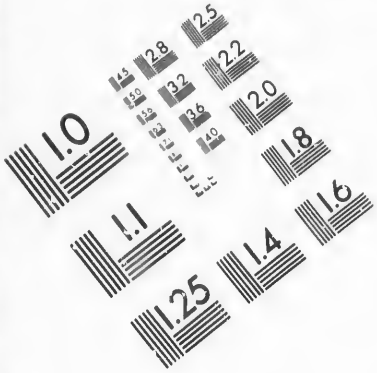

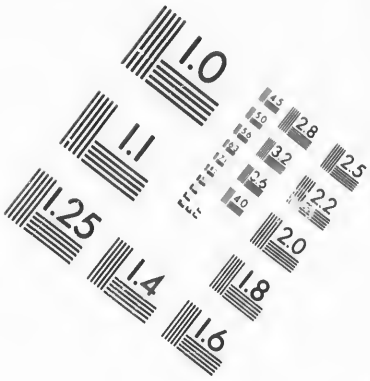

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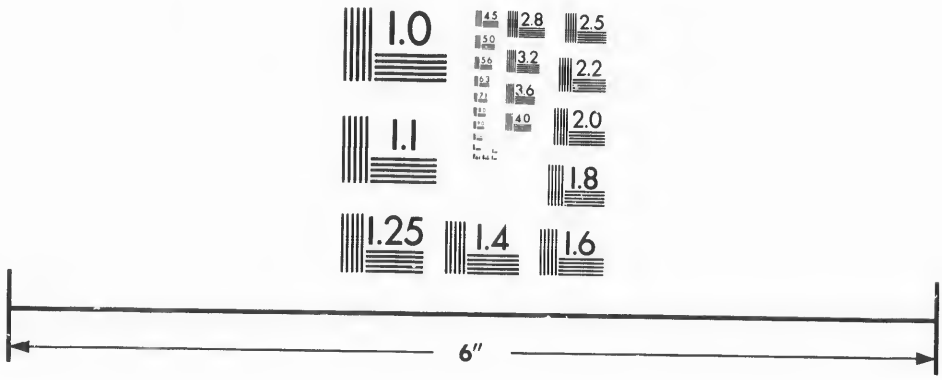

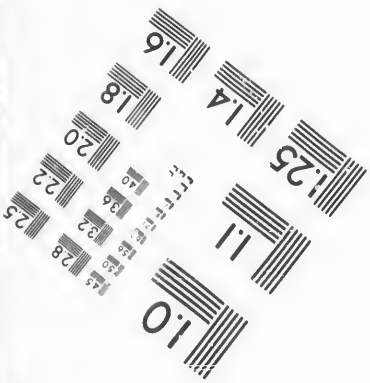

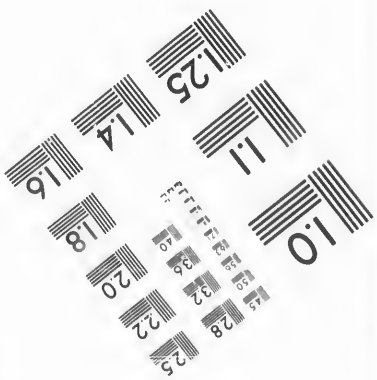

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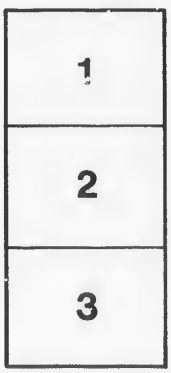

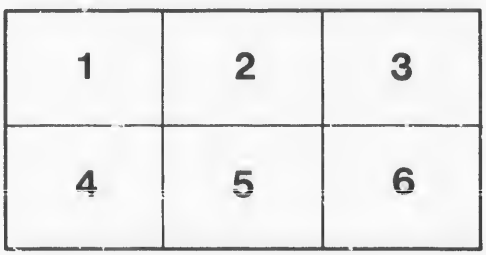

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In Re SEAMAN ESTATE.

Monday, May 7, 1866.

This was an application under the Provincial Act, 28th Victoria (1865), chap. 7, sec. 7, by the Executors of the Estate of the late Amos Seaman, of Minudie, to the Judge in Equity (Judge Johnston), for directions as to the management of the estate. The Executors filed separate petitions, and the questions submitted were by the Judge in Equity directed to be argued before himself and two associate Judges of the Supreme Court, and were accordingly so argued on the 20th and 21st February last before the Judge in Equity, Judges DesBarres and Wilkins; by Hon. J. McCully, Q. C., and J. W. Johnston, Jr., Esq., on behalf of Rufus Seaman, Esq., one of the Executors, and of certain of the devisees; and by Hon. J. W. Ritchie, Solicitor-General, on behalf of Hon. Alex. Macfarlane, the other Executor.

The Court, being divided in opinion, now delivered judgment *seriatim*.

The following are the opinions of the majority of the Court.

The Judge in Equity delivered a dissentient opinion.

Wilkins, J.—As to the first point of inquiry, "*Whether any and what consideration is to be given to certain Books, Documents, and verbal declarations of Testator?*" By section 14 of his will testator says:—

"And inasmuch as several of my children and grandchildren have received and may receive from me advances in Personal or Real Estate, "or in both, which it is my desire should be charged against their "respective shares, portions or interest, in and out of my Estate or some "part thereof, *I do direct* and order and my will is *that all advances* of "Real or Personal Property and all sums and charges of what nature or "kind soever *which have been or shall be by me entered* or set down as "*advancement* to, or charged to or against any of my children or grand-"children *in a book used or to be used by me for that purpose, shall* in the "distribution of my Estate *stand as advancement* made to such children "and grand-children respectively at the value by me declared and set "down therein; or otherwise, if the value be not set down and declared, "then at a just value and be deducted from their several shares, portions "and interest in my Estate, and be taken by each of such children or "grandchildren towards his or her share of my Estate."

The 15th section of the Will is in terms as follows:—

"And further, to prevent dispute and dissatisfaction in the division of "my Property after my death, *I may make some apportionment* of my "Minudie Estate or *parts thereof to take effect* as respects my children "or grandchildren or some of them *after my death, it is my Will* and I "do order *that all any and every portion* of my Minudie Estate, whether

* For the opinion of DesBarres, J., which should have preceded that of Wilkins, J. see *post*.

"Marsh Land or Upland, *which by Deeds executed or to be executed by* "*me, I have conveyed or shall convey*, or have expressed or shall express "to convey to any of my children or grandchildren, *or which I have allot-* "*ted or shall allot* and appertion to any of my children or grandchildren, "*and* shall *particularly describe* and designate *in any writing by me* "*signed, shall in the division* of my Estate *be included* in the shares of "such children or grandchildren respectively, and be estimated in mak- "ing up and allotting such shares at the value which I shall declare and "set down in writing to be the value I attach thereto in such apportion- "ment, or otherwise in the absence of such declaration of value then at a "just value, and such and every of my children and grandchildren, to "whom or in whose name I have made or shall make any such deed or "allotment, shall accept the same towards their shares respectively in my "Estate at a value ascertained, or to be ascertained as before mentioned "and in manner as aforesaid."

It is contended, on behalf of Mr. McFarlane, that the *black* book found by him, after testator's death, in a locked trunk is, under the circumstances detailed by Mr. McFarlane, *the* book to which, in legal effect, the will,—set up with the *black* book incorporated by the codicil (as is contended it was,) refers in these two sections.

On behalf of Rufus Seaman it is contended that the *red* book, sent to him by the testator, three weeks or a month before his death, is, under the testimony respecting it, entitled, on at least as strong grounds as those on which its rival rests for its support, to be considered *the* book so referred to.

I did not, at the argument, understand the writing, No. 13, to be much, if at all, insisted on; but I shall, nevertheless, consider its claims to be regarded as incorporated in the will.

All of these documents being unattested, according to the requirements of the Wills Act, neither can be regarded as a part of the will, unless its incorporation can be established by evidence that will bring it within the rule enunciated by Lord Eldon, in Sm[illegible] *v.* Prujean, 6 Ves. 565, which has often been recognized as the only safe rule:—

It is as follows:—"An instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated, in such a way, that the Court can be under no mistake."

