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BILL OF COMPLAINT.

Filed May 22, 1929.

In Chancery of New Jersey

To the Honorable Edwin Robert Walker, 10
Chancellor of the State of New Jersey.

The complainant, Blanche W. Weyer, of the City of Newark, in the County of Essex and State of New Jersey, respectfully shows that:

1. On June 12, 1925 Edward T. Weyer, widower, conveyed to his son, Edward W. Weyer, for a full and valuable consideration, by Warranty Deed in fee simple, the following described lands and premises in the City of Newark, in the County of Essex and State of New Jersey: 20

BEGINNING at a point in the Easterly side of Bloomfield Avenue distant ninety-eight feet and four inches Westerly from the Northwesterly line of North Fifth Street; from thence running (1) Northerly along said line of Bloomfield Avenue fifty feet; thence (2) Easterly at right angles to Bloomfield Avenue sixty-seven feet eight and one-half inches; thence (3) Southeast- 30
erly at right angles to North Fifth Street sixty-seven feet eight and one-half inches to the Northwesterly line of North Fifth Street; thence (4) Southwesterly along North Fifth Street fifty feet; thence (5) Northwesterly at right angles to North Fifth Street forty-four feet ten and one-half inches; thence (6) Westerly at right angles to Bloomfield Avenue forty-four feet ten and one-half inches to the line of Bloomfield Avenue and place of BEGINNING. 40

Bill of Complaint.

10 BEING Lots #47 and 48 on Block "B" on a map of the property of The Knickerbocker Life Insurance Company, made by Van Duyne & Young, Surveyors, and being the same premises conveyed to the said Edward T. Weyer, and Minnie Weyer, his wife, by deed dated June 7th, 1899, and recorded in the Essex County Register's Office in Book N 32 of Deeds for said County, on page 146 &c. The said Minnie Weyer having since died viz, January 10th, 1921.

20 The said deed having been first duly acknowledged and the certificate of acknowledgment duly endorsed thereon, was, on June 15, 1925 duly recorded in the Register's Office of said County of Essex in Book B 72 of Deeds for said County, on pages 486-487.

2. That said Edward W. Weyer and this complainant, Blanche W. Weyer, were married at Newark, Essex County, New Jersey on October 29, 1924.

30 3. That said Edward W. Weyer died intestate August 24, 1928, seized of above-described premises in his right in fee simple, without devising the same in due form of law, and without leaving lawful issue but leaving this complainant, his wife, him surviving.

40 4. As part of consideration for said deed, there was given by said Edward W. Weyer to said Edward T. Weyer, a bond to secure the payment of the sum of five thousand (\$5,000.00) dollars, with interest thereon at the rate of six (6%) per cent. per annum, dated June 12, 1925, and the payment of said bond was secured by a mortgage given by said Edward W. Weyer to Edward T. Weyer, bearing even date with said

Bill of Complaint.

bond and embracing the above-described premises, and which mortgage was recorded in Book N 54 of Mortgages for said County, page 359; said mortgage was given to secure part of the purchase price of said deed.

5. Complainant has, ever since the death of her said husband, Edward W. Weyer, been in peaceable possession of the lands therein described and has always claimed and does now claim to own the same. 10

6. Complainant's title to said lands is denied and disputed by said Edward T. Weyer, Emma Lillian Anderson, her husband, Frederick Anderson, and Irene Weyer, who claim to own the same, or some part thereof, or some interest therein, or to hold some lien or encumbrance thereon. 20

7. Said Irene Weyer and Emma Lillian Anderson are the only sisters of said Edward W. Weyer at the time of his death, and there being no brothers of said Edward W. Weyer, nor any child or children of any deceased child or children of said Edward T. Weyer; in other words, there were only three children born to said Edward T. Weyer, as above stated.

8. No suit is pending to enforce or test the validity of the title, claim or encumbrance of said Edward T. Weyer, Emma Lillian Anderson, her husband, Frederick Anderson and Irene Weyer. 30

9. On July 1, 1926 the said bond and mortgage held by Edward T. Weyer became due and payable.

10. On April 23, 1929 complainant tendered to said Edward T. Weyer the sum of five thou- 40

Bill of Complaint.

sand (\$5,000.00) dollars principal on said bond and mortgage and interest thereon due to the date last foresaid, and demanded from the said Edward T. Weyer the surrender of the said bond and mortgage for the purpose of canceling the same.

10

11. The said Edward T. Weyer at the time and place aforesaid refused to accept said sum so tendered to him by complainant, or to surrender to complainant said bond or mortgage.

20

12. Complainant is, and has at all times since said date, been ready, willing and able to pay said principal sum of five thousand (\$5,000.00) dollars remaining unpaid on said bond and mortgage, together with interest thereon from June 12, 1925, and now tenders herself ready to pay into this court said sum of five thousand (\$5,000.00) dollars, principal, together with interest thereon from June 12, 1925, or whatever sum or sums this court may adjudge to be the amount which she should pay in order to satisfy and discharge the said bond and mortgage.

Complainant is without adequate remedy in the courts of law, and therefore prays:

30

1. That Edward T. Weyer, Emma Lillian Anderson and Frederick Anderson, her husband, and Irene Weyer, defendants to this suit, may answer this bill of complaint and each statement therein made.

40

2. That the said defendants may set forth and specify their title, claim or encumbrances to or upon the lands and premises hereinbefore described and how and by what instrument the same was derived or created.

Bill of Complaint.

3. That the rights of all of the parties to this suit—and to the lands hereinbefore set forth—may be fixed and settled by this court and that complainant may be decreed to have a perfect title thereto, and the said defendants to have no estate, interest or right in or encumbrance upon said lands or any part thereof. 10

4. That complainant may be decreed to be entitled to redeem the said mortgage held by said Edward T. Weyer.

5. That the said Edward T. Weyer may be decreed, upon payment or tender to him by complainant of whatever amount is decreed to be equitably due to said Edward T. Weyer on said bond and mortgage, to deliver to complainant the said bond and mortgage, after having first duly endorsed the same for cancelation. 20

6. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

LINTOTT, KAHR & YOUNG,
Solicitors for and of Counsel
with Complainant.

30

40

Bill of Complaint.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

BLANCHE W. WEYER, of full age, being duly sworn according to law, upon her oath deposes and says:

- 10 1. I am the complainant in the foregoing bill mentioned. I have read the said bill and know the contents thereof, and the same are true of my own knowledge, except as to matters that are therein stated to be on information and belief, and as to those matters, I believe them to be true.

BLANCHE W. WEYER.

- 20 Sworn and subscribed to before me
 this 15th day of May, 1929.

HELEN R. BYRNES,
 Notary Public of New Jersey.

30

40

ANSWER AND COUNTER-CLAIM.

Filed June 13, 1929.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>BLANCHE W. WEYER, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>EDWARD T. WEYER, <i>et als.</i>, <i>Defendants.</i></p>	}	<p>10</p> <p><i>On Bill, &c.</i></p> <p><i>Answer and</i></p> <p><i>Counter-</i></p> <p><i>claim.</i></p>
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The answer of Edward T. Weyer, Emma L. Anderson and Frederick Anderson, her husband, and Irene L. Weyer, the defendants in the above-stated cause, to the bill of complaint of Blanche W. Weyer, complainant. 20

These defendants answering the bill of complaint, say that:

1. Paragraph 1 is denied, and these defendants say that the conveyance of the lands and premises mentioned in paragraph 1 by Edward T. Weyer to Edward W. Weyer, was a gift. 30

2. Paragraph 2 is admitted.

3. Defendants are informed that said Edward W. Weyer died intestate and they are also informed that he died without leaving any children, but they deny that he was seized in fee simple of the said lands and premises.

4. Paragraph 4 is denied, and these defendants say that the mortgage described in said paragraph was given to Edward T. Weyer to 40

Answer and Counter-claim.

secure the payment of money loaned by him to Edward W. Weyer.

5. Defendants admit that the complainant has been in peaceable possession of the lands since the death of her husband, but they deny that she has always claimed to own the same.

10

6. Paragraph 6 is admitted.

7. Paragraph 7 is admitted.

8. Paragraph 8 is admitted.

9. Paragraph 9 is admitted.

10. Defendants deny that any legal tender of money was made to the defendant, Edward T. Weyer, as alleged in paragraph 10; but they admit that Edward T. Weyer refused to accept any money for the reason that he felt that by taking the money he might surrender his rights in the land as owner thereof.

20

11. Paragraph 11 is denied, with the explanation contained in the answer to paragraph 10.

12. Defendants say in answer to paragraph 12 that they believe that the complainant is able to pay the said mortgage, but said defendant, Edward T. Weyer is not willing to accept the money and cancel the mortgage, until the question is determined as to who owns the land and premises.

30

And this defendant, Edward T. Weyer, by way of counter-claim to the bill of complaint, says:

1. On or about June 12, 1925, the defendant, Edward T. Weyer made a conditional gift of the land and premises described in paragraph 1 of the bill of complaint, to his son, Edward W.

40

Answer and Counter-claim.

Weyer, and at the same time transferred to his said son the goods and chattels and good-will of the bakery business which had been carried on in said premises by the said Edward T. Weyer for many years.

2. The condition of the gift alleged in paragraph 1 was as follows: That the said Edward W. Weyer should pay to his sister, Emma Lillian Weyer, now Emma Lillian Anderson, the sum of \$10,000 to compensate her for her share of the business, she having worked in the business with her father and brother for many years; and that the said Edward W. Weyer should also make and execute a will devising the said land and premises to his father and sisters, so that in case of his death the land should revert to his father and sisters. 10
20

3. That the said Edward W. Weyer did undertake and promise to pay the said sum of \$10,000 to his sister Emma and to make a will, as alleged in the preceding paragraph, and relying upon his said promises the said Edward T. Weyer transferred the business to him and executed and delivered to him a deed of conveyance for the lands and premises, and permitted him to take possession of the lands and premises and of the business, and to carry on the business. 30

4. That the said Edward W. Weyer did pay to his sister the sum of \$10,000, and the defendant, Edward T. Weyer, loaned to him the sum of \$5,000 to assist him in making such payment, and that loan was secured by the mortgage described in paragraph 4 of the bill of complaint.

5. That this defendant was informed after the death of the said Edward W. Weyer, that he had not executed a will in accordance with 40

Answer and Counter-claim.

his promise; and he was also informed that he was prevented from making a will by the said complainant.

10 6. This defendant, Edward T. Weyer, has not taken any action because he was repeatedly promised by the complainant that everything would be made all right as soon as she could get the estate settled up.

20 This defendant has no adequate remedy at law and prays that the promise of the said Edward W. Weyer to devise said land and premises to his father and sisters may be enforced by a decree adjudging that the said land and premises belong to this defendant, Edward T. Weyer, and that if necessary the complainant may be decreed to release any interest which she may have in the said land and premises or claim to have, and that this defendant may have such other relief from the complainant as may be agreeable to equity.

FRANK E. BRADNER,
Solicitor for and of Counsel with Defendants.

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40

REPLY AND ANSWER TO COUNTER-CLAIM.

Filed June 22, 1929.

IN CHANCERY OF NEW JERSEY.

Between

BLANCHE W. WEYER,
Complainant,

and

EDWARD T. WEYER, *et als.*,
Defendants.

On Bill, &c.

*Reply and
Answer to
Counter-
claim.*

10

The complainant joins issue on the answer of the defendants.

As to the counter-claim contained in said answer, complainant says:

20

1. Paragraph 1 is denied.
2. Paragraph 2 is denied.
3. Paragraph 3 is denied.

4. Complainant admits that Edward W. Weyer did paid to his said sister the sum of ten thousand (\$10,000.00) dollars, but alleges that it was part of the consideration paid by said Edward W. Weyer to Edward T. Weyer for the land and premises referred to in the bill of complaint and which consideration, at the direction of said Edward T. Weyer, was paid to his said daughter.

30

5. Complainant has no knowledge as to what information was received by said Edward T. Weyer as alleged in paragraph 5, and therefore leaves defendants to their proof.

40

Opening.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

January 22, 1930.

Between

BLANCHE W. WEYER,
Complainant,

and

EDWARD T. WEYER, *et als.,*
Defendants.

10

Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Lintott, Kahrs & Young (by Mr. Kahrs), for complainant; Frank E. Bradner, for defendants.

20

The Court: What is the case?

Mr. Kahrs: In June, 1925, Edward W. Weyer took title to a piece of property in the City of Newark. He was then married to Blanche W. Weyer, who is the complainant in this suit. He took it under a warranty deed and at that time gave back a bond and purchase money mortgage to secure part of the purchase price to his father, who had conveyed the property to him.

30

The Weyers were married in October, 1924, and continued to be married to each other up until the time of his death, which was in August, 1928. And Edward T. Weyer, the son, who owned this property—Edward W. Weyer, who owned this property, died intestate with-

40

Opening.

out children at that time, so that we claim that under the Act of 1926 title vested in his widow. The mortgage remained on the property, no interest was paid on it. An offer was made, a tender of the amount, the balance due on the mortgage which was refused, and so this is a bill
 10 filed, in the first place, to remove the cloud on the title, if there is a cloud, because a claim was made by the members of the Weyer family, and also to redeem the premises from the lien of this mortgage by a payment on our part of the amount due.

The Court: Well?

Mr. Bradner: Your Honor please, the elder Weyer, Edward T. Weyer, had a bakery on Bloomfield avenue, I think somewhere near Mt.
 20 Prospect avenue, for a great many years. He had working in the bakery his eldest daughter for fourteen or eighteen years and his son who was, at the time of this transaction, about twenty-five years old, had been working there.

The son was in very poor health, was not expected to live a very long time. The father decided to retire from the business. He did not care much about selling it out so as they set up in the answer he said to his son, "I will give it to
 30 you," give him the business, and he gave him the building in which the business had been carried on. The sister then said, "Well, I have been working here for a number of years and Eddie is married, I suppose he will have his wife come in here with him and I want—I would like to have something out of this." And he said, "Well, I will give you ten thousand dollars." That is, the son said that to his sister. The property was conveyed—the real estate was conveyed to the son. The consideration expressed
 40

Opening.

in the deed is "One dollar and other valuable considerations." The witness to the deed was Edward George, who died before Mr. Edward W. Weyer.

For some reason or other the mortgage was made by the son to his sister to secure the payment of \$5,000 and that mortgage recites that it is to secure part of the purchase money made to the sister. There was another mortgage made to the father for \$5,000 which recites that it was to secure payment for part of the purchase money. 10

Nothing has been paid on the mortgage to the father. The sister's mortgage has been paid and cancelled of record.

I have here, today, from the savings institution the check for \$5,000 that the father loaned to his son when he took that mortgage, so it was not purchase money, it was an outright loan to his son, which was made to the son in order to furnish him with money to give to his sister, so that the meritorious defense is that this was a family arrangement, family settlement; the father was retiring from business and those settlements are something on which the Court always looks with great favor not to disturb them, and it was carried out, but it was carried out in a way that was beyond their comprehension. They just simply went to a lawyer and let him do it. Those facts can be disregarded to get at the truth of the matter. 20 30

Now, he had two sisters—there was a younger sister, too—I have gotten a little ahead of my story. When this arrangement was made with the son, he agreed with his father that he would make a will giving this property so that in case he died the property would come back to the 40

Opening.

father and the family, if he could make that will. Of course, that is a matter of proof in the case.

10 The two sisters defend upon the ground that Mrs. Blanche Weyer has no title to the property; that the Act of 1926 is not applicable, and that under the previous act the brother having died without issue they would take as his sisters.

20 The father defends upon the same ground and also on the ground that the son made this parole agreement with him to make a will and leave the property to him and the family and the father files a counter-claim; the sisters do not, so the case stands with the widow of the deceased son filing a bill and claiming the property in her own right; the two sisters of the deceased claiming the property under the statute of descent in force before this Act of 1926; and the father claiming by counter-claim that a parole agreement was made when the gift was made, to make a will to leave the property to him and the family.

30 The bill alleges, your Honor, I suppose in anticipation of the questions that would come up, that the conveyance was made for a full and valuable consideration although the deed expressed on its face, "One dollar and other valuable considerations," I want to say to the Court that this is not a real fighting case. It is rather an amicable case. Mr. Kahrs and I have talked it over and I think I myself suggested this course of procedure, although, strictly speaking, the bill is multifarious, because a bill to quiet title makes for a bill to redeem a mortgage, but we don't want to make any point of that. We want to get right down to the merits of the case.

40 The Court: All right.

Blanche Weyer, direct.

Mr. Bradner: Have I made myself plain on that?

The Court: Yes.

BLANCHE WEYER, sworn for complainant.

Direct examination by Mr. Kahrs. 10

Q Mrs. Weyer, where do you live? A 375 Bloomfield avenue.

Q And you are the widow of Edward W. Weyer? A Yes.

Q And when were you married to him? A October 29, 1924.

Q And when did he die? A August the 24th, 1928.

Q Did he die leaving a will or intestate? A Intestate. 20

Q Have you been appointed administratrix? A I have.

Mr. Kahrs: I desire to offer the deed referred to in the opening.

Mr. Bradner: I want to make formal objection to it in order to raise the necessary questions, that the deed on its face does not purport to convey any title to complainant, and, for that reason it is inadmissible, unless it is to be supplemented by further proof of title. 30

The Court: I will admit it.

(Deed marked Exhibit C. 1.)

Mr. Kahrs: I desire to offer in evidence bond and mortgage given at the time of the execution of the deed.

