Graham, R + C; Harney, W + M; Clemens, Eliza vs O'Fallon, John 1834 3rd D / 133/11
Exec of Mullanphy

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State of Missouri
County of Saint Louis } ss Be it Remembered that heretofore to wit. on the sixth day of March in the year of Our Lord One thousand eight Hundred and thirty four. The Clerk of the County Court within and for the County of Saint Louis. filed in the Office of the Clerk of the Circuit Court for the County of Saint Louis a Transcript of the Record and proceedings on an appeal from an order refusing Probate of the last will and Testament of John Mullanphy which Cause was docketed and set for hearing at the March Term of the said Circuit Court in the year aforesaid and is in the words and figures following to wit;

State of Missouri
County of St Louis } ss Be it Remembered that heretofore, to wit; At a County court begun and held at the City of St Louis within and for the County of St Louis in the State of Missouri on the first monday of November. it being the fourth day of said Month in the year of Our Lord Eighteen Hundred and thirty three were present. Mary P Leduc Esquire Presiding Justice. Caleb Bowles Esquire and Hartley Sanham Esquire Justices. John K Walker Sheriff Henry Chouteau Clerk. Now

order — on the sixth day of the said month of November in the year aforesaid. on motion of Henry S Geyer it is ordered by the Court that the papers purporting to be a Copy of a will and Codicils thereto. of John Mullanphy deceased filed with the Clerk of this Court for Probate together with the proceedings in relation thereto and the Caveat of Richard and Catharine Graham, James and Eliza Clemens William S and Mary Harney, be filed, and the cause docketed in this Court, which Copy of a will and Codicils thereto. proceedings and caveat. are in the

Codicil — words and figures following that is to say. Whereas I John Mullanphy deem it expedient to make some alterations of and additions to my last will and testament executed by me heretofore on the twenty seventh day of February in the year Eighteen Hundred and thirty; Now therefore I do hereby make the following Codicil; 1 I give and bequeath to ..... the sum of five thousand dollars on condition that the same shall be employed to support instruct and educate ..... orphan and destitute boys to be received from time to time at the Roman Catholic College (Large blank) and to be continued there till of age or to be bound out to any trade or business according to the direction of the governors for the time being of said College, and if bound out as aforesaid to still remain under the control and superintendence of said ..... said boys are to be taken from time to time from the Sisters of Charity who are established at St Louis and if a sufficient number cannot be thus had, of boys that have been under the care and charge of said sisters of Charity in St Louis, then any three of my heirs

are authorized from time to time to designate such others as can be accommodated at said College. 2. I give and bequeath to the Bishop for the time being of St Louis (meaning the Roman Catholick Bishop) the sum of five thousand dollars the use of it to be applied under the management of the Sisters of Charity in St Louis to the support and education of orphan and destitute boys and girls the boys to be from time to time taken to said Colleges as aforesaid and the girls not being over eight years of age to be transferred to the establishment of the nuns of the Sacred Heart at St Louis, to be there received and educated according to the tenor and provisions of the deed creating and endowing said establishment so far as they can be there accomodated according to the provisions and limetations of that deed. Provided however that any sum or sums hereafter paid by me for procuring property for said Sisters of Charity in St Louis in my life time shall be taken and considered as paid on account of their legacy of five thousand Dollars & my Executors shall pay only the balance and said fund shall be held forever by said Bishop and his successors in the same diocese for the use aforesaid – 3. I hereby revoke and annul the first section of my said last will, which contains a bequest to the Bishop. 4 I also annul the third section in the same will, which section provides for my sister Jane Delany, she having two sons who are phisicians in good practice and able to support her – 5. I likewise revoke and annul the eleventh section of said will which contains certain bequests to Bryan Mullanphy and also all of the twelfth section except so much thereof as relates to any annuity to my daughter Octavia which is to be paid and secured on the lot as therein stated; and the property and portion given to my son Bryan or his use in said eleventh section is to be held by the trustees to the general uses of said will as if said eleventh section had never been written. 6 And whereas Thomas Biddle one of the Executors and trustees of said will has departed this life I hereby declare that the remaining Executors in said will are authorized to act and to receive the property devised in the same manner and with as full powers as if the said Biddle had never been named the above six articles forming a Codicil to the last will and testament heretofore made by me I have this day signed and sealed – Nov 23d 1831

John Mullanphy (Seal)

The above was signed sealed published and declared as a codicil to his last Will and testament by John Mullanphy in our presence and in the presence of each of us who in his presence and at his request and in the presence of each other have hereto subscribed our names as witnesses this --- blank --- day of November in the year of our Lord 1831

Jno W Johnson

Thos Houghan

(Large blank)

I hereby make the following additional Codicil to my last will and testament which was omitted in the foregoing. Viz; I give and bequeath to my son Bryan the annual sum of seven Hundred and fifty dollars which my trustees and executors are required to pay to him annually during his life in equal quarter yearly instalments commencing from the time of my decease. I have this day signed and sealed the above as an additional Codicil to my last will and testament this 23. November 1831

John Mullanphy (Seal)

The above was signed sealed published and declared as a codicil to his last will and testament by John Mullanphy in our presence, who in his presence and at his request and in the presence of each other have hereto subscribed our names as witnesses this — blank day of November in the year of our Lord 1831 Jno M. Johnson — Thos Vaughan

will — (will) In the name of God. Amen. I, John Mullanphy being in sound and disposing mind and memory make this my last will and testament 1 — I hereby give and bequeath to the Roman Catholick Bishop of St. Louis for the time being or if there be no Bishop, then to the highest dignitary of the Roman Catholick Church in said Diocese the sum of two thousand dollars for the sole and only purpose of erecting a chapel on the lot in the city of St. Louis heretofore conveyed by me for the use of the Sisters of Charity and on which lot the Sisters of Charity now reside; but this legacy is upon the condition that the said Bishop shall furnish a Clergyman to perform service in said Chapel daily and every day in the year, as long as the sisters of Charity continue an establishment upon said lot and untill the lease for said lot heretofore executed by me for the benefit of said Sisters of Charity shall expire or be forfeited. 2 I give and bequeath to the Roman Catholick Bishop of the diocese aforesaid or if there be no such Bishop to the next highest dignitary of the same Church in said Diocese, for the use of the Children brought up from time to time by the nuns of the Sacred Heart of Jesus on the foundation heretofore Created by me at St. Louis, the yearly sum or annuity of One Hundred Dollars, to be paid to said Bishop or other dignitary in equal semi annual instalments forever, which said Bishop or other dignitary as aforesaid is to receive said annuity from time to time in trust, first to put the same out at interest to the best advantage, from time to time to time to accumulate and form a fund for the benefit of said Children — secondly whensoever any of said Orphan Children shall have remained out their time at said establishment and shall have conducted with propriety and shall marry, then upon such marriage said Bishop or other dignitary administering this fund for the time being shall give to each of said orphans so marrying whose conduct has been proper and meritorious as aforesaid

the sum of One Hundred dollars at least and more if the situation of the fund will admit according to the respective merits of those entitled to a donation out of this fund — 3d I give and bequeath to my sister Jane Delany of Baltimore the sum of three Hundred a year to be paid to her for and during her natural life by semi annual instalments of one ~~hun~~ Hundred and fifty dollars each, 4. to my nephew Hugh Mullanphy of Cullenwood Dublin City in Ireland, I give and bequeath the sum of two Hundred and fifty pound, in sterling money to be paid as soon as convenient after my death, to the said Hugh if he be then living but this bequest will be me=gatory if he dies before me. 5. I give and bequeath to the sisters of Charity in St Louis established on a foundation created by me, a mulatto Child called Fanny now aged about four years and living with me; To have and to hold to said sisters of Charity untill she shall arrive at the age of eighteen years. They are to learn her to read and write and treat her kindly, at the ~~the~~ age of eighteen years the said Fanny shall be free absolutely provided she shall have in the mean time conducted with propriety, and upon her marriage to some decent orderly person after she shall have become free I give and bequeath to her the sum of two Hundred dollars. 6. and for the purpose of securing forever the payment of the annuity of one Hundred dollars mentioned in the second article above and also the payment of the three Hundred Dollar annuity mentioned in the third article above for and during the whole period that said annuities shall be pay=able respectively according to the tenor of said articles; and for the pur=pose of securing the payment of the two Hundred Dollars mentioned in the fifth article above, whensoever the contingency shall have happened on which the payment thereof depends, I do devise unto John O'Fallon, Thomas Biddle and George Collier ——— the following described lot of ground situate in the City of St Louis to wit, a lot one Hundred and seventy feet french measure in front on main St running back to the river mis=sisippi with the same width bounded on the north by Cherry Street, east by the Mississippi River south by property formerly of one Pincen=neau & west by main St. To Have and to hold the same unto the Said O'Fallon, Biddle and Collier for and during their lives and to the sur=vivors of them & unto the survivor of them for and during their and his life and unto the heirs and assigns of the survivor of them forever. In trust for the ultimate security for payment of said annuities and each instalment thereof & for the ultimate payment of the said two Hundred dollars, But it is my intention and will that said trustees who are also general trustees for the purposes of this last will and testament shall pay said annuities from time to time and shall pay said two