This Court is, when adjudicating in the matter of this enquiry, in a certain sense a Court of construction, and must, looking at the circumstances which surrounded the testator at the execution of his will, if necessary to do so, compare with his language in these sections every document offered in evidence claiming to be the extrinsic "book" or "writing under the hand of the testator" referred to therein; and, in order to this, the intrinsic evidence of such document must be carefully considered so far, *and so far only*, as may be necessary to decide "*whether it is identical with the document to which the will refers.*" I will not enquire, particularly whether, where as here, more than one document is

presented in evidence which may possibly be the extrinsic document referred to, the Court can decide between them. The language of Lord Kingsdown in Allen *v.* Maddock, 11 Moore's P. C. C. 454, referring, as it does, to a decision of Lord Lyndhurst in Hodges *v.* Horsfall 1 Rus. & Mylne 116, where one of such documents was received, and which decision Lord Kingsdown says has been criticised for that reason, and because opposed to the expressed opinions of Parke J. and Littledale J. in Shortrede *v.* Cheek, 1 Ad. & Ell. 60, who thought such evidence inadmissible—cannot but occasion very grave doubts as to the propriety of admitting it.—A judge called on to decide the point referred to might well say, in such a case as that before us, "I stand on delicate ground—the question is *res integra*. I am unwilling to go beyond the authority of decided cases." Assume, however, that such an admission of testimony is not open to objection—also, that the *prospective* powers reserved by this testator in sections 14 and 15, were legally reserved, and further, that the *comparative* force of the rival claims of these documents may be determined by evidence of *declarations of the testator respecting them made since the execution of the will*. These are the words of the Right Hon. T. Pemberton Leigh in Allen *v.* Maddock, (the character of which case, by the way, he thus described, p. 454:—"The thing referred to (a codicil) is a writing (a written will); it is in its nature a single instrument; *and only one document* is found to answer the description.")

"It is necessary also to remember the distinction between the admissibility of evidence to prove a testamentary paper, and of evidence to explain its meaning, that direct evidence of intention, *declarations of the testator by word or in writing*, and other testimony of a similar character are admissible, when the will is disputed, but that no such evidence can be received in order to explain the expressions which he has used." (p. 440) Still, conceding for the present all that is thus assumed, I find, referring to the evidence, that it would be utterly impossible to pronounce on the identity of either document, as manifestly that by which the testator, at the moment of his death, designed to give *effect* to section 15, except to a very limited extent that I shall explain hereafter. To adopt the language of Lord Eldon, in Smart *v.* Prujean, "I may conjecture, but the fact is not so manifest that there can be no doubt or difficulty." Neither could be recognised without nicely balancing evidence, even supposing that evidence legal in its character. On that point, however, grave doubt arises. The testimony of either McFarlane, Rufus Seaman or Vernon is open to the objection "that it violates the spirit of the Wills Act." Can the black book, or No. 13, be set up by MacFarlane, or the red book by Seaman or Vernon, without such a result? The first is supporting a devise to his own wife. The two last are endeavoring, Seaman to maintain a devise to himself; Vernon a devise to his wife. Thus each practically makes himself a subscribing witness, for *himself*, as well as for others, and *without incurring the forfeiture which the legislature requires in order to making him competent*. But, I overlook, for the present, this objection also, and proceed to enquire whether this testimony, in

connection with the documents to which it refers, substantiates "beyond doubt or difficulty" the identity of book or writing, with the extraneous document that is mentioned in the 15th section. It will be perceived, presently, that I consider the question, as to the effect of the evidence, to be presented under very different circumstances, relatively to *section* 14. The books and the writing No. 13, alike profess to describe the allotments mentioned in section 15, and every one of these is "a writing signed by the testator." A *book* is not mentioned in section 15, in which the comprehensive term "*any writing*" is used. Both the books indicate advances as referred to in section 14. On the point of mere intention we may perhaps, notice that the testator did, in fact, under the reserved prospective power, at different times after the execution of his will, adopt a different writing. MacFarlane, who says, "After the execution of the last will the deceased again shewed me this red book with the entries made therein in connection with that will," and who afterwards heard testator say, referring to the *black* book, that, adopting it, he had made void the *red* book—says, further, (and note this was after the execution of the codicil) the testator said to me "that the black book—the important book—kept by him in connection with his will was in his red box, where it was found." Macfarlane says further, "This (the black book) is the same book which testator had before repeatedly shown me as the book kept by him in connection with his will." *When* last previously the testator had so stated we are not informed, though it were desirable to know, since within a very few weeks before testator's death, he is proved to have spoken of the red book as *the* book connected with his will. Rufus Seaman tells us (and the time according to him and Vernon could not have been more than a month before the testator's death) that at his last conversation with his father, the testator, expressly referring to the red book, said "You will see by that how I want my property divided." Rufus adds, "My father referred to that book sent me by Vernon and said, "You will see, in the adding up, that your share is not equal to the rest; but when this place (the homestead) is added to it, it will make it more than equal." Vernon, when he carried the red book to Rufus, was told by the testator to take it down to the boys and tell them "*It is to be the final division of my Estate as the book will shew them.*" The red book is identified by Vernon. Thus, though it seems the testator told MacFarlane, long before this, that he had made the red book void, yet the testator, so far from destroying the red book, sent it thus formally, a few weeks before his death, to his son, (who is now one of his executors), as and for the book that was to shew how the testator's property was to be disposed of. As such, that son and executor who retained it, produced it after his father's death. In the interval between the declaration made by testator to Vernon and Rufus respecting the adoption of the red book, and that last made to MacFarlane regarding his recognition of the black book, we have no evidence respecting either book. If the circumstance of the black book being found in the trunk can have any weight in raising a presumption in its favor, that presump-

tion would have to encounter the declarations in favor of the red book, and the fact of its co-existence (uncancelled) with the black book. At the moment of testator's death, when one of the executors possessed and relied on the black book, the other executor possessed and was relying on the red book. The existence of the red book in testator's possession in 1861, and anterior to the existence of the black book, and of the writing No. 13, is clearly proved. Such is the difficulty as regards the books; but No. 13 claims to be incorporated in section 15. It furnishes no internal evidence of being connected with the 14th section, as it has no reference to charges or advances. It is, however, "a writing signed by the testator," and it is headed in accordance with the 15th section of the will. It is without date, but it is proved *that the red book long pre-existed it.* McFarlane says he prepared it in the year 1862, and *after the execution of the will*, it was sent or delivered to him, signed by the testator, to be laid away as it was, with the will. Red book and black book are each also "a writing signed by the testator." No. 13 allots and fixes valuations; so does also each of the books. Being signed after the execution of the will No. 13 like the black book, is, of course, founded on the reserved *prospective* power. It would seem to follow that if used according to law originally it could be abandoned, and a subsequent writing adopted by the testator. That he did adopt another is incontestable. We cannot, therefore, believe that he relied on No. 13, at the time of his death. That document is silent on the subject of advances; but the testator has made an indication by him of *advances*, an essential and indispensable part of his plan embodied in the two sections. The provisions of section 15 must necessarily fail if those of 14 cannot be effectuated. The converse does not follow, for 14 can stand without 15. A construction of these sections involves a necessity for considering the effect of the deeds in evidence. That question presents a double aspect; first, as regards the deeds in the abstract; secondly, as regards them in connexion with the intended disposition of the estates as referred to in the sections. Under the first the question simply is, "Were the deeds completely executed?" There are three in one class, six in the other. The latter have all *monied* considerations expressed, the former are stated to be for *love and affection.* They bear date, the six on the 14th January, 1864, the three on the 25th March, 1854. The only evidence respecting the execution of the latter is given by MacFarlane, who says, "These were handed me by the deceased, some three or four years ago. He said I was to retain the deeds as escrows, and deliver them to the parties or those who might represent them after his death, should he not deliver them before." He adds, "They are in the handwriting of William, deceased, who is a witness thereto. They have never been actually delivered to or accepted by the grantees, but I have registered them since testator's death. The deeds in the second class, being dated subsequently to the execution of the will and being to children and grandchildren of the testator, were prepared by McFarlane in the year 1863 or 1864 from a paper written by the testator. After they had been executed in the