The Court: That is the one you called for? 40

Blanche Weyer, cross.

Mr. Bradner: Yes, sir.

(Bond and mortgage marked Exhibits C. 2 and C. 3.)

10 Mr. Kahrs: And I desire to offer at this time to pay the amount due to date on the mortgage just offered in evidence. I have with me a North Ward National Bank check, the bank check for the amount plus the interest to date.

The Court: You can make that offer.

Mr. Kahrs: I make the offer.

The Court: And keep the check.

20 Mr. Kahrs: Yes. And, Mr. Bradner, I would like to offer your letter to me of May 7, 1929, merely for the purpose of proving a claim was made.

(Letter marked Exhibit C. 4.)

Q Did I ask you, Mrs. Weyer, if you had children by your marriage with Edward W. Weyer? A No, I did not.

Mr. Kahrs: No children. We rest, your Honor.

30 *Cross examination by Mr. Bradner.*

Q When did Mr. Weyer die? A August the 24th, 1928.

Q Where was he when he died? A At home. 375 Bloomfield avenue.

Q Who was there?

Mr. Kahrs: I object, your Honor please.

40 The Court: I will allow it.

Thomas Loughlin, direct.

Q Who were there? A My sister-in-law, Emma Anderson; my mother and the nurse in charge and myself.

Q Before he died did he tell you he wanted to have a lawyer come so he could draw his will?

Mr. Kahrs: I object, if your Honor please. 10

The Court: Why?

Mr. Kahrs: Not cross examination.

The Court: No, it is not cross examination.

Mr. Bradner: I am laying a foundation for contradiction, your Honor.

Mr. Kahrs: I object at this time.

The Court: I will sustain the objection. This is not cross examination. 20

Mr. Bradner: That is all.

The Court: That is all, madam.

Mr. Kahrs: We rest, your Honor please.

Mr. Bradner: Mr.—the clerk from the bank.

THOMAS LOUGHLIN, sworn for defendant. 30

Direct examination by Mr. Bradner.

Q Are you connected with the United States Savings Bank? A I am.

Q And have you produced here a check on subpoena? A That is right; yes, sir.

Q And what is the check you have there? A It is a check of July 3, 1925, to the order of Edward T. Weyer for \$5,000. 40

Arthur A. Werthmann, direct.

Q And what endorsements are on it? A It has several. Edward T. Weyer endorsed it in this fashion, "Pay to the order of Edward W. Weyer" and endorsed his name "Edward T. Weyer." Edward W. Weyer further endorsed it in this fashion, "Pay to the order of Emma
10 Weyer" and endorsed it "Edward W. Weyer," and Emma L., I believe, Weyer, endorsed it for deposit in the National Newark & Essex Bank.

Mr. Bradner: May I have the check marked in evidence?

Mr. Kahrs: I object.

The Court: What is that?

Mr. Kahrs: I object.

The Court: Rise and state your objection.

20 Mr. Kahrs: There is nothing to show the relevancy of the check at this time.

The Court: Well, I know there is not, but there may be later. I will admit it.

Mr. Bradner: There is, because he put my letter in evidence in which I say Mr. Weyer loaned the money to him. That lets the check in. That is all.

30 Do you want to keep the check here or shall I let him take it back?

Mr. Kahrs: I think we better keep it.

ARTHUR A. WERTHMANN, sworn for defendant.

Direct examination by Mr. Bradner.

Q Are you a member of the Bar, Mr. Werthmann? A I am.
40

Arthur A. Werthmann, direct.

Q How long have you been practicing? A Four years.

Q Were you connected with Edward George in his lifetime in his office? A I was.

Q Do you know the Weyers, father and son? A I do.

Q Do you know anything about the original transaction between them when Mr. George prepared some papers in about June, 1925? A No, I do not. I only know I went up to the court house and copied the old deeds, that is all.

10

Q You went there and copied the old deeds? A Abstracted the old deeds to the property.

Q When did you do that? A That was right before these papers were drawn.

Q But you don't know what arrangement was made between the father and son? A No, I do not.

20

Q Mr. George is dead, is he not? A Yes.

Q When did he die? A December 10, 1926.

Q Since his death have you ever seen the Weyers, father and son, at your office? A Yes, I have.

Q Can you fix the time? A Yes. It was on a date I drew a lease for Mr. Weyer, January 10, 1928.

Q And at that time did you hear any conversation between them? A Yes, sir.

30

Q Can you state what it was? A While we—(interrupted).

Mr. Kahrs: I object, if your Honor pleases. Apparently, this is an attempt—in the first place, I would like to call your Honor's attention to the fact that there is no allegation of fraud in the bill and this apparently is an attempt to vary the terms

40

Arthur A. Werthmann, direct.

of a written agreement, and I do not think it is proper or admissible.

The Court: What do you say to that, Mr. Bradner?

10 Mr. Bradner: Well, we are not going to try to change the estate, your Honor. We are only trying to show it was a gift instead of a purchase. We claim that the word "purchase" in the statute means an actual buying of the property and not ordinary title by purchase.

The Court: What difference does it make whether it was a gift or a purchase?

Mr. Bradner: What difference would it make?

20 The Court: Yes.

Mr. Bradner: It would make this difference, that, under the statute, if it was a gift, it would not be a purchase in the ordinary sense and the statute would not apply and she would have no title whatever.

The Court: Well, I will allow it.

Mr. Bradner: We have not argued that question.

30 Mr. Kahrs: That point is coming in the case and I would just as leave argue it now in order that the matter may be determined.

The Court: No. I will admit the testimony and then we will argue it later. We want to get all the testimony in first.

40 Mr. Bradner: The question is a very important one. The statute changes the whole law of descent, and it is a very serious question and will affect a great many titles in this State. I have had it come up in two or three matters since.

Arthur A. Werthmann, direct.

Mr. Kahrs: I don't want to appear persistent in this matter with my objections, but my objection was not only leveled to the effect of the law, but beyond that, to the attempt to vary the terms of a written agreement.

Mr. Bradner, in his opening declares that there was a verbal agreement that the property was to be reconveyed, or, rather, devised to his father. I submit, if there was an agreement of that kind not in writing it cannot be shown by oral evidence in this proceeding. 10

The Court: Well, I will—

Mr. Kahrs: I think your Honor—

The Court: I will listen to an argument on that after, but I will hear the testimony. What I want to do is get all the testimony. 20

Mr. Bradner: Your Honor decided just the other way in a case, in a partition suit you decided just the other way, that parole evidence was admissible. You did not sustain it because the fact was not so.

The Court: I do not think there is much question but that a promise to make a will can be proved by oral testimony. 30

Mr. Bradner: In this State there are about twenty-five cases on it.

What was the question?

(Question read as follows: "And at that time did you hear any conversation between them? Answer: Yes. Question: Can you state what it was? Answer: While we—")

The Witness: While we were trying to get the lease and while the stenographer was— 40

Harry J. Greger, direct.

Mr. Kahrs: Pardon me. May I ask when that was?

Mr. Bradner: He said January, 1928.

10 The Witness: January 10, 1928, while the stenographer was typing the lease, Mr. Edward T. Weyer said to Mr. Edward W. Weyer, "Eddie, you have to make that will and while you are here why don't you make an appointment with Mr. Werthmann?" And the younger Mr. Weyer answered and said, "Yes, Mr. Werthmann, I have to make that will, but I will call you tomorrow and see how my appointments are to make an appointment with you." But he never called to make an appointment.

20 Q Have you ever seen him since? A No, I never saw him since that.

Mr. Bradner: Cross examine.

Mr. Kahrs: No questions.

The Court: That is all, sir.

Mr. Bradner: Mr. Greger.

30 HARRY J. GREGER, sworn for defendant.

Direct examination by Mr. Bradner.

Q What is your business, Mr. Greger? A Insurance.

Q Did you know the Weyer family? A Yes, sir.

Q How intimately? A I beg your pardon?

Q How intimately? A I have known Mr. Weyer and the family for over twenty years.

40

Harry J. Greger, direct.

Q And did you ever call at the bakery? A
Very often.

Q Was there a room back of the bakery
store? A There was one room behind the
bakery.

Q What did they call that? A The kitchen.

Q Were you ever in the kitchen? A Many
times. 10

Q Do you remember any occasion when there
was some conversation between the son and his
father in relation to the business there? A
Yes, sir.

Q Do you remember when that was? A It
was the first week in June in 1925. I cannot re-
member the exact day, but it was in the after-
noon.

Q Was the conversation about the busi- 20
ness? A I went in there to see Mr. Weyer and
his son.

Q Yes? A And they—and Eddie appeared
to be rather excited, nervous, and he was saying
to his father, he says, “Turn the business and
property over to me, turn it over to me,” and
when I heard that I said, “Eddie, how can you
expect to have the property turned over to you
after Mr. Weyer has worked all those years to
get what he has, and how about Emma and 30
Irene? They will have to be taken care of, too.
Suppose something happens to you, what will
happen to them?” “Well,” he says, “that is all
right,” he says, “I will make a will and then
the estate will go back, or the property, the
business will go back to my father and the
estate and they will be protected.” Mr. Weyer
at the time says, “Well, all I want is what is
right, and if you will do that I am satisfied,”
he said, “turn the property over to him.” 40

Harry J. Greger, direct.

Q You don't know whether it was turned over to him? A I don't know.

Q Did you ever see Eddie after that? A Yes, I saw him about a year after that.

Q Well, do you know whether Mr. Weyer left the store and went away, anyway? A The—
10 at that time—

Q The elder? A Yes. Left the store. Mr. Weyer went to Brooklyn after that.

Q When? A I don't know when, but—I don't know what time he went away, but I know a year after I went in to see Eddie and a company was being organized and I wanted to get Eddie to become a director of the company and I asked him—showed him the proposition, put it up to him and told him what we had and we
20 would like to have him a director and he said he had no money. "Well," I said, "apparently your business is doing good here, Eddie." "Well," he said, "it belongs to my father. I am only the manager and trustee of the business, and," he says, "I can't do anything until I see him." I said, "Where is your father?" He says, "In Brooklyn; he lives in Brooklyn." He was married at that time. And he says, "I will see my father and then you can come back
30 again." Well, I tried—I waited and I saw him again after that and I called him up on the telephone, but I couldn't get much satisfaction and I decided to go to Brooklyn to see Mr. Weyer and talk to him.

Q Never mind what happened over there. You did go to Brooklyn and did see Mr. Weyer Senior? A I know, but before I went there I didn't know the address and I called up the bakery association on the phone and tried to get the address there. They knew he moved to
40

Harry J. Greger, cross.

Brooklyn but where they didn't know, and I called up 375 Bloomfield avenue and tried to get Eddie on the wire and I couldn't get him, every time I tried to get him he was not there, but Mrs. Weyer, this young lady here, she answered the phone and gave me the address of Mr. Weyer in Brooklyn. I went to see Mr. Weyer. 10

The Court: Well, that is enough.

Q Never mind what happened with him. You cannot tell that. A I see.

Q Did you go back and see Eddie? A Yes, sir.

Q Did you have any further conversation with him? A Yes. I tried to get him to become a director, but apparently they could not—he was too busy and he hadn't had a chance to see his father about the will and so I finally dropped it. I went there after that again, but not for that purpose. 20

Mr. Bradner: Cross examine.

Cross examination by Mr. Kahrs.

Q You have known the Weyer family for a long time, haven't you, Mr. Greger? A For about twenty years. 30

Q And very friendly with them? A Yes, sir, very friendly.

Q You are not related? A No, sir.

Q But you are very friendly? A I was doing business with Mr. Weyer for years.

Q You have been doing business with Father Weyer for many years? A Yes, sir, and the son. 40

Harry J. Greger, cross.

Q And the son. And during the course of that time you became very well acquainted with—

A Yes, sir.

Q All the members of the family? A Yes, and very intimate with Eddie especially, Eddie and I were doing business together.

10 Q Yes. A We were selling securities and Eddie—we were splitting on the securities we were getting.

Q I see. A Eddie and I.

Q I see. And since this suit was started, or just prior to it, I suppose you had several conversations with Mr. Weyer? A Previous to what?

Q Well, this time within the past year, say?

20 A No, I have not. I met Mr. Weyer—I didn't know Eddie was dead until a salesman of Fleischmann's yeast told me and I knew Eddie had stock securities and I didn't know whether they had been transferred, so I went to see Mr. Weyer and told him that if the securities that Eddie owned—if he wanted me to have them transferred I would see the people in New York, the companies, and transfer the securities over to his wife. I knew they belonged to him personally.

30 Q Those were the securities that you had sold him, weren't they? A Yes, sir.

Q And that was the only conversation you had with Father Weyer? A No. Then he told me that he couldn't do anything because the estate was tied up in a certain way and that—or he was afraid that somebody was going to claim his property. "Well," I says, "how can they? It belongs to you. Eddie left a will." And I advised Mr. Weyer to see a lawyer.

40

Harry J. Greger, cross.

Q Now, did you tell him about that conversation you say you overheard in June, 1925? A Did I tell Mr. Weyer that?

Q Yes. A No, sir. He knew that; I didn't have to tell him.

Q You have not told that to him at any time during the past year? A No, sir; I have not. 10

Q You have not discussed it with him? A Yes; we have spoke about it several times, but I didn't tell him about it. He knew about it at the time because he was there.

Q You mean within the past year you have spoken—you have discussed it with him? A Yes.

Q Now, going back to June, 1925, what was the occasion of your call that time? A Eddie and Mr. Weyer—Mr. Weyer and Eddie, Jr., had purchased—well, if you want the name, the Colonial Finance Corporation stock; they paid him around twenty-five dollars a share for it. There was some stock on the market and I was trading, buying and selling unlisted securities at 972 Broad street at the time and I wanted them to average down. What I mean by "averaging down," buy more stock at a reduced rate so that the average they paid for the stock would be less than the original price, and for that reason I went to see them, and when I got there I saw this commotion about the transferring of the business and property. 20 30

Q You were then in business in Newark? A In Newark, 972 Broad street.

Q You had your office and kept your records there? A Yes, sir.

Q Now, how do you fix June, 1925, as the time you called? A That was the time there was stock on the market and I was trying to— (interrupted). 40

Harry J. Greger, cross.

Q Yes, but there was stock in May, 1925, wasn't there? A Yes.

Q And there was stock in July, 1925? A Yes, that is true.

Q And stock during other months? A Yes. And previous to that I was buying and selling
10 stock, but at that particular time I had Mr. Weyer in mind and you couldn't always buy the stock up reasonably, at a reasonable price, but at that time I had a block—well, several blocks—(interrupted).

Q Well, did you sell him any stock at that time? A No, I did not.

Q Did you sell any stock at that time? A Yes. Lipman & Lowy.

Q In June, 1925? A Yes.

Q Do your records show that? A Yes. I
20 haven't the records.

Q But you still—are the records in existence? A Why, I don't know. Yes, I guess I could look over them. It is nineteen twenty—I have been out of business since 1926. I didn't bother with it any more.

Q Well, why did you fix June, 1925, as the time you called there, instead of May or July?

A I had been there previous to that. I had been
30 there a year previous to that and been there continuously.

Q What day of the month was it? A I couldn't tell you. In June, you mean?

Q Yes. A It was around the latter part of May or beginning of June. It was around the first week in June.

Q Why do you fix the—how do you fix it that way? A Well, I know the property—there was a dispute—Mr. Weyer wanted to get married and there was objections to Mr. Weyer getting
40 married.

Harry J. Greger, cross.

Q Well, what has that got to do with it? A It has nothing to do with the stock, but that is why I remember the time so distinctly.

Q Do you remember when he was married? A Mr. Weyer—no, I don't know when Mr. Weyer got married—you mean Eddie Weyer.

Q Yes, Edward T. Weyer. A No, I don't know when he got married. 10

Q Then how does that help you fix the time? A Because they strenuously objected to Mr. Weyer getting married.

Q At that time? A At that time, in 1924, the latter part of 1924 and 1925, Mr. Weyer wanted to get married and they objected to it, the children, Eddie and Emma didn't want to turn anything over.

Q Then you had heard the objection to the marriage— A Previously. 20

Q —on a number of occasions previous to that? A Yes, in 1924.

Q So that that particular—that is not the only thing that helps you fix the time? A That is the idea.

Q I say, that is not the only thing that helps you fix the time? A Well, that, and at the time I was selling securities, I was there quite often, I used to go there quite often, almost every week. 30

Q Exactly. You were a frequent caller. A That is it.

Q I am asking you now whether there is any other way you can fix the time as June, 1925? A No, I can't say as I can fix the time, only I know it was in 1925 I was very active selling securities May and June.

Q Now, as a matter of fact, it may have been July? A No, it was not in July, because I 40

Harry J. Greger, re-direct.

didn't do much in July; I was more working on the other thing and had not bothered with it. It was some of the last stock, Colonial I was selling; I wasn't handling much after that.

Q What time of the day were you there? A What time?

10 Q Yes. A It was in the afternoon late, around two o'clock, maybe.

Q And how did you happen to go there that day? A I just had the stock then and I used to go out and offer it to people when I had some of it.

Q And you just went there that afternoon for that purpose? A That was the intention of selling the stock, and when I got there I heard the conversation.

20 Q And there were only present Edward T. Weyer— A And Mrs. Weyer.

Q —and Mrs. Blanche Weyer? A Yes, sir.

Mr. Kahrs: That is all.

Mr. Bradner: Not Mrs. Blanche—

The Witness: Mrs. Blanche Weyer, not this young lady; Eddie was there and his father.