Hundred Dollars out of the general mass of my Estate put into their hands as hereinafter expressed; as it is my design and meaning that said lot shall be charged for the ultimate security of said moneys and annuities & is to be resorted to only in case they cannot be paid out of other funds. 7th and whereas I have expended in cash upon the lots by me conveyed for the use of the Sisters of Charity in St Louis and for their support and maintenance three thousand Dollars more than I had agreed to expend: for which the Roman Catholick Bishop of this diocese has agreed to execute a mortgage on that one of said lots which is opposite to the green tree tavern upon which are four buildings to secure the payment of the sum of one Hundred and twenty dollars per annum for and during the existence of the lease made by me for the use of the nuns of the Sacred Heart of Jesus at St Louis; I do therefore give and devise said annuity of one Hundred and twenty dollars to said nuns, and direct that the said mortgage be executed to Mde Duchesne to hold to her in the same manner and on the same conditions in and upon which the land was conveyed to her by me, which annuity is to be expended from time to time in the purchase of bedding and cloathing for the Orphan Children maintained on the foundation created by me in the manner stipulated in the instrument by which I conveyed the land for said nuns of the Sacred Heart and created said foundation — 8th All my estate real and personal, all my lands tenements and hereditaments and all right in law or equity to any land or real Estate owned by me, bonds, notes, mortgages, debts, accounts, demands and Claims due to or belonging to me in any way, and all cash annuities, bank stock, government stock, or any other stock whatsoever and any dividends due or to grow due on the same, belonging to me or claimed by me, in law or equity, wheresoever the same real estate and lands and stock & debts & claims may be; and all my slaves and personal property furniture books &c; with the exceptions and reservations contained in the legacies, devises, and dispositions in the preceding articles herein contained I do give devise and bequeath unto the said..... ..... during their joint lives and to the survivors and to the survivor of them, to have and hold the same lands tenements and hereditaments and every parcel thereof and all rights & appurtenances thereto belonging and the same bonds, mortgages, notes, debts, accounts & demands, cash, annuities, bank stock and other stock & dividends and said personal property & slaves with the exceptions aforesaid, unto them the said..... for and during their joint lives with remainder to the two survivors of them for and during the joint lives of such survivors and with remainder then to the survivor of the three for and during his life & to the heirs and assigns of such survivor forever

in trust for the purposes herein specified. 9th the said trustees and the survivor and his heirs so long as this trust shall continue are to pay out of the general fund thus created in their hands the annuities mentioned in the second and third articles above, if said annuities shall so long continue & shall also pay if the contingency occurs the two Hundred dollars in the fifth article above mentioned, the lot charged with said annuities and sum of money being intended only as ultimate security. 10th after the legacies and provisions herein before made the one equal fourth of all my property thus thrown into one fund and mass in the hands of said trustees is to be held by said trustees for the use of my daughter Jane Chambers and her lawful issue ..... this fourth I consider the portion of two children (as I have had eight) but as I am sure it was and would have been the intention of my deceased daughter Ellen to give her portion to the said Jane and her family. I now carry her presumed intention into effect. this undivided fourth part my said trustees are to manage and receive the rents issues and profits; and out of its income to pay one thousand dollars annually to the said Jane during her life, for her sole and seperate use; and the residue of the income derived from this fourth part, is to be placed at interest except a sufficient allowance out of it for the education of her children and is thus to accumulate untill the marriage of the daughters of said Jane respectively and untill her sons shall respectively arrive at the age of twenty five years and when the contingency of marriage happens to a daughter or the arrival at the age of twenty five years to a son, the rateable proportion of such accumulation as afore said, shall be paid over to such son or daughter and the rateable proportion of the annual income of one fourth of my estate in this article appropriated, is to be paid annually to such child so marrying or arriving at the age aforesaid during his or her natural life; and in case of his or her death is to go in fee to right heirs of such child forever, and in case any of said Jane's Children die not having lawful issue then such Child's portion shall go to the surviving Children of said Jane in the same manner and under the same regulations as has already been provided as to their own shares. if my daughter Jane should die while her children or any of them are under the age of twenty one years it is my request that my sons in law Thomas Beddle and Richard Graham or the survivor of them should be appointed and serve as Guardians of such minors and take charge of their welfare and education and the provisions in this last will and testament to the advantage of such minor children of my daughter Jane shall be null and void, and their portions shall go back into the general fund

in case said Biddle and Graham or one of them shall not be appointed guardians as aforesaid provided they or one of them will accept such guardianship & are labouring under no disability to act as such guardians — if said Biddle & Graham shall die before my daughter Jane or be disqualified utterly to act as such guardians in the life time of said Jane then it is my will that said Jane should nominate some fit person or persons other than her husband to act as such guardians after her death

11th Another undivided fourth part of the general mass of my property conveyed to the trustees as aforesaid is to be held by them for the use of my son Bryan Mullanphy in the following manner. The trustees are directed to pay him the sum of one thousand dollars per annum out of the income thereof untill he shall attain to the age of twenty five years to be paid in equal quarterly instalments of two Hundred and fifty dollars. The residue of the income derived from this fourth is to be placed at interest by the trustees to accumulate untill said Bryan shall be twenty five years of age. At that period if said trustees or the survivors or survivor of them shall be of opinion that the Conduct of said Bryan is such as to warrant a reasonable belief that he will properly manage the property and make good use of it, then the trust as to him shall cease and the trustees shall account to him for his fourth and its accumulations and convey the same to him in fee — 12th The portion devised for the benefit of my son is two eighths being the equal portion of two children; but it is intended and so I will declare and so instruct my trustees, that out of this fourth an annuity shall be paid for the support of my daughter Octavia now in france; who will probably enter some religious community, in order to provide for her. it is my will that she receive for and during her natural life the annual sum of One thousand Dollars payable in advance in semi annual instalments by the trustees while they act in the trust and by my son Bryan in the same manner whenever he shall come to the possession and ownership of his portion. And to secure this annuity and its punctual payment to my daughter as aforesaid, I charge the same on the lot devised in the sixth article above, lying in St Louis being one Hundred and seventy feet french measure in width in front on Mn Str running back with same width to the river, bounded north by Cherry Str & South by land formerly of Pincenneau; which lot is to be deemed and held bound for the payment of the annuity herein created as well as for those mentioned in said sixth article