presence of one Charman—a subscribing witness thereto—under circumstances to be stated—they were retained by the testator. After his death they were received by MacFarlane, at the hands of Emma Seaman, the testator having, a short time before his death, addressed to MacFarlane these words "Those deeds you wrote of the new diked marsh you will get from Emma Seaman; those I wish you to take for delivery to the parties when I am gone." Charman says, "I was called on by the testator to witness some deeds, between December, 1863 and January, 1864. Mr. Seaman, at his house, said he had some deeds to witness,. He, the testator, signed them, one after another, and desired me to set down my name as a witness, which I did. He said, "*Perhaps you may be called on some time to prove these deeds, and perhaps not.*' He retained the deeds and I came away." MacFarlane gives this further testimony concerning them. "Some short time after I prepared the deeds, the testator at Minndie, shewed them to me executed, and subscribed by Charman. Testator said he had executed them, and that they were as escrows to take effect after his death, unless he himself delivered them before to the parties." This was, as has been shewn, anterior to the last declaration made by the testator respecting these deeds. The deeds of 1864 are materially distinguished as to their operation from those of 1854, in this respect, that the former, for reasons which will be explained, are unconnected with the will, whilst the latter are essentially a part of it. The following appear to be the legal principles which govern the question as respects the former. The authorities shew that a deed may be, in the absence or without the knowledge or consent of the grantee, absolutely executed, so as to convey the estate to him; and the grantor may, without affecting the validity of the execution, retain the document. The grantee thus invested with a title without his concurrence can, of course, however, disclaim it, if he pleases, by deed under seal. But the authorities also shew that to make the deed operate, either absolutely or as an escrow, on the performance of a condition imposed, there must be a complete execution by the grantor. The grantor may completely execute a deed, and deliver it to a third person, with directions not to hand it to the grantee until after the grantor's death. In one of the cases stated below, it will be seen, however, that Coleridge J. expressed himself doubtful if the deed had been delivered *on condition that the grantee should not have it till the grantor's death*, whether it could operate as an escrow. Doe e. d. Garnons *v.* Knight, 5. B. & Cr., 671: Doe d. Lloyd *v.* Bennett, 8. Car. & P. 124; Graham *v.* Graham, 1 Ves. 275; Cecil *v.* Butcher, 2 Jac. & W. 565. The power of a Court of Equity to relieve, in cases of execution of deeds, according to good conscience and the real intentions of the parties, sufficiently appears from the cases noticed by the Master of the Rolls in the above case of Cecil *v.* Butcher.

Now, applying these principles, I consider the words of the grantor addressed to Charman, at the time of his subscription, namely, "*perhaps you may be called on to prove these deeds and perhaps not*," decisive in connexion with grantor's retention of the deeds, to shew that the

execution by the grantor was not *then* complete, and that he had not absolutely divested himself of his title to the estate mentioned in the deeds. These were retained by the grantor, and continued in his possession until his death. The directions respecting them which the testator gave to MacFarlane on the evening before the day of his death, appear to me clearly of a testamentary nature in reference to the intended operation of these deeds; but they cannot, in my opinion, have a testamentary effect, because they are unconnected with the will, either by direct reference or through the medium of any extraneous document in effect incorporated with the will. My reasons for this opinion, and my view of the operation of the deeds of 1854, will appear from the result of my reasonings respecting a principle which, in my opinion, prevents either of the extrinsic documents in evidence being received as incorporated in the will, *as respects any act done, or writing signed by the testator, subsequently to the execution of his will.* It will be seen that I regard section 14 as made to speak effectually *in regard to advances or charges in personal or real estate*, by means of the red book, so far as such advances or charges are expressed therein. My mind has reached a clear conviction that neither the operation of the execution of the will, nor of the execution of the codicil of the 13th September, 1864, incorporated with the 15th section the red book or any other document in evidence, as regards any "apportionment" "conveyance" or "designation of estate," expressed, executed or described by the testator after the actual execution of his will; and this on the broad ground that a will cannot incorporate an extrinsic paper *not in existence at the execution of the will.* If, at the time of the execution of the codicil, the will had not effectually incorporated an extrinsic document, the execution of the former could not have that effect *from its mere operation.* It would set up the will of which it professed to be a codicil, and also previous codicils executed, or, perhaps, since the statute, *unexecuted*, from the force of the term "codicil," and by virtue of express decisions. But it could not incorporate any paper which the will had not incorporated, *without express reference thereto in the codicil.* I have found a notice of but one case which could, at all, even seem to sanction such a violation of principle. It is the case cited at the argument of "In the goods of Hunt," reported in 2 Robert. 622, and mentioned by Williams, p. 195 (Wms. on Ex'ors). I can attach no importance to it, as stated in the text writer, without inspection of the report to which we have not access. It is inconsistent with not only Croker *v.* Hertford, of which hereafter, but with another passage in Williams, p. 85, in these terms, "The *reference* must be distinct, so as to exclude the possibility of mistake, and *the paper*, (not incorporated *but*) REFERRED *to, must be* ALREADY WRITTEN." For this Williams cites Wilkinson *v.* Adam, 1 Ves. & B. 445, (to which I shall presently refer,) and Utterton et. al. *vs.* Robins et. al., 1 Ad. & El. 423. These are the words of Sir William Grant on the effect of the execution of a codicil. He says, in Pigott *v.* Waller, 7 Ves. 118, "A reference to the will proves only that the devisor recognizes the existence of the will, which the act of making a codicil necessarily implies,

—not that he means to give *it any new operation, or to do more by speaking of it than he had previously done by executing it.*" Dr. Lushington, in Sheldon *v.* Sheldon, 1 Robert. 88, says, "Under the late Wills Act it is still possible to incorporate with a duly executed will or codicil any written document *then in existence.*" Thus the learned Judge qualifies the rule. And again he says in the same case:—"If the testator, in a will or codicil duly executed, *refers to an existing unattested will, or other paper*, the instrument so *referred to* becomes part of the will. But the *reference* must be distinct, so as to exclude the possibility of mistake, and the paper *referred* to must *be already written.*" This principle is recognized by Mr. Pemberton Leigh (Lord Kingsdown) in Allen *v.* Maddock. The learned Judge in that case refers to Wilkinson *v.* Adam, in which we find the following clear and decisive language used by a great Judge who never spoke unadvisedly. Lord Eldon says, "The cases, as far as they have gone, have raised doubts, even as to a paper antecedently existing, but clearly and undeniably referred to in a will." (These, it appears from Allen *v.* Maddock, have been since removed. His Lordship continues:) "But I take it to be decided, and there is no doubt, that a paper *made afterwards*, could *never* be part of the will; for the three witnesses required by the statute, are witnesses to the sanity of the testator, and to all that is necessary to constitute a good will. The consequence is that the subsequent paper has not the ceremonies necessary to constitute a devise of land." The reasons, conclusive in the particular case, would not, of course, apply to the case of a defectively executed will, referring to an extraneous document as designed to be incorporated, being followed by a codicil *referring to that document*, and itself legally executed. Such reference would incorporate the document in the codicil. In my view of the law and of the evidence the execution of the codicil in September, 1864, has no practical operation in this case. It must be borne in mind that the reference in section 14 is, not to a book, but to "*entries* made, or to be made in a book." It will be perceived, already, as a consequence of the opinion I entertain of the law governing the facts, that the black book must be rejected *in toto*, and the red book held to be incorporated, but not as regards any entries made therein after the execution of the will. The red book, proved to have existed at the execution of the will, contains entries shewn, *per se*, to be made, some before, others since, the 8th March, 1862. All the entries in the black book are proved to have been made *after* that time. Both classes accord with the description of entries referred to in the will. Those that at the execution of the will existed were, and are, a part of the will; and, as such, needed, and could derive, no aid from the execution of the codicil. The entries made (and they include all those in the black book) *after* the execution of the will were, at the moment of the execution of the codicil, *void*. That act republished the will, and made it repeat the voice that it uttered at the day of its execution. It could do no more. What it had then uttered was the language of section 14, (it is sufficient now to refer to that alone,) as made completely intelligible by the entries in