30 Mr. Bradner: May I ask one question I forgot?

Re-direct examination by Mr. Bradner.

Q Do you know anything about the value of that property? A It was understood—

Mr. Kahrs: I object, your Honor, please.

The Court: Yes. I will sustain the objection. He is not an expert.

40 Mr. Bradner: Mr. Anderson.

Frederick Anderson, direct.

FREDERICK ANDERSON, sworn for defendant.

Direct examination by Mr. Bradner.

Q What is your occupation, Mr. Anderson?
A Police officer. 10

Q In the City of Newark? A Right.

Q Are you the husband of Emma Weyer?
A I am.

Q When were you married? A Married
November 18th, 1925.

Q I didn't catch that date. A November
18th, 1925.

Q Do you know Mrs. Blanche Weyer? A I
do. 20

Q Did you have any conversation with her
after her husband's death in the house in Bloom-
field avenue? A I did.

Q How long after his death? A Well, I
see—he died in the afternoon, it was some time
during that same night, about nine o'clock, be-
tween eight and nine the same evening.

Q I did not catch that last. Will you read
it?

The Witness: He died in the afternoon. 30
It was about between eight and nine that
evening.

Q What was the conversation? A The con-
versation was that Edward Weyer wanted a
lawyer before he died and that she said that he
did not—it was—he didn't need a lawyer at that
time.

Q Who was it said that? A Mrs. Blanche
Weyer. 40

Frederick Anderson, direct.

Q And who were present when that conversation took place? A Mr. Weyer, Edward T. Weyer, Irene Weyer, and my wife, Emma Anderson.

10 Q Whereabouts was it? A It was in the rear of the second floor of 375 Bloomfield avenue.

Q Do you know anything about a safe in this store? A I do.

20 Q Was there anything said in relation to that safe at any time since Edward's death? A Why, there was a safe there and Mr. Edward T. Weyer had some belongings in that safe, and the combination no one seemed to know, to have known the combination so I suggested to Mr. Weyer that—to get a man to open it, a professional safe opener, but it seems as though we couldn't get in, so I told him I could try to open it, if he wanted it pried open and he spoke to Mrs. Blanche Weyer and she said it was all right, so I went up that afternoon and pried the safe open, that is the 25th, the next afternoon.

Q After he died? A After he died.

30 Q Couldn't you find any record of the combination? A No, not until the following day and Mrs. Blanche Weyer found a combination in a book, under the cover of a book. She said she didn't know where there was one, but the next day she located it.

Q And produced it? A And produced it.

40 Q What did you find in the safe? A In the safe there was some silver and a few different envelopes, but there was one document box which was never opened and it had been locked and Mr. Weyer said not to open it—didn't care to look in it, I guess, and in order to open it—it was one of them small tin boxes about four or

Edward T. Weyer, direct.

five inches wide and about ten or twelve inches long. It was never opened.

Q What became of that box? A That I don't know. It was put back in the safe, and I have never been there since then outside of when he got married.

10

Mr. Bradner: Cross examine.

Mr. Kahrs: No cross examination.

The Court: That is all.

Q Oh, did you go down to the bank with Blanche Weyer and your father-in-law? A I did.

Q When was that? A That was August the 28th, 1928, the day after he was buried, went down to the Federal—National Newark & Essex. 20

Q And was there anything said at that time? A The only thing, Mrs. Blanche Weyer said, she said, "Father, I will do anything that you say."

Q You heard her say that? A I did.

Mr. Bradner: Cross examine.

The Court: That is all.

Mr. Bradner: Edward T. Weyer.

30

EDWARD T. WEYER, sworn for defendant.

Direct examination by Mr. Bradner.

Q You live in Newark, Mr. Weyer? A Yes, sir.

Q And how long have you lived here? A 1888 and I was away two years in Brooklyn, that is all.

40

Edward T. Weyer, direct.

Q Have you been in business in Newark? A Yes, sir.

Q What was your business? A Bakery.

Q Where did you have your bakery? A The first bakery I had on the corner of Sussex avenue and Nesbit street.

10 Q Yes? A And then I was there five years and I built up in 375 Bloomfield avenue and I was there for twenty-five years. That will make thirty years straight in business, at hard work.

Q Did you have any children? A Yes, sir.

Q And what are their names? A Edward W. Weyer, Emma Weyer, Irene Weyer.

Q Is their mother living? A No, she died—

Q When did she die? A In January, the 10th, 1921.

20 Q Did you marry again? A Yes, sir.

Q And when did you marry? A On June the 15th, 1925.

Q Did you continue to live in Newark after your second marriage? A Yes, afterwards I built in Newark and moved over again.

Q Where did you go when you got married?

A I went to the country for a couple of weeks. Then I went out to Europe for a while.

30 Q Yes. Then where did you go to live for a while? A To live for a while?

Q Yes. A I lived in Brooklyn for a while.

Q While you were carrying on the business on Bloomfield avenue for twenty-five years, I think you said— A Yes, sir.

Q —did any of your children assist you in the business? A Yes.

Q Who? A Why, Emma, she was working there hard, and Eddie, he done whatever he could. He couldn't do much because he was a sickly boy.

40

Edward T. Weyer, direct.

Q And how long has she worked there? A Oh, a good many years. She had to stay home. Around when she was—she went to school and after school she helped and then when she was around fifteen, sixteen, got out of school she had to stay steady in the store.

Q And Irene, did she work there? A Well, she went to school every day. She was small. 10

Q How old was Eddie when he died? A He was thirty-two years old.

Q Thirty-two? A Yes, sir.

Q Did you build the house? A Yes.

Q Where you had a bakery? A Yes, sir.

Q How much was that property worth?

Mr. Kahrs: I object.

The Court: I will allow it. He can express his opinion as to the value of his own property. 20

Mr. Bradner: You will allow it?

The Court: I will allow it.

Q What was the property worth? A Why, when I gave it to my son, I valued the property at \$35,000 and the business at \$10,000 and the car I gave him was \$5,000.

Q Did you give up the business? A I gave it up, yes, sir. 30

Q When was that? A 1925.

Q Do you remember what month? A In June.

Q Do you remember just what day you quit? A Well, not at the same time. I was there for a while. It was all right.

Q What was Eddie's physical condition at the time you gave up the business? A Well, he had heart trouble. 40

Edward T. Weyer, direct.

Q How long had he had heart trouble? A Oh, he was sickly from a boy on. He had all kinds of sickness. It cost me a small fortune to raise him, paying doctor bills and nurses and all that; had him away a couple of times.

10 The Court: Well, that is enough.

Q When you gave up the business—we find a deed here which you made.

Mr. Bradner: It is in evidence, the original deed?

The Court: It is right up there, Mr. Bradner.

20 Q You signed that deed? A Yes.

Q Exhibit C. 1. A Yes; that is my signature.

Q Where did you sign it? A In George's office.

Q George's office. At the time you signed the deed who were present in the office? A There was myself and my son and Mr. George.

Q Is Mr. George dead? A He died, yes.

30 Q Who was Mr. George? A He was my lawyer.

Q How long had he been your lawyer? A Well, about five years, I guess, something like that, I am not sure.

Q After the deed had been signed did you notice what was done with it? A No, I don't know anything. I just signed the deed and went out and I said to my son—(interrupted).

40 Mr. Kahrs: Just a minute. I object to any conversation.

Edward T. Weyer, direct.

The Court: On what ground?

Mr. Kahrs: On the ground that the rule of evidence does not permit conversation with a decedent.

Mr. Bradner: That only happens when the deceased party is suing or being sued in a representative capacity. It does not appear in this case. She is not suing as administratrix, she is suing in her own right. 10

The Court: I will allow it.

Q Go ahead. What did you say at that time?

A Well, when I signed the contract and I told my son, I says, "Now, the contract is signed, you make your will the way you said it," and I went out and he came along with me.

Q Did you ever see that deed handed to anybody? A No, sir. 20

Q You didn't see it handed to your son? A (Witness nods no.)

Q No. Prior to signing the deed in Mr. George's office had you had any conversation with your son? A Yes, sir.

Q Whereabouts? A Right there in the office.

Q Where? A In Mr. George's office.

Q No, I mean before that. A Oh, before. Yes, home. 30

Q Whereabouts in your home? A In the kitchen.

Q And the first time you had a conversation was anybody there? A That was me and my son and my Emma.

Q Yes. Do you know anything about Mr. Greger being there at that time? A Mr. Greger came there, well, it was around June, because I had the first conversation in May and then in June again. 40

Edward T. Weyer, direct.

Q Yes. A And then Mr. Greger came in one time and he heard a conversation.

Q Well, at a time when Mr. Greger was there do you remember what was said? A Yes.

10 Mr. Kahrs: Well, if your Honor pleases, I must enter an objection to an attempt to vary the terms of a written agreement, which is expressed in the deed.

The Court: Well, I will allow the testimony. This is an attempt to show that an agreement was made to make a will for a consideration.

Mr. Bradner: Yes.

20 The Court: And as I understand the cases that is perfectly proper to introduce parole evidence to prove that.

I decided one or two cases along those lines myself.

Mr. Bradner: I have one of your latest cases here on my memorandum. That was a partition suit and a counter-claim filed.

Q Now, go ahead, Mr. Weyer? A With the conversation?

30 Q Yes. A Yes. We just talked it over and we said, and I said—well, he was always sick, he wanted the business and the property, he wanted that all by himself.

Q Yes. A And I says, "Now, here, you are a sickly man, I am willing to help you and where is Emma coming in?" She was working there. "Well," he said, "then we will make it \$10,000 for her, and," he says, "Well, I haven't got \$10,000, I got about five." I said, "I will lend you five for the first mortgage" so

Edward T. Weyer, direct.

that would be just the same as my other mortgages, I got a few more.

Q Yes? A And he said he was satisfied.

Q Well, is that all that was said? A Well, of course he must put that in the will so that—

Q What will? A The will.

Q What will? A I gave him the property and the business and he must make a will to put it in so the property goes back if anything happens to him. 10

Q "Goes back"? A Comes back again to me or to my two daughters.

Q Yes. And now who was present when you had that talk? A Well, there was Emma, me and my son.

Q Did Eddie agree to that? A Yes, sir.

Q And you say Emma was there? A Emma was there, too. 20

Q Is Emma married now? A Yes.

Q Is her name Mrs. Anderson? A Mrs. Anderson.

Q Where were you when that agreement was made? A In the kitchen.

Q Was that before the time Mr. Greger was there? A That was before.

Q Well, you carried out your part of it, did you? A Yes, sir. 30

Q You made a deed of the property to him? A Yes.

Q You turned over the business to him? A Turned it over.

Q Yes? A Everything for nothing.

Q Did you lend him the money? A Yes, sir.

Q The five thousand dollars? A Yes, sir.

Mr. Bradner: Where is that check? 40

Edward T. Weyer, direct.

The Witness: You have got the check there.

Q I show you Exhibit D. 1. Is that the check?
A Yes, sir, that is the one.

10 Q Where did you get the money? A Down in the bank, United States Bank.

Q Did you get anything to secure that money? A Well, the first—

Q Anything from Eddie? A The first mortgage.

Q Who drew the mortgage? A Who drew it up? Mr. George.

Q Do you know what was in it? A No, sir.

Q Did you ever read it? A No, sir.

20 Q Why? A Well, I trusted him; I thought everything was all right.

Q What money did you ever get from Eddie for what you handed over to him? A Nothing, not a cent.

Q Didn't give you anything at all? A No, sir. I give him some of my money yet besides.

Q What is that? A I give him some of my money yet besides. I gave him a thousand dollars when he got married.

30 Q Do you know whether Eddie ever made a will? A Well, I can't tell if he did or not.

Q Do you remember going down to Mr. Werthmann's office to prepare a lease? A Yes.

Q Do you remember that occasion? A That was in January, 1928, and we made the lease for the corner on Bloomfield avenue.

40 Q Yes. Well, what was said then? A Well, I was telling Eddie. I said, "Now is the time to make your will." "Well," he said, "I haven't got much time. I will call up and make a date with Mr. Werthmann." That is all that was said then.

Edward T. Weyer, direct.

Q And you don't know whether he ever made one? A I don't know.

Q Well, after he died or on the day he died were you in the building, in the house—did you hear any talk there? A I was in the house around the same night he died, I was down in Rockaway Point and Irene came down and got me and I was there the same night, it was around nine o'clock, in the back room, and my daughter-in-law, Blanche, she said, "Well, he wanted a lawyer to make his will and I said he didn't need any." 10

Q She said she had said that; is that it? A She told us all there when we were all there together.

Q Now, when the safe was opened were you there? A Yes. 20

Q Did you see the tin box inside? A Yes.

Q Did you see what was in it? A No.

Q What became of that box? A I don't know what became of that box.

Q Did Blanche go down to the bank with you after Eddie's death? A Yes.

Q Was there any conversation on that day? A Well, the way I heard she was saying, "Whatever father says goes." 30

Q And Mr. Weyer, did Eddie ever pay you any interest on the mortgage? A No, sir.

Q Or any part of the debt? A No.

Q How did she happen to say that "Whatever father says goes"? A Well, I suppose she thought whatever I think is right, because—

Q Well, what had you been talking about? A Well, I don't know what we had been talking about. Oh, I can't remember that no more.

Q Well, how long did it take to go down to the bank? A Well, Mr. Anderson took us down. 40

Edward T. Weyer, cross.

Q In a car? A In his car.

Q Who did she mean by "father," do you know? A She meant me.

Q Well, had you been talking to her about anything? A Well, I was talking to her.

Q Well, she is living there on that property
10 now, isn't she? A Yes.

Q And running the business? A Yes.

Q Well, if you thought it belonged to you why didn't you go in and take it? A Well, I was waiting for her. I thought she would make everything right.

Q What made you think she would make everything right? A Well, because I thought she was that honest to have things right.

Q Did you ever say anything to her about it?
A Yes. I said a couple of times, "Well, what
20 are you going to do about Irene and Emma"?

Q Yes? A "Well," she said, "it is not settled yet."

Q Well, is that all? A "I don't know what is left."

Q What is that? A She said, "I don't know what is left after it is settled."

Q Do you remember whether anything was said about turning the property over to you?

A No.

30 Q Don't remember that? A No.

Q Was anybody else in the car when you went in the car that day? A Only Blanche and Mr. Anderson; that is all.

Mr. Bradner: Cross examine.

Cross examination by Mr. Kahrs.

Q Mr. Weyer, you worked in that bakery
40 business for a number of years in that bakery
on Bloomfield avenue, didn't you? A Yes.

Edward T. Weyer, cross.

Q And your son assisted you from the time he was old enough? A Well, he just helped around whatever he could, Mr. Kahrs.

Q But he devoted all of his time to that business, didn't he? A Well, he had his days off. He couldn't do much, you know; he was always sick.

10

Q Well, I mean, he had no other business?
A No.

Q And he was in that business every day?
A He was there around, and he didn't work much; he couldn't work much because he was sick half the times.

Q Up until the time of his marriage? A Yes.

Q And then his wife came and lived in the place, didn't she? A Yes.

20

Q She lived over the place, over the store?
A Yes, they lived together.

Q With your son? A Yes.

Q That was their home? A Yes, sir.

Q And from the time of her marriage until the time of your son's death she worked in the store, didn't she? A Who?

Q Blanche? A Oh, yes, she worked there.

Q She worked there every day? A Well, every day, when she was off, that is all.

30

Q And she really managed the business with your son, didn't she? A Well, they managed it.

Q Well, there was nobody else there, was there? A There was nobody else there.

Q And they ran the business? A They ran the business, yes.

Q Now, you were a widower at that time?
A Yes.

Q And you contemplated being married again? A Yes.

40

Edward T. Weyer, cross.

Q And when did you marry again? A In June, 15th, 1925.

Q And you owned other real estate— A Yes.

Q —at that time, didn't you? A Yes, sir.

10 Q And what other real estate did you own?

Mr. Bradner: I object. It is not material. We are not disputing the gift as being improvident, or anything of the kind. There is no attack upon it, we admit it.

The Court: I will sustain the objection.

Mr. Kahrs: I want to show, if your Honor pleases, if I may be permitted, that this was all—well, all right, if your Honor has ruled—

20

Q Well, there was a desire on your part at that time, wasn't there, to divide some of your property between your son Ed, and Irene, your daughter Irene—

Mr. Bradner: Emma, you mean.

Q Emma? A No, only that property there what I gave to them.

30 Q But you wanted to divide that between those two children, didn't you? A Yes, I wanted to do that first.

Q You wanted to do that before you were married? A Yes, sir; I wanted to do that first.

Q Didn't you want to do that before you married again? A What, before I was married?

Q Yes. A Yes.

40 Q And at that time you loaned your son five thousand dollars? A Yes.

Edward T. Weyer, cross.

Q And he gave you back a bond and mortgage for five thousand dollars, didn't he? A Yes.

Q So at the time of his death he owed you the five thousand dollars and interest? A Yes, sir.

Q Isn't that so? A That is right. 10

Q And didn't he at times offer to pay you interest on this bond? A Well, he told me, he said, "Any time I got the money I will give it to you. Let me get on my feet a little first and then you will get your money."

Q But you always expected to get it from him some day? A Oh, yes; I always wanted it.

Q And at that time wasn't Emma to get ten thousand dollars altogether? A No, that was only a part of her share. 20

Q Yes, but I mean, she was to get ten thousand dollars? A Yes, sir.

Q And she got the five thousand dollars from Ed at the time the deed was signed? A (Witness nods yes.)