13th the remaining half of the general mass of my property not yet disposed of, is to be held for the use and benefit of my daughters Catharine Graham Ann Biddle, Mary Mullanphy, and Eliza Mullanphy share and share alike; the two former to receive from the trustees their respective

incomes as they arise from their portions to their sole and seperate use during their lives respectively; and I empower the said Catherine and the said Anne each of them by their respective last wills and testaments in writing duly executed to dispose of their respective shares under this will, and to bequeath and devise each of them in fee, her eighth part of my estate herein devised to her use as she pleases absolutely; and my trustees are instructed to act accordingly and convey their respective portions in conformity with the directions of such wills. and my daughters Mary & Eliza are each to receive from the trustees out of the incomes of their respective portions annually a reasonable sum for their support while unmarried. and the residue of the income of each shall be placed at interest untill their respective marriages. and whenever either of them shall marry the trustees shall pay over to her any accumulations on her eighth that my have accrued, and thereafter shall annually pay to her the whole amount of the income from her eighth part. if either of my said daughters Mary and Eliza, shall die before marriage and without lawful issue the portion of such daughter deceased shall from that time be held by such trustees for my other children as already provided and is considered as disposed of in the provisions herein before inserted; & in case they marry they can respectively by their last will dispose of their portions in fee and my trustees will act accordingly. 14 To my wife Elizabeth Mullanphy in lieu of dower I give and bequeath the annual sum of one thousand dollars during her life payable in advance and semi annually remitted to her at Paris clear of all expences to her. this provision and bequest is to be complied with and fulfilled by my said trustees punctually: and this annuity is to be paid by the trustees out of the general fund & mass of my property conveyed to them herein prior to and having preference of the devises and distributions to my children. 15th I declare it to be my intention herein and that such is the disposition of the several portions, parts and annuities herein provided for my daughters, the same portions and annuities and provisions are and are to be during the respective lives of my said daughters for the sole and separate use of my said daughters apart from and uncontroled by their ~~their~~ respective husbands; and said trustees are directed to act accordingly and account to my said daughters accordingly and not to their husbands. 16th In case my son Bryan shall die before me not leaving lawful heirs of his body his portion above provided for him, shall belong to the mass and fund conveyed to said trustees and be held by them for the uses specified already. But if my son shall survive me then I devise to him the

following tracts of land situate in St Ferdinand Township & St Louis County in Missouri, to wit; first a tract of land in the Florisant fields of eighteen arpens in front bounded east by the little stream called cold water, on the north by the property now owned by ..... Hume, on the west by the Missouri River & south by an arpent of land belonging to the heirs of John Baptiste Laurent, secondly, another tract of land in the same field of seven and a quarter arpens in front bounded east by said little river called cold water North by the said Arpent belonging to the heirs of Jean Baptiste Laurent west by the Missouri River & South by Joseph Subuchon third - another tract of land bounding on the one last described containing five Hundred and seventy five arpents, bounded north by the last described lot in part, on the west by the Missouri River, East by the common field lots of the Village of Florissant & on the south by property now or lately belonging to Pierre Chouteau Senior: fourth the Island commonly called Charbonnierre Island in the Missouri lying immediately apposite to the tract of land first above in this article described: Fifthly, the house lately occupied by me as a mansion in said Village of Florissant & the lot and premises comprehending some five or six superficial arpents contiguous and appurtenant thereto on which are stable yard &c which premises are bounded west by said Cold water Creek North by the public road as it now runs. East by a street and South by the street leading to the nunnery. To have and to hold said tracts of land. Island and lot and house & premises with all rights and appurtenances thereto belonging unto my said son Bryan for and during the term of his natural life; and after his death the same are to go and I devise the same to the Children of said Bryan lawfully begotten in fee forever; or if he shall die without lawful issue born or to be born to him then I devise the same to his right heirs in fee simple forever. In case my said son shall out live me the devises in this article contained shall operate to the exclusion of said trustees. & to the exclusion of all other devises, bequests and provisions in this last will and testament contained: and shall operate to vest the legal title of said lands tenements and hereditaments for life in my said son, with remainder in fee to his lawful issue & in default of such issue to his right heirs. the provisions in this article are cumulative & additional to the other provisions in favor of my son in this last will contained. 17th my trustees are directed as soon as convenient after my decease to divide my real property lying at the north end of the City of St Louis. to the north of the street called willow St as well as what lies on the Mississippi river as on all the Strs that do or will run through the same & to sell in fee alternate lots reserving the others from sale and always reserving the corners &

leaving in all instances an alley not less than eighteen feet wide running from north to south through each square: and on such sales to make execute and deliver every and all proper deeds title bonds & conveyances in fee as shall be proper and good in law: and to receive the proceeds of such sales; and out of such proceeds to erect and build on the lots reserved as aforesaid or any of them, good substantial brick and stone edifices. the rents issues and profits accruing from which said buildings and improvements are to be recd by my said trustees & to belong to the general fund in their hands & be subject to the provisions relating thereto herein contained — if either of my four daughters mentioned in the thirteenth article above shall die leaving lawful issue & without disposing of the portion in this will provided for her, as herein authorized the same shall go — her children in fee simple. & if she leaves no lawful issue the same shall go in fee to her lawful heirs — 19th if either of my unmarried daughters Mary and Eliza shall marry without the consent of my executors or a majority of them in such case I devise and bequeath to such daughter so marrying without consent one dollar in full of her portion of my estate & declare null all provisions for her benefit in this will contained except the one in this article — 20th And I give and bequeath to Daniel Mc Gurran a sick man at this time under the care of the sisters of Charity in St Louis, to be paid to him only at and during such time or times when he shall be in want and actually need it the sum of three dollars per week to be taken from the body of my Estate before distribution among my children 21st if by any occurrence it shall at any time happen that the lot on which the mortgage is to be executed mentioned in the seventh article above, by the Bishop to secure the annuity of one Hundred and twenty dollars shall not produce that sum, whether it be by failure of title, fire, depreciation of property or for any other reason then in such case the lot described in the sixth article above & therein devised to trustees, being one Hundred and seventy feet french measure in front on Mt St & running back to the Mississippi river shall be bound and held in trust for the payment of said sum of one Hundred and ~~and~~ twenty dollars annually as long as the said annuity shall of right be payable & my trustees mentioned in said sixth article, and the heirs of the survivor of them will hold the same lot in trust for this additional object; but it is my intention that in no case and at no time shall resort be had to said mentioned lot for the payment of said one Hundred and twenty dollars unless the lot specified in said seventh article shall fail to produce the

the necessary sum— 22nd I hereby revoke and annul all former wills and testaments executed by me and appoint John O'Fallon Thomas Biddle and George Collier Executors of this my last will and testament. In Testimony whereof I have hereunto set my hand and seal to this my last will and testament consisting of six leaves fixed together this being ~~being~~ the seventh, and of twenty two articles. there being an interlineation of the word "it" in the sixth article; the word "is" the words "of and before marriage" and "in" in the thirteenth article and the words "shall die in the eighteenth article and three words erased in the fourth line of the seventh article

John Mullanphy

signed, sealed, published and declared by John Mullanphy as and for his last will and testament in the presence of us, who at the same time, at his express request and direction, and in his presence and in the presence of each other subscribed our names as witnesses thereunto this twenty seventh day of February in the year of Our Lord one thousand eight Hundred and thirty at St Louis

William Higgins
John Thornton
Thos Houghan

On reading the foregoing last will and testament I perceive that I have made an omission in the fifth article respecting the mullatto Child Fanny. The provisions therein made for her I have been induced to make from Commiseration for her destitute situation, as I have sent her mother to a distance for her improper Conduct; and from the interest excited in me by the intelligence and smartness of the said Fanny and from her frequent entertaining and amusing me with her innocent prattle; and in order to rebut and prevent any suspicion or imputation that may exist in consequence of the notice of her in my will I solemnly declare before God that she is not my daughter. In Testimony whereof I have hereunto set my hand and seal John Mullanphy <5>

signed sealed published and declared by John Mullanphy as and for a part of his last will and testament in the presence of us who at the same time at his express request and direction and in his presence and in the presence of each other, subscribed our names as witnesses thereunto this twenty seventh day of February in the year of our Lord one thousand eight Hundred and thirty at St Louis William Higgins

John Thornton
Thos Houghan

State of Missouri }
County of St Louis } ss Be it Remembered that on this thirtieth day of October in the year of our Lord Eighteen Hundred and thirty three before me the Clerk of the County Court within and for the County aforesaid appeared Thomas Houghan, who being duly sworn upon his oath saith that a short time before John Mullanphy left the City of St Louis in the State aforesaid, for Washington City to appear as a witness in the case of Judge James H Peck, before the Senate of the United States he the said John Mullanphy requested this deponent to witness a certain instrument of writing which he then declared was his last will and testament that he the deponent did sign the said instrument of writing as a witness thereto in the presence of the said John Mullanphy and in the presence of John Thornton, to the best of his recollection, he the said John Mullanphy having previously signed and executed the said instrument in the presence of this deponent and that at the time of so doing he the said John Mullanphy was of sound and disposing mind to the best of his knowledge observation and belief, all which was done at the Office of Josiah Spalding in the City of St Louis in the County aforesaid