the book referred to *as then made*, and which were then—8th March, 1862—in the book, as proved by the book itself. The execution of the codicil (that codicil containing no express reference to any entries) could not *by implication* make the will then—in September, 1864—speak the voice of entries that did not exist at the time when the will first spoke. The language of the section 14 shews that the testator reserved to himself a power to make the section speak by entries *to be made after the execution of the will, and not duly attested*, but that the law did not permit. The moment an attempt is made by implication from the mere effect of the execution of a codicil, not expressly referring to it, to set up as part of the will, these republished entries in a book, then existing, but not in existence at the execution of the will, there arises an indispensable necessity to have recourse to *parol testimony* to ascertain *what* entries the testator, at the time of the execution of the codicil, *intended* to be incorporated in his thus republished will. This cannot be done consistently with the Statute of Wills. These are the words of Dr Lushington, in Sheldon *v.* Sheldon, 1 Robert. 88. "The validity of the incorporation does not depend on parol evidence (which is no longer permitted) but the paper to be incorporated is protected by exactly the same evidence as renders valid the instrument by which the incorporation is effected, namely, signature by the testator, and the subscription of two witnesses." Thus were protected, in this case, the entries in the red book, existing at the time of the execution of the will The testator and witnesses both in legal contemplation subscribed these entries, because they subscribed the will of which they were as much a part in the eye of the law, as if written in the will. So the testator and witnesses who subscribe a codicil, in legal contemplation, then subscribe all previous codicils and the will, the whole in the view of the law constituting one then subscribed instrument. But try the application of this to the execution of this codicil in relation to the entries in the black book, and its failure is glaring. The testator and the two witnesses who subscribed this codicil in September, 1864, in legal contemplation could be held to have subscribed nothing but the codicil, and the will with the entries co-existing with the will at its original execution and *then* a part of it. On what *incorporating* evidence, let me ask, did the entries in the black book rest, one minute *before* the execution of the codicil? Not on the execution of the previous will for the reasons stated. Not on the subscription of testator and two witnesses to the entries, for those had no such subscription in fact. On what *incorporating* evidence did they rest one minute *after* the execution of the codicil? Exclude McFarlane's evidence of the declarations—parol testimony—and there is no pretence for implied incorporation. Suppose the testator had himself declared to the two witnesses, whilst producing the black book and putting his finger on the entries, that he had made them *after the execution of his will*, and intended them to speak as and for the entries referred to in section 14, and thereupon he and the witnesses had subscribed a codicil *silent about those entries*. This is plainly substituting parol testimony to prove a will for

the requirements of the Statute. When we refer, however, to the evidence of McFarlane respecting the black book, to the book itself, and to the codicil as executed—the testimony does not differ in kind or in degree from that which I have supposed. The two books, were, on unobjectionable evidence, proved to have existed at the time of the execution of the codicil. Referring to their entries made subsequently to the execution of the will, the mere internal evidence for the one is as strong as for the other. By what means is the scale attempted to be turned? By the testimony of witnesses orally delivered, in connection with one of two rival books *unincorporated*, and by means of that alone! My opinion is that a man's estate cannot thus be disposed of after his death! To talk about *republication* by the codicil of the black book which *ex concesso had never been published* would be a contradiction in terms. The question can only be, "Was the black book *incorporated* in the codicil of 1864?"

After writing what I have just read, I found, with great satisfaction, the following express confirmation, by the highest authority, of the opinion entertained by me, that "*since the Wills Act an attested paper, even a codicil, cannot incorporate an unattested paper, without expressly referring to it.*"

Dr. Lushington, in Croker *v.* the Marquis of Hertford, 4 Moore's P. C. C. 365, says:—"Before the passing of the recent Statute it was common to republish a will or a codicil for the purpose of rendering them operative from the date of publication, because otherwise lands acquired subsequently would not pass. Ordinarily, there had been a previous legal execution of the codicil sought to be republished; as, indeed, the term itself imports; but there was another mode admitted to be legal, namely, a regularly executed codicil, *to refer expressly to a paper not previously duly executed;* this was not, properly speaking, a republication, but an incorporation, *by reference*, of an unexecuted paper.

"We will next consider," he continues, "upon what principle it is, that incorporation by reference has stood, and may be justified.

By the Statute of Frauds, devises of lands were to be in writing, signed and attested; this was the security which that law provided for the authenticity of such instruments. Any attempt to devise lands with less security, would be, *pro tanto*, a defeasance of the statute; therefore, it was held that a man could not, by his will, reserve to himself the power of devising land by an unattested codicil—for such codicil would carry with it less proof of authenticity; but it was permitted to a testator to render operative as part of his will duly attested, a written paper *already in existence;* and for this reason—because the paper being clearly identified, and the will duly attested, the security intended by the Statute would not be diminished. It is, however, evident that certainty and identification is the very essence of such incorporation. If any doubt can exist as to the instrument to be incorporated, then the principle of incorporation by relation would fail. Consequently, so far as we can discover in all the cases of incorporation under the Statute of Frauds, there has been an *express reference* to a paper in writing described with certainty." Then, after reviewing authorities, the learned Judge thus continues:—"Having then examined the doctrine applied to incorpora-

tion, in cases bearing reference to the Statute of Frauds, the next step is to determine whether it does not equally apply to the present Statute of Wills; there is not any ground for distinction, for the only difference as relates to this case, is attestation by two instead of three witnesses; a bequest of personal estate being now governed by the same rules as apply to devises of real property. This brings us at once to the question, whether the Milan script, being a separate paper, distinct from the codicil of the 26th April, 1839, and not executed according to the Statute, is incorporated as part of the codicil of April, 1839; for "republished" in the proper sense of the term the Milan codicil (that is the separate paper) cannot be, for it never was legally published or duly executed. Bearing in mind that certainty, and prevention of mistake are requisite, let us examine the words of the codicil of April, 1839. There is no express reference to the Milan script, by date, by contents, or by any other specific description which could identify. The words to be relied on are "I affirm my said will and codicils." If such words are sufficient for incorporation, then general description will incorporate, without express reference or identification." and then the learned Judge asks, "Is general description, certainty, without chance of mistake?" The want of specific identification would, of necessity, repeal, to a certain extent, the Statute; for if general reference will 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, defeat the provisions of the Statute? The Statute says property shall not be thus bequeathed, unless the paper to be incorporated is as clearly identified, as if it was actually a part of the executed will or codicil." Dr. Lushington concludes, warningly to us, thus:—"If we defeat the possible intentions we may lament it; but we sit here, not to try what the testator may have intended, but to ascertain, on legal principles, what testamentary instruments he has made; and we must not be induced by any consideration of intention or hardship, to relax the provisions of a Statute (perhaps the most important of modern times) for the distribution of property." In the case of "In the goods of Smith, deceased," 2 Curt. 796, where the words relied on to incorporate were, "I make and publish this a *second* codicil to my last will and testament"—held that a previous codicil signed by deceased not attested was incorporated. Sir H. Jenner says, "The latter codicil being duly executed, and *referring to the former*, is an execution of the former codicil also."

Under the present Statute of wills it is a fixed law regulating incorporation, "That an attested testamentary paper cannot incorporate an unattested paper without express reference to it."