Q And later on Ed out of his own fund paid the five thousand dollars, didn't he? A Yes.

Mr. Bradner: Now, I wonder if he knows that. He shakes his head. 30

Mr. Kahrs: Well, I asked him and he said yes.

Q Let us have that understood, Mr. Weyer. Do you know whether Ed paid Emma five thousand dollars? A I don't know about that, no. I don't know Ed paid her that or not.

Q Didn't Emma ever tell you she received the money? A Well, only I never seen it, you know—I never— (interrupted). 40

Edward T. Weyer, re-direct.

Q You were not there when the transaction was closed? A No.

Q But didn't she tell you she had received the five thousand dollars? A Oh, she said something about it.

10 Q Yes. A But I never knew when it was given to her. I was not there.

Q But you knew from what she said to you? A Yes.

Q And you knew she received altogether ten thousand dollars? A Yes, that is about all; part of her share.

Mr. Kahrs: That is all.

The Court: That is all.

20 *Re-direct examination by Mr. Bradner.*

Q Mr. Weyer, you were asked a question there to this effect: that you were dividing the property between your son and Emma. Were you dividing it between them? A No, it was given away—I gave it to my son alone. He wanted it alone, you know.

Q Yes. A First off he had it in our mind to do that.

30 Q Well, how did Emma come into it? A Well, Emma was there, working, too. She done more work than Ed, too.

Q How did he happen to agree to give her ten thousand dollars? A When that was—she worked there and never had no wages off me.

Q And she must be paid something before you—(interrupted). A Yes. She wanted to get married and she couldn't get married with nothing.

40

Emma Anderson, direct.

Q Do you know whether she stayed there and worked for Eddie? A Yes. At the time she got her wages after that.

The Court: That is all.

Re-cross examination by Mr. Kahrs.

10

Q How did you pay— Just a moment. —how did you pay Eddie during the time he worked there until the time he married? A Well, I will tell you: I put some money every month for his building and loan and bought him his clothes, everything.

Q And you did that for Emma, too, didn't you? A Well, she got that, too, yes.

Q Yes, but they received no fixed salary for wages? A No, no, no. 20

Q They were both about on an equal basis, weren't they? A Yes, just around helping me.

Mr. Kahrs: That is all.

Mr. Bradner: Emma Anderson.

EMMA ANDERSON, sworn for defendant.

30

Direct examination by Mr. Bradner.

Q You are the wife of Mr. Anderson? A I am.

Q Fred Anderson? A I am.

Q And the daughter of Edward T. Weyer? A Yes.

Q Did you ever work in the bakery? A I did.

40

Emma Anderson, direct.

Q How many years? A Well, I worked from eleven years old until I was twenty-six years of age.

Q Yes? A And I left then.

Q How old were you when the business was turned over to Eddie? A Well, the business
10 was turned over to Ed in 1925.

Q Yes. A So 1925 I married. I was twenty-six years old.

Q You were in 1925? A Yes.

Q You married in that year? A Yes, married.

Q Were you present at any conversation between your father and Eddie relating to the transfer of the business and the house? A I was.

Q And where did that take place? A That
20 took place in the rear of the store, that was called the kitchen.

Q Yes. And you three people were there?
A Yes.

Q Nobody else? A Nobody else.

Q Now, will you tell us—

The Court: When was this, Mrs. Anderson?

The Witness: It was the first part of
30 June in 1925.

The Court: All right.

Q Will you tell us now, Mrs. Anderson, your recollection of what was said at that time? A Well, my father had intended to give my brother the business and property.

Q Yes. A With the understanding—

Mr. Kahrs: Just a minute.
40

Emma Anderson, direct.

The Court: No. Say what your father said and what Eddie said.

The Witness: With the understanding—

The Court: No.

Q No. What they said. A Oh, what they said. 10

Q Yes. A Well, my father told Eddie he could have the business and the property, but to make a will in case he died that the business and property was to come back to the family.

Q And what did you say? A Why, I wanted to know what my part of the share was going to be after working those many years—

Q Yes. A —what I was going to get.

Q And then was anything said about what you should get? A Why, yes, there was. 20

Q What was it? A I was to get ten thousand dollars part of my share, that was to be just part of the share, of my share.

Q Well, was it figured out at that time how much the property and business were worth? A No. No, I don't know how much it was worth.

Q You don't know? A No.

Q What was Eddie's physical condition at that time? A Very poor. He was always sickly. 30

Q Did he have any regular physician? A Yes, he did. Dr. Epstein always attended him.

Q Did you ever hear Dr. Epstein say anything to him about his physical condition? A Why, yes, he has told me—

The Court: No.

Q Never mind. I didn't ask you what he said. A No. 40

Emma Anderson, direct.

Q Were you present when Eddie died? A I was.

Q And on the same day after his death, did you have any conversation with Blanche? A I did.

Q And who were present at that time? A
10 Just myself at the first conversation.

Q And what was said then? A She said that Eddie wanted a lawyer and she said he didn't need any, but she was going to do what was right by us girls.

Q Yes? A And she said, "Don't worry. Whatever father says I will do."

Q That was one conversation. Was there another one? A Well, that was when my husband, my father, my sister and her mother was there at the time. She had told the same thing
20 of Eddie wanting a lawyer and she told him he didn't need any, but whatever father says she will do.

Q Did her mother say anything in her presence at that time? A Her mother?

Q Yes. Do you remember? A No, I don't remember what her mother said.

Q I show you Exhibit D. 1, a check for five thousand dollars; is that your name? Did you write your name on the back there? A I did.
30

Q You got that money? A I did.

Q Was the other five thousand dollars paid? A Yes, it was paid.

Q Do you remember when that was paid? A Well, I just don't remember the day or the date.

Q But Eddie did pay it? A Eddie paid it.

Q Do you remember whether it was paid in cash or with his check? A It was paid with the check.
40

Emma Anderson, cross.

Q After you were married—you were married in the fall of 1925, weren't you? A Yes.

Q After you were married did Eddie ever come to see you? A He did.

Q Did you have any conversations with him? A Yes, several of them.

Q I mean, relating to this business, or anything of that kind? A Yes, I asked him how he felt, how his business was, and asked him if he had made a will. 10

Q Yes, and what did he say? A And he said, well, no, he didn't have time, but not to worry, he would.

Mr. Bradner: Cross examine.

Cross examination by Mr. Kahrs. 20

Q And then, as a matter of fact, Mrs. Anderson, you received ten thousand dollars as part of your share? A I did.

Q And the arrangement at that time was that you were to receive more than the ten thousand dollars? A That is right.

Q As your share? A Yes.

Q And what was the other to consist of? A Why, of the business and the property, a part of the business and the property. 30

Q And any other property of your father's? A Well, not at that time. That was the property on 375 Bloomfield avenue.

Mr. Kahrs: That is all.

The Court: That is all, madam.

Mr. Bradner: That is all. Irene Weyer.

Irene Weyer, direct.

IRENE WEYER, sworn for defendant.

Direct examination by Mr. Bradner.

Q Where do you live? A I live at my sister's house, 342 Ellery avenue.

10 Q Mrs. Anderson you mean by your sister?
A Uh huh.

Q Did you know your brother pretty well?
A I certainly did.

Q Talk to him? A Uh huh, many times.

Q Do you remember—when your father gave up the business, do you remember that? A Yes, I remember when he did, uh huh.

Q And after that did you have any talks with your brother? A Yes, many times. He took
20 me out on Monday afternoons when he went to the bank, and, why, we would always talk about school. He was very much interested in the way I got along in school and he always wanted to know how my marks were and everything else, and we talked about his health and I would ask him how he was getting along and was he on his feet very much and he said he tried to keep off them as much as he could, but in a business like that you just had to be on your feet, and
30 I told him one day, I said, "Well, listen, Eddie, you will be going and then somebody else will be enjoying what you are working for, so keep off your feet." And Eddie said, "Don't you worry, I will make a will that the business and property will come back to the family." He said "After mother and father and Emma have put in so many years of their life and worked hard and try to put that business where it was he was not going to have anybody else enjoy it and he
40 used to take me on Mondays, that was when he

Irene Weyer, cross.

would go to the bank, we would be alone then, and many times I went over to the store, see, and I would be sitting on my brother's lap and Blanche would be sitting there and I got very cross looks from her, I don't know why. I was very fond of my brother.

10

The Court: Never mind that.

Q Were you ever in your brother's house after he died? A In my brother's house, yes, I was.

Q Did you hear anything said about a will? A I did.

Q What did you hear? A Blanche said Eddie had asked for a lawyer, but she refused to get him one; Mrs. Halsey was there at the time and she said, "Blanche, you should have gotten one."

20

The Court: No, strike it out.

Q Who was Mrs. Halsey? A That was Blanche's mother.

Q Oh, that was Blanche's mother? A Yes, she was there at the time.

Q Did she say that in the presence of Blanche? A She did, in the presence of my father and my sister and brother-in-law.

30

Cross examination by Mr. Kahrs.

Q When were those conversations with your brother? A They were while he was married; during the summertime I did not attend school.

Q Summer of what year? A The last year before he died.

40

Irene Weyer, cross.

Q And when did he die? A He died 1928, August 24th.

Q And until then—until that summer you had no conversations with—(interrupted). A I did. I often had them. We spoke many times together.

10 Q When? A Well, all the times that I ever saw him.

Q Now, I want you to tell us—that was in 1928— A Yes.

Q —when conversations that you told Mr. Bradner about were had? A Yes, I had them in 1927, 1926, all along, ever since I have been going to school.

20 Q Well, in 1926 where did you have conversations? A I had them at his home, 375 Bloomfield avenue; I have had them in the car when he was taking me down to the bank.

Q Did you have any other conversations besides those in 1926 and 1927? A All along ever since I have been going to school.

Q Well, when did you start going to school? A At the age of seven, but, of course, I had them when I went to High School at the age of fourteen, I guess it was.

30 Q Did you have conversations with your brother about making a will during all those years? A Not—not those years, just at the end.

Q When was the conversation about the will? A This last year that I saw him.

Q Only the last year? A Yes.

Q And not previous to that? A No; they were not relating to any will.

The Court: That is all.

Mr. Bradner: That is all.

Blanche Weyer, recalled, direct.

Now, if your Honor please, Dr. Epstein was to be here and he had a very serious operation, I understand, in the hospital this morning and could not get here.

The Court: What has he got to do with it?

Mr. Bradner: Simply to testify to this young man's physical condition, that he was not expected to live very long, that he had very serious heart trouble. 10

The Court: Well, I don't think that has anything to do with it.

Mr. Bradner: Well, never mind, then.

The Court: Is that the case?

Mr. Bradner: Yes, that is the case.

The Court: I suppose you would like to submit memorandums? 20

Mr. Kahrs: I would like to put Mrs. Weyer on the stand.

The Court: Oh, excuse me.

Mr. Bradner: Yes. A question of law.

BLANCHE WEYER, recalled.

By Mr. Kahrs. 30

Q Mrs. Weyer, from the time of your marriage you were engaged in the baking business, assisting your husband, weren't you? A I was.

Q And that continued until the time of his death? A Yes.

Q How much time did you devote to that business? A We were open eighteen hours every day in the year and I was there practically every hour of every day except the last year 40

Blanche Weyer, recalled, direct.

when we took off one day a week, leaving home about seven, seven-thirty in the morning and returning about eleven—between eleven and twelve at night, but we only had that day off the last year we were married.

10 Q What did you do? What were your duties?

The Court: Well, she just tended to the business, the baking business, that is about all.

Mr. Bradner: Worked hard.

The Witness: I washed the windows and cleaned the cases and cleaned the floors, tended the store.

20 Q Something has been said about conversations with you the night of your husband's death regarding a will. Did you have any conversation with your husband about a will? A Before that night, yes.

Q Well, now, he died about two o'clock in the afternoon? A Yes.

Q What day of the week? A On a Friday.

Q On a Friday. And how long had he been—what did he die as a result of? A Dr. Epstein termed it bronchial grippe.

30 Q Grippe. And how long had he been sick with grippe? A He had been out with his father on Monday; on Tuesday he was up and down, lying down a good part of the day; Wednesday he was confined to his bed throughout the day. We had the doctor on Wednesday for the first.

Q When were you first alarmed about him? A Thursday afternoon.

40 Q And did he say anything to you about a will? A Not at that time.

Blanche Weyer, recalled, direct.

Q When? A My sister-in-law, Irene, came over in the evening and my girl in the store, I only had one girl in the store, and she went off at nine-thirty which left my husband alone from nine-thirty until twelve o'clock, when I closed, he was very short of breath.

Q Was that Thursday night? A That was 10
Thursday night, the night before he died.

Q Yes. A He was very short of breath.

Q Did you think he was dying? A No.

Q Had you been told by anybody that he was seriously ill? A No. The doctor was there on Wednesday morning, said he had bronchial grippe. He said, "Eddie, stay in bed Wednesday and Thursday; Friday you can get up and sit in the parlor; Saturday you can go downstairs."

Q That was Wednesday. A And he went 20
with the idea of returning, the doctor.

Q And when did he return next? A When he was called Friday morning.

Q So he was not there from Wednesday morning until Friday morning? A No, sir.

Q All right. You were telling about something that occurred Thursday night. A Thursday night my sister-in-law, Irene, came over—she often did—I was upstairs with my husband and she sat there in the bedroom. We were 30
talking. She saw that he was so excited about being alone from nine-thirty until twelve, she said, "Blanche, do you mind if I go down and call up Emma and tell her I won't be home until twelve o'clock?" Then Eddie wanted me to take her home after I closed the store at twelve o'clock. That was just so he would have company from nine-thirty until twelve, and I had promised to take her over. In the meantime—
(interrupted) 40

Blanche Weyer, recalled, direct.

The Court: I don't see that this has anything to do with it.

The Witness: In the meantime when she went downstairs—(interrupted)

Mr. Bradner: There has not been any foundation laid for it.

10

Mr. Kahrs: If your Honor please, if you will bear with me a moment, there has been conversation as to what was said about a will.

The Court: Well, let her say what was said about a will, not about "leave him alone" and all that.

Mr. Kahrs: All right. Now come right down to the Thursday night, if Eddie said anything to you about a will.

20

The Witness: Thursday. During the night, about three o'clock in the morning—of course, I was up with him all night, didn't have my clothes off—he was very, very short of breath; he was in his sane mind, but very excited. Eddie was always afraid of being alone.

The Court: Now, what did he say? What did he say?

30

The Witness: He said, "Blanche, go down and get me a lawyer." He said, "Call up a lawyer," he didn't say who. I said, "Why, Eddie, you are not going to die. Why do you want a lawyer?" And then another minute he grabbed onto me and he said, "Don't leave me, don't leave me, don't leave me."

Q Is that all that was said? A He never said to make a will.

40

Blanche Weyer, recalled, direct.

Q That is all he said about a will? A That is all he said.

Q Did he at any other time say anything to you about drawing a will? A Yes, sir.

Q When? A Many occasions he would come home after having his father out on a Monday, and his sister, and he would say, "Do you know what my father said to me today? 'Eddie, you ought to make a will'." 10

Mr. Bradner: I object to that.

The Witness: "You ought to make a will."

Mr. Bradner: One moment; I object.

The Court: No. I will allow it. And then what did he say to that?

The Witness: "Eddie, you ought to make a will." I said, "Ed, you had ought to make a will; you ought to make a will and let it go to whoever you think it should go to; use your own judgment." 20

Q What did he say about that? A That would end it.

Q That was the substance of your conversation about a will? A Yes.

Q Now, you heard Mr. Anderson testify about a conversation he had regarding a lawyer that night after your husband's death? A About me, just what I spoke of now? 30

Q Do you remember a meeting with Mr. Weyer and Mr. Anderson? A Yes.

Q That night after your husband's death? A Yes.

Q Was there anything said about a lawyer? A We were just talking over remarks, last 40

Blanche Weyer, recalled, cross.

words of Eddie's that he had said before his death, which all families would talk about.

Q And I suppose you told them? A And I just told them that Ed asked for a lawyer.

Q And that was all that was said? A That was all that was said.

10 Q Nothing else? What about that box that was in the safe? A I didn't know there was a box there.

Q Did you see it? A It is just as it was. I have never been in the safe since they left it.

The Court: Maybe the will is in there now.

The Witness: It might be. It could be.

20 The Court: Well, it seems to me it would be a wise plan to open the box.

Mr. Kahrs: That is all.

Cross examination by Mr. Bradner.

Q Did Dr. Epstein tell you before you were married that you and Eddie ought not to get married; that he was not in a fit condition to get married?

30 Mr. Kahrs: Oh, I object.

The Court: I will sustain the objection.

Q Did you know he was in poor condition?

Mr. Kahrs: I do not think there is testimony—

The Court: I will sustain the objection.

Q Did you bring a suit against Eddie Weyer before you married him for breach of promise?

40 A Absolutely not.

Blanche Weyer, recalled, cross.

The Court: You need not answer any of these questions, madam.

Q Have you remarried since his death? A No, sir.

Q Where are you living now? A 375 Bloomfield avenue. 10

Q Are you carrying on the business there yourself? A I am.

Mr. Bradner: That is all.

The Court: That is all. That is the case? Have the testimony written out.

Mr. Bradner: Well, your Honor does not care to hear what Dr. Epstein has to say?

The Court: Why, no, the case is finished. I cannot— 20

Mr. Bradner: Well, I meant—

The Court: No, I don't think that is important, medical testimony. The question is whether this man made an agreement for a proper consideration to turn over the property—to will the property.