Th Houghan

(Seal) In Testimony whereof the said Thomas Houghan has hereunto affixed his name and I have set my Hand and affixed the seal of said Court hereunto at the City of St Louis the day and year first aforesaid

Henry Chouteau Clerk

State of Missouri }
County of St Louis } ss Be it Remembered that on this thirtieth day of October in the year of our Lord Eighteen Hundred and thirty three before me the Clerk of the County Court within and for the County aforesaid appeared John Thornton who being duly sworn upon his oath saith that a short time before John Mullanphy left the City of St Louis in the State aforesaid for Washington City to appear before the Senate of the United States as a witness in the case of Judge James H Peck, he the said John Mullanphy being at Josiah Spalding's Law Office in the City of St Louis aforesaid requested this deponent to witness an instrument of writing which the said Mullanphy then declared to be his last will and testament that this deponent did see the said Mullanphy sign the said instrument in two places and that he the said deponent and Thomas Houghan as well as William Higgins did sign the said instrument of writing in two different places, as witnesses thereto, in the presence of the said

John Mullanphy and in the presence of each other; and that at the time of so doing he the said John Mullanphy was of sound and disposing mind to the best of his knowledge observation and belief - And the said deponent further says that since that time the said William Higgins has departed this life - And further the said deponent saith not John Thornton -

(Seal) In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court at the City of St Louis the day and year first aforesaid Henry Chouteau Clerk

State of Missouri }
County of St Louis } ss Be it Remembered that on this thirtieth day of October in the year of Our Lord eighteen Hundred and thirty three, before me the Clerk of the County Court within and for the County aforesaid appeared John W Johnson who being duly sworn upon his oath said, that in the fall of the year of Our Lord Eighteen Hundred and thirty one, being in the Auction Room of William A Savage in the City of St Louis County aforesaid he was requested by John Mullanphy to walk over to Thomas Houghan's Store to witness a codicil which he had made to his will, and being at the Store of the said Thomas Houghan in the City aforesaid, he did see John Mullanphy sign an instrument of writing which at that time he declared as a codicil to his will, in two places and that he the said deponent and Thomas Houghan did subscribe their names to the said instrument of writing in two places in the presence and at the request of the said John Mullanphy and in the presence of each other as witnesses to the same, and that at the time of so doing he the said John Mullanphy was of sound and disposing mind to the best of his knowledge observation and belief, and further the said deponent saith not Jns W Johnson

(Seal) In Testimony whereof I have hereunto set my Hand and affixed the seal of said court at the City of St Louis the day and year first aforesaid
Henry Chouteau Clerk

State of Missouri }
County of St Louis } ss Be it Remembered that on this thirty first day of October in the year of Our Lord eighteen Hundred and thirty three, before me the Clerk of the County court within and for the County aforesaid personally appeared Bryan Mullanphy who being duly sworn upon his oath saith that the annexed paper purporting to be a copy of an instrument of writing purporting to be the last will and testament and codicils thereto of John Mullanphy deceased, now here produced to the said deponent, was copied by the said Bryan Mullanphy from the paper thus purporting to be the last will and testament and codicils

of the said John Mullanphy and which he believes is a true Copy. and that the names of John Mullanphy which were affixed to the said instruments of writing were the proper hand writing and signature of the said John Mullanphy to the best of his knowledge remembrance and belief. That said copy was made by him as aforesaid on the second and third days after the death of his father the said John Mullanphy deceased: and that the last time he did see the said instruments of writing it was in the house occupied by his said father as his residence; and that when he last saw the said paper, as aforesaid he does not recollect that it was in the possession of any particular member of his said father's family that he does not know what has since become of the said instrument of writing. That the said will was a subject of conversation in the family, presumes he made enquiries about it but was unable to learn what had become of it Bryan Mullanphy

In Testimony whereof the said Bryan Mullanphy has hereunto subscribed his name. and I have set my Hand and the Seal of said County Court (Seal) at the City of St Louis the day and year first aforesaid

Henry Chouteau Clerk

Codicil

I John Mullanphy of the City of Saint Louis in the State of Missouri wishing to make some donations. for the support and education of orphans as Substitutes for, and in lieu of any donations for those objects which may be found in my last will and testament, as at present prepared and published. do make the following donations for three purposes absolutely and not to be affected or annulled by any subsequent alteration. or avoidance of said will; but to stand independently of my last will and testament, should the same be altered or redrawn in my life time or avoided, or set aside after my decease; and any of said donations or part or parts thereof which may be actually made by me, during my life time, are to be taken as part of, and after my decease to be deducted from the respective donations. following, 1st. I give to the Bishop of Saint Louis, three thousand dollars for the purpose of building not less than eight Houses for widows. on the lot already conveyed to him for that purpose. upon a plan to be furnished by him or should I omit to furnish the plan, then to build so as best to attain the object of the donation. 2. To the Jesuits College at Saint Louis five thousand dollars on condition that they support and educate forever five orphan boys, at a time to be taken from the School of the Sisters of Charity at Saint Louis and ——— in succession so as to keep the number of five always full as nearly as may be, until each boy shall be twelve years old

respectively; and then to superintend the binding of them apprentices to some useful trade, or occupation, and the proper care of them during their respective apprenticeship: but such of the boys as shall be found to possess talents for the higher branches of learning, or for the ministry are to be kept, supported, and educated, by the College after they attain the age of twelve years, instead of being bound apprentices — And in the event of a discontinuance of the said College, the donees are to refund to the legal representatives of the donor, the principal sum of this donation, it being the intention of the donor that the interest of that sum shall be applied to the objects of this donation. And if the Jesuits College at Saint Louis should decline to accept, or fail to fulfil the conditions of this bequest, or donation then I give the said five thousand dollars to the Bishop Rosatti, and his successors as principals of the Sainte Mary's College at the Barrens in Missouri upon the same terms and conditions as are offered to the Jesuits College — and I make the following donations for the purpose of supporting and educating orphan Children, and for no other purpose whatever. 3. To the Bishop of New York three thousand dollars. 4 To the Bishop of Baltimore three thousand dollars. 5. To the Bishop of Boston one thousand dollars 6 To the Bishop of Philadelphia one thousand dollars 7 To the Bishop of Bardstown Kentucky one thousand dollars. 8. To the Bishop of Cincinnati Ohio. One thousand dollars. 9 To the Bishop of New Orleans one thousand dollars. 10 To the Bishop of Florida five Hundred dollars, 11 To the Bishop of Detroit in Michigan Territory five Hundred dollars and 12. To the Bishop of Charlestown South Carolinia five Hundred dollars — signed and declared to be his act for the purposes above expressed by the Donor John Mullanphy in the presence of the subscribing witnesses, who in his presence and in that of each other, have subscribed as witnesses at Saint Louis, this third day of July in the year one thousand eight Hundred and thirty three

John Mullanphy (L.S.)

Attest Henry Shaw. Wm Glasgow. John Ford.