I shall, therefore, regard the point as settled, and conclude in the language of the Vice-Chancellor, in Johnson *v.* Ball, 5 DeG. & Smale 91, "That a testator cannot, by his will, prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil." My argument as to the inefficiency of the execution of a codicil to set up an extraneous paper *not referred to in it*, of course demands

this principle for its support. It may not be amiss to remark that if it were found that, at the execution of this will, there did exist an extraneous instrument that was *legally* incorporated, and the effect of which in connection with the will was to dispose of the testator's estate, another instrument not duly executed could not be substituted, that *changed* the disposition consistently with the provisions of the Wills Act (see sec. 15 and 16), because it would amount to the extent of the alteration, to an unauthorized *revocation* of the will. If the principles above stated are sound, then No. 13, the black book, and all entries made in the red book subsequently to the 8th of March, 1862, when the testator executed his will, must be dismissed from our consideration. I am of opinion that certain entries in the red book at the time of the execution of the will, were incorporated with section 14, as being, in the language of that section, entries then made by the testator of "advances of real or personal property, and sums and charges as advancement to, or charged against certain of his children or grand-children therein named." I am, also, of opinion that these were then incorporated in sec. 15, so far as that section speaks of deeds then executed by the testator which are plainly referred to in that book. I am of opinion that the three deeds of 1854 are so referred to, and must take effect precisely as if the testator had devised the estates in the body of the will, and had declared in the will, as he has declared in the book, read with the will in connection with these deeds, that the devisees, who are the grantees, should be subject to a deduction from their several shares of the estate, of the sums charged *in the book in respect of the estates* professed to be conveyed by the deeds. The testator in the book under date of the very date of these deeds, has expressly declared "*that he then deeded the lands*" and the deeds are found at his death. I have spoken of these papers as *deeds*, but, of course, I have not supposed that they could operate as common law conveyances. They could not do so in point of law, and it would be inconsistent, as my view of their operation supposes, with the intention of the grantor, (viewed as *this testator*) so to regard them. I view them as written papers, signed by the testator, referred to in his will as "deeds executed" which, in form, they are, and in entries existing at the execution of the will, referring to them, and found in a book —*the book*—to which the will refers. I consider that these written papers, and the language of the sections and the entries—all proved to have co-existed with the execution of the will, which in legal effect incorporated them, constitute a devise to the *quasi* grantees of the different estates respectively named in the papers; whilst the testator has, in legal effect, said, "each and every of the parties named in these papers shall be subject to a deduction from his share of the whole estate, corresponding in amount to that sum which in the entries I have written opposite to my reference to the particular deed, as my declared valuation of the estate named therein." All *that* he has as plainly said as if he had expressed himself in the words which I have used to shew the effect supposed by me. Had he said in the will "I devise to my son Rufus a portion of my estate, as described, and on the terms stated in a written paper being in

form a deed between me and him "for love and affection," but on the conditions expressed herein, and in a certain book respecting the same, as to what he is to allow for it out of his portion of my estate,"—the effect would have been *a devise*, but no more a devise than is the actual incorporation in this will of the extraneous papers and entries that I have referred to.

The entries in the book beginning, "*Amos Thos. Seaman*, Dr., 1845, &c.," and, ending with the testator's signatures subscribed to the two consecutive entries which referred first, to a will of 23d September, 1861, (and secondly to that of March, 1862, although I deem any such reference immaterial) shew distinctly in my opinion, the charges as advancement which the executors of the last will must regard as regulating the disposition and settlement of the estate. Section 14 of the will refers to "entries which the testator *had* made," and clearly those are they.

The date, in pencil, *January* 31, 1863, which is immedia ely preceded to the testator's notice of Eph. (or Ephraim), evidently refers to that notice alone. The entries are some *in pencil*, others in ink; but this, in no respect, detracts from their genuineness or authenticity. There they are, and were, at the execution of the will, uneffaced, unobliterated, uncancelled. Section 14 does not require the entries of advances and charges to be *signed by the testator*—all that it requires is that they shall appear in a book kept by the testator for that purpose. Of the fact that this *at the testator's execution of the will* was "*the book so kept*" there is the clearest evidence within, and without the covers of the book—indeed it is not denied!

I have already expressed my opinion that the red book cannot be regarded as incorporated in section 15, for the purpose of describing and designating in "a writing signed by the testator" an apportionment of the Minudie estate, or parts thereof, except as regards the deeds shewn by that book to have been *previously* executed in furtherance of that purpose. That section, therefore, being, as shewn, without support from any other "writing" is, in my view, *as regards apportionment*, as inoperative as if struck out of the will.

My reasons for forming that opinion are these:—The book, among other entries, contains one in these terms:—"This book is kept by me, and the entries and charges therein by me made *are* in accordance with the clause inserted in my will, *executed on the eighth day of March*, 1862.

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The testator thus declares that on that particular day he executed his will; but all the entries that follow purporting to apportion his estate among his descendants, and to declare the values of the portions thereof, are expressly stated to be made *subsequently to the execution of the will*.—They must all, therefore, share the fate of the black book, and be rejected, as, in legal effect, unattested, and not incorporated in the will.

I turn back, then, to the preceding pages of the red book to see whether they contain entries of an apportionment made by the testator, at, or previous to, the execution of the will. If such be found they must be regarded as

incorporated therein. I find entries, indeed, evidently made in *order to apportionment* They are inserted between the dates of Septr. 27th, 1844, and January 24, 1846:—but they, in my opinion, are not incorporated, because they are manifestly incomplete and defective. Whilst they profess to apportion, and do apportion to *some* of the descendants named, in an unqualified manner, they are so uncertainly and vaguely expressed as regards *others*, that it cannot be said in reference to these, what the testator intended to give them:—For instance, whilst Ann's portion is thus described. "Ann to have that part of the manor-farm where the Doncasters now live to the Lake Road, at same value, for the marsh, 30 acres, £15. and improved upland at £10—woodland, say at £2 per acre,"—the apportionment to Rufus and William is as follows: "Rufus and William to have the upland rise from the old chapel to Clarke's Point, with the pasture marsh to the north of the road opposite, at same rate—upland £10, and marsh £15, per acre, to be equally divided as they may agree; *but if Rufus sticks by me, and behaves well, it is my desire for him to have that part with the buildings I now occupy, and William to take from Blenkhorn's line to the point, value both £945. If Rufus takes the homestead, he ought to allow William* SOMETHING *for building extra.*" Again, in the apportionment for Mary and Jane, he writes: "They should have *some part* of the little marsh in front, to accommodate each, &c." Now, adverting to this vagueness, and incompleteness in some of the apportionments, I consider it quite impossible to consider the general entries last referred to incorporated in the 15th section. Another objection to so regarding them arises from the fact that, at an interval of eight years from the date at the end of the last mentioned entries, the testator disturbed the previous arrangement by entries made shewing the subsequent conveyances to Rufus, Gilbert and James, and by certain entries under the date which accords with that of those conveyances, shewing a variance from the previous apportionment, for instance, "*the Blenkhorn lot may go to Jane and Sarah.*" I forbear remarking on the inference of changed intention as to mode of apportionment arising from that which appears in the book to be entered *after the execution of the will*, feeling sure that I am bound to shut my eyes to this last, as much as I am to the whole contents of the black book. My views of this case preclude the possibility of my contrasting the books, inasmuch as I consider the black book absolutely void.