30

40

*Complainant's Exhibits.***COMPLAINANT'S EXHIBITS.**

- 10 C. 1. Deed of Conveyance made by Edward T. Weyer to Edward W. Weyer, ack. June 12, 1925, before Edward C. George, Master in Chancery, and recorded June 15, 1925, in Book B. 782, p. 486. Cons. \$1 and other valuable consideration. Conveys premises described in Bill of Complaint by deed of Bargain and Sale with covenant against Grantor.
- C. 2. Bond, Edward W. Weyer to Edward T. Weyer, dated June 12, 1925. Conditioned for the payment of \$5000 on July 1, 1926 with interest at 6% per annum from July 1, 1925.
- 20 C. 3. Mortgage made by Edward W. Weyer to Edward T. Weyer on land and premises described in Bill of Complaint, dated June 12, 1925. Acknowledged before Edward C. George, Master in Chancery on June 12, 1925, Recorded June 15, 1925, in Book N 54 of Mortgages at pp. 359-361. The mortgage recites as follows:—"Being the same premises conveyed to the said Edward W. Weyer by deed bearing even date and as yet not recorded; this mortgage being given to secure part of the purchase money for said conveyance." The mortgage refers to the bond described in Ex. C. 2.
- 30

Complainant's Exhibits.

C. 4. Letter of May 7, 1929, which reads as follows:—

“May 7, 1929.

Joseph Kahrs, Esq.,
810 Broad St.,
Newark, N. J.

10

Dear Mr. Kahrs:— I sent for Mr. Weyer and have had a conference with him this morning. He is willing to have the property and business appraised by some disinterested person or persons and will consent that his daughter-in-law shall have one-third of the entire property, provided of course, that she shall pay out of that one-third the amount borrowed from him by his son. If we cannot agree and you are not willing to file a bill to quiet title, I will start proceedings in order to have the matter settled up.

20

Yours very truly,

FRANK E. BRADNER.”

30

40

*Defendants' Exhibit.***DEFENDANTS' EXHIBIT.**

D. 1. Check dated July 3, 1925, which reads as follows:—

United States Savings Bank.
 10 No. 10579. Newark, N. J., July 3rd, 1925.
 Pay to the order of Edward T. Weyer \$5,000
 Exactly Five thousand Dollars Dollars
 To NATIONAL STATE BANK,
 Newark, N. J.
 (SIGNED) H. F. Peal, Secretary.
 W. G. Trautwein, Treasurer.

Ex. D. 1., endorsed on back, as follows:—

20 "Pay to the order of Edward W. Weyer,
 Edward T. Weyer.
 Pay to the order of Emma Weyer
 Edward W. Weyer.
 Emma L. Weyer.
 Savings 1
 July 8, 1925.
 I. L. & L. Bkg. Co.
 Received payment through
 the Newark Clearing House
 July 8, 1925.
 30 Prior endorsements guaranteed
 No. 1
 Nat'l. Newark & Essex Banking Co."

OPINION.

Filed April 30, 1930.

IN CHANCERY OF NEW JERSEY.

*Between*BLANCHE W. WEYER,
Complainant,
*and*EDWARD T. WEYER, *et als.*,
Defendants.

10

Opinion.

Messrs. Lintott, Kahrs & Young, for complainant.

Mr. Frank E. Bradner, for defendants.

20

SYLLABUS:

1. An oral promise to make a will is inapplicable unless there is a mutual agreement.

2. When one party has performed his agreement and the other party has given only a promise to do something in the future, the case comes within the statute of frauds, and oral testimony will not be received.

CHURCH, *V.-C.*

30

This is a bill for redemption and to remove a cloud upon the title to premises of complainant.

It appears from the testimony that Edward T. Weyer conveyed certain premises, with the business, to complainant's husband, Edward W. Weyer. Edward W., the son, in return gave a \$5,000 purchase money mortgage to the father, and a \$5,000 purchase money mortgage and also \$5,000 in cash to his sister Emma. The \$5,000 mortgage to Emma was subsequently paid off

40

Opinion.

and this suit is brought to redeem the purchase money mortgage of \$5,000 to the father. The testimony also shows that the father intended to retire from participation in the business and apparently desired to compensate his children and his daughter-in-law for services rendered to him in conducting the business. Edward W. Weyer and his wife managed and worked the business alone and lived there until the death of the former in August, 1928.

Defendants have filed a counter-claim in which they allege an oral promise made by the intestate, Edward W. Weyer, to will the property to his father or sisters. It seems to me that the only proof offered at the trial, that is, oral proof, is inadmissible as being contrary to the statute of frauds. One principle found in cases where a conveyance has been made or an act performed in return for a promise is absent in this case. That is, one party performed his part of the agreement, and the other party only gave a promise to do something in future. In *Johnson v. Hubbell*, 10 N. J. Eq. 332, at page 339, the Court said:

“The part of the agreement which the son was to perform was to be performed *in praesenti*, and that part to be performed by the father was to be performed *in futuro*.”

The case of *Lozier v. Hill*, 68 N. J. Eq. 300, sustains this contention. In that case complainant conveyed to her brother a lot for the consideration of \$1,000, although the consideration stated in the deed was \$1,450. It was alleged that the brother promised to build a house on the lot and devise it to the complainant. Vice-Chancellor Stevenson said:

“The alleged contract of Mr. Kip to devise the land in question to the complainant

Opinion.

is within the statute of frauds. Browne Fraud., sec. 263; Johnson *v.* Hubbell, 10 N. J. Eq. (2 Stock.) 332; Gould *v.* Mansfield, 103 Mass. 408; Harder *v.* Harder, 2 Sandf. Ch. 17.

* * * * *

“No facts are proved which exempt the alleged oral contract from the operation of the statute of frauds. 10

“There was no fraud in the transaction. No fraud will be effectuated in case the promise to devise was made and the complainant fails to get the land by devise or by the decree of this court. In such case the complainant will not be defrauded, but will merely suffer from the non-performance of a promise which is not legally enforceable.

* * * * *

“If the conveyance by the complainant to Mr. Kip was such part performance as takes the alleged verbal promise out of the operation of the statute, I see no reason why anyone of ten thousand grantors of land may not get his land back by a lease, a conveyance in fee or a decree by simply proving by parol that he sold his land at a smaller price than he otherwise would have accepted upon the verbal promise of the grantee to lease, convey or devise it back. That all conveyances of land after the decease of the grantee are subject to such a possible defeasance, is certainly a very startling suggestion. 20 30

“The conclusion on this branch of the case is that the statute of frauds is a complete defense to the whole case made out by the complainant, assuming that the parties intended to make and did make, so far as possible by mere words, the contract set forth in the bill of complaint.

“3. Precisely the same result is reached if we exclude the statute of frauds from 40

Opinion.

10 consideration and apply the well-settled rules which protect written contracts from impeachment by parol testimony. The effect of giving force to this alleged oral contract would be to alter radically a most solemn contract in writing—a conveyance of land under seal—and to convert what on its face is an absolute conveyance of the whole legal and equitable estate into a conveyance of a life estate only, leaving an equitable estate in reversion vested in the grantor.

20 “As has already been pointed out in discussing the relation of the statute of frauds to the case, no actual or constructive fraud or other sufficient reason has been shown which would justify any court in dealing in such a violent manner with this plain written contract. No exception on behalf of the complainant is established which takes her case out of the operation of the wholesome general rule excluding parol testimony when offered to alter the meaning of a complete, intelligible, written contract.

30 “In connection with this point it is well to consider the appalling results which might follow if this grantor, who made this conveyance of land in fee, after sleeping on her rights upon a plea of poverty or mistake of law until her grantee and her grantee’s devisee have both died, should be allowed by parol testimony to inject into the written contract a contemporaneous oral agreement, and thereby establish in herself a full reversionary ownership.

* * * * *

“If the land had been conveyed for no consideration, or for a plainly inadequate consideration, then the alleged parol contract would have explained a transaction which otherwise would appear to have been an extraordinary one, involving an unreasonable and improvident gift.

Opinion.

“There is not a single act shown to have been performed by either party to the alleged parol contract which is not referable to the written contract, or which can be attributed to the parol contract except by calling in parol evidence to contradict the written contract. Of course, I leave out of view the claim that the land was sold for an inadequate price, because I have found that such claim is entirely unsupported by the proofs.” 10

There is no question but that in the case before me complainant’s husband gave a substantial consideration for the property. As there is no evidence that the consideration was inadequate, I must assume that it was adequate. It seems perfectly clear to me, therefore, that the case above cited covers the matter and that the oral testimony of the alleged agreement is inadmissible. 20

It should be further noted that the alleged oral agreement is not proved with the clearness and distinctness which is necessary under the cases.

Mr. Justice Fort, speaking for the Court of Errors and Appeals, said in *Cooper v. Colson*, 66 N. J. Eq. 328, at page 330:

“In every case, in order to take the case out of the statute on the ground of part performance, irrespective of other questions, two things are requisite. The terms of the contract must be established by the proofs to be clear, definite and unequivocal, and the acts relied on as part performance must be exclusively referable to the contract. *Wallace v. Brown*, 2 Stock. 308; *Brown v. Brown*, 6 Stew. Eq. 650. 30

* * * * *

“She in no way changed her mode of living, or course of life, or life work, because of them. What she did was of such a char- 40

Opinion.

10 acter as to be easily and adequately com-
 pensated on the *quantum meruit*. There is
 nothing to establish that she had abandoned
 any other plan of life work or calling to de-
 vote herself to the deceased in consideration
 of the promised conveyance of a farm. Most
 scrupulous care should be exercised by the
 20 courts in this class of cases, and especially
 where one of the alleged contracting parties
 is dead. An allegation of an agreement to
 convey is easily made, and casual conversa-
 tions or jocular remarks of intent to devise
 or convey at death can readily be turned
 into serious import. The statute declares
 that agreements to convey land not in writ-
 ing are void. If equity is to overthrow the
 statute, on the ground that, owing to the
 peculiar character of the facts in a given
 case, it would be a fraud not to hold one
 30 of the contracting parties estopped from
 setting up the statute, such power should be
 exercised upon the most clear proof, not
 only of the contract to devise or convey the
 land in question, but of the fact that the
 rendition of the services was wholly refer-
 able to the contract to convey, and solely
 predicated upon that agreement, and that
 proper and adequate compensation for the
 services cannot otherwise be made, because
 of the fact that, in reliance upon the con-
 tract, it appears reasonably probable that
 the complainant has irretrievably changed
 the whole course of his life and circum-
 stances in order to fulfill his part of the
 agreement."

40 The contention is made that the complainant
 has no standing in court because she does not
 come within the provisions of "A Supplement
 to an act entitled 'An act directing the descent
 of real estate,' approved March ninth, one
 thousand eight hundred and seventy-seven."
 Chapter 41, P. L. 1926, page 77. The theory of

Opinion.

defendants seems to be that the statute is not retroactive so as to include land purchased before the act took effect. However, the statute reads:

“Be it enacted by the Senate and General Assembly of the State of New Jersey:

“1. Hereafter, when any married persons shall die seized of any lands, tenements or hereditaments, in his or her right in fee simple without devising the same in due form of law and without leaving lawful issue but leaving a husband or wife him or her surviving, then and in that case the said person so surviving, whether it be husband or wife, shall take an entire estate in fee simple in the deceased’s lands, tenements or hereditaments; provided, however, this act shall only apply to property of which husband or wife may die seized of, which had been purchased by husband or wife during coverture. 10
20

“2. All acts or parts of acts inconsistent with this act are hereby expressly repealed and this shall take effect immediately.”

The word “hereafter” refers to death and not to purchase. At the end of the statute these words appear:

“* * * provided, however, this act shall only apply to property of which husband or wife may die seized of, which had been purchased by husband or wife during coverture.” 30

It does not seem to be necessary to discuss the further contention that the word “purchase” is not used in the statute in its technical sense. However, a valuable consideration was paid for the property which would seem to dispose of that argument.

I will advise a decree in accordance with the prayer in complainant’s bill. 40

Final Decree.

was recorded on June 15, 1925 in the Register's Office of the County of Essex in Book B 72 of Deeds for said County, on pages 486-487, and that said Edward W. Weyer and this complainant, Blanche W. Weyer, were married at Newark, Essex County, New Jersey, on October 29, 1924 and that said Edward W. Weyer died intestate August 24, 1925, seized of above described premises in his right in fee simple, without devising the same in due form of law, and without leaving lawful issue but leaving this complainant him surviving. 10

And it further appearing that this complainant, Blanche W. Weyer, was in peaceful possession of said lands and premises and was entitled to bring and maintain her suit in Chancery to settle the title thereto and clear up all doubts and disputes concerning the same; 20

And it further appearing that the claim of the said defendants, Edward T. Weyer, Emma L. Anderson and Frederick Anderson, her husband, and Irene L. Weyer in and to the said lands and premises which they claim and insisted on as aforesaid, is not valid and that the said defendants have not any such estate or interest therein as was so by them claimed or set up in this cause; and no further claim being set up by said defendants or now appearing and the complainant, Blanche W. Weyer, appearing to be entitled to the relief prayed in this bill, 30

It Is, on this 16th day of May, 1930, ORDERED, ADJUDGED and DECREED that said Edward W. Weyer, for a full and valuable consideration purchased said lands and premises from the defendant, Edward T. Weyer as above stated, and that the said defendants, Edward T. Weyer, Emma L. Anderson and Frederick Anderson, her 40

Final Decree.

husband, and Irene L. Weyer have no estate or interest in, or encumbrance upon said lands and premises, or any part thereof, except the mortgage hereinafter referred to held by said Edward T. Weyer.

10 It is further ORDERED, ADJUDGED and DECREED that as to all of the said lands and premises described in said bill of complaint, situate, lying and being in the City of Newark, County of Essex and State of New Jersey, more particularly described as follows:

20 BEGINNING at a point in the Easterly side of Bloomfield Avenue distant ninety-eight feet and four inches Westerly from the Northwesterly line of North Fifth Street; from thence running (1) Northerly along said line of Bloomfield Avenue fifty feet; thence (2) Easterly at right angles to Bloomfield Avenue sixty-seven feet eight and one-half inches; thence (3) Southeasterly at right angles to North Fifth Street sixty-seven feet eight and one-half inches to the Northwesterly line of North Fifth Street; thence (4) Southwesterly along North Fifth Street fifty feet; thence (5) Northwesterly at right angles to North Fifth Street forty-four feet ten and one-half inches; thence (6) Westerly at right angles to Bloomfield Avenue forty-four feet ten and one-half inches to the line of Bloomfield Avenue and place of BEGINNING.

30

40 BEING Lots #47 and 48 on Block "B" on a map of the property of The Knickerbocker Life Insurance Company, made by Van Duyne & Young, Surveyors, and being the same premises conveyed to the said Edward T. Weyer, and Minnie Weyer, his wife, by

Final Decree.

deed dated June 7th, 1899, and recorded in the Essex County Register's Office in Book N 32 of Deeds for said County, on pages 146 &c. The said Minnie Weyer having since died viz, January 10th, 1921.

so far as relates to any claim thereon by, or on behalf of said defendants, Edward T. Weyer, Emma L. Anderson and Frederick Anderson, her husband, and Irene L. Weyer, the title of said complainant, Blanche W. Weyer, in and to the same and every part thereof is hereby determined, fixed and settled and declared to be good. 10

It further appearing to the satisfaction of the Court that the complainant is entitled to the relief prayed for by her in her bill of complaint filed herein, and that there is equitably due from the said complainant to the defendant, Edward T. Weyer, the sum of five thousand (\$5,000) dollars principal on the mortgage given by said Edward W. Weyer to Edward T. Weyer, and more particularly described hereinafter, together with the sum of \$1,483.33 for interest on said principal sum at the rate of six (6%) per centum per annum from June 12, 1925 to May 16, 1930, being the sum of \$1,483.33 and making the total sum due for principal and interest of \$6,483.33. 20 30

It is therefore further ORDERED, ADJUDGED and DECREED that the said complainant, Blanche W. Weyer, is entitled to redeem said mortgage mentioned and described in her bill of complaint, being a certain mortgage executed by said Edward W. Weyer to the defendant, Edward T. Weyer, dated June 12, 1925, to secure the payment of a bond executed by said Edward W. Weyer to said Edward T. Weyer on said June 12, 1925 in the sum of five thousand (\$5,000) dollars, payable on May 16, 1930, with interest 40

Final Decree.

at the rate of six (6%) per centum per annum, payable half yearly from said date of said bond, which said mortgage was recorded in the Register's Office of the County of Essex in Book N 54 of Mortgages for said County, page 359, and which mortgage conveys the lands and premises
 10 above described.

It is further ORDERED, ADJUDGED and DECREED that the said complainant serve a true but un-certified copy of this decree upon the defendant, Edward T. Weyer, or his solicitor, within five days from the date hereof, and that the said complainant pay to the said defendant, Edward T. Weyer, or his solicitor, on the 26th day of May, 1930, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, at
 20 the office of Frank E. Bradner, Counsellor at Law, No. 31 Clinton street, Newark, New Jersey, the aforesaid \$6,483.33 less counsel fee of \$250 which is hereby allowed to said complainant, and that upon the making of said payment the said defendant, Edward T. Weyer shall forthwith deliver to the said complainant the said bond and mortgage, after having first duly endorsed the said mortgage for cancellation; but that in default of said complainant, Blanche W. Weyer,
 30 paying the said sum to said Edward T. Weyer, or to his solicitor, at the time and place aforesaid, the complainant's bill be dismissed.