State of Missouri }
County of St Louis } Be it Remembered that on this first day of November in the year of our Lord Eighteen Hundred and thirty three personally appeared before me the Clerk of the county court within and for the County aforesaid John Ford who being duly sworn upon his oath saith that in the month of July in the year of our Lord

Eighteen Hundred and thirty three he did see John Mullanphy sign the foregoing instrument of writing and heard him declare the same to be his ~~act~~ hand, act and deed for the purposes therein mentioned, and that he the said deponent did at the request of the said John Mullanphy, sign his name thereto as a witness to the same in his presence and in the presence of Henry Shaw and William Glasgow the other subscribing witnesses to the same - and that at the time of so doing he the said John Mullanphy was of sound and disposing mind to the best of his knowledge observation and belief. — John Ford

(Seal) In Testimony whereof the said John Ford has hereunto signed his name, and I have set my Hand and affixed the seal of said court, the day and year first aforesaid — Henry Chouteau Clerk

State of Missouri }
County of St Louis } ss Be it Remembered that on this first day of November in the year of Our Lord Eighteen Hundred and thirty three, before me the Clerk of the County Court within and for the County aforesaid, personally appeared Henry Shaw, who being duly sworn upon his oath saith that in the month of July in the year of Our Lord Eighteen Hundred and thirty three, he did see John Mullanphy sign the annexed instrument of writing and heard him declare the same to be his hand act and deed for the purposes therein mentioned, and that he the said deponent did at the request of the said John Mullanphy sign his name thereto as a witness to the same in his presence and in the presence of William Glasgow and John Ford the other subscribing witnesses to the same. And that at the time of so doing he the said John Mullanphy was of sound and disposing mind to the best of his knowledge observation and belief — Henry Shaw

(Seal) In Testimony whereof I have hereunto set my Hand and affixed the seal of said Court, and the said Henry Shaw has subscribed his name thereto the day and year first aforesaid. — Henry Chouteau Clerk

Caveat — In The County Court. St Louis County Nov Term 1833. In the matter of an application of John O'Fallon to prove and establish as the last will and Testament of John Mullanphy, a certain paper writing alleged to be a copy — Richard Graham and Catharine his wife James Clemens Jun and Eliza his wife and William S Harney and Mary his wife by their attorneys, Allen, Bates & Geyer come and protesting that the said John Mullanphy in his lifetime did not make and publish any last will and testament as the said John O'Fallon is supposed, say, that they the said Catherine Eliza and Mary are the Children of the said John Mullanphy deceased

said claim an interest in his estate as his heirs at law - and that the said John O Fallon ought not to have probate of the said supposed copy so by him presented, nor ought the same to be in any wise established or received as the last will and testament of the said John Mullanphy because they say that according to the laws of the land the said Court cannot proceed to establish or allow probate of any will by a copy or supposed copy and can only allow probate upon the exhibition and proof of the will according to the form of the statute in such case made and provided; and also because the said writing so as aforesaid exhibited as a copy of the said supposed last will and testament is not a true copy of any last will or testament ~~[is not a true copy of any last will or testament]~~ made & published by the said John Mullanphy in due form of law. all which matters and things the said Richard, Catherine, James, Eliza William & and Mary aver and will maintain when & where the court shall award and direct and therefore pray that the said application of the said John O Fallon in that behalf be over ruled

Allen Bates & Geyer atty

Order

and afterwards to wit, at the same term of the said county court on the nineteenth day of November in the year of our Lord Eighteen Hundred and thirty three, on motion of Henry S Geyer it is ordered by the court that a citation be awarded to notify John O Fallon and George Collier who the court are informed are the executors appointed in the last will and testament of John Mullanphy deceased to be and appear on the twenty first instant before this court to make probate of said will if any such exists. and to take out letters testamentary thereon according to law or renounce their right and title to the said executorship. that administration with the will of the said John Mullanphy annexed, may be committed to such person or persons as may be entitled thereto

Citation

which citation and the return of the Sheriff thereon are in the words and figures following to wit; County of St Louis ss. The State of Missouri to the Sheriff of St Louis County. Greeting. whereas the County court within and for the county aforesaid now sitting at the city of St Louis in said County, have received information that John Mullanphy late of St Louis deceased, lately died having first made his last will and testament in writing, and thereof appointed John O'Fallon and George Collier to be the executors; it was ordered by said court that a citation should be awarded to the said executors, to be and

appear before said Court to make probate of said will. These are therefore to command you, that you cite and notify the said John O'Fallon and George Collier to be and appear before said Court on the twenty first day of November in the year Eighteen Hundred and thirty three at the City of St Louis in the County aforesaid, then and there to make probate of said will (if any such exists) and take out letters testamentary thereon according to law or renounce their right and title to the said executorship and administration with the will of the said John Mullanphy annexed may be committed to such person or persons as may be entitled thereto (Seal) In Testimony whereof, I Henry Chouteau Clerk of said County Court have hereunto affixed the seal of said Court at St Louis this nineteenth day of November in the year of Our Lord Eighteen Hundred and thirty three

Henry Chouteau Clerk

Served this citation on George Collier & John O Fallon on the 20th day of Nov 1833 in St Louis Jno K Walker Shff Service $1.00

Appearance

And afterwards to wit: on the twenty first day of the said month of November in the year aforesaid the following proceedings were had, to wit, and now at this day come John O Fallon and George Collier agreeably to the Command of the Citation in this behalf and Richard Graham and Catharine his wife, James Clemens Junior and Eliza his wife and William S Harney and Mary his wife by their respective attorneys, who contest the probate of the will of John Mullanphy come also; and pray the Court to rule the said John O'Fallon and George Collier to make their election whether they will take upon themselves the proof and execution of the said will, or renounce the execution thereof which is objected to by the said John O'Fallon and George Collier by their Council; whereupon the Court sustain the motion and overrule the objection; which decision is excepted to by the said John O'Fallon and George Collier; and the said John O'Fallon and George Collier also object to the Jurisdiction of this Court to proceed in the said matter of probate to the exclusion of the Clerk of this Court in vacation which objection is overruled by the said Court, and the matter directed to proceed in this Court to which the said John O Fallon and George Collier also except, The said John O Fallon and George Collier filed their several answers to the said Citation and it appearing to the Court that there is good cause for continuing the matter for a further day, the cause is continued to the next Term of this Court

Answers

which said several answers are in the words and figures following to wit: In answer to the Citation served on me to appear and say whether I will renounce the right of administering on the estate of John Mullanphy as executor or not I say. that I have been informed there was a will of said Mullanphy appointing me executor but I have never seen that will & I understand it is mislaid or lost from some of the heirs; I will not renounce till I ascertain what the will is; on the production of the original which I believe still exists, or when the Court shall have determined what the will is, I will then say whether I will act as executor or not. Novr 21st 1833

George Collier

John O'Fallon says in answer to the Citation — That he believes Mr John Mullanphy deceased made and executed in his life time his last will and testament with sundry Codicils and that said will and ~~that~~ said ~~will~~ and Codicils were executed as he believes in due form of law. he further says that said will and codicils were as he believes in existence after the death of the said John Mullanphy in full force and effect. he further says that said will and Codicils were after the death of the said John Mullanphy in the possession of some of his heirs and that it is now reported to him that the said will and two of the Codicils have been lost or mislaid. but whether such be the fact he is unable now to say. he says he has never had the possession of, or seen the original and that he is not able to produce it before this Court for probate. He further says that in consequence of the representations of the heirs of said Mullanphy that the said will was lost or mislaid he commenced a proceeding before the Clerk of this Court in order to make probate of a Copy of said will and Codicils but that he was unable to complete the taking of the proof before the Clerk in consequence of the want of time before the sitting of this Court. that regarding the proceeding before the Clerk as one by which the jurisdiction of that Officer attached to the subject he has made no preparation for proving the will and Codicils before this court intending to continue the proof before that Officer when his, the Clerks convenience admitted. that he is not now prepared to proceed before this Court with the proof of said copy nor could he if he were ever so desirous to proceed at this time procure the testimony of Thomas Houghan one of the subscribing witnesses to the will who resides in the State of Illinois. He further states that he intends to proceed with the proof of said will and Codicils and declines entirely renouncing his rights under

the appointment of Executor made by said will

J O'Fallon

Copy offered

and afterwards to wit; At a County Court begun and held at the City of St Louis within and for the County of St Louis in the State of Missouri, on the first monday it being the third day of February in the year of Our Lord Eighteen Hundred and thirty four, were present Mary P Leduc Esquire Presiding Justice. Hartley Lanham Esquire and Caleb Bowles Esquire Justices. John K Walker Sheriff Henry Chouteau Clerk. Now on the thirteenth day of the said month of February in the year aforesaid John O Fallon Claiming to be Executor of the last will and Testament of John Mullanphy deceased produces here in Court a paper which he alleges to be a copy of the last will and testament of said John Mullanphy deceased disposing by devise and bequest of his real and personal Estate and offers to prove that the original will and testament of which the paper produced is a copy was duly executed by said John Mullanphy in his lifetime in pursuance of law; that the said original will and testament was in existence since the death of the said John Mullanphy and that it has been since the death of the said Mullanphy either lost or destroyed and that it cannot now be produced. and also to prove that the paper now produced is a true copy of said original will and testament; and that the mansion house; and known place of abode of said testator was at the time of his death in the County of St Louis. for the purpose of obtaining letters testamentary upon the same — To the taking of which proof, and the Jurisdiction of the Court in taking probate of such last will and testament in the manner aforesaid. James Clemens and Eliza his wife Richard Graham and Catherine his wife, and William S Harney and Mary his wife which Eliza, Catharine and Mary are some of the heirs at law of said John Mullanphy, by their attorneys, Object; and the Court after argument of Counsel do consider order and adjudge that the proof here offered by said John O Fallon Claiming to be executor as aforesaid be rejected

Appeal

And afterwards, to wit; at the same term of said Court, on the twentieth day of February in the year aforesaid. John O Fallon Claiming to be the Executor of the last will and testament of John Mullanphy deceased, appears in Court and prays an appeal to the Circuit Court of St Louis County from the judgment order and decree of this court rejecting the proof offered by him of the last will and testament of said John Mullanphy deceased and thereupon the said John O Fallon files his affidavit, and the costs of proceeding in this Court having

been paid by him the said appeal is granted

Affidavit which affidavit is in the words and figures following that is to say In the County Court St Louis County – John O'Fallon Executor of the last will and testament of John Mullanphy deceased vs Richard Graham and Catharine his wife, James Clemens and Eliza his wife William S Harney and Mary his wife – This day personally appeared in open Court John O Fallon Claiming to be the Executor of the last will and testament of John Mullanphy deceased and ~~and~~ makes oath that his application for an appeal to the Circuit Court of St Louis County from the judgment, order and decree of this court in rejecting the proof offered by him of the last will and testament of said John Mullanphy deceased is not made for the purpose of vexation or delay, but because he feels himself aggrieved by the judgment of this Court

J O'Fallon

Sworn to & subscribed in open Court February 20th 1834

Henry Chouteau Clerk

State of Missouri }
County of St Louis } ss I Henry Chouteau Clerk of the County Court within and for the County aforesaid do hereby Certify that the foregoing is a true full and Correct transcript of the Record and proceedings in the matter about the contest of the probate of the last will and testament of John Mullanphy deceased as the same remain of Record in my office – and the same is now here certified and transmitted to the Clerk of the Circuit Court of St Louis County. (Seal) In Testimony whereof I have hereunto set my Hand and affixed the seal of said court at the City of St Louis this fifth day of March in the year of our Lord Eighteen Hundred and thirty four

Henry Chouteau Clerk

and afterwards, to wit; at the said March Term of the said circuit court in the year of our Lord one thousand eight Hundred and thirty four, the following proceedings were had in said circuit court to wit; John O Fallon Executor of John Mullanphy deceased, vs Richard & Catharine Graham, James and Eliza Clemens, William S & Mary Harney Now at this day this cause and the matters in controversy therein are submitted to the court, whereupon the Court after argument of Counsel on both sides and being sufficiently advised in the premises doth Consider that the said decission of the County Court rejecting the evidence offered by the appellant to prove the will of John Mullanphy, be reversed and that ~~the~~ said County Court is hereby in-

structed to receive the evidence offered. and it is further ordered that the Clerk certify this cause to the said County Court to be proceeded in according to law and this opinion. And it is further Considered that the appellees do pay the costs of this appeal

State of Missouri } ss
County of St Louis } I Archibald Gamble Clerk of the Circuit Court for the County of St Louis do certify that the above and foregoing twenty two pages contains a full and true transcript of the Record and proceedings in the case of an Appeal from the County Court of the County of St Louis from an Order refusing probate of the last Will and testament of John Mullanphy, and the proceedings on said Appeal in the Circuit Court now certified upon writ of Error to the Supreme Court

Given under my hand & Seal of Office at St Louis this 24th day of May 1834

Archibald Gamble Clerk

CIRCUIT COURT

No 21

Supreme Court 3rd Judicial District
June Term 1834

Richard Graham & wife, James
Clemens & others
vs
John O' Fallon Exr of John Mullanphy

Transcript	$10 .. 50
Certificate & Seal	0 .. 50
Tax	0 .. 62½
	$11, 62½

STATE OF MISSOURI, } ss.
Third Judicial District,

The State of Missouri, to the Honorable the Circuit Court of Saint Louis County,

GREETING:

FOR AS MUCH *as in the record and process, as well as in the rendition of Judgment, on a certain plaint which was in our Circuit Court, for our County of* Saint Louis *before our Judge thereof, between* John O'Fallon Executor of John Mullanphy deceased

, *and* Richard Graham - Catharine Graham, James Clemens Jr. Eliza Clemens William S. Harney - and Mary Harney - Defendants - in an appeal from the Circuit Court for the County of Saint Louis

~~Defendant~~ ,

~~in a plea of~~ *as it is said, manifest error hath happened, to the great damage of the said* Richard Graham - Catharine Graham - James Clemens Jr. Eliza Clemens - William S. Harney and Mary Harney *as by* their *complaint we are informed:* **We,** *being willing that the error, if any there be, should be duly amended, and full and speedy justice done to the parties aforesaid in this behalf,* **COMMAND YOU,** *that if judgment be thereupon given, then a transcript of the record of the judgment, with all things touching the same, you certify and send (with this writ) to our Supreme Court, to be holden at the City of St. Louis, within and for the Third Judicial District, on the* First monday *of* June *next, that our Judges of our said Court, inspecting the record of the judgment aforesaid, may cause to be done therein, for correcting the said error, what to them of right, and according to law, shall seem meet to be done.*

In Testimony Whereof, *I,* **JOSEPH C. BROWN,** *Clerk of our Supreme Court for the Third Judicial District, have hereunto set my hand and seal of Office, at Office, this* Nineteenth *day of* May *in the year of our Lord one thousand eight hundred and* thirty four *and of the Independence of the United States of America, the* Fifty Eighth

Jos. C. Brown Clerk

In Obedience to the Commands of the within sent I return herewith a Transcript of the record and proceedings in the within entitled case as therein commanded

St Louis 24th May 1834

Archibald Gamble Clerk

405

No 21 (3)

Supreme Court 3d Judicial District

June Term 1834

Richd & Catharine Graham - James &

Eliza Clemens & Wm & Mary Harney

as

Jno O'Fallon Extr of John Mullanphy

405

Filed 24th May 1834

Joseph C Brown Clerk

[illegible] of [illegible] - 11 [illegible] - 13 - [illegible] & advisari - 28 - [illegible] affmd 31 -

Fee bill 49

John O'Fallon Ex^r of
John Mullanphy dec^d. ~~Deft.~~
ats.
Richard Graham & Catharine
his wife, James Clemens Jr. &
Eliza his wife, William S.
Harney & Mary his wife. ~~pltffs.~~

In Error

And now at this day come the said plaintiffs in error & say that in the record & proceedings aforesaid & also in the giving of the judg^t. aforesaid in form aforesaid given there is manifest error in this, to wit, that by the record aforesaid, it appears that the judg^t. aforesaid in form aforesaid given was given for the said John O'Fallon Executor as aforesaid against the said Richard Graham & wife & others whereas by the law of the land the said judg^t. ought to have been given for the said Richard Graham & wife and others against the said John O'Fallon Ex^r as aforesaid

Wherefore for the error aforesaid & also for other errors appearing in the record & proceedings aforesaid the said pltffs: in error pray judg^t &c.

Bates Geyer & Allen
atty^s for pltffs: in
error.

And the said O'Fallon by his attorney comes and says that there is no error in said record & proceedings & judgment in manner & form as in above assignment of errors is alleged &c. wherefore he prays judgment &c.

W. R. Gamble &
Spalding attys for
defts in Error

21
June 1834

Richard Graham & wife
& others
vs
Jno: O'Fallon Ex.r of
Jno: Mullanphy dec.d

Assignment of Errors.

Filed 2nd June 1834
Joseph C. Brown Clerk

Joinder in Error filed 9th June 1834
Joseph C Brown Clerk

Graham and others vs O'Fallon exr.

Error to St Louis circuit court

At the November term of the St. Louis county court for the year 1833 certain papers were filed in that court purporting to be copies of the will of John Mulanphy deceased. O'John O'Fallon the ~~appellee~~ defendant in error claiming to be the executor of said Mulanphy offered to prove that the papers above mentioned were a copy of the last will and testament of said deceased, and also offered to prove that the original will and testament was duly executed by said Mulanphy in his life time in pursuance of law, that the said original will and testament was in existence since the death of said Mulanphy and that it had been since his death either lost or destroyed and that it cannot be produced, and further to prove that the paper produced ~~and that~~ is a true copy of said original will and testament. To the taking of this proof and the jurisdiction of the court in taking probate of such lost will and testament in the manner aforesaid, James Blemins and Eliza his wife, Richard Graham and Catharine his wife, William Harney and Mary his wife which said Eliza, Catherine and Mary are some of the heirs at law of the said Mulanphy objected; and the county court sustaining this objection rejected the evidence offered.

From this decision of the county court O'Fallon appealed to the circuit court and that court having reversed the decision of the county court Graham, Blemins, Harney & wife ~~appealed~~ ~~prayed~~ a writ of error to this court. Believing that the proper mode of proceeding in this cause ~~was~~ is by writ of Mandamus from the ~~county~~ circuit court to the county court commanding it to admit the proof or shew cause, we will, nevertheless as the cause is before us, and as it is important that a final decision should be had in as short a time, as is consistent with a correct ad-

ministration of justice, take it into consideration.
The assignment of errors being general we will consider only whether ~~the court~~ ~~county court~~ ~~has jurisdiction of the cause and whether if it has the evidence ought to have been~~ the evidence has been properly rejected.
The plaintiffs in error contend that the county court can ~~take~~ grant probate only of the original executed by the deceased and not of a copy. They rely on the 5th 6, 8 & 10th sections of the act concerning wills.
Those sections all are framed with a view to direct the courts how to proceed in the proving of wills which may be exhibited in court. The 8th section provides that in certain cases the court or its clerk may issue a commission annexed to a will and direct it to any judge or justice of the peace &c empowering him to take and certify the attestation of the witnesses to such will.
The 10th section requires that when any will shall be exhibited to be proved, the court or clerk having jurisdiction thereof shall receive proof thereof and grant a certificate of probate &c. Thence it is inferred that the statute only intended to confer this jurisdiction on the county court in cases where the original was produced. See Revised Code p. 791-2
On the other hand the counsel for the defendant contends that the act of 1824 concerning courts gives to the probate courts a general jurisdiction in all cases relative to the probate of last wills and testaments, and that the act concerning wills does not ~~limit that jurisdiction~~ restrain that jurisdiction; and rely on the third section of the same act (see revised code p. 790) which, they say, shows that the legislature in passing that act had in their mind the case of destroyed wills. And they add that the act of 2. January 1827 to amend the act to establish

courts of Justice &c. transfers to the county courts all the power before possessed by the Probate courts (see 3 sec. p. 19 of the acts of 1826 & 7.)

The 4th section of the act of 1825 above mentioned, and to which the counsel of the defendant in error refer gives to the several court of probate exclusive original jurisdiction in all cases relative to the probate of last wills and testaments, the granting of letters testamentary and of administration, and the repealing of the same &c. The act concerning last wills and testaments seems to have been made partly with a view to direct the court of probate how to proceed in some of its duties. The 8th section gives to that court the power to issue a commission annexed to the will to certain judicial officers to take and certify the attestation of such witnesses as may be prevented by sickness from attending, or may reside out of the state &c. The 10th section directs the court or clerk how to proceed when a will is presented and witnesses are at hand, As the most ingenious and able lawyer would find it a difficult task to foresee every difficulty or doubt that might arise in the discharge of the duties of Probate courts, the legislature seems to have contented itself with providing for those cases which appear to have presented the greatest difficulty, and to have left them to seek aid, in the common law rules of proceeding in the discharge of the ordinary duties imposed on them by the 4th section of the act of 1825 above cited. The act of 1827 in amendment of the last cited act transfers to the county courts in terms all the jurisdiction which the act of 1825 had given to the Probate courts; and which the act concerning last wills and testaments does not seem intended to restrain. The county courts then being in possession of exclusive original jurisdiction in all cases relating to the probate of last wills

testaments, and in our opinion unrestrained by any provision in the act concerning last wills and testaments (see p. 19 of acts of 1827 section 3.) it remains to be seen whether, by the known rules of evidence, the original will being lost, inferior evidence may be received.

The statute requires that the last will & testament shall be signed by the testator or by some person in his presence by his direction, and be attested by two or more competent witnesses subscribing their names in the presence of the testator. The best evidence, ~~evidence~~ the nature of the case will admit of, must be produced. (Peake Ev.) If it appear that better evidence might have been brought forward, the very circumstance of its being withheld furnishes a suspicion that it would have prejudiced the party in whose power it is, had he produced it. Thus if a written contract be in existence and in the custody of the party, no parol testimony can be received of its contents. In some cases (Peake Ev 30) when it has been clearly shown that a record once existed, which has been since destroyed, much inferior evidence of its contents has been admitted. The same author at page 69 says "We have seen that even a judgment when destroyed 'may be proved by secondary evidence: this rule applies 'universally to every species of evidence". The admission of secondary evidence does not dispense with any of the provisions required by the statute to give solemnity to the instrument sought to be established as a last will and testament. After its existence has been proved and its subsequent loss, then it must equally be proved that it was subscribed by the testator, and that the two witnesses each subscribed it in his presence. One of these witnesses will be enough to establish the due execution of the will if he can prove that he saw the

other witness subscribe it in the testators presence. For the law which requires the best evidence does not require all of it the evidence which might be given (Peake. 9) If then the contents of so solemn an instrument as a record can be proved by inferior evidence, the loss of the record being first proved, why not the contents of a lost will and testament of dead man? The original will itself ~~is evidence~~ even after probate is evidence of inferior character to the Record of a court. In the absence of authority we might be content with this demonstration of the soundness of the rule, that would let in inferior evidence to prove the contents of the lost will. But we are not without authority. The following authorities furnished by the counsel for the defendant in error are very appropriate. Toller on Exors. p. 14 If a will be destroyed ~~by~~ during the life time of the testator, it will be substantiated upon satisfactory proof thereof, and of its contents (see case there cited). Again the same author at page 71 says if the will be lost and two witnesses superior to all exception who read the will, prove its existence after his death, remember its contents, and ~~prove its contents~~ depose to its tenor, are sufficient to establish it. So where the testator had delivered his will to a friend to keep for him, and four years afterwards died, when the will was found gnawn to pieces by rats, and ~~illegible~~ in part illegible, on proof of the substance of the will by joining the pieces, and the memory of witnesses, the probate was granted. In the case before the court much better evidence of the contents of the will was offered than was admitted in the cases above cited. It was a copy of the will of Morlanphy. The memory of man is weak, whereas the copy is as unchangeable as the original. The Kentucky books also furnish us

authorities of which one only will be produced
"In the case of Happy's will 4 Bibb 553 it was decided that probate may be granted of a copy of a will when the original cannot be produced.
'The judge, who delivered the opinion, (Owsley) says 'it is objected that probate cannot be granted by the county court on a copy; but that the only appropriate remedy is by bill in equity. We are unable to perceive any force in this objection. The case of a lost will is no where excepted in the statute from the jurisdiction given to the county courts in testimentary matters; and upon principle we do not suppose such a case should form an exception.
'In deciding (continues the Kentucky case) whether 'probate ought, or ought not to be granted, the county 'court, it is true, ought to require the original will 'to be produced, if it is to be had; not however because 'it is necessary to give them jurisdiction of the matter, 'but in obedience to the law requiring the best evidence 'ever the nature of the case is susceptible of: but if 'the original is not to be had, then a copy constitutes 'the best evidence in the power of the party, and upon 'its production, under the ~~same~~ influence of the same 'rule the court ought to proceed either to grant or refuse probate'" It cannot have escaped the most superficial observer that there is a very remarkable resemblance between the case of Happy's will and that of Mulanphy's now before us: so strong indeed is this resemblance that the court of appeals in Kentucky ~~may be said to has~~ in deciding the case of Happy's will may be said virtually to have decided that of Mulanphy's: And that court was so far from thinking the case a difficult one that it appears to have been surprised that any doubt concerning the jurisdiction of the county court

could have arisen. We cannot but concur with them in opinion (see 4th Monroe 422 to the same purpose. The judgment of the Circuit court is therefore affirmed.

M. M. Gish
George Tompkins
N Wash

Graham & others
vs Ξ opinion
O'Fallon Exor.

25 oct 34

1998 words

Tompkins

Graham and al
vs
O'Fallon Exr. &c.

In Error

This is a writ of error on the judgment of the circuit court rendered on an appeal from the county court of Saint Louis County. The facts appear to be these, that at the November term, 1833. of the county Court of Saint Louis County, the Deft. in Error applied to said county court to prove and establish as the last will and testament of John Mullanphy a certain paper writing alleged to be a copy which writing is set out on the record – The Plaintiffs in error appeared at the same time and entered their caveat protesting that the said John Mullanphy in his life-time did not make and publish any last will and testament as by the said John O'Fallon is supposed and say, that they the said Catherine, Eliza and Mary, are the children of the said John Mullanphy decd. and claim an interest in his estate as heirs at law & that the said John O'Fallon ought not to have probate of the said supposed copy so by him presented nor ought the same to be in any wise established or received as the last will and testament of the said John Mullanphy, because they say that according to the laws of the land the said court cannot proceed to establish or allow probate of any will by a copy or supposed copy and can only allow probate upon the exhibition and proof of the will according to the form of the statute in such case made and provided and also because the said writing so as aforesaid exhibited as a copy of the said supposed last will ~~and~~ & testament is not a true copy of any last will or testament made and published by

the said John Mullanphy in due form of law — at the same term a citation issued to the said John O'Fallon and George Collier who the court are informed are the executors appointed in the last will and testament of John Mullanphy dec. to be and appear on the 21st. Instant (Nov. 1833) being November term aforesaid, before said county court to make probate of said will if any such exists & to take out letters testamentary thereon according to law or renounce their right and title to such executorship that administration with the will of the said John Mullanphy annexed may be committed to such person as may be entitled thereto — which citation was served — & such proceedings were had that at a term of the county court held Feby. 1834 John O'Fallon claiming to be executor of the last will and testament of John Mullanphy dec'd. produces here in court a paper which he alleges to be a copy of the last will and testament of said John Mullanphy dec'd. disposing by devise and bequest of his real and personal estate and offers to prove that the original will and testament of which the paper produced is a copy was duly executed by the said John Mullanphy in his lifetime in pursuance of law — that the said original will and testament was in existence since the death of the said John Mullanphy and that it has been since the death of the said Mullanphy either lost or destroyed and that it cannot now be produced and also to prove that the paper now produced is a true copy of the said original will & testament & that the mansion house and known place of abode of said testator was at

the time of his death in the County of saint Louis for the purpose of obtaining letters testamentary upon the same.
To the taking of which proof and the Jurisdiction of the court in taking probate of such last will and testament in manner aforesaid the said pltffs: in error object, which objection was sustained.
Which judgment of the county court on an appeal to the circuit was by the same reversed.

The question raised on this record is, whether a lost will can be admitted to probate? The negative is held by the pltffs: in error they rely in support thereof on the 1st. 4th, 5th, 6th, 8th & 10th Ss. of the act entitled "An act concerning wills & testaments."

B. Allen & al:
attys. for pltffs: in Error.

R Graham sal:

Jno: O'Fallon Exr. &c
of Jno: Mullanphy

Brief of pltffs: in error

B. Allen sal
for pltffs in error

Graham & al. heirs of Mullanphy
vs.
O'Fallon Extr

Sup Court Oct. Term 1834

Constitution Missouri page 54 Sect. 12. ordains tribunals for "granting letters testamentary & of administration" &c.

act respecting Courts

1825. Jany 7. The act entitled "Courts" was passed & went into effect & in page 270 Rev Code Sec. 6 it is enacted that the probate Court shall have "exclusive original jurisdiction in all "cases relative to the Probate of last wills & testaments, the gran-"ting letters testamentary and of administration & repeating the same "&c. ——— to hear and determine all disputes and con-"troversies whatsoever respecting wills, the right of executorship" &c

act respecting Wills -

1825 February 19. The act respecting wills was passed & went into effect on the same day.

page 791. Section 6 makes it duty of Court or clerk "to take the proof of last wills and testaments." It then prescribes in what County.

This Section does not narrow the jurisdiction granted to the Court, in the act respecting Courts. in terms:

Nor does the act on wills, narrow such jurisdiction by implication, & take it away in case of a destroyed will.

For see Section 3rd page 790. which shows that the Legislature when passing that act, had in their mind the case of ~~lost or~~ destroyed wills, & in this Section declare that such will shall remain in force unless cancelled or destroyed by the testator.

Section 8th. is only a provision for taking depositions where there is an original will left with the Court or Clerk & authorizes the sending it abroad: without which authority it could not be done.

Section 9. includes all wills proved, whether written or not: For it may be a mariner's will, ~~or~~ a nuncupative will, mentioned in the previous sections: and this Section requires them to be recorded

Section 10. under the ~~terms~~ "when any will shall be exhibited to be proved", evidently includes nuncupative wills

as well as original written ones, & if so, it may & must include wills, the originals of which have been destroyed or lost, & which are still in force

act respecting administration.

1825 Febry 21. This act was passed & went into effect on 4th. July 1825. &c. The first Section page 92 ~~is~~ makes it the duty of the Court or Clerk to grant letters testamentary or of administration, like the 6th Section of act of "Wills". & does not restrain or narrow the jurisdiction granted in the act on Courts.

Nor does any thing in this act, by implication narrow it. Section 5. declares that the executor has power over the estate before probate of the will.

Section 7. page 94. shows that the act contemplates no administration, except by the executor or with the will annexed, in cases where the original is lost or destroyed; for it requires the person administering to swear that "the decedent died without a will as far as he knows or believes".

Act transferring probate to County Courts

1827 Jany 2. This act was passed; & went into force on the 1st. May then next. In Section 3rd. page 19. the jurisdiction is stated as follows: "shall have exclusive "original jurisdiction in all cases relating to the probate of "last wills & testaments, the granting letters testamentary, & of administration "and repealing the same: _____ to hear and de"termine all disputes and controversies whatsoever respecting "wills, the right of executorship" &c. & all the powers of the Probate Courts.

The words of the above acts conferring jurisdiction comprehend all cases, whether the original will can be produced or not.

Analogy

One would suppose from analogy, without authority directly on the point, that the loss or destruction of the will, would not destroy the right & power of proving the will.

Lost deed is not loss of estate

If an instrument, a deed, &c. is lost, the party does not lose his estate or right thereby; but he proves a copy or the contents. This is a familiar doctrine of Evidence: and 1 Madd. 326-7 it appears that courts of equity relieves in case of suppression of will or deed, but in case of will of personalty only. Equity cannot in England relieve for fraud. 1 Madd 258-9, because the Ecclesiastical Court has sole jurisdiction. 1 Strange 481 2 Strange 666.

A will is good though lost or destroyed 7 Bac Abr. 320 note 1 Bay 464 2 Binney 406.

Express authority —

But there is authority.

1st. In England. Toller on Exrs pages 14 & 71 also 1 Williams on Exrs. 209-10

2nd & in America. 4 Bibb 553 4 Monroe 422

These cases & authorities show that the probate of a will in England, when lost or destroyed, is a thing of ordinary occurrence in the Ecclesiastical courts. and in Kentucky under a statute similar to ours the highest Court decided after great deliberation that probate should be made of a lost will.

See Crabb's Com. Law page 14. as to wills &c. in Saxon times.

Heirs of Mullanphy
vs
O. Fallon Extr.

mem &c.

Rev Code. pages 54. 92. 270. 791
Pamphlet 1826-7 page 19.
1 Williams on Extrs - - 209-10
Foller on Extrs — 14 & 71
~~7 Bac. Abr. 320 note~~
Crabb Com. Law 14. 110. 112
4 Bibb 553
4 Monroe 422
1 Madd 258-9, 326-7
2 Williams on Extrs
1 Strange

There has been taken to Court Oct 16 1834

Ibid. page 110, 112 as to origin &c, of Ecclesiastical Jurisdiction. 1 Strange 666 cited in 4 Monroe 422 as to its origin & history &c,