The Court is also required to construe the eleventh section of the will, and decide "*what portion of the shore frontage as it is called, passed to Mr. McFarlane under that section.*" The words of it are as follows:—

"Whereas the immediate division of that portion of my Minudie estate, "called the Joggins, would be injurious to the profitable working of the "Quarries and Ledges of Free Stone thereon, *I do* therefore *give* and devise "*to the said Alexander McFarlane, his Executors* and Administrators, *all* "*that portion of the Shore Frontage of my Minudie Estate lying between* "*Dogfish Cove, and Lower Cove, with the lands adjoining, extending for* "*One Quarter of a Mile inward from the Shore and running that breadth* "*along the whole of the said shore frontage, with the Reefs and Quarries* "*of Stone thereon and therein, and all the Houses, Stores, Buildings and* "*Appurtenances, and all privileges of every kind thereon or thereto belong-*

"*ing or enjoyed therewith*, TO HOLD to the said Alexander McFarlane, "his Executors and Administrators, from the day of my death for and during "and until the full end and term of Fifty Years, from thence to be completed "and ended without any manner of impeachment of waste. Upon trust, "nevertheless, and for the uses, ends, and purposes following—that is to say: "upon trust that the said Alexander McFarlane, his Executors or Adminis- "trators, shall enter into and upon and possess the said described Premises "and any part thereof, and shall during the said Term in and by such ways, "manner and means as to him or them shall seem most advantageous or advi- "sable, occupy, use or work, or cause to be occupied, used and worked, the "said Premises and the Quarries, Ledges and Reefs of Free Stone and other "materials and minerals therein or thereon, or portions of them, and the "produce thence coming and arising, sell or dispose of to the best advantage, "and also from time to time during the said term, and as often as he or they "shall deem it to be advantageous and advisable so to do, demise, lease, and "let the said Premises or portions thereof, and the said Quarries, Reefs and "Ledges, or portions thereof, for such terms and periods of occupation, and "on such rents, reservations, conditions and agreements as he or they shall "think suitable and beneficial, and such demises, leases, occupations and "terms renew or alter or terminate and discontinue, and also other demises, "leases, occupations and terms make and create from time to time as occasion "may require."

The testator, in sec. 13, speaking of the reversion of this, uses the phrase, "*the said property, called the Joggins, as hereinbefore described*,"—in sec. 16, the language is, first, "*in my Joggins estate before mentioned*," secondly, "*excepting the said Joggins estate*, and the reversion, &c." These are all the words in the will that can possibly aid the construction in question. They throw no light on the point of inquiry, because there is a reference in them to the preceding description, and the mind of the enquirer is brought back to the consideration of *that*. It is contended that an intent is manifested by the context and the surrounding circumstances that the whole extent of that which was known, and indifferently designated in the testator's lifetime as the "Joggins," or "Joggin Quarries," or "Joggin shore," of which, indisputably, by far the more valuable portion, in general repute, and according to the witnesses, is not included in, but lies far out of, the prescribed limits, should be considered as included within these last; and, further, that such intent can, consistently with acknowledged rules of construction, override the particular language used. Supposing such intent, if manifest, could be legally effectuated under this devise, let us enquire whether the words, the context, and the evidence of the situation and circumstances of the testator when he made his will establish it. My impression is that all these considerations rather point to an intention in accordance with the primary meaning of the words. The testator would seem to have intended to *circumscribe*, and not to permit the *whole* of the Joggin shore, to be the subject of the particular disposition to which undoubtedly the recital points. Had he intended not to do this, he would not have stated any limits at all, but would have used the general description which would have effectuated his intention without the risk of controversy. He must have had a definite purpose in his mind when he pre-

scribed limits, and if so, he could not have intended the whole to pass. He must necessarily have designed to effect a purpose essentially different from that which would have been effectuated had he used *the general description*. Our difficulty of departing from the primary meaning is, I think, immensely increased by consideration of the fact as stated by Rufus, namely, that Lower Cove contains the principal, and the most valuable, and the hitherto most profitably worked quarries. It is scarcely possible to conceive that the testator, aware of all this, excluded Lower Cove without design—mistake is out of the question. The will shews on its face evidence of great deliberation and carefulness in preparing its provisions. We are precluded by the general character of the will, and the surrounding circumstances, from supposing it possible that this testator could, from oversight or mistake, have designated boundaries of a far more limited effect than he intended Every foot of the land and water in the locality was familiar to him as an household thing. We can gather nothing conclusive in favor of the larger limits supposed to be intended from the *recital*, since it is not necessarily inconsistent with the testator's opinion "that the immediate division of 'the Joggins' would be injurious to the profitable working of the quarries (regarded *as a whole*)," that he should, for reasons which, though unexpressed, may have influenced him, have determined to make the subject of a lease that portion of them *alone* which he has defined. We must bear in mind that he had differed with his sons about the management of these quarries, and had expressed an opinion (not apparently in accordance with that of others) that it would not be advantageous to open and work "the Bank Quarries," a portion of the Joggins, and which Cutter says was, in his opinion, *the most valuable part of the whole*. Those the plan shows to lie outside the limits. This is a noticeable fact. When it is urged that it was more probable, as it would be more for the interest of the estate, that he designed thus to devise *the whole*, the obvious answer is, "*that* is a mere conjecture, and his views on the point of the interest of the estate, might not be in accordance with those of his children, or of the neighbourhood." It is the more difficult for a Court of construction to assume the responsibility of amplifying the limits, because that cannot be done without violence to very precise language used, in a case where the circumstances shew that there must have been reflection and deliberation before the words were adopted. The testator, before using them, had to consider, not merely the frontage, but the precise depth or breadth of contiguous land to be devised along that frontage. The terminus *a quo* and the terminus *ad quem* are stated with careful precision. The word "*between*," when used, as here, (not figuratively,) in relation to space, is free from ambiguity. Worcester defines it, "*in the intermediate space.*" "Deg-fish Cove" on the one side, and "Lower Cove" on the other, are, *ex vi terminorum* excluded from that intermediate space. In considering the rules of law which govern this enquiry, I intend to confine myself, shortly, to the concise but comprehensive canons of Sir James Wigram. That most learned author in his treatise on the admissibility of extrinsic evidence to explain wills, thoroughly considered all the cases, and elicited deductions in the form of propositions which may be safely regarded as maxims. His proposition II. is as follows: "Where there is nothing in the context of a will from

which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted *are sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and *although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.*"

Now the words in question descriptive of the limits devised in section eleven, considered with reference to the extrinsic circumstances, viz., the situation of the testator relatively to the "Joggins" or "Joggin Quarries," viewed as a whole, are undeniably *sensible*, and create, *per se*, no difficulty of interpretation. The words are not capable of any different sense from that which they primarily convey—and there is absolutely no evidence (nothing but a mere conjecture) of an intention to convey another and a different meaning, which would require the substitution of other words. Sir James Wigram thus expresses, at the end of his treatise, his conclusions from his preceding review of the authorities. He says :—

"The conclusions, then, which the preceding pages appear to authorize, are these :—

"1. That evidence of material facts is, in all cases, admissible in aid of the exposition of a will.

"2. That the legitimate purposes to which—*in succession*—such evidence is applicable are, two : namely, *first*, to determine whether the words of the will, with reference to the facts, admit of being construed in their primary sense ; and *secondly*, if the facts of the case *exclude* the primary meaning of the words, to determine whether the intention of the testator is certain in any other sense, of which the words, with reference to the facts, are capable. And

"3. That intention cannot be averred in support of a will, except in the special cases which are stated under the Seventh Proposition."

Referring to that proposition we find those cases thus defined :—"Where the object of a testator's bounty, or the subject of disposition is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator."

Sir James concludes his deductions in these words :—"The writer of this Examination, then, whilst he admits and insists upon the rule "that the judgment of a Court in expounding a will should be simply *declaratory* of what is *in* the instrument,"—hopes that he may, in this place, without fear of correction, add that, *consistently with that rule*—"Every claimant under a will has a right to require that a Court of Construction in the execution of its office, shall—by means of extrinsic evidence—place itself in the situation of the testator, the meaning of whose language it is called upon to declare."

The expression of the result of the authorities seems to me to go the length of shewing that the clearest possible intention, proved by extrinsic facts, on the part of this testator to devise the whole extent of the quarries, could not prevail against the plain and sensible language used. It clearly, I think,

sanctions the view I have expressed, of a necessity for construction of the section in question according to the primary meaning of the words of the testator.

As regards the codicil of 22nd October, 1862, and its legal operation, assuming its due execution proved, I am of opinion that it can operate according to the expressed intent of it, without a contravention of any rule of law or of equity. It imposes a condition on a mere voluntary act of bounty on the part of the testator; and the object of that bounty cannot insist on taking any benefit under this will to which the testator has attached a condition, without acceding to the obligation of that condition. The condition is in effect, the non-prosecution by those who are named in the codicil of their respective claims against the estate of the deceased. Whether those have, or have not, a support in law or equity, seems to me beside the question. The attempt to assert them compulsorily by either of the parties named, is made by the testator to involve a forfeiture of the intended devise or bequest in favor of that party.

The Court is asked to declare "whether Rufus Seaman is trustee as respects the land devised for school purposes?"

By the codicil of 13th September, 1864, the testator appointed his said son in terms "to be *executor* of his will, in connection with his son-in-law, Mr. MacFarlane, with the same power and authority as if his name had originally been inserted therein." These words are satisfied by holding them to constitute Rufus Seaman co-executor in the strict sense of the word "executor," as contradistinguished from the office of "trustee." Adverting to the 10th section of the will which refers to the school purposes, we find MacFarlane thereby appointed a *trustee* in terms; and for the purposes of the trust twenty acres of land are devised to him. The devise is, indeed, to him, his heirs and assigns, but it is made, nevertheless, under special circumstances of personal confidence as respects MacFarlane. I think, for these reasons, Rufus Seaman has no authority to act under the section in question.

DesBarres, J.—This very important case, in which the learned Judge in Equity has just delivered an elaborate opinion I have not failed carefully to consider, and I have examined the authorities which were cited at the argument, and others which a research conducted together with my brother Wilkins has discovered. With him I have more constantly conferred, than the many engagements of the learned Judge in Equity have enabled me to do with him, as I could have desired. With that learned Judge my brother Wilkins and I unfortunately are unable to concur in some of the conclusions at which he has arrived, and there are some points, indeed, in which my views are not entirely coincident with those of my brother Wilkins, but in his conclusions as to the necessity of rejecting all entries in the red book made subsequent to the execution of the will,—the black book, and paper marked No. 13,—as to the construction of section eleven of the will in relation to the quarries,—as to the effect of the first codicil of October, 1862, and as to the question submitted relative to the trusteeship of Rufus Seaman, I concur; and without having written an opinion, I content myself with referring to the elaborate one prepared by my brother Wilkins, which I have read, and of which I generally approve.

HALIFAX, S. S. IN EQUITY.

In the matter of the Estate of AMOS SEAMAN, late of Minudie, in the County of Cumberland, Esquire, deceased.

To the Honorable JAMES W. JOHNSTON, Judge in Equity, &c., &c., &c.

The petition of RUFUS SEAMAN, of Minudie, in the County of Cumberland, one of the Executors, and a Trustee under and by virtue of the last will and testament of Amos Seaman, late of the same place, deceased,

Humbly sheweth:—

That the said Amos Seaman, the father of your petitioner, departed this life in the month of September, A. D. 1864, having first made his last will and testament with a codicil of a subsequent date, as by copies thereof hereunto annexed numbered 1 and 2 will appear.

That the will No. 1 and codicil No. 2, being in the possession or under the control of the Honorable Alexander Macfarlane, a co-executor, and also a trustee were produced by him, and having been proved probate thereof was duly granted to him and your petitioner as executors.

That an inventory of the real and personal estate of the testator has been duly filed in the office of the Registrar of Probate in said county.

That in the month of May last your petitioner applied in the usual way by petition to the Judge of Probate for the County of Cumberland for an order to appoint appraisers to divide the real estate and lay off the shares of the several devisees, and an order was made accordingly, and three respectable freeholders namely, Robert Donkin, Nicholas Keiver, and George Moffat, were appointed accordingly.

That shortly after and on the twenty-ninth day of May, the Honorable Alexander MacFarlane, co-executor and trustee and a devisee under said will, filed a caveat in the office of the Registrar of Probate for said county and no further proceedings have, therefore, been had in reference to such division, and the real estate valued at thirty one thousand seven hundred and fifty seven pounds ten shillings still remains undivided, and as it was at the testator's death. That this has been productive of great inconvenience and mischief, as none of the devisees can safely proceed to make improvements or to let the property, nor can your petitioner, appointed a trustee, or as a devisee, take upon himself to act as he otherwise would.

Your petitioner is informed and believes that the testator kept one or more books or written papers made subsequently to the date of his will, but none of which have been produced for probate, nor are they capable of being proved as testamentary documents, as your petitioner is informed and believes. One such book or document was deposited by tes-

tator with your petitioner, and he hath the same ready to be produced if required, or ordered so to do; another such book or document your petitioner believes is in the possession of the Honorable Alexander MacFarlane, co-executor, and a copy hath been furnished by him to your petitioner.

Your petitioner having submitted the copy of the testator's will and codicil, and copies of these several documents to counsel, hath been advised to submit the facts by way of petition to your Lordship, and ask the opinion, advice and directions of your Lordship respecting the management and administration of the trust property, and the assets of the testator as to the proper course of procedure, and especially as to whether the books or documents so referred to are legal and valid instruments, and to what extent, and whether the verbal declarations of testator about or shortly before the time of his decease are admissable to explain the contents of said books, and if anything written or spoken by testator in reference to his will, and the devises therein contained, should control or affect the dispositions contained therein, whether the freeholders already named should proceed to divide and lay off to the respective devisees according to the form of the Statute in such cases provided, their respective shares, or whether they should not or how otherwise.

Your petitioner also respectfully submits that upon a recent inspection of the public records in the office of Registrar of Deeds at Amherst, he finds that nine deeds purporting to be made by testator, and to convey parts and portions of the testator's real estate (inventoried as such by the executors, in the month of May previous) to certain of his children, some for natural love and affection, and others for small and inconsiderable considerations, were on the seventh and ninth days of July, A. D. 1865, proved and recorded, but whether these deeds were ever delivered or executed to convey real estate, your petitioner is unable to pronounce, but believes some of them were not, and as the clauses in the books, and the considerations in the deeds are not in consistency with each other, he prays advice and direction on the subject in connection therewith. If permitted so to do, your petitioner is prepared to show that neither the deeds recorded, nor the books referred to, carry out the intentions of the testator as regards the division of his estate among his children, and as shortly before his decease testator had frequently and repeatedly declared what his intentions in that respect were, your petitioner has reasons to believe that other books or papers yet exist in reference to such division which embody the testator's views, and if reference should be had to deeds and books, then he prays that testimony be taken on that point.

Your petitioner further desires the opinion, advice, and direction of your Lordship as to whether he as co-executor, is by the tenth clause of the said will, a co-trustee with the Honorable Alexander McFarlane, of the twenty acres of land devised for school purposes.

And also whether under the eleventh clause of such will, and the expression "all that portion of the shore frontage of my Minudie estate, lying between Dogfish Cove and Lower Cove with the lands adjoining, ex-

tending for one quarter of a mile inward from the shore, and running that breadth along the whole of the said shore frontage with the reefs and quarries of stone thereon and therein, and all the houses, stores, buildings and appurtenances, and all privileges of every kind thereon or thereto belonging, or enjoyed therewith"—the coves themselves, and the lands, houses, &c., within such coves are included, or excluded.

And if it should be held that the deeds above referred to, or any of them, were well executed by the testator in his lifetime to convey real estate, whether the sums, &c., therein named as the consideration money shall be conclusive as to the value, and be a compliance with the provisions set forth in the tenth clause, or any other clause of the said Will, so that it shall be binding. And whether in cases where natural love and affection is the consideration, the property conveyed shall be held to be a clear gift, and the grantee and his representatives be entitled to one-eighth of the residue.

And also, in case a grantee is unwilling to accept the portion thus conveyed, or to accept it at the rate conveyed, whether he has the option, under the terms of the said Will so to do, and claim an eighth of the entire estate.

And also whether the trusts set forth and described in the seventeenth clause are one and indivisible, or whether petitioner can take upon himself the burden of trust as regards one or more of the devisees or the representatives of the deceased children of testator, and yet decline as to others.

And also, how and in what manner the alleged advancements referred to in clause twenty-third, to the children of Amos S. and of James Seaman, deceased, are to be ascertained; and also as to any and all other portions of said Will and Codicils where doubts and differences of opinion exist. And he, as in duty bound, will ever pray.

(Signed) Rufus Seaman.

Minudie, Oct 19th, A. D. 1865.

Halifax, SS. In Equity.

In the matter of the Estate of Amos Seaman, late of Minudie, in the County of Cumberland, Esquire, deceased.

To the Honorable James W. Johnston, Judge in Equity, &c. &c. &e,

The Petition of Alexander MacFarlane, of Wallace, in the County of Cumberland, one of the Executors and Trustees of the late Will and Testament of the said Amos Seaman,

Humbly sheweth:—

That the said Amos Seaman departed this life on the fourteenth day of September, A. D. 1864, having made his last Will and Testament on the eighth day of March, A. D. 1862, with two codicils, one dated on the twenty-

second day of October. A. D. 1862, and the other on the thirteenth day of September, A. D. 1864, copies of which will and codicils are annexed hereto.

That the will and codicil first executed had been deposited by the testator with petitioner, long previous to his death, and petitioner being sole executor of the said will, and being desirous of having Rufus Seaman, one of the testator's sons, connected with him therein, induced the testator during his last illness to consent to the appointment of the said Rufus Seaman, and he was so appointed by the last mentioned codicil, executed by the testator the day before his death.

That testator having informed petitioner that it was his wish that the codicil executed by him in the month of October, 1862, should only be made use of in the event of any accounts or claims against his estate as therein mentioned, being made; petitioner previous to taking probate of the testator's Will, consulted the said Rufus Seaman as to whether or no the said codicil should then be proved, and understanding from him that there was no intention of making any accounts against the estate, as in such codicil referred to, it was not then proved or included in the said probate. But subsequently the said Rufus Seaman having informed petitioner that such claims would be made against his father's estate, and petitioner being aware that these demands were disputed by the testator in his lifetime, then informed the said Rufus Seaman that in such case the said codicil should be proved, and filed in the office of the Registrar of Probate at Amherst, which has accordingly been done.

That an inventory of the real and personal estate of the testator has been filed in the office of the said Registrar of Probate, and although petitioner was desirous of having such real estate divided among the several children and heirs of the testator with the least possible delay, he found that in consequence of the peculiar nature of the trusts and bequests in the testator's Will, and from the fact that parts of such real estate were mentioned by him as having been allotted to certain of his children and grandchildren, and value put thereon, in a book kept by the testator in connection with his Will, and also that other portions of his lands had been conveyed by deeds to his several children; in some of which deeds the consideration was nominal; that such division could not be safely or properly made without having the disputed and doubtful matters in reference to the distribution of the assets of the estate first settled, to guide and direct the parties in making such division.

That testator on several occasions previous to his death, shewed petitioner a book kept by him, with entries therein of charges made against his several children and grandchildren, and also describing the allotments of certain portions of his real estate to such children and heirs; and during his last illness conversed with petitioner respecting this book as expressing his intentions respecting the distribution of his estate, informed him where the same was kept, and it was found by the petitioner after the testator's death in a small locked box in which he kept his money. That the entries in such book are wholly in the handwriting of the testator, and it is the same book so shewn to petitioner, and described to him by the testator as the book kept by him in connection with his Will. That such book is in petitioner's possession, ready to be produced as directed, and a copy thereof marked is hereto annexed.

That testator had also, previously to the time of his last illness, deposited with petitioner a written paper signed by him, shewing an allotment of portions of his real estate among his children and heirs, which is similar to the entries and allotments made in the book referred to, but does not include all the parcels of land therein described, nor the other charges made therein.

That this book and paper writing (and the deeds hereinafter mentioned) contain all the allotments or dispositions of his estate made by the testator in connection with his Will, which have come to the possession of petitioner, or of which he has any knowledge; with the exception of a book alleged by petitioner's co-executor as having been given to him by the testator, which petitioner has not seen, nor was it even spoken of by the testator to him.

That three deeds signed by the testator, dated in March, 1854, and made in favor of his sons Gilbert, Rufus, (and James, now deceased), conveying certain portions of his real estate to them, were, some time previous to the death of the testator, deposited by him with petitioner, with instructions that they were to be delivered to the said parties after his death and although the consideration mentioned in such deeds is natural love and affection, testator informed petitioner that the amount they were to be charged therefor was mentioned in the book so kept by him, which book does contain entries placing a value on the lands described in the said deeds.

That some months previous to the time of his death, the testator directed petitioner to prepare further deeds for conveying certain other portions of his marsh lands to his children and grandchildren, and these deeds, so written, were afterwards shewn to petitioner by the testator, signed by him, and petitioner was informed by testator that they were executed by him as escrows, to be delivered and take effect after his death. Such deeds, six in number, bear date the fourteenth day of January, 1864; one a joint deed to his two sons Gilbert and Rufus, and his daughter Jane; one to the children of his deceasod son James; one to the children of his deceased son Amos Thomas, and one to each of his three daughters, Ann, Mary and Sarah; which deeds during his last illness, the testator informed petitioner, were then in the keeping of his niece, Emma Seaman, from whom petitioner was directed by him to receive them, for the benefit of the parties to whom they professed to be executed. That such deeds were so received, and with the first mentioned deeds to testator's sons, have been placed on record by petitioner.

Your petitioner is desirous to submit these facts in connection with such Will, as affecting the administration and distribution of the assets of the testator's estate, by way of petition to your Lordship, and asks your Lordship's opinion, advice, and direction as to the proper course of procedure thereunder, and especially on the following points:—

1st. As to the validity and operation of the codicil to the testator's Will, executed on the twenty-second day of October, A. D. 1862, witnessed by G. W. Cutter and Chas. C. Seaman.

2nd. Whether the book referred to is legal and valid and to what extent, and in what manner the charges and entries therein made will operate in the distribution and settlement of the testator's estate

3rd. Whether or no the deeds above mentioned, or either of them, are so executed as to convey the real estate therein described, and if so executed,

whether the consideration moneys therein mentioned are the values to be placed thereupon; or where such consideration is nominal, if the value put thereon in the said book is the sum to be charged therefor.

4th. If the allotments made in the book kept by testator, and the properties described as conveyed by the said deeds, are held to entitle the several parties to whom the same are so given to retain them at the value put thereon by the testator; how the residue of the real estate is to be divided, and in what manner the value of the same is to be ascertained.

And also as to any and all other parts of the said Will and Codicils wherein doubts and differences of opinion may exist.

And as in duty bound petitioner will ever pray.

ALEXR MACFARLANE.

November, 1865.

I, Amos Seaman, of Minudie, in the County of Cumberland, Esquire, do hereby make and publish the following to my last Will and Testament, executed on the eighth day of March last past, as a Codicil.

WHEREAS my sons Gilbert and Rufus, and George Hibbard, husband of my daughter Jane, have expressed their intention of making charges against my estate, for doing which they or either of them can have no just right or equitable claim, it being my intention and desire that the interest and share they may severally inherit and take under the provisions of my said Will, shall be the full amount that they or either of them are to receive from my estate.

It is therefore my will, and I hereby authorize and direct my executor and executors, to retain and deduct from the respective shares or sums which my said sons Gilbert and Rufus, and my daughter Jane, may severally become entitled to receive, either from my personal estate or from the rents arising from my Quarries or Joggins lands, bequeathed in trust to my executor, the full amount of any claim, demand, or account which my said sons Gilbert and Rufus, or the said George Hibbard, may render or make against my estate, together with all costs, charges, or expenses, which my executor or my estate may be put to or be subjected to in consequence of the rendering of any such claims

Hereby ratifying and confirming my said last Will and Testament, I declare the foregoing to be a Codicil thereto.

In witness whereof I have hereto set my hand and seal, this twenty-second day of October, in the year of our Lord one thousand eight hundred and sixty-two.

Signed, sealed, published and declared, by the said Amos Seaman, as and for a Codicil to his last Will, in the presence of us, who, at his request, and in the presence of each other, have hereto set our names as witnesses.

(Signed) AMOS SEAMAN. [L.S.]

(Signed) GEO. W. CUTTER,
CHAS. C. SEAMAN.