It is further ORDERED, ADJUDGED and DECREED that the counter-claim filed herein by said Edward T. Weyer to the bill of complaint be and the same is hereby dismissed.

E. R. WALKER,

C.

Respectfully advised,
 ALONZO CHURCH,

40

V.-C.

NOTICE OF APPEAL.

Filed May 20, 1930.

IN CHANCERY OF NEW JERSEY.

<i>Between</i>		10
BLANCHE W. WEYER, <i>Complainant,</i>	} <i>On Bill, &c.</i>	
<i>and</i>		
EDWARD T. WEYER, EMMA LILLIAN ANDERSON and FREDERICK ANDERSON, her husband, and IRENE WEYER, <i>Defendants.</i>	} <i>Notice of Appeal.</i>	20

Notice is hereby given that the defendants, Edward T. Weyer, Emma Lillian Anderson and Frederick Anderson, her husband, and Irene Weyer, appeal to the Court of Errors and Appeals in the last resort in all causes, from the whole and every part of the final decree made by the Chancellor on the advice of Vice-Chancellor Alonzo Church, which decree bears date May 16, 1930.

FRANK E. BRADNER,
Solicitor of Defendants.

30

Dated May 20, 1930.

I conceive there is good cause for appeal in the above stated cause.

FRANK E. BRADNER,
Of Counsel for Defendants.

Served May 21, 1930.

40

PETITION OF APPEAL.

Filed June 2, 1930.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	<p style="margin: 0;"><i>Between</i></p> <p style="margin: 0; text-align: center;">BLANCHE W. WEYER, <i>Complainant-Respondent,</i></p> <p style="margin: 0; text-align: center;"><i>and</i></p> <p style="margin: 0; text-align: center;">EDWARD T. WEYER, <i>et als.,</i> <i>Defendants-Appellants.</i></p>	<p style="margin: 0;"><i>On Appeal</i> <i>from the</i> <i>Court of</i> <i>Chancery.</i></p> <p style="margin: 0;"><i>Petition</i> <i>of Appeal.</i></p>
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20 *To the Honorable the Court of Errors and Appeals in the last resort in all causes.*

The petition of Edward T. Weyer, Emma L. Anderson, Frederick Anderson, her husband, and Irene Weyer, the defendants in the above stated cause, respectfully show:

30 First: The petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, which decree bears date May 16, 1930, and does order, adjudge and decree as follows:

1. That the defendants in the cause have no estate or interest in or encumbrance upon the lands and premises described in the bill of complaint and in the decree, except a certain mortgage in the sum of \$5,000.00 made by Edward W. Weyer, in his lifetime to the defendant, Edward T. Weyer.

40 2. So far as relates to any claim to said lands and premises by or on behalf of the defendants,

Petition of Appeal.

said title of the complainant Blanche W. Weyer in and to the same and every part thereof, is determined, fixed and settled and declared to be good.

3. That the complainant, Blanche W. Weyer, is entitled to redeem a certain mortgage encumbrance upon the said lands and premises in the sum of \$5,000.00, which mortgage bears date June 12, 1925, upon payment of the principal sum together with interest from June 12, 1925, less \$250.00 counsel fee. . 10

4. The said decree orders that the counterclaim filed by said Edward T. Weyer, shall be dismissed.

Second: Petitioners appeal from the final decree upon the ground that the same is erroneous, for these reasons: 20

1. The complainant, Blanche W. Weyer, did not prove that she had any title to the lands in question; that she had no estate in the said lands other than a possible estate in dower.

2. The evidence in the cause proved that the legal title to the land was in Edward W. Weyer at the time of his death and that he died intestate, and that the title descended to his two sisters, Emma L. Anderson and Irene Weyer, subject to the right of their father, Edward T. Weyer, to have specific performance of an agreement made by Edward W. Weyer in his lifetime to devise the land to his father. 30

3. The complainant had no title to the land and had no right to redeem the mortgage thereon, and if she had such right, she was not entitled to recover any costs or counsel fee from the holder of the mortgage. 40

Petition of Appeal.

4. The defendant, Edward T. Weyer, proved clearly that the conveyance of the land to his son on June 12, 1925, was a gift to his son subject to a payment of \$10,000 to Emma L. Anderson, then Emma L. Weyer, and on condition that the son should make and execute a last will and testament devising the land to his father.

5. The defendant, Edward T. Weyer, was entitled to a decree sustaining his counter-claim.

Third: Petitioners therefore, pray that the said decree of the Chancellor may be reversed, set aside and for nothing holden and that petitioners may have such other relief as to this court may seem equitable.

FRANK E. BRADNER,
Solicitor for and of Counsel
with Petitioners.

20

30

40

ANSWER TO PETITION OF APPEAL.

Filed June 9, 1930.

NEW JERSEY COURT OF ERRORS AND
APPEALS.*Between*BLANCHE W. WEYER,
*Complainant-Respondent,**and*EDWARD T. WEYER, *et als.,*
*Defendants-Appellants.**On Petition
from the
Court of
Chancery.**Answer to
Petition of
Appeal.*

10

The answer of the above named respondent
Blanche W. Weyer to the petition of appeal of
the above named appellants is as follows: 20

This respondent not acknowledging all or any
of the matters which in the said petition of ap-
peal are contained to be true, for answer thereto,
nevertheless says and admits that a final decree
was on or about May 16, 1930, made and entered
in the Court of Chancery in this cause as men-
tioned in the said petition, but as to the sub-
stance and form thereof this respondent prays
to refer thereto when the same shall be pro- 30
duced. And this respondent is advised and be-
lieves that said decree and the relief granted
therein is agreeable to equity, and prays that
the same may be affirmed, with costs to be ad-
judged to this respondent.

LINOTT, KAHRS & YOUNG,
Solicitors for and of Counsel,
with Blanche W. Weyer,
Complainant-Respondent.

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New Jersey Court of Errors and Appeals

Between

BLANCHE W. WEYER,
Complainant-Respondent,

and

EDWARD T. WEYER, *et als.,*
Defendants-Appellants.

On Bill, &c.

*On Appeal
from the
Court of
Chancery.*

BRIEF FOR APPELLANTS.

Abstract of the Case.

Edward T. Weyer carried on a bakery business in a building on the lands involved in this suit known as No. 375 Bloomfield avenue, Newark, N. J., for 25 years. His wife died and he contemplated marrying again and there seems to have been some discussion among the members of his family consisting of his son, Edward, and two daughters, Emma and Irene. In the Spring of 1925, Edward said to his father that he would like to have the bakery business, and after some discussion between the father and son and Emma, an agreement was made that the business should be transferred to Edward and the real property conveyed to him, and that Edward should pay Emma \$10,000 and should make a Will giving the property back in case of his death, to his father, and through him to the sisters. Edward did not have sufficient money to pay Emma and borrowed \$5,000 from his father, which loan is shown by a check issued by United States Savings Bank, in evidence in this case (Ex. D. 1, p. 66). The check was endorsed over to Edward, and by him to his sister. This loan is the same debt referred to in the mort-

gage held by Edward T. Weyer. This mortgage (Ex. C. 3, p. 64) purports to have been given to secure a part of the purchase money, but as it is not signed by Edward's wife, the complainant in this suit, it was probably called a purchase money mortgage, so that her signature would not be necessary.

Edward had been working with his father for some years, but he was in poor health and had been sickly all his life, and had been a very great expense to his father. There is no evidence that any agreement was ever made to pay him any compensation for his services, and of course, there could be no implied agreement between members of the family. However, it appears from the testimony of Edward T. Weyer, that he supported his son and bought his clothes and put money in a building and loan association for him. Emma did more work than Edward in the bakery and received support and clothing. Irene was a school girl and did not do any particular work. The complainant, Blanche, was married in October, 1924, and lived with her husband, Edward, in the father's home until the transfer of the business was made in June, 1925. She testified that she worked in the store assisting her husband, but it does not appear that she was doing any work at the request of her father-in-law. It will be observed, that if Blanche did any work for her father-in-law, it covered a period of eight months only; from October, 1924, to June, 1925. After the transfer had been made, Emma was married in the Fall of 1925, and there is no dispute that she received the \$10,000. In June, 1925, the father transferred the bakery business to his son, as appears from the testimony of the father, although no bill of sale has been produced. At the same time, the father made a deed

of conveyance of the land and the premises to his son, which deed is in evidence (Ex. C. 1, p. 64) and purports on its face to have been made in consideration of \$1.00 and other valuable consideration.

It appears from the testimony of the complainant, that Edward died in August, 1928, intestate, and that the complainant and her husband were living on the premises at the time of his death and that she has remained in possession thereof since his death and is now in possession. It appears that some conversations have been held between the complainant and her father-in-law, to the effect that she would do whatever was right, and his attitude towards her is evidenced by the letter which counsel for defendant wrote to her solicitor, bearing date May 7, 1929, and which was put in evidence on her behalf. The letter reads as follows (Ex. C. 4, p. 65):

“May 7, 1929.

Joseph Kahrs, Esq.,
810 Broad St.,
Newark, N. J.

Dear Mr. Kahrs:

I sent for Mr. Weyer and have had a conference with him this morning. He is willing to have the property and business appraised by some disinterested person or persons, and will consent that his daughter-in-law shall have one-third of the entire property, provided, of course that she shall pay out of that one-third, the amount borrowed from him by his son. If we cannot agree and you are not willing to file a bill to quiet title, I will start proceedings in order to have the matter settled up.

Yours very truly,
F. E. Bradner.”

The complainant then filed a bill to quiet title to the land, alleging that she is in peaceable possession and that she became the absolute owner in fee of the land upon her husband's death, by virtue of a statute passed in 1926, P. L. 1926, p. 77. She also seeks to redeem the subsisting mortgage (Ex. C. 3, p. 64) on the land given by her husband to his father to secure the loan of \$5,000, no part of which has been paid, and no interest has been paid.

The defendants contend that the statute relied upon by the complainant is not applicable, and the father has filed a counter-claim setting out the parol agreement to make a Will devising the land to him, and asks for specific performance.

The statute upon which the complainant relies, is entitled "A supplement to an act entitled 'An Act directing the descent of real estate, approved March 9, 1877,' " which supplement is Chap. 41 of the Laws of 1926, P. L. 1926, p. 77, approved March 17, 1926; and reads as follows:

"Be it enacted by the Senate and General Assembly of State of New Jersey (1) Hereafter when any married person shall die seized of any lands, tenements or hereditaments in his or her right in fee simple without devising the same in due form of law and without leaving lawful issue but leaving the husband or wife him or her surviving, then and in that case the said person so surviving whether it be husband or wife, shall take an entire estate in fee simple in the decedent's lands, tenements or hereditaments; provided, however, this act shall only apply to property of which husband or wife may die seized of, which had been purchased by husband or wife during coverture. All acts or parts of acts inconsistent with this act, are hereby expressly repealed and this shall take effect immediately."

The Vice-Chancellor held that the statute aforesaid was applicable to the case and that the complainant took by descent from her husband by virtue of the provisions of that act. See Opinion (p. 72, l. 34). He also held that the alleged parol agreement to devise the land, was not clearly proved and if it had been clearly proved, it would not be enforceable because it would be within the Statute of Frauds. See Opinion (p. 67).

SPECIFICATION OF REASONS FOR REVERSAL.

1. Complainant failed to prove any title to or estate in the land, except possibly an estate in dower.

2. Under the evidence in the cause a decree should have been made that the land descend to Emma Anderson and Irene Weyer, subject to the right of their father, Edward T. Weyer, to have specific performance of an agreement made by Edward W. Weyer in his lifetime, to devise the land to his father.

3. The complainant was not entitled to redeem the mortgage and was not entitled to either costs or counsel fee.

4. The evidence in the cause was clear and convincing that Edward T. Weyer and Edward W. Weyer made an agreement whereby Edward T. Weyer was to transfer the business and convey the land to Edward W. Weyer, and Edward W. Weyer was to pay his sister Emma \$10,000 and was to make and execute a will devising the land to his father; and the decree should have been made in accordance with the prayer of the counter-claim filed by Edward T. Weyer.

ARGUMENT.

First: The statute approved March 17, 1926, P. L. 1926, is not applicable to this case for two reasons, as follows:

1. Because it is not retroactive so as to include land purchased before the act took effect.

2. The word "purchased" in the statute is not used in its technical sense of title acquired by any means other than descent, and means actually bought and paid for.

The general rules relating to the question of retroactive effective statutes, are stated as follows:

"In the absence of any words expressing a contrary intention, a statute will be construed to operate prospectively."

Crucible Steel Co. v. Polack Tire Co., 92 N. J. L. 221.

"A statute will not be construed as retroactive unless its nature precludes any other reasonable interpretation."

Spencer v. Middlesex County Tax Board, 93 N. J. L. 25.

"Statutes are not retroactive unless the language thereof admits of no other construction."

Public Service Electric Co. v. Public Utility Commission, 87 N. J. L. 128.

The foregoing cases are cited by the Supreme Court in *Nugent v. Cahill*, 133 Atl. Rep. 421; 4 N. J. Misc. Rep. 504, Affd. 135 Atl. Rep. 119; 103 N. J. L. 499.

V.-C. FALLON says in *Riesen v. Riesen*, 147 Atl. 225, 7 N. J. Adv. Rep.:

"The laws are generally enacted for the regulation of future affairs and conduct and to establish a basis on which rights may

thereafter under them be rested and are not usually designed to alter or affect the quality or legal relations of past acts and concluded transactions, much less to disturb rights which have arisen under laws running concurrently with their birth."

The word "hereafter" in the statute, indicates that the statute is to apply to land acquired after the statute takes effect. If that is not so, then the statute would apply to land acquired by a married person twenty years before it was enacted, and even to land devised, if the word "purchased" has its technical meaning.

This statute is in derogation of the common law and must of course be construed strictly, and that means that it will not be extended by interpretation beyond its very terms. It certainly is a very reasonable interpretation of this statute, that it is to apply to land purchased after the statute takes effect only. If this statute is given a retroactive effect so that it shall apply to any land purchased before the statute was approved, it would result in creating an estate by the entirety in husband and wife the moment land was purchased, which estate could be destroyed by either party by devising the land. Purchasers of land five, ten, fifteen or twenty years before this statute was passed, could not possibly have anticipated that a statute would be passed which would deprive them of their absolute ownership of the land.

The word "purchased" is used in its ordinary common meaning. The word "purchase" in the ordinary and popular acceptance of the term, is a transmission of property from one person to another by their voluntary act and agreement founded on a valuable consideration.

A. & E. Enc. of Law, 2nd Ed. Vol. 23, p. 462.

The word purchase applies only to such grants of real estate as are obtained by money or some other valuable consideration.

Ten Eyck v. Witbeck, 135 N. Y. 44; 91 N. E. Rep. 924.

A New York statute of March 26, 1802, enacted that:

“All purchases of land made, or to be made by any alien or aliens who have come to this State and become inhabitants thereof, shall be deemed valid to vest the estates to them granted.” And a later statute, April 8, 1808, enacted that all persons authorized by it, or by the statute first cited to acquire real estate by a purchase made, also take and acquire by devise or descent.”

In construing these statutes, the Court said in *Priest v. Cummings*, 20 Wendell N. Y. 356, Vol. 18, Law Ed. 338:

“It seems to me evident that the manner in which the word ‘purchase’ is used in the Act of 1802, shows that it is not used in its peculiar real estate sense, but in its ordinary and habitual one. All purchases of land made, can only mean all lands bought. This use of the word is not a colloquial or vulgar one, but may be found in the written opinions of Hardwicke and Kent and might well be used in legislative enactment.”

Accordingly, it was held that title by dower does not come within the meaning of the phrase purchases of land, as used in the statute, and that an alien cannot hold lands thus acquired. See also the following cases:

Cummings v. Coleman, 17 Rick. Eq. 509; 62 Amer. Dec. 402;

Ex parte Hillman, L. R. 10 Ch. Div. 622.
In re Amos, 3 Ch. 159, 1896.

In the instant case, if the property was a gift to the son, then under the authorities above cited,

he was not a purchaser for valuable consideration, and the statute does not apply. If this statute read that it should only apply to property which came to husband or wife "by purchase," instead of "which had been purchased" by husband or wife, it would be a more doubtful meaning, but it seems to me to be entirely clear. "Which had been purchased" means which had been bought.

If the statute relied upon by the complainant is not applicable, then the son died intestate and the land descended to his sisters, in the absence of any agreement on his part to devise it. Comp. Stat. (title "Descent") p. 485, Sec. 1.

Suppose a case as follows: A woman acquired title to land by purchase in 1920 with her own money, and then married and executed together with her husband a deed of trust for certain purposes, and in 1925 the trustee reconveyed the land to her and after the passage of the Act of 1926 she died intestate and without leaving lawful issue and leaving her husband surviving. Did the husband take the absolute title to the land under this statute? Surely the conveyance by the trustee would pass title by purchase within the technical meaning of that word; and if the statute is retroactive it would include the conveyance by the trustee made before the statute took effect.

The Act of 1926 is probably unconstitutional for the reason that it injuriously affects the natural rights of the sisters of the deceased owner of the lands. No case has been found in New Jersey, but the question was raised in Wisconsin in 1906 in *Nummemaker v. State*, reported in 129 Wisconsin 190, and also in A. & E. Ann. Cases, Vol. 9, p. 711.

This question of unconstitutionality was not argued before the Vice-Chancellor. The New Jersey Constitution is broader than the Wisconsin Constitution in respect to the natural rights to acquire property.

Second and Fourth: Defendant, Edward T. Weyer, is entitled to specific performance of the agreement made by his son to devise the land to him.

Family agreements and settlements are treated with special favor by the courts of equity and equities are administered in regard to them which are not applied to agreements generally; and this is on the ground that the honor and peace of families make it just and proper to do so.

A. & E. Enc. of Law, 2nd Ed. Vol. 12, p. 875.

Transactions between parent and child, if in the nature of a settlement of property or rights, are regarded with favor and not with minute regard to the consideration.

Baker v. Bradley, 70 DeGex, M. & G. Eng. Ch. Rep. Vol. 56, p. 597.

In the instant case, there was a family arrangement made and the defendant Edward T. Weyer conveyed the land in question to his son in pursuance of that arrangement. The conveyance was not a sale. The recital in the deed, that it is made in consideration of One Dollar and other valuable consideration, makes parol testimony admissible to show what the real consideration was.

“The true consideration of a deed may be shown by parol evidence, although it vary from the consideration expressed in the deed;

but such evidence cannot be received to enlarge or vary the grant itself.”

Morris Canal & Banking Co. v. Ryerson,
27 N. J. L. 457.

The law, it has seemed to me, is so well settled in this State, that a parol agreement to devise land, if based upon a consideration so as to make it a contract which has been performed in part, can be enforced in equity.

There is a long line of cases, beginning with *Johnson v. Hubbell*, 10 N. J. Eq. 1855, which was decided upon a demurrer to the bill. Chancellor Williamson, at p. 335, says:

“There can be no doubt but that a person may make a valid agreement binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by a conveyance to be made at some specified future period or upon the happening of some future event. It may be unwise for a man, in this way, to embarrass himself as to the final disposition of his property, but he is the disposer by law of his own fortune, and the sole and best judge as to the time and manner of disposing it. A court of equity will decree the specific performance of such an agreement upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction.”

Davison v. Davison, 13 N. J. Eq. 246, on final hearing, in which Chancellor Green says, at p. 252:

“The agreement thus proved is valid in law. That the contract was by parol and not in writing, while it greatly increases the difficulty of proving its terms, constitutes no

valid objection to its enforcement. There has been a part performance on the part of the complainant. He served his father several years upon the faith of the contract, and, as the evidence shows, faithfully, and to his father's satisfaction. Part performance takes the case out of the operation of the Statute of Frauds."

Duvale v. Duvale, 56 N. J. Eq. 375 (Ct. of Er.), in which MAGIE, C. J. sustained a parol agreement by a wife to devise land to her husband, which land had been purchased by his funds and put in her name in reliance upon her agreement to devise it, as stated. The Court said that it would be inequitable to permit her to violate the agreement.

Cooper v. Colson, 66 N. J. Eq. 328 (Ct. of Er.) in which it was expressly held that "an oral contract for the sale of land or any interest therein, partly or wholly performed, in certain respects by the party seeking the remedy, may, if such performance is clearly referable to the execution of the contract, be specifically enforced by courts of equity, notwithstanding the Statute of Frauds."

Clawson v. Brewer, 67 N. J. Eq. 201, in which V.-C. EMERY reviews the authorities (p. 207).

I contend that Edward T. Weyer proved beyond question that an agreement was made, whereby his son was to devise this land to his father, and that agreement was a part of the transaction between them and formed a part of the consideration for the transfer of the business and the conveyance of the land to the son. The father on his part has fully performed what he agreed to do. The son on his part has taken possession of the land and of the business, and his widow is still in possession of the land and the

business, and the son paid the \$10,000 to his sister as agreed he would do, but he did not make a Will as he agreed to do.

A defence of the Statute of Frauds is an attempt to defeat an equitable right to which the father is entitled and which has been shown is a part of a family arrangement which the courts look upon with favor.

It was contended by the Vice-Chancellor that the complainant was not a party to the arrangement that was made, although she claims that she was interested because she had done work in the bakery. The complainant testified (p. 57), as follows:

“Q (Mr. Kahrs.) Mrs. Weyer from the time of your marriage you were engaged in the bakery business assisting your husband weren't you? A I was.

Q And that continued until the time of his death? A Yes.”

She was married in October, 1924, and therefore, if she did any work in the bakery, it was according to her own testimony, assisting her husband. She was not a member of the family in the sense indicated in the authorities cited. She was a new-comer, and there was no reason that Edward T. Weyer should take her into consideration in making the gift to his son, except that he would naturally think in view of Edward's very poor health that he and Edward's sisters ought to have the property and something should be done so that it would not go to a stranger who had been married to Edward for only a few months.

The Vice-Chancellor would not permit a delay at the hearing so that Dr. Epstein, Edward W. Weyer's physician for many years, could be called. Dr. Epstein was engaged in performing

an operation at the time of the hearing, in a hospital (pp. 57 and 63).

Objection was made to the testimony of Edward T. Weyer and his two daughters, as being contrary to the statute. If there is any force at all in this objection, that objection was abandoned when Mrs. Blanche Weyer went on the witnessstand and testified to transactions with and statements made by her husband.

The only meritorious question to be considered at this time is whether the evidence proves that a contract was made, and the terms of the contract.

Harry J. Gregar testified (p. 25) that he had been a friend of the family for over twenty years, and that during the first week in June, 1925 (he cannot remember the exact date), but he thinks it was in the afternoon, he was in the store and Mr. Weyer and the son were there and Eddie appeared to be rather excited, nervous, and he was saying to his father; he says (p. 25) "Turn the business and property over to me, turn it over to me" "And when I heard that, I said 'Eddie, how can you expect to have the property turned over to you after Mr. Weyer has worked all these years to get what he has, and how about Emma and Irene, they will have to be taken care of too. Suppose something happened to you, what will happen to them?'" Well, he says, "that is all right he says, 'I will make a Will and then the estate will go back, or the property, the business will go back to my father and the estate and they will be protected.' Mr. Weyer at the time says " 'Well, all I want is what is right and if you will do that I am satisfied, "He said" 'Turn the property over to him.'" Mr. Gregar also testified at p. 26, that subsequently he was

at the store and saw Eddie and wanted to sell him some stock so that he could become a director of a company, and Eddie said he had no money. "Well," I said, "apparently your business is doing good here, Eddie. 'Well,' he said, 'it belongs to my father, I am only the manager and trustee of the business, I cannot do anything until I see him.'"

Arthur A. Werthmann testified (p. 21) that he was in Mr. George's office at the time of the transaction, but he did not know at that time what was being done, except that he was sent up to the Court House to copy some deeds. He stated that Mr. George is dead and that he died in December, 1926. At p. 24, the witness testified:

Witness: "January 10, 1928, while the stenographer was typing the lease, Mr. Edward T. Weyer said to Mr. Edward W. Weyer: 'Eddie, you have to make that Will and while you are here, why don't you make an appointment with Mr. Wertmann' and the younger Mr. Weyer answered and said 'Yes, Mr. Wertmann, I have to make that Will, but I will call you tomorrow and see how my appointments are, to make an appointment with you'; but he never called to make an appointment."

Mr. Gregar's testimony establishes the fact that Eddie had agreed to devise the land.

Mr. Wertmann's testimony is material because it shows that Eddie had made some arrangement with his father to execute a Will.

Edward T. Weyer testified (at the foot of p. 40):

"We just talked it over and we said and I said: well, he was always sick; he wanted the business and the property, he wanted that all by himself, and I says, 'Now, here, you

are a sickly man, I am willing to help you and where is Emma coming in?' 'Well' he said, 'then we will make it \$10,000 for her,' and he says 'Well, I haven't got \$10,000, I got about five.' I said 'I will lend you five for the first mortgage, so that would be just the same as my other mortgages. I got a few more. And he said he was satisfied.' "

Q Well, is that all that was said? A Well, of course, he must put that in the Will.

Q What Will? A The Will.

Q What Will? A I gave him the property and he must make a Will to put it in so the property goes back if anything happens to him.

Q Goes back? A Comes back again to me or to my two daughters.

Q And now who was present when you had that talk? A Well, there was Emma, me and my son.

Q Did Eddie agree to that? A Yes, sir."

Emma Anderson testified (p. 49), that she is a sister of Edward, and the wife now of Frederick Anderson; that she was present at a conversation between her father and Edward relating to the transfer of the business and the house, and that the conversation took place in the rear of the store that was called the kitchen, between her and Edward and her father.

Q (P. 50.) "Will you tell us now, Mrs. Anderson, your recollection of what was said at that time? A Well, my father had intended to give my brother the business and property.

Q Yes? A With the understanding"— (the witness proceeds) "Well, my father told Eddie he could have the business and property but to make a Will in case he died, that the business and property was to come back to the family.

Q What did you say? A I wanted to know what my part of the share was going to be after working there many years.

Q Yes. A What I was going to get.

Q And then was anything said about what you should get? A Why yes there was. I was to get \$10,000 of my share. That was to be just part of my share.

Q Well, was it figured out at that time how much the property and business were worth? A No, I don't know how much it was worth.

Q You don't know? A No.

Q What was Eddie's physical condition at that time? A Very poor, he was always sickly."

Irene Weyer testified (p. 54):

"One day I said, 'well listen Eddie, you will be going and then somebody else will be enjoying what you are working for; so keep off your feet.' And Eddie said: 'Don't you worry, I will make a Will that the business and property will come back to the family. After mother and father and Emma have put in so many years of their life and worked hard and tried to put that business where it was, he was not going to have anyone else enjoy it. And he used to meet me on Monday mornings, that was when he would go to the bank and would be alone then, and many times I went over to the store.'"

Edward also told his sister Emma, when he visited her (p. 53):

"Q After you were married, did Eddie ever come to see you? A He did.

Q Did you have any conversation with him? A Yes, several times.

Q I mean relating to this business, or anything of that kind? A Yes, I asked him how he felt, how his business was, and asked him if he had made a Will.

Q Yes, and what did he say? A Well, no, he didn't have time, but not to worry, he would."

When Edward was dying he asked his wife to send for a lawyer. She also stated in the presence of Frederick Anderson, Edward T. Weyer, Emma Weyer and Irene Weyer, that he asked her to send for a lawyer and that she would not send for a lawyer.

The complainant was recalled (p. 57) and (at p. 60) testified:

“It was during the night, about three o’clock in the morning; of course, I was up with him all night, didn’t have my clothes off, he was very very short of breath, he was in his sane mind, but very excited. Eddie was always afraid of being alone. He said: ‘Blanche, go down and get me a lawyer.’ He said ‘Call up a lawyer.’ He didn’t say who. I said, Why, Eddie, you are not going to die. Why do you want a lawyer? And then in another minute he grabbed on to me ‘Don’t leave me; don’t leave me; don’t leave me’ he said.

Q Is that all that was said? A He never said to make a Will.’”

Why should such a sick man want a lawyer on such an occasion? His conscience was troubling him; he knew what promise he had made to his father and he wanted to perform that promise.

The argument is made on behalf of the complainant that Edward paid full and valuable consideration for the property. The evidence in the case as to the value of the property is that given by Edward T. Weyer, the owner of it, that the business was worth \$10,000; the real estate was worth \$35,000, and that an automobile that he gave his son at the same time, was worth \$5,000.

The only real money that Edward paid was \$5,000, which probably came out of the business after he got it.

It is clear that this valuable property was not sold to Edward W. Weyer for the \$10,000 that he paid to his sister Emma; \$5,000 of which he borrowed from his father and has not yet repaid him.

The money was given to Emma because she wanted to get married and did not have any money.

I contend that the defendant is entitled to a decree that the property should be conveyed to him. It has been argued by complainant that an agreement to make a Will devising the land to the father, changes the estate granted into a life estate. That argument is not tenable, because Edward could have made the Will and thereby fully performed his contract, and he could have destroyed it afterwards and made another Will. That was the situation in *Eggers v. Anderson*, 63 N. J. Eq. 264, in which case Justice Dixon calls attention to the ambulatory character of a will where by it may be changed or revoked, and a promise to make a will does not actually affect the estate. If the facts had proved such a state of affairs—that a will had been made and afterwards destroyed, this Court would have jurisdiction to compensate Edward T. Weyer I should think, by giving him a lien on the land for its value, less what had been paid.

The Vice-Chancellor determined that the mortgage for \$5,000.00 was a purchase money mortgage and evidently disregarded the testimony in relation to the check for \$5,000.00 on July 3, 1925, Ex. D. 1.

If it should be held that the transaction with Edward was a sale of the property, and that he gave a purchase money mortgage for \$5,000.00, then it is apparent that Edward still owes the

\$5,000.00 loaned to him on July 3, 1925, and that debt would be and is a lien on the land by virtue of the statute (Orphans Court Act, Comp. Stat. Sec. 81).

The Vice-Chancellor cites a long extract from the Opinion of V.-C. STEVENSON in *Lozier v. Hill*, to the effect that a mere promise to make a will is not enforceable. The instant case differs from *Lozier v. Hill*, in that the promise was a part of the consideration for the conveyance of the land to the son and the giving of possession of the land to the son was part performance, which takes the case out of the Statute of Frauds. The argument that such a promise would defeat the estate granted and turn it into a life estate, is not sound. A purchaser from Edward would have taken the title to the land absolutely, provided he was an innocent purchaser for a valuable consideration. So long as the title remained in Edward, the father could ask performance of the agreement. The complainant does not claim to be an innocent purchaser for value. The decree in *Lozier v. Hill* was justified upon the ground of laches and acquiescence. In the instant case there is no evidence of laches or acquiescence. On the contrary the testimony is that the complainant had on several occasions stated to her father-in-law that everything would be all right, and thereby misled him.

Third: The complainant was not entitled to redeem the mortgage and was not entitled to either costs or counsel fee.

The bill was filed to redeem the mortgage for \$5,000 and also to quiet title. Technically, the bill is multifarious. The suit was somewhat of an amicable one and was suggested by me in my

letter to Mr. Kahrs, complainant's solicitor, dated May 7, 1929, Ex. C. 4.

If complainant has an estate in dower, she was not entitled to redeem the mortgage. If she had no estate in the land by virtue of the Statute of 1926, she was not entitled to redeem the mortgage. Assuming that she was entitled to redeem the mortgage, the allowance of counsel fee was contrary to the general rule settled in this State. In the absence of vexatious defence by the mortgagee, the rule is that the mortgagor must pay costs to the mortgagee.

Phillips v. Hulziser, 20 N. J. Eq. 308;

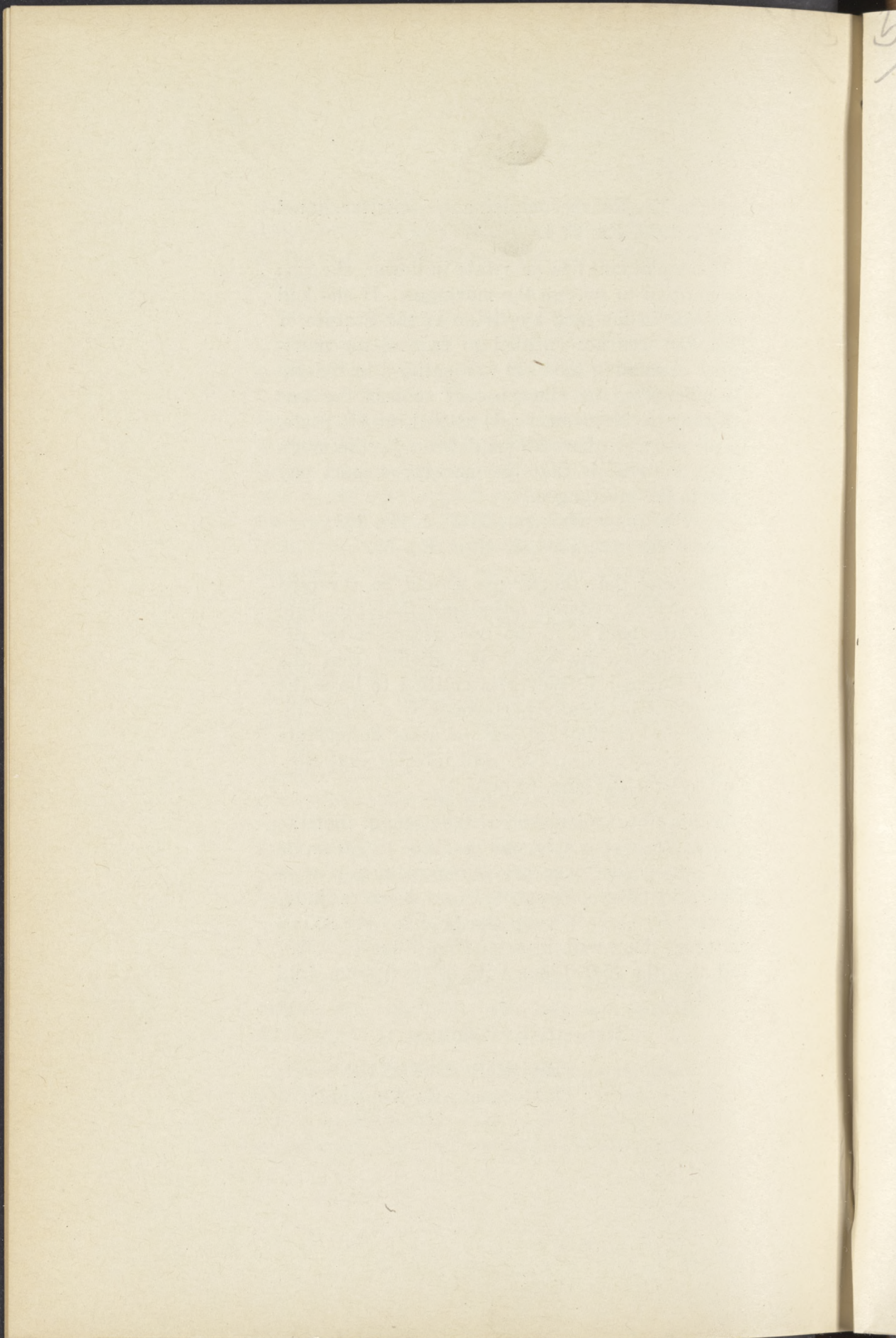
Winters v. Earl, 52 N. J. Eq. 52.

I contend that the decree should be reversed and a decree ordered adjudging that the legal title to the land is in the two sisters of the decedent, unless the Court is satisfied that the father Edward T. Weyer is entitled to have the agreement specifically performed by a decree directing the complainant and the other defendants to convey any right, title and interest that they may have in the land, to him.

If this Court should be of the opinion that the transaction was a sale and that the \$5,000 mortgage was given to secure purchase money, then Edward T. Weyer is entitled to a decree adjudging that he has a lien on the land for the \$5,000 mortgage debt, with interest from June 12, 1925; and also, the \$5,000 loan with interest from July 3, 1925.

Respectfully submitted,

FRANK E. BRADNER,
Of Counsel with Appellants.



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New Jersey Court of Errors and Appeals

Between

BLANCHE W. WEYER,
Complainant-Respondent,
and
EDWARD T. WEYER, *et als,*
Defendants-Appellants.

On Bill, etc.
On Appeal
from the
Court of
Chancery.

ANSWERING BRIEF OF COMPLAINANT-RESPONDENT

THE FACTS

Edward T. Weyer, for the sum of \$15,000.00 and in recognition of services rendered by his son, Edward W. Weyer, and daughter-in-law, Blanche W. Weyer, complainant-respondent herein, who was the wife of said Edward W. Weyer, conveyed premises in question, with the bakery business conducted therein, to his son, Edward W. Weyer, by deed dated June 12, 1925.

Said Edward W. Weyer and this complainant, Blanche W. Weyer, were married at Newark, Essex County, New Jersey, October 29, 1924, and said Edward W. Weyer died intestate August 24, 1928, seized of said premises in his right in fee simple, without devising the same in due form of law, and without leaving lawful issue but leaving this complainant-respondent, his wife, him surviving.

From the time of such conveyance said Edward W. Weyer and the complainant-respondent managed and worked the bakery alone until the death of the former in August, 1928.

At the time of said conveyance, Edward W. Weyer executed a purchase money mortgage to Edward T. Weyer, which was recorded in the County of Essex, State of New Jersey, on June 15, 1925, in Book N 54 of Mortgages, at pages 359-361.

Said mortgage is at present open of record and the complainant-respondent filed this bill for the purpose of redeeming the property from the lien of said purchase money mortgage, and also to remove a cloud on title existing by virtue of the claim of said appellant, Edward T. Weyer, and his daughters, Emma and Irene, to an interest in said property, or claim of lien or encumbrance thereon.

Thereupon the appellants filed a counterclaim alleging an oral promise was made by the intestate, Edward W. Weyer, to will the property to the father or sisters. The complainant-respondent contends no such agreement was made and, further, that had such an agreement been made it would not be binding in the Court of Equity.

ARGUMENT

I.

The respondent contends that in accordance with a supplement to an act entitled "An Act directing the descent of real estate" (P. L. 1926, p. 77) she receives title to the property in fee simple.

The appellants in their brief contend that the Statute of 1926 is not applicable to the instant case, because it is not retroactive so as to include land purchased before the act took effect.

The contention cannot be substantiated because the Statute reads:

"Hereafter when any married person shall die seized of any lands, etc."

clearly indicating the Statute is not to be retro-

active but "hereafter" to control the descent of real property upon the death of a married person; the word "hereafter" referring to the word "death" and not the purchase of the property.

At the end of the Statute these words appear :

" * * * provided, however, this act shall only apply to property of which husband or wife may die seized of, which had been purchased by husband or wife during coverture."

only for the purpose of limiting the application of the Statute to property purchased during coverture.

The appellants further contend the Statute is inapplicable because the word "purchased" is not used in its technical sense. The appellants completely overlook the fact that a valuable consideration was paid for the property. And, further, should the conveyance be considered a gift, nevertheless to take by gift is to take by purchase.

The word "Purchase" signifies, in the statute under construction, the obtaining or acquiring title to lands and tenements by money, deed, gift, or any means, except by descent.

In *Berger vs. United States Steel Corporation*, 1902 (63 E. p. 809) the Court of Errors and Appeals in construing the signification of the word "purchase," in the General Corporation Act, when used as regards the retirement of shares of stock by purchase, said :

"There is a technical meaning given in the law to the word 'purchase' as applied to real estate, wider than its general signification; it is the acquisition of lands by other means than descent or inheritance."

The Court then stated that the definition of the word "purchase" as regards personalty was the

“acquisition of anything for a price, by the payment of money or its equivalent.”

In *State ex rel James Caldwell vs. Glenn*, 1883 (1 Pac. 186), the Supreme Court of Nevada in construing a resolution, namely,

“Resolved, that the President be and is hereby authorized on behalf of the Company, to deed and convey to purchasers, at his discretion, town lots in the Town of Hawthorne”

passed by the trustees of the grantor corporation in order to determine the authority of the officer executing the instrument to donate the property to the county, said:

“Does this resolution authorize the President, on behalf of the corporation, to donate the land to the county? We think it does. The use of the word ‘purchasers’ was not intended to limit his authority to only convey land to those who paid a price or value for the same. It is evident that the word ‘purchasers’ as used in the resolution, is more extensive in its meaning. In its broadest sense it includes the power to donate land to execute a conveyance by gift, and all other modes of personal acquisition of real property, except by descent or inheritance.”

In *Watson vs. Donnelly*, 1858 (28 Barbour (N. Y.) 653), the New York Supreme Court in construing the rights of an alien Britisher, to devise or leave land, by reason of the treaty of the United States with Great Britain, said:

“Heirs and ‘assigns’ were used in the last clause of this section of the treaty as embracing all who could in any manner succeed to the title of the alien owner, dividing them into two classes in reference to the mode of acquiring

title, to wit, those acquiring title by descent and by purchase, the latter class including devisees. Purchase in its most enlarged sense, signifies the lawful acquisition of real estate by any means whatever except by descent (2 Bl. Comm. 241). The term 'assigns' is as comprehensive as that of purchaser, or 'one taking by purchase.' It means those to whom rights have been transmitted by particular title such as sale, gift, legacy, transfer or cession. (Bourier's Dict. 'assigns' Booth's case 5 Co. Rep. 77L.) The treaty authorized the alien owner to 'grant, sell and devise,' and then gives to the 'assigns' all the rights of citizens, in respect to said lands."

In *Callahan vs. O'Brien*, 1893 (25 N. Y. S. 410) the Supreme Court, in following *Staumn vs. Bostwick*, to which it refers, said:

"The word purchase as used in Laws 1875 at 38, providing that aliens may inherit from a citizen who has purchased and taken a conveyance to real estate, is not used in its popular and commercial meaning as equivalent with to 'buy,' but in its proper extended legal meaning, as including every mode of acquiring land except by descent. 1890, *Staumn vs. Bostwick*, 25 N. E. 233, 122 N. Y. 48, 9 L. P. A. 597. The word 'purchase' in such law embraces only lands acquired by purchase, and does not apply to lands descended to deceased though owned and held at the time of the decease, and the same descends only to such liens as are citizens."

Accord and construing the same statute: *Branagh vs. Smith*, 46 Fed. 517.

In *Greer vs. Blanchard*, 40 Calif. 194, a parcel of real property was conveyed to a trustee "in trust for the use and benefit of Harriet M. Risley and S. Risley."

The Court said:

"By means of that conveyance, the equitable estate in the premises was vested in the Risleys, as joint tenants. It is objected that they did not become joint tenants, because they did not come to the estate by purchase."

A joint tenancy being defined by Washburn on Real Property, Vol. 1, p. 421, to be

"where several persons have any subject of property jointly between them in equal shares by purchase."

The Court continued:

"It is not alleged that they acquired the estate by inheritance, but it is alleged that it was conveyed to them. Purchase includes every mode of coming to an estate, except inheritance."

The appellants content the statute is inconsistent because it abrogates a right of the sisters of Edward W. Weyer. The contention is clearly unsound in principal and fact. It is well settled that there can be no heirs of a living person, and until his death the sisters had no vested interest with which the Statute could interfere. They had merely the possibility that if Edward W. Weyer died intestate, they would have taken, had the Act in question not been passed.

The Statute is a general law regulating the descent of real property of anyone dying "here-

after," clearly not interfering with vested rights.

The Appellants cite the New York case of *Cummings vs. Priest*. If the reading of the same opinion is continued, we find these words:

"The subsequent statute of 1808, in part materia, has given a legislative construction to the act of 1802, by providing that 'all persons authorized to acquire real estate under these acts, may also take by devise' thus evidently showing that in the former act the broader sense of purchase, which would include devise, was not meant, but the more limited, natural and common one of buying. Besides this, the preamble of the act of 1802, above cited, speaks of the resident aliens, for whose relief it was passed, 'having expended the greater part of their capital in purchasing and improving real estate,' and in the body of the act the estates so purchased are spoken of as to them granted. This is the same principal of interpretation (though stronger in its application) as that on which in *Twyne's* celebrated case, the Statute of 27 Elizabeth was held to apply to purchases for money or valuable consideration, in consequence of the word paid in one of the clauses, limiting the broader sense of the word purchases." 3 Rep. 83, 4 Cruise 382.

Clearly indicating that no other construction was possible in that case.

II.

The line of cases which allow oral proof of a promise to make a will are inapplicable and the Statute of Frauds is a bar to this admission of such testimony given in the instant case.

There is one basic principle found in the cases

where a conveyance has been made or an act performed in return for a promise to execute a will, absent in this case.

That is, one party to the agreement has performed his part of the agreement, and the other party has given only a promise to do something in the future. Nothing more.

As the Court said in *Johnson vs. Hubbell* (10 Eq. 332 at 339) :

“The part of the agreement which the son was to perform was to be performed in praesenti, and that part to be performed by the father was to be performed in future.”

The case of *Lozier vs. Hill* (68 Eq. 300) clearly sets forth this contention, that where a consideration has been paid by the one promising to execute a will, the promise is within the Statute of Frauds and unenforceable—although the promise has been proven beyond question or admitted.

In *Lozier vs. Hill* the complainant conveyed to her brother, a lot for the actual consideration of \$1,000—although this consideration stated in the deed was \$1,450. The complainant stated at the time she believed the lot to be worth \$500 more. It was alleged the brother promised to build a house on the lot and devise it to the complainant, on his decease, and that she relied on his promise, contradicting the respondent's contention that *Lozier vs. Hill* is inapplicable because the alleged promise to devise back was not alleged to have been made at the time of the conveyance. On the facts the cases are identical.

The complainant in *Lozier vs. Hill* files this bill to have the promise specifically performed.

Vice-Chancellor Stevenson said :

“The alleged contract of Mr. Kip to devise the land in question to the complainant is with-

in the statute of frauds. Browne Fraud, 263; Johnson *vs.* Hubbell, 10 N. J. Eq. (2 Stock.) 332; Gould *vs.* Mansfield, 103 Mass. 408; Harder *vs.* Harder, 2 Sandf. Ch. 17."

Further,

"No facts are proved which exempt the alleged oral contract from the operation of the statute of frauds."

"There was no fraud in the transaction. No fraud will be effectuated in case the promise to devise was made and the complainant fails to get the land by devise or by the decree of this court. In such case the complainant will not be defrauded, but will merely suffer from the non-performance of a promise which is not legally enforceable."

The learned Vice-Chancellor clearly sets forth the rule in stating,

"If the conveyance by the complainant to Mr. Kip was such part performance as takes the alleged verbal promise out of the operation of the statute, I see no reason why any one of ten thousand grantors of land may not get his land back by a lease, a conveyance in fee or a decree by simply proving by parol that he sold his land at a smaller price than he otherwise would have accepted upon the verbal promise of the grantee to lease, convey or devise it back. That all conveyances of land after the decease of the grantee are subject to such a possible defeasance, is certainly a very startling suggestion.

The conclusion on this branch of the case is that the statute of frauds is a complete defence to the whole case made out by the com-

plainant, assuming that the parties intended to make, and did make, so far as possible by mere words, the contract set forth in the bill of complaint.

3. Precisely the same result is reached if we exclude the statute of frauds from consideration and apply the well-settled rules which protect written contracts from impeachment by parol testimony. The effect of giving force to this alleged oral contract would be to alter radically a most solemn contract in writing—a conveyance of land under seal—and to convert what on its face is an absolute conveyance of the whole legal and equitable estate into a conveyance of a life estate only, leaving an equitable estate in reversion vested in the grantor.

As has already been pointed out in discussing the relation of the statute of frauds to the case, no actual or constructive fraud or other sufficient reason has been shown which would justify any court in dealing in such a violent manner with this plain written contract. No exception on behalf of the complainant is established which takes her case out of the operation of the wholesome general rule excluding parol testimony when offered to alter the meaning of a complete, intelligible, written contract.

In connection with this point it is well to consider the appalling results which might follow if this grantor, who made this conveyance of land in fee, after sleeping on her rights upon a plea of poverty or mistake of law until her grantee and her grantee's devisee have both died, should be allowed by parol testimony to inject into the written contract a contemporaneous oral agreement, and thereby establish in herself a full reversionary ownership."

The Court then stated on page 308:

“If the land had been conveyed for no consideration, or for a plainly inadequate consideration, then the alleged parol contract would have explained a transaction which otherwise would appear to have been an extraordinary one, involving an unreasonable and improvident gift.

There is not a single act shown to have been performed by either party to the alleged parol contract which is not referable to the written contract, or which can be attributed to the parol contract except by calling in parol evidence to contradict the written contract. Of course, I leave out of view the claim that the land was sold for an inadequate price, because I have found that such claim is entirely unsupported by the proofs.”

The son, the respondent's husband, beyond question gave a valid and substantial consideration for the property, and there is no evidence in the case that the consideration was inadequate, as the learned Vice-Chancellor stated in his opinion. The father received a purchase money mortgage of \$5,000.00—to redeem said mortgage this suit was begun—the daughter, Emma, received \$5,000.00 in cash and a purchase money mortgage of \$5,000.00, which mortgage was subsequently paid off.

It is therefore clear that the respondent's husband actually paid the sum of \$15,000.00 for the property, without considering the transaction in the light of a payment for their services.

The respondent contends that the amount paid was the full and substantial value of the property at the time of the conveyance. Although no evidence was submitted by the respondent as to the

value of the property, it is respectfully submitted that the consideration given for the conveyance, being not merely a nominal consideration, is sufficient. Further, that this should be considered the value of the premises unless there is evidence to the contrary. The respondent contends that there was no testimony to the contrary.

Vice-Chancellor Stevenson stated in *Lozier vs. Hill, supra*, on page 309 :

“The further claim that the land was sold for a less price than complainant would have been willing to accept is of no importance, because the complainant’s state of mind on that subject is evinced by parol evidence only.”

The Court in *Lozier vs. Hill* then said :

“The account given by all the witnesses, including the complainant, indicates very strongly that the complainant, in making the particular bargain under investigation, was absolutely free from any influence from her brother, and asserted her views, which were hostile to his wishes, with independence and energy. She denied his repeated requests that she sell him the lot for the amount which he offered (\$1,000), and it appears from the complainant’s testimony, as well as from that of her daughters, that her brother practically accepted such denial as a finality. Mr. Kip then made his new offer, which included the devise of the lot back to his sister after the house should be erected upon it. The complainant most distinctly testifies that this new offer was the inducement which persuaded her to make the conveyance to Mr. Kip. Assuming that the oral contract was made, the situation presented, in my opinion, is the ordinary

one where a party competent to contract has voluntarily, with full knowledge of all the facts, and with the aid of independent advice, made a contract which is not enforceable on account of the provisions of the statute of frauds. If the mere relation of brother and sister, with the ordinary incidents of friendship which usually accompany that relation, are sufficient in this case to convert an absolute deed practically into a conveyance of a mere life estate, and bind the grantee, who has paid full value, to add several thousand dollars in value to the property before it is to revert to the grantor, then it seems to me a long step is taken towards removing all contracts between brothers and sisters, or other near relatives, or even intimate friends, from the protection of the statute of frauds.

The only performance of the contract on the part of the complainant consisted in her conveying the land for the sum of \$1,000 which she received. She stands in no better position than if she had paid \$500 in cash as the consideration of a promise made by her brother to her to erect a house on a lot belonging to him, and then to devise the house and lot to her at his death.

Payment in whole or in part of the consideration does not exclude the operation of the statute. *Browne Fraud*, 461 et seq; *Pom. Spec. Perf.* 106; *Brown vs. Brown*, 33 N. J. Eq. (6 Stew.) 650, 660; *Lippincott vs. Bridgewater*, 55 N. J. Eq. (10 Dick.) 208, 210; *Cochrane vs. McEntee*, 51 Atl. