite of the microscopic differences in rulings between the first half sheet of the will and the paper of pages 3-12 of the will noted by Mr. Kingsley (p. 76, ll. 30-40) to which we attach no significance whatever; nor do we think the deduction of the court below that these papers were therefore made at different times holds at all, because it is evident that they were made the same year, by the same concern, and the differences in ruling can readily be accounted for by the fact of their having been ruled on different presses, though at substantially the same time.

But if the inference is that Mr. Runkle made three purchases of paper, instead of two, the probabilities of his having bought it all at the same place are very greatly increased.

We may next consider the matter of the comparative physical condition of the will and the codicil.

Upon this question of physical condition we feel that the observations of the learned judge who tried this case below are infinitely more valuable than any present inspection of the instruments themselves can possibly be, for a considerable time has elapsed since the trial, and these documents have unquestionably been much handled since then.

What the court saw upon its inspection of the papers, it describes as follows:

> "The worn folds of the first half sheet are similar to the folds in the half sheet and two full sheets of the will. None of the folds of the codicil are so much worn. The first half sheet appears as old and generally much used as the other sheets of the will. The sheet of the codicil appears comparatively new. The tears in the first half sheet are the same as appears in the sheets of the will, and there is a slight tear in the sheet of the codicil. The pressure marks of the mushroom or eyelet of the Challenge fastener shows that the first half page was in contact with, and in a position next to the eyelet for a considerable period of time."
>
> (Opinion p. 130, l. 30 *et seq.*)

It is indeed difficult to see how these findings of fact can now be reviewed at all, in view of the handling to which the document has unquestionably been subjected since the trial.

We therefore submit that the findings of fact upon the above matters must be taken as final and conclusive.

In addition to the physical facts above referred to, the court below also refers to the gift to Kathryn Tully, of the household effects, in the 15th paragraph of the will, and the corresponding provision in the third paragraph as being interdependent and internal evidence that the first half sheet is a constituent part of the will.

In view of the relatively greater age of the first two pages; the use of the 1908 paper, in the first two pages, and in the will, and the 1910 paper in the codicil, and the other facts referred to, the court below held, *as a matter of fact,* that the first

two pages were annexed to the will before the codicil was executed.

> "Under all the circumstances of the case the court is constrained to hold, as a *fact*, that the first half sheet containing 1 and 2 was prepared and annexed to the will prior to the execution of the codicil."
>
> (Opinion 131, ll. 20-30).

Nor is this conclusion negatived by any circumstance whatsoever, however minute.

Moreover it is in entire accord with the probabilities of the case.

We would urge in this connection the extreme unlikelihood that any testator, who has once made a codicil, would attempt to make any change in his will thereafter by any less formal method.

The execution of a codicil shows very plainly the testator's full appreciation of the legal requirements of the case and Mr. Runkle's will, in other respects, shows too good a knowledge of the law generally, to warrant us in attributing to him the ignorance of legal requirements which the assumption that he changed his will after the codicil was executed, demands.

And, on the other hand, we would urge the entire reasonableness of the supposition that all of the changes were made at or about the same time, and therefore, since we know the date when the Schofield legacy was cancelled, before the codicil.

Moreover, this will, with all its apparent changes, should be upheld, because there can be no question whatever as to the testator's actual intentions; and his testamentary capacity and the absence of fraud or undue influence, have been voluntarily conceded by the caveator. (P. 71, ll. 10-20).

The objections to this will are therefore without equity or merit, and purely technical.

This contest is an avowed effort to create an intestacy (p. 107, 110-130), and to subvert the plain and acknowledged intentions of a testator, whose will is pre-eminently just, equitable and reasonable, whose benefactions are worthy, and whose capacity is conceded on all hands.

POINT II.

Mr. Smith's appointment should be upheld on the equities, the facts and the law.

1. The equities of this case are all with Mr. Smith.

No one will question that the testator intended that William E. R. Smith should be his executor.

It is equally certain that he did not wish Mr. Rodman to act in that capacity.

The testator's wishes he has shown in no uncertain manner; for he was at great pains to obliterate Mr. Rodman's name and when he came to write in Mr. Smith's name, he did so twice.

Moreover, he told Mr. Smith he had named him as executor, and left instructions that his will should be delivered to Mr. Smith after his death.

No one will question the absolute right of a testator to select his own executor, and it goes without saying that his personal wishes should be respected and given effect if it is possible to do so.

The appointment of an executor, especially of so large an estate, is a matter of considerable importance.

And so Mr. Runkle regarded it; otherwise he would not have made any change or been at such pains to make the change he did make.

We must assume that a man of Mr. Runkle's intelligence would not make such a change without some reason very satisfactory to himself.

What that reason was we have no means of knowing, nor indeed may we enquire, for the right to make it was an absolute one.

Nevertheless the circumstances of this case, indicating as they do that Mr. Runkle gave a great deal of careful thought to the provisions of his will, warrant the impression that this particular change was based on some reasons which the testator regarded as controlling.

Shall these facts count for nothing?

Conceding the proposition that a will is not well executed simply because it is apparent that the testator intended it to be—that however plain that intent, the statute must nevertheless be complied with, we nevertheless say that where a will has been proven as a whole, to have been duly executed in conformity with the statute, and when it is conceded that the testator was perfectly competent to make a will, and there is not the slightest suggestion of fraud or undue influence, it is contrary to the genius of our system of jurisprudence and contrary to the more fundamental principles of right and justice, to ignore and subvert, the testator's known intent, in an important matter of which he was legally the sole and absolute judge, if it is conceivably possible to avoid doing so.

But the elimination of Mr. Smith and the reinstatement of Mr. Rodman is the exact opposite of which Mr. Runkle intended should be done, and will accomplish the one thing he wanted to prevent.

Certainly his intentions should not be thus subverted and his wishes nullified, without some very strong reason.

But in the discussion of the facts, and the law, this matter is only too apt to be forgotten.

We therefore seek to impress upon the court at the outset, the equities of this case, and of this appellant's position.

This is the will of William Runkle.

William Runkle had an absolute right to chose his own executor.

He has exercised that right and named William E. R. Smith.

He has emphasized that choice by writing in the margin the words—

> "Wm. E. R. Smith to be executor" (p. 149, l. 9).

And Mr. Smith, to whom the will was delivered pursuant to the testator's instructions, and who, as was his duty offered it for probate, is on this appeal seeking to carry out the known and conceded wishes of his friend, who honored him in this way, by defending his will in all respects, and exactly as it came into his hands, from those of the testator.

2. The appointment of William E. R. Smith as executor stands in the same case as the first two pages of the will and the latter being upheld, the former must also. The findings of the lower courts are based upon a serious error.

The learned Judge of the Orphans' Court held, as a fact, that Mr. Smith's name was written with ink and pen different from the ink and pen used in writing any other part of the will and codicil, including the first two pages.

In the opinion this is stated as follows:

> "The testimony shows that the pen and ink used were different from the remainder of the will and codicil; therefore the alteration was made at a time other than that at which any other part of the will or codicil was written or obliteration or amendment or mutilation took place" (p. 141, l. 20).

With all due respect we submit that the testimony, far from warranting such a conclusion, leads to results exactly the opposite of this; and it is here that we find the error of fact which controlled the lower courts in their decision.

The only testimony upon this point to be found in this case is the testimony of Mr. Kingsley, the caveator's expert.

Mr. Kingsley is an examiner and photographer of questioned documents, handwriting, typewriting, ink and paper, has been a professional penman for thirty years, has devoted many years to the study of questions involved in disputed documents, and for nineteen years has been testifying in courts of law in questioned document cases.

His standing and qualifications were not and cannot be questioned.

With respect to the inks used in writing the body writing of pages 1-2 and pages 3-12 of the will, he testified as follows:

> "On pages 1 and 2 the ink is distinctly different from the ink used in the body writing of pages 3 to 12. Pages 1 and 2 are written with a blue-black ink inclined to be quite black, while pages 3-12 have a light brown tendency, that is distinctly divergent from pages 1 and 2. The ink on pages 1 and 2 I have denominated as ink No. 1" (p. 77, l. 22).

As to the ink used in writing the name of William E. R. Smith, he said:

> "On page 11 where we have the name 'William E. R. Smith' and the word 'east' on line—second line of paragraph 8 (Sic) written over a chemical erasure, is in a dark ink that resembles somewhat ink No. 1, although I wouldn't say it is ink No. 1, and I have not given it a number because I cannot say definitely whether it is ink No. 1 or a different ink" (page 78, l. 2).

Mr. Kingsley does not seem to have had any difficulty in distinguishing between all the other inks in the will, and codicil, and yet when he comes to compare the name of "William E. R. Smith" with ink No. 1, he cannot differentiate between them.

What his testimony amounts to is neither more nor less than this—that all the points noted by him in comparing these two inks are points of resemblance, and that there is not a single point of difference; otherwise he not only could, but must have distinguished between them.

It was too much to expect that the caveator's expert would put the matter in a light so favorable to the proponent's case.

On the contrary, we find him doing the opposite in lightly referring to inks as resembling each other "somewhat" and in refusing to say they were the same. The latter we may ascribe perhaps to professional caution, but with respect to the former, we should say that when two things are so much alike that an expert cannot distinguish between them, or say they are not the same, they must certainly resemble each other, rather more than "somewhat."

A thing is either the same as, or different from, another—there is no half way ground.

And when they are so similar that a professional expert cannot point out any difference, it is a fair inference that they are the same.

Indeed that is the *only* fair inference, and it is clearly the only practical inference.

This court is now called upon to say whether or not the lower courts were justified in asserting, what Mr. Kingsley would not assert, that the ink used in writing Mr. Smith's name was different from ink No. 1 with which pages 1 and 2 were written.

We submit that the testimony not only does not show that they were different inks, but from it, the only fair conclusion to be drawn is that they were the same.

A comparison by this court of the original is respectfully suggested, for we feel satisfied that after seeing them, this court will arrive at the same conclusion that Mr. Kingsley reached, namely: that they are so alike that they cannot be told apart.

Next let us consider the matter of pens.

It would certainly seem to be more than a coincidence if Mr. Kingsley should not be able to distinguish between the pens, for if the pens should prove to be the same the probability that the inks were also would be greatly increased and vice versa.

The lower courts have held that the testimony shows that the pen which wrote Mr. Smith's name was different from the pen which wrote pages 1 and 2.

What is the testimony on this point?

Asked about the pen used in writing pages 1 and 2 Mr. Kingsley said:

> "Pages 1 and 2 were written, in my opinion, with a pen considerable coarser, point not so fine, as that used in writing pages 3-12 inclusive" (p. 80, l. 1).

Regarding the pen used in writing Mr. Smith's name, he said:

> "Q And what distinguishing characteristics were there in the pen that wrote the name William E. R. Smith in the two places?
>
> A That, in my opinion, is a pen considerable coarser than the pen used in writing the body of that same page 11 or in writing any of the pages 3 to 12 inclusive, that is the body writing of those pages" (p. 80, l. 12).

That is to say, having previously noted similarities only, and no differences in the inks, he now characterizes the pens which wrote pages 1 and 2 and "William E. R. Smith" in precisely the same way, to wit, as "considerably coarser" than the pen that wrote page 3-12.

Mr. Kingsley was able to say this of the pen which wrote Mr. Smith's name in spite of its linted condition—and that was all he was able to say about the pen that wrote pages 1-2.

He appears on his direct examination to have been perfectly able to compare the "Smith" pen with the pen of pages 3-12, with positive results, which are quite as complete as the results of his comparison of the pen of pages 1-2 with the pen of pages 3-12.

But on his cross examination when asked to compare the "Smith" pen with the pen of pages 1 and 2, he experiences "lint trouble" if we may use the expression, and is unable to say whether the one pen is coarser or finer than the other.

But at least he is not able to distinguish between them.

> "You feel unable to say? A I feel unable to say about that whether it is finer or coarser than the pen that wrote pages 1 and 2" (page 87, l. 30).

But when one cannot tell whether one pen is finer or coarser than another, we would have supposed that the indications were that they were neither one nor the other, but so similar that they could not be told apart.

That indeed is the practical effect of his testimony, just as it was the net result of his testimony about the inks.

He could not tell the inks apart, and he cannot now tell the pens apart.

This court is now called upon to decide whether or not there was any basis in his testimony for the finding of the lower courts that these were different pens; or whether the testimony is not that the pen which wrote Mr. Smith's name and the pen which wrote the first two pages were both "considerable coarser" than the pen which wrote pages 3-12, and that when compared by the witness he could not say that they were not the same pen or point to any difference whatever between them.

Turning now from the testimony, let us consider certain other matters.

We cannot for one moment suppose that Mr. Kingsley omitted to compare every fraction of every questioned portion of the will, with every portion of the will and codicil which could by any possibility disclose anything whatsoever.

It was his business to do this and he was eminently qualified to do it.

He was the caveator's own expert, employed for the purpose and of course not expected to testify in hostility to his client's interests, or to color his testimony in favor of the proponent.

Of all the various parts of this will, the paragraph containing Mr. Smith's name appears, from the special photographs and enlargements, to have been the most thoroughly examined and studied.

But there are certain omissions from Mr. Kingsley's testimony which seem to us to be most significant.

Why did he say nothing about the relative ages of the inks and particularly about the apparent age of the chemical erasure on which Mr. Smith's name was written.

Certainly if there had been any appreciable difference in the ages of the inks of the first two pages, and Mr. Smith's name, Mr. Kingsley would have noted it.

Referring to the conversation between Mr. Runkle and Mr. Smith, in which Mr. Runkle told him that he was his executor, the learned judge of the Orphans' Court said:

> "If it were competent for any purpose it might tend to show the alteration was very recent."

But if the change had been made "very recently" the ink used and the chemical erasure of Mr. Rodman's name could hardly have failed to disclose the fact.

They would both have necessarily appeared comparatively fresh.

Yet nowhere does Mr. Kingsley say they were, and the court itself does not make any such suggestion.

It is obvious, therefore, that these changes were not "recent" but quite old—so old that not even an expert could note anything "recent" in them.

As to the inference indulged in by the court, based upon the fact that Mr. Runkle told Mr. Smith only a few days before his death, that he was his executor, we submit that such an inference is most unreasonable and unfair.

Mr. Rodman's name was in the will before Mr. Smith's was, and yet it does not anywhere appear that Mr. Runkle *ever* told him that he had named him as executor.

It is certainly not uncommon, indeed it is perhaps the usual thing, for testators to keep such matters to themselves. Evidently Mr. Runkle had kept his appointment of Mr. Smith a secret for some considerable time; otherwise he would hardly have used such an expression as "I did not intend to tell you, Billy."

But we are by no means limited to the direct testimony to support our contentions.

The reasonable probabilities of the case are all against the assumption that Mr. Smith's name was inserted after the codicil.

The courts below have held as a fact that two out of the three changes that were made, were made before the execution of the codicil.

The date of the cancellation of the Schofield legacy, is October 5, 1912, more than six months before the codicil was made, and the first two pages have been held to have been written before the codicil.

But if two out of three of the series of changes that were made preceded the codicil, what reasonable ground is there for believing that the third did not also.

The probabilities are all the other way.

And especially is this so when we consider how unlikely it is that any one who has once made a codicil, and thereby shows his thorough realization of the fact that a codicil was legally necessary, would thereafter attempt to change his will by any less formal method.

If he had believed that he could make alterations in his will *ad libitum,* without re-execution, or without relying on a codicil to republish the same, why did he ever make a codicil at all? Why did he not simply re-write the first two pages again, inserting in clause 5, for instance, the bequest to George McM. Godley, and in clause 2, the bequest to Nancy Catherine Byrnes and John Gilleran. He certainly had plenty of room to do this, as he had been forced to extend his writing in the first two pages considerably to make it come out even, and even then he left a good margin at the bottom.

Mr. Runkle knew that to make a change in his will he had either to re-execute the will or make a codicil, and it would be ascribing to him a rather remarkable degree of ignorance to assume that he did not know that a codicil would re-execute his will and validate any changes in it.

Certainly we have shown much more than the scintilla of evidence called for, by the courts below, to uphold Mr. Smith's appointment.

It is generally conceded, even in those jurisdictions which presume against alterations in a will that but slight evidence is required to overcome such presumption.

Much evidence can never be reasonably looked for in such cases, and the courts have never required it.

A mere breath will turn the scale.

But we have shown much more than that—we have shown fully as much evidence as that upon which the courts below sustained the first two pages.

The evidence regarding Mr. Smith's appointment couples it to the first two pages, and the latter being upheld, the former must be also.

That the lower courts erred and entirely misconceived the purport of the testimony with respect to Mr. Smith's name, must be perfectly apparent, and that this error controlled the lower decisions, is manifest.

The purport of the testimony being the exact opposite of what the lower courts held it to be, the conclusions drawn therefrom must be reversed, and Mr. Smith's nomination sustained on the facts.

3. Mr. Smith's appointment should be upheld on the law.

The courts below appear to have held that there is a rebuttable presumption that unnoted alterations in a will were made after execution; and in this case have extended such supposed presumption to the case of a will republished by a codicil, holding that there is a presumption that an alteration in the original will was made after the execution of a codicil, no matter how long an interval may have elapsed between the making of the will and the making of a codicil.

But the question whether there is any such presumption, especially in the case of a codicil, is a matter calling for some very serious consideration.

It has been repeatedly held that, with regard to instruments other than wills, alterations, on the

face thereof, will be presumed to have been made *before* and not after execution.

Sayer vs. *Reynolds,* 5 N. J. L., 737.
Bank vs. *Hale,* 6 N. J. L., 215.
Farlee vs. *Farlee,* 21 N. J. L., 279.
N. R. M. Co. vs. *Church,* 22 N. J. L., 424.
Hunt vs. *Gray,* 35 N. J. L., 727.

But with respect to wills, there appears to be no authority whatsoever in this State.

The case of *Ward* vs. *Wilcox,* 64 Eq., 303, relied upon by the lower courts, is not an authority, for the reason that the question was not decided in that case.

Ward vs. *Wilcox* was a case in which alterations appeared upon the face of a will, and the Chancellor held that there was sufficient evidence to permit him to find, as a matter of fact, that these alterations were made *before* execution. It is true that the question of presumption was discussed to some extent in that case, but the Chancellor expressly disclaimed any intention of deciding the point, and did not even examine the American authorities.

> In the opinion he said: "Counsel for appellant has not cited to me any American cases upon the subject of the presumption in respect to alterations apparent on the face of the will, when offered for probate or relied on for relief. I have not deemed it necessary to spend time in examining our authorities."

It is difficult to see how the Court could have more clearly characterized its own remarks upon this subject as *dicta,* and it is plain that the learned Chancellor never intended that *Ward* vs. *Wilcox* should stand as authority for the proposition that alterations on the face of a will were

presumed to have been made after execution, for he expressly states that he does not decide the point.

This leaves New Jersey without any precedent whatsoever, for we know of no other case in which the question has been raised.

But this is not the same thing as saying New Jersey has no law on the subject.

As the English common law was bodily adopted by the States upon their separation from England, the law of New Jersey stands today as it stood in England at the time of the Revolution, except as since modified by legislation or judicial decisions.

In England, prior to the enactment of the *Wills Act,* 1 Vict. C., 26, the presumption with respect to unnoted alterations in wills (at least when they were in the testator's own handwriting) was that such alterations were made *before* execution.

The history of the whole question has recently been very thoroughly examined by Surrogate Fowler of New York County, *in the matter of Easton,* reported in 84 Misc. 1, and his conclusion was that "at common law unexplained alterations in a will were presumed to have been made *before* execution."

We quote at length that portion of the opinion in the *Easton Case,* devoted to such historical review:

Matter of Easton, 84 Misc. 1,

> "This is a proceeding to probate a holographic testament. The will on its face contains sevaral alterations or interlineations or amendations not noted before execution. The question now here is, are these changes in the cursory script entitled to probate? There is no extrinsic evidence showing when these

changes or interlineations were made, and we are confronted by the suggestion that there is therefore a presumption of law applicable, *viz.*, 'that changes or alterations in the text of a will if unexplained, are presumed to be made after execution.'

It is often stated at large that interlineations or alterations in a will are presumed to have been made after execution. We find this statement repeated by text writers and even applied by that supremely competent judge of this court, Mr. Surrogate Rollins, in his judgment, in Wetmore *vs.* Carryl, 5 Redf., 544; *s. p.* Dyer *vs.* Erving, 2 Dem., 160, 182, a case often cited by text writers. Were it not for the subsequent decisions of the Court of Appeals of this State, which I shall hereafter refer to, I should not feel at liberty to re-examine a point of this character when once decided by Mr. Surrogate Rollins in this court. But the subsequent decisions of our Court of Appeals compel me to review the law on this point.

The so-called presumption that interlineations or alterations in a will in the absence of proof were made subsequent to execution grew up, I think, in England only after the Wills Act of 1 Victoria, and I doubt extremely if it is even yet rightly termed a presumption of the common law. I am confirmed in this doubt by the statement of that very able man, Sir W. P. Wood, afterward Lord Chancellor, in Williams *vs.* Ashton, 1860, 1 J. & H., 115, 118, where he said in substance that he did not think the so-called presumption correctly stated the law of England. It is not, however, the modern law of England which we must examine in this matter, but the law of

this great and ancient state, for the modern law of England is often affected by changes which have no application to our particular jurisprudence.

In examining the question indicated, it may be well to determine primarily what was the common law regarding alterations in last wills and testaments in the absence of proof of the time of making them, for the common law, unaffected by statute changing it, is by constitutional reservation now the law of this case. I may add that I am of the opinion that our constitutional adoption of the common law means always just what it says, and I have no patience with a course which leaves the determination of the common law to the volition or imagination of the modern magistrate. The common law adopted by the constitution of this state is always susceptible of exact determination, and, whether we like it or not, it is the law until the legislature alters it.

It seems to me it is not doubtful that before the statute (c. 26, 1 Vict.), it was an established doctrine of the common law in both England and New York that where there was nothing to show at what time an interlineation or alteration was made in a will, it would be presumed to have been made before execution on the principle '*praesumuntur omnia rite acta fecisse.*' See note to Waddilove's Digest of Cases in Ecc. Cts., 333. Now, this statement is the exact contrary of a prevalent notion, but the following adjudications which I have found confirm Dr. Waddilove's conclusion. In Goods of George Streaker, 28 L. J., 50; Benson *vs.* Benson, L. R., 2 P. & D., 170; Banks *vs.* Thornton, 11

Hare, 176, 180; Matter of Goods of Pennington, 1 N. Cas. in Ecc. Cts., 399. That such was the state of the common law of New York is confirmed by a very able opinion of the Court of Appeals in the leading case of Crossman *vs.* Crossman, 95 N. Y., 145, where it is said (at p. 152): 'The claim on the part of the contestants is that the law presumes that this interlineation was made after execution. * * * But we do not so understand the law in this State. Where an interlineation, fair upon the face of an instrument, is entirely unexplained, we do not understand that there is any presumption that it was fraudulently made after the execution of the instrument.' This is distinctly recognized as the true doctrine by Judge Brown in Matter of Conway, 124 N. Y., 466. It will be perceived that the conclusion of Judge Brown is quite in line with that of Sir W. P. Wood (subsequently Lord Chancellor) in Williams *vs.* Ashton, before noticed, as is the decision in Matter of Drake, 75 App. Div., 403, which I think controlling here.

"The fundamental law of this state governing interlineations in last wills and testaments is the common law, unaffected by any statute similar to section 21 of the English Wills Act of 1837 (Chap. 26, 1 Vict.) Section 21 of the English Wills Act provided in substance that no interlineation made in any will after execution shall have any effect, unless re-executed or signed by the testator and the witnesses opposite or near to the interlineation. Many of the English cases since the Wills Act of 1 Victoria turn upon the construction of section 21 and are not of much weight on the proposition now here.

"The presumption that alterations in wills were made subsequent to execution seems to have been first announced in England after the Wills Act of 1 Victoria, by Doctor Lushington, while sitting for Sir H. Jenner Fust in the Prerogative Court of Canterbury. Burgoyne *vs.* Showler, 1 Robt. 5, 13; Matter of Goods of E. Saumarez, 3 N. Cas. Ecc. Cts. 208, notis, Perog. Ct., 28 June, 1844, said to be confirmed by the Privy Council in Cooper *vs.* Bockett, 4 Moore, P. C., 419. Cooper *vs.* Bockett, and other late English cases of no particular authority here, were followed very literally by Mr. Surrogate Rollins in his opinion in Wetmore *vs.* Carryl, 5 Redf., 444, 2 Dem. 182, but I think the so-called doctrine of Wood *vs.* Bockett is not adopted by the later decisions of our Court of Appeals.

"At this point I take leave to note a very important distinction in the value of cases decided by the Privy Council of England and one which I have never seen noticed. In England the decisions of the Privy Council always have been of limited authority. Great Northern Rail Co. *vs.* Swaffield, 1847, L. R., 9 Ex., 132, 138; Abrahams *vs.* Deakin, 1891, 1 Q. B., 516, 521. But in New York they are of plenary authority if decided before the revolution, as that tribunal or its predecessor, the king in council, was long the original Court of Appeals from this province, and its decisions were consequently conclusive in New York. The importance to our common law of such decisions on appeals is emphasized, if we remember that at one time the great Lord Mansfield, then Mr. Murray, was the agent of New York, and often argued such

appeals before the council. While these early appeals from New York are not generally reported, the records on appeal are extant and at one time I was tolerably familiar with them, as I early recognied their great importance to questions affecting the particular jurisprudence of this ancient commonwealth. Now, it will be observed that the so-called doctrine of Cooper *vs.* Bockett, 4 Moore, P. C., 419, applied by Mr. Surrogate Rollins in Wetmore *vs.* Carryl, 5 Redf., 544, was decided by the Privy Council only after our independence of the crown, and at a time when that tribunal was powerless to affect the common law of New York. That the case was not decisive of the common law I have shown. That it was not authoritive here is apparent. I have even some doubt whether Lord Broughan ever enunciated such a presumption in Cooper *vs.* Bockett as it commonly stands for in the text books.

"The examination which I have made of the origin of the presumption in question leads to a very great doubt in my mind whether or not there is in the jurisprudence of this state any well-settled presumption, that interlineations or alterations in a will, in the absence of all proof, are made after execution. But happily I am not left to my own imperfect deductions in this matter, for the Court of Appeals in Crossman *vs.* Crossman, has as before stated, confirmed my doubt, as has Matter of Drake, 75 App. Div., 403. That the rule involved in the so-called presumption is now doubted even in England is apparent from the *sed contra* nearly always put against Cooper *vs.* Bockett in books of some authority. Beale's Cardinal Rules of

> Interpretation, 610; Mortimer Probate, 210. That in some cases the burden will be on proponent, or on the legatee or the devisee claiming under it, to explain an alteration in a testamentary script is undoubted law. But this rule is not at all the same thing as the naked presumption invoked in this proceeding. At common law unexplained alterations in a will were presumed to have been made before execution, as already stated. * * *"

We find confirmation of the learned surrogate's conclusion that at common law the presumption was that alterations were made *before* the execution, in the following admissions of counsel in what is generally regarded as the leading English case on the subject:

> "We admit that prior to the statute, 1 Vict., C. 26, if an alteration was made in the handwriting of the testator, the presumption was in favor of its having been made prior to the attestation."
>
> *Cooper* vs. *Bockett,* 4 Moore, P. C. C., 419.

The modern English doctrine is thus traced directly to the statute and particularly to section 21 thereof, which has no counterpart in this State or in the American States generally and provides as follows:

> "No * * * alteration made in any will, after the execution thereof shall be valid or have any effect * * * unless such alteration shall be executed in like manner as required for the execution of the will; but the will with such alteration as a part thereof shall be deemed to be duly executed, if the signatures of the testator and * * * witnesses be made in the margin * * * opposite to or near the alteration or at the foot

or end or opposite to a memorandum referring to such alteration. * * *"

Sec. 21, C. 26, 1 Vict. (p. 127, l. 40).

And in thus tracing the origin of the modern English rule to that source, the learned surrogate who wrote the opinion in the *Easton Case,* is confirmed by the English cases as well as by the general opinion of the text writers and commentators.

Thus we find the English courts distinctly so stating.

"In a recent case before the Privy Council, Cooper *vs.* Bockett (4 Moore's P. C. C., 419), the judicial committee decided, in a case where there were interlineations but no proof as to when they were made, that probate must be granted of the will as it stood before the making of interlineations. Their lordships held that they could not presume them to have been made before the will was executed. The decision preceded on the 21st clause of the last Will Act, 1 Vict. C., 26, which enacts (*inter alia*) that no determination (*sic*) made in any will after the execution thereof shall have any effect unless the alterations shall be executed in the manner required for the execution of the will." (Simmons *vs.* Rudall, 1 Sim., N. S., 115, 137).

This also seems to be the general view of the text writers and commentators.

"The reporter's marginal notes in Burgoyne *vs.* Shouler, 1 Robt. Eccl. 5 and Cooper *vs.* Bockett, 4 Moore, P. C. C., 419, state the broad proposition that alterations in a will not accounted for are *prima facie,* presumed to have been made after its execution, but on examination of these cases they are found

to turn entirely on the provisions of the statute of wills, 1 Vict. C., 26, Sec. 21." (Greenleaf Evid., Vol. 1, p. 704, note).

"The rule being that, having regard to the statute of frauds, and the will act (1 Vict. C., 26, S. 21) the onus is cast upon the party who seeks to derive an advantage from an alteration in a will to adduce some evidence from which the jury may infer that the alteration was made before the will was executed." (Best on Evid., Sec. 229.)

"The statute in this country that usually prevails makes it logical for our courts to presume that apparent alterations in wills in the absence of suspicious circumstances were made before execution. In England on the other hand, the statute at least suggests that an alteration should be deemed to have been made after the execution in the absence of evidence to the contrary." (25 Harvard Law Review, p. 691.)

In a note to Columbia Law Review (Vol. 14, note 3, p. 264) it is stated that the English rule is probably justified in view of the provisions of the Wills Act.

In view of the great authority and entire unanimity of the opinion on the subject, we would suppose that it were no longer an open question that the English rule owes its origin to the peculiarity of the English statute.

Historically considered therefore, the New Jersey law at any rate was, and in the absence of statutory or judicial change is, the same as the English common law before the Wills' Act and therefore the presumption would be that any alteration in a will was made *before* execution.

But if the courts feel free in the absence of legislation on the subject to adopt a new rule they

should nevertheless proceed with great caution before adopting a rule originating in a foreign jurisdiction, and arising out of a peculiarity of a foreign statute having no counterpart here, especially as the rule is much disputed in other American States and has nothing to recommend it as a general principle of law.

The English courts in their enunciations of this rule have quite naturally sought to justify it upon general principles as well as by the statute, but it will be found, we think, that they seldom fail to refer it to the statute, either directly or indirectly; for to the statute it must in the end be traced.

And that it is not in fact grounded upon any general principle independent of the statute is perhaps best illustrated by the cases upon which the court below, in the last analysis, finally rests its conclusions here.

We refer to the English cases holding that not only does the presumption against alterations apply to the *will alone,* but that it also applies to the case of alterations *in a will* which is *afterwards republished by a codicil.*

The English cases referred to hold that when unnoted alterations appear in a *will* they are presumed, in the absence of evidence to the contrary, to have been made *after the execution of the codicil.*

The leading, and in fact the only illuminating decision to this effect is in the case of *Lushington* vs. *Onslow,* 12 Jur., 465, cited by the court below.

> "The presumption of law is against the validity of the alteration since it is reasonable to believe that if the alteration had been made before the execution of the codicil some notice would have been taken of the alteration in the codicil."

But curiously enough the first case of the kind to arise in New Jersey only serves to expose the fallacy of this reasoning, at least for jurisdictions having no statute corresponding to Sec. 21 of the English Wills Act.

For in the case at bar we know that two of the alterations in the will were in fact made before the codicil was executed, and yet they are not mentioned in it.

But what can be said for the logic which would lead us to conclude that, although two alterations *known* to have been made *before the codicil,* are *neither of them mentioned in it,* nevertheless a third alteration, *because it is not mentioned in the codicil,* must therefore be presumed to have been made *after the codicil was executed?*

The fallacy of *such* an argument needs no argument to disclose it.

Even in England we may well doubt if the rule would be applied in such a case; or if it were, it would *never* be applied on the reasoning of the case of *Lushington* vs. *Onslow,* for that reasoning does not hold good to such a state of facts.

Yet that is the state of facts presented by the case at bar.

The other English authorities for the presumption that an alteration in the will was made *after the codicil* do not attempt to reason the matter—they simply apply the rule; (*Rowley* vs. *Mertin,* 6 Jur. N. S., 1165; *Christmas* vs. *Whinyates,* 32 L. J. P., 73) though the latter case—and this is most significant—*specifically points out that this rule dates from the Statute 1 Vict. 26.*

It is therefore with considerable confidence, largely derived from the English authorities themselves, that we submit, that, as they rest on a statute peculiar to England and not common to

American jurisprudence, they are entitled to little or no weight upon this point in any American jurisdiction.

That this is the American view of the matter is perhaps best evidenced by the diversity of opinion in our various States, as to what the rule should be in such a case.

Thus in Pennsylvania we find that the courts have utterly repudiated the English rule and have repeatedly held that where unnoted alterations appear on the face of a will, they shall be presumed to have been made *before* execution.

Wikoff's Appeal, 15 Pa. St., 281.
Linnard's Appeal, 93 Pa. St., 313.
Morrow's Est., 204 Pa., 479.
Glassen's Est., 13 W. N. C. (Pa.), 79.

It is quite true that a *dicta contra* appears in *Teeds Est.,* 74 Atl. (Pa.), 606, but upon analysis this is seen to be dicta only.

In Michigan the only case was one involving minor alterations but they were presumed to have been made *before* execution.

Jersey vs. *Jersey,* 146 Mich., 660.

In Massachusetts it is held that there is no presumption of law against the alteration but that the burden of proof rests upon the proponent, the question being *one of fact* to be determined on all the evidence.

Wilton vs. *Humphries,* 176 Mass., 253.

Kentucky seems to follow the English rule.

Toebbe vs. *Williams,* 80 Ky., 661.

But the better rule is to be found in New York, where the matter has been more often considered than elsewhere in America, and where the rule is more in accord with the tendency to break away from fixed formulae and to apply general principles of law to the facts of the individual cases.

The New York law is enunciated in *Crossman* vs. *Crossman,* 95 N. Y., 145, followed by *Matter of Conway,* 124 N. Y., 455, and *Matter of Easton,* 84 Misc. 1.

Crossman vs. *Crossman,* (*supra*) is the leading case and the abstract proposition is there stated as follows at p. 152:

> "When an interlineation, fair upon the face of an instrument, is entirely unexplained, we do not understand that there is any presumption that it was fraudulently made after the execution of the instrument."

Crossman vs. *Crossman* is approved in *Matter of Conway* (*supra,* at p. 466), the Court saying:

> "It is well settled that an interlineation or erasure on the face of a will does not necessarily destroy it, and there is no presumption when it is fair on its face that it was made after execution."

Matter of Easton (*supra*) from which we have elsewhere quoted follows these Court of Appeals cases and reviewing the history of the matter traces the New York rule to its common law origin.

The philosophy of the New York rule is sound.

The burden of proof is cast, not by an arbitrary formula, but by the circumstances.

If the circumstances are suspicious, they should be explained, and if they are not, there is no need of any explanation.

Such a rule is essentially fair and reasonable; nor is there anything in the American Wills' Act generally, which would justify any other rule.

All that the American Wills' Acts require is that the instrument shall be in writing, and signed, published, declared and attested as a will.

No particular form of writing is specified.

The paper may be replete with alterations, erasures and interlineations, and in no wise offend the American statutes. There is nothing in the statute which requires the will to be letter-perfect, any more than any other legal instrument.

The mere fact that careful practitioners have formed the habit of noting alterations in the attestation clause, amounts to nothing legally, for there is no statutory requirement therefor.

Especially if the will happens to be holographic, and was not drawn by a lawyer, but by the testator himself, would it not be manifestly unfair to draw any conclusion from the fact that the instrument was not letter-perfect.

It is only where the circumstances are such as to suggest in a positive manner, that the alterations may have been made after exectuion, that any explanation should be required.

Where the alteration is free from any such positive suggestion, no presumption can be fairly made against it, and none should be made.

In the case at bar the learned judge of the Orphans Court said that the appointment of Mr. Smith was not a "fair" alteration, even in the meaning of the New York rule, as enunciated in the matter of *Easton* (*supra*).

By that the Court did not mean to say that the alteration in question does not reflect the testator's actual intent, or is unreasonable or improper, or tainted by any suggestion of fraud.

It merely pointed out that the pen and ink used in writing Mr. Smith's name were different from the pen and ink used in writing the rest of the page 11 of the original will. And, therefore, said that the alteration was unfair even under the New York rule, stating that in the *Crossman* and *Easton* cases the alterations made were apparently made with the same pen and ink used in writing the rest of those wills.

It is to be noted, however, that the *Crossman* and *Easton* cases were not cases involving codicils, while in the case at bar the validity of all the alterations concededly turn upon the republication of the original will as altered by the subsequent execution of the codicil.

It must never be forgotten that while the will and codicil are, in their legal effect, but a single instrument, they are, nevertheless, in fact, two entirely distinct and separate documents, made at different times, and under entirely different circumstances nearly a year after the will was made.

In that interval all of these changes could have been made, and the lower courts have held that two of them were actually made.

The only inference that follows from the fact that the pen and ink used in writing Mr. Smith's name were different from the pen and ink used in writing page 11 of the original will, is that Mr. Smith's name was written after page 11 was written. But it does not follow at all because the ink used in writing Mr. Smith's name differs from the ink used in writing page 11, that his name was not written in before the codicil was made.

Alterations made in the original will, after the original will was made, but before the codicil was executed, we would naturally expect to find written with a different pen and ink from either the will or the cidicil.

But what is natural, is certainly not a suspicious circumstance.

But if the circumstances are not suspicious, but are entirely natural, and what one would expect in such a case, there is nothing to explain, and no necessity for any explanation.

The pens and ink used in writing pages 1 and 2 and in cancelling the Schofield legacy, also differ

from the pen and ink used in writing pages 3 to 12, of the original will, and yet these changes have both been found to have been made prior to the execution of the codicil.

We say, therefore, that the alteration whereby Mr. Smith's name was substituted for that of Mr. Rodman's is entirely fair, within the meaning of the New York rule because it is exactly what we should have expected to find in case Mr. Smith's name was written in at or about the time that the other alterations were made, and is exactly what we would expect to find where a testator makes an alteration in the interval between the execution of his original will, and the execution of the codicil thereto.

The common law of this State is that an alteration in a holographic will is presumed to have been made before execution.

The circumstance that such alteration was made with a different pen and a different ink from that used in writing the original will would seem to place a burden upon the proponent to show that such alteration was made before the execution of the original will.

But where such will has been republished by a codicil, executed a considerable time after the original will was executed, the proponent is relieved from the burden of showing that such alterations in the original will were made prior to the execution of the original will, and it is to be presumed that such alteration was made prior to the execution of the codicil.

Especially is this so where it appears that the testator has made other changes in the original will, and that such changes were made before the execution of the codicil, and where there is absolutely nothing to show or indicate or suggest that any of the changes were actually made after the codicil was made.

In the absence of any further evidence, therefor, we contend that the presumption is that Mr. Smith's name was written in before the codicil was executed.

We believe that not only is this the law today but that it is based upon sound reason, and good sense, and that there are no purposes to be served in adopting any other or different rule of law.

But if the Court does not care to pass upon this point of law in this case, it is not necessary to do so. For we have shown above that Mr. Smith's appointment should be, and can be sustained upon the facts, because the testimony, the evidence, and the reasonable probabilities of the case all indicate that Mr. Smith's name was written in to the will at or about the same time as the first two pages were written; that the pen with which his name was written can not be distinguished from the pen with which the first two pages were written; that there is no apparent difference in the ages of the inks used, and that it is unreasonable to suppose that Mr. Runkle would have made any change in his will, after once having made a codicil, and that it is reasonable to suppose that the changes that he did make were all made about the same time.

In conclusion we again revert to the equities of the case, and ask the court to consider that it was Mr. Runkle's wish that Mr. Smith should be his executor, and that the testator's intentions and wishes will be defeated if this appointment is not upheld, and that there is every reason why it should be upheld, and no good reason for not doing so.

Respectfully submitted,

CHURCH & HARRISON,
Proctors and of Counsel with W. E. R. Smith.

New Jersey Court of Errors and Appeals.

Appeals by:

HARRY G. RUNKLE,
Caveator-Appellant,

GEORGE McM. GODLEY,
Appellant,

CHARLES P. SCHOLFIELD,
Appellant,

WILLIAM E. R. SMITH,
Appellant,

From the Decree of the Prerogative Court affirming the Decree of the Essex County Orphans' Court probating the Will and Codicil of

WILLIAM RUNKLE,
Deceased,

WILLIAM H. HULICK,
and others,
Respondents.

BRIEF IN BEHALF OF WILLIAM H. HULICK.

I.

Nature of the appeal.

This is an appeal from the Decree of the Prerogative Court (Record, pp. 228, 229), affirming

in its entirety the Decree of the Essex County Orphans' Court admitting to probate the Will and Codicil of William Runkle, deceased (pp. 162-164). The Opinion of the Ordinary before whom the appeal in the Prerogative Court was heard, is in substance an affirmation, after "a very careful consideration of this case," of the views expressed by Judge Martin in the Orphans' Court. The Opinion of the latter Court is lengthy, and, we submit, complete and conclusive. It appears at pages 108 to 147 of the Record. Both of the learned Judges below evidently gave the case very careful consideration. It was tried before Judge Martin in March and April, 1914, and decided by him the following Autumn. It was argued on appeal before the Ordinary in March, 1915, and decided by him in November.

The main contestant all through the Courts, and the sole person who filed a caveat (p. 1), has been Harry G. Runkle, the only brother and sole next of kin of the decedent, who would take the entire Estate if there were no Will. He appeals from the whole of the Decrees below, and objects to the admitting of any part of the Will or Codicil to probate (see his petition on appeal, pp. 231, 233).

George McM. Godley has also appealed (see his petition on appeal, pp. 236, 237), to the extent of objecting to the admission to probate of the "first half sheet" and the "second half sheet"

of the Will; and to the further extent of objecting to the refusal to permit proof of a certain supposed prior Will.

Charles P. Scholfield appeals (see his petition, pp. 234, 235), in so far as objecting to that part of the Decree of the Court below that gives effect to the cancellation by the testator of the $25,000 legacy to Mr. Scholfield.

William E. R. Smith appeals (see his petition, pp. 238, 240), in so far as the Courts below decreed that he was not entitled to be the Executor of Mr. Runkle's Will, and appointed in place thereof Mr. Randolph Rodman, whose name had evidently been the first inserted in the Will.

Regarding the Respondents: Mr. Smith was the original proponent of the Will, but as his claim to the executorship was defeated in the Orphans' Court, the burden of sustaining the Decrees below has fallen on the various legatees and devisees mentioned in the Will. Mr. William H. Hulick is one of these legatees, and the value of the legacy to him has resulted in his occupying the more prominent place of those seeking to sustain the Decree below in all respects.

II.

The issues below, and in this Court.

As, naturally, there were no pleadings in the Orphans' Court, a brief preliminary statement is necessary of what the Record below showed as to the precise issues involved. This is additionally important in constructing a foundation, out of which a point of law arises which we shall undertake to develop later in this point, namely that the decisions below have been in each and every instance, and in their entirety, in favor of carrying out the testamentary intentions and desires of the testator, and that as there is no dispute about his intentions and desires, the burden is upon his next of kin to show that the Will and Codocil as probated failed to give them effect.

Mr. William Runkle, widower, of Orange, Essex County (p. 148), died January 31, 1914 (pp. 30, 34), leaving an Estate which according to his own inventory found in the envelope that contained his Will (p. 41) was of a value of upwards of $2,000,000, and which consisted for the most part of excellent marketable securities (pp. 159, 160).

By the Will offered for probate, this present appellant, Harry G. Runkle, he being William Runkle's brother and sole next of kin (p. 2), was made sole residuary legatee (p. 155). In addition, the brother and the brother's two children

were the beneficiaries of a legacy of $750,000, in trust, to pay them, one-third each, the income, and the principal to their descendants (pp. 152-154). The Will, together with a Codicil thereto, contained further legacies in favor of more distant relatives, friends and charities, amounting to about $750,000 in the Will and $75,000 more in the Codicil. The residuary estate thus bequeathed to Harry G. Runkle outright cannot be less than half a million dollars, in addition to the $750,000 trust in favor of him and his family.

To this must now be added the increment that has resulted from the two years' delay in distributing the Estate on account of the contest.

It is in such a situation that, not content with the munificent provisions in his favor, Harry Runkle has sought to appropriate the entire $2,000,000 Estate left by his brother through the contention that the Will and Codicil are entirely void. On being the sole caveator (p. 1) such was the position taken by his counsel in the Orphans' Court (p. 107); and it is the position which he has again specified in his papers on appeal (pp. 165, 170 l. 30, 202, 204, 205, 233).

As to the Will and Codicil, it is sufficient at this point to say that they are in the handwriting of the testator written on legal cap paper (p. 40). The first and second sheets, being pages one, two, three and four of the Will, are half or single sheets. The remainder of the Will itself is written on complete or double sheets of

paper, as is also the Codicil. The pages of the Will following the first sheet are fastened together by "Challenge" fasteners which are inserted through perforations and pressed down by a machine (p. 54). The first sheet, the balance of the Will and the Codicil were all fastened together by "gem" clips, which are of wire, and held the sheets together by being slipped over the top edge (pp. 39, 57). In this condition the papers immediately after Mr. Runkle's death, and *pursuant to his instructions,* were delivered to the Executor named in the Will in an envelope on which appeared in the testator's writing "Last Will and Testament of William Runkle" (pp. 30, 37), and then deposited in the Surrogate's office for probate (p. 43).

The caveator prosecutes this appeal and continues this contest, notwithstanding the following unquestioned conditions:

1. William Runkle had undoubted testamentary capacity (p. 71).

2. In making his testamentary dispositions he was subject to no undue influence (p. 71).

3. There is no question of any fraud perpetrated upon the testator in relation to his testamentary dispositions (p. 71). Every word of the Will and of the Codicil was in Mr. Runkle's own handwriting, except the signatures and addresses of the witnesses (pp. 40, 41, 64, 72).

The above three elements were conceded, after the testimony had been taken of the witnesses to the Will and Codicil and further proof was suggested on the part of the proponents relating to Mr. Runkle's testamentary capacity.

4. The much discussed half sheet of paper that begins the Will as surely expresses on its two pages William Runkle's deliberate testamentary intentions and desires as any other portion of the document. Only ten days before he died he wrote his friend, William H. Hulick, a letter that concerned one of the bequests made to Mr. Hulick. The language of this letter carries the unconscious assurance that *of course* Mr. Runkle's intentions would be honored by those whom he had left behind, and carries an utter absence of conception that anyone either could or would question the validity of any of his bequests or devises.

In this letter (p. 161, Exhibit P6a, P6b) he said:

"JANY. 21ST, 1914.

My dear Will:

I have said in my Will that Katie is to have such household and ornamental articles as she may choose, and knowing her extreme modesty, I want you to see that she takes the following. Painting of self as child, hanging in the Sitting Room, also Victor Machine Cabinet and Records in same room. Engraving The Angelus in Parlor. Painting of Roses in the Library. Two Covered Vegetable Dishes (Sil-

ver Plated) on Buffet in the Dining Room. This is all I think of now, if others occur to me I will add them.

Your Friend,

WM. RUNKLE."

Mr. Hulick was not named as Executor in the Will, and therefore would have had no connection with Miss Tully's receiving any of the objects referred to in this letter except for the fact that he was, *and was regarded by Mr. Runkle as,* the undoubted devisee of the house wherein those objects lay. That devise was contained on the first half sheet of the Will.

Grouping the facts: that Harry Runkle, the appellant, is abundantly provided for in the Will; that William Runkle had undoubted testamentary capacity; was subject to no undue influence; that no fraud was practised upon him; and that the papers now probated indisputably represent his real testamentary intentions and desires. It must be conceded for Harry G. Runkle that,—whatever his success in this litigation may have been, or upon this appeal may be,—he has stood convicted of gross ingratitude to his benefactor and brother; and he now stands convicted of prosecuting an appeal, unconscionably on his part, however much able counsel may seek to minimize that fact.

Our learned opponents characterized this as "a case that ought to be argued almost academically" (p. 107). Undoubtedly all cases should be

argued calmly, but there is nothing about this litigation which we would characterize as academic. The Statutes of the State of New Jersey with reference to Wills have been enacted to secure, as far as Statutes may, deliberateness, safety, and certainly in testamentary dispositions,—and have not been enacted, if we may be pardoned for saying so, on account of any particular solicitude for next of kin or for the defeat of free testamentary disposition. Appellant's counsel here assert the Statute as a weapon to defeat the purpose of the Statute, and they invoke what they assert to be the law on the question of "presumptions" as to when alterations were made, as a means to defeat a result which in this particular litigation this particular appellant knows to be just and right.

In a subsequent portion of this brief we intend to lay stress on the fact that in each and all of the supposedly conflicting decisions upon the question of such presumptions the cardinal effort of the Courts has been to accomplish by their Decree just what they thought the testator had intended and desired to accomplish by his Will. The Courts have sought to defeat the commission of frauds upon testators, and when confident that otherwise a fraud upon a testator would be sanctioned they have summoned the doctrine of presumption to their assistance. When satisfied that they were carrying out the testator's desires, this doctrine of presumption fades out and

passes away, for the Court then speedily holds that the "presumption is overcome." In short, invariably the Courts desire to secure a result and Decree that should be right upon general principles of right and equity. And as to what is right in this case in the sense of according with such principles, there can be no ground for dispute.

A word in concluding this introduction to our brief is necessary with reference to the issues raised through the appeals of the other three appellants:

Regarding Mr. Smith's appeal: All of the respondents, other than Mr. Rodman, remained naturally indifferent. The question of whether this Estate should be administered by Mr. Smith or by Mr. Rodman is something that can scarcely concern any other legatee than the residuary legatee as there is a great deal more than ample to pay all of the specific and general legacies.

Regarding Mr. Scholfield's appeal: Here all of the respondents are likewise indifferent. The question whether there is, or is not, an additional general legacy of $25,000 is something which concerns only the residuary legatee. Perhaps this is as good an occasion as any other to point out that under the Statutes and decisions of New Jersey, the Will stands, whether the cancellation of that particular legacy was effective or ineffective. The cases cited at page 40 of Judge

Martin's Opinion are sufficient authority for this, and we do not understand that the point is questioned.

Regarding the appeal of George McM. Godley: We observe that the brief filed in his behalf is in reality only an effort to fortify the position of the main appellant, the caveator. As such we must answer it in the subsequent portion of this brief. The reason why this legatee who benefited in the Codicil to the extent of $50,000 and having no other concern with this litigation, should have attacked a part portion of the Will is hardly apparent. Upon the proceedings before Judge Martin, Mr. Lum, of counsel for Mr. Godley, took a definite position clearly in favor of the entire Will. At page 93 of the Record it appears that he said:

> "My contention is that the Will now as offered, *with the two sheets as they now exist,* should be admitted to probate, and I will offer no objections against that." (Italics are ours.)

Again at page 98:

> "I do not want to be understood as attacking the Will * * * I am not attacking the Will * * *."

In that connection counsel endeavored to offer a copy of a document that once was a Will of Mr. Runkle's of a date prior to the Will now probated, the original of which old Will apparently had long since been destroyed. Exactly what counsel for this particular legatee was trying to

effect was not apparent at the moment, and never apparent to the learned Judge in the Orphans' Court (see his Opinion, p. 120). Counsel for Mr. Godley took no exception to Judge Martin's ruling. Nevertheless he now appeals with the object of eliminating the first half sheet and the second half sheet of the Will (p. 237). As the affirmance or reversal of the Decrees below would not affect the legacy to George McM. Godley of $50,000 in the Codicil, it is not apparent how he can be heard upon this point, except in effect as *amicus curiae*. The relation of the elimination of these two half sheets to the substitution in *this present Will* of provisions of another older Will is too complicated for us to argue about; and we shall treat the brief of the appellant Godley only as an addendum to the brief of the main appellant.

III.

The circumstantial evidence of this case affirmatively shows the facts to be that the first half sheet of the will was affixed prior to the execution of the will; and certainly it was there long prior to the date when the will was republished in the codicil.

The briefs of all parties to this litigation have presented an encyclopedia-ful of law on when alterations in Wills are presumed to have been made; and we shall discuss that interesting ques-

tion in due course in this point. But we have contended from the first that this whole question was academic because of the circumstantial evidence in this particular controversy, which all pointed the one way and showed what the facts were in that particular matter. No one has disputed the proposition that presumptions yielded to evidence; and Judge Martin might well in his Opinion have said no more than assuming the law to be as claimed by the counsel for the caveator, it had no application because of the *facts* which he found the proofs to have established.

Therefore, it seems to us in behalf of this respondent more appropriate to lay before the Court this circumstantial evidence, assuming for the moment that the law is precisely as our learned opponents claim it to be. We have the circumstantial evidence of what actually took place in the matter of this Will and Codicil, and that evidence is all the one way.

First we ask the attention of this learned Court to what we understand to be the *real point of discussion upon the question of fact* here.

We have never questioned but that when the Challenge or mushroom fasteners were put through the three sheets of paper that Mr. Runkle had originally written out as constituting the twelve pages of his proposed Will, (not the Codicil of course), the first half sheet of paper was not the half sheet now before the Court. Undoubtedly, whether because there was

some accidental defacement of the opening page of the proposed Will, or a blot of ink had fallen thereon, or there was some language in the half sheet which, as originally phrased, did not suit him, Mr. Runkle tore off that half sheet and replaced it by the half sheet now before the Court. Our learned opponent for the main appellant occupies a considerable portion of his brief in the establishment of this fact. There was little need for that, because we admit it. It is the very point of departure for the controversy that has arisen in this litigation. The question of fact to be discussed in the case is—*When* did Mr. Runkle do this? Did he do it before he executed the Will? Did he do it after he had executed the Will but before he had executed the Codicil? Did he do it after he had executed both the Will and the Codicil?

a.

The Evidence in the Case Tends to Establish that the Substitution was Prior to the Execution of the Original Will.

Before rehearsing the evidence upon which we affirmatively rely at this point, we call attention briefly to the sole argument suggested as a point of *fact* (as distinct from a point of presumption) against our present contention. The inquiry was repeatedly pressed home as to why, if the replacement occurred prior to the execution of the

original Will, the first half sheet did not have the mushroom fasteners through it like the other sheets of the original Will; and why (like the Codicil) it was only affixed to the other parts of the Will by the gem clip that connected it. The answer is plain, even though it comes in the form of another question. Why should it have the mushroom fasteners through it if the replacement occurred prior to the execution of the Original Will any more than if the replacement had occurred after the execution of the original Will.

The inquiry we submit is clearly only pertinent from the form in which the question is put. The underlying argument is specious. This circumstance has nothing to do at all with the *question of time when* the substitution took place. The substitution is conceded by us. It is conceded that the first half sheet was torn from its connection beneath the mushroom fasteners. But all sides must equally concede what was the evident fact; that Mr. Runkle—like most of the rest of us who are not stenographers—did not know how to extract the mushroom fasteners from off the other sheets of the proposed Will and bind it up over again with mushroom fasteners that would include the new half sheet. What has this to do with the point of time when this substitution was made? Would it have been easier to have extracted those mushroom fasteners from the proposed Will before it was executed,

and to have fastened them anew over the new half sheet, than to have done the same thing after the Will was executed? Obviously not. And the inquiry has nothing to do with the case. One thing is sure—that Mr. Runkle, a man of years, and, therefore, naturally of constrained handwriting, had laboriously written out with his own hand twelve full pages of legal cap. The varying handwriting in each and all of the different pages is evidence enough that the job occupied a good deal of time and gave him a good deal of trouble. It was certainly natural that finding the first half sheet to need replacement he did not on that account wish to tear the paper of the other sheets or to write out those other sheets all over again. Under those circumstances he substituted a new half sheet as he did; —*but we are still entirely at the threshold of the real inquiry as to when he did it.* Thus far, we respectfully submit, we have no particle of evidence whatever tending to show either that the substitution occurred before or after the execution of the Will.

Proceeding now to the points of fact which we adduce affirmatively:—and building them up one by one:

1. *It affirmatively appears that the majority if not all of the testamentary provisions on the first half sheet were pursuant to an intention and design formed prior to the execution of the Will.*

In the leading case of *State* vs. *Ready,* 78 N. J. L., 599, it was debated, among other things, whether, if the issue was whether a Will as originally made had certain provisions, the pre-existing testamentary design of the testator was relevant. And the Court says:

> "It cannot be doubted that if the decedent * * * had made up his mind * * * to leave his property to his housekeeper, Miss Clavin, this pre-existing testamentary design would not only have been relevant but would have had great potency in determining the question whether the disputed instrument was a forgery or his genuine will."

Applying that doctrine by analogy here:

In the case at bar we begin with the fact that the $50,000 legacy to Mr. Hulick was unquestionably pursuant to a testamentary design of Mr. Runkle's conceived prior to the execution of the Will, and that the first half of Article 7 of the Will, containing that bequest, must have been at the end of the original half sheet, just as it was on the substituted half sheet. *The testator could not have changed that particular legacy after execution of the Will, because to have done so he would have had to remove as well the second half sheet; i. e., pages 3 and 4 of the executed Will.* The beginning of the second half sheet dovetails in to a legacy of $50,000 to some male friend who had children. Mr. Hulick was a friend and close associate in business of forty-

five years standing (p. 64). There is no suggestion that any one else, for whom Mr. Hulick was substituted, originally would have fitted as the legatee of $50,000 thus described.

We start then with the fact that Article VII of the Will, a part of which was on the questioned half sheet, constituted a legacy that was pursuant to a design conceived prior to the execution of the Will.

With this as a point of departure, we further find that, whereas on the second half sheet the first article *is* numbered "8," the first half sheet contains seven articles set forth in orderly manner, each relating to its own appropriate subject, and leading up in natural order to an article on the second half sheet that would be numbered 8. In other words, the design of the Will, that was conceived prior to its execution, put seven articles in the Will on the first half sheet,—just as we find it.

Next we see that the first half sheet refers to a single Executor, a rather unusual circumstance in a Will bequeathing an estate of this magnitude. And then we observe that in the balance of the Will but one Executor is named, thus showing that Article 1 was pursuant to a design conceived prior to the execution of the Will. The like reasoning might apply to Article 2. Article 3, on the first half sheet, dovetails absolutely, and with peculiar fitting, into Article 15,—the one devising to Mr. Hulick the testator's house and household effects

> "save such household, domestic and other articles and effects therein as Kathryn Tully may choose to take";

and then those effects "which she may select" are bequeathed to Miss Tully in Article 15.

2. There is no especial affirmative evidence in the Will that Articles 4, 5 and 6 were pursuant to a design conceived prior to its execution. And that leads us to the second circumstance in completion of the circle of circumstantial evidence which we seek to draw, namely:

The testator at the time when he executed the Will and at the time when he executed the Codicil, appreciated personally, and apart from any lawyer, what was the nature of a Will, what was the nature of a Codicil, how a Will had to be executed, *and that a Codicil was required in order to change it.* If, therefore, any of these three legacies to Jesse Godley, Elnora Godley or Alfred J. Gerard had not been decided upon and inserted in the original Will prior to its execution, the above factors in the case render the conclusion necessary that Mr. Runkle would have put those legacies in a Codicil. To use the phrase of our learned opponent, the *presumption* is that the Codicil marks the first change in the Will.

Mr. Godley's counsel argues that the fact that the Codicil makes no mention of an alteration, raises a presumption that it was made after the execution of the Will, for otherwise the natural

course, he says, would have been to leave the Will proper unaltered and embody the desired changes in the Codicil. It seems to us, however, that exactly the opposite inference from this fact is the correct one. The very existence of a Codicil negatives a presumption that the testator would attempt to do in an unlawful manner that which the Codicil shows he knew how to do in a lawful manner. Therefore the presumption from the fact that the Codicil makes no mention of any alteration, would be that the Will as executed was as the testator wished it to be. That is, the presumption is one of regularity.

The Codicil that Mr. Runkle wrote out was a matter entirely of his own volition, prepared, written out and executed on his own initiative and without the aid of a lawyer. The testimony of the attesting witnesses shows that. In the Codicil that he did make he left, for instance, a legacy of $50,000 to George McM. Godley and a legacy of $25,000 to Frederick A. Godley. Obviously if he had not made the first half sheet already a part of his Will, the legacy of $25,000 to Jesse Godley and the legacy of $10,000 to Elnora Godley would have been in that Codicil, too. Or if he had conceived the design of making them legatees after the execution of the first Codicil, he would have made out a second Codicil.

It is all very well to have a presumption that a man has failed to do with attention to regularity that which he may not have known how to do;

but *when we have proof positive that this testator knew precisely what to do and how to do it, it must be admitted either that those legacies were in that half sheet prior to the execution of the original Will, or else that Mr. Runkle consciously intended an illegal and ineffective thing, that he intended to commit a conscious fraud upon himself and those legatees.* This latter supposition cannot be tenable, and the first must hold.

Finally, in this connection, we ask the Court to examine the crease or fold which will be found about an inch from the top of the first page of the Will, running partly through and partly on top of the first line of writing. *It is located at the end of the Gem clips.* This crease or fold extends equally and in substantially like proportion through all the pages of the Will proper, being found at the top of the front pages and, of course, at the bottom of the back pages, as the paper was written on both sides. Coming then to the last page of the Will we find this crease present just below the signatures of the witnesses. It is exactly the crease that would have been made in the Will when presented by Mr. Runkle to the witnesses for signature "opened on the last page where the name Runkle and the names of the witnesses appeared" (p. 5, l. 34). Or, indeed, it could well have rsulted from one or both of two other probable causes. Mr. Runkle might well have fastened the papers together before he started to write his Will, know-

ing from his draft how many sheets would be required. If so, the crease would naturally occur during the course of writing. The other cause, and a most natural one, would be that it was the result of his reading the Will before taking it to the Bank for execution. The fact that this crease is lacking in the Codicil in anything like similar proportions shows, we submit, that the instrument as offered for probate was composed of the same sheets at the time of execution.

Thus, we respectfully submit, the circle is complete, and the circumstantial evidence shows that this half sheet was substituted prior to the execution of the original Will.

We may be pardoned for explaining that we have dwelt thus carefully upon this point because of the observation in the opinion of Judge Martin, where he says (p. 130):

> "it may be that the half sheet upon which the first and second pages are written was not in the Will at the time of execution of the Will."

His Honor goes on to hold that

> "by comparing the first half sheet with the sheets of the Will and Codicil it is apparent that it was written prior to the execution of the Codicil."

The latter point, and the one upon which Judge Martin put his decision in our favor, seems to us patent for the reasons that he suggested, and which reasons we are now about to reiterate.

But we have first laid emphasis on this present point because we felt that Judge Martin should have been convinced as to that, too, and because we trust to convince the learned Court now that we are correct in this contention that we have made. The presumption against us, if presumption there be, is, as all sides must admit, as light as a feather, yielding to the slightest circumstantial evidence that weighs down the balance the other way. Here we have such circumstantial evidence sufficient to overcome the presumption, and that we respectfully submit ought to be the end of the case without more discussion.

To proceed now to the further branch of the argument, to wit:

b.

Plainly the First Half Sheet was Affixed to the Will Prior to the Execution of the Codicil, and the Codicil Republished the Will in that Form.

The Codicil undoubtedly republished *some* Will. The cases cited in the opinion (pp. 131-134) are sufficient to establish that general proposition. The paper called itself "1st Codicil"; and in so doing, and in the general nature of its context, it clearly referred to *some* paper as a Will, which, except for the added provisions of the Codicil, the Testator was then reaffirming.

Next, it is clear that the Will now probated—not speaking for the moment especially of the half sheet—has been identified as the Will (in general) to which the Codicil referred.

As a matter of legal presumption, it was well said (p. 533) in *Marsh* vs. *Marsh* (discussed at length *infra*) that the Will that a Codicil republished was *"prima facie* the last existing Will, especially if that revoked all others" (see Record here, 156 l. 20).

Allen vs. *Maddock,* 11 Moore's Privy Council Cases, 427, is most enlightening in its analogy to the facts of the present case. There the testatrix, in 1851, made a testamentary instrument in her own handwriting, which she intended to operate as a Will, but which was not properly attested. In 1856 she duly executed a Codicil, which was headed "This is a Codicil to my last Will and Testament." This Codicil contained no reference to the testamentary paper of 1851 which was not produced at the time the Codicil was executed, but was found at her death in a trunk in a room in the deceased's residence, enclosed in an envelope on which was endorsed "Mrs. Anne Foote's Will." The Codicil was found in a drawer in her bedroom. No other Will or testamentary paper was found. It was held that though informally executed the testamentary paper of 1851 was incorporated with and made valid by the duly executed Codicil of 1856, and probate was granted to both papers

as together constituting the Last Will and Codicil of the testatrix.

Lord Leigh said, in the course of a lengthy opinion (p. 442):

> "If the will in question had been properly executed, there can be no doubt that it would have been treated as the instrument referred to by the Codicil.
>
> * * * * * *
>
> (p. 461) The result of the authorities both before and since the Act, appears to be, that when there is a reference in a duly executed testamentary instrument to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified.
>
> * * * * * *
>
> The facts on which we rely, are, beyond all question, admissible in evidence, namely, that the paper in question was written by the testatrix, was found locked up in her possession at her death, in a sealed envelope, on which there was an endorsement prescribing it as her Will; and that after diligent search no other paper has been found answering the description, and that the only trace of any other testamentary paper in the evidence, is the proof of an earlier Will, which the testatrix destroyed."

The strength of this apparent analogy in support of the respondent's contentions, would ap-

pear to us as unanswerable on this point; especially when we consider that in *Allen* vs. *Maddock* the Codicil contained no reference to the Will and was found separated from it in an entirely different place, while in the present case the Will and Codicil, were physically joined together.

But further, and as a matter of fact: when the testator arrived at the Bank with the intention of having the Codicil witnessed by the two bank officials, he "had the Will in his hand" (p. 7, l. 10. He said, "I am making a Codicil to my Will" (p. 7, l. 12). His Honor Judge Martin interrupted with a question the witness to the Will, Mr. Burkardt, while he was giving his testimony, saying:

> "All he showed you on that second occasion was the instrument which you have described as a Codicil"?

To that the witness answered very promptly:

> "No, sir; he had the whole thing together, —turned over" (p. 8, l. 35).

Then the Court brought out that when the Codicil was executed he showed them the last page of "the Will." Obviously he was only referring to the Will just proven and witnessed by the same two people. It was a paper in the testator's own handwriting (p. 6, l. 23). The witness said that the last page was all that he was

shown, but that "There was more to it." The Court then says:

> "The Court.—That is, the top of the Codicil was attached to the last page of the Will? The Witness.—Yes, sir" (p. 9).

After skilful cross-examination one cautious witness says:

> "The Codicil was attached to a paper, but I couldn't say it was the Will; I couldn't swear it was the Will" (p. 20).

The other says:

> "I saw it was attached to a bunch of papers" (p. 26, l. 29).

But the fact remains that the Will and Codicil as now presented for probate were obtained by Mr. Runkle shortly before his death from this same Bank of which these two witnesses were officials (p. 34, l. 12). Now, just as when first executed (pp. 11, 18) the pages of the document are of similar character, and there is no cover thereon. Precisely the same two men were selected to witness the Codicil who had already witnessed the Will. *And those two men, neither of them, ever witnessed any other testamentary document of Mr. Runkle's, except the two which are now presented for probate* (p. 29). As Judge Martin indicates in his opinion (p. 134) there is a strong likelihood that when he asked these two men to witness his Codicil and called the paper 1st Codicil, the paper that he had in

his hand and the Will to which he was referring, was the Will that had been witnessed by these same two individuals at that same place, and not, for instance, a Will such as that drawn up in Judge Storr's office and witnessed by Storr and somebody in his office (p. 98), two years before.

There is also another means of identification of the Will that the Codicil referred to, connected with the first half sheet of the Will, namely, the existence of the pressure marks on the paper, from the heads of the mushroom fasteners. But to this we shall allude more particularly hereafter, as it is more important in consideration of the question whether that first half sheet was then upon the Will when the Codicil was executed. So likewise the identity of the tears in the sheets, and the identity of the folds of the papers, factors hereafter more particularly discussed, are also in point in this connection.

The identification of these two instruments is also confirmed by the fact that they were found joined together, in one envelope on which was written, in the testator's handwriting: "Last Will and Testament of William Runkle." We have also the positive testimony of Miss Tully, that she was directed by the testator to give this envelope to the Executor named in the Will (pp. 32-3).

All of these facts support the presumption of identification of the sheets found together as con-

stituting the Will. Judge Martin discusses the authorities (pp. 134-138), and we find no authorities in the appellant's brief to overcome the presumption which he finds existed under the circumstances above detailed.

In short, there can be no doubt that the Will republished by the Codicil was the Will signed by these same witnesses who were witnessing the Codicil, and which has now been presented for probate.

The Codicil then republishing the Will, as it did, there should, we submit, be no serious doubt, under the circumstantial evidence of this case, that the first half sheet was then on the Will as thus republished.

Upon this point it might suffice to leave it upon the findings of his Honor Judge Martin, as his reasoning cannot well be gainsayed; and especially so since the decision by the Ordinary, which affirmed in all things the Decree below, stating:

> "A very careful consideration of this case has led me to the conclusion that it was rightly decided in the Essex County Orphans' Court."

(pp. 130, 131, 227). However, to reiterate this evidence at somewhat greater length:

1. We start with the undoubted factor in the case that the first half sheet as written is a document of very considerable age. The paper was manufactured, as the watermark shows, in 1908, and the writing on the paper is old. It may well

be that experts cannot truthfully say whether ink is, for instance, three years old as against four years old; but any lawyer experienced in the class of cases that calls for the opinions of handwriting experts, knows that they can tell when ordinary commercial ink has been affixed to a document within such a recent date as a week or a month or two or three months prior to the examination, as against a writing in ink that is a year or more old. If Mr. Runkle's handwriting on this half sheet had been recent, of course Mr. Kinsley, the expert for the caveator, would have said so. The question was put to him (p. 75):

> "Q. Referring now to the first and second pages of the document, I would like you to compare that with the succeeding pages of the Will and tell us what difference you find as to paper, pen, ink, method and style of writing as to indicating painstakingness, slowness, rapidity or anything that you find?"

Mr. Kinsley had evidently been over the Will with the utmost care and had made a very considered examination of it. His failure to say that the ink on the first half sheet was more recent than the ink on the rest of the Will or the ink on the Codicil, is an admission against the caveator—which we put conservatively in stating—as one that the writing was not recent. We might almost go further and say that it is an admission that the writing was older than the writing on the Codicil. Apart from the question of

the age of the paper and the age of the ink, it appears that the folds in the first half sheet are of evident considerable age. The document also looks old; old, too, as compared with the Codicil which admittedly is (at this present date) almost three years old. The tears on the paper do not look fresh. It would be an absolute impossibility that a short period of time would have left on the first sheet the little impressions from the marks of the eyelets or fasteners that existed.

Undoubtedly, therefore, the substitution of the first half sheet as presented for probate, occurred a very considerable time, in point of months or years, prior to Mr. Runkle's death.

The question then is, did it occur prior to the execution of the Codicil in April, 1913? Undoubtedly so for the following reasons:

2. The worn folds in the first half sheet of the Will fit precisely into the folds in the rest of the Will, and *evidently so fitted at the time when the Codicil was affixed to the Will, because the folds of the Codicil are not as much worn.* This applies with peculiar force to the unusual fold about an inch below the top of the sheets, and evidently on a line touching the ends of the Gem clips. This fold we have already discussed at some length as evidence that the first half sheet was on the Will when executed. However far the Court may consider our argument as tending to establish that fact, the character of this fold must go even further in proving that the

first page was on the Will when the Codicil was executed.

The folds in the Codicil, being the outside paper, would naturally be the most worn of all of them if all of the sheets had been contemporaneously folded. That this is not so, shows that all of the Will, including the first half sheet as now produced, was in existence, folded together, prior to the date of the execution of the Codicil, and that the Codicil was then affixed thereto. The fold just below the Gem clips shows, too, how old those fasteners are on the document.

With reference to this and the succeeding points, we suggest that the Court look at the photographs submitted by both sides, as they better show the condition of the Will shortly after the testator's death.

3. The appearance of the first page of the first half sheet is older and dirtier than that of any other page in the entire Will. The other pages, namely the second page of the first half sheet and all the other pages on the second sheet and later sheets of the Will, are then of about the same appearance in point of age. Finally, the appearance of the Codicil is a step forward again in point of freshness. This is precisely what would have been expected from the situation of a Will in existence prior to the Codicil, with the first part thereof more exposed to handling and inspection than any other part, and consequently

looking the older. It is entirely antagonistic to the situation of a substitution of the first half sheet after the date of the Codicil.

4. *The marks on the first half sheet showing the long pressure of the mushroom fasteners against it in themselves carry conviction.* When the Will was first brought to the Surrogate's office, these marks on the first half sheet were directly over the two respective heads of the fasteners (pp. 54, 62). The mere juxtaposition of the first half sheet with the rest of the Will, through the medium of the Gem clip, had been of such very long duration that that first half sheet had received these strong impressions from the heads of the mushroom fasteners against it. These impressions were even distinctly stronger than the impressions that the other ends of the mushroom fasteners had made against the Codicil, although by careful examination the latter impressions can be distinguished upon the Codicil.

To us this is proof conclusive that the first half sheet had been fastened to the rest of the Will at a date long prior to the time when the Codicil was likewise so appended to the last sheet of the Will. When Mr. Runkle took off the Gem clips, as he must have from the Will in order to affix the Codicil thereto, the pressure must have been so strong already by that date as to have held that first half sheet precisely in place while he appended the Codicil to the Will.

Surely nothing can be more illuminating or conclusive than this proof.

5. The tear (see p. 57, l. 35) at the top of the first half sheet is identical with the tear at the top of the other sheets of the Will. (Of course in looking at the photographs that same tear appears at the bottom of some of the pages of the album.) This tear, although extending all through the Will, gradually decreases to the Codicil. Now it could not be that that kind of a tear had taken place unless the first half sheet was affixed prior to the time when the Codicil was affixed. How could a tear exist that was less strong all the way through the succeeding pages, beginning from the first and ending at the last, with a uniform decrease in intensity, unless the first half sheet had been there from the first?

6. Finally, and perhaps as conclusive, a feature as any other in this case by way of circumstantial evidence, is the *watermark* on the paper. The first half sheet and the rest of the Will was on a paper manufactured in the year 1908 (pp. 50, 51). The Codicil was written on a paper manufactured in the year 1910. If this testator had had occasion after April, 1913, to substitute a new half sheet to his Will, it is most extremely unlikely that he would have had at hand old legal cap paper of the manufacture of 1908. Even when it came to the making of the Codicil he already went to a later supply, as the watermark there is 1910.

This latter element is sought to be minimized in the testimony of Mr. Kinsley to the effect that the first half sheet, although of the output of the mill in the year 1908, is not of the identical output that the other sheets are. We think that the cross-examination (pp. 86, 87) lessened the certainty of Mr. Kinsley's conclusions upon this point as to the fact. At most the difference was in different presses in the same mill working in the same year, and perhaps contemporaneously. Assuming that Mr. Kinsley's conclusions were correct, the point that we make still holds good, as to the unlikeliness of Mr. Runkle's having purchased, or otherwise found, after April, 1913, paper of this old date of 1908, when it appears he used 1910 paper in writing out his Codicil.

7. In considering all of these matters we call attention again to the photographs taken by proponent's expert, Mr. Osborn. They are especially illuminating in showing that the whole document of the Will, not only the first half sheet as distinct from the other sheets, but each of the other sheets, were written out at different times, apparently covering a very considerable period. More than that, they show that at some of the times the testator's handwriting was steadier than at others, and that this difference has no correlation as between the first half sheet and the other sheets any more than as between different parts of the first half sheet or different parts of some of the other sheets.

Referring to page 15 of Mr. Osborn's photographs (marked 14), the Court will find the extract from the first half sheet of the Will that is at the bottom of that page in a much steadier handwriting than the extract from the *later* sheet that is at the top. If there be any presumption to be indulged in from that, it is that the first half sheet of the Will was written at a date when the testator was younger. As a matter of fact, the difference probably came from its being written at different periods of the day.

On coming to the next page of the album, we observe at the top an extract from the first half sheet of the Will which far more resembles in handwriting the extract from a later sheet that is at the bottom of that page, than does the extract from the second sheet of the Will, in the middle of the album's page, resemble the later sheet (at the bottom of the page).

On the next page of the album we have an extract from the first half sheet of the Will, and one from a later sheet, and *we do not believe that any one could tell which was which without knowing where it was in the Will.* On the next page we have two extracts both from later sheets of the Will which *per contra,* show great difference in the handwriting.

The deduction to be made from all of this is that the writing out of the Will occupied weeks or possibly months. Very likely, as we have heretofore said, there occurred some accidental

defacement on the opening page of the proposed Will, or in the course of his writing a blot of ink had fallen thereon, or possibly there was some language therein which as originally phrased did not suit Mr. Runkle. This occurred, or came to his attention, after he had done up his proposed Will through these mushroom fasteners; and, averse to tearing it all apart, or writing it over again, he substituted the paper in the manner we have stated. When he came to write out the half sheet over again, the spacing did not come out exactly the same, and so he amplified his writing and left a vacant line in order to have the end of the half sheet dovetail precisely into the opening of the second half sheet.

8. The discussion in the earlier part of our brief in support of the argument that the evidence in the case tends to establish that the substitution was prior to the execution of the original Will, is, of course, also in point when considered with reference to the question as to whether the first sheet was on the Will at the time the Codicil was executed. Further confirmation is found from the consideration of the fact that if Mr. Godley, the appellant, had been named in the Will as originally executed, then the bequest in the Codicil was not necessary. Mr. Lum argues that the bequest in the Codicil must be viewed as in addition to the one he claims was contained in the body of the Will. If that were the case, clearly Mr. Runkle would have charac-

terized it as an additional bequest. The inference, we submit, is unavoidable, that Mr. George Godley was not named in the Will as it was originally executed, and beyond a doubt was not named in the Will when the Codicil was executed, for the very existence of the Codicil and the legacy therein to Mr. Lum's client, presuppose the prior destruction of any Will containing a bequest to him.

(*c.*)

In Conclusion.

We therefore confidently submit that whether or not this substitution occurred prior to the execution of the Will, indisputably does the circumstantial evidence point to the fact that it occurred prior to the execution of the Codicil. To our own minds the factors presented by the evidence relating to the language of the Will itself, coupled with the evidence showing that Mr. Runkle knew the requirements for a valid Will and that a Codicil was necessary for its alteration, show that this substitution occurred prior to the execution of the Will itself. If this Court should not reach that conclusion, surely, however, this same evidence, coupled with all the other pieces of circumstantial evidence that we have just above set forth, demonstrates to a certainty that the substitution occurred prior to the execution of the Codicil.

We beg again, respectfully but emphatically to point out, that the circumstantial or expert evidence on the part of the caveator only goes at all times to show that there was some substitution. It never goes in any shape, manner or way to contradict our proof that that substitution occurred prior to the execution of the Codicil. There is not one single element of evidence in the case, direct or circumstantial, which is affirmative evidence *for* the caveator upon that point. Difference in ink; difference in pen; difference in paper, are all addressed to the factor that there was a substitution of this half sheet for another half sheet. Such are never addressed to the point of *fact* as to *when* that substitution occurred.

The caveator had but the one witness—Mr. Kinsley, the handwriting expert. The feature the most conspicuous all through his testimony was its omissions—omissions which undoubtedly would have been supplied if Mr. Kinsley could conscientiously have supplied them after an inspection of the instruments. The most crucial point for the caveator was to establish affirmatively that some of the ink or handwriting in the Will was of a date succeeding the date when the Codicil was executed, or that the ink or handwriting on the first half sheet of the Will was of a later date than the ink or handwriting on the other pages of the Will. The omission to bring out from Mr. Kinsley in Court anything about

these points—which manifestly were the first points upon which he must have been questioned out of Court on being retained by the contestant —is at once a tribute to the integrity of the expert and, at the same time, a most significant failure of proof on the part of the other side.

We have already called attention to the question that was put to him and that appears at the bottom of page 75 of the record, requesting him to state "anything that you find," and have commented upon the paucity of his response. We might also call attention to the question at the bottom of page 81:

> "What have you to say about the indications of tremor in the various parts of the document?"

An interruption by the Court opportunely enabled a graceful veil to be thrown over the question, and it remained totally unanswered.

There is, we respectfully submit, *nothing* by way of circumstantial or expert evidence that even tends to contradict the proofs that we have put forward.

Assuming that all the law for which counsel for the caveator have stood,—and a large part of which has been upheld by his Honor Judge Martin,—is the correct law,—assuming, to put it summarily that the law in this case in the instance of a substitution is to create a presumption against regularity, there is then on the one side the presumption against us, and on the other

side there is all the circumstantial evidence which we have put forward in our favor. This presumption against us, as we have said, is at most a trifle, light as air; and even if all the evidence that we have adduced had consisted of but a series of straws, the combined weight is far more than enough to weigh down the presumption supposed to exist the other way.

III.

The legal presumption is not against regularity in the instance of substituted sheets, where the identity of the sheets as part of the document is clear.

His Honor, Judge Martin, drew a distinction in his opinion between the cases that involved identification of the paper pages in a Will, and the cases that involved alterations or erasures on the same pages, or mutilations of these pages. The cases relating to the first consideration are discussed by him at pages 134 to 139 of his opinion, while the cases involving the second consideration are discussed at pages 122 to 130 of his opinion. In the instance of alterations, the learned Court seems to have been constrained to conclude that the presumption was against regularity,—this largely upon the authority of the *dictum* of Chancellor Magie in *Ward* vs. *Wilcox*, 64 N. J. Eq., 303. In the instance of substitu-

tions his conclusions are the other way,—and so far as we are aware there is no authority against his views, assuming that the identity of the various sheets as part of the document found after the death of the testator, is well established.

In view of the fact that we merely represent legatees on the first half sheet of the Will, and their situation does not present any question arising upon an alteration in the writing, but only upon a substitution of sheets, and in view of the further fact that Mr. Smith, the Executor named in Mr. Runkle's Will (or proposed Will) after Mr. Rodman had first been named, is represented by separate counsel and his situation does present the instance of an alteration in writing, it would seem intrusive on our part to enter into a consideration of the question whether the *dictum* in *Ward* vs. *Wilcox* represents the New Jersey law as his Honor Judge Martin held. We feel, however, compelled to briefly discuss this case by reason of the fact that counsel for two of the appellants have seriously contended that the same rule which applies to alterations or erasures applies in the instance of substitutions. In the first place we submit that the *dictum* of Chancellor Magie does not purport to apply to a case of substitution, and that eminent judges have made the express distinction, is shown, for instance, in the two decisions of Sir Cresswell Cresswell, the one in the *Marsh* case, hereinafter cited by us, and the other in *Rowley* vs. *Merlin,* relied upon

by counsel for the caveator. We may be permitted to suggest that, apart from the provisions of the peculiar English Statute in reference to alterations, which it is asserted has been the cause of the presumption against regularity in the instance of uninitialed alterations, justice would ordinarily require a presumption in favor of regularity in the instance of uninitialed alterations, just as in the instance of substitutions of sheets.

Again, the result reached by the learned Chancellor in *Ward* vs. *Wilcox* is typical of the result reached in all cases which we have examined, and that is that justice was done, and the intention of the testator when ascertainable carried out. In reaching such a conclusion the Chancellor in the course of his Opinion clearly established that his remarks on the subject of presumption were a dictum. He said (p. 308):

> "Counsel for appellant have not cited to me any American cases upon the subject of the presumption in respect to alterations apparent on the face of a Will when offered for probate, or relied on for relief. I have not deemed it necessary to spend time in examining our authorities."

It is therefore in order to call the attention of the Court to a carefully considered case in the New York Court of Appeals, *Crossman* vs. *Crossman,* 95 N. Y., 145, where Judge Earl said on the subject of alterations (p. 152):

> "Where an interlineation, fair upon the face

> of an instrument, is entirely unexplained, we do not understand that there is any presumption that it was fraudulently made after the execution of the instrument.
>
> * * * * * *
>
> (p. 153) Here, from all the circumstances it was, at least, for the Surrogate, to determine, whether this interlineation was made before or after the execution; and in making that determination he was bound to consider the handwriting, the color of the ink, the manner of the interlineation, the fact that it was noted at the bottom of the instrument, and that it was made to correspond with the other duplicate. Where an interlineation or erasure in a will is fair upon its face, and it is entirely unexplained, there being no circumstances whatever to cast suspicion upon it, it would not be proper for any court to hold that the alteration was made after execution; but if there are any suspicious or doubtful circumstances growing out of the mode of the alteration, the ink in which it was made, the fact that it was in favor of the party holding the instrument, and that it is not noted at the bottom, then these and all the other circumstances must be submitted as question of fact to be determined by the court in deciding whether the alterations were made before execution or not."

The authorities cited at page 16 of the Caveator's brief are not in point in this connection, as all of the cases involve entire revocation or cancellation of parts of Wills, and the question for the Court was as to the legality of these acts under the Statute.

The broad underlying question that we respectfully submit to be at the bottom of all this consideration of what the true legal presumption is as to the point of time when a substitution has occurred, to wit, whether before or after the execution of the document, is *what presumption will best subserve justice and the right?* Formalities relating to the execution of Wills, as we have said, are not because next of kin and heirs at law are entitled to the peculiar care of the Courts, but because such formalities are deemed necessary aids to effect safety, deliberateness and cartainty in testamentary dispositions. If that be so, the common sense corollary is this: If the proofs show that the document propounded for probate is the precise document that the testator *understood* and *intended* to be his Will, and to represent his wishes; if there is an absence of suggestion of fraud upon the testator, and an absence of tenable claim that the document propounded fails to carry out his testamentary desires; *then there is no excuse for a presumption against regularity of execution.* There is, in such an instance, no common sense, justice, or right, in a legal presumption that a substitution of sheets took place after execution of the Will. The distinction made between a Deed and a Will, that a party executing an acknowledged instrument would not alter it after its acknowledgment because that would be to commit a crime, whereas otherwise in the instance of a Will, is, with

great deference, a farcial distinction. We respectfully and emphatically submit that in an instance where the result would surely tend to subserve that which is just and that which is right, the presumption should be for regularity.

On the other hand, a suspicion of fraud upon the testator, (as, for instance, where the alterations were not in his handwriting), or a lack of certainty as to the intention of the testator, (as, for instance, if there were two first sheets to a Will lying together and one could not tell which of the two the testator deemed the true first sheet), would throw the burden of proof, it would seem to us, the other way; and in such instances a presumption against regularity is right and proper.

In the particular instance of the first half sheet of the Will of William Runkle—the instance that we are now discussing in this case at bar—the erecting of this whole claim that there is a presumption against regularity, and that it is to be presumed that Mr. Runkle invalidated his Will, is an act on the part of this caveator that is mere toying with justice. By reason of the eminent counsel that the caveator has retained, these claims have received attention, and have been dignified, in a manner very much more than they have ever deserved, or now merit.

To come to a consideration of the authorities

—but first to the particular facts that make them pertinent.

The Will and Codicil when propounded for probate, and as now probated by the Decree of Judge Martin, were and are in precisely the same condition as they were when in the testator's possession prior to his death. That much is proved by direct (not circumstantial) evidence. Without again referring to the particular pages and folios, we briefly rehearse, that the testimony of Kathryn Tully shows the testator bringing the papers from the Orange National Bank to his house (pp. 33, 34); requesting Miss Tully in the event of his death to give them to Mr. Smith (pp. 32, 33); her doing this (p. 33); and then Mr. Smith's taking them to the Surrogate's office (pp. 36-43). The officials in the Surrogate's office testified to their condition upon arrival (pp. 57-59, 62), and the testimony of the other witnesses is that their condition was unchanged from what it was at the time that Mr. Runkle had them in his house prior to his death (see especially, pp. 38, 39, 45).

This condition of the Will and Codicil is briefly (pp. 38-40, 57-59), that while the second half sheet and the two full sheets of the Will were further bound together by the mushroom fasteners, the whole of the Will together with the Codicil were bound together as one document by the Gem clips. The whole document was fastened together in this manner, the Codicil being

fastened to the last sheet of the Will precisely as the first half sheet was fastened to the second half sheet of the Will, and by the same fasteners. More than that, the Will and Codicil as a whole were found as having been enclosed by Mr. Runkle (pp. 37, 64) in the envelope Exhibit P3, upon which had been written—evidently for some time—in his own handwriting the words "Last Will and Testament of William Runkle." The photograph of this envelope appears as the first sheet in Mr. Osborn's album.

No other testamentary disposition, or original paper purporting to be, or attempting to make, any testamentary disposition on the part of William Runkle, has been brought before the Court by anyone.

The cases most nearly in point are two English cases alluded to in Judge Martin's opinion. The first, perhaps, that deserves notation is *Marsh* vs. *Marsh,* 1 Swab & Trist, 528, digested at pages 134 to 136 of the printed record. This was a decision by Sir Cresswell Cresswell as Probate Judge in 1860. It will be observed as a true case of substitution, because some sheets that were in the Will as probated were not in the Will as first written out. One interesting feature is the holding that where the Will was found written on several sheets "*prima facie* the presumption is, that they were in the room and formed a part of the Will at the time of execution." It is al-

most needless to say that the facts in the *Runkle* case at bar are far stronger for the Will than they were in the *Marsh* instance. Or, in other words, if the *Marsh* decision was right, *a fortiori* was Judge Martin's decision correct. In the *Marsh* case it is interesting also to note the weight accorded the internal evidence from the consistency of all of the provisions of the Will—this on the same line as our argument in subdivision *a* of our last point.

The second case is *Rees* vs. *Rees,* L. R., 3 P. & D., 84, decided in 1873 by the Probate Judge Sir James Hannen. This is digested by Judge Martin at pages 137 and 138 of the record. The case is a certain instance of substitution of one sheet for the other, and under circumstances ten times more suspicious than the circumstances in the case at bar. The learned Court found for the Will.

Both of the above cases rely on a decision of Sir H. Jenner Fust in *Gregory* vs. *His Majesty's Proctor,* 4 Notes of Cases, 620. If this Court desires to see how far the English courts have gone in the matter of sustaining substituted pages in Wills, it has only to examine the last page of the report in that case—page 642.

Bond vs. *Seawell,* 3 Burroughs, 1773. This authority is not so much a decision by Lord Mansfield (in 1765) as it is a general expression of the opinion of the judges of the time as voiced by him. We call attention to his statement:

> "Every presumption ought to be made by a jury in favor of such a Will when there is no doubt of the testator's intention."

This refers to an instance of lack of close contact in the different sheets of a document, although there was no doubt as to what the testator had intended to be his Will.

The case of *Goods of Braddock,* L. R., 1 P. & D., 433, is interesting because there the connection of the testamentary documents was through the means of a pin. Sir James Hannen says:

> "No particular mode of affixing one piece of paper to another is prescribed by law, and I cannot say that the fastening of two sheets of paper together by a pin is an insufficient mode of connection, or that it is less effective than the lawyer's mode of fastening by a tape."

Another interesting and pertinent case is *"Matter of Wood,"* 144 App. Div., N. Y., 259. That was an appeal from a Decree of the Surrogate's Court admitting to probate the last Will and Testament of one Wood. Various alterations and mutilations appeared in the Will. One page had been cut from the legal cap upon which the Will was written, and in another place a page had been extended by pasting on another piece of paper. There was no contention that the testator lacked testamentary capacity or was under undue influence, or that the instrument was not duly executed. In affirming the Decree below the Court said (p. 264):

"The first four sheets of the Will are clearly creased; they bear evidence of having never been folded in anything other than the regular way, while the long sheet is badly mussed and shows the usual 'bunglesome' way of such pages, and the description which the witnesses give indicates clearly that the papers, at the time of the execution, were in their present condition, making allowances, of course, for wear and tear.

* * * * * *

(p. 265) Nothing is more common than for persons to be called upon to witness the execution of Wills where they are not permitted to know the contents of the same, and if the presence of a mere correction in the amount of a bequest, or in the detail of administration, or the cutting out of a sheet of paper from a bound group of such papers, gives rise to the presumption that the paper has been changed after the execution. there are many Wills extant which could not be admitted to probate. We do not believe that is the law of this State, and particularly where, as here, no suggestion of fraud or bad faith is present."

We also call attention to others of the cases that will be found at pages 136 and 137 of Judge Martin's opinion.

The three cases which Judge Martin mentions in his opinion as cited by the counsel for the caveator against us, beg the whole present question. They are merely to the point as to what would happen to the rest of the Will in the case at bar if the first half sheet had not been a part

of it. They were all cases where it was either admitted, or else conclusively proved as a fact, that the document presented for probate was an incomplete Will.

IV.

The other appeals.

a.

Mr. Smith's Appeal.

As between Mr. Smith and Mr. Rodman, probably both their respective learned counsel would desire us to stand indifferent. We therefore have refrained from making any arguments which would involve their opposing claims. If by any chance the learned Court should be of the view that no executor now remains duly named by the Will, we ask that there be no appointment of any administrator with the Will annexed until there be affidavits submitted as to fitness for the position.

b.

Mr. Scholfield's Appeal.

It would be likewise intruding on our part to make any argument regarding the correctness of the position taken by counsel for Charles P.

Scholfield. We merely point out that under the statutes and decisions of New Jersey the Will stands, whether the cancellation of that particular legacy was effective or ineffective. See the cases cited at page 140 of Judge Martin's opinion.

c.

Mr. George Godley's Appeal.

It is difficult to consider the position of Mr. Lum's client as distinctly that of an appellant, because we fail to see how his client could become an appellant when Mr. Lum below took the position clearly in favor of the Will which we indicated at the outset of our brief.

We have already discussed such of Mr. Lum's contentions as seemed necessary. To restate here those earlier remarks would be needless repetition. We will simply ask the Court to bear in mind our argument to the effect that the legacy to Mr. Lum's client in the Codicil did not take the form of an *additional* bequest, and therefore presupposes the prior destruction of any Will wherein George Godley was named as a legatee, and if, as Mr. Lum argues, the now contested half sheet replaced the pages of a prior Will that contained a legacy to Mr. Godley, that fact is but a new demonstration that the substitution occurred at least before the Codicil was executed.

Finally, we think we have answered fully the

argument which Mr. Lum sets forth on page 14 of his brief that where there is a Codicil to a Will which Codicil takes no notice of alterations, the presumption is that they were made after the date of the Codicil, applies for the like reason in the case of substitution of pages. We will only add by way of further reply that where pages are substituted there is no way of noting that fact in the Codicil, which may very well be the basis for the distinction drawn by the authorities we have quoted between alteration on pages of a Will and substitutions.

V.

In Conclusion.

Without taking a position either way with reference to the Smith appeal or the Scholfield appeal, we submit that the decree appealed from was right and should be affirmed.

HOWARD TAYLOR,
JOHN G. JACKSON,
JEHIEL G. SHIPMAN,
Of Counsel for William H. Hulick, Legatee.

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Caveat.

To Isaac Schoenthal, Esq., Surrogate of the County of Essex:

I, HARRY G. RUNKLE, a brother and one of the heirs at law and next of kin of William Runkle, late of the City of Orange, County of Essex and State of New Jersey, who died on the 31st day of January, A. D. 1914, DO HEREBY CAVEAT and protest against admitting to probate any paper, purporting to be the last Will and Testament of the said William Runkle, until examination and decree thereon by the Orphans' Court of the said County of Essex.

Dated, February 9th, A. D. 1914.

HARRY G. RUNKLE.
JOSEPH H. LECOUR, JR.,
Proctor of Harry G. Runkle,
Belleville, N. J.

Petition for Probate.

To the Surrogate of the County of Essex:

The petition of William E. R. Smith, 156 Harrison Street, East Orange, N. J., the executor named in the last Will and Testament of William Runkle, late of the City of Orange, in the County of Essex and State of New Jersey, respectfully shows that the said Testat died on the thirty-first day of January, 1914, and that the next of kin and heirs at law of the said Testator with their respective residences or post office addresses, and the manner and degree in which they severally stand related to said Testator so far as the same are known to your petitioner, are as follows, to wit:

Harry G. Runkle, brother, Plainfield, N. J.

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

WILLIAM E. R. SMITH.

Dated, Newark, N. J., February 11, 1914.

ESSEX COUNTY, SS:

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

WILLIAM E. R. SMITH.

Sworn to before me
February 11, 1914.

JOHN D. ANDERSON,
Attorney at Law of N. J.

Testimony.

ESSEX COUNTY ORPHANS' COURT.

March 6, 1914.

IN THE MATTER OF The offer for Probate of a certain paper writing purporting to be the last Will and Testament and Codicil thereto of William Runkle, deceased.	*On Caveat.*

Transcript of shorthand notes of testimony taken in the above matter before his Honor, WILLIAM P. MARTIN, Judge, at the Court House, in the City of Newark, New Jersey, in the presence of

Hon. ROBERT H. MCCARTER (MCCARTER & ENGLISH), Proctor for Proponents.

Hon. JOHN W. GRIGGS, and CHARLES H. WERNER, Esq. (New York Bar), Proctors for Caveator.

FREDERICK J. FAULKS, Esq. (LINDABURY & FAULKS), Proctor for Edith J. Adams, Legatee.

RALPH E. LUM, Esq. (LUM, TAMBLYN & COLYER), Proctor for George McM. Godley.

HENRY V. CONDICT, Esq. (CONDICT, CONDICT & BOARDMAN), Proctor for Carrie R. and Charles P. Scholfield.

WILLIAM HUCK, Jr., Esq., Proctor for the College Board of the Presbyterian Church of the United States.

Hon. CHARLES B. STORRS, Proctor for Randolph Rodman.

Mr. McCarter: May it please your Honor, this is an application to produce and offer for probate a paper writing purporting to be the last Will and Testament of William Runkle, late of East Orange, and a paper writing attached to it purporting to be a codicil. The will bears date the 11th of May, 1912, is witnessed by Charles Hasler and John S. Burkardt, with a regular attestation clause. The codicil is brief and dated April 29, 1913, and is witnessed by the same two gentlemen without an attesting clause. The will, immediately after Mr. Runkle's death a very short time ago, was left with the Surrogate and before the ten days expired a caveat was filed by the brother of the testator to the admission of the will to probate.

JOHN A. BURKARDT, sworn for proponents.

Direct examination by Mr. McCarter.

Q. You live where, Mr. Burkardt? A. 112 Day Street, East Orange.

Q. What is your occupation? A. Receiving teller, Orange National Bank.

Q. Did you know William Runkle in his lifetime? A. Yes, sir.

Q. How long had you know him? A. Well, fifteen years.

Q. Was he accustomed to coming to the bank of which you were receiving teller? A. Yes, sir.

Q. I show you a document which, for brevity, I will call the will and ask you to look at it and

tell me if you are the John S. Burkardt— A. John A. Burkardt.

Q. John A. Burkardt, whose name appears as a witness? A. Yes, sir.

Q. Do you remember the circumstances of your attaching your signature to that will? A. Yes, sir.

Q. Please state them as fully as you can recall. A. Mr. Runkle came in and asked Mr. Hasler and myself to be witnesses to his will. He said, "This is my will and I want you and Mr. Hasler to be witnesses to it." Then we went into what we call the directors' room and Mr. Runkle signed the will, whereupon we signed as witnesses.

Q. Did you see him sign his name as it appears there opposite that seal? A. Yes, sir.

Q. And you thereupon—who signed the will next then, or signed as witness? A. Mr. Hasler.

Q. Were you there? A. Yes, sir.

Q. You saw him sign? A. Yes, sir.

Q. Then you put your name there? A. Yes, sir.

Q. And did Mr. Hasler remain until after you had put your name there? A. He did.

Q. Where was this document which he said was his will at the time he made the statement to you that you have referred to, in his hand? A. In his hand.

Q. How was he holding it? A. Had it turned up something like this (indicating).

Mr. Griggs: Let us get that on the record.

The Court: Indicating that he had it opened on the last page where the name Runkle and the names of the witnesses appeared.

Mr. McCarter: That is right.

Q. Did you see the earlier pages of the document at that time? A. No, sir.

Q. Did not. After the ceremony which you have just detailed was completed, did Mr. Runkle go away? Left? A. I think he did; yes, sir.

Q. Took the document with him? A. Yes, sir.

Q. That is all that occurred that day? A. That is all that occurred.

Q. I understand that you have testified that Mr. Hasler and Mr. Runkle and you all remained in this directors' room where the signing by him and the signing by you and Mr. Hasler took place until the entire ceremony was over? A. Yes, sir; all there together.

Q. Were you familiar with Mr. Runkle's handwriting? A. Yes, sir.

Q. Did you see enough of the document which he designated as his will and which you witnessed to see whether or not that part that you did see was in his handwriting? A. Yes, sir.

Q. You recognized the part that you did see as being in his own handwriting? A. Yes, sir.

Q. Do you remember whether any comment was made at that time by you or anybody else of that fact, or did you just observe it? A. Why, it went through my mind at the time that he was writing his own will.

Mr. Griggs: That was not a comment.

Mr. McCarter: Apparently not.

Q. Now, we come to the codicil. Do you recall the fact that later Mr. Runkle came and enlisted your own and Mr. Hasler's services for a second document? A. Yes, sir; I do.

Mr. Griggs: That is somewhat leading.

Mr. McCarter: I was not going any fur-

ther along that line except to recall the incident. I do not want to lead this witness at all.

Mr. Griggs: Go ahead.

Q. Tell us what occurred on that occasion? A. Why, Mr. Runkle had the will in his hand and came up to our window; that is, the receiving teller's window—Mr. Hasler was there at the time—he says, "John, I am making a codicil to my will. I want you and Charlie to be witnesses."

Q. Then what occurred? A. Why, then, Hasler signed and I signed.

Q. Yes. Had he—was his name "William Runkle" that is attached to the codicil there at that time? A. Yes, sir.

Q. He did not then sign it after the talk with you?

Mr. Griggs: I object. I wish you would not ask any questions that lean towards leading at all. I think you ought to ask this witness what his recollection is.

Q. Whose handwriting is the signature "William Runkle" attached to this so-called codicil? A. I don't quite understand that question.

Q. Whose signature is the signature "William Runkle" attached to the codicil? Whose writing is that? A. William Runkle.

Q. Did you make any inquiry of Mr. Runkle on this last occasion that we have been referring to with regard to the signature? A. I noticed that the codicil was signed, and I asked Mr. Runkle to acknowledge his signature. In fact I said, "You acknowledge this to be your signature," because I know he should have signed it in our presence.

Q. And what did he say? A. He says, "Yes, sure."

Q. Yes. Well, then, in what order and under what circumstances did Mr. Hasler and you then sign your names as they appear below the word "witnesses" to this codicil? A. Mr. Hasler signed first because I remember he turned around and asked me if he should put the street. I said it wasn't necessary, that Orange, New Jersey, was sufficient, or East Orange.

Q. Yes. A. Then I signed after him.

Q. Where was Mr. Runkle at the time that you and Mr. Hasler were signing the name? A. Mr. Runkle stood right at the window.

Q. And did he continue there until you both had signed? A. Yes, sir.

The Court: That is a very leading question and a highly improper one at this point, if there is any question about the execution of this instrument. This instrument was a codicil without a regular attestation clause. Do not lead the witness.

Q. What became of the documents after you and Mr. Hasler had signed your names as witnesses? A. Mr. Runkle took them with him.

The Court: All he showed you on that second occasion was the instrument which you have described as a codicil?

Witness: No, sir; he had the whole thing together, turned over.

Q. Will you take the documents, and show to his Honor, the Judge, how they were at the time of the execution of the codicil which you have just de-

scribed? A. The first instance, he had it this fashion (indicating).

The Court: That is to say, the will when first shown to you, the last page only of the so-called will, was exhibited at that time?

Witness: That is all.

The Court: Was there a cover on it?

Mr. McCarter: Talking about the codicil now, or the will?

The Court: Talking about the will.

Witness: I don't mean there was only one page. He showed it this way (indicating).

The Court: He showed you the last page of the will. That is what you are describing?

Witness: Yes, sir; that is all. The last page. There was more to it.

The Court: That is what he showed you?

Witness: Yes, sir. I thought you meant there was only the one page. The codicil to the same came attached to the will in this manner (indicating).

The Court: That is, the top of the codicil was attached to the last page of the will?

Witness: Yes, sir.

Q. Now, at the time that he opened his conversation and made this statement that you have already testified to, where was Mr. Hasler? A. With the codicil?

Q. Of the codicil, yes, sir. A. Mr. Hasler stood right at my side.

Q. Right at your side, and where was Mr. Runkle? A. Mr. Runkle was on the outside of the window.

Q. Yes. Now, what was this partition or separation between you? A. Why, it is like in most banks. Open grill work.

Q. And you two stood right together and he was on the outside? A. As I remember, we opened the gate in it for him to put the will through.

Q. I see. And where were you when you signed? A. Right there.

Q. You signed and he signed— A. Right there at the counter.

Q. Where was he at the time you signed? A. Stood right there.

Q. After the gate remained open—how long did it remain—continue to remain open? A. Just while we signed.

Q. And after you had signed and handed it back to him did you hand it through the open orifice again? A. To the best of my knowledge.

Q. Had you ever witnessed wills before, Mr. Burkardt? A. Yes, sir.

Cross-examination by Mr. Griggs.

Q. Ever a witness for Mr. Runkle before? A. Not for Mr. Runkle, no.

Q. You indicated the way in which the will was presented to you at the time of its execution by showing, as I observed, that it was folded back in the middle in that manner (indicating) as I now show you. Is that right? A. Well, I wouldn't say it was in the middle.

Q. You held it so in your hand when you testified, and I was uncertain whether you meant that or whether you meant that it lay back full sheet exposed. Now, which was it? A. It was folded. I cannot describe just at what angle it was folded. It was folded back, though. It was turned over.

Q. Well, still we come to the same question, was it folded back in the middle as it is when I showed it to you now, disclosing Mr. Runkle's signature, or was it folded all the way back disclosing not only the upper half of the sheet but the lower half which contains the attestation clause, then contained the attestation clause. Now, what is your recollection? A. Why, the recollection is that he signed it and then we turned it over and we signed it.

Q. Then it would be that—your recollection would be that it was presented folded in the middle like that (indicating) and that he signed it? A. My recollection is that he held it that way when we went in the room.

Q. And then he signed it and then you turned it over, as I now do, the half sheet, and you signed it there? A. That is my recollection.

Q. At any rate all that you could see was what was contained on this page on which the signatures are? A. That is all. That is all of the will I saw.

Q. Do you recollect whether at that time the paper bore indications of having been folded in that form (indicating), the form now being as legal papers are folded, in two turns? A. That I couldn't—I couldn't say it was folded twice. It was only folded the way I have described.

Q. Did it have anything like a cover or back such as are put on legal documents? A. I do not recall that.

Q. You don't know. Now, the execution of the codicil was not in the directors' room but at the teller's window? A. That is right.

Q. He was standing out in the hall or lobby where the depositors stand when they hand their money in to the receiving teller?

Mr. McCarter: What do you call that place?

Mr. Griggs: Hall or lobby. What do you call it, Mr. Burkardt?

Witness: I suppose you would call it a lobby, where the people congregate there, but it is right as close as this is to that (indicating).

Q. We know what it means—you know what I mean? A. Yes, sir.

Mr. Lum: The witness states it was as close as this is to that, indicating the witness and the witness box, probably six inches.

The Court: How far away were you?

Witness: I should say I was here (indicating) writing my name and Mr. Runkle stood right on the outside of the partition (indicating).

Q. Now, when he walked up to the window, on the second occasion of the codicil, was the window open? A. Why, we opened it for him to put the paper in. It isn't a window. It is grill work.

Q. The money is put in under a slide when customers want to come there? A. Yes, sir.

Q. You opened the window as is the custom of the tellers or cashiers when you want to communicate with somebody outside to sign or hand papers in larger amounts? A. Yes, sir.

Q. You opened the window? A. Yes, sir.

Q. Now, what was the first thing he said as he came up to the window, as you remember it now? A. The first thing he said was, "John, I am making a codicil to my will" or "This is a codicil to my will, and I want you and Charlie to be witnesses."

Q. Which did he say, "I am making a codicil to my will" or "This is a codicil to my will"? A. I believe it was "This is a codicil to my will."

Q. And what did he have in his hand at that time, if anything? A. He had the paper.

Q. Had a paper in his hand? A. Yes, sir.

Q. And it was to that paper he referred when he said he was making a codicil to his will or this is a codicil to my will? A. Yes, sir.

Q. What next did he say? A. Why, I noticed that the codicil was signed and I says——

Q. Now, stop a moment. Excuse me.

The Court: Answer the question.

Q. What next did he say? Didn't he say he wanted you to sign or something to that effect? A. He says, "I want you and Charlie to be witnesses." Yes, sir; he says, "I want you and Charlie to be witnesses."

Q. And then he showed you something, did he? A. Yes, sir; handed us the paper.

Q. Now, just indicate how he handed it in, assuming that you are on the outside of the cage and I am in the cage?

Mr. McCarter: In the lobby?

Mr. Griggs: No, I have got him in the lobby.

A. Handed it in that fashion (indicating).

The Court: Let us agree on what "that fashion" is on the record. You can state it, Mr. Griggs.

Mr. Griggs: He held a paper part of which was folded over back so you couldn't see it?

Witness: Yes, sir.

Q. As you have it now? A. Just as I have it now.

Q. And he held that over in his left hand as you have it yourself? A. Well, I don't know which hand he had it in. I know it was turned over as he handed it in.

Q. He was holding it either in one hand or the other, holding the turned-over sheet at the top and in the other hand he held the bottom of the sheet on which the codicil was written? A. Yes, sir.

Q. And he shoved that into the window, did he? A. Pushed it through the window.

Q. In that shape—in that condition? A. Yes, sir.

Q. Now, you can commence at the point where you observed that he had signed. You say you observed that he had signed? A. I noticed that the codicil was signed, whereupon I asked him to acknowledge his signature, which he did.

Q. You put it that way, to acknowledge his signature? A. I says, "Mr. Runkle, you acknowledge this to be your signature?" and he said, "Yes."

Q. And then you signed as a witness? A. I signed as a witness. Mr. Hasler signed——

Q. Mr. Hasler signed after you? A. No; he signed before I did.

Q. After you said, "Mr. Runkle, you acknowledge this to be your signature?" Mr. Hasler signed as a witness? A. Yes, sir.

Q. And then you signed? A. I signed.

Q. Was anything more said then? A. Nothing that I know of.

Q. Well, after you had signed what did you do with the paper? A. Handed it back to Mr. Runkle.

Q. And what did he do with it? A. Took it away.

Q. Well, before he took it away, did he fold it up? A. As near as I can recollect; yes, sir.

Q. Is that inference or is that a recollection, Mr. Burkardt? A. Well, to the best of my knowledge.

Q. I assume that he did, too. To the best of my knowledge he did. But do you remember? Is that your memory? A. Not distinctly, whether he folded it up.

Q. I want to know how good your memory is? A. I don't remember distinctly that he folded it up.

Q. He went away with the paper and your memory doesn't serve you whether he went away with it in his hand— A. No, sir.

Q. Or whether he folded it up and put it in his pocket? A. What is that?

Q. Proceed. A. After I handed it to him, of course, I didn't take notice any more. I went on with the business.

Q. Well, when you first observed him that day was he right in front of the cage at the window, or did you see him come in? A. I saw him coming towards the window.

Q. Now, at what point did he produce the paper, or did he have it in his hand from the time you saw him? A. He had it in his hand.

Q. When you first saw him? A. Yes, sir.

Q. And did he have it opened in the way you have described, with the codicil showing? A. Yes, sir; walked right to the window that way.

Q. Just, practically, as I have it here now? A. Yes, sir.

Q. Do you think he had it so when he came into the door of the bank from outside?

Mr. McCarter: I do not suppose we better speculate. All he can say is the way it

was when he first saw it. You ask him if he thinks. I don't think he ought to speculate. I object.

Mr. Griggs: I will withdraw the question.

Q. Did you observe whether he had the will in his hand—the document in his hand open when he came into the building from outside? A. No, sir; I do not. I only saw him when he was part way to the window.

Q. Recurring now to the execution of the first document, which occurred in the directors' room, do you remember what kind of a pen he used? A. No; I do not.

Q. Do you remember what kind of a pen you used? A. I always write with a fountain pen.

Q. Carry it in your pocket? A. Yes, sir.

Q. And you did use that fountain pen on that occasion? A. Yes, sir.

Q. What kind of a pen did Mr. Hasler use? A. Why, I am pretty sure a fountain pen.

Q. Is it his custom to use a fountain pen? A. Yes, sir.

The Court: Is Mr. Hasler in the bank, too?

Witness: Yes, sir.

Q. When you signed the codicil did you use your fountain pen? A. Yes, sir.

Q. The same one? A. I think it was the same one. I couldn't swear to that because we change them off and on.

Q. And Mr. Hasler used— A. I think a fountain pen, because we always do use a fountain pen.

Q. Well, I will ask you this question, are you

able to say from anything that you could see at the time this codicil was executed that the other sheets of paper that were folded over are the same sheets of paper which are now here (showing witness the proposed document)? A. No; I cannot.

Redirect.

Q. Mr. Burkardt, let us get a little more clear description in our minds of this arrangement in this bank. What are, normally, the relative positions of Mr. Hasler and yourself? A. Why, Mr. Hasler is at the window and I am right at the desk on the side. Right there together.

Q. Right there together? A. Yes, sir.

Q. What is the grill or partition you have spoken of? Just describe it to Judge Martin, please? A. Why, it is like all——

Q. First place you have a desk? A. Marble slab.

Q. And as high as what? A. Ordinary desk.

Q. Behind which you stand? A. Yes, sir.

Q. Is there inside a desk on top of this marble slab? A. Well, slab pad.

Q. Now, above this slab some partition or grill has been spoken of? A. Yes, sir.

Q. Describe that to the Court? A. Why, it is where the depositors put in their money. It is all open. Grill work.

Q. Is there any window glass in the grill? A. Not across the desk part.

Q. So that where you are standing and where Mr. Hasler was standing and where Mr. Runkle came there was no partition between you except this open grill work? A. Open grill work. That is all.

Q. What is this grill work composed of—what metal—what material? A. Why, steel, I guess.

Q. Did you observe whether or not there was more than one sheet in the paper that he signed the first time? Although you only saw the last page, did you reach any conclusion as whether there was more than the sheet upon which that last page was written? A. I should say there was.

Q. Yes. And describe the appearance of the document just as you have a picture of it in your mind's eye at that time. You have described to Governor Griggs how the last page looked. What else did there seem to be there? That is what I am trying to get at.

The Court: You better revise the question. You have two or three independent propositions. Ask him to tell how it looked to him at that time as he remembers it now.

Q. You stated there seemed to be other pages there? A. When he handed the codicil?

Q. No; the will first? A. I should say there was more than one page.

Q. Did they seem to be similar character of pages? A. Yes, sir.

Q. Now, at the time the codicil was executed did you again observe the last page of the will to which your former signature had been attached? A. I know there were attached to the codicil——

Mr. Griggs: One moment. That was a leading question.

Mr. McCarter: "Did you observe the last page?" I do not think that is improper.

The Court: He already testified on direct that that was the way in which the paper

was held when it was brought to him on the second occasion.

Mr. Griggs: So that he couldn't see.

The Court: So that he did see.

Mr. McCarter: Of course he saw.

The Court: Then on cross-examination he testified in detail in response to your questions that he held the paper in one hand with the other hand at the bottom of the paper and that the sheets were folded over the top or folded back over. Now, he is asked whether or not he saw that the last page of the will was the same page that he had signed his name to.

Mr. Griggs: He told me that he couldn't see the last page—he couldn't see what was on the previous folded-over page, and he wouldn't say whether it was the same that is there now. Now, he asked him the leading question.

Mr. McCarter: Read the question. I do not think it is leading at all.

(Question read.)

The Court: That is leading. Objection sustained.

Mr. Griggs: I understand that question has been answered. Perhaps the objection came too late.

The Court: Do you want to withdraw the objection?

Mr. Griggs: I would like to have the answer read to me first. I will withdraw the objection. I only want the truth and I believe this witness is trying to tell it.

The Court: Answer the question.

Mr. Griggs: I think the answer has been

made. I would like to re-examine the witness now.

The Court: You may do that.

Mr. Lum: The answer was not completed.

The Court: Let him state now whether that is all of the answer.

(Answer read.)

Witness: I know there was a paper attached to the codicil—the codicil was attached to a paper, but I couldn't say it was the will. I couldn't swear it was the will.

Recross.

Q. You mean by that that you did not see the page of the document to which the codicil was attached to be able to say whether any part of it was the paper which you now hold in your hand as the will? A. The way he had it folded I couldn't see.

Q. Couldn't see? That is what I understood.

By Mr. Condict.

Q. Did you see any other part of the will when you signed as a witness to the codicil? A. No.

Q. You did not. Did you see any other part of the will when you signed it as a witness. I asked you whether you saw any other part of the will when you signed the codicil. Now, I ask you did you see any other part of the will excepting the last page when you signed as a witness to the will? A. No.

Q. Have you ever seen these papers excepting upon those two occasions during the lifetime of Mr. Runkle? Did you ever see these two papers excepting on those two occasions when you signed as witness? A. No, sir.

Mr. Griggs: You saw the paper in the Surrogate's office before you came here this morning?

Witness: Yes, sir.

Mr. Condict: I asked him during Mr. Runkle's lifetime.

CHARLES HASLER, sworn for proponents.

Direct examination by Mr. McCarter.

Q. Mr. Hasler, you live where? A. Live in East Orange, New Jersey.

Q. And what is your business? A. Employed by the Orange National Bank.

Q. How long have you been in the bank? A. Twenty-seven years.

Q. Did you know William Runkle in his lifetime? A. Yes, sir.

Q. Did you know his handwriting? A. Yes, sir.

Q. Was he accustomed to go to that bank much? A. Yes, sir.

Q. And did he keep an account there? A. Kept an account.

Q. Had you ever acted as a witness to a will prior to the occasion I am going to direct your attention to? A. Not that I remember.

Q. Well, now, I see a name attached to this will "Charles Hasler." Is that your name? A. Yes, sir.

Q. And you are the Charles Hasler whose name is attached to that instrument? A. Yes, sir.

Q. The will. I think you have already said you know Mr. Runkle personally—William Runkle? A. Yes, sir.

Q. I show you your signature to what purports to be the will of Mr. Runkle. Will you please relate the circumstances as you recall them of the execution of that document? A. As I recall Mr. Runkle came to our window and said, "Charlie, I want you boys to witness my will," and I told him to wait a minute, and we went into the directors' room, and as near as I can remember Mr. Runkle signed first and we signed afterwards—I signed next and Mr. Burkardt next.

Q. Did you all remain in the room until the ceremony was completed? A. We did.

Q. In the directors' room? Yes. And on what did you severally write your name? What kind of a desk? A. Well, it is a large oak table which we have in that room.

Q. When did you first see the paper which seems to be the will? Had that been exposed to your view before you got into the directors' room? A. As I recall Mr. Runkle had it in his hand.

Q. Had it in his hand? A. Folded.

Q. And was it or was it not exposed to your view as the little procession marched into the directors' room? I mean in the way he was carrying it, or did he put it in his pocket again? A. No, sir; he had it——

Q. He had it in his hand and kept it there? A. He had it in his right hand.

Q. In his right hand? A. Yes, sir.

Q. Now, did you see any part of it other than the page upon which your signature appears? A. No, sir; I did not.

Q. No. Do you recall how the paper was placed when Mr. Runkle signed it in the directors' room there? A. I do not.

Q. No. What kind of a pen did you use? A. I used a fountain pen.

The Court: Is that a stub pen or sharp pen?

Witness: It would be called a sharp pen. It was a coarse sharp pen.

Q. Is there pen and ink in the directors' room on the table? A. Always.

Q. What is the character of this desk and grill that has been referred to? A. Why, it is open wrought iron grill work.

Q. And something has been said about a door. What kind of a thing is that? Of course, we all have our ideas, but I suppose it has got to be on the record.

Mr. Griggs: You mean the gate?

A. Iron gate with a good strong lock on the inside.

The Court: It is an open iron gate.

Q. No glass partition in the grill? A. No glass partition.

Q. No. Now, I show you what we call the codicil attached to this document. Are you the Charles Hasler whose name appears as a witness to that paper? A. I am.

Q. And is that your signature? A. That is my signature.

Q. Please state the circumstances that occurred with regard to the execution of that document? A. My mind is not clear on the exact approach of Mr. Runkle to the window at that time. I recall his assurance to Mr. Burkardt that this was his signature and I recall our signing.

Q. Signature to what? A. To this codicil.

Q. Yes. And where were you and Mr. Burkardt when you respectively put your signatures to that codicil? A. We were at the desk in the cage—the same desk.

Q. And where was Mr. Runkle at that time? A. Stood just out——

Q. Outside of the— A. Outside of the gate.

Q. How did the will get inside—the document get inside of the grill or partition—gate? A. I have no definite recollection on that score.

Q. Don't remember. Where did Mr. Burkardt stand while you signed the codicil? A. At my elbow.

Q. Your elbow. And where did you stand when Mr. Burkardt signed? A. At his side.

Q. Right side by side? A. Right side by side; yes, sir.

Q. And Mr. Runkle in the meantime stood where, while you were both signing? A. Outside.

Q. Just outside the— A. Just outside.

Q. Yes. Now, I understand that you recall Mr. Burkardt saying, "Mr. Runkle, is this your signature to the codicil"? A. Yes, sir.

Q. He said, "Yes"? A. He said, "Yes."

Q. Did you at that time observe the body of the codicil? A. No; I saw no——

Q. Did you notice whether or not it was in Mr. Runkle's handwriting, with which I think you said you were familiar? You can't remember that? A. I can't recall that.

Cross-examination by Mr. Griggs.

Q. What is your position in the bank? A. I am called assistant cashier.

Q. How did it happen that on the first occasion

when Mr. Runkle came there to get you to witness a document you took him into the directors' room and on the second occasion you did the performance through the window of the cage? A. I don't know any special reason.

Q. You recollect nothing said about it that gives you a— A. No; not a thing.

Q. Addressing yourself now to the second occasion, have you any recollection what time of year that was? A. None whatever.

Q. Have you a recollection of what year it was? A. No.

Q. What is the first thing you remember hearing Mr. Runkle say on that occasion—the second occasion? A. Well, I have tried very hard to recall his conversation with Mr. Burkardt. I have tried to recall a great deal of it but I cannot honestly say that I recall anything before he mentioned his codicil.

Q. Well, now, what did he say? The first thing you remember that he said? A. "This is a codicil to my will and I want you boys to witness it."

Q. You recollect his saying that? A. Saying that.

Q. And at that time he exhibited that paper which you now hold in your hand which you subscribed your names to as witnesses—the alleged codicil? A. Yes, sir.

Q. Did you see his signature on that document? A. On this?

Q. Yes, sir. A. I saw the signature.

Q. The signature which you witnessed at that time? A. Yes, sir.

Q. You saw that? A. That signature.

Q. It was there when you first saw the paper? A. It must have been.

Q. Yes. A. Yes, sir.

Q. Well, you remember, don't you, that it was there, and it caused Mr. Burkardt to ask him whether that was his signature? A. Yes, sir; I remember Mr. Burkardt asking that question.

Q. Just what did Mr. Burkardt say? Do you remember his words? A. "Mr. Runkle, do you acknowledge this to be your signature?"

Q. That, you think, is what he said? A. That is right.

Q. And Mr. Runkle said what? A. "Yes; it is."

Q. And then you signed first? A. I signed first.

Q. Mr. Hasler signed? A. Yes, sir.

Q. And then Mr. Runkle took the document and went away? A. As far as I know.

Q. Now, at the time the paper that we call the will was executed, I understand you to say that you saw nothing except a part of the last sheet; is that correct? A. I don't remember.

Q. Don't remember what you saw? A. No; I don't remember what I saw.

Q. Now, at the time the codicil was signed did you see anything except what is contained on the sheet on which the codicil is written? A. I saw it was attached to a bunch of papers.

Q. But can you say what bunch of papers or identify in any wise what they were? A. No.

Q. Can you say whether these papers now attached to the codicil are the same that were attached to it at that time? A. No.

Q. You don't even know that this paper on which the codicil is written was actually attached, do you? That is to say you didn't see any fasteners. You only know that there appeared to be other papers folded back of it? A. I don't remember any fasteners.

Mr. Griggs: Are you not going to account for how the will came into the possession of Mr. Smith?

Mr. McCarter: I don't think so. I didn't understand there was any further proof this morning.

Mr. Griggs: At any other time are you going to account for that?

Mr. McCarter: I haven't thought anything about it, Mr. Griggs. I don't know one way or the other. I haven't come prepared to prove anything to-day, beyond the proof of the will. If it is important to show that I judge we can show it.

The Court: You haven't proved Mr. Runkle's death.

Mr. McCarter: I think that that will be admitted.

The Court: You can't admit it. It has got to be proved. Do you want to rest at this time or account for the possession of the instrument?

Mr. McCarter: I think in view of the fact that some of the gentlemen are not here and as we understood the proof to-day was to be confined entirely to the statutory execution of the documents that we will say we have no further proof for to-day and rest where we are—not rest the case.

We will offer the documents in evidence.

Will marked Exhibit P-1.

Codicil marked Exhibit P-2.

Adjourned to Thursday April 2, 1914, at 10 A. M.

ESSEX COUNTY ORPHANS' COURT.

April 2, 1914.

IN THE MATTER OF The offer for Probate of a certain paper writing purporting to be the Last Will and Testament and codicil thereto of William Runkle, deceased.	*On Caveat.*

APPEARANCES:

ARTHUR F. EGNER, Esq. (MCCARTER & ENGLISH), Proctor for Proponents.

Hon. JOHN W. GRIGGS, Proctor for Caveator.

FREDERICK J. FAULKS, Esq. (LINDABURY, DEPUE & FAULKS), Proctor for Edith J. Adams, Legatee.

RALPH E. LUM, Esq. (LUM, TAMBLYN & COLYER), Proctor for George McM. Godley.

HENRY V. CONDICT, Esq. (CONDICT & BOARDMAN), Proctor for Carrie R. and Charles P. Scholfield.

WILLIAM HUCK, JR., Esq., Proctor for the College Board of the Presbyterian Church of the United States.

Hon. CHARLES B. STORRS, Proctor for Randolph Rodman.

JEHIEL G. SHIPMAN, Esq. (FORT & FORT), and HOWARD TAYLOR, Esq. (New York Bar) Proctors for William Hulick.

JOHN A. BURKARDT, recalled for proponents.

Direct examination by Mr. Egner.

Q. Mr. Burkardt, you have already been a witness here in this case? A. Yes, sir.

Q. At the conclusion of your direct examination you were asked whether you had ever witnessed wills before, and you said yes, and then you were asked by Governor Griggs, "Ever witness a will for Mr. Runkle before?" and you answered "Not for Mr. Runkle; no." I understand that you did not mean to include in that answer the will and codicil that you had already testified you had witnessed? A. No.

Q. As a matter of fact did you ever witness any other paper for Mr. Runkle other than the will and codicil which you testified in regard to? A. Not to the best of my knowledge.

Not cross-examined.

CHARLES HASLER, recalled for proponents.

Direct examination by Mr. Egner.

Q. Mr. Hasler, were you ever a witness for Mr. Runkle for any instrument other than the will and codicil which you have already testified to? A. I haven't the slightest recollection of any.

Not cross-examined.

KATHERINE TULLY, sworn for proponents.

Direct examination by Mr. Taylor.

Q. Did you know Mr. William Runkle in his lifetime? A. I did.

Q. Had you lived in the house with Mr. and Mrs. Runkle? A. I had.

Q. How long had you lived there? A. For sixteen years.

Q. In a general way what were your duties there? A. I acted as private secretary to Mr. and Mrs. Runkle and in personal trust of their house.

Q. Were you there at the time of his death? A. I was.

Q. What day did he die? A. Mr. Runkle died January 31st, between 4 and 5 o'clock in the afternoon—on Saturday.

Q. Saturday. Immediately after his death did you send for any people and if so whom? A. Yes, sir; I immediately telephoned to his brother, Mr. Hulick and Mr. Smith. I telephoned for his brother first because he was further away than any of the others. Mr. Runkle had always told me that if anything——

The Court: Never mind what he told you.

Q. You telephoned to Mr. Runkle, his brother, and Mr. Hulick? A. Yes, sir.

Q. What is Mr. Hulick's full name? A. William H. Hulick.

Q. And what connection had he with Mr. Runkle? A. I don't know aside from that he was vice-president of the Warren Foundry which Mr. Runkle was the president of.

Q. Then you also telephoned Mr. Smith? A. I did.

Q. Now, had anything occurred between you and Mr. Runkle in the last days of his life which caused you to telephone to Mr. Smith, and if so, state what took place? A. Why, Mr. Runkle had told me for some time before his death should anything happen——

Mr. Lum: I object.

Mr. Taylor: I respectfully insist upon the question. What I desire to do is to show that——

The Court: I do not want to hear any argument. I want to know what the situation is. Do you appear for the will or against it, Mr. Lum?

Mr. Lum: I appear for Mr. George McM. Godley, who is under the codicil and who may have other interests.

The Court: You are a legatee under the codicil?

Mr. Lum: I will withdraw my objection at the present time.

The Court: I will not rule on the question at this time, but as I understand it all the legatees under the will and codicil must appear only in support of the instruments and not against them.

How can she state, counsellor, what Mr. Runkle told her?

Mr. Taylor: What I desire to show is that the will and codicil as they appeared in the Surrogate's Court were—I desire to show their condition at the moment of Mr. Runkle's death and how she happened to

give them to Mr. Smith and then we will follow that up.

The Court: You are asking her now to testify to a conversation with Mr. Runkle in which he gave certain instructions. That is what is objected to.

Mr. Taylor: I am not seeking to determine the will and codicil, but endeavoring to show how she happened to give the paper to Mr. Smith.

The Court: Let her answer that. Objection sustained.

Mr. Taylor: I do not understand there is an objection.

Mr. Griggs: I understand this witness gave a package to Mr. Smith which contained this will shortly after Mr. Runkle's death. While I do not think it is material yet I do not object, that she did that because Mr. Runkle told her. But beyond that I do not want. The fair facts connected with that identification——

The Court: Revise the question.

Mr. Taylor: If I may ask a leading question that will simplify it.

Q. You said you telephoned to Mr. Smith. Was that in accordance with a request of Mr. Runkle, made to you shortly before his death? A. Yes, sir.

Q. Then, when Mr. Smith arrived what did you do? A. I immediately went to Mr. Runkle's desk and got those papers.

Q. Got some papers? A. Got some papers that set on the top of the desk and also a flat package that Mr. Runkle had put in the middle drawer of

his desk and told me also that I was to hand to Mr. Smith.

Q. Did you hand those papers to Mr. Smith? A. I handed those to Mr. Smith just as they were.

Q. Was that in accordance with Mr. Runkle's request? A. It was.

Q. Had you yourself made any change in those papers in any shape, manner or form? A. None whatever.

Q. So that they were given by you to Mr. Smith in precisely the same condition— A. They were.

Q. As you took them out of the desk, and, so far as you know, at the time Mr. Runkle spoke to you about them? A. They were.

Q. Then Mr. Smith took them away? A. Mr. Smith took them away.

Q. Did I ask you when that was—how soon after his death? A. Well, Mr. Smith came around immediately after I telephoned.

Q. The same evening? A. Perhaps it was—the same evening—within an hour.

Q. Is Mr. Smith here present in Court? A. Yes, sir.

Cross-examination by Mr. Griggs.

Q. Miss Tully, the packages or papers you speak of were two, were they not—two packages? A. Well, it was a package I should say about eight inches high. It was one that wouldn't fit in the drawer of Mr. Runkle's desk.

Q. About eight inches. And then there was a smaller package? A. It was a bulky package. Then there was a flat package perhaps eight or ten inches long.

Q. Now, Mr. Runkle brought those into the house from somewhere outside on the Monday preceding

his death, did he not? A. I don't know that it was Monday. It was a short time before his death.

Q. And he placed them, one on the desk and the other in the drawer? A. He placed one—he placed this larger package on the desk, and then I don't believe he had this flat package. I think he got that in the Orange National Bank a day later.

Q. When he did get it it was only a few days before his death? A. Just a few days before his death.

Q. And put it in the drawer, and it remained there and the other package remained on the top of his desk until after his death, when you took them away? A. It did.

Q. Is that right—is that correct? A. That is correct.

Q. The flat package—the small package was wrapped up in paper? A. It was in an envelope. What the color of it was I don't know.

Q. But you could simply see it was covered up? A. It was covered up.

Q. Mr. Runkle's death occurred in January, 1914, the present year, did it? A. Yes, sir.

Q. That was on Saturday? A. On Saturday afternoon.

WILLIAM E. R. SMITH, sworn for proponents.

Direct examination by Mr. Egner.

Q. What is your business, Mr. Smith? A. Bond dealer.

Q. Where do you carry on business? A. 20 Broad Street, New York.

Q. Where do you reside? A. 156 Harrison Street, East Orange.

Q. Did you know Mr. William Runkle? A. I did.

Q. And how long did you know him? A. About fifteen years.

Q. Ever have any business dealings with him? A. I did.

Q. When did you last see Mr. Runkle prior to his death? A. On Thursday the week before he died.

Q. Did you on that occasion have any talk with Mr. Runkle as to anything to be done by you in case of his death? A. Yes, sir.

Q. What was said? A. By him?

Q. Just tell us you own way? A. He started the conversation by saying, "I didn't intend to tell you, Billie, but you have another." I said, "What do you mean?" He says, "You are my executor."

Q. What had he said before that? A. We were discussing Mr. Dyer's death and I was executor of his estate.

Q. Well, what else was said? A. Well, he made several remarks. It would be a great responsibility, etc.

Mr. Griggs: I object to that as hearsay, as irrelevant and immaterial. I rather think that a statement to the witness as to where he could go to find his will or something of that kind is competent. That is the reason I did not object to the original question, but I think various conversations at this time about other matters or matters connected with it, as to what his will was

and so on, are incompetent and therefore I object to it.

Q. Just confine this to directions that Mr. Runkle gave you? A. Yes, sir.

Q. What else did he say with reference to what would happen or what was to be done by you in case of his death? A. The only real instructions he gave me was that if anything happened to him that Katie Tully would notify me.

Q. And who was Katie Tully? A. Member of his household.

Mr. Griggs: The last witness?
Witness: The last witness.

Q. Was anything further said at that time? A. Nothing important, except on a business matter that I——

Q. Do you remember the day when Mr. Runkle died? A. Very well.

Q. Now, between that time and the occasion you have just testified about did you have any talks with Mr. Runkle with reference to his will? A. I did not.

Q. How were you advised of Mr. Runkle's death? A. I was at my home on Saturday afternoon, neighborhood of between 4 and 5 o'clock, and received a telephone message, purporting to be from Miss Tully, that Mr. Runkle had died and requesting me to come around, which I did.

Q. You then went to the house? A. At once.

Q. Now, just describe briefly what happened when you arrived at the house? A. I rang the doorbell and the door was opened. I saw two persons in the hall. I don't know who opened the door. There was a man and woman. I asked the

maid—apparently a maid—for Miss Tully and she went out and came back in possibly a moment—minute—with Miss Tully, who handed me a package—two packages as a matter of fact.

Q. Two packages. Now, describe these two packages which were handed to you? A. Two black leather-bound volumes about eight by ten each and an inch or more thick, tied together with a string, and a blue envelope containing a rather bulky document and two memoranda.

Q. Was there anything written on the blue envelope? A. There was. "The last Will and Testament of William Runkle."

Q. I show you an envelope endorsed "Last Will and Testament of William Runkle"; is that the envelope which was handed to you by Miss Tully? A. It was. It is.

Mr. Taylor: I think we ought to have this marked.

Envelope marked Exhibit P-3 for Identification.

Q. What examination did you make of these papers in Mr. Runkle's home immediately after they were handed to you? A. Nothing more than to look in the envelope, which was open, and saw there were papers. Didn't open the envelope at all—didn't take anything out. The books were tied up.

Q. Just for the purposes of the record, Mr. Smith, the word "citations, $150" were not on that envelope when you got it? A. They were not.

Q. From Mr. Runkle's home where did you go? A. Directly to my home.

Q. And when did you first make an examination of the contents of these two packages? A. Im-

mediately after reaching home I opened the envelope and took out what appeared to me the last Will and Testament of William Runkle and started to copy the main points.

Q. Now, before that, Mr. Smith, tell us just what was in the envelope marked "Last Will and Testament of William Runkle"? A. This document that purported to be his will and apparently a list of his securities; also a small piece of paper—memorandum paper in his handwriting with reference to his membership in the Lorange Club.

Q. I show you the supposed will of Mr. Runkle which has been marked Exhibit P-1 and the codicil which has been marked Exhibit P-2. Are these the papers which you found in the envelope? A. That wasn't on——

The Court: What does he refer to?

Witness: This paper that is loose in here.

The Court: Referring to a slip of paper that is loosely attached?

Mr. Griggs: Loose from the binder.

Mr. Taylor: Under the clip?

Witness: Yes, sir; that was the document.

Q. I will remove the piece of paper that was under the clip, Mr. Smith, and again show you the will. Is that the condition it was in as I am now placing it?

The Court: Showing him will and codicil.

A. Apparently so; that is the way it appeared to me.

Q. Do you recall, Mr. Smith, whether these papers, the will and codicil, were fastened together in any manner? A. I do.

Q. And were they fastened together? A. They were.

Q. And how were they fastened together? A. Apparently the same as they are now. I don't know if they are the same clips, but the same style of clips.

The Court: We ought to have some description of what the witness refers to.

Mr. Lindabury: What do they call them?

Witness: Wire clip.

The Court: This loose fastener—wire clip—is simply placed over the outside of the paper—outside of each paper and does not penetrate.

Mr. Griggs: I suggest that it might be well to have samples of those clips either left on the paper as it now is or put somewhere so that they could always be identified by inspection as well as by description.

Mr. Lindabury: I think that one ought to be offered in evidence and marked as an exhibit, because these might be detached some time or other.

Mr. Taylor: I will offer one of these in evidence.

The Court: Proceed and make up your facts first and then perhaps the gentlemen can agree on some sort of a model afterwards.

Q. Now, Mr. Smith, did you make enough of an examination of this will and codicil at that time to be able to say that every one of the pages which are now included in Exhibits P-1 and 2 were so included at the time you made your first examination of the will? A. I did.

Q. You can? A. And can.

Q. Are they now included—were they then included? A. That is the complete documents.

The Court: Ask him whether the papers that are there now were there then?

Witness: Yes, sir.

Q. They were? A. They were.

Q. And were they arranged in the same order in which they are now arranged? A. Yes, sir.

Q. And just tell us how many pages there are upon which writing appears? A. I never counted them.

Q. Count them now. A. Thirteen.

Mr. Lindabury: That is pages, not sheets?

Witness: Thirteen pages.

Q. Were you acquainted with Mr. Runkle's handwriting, Mr. Smith? A. Yes, sir.

Q. Is that will and codicil in his handwriting? A. It is.

Q. Referring to the first two pages of this instrument, beginning the first page, "In the name of God, Amen," ending "Fifty thousand dollars ($50,000)," is that first sheet, consisting of the two written pages, in Mr. Runkle's handwriting? A It is.

Q. Referring now to the following pages, beginning "$50,000" in figures, continuing "But in case he shall die," being a sheet written upon both sides; another sheet beginning "And to Bridget Gabin of Orange" and being also written upon both sides; and next sheet beginning "Newark, to his successors and assigns," also being written upon both

sides; the next sheet beginning "Descendants of my said nephew" being written upon both sides; the next sheet beginning "be owing by him to me" and being written upon the first side, with the signature of Mr. Runkle on the middle of the reverse side and with the attestation clause thereon; the pages which I have just referred to, are they all in Mr. Runkle's handwriting? A. They are.

Q. Except, of course, the signature of the witnesses? A. Of the witnesses.

Q. Referring to the codicil beginning "First codicil made April 29, 1913," is that, with the exception of the signatures of the witnesses, in Mr. Runkle's handwriting? A. With the exception of the witnesses and the attest.

Q. Yes. And, to repeat, these pages when you first saw them were in the same order in which I have just referred to? A. They were.

Q. Now, you have said that there were other papers in this blue envelope. I show you a lead pencil memorandum beginning "My note is in the National Park Bank." Is that one of the papers which was in the envelope? A. It is.

Q. And in whose handwriting is that? A. The handwriting of William Runkle.

Mr. Egner: I would like to have that marked in evidence.

Paper marked Exhibit P-4.

Q. I show you also a copy of what seems to be a copy of an inventory. Is that the other paper which was in the envelope? A. That is it.

Q. Is that also in Mr. Runkle's handwriting? A. Yes, sir.

Mr. Egner: I offer this in evidence.

Paper marked Exhibit P-5.

Q. The other package that you have referred to consisted of what? A. Two leather-bound volumes, about eight by ten I should say, and probably a little over an inch thick each, tied together with a string, a small cord. I never opened those at the time, until afterwards, when they were examined by McCarter & English.

Q. When did you first examine the contents of that leather wallet? A. You mean the books?

Q. Yes; the other package. A. Monday morning, just casually, in the Fidelity Trust Company.

By the Court.

Q. After the Saturday he died? A. After the Saturday he died—the following Monday morning.

Q. And what did you find them to contain? A. They looked like books of account, and possibly some memorandum papers which I never examined.

Q. Where is that package now? A. In the Fidelity Trust Company.

Q. Now, this blue envelope with the will and codicil, where was that during Saturday after you received it and during Sunday? A. In the pocket of my coat.

Q. You kept it? A. Kept it with me all the time.

Q. Kept it with you. Now, what did you do with the envelope on the Monday following Mr. Runkle's death? A. I went to the Fidelity Trust Company early, about 9 o'clock, and showed the packages to Mr. Uzal McCarter, the president, and Mr. Downing, vice president of the Fidelity Trust Company, as they were named in the will, and wished to consult with them about it.

Q. Where was the package left after you had shown it to these gentlemen on Monday? A. In a vault of the Fidelity Trust Company.

Q. Did it remain there Monday night? A. It did.

Q. What was done with the package on Tuesday? A. I took it out of the vault on Tuesday morning, took it to the office of McCarter & English for examination and we then took the will to the Surrogate's office.

Q. Who did you see in McCarter & English? A. Mr. Egner, yourself, on Monday morning, and Mr. Robert McCarter and yourself on Tuesday morning.

Q. You hadn't been able to see Mr. McCarter on Monday? A. He was away. I didn't see him on Monday.

Q. Now, after you had called at our office on Tuesday morning, what was done with this package? A. The books—the two books?

Q. What was done with the books? A. Put in the Fidelity vault again.

Q. And what was done with the blue envelope endorsed "Last Will and Testament of William Runkle" and the will and codicil? A. Brought to the Surrogate's office and left with Mr. Anderson.

The Court: Mr. Anderson, a clerk in the Surrogate's office, isn't he?

Witness: I don't know his position.

The Court: You found him in the office?

Witness: Found him in the office.

Q. And this will and codicil and envelope were handed to this gentleman whom you supposed to be Mr. Anderson? A. He was introduced to me as Mr. Anderson by yourself.

Q. What, if anything, did Mr. Anderson do with the package in your presence? A. He said he would—he put it in a safe in the inside office.

Q. After the will and codicil were put in that safe was it in your custody again at any time? A. Never.

Q. Now, as far as you know, Mr. Smith, was the will and codicil in the same condition when you put it in the hands of Mr. Anderson as it was when you received it from Miss Tully at Mr. Runkle's residence? A. It was.

Q. On the afternoon of his death it was. Did you yourself make any change in it? A. I did not.

Q. And as far as you know no change was made? A. No, sir; never out of my possession.

Q. Mr. Smith, I show you an envelope addressed "William H. Hulick, Esq., 111 Broadway, New York City," with an enclosure dated January 21, 1914, "My dear Will," and signed "Your friend William Runkle." Have you ever seen this envelope and its enclosure before? A. I never have.

Q. You have not. Do you know whether they are in Mr. Runkle's—in whose handwriting are they? A. Both in the handwriting of William Runkle.

Cross-examination by Mr. Griggs.

Q. Mr. Smith, was this envelope, Exhibit P-3, as much worn when you got it as it is now? A. Apparently it looked just about the same.

Q. I show you the will and codicil and call your attention to the tear in the middle of the top and ask you if that was there when you got it? A. I couldn't tell you. The outside page was torn about the same way but I never noticed that the back or inner pages were torn.

Q. You don't know whether it extended all the

way through or not, the other pages. Well, you did not do the other tearing? A. I didn't notice. I did not.

Q. I call your attention to a tear on the left-hand side about the middle of the first page and ask you whether that was there when you got it? A. I couldn't tell that.

Q. Did you have the sheets of the will apart at all? A. I did not.

Q. Did you notice whether the first leaf or page was fastened in any different way from the succeeding leaves or pages of the will? A. I did not.

Q. You didn't notice that there were staples or fasteners that perforated the will? A. I did not.

Q. Did you never notice that? A. It was pointed out to me in the Surrogate's office afterwards.

Q. You did then see it? A. After it was apart.

Q. After it was apart? A. They showed me the holes where the men were discussing it—Mr. Anderson.

Q. Was that the day you left it there? A. No; later on, I believe.

Q. But you didn't observe anything of that kind? A. I did not.

Q. Of course you read this will? A. I did.

Q. The day you got it? A. I did.

Q. Referring to the third page, the words in the margin, "Canceled October 5, 1912, William Runkle," is that in the handwriting of Mr. Runkle? A. It is.

Q. Referring to paragraph 28, on the eleventh page, in the margin "William E. R. Smith to be executor," and in the body of the will "William E. R. Smith, of East Orange," is that in Mr. Runkle's handwriting? A. The margin certainly is, and that

(indicating) I should think it was. I could never swear to that, as to whose it was.

The Court: Referring to the body of the will?

Witness: Body of the will. It is so blurred.

Q. There appears to be at the bottom—the bottom page appears to be entirely blank. Was that there when you— A. I never noticed that.

Q. I refer to the page that follows the codicil? A. Yes, sir. I may have at the time but since then I haven't.

Q. Well, it must have been, must it not, because it is part of a sheet? A. Yes, sir.

Q. Of legal cap that has not been separated? A. Yes, sir; no doubt of it.

Q. No doubt of that. Did you have the same wire fasteners that we described on the will when you left it at the Surrogate's office that were on it when you got it? A. They were.

Q. Had they been taken off as far as you know? A. Never.

Q. And you say they were the same as these that are now on it practically? A. Similar, I should judge.

Q. They were light metal and possibly an inch long, but I didn't notice the style, and seemed to be very tight.

Q. They are the kind that go over the top of the paper and do not go through the paper? A. Right, as far as I knew. I didn't examine them closely, but I have no doubt that was the kind.

Examined by Mr. Taylor.

Q. I just want to identify this. Don't you recollect telephoning to Mr. Hulick to come and stop

at your house, that there was something for him? A. I do recollect there was some such message. I don't know and I was not there when he called.

Q. When he called. What was he to call for? A. Just let me think. I had forgotten all about that.

Q. Just look at that envelope again. See if you can recall it? A. Let me see it. Pardon me.

The Court: Would you like to have it marked for identification?

Mr. Taylor: I would like to have it marked. I just want to see how Mr. Hulick got it, that is all.

Witness: Why, I didn't place any stress on this at the time, but I recollect—and for the moment I can't tell where I got it. I will have to think for a moment. Someone gave me a letter or left a letter at my house with the request that Mr. Hulick stop, coming out—after Mr. Runkle's death—to get it, and for the moment I have forgotten where it came from—who gave it to me. It must have been at my house and Mr. Hulick was to stop and get it, but where it came from for the minute I absolutely do not recollect.

Q. You remember that there was such an episode? A. Yes; I do, because I apologized for not being there when he called. I recollect that.

Mr. Taylor: I would like to offer the envelope for identification.

Envelope marked Exhibit P-6a for Identification.

Letter marked Exhibit P-6 for Identification.

The Court: Was Mr. Runkle sick in bed on the Thursday before he died?

Witness: I knew nothing of his health after Thursday of the week before he died.

The Court: Well, of that Thursday you saw him of the week before he died?

Witness: He was in his office. He seemed to be about as well as usual.

The Court: Didn't see him at his home?

Witness: No; in New York.

Mr. Lindabury: I did not get it clear. Was that Thursday that you saw him the Thursday of the week he died or of the preceding week?

Witness: Preceding week.

Mr. Lindabury: That is nine days earlier?

Witness: Nine days before he died.

Recross by Mr. Griggs.

Q. Mr. Smith, you lived very near to Mr. Runkle, didn't you, in the same vicinity? A. Yes, sir.

Q. And you saw him frequently for the last two years or more before his death as neighbors do? A. Well, I saw him quite often—not so very frequently.

Q. What was his physical trouble? A. I never knew. I always supposed he had heart disease.

Q. Don't you know that he died of angina pectoris? A. I don't know.

The Court: Where do you live on Harrison Street, between what other streets?

Witness: Central Avenue and the next street. I don't know the name.

The Court: Next street south?

Witness: South of Central Avenue.

The Court: Then you were practically across the park from where Mr. Runkle lived?

Witness: Practically straight across.

The Court: What is that, half a mile?

Witness: I should judge half a mile straight across and a little more around.

ARTHUR CROSS, sworn for proponents.

Direct examination by Mr. Egner.

Q. What is your business? A. Printing business.

Q. You are connected with what firm? A. Baker Printing Company of Newark.

Q. And what other lines of business do you engage in besides printing? A. Stationery, desks.

Q. Are you familiar with the usages and customs of the stationery trade? A. Fairly well, sir.

Q. How much experience have you had? A. I have been in the business about twenty-two years.

Q. I show you Exhibits P-1 and 2 in this matter, Mr. Cross. Will you look at the paper which composes those exhibits?

Mr. Griggs: Hasn't he looked at it, Mr. Egner, before?

Mr. Egner: He has not.

Q. Look at the paper which composes this exhibit and tell us, if you can, what make of

paper it is? A. The name of that paper is Old Berkshire Mills.

Q. Take the first sheet of that paper and take the other sheets in order and tell us what water mark, if any, there appears in these sheets? A. Page 1 is Old Berkshire Mills, 1908; second one is only the word "Old" on it—hasn't got the full water mark.

The Court: What does he mean by the second sheet?

Witness: I will correct that. It is Old Berkshire Mills, 1908.

The Court: When you referred to the first sheet you referred to the first and second pages of that paper on which those two pages are written, do you?

Witness: That is right, Judge. The third sheet is also Old Berkshire Mills, 1908; the fourth sheet is the same; the fifth sheet is also the same; so is the next one.

Mr. Griggs: Allow us to interject into the testimony there that that completes the will and that the next one is the codicil.

Mr. Lindabury: Don't do that. When he mentions the next let him tell what that next has on it.

Witness: The next sheet is Old Berkshire Mills, 1910.

Q. Now, Mr. Cross, what are the first words on the sheet that you have just referred to which has the 1910 water mark on it? A. First words "First codicil made April 29, 1913."

Q. And the other pages which you have referred to are the pages preceding? A. Preceding this codicil.

The Court: What is his answer as to the first sheet?

Mr. Lindabury: I understood the witness to use the term first page.

Witness: Sheet.

Q. Are there any other further pages—sheets after the sheet on which the codicil is written? A. Yes, sir; there is one blank sheet here.

Q. What water mark is on that? A. Old Berkshire Mills, 1910.

Q. That is part of the double sheet upon which the codicil is written, is it not? A. It is.

Q. Now, these water marks which you have referred to, Mr. Cross, indicate what? A. That is the way in which the manufacturer identifies his paper.

Q. And the figures 1908 and 1910 respectively, indicate what? A. The year in which the paper is manufactured.

Cross-examination by Mr. Griggs.

Q. The last two pages, on one of which the codicil is written, constitute one sheet, don't they, as sold in the stationer's? A. Yes, sir; they do.

Q. That paper generally goes by the name of legal cap, does it not? A. It does.

Q. You don't deal in that very much any more, do you? A. No, sir; not very much; no, sir.

Q. Since the time of typewriters and stenographers there is very little of that used by the legal profession? A. Very little indeed.

Q. I suppose you do not know whether you ever had that paper in your shop? A. I don't think we ever carried it, not in this legal cap form.

Q. I mean legal cap of that mill? A. I don't think we ever had any legal cap in our office of this kind, not for sale in general. We might have bought it specially for a customer, that is all.

Q. Are you enough of an expert, do you think, to tell whether this first half-sheet is of the same lot as the balance of the will? A. May I have the paper?

Q. My question is whether you in your business have become sufficiently expert in examining to tell by the imprint of the ruling and so on—the lines? A. No. I wouldn't want to pass an opinion upon it.

Q. Then I won't ask you to. That is all.

JOHN D. ANDERSON, sworn for proponents.

Direct examination by Mr. Egner.

Q. What is your full name, Mr. Anderson? A. John D.

Q. You are connected with the Surrogate's office of Essex County? A. I am.

Q. It has been testified by Mr. Smith that he handed an envelope containing Exhibits P-1 and 2 to a Mr. Anderson at the Surrogate's office; are you the gentleman referred to? A. I think so.

Q. When did you first see this envelope, Exhibit P-3 with its contents, Exhibits P-1 and 2? A. I saw this two or three days after Mr. Runkle's death—two or three days after I saw his death in the newspaper. I saw it in the Surrogate's office. I think in the morning—I think it was on the morning as the funeral—Mr. Runkle's funeral was in the afternoon.

Q. You knew Mr. Runkle by reputation? A. I knew him personally.

Q. You knew him personally. In whose custody was this envelope and the will and codicil when you first saw it? A. I think that Mr. Smith was accompanied by you. I know Mr. Smith was accompanied to the Surrogate's office by you and I think that Mr. Smith handed me the envelope and said that the envelope contained Mr. Runkle's will and asked me to file it and give him a receipt for it.

Q. Did you give a receipt? A. I declined to give him any receipt. It is contrary to practice and custom.

Q. What did you do with it? A. What did I do with what?

Q. Do with the envelope and the will and codicil? A. I took the envelope, the will out—it was not sealed—and simply unfolded it, leafed over a page or two, put it back in the envelope and conducted you and Mr. Smith into the middle room in our suite of offices and showed you where I had placed it in the safe, in case I should not personally be there when it was wanted again.

Q. And did you as a fact actually place it in the safe? A. I actually placed it in the safe and closed the door to that part of the safe.

Q. Now, when did you first make a particular examination of the will and codicil? A. Later that same day.

Q. Now, when you made that examination, Mr. Anderson, tell us just in what condition the instrument was? A. If you will let me have the will I think I can show that more clearly. When I examined it it was in this condition (indicating) with, I think, those same two metal fasteners at the top.

The Court: Referring to the wire clips before mentioned?

Witness: What is known as the Gem clip at the top.

Mr. Lindabury: What is it called?

Witness: Those are called Gem clips, that is what we order, by name. They were placed in about that position (indicating). My attention was attracted to a little mark here at the top.

The Court: Indicating the first page?

Witness: At the top of the first page, similar to the mark that you get from rubbing a coin with the end of a blunt lead pencil—the boys used to make eagles and things on paper. I took the clips off and noticed that through this portion of the will (indicating), in those holes.

Q. You might say the rest of the remaining pages up to and including the attestation clause.

Mr. Lum: Of the will and codicil?

Mr. Egner: No; the will.

Witness: Codicil I lay aside. Those holes were filled with, each of them, with what we call a challenge fastener; that is a brass fastener which fits over the back and then the machine is pressed downward and makes the little point there—little five or six points like a little star on the face of it.

Q. You might now refer to this. We agree to put this in evidence, that this shows the kind of clip (handing witness paper).

Paper marked Exhibit P-7.

Mr. Griggs: I think the testimony would be clearer if he said I have here an illustration showing what I mean.

Witness: The paper was fastened when it was left at the Surrogate's office in the manner in which that Exhibit P-7 is fastened.

Q. When you say the paper you mean the sheets you have just been talking about? A. The sheets which I refer to but not including the first sheet. By "sheet" I mean two pages—first two pages.

Q. Will or the codicil sheet?

The Court: Let me see the will.

Witness: By first sheet I mean the first two pages, one-half of a legal cap sheet.

Q. I notice on this sample Exhibit P-7, which you have just produced, Mr. Anderson, there are small pieces of paper between the fastener and the sheet itself. What does that represent?

The Court: Is that on the front on which the words Exhibit P-7 are written?

Mr. Egner: Yes, sir.

Witness: It indicates to my mind that there was another sheet of paper there.

Q. I am not asking you what it indicates to you but I am asking you what it shows with reference to the condition of the will when you made your examination? A. It produced practically the same thing in blank which the original showed.

Q. In other words there were small pieces of paper on the original will similar to the small

pieces of paper which appear on this sample? A. Underneath these clips.

Q. Underneath these fasteners?

Mr. Griggs: Edge of the fasteners?

Mr. Egner: Yes.

Witness: Yes, sir.

Mr. Lindabury: The fasteners used in the exhibit are the same kind as were on the sheet?

Q. Are these fasteners the same kind as were used on the will—on the sheets of the will? A. They are, I think.

The Court: Would you undertake to say that the flattened ends on what has been called the front—the flattened ends of the fastener are the same as on the original will when it was left at the Surrogate's office?

Witness: You mean that these are the identical pieces of metal?

The Court: No; in the same position, or were they put through the other way?

Witness: They were in—if I may see the will I can answer that, I think.

Mr. Griggs: You mean the same distance from the top?

The Court: Same fasteners, but it is difficult to say what the head of the fastener is. There is a smooth end of the fastener in the dummy, P-7, and there is an end with the edges cut. I want to know which is the end that was actually on the front of the instrument which he saw?

Witness: This end was there (indicating).

The Court: That is to say the cut——

Witness: The star pointed top.

The Court: Star pointed?

Witness: The star pointed top was—showed at the top of what becomes the third page, and that is—my recollection is refreshed by the type of mark which was made by it, because that was the thing that first attracted my attention that there must be something underneath.

Q. You have already said, Mr. Anderson, that the first page was attached to the remaining pages by these two Gem clips? A. Yes, sir, and the codicil was clipped over in the same way.

Q. Then I understand you to say that the codicil was attached in the same way? A. It was attached at the top in the same way.

Q. That is, the same two clips served to fasten the entire will and the codicil together? A. The thing came to us in just——

Q. Is that so? A. Yes. The thing came to the Surrogate's office in exactly the way that that is now, with the exception that beginning at the top of the will were those two metal clips which have been removed and which had little pieces of paper underneath them which showed from the front.

The Court: The witness refers to P-1 and 2.

Q. Now, in P-1 and 2, Mr. Anderson, you will observe that there is a tear in every one of the sheets—in the middle of the sheets at the top. Was that tear in the will and codicil when you first saw it? A. It was.

Q. And there is also a tear at the left-hand side of the first sheet. Was that tear there when you

first saw it? A. There was a small tear there. I think it has become a little enlarged.

Q. Can you say as to whether the tears at the top have become a little enlarged? A. Well, this is a little there (indicating) I think, at the fold there it has become loose.

Q. Referring to the first sheet? A. Referring to the first sheet. I don't remember any tear at right angles. The vertical tear at the top I do remember—the vertical tear.

Q. Mr. Anderson, will you tell us how these eyelets that you referred to come to be removed from the instrument? A. I can only testify to that from hearsay.

Mr. Egner: You have no objection to that, have you?

Mr. Griggs: No.

Q. Just tell us. A. My understanding of the matter is that after the will was brought into the office and after the petition for probate of the will was filed, that we received requests—quite a number of requests for copies of the will, and that the matter of making those copies was entrusted to Miss Gluck, of the Surrogate's office, and that in order to facilitate her work she removed those metal fasteners. That is entirely hearsay.

Mr. Egner: Can't we leave that out, "That is entirely hearsay"?

Mr. Griggs: I suppose this is the official report of the Surrogate's office on the subject. I have no objection to it in that sense.

Mr. Egner: I think there is no question about it.

Cross-examination by Mr. Lindabury.

Q. I am not sure that it clearly appears that the first sheet and the last sheet were attached to the other sheet by the two Gem clips, both of which covered both the first and last sheet? A. That is correct.

Mr. Taylor: In referring to the last sheet you are speaking of that which covers the codicil?

Witness: That which contains the codicil, and the blank page at the back of the codicil.

Mr. Taylor: The little eyelets did not go through either the first sheet or the last sheet?

Witness: No, sir, they did not.

Mr. Taylor: But the Gem clips covered both?

Witness: The Gem clips were over the thing as it stands there in that form now.

Cross-examination by Mr. Griggs.

Q. Mr. Anderson, do you know what became of the little remains of paper that were under the spread of the eyelets? A. I do not.

Q. They disappeared, did they, in the process of copying? A. I think they must have disappeared.

Q. Were those remains of paper—were the remains under both eyelets? A. Yes, sir.

Q. And were they more visible at the top than at the bottom? A. Somewhat more at the top than at the bottom.

Q. Was it as though—as it might have been if a sheet had been born off by violence?

Mr. Enger: I do not think the witness ought to characterize it. We have the sample here. It is for the Court to say how that happened.

Mr. Griggs: I think on cross-examination I can ask the witness anything.

Mr. Lum: Might have been torn off without violence.

Mr. Lindabury: I don't suppose it is a question of expert testimony.

The Court: The objection is sustained.

Q. Did you notice whether, or can you say whether now these sheets after the first and second leaves are torn apart at the top so as to form single or half-sheets, or whether they are still joined together in legal cap style? A. I think they are still together, Governor, I can spread them out here and determine that.

Q. I think you can tell without spreading them out. I think they are. Spread them out if you want to.

The Court: The witness indicates that the sheet upon which the first and second page is written is separate from the sheet upon which the third and fourth page is written; fourth, fifth, sixth and seventh page and the eighth, ninth, tenth and eleventh are together.

Q. The third and fourth page are on half-sheets —first and second are on half-sheets. Mr. Anderson, the first and second are on a half-sheet? A. The first and second are on half-sheets.

Q. The third and fourth are on half-sheets? A. Third and fourth are on half-sheets.

Q. The remainder are unseparated? A. The remaining are—three of those sheets are still remaining attached at the top.

Q. Now, was that the condition when the will was brought to the Surrogate's office? A. Yes, sir.

Q. There were no holes in either the top sheet—half-sheet—nor the bottom sheet, which contains now the codicil—no holes in which fasteners have been? A. No, sir.

Q. But there were holes in the part of the will after the first and second pages? A. There were holes filled up with this fastener.

Q. The metals were in? A. The metals were in.

Q. And had penetrated? A. Had penetrated through the paper.

JOHN C. FINNERAN, sworn for proponents.

Direct examination by Mr. Egner.

Q. Mr. Finneran, you are associated with the Surrogate's office of Essex County? A. Yes, sir.

Q. When did you first see the will and codicil of Mr. Runkle which has been marked here Exhibits P-1 and 2, and the envelope which has been marked Exhibit P-3? A. Possibly an hour or hour and a half after it was left in the office.

Q. And did you make an examination of these papers? A. After the will had been left with Mr. Anderson to be placed in the safe Mr. Anderson remarked to me that they had the will of Mr. Runkle in the office, and being a resident of Orange and interested somewhat to see what disposition had been made of the estate, I took the

will out of the safe and looked over the will as an entirety.

Q. Well, now, when you first saw this will and codicil were the various sheets together in any way? A. When I took the will out of the safe I found the will with two clasps—Gem clasps—which attached the first page and the codicil to the balance of the will.

Q. And they were all attached together? A. All attached together with two clasps.

Q. Now, what else did you see as to the shape of the will and codicil? A. As soon as I took it I noticed that the first sheet was not attached to the rest, only by these two clips, and you could notice a sort of pressure on the top of the page—of the two first sheets, and in reading through it—

Q. Just to interrupt a minute. Was that pressure about the same as it is now in the first sheet which I show you? A. Just about the same.

Mr. Lindabury: You better let him describe it a little, that pressure mark.

Q. What was it? Just explain. What was the nature of this pressure mark? A. Under the pressure mark were the two brass fasteners.

Q. Yes. What style of brass fasteners were they? A. Possibly the same style as that (indicating). It was a brass fastener. I wouldn't say it was exactly like that.

Q. You are referring to what? A. To P-7.

Q. What else did you see? A. In examining it I noticed that there was two pieces of white paper —scrap—as though something had been taken off this page.

Q. And were those little pieces of paper about the same as the little pieces of paper you find on

Exhibit P-7, between the first sheet and the clasp? A. Generally; yes, sir; as near as you could get it.

Not cross-examined.

The Court: You said clasp. Do you mean those wire clips?

Witness: When the will came in originally——

The Court: By the use of the word "clasp" do you mean those wire clips that you see there? You said the instrument was bound together by clasps?

Witness: Yes, sir.

The Court: Did you mean by that word "clasp" the wire clips that are there?

Witness: Yes, sir.

Q. You mean the clips called "Gem clips"? A. Yes, sir.

Mr. Griggs: I understand Mr. Anderson to say that those are the very clips.

Mr. Egner: Yes.

WILLIAM H. HULICK, sworn for proponents.

Direct examination by Mr. Taylor.

Q. Mr. Hulick, did you know Mr. Runkle in his lifetime? A. I beg pardon, I am a little bit deaf. You will have to speak louder.

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

Q. Were you associated with him in business? A. Yes, sir.

Q. What business? A. Warren Foundry & Ma-

chine Company. He was president of the company and I was vice-president.

Q. What is your position there now? A. President of the same company.

Q. How many years had you known Mr. Runkle? A. I knew Mr. Runkle about forty-five years.

Q. Have you often seen him write? A. Oh, yes.

Q. You know his handwriting? A. Yes, sir.

Q. I show you Exhibit P-3 for Identification.

Mr. Taylor: I offer this envelope in evidence.

Mr. Griggs: No objection.

Q. I show you Exhibit P-3 and ask you in whose handwriting are the words, "Last Will and Testament of William Runkle," on that exhibit? A. Yes, sir.

Q. In whose handwriting are they? A. William Runkle.

Q. I show you Exhibit P-1, a document consisting of twelve pages, and Exhibit P-2, a document consisting of four pages, on one of which is handwriting, and ask you in whose handwriting those two documents are? A. William Runkle's.

Q. With the exception of the names and addresses of the witnesses, is all of the handwriting that of William Runkle? A. Yes, sir.

Q. I show you Exhibit P-6 for Identification, consisting of a letter and an envelope. In whose handwriting is that? A. That is in Mr. William Runkle's handwriting.

Q. Both the letter and the envelope? A. Yes, sir.

Q. Does this letter and envelope now come out of your possession? A. Yes, sir.

Q. Where did you get it? A. It was addressed to me, found among his papers.

Q. From whom did you get it? A. I got it on the day after his death, from Mrs. William E. R. Smith. I called at the house and she handed it to me.

Q. In response to a request to go there? A. Request to go there by Mr. Smith. The letter was addressed to me.

Mr. Taylor: I offer it in evidence.

Mr. Griggs: Allow me to see it. Objected to as immaterial and irrelevant. I do not see how it can do any good or any harm.

Mr. Lindabury: I should like to be heard in support of that offer before it is rejected, if the Court will permit.

The Court: Katie Tully mentioned on the second page of the will.

Mr. Griggs: I suppose so.

Mr. Taylor: Mr. Hulick's only connection with the will is on the first page. He is given the house. There would be no possible occasion for writing to him on the matter at all, unless that first page were part of Mr. Runkle's will.

Mr. Lindabury: And the name of Miss Tully is also there.

The Court: How is that relevant?

Mr. Taylor: So far as the relevancy is concerned, as I have just said, Mr. Hulick's only appearance in the will is on this first page, which has been the subject of discussion here, and there would be no occasion for writing to him anything about what was to be given to Miss Tully, unless it were the idea that Mr. Runkle had that he had left

the house to Mr. Hulick. Now, that is so far as the relevancy is concerned. This particular letter shows beyond possibility of dispute what Mr. Runkle intended to do, and reduces the contest of this case to a contest on a mere technicality. There can be no dispute about that so far as its relevancy is concerned. Now, so far as the competency is concerned——

The Court: The issue here in the case is whether or not the first half-sheet of paper is part of the will, isn't it, together with certain obliterations and alterations found later in the will.

Mr. Taylor: Well, there are several issues in the case. That is one of them, sir. Another issue in the case is whether the codicil has republished the will or not, and there are other like issues, but I understood at the outset, although I wasn't here at the time, that there was some question as to whether this will expressed Mr. Runkle's desire, or whether there was some other will which might have possibly expressed his desire. Now, here we have an expression of Mr. Runkle written ten days before his death, of what he had understood had been his testamentary disposition of his property, so that that reduces this contest to a position on the part of the contestants and the next of kin of going in absolute contravention of the desires of the brother, the testator. So much for that. It would seem to me, therefore, relevant on that particular point. Now, upon the question of competency——

Mr. Griggs: If the Court please, I have a suggestion that may obviate particular ar-

gument on this at this time. I have objected. Now, I do not want to deprive them of whatever benefit the Court might think or an appellate court might think they are entitled to from it. I was going to suggest that the Court admit it over the objection and the effect of it be considered in the final argument.

The Court: I can reserve decision on it and determine it finally.

Mr. Griggs: I think they ought to have the opportunity to have it in the record somewhere.

Mr. Lindabury: You might withdraw your objection.

Mr. Griggs: No. My objection is that it is immaterial and irrelevant.

Mr. Taylor: In reserving decision may I be permitted to say this one thing. We have in the New York Courts a distinction as to what presumptions will be indulged in in reference to the time when alterations were made in a will. The distinction in cases where the surrounding circumstances suggest fraud or bad faith from what are the presumptions where there is no suggestion of fraud or bad faith. Now, upon the question of whether there was any fraud or bad faith in the matter of this will this particular letter would be clearly evidential, thus showing that upon that score that the contest comes down to a contest upon a pure technicality, and to defeat the evident intentions of the testator, so that the evidence of fraud or bad faith upon our part is entirely eliminated. Another question has been suggested to me by Mr. Egner and that is the question of identification of this first

page of the will. In an English case there was testimony offered of what had been done by the testator long after the will had been executed—what had been done by him in regard to the document as bearing upon the likelihood of whether he had altered the will before or after it had been executed, and that testimony was allowed in order to give the Surrogate a better understanding of what likely had taken place, and upon that I would like to press this offer.

Mr. Lindabury: I understand that in these cases where a question arises as to revocation, where a will has been obliterated or pages have been substituted or other changes have been made, the question arises as to whether or not the thing was done with intent to change a particular provision or to revoke the whole will. In every one of these cases—not in every one, but in many such cases—that a double question arises. Now, when a question arises especially as to whether the testator by what he did intended to revoke the whole will, evidence is admissible, I think in all jurisdictions, of declarations or letters or other conduct upon his part, of a later date, recognizing the document as his will, as rebutting the inference drawn from the acts put in evidence, from which it could be argued that he had an intent to revoke the will. By our statute, you know, a will may be revoked in other ways than by a formal revocation duly witnessed, and it often is a question as to what the intent of the testator was in the act that he did—whether he intended to revoke anything, whether he intended substitution, whether he intended re-

voking the whole will, or what was his real intent. Now, so far as I know, it has not been held anywhere that on the question of the general intent to revoke evidence should be refused of acts, words and writings of a later date recognizing the paper as his will.

The Court: Well, the case of the State vs. Ready is the one which determines this question. The rule laid down in Wigmore is the one which is adopted in this State, and I presume it is the last statement, and that is that wherever the intention of the testator is involved that hearsay evidence may be introduced to show his condition of mind. In that sense it is not exactly hearsay. It is a little better testimony than hearsay. But your proposition that the subsequent declarations—not prior to the time when the intention must be shown—but declarations subsequent to the time, is a question upon which I have very grave doubt, how a person could make a subsequent expression of prior intentions. I would like to look at that Ready case again. I will admit it now, unless you want to be heard, Mr. Griggs.

Mr. Griggs: No.

The Court: I will admit it now and you can make a motion to strike it out now, and I will reserve decision on that.

Mr. Griggs: I cannot do that. I shall argue it was improperly admitted, because it has no legal effect.

Mr. Lindabury: It would be harmless error, anyway.

The Court: The best thing for the Court when there is no jury is to admit everything. I will admit the testimony at this time.

Mr. Lindabury: I think the Ready case does not touch the question that I had in mind of subsequent declaration.

Mr. Egner: I will not take the time to give my view, which is different from the others.

The Court: I will admit the letter.

Letter marked Exhibit P-6b.

Mr. Taylor: In the will Mr. Hulick is not appointed executor. He has nothing to do with the will except the devise to him of real estate in the City of Orange, and that being his connection with the will, this letter is written to him about ten days before testator's death (reading part of letter). This is all I think of now. If others occur to me I will add them.

I will offer in evidence one more letter.

The Court: It doesn't appear whether that envelope was in the envelope P-3 or not. The only information we have now is that Mr. Hulick received the letter from Mrs. William E. R. Smith.

Q. Mr. Hulick, when you received the envelope from Mrs. Smith, was the envelope sealed? A. Yes, sir.

Q. It was sealed? A. Yes, sir.

Q. And was this the letter inside of it? A. It was.

Q. That has just been offered in evidence? A. Yes, sir.

Q. You unsealed the envelope yourself? A. I did.

Mr. Taylor: I have one more letter which I might offer in evidence for the general edification of all concerned, in that it is a let-

ter written by Mr. Hulick within two hours of his death.

The Court: You mean Mr. Runkle?

Mr. Taylor: Mr. Runkle. It is just showing that the man's mind was——

Mr. Griggs: I haven't the slightest objection to that except you might offer any business man's whole correspondence. We do not question his capacity at all.

Mr. Lindabury: No question of testamentary capacity?

Mr. Griggs: No, or undue influence or fraud.

Mr. Taylor: Then under that statement there is no use of my offering the letter.

Not cross-examined.

The Court: Have you proved the exact date of Mr. Runkle's death?

Mr. Egner: Yes.

PROPONENTS REST.

WILLIAM J. KINSLEY, sworn on the part of the caveator.

Direct examination by Mr. Griggs.

Q. Your residence, Mr. Kinsley? A. Nutley, Essex County, New Jersey.

Q. Your profession? A. Examiner and photographer of questioned documents, handwriting, typewriting, ink and paper.

Q. How long have you followed that profession? A. I have been a professional penman for about thirty years; twenty-eight years of that time have

given particular attention and study to questions involved in disputed documents, and for nineteen years have been testifying in courts of law in questioned document cases.

Mr. Griggs: Now, I will assume that the witness has qualified as an expert, unless some of the counsel object.

Mr. Lindabury: I can support that testimony.

Q. Mr. Kinsley, have you examined the paper purporting to be the last Will and Testament of William Runkle and the codicil attached thereto, which have been before the court, Exhibits P-1 and P-2? A. I have.

Q. Just tell us whether in your judgment and opinion the body of those documents outside of the signatures and addresses of the subscribing witnesses is in the same handwriting or not? A. In my opinion it is.

Q. I call your attention to the provision in the——

Mr. Taylor: Did that question include the codicil?

Mr. Griggs: Yes; it included the codicil.

Q. In the 28th paragraph, in the body of the paragraph, "William E. R. Smith," and then the "East" in front of Orange, is it your opinion or not that that is in the same handwriting as the rest of the document? A. It is.

Q. Have you made photographs of this will? A. Yes, sir.

Q. Have you one here? A. Yes, sir; I have.

Q. This portfolio which I now hand you, does that contain photographs of the various pages of the will? A. Yes, sir.

Q. You made those photographs yourself? A. I did.

Q. And that is part of your business and profession? A. Yes, sir.

Mr. Griggs: I offer that in evidence, merely as a convenience. Not as proof of anything, but for use to save the handling of the written document.

Book marked C-1.

Mr. Egner: We have no objection. We also have a set which we would like to offer in evidence.

Mr. Griggs: We will take yours.

Mr. Lindabury: Is there any difference?

Mr. Griggs: Can't be.

Mr. Egner: Suppose you confine your offer to the photograph of the pages of the will and codicil.

Mr. Griggs: Let me examine further.

Q. The photographs that are enclosed in this portfolio give in order the successive pages of the will and codicil, reproduced on the same scale as the originals, do they not? A. Yes, sir.

Mr. Lindabury: Natural size?

Witness: Natural size. There is a scale photographed on each page.

Q. Then follows a page in which there are three different excerpts on the same page, beginning "In the name of God, Amen." That first excerpt is the beginning of the will, is it not? A. Page 1.

Q. The second one is that part of the will which contains the name of William E. R. Smith? A. Page 11.

Q. Page 11. And the third one is a part of the codicil? A. Yes, sir.

Q. Now, then, on the page following the one I have just referred to, page 15 of the portfolio——

The Court: Is that what you have been examining?

Mr. Griggs: Page 14 we have just been examining on.

Witness: Yes, sir; is natural size.

Q. That is natural size? A. Yes, sir.

Mr. Lindabury: Have you copies of that for us?

Mr. Griggs: No, I haven't any now.

Q. Now, page 15 is an enlargement of certain parts of the document? A. Yes, sir. The upper part of the page contains the name of William E. R. Smith, to be executor; the marginal writing on page 11 of the will. The second or the middle paragraph in that photograph is the beginning of the will, page 1. The bottom of third portion is the beginning of the codicil—portion of the beginning of the codicil.

Q. Now, turning to page 16.

Mr. Egner: On what scale is page 15?

The Court: How many diameters?

Witness: Page 15 is two diameters—I think two diameters enlarged. The scale got cut off of that. I enlarged it and it slid off.

Q. Page 16 in the portfolio, what does that show? A. That represents that portion of page 11 where the chemical erasure appears and the

overwriting of the name "William E. R. Smith of East Orange," with two exposures on the plate, an upper and lower portion at two different times; it is enlarged three and one-third diameters. The idea was to photograph the background especially, around the name of William E. R. Smith as it now appears.

Q. Well, what is the bottom line on page 16? A. That is two lines below Mr. Smith's name as it appears on page 11. It just happened so.

Q. Paragraph 18? A. Twenty-eighth paragraph.

Q. Page 17, what does that contain? A. That is a two-diameter enlargement of four separate pages of the will and codicil. The one at the top is a portion of the top of page 1 of the will. The second specimen is the top of the codicil. The third specimen is that portion of page 3 of the will where paragraph 9 has been cancelled with a marginal writing reading, "Cancelled October 5, 1912, William Runkle." The bottom and fourth specimen represents that portion of the page where the "William E. R. Smith to be executor" is in the margin opposite paragraph 28, and takes in a small part of paragraph 28, showing the body writing and marginal writing. That is enlarged two diameters.

Q. That is all the portfolio contains? A. Yes, sir.

Q. Referring now to the first and second pages of the document, I would like you to compare that with the succeeding pages of the will and tell us what difference you find as to paper, pen, ink, method and style of writing as to indicating painstakingness, slowness, rapidity or anything that you find. A. First taking up the question of paper, pages 1 and 2, being a half-sheet of legal

cap paper bearing the watermark "Old Berkshire Mills, 1908," I find the same watermark in pages 3 to 12, inclusive, but in my opinion it is different ruling both for the vertical and horizontal lines. The vertical ruling in pages 1 and 2, that is the first half-sheet, is fainter than the ruling of the vertical line in pages 3 to 12, inclusive. It is also narrower ruling—slightly narrower—when compared.

Q. You mean by measurement narrower? A. Yes, sir; by actual observation under microscopic enlargement. It shows that the lines vary in thickness, and the extreme dimensions—the outside of the ruled line is slightly less, pages 1 and 2, than it is on pages 3 to 12 inclusive.

Q. You examined it by the microscope? A. Yes, sir. A lower power glass is sufficient. I examined it that way and also with a compound microscope, but a slight magnification is sufficient to observe that that is a physical fact, that the vertical ruling is narrower and is fainter in ink than pages three to twelve.

Q. Right there is the vertical ruling on pages 3 to 12 uniform? A. Yes, sir; substantially so.

Q. Proceed now. A. The horizontal ruling on pages 1 and 2, this first half-sheet, is some stronger; the ink is brighter and the ruling stronger than pages 3 to 12, inclusive. The vertical ruling is weaker on pages 1 and 2 and the horizontal ruling is stronger on pages 1 and 2 when compared with pages 3 to 12. Then the codicil sheet, the vertical ruling is stronger and brighter than any of the other vertical rulings on pages 1 to 12, inclusive. Taking the other two sets of paper—two varieties or two rulings of paper—the codicil has a stronger ruling and it appears brighter than the ruling on pages 1 and 2, or the

ruling on pages 3 to 12, inclusive. The horizontal ruling is also brighter on the codicil than on pages 1 and 2, or pages 3 to 12, inclusive.

Q. Then may I ask you how many different kinds of paper do you find in that document? A. I find what in my opinion is three rulings of paper, but one manufacture of paper. Two of the papers, the first half-sheet, pages 1 and 2, and the remaining pages 3 to 12, inclusive, have the same watermark, 1908, the codicil has the same watermark, but 1910 date in it, but in my opinion pages 1 and 2, the first half-sheet, were ruled at a time other than when the ruling was done on pages 3 to 12, inclusive, and the codicil was ruled at some other time. There are three separate rulings on the pages I have indicated.

Q. If that is all you have to say as to the paper, you may proceed with the matters of penmanship. A. Well, the question of ink. On pages 1 and 2 the ink is distinctly different from the ink used in the body writing of pages 3 to 12. Pages 1 and 2 are written with a blue-black ink, inclined to be quite black, while pages 3 to 12 have a light brown tendency. That is distinctly divergent——

Mr. Lindabury: What is the last word?

Witness: Tendency, that is in appearance.

Distinctly divergent from pages 1 and 2. The ink on pages 1 and 2 I have denominated as ink No. 1, to identify it, while the ink on pages 3 to 12, inclusive, not taking in the marginal writings—omitting that—but taking the body writing on pages 3 to 12, inclusive, I have denominated as ink No. 2. On page 3, where we have the cancellation and the words, "Cancelled October 5, 1912,

William Runkle," I have indicated that ink as No. 3. On page 11, where we have the name "William E. R. Smith to be executor," and the name "William E. R. Smith," and the word "East," on line —second line of paragraph 8, written over a chemical erasure, is in dark ink that resembles somewhat ink No. 1, although I wouldn't say it is ink No. 1, and I have not given it a number, because I cannot say definitely whether or not it is ink No. 1 or a different ink. The codicil is written in a thick black ink that does in some ways resemble ink No. 1, only thicker and heavier and blacker. I haven't given it a number, although it could probably be differentiated from the other inks. The ink in the signature to the codicil appears to be the same as the ink in the body of the codicil. The witnesses' signatures on the will, page 12, appear to be written in the same ink—that is, the two witnesses—but that ink differs from the ink used in writing the body of that page or the ink used by the testator in signing the name "William Runkle." On page 13, the codicil, the witnesses' names appear to be in two different inks, one in one ink and one in the other, although they quite closely resemble each other, and those two inks are different from the ink in the body of the codicil or in the "William Runkle" signature to the codicil.

The matter of pens. Pages 1 and 2 in my opinion were written with a pen entirely different from that which wrote pages 3 to 12, inclusive. The body writing on those pages, and pages 1 and 2, I have called that pen No. 1; pages 3 to 12, the body writing, I have called that pen No. 2. The cancellation, or rather the marginal writing on page 3 opposite paragraph 9, "Cancelled October 5, 1912, William Runkle," I think was written with a different pen from either pages 1 and 2 or

body of page 3. I have called that pen No. 3. The signature of William Runkle to the will on page 11 I think was made with a pen different from the one which wrote the body of the page, although it would be possible to produce a heavier shaded signature as that is—heavier shaded writing as compared with the body, and do it with the same pen, but I am inclined to think that that is another pen and have called that pen No. 4. In the codicil—the signature to the codicil on page 13 I think was written with still another pen, and I have denominated that pen No. 5.

Mr. Lindabury: You were speaking of the signature only, were you not?

Witness: The body of the codicil and the signature of Mr. Runkle.

Mr. Lindabury: I did not catch the body.

Witness: The body and the signature. I think it was written with pen No. 5.

Mr. Lindabury: Different from any of the others?

Witness: Different from any of the others.

Mr. Egner: Have you given the pen which wrote the codicil a number?

Witness: Five.

The Court: Codicil and signature are 5.

Q. By what indicia do you determine the different pens that were used? A. By a study of the pen strokes as they appear on the document itself, more especially the up or unshaded strokes—the strokes without pressure—as indicating what would be the width of the pen-point on the paper.

Q. Do you use a glass or microscope for that purpose? A. Oh, yes; yes, sir. I used the simply

magnifying glass, compound microscope and stereoscopic microscope in studying these ink lines.

Q. Well, can you tell what in your opinion was the character of the pen used in writing pages 1 and 2, as distinguished from the character of the pen used in writing pages 3 to 12? A. Pages 1 and 2 were written, in my opinion, with a pen considerably coarser, points not so fine as that used in writing pages 3 to 12, inclusive.

Q. And what distinguishing characteristics were there in the pen which wrote the name of William E. R. Smith in the two places? A. That in my opinion is a pen considerably coarser than the pen used in writing the body of that same page 11, or in writing any of the pages 3 to 12, inclusive, that is the body writing on those pages.

Q. By what is the quality which you call coarseness in a pen determined, by the point or— A. By the point and the width of the stroke left by the two pen-points as they travel over the paper, especially on the up-strokes, where you have no indication of pressure or where there should not be and cannot be very much pressure. You are then enabled to determine the width of the pen-point by the record that they leave on these upstrokes.

Q. What distinguishing characteristics do you find in the handwriting itself, as contained on pages 1 and 2, as compared with pages 3 to 12? A. Pages 3 to 12 is more careful—formal piece of writing; it is more compactly spaced than writing on pages 1 and 2. While the writing on pages 1 and 2 is not what I would call careless writing by any means, yet as compared with pages 3 to 12, I do not think it evidences the same care and formality, and certainly is not as compact and as closely spaced a specimen of penmanship as we find on pages 3 to 12, inclusive.

Q. Well, do you find anything on page 2 as to spacing or the size of the letters that indicates a variation from the other parts of the document? A. Yes, sir. Between paragraphs 6 and 7 I find the only spacing—vertical spacing—that leaves a blank space that occurs anywhere in the thirteen pages of the will and codicil. There is an open space.

Q. Just point out to the Court what you refer to. A. (Indicating.)

The Court: Where is that?

Witness: Page 2, at the bottom. There is the only time.

The Court: Between paragraphs 6 and 7.

Q. There is a line of space left there, isn't there; whole line? A. Yes, sir; that is the only place in the will that I have found a blank line left for paragraph purposes or for any purpose that I can see. And I find, comparing the bottom part of page 2 with the upper part of the same page, that there is a tendency to increase the lateral spaces between words and letters in the bottom part of the page. The writing is a little coarser as the bottom part of the page is reached.

Q. By coarser you mean larger letters? A. Larger.

Q. More extended? A. More extended and it is larger in both ways, especially in the spacing between words and letters.

Mr. Lindabury: Endeavor to spread over a little more space?

Witness: To spread it over a little more space.

Q. What have you to say about the indications of tremor in the various parts of the document——

The Court: Has he answered the question as to the condition of the codicil?

Mr. Lum: Not yet.

The Court: You asked him to compare the document, and he tells about pages 1 and 2 and 3 to 12, but has not told us about the characteristics of the codicil, if any.

Q. Now, tell us about the characteristics of the handwriting of the codicil as compared— A. The handwriting of the codicil is larger and coarser than in any other portion of the writing in the document, although page 3, the canceled—the date in the margin—somewhat approximates it, although even there on page 3 it isn't so large and not quite so heavy as in the codicil. The codicil is not as widely spaced, or any wider spaced than the bottom of page 2, although the handwriting is much larger—that is the handwriting vertically is larger, and that would entail naturally a more lateral space for the same letters. On the whole I think the codicil is very much larger than any other writing in the thirteen pages.

Q. Now, I call your attention to page 11, paragraph 28, where the words, "Wm." for "William," "E. R. Smith, East," appear, and ask you what change, if anything, has been effected in that part of the document, from what it was in the first instance, and in the question I would include this, can you tell what it originally read—how it originally read? A. First there has been a chemical erasure of some ink lines at that point, second line of paragraph 28, page 11, and this chemical being applied has partially decolorized the ink, hasn't removed the ink entirely from the paper, and a study of that place with the glass, and especially photographically enlarging it, has shown me

sufficient amount of underwriting to read substantially all, I think, of what was there originally. There are two little pieces of letters that were not chemically erased. One of them occurs just below the capital "R" of Smith, and the other shows that it was the finishing stroke of a small "n." By beginning with the first part that is shown underneath, where now appears the capital "W" of the abbreviated name "William," in line 2, you can see capital "R," small oval letter resembling an "a," nearly all of a small "n," nearly all of a small "d," and then a small "o" comes about the center of the blot, where presumably the capital "E" was attempted to be placed, and can see the outline of the small "o," and as the pen traveled over to the "l," which is quite distinct between the "E," "R"—the capital "E" and "R" of Smith, and then a small portion of the upper part of a small "p" and the stem part below the line, portion of which has not been erased, the finishing part of a letter something like the finishing part of the small "n" just after the word "Smith" now shows, and in the negative I can see a little better. Even in the print I can see portions of what looks like a small "h."

Q. Then, what do you make out that word to have been? A. "Randolph." Then the capital "R" is underneath the "S" of "Smith" quite distinctly, small part of an oval letter resembling an "o" or "a," or nearly resembling an "o," and then, the small "d"—the oval part isn't so distinct—but shows slightly the staff part, runs into or rather is covered now, the top of it, by the "i" dot in "Smith," a very large "i" dot, and the bottom part of the small "m," with part of the upper curves and outline, is shown, and under the bottom part of the small "h" in "Smith," and then

under the finishing part of it, or rather the bottom part of the small "h," the last time it touches the base line, appears a portion of an oval letter resembling a small "a," and then the small "n" is quite distinct, standing alone, not being covered at all, which would——

Q. So that you make out what for that name? A. Rodman.

Q. Then, you think that the name that was there was Randolph Rodman? A. Yes, sir.

Q. Now, referring to the word "East" that follows the "of"—the original "of" following the name is still there unerased, is it? A. Yes, sir.

Q. And the next word is "East"? A. Yes, sir.

Q. Has that been written over something? A. Been written over the chemical erasure of some character.

Q. What do you make the underlying word to be? You needn't go into each letter. A. It is spaced and resembles in outline, the portions that can be determined, the word "South."

Q. As if it had originally read, "Randolph Rodman of South Orange," is that what you mean to say? A. Yes, sir.

Q. Now, what is there with reference to the space formerly occupied by the name of "Randolph Rodman," which is there, and the filling up of that space with the "William E. R. Smith"? Is there any evidence of compression or stretching or anything of that kind? A. There is evidence of extenuation of the handwriting in the name "William E. R. Smith." It is spread out laterally and is heavier than the other writing, and yet doesn't cover in measurement from left to right as much space as Randolph Rodman occupied.

Q. I notice that the writing of "William E. R. Smith, East Orange," is very much blurred or

spread. What is the cause of that, are you able to say? A. Yes, sir; I would say that that ink in the name "William E. R. Smith" and the word "East," of "East Orange," were put on the paper while the paper was wet and presumably—and by inference, following the chemical erasure, but of course, I couldn't say that.

Q. What kind of a chemical erasure was used? A. Some chlorine.

Q. To effect that change or discoloration? A. Some bleaching acid like chlorine, that you apply to bleach—take the color out of the ink—they are liquid.

Q. Are such preparations sold at the stationer's? A. Yes, sir.

Q. For use by bookkeepers and others? A. Twenty-five cents each.

Q. Not uncommon? A. Very cheap; very easy to obtain—in common use.

Q. The writing in the margin is also spread a little, is it not? I mean of the name of "William E. R. Smith"? A. Yes, sir; it is blurred.

Q. As if the pen had blotted a little at the head of the "e"? A. Yes, sir.

Q. You attribute that to blotting or the spreading of the pen—dropping ink like a blot, or to the moisture of the paper or what? A. No. I think that is occasioned by the fact that the man first wrote "William E. R. Smith, East," in the body over this chemically erased area of the paper; that the paper had been softened by the chemical so as to disturb the surface, and some of that surface lint got on the pen, and then he wrote in the margin with the pen not in a clean condition.

Q. Are you able to say from the indistinct remnants of the words, "Randolph Rodman, South" Orange, whether they were in the same handwriting

as the context and in about the form and the same size and style as to indicating whether they were written about the same time? Tell us what you know about it. Same pen? A. My opinion they conform to the handwriting in the body of the instrument. That is, my opinion is that it was written by one and the same hand that wrote the body, and in spacing. Of course as to handwriting they are not so distinct as other parts, and my opinion would have to be modified to that extent, but in design, construction and spacing they conform—the parts that are clear and distinct conform to the body writing and lead me to the opinion that it is originally by one and the same hand. In spacing it conforms to the writing preceding and following it—it fits right in, and those portions of the writing like the small "p" below the "R" of "William E. R. Smith," and the "m" and the tail of the "n" of Rodman fit right in, as do other parts, to a spacing reading "Randolph Rodman." If you would construct the two words with the same spacing, the same size, it would fill just that space, even if you couldn't read the writing itself, so I think it is the same handwriting, and the same spacing and arrangement as the body of that page.

Cross-examination by Mr. Egner.

Q. Mr. Kinsley, you have referred to the differences in ruling, both horizontal ruling and vertical ruling, on the various pages of the will. Are there any differences in the thickness of the ruling in pages 3 to 12, inclusive? A. Very slight. Of course it is impossible to get any two pages that would be, when highly magnified, just the same, but they are nothing like the differences that we

find between the ruling on pages 1 and 2 and pages 3 and 12.

Q. There are differences? A. Yes, sir. Sometimes the line doesn't show all the way down the full width, but I mean to take it at its widest place, to takes pages 1 and 2 and measure them all over all the width, and then take pages 3 to 12 and measure them at their extremes all over, there is this difference which I have pointed out.

Q. How does the pen which wrote the words, "William E. R. Smith to be executor," compare with the pen which wrote pages 1 and 2? A. It is a little difficult to compare it, for the reason that I think there was lint on the pen when it wrote "William E. R. Smith to be executor." I think that the pen when writing the margin had been used in writing some place that gave it lint, and by inference I suppose by writing the second line of paragraph 28 and that had caused a wider stroke, but I think that—well, I won't say. I have it photographed and enlarged here. I would be unable to say whether or not the one pen is coarser than the other because "William E. R. Smith to be executor," the pen isn't in its normal writing condition.

Q. You feel unable to say? A. I feel unable to say about that, whether it is finer or coarser than the pen that wrote pages 1 and 2.

Q. There are variations in the handwriting in pages 3 to 12, inclusive, are there not, Mr. Kinsley? A. Yes, sir.

Q. At the time you were making your examination of the will was it suggested to you by anybody that Mr. Randolph Rodman's name had been there? A. Yes, sir.

RECESS.

WILLIAM E. R. SMITH, recalled for further cross-examination.

Cross-examination by Mr. Griggs.

Q. Mr. Smith, do you know a gentleman by the name of Randolph Rodman? A. I do.

Q. Where does he live? A. He lives in South Orange. I don't know the street.

Q. How long has he resided there, as far as you know? A. For several years.

Q. What is his business? A. He is a member —partner in a brokerage house.

Q. New York City? A. New York.

Q. He is a well-known resident of South Orange, is he? A. Yes, sir.

Q. And do you know whether he was an acquaintance of Mr. William Runkle? A. Close friend.

Mr. Storr: I wish to have Mr. Kinsley take the stand for a moment.

WILLIAM J. KINSLEY, recalled.

Examined by Mr. Storr.

Q. Mr. Kinsley, the question was asked you just before recess whether the name "Rodman" was suggested to you before you deciphered it. Now, I ask you whether the name of Randolph Rodman was suggested? A. No.

Q. Will you state the circumstances in connection with the suggestion of Rodman's——

Mr. Lindabury: We will not claim that this witness only discovered that because he was told of it, or that his testimony is not to be taken.

The Court: Are you willing to take that admission?

Mr. Storr: Yes.

The Court: The statement of Mr. Lindabury is made with the acquiescence of Mr. Egner, who appears for the proponent.

Mr. Egner: Oh, yes.

CAVEATOR RESTS.

ALBERT OSBORN, sworn for proponents.

Direct examination by Mr. Egner.

Q. What is your profession, Mr. Osborn? A. Examiner of questioned documents, handwriting, typewriting, etc.

Q. What experience have you had? A. I have made a special study of the subject for upwards of twenty-five years, testified in many courts on the subject.

Q. Have you made photographs of the Runkle will and codicil? A. I have.

Q. And when did you make them? A. I made them on two different occasions. The first time was the 19th of February, and then again on the 12th of March.

Q. Taking the album which you have in your hand and going from photograph to photograph, will you tell us what the photographs represent? A. The first fourteen pages of the album are the

thirteen pages of the will and codicil, and the blue envelope in which it was enclosed. These are photographs of the original document the same size as the original. The next photograph numbered in my book 14 is photograph of a portion of paragraph 19 in the body of the will, and portion of the second page of the will.

Q. Which is which? A. The upper one is from paragraph 19.

Mr. Griggs: What size?

Witness: Photograph number 15 in my book is a photograph of portion of page 1 and photograph of portion of page 6 of the will.

Q. And which is which again? A. The upper one is from page 1; the lower one from page 6.

Q. How much are they enlarged? A. That is enlarged approximately three diameters, and the previous one two diameters.

The Court: Fourteen?

Witness: Yes, sir. Fourteen is two diameters. I have a scale on here—two-inch scale that is photographed on the photograph, and fifteen, I think, approximately three. It is as large as it could go, this portion, on a 11-14 plate. Photograph 16 is a portion of photograph—no—photograph 16 is part of the first page of the will, a portion of the third page and a portion of the sixth page.

Q. Are they placed in the order in which you have referred to them? A. Yes, sir. And photograph 17 is a photograph of the will beginning with paragraph 10 of the will, beginning at the top of page 10, and photograph 18 is——

Q. What enlargements is the last one? A. Approximately two diameters. And the last photograph, 18, is of the first line of the first page.

The Court: First line showing marks at the top of the sheet.

Mr. Egner: I offer this collection in evidence.

Book marked Exhibit P-8.

Not cross-examined.

PROPONENTS REST.

Mr. Storr: I desire to offer in evidence two pages relating to the appointment of the executors.

The Court: Here is C-1. Do you want to add something?

Mr. Storr: I want to add these two pages.

The Court: You better ask leave to open the case and put Mr. Kinsley on and let him tell what those are.

Mr. Lindabury: I do not think we need put Mr. Kinsley on.

The Court: It will be better to have it appear what they are.

WILLIAM J. KINSLEY, recalled.

Examined by Mr. Storr.

Q. Mr. Kinsley, there are two pages in this book which is entitled "Photographic Exhibits, Case of William Runkle Will, William J. Kinsley," exam-

iner, etc., bound in leather and cardboard. I now call your attention——

The Court: Are you referring to another book? You better mark it C-2 for Identification.

Book marked Exhibit C-2 for Identification.

Q. I now call your attention to plates in C-2 for Identification, 3 and 4. A. Two and 3.

Q. Two and 3. And ask you if those are plates made by you? A. Yes, sir.

Q. And they relate to the will? A. Yes, sir, page 11 of the will, that portion where the chemical erasure occurs and the overwriting of the name of William E. R. Smith.

Q. Now, those photographs are enlarged photographs? A. Yes, sir; slightly over two diameters. I intended them for about two diameters. The scale shows they are slightly over.

Q. These were referred to by you on direct examination this morning. You referred to negatives of the photographs? A. Yes. I don't know whether I specifically referred to these. I said I made photographs whether I referred to them or not, but these are in addition to those that went in in the other album of photographs identified by me this morning and marked Exhibit C-1, and they are photographs of the same place on page 11 where this chemical erasure occurred, but they are made with different plates and different length exposure, in order to bring out the background as much as possible underneath now what appears the name of William E. R. Smith.

Mr. Storr: I offer that in evidence.

Mr. Lindabury: To prove the name of Mr. Rodman was under.

Mr. Storr: Yes.

The Court: You offer the book in evidence?

Mr. Storr: I offer those two pages, or I will offer the entire book.

By the Court.

Q. Mr. Kinsley, the book just now offered in evidence and marked C-2 for Identification, is a duplication of C-1, except as to these two additional plates to which you have referred? A. In so far as the prints appear. There are only four prints in this last book. Page 11 natural size, and one other three and one-third diameter enlargement, which appears in C-1, but that is all. There are only four prints in this whole book.

The Court: It will be received and marked in evidence by striking out the words "for identification."

Mr. Lum: May it please your Honor, I want to offer in evidence a copy of a last Will and Testament of William Runkle, dated the 26th day of April, 1911. It is a copy of the will just as it was executed, and I desire to offer to corroborate that by the attesting witnesses, and I would state for the record that this will was executed—the original—we do not have it—I don't know where it is. I offer it for two reasons. My contention is that the will now as offered, with the two sheets as they now exist, should be admitted to probate, and I will offer no objections against that. I do not want to take an inconsistent position.

If, however, after the examination of the law on the record as it now stands, it should seem to this Court that the two pages of the present will could not stand, I desire to be in position to establish the two pages as they were originally on that will, if possible. The document that I offer will also, in my judgment, have additional value, in that the language used is so nearly identical with the language used in the present instrument. On that ground I desire to be permitted to call the attesting witnesses to prove that this will was executed at the date stated, and in the form as shown in this document.

Mr. Griggs: If the Court please, I do not think that anything ought to be received in this case that cannot have some legal and proper bearing on the validity of the documents that are now offered for probate. If this were offered for the purpose of showing that the present documents had been superseded, for instance, by another will, it would be relevant. I cannot see how the fact that at a prior date Mr. Runkle executed a will can make any possible difference or have any possible effect on the issue now before the Court. If we had the original, signed by him, it could be of no effect whatever, because it is expressly revoked by the provisions of this document that is signed, whether it ever becomes a testamentary document or not.

The Court: What is the date of that?

Mr. Griggs: This predates the will which we have. It is dated the 26th of April, 1911. The will here is dated in 1912, and the codi-

cil in 1912, a year after this. The will is dated in May, 1912. Now, the fact that he made a will in April, 1911, I do not think can possibly throw any light on what he did in 1912 or in 1913 or in 1914. It is because of its effect that I object to it. It cannot have any effect whatever.

The Court: How is that relevant, Mr. Lum?

Mr. Lum: Why, we have considerable law to the effect that a revocation of a will induced by an assumption of fact which turns out to be false is inoperative. My theory is this, that if it should be held that the two sheets were obliterated and that that acted as a revocation—that that destroys the will now offered as a will——

The Court: Of the whole will?

Mr. Lum: Of the whole will. That if that should be held either here or elsewhere, then I would ask that this will should stand.

Mr. Griggs: Without seeing the original or accounting for it on the assumption that the original was destroyed, do I understand counsel to say that the office copy could be produced and offered in evidence to show that the original will which was presumably destroyed is extant? I do not think we can find any such doctrine as that.

Mr. Lum: I would be very glad to refer you to authorities. And, moreover, on the further ground that the language used in the will now offered is so similar that this might have evidential value. The question here is when the alterations were made, as well as other things, and the usual rule is, and presumption, that they were made

after execution. Now, in such cases everything of every kind that can throw any light has always been admitted. The Courts have always sought for everything of any evidential value which they could find. Now, the similarity of language would, it seems to me, bring this within the rule, and make it admissible, and I would say further to the Court that I would desire, if this is admitted, to offer to produce witnesses to state certain things said by the testator which I think also can be——

The Court: Suppose you prove that on the date of this alleged paper writing purporting to be a copy of his last Will and Testament that he made and duly executed a last Will and Testament, and that on the date of P-1 he destroyed that and executed P-1, in its original form, without pages 1 and 2; that is to say, with a half-page in place of 1 and 2, and 1 and 2 were subsequently written and put on to the will. If it is a proposition of law, which it seems to be almost impossible to believe, that by the destruction of the first half-sheet, to wit, pages 1 and 2, that operates as a revocation of the whole will P-1, then what is there to indicate that that was done with the intention to revise the will, a copy of which you have?

Mr. Lum: I simply say that under the decisions if his act was under a mistake either of fact or of law——

The Court: If a man has a will dated the 1st of January, and he makes another will on the 2nd of January, and in the second will he revoked the first one, and those two

wills are put in the safe, and after a little while he takes out the will of January 2nd, the later will, and destroys it, then you may say—or at all events you have got something to base your argument on that the will of January 1st is revised, because he revoked the second will, with the intention of reviving the first will, but how can you argue that he is revoking the second will with the intention of reviving the first will, which has already been described?

Mr. Lum: The testator executed a second will which was not good, and was invalid because not attested according to the statute. After executing the second will he canceled the first. The question was whether that was a revocation. It was held it was not because there was no self-subsisting independent act—it was done under the opinion that the second will had revoked the first—that was what induced him to tear up the first as of no use. It was held that the first will was unrevoked.

The Court: In this State in order to show the revival of a prior will when revoking the second will you have got to show that it was revoked with the intention of reviving the former will. I think, Mr. Lum, the way this matter is now appearing upon the record, that if your application is refused that you are going to be given the benefit of it perhaps more than you can prove. Your application now is an offer to prove something. Now, if you want to gain the advantage of your position, you better put your witness on and ask two or three questions, and then the Court can rule upon the situation.

Mr. Lum: I do not want to be understood as attacking the will.

The Court: You are mentioned in the codicil?

Mr. Lum: Yes.

The Court: And not in the will?

Mr. Lum: Not in the will, but I am not attacking the will.

CHARLES B. STORRS sworn.

Direct examination by Mr. Lum.

Q. I show you a document which purports to be a copy of the last Will and Testament of William Runkle, dated April 26, 1911, do you recognize it? A. That is a copy made from the original draft which was prepared for Mr. Runkle and which is not in my possession.

Q. What was done with that original draft from which this was prepared? A. It has been retained in my office since the original will—that is, the will of 1911—was drawn and executed by Mr. Runkle.

Q. Where was that original will of 1911 to which you have just referred, executed? A. In my office.

Q. Were you present at that time? A. I was.

Q. Who else was present? A. Miss Burk, clerk in my office—Miss Mary Burk.

Q. And was there anyone else there? A. That is all, and Mr. Runkle, of course.

Q. And who signed that document first? A. Mr. Runkle.

Q. What, if anything, did you do? A. I asked Mr. Runkle to put his finger on the seal, and I

said, "Mr. Runkle, in the presence of Miss Burk and myself, whom you ask to be witnesses to this, your will, you declare this to be your last Will and Testament, and you ask us to sign it as such will, and you state that that is your signature, and that it is your seal subscribed to your last Will and Testament"?

Q. What did he answer? A. He said, "I do."

Q. Then what did you do? A. Then I asked Miss Burk to sign; she signed as witness in my presence, Mr. Runkle standing by the table; I then signed in her presence, Mr. Runkle also standing in the same spot.

Q. What then was done with the original will? What was the date? A. April 26, 1911, Wednesday morning.

Q. What then was done with the original will? A. The original will was mailed to Mr. Runkle that same afternoon.

Q. By whom? A. By me.

Q. Have you ever seen it since? A. I never have.

Q. Will you tell us whether or nor this is an exact copy? A. So far as I know it is a copy, word for word, with the will executed at that time by Mr. Runkle.

Mr. Lum: I now offer it.

The Court: That is pretty indefinite, Judge.

Witness: Well, I will say this is the will executed by Mr. Runkle, was copied by my clerk from the typewritten draft which had been submitted to Mr. Runkle for his approval. It was compared by my clerk and me, she copying the typewritten draft in this form in longhand. The longhand copy

was exactly as the typewritten copy, word for word, and that was the copy that was executed by Mr. Runkle.

Mr. Griggs: May I ask, was it a typewritten copy that was executed by him?

Witness: A copy in longhand, the same handwriting.

Mr. Griggs: Then there were two longhand copies?

Witness: Only one longhand copy.

Mr. Griggs: Two longhand, one a copy?

Witness: The draft was typewritten. The will as prepared for his execution was written out in longhand like this.

Mr. Griggs: The will and the copy were in longhand. The original draft was in typewriting.

Witness: The original draft was in typewriting. The will as executed by him was in longhand. This (indicating) has been written out since these proceedings.

The Court: The testimony is that he made a draft of the will and submitted it to Mr. Runkle in typewriting, and after receiving his approval he made a will up in longhand writing which was executed, and that this paper which the witness holds in his hand is a copy of the draft from which the will executed by Mr. Runkle was made.

Mr. Griggs: Then I will ask the Court why we are not entitled to the typewriting —the original copy. It strikes me that that is the thing we ought to have.

Mr. Lindabury: I understood you to say in addition to what the Court recited that you had personally compared the one executed with the typewritten one by the aid

of your clerk? I understood you to say that.

Witness: Yes, sir.

The Court: He stated that he compared the draft approved by Mr. Runkle with the one executed by him.

Mr. Lindabury: That is what I understood.

Q. Have you compared this (indicating) with the typewritten draft? A. I have.

Q. Will you produce the typewritten draft also? A. To-morrow.

The Court: You haven't it here?

Witness: I haven't it here.

Mr. Griggs: I object, of course, to this, on the ground that so far as its effect on these documents is concerned it is immaterial and irrelevant; that this is not the time for them to establish another will; that it must be done in a separate proceeding on proper petition for probate, and they have their right—anybody has the right to come in even after this will is admitted to probate and show a later will.

The Court: That would be so if this were an appeal, but I understand Mr. Runkle, the brother, has filed a caveat with the Surrogate against the proof of any will, and this proceeding is not for the purpose of determining whether P-1 and 2 constitute the last Will and Testament of Mr. Runkle, but it is a proceeding to ascertain what is the last Will and Testament of Mr. Runkle, isn't it?

Mr. Griggs: I imagine that if we should find somewhere a recent will after this were

admitted to probate there is some way of getting it proved.

The Court: There isn't any open question or offer on the record.

Mr. Lum: I have offered this will as evidence.

The Court: You offer the copy in evidence?

Mr. Griggs: I do not object because it is not the typewritten copy. I object to the typewritten copy, if that be considered as offered. I object because neither of them are relevant or material or can have any bearing whatever on the issue.

The Court: What is the name of your client?

Mr. Lum: George McM. Godley.

The Court: Is it the only Godley mentioned in the will?

Mr. Lum: No; there are five other Godleys mentioned in the will.

The Court: The paper will be marked George McM. Godley Exhibit 1 for Identification. Where is Miss Burk?

Witness: She is in my office at Orange.

The Court: Objection sustained.

Mr. Taylor: I had not heard the offer after it was offered for identification.

The Court: That is simply to amend the offer, Mr. Taylor. The Court will withdraw its ruling to hear you.

Mr. Taylor: I didn't know anything about this matter until it came up now within the last fifteen or twenty minutes. Seems to me that the provisions of the prior will might bear some relation to the provisions of the will and codicil that are now before

the Court, which will be helpful, and I will ask that it be received.

Mr. Griggs: I would like to ask my friend what light it throws or can possibly throw on it.

Mr. Taylor: For instance, suppose this will here, the first two pages of this will, were absolutely identical with the first two pages of the will of 1912.

Mr. Griggs: But they are not.

The Court: If you compare this copy of the will of 1911 with P-1 and you find they are different, how does that help you to determine when the change was made?

Mr. Taylor: Of course it is only going to help your case (interrupted)——

The Court: Doesn't it complicate the case?

Mr. Taylor: No. I think that any light that can be thrown on it is to do good.

The Court: Any light that is helpful; but if you have too many shades of light you will be helplessly lost. Objection sustained.

Mr. Lum: I now offer to prove that shortly after May 12, testator stated that he had made his will and left his house and $300,000 to George McM. Godley.

Mr. Griggs: When did he say that?

Mr. Lum: Shortly after the will P-1 was made—shortly after the 11th day of May, 1912.

Mr. Griggs: I understand you cannot offer things of that kind. Call your witness.

Mr. Lum: I will simply say this. I do not want to offer something that I cannot prove, if I may have my ruling on it.

The Court: Make the offer first. If counsel on the other side are willing, the Court will not object.

Mr. Lum: I will substantiate the offer or consent that it be stricken from the record.

Mr. Egner: I think this ought to be done in the regular way.

The Court: Offer your witnesses and come to the precise point.

Mr. Lum: My difficulty is that I anticipated this case would take considerably longer and I haven't my witnesses here, and cannot get them here this afternoon. I don't see why Mr. Egner should insist on that, on my statement, that after it is ruled on I won't ask any advantage of the ruling; I will still substantiate that or consent on the record that it be stricken from the record.

Mr. Lindabury: If the Court rules it out the situation is as if you had proved it.

Mr. Lum: If he rules it out now, that ruling is of no weight, unless I bring my witnesses to substantiate.

Mr. Lindabury: Suppose it is ruled in, then you have got to bring your witnesses.

Mr. Lum: Exactly.

Mr. Lindabury: Then you get nowhere by considering the offer to-day. In either event the witnesses will have to be produced.

Mr. Lum: Exactly.

Mr. Taylor: Do I understand this is some statement of intention?

Mr. Lum: Not a statement of intention, but a fact.

Mr. Taylor: A statement made after he

had executed the will, not that he had made the codicil.

Mr. Lum: No, not with reference to the codicil.

Mr. Taylor: Said that he had done that which is contained in the first page of the will?

Mr. Lum: Yes.

The Court: That is to say, that he gave Mr. Godley the place on Center Street and $300,000.

Mr. Taylor: I think it is all too indefinite. I object.

The Court: Cannot be effective, statements made subsequent to the testamentary disposition. Statements made at the time or prior to it are evidence under the Ready case.

Mr. Lindabury: I understand this as a later date.

The Court: This is a later date. A statement by the testator that I made a will yesterday in which I left you so much money —that is hearsay testimony. In view of the position which you desire this matter placed —you do not seek any advantage by it—it isn't necessary for the Court to do any more than to indicate its opinion.

Mr. Lum: Permit me an opportunity to perfect the record.

The Court: How are you seriously interested in the matter, the codicil is the one under which you claim?

Mr. Lum: Yes.

The Court: What difference does it make to you what he said? You are going to get your money anyway.

Mr. Lum: Thank you.

The Court: No; you needn't thank me yet, because the situation is a tentative situation.

Mr. Lum: That is what I was afraid of.

The Court: It is a hypothetical situation. Assuming, no matter what happens, if anything results in the upholding of any part of this instrument it will be the codicil. Now, under those circumstances how are you affected by any subsequent statement?

Mr. Lum: Simply this, your Honor, the document that we have now offered and which your Honor has overruled, on the first two pages leaves to my client the house in question and $300,000, if it should be held that the will, P-1, as now offered, the first two pages of it, cannot be considered for any reason, I then want to be in a position to argue that the two sheets as written on that will gave to George McM. Godley $300,000 and house.

The Court: You can't do that, without producing those first two sheets.

Mr. Lum: That was part of my ground for offering this will which does leave on the first two sheets to George McM. $300,000 and the house.

The Court: That is another will.

Mr. Lum: Then if I could bring evidence to show that the testator made the statement that he had done that it would be, in my judgment, strong evidence to support the contention, and that is all I am asking.

The Court: You are endeavoring to prove a written instrument by the declaration by the testator made subsequent to the time.

That is too remote. Is the $300,000 in the codicil?

Mr. Lum: No, $50,000 in the codicil.

Mr. Griggs: What other differences are there in this present will, Mr. Lum, in the will that Judge Storr drew?

Mr. Lum: Quite a number. Do you make any attack on the codicil?

Mr. Griggs: The codicil is revoked by the action of the testator in mutilating the first page of his will by tearing it off and substituting another. Then my claim—I am perfectly willing to state the whole claim to counsel now,—if they want it—I think this is a case that ought to be argued almost academically—I state frankly to counsel that I intend to claim that the document is of no validity whatever because the modification of it by the change of the first two pages has rendered it impossible for the Court to say what is intended.

CASE CLOSED.

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER OF The Application for Probate of certain paper writings as the last Will and Testament and Codicil of William Runkle, deceased.	*On Caveat.* *Opinion.*

Mr. ROBERT H. MCCARTER and Mr. ARTHUR F. EGNER (MCCARTER & ENGLISH), of Counsel with and Proctors for WILLIAM E. R. SMITH, Proponent, and with A. S. WEILL (Pennsylvania Bar), for Elizabeth Haines, Legatee.

Mr. RICHARD V. LINDABURY and Mr. FREDERICK J. FAULKS (LINDABURY, DEPUE & FAULKS), of Counsel with and Proctors for Edith J. Adams, Legatee.

Mr. RALPH E. LUM (LUM, TAMBLYN & COLYER) of Counsel with and Proctor for George McM. Godley, Legatee.

Mr. HENRY B. CONDICT (CONDICT, CONDICT & BOARDMAN), of Counsel with and Proctor for Carrie R. Scholfield, Legatee, and Charles P. Scholfield.

Mr. WILLIAM HUCK, Jr., of Counsel with and Proctor for the College Board of the Presbyterian Church of the United States, Legatee.

Mr. JEHIEL G. SHIPMAN (FORT & FORT) and Mr. HOWARD TAYLOR (New York Bar), JOHN G. JACKSON (with them on the brief), of Counsel with and Proctor for William H. Hulick, Legatee.

Mr. JOHN W. GRIGGS with Mr. CHARLES H. WERNER (New York Bar), of Counsel with and Proctor for Harry G. Runkle, Caveator.

Mr. CHARLES B. STORRS of Counsel with and Proctor for Randolph Rodman, Executor.

MARTIN, *J.:*

William Runkle, late of Orange, died Saturday, the 31st day of January, 1914, possessed of a considerable estate. A paper writing bearing date of May 11th, 1912, purporting to be his last Will and Testament, and a paper writing bearing date April 29, 1913, purporting to be a codicil thereto, were presented by proponent to the Surrogate for probate. A caveat was filed by Harry G. Runkle, a brother of decedent, the nearest of kin surviving. The Surrogate issued citations to all parties interested and after a hearing the questions involved were submitted for determination.

The paper writings are in the handwriting of the decedent. They were in his custody immediately prior to his death, folded together and contained in a large unsealed envelope (with a list of securities), endorsed, "Last Will and Testament of William Runkle." The envelope is stained with dirt, and parts of the surfaces are rubbed off showing considerable wear.

The first paper writing, which will be designated as the will, is upon paper of legal cap size. The pages were not numbered, but, for the purpose of convenience, they have been numbered in pencil since the death of the decedent and before the handwriting and ink experts made the excellent and instructive photographs which are in evidence.

The will is substantially as follows:

Pages 1 and 2.

"In the name of God, Amen, I, William Runkle widower, of * * Orange * * do make, publish and declare this my last Will and Testament in the manner and form following,"

(1) directs payment of debts and funeral expenses and (2) burial at Asbury in the family plot, (3) devises a residence on Center Street and all house hold and domestic articles to Wm. H. Hulick, except such articles as Kathryn Tully may choose. (4) bequeaths to Jesse Godley $25,000. (5) Elnora Godley, $10,000. (6) Alfred J. Gerard, $10,000.

At this point there is a line on the paper not written upon.

"7. I give and bequeath to my friend William H. Hulick of the City of New York the sum of Fifty Thousand ($50,000)."

This completes page two on the back of and at the end of first half sheet.

Pages 3 to 12 inclusive.

At the top of page three is a repetition of the amount "(50,000)" without a new paragraph or sentence,

"($50,000), but in case he shall die in my lifetime then I give and bequeath the same to his child or children who shall be living at my decease in equal parts."

(8) Bequeaths to Frank W. Campbell $25,000.

"(9) I give and bequeath to my friend Charles I. Scholfield of the City of New York the sum of Twenty-five Thousand Dollars ($25,000)."

"Cancelled October 5th, 1912, Wm. Runkle."

(10) Bequeaths to Carrie R. Scholfield $25,000; (11) Edith J. Adams $100,000; (12) Camilla Hill $10,000; (13) John W. Hulsizer $15,000; (14) Samuel A. Bristol $50,000; (15) Kathryn Tully $50,000, and any articles and paintings in the house in Orange which she may select; (16) Delia Fanning $5,000, Dietrich Kindsgrab $5,000, Maurice Lynch $5,000, Bridget Gavin $5,000, Margaret G. Hanley $5,000, Bartley Sherlock $2,000, William Sauer $1,000, Mrs. Kate Shanley $1,000; (17) Lafayette College $100,000; (18) Orange Orphan Society $25,000, Orange Free Library $25,000, St. Mary's Hospital $25,000, Orange Memorial Hospital $10,000, Children's Aid & Protective Society $10,000, Orthopaedic Hospital $10,000; (19) Board of Home Missions of Presbyterian Church $25,000; (20) Presbyterian Board of Relief $50,000; (21) College Board of Presbyterian Church $25,000; (22) American Sunday School Union $25,000; (23) Fidelity Trust Company $10,000 in trust for Board of Trustee of Presbyterian Church of Asbury, Warren County; (24) Fidelity Trust Company, in trust $750,000, to pay one-third of income to Harry G. Runkle (caveator) for life, one-third to a nephew, Daniel Runkle, and one-third to a niece, Mary G. Runkle, and provides for income to be paid representatives in event of decease of such legatee; (25) Fidelity Trust Company $30,000, in trust for Elizabeth Haines; (26) Fidelity Trust Company $10,000, for Presbyterian

Church Cemetery at Asbury; (27) devises and bequeaths remainder to Harry G. Runkle, and releases him from all debts and directs that any obligation be released to Harry G. Runkle.

"28. I hereby nominate and appoint my friend William E. R. Smith, of East Orange, New Jersey, * sole executor * * * "

"Wm. E. R. Smith to be executor."

Here follows permission to satisfy legacies in securities, at values fixed by executor, direction to pay inheritance taxes, and revocation of all former wills. In the margin opposite the figure 28 is written "Wm. E. R. Smith to be executor." On page eleven the writing of "Wm. E. R. Smith" and "East" is blurred. They are written over a chemical erasure of the name "Randolph Rodman" and the word "South." The words at the beginning of paragraph 28 were originally

"28. I hereby nominate and appoint my friend Randolph Rodman of South Orange, New Jersey * sole executor," etc.

The will is signed "Wm. Runkle" with a seal affixed, and the usual attestation clause signed by the witnesses is appended.

The execution of the will was in accordance with the provisions of the statute.

The codicil is as follows:

First Codicil,

"Made April 29th, 1913.

"I hereby give and bequeath to George McM. Godley of the City of New York the

sum of Fifty Thousand dollars; and to his brother Frederick A. Godley the sum of Twenty-five Thousand dollars.

"I also give and bequeath, if they are in my employ, at the time of my decease, to Nancy Shields the sum of $1,000 and to Catherine Byrnes and to John Gilleran the sum of Five Hundred dollars each."

(Signed) "Wm. Runkle."

Witnesses:

"Chas. Hasler 545 Springfield Ave, East Orange, N. J."
"John Burkhardt, Orange, N. J."

The proofs show due execution of the codicil although no attestation clause is appended.

The first and second pages of the will are written on the front and back of one-half sheet of legal cap and the third and fourth pages are on the front and back of another half-sheet. These two half-sheets are not physically connected with each other except by the two clips hereafter described. The fifth, sixth, seventh, and eighth pages are written on the front and back of a full sheet of legal cap; the ninth, tenth, eleventh and twelfth pages are written on the front and back of a second full sheet of legal cap and the codicil is upon a sheet of legal cap, the writing covering about three-fourths of the first page which constitutes the thirteenth page of the testamentary contents of the envelope. The remaining three pages of the sheet upon which the codicil is written are blank.

The second half sheet of the will pages three and four, and the other two full sheets, pages five to twelve inclusive, are fastened together by a fastener known as a "Challenge" fastener. This half sheet

and the two sheets are perforated by two round holes. The fasteners were inserted and crushed down at the front near the top of page three. The edges are rough and indurated. It has been referred to as the "mushroom or eyelet" end of the fastener. The other end at the back of the fasteners on page twelve is round and smooth. Under the spread or mushroom of the Challenge fasteners upon the face of page three are several small pieces of paper, indicating that the original half sheet forming the other half of the sheet upon which pages three and four are written was apparently originally fastened under the spread or mushroom of the Challenge fasteners and probably later torn off. The half sheet now offered for probate, upon which pages one and two are written, is not perforated by the challenge fastener and is merely attached to the other half sheet, the two sheets constituting the remainder of the will, and the sheet upon which the codicil is written, by means of two wire clips known as "Gem" clips placed over the top and holding the first half sheet at and in the front of, and the codicil at the back of, the half sheet and the two sheets constituting the body of the will, pages three to twelve.

The water-mark indicating the manufacturer and year of production of the paper on the first half sheet, pages one and two, on the second half sheet, pages three and four, and the remaining two sheets of the will, pages five to twelve inclusive, is "Old Berkshire Mills 1908," and on the last sheet, the codicil, pages thirteen, fourteen, fifteen and sixteen, is "Old Berkshire Mills 1910." Both years are prior to the dates of execution of both instruments.

The fronts of the mushroom or eyelet of the fasteners upon page 3 have made marks by pressing against the bottom of page 2 which show through

the paper on the front of page 1. This "pressure" mark on the first half sheet appears to be the result of long contact. There is no "pressure" mark at the back end of the fasteners on the codicil.

A partially perpendicular tear in the papers, about an inch in length at the top of first and second half sheets and the other two sheets constituting the will and codicil, was made while the paper writings were in the custody of testator. This tear is almost the same in the half sheets and in the two whole sheets but slightly less in the codicil and was not made recently. No doubt the force that caused the tear in the sheets of the will was sufficient to tear the sheet upon which the codicil is written. It may reasonably be inferred that they were done at the same time and therefore the codicil was attached to the will at the time it was torn.

The folds in the first half sheet consist of a well-worn horizontal fold across the middle of the sheet and two slightly worn folds, one about a fourth of the space down on the half sheet and the other about three-fourths of the space, and are precisely opposite similarly worn folds in the other half sheet and the two sheets constituting the will.

A microscopic examination of the lines printed on the papers discloses a slight variation. The ruling of the first half sheet was done at some time other than at the time that the ruling on the other half sheet and two remaining sheets offered as the will was ruled.

The ink on pages one and two is different from the ink in the body of pages three to twelve inclusive. On page three, where the cancellation is made, the words "Canceled October 5, 1912, William Runkle," are in a third ink. On page eleven the words "William E. R. Smith to be executor"

in the margin and "William E. R. Smith" and "East" written over a chemical erasure, are in a dark ink that somewhat resembles the ink of pages one and two, but is different from it. The codicil is in a thick black ink in some respects resembling the ink of pages one and two, but is thicker, heavier and blacker. The ink in the signature to the codicil appears to be the same as the ink in the body of the codicil. The witnesses' signatures to the will are in the same ink, but different from that in the body of the will. The witnesses' signatures to the codicil are in two different inks, different from the codicil and the signature of the testator.

Pages one and two were written with a pen different from that which wrote pages three to twelve inclusive. The words "Canceled October 5, 1912, William Runkle," were written with a different pen from that of either pages one and two or the body of the will, pages three to twelve inclusive. The signature to the will on page twelve was made with a pen different from the one which wrote the body of the page. The body of the codicil was written with a pen other than the ones referred to, and the signature to the codicil was written by another pen. The differences in the pens are shown by the appearance under examination by a microscope of strokes and pressure used.

The distinguishing characteristics of the handwriting on pages one and two as compared with that of pages three to twelve inclusive are that the letters in the latter are more carefully formed and compactly spaced. This is shown particularly on the lower part of page two where a line is not written upon at the end of paragraph 6 and another line is not written upon after that part of paragraph 7 which is on page two. The size of the

writing on pages one and two appears to differ from the remaining pages of the will. The handwriting of the codicil is larger and coarser than that of any part of the will.

In paragraph 28, page eleven, the words "William E. R. Smith" and "East" were written over a chemical erasure which decolorized the original ink but did not remove it sufficiently to make it impossible to decipher what was originally written. A study with a microscope or magnifying glass and by photographically enlarging the parts shows that the original was "Randolph Rodman of South Orange," written in the same handwriting as the body of the will. This was admitted at the hearing.

The witnesses to the will and codicil are Charles Hasler, the assistant cashier, and John A. Burkhardt, the receiving teller of the Orange National Bank in which testator had an account. Both were well known to Mr. Runkle for many years. On May 11, 1912, testator called at the bank and stated to them that he wished them to witness his will. At the time testator held the document he referred to in his hand. They accompanied him to the directors' room in the rear where he signed the will in their presence. The will was folded and laid on the table so that they could not see more than the last page (12) upon which their signatures appear. They state that there were several other papers the number of which they are unable to give. The witnesses have a reasonably clear recollection of the circumstances of the execution of the codicil. This had been signed by the testator when he brought it to the bank. The witnesses were standing close together in the teller's space, partitioned off from the space used by customers.

The testator acknowledged his signature and stated that it was a codicil to his will and desired them to witness it. The witnesses observed that the codicil was attached to other papers at the top but they are unable to say that the sheets constituting the will offered are the same sheets and half-sheets they saw, because the papers which were attached to the codicil were folded over. They appeared to be the same kind of paper.

The testimony does not give any other information relating to the preparation of the two paper writings. Apparently no one saw them, except the testator and two witnesses, until after his death. Miss Kathryn Tully, a member of his household, saw the envelope in the week preceding his death. The testator brought the envelope in a wallet to the house and placed it on top of his desk in the sitting room, directing Miss Tully, if anything happened to him, to deliver the wallet to Mr. Smith (the proponent). After the death the wallet was delivered to proponent and by him the contents of the envelope were delivered to the Surrogate in the same condition in which he received them.

Mr. Smith testified that on the Thursday of the week preceding and nine days before the death, he had a conversation with testator with reference to a friend of whose will Mr. Smith was executor, and in the course of the conversation testator said, "I didn't intend to tell you, Billy, but you have another" referring to the fact for the first time that he had appointed Mr. Smith executor, and told him that if anything happened Miss Tully would notify him. This conversation cannot be considered as any evidence of the contents of the will because it is a subsequent declaration. *State* v. *Ready,* 78 L., 599-609. If it were competent for any purpose

it might tend to show the alteration was very recent.

Proponent requests probate of pages one and two with pages three to twelve inclusive as amended with his name inserted as executor as the last Will and Testament, except the ninth provision, page three, in favor of Charles P. Scholfield, and probate of the codicil.

The caveator contends that by the removal of the first half-sheet of the will, the contents of which are unknown, and the attempted substitution of another half-sheet subsequently written, the testator has so mutilated the will as to make it impossible to ascertain what is his will as executed. Citing *Trelaor* v. *Levy,* 14 Prob. Div., 49; *Sweetland* v. *Sweetland,* 34 L. J. P. & M., 42; s. c. 4 Sw. & Tr., 6; *Leonard* v. *Leonard,* P. D., 243 (1902), all of which are cases of alteration, by destruction of certain original and substitution of unattested and unexecuted sheets. The caveator also contends that this mutilation is presumed to have been after the execution of the codicil, and that the will and codicil thus destroyed so far beyond the capability of restoration are revoked. The caveator agrees with proponent that the ninth paragraph was canceled by the lines and marginal notations, but asserts that the appointment of the executor was canceled by the erasure of the name Randolph Rodman, and insists that it was done with the intention of revoking the appointment, and that the appointment of William E. R. Smith is not effective.

Charles P. Scholfield contends that the ninth provision of the will was not revoked in a writing duly witnessed by two persons in pursuance of what he insists is the statute which should control this branch of the case.

Randolph Rodman contends that the pages one and two and three to twelve inclusive, with the codicil, should be admitted to probate with the exception of the ninth provision, and that letters testamentary should be issued to him because the doctrine of dependent relative revocation applies to the cancellation of his name and the writing in of the name of William E. R. Smith.

George McM. Godley, a legatee mentioned in the codicil, contends that the pages one and two were inserted in place of original pages one and two and asserts that the will was copied from a will prepared by Charles B. Storrs and executed by testator on the 26th of April, 1911. A copy of the former will was offered in evidence but was rejected by the Court because it was not first shown that the contents of pages one and two as originally written were copied from the Storrs will. George McM. Godley also contends that the doctrine of dependent relative revocation applies to the first and second pages and that the will as admitted to probate should be the same as the Storrs will up to the middle of the seventh provision. There are no facts in evidence showing the contents of the original first and second pages and therefore there is nothing upon which to base any such inference. The contention will not be considered.

The other legatees who have appeared desire generally the same result as that prayed for by proponent.

The questions presented for determination are: (a) whether or not the first half-sheet, consisting of pages one and two, is a part of the will; (b) whether or not paragraph ninth of the will is revoked, and (c) whether or not the erasure of the

name of Randolph Rodman of South Orange and the insertion of the name William E. R. Smith of East Orange are a part of the will; and as subsidiary to this question, whether the appointment of the executor was revoked by obliteration and the right to name the administrator with the will annexed goes to the residuary legatee, or whether it is a case of dependent relative revocation and the name of Randolph Rodman remains in the will when probated as it was at execution.

It has been argued with great force on behalf of the proponent and particularly on behalf of the legatees who are mentioned in the first half-sheet, that the testator's purpose ought to be effectuated and that the testator's estate was accumulated by him and his distribution of it ought to be legalized if possible. On the other hand it is contended with equally strong emphasis that a person by adopting the plan of writing his own will ought not to have the privilege of perpetually amending it, reserved to him, and that the heir and next of kin should not be deprived of their inheritance without actual compliance with the safeguards provided by the Legislature. The suggestions are interesting but may not control as the ultimate result may properly be reached by deciding the questions (a), (b), and (c) above stated.

The first question is whether or not the first half-sheet is a part of the will. The caveator contends, with respect to the removal of the original first half-sheet, that pages five to twelve are on legal cap consisting of two complete sheets, the half-sheets of which are unsevered at the top; that pages three and four are on a half-sheet of legal cap, the original half-sheet having been torn off; that pages three to twelve have perforations

through which permanent challenge fasteners were inserted which did not include the first half-sheet now offered for probate; that the top of the fasteners contained remnants of paper, confirming the fact that a half-sheet had been torn off; that pages one and two as offered are written on a half-sheet of legal cap of a different ruling from that of the body of the will; that pages one and two are written with a different pen and ink from the remainder of the body of the will and that at the bottom of page two occurs a spacing showing that the writer was endeavoring to fill out the page to meet the top of page three to make it appear in an orderly and natural manner, but repeated the figures ($50,000) in brackets. There may be little dispute about any of these grounds advanced by caveator and it seems that the will as originally written apparently did not contain the first half-sheet now offered. The question to be determined may be solved by ascertaining when the first half-sheet offered was written and annexed to the body of the instrument. There is no extrinsic, positive and direct evidence to show when it was done, whether (1) before the execution of the will, (2) after the execution of the will and before the execution of the codicil, or (3) after the execution of the codicil.

The rule as to the presumption or burden of proof where alterations appear in a will offered for probate is considered in the case of *Cooper* v. *Bockett,* Privy Council (1844), 10 Jurist, 931; 4 Moore's P. C. C., 419. In that case Lord BROUGHAM said, Jurist, 936; Moore, 449, that there were two questions to be considered:

> "First: At what time were the alterations made? * * * Secondly: If that point

> cannot be ascertained, is the instrument to be read as it originally stood, or are the alterations to be admitted as a parcel of it? * * *"

After reviewing the testimony which showed that when the will was executed the witnesses observed no changes nor alterations he proceeds, Jurist, 936; Moore, 450:

> "Whoever propounds an instrument which, on the very face of it, exhibits grounds of great doubt, must remove those grounds and clear up the doubt."

This case was followed in 1848 in *Lushington* v. *Onslow,* 12 Jur., 465; 6 N. C., 183. The question there was as to the effect of alterations in a will with a codicil attached, and it was held that the presumption is against the alterations, since it is reasonable to believe that if the alteration had been made before the execution of the codicil some notice would have been taken of the alteration in the codicil.

In *Shallcross* v. *Palmer,* 15 Jur., 837, 839, Lord CAMPBELL declared that certain unattested alterations in a holograph will must be presumed to have been made after execution. He commented upon the dangerous facility which would be given to a testator to alter his will after execution unless the doctrine were upheld.

In *Greville* v. *Tylee,* 7 Moore P. C. C., 320, Privy Council (1851), there was an erasure and over it new matter inserted. Dr. Lushington said:

"We apprehend it to be now settled that whoever alleges such an alteration to have been done before the execution of the will is bound to take upon himself the *onus probandi.*"

The Court of Probate in 1858, when the question arose as to the effect of erasures so complete as to baffle all efforts to ascertain the obliterated words, said the presumption is that the erasures were made subsequent to execution, and that as to the parts totally erased probate should be had in blank. Goods of Elizabeth Stone James, 1 Swab. and Trist., 238.

In *Williams* v. *Ashton,* 1 Johns and H., 115, over an erasure certain provisions were written. The attesting witnesses said that testatrix told them at the time of the execution that she had made some alterations. The will was so folded, however, that they did not see what the alterations were. The vice-chancellor held that the onus was upon the party who sought to derive an advantage from an alteration to adduce evidence from which it might be inferred that the alteration was made before execution. This is followed substantially in *Gann* v. *Gregory,* 22 L. J. Eq., 1059, and *Simmons* v. *Rudall,* 1 Simons (N. S.), (115-137). See also *Burgoyne* v. *Showler,* 1 Robt. Eccl., 5; 8 Jur., 814, and *Rowley* v. *Merlin,* 6 Jur. (N. S.), 1165 (1860).

In 1 Jarman on Wills, 162 (Star., p. 118), at page 156, it is stated:

"If there be a codicil to a will and the codicil refers to unattested alterations in the will, this incorporates them in the will. If the codicil takes no notice of them, the

presumption is that they were made after the date of the codicil (citing *Lushington* v. *Onslow* and *Rowley* v. *Merlin*), and the same presumptions held regarding mutilations" (*Christmas* v. *Winyates*, 32 L. J., 73).

Van Buren v. *Cockburn*, 14 Barb., 118-122, holds that when it is made clear that a will has been altered the presumption that it was the same paper that was executed disappears; and that without evidence of the time of alterations they are presumed to have been made after execution. In New Jersey the diligence of counsel has produced only one case that touches the question.

In *Ward* v. *Wilcox*, 64 Eq., 303, Chancellor MAGIE, sitting as ordinary says, at page 308:

> "*In cases arising upon wills made before as well as after the adoption of that act, the English Courts held that where alterations are apparent upon the face of the will the presumption is that they were made after execution. A distinction is made between such alterations in wills and in other documents, on the ground that an alteration of the latter after execution involves either fraud or crime, and no presumption of either can be made, while a testator may alter his will at his pleasure, without committing either fraud or crime. Doe, Shallcross* v. *Palmer*, 16 Q. B., 747; *Cooper* v. *Bockett*, 4 Moo. P. C. C., 419; *Greville* v. *Tylee*, 7 Moo. P. C. C., 320; *Doe, Tatner* v. *Catsmore*, 16 Q. B., 745. * * *
>
> "Text writers seem to agree that the presumption is of an alteration after execution.

Schoul. Wills, 435; Underh. Wills, 268; Page Wills, 431, 432; Tayl. Ev., 180, 868; 1 Jarm. Wills (R. & T.), 304). *The common practice to note at the foot of a will about to be executed any alteration, in such manner as that the execution by the testator, and the attestation by the witnesses may include and recognize them as theretofore made, will, I think, justify a presumption that unnoted and unattested alterations were made after execution. So I shall assume, without deciding that, upon the production of the paper in dispute before the Court, with a plainly apparent alteration, a presumption was at once raised that such alteration had been made by Miss Ward after its execution.* Nor do I deem it necessary to decide what effect would have been produced if such presumption had been left unrebutted.

"That such a presumption as I have assumed may be overcome and rebutted by competent and sufficient evidence justifying the conclusion that the apparent alteration did, in fact, exist at the time of the execution of the paper, is in accord with reason and the authorities above cited."

This case was affirmed on the opinion below in 65 Eq., 397, and cited with approval, 40 Cyc., 1288, n. 47.

The proponent contends that the presumption at common law was that unexplained alterations were made before the execution of the will and that *Cooper* v. *Bockett,* which is said to be the leading case after the Wills Act, is usually cited erroneously as authority for the common law and that the learned Chancellor in the case of *Ward* v.

Wilcox, inadvertently seemingly approved the error. This was the first case arising after the Wills Act, 1 Vict., Chap. 26, and holds that the presumption is that unnoted and unexplained alterations are made after execution of the will. Proponent lays stress upon the fact that, in the course of the argument it was conceded by counsel attacking the will, that prior to the statute the presumption was in favor of the alteration having been made prior to the execution of the will, Jur., 935, s. c., 419-445. In *re Streaker,* 4 Sw. & Tr., 192, s. c., 28, L. J. Prob., 50. It is not readily understood why a concession by counsel should be accepted as an authoritative utterance of a principle of law. In the case of *Simmons* v. *Rudall, supra,* at page 137, the Court holds that alterations in a will probated in 1821, before the enactment of the statute, are presumed to have been made after the execution of will (see also 1 Wms. Ex., 390, 7th Am. Ed.), and that such was the presumption prior to *Cooper* v. *Bockett.* It is urged by proponent that the decision in *Cooper* v. *Bockett* is based upon the statute only, and that without the statute the decision would have been that the presumption is that unnoted and unexplained alterations are made before the execution of the will. This requires consideration of the provisions of the statute. 1 Vict., Ch. 26, Sec. 21, which is as follows:

> "No * * * alteration made in any will *after the execution thereof,* shall be valid or have any effect * * * unless such alteration shall be executed in like manner as required for the execution of the will; but the will *with such* alteration as part thereof, shall be deemed to be duly executed, if the signatures of the testator

> and * * * witnesses be made in the margin * * * opposite to or near the alteration, or at the foot or end or opposite to a memorandum referring to such alteration. * * *"

The theory of the decision advanced by the proponent is that because the alteration then in question was not noticed in the margin or otherwise, therefore, it was not executed and it was consequently invalid. This seems to be a misapprehension of the decision. *The statute does not provide that all alterations which are unnoted shall be invalid.* It provides that those alterations which are *made after execution* are invalid unless the will is re-executed, and it shall be deemed to be re-executed if the alteration is noted by the signature of the testator and witnesses. An unnoted alteration made prior to execution is valid under the statute. In *re Goods of Cadge,* 1 L. R. P. Div., 543; 37 L. J. P., 15; *Duffy,* 5 Ir. R. Eq., 306; *Moore* v. *Moore,* 6 Ir. R. Eq., 166; *in re Goods of King,* 2 Sw. & Tr., 621; *Deuch* v. *Deuch,* 46 L. J. P. Div., 13; 2 L. R. P. Div., 60; *Hindmarch,* 36 L. J. P., 24; L. R. 1, page 307, and *Shearn,* 50 L. J. P. Div., 15; 43 L. T. N. S., 736; 29 W. R., 445, and it is for this reason that Lord BROUGHAM considers the evidence offered and reaches the conclusion that there is nothing to show when the alteration was actually made. The question in *Cooper* v. *Bockett* was as to the presumption or burden of proof to show when the alteration was made. If made before execution it was valid; if made after execution of the will without re-execution and notice by the testator and witnesses, it was invalid. If made after execution and the will were again executed,

and the alteration noticed, then it would be valid. As the alteration in that case was not noticed it was not valid, if made after execution, because it was not re-executed in compliance with the statute. The question therefore was whether the unnoted and unexplained alteration should be presumed to have been made before execution and become a valid part of the will or should be presumed to have been made after execution and thus be invalid. It was held that the burden of proof was upon the person who asserts that the alteration was made prior to execution to show that fact. It is also asserted by proponent that most of the text writers (except 1 Greenleaf on Ev., 702; Best on Ev., Sec. 229) and many of the decisions cite—as authority for the proposition that alterations are presumed to have been made after the execution of the will—decisions in England after the enactment of the statute and not before. This overlooks the real point in *Cooper* v. *Bockett* as shown in *Simmons* v. *Rudall.* Proponent urges that the learned Court in *Ward* v. *Wilcox* having reached the conclusion upon the facts that the alteration was actually made prior to the execution of the will, that whatever the Court says as to the presumption of law as to when an alteration is presumed to have been made is *obiter dictum.* Technically this may be correct but the distinguished Chancellor who decided that case gave very careful consideration to the subject-matter. His opinion, based upon the important reason he refers to and approved by the Court of Errors and Appeals, should be given greater weight than the concession by counsel on the argument in *Cooper* v. *Bockett.*

It is not necessary to make a more extended examination of the cases because the solution of the

question seems to be stated in *Ward* v. *Wilcox, supra;* 40 Cyc., 1097-1275; 6 n., 67, and *Simmons* v. *Rudall, supra.* A presumption arises from an unexplained alteration of a will that the alteration was made after execution and that the burden of proof is upon any person asserting to the contrary to show that it was made in fact before execution.

In text books and cases in which it is stated that the presumption is that alterations were made subsequent to execution it is stated that it is a rebuttable presumption, and in the cases holding that the burden of proof is upon the person who seeks an advantage by alteration, it seems that the courts have stated what amounts practically to the same principle, viz., that when an alteration appears and there is no testimony to show when the alteration was made the law cannot definitely say that the alteration was made before execution. *Wilton* v. *Humphreys,* 176 Mass., 253-257, IV; Wigmore on Evidence, 3570, Sec. 2525 (elaborate note).

In the case at bar, it may be that the half-sheet upon which the first and second pages are written was not in the will at the time of execution of the will, but by comparing the first half-sheet with the sheets of the will and codicil it is apparent that it was written prior to the execution of the codicil. The worn folds in the first half-sheet are similar to the folds in the half-sheet and two full sheets of the will. None of the folds of the codicil are so much worn. The first half-sheet appears as old and generally as much used as the other sheets of the will. The sheet of the codicil appears comparatively new. The tears in the first half-sheet are the same as in the sheets of the will and there is a slight tear in the sheet of the codicil. The "pres-

sure" marks of the mushroom or eyelet of the Challenge fastener show that the first half-sheet was in contact with and in a position next to the eyelets for a considerable period of time. The first half-sheet contains a bequest to William H. Hulick of the house and furniture, except such articles as Kathryn Tully may select, and in the body of the will a bequest is made to her of such articles. These two provisions are inter-dependent. Although not altogether satisfactory the foregoing facts are some internal evidence that the first half-sheet is a constituent part of the body of the will. Without other evidence, the annexation of the first sheet to the body of the will by the same means employed to attach the codicil is entirely consistent with the fact that they were done at one and the same time, and, as the evidence shows, the codicil was annexed before execution, it may be inferred that the first half-sheet was also in position prior to execution of the codicil. The dates of the water marks are consistent with this result. Under all the circumstances of the case the Court is constrained to hold as a fact that the first half-sheet containing pages one and two was prepared and annexed to the will prior to the execution of the codicil.

If the will were altered after execution and then republished and confirmed by the codicil the altered instrument was validated. Shouler on Wills, par. 434; *Burge* v. *Hamilton,* 72 Ga., 568; *Tyler* v. *Merchant Tailor's Co.,* 15 P. D., 216; 40 Cyc., 1218; Redfield on Wills, p. 372; *Camp* v. *Shaw,* 52 Ill. App., 241, aff'd 163 Ill., 144; s. c., 45 N. E., 211; *Blackett* v. *Ziegler,* 133 N. W., 901; *Corr* v. *Porter,* 33 Grattan, 278; *Kip* v. *Van Cortland,* 7 Hill, 346.

In *Attorney General* v. *Downing,* 2 Amb. (Eng. Chan.), 571, the Lord Chancellor, quoting from Rollins' Abridg. says:

> "There are two ways by which a codicil operates as a republication of a will: 1. By being annexed to it; 2. By the contents showing the intention."

See also *Hubbard* v. *Hubbard,* 64 N. E. (Ill.), 1038; *Tyler* v. *Merchants Tailors Co., supra.*

The valid execution of a codicil is a re-execution of the original will in the form in which it existed as the time of the execution of the codicil and no precise form of words nor even an apparent intention to republish is necessary. 1 Woerner on Adm., 86; Jarman on Wills, 191; Underhill on Wills, Sec. 216; *Haven* v. *Foster,* 14 Pick., 534.

In the case of *Shaw* v. *Camp, supra,* it was held that an unsigned unattested sheet making an additional bequest attached to a will after its execution is made effective as part of the will by a subsequent codicil duly executed and attested, attached thereto.

In the Matter of Campbell, 170 N. Y., 84; 62 N. E., 1070, testator duly executed the will, and thereafter executed a second will, containing a provision expressly revoking all prior wills; later he made a codicil to his first will, wherein no reference was made to the latter will and it was held that the effect of the codicil was to revive and republish the earlier will as of the date of the codicil so that the codicil and the earlier will constituted the final testamentary disposition of testator. The same result was reached in the cases of *Blackett* v.

Ziegler, supra; Neff., 48 Pa., 501; and *in re Knapp's Will,* 23 N. Y. Sup., 282.

If a testator makes his will while *non compos* and afterwards recovers his understanding and executes a codicil to his will the execution of the codicil republishes the will. 1 Williams' Executors (7 Am. Ed.), 267.

A duly executed codicil attached to or referring to a paper which was never duly signed or published as a will is a republication of the paper writing in question and has the effect of giving operation to the whole as one will. *Beall* v. *Cunningham,* 42 Ky., 390; 39 Am. Dec., 469; *Stover* v. *Kendall,* 41 Tenn., 557; *in re Kelly's estate,* 84 Atl., 593 (Pa.); *Goods of Braddock L. R.,* 1 Prob. & Div., 433.

The only New Jersey case in which this subject appears to have been considered is *McCurdy* v. *Neal,* 42 N. J. Eq., 333. In this case testator's will to which he had attached a codicil was attacked on the ground that it had not been executed in conformity with the statute. After reviewing the evidence and finding a valid execution of the will, the ordinary (Chancellor RUNYON) said, 336:

> "But, further, it cannot be denied that the codicil was executed with all due formalities. It is proved to have been so executed. It expressly confirms the will, so far as the codicil is consistent with it, and is, therefore, a republication of the will itself, supplying all omissions and remedying all defects, if any, in the execution of the latter."

In the case at bar, if the preparation and annexation of the first half-sheet were not prior to the execution of the will it is clear that the

preparation and annexation were prior to the execution of the codicil and as the codicil is physically annexed to the will and is described as a "1st codicil" which must be to some will and as that will is the only one presented it seems to be a codicil to that will. *Allen* v. *Maddock,* 11 Moo. P. C., 427.

In this connection a very important fact should not be overlooked. The testator selected the same persons as witnesses to the codicil who had already witnessed the will. This fact standing alone is not a sufficient identification of the will but under all the circumstances of the case it is significant as tending to show that the codicil was to his mind a part of the instrument with which the witnesses were identified. The codicil was also found in the envelope with the will. The codicil therefore republishes and re-executes the will as amended.

The cases cited by Caveator, *Treloar* v. *Levy, Sweetland* v. *Same, Leonard* v. *Same, supra,* do not contain the element of republication by a codicil.

The result reached is based upon the fact that an alteration was made by testator before the execution of the codicil. The result is supported upon the theory that sheets fastened together constitute the will. This is the doctrine of identification of sheets constituting the will.

An early case which referred to the rule as to alterations and which made clear the distinction between the effect of alterations and of the identification of the pages or parts of the will is *Marsh* v. *Marsh,* 1 Swab. & Trist, 528. There the testator left a will dated 1856, consisting of seventeen pages written on paper of three different sizes loosely

tied together. The first three pages and the last two were in testator's handwriting, ten of the intermediate pages were parts of a will prepared in duplicate by a solicitor in 1854, and the three remaining sheets were part of a draft prepared by another solicitor in 1856. The last two sheets were executed and dated respectively the 22nd of March, and the 19th of May, 1856. The last sheet contained a general revocation of all former wills. The codicil of the 29th of April, 1858, was in the testator's handwriting and it was found annexed by a tape to a will of 1851 and a codicil of 1852. An interlineation was made in the codicil. Among the questions raised were (1) whether the sheets, other than the last sheet of the will, were annexed to and formed, together with that sheet, the last will of deceased at the time of the execution of such last sheet and (2) whether the interlineations in the codicil were written before execution.

The Court said (530):

> "Where a will is found written on several sheets, and the last only is signed and attested, although the witnesses did not observe the others, *prima facie* the presumption is, that they were in the room and formed a part of the will at the time of execution (*Gregory* v. *Queen's Proctor,* 4 N. C., 620). * * *
>
> "The will consists of three portions; first, the formal commencement and disposition of real property; secondly, the special clauses as to personal property; thirdly, several provisions and trusts relating to the real and personal estate. It is true that some provisions in the third part are inconsistent

with the first, but any one or two of the parts without the rest would be so manifestly imperfect, and the reasons for supposing that the whole were there are so much stronger than any contrary presumption arising out of the inconsistency of some parts, that I have arrived at the conclusion of fact, that all the sheets now forming part of the will of the 19th of May, 1856, did so at that time. Dr. Spinks likened it to the case of alterations; but that differs from the present, for there the Court has evidence before it that the will was originally in a different form from that produced. * * *"

The Court later decided that the interlineations were made after the execution of the codicil.

Lord MANSFIELD in *Bond.* v. *Seawell,* 3 Burrows, 1773 (in 1765), also discussed the question.

In 1 Jarman on Wills, page 116, it is said as follows:

"A will may be composed of several clauses written at distinct intervals and one memorandum of attestation subscribed to the last part may apply to the whole, including as well what was long before written as what had been recently added, though the antecedent part bears a different date from, and is complete in itself independently of, the latter.

Carleton v. *Griffen,* 1 Burr., 549.

"And the same general doctrine applies to a will whose contents as distributed through

several sheets of paper, which would be adequately attested by a single memorandum provided all the detached parts were present when the act of attestation took place; and which fact it seems would be presumed unless the contrary be distinctly proved as would also that of the attestation being intended to apply to the whole."

Citing *Bond* v. *Seawell, supra.* See also Shouler on Wills, par. 284; *Palmer* v. *Owen,* 82 N. E. (Ill.), 275; 40 Cyc., 1093, 1228; *Walsh* v. *Gorty,* 62 N. E., 907; 1 Williams on Exrs., 194; *in re Woods' Will,* 129 N. Y. Supp., 5; s. c., 144 A. D., 259.

An important case is *Rees* v. *Rees,* L. R., 3 P. & D., p. 84. The will had been engrossed by a law stationer on fifteen sheets with blanks for the names of legatees and amount of legacies. The blanks were filled up in the handwriting of decedent. The fourth sheet was removed and replaced by another in the handwriting of decedent. The original sheet was in existence. The number of the sheet incorporated in the will was altered from 17 to 4. About three weeks before his death the testator called his son to his bed and told him to bring the will from a davenport in the room giving him a key to do so. He found the will on opening the davenport. He showed the will to his father, who requested him to tie up the tape and replace it. This he did, and at the death of the testator, the will was sealed up in an envelope and opened on the day of the funeral. When opened it was in the form in which it was when presented for probate. The attesting witnesses could not identify the papers which they had not seen. The Court (Sir J. Hannen) held that the question was

whether the fourth sheet was the fourth sheet of the will as executed, or whether another sheet found loose among the testator's papers and numbered 4 was the fourth sheet of the will. The Court said (86):

> "In these circumstances the legal presumption is that the sheets bound together and constituting the will, as found in the testator's desk, were so bound together at the time of the execution and attestation. *Gregory* v. *H. M.'s. Proctor; Marsh* v. *Marsh.* The question is whether this presumption is rebutted by any evidence in the case. The facts chiefly relied upon as tending to rebut the presumption that the testator had before execution substituted the sheet in his own handwriting for the fourth page of the stationer's draft, was that it was numbered 17, in the testator's figures, whereas, the codicil proved to have been executed after the will was on a sheet numbered 16 in the testator's figures, thus leading to the inference, as it was argued, that the removal of page 17 and its substitution for page 4 of the stationer's draft had taken place after or at the time of the execution of the codicil. I am of the opinion, however, that neither this nor any other fact proved at the trial does rebut the presumption arising from the plight and condition of the will as found after the testator's death."

The principle of law is therefore that sheets tied together, or placed in one receptacle *prima facie,* constitute the will. The list of cases cited by caveator such as *Treloar* v. *Levy, Sweetland* v.

Same and *Leonard* v. *Same, supra,* show this is a rebuttable presumption. It would seem in the case at bar that the bits of paper clinging under the mushroom or eyelet end of the Challenge fastener tend to rebut this presumption that the substitution was made before execution of the will but under all the circumstances of the case it is clear that they do not go to the extent of rebutting the presumption that the sheets are all parts of the whole testamentary paper writings of which the codicil forms a part.

It seems that the first half-sheet offered by proponent, consisting of pages one and two, should be admitted to probate.

The ninth paragraph is obliterated by lines drawn across the written provisions in favor of Charles P. Scholfield, on page three and the words "Canceled October 5, 1912, Wm. Runkle," are written in the margin.

It may be considered that the words "Canceled October 5, 1912," are hearsay, in so far as the date of the act is concerned, but in so far as the note describes the linear excision as a cancellation, it may be accepted as a contemporaneous expression of intention to cancel and revoke the bequest. *Goods of Adamson,* L. R., 3 P. & D., 253. If they are not hearsay, the will was republished by the execution of the codicil and therefore the ninth paragraph is eliminated.

Counsel for Charles P. Scholfield contends that the statutes contain three provisions with respect to revocation of wills in whole or in part; 40 S., p. 5361, Sec. 2; p. 5865, Sec. 16; p. 5870, Sec. 25. It is contended that Section 2 is a re-enactment of the statute of frauds passed in the reign of Charles II and relates exclusively to estates in land; Section 16 relates exclusively to personal property,

and that Section 25 appeared first in the statutes of New Jersey in 1851, when it was first provided that wills of real and personal property should be proved in the same manner, and that it provided a method of revoking wills of real and personal property if the revocation be in writing. It is further contended that the methods of revoking gifts of real estate mentioned in Section 2, such as tearing, mutilating and canceling, do not apply to revocations of personal property which are dealt with exclusively in Section 16. An interesting argument is presented by counsel seeking to establish these propositions but the matter is not open for discussion at this time.

The rule that a will and devises and bequests in a will may be revoked by mutilation, obliteration, or cancellation has been fully recognized in this State. *Smock* v. *Smock,* 11 Eq., 156; *White,* 25 Eq., 501; *Kirkpatrick,* 22 Eq., 463; *Hilyard* v. *Wood,* 71 Eq., 214; *Collard* v. *Collard,* 67 Atl. Rep., 190; *Frothingham,* 75 Eq., 205; Rev. 76 Eq., 331. In the case of *Hilyard* v. *Wood, supra,* it was held that lead pencil cancellations of a document written in ink work a valid revocation, and in *Collard* v. *Collard, supra,* it was held that revocation by cancellation of a devise in a will was valid even though the incidental effect increases an estate in remainder to one in fee. The alleged distinction between obliteration and cancellation of a devise of realty and bequest of personalty has been considered in the *Kirkpatrick* case *supra,* which repudiated this contention and settled the law in this State since 1871. In the case of *Frothingham,* 75 Eq., 205; Reversed 76 Eq., 331, and *Hilyard* v. *Wood, supra,* the point was not discussed, but they hold that by cancellation or obliteration of a be-

quest of personal property, *animo revocandi,* that the revocation is perfected. The ninth provision of the will was revoked by cancellation.

The question arising out of the insertion of the name "William E. R. Smith" of "East" Orange in the place of "Randolph Rodman" of "South" Orange remains for determination. In considering the question of the admission of the first half-sheet upon which pages one and two are written the rule is stated that the presumption is that an unexplained alteration was made after execution of the will and codicil and that the burden of proof is upon proponent to show some evidence that the alteration was made before the codicil. The testimony shows that the pen and ink used were different from that of the remainder of the will and codicil; therefore, the alteration was made at a time other than that at which any other part of the will or codicil was written or obliteration or amendment or mutilation took place. There is nothing in the evidence, not even a suggestion, or a scintilla of evidence to show when this alteration was made. It is not even a "fair" alteration within the alleged unique New York rule. *Crossman* v. *Crossman,* 95 N. Y., 145; *Matter of Conway,* 124 N. Y., 455. In the *Crossman* case the will was in duplicate and a correction was made with the same pen and ink. The *Conway* case turns on the New York statute requiring subscription at the end. In the *Matter of Easton,* 84 Misc., the learned Surrogate bases his opinion on the dissenting opinion in the *Conway* case and decides that the interlineations were made with the same pen and ink. There is a distinction between interlineations and alterations. It is more easy to believe that an interlineation conforming to the context

was written in before execution than that an alteration was made before execution. It is urged that because testator noted the date on the cancellation of paragraph nine he knew the law and, therefore, this substitution of an executor must have been legally done before execution. There is no presumption that knowledge of law implies conformity in fact with it. Human experience shows knowledge of law and violation of law frequently go hand in hand. If this alteration is to stand, the settled practice in the Probate Courts of the State will be overthrown. The proponent has failed to sustain the burden of proof to show that the name of William E. R. Smith was written in prior to the execution of the codicil. The testator's attempt to erase and substitute without re-execution must fail, because the instrument as altered is not executed as required by the statute, and if the erased word is not so obliterated as to be illegible or undecipherable, the will remains intact as before the alteration or erasure. This rule applies where the testator has canceled or erased and interlined words in his will after execution, in order to substitute others; thus (a) where the name of a legatee is erased and another name substituted. *Gardner* v. *Gardner* (N. H., 1890), 8 L. R., Am., 383; (b) where the name of a devisee is canceled and another substituted. *Wolf* v. *Bollinger,* 62 Ill., 368; (c) where the amount of a legacy is changed. *Locke* v. *James,* 11 M. & W., 901; *Short* v. *Smith,* 4 East., 419; *Wetmore* v. *Carryl,* 5 Redf. (N. Y.), 544; (d) where the name of a person nominated as executor is erased and another name substituted. *Re Goods of Greenwood,* L. R. Prob. Div. (1892), 7; see also *Jackson* v. *Holloway,* 7 Johns., 399; *Doane* v. *Haddock,* 42 Me., 72; Shouler on Wills, 431; 1 Jarman, 136.

In *Locke* v. *James, supra,* the testator by his will devised certain real estate in fee, subject to and charged with an annuity of six hundred pounds a year; he subsequently erased with his pen the word "six" and inserted over it the word "two," leaving, however, the word "six" legible in each place where it occurred. It was held that the substitution of "two hundred" for "six hundred" under these circumstances was inoperative, and PARK, *B.,* said (910):

> The substitution in the will was inoperative, having been made after the subscription of the witnesses, not in their presence, and without republication, and the substitution, for the purpose of giving effect to which the erasure was made, thus failing, the law is clear that the erasure fails also. It is treated as an act done by mere mistake, *signe animo concellandi.* What the testator in such a case is considered to have intended is a complex act, to undo a previous gift for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, the doctrine is that there is no sufficient reason to be satisfied that he meant to vary the former gift at all."

In the case of *re Goods of Greenwood, supra,* the fact appeared that, after the execution of the will the testator directed that the name of Charles Stansfield, who was an attesting witness, as well as executor, be erased, and the name of William Sutcliff be written over the erasure.

The Court said (8):

> "The erasures and subsequent substitution of names are not attested, and as the

will was not re-executed afterwards, the name of Charles Stansfield must be restored, both as an executor and an attesting witness."

In the case of *re Penniman's Will,* 20 Minn., 245, where the will offered for probate showed erasures and interlineations, and where the words originally written in the will could still be read, the Court said (p. 255):

"When words or clauses in a will are cancelled in order to substitute others, which fail for want of due authentication, the cancellation will be treated as relative and dependent, or, as is sometimes said, as subsidiary to the interlineation, and the devise or bequest will take effect as originally made. Am. Lead. Cas. (5th Ed.), 502."

And on page 230, in the opinion states:

"As the interlineation and additions cannot be upheld, it follows, upon the principles above laid down, that the erasures must fall also, notwithstanding they might operate as a *pro tanto* revocation if they stood alone. 1 Redf. Wills, 326-327, Sec. 44, and note."

It is elementary that to constitute a valid revocation or cancellation of the whole or any portion of a will the existence of an intent to so revoke or cancel is indispensable. *Sickle's* case, 63 N. J. Eq., 233. Affirmed 64 N. J. Eq., 791. And the intent to revoke or cancel must be absolute and have something more than a conditional existence. There must be an intention to revoke at all events.

Harris' Goods, 1 Swabey & T., 536; *Parr's Goods,* 29 L. J. Prob. N. S., 70; 6 Jur. N. S., 56. The rule likewise applies where a testator has so entirely erased the name of a legatee that it is no longer apparent and has substituted another name for it. In such a case the Court will receive evidence to show what the original name was and restore it to the probate, if satisfied that the testator revoked the first bequest only on the supposition that he had effectually supplied a new legatee. *Matter of McCabe,* L. R., 3 P. & D., 94; *Brooke* v. *Kent,* 3 Moore P. C., 334; *McIntyre* v. *McIntyre,* 120 Ga., 67; 102 Am. St. Rep., 71; 47 S. E., 501; *Thomas* v. *Thomas,* 76 Minn., 237; 77 Am. St. Rep., 639; 79 N. Y., 104; *Reeve's Goods,* 13 Jur., 370. It was so held where the testator tore out a page of his will containing a certain bequest and devise and a gift of a contingent remainder to his brother and sister and had it rewritten, omitting the name of his sister as a contingent remainderman, with the intention of revoking the devise to her only. *Varnon* v. *Varnon,* 67 Mo. App., 534.

In the case of *Frothingham,* 75 N. J. Eq., 205, the present Chancellor plainly states the doctrine of dependent relative revocation. There is nothing in the opinion of the Court of Errors which affects the existence of the doctrine in the law; the difficulty there was in its application to the facts. In that case (76 Eq., page 331) the Court of Errors and Appeals says, with relation to the facts as stated in the opinion of the Orphans' Court, and more particularly shown in the opinion below, in a *per curiam* opinion, in part, as follows:

> "Our examination of the testimony convinces us of the correctness on the conclu-

sions reached by the Orphans' Court, viz., that *at the time the testator made the erasures his sole object was to get rid of the clauses that he so canceled and that the having of a fair copy made by a penman, and whatever grew out of it, were afterthoughts to which controlling significance did not attach.*"

In the *Frothingham* case the reason that the doctrine did not apply was that the changed condition of the testator's financial affairs plainly indicated his intention at the time of making the pencil marks on the will, to revoke the bequests.

It remains in this case therefore to consider the intention with which the alteration was made. It is probable that the testator did not intend to permit the will to exist without naming some person as executor. He evidently erased the name of Randolph Rodman and inserted the name of Smith at the same time because the name of Smith and "East" would not have been so greatly blurred if the chemical erasure had been permitted completely to dry. The operation was so bungled that testator felt obliged to make clear the name by writing it again in the margin. If the act of obliteration were separate from the insertion it is unlikely that the testator would have erased the name alone or the name and "South Orange." He would not have eliminated the name and "South" only, leaving in "Orange" if he intended at some future time to insert a name thereafter to be determined upon because he would not have then known that the person ultimately to be selected resided in one of the Oranges. By taking out the name of "Rodman" and "South" only he conclusively shows his pur-

pose to substitute "Smith" and "East" in the places respectively. If the act of obliteration were separate from the act of insertion there would be some foundation for the contention that while the insertion is invalid yet the obliteration works a revocation of the appointment of the original executor. The fact that the obliteration was a little more complete or better done than by merely running a line through the name does not necessarily mean that the intention at the time was not to insert the name of Mr. Smith in place of Mr. Rodman. Under these circumstances it seems that the doctrine of dependent relative revocation applies and that the name of Randolph Rodman of South Orange should be restored.

The first half-sheet, the second half-sheet and two full sheets constitute the will and may be admitted to probate with the name of Randolph Rodman as executor, omitting, however, the ninth paragraph, page three, bequeathing $25,000 to Charles P. Scholfield. The codicil will also be admitted to probate.

Exhibit P-1.

WILL OF WILLIAM RUNKLE.

In the name of God, Amen, I, William Runkle, widower of the City of Orange in the County of Essex and State of New Jersey being of sound and disposing mind and memory do make publish and declare this my Last Will and Testament in the manner and form following, that is to say

1. I direct my Executor hereinafter named to pay and satisfy all my just debts, funeral, and testamentary expenses as soon as convenient after my decease.

2. I direct that my body be buried in our family plot in the Cemetery of the Presbyterian Church at Asbury Warren County New Jersey.

devise

3. I give ∧ and bequeath all my real estate in the City of Orange, being one plot of land which is my residence property and is located at the southwesterly corner of Centre Street and Highland Avenue having a frontage on Centre Street of about four hundred and twenty five feet and on Highland Avenue of about three hundred and twenty feet together with my house, stable horses carriages harness, and stable equipments, greenhouses plants and all furniture articles and effects of household and domestic use or ornament in my house, save such household, domestic and other articles and effects therein a Kathryn Tully may choose to take, to my friend Wm. H. Hulick of the City of New York his heirs and assigns forever.

4. I give and bequeath to my cousin Jesse Godley of Trenton New Jersey the sum of Twenty Five Thousand Dollars ($25000.) but in case he shall

die in my lifetime, then I give and bequeath the same to his wife and child or children who shall be living at the time of my death, in equal parts.

5. I give and bequeath to my cousin Elnora Godley of Milford New Jersey, the sum of Ten Thousand Dollars ($10000.).

6. I give and bequeath to my friend Alfred J. Gerard of the City of New York, the sum of Ten Thousand Dollars ($10000.) but in case he shall die in my lifetime then I give and bequeath the same to his child or children who shall be living at my decease in equal parts.

7. I give and bequeath to my friend William H. Hulick of the City of New York the sum of Fifty Thousand Dollars ($50000.—) ($50000.—), but in case he shall die in my lifetime, then I give and bequeath the same to his child or children who shall be living at my decease in equal parts.

8. I give and bequeath to my friend Franklin W. Campbell of the City of New York the sum of Twenty Five Thousand Dollars ($25000.—)

Cancelled October 5″1912 Wm. Runkle

9 ~~I give and bequeath to my friend Charles P. Scholfield of the City of New York the sum of Twenty Five Thousand Dollars ($25000.)~~

10 I give and bequeath to my friend Carrie R. Scholfield of Essex Fells New Jersey the sum of Twenty Five Thousand Dollars ($25000.—)

11. I give and bequeath to Edith J. Adams wife of Thatcher M. Adams Jr. of the City of New York, the sum of One Hundred Thousand Dollars, but in case she shall die in my lifetime, then I give

and bequeath the same to her child or children who shall be living at my decease in equal parts.

12 I give and bequeath to Camilla Hill wife of Nathaniel Hill of Pittsboro Chatham County North Carolina the sum of Ten Thousand Dollars ($10000.—) but in case she shall die in my life time, then I give and bequeath the same to her child or children who shall be living at my decease, in equal parts.

13. I give and bequeath to John A. Hulsizer of Asbury Warren County New Jersey, the sum of Fifteen Thousand Dollars. ($15000.—) but in case he shall die in my lifetime then I give and bequeath the same to his child or children who shall be living at my decease, in equal parts.

14. I give and bequeath to Samuel A. Bristol of Asbury, Warren County New Jersey the sum of Fifty Thousand Dollars ($50000.—) should he predecease me, then I give and bequeath the same to Annie C. Bristol his wife should she then be living.

15. I give and bequeath to Kathryn Tully of the City or Orange New Jersey the sum of Fifty Thousand Dollars ($50000.) and in addition I give and bequeath to her any articles of household and domestic nature and any pictures and paintings in my house in Orange at the time of my death which she may select, also one of my horses, her choice.

16. I give and bequeath to Delia Fanning, wife of Martin Fanning of Orange, New Jersey, the sum of Five Thousand Dollars ($5000.—) and to Dietrich Kindsgrab, of East Orange, long my faithful gardener, the sum of Five Thousand Dollars

($5000.—) and to Maurice Lynch, long my faithful coachman the sum of Five Thousand Dollars ($5000.—) and to Bridget Gavin of Orange New Jersey the sum of Five Thousand Dollars ($5000.—) and to Margaret G. Hanley, wife of William Hanley of Orange New Jersey the sum of Five Thousand Dollars, and to Bartley Sherlock of the same place the sum of Two Thousand Dollars ($2000.—) and to William Sauer of the same place, the sum of One Thousand Dollars. and to Mrs. Kate Shanley of South Orange New Jersey the sum of One Thousand Dollars ($1000.—)

17. I give and bequeath to Lafayette College located at Easton Pennsylvania the sum of One Hundred Thousand Dollars ($100000.—) absolutely and without restriction for the general uses of said institution.

18. I give and bequeath to the Orange Orphan Society, the sum of Twenty Five Thousand Dollars, ($25000.—) and to the Orange Free Library the sum of Twenty Five Thousand Dollars ($25000.) and to St Marys Hospital of Orange New Jersey the sum of Twenty Five Thousand Dollars ($25000.—) and to Orange Memorial Hospital the sum of Ten Thousand Dollars, and to the Childrens Aid and Protective Society of the Oranges, the sum of Ten Thousand Dollars ($10000.—) and to the Orthopaedic Hospital of Orange New Jersey, the sum of Ten Thousand Dollars ($10000.—)

19. I give and bequeath to the Board of Home Missions of the Presbyterian Church in the United States of America, incorporated April 19th 1872 by act of the Legislature of the State of New York, the sum of Twenty Five Thousand Dollars

($25000.—) absolutely and without restriction, for the general uses of said Board.

20. I give and bequeath to the Presbyterian Board of Relief for Disabled Ministers and the Widows and Orphans of Deceased Ministers incorporated in the State of Pennsylvania October 21st 1876, having its office in the City of Philadelphia, the sum of Fifty Thousand Dollars ($50000.—) to be used for the approiate objects of said Board.

21. I give and bequeath to the College Board of the Presbyterian Church in the United States of America the sum of Twenty Five Thousand Dollars ($25000.—) for the general uses of said Board.

22. I give and bequeath to the American Sunday School Union in the City of New York, the sum of Twenty Five Thousand Dollars, absolutely and without restriction for the general uses of said Union.

23. I give and bequeath to Fidelity Trust Company, a New Jersey Corporation located and having its principal office in the City of Newark, its successors and assigns the sum of Ten Thousand Dollars, in trust nevertheless and for the following uses and purposes, to wit, that it shall invest said sum and keep the same safely invested and pay the income thence arising to the Treasurer of the Board of Trustees of the Presbyterian Church of Asbury, Warren County, New Jersey.

24. I give and bequeath to Fidelity Trust Company, a New Jersey Corporation, located and having its principal office in the City of Newark, its successors, and assigns the sum of Seven Hundred

Dollars
and Fifty Thousand ($750000.—) in trust nevertheless and for the following uses and purposes, to wit, That it shall invest the said sum, and Keep the same safely invested, and pay one equal one third (1/3) part of the income thence arizing to my brother Harry G. Runkle of Plainfield New Jersey, during the term of his natural life, and upon the death of my said brother, I direct that an equal one third (1/3) part of the principal of said trust property shall be paid over transferred and distributed absolutely and free of trust to and among the issue or descendants of my said brother then living the said issue or descendants to take per stirpes, and not per capita; and I direct that my Trustee, shall pay another equal one third (1/3) part of such income to my nephew, Daniel Runkle of Plainfield New Jersey during the term of his natural life, and upon his death, I direct that an equal one third (1/3) part of the principal of said trust property shall be paid over transferred and distributed absolutely and free of trust, to and among the issue or descendants of my said nephew then living, the said issue or descendants to take per stirpes and not per capita. And I further direct that my said Trustee shall pay the remaining one third (1/3) part of such income to my niece Mary G. Runkle of Plainfield, New Jersey during the term of her natural life; and upon her death I direct that an equal one third (1/3) part of the principal of said trust property shall be paid over transferred and distributed absolutely and free of trust to and among the issue or descendants of my said niece then living, the said issue or descendants to take per stirpes and not per capita; but should my said niece die in the lifetime of my said nephew leaving no issue or de-

scendants, then, I direct that the said one third (1/3) part of the income which she would have received if living, shall be paid in equal shares to the issue or descendants of my said nephew until his death, and upon his death, then, I direct that the said one third (1/3) part of the principal of the said trust property shall be paid over transferred and distributed to and among the issue or descendants of my said nephew then living, said issue or descendants to take per stirpes and not per capita. Should my said niece die after my said nephew leaving no issue or descendants, then I direct that the said one third (1/3) part of the principal of said trust property shall be paid over transferred and distributed to and among the issue or descendants of my said nephew then living, said issue or descendants to take per stirpes and not per capita.

I give and bequeath to Fidelity Trust Company a New Jersey Corporation located and having its principal office in the City of Newark, its successors and assigns the sum of Thirty Thousand Dollars ($30000.—) in trust nevertheless and for the following uses and purposes, to wit, that, it shall invest the said sum, and keep the same safely invested and pay the income thence arising to Elizabeth Haines wife of Lindley Haines of Germantown Pennsylvania, during the term of her natural life and upon her death I direct that the principal of the said trust property, together with any and all income accrued thereon and remaining unpaid shall be paid over absolutely and free of trust in equal parts to my nephew Daniel Runkle and my niece Mary G. Runkle, both of Plainfield New Jersey.

26. I give and bequeath to Fidelity Trust Company a New Jersey Corporation located and having its principal office in the City of Newark, its successors and assigns, the sum of Ten Thousand Dollars ($10000.—) in trust nevertheless, and for the following uses and purposes, to wit, that it shall invest the said sum, and keep the same safely invested, and pay the income thence arising to the Treasurer, for the time being, of the Presbyterian Church Cemetery located at Asbury, Warren County New Jersey.

27. I give, devise and bequeath all the rest, residue and remainder of my estate real and personal, whatsoever and wheresoever situate, of which I shall die seized or possed and not otherwise herein bequeathed or devised, to my brother Harry G. Runkle absolutely, and I do release to him, my said brother or to his representatives, if he shall die in my lifetime, all sums which may be owing by him by him to me, at my death, both principal and interest, and I direct that any note or notes, bond or bonds, or other obligations or security for the same, shall be released and given up, to my said brother or his representatives.

Wm. E. R. Smith to be Executor

28. I hereby nominate and appoint my friend Wm. E. R. Smith of East Orange New Jersey, as and to be sole Executor of this my Last Will and Testament, without bonds, and I do authorize and empower my said Executor in his sole discretion, in the payment and satisfaction of the pecuniary legacies and bequests, hereinabove given, to pay satisfy and discharge the same either in cash or in any bonds, stocks or other forms of investment securities of which I may be possessed at the time of my death at their appraised value, and I do

further order and direct that my said Executor, out of my said Estate, shall pay, discharge and satisfy all taxes and fees which may be assessed against or laid upon any of the gifts, legacies or devises made or given by me, by the provisions of this my Last Will and Testament, pursuant to any statute, or act for the taxation of estates gifts, legacies and devises, and commonly known as the Collateral Inheritance Tax, my meaning and intent herein being to have the full amount of the aforesaid legacies gifts and devises paid to the above named beneficiaries without any deduction whatever.

I do hereby annul and declare void any and all wills and testamentary dispositions by me at any time heretofore made.

In witness whereof I the said William Runkle have hereunto set my hand and seal the eleventh day of May, in the year of Our Lord One Thousand Nine Hundred and Twelve.

WM. RUNKLE (L. S.)

Signed, sealed published and declared by the above named testator William Runkle as and to be his Last Will and Testament in the presence of us, who being present at the same time, at his request in his presence and sight and in the presence of each other have hereunto subscribed our names as witnesses

CHAS. HASLER Orange N. J.
JOHN BURKARDT Orange N. J.

Exhibit P-2.

CODICIL TO WILL OF WILLIAM RUNKLE.

Codicil.

Made April 29th 1913

I hereby give and bequeath to George McM Godley of the City of New York, the sum of Fifty Thousand Dollars; and to his brother Frederick A. Godley the sum of Twenty Five Thousand Dollars.

I also give and bequeath, if they are in my employ at the time of my decease, to Nancy Shields the sum of One Thousand Dollars, and to Catherine Byrnes and to John Gilleran the sum of Five Hundred Dollars each.

WM. RUNKLE.

Witnesses

CHAS. HASLER 545 Springdale Ave
East Orange N. J.

JOHN BURKARDT Orange N. J.

Exhibit P-4.

My note is in Nat Park Bank for $21000.—due Feby 8th 1914. also another note in same Bank for $21000.—due Feby 26th 1914

Collateral up on both notes
1000 shares United Gas Impvt Co.
150 " L. V. R. R. Co.

My note is in the Orange Nat Bank for $23000.—due April 10th 1914, no collateral

(Sigd) WM. RUNKLE

Jany 11/14

Get from my lockup in the safe in Foundry office various securities, the balance are in the Vault boxes in Orange Bank

My certificate of membership in the Laurentian Club I want given to Austen Colgate a long with my canoe, my rods, fishing net and its contents.

W. E. R. Smith & Co. have 28 bonds of the N. Y. & Westchester Ltg. Co. given them to sell.

W. C. Sheldon & Co. have 2000 shares of the Bay State Gas Co. belonging to me.

Exhibit P-5.

		Par		Market
Warren Foundry & M Co.	1122	28,050	400	112,200.
Thomas Iron Co.	840	42,000	25.	25,200.
Hackensack Water Co. Pfd.	987	24,675	30.	29,610.
" " " Com.	5279	131,750	30.	158,370.
Second Nat. Bank Hoboken	105	10,500.	350.	36,750.
American Surety Co.	400	20,000.	250.	50,000.
United Gas Impvt Co.	1250.	62,500.	85.	106,250.
Hudson County Gas Co.	152	15,000.	140.	21,280.
Phillipsburg Nat. Bank	30	1,500.	200.	3,000.
Plainfield Union Water Co.	208	20,800.	150.	31,200.
Middlesex Water Co. Pfd.	140	14,000.	110	15,400.
" " " Com.	200.	20,000	100	20,000
Liberty Nat. Bank	300	30,000	600	180,000
H. R. Worthington Pfd.	116	11,600	100	11,600
Atlas Portland Cement Co. Pfd.	316	31,600	125	39,500
Paterson & Passaic Gas & E Co.	600	60,000	93	55,800
Conn. Ry & Ltg Co.	2200	220,000	80	176,000
Plattsburg Gas & E Co Pfd	207	20,700	90	18,630
Amer, Agri, Chem Co. Pfd	50	5,000	90	4,500
Michigan Lt Co "	250	25,000	98	24,500
Nazareth Cement Co. "	96	9,600)		7,500
" " " Com	36	3,600)		
Easton Trust Co.	122	12,200	175	21,350
Albany Southern R. R. Co. Pfd	100	10,000	40	4,000
" " " " " Com	50	5,000		
Somerset Union & Msex Ltg Co.	600	60,000	80	48,000
N. Y. City Interboro Ry Co.	500	50,000		
American Lt & Traction Co. Pfd	100	10,000	106	10,620.
" " " " " Com	100	10,000	350	50,000.
National Water Co. Pfd	420	42,000	100	42,000.
" " " Com	150	15,000	20	3,000.
Buffalo & Lake E Trac Co Pfd	100	10,000		
" " " " " " Com	100	10,000		
Morris & Essex R. R. Co.	20	1,000		1,750.
U. S. Ltg & Htg Co. Pfd	100	10,000		9,000.
" " " " " " Com	50	5,000		
N. Y. & Queens Elec Lt & P Co Pfd.	150	15,000	80	12,000.
Atlantic City Gas Co.	25	2,500		500
Fulton County G & E Co.	100	10,000	85	8,500
Dayton Ltg Co Pfd	59	5,900	80	4,720.
Dayton Power & Lt Co. Com.	300	30,000	26.	7,800.

Exhibit P-5.

		Par		Market
American Pub Utilities Pfd.	200	20,000.)		
" " " Com	80	8,000.)		20,000.
Gas & Elec Co. of Bergen County	600	60,000.	90.	54,000.
American Gas Co.	120	12,000	100	12,000.
Dayton Powr & Lt Co Bonds	11	11,000	90	9,900.
Utilities Impvt Co. Pfd	19	1,900		
" " " Com	7	700		2,000.
Nassau & Suffolk Ltg Co.	250	25,000	100	25,000.
N. J. & Hud Riv Ry & Ferry Co Gtd. 6%	500	50,000	110	55,000.
Del Lack & Westn R. R. Co.	200	10,000.	425	42,500.
United Elec Co.	100	10,000.	93	9,300.
Orange Nat Bank	50	2,500.	290	7,250.
Easton " "	91	4,550.	60.	5,460.
Lehigh Valley R. R. Co.	150	7,500.	80.	12,000.
Riverside Traction Co. Pfd	40	2,000.	85.	1,700.
				1,623,390.

Apl. 15/13 1,617830.
572440.

2,190270.

N. Y. & Westchester Ltg Co.	228	228,600.	80.	182,400.
Somerset, Union & Msex Ltg Co.	100	100,000.	80.	80,000.
Binghamton Gas Works	16	16,000.	96	15,360.
Northern Union Gas Co.	10	10,000.	100	10,000.
Council Grove Water Co.	7	7,000.	30	2,100.
Hackensack Water Co.	25	25,000.	90	22,500.
Paterson & Passaic G & E Co.	16	16,000.	103	16,480.
White Plains Ltg Co.	23	23,000.	105	24,150.
Westchester Ltg Co.	10	10,000	105	10,500
Citizens Elec Co.	14	7,000.	105	7,350.
Plainfield G & E Co.	23	23,000.	105	24,150.
Lincoln G & E Co.	15	15,000.	85	12,750.
Central Elec Co.	1	1,000.	100	1,000.
Borough of Brooklyn Gas Co.	15	15,000.	100	15,000.
Detroit Edison Co.	10	10,000.	103	10,300.
Dallas Gas Co.	10	10,000.	95	9,500.
N. Y. & Queens Gas Co.	6	6,000.	100	6,000.
Syracuse Gas Co.	10	10,000.	103	10,300.
Buffalo & Lake Erie Traction Co.	20	20,000.		
Consumers Aq Co.	10	10,000.	100	10,000.
N. Y. & Hoboken Ferry Co.	10	10,000.	97½	9,750.
Atlantic City Gas Co.	9	9,000.	95	8,550.
				478,140.

Exhibit P-6b.

343 Centre Street
Orange, New Jersey

Jany 21st 1914

My dear Will

I have said in my Will that Katie is to have such household and ornamental articles as she may choose, and knowing here extreme modesty, I want you to see that she takes the following. Painting of self as child, hanging in the Sitting Room, also cabinet & records Victor machine in same room. Engraving The Angelus in Parlor. Painting of Roses in the Library. Two covered Vegetable Dishes (Silver Plated) on Buffet in the Dining Room. This is all I think of now, if others occur to me I will add them.

Your friend

WM. RUNKLE.

Exhibit P-6a.

Envelope addressed as follows:

Wm H. Hulick Esq
111 Broadway
New York City

New Jersey State Library

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER OF The Application for Probate of certain paper writings as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.	On Caveat. Decree Granting Probate.

Certain instruments in writing having been presented by the proponent to the Surrogate of Essex County for probate as the last Will and Testament and Codicil thereto of William Runkle, deceased, and a caveat against the probate of said instruments in writing having been filed by Harry G. Runkle, and citations having been issued to all persons in interest, and having been returned duly served by the Sheriff of Essex County, and the matter coming on to be heard in the presence of McCarter & English, of counsel with proponent, John W. Griggs, Esquire, of counsel with the caveator; Messrs. Lindabury, Depue & Falks, of counsel with Edith J. Adams; Messrs. Lum, Tamblyn & Colyer, of counsel with George McM. Godley; Messrs. Condict, Condict & Boardman, of counsel with Carrie R. Scholfield and Charles P. Scholfield; William Huck, Jr., Esquire, of counsel with The College Board of Presbyterian Church of the United States; Howard Taylor, Esquire, Jehiel G. Shipman, Esquire, and John G. Jackson, Esquire, of counsel with William H. Hulick; Charles B. Storrs, Esquire, of counsel with Randolph Rodman and A. S. Weill, Esquire, counsel for Elizabeth Haines, and the Court having taken testimony, and heard the allegations of the parties herein, and be-

ing satisfied that the instruments in writing offered by the proponent for probate as and for the last Will and Testament and Codicil thereto of William Runkle, deceased, were duly executed by the said William Runkle as and for his last Will and Testament and codicil thereto, the said last Will and Testament consisting of a first half-sheet beginning with the words, "In the name of God, Amen," and concluding with the words, "the sum of Fifty Thousand Dollars ($50,000)"; a second half-sheet beginning with the words, "($50,000), but in case he shall die in my lifetime," and concluding with the words, "the sum of Five Thousand Dollars ($5,000)"; a full sheet beginning with the words, "and to Bridget Gavin, of Orange, New Jersey," and concluding with the words, "paid in equal shares to the issue or," and a full sheet beginning with the words, "descendants of my said nephew until his," and concluding with the attestation clause and the words, "John A. Burkardt, Orange, N. J.," and the said codicil consisting of a full sheet with writing upon the first page thereof, and the Court being satisfied that the said William Runkle at the time of executing the said instruments was in all respects competent to execute the same and was not under any restraint or undue influence, and the Court being satisfied that the half-sheets and sheets above enumerated constituted said last Will and Testament at the time of the execution of said Codicil thereto, and the Court being further of the opinion that the Ninth paragraph of said last Will and Testament upon the second half-sheet thereof was canceled by the said William Runkle, deceased, prior to his decease, and the Court being further of the opinion that the words "Wm. E. R. Smith," and "East," in the Twenty-eighth paragraph of said last Will

and Testament, upon the third page of the second full sheet thereof, and the words "Wm. E. R. Smith to be executor," in the margin of said last Will and Testament, opposite the said Twenty-eighth paragraph thereof, were inserted in the said will and testament subsequent to the execution of the said will and testament, and subsequent to the execution of the codicil thereto, and that the words "Randolph Rodman" existed in place of the words "Wm. E. R. Smith," and the word "South" existed in the place of the word "East," at the time of the execution of said last Will and Testament, and the codicil thereto,

It is thereupon, on this day of , Nineteen hundred and fourteen, ORDERED, ADJUDGED AND DECREED, that the said instruments be and the same hereby are established as the last Will and Testament and codicil thereto of the said William Runkle, deceased, with the exception of the said Ninth paragraph of the second half-sheet of said Will and Testament, and the words "William E. R. Smith" and "East," appearing in the Twenty-eighth paragraph of said will, and that the words "Randolph Rodman" and "South" be inserted in lieu thereof, and that the same be and they hereby are admitted to probate with the said exceptions and substitutions as the last Will and Testament and codicil thereto of said William Runkle, deceased.

And it is further ORDERED that letters testamentary be issued upon the aforesaid Will and Testament and codicil thereto, as admitted to probate as aforesaid, to Randolph Rodman.

WM. P. MARTIN.

A true copy.

ISAAC SCHOENTHAL,
Surrogate.

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER OF The Application for Probate of certain paper writings as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.	On Caveat. Appeal.

Harry G. Runkle, caveator, and next-of-kin of William Runkle, deceased, late of the County of Essex, hereby appeals in the Prerogative Court from the decree entered herein on the sixth day of November, Nineteen hundred and fourteen, admitting to probate the instruments purporting to be the last Will and Testament of said William Runkle and codicil thereto, with the exception of the Ninth paragraph upon the second half-sheet of said will, and further ordering that letters testamentary be issued upon the aforesaid will and testament and codicil thereto, as admitted to probate aforesaid, to Randolph Rodman, and from each and every part of said decree.

Dated, November 6, 1914.

GRIGGS & HARDING,
Proctors and of Counsel
with Appellant.

(Filed December 1, 1914.)

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER OF The Application for Probate of certain papers writing as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.	On Appeal of Charles P. Scholfield. Notice or Demand for Appeal.

Charles P. Scholfield, appellant, a legatee named in the Ninth numbered paragraph of the last Will and Testament of William Runkle, deceased, hereby appeals to the Prerogative Court from so much of the decree of the Essex County Orphans' Court, entered herein on the sixth day of November, Nineteen hundred and fourteen, as recites that the Court is of the opinion "that the Ninth paragraph of said last Will and Testament upon the second half-sheet thereof was canceled by said William Runkle, prior to his decease," and from so much of said decree as excepts the said Ninth paragraph on the second half-sheet of said Will and Testament from the effect of said decree, establishing the said last Will and Testament and admitting the same to probate.

CONDICT, CONDICT & BOARDMAN,
Proctors for and of Counsel
with Appellant.

Dated, November 27, 1914.

(Filed December 4, 1914.)

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER OF The Application for Probate of certain paper writing as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.	On Caveat. Notice of Appeal.

The respondent, George McM. Godley, hereby appeals from so much of the decree made in this Court in the above-stated matter, on the sixth day of November, Nineteen hundred and fourteen, as admits to probate and establishes as part of the last Will and Testament of the said William Runkle, deceased, the certain paper writings designated in said decree as "first half-sheet" and "second half-sheet," to the Prerogative Court of the State of New Jersey.

Dated, November 19, 1914.

LUM, TAMBLYN & COLYER,
Proctors for and of Counsel with
George McM. Godley, Respondent.

I conceive there is good cause for appeal in the above-stated cause.

RALPH E. LUM,
Of Counsel with George McM. Godley,
Respondent.

(Filed November 24, 1914.)

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER OF The Probate of the last Will and Testament and Codicil thereto of WILLIAM RUNKLE, deceased.	On Caveat Notice of Appeal.

William E. R. Smith, the executor named in the last Will and Testament of William Runkle, deceased, late of the County of Essex, hereby appeals to the Prerogative Court from the decree entered herein on the sixth day of November, Nineteen hundred and fourteen, admitting to probate the last Will and Testament of the said William Runkle and the codicil thereto, and especially as to so much of said decree as excepts from the will and codicil as established, the words, "William E. R. Smith," and "East," appearing in the Twenty-eighth paragraph of said will, upon the third page of the second full sheet thereof, and the words, "William E. R. Smith to be executor," in the margin of the said will, opposite the said Twenty-eighth paragraph thereof, and as to so much of said decree as orders that the words "Randolph Rodman" be inserted in lieu of the words "William E. R. Smith," and the word "South" be inserted in lieu of the word "East," and as to so much of said decree as orders the issuance of letters testamentary upon said Will and Testament and codicil, to Randolph Rodman.

MUNN & CHURCH,
Proctors and of Counsel with
William E. R. Smith.

(Filed December 5, 1914.)

NEW JERSEY PREROGATIVE COURT.

WILLIAM E. R. SMITH, Proponent; ELIZABETH HAINES, EDITH J. ADAMS, GEORGE McM. GODLEY, CARRIE R. SCHOLFIELD, CHARLES P. SCHOLFIELD, THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES, WILLIAM H. HULICK, Legatees, and RANDOLPH RODMAN, named in said Will as Executor, whose name was obliterated,

Respondents,

vs.

HARRY G. RUNKLE,

Caveator-Appellant.

On Appeal from a decree of the Essex County Orphans' Court admitting to probate the instruments purporting to be the last Will and Testament of William Runkle, deceased, and codicil thereto, with the exception of the ninth paragraph upon the second half-sheet of said will, and further ordering that letters testamentary be issued upon the aforesaid Will and Testament and codicil thereto as admitted to probate aforesaid to Randolph Rodman.

Petition of Appeal.

To the Honorable the Prerogative Court of the State of New Jersey:

The petition of Harry G. Runkle, the appellant in the above-stated cause, respectfully shows:

That your petitioner finds himself aggrieved by a decree made by the Orphans' Court of the County of Essex, dated on or about the sixth day of November, Nineteen hundred and fourteen, in the matter of paper writings alleged to be the last Will and Testament and codicil thereto, of William Runkle, late of the County of Essex, deceased, by which the above-named respondent, William E. R. Smith, was named as executor, by whom said paper writings have been offered for probate be-

fore said Orphans' Court, and wherein your petitioner filed a caveat against admitting the same to probate; and your petitioner further shows, that he is aggrieved by said decree in this respect, to wit:

That said decree adjudges, that the instruments in writing offered by the proponent for probate, as and for the last Will and Testament and codicil thereto of William Runkle, deceased, were duly executed by said William Runkle, as and for his last Will and Testament and codicil thereto, and in this, that the said decree establishes said instruments as the last Will and Testament and codicil thereto of the said William Runkle, deceased, with the exception of the Ninth paragraph of the second half-sheet of said Will and Testament, and in this, that said decree admits the said instruments to probate, with the exception of the said Ninth paragraph upon the second half-sheet of said Will and Testament, as the last will and codicil thereto of said William Runkle, deceased, and in this, that said decree also further orders and decrees that letters testamentary be issued upon the said Will and Testament and codicil thereto, as admitted to probate, as aforesaid, to Randolph Rodman.

And your petitioner appeals from the whole and every part of said decree, upon the grounds that said decree should have adjudged that neither said will nor codicil should have been admitted to probate, but that probate thereof should have been refused, and that said decree and every part thereof is erroneous.

Your petitioner therefore prays, that the said decree may be wholly reversed, set aside and for nothing holden, and that probate of said papers purporting to be said last will and codicil thereto may be refused, and that your petitioner may have

such further relief in the premises as shall be equitable and just.

GRIGGS & HARDING,
Proctors and Counsel with Appellant.

(Filed December 1, 1914.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Application for Probate of certain papers writing as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.	On Appeal from Order of Orphans' Court. Petition.

To his Honor, EDWIN R. WALKER, *Ordinary and Judge of the Prerogative Court:*

The petition of Charles P. Scholfield, the appellant in the above-stated cause, respectfully shows that your petitioner finds himself aggrieved by a decree made in the Orphans' Court of the County of Essex by his Honor, WILLIAM P. MARTIN, bearing date the sixth day of November, Nineteen hundred and fourteen, in the matter of the application for probate of certain papers writing as the last Will and Testament and codicil of William Runkle, deceased, in these respects:

That the said decree recites as follows:

"And the Court being further of the opinion that the Ninth paragraph of said last

Will and Testament, upon the second half-sheet thereof, was canceled by the said William Runkle, deceased, prior to his decease."

And that the said decree excepts from the operation of said decree establishing the instrument propounded for probate as the last Will and Testament, and admitting the same to probate, the said Ninth paragraph on the second half-sheet of said Will and Testament.

And your petitioner humbly appeals from so much of said decree of November sixth, Nineteen hundred and fourteen, as recites and adjudges, as aforesaid, upon the ground that the said Ninth paragraph of said last Will and Testament, upon the second half-sheet, was not canceled by the said William Runkle, deceased, and that there was no legal evidence before the Court upon which the Court could have found that the said William Runkle, deceased, canceled the said Ninth paragraph of said last Will and Testament, and that it appears by the record of this case that the said Ninth paragraph of this will was not canceled in a manner required by law and the statutes of this State, in such case made and provided, and that the said decree should have admitted to probate the instrument propounded for probate, including the said Ninth paragraph, as a valid and integral part of said last Will and Testament.

Your petitioner therefore prays that the said decree of the Orphans' Court may be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the said premises as to your Honor may seem meet.

CONDICT, CONDICT & BOARDMAN,
Proctors for and of Counsel
with Appellant.

(Filed December 14, 1914.)

NEW JERSEY PREROGATIVE COURT.

Between

GEORGE MCM. GODLEY,
Appellant,

and

WILLIAM E. R. SMITH, Proponent; ELIZABETH HAINES, EDITH J. ADAMS, HARRY G. RUNKLE, CARRIE R. SCHOLFIELD, CHARLES P. SCHOLFIELD, THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES, WILLIAM H. HULICK, Legatees, and RANDOLPH RODMAN, named in said Will as Executor, whose name was obliterated,
Respondents.

On Appeal from Decree Granting Probate.
Petition of Appeal.

To the Honorable EDWIN ROBERT WALKER, *Ordinary of the State of New Jersey:*

The petition of George McM. Godley, the appellant in the above-stated cause, respectfully shows that on or about the thirty-first day of January, A. D. Nineteen hundred and fourteen, William Runkle departed this life in the City of Orange, in the County of Essex and State aforesaid, possessed of a considerable estate; that thereafter a paper writing bearing date May eleventh, Nineteen hundred and twelve, purporting to be his last Will

and Testament, and a paper writing bearing date April twenty-ninth, Nineteen hundred and thirteen, purporting to be a codicil thereto, were presented by one William E. R. Smith to the Surrogate of the County of Essex, for probate; that a caveat was filed by one Harry G. Runkle, brother of the decedent and his nearest of kin surviving; that said Surrogate of the County of Essex issued citations to all parties interested, citing them to appear before the Orphans' Court of the County of Essex, wherein the question involved was submitted for determination.

And your petitioner further shows that on or about the sixth day of November, Nineteen hundred and fourteen, a decree was made in the said Essex County Orphans' Court, wherein and whereby it was, amongst other things, ordered, adjudged and decreed that the said instruments be, and the same were thereby established as the last Will and Testament and codicil thereto of the said William Runkle, deceased, with a certain exception and insertion therein particularly mentioned and set forth.

Your petitioner complains that the said Essex County Orphans' Court, after the said matter had come on to be heard and upon proofs taken, although no sufficient evidence was adduced, and contrary to law and in violation of the rights of this petitioner, the appellant herein, by its said decree did admit to probate as a part and portion of the last Will and Testament of the said testator, the certain paper writings designated in said decree as "first half-sheet" and "second half-sheet."

And your petitioner further complains and alleges that the said paper writings designated as aforesaid were not established by the evidence produced before said Court as a part or portion of

said last will, and that said paper writings designated as aforesaid were not executed in the manner prescribed by statute for the making and execution of a last Will and Testament in this State; and that the said paper writings designated as aforesaid were not established by the evidence produced at the hearing as being parts of the last Will and Testament of the said testator as made, published and declared by him; and he further complains that the said Essex County Orphans' Court illegally and improperly refused to permit proof to be made of the will of April 26th, Nineteen hundred and eleven, and that said Court illegally and improperly refused to admit testimony as to the declarations by the testator relative to his testamentary dispositions; and he further complains and alleges, for the above and divers other reasons, that the said decree of the Orphans' Court in the respects aforesaid is erroneous, improper and contrary to law, and that your petitioner is aggrieved thereby, and your petitioner humbly appeals therefrom to this Honorable Court upon the grounds aforesaid.

Your petitioner therefore prays that the said decree of the said Essex County Orphans' Court may, in so far as it admits to probate and establishes as part of the last Will and Testament of William Runkle, deceased, the certain paper writings designated in said decree as "first half-sheet" and "second half-sheet," be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

LUM, TAMBLYN & COLYER,
Proctors for and of Counsel
with Appellant.
RALPH E. LUM,
Of Counsel with Appellant.

(Filed November 14, 1914.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Probate of the last Will and Testament and Codicil thereto of WILLIAM RUNKLE, deceased.	On Appeal from Essex County Orphans' Court. Petition of Appeal.

The petition of William E. R. Smith, of the City of East Orange, County of Essex, and State of New Jersey, respectfully shows: That William Runkle, late of the County of Essex, died on the thirty-first day of January, Nineteen hundred and fourteen, seized and possessed of real and personal estate; that on said date your petitioner, who was named as executor in the paper writing hereinafter mentioned, produced before the Surrogate of Essex County for probate as a will of real and personal estate, certain instruments in the writing of said decedent, purporting to be the last Will and Testament of the said William Runkle, which instruments consisted of a will bearing date the eleventh day of May, Nineteen hundred and twelve, and a codicil thereto bearing date the twenty-ninth day of April, Nineteen hundred and thirteen.

Your petitioner further shows that certain questions arose on the face of said will, and that a caveat was filed against the probate thereof, and the matter was duly heard in the Essex County Orphans' Court before the Honorable WILLIAM P. MARTIN, one of the Judges of said Court.

Your petitioner further shows that in and by an order of said Court, bearing date the sixth day of November, Nineteen hundred and fourteen, said Court ordered that said written instruments be established as the last Will and Testament and the codicil thereto of the said William Runkle, with the exception of the Ninth paragraph of the second half-sheet of said will, and with the exception of the words "William E. R. Smith" and "East," appearing in the Twenty-eighth paragraph of said will, and that the words "Randolph Rodman" be inserted in lieu of the words "William E. R. Smith," and the word "South" be inserted in lieu of the word "East," and that letters testamentary be issued upon the aforesaid Will and Testament and codicil thereto, to the said Randolph Rodman.

Your petitioner complains and alleges that said decree is erroneous, improper and illegal, in so far as it excepts from said Will and Testament and codicil thereto the words "William E. R. Smith" and "East," appearing in the Twenty-eighth paragraph of said will, on the third page of the second full sheet thereof, and the words "William E. R. Smith to be executor" in the margin of the said will opposite said Twenty-eighth paragraph, and in so far as said decree orders that the words "Randolph Rodman" be inserted in lieu of the words "William E. R. Smith," and the word "South" inserted in lieu of the word "East," and in so far as said decree orders that letters testamentary be issued to the said Randolph Rodman and not to your petitioner, and that your petitioner is aggrieved thereby and prays that the decree and proceedings of the said Orphans' Count of the County of Essex, as herein complained of, may be reversed by this Honorable Court, and that a day and place may be appointed for the hearing upon this appeal,

and that your petitioner may have such other and further relief in the premises as may be just and equitable.

WM. E. R. SMITH,
Petitioner.

MUNN & CHURCH,
Proctors for and of Counsel
with Petitioner.

(Filed December 12, 1914.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Application for Probate of certain paper writings as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.	On Appeal from Essex County Orphans' Court. Answer to Petition of Appeal of Harry G. Runkle, Caveator.

The answer of Randolph Rodman, one of the respondents, to the petition of appeal of Harry G. Runkle, caveator, appellant:

This respondent admits that an order or decree of the date, tenor and effect in the said petition of appeal set forth, was made by the Orphans' Court of the County of Essex; and this respondent denies that said decree, or any part thereof, is erroneous, improper or illegal, and alleges that said decree, and every part thereof, is legal, proper and correct. He therefore prays that the said petition of appeal may be dismissed, with costs to be adjudged to this respondent.

CHARLES B. STORRS,
Proctor for and of Counsel
with Respondent.

(Filed December 29, 1914.)

NEW JERSEY PREROGATIVE COURT.

WILLIAM E. R. SMITH *et al.*, Respondents, vs. HARRY G. RUNKLE, Caveator-Appellant.	Sur-Appeal. Answer of Carrie R. Scholfield to the Petition of Appeal of Harry G. Runkle.

Carrie R. Scholfield, one of the respondents, answering the petition of appeal of Harry G. Runkle, appellant, says that she denies that the said appellant is in anywise aggrieved by the decree of the Orphans' Court, dated on or about the sixth day of October, 1914, from which this appeal is taken, and this respondent says that said decree is not erroneous in the matters in said petition of appeal alleged, and this respondent respectfully shows that the said decree should, as against the said petitioner of appeal, be in all things affirmed.

CONDICT, CONDICT & BOARDMAN,
Proctors.

(Filed January 8, 1915.)

NEW JERSEY PREROGATIVE COURT.

WILLIAM E. R. SMITH, Proponent; ELIZABETH HAINES, EDITH J. ADAMS, GEORGE McM. GODLEY, CARRIE R. SCHOLFIELD, CHARLES P. SCHOLFIELD, THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES, WILLIAM H. HULICK, Legatees, and RANDOLPH RODMAN, named in said Will as Executor, whose name was obliterated,

Respondents,

vs.

HARRY G. RUNKLE,
Caveator-Appellant.

On Appeal from a decree of the Essex County Orphans' Court admitting to probate the instruments purporting to be the last Will and Testament of William Runkle, deceased, and codicil thereto, with the exception of the ninth paragraph upon the second half-sheet of said will, and further ordering that letters testamentary be issued upon the aforesaid Will and Testament and codicil thereto as admitted to probate aforesaid to Randolph Rodman.

Answer to Petition of Appeal of Harry G. Runkle.

To the Honorable the Prerogative Court of the State of New Jersey:

The answer of William E. R. Smith, respondent, to the petition of appeal of Harry G. Runkle, respectfully shows:

That this respondent admits that as executor and proponent of the last Will and Testament of William Runkle, late of the County of Essex, deceased, he offered for probate before the Orphans' Court of Essex County said will and codicil, and that Harry G. Runkle filed a caveat against admitting the same to probate, as stated in the petition of appeal of the said Harry G. Runkle.

That this respondent admits that the decree of

the Orphans' Court of the County of Essex, referred to in said petition of appeal, was as is stated therein; and this respondent denies that every part of said decree should be set aside, and that neither the will nor codicil should have been admitted to probate, and that probate thereof should have been refused; and this respondent alleges that said decree is legal, proper and correct in every part, except that portion which excepts from the said Will and Testament and codicil thereto the words "William E. R. Smith" and "East," appearing in the Twenty-eighth paragraph of said will, on the third page of the second full sheet thereof, and the words "William E. R. Smith to be executor," in the margin of the said will opposite said Twenty-eighth paragraph, and orders that the words "Randolph Rodman" be inserted in lieu of the words "William E. R. Smith," and the word "South" inserted in lieu of the word "East," and that portion of the decree which orders that letters testamentary be issued to Randolph Rodman, and not to William E. R. Smith, and this respondent, therefore, prays that the decree may be sustained, with the exception as above set forth, but may be reversed in so far as it refers to the portion above set forth.

MUNN & CHURCH,
Solicitors for and of Counsel
with William E. R. Smith.

(Filed December 9, 1914.)

NEW JERSEY PREROGATIVE COURT.

WILLIAM E. R. SMITH, Proponent, and others, Respondents, vs. HARRY G. RUNKLE, Caveator-Appellant.	On Appeal from Essex County Orphans' Court. Answer to Petition of Appeal of Harry G. Runkle.

The answer of George McM. Godley, one of the respondents, to the petition of appeal of Harry G. Runkle, the above-named appellant.

This respondent, not acknowledging all or any of the matters which in the said appellant's petition of appeal are contained, to be true, for answer thereto nevertheless says and admits that a decree was on the sixth day of November, Nineteen hundred and fourteen, made and entered in the Essex County Orphans' Court in the matter, for the purpose mentioned in said petition in substance as is therein stated, but as to both the substance and form of said decree, this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said decree is just and equitable, save in so far as by the same there was admitted to probate as a part and portion of the last Will and Testament of the said testator the certain paper writings designated in said decree as "first half-sheet" and "second half-sheet"; and he therefore prays that the said decree, save in the respects aforesaid, may be affirmed, with costs to be adjudged to this respondent.

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

(Filed December 16, 1914.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Application for Probate of certain paper writings as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.	Answer to Petition of Appeal.

The answer of William H. Hulick, respondent, to the petition of appeal of Harry G. Runkle, appellant:

This respondent, not acknowledging all or any of the matters which in the said petition of appeal of Harry G. Runkle are contained, to be true, in answer thereto says and admits that on or about the sixth day of November, Nineteen hundred and fourteen, a decree was made by the Orphans' Court of the County of Essex in the matter of paper writings alleged to be the last Will and Testament and codicil thereto of William Runkle, deceased, which paper writings had been offered for probate before the said Orphans' Court, and this respondent admits that the said decree did adjudge that the said paper writings and instruments, offered by the executor named therein, William E. R. Smith, for probate as and for the last Will and Testament and codicil thereto of William Runkle, deceased, were duly executed by the said William Runkle as and for his last Will and Testament and codicil thereto, and the said decree did establish the said instruments as the last Will and Testament and codicil thereto of the said William Runkle, de-

ceased, with the exception of the ninth paragraph of the second half-sheet of said will, and did admit the said instruments to probate as the last will and codicil thereto of William Runkle, deceased, with the exception of the said Ninth paragraph on the second half-sheet of said will; and said decree did further order that letters testamentary be issued upon the said Will and Testament and codicil thereto, as admitted to probate, to Randolph Rodman, and this respondent denies that the appellant, Harry G. Runkle, is in any way aggrieved by the said decree, and denies that the said decree, or any part thereof, is erroneous, and this respondent alleges and believes that the said decree is in every respect proper and legal, and denies that it should be reversed, and prays that the same may be affirmed in all respects, with costs to be adjudged to this respondent.

JEHIEL G. SHIPMAN,
Proctor for and of Counsel with
William H. Hulick, Legatee.

(Filed January 8, 1915.)

NEW JERSEY PREROGATIVE COURT.

WILLIAM E. R. SMITH, Proponent; THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES, Legatees, etc., *et als.*, Respondents,

vs.

HARRY G. RUNKLE, Caveator-Appellant.

Answer of the College Board of the Presbyterian Church in the United States of America to Petition of Appeal of Harry G. Runkle, Caveator.

To the Honorable, the Prerogative Court of the State of New Jersey:

The answer of The College Board of the Presbyterian Church in the United States of America, to the petition of appeal of Harry G. Runkle, says:

(1) This respondent denies that the decree admitting the will of William Runkle, and the codicil to such will, to probate, was erroneous.

(2) This respondent denies that either for the reasons stated in the petition of appeal, or for any other reasons, that said decree admitting said will to probate should be reversed and set aside, but says that the said decree was duly and properly made after hearing all the facts and evidence in relation to the making thereof, and that the decree appealed from should be affirmed.

This respondent therefore prays that the decree admitting the said paper writings to probate as the last will and codicil thereto of William Runkle, deceased, be affirmed, and that this respondent be hence dismissed, with its costs in this respect sustained.

THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA,

By WM. HUCK, JR.,
Proctor.

(Filed December 26, 1914.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Application for Probate of certain paper writings as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.	On Appeal from Essex County Orphans' Court. Answer to Petition of Appeal.

The answer of the respondents Elizabeth Haines and Board of Home Missions of The Presbyterian Church, to petition of appeal of Harry G. Runkle, appellant:

These respondents, not acknowledging all or any of the matters which in the said petition of appeal of Harry G. Runkle are contained, to be true, in answer thereto says and admits that on or about the sixth day of November, Nineteen hundred and fourteen, a decree was made by the Orphans' Court of the County of Essex in the matter of paper writings alleged to be the last Will and Testament and codicil thereto of William Runkle, deceased, which paper writings had been offered for probate before the said Orphans' Court, and this respondent admits that the said decree did adjudge that the said paper writings and instruments, offered by the executor named therein, William E. R. Smith, for probate as and for the last Will and Testament and codicil thereto of William Runkle, deceased, were duly executed by the said William Runkle as and for his last Will and Testament and codicil thereto, and the said decree did establish the said instruments as the

last Will and Testament and codicil thereto of the said William Runkle, deceased, with the exception of the Ninth paragraph of the second half-sheet of said will, and did admit the said instruments to probate as the last will and codicil thereto of William Runkle, deceased, with the exception of the said Ninth paragraph, on the second half-sheet of said will; and said decree did further order that letters testamentary be issued upon the said Will and Testament and codicil thereto, as admitted to probate, to Randolph Rodman, and this respondent denies that the appellant, Harry G. Runkle, is in any way aggrieved by the said decree, and denies that the said decree or any part thereof, is erroneous as far as said appellant is concerned, and this respondent alleges and believes that the said decree is proper and legal, and denies that it should be reversed in favor of the appellant, and prays that the same may be affirmed in all respects as to appellant, with costs to be adjudged to these respondents.

McCARTER & ENGLISH,
Proctors for and of Counsel with
Elizabeth Haines and Board of Home
Missions of The Presbyterian Church.

(Filed December 26, 1914.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Application for Probate of certain paper writings as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.	On Appeal from Essex County Orphans' Court. Answer to Petition of Appeal.

The answer of the respondents Elizabeth Haines and Board of Home Missions of The Presbyterian Church to petition of appeal of the appellant George McM. Godley:

These respondents, not acknowledging all or any of the matters which in the said petition of appeal of George McM. Godley, are contained to be true, for answer thereto says and admits that on or about the thirty-first day of January, Nineteen hundred and fourteen, William Runkle departed this life, and that thereafter a paper writing bearing date May eleventh, Nineteen hundred and twelve, purporting to be his last Will and Testament, and a paper writing bearing date April twenty-ninth, Nineteen hundred and thirteen, purporting to be a codicil thereto, were presented by William E. R. Smith to the Surrogate of Essex County, and that a caveat was filed by Harry G. Runkle, brother of the deceased, and a hearing was held upon the said caveat. And respondents further admit that on the sixth day of November, Nineteen hundred and fourteen, a decree was made by the Essex County Orphans' Court, whereby it was ordered, adjudged and decreed that the aforesaid instruments be, and the

same were thereby, established as the last Will and Testament and codicil thereto of the said William Runkle, deceased, with certain exceptions and insertions therein particularly mentioned, and respondents admit that the said Essex County Orphans' Court by the said decree did admit to probate as a part and portion of the said Will and Testament of the said testator, certain paper writings designated as the first half-sheet and second half-sheet.

Respondents allege that there was sufficient evidence produced to admit the said first half-sheet and second half-sheet to probate as part of the said last Will and Testament of the said testator, and allege that the admission of the said sheets was lawful and proper, and in no way violated petitioner's rights.

Respondents allege and charge that the last aforesaid paper writings were clearly established by the evidence produced before the said Court as a part and portion of said last will, and allege that the said paper writings, designated as aforesaid, were properly executed in the manner prescribed by the statute for the making and execution of wills and testaments in this State, and that the said paper writings were clearly established by the evidence produced as parts of the last Will and Testament of the said testator as made, published and declared by him. And respondents further allege that the Orphans' Court did legally and properly refuse to permit proof to be made of the will of April twenty-sixth, Nineteen hundred and eleven, and that the said Court did properly refuse to admit testimony as to the declarations by the testator relative to his testamentary dispositions, and allege and charge that the said decree of the Orphans' Court in the respects aforesaid is proper,

equitable and according to law, and deny that petitioner is aggrieved thereby.

And respondents pray that the said decree of the said Essex County Orphans' Court may be in all respects affirmed, with costs to this respondent.

McCARTER & ENGLISH,
Proctors for and of Counsel with
Elizabeth Haines and Board of Home
Missions of The Presbyterian Church.

(Filed December 16, 1914.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Application for Probate of certain paper writings as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.	On Appeal from Essex County Orphans' Court. Answer to Petition of Appeal.

The answer of the respondent William H. Hulick to the petition of appeal of the appellant, George McM. Godley.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal of George McM. Godley are contained, to be true, for answer thereto says and admits that on or about the thirty-first day of January, Nineteen hundred and fourteen, William Runkle departed this life, and that thereafter a paper writing bear-

ing date May eleventh, Nineteen hundred and twelve, purporting to be his last Will and Testament, and a paper writing bearing date April twenty-ninth, Nineteen hundred and thirteen, purporting to be a codicil thereto, were presented by William E. R. Smith to the Surrogate of Essex County, and that a caveat was filed by Harry G. Runkle, brother of the deceased, and a hearing was held upon the said caveat. And respondent further admits that on the sixth day of November, Nineteen hundred and fourteen, a decree was made by the Essex County Orphans' Court, whereby it was ordered, adjudged and decreed that the aforesaid instruments be and the same were thereby established as the last Will and Testament and codicil thereto of the said William Runkle, deceased, with certain exceptions and insertions therein particularly mentioned, and respondent admits that the said Essex County Orphans' Court by the said decree did admit to probate as a part and portion of the said Will and Testament of the said testator certain paper writings designated as the first half-sheet and second half-sheet.

Respondent alleges that there was sufficient evidence produced to admit the said first half-sheet and second half-sheet to probate as part of the said last Will and Testament of the said testator, and alleges that the admission of the said sheets was lawful and proper, and in no way violated petitioner's rights.

Respondent alleges and charges that the last aforesaid paper writings were clearly established by the evidence produced before the said Court as a part and portion of said last will, and alleges that the said paper writings designated as aforesaid were properly executed in the manner prescribed by the statute for the making and execu-

tion of wills and testaments in this State, and that the said paper writings were clearly established by the evidence produced as parts of the last Will and Testament of the said Testator as made, published and declared by him. And respondent further alleges that the Orphans' Court did legally and properly refuse to permit proof to be made of the will of April twenty-sixth, Nineteen hundred and eleven, and that the said Court did properly refuse to admit testimony as to the declarations by the testator relative to his testamentary dispositions, and alleges and charges that the said decree of the Orphans' Court in the respects aforesaid is proper, equitable and according to law, and denies that petitioner is aggrieved thereby.

And respondent prays that the said decree of the said Essex County Orphans' Court may be in all respects affirmed, with costs to this respondent.

Jehiel G. Shipman

Proctor for and of Counsel with
William H. Hulick, Legatee.

(Filed January 21, 1915.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER

OF

The Application for Probate of certain papers writing as the last Will and Testament of WILLIAM RUNKLE, deceased.

Answer of the College Board of the Presbyterian Church in the United States of America to Petition of Appeal of George McM. Godley.

To the Honorable, the Prerogative Court of the State of New Jersey:

The answer of The College Board of the Presbyterian Church in the United States of America, to the petition of appeal of George McM. Godley, says:

(1) This respondent denies that the decree, or any part thereof, admitting the will of William Runkle, and the codicil to such will, to probate, was erroneous.

(2) This respondent denies that either for the reasons stated in the petition of appeal, or for any other reasons, that said decree, or any part thereof, admitting said will and codicil to probate, should be reversed and set aside, but says that the said decree was duly and properly made, after hearing all the facts and evidence in relation to the making thereof, and that the decree appealed from should be affirmed.

This respondent therefore prays that the decree admitting the said papers writing to probate as the last will, and codicil thereto, of William Run-

kle, deceased, be affirmed, and that this respondent be hence dismissed, with its costs in this respect sustained.

THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA,

Respondent.

By WM. HUCK, JR.,
Proctor and of Counsel
for said Respondent.

(Filed January 5, 1915.)

NEW JERSEY PREROGATIVE COURT.

WILLIAM E. R. SMITH *et al.*, Respondents, vs. HARRY G. RUNKLE, Caveator-Appellant.	Sur-Appeal. Answer of Carrie R. Scholfield and Charles P. Scholfield to the Petition of Appeal of George McM. Godley.

Carrie R. Scholfield and Charles P. Scholfield, two of the respondents, answering the petition of appeal of George McM. Godley, appellant, say that they deny that the said appellant is in anywise aggrieved by the decree of the Orphans' Court, dated on or about the sixth day of October, 1914, from which this appeal is taken, and these respondents say that said decree is not erroneous in the matters in said petition of appeal alleged, and these respondents respectfully show that the said decree, as against the said petitioner of appeal, should be affirmed in all things, except those complained of in this respondent's, Charles P. Scholfield's, petition of appeal.

CARRIE R. SCHOLFIELD and
CHARLES P. SCHOLFIELD.
By CONDICT, CONDICT & BOARDMAN,
Their Proctors.

NEW JERSEY PREROGATIVE COURT.

WILLIAM E. R. SMITH, Proponent; ELIZABETH HAINES, EDITH J. ADAMS, GEORGE McM. GODLEY, CARRIE R. SCHOLFIELD, CHARLES P. SCHOLFIELD, THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES, WILLIAM H. HULICK, Legatees, and RANDOLPH RODMAN, named in said Will as Executor, whose name was obliterated,

Respondents,

vs.

HARRY G. RUNKLE,
Caveator-Appellant.

On Appeal from a decree of the Essex County Orphans' Court admitting to probate the instruments purporting to be the last Will and Testament of William Runkle, deceased, and codicil thereto, with the exception of the ninth paragraph upon the second half-sheet of said will, and further ordering that letters testamentary be issued upon the aforesaid Will and Testament and codicil thereto as admitted to probate aforesaid to Randolph Rodman.

Answer to Petition of Appeal of George McM. Godley.

To the Honorable the Prerogative Court of the State of New Jersey:

The answer of William E. R. Smith, respondent, to the petition of appeal of George McM. Godley respectfully shows:

That this respondent admits that as executor and proponent of the last Will and Testament of William Runkle, late of the County of Essex, deceased, he offered for probate before the Orphan's Court of Essex County said will and codicil, and that Harry G. Runkle filed a caveat against admitting the same to probate.

That citations were issued to all parties in interest to appear before the Orphans' Court of Essex County, as stated in the petition of appeal of the said George McM. Godley.

This respondent admits that on or about the sixth day of November, Nineteen hundred and fourteen, a decree was made in the said Essex County Orphans' Court wherein it was ordered, adjudged and decreed as in the said petition stated.

This respondent denies that said decree did admit to probate, contrary to law and in violation of the rights of said George McM. Godley, certain paper writings designated in said decree as "first half-sheet" and "second half-sheet," but alleges that the decree in this respect is legal, proper and correct in every part.

And this respondent further denies that the said paper writings were not established by the evidence produced before said Court as a part or portion of said last will, and that said paper writings designated as aforesaid were not executed in a manner prescribed by the statute for the making and execution of a last Will and Testament.

And this respondent further denies that the said paper writings designated as aforesaid were not established by evidence produced at the hearing.

And this respondent further denies that the Essex County Orphan's Court illegally and improperly refused to permit proof of the making of the will of April 26th, Nineteen hundred and eleven, but your petitioner alleges that the decree in regard to the matters as aforesaid is legal, proper and correct in every part.

But this respondent alleges that the said decree is legal, proper and correct in every part, except that portion which excepts from the said Will and

NEW JERSEY PREROGATIVE COURT.

WILLIAM E. R. SMITH, Proponent; ELIZABETH HAINES, EDITH J. ADAMS, GEORGE McM. GODLEY, CARRIE R. SCHOLFIELD, CHARLES P. SCHOLFIELD, THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES, WILLIAM H. HULICK, Legatees, and RANDOLPH RODMAN, named in said Will as Executor, whose name was obliterated,

Respondents,

vs.

HARRY G. RUNKLE,
Caveator-Appellant.

On Appeal from a decree of the Essex County Orphans' Court admitting to probate the instruments purporting to be the last Will and Testament of William Runkle, deceased, and codicil thereto, with the exception of the ninth paragraph upon the second half-sheet of said will, and further ordering that letters testamentary be issued upon the aforesaid Will and Testament and codicil thereto as admitted to probate aforesaid to Randolph Rodman.

Answer to Petition of Appeal of George McM. Godley.

To the Honorable the Prerogative Court of the State of New Jersey:

The answer of William E. R. Smith, respondent, to the petition of appeal of George McM. Godley respectfully shows:

That this respondent admits that as executor and proponent of the last Will and Testament of William Runkle, late of the County of Essex, deceased, he offered for probate before the Orphan's Court of Essex County said will and codicil, and that Harry G. Runkle filed a caveat against admitting the same to probate.

That citations were issued to all parties in interest to appear before the Orphans' Court of Essex County, as stated in the petition of appeal of the said George McM. Godley.

This respondent admits that on or about the sixth day of November, Nineteen hundred and fourteen, a decree was made in the said Essex County Orphans' Court wherein it was ordered, adjudged and decreed as in the said petition stated.

This respondent denies that said decree did admit to probate, contrary to law and in violation of the rights of said George McM. Godley, certain paper writings designated in said decree as "first half-sheet" and "second half-sheet," but alleges that the decree in this respect is legal, proper and correct in every part.

And this respondent further denies that the said paper writings were not established by the evidence produced before said Court as a part or portion of said last will, and that said paper writings designated as aforesaid were not executed in a manner prescribed by the statute for the making and execution of a last Will and Testament.

And this respondent further denies that the said paper writings designated as aforesaid were not established by evidence produced at the hearing.

And this respondent further denies that the Essex County Orphan's Court illegally and improperly refused to permit proof of the making of the will of April 26th, Nineteen hundred and eleven, but your petitioner alleges that the decree in regard to the matters as aforesaid is legal, proper and correct in every part.

But this respondent alleges that the said decree is legal, proper and correct in every part, except that portion which excepts from the said Will and

Testament and codicil thereto the words "William E. R. Smith" and "East," appearing in the Twenty-eighth paragraph of said will, on the third page of the second full sheet thereof, and the words "William E. R. Smith to be executor," in the margin of the said will, opposite said Twenty-eighth paragraph, and orders that the words "Randolph Rodman" be inserted in lieu of the words "William E. R. Smith," and the word "South," inserted in lieu of the word "East," and that portion of the decree which orders that letters testamentary be issued to Randolph Rodman, and not to William E. R. Smith.

This respondent therefore prays that the decree as to the above-recited matters may be sustained.

MUNN & CHURCH,
Proctors for and of Counsel
with the Respondents.

(Filed February 15, 1915.)

NEW JERSEY PREROGATIVE COURT.

Between

GEORGE McM. GODLEY,
Appellant,

and

WILLIAM E. R. SMITH, Proponent; ELIZABETH HAINES, EDITH J. ADAMS, HARRY G. RUNKLE, CARRIE R. SCHOLFIELD, CHARLES P. SCHOLFIELD, THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES, WILLIAM H. HULICK, Legatees, and RANDOLPH RODMAN, named in said Will as Executor, whose name was obliterated,
Respondents.

Answer of Harry G. Runkle, Respondent, to the Petition of Appeal of George McM. Godley.

To the Honorable the Prerogative Court of the State of New Jersey:

The answer of Harry G. Runkle, one of the respondents above named, to the petition of appeal of George McM. Godley, the above-named appellant, respectfully shows:

That this respondent admits that on or about the thirty-first day of January, A. D. Nineteen hundred and fourteen, William Runkle departed this life in the City of Orange, in the County of

Essex, and State aforesaid, possessed of a considerable estate; that thereafter a paper writing bearing date May eleventh, Nineteen hundred and twelve, purporting to be his last Will and Testament, and a paper writing bearing date April twenty-ninth, Nineteen hundred and thirteen, purporting to be a codicil thereto, were presented by one William E. R. Smith to the Surrogate of the County of Essex, for probate; that a caveat was filed by Harry G. Runkle, brother of the decedent, and his nearest of kin surviving; that said Surrogate of the County of Essex issued citations to all parties interested, citing them to appear before the Orphans' Court of the County of Essex, wherein the question involved was submitted for determination; and that on or about the sixth day of November, Nineteen hundred and fourteen, a decree was made in the said Essex County Orphans' Court, wherein and whereby it was, amongst other things, ordered, adjudged and decreed that the said instruments be, and the same were thereby, established as the last Will and Testament and codicil thereto of the said William Runkle, deceased, with a certain exception and insertion therein particularly mentioned and set forth; and that the said Essex County Orphans' Court, after the said matter had come on to be heard, and upon proofs taken, by its said decree did admit to probate as a part and portion of the last Will and Testament of the said testator, the certain paper writings designated in said decree as "first half-sheet" and "second half-sheet," and this respondent denies that the said Essex County Orphans' Court illegally or improperly refused to permit proof to be made of the will of April twenty-sixth, Nineteen hundred and eleven, referred to in the above-named appellant's petition of appeal filed herein, or that

said Court illegally and improperly refused to admit testimony as to the declarations by the testator relative to his testamentary dispositions; and this respondent alleges that the said decree is illegal in this, that it adjudges that the said instruments purporting to be the last Will and Testament and codicil of William Runkle, deceased, were duly executed by said William Runkle as and for his last Will and Testament and codicil thereto, and in this, that the said decree establishes said instruments as the last Will and Testament and codicil thereto of the said William Runkle, deceased, with the exception of the Ninth paragraph on the second half-sheet of said Will and Testament, as the last will and codicil thereto of said William Runkle, deceased, and in this, that said decree also further orders and decrees that letters testamentary be issued upon the said Will and Testament and codicil thereto as admitted to probate, as aforesaid, to Randolph Rodman; and this respondent further alleges that the whole and every part of said decree is illegal and erroneous, and that said decree should have adjudged that neither said will nor codicil, nor any part thereof, should have been admitted to probate, but that probate thereof should have been refused; wherefore, this respondent prays that said decree may be wholly reversed, set aside and for nothing holden, and that probate of said papers purporting to be said last Will and Testament and codicil thereto may be refused, pursuant to the petition of appeal filed by this respondent herein.

Griggs & Harding,
Proctors of
Harry G. Runkle.

(Filed January 15, 1915.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Application for Probate of certain papers writing as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.	Answer of Harry G. Runkle, Respondent, to the Petition of Appeal of Charles P. Scholfield.

To the Honorable the Prerogative Court of the State of New Jersey:

The answer of Harry G. Runkle to the petition of appeal of Charles P. Scholfield, the appellant in the above-stated cause, respectfully shows:

That this respondent admits that the decree made in the Orphans' Court of the County of Essex, bearing date the sixth day of November, Nineteen hundred and fourteen, recites as follows:

> "And the Court being further of the opinion that the Ninth paragraph of said last Will and Testament upon the second half-sheet thereof, was canceled by the said William Runkle, deceased, prior to his decease."

And that the said decree excepts from the operation of said decree establishing the instrument propounded for probate as the last Will and Testament, and admitting the same to probate, the said Ninth paragraph on the second half-sheet of said Will and Testament.

And this respondent denies that said Ninth paragraph of said will upon said second half-sheet,

was not canceled by the said William Runkle, deceased, and denies that there was not legal evidence before the Court upon which the Court could have found the said William Runkle, deceased, canceled the said Ninth paragraph of said last Will and Testament, and denies that it appears by the record of this case that the said Ninth paragraph of said will was not canceled in a manner required by law and the statutes of this State, in such case made and provided, and denies that the said decree should have admitted to probate the instruments propounded for probate, including the said Ninth paragraph, as a valid and integral part of said last will and codicil; and this respondent, denying as hereinafter alleged, that said will or codicil, or any part thereof, should have been admitted to probate, further denies that said Ninth paragraph was a valid or integral part of said will, even if said will and codicil, except said paragraph, should have been admitted to probate, and this respondent alleges that said Ninth paragraph was canceled by said William Runkle, deceased, and should have been excepted from the probate of said will and codicil, even if said will and codicil, except said Ninth paragraph, should have been admitted to probate.

And this respondent alleges that the said decree is illegal in this, that it adjudges that the said instruments purporting to be the last Will and Testament and codicil of William Runkle, deceased, were duly executed by said William Runkle as and for his last Will and Testament and codicil thereto, and in this, that the said decree establishes said instruments as the last Will and Testament and codicil thereto of the said William Runkle, deceased, with the exception of the Ninth paragraph on the second half-sheet of said Will

and Testament, as the last will and codicil thereto of said William Runkle, deceased, and in this, that said decree also further orders and decrees that letters testamentary be issued upon the said Will and Testament and codicil thereto as admitted to probate, as aforesaid, to Randolph Rodman; and this respondent further alleges that the whole and every part of said decree is illegal and erroneous, and that said decree should have adjudged that neither said will nor codicil, nor any part thereof, should have been admitted to probate, but that probate thereof should have been refused, wherefore this respondent prays that said decree may be wholly reversed, set aside and for nothing holden, and that probate of said papers purporting to be said last Will and Testament and codicil thereto may be refused, pursuant to the petition of appeal filed by this respondent herein.

Griggs & Harding
Proctors of Harry G. Runkle.

(Filed December 16, 1914.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Application for Probate of certain paper writings as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.	On Appeal from Essex County Orphans' Court. Answer to Petition of Appeal.

The answer of William H. Hulick, legatee, to the petition of appeal of the appellant Charles P. Scholfield:

This respondent not acknowledging all or any of the matters which in the said petition of appeal of Charles P. Scholfield are contained to be true, in answer thereto says and admits that a certain order was made in the Essex County Orphans' Court on the sixth day of November, nineteen hundred and fourteen, establishing certain paper writings as the last Will and Testament and Codicil thereto of William Runkle, deceased, and admitting said paper writings to probate the last Will and Testament and Codicil thereto of William Runkle, deceased, with the exception of the ninth paragraph upon the second half-sheet of said last Will and Testament. And this respondent neither admits nor denies that this petitioner and appellant was aggrieved because the said decree did except the said ninth paragraph of the second half-sheet of the said last Will and Testament of said William Runkle from probate, nor does this respondent admit nor deny whether the cancellation of the said ninth paragraph was performed in the

manner required by law, nor does this respondent allege or deny that the said ninth paragraph should have been admitted to probate along with the said paper writings as the said last Will and Testament and Codicil thereto of the said William Runkle, but prays that this Court will make such order in the premises as shall seem equitable and just. But this respondent alleges and charges that in all other respects the said decree was legal and proper and prays that the same may be affirmed with costs to be adjudged to this respondent.

Jehiel G. Shipman

Proctor for and of Counsel with
William H. Hulick, Legatee.

(Filed December 12, 1914.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Application for Probate of certain paper writings as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.	On Appeal for Decree of Essex County Orphans' Court. Answer to Petition of Appeal of Charles P. Scholfield.

The answer of Randolph Rodman, respondent, to the petition of appeal of Charles P. Scholfield, appellant:

This respondent admits that an order or decree of the date, tenor and effect in the said petition of appeal set forth was made by the Orphans' Court of the County of Essex; and this respondent denies that said decree or any part thereof is erroneous, improper or illegal, and alleges that said decree and every part thereof is legal, proper and correct. He therefore prays that the said petition of appeal may be dismissed with costs to be adjudged to this respondent.

CHARLES B. STORRS,
Proctor for and of Counsel
with Respondent.

(Filed January 11, 1915.)

NEW JERSEY PREROGATIVE COURT.

WILLIAM E. R. SMITH, Proponent; ELIZABETH HAINES, EDITH J. ADAMS, GEORGE McM. GODLEY, CARRIE R. SCHOLFIELD, CHARLES P. SCHOLFIELD, THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES, WILLIAM H. HULICK, Legatees, and RANDOLPH RODMAN, named in said Will as Executor, whose name was obliterated,

Respondents,

vs.

HARRY G. RUNKLE,
Caveator-Appellant.

On Appeal from a decree of the Essex County Orphans' Court admitting to probate the instruments purporting to be the last Will and Testament of William Runkle, deceased, and codicil thereto, with the exception of the ninth paragraph upon the second half-sheet of said will, and further ordering that letters testamentary be issued upon the aforesaid Will and Testament and codicil thereto as admitted to probate aforesaid to Randolph Rodman.

Answer to Petition of Appeal of Charles P. Scholfield.

To the Honorable the Prerogative Court of the State of New Jersey:

The answer of William E. R. Smith, respondent, to the petition of appeal of Charles P. Scholfield, respectfully shows:

That this respondent admits that a decree was made on or about the sixth day of November, Nineteen hundred and fourteen, in the above-entitled cause in the Essex County Orphans' Court, wherein was ordered, adjudged and decreed as in said petition stated.

And this respondent denies that the ninth paragraph of said last Will and Testament upon the second half-sheet was not canceled by the said William Runkle, deceased, and further denies that

there was no legal evidence before the Court upon which the Court could have found that the said William Runkle, deceased, canceled the ninth paragraph of said last Will and Testament, and further denies that it appears by the record of this case that the said ninth paragraph of this will was not canceled in a manner required by law and the statutes of this State in such case as made and provided, and further denies that the said decree should have admitted to probate the said ninth paragraph as a valid and integral part of said last Will and Testament.

But this respondent alleges that the said ninth paragraph was legally and properly canceled by the said William Runkle, and he is so advised by counsel.

This respondent, therefore, prays that the decree, in so far as it refers to the said ninth paragraph, should be sustained.

And this respondent alleges that the said decree is legal, proper and correct in every part, except that portion which excepts from the said Will and Testament and Codicil thereto the words "William E. R. Smith" and "east," appearing in the twenty-eighth paragraph of said will on the third page of the second full-sheet thereof, and the words "William E. R. Smith to be executor" in the margin of the said will opposite said twenty-eighth paragraph, and orders that the words "Randolph Rodman" be inserted in lieu of the words "William E. R. Smith" and the word "south" inserted in lieu of the word "east," and that portion of the decree which orders that letters testamentary be issued to Randolph Rodman and not to William E. R. Smith.

MUNN & CHURCH,
Proctors for and of Counsel
with the Respondents.

(Filed January 21, 1915.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Application for Probate of certain papers writing as the last Will and Testament of WILLIAM RUNKLE, deceased.	Answer of the College Board of the Presbyterian Church in the United States of America to Petition of Appeal of Charles P. Scholfield.

To the Honorable the Prerogative Court of the State of New Jersey:

The answer of The College Board of the Presbyterian Church in the United States of America to the petition of appeal of Charles P. Scholfield says:

(1) This respondent denies that the decree or any part thereof admitting the will of William Runkle and the codicil to such will to probate was erroneous.

(2) This respondent denies that either for the reasons stated in the petition of appeal or for any other reasons that said decree or any part thereof admitting said will and codicil to probate should be reversed and set aside, but says that the said decree was duly and properly made after hearing all the facts and evidence in relation to the making thereof, and that the decree appealed from should be affirmed.

This respondent, therefore, prays that the decree admitting the said papers writing to probate as the last Will and Codicil thereto of William Runkle, deceased, be affirmed, and that this re-

spondent be hence dismissed with its costs in this respect sustained.

THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA,

Respondent.

By WM. HUCK, JR.,
Proctor and of Counsel
for said Respondent.

(Filed February 15, 1915.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Probate of the Last Will and Testament and Codicil thereto of WILLIAM RUNKLE, deceased.	Answer of Harry G. Runkle, Respondent, to the Petition of Appeal of William E. R. Smith.

To the Honorable the Prerogative Court of the State of New Jersey:

The answer of Harry G. Runkle, respondent, to the petition of appeal of William E. R. Smith, filed in the above matter, respectfully shows:

That this respondent admits that William Runkle, late of the County of Essex, died on the thirty-first day of January, Nineteen hundred and fourteen, seized and possessed of real and personal

estate; that on said date the said William E. R. Smith, appellant, who was named as executor in the paper writing hereinafter mentioned, produced before the Surrogate of Essex County for probate a will of real and personal estate, certain instruments in the writing of said decedent, purporting to be the last Will and Testament of the said William Runkle, which instruments consisted of a will bearing date the eleventh day of May, Nineteen hundred and twelve, and a paper purporting to be a codicil thereto bearing date the twenty-ninth day of April, Nineteen hundred and thirteen; that this respondent admits that certain questions arose on the face of said papers and that a caveat was filed against the probate thereof by this respondent and the matter was duly heard in the Essex County Orphans' Court before the Honorable WILLIAM P. MARTIN, one of the Judges of said Court; that in and by an order of said Court bearing date the sixth day of November, Nineteen hundred and fourteen, it was ordered that said written instruments be established as the last Will and Testament and the codicil thereto of the said William Runkle, with the exception of the ninth paragraph of the second half-sheet of said will, and with the exception of the words "William E. R. Smith" and "east" appearing in the twenty-eighth paragraph of said will, and that the words "Randolph Rodman" be inserted in lieu of the words "William E. R. Smith" and the word "south" be inserted in lieu of the word "east," and that letters testamentary be issued upon the aforesaid papers purporting to be said Will and Testament and codicil thereto to the said Randolph Rodman; and this respondent alleges that the said decree is illegal in this, that it adjudges that the said instruments purporting to be the last Will and Testa-

ment and codicil of William Runkle, deceased, were duly executed by said William Runkle as and for his last Will and Testament and codicil thereto, and in this that the said decree establishes said instruments as the last Will and Testament and codicil thereto of the said William Runkle, deceased, with the exception of the ninth paragraph on the second half-sheet of said Will and Testament as the last will and codicil thereto of said William Runkle, deceased, and in this that said decree also further orders and decrees that letters testamentary be issued upon the said Will and Testament and codicil thereto as admitted to probate, as aforesaid, to Randolph Rodman; and this respondent further alleges that the whole and every part of said decree is illegal and erroneous, and that said decree should have adjudged that neither said will nor codicil nor any part thereof should have been admitted to probate, but that probate thereof should have been refused; wherefore, this respondent prays that said decree may be wholly reversed, set aside and for nothing holden, and that probate of said papers purporting to be said last Will and Testament and codicil thereto may be refused, pursuant to the petition of appeal filed by this respondent herein.

Griggs & Harding
Proctors of Harry G. Runkle.

(Filed December 16, 1914.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER
OF
The Application for Probate of certain paper writings as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.

The answer of William H. Hulick, respondent, to the petition of appeal of William E. R. Smith, appellant:

This respondent not acknowledging all or any of the matters which in the said petition of appeal of the said William E. R. Smith are contained to be true, for answer thereto says and admits the death of the said William Runkle on January thirty-first, Nineteen hundred and fourteen, and that certain paper writings of which the petitioner, William E. R. Smith, was named as executor were produced before the Surrogate of Essex County for probate as the last Will and Testament and codicil thereto of the said William Runkle, deceased, and this respondent admits that a caveat was filed against the probate of said papers and that the matter was heard in the Essex County Orphans' Court, and that on November sixth, Nineteen hundred and fourteen, a decree was made by the said Essex County Orphans' Court that the said written instruments be established as the last Will and Testament and the codicil thereto of the said William Runkle, with the exception of the ninth paragraph of the second half-sheet of said will and with the exception of the words "William E.

R. Smith" and "east," appearing in the twenty-eighth paragraph of said will, and that the words "Randolph Rodman" be inserted in lieu of the words "William E. R. Smith," and the word "south" be inserted in lieu of the word "east," and that letters testamentary be issued from the aforesaid Will and Testament and codicil thereto to the said Randolph Rodman.

This respondent neither admits nor denies that the said decree is erroneous in so far as it excepts from the said Will and Testament and codicil thereto the above-mentioned words, and in so far as it orders the words "Randolph Rodman" to be inserted in lieu of the words "William E. R. Smith" and the word "south" inserted in lieu of the word "east."

And this respondent prays that this Honorable Court will give such relief in the premises to the petitioner herein as shall seem equitable and just, but this respondent believes that the said decree or order in all other respects is legal and proper and prays that the same may be in all other respects affirmed, with costs to this respondent.

Jehiel G. Shipman.

Proctor for and of Counsel with
William H. Hulick, Legatee.

(Filed December 12, 1914.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Application for Probate of certain paper writings as the last Will and Testament and Codicil of WILLIAM RUNKLE, deceased.	On Appeal from Essex County Orphans' Court. Answer to Petition of Appeal of William E. R. Smith.

The answer of Randolph Rodman, respondent, to the petition of appeal of William E. R. Smith, appellant:

This respondent admits that an order or decree of the date, tenor and effect in the said petition of appeal set forth was made by the Orphans' Court of the County of Essex; and this respondent denies that said decree or any part thereof is erroneous, improper or illegal, particularly in so far as it excepts from said Will and Testament and codicil thereto the words "William E. R. Smith" and "east," appearing in the twenty-eighth paragraph of said will on the third page of the second full-sheet thereof, and the words "William E. R. Smith to be Executor" in the margin of the said will opposite said twenty-eighth paragraph, or in so far as said decree orders that the words "Randolph Rodman" be inserted in lieu of the words "William E. R. Smith" and the word "south" inserted in lieu of the word "east," or in so far as said decree orders that letters testamentary be issued to the said Randolph Rodman and not to the appellant herein; and this respondent alleges that said decree and every part thereof is legal, proper

and correct. He, therefore, prays that the said petition of appeal may be dismissed with costs to be adjudged to this respondent.

CHARLES B. STORRS,
Proctor for and of Counsel
with Respondent

(Filed January 21, 1915.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER

OF

The Application for Probate of certain papers writing as the last Will and Testament of WILLIAM RUNKLE, deceased.

Answer of the College Board of the Presbyterian Church in the United States of America to Petition of Appeal of William E. R. Smith.

To the Honorable the Prerogative Court of the State of New Jersey:

The answer of The College Board of the Presbyterian Church in the United States of America to the petition of appeal of William E. R. Smith says:

(1) This respondent denies that the decree or any part thereof admitting the will of William Runkle and the codicil to such will to probate was erroneous.

(2) This respondent denies that either for the reasons stated in the petition of appeal or for any

other reasons that said decree or any part thereof admitting said will and codicil to probate should be reversed and set aside, but says that the said decree was duly and properly made after hearing all the facts and evidence in relation to the making thereof, and that the decree appealed from should be affirmed.

This respondent, therefore, prays that the decree admitting the said papers writing to probate as the last Will and Codicil thereto of William Runkle, deceased, be affirmed, and that this respondent be hence dismissed with its costs in this respect sustained.

THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA,

Respondent.

By WM. HUCK, JR.,
Proctor and of Counsel
for said Respondent.

(Filed January 5, 1915.)

NEW JERSEY PREROGATIVE COURT.

WILLIAM E. R. SMITH, *et al.*, Respondents, vs. HARRY G. RUNKLE, Caveator-Appellant.	Sur-Appeal. Answer of Carrie R. Scholfield and Charles P. Scholfield to the Petition of Appeal of William E. R. Smith.

Carrie R. Scholfield and Charles P. Scholfield, two of the respondents, answering the petition of appeal of William E. R. Smith, appellant, say that they deny that the said appellant is in any wise aggrieved by the decree of the Orphans' Court, dated on or about the 6th day of October, 1914, from which this appeal is taken, and these respondents say that said decree is not erroneous in the matters in said petition of appeal alleged, and these respondents respectfully show that the said decree, as against the said petition of appeal, should be affirmed in all things, except those complained of in this respondent's, Charles P. Scholfield's, petition of appeal.

CARRIE R SCHOLFIELD and
CHARLES P. SCHOLFIELD,
By CONDICT, CONDICT & BOARDMAN,
their Proctors.

NEW JERSEY PREROGATIVE COURT.

WILLIAM E. R. SMITH, Proponent, *et als.*, Respondents, vs. HARRY G. RUNKLE, Caveator-Appellant.	On Appeal &c.

It appearing to the Court that the petition of appeal and transcript of proceedings in the Court below have been filed with the Register,

It is, on this eighteenth day of January, One thousand nine hundred and fifteen,

ORDERED, that the respondent, Edith J. Adams, answer the petition of appeal within twenty days after service of a copy of the petition of notice of this order, and in default thereof that appellant may be heard *ex parte*.

By the Ordinary,

DAVID S. CRATER,
Register.

Endorsed:

"Filed Jan. 18, 1915.

DAVID S. CRATER,
Register."

NEW JERSEY PREROGATIVE COURT.

WILLIAM E. R. SMITH, Proponent, *et als.*,
Respondents,

vs.

HARRY G. RUNKLE,
Caveator-Appellant.

On Appeal &c. Order.

It appearing to the Court that by an order of this Court dated the eighteenth day of January, Nineteen hundred and fifteen, it was ordered that Edith J. Adams, one of the respondents in the above-entitled cause, answer the petition of appeal filed herein within twenty days after service of a copy of the petition and notice of this order and in default thereof that the appellant may be heard *ex parte;* and it further appearing that a copy of the petition of appeal and notice of this order having been served upon the said Edith J. Adams and that she has not answered the said petition within twenty days,

It is on this nineteenth day of February, Nineteen hundred and fifteen,

ORDERED, that the appeal of the said appellant, Harry G. Runkle, be heard *ex parte* as against the said respondent, Edith J. Adams.

E. R. WALKER,
Ordinary.

Respectfully advised:
JOHN H. BACKES,
V. O.

Endorsed:
"Filed Feb 19 1915
DAVID S. CRATER,
Register."

NEW JERSEY PREROGATIVE COURT.

GEORGE McM. GODLEY, Appellant, vs. WILLIAM E. R. SMITH and others, Respondents.	Order to Answer.

It appearing to the Court that the petition of appeal and transcript of proceedings in the court below have been filed with the Register,

It is, thereupon, on this fifth day of January, A. D. One thousand nine hundred and fifteen,

ORDERED, that the respondent answer to the petition of appeal within twenty days after the service of a copy of the petition and notice of this order, and in default thereof that the appellant be heard *ex parte*.

By the Ordinary,

DAVID S. CRATER,
Register.

Endorsed:

"Filed Jan. 5, 1915,
DAVID S. CRATER,
Register."

A true copy:

LUM, TAMBLYN & COLYER.

NEW JERSEY PREROGATIVE COURT.

GEORGE MCM. GODLEY, Appellant, vs. WILLIAM E. R. SMITH, Proponent, *et als.*, Respondents.	On Appeal from Decree Granting Probate. Order for Hearing *ex parte*.

This cause being opened to the Court by Lum, Tamblyn & Colyer, proctors for the appellant, and it appearing that Richard V. Lindabury, proctor for Edith J. Adams, legatee; Charles B. Storrs, proctor for Randolph Rodman, executor; William Huck, Jr., proctor for The College Board of the Presbyterian Church of the United States, legatee, and Griggs & Harding, proctors for Harry G. Runkle, caveator, have been duly served with a copy of the petition of appeal and of the order to answer entered on January fifth, Nineteenth hundred and fifteen, and it further appearing that the respondents Edith J. Adams and Randolph Rodman have not nor has either of them filed any answer to the said petition of appeal within the time limited by law, but have wholly failed and neglected so to do,

It is, on this day of February, Nineteen hundred and fifteen, on motion of Lum, Tamblyn & Colyer, proctors for the appellant,

ORDERED, that the appeal be heard *ex parte* as against such respondents.

E. R. WALKER,
Ordinary.

Respectfully advised:
JOHN H. BACKES,
V. O.

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Probate of the last Will and Testament and Codicil thereto of WILLIAM RUNKLE, deceased.	Stipulation.

It is stipulated by and between the parties in interest in the above-entitled cause that all parties who have appealed from the decision of the Essex County Orphans' Court shall go up on the transcript filed by Griggs & Harding, attorneys for the appellant, Harry G. Runkle.

Dated,

GRIGGS & HARDING,
Solicitors and Counsel
of Harry G. Runkle.

MUNN & CHURCH,
Solicitors for
Wm. E. R. Smith.

RALPH LUM,
Solicitor for
George McM. Godley.

HENRY V. CONDICT,
Solicitor for
Charles P. Scholfield.

Opinion.

NEW JERSEY PREROGATIVE COURT.

Memorandum.

WILLIAM E. R. SMITH, Proponent; ELIZABETH HAINES, EDITH J. ADAMS, GEORGE McM. GODLEY, CARRIE R. SCHOLFIELD, CHARLES P. SCHOLFIELD, THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES, WILLIAM H. HULICK, Legatees, and RANDOLPH RODMAN, named in said Will as Executor, whose name was obliterated,

Respondents,

vs.

HARRY G. RUNKLE,
Caveator-Appellant.

On appeal from a decree of the Essex County Orphans' Court admitting to probate the instruments purporting to be the last Will and Testament of William Runkle, deceased, and codicil thereto, with the exception of the ninth paragraph upon the second half-sheet of the will, and further ordering that letters testamentary be issued to Randolph Rodman upon the will and codicil as admitted to probate.

Messrs. GRIGGS & HARDING, for Harry G. Runkle.

Messrs. LUM, TAMBLYN & COLYER, for George McM. Godley.

MR. JEHIEL G. SHIPMAN, MR. HOWARD TAYLOR and MR. JOHN G. JACKSON, of the New York Bar, for William H. Hulick.

Messrs. Condict & Boardman and Mr. Gilbert Collins, for Charles P. Scholfield and Carrie R. Scholfield.

Mr. Alonzo Church, Mr. J. Henry Harrison and Mr. Allen S. Wrenn, of the New York Bar, for William E. R. Smith.

Mr. William Huck, Jr., for the College Board of the Presbyterian Church in the United States.

Messrs. McCarter & English and Mr. Arthur F. Egner, for Home Missions of Presbyterian Church and Elizabeth Haines.

Mr. Charles B. Storrs, for Randolph Rodman.

Walker, *Ordinary:*

A very careful consideration of this case has led me to the conclusion that it was rightly decided in the Essex county orphans' court, and the decree of that court admitting to probate the last will and testament and codicil thereto of William Runkle, deceased, in the form therein expressed and adjudged, will be in all things affirmed.

Decree of Prerogative Court.

NEW JERSEY PREROGATIVE COURT.

WILLIAM E. R. SMITH, Proponent; ELIZABETH HAINES, GEORGE MCM. GODLEY, CARRIE R. SCHOLFIELD, CHARLES P. SCHOLFIELD, THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES, WILLIAM H. HULICK, Legatees, and RANDOLPH RODMAN, named in said Will as Executor, whose name was obliterated,

Respondents,

vs.

HARRY G. RUNKLE,
Caveator-Appellant.

Decree of Affirmance.

On appeal from a decree of the Essex County Orphans' Court admitting to probate the instruments purporting to be the last Will and Testament of William Runkle, deceased, and codicil thereto, with the exception of the ninth paragraph on the second half-sheet of the will, and further ordering that letters testamentary be issued to Randolph Rodman upon the will and codicil as admitted to probate.

This matter being brought to hearing on appeal, in the presence of Messrs. Griggs & Harding, counsel for Harry G. Runkle; Messrs. Lum, Tamblyn & Colyer, counsel for George McM. Godley; Messrs. Condict, Condict & Boardman and Mr. Gilbert Collins, counsel for Charles P. Scholfield and Carrie

R. Scholfield; Messrs. Church & Harrison and Mr. Allan S. Wrenn, of the New York Bar, counsel for William E. R. Smith; Mr. Jehiel G. Shipman and Mr. Howard Taylor and Mr. John G. Jackson, of the New York Bar, counsel for William H. Hulick, respondent; Messrs. McCarter & English and Mr. Arthur F. Egner, counsel for Home Missions of Presbyterian Church and Elizabeth Haines, respondents; William Huck, Jr., counsel for the College Board of Presbyterian Church in the United States, respondent; and Mr. Charles B. Storrs, counsel for Randolph Rodman, respondent; and the arguments of counsel being heard and the matter being duly considered and the Court being of the opinion that the decree of the Essex County Orphans' Court should be in all respects affirmed; it is on this 3rd day of November, nineteen hundred and fifteen,

ORDERED, ADJUDGED AND DECREED, that the decree of the Essex County Orphans' Court, made on the sixth day of November, nineteen hundred and fourteen, admitting to probate the last Will and Testament and codicil thereto of William Runkle, deceased, in the form therein expressed and adjudged be in all things affirmed. And it is further

ORDERED, ADJUDGED AND DECREED, that the record be remitted to the Essex County Orphans' Court to proceed thereon according to law and the practice of the said Court.

E. R. WALKER,
Ordinary.

Endorsed:

"Filed Nov 3 1915.
THOMAS F. MARTIN,
Register."

Notice of appeal from the decree of the Prerogative Court to the Court of Errors and Appeals of Harry G. Runkle, filed by Griggs & Harding, proctors.

Notice of appeal from the decree of the Prerogative Court to the Court of Errors and Appeals of Charles P. Scholfield, filed by Condict, Condict & Boardman, proctors.

Notice of appeal from the decree of the Prerogative Court to the Court of Errors and Appeals of George McM. Godley, filed by Lum, Tamblyn & Colyer, proctors.

Notice of appeal from the decree of the Prerogative Court to the Court of Errors and Appeals of William E. R. Smith, filed by Church & Harrison, proctors.

Petition of Appeal of Harry G. Runkle.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM E. R. SMITH, Proponent; ELIZABETH HAINES, EDITH J. ADAMS, GEORGE McM. GODLEY, CARRIE R. SCHOLFIELD, CHARLES P. SCHOLFIELD, THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES, WILLIAM H. HULICK, Legatees, and RANDOLPH RODMAN, named in the instrument purporting to be the last will of William Runkle, deceased, as Executor, whose name was obliterated,

Respondents,

vs.

HARRY G. RUNKLE,
Caveator-Appellant.

On appeal from a decree of the New Jersey Prerogative Court affirming a decree of the Essex County Orphans' Court admitting to probate the instruments purporting to be the last Will and Testament of William Runkle, deceased, and codicil thereto, with the exception of the ninth paragraph upon the second half sheet of said will, and further ordering that letters testamentary be issued upon the aforesaid Will and Testament and codicil thereto as admitted to probate as aforesaid to Randolph Rodman.

Petition of Appeal.

To the Honorable the Court of Errors and Appeals of the State of New Jersey in the Last Resort in All Causes:

The petition of Harry G. Runkle, the appellant in the above stated cause, respectfully shows:

That your petitioner finds himself aggrieved by a decree made in the New Jersey Prerogative Court by his Honor EDWIN ROBERT WALKER, Ordinary of said Prerogative Court, bearing date the third day

of November, nineteen hundred and fifteen, which said decree affirms a decree made by the Orphans' Court of the County of Essex, dated on or about the sixth day of November, nineteen hundred and fourteen, in the matter of paper writings alleged to be the last Will and Testament and codicil thereto of William Runkle, late of the County of Essex, deceased, by which the above-named respondent, William E. R. Smith, was named as executor, by whom said paper writings have been offered for probate before said Orphans' Court, and wherein your petitioner filed a caveat against admitting the same to probate; and your petitioner further shows that he is aggrieved by said decree of said Prerogative Court in this respect, to wit:

That said decree of said Prerogative Court in all things confirms said decree of said Orphans' Court and adjudges, that the instruments in writing offered by the proponent for probate, as and for the last Will and Testament and codicil thereto of William Runkle, deceased, were duly executed by said William Runkle, as and for his last Will and Testament and codicil thereto, and in this, that the said decree of said Prerogative Court established said instruments as the last Will and Testament and codicil thereto of the said William Runkle, deceased, with the exception of the ninth paragraph of the second half-sheet of said Will and Testament, and in this, that said decree of said Prerogative Court admits the said instruments to probate, with the exception of the said ninth paragraph upon the second half-sheet of said Will and Testament, as the last will and codicil thereto of said William Runkle, deceased, and in this, that said decree of said Prerogative Court also further orders and decrees that letters testamentary be issued upon the said last Will and Testament and

codicil thereto, as admitted to probate, as aforesaid, to Randolph Rodman.

And your petitioner appeals from the whole and every part of said decree of said Prerogative Court upon the grounds that said decree should have reversed, set aside and annulled said decree of said Orphans' Court and adjudged that neither said will nor codicil should have been admitted to probate, but that probate thereof should have been refused, and that said decree of said Prerogative Court and every part thereof is erroneous.

Your petitioner therefore prays, that the said decree of said Prerogative Court may be wholly reversed, set aside and for nothing holden, and that probate of said papers purporting to be said last will and codicil thereto may be refused, and that your petitioner may have such further relief in the premises as shall be equitable and just.

GRIGGS & HARDING,
Proctors and Counsel with Appellant.

Petition of Appeal of Charles P. Scholfield.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM E. R. SMITH, RANDOLPH RODMAN *et al.*, Respondents, vs. CHARLES P. SCHOLFIELD, Appellant.	On appeal from decree of the Prerogative Court affirming decree of Essex County Orphans' Court. Petition of Appeal.

To the Honorable Court of Errors and Appeals:

The petition of Charles P. Scholfield, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a decree of the New Jersey Prerogative Court, entered on the third day of November, 1915, in that the said decree affirms in all things a certain decree of the Essex County Orphans' Court made on the sixth day of November, 1914, which said last-mentioned decree recites "that the ninth paragraph of said last Will and Testament upon the second half-sheet thereof was canceled by said William Runkle, prior to his decease," and excepts the said ninth paragraph on the second half-sheet of said Will and Testament from the effect of said decree establishing the said last Will and Testament and admitting the same to probate.

And your petitioner shows that the said decree of the Prerogative Court is erroneous in this, that whereas said ninth paragraph of said last Will and Testament was not canceled by said William Runkle, deceased, nor was it in any way revoked in the manner prescribed by law, the said decree of said

Orphans' Court should have been reversed to the end that said recital might have been exercised therefrom and said Orphans' Court decree modified to admit to probate the instrument propounded for probate, including said ninth paragraph as a valid and integral part of said last Will and Testament.

And your petitioner appeals from the said decree of the Prerogative Court in so far as it is herein alleged to be erroneous, and your petitioner prays that the said decree of the Prerogative Court may be reversed to the end that the said decree of the said Orphans' Court be reversed and said recital excised therefrom and so modified as to admit to probate the instrument propounded for probate, including said ninth paragraph as a valid and integral part of said last Will and Testament.

CONDICT, CONDICT & BOARDMAN,
Proctors for and of Counsel with
Chas. P. Scholfield, Appellant.

Petition of Appeal of George McM. Godley.

NEW JERSEY COURT OF ERRORS AND APPEALS.

GEORGE MCM. GODLEY,
Appellant,

vs.

WILLIAM E. R. SMITH, Proponent; ELIZABETH HAINES, EDITH J. ADAMS, HARRY G. RUNKLE, CARRIE R. SCHOLFIELD, CHARLES P. SCHOLFIELD, THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES, WILLIAM H. HULICK, Legatees, and RANDOLPH RODMAN, named in said Will as Executor whose name was obliterated,
Respondents.

On appeal from decree of the Ordinary of the State of New Jersey affirming decree of Essex County Orphans' Court.

Petition of Appeal.

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of George McM. Godley, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Prerogative Court by his Honor EDWIN ROBERT WALKER, Ordinary of the State of New Jersey, bearing date the third day of November, A. D. nineteen hundred and fifteen, wherein the said George McM. Godley was appellant and William E. R. Smith, proponent, and Elizabeth Haines, Edith J. Adams, Harry G. Runkle, Carrie R. Scholfield, Charles P. Scholfield, The College Board of the Presbyterian Church of the United States, William H. Hulick, legatees, and Randolph Rodman were respondents in the follow-

ing respects, to wit: That said decree of said Prerogative Court in all things confirms a certain decree made in the Essex County Orphans' Court on or about the sixth day of November, nineteen hundred and fourteen, and adjudges that said decree did duly admit to probate as a part and portion of the last Will and Testament of William Runkle, deceased, the certain paper writings designated in said decree as "first half-sheet" and "second half-sheet" and in this, that the said decree of said Prerogative Court adjudges that said paper writings designated as aforesaid were established by the evidence produced before said Orphans' Court as a part of said last will and that said paper writings were executed in the manner prescribed by statute for the making and executing of a last Will and Testament in this State, and that said paper writings were part of the last Will and Testament of said testator as made, published and declared by him and that the said Essex County Orphans' Court legally and properly refused to permit proof to be made of the will of April 26, 1911, and that said Court legally and properly refused to permit testimony as to the declaration by the testator relative to his testamentary dispositions.

And your petitioner appeals from the decree of the Prerogative Court so far as it admits to probate and establishes as a part of the last Will and Testament of William Runkle, deceased, the certain paper writings designated as above, and prays that the said decree of the said Prerogative Court may be reversed, set aside and for nothing holden in the respects above mentioned, and that your petitioner may have such relief in the premises as to this Honorable Court may seem meet.

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

RALPH E. LUM,
of Counsel with Appellant.

Petition of Appeal of William E. R. Smith.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM E. R. SMITH,
Proponent-Appellant,

vs.

ELIZABETH HAINES, EDITH J. ADAMS, GEORGE MCM. GODLEY, CARRIE R. SCHOLFIELD, CHARLES P. SCHOLFIELD, THE COLLEGE BOARD OF THE PRESBYTERIAN CHURCH OF THE UNITED STATES, WILLIAM H. HULICK, Legatees, and RANDOLPH RODMAN, named in said Will as Executor, whose name was obliterated, and HARRY G. RUNKLE,
Respondents.

Appeal of William E. R. Smith from a decree of the Ordinary of the State of New Jersey admitting to probate the last Will and Testament of William Runkle, deceased, with the exception of the ninth paragraph of the second half sheet of said last Will and Testament.

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

The petition of William E. R. Smith, an appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Prerogative Court by his Honor EDWIN ROBERT WALKER, Ordinary of New Jersey, bearing date the third day of November, in the year nineteen hundred and fifteen, wherein the said William E. R. Smith was an appellant and the said Elizabeth Haines, Edith J. Adams, George McM. Godley, Carrie R. Scholfield, Charles P. Scholfield, The College Board of the Presbyterian

Church of the United States, William H. Hulick, legatees, and Randolph Rodman, named in said will as executor, whose name was obliterated, and Harry G. Runkle were respondent-appellees, in this respect, to wit: that the said decree adjudges that the words "William E. R. Smith" and "east" in the twenty-eighth paragraph of said Will and Testament upon the third page of the second full sheet thereof and the words "William E. R. Smith to be executor" in the margin of the said last Will and Testament opposite the said twenty-eighth paragraph thereof, were inserted in the said Will and Testament subsbequent to the execution of the said Will and Testament, and subsequent to the execution of the codicil thereto, and that the words "Randolph Rodman" existed in place of the words "William E. R. Smith" and the word "south" existed in the place of the word "east" at the time of the execution of said last Will and Testament and the codicil thereto, and ordered that the will be established with the exception of the ninth paragraph of the second half-sheet of said Will and Testament and the words "William E. R. Smith" and "east" appearing in the twenty-eighth paragraph of said will and that the words "Randolph Rodman" and "south" be inserted in lieu thereof. And your petitioner humbly appeals from that part of the decree as aforesaid, upon the ground that the same is erroneous, for that the words "William E. R. Smith" and "east" in the twenty-eighth paragraph of said last Will and Testament upon the third page of the second full sheet thereof and the words "William E. R. Smith to be executor" in the margin of the said last Will and Testament opposite the said twenty-eighth paragraph thereof, were inserted in said last Will and Testament prior to the execution of the said Will and Testament, and prior to the execution of the codicil thereto,

and that the said words "William E. R. Smith" and "east" existed in the will at the time of the execution of said will and the codicil.

Your petitioner therefore prays that the said decree of the said Ordinary may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court may seem meet.

Dec. 8, 1915.

CHURCH & HARRISON,
Solicitors and of Counsel with Appellant.

Answer of Harry G. Runkle to petition of appeal of Charles P. Scholfield, filed by Griggs & Harding, proctors.

Answer of Harry G. Runkle to petition of appeal of George McM. Godley, filed by Griggs & Harding, proctors.

Answer of Harry G. Runkle to petition of appeal of William E. R. Smith, filed by Griggs & Harding, proctors.

Answer of William E. R. Smith to petition of appeal of Harry G. Runkle, filed by Church & Harrison, proctors.

Answer of William E. R. Smith to petition of appeal of George McM. Godley, filed by Church & Harrison, proctors.

Answer of William E. R. Smith to petition of appeal of Charles P. Scholfield, filed by Church & Harrison, proctors.

Answer of George McM. Godley to petition of appeal of Harry G. Runkle, filed by Lum, Tamblyn & Colyer, proctors.

Answer of George McM. Godley to petition of appeal of Charles P. Scholfield, filed by Lum, Tamblyn & Colyer, proctors.

Answer of George McM. Godley to petition of appeal of William E. R. Smith, filed by Lum, Tamblyn & Colyer, proctors.

Answer of Charles P. and Carrie R. Scholfield to petition of appeal of Harry G. Runkle, filed by Condict, Condict & Boardman, proctors.

Answer of Charles P. and Carrie R. Scholfield to petition of appeal of William E. R. Smith, filed by Condict, Condict & Boardman, proctors.

Answer of the College Board of the Presbyterian Church in the U. S. A. to petition of appeal of Harry G. Runkle, filed by William Huck, Jr., proctor.

Answer of the College Board of the Presbyterian Church in the U. S. A. to petition of appeal of George McM. Godley, filed by William Huck, Jr., proctor.

Answer of William H. Hulick to petition of appeal of Harry G. Runkle, filed by Jehiel G. Shipman, proctor.

Answer of William H. Hulick to petition of appeal of George McM. Godley, filed by Jehiel G. Shipman, proctor.

Answer of William H. Hulick to petition of appeal of Charles P. Scholfield, filed by Jehiel G. Shipman, proctor.

Answer of William H. Hulick to petition of appeal of William E. R. Smith, filed by Jehiel G. Shipman, proctor.

Answer of Randolph Rodman to petition of appeal of Harry G. Runkle, filed by Charles B. Storrs, proctor.

Answer of Randolph Rodman to petition of appeal of William E. R. Smith, filed by Charles B. Storrs, proctor.

Answer of the Board of Home Missions of the Presbyterian Church and Elizabeth Haines to petition of appeal of Harry G. Runkle, filed bby McCarter & English, proctors.

Answer of the Board of Home Missions of the Presbyterian Church and Elizabeth Haines to petition of appeal of George McM. Godley, filed by McCarter & English, proctors.

Answer of the Board of Home Missions of the Presbyterian Church and Elizabeth Haines to petition of appeal of Charles P. Scholfield, filed by McCarter & English, proctors.

Stipulation.

NEW JERSEY COURT OF ERRORS AND APPEALS.

IN THE MATTER OF The Probate of the last Will and Testament and codicil thereto of WILLIAM RUNKLE, deceased.	On appeals of Harry G. Runkle, William E. R. Smith, George McM. Godley and Charles P. Scholfield. Stipulation.

It is hereby stipulated and agreed by and between the proctors of the appellants in the above-entitled matter that all the appeals be consolidated for the purpose of argument, and be heard upon the same state of the case.

Dated, February 17, 1916.

GRIGGS & HARDING,
Proctors of and of Counsel with Appellant Harry G. Runkle.

CHURCH & HARRISON,
Proctors, etc., of William E. R. Smith.

LUM, TAMBLYN & COLYER,
Proctors, etc., of George McM. Godley.

CONDICT, CONDICT & BOARDMAN,
Proctors, etc., of Charles P. Scholfield.

New Jersey State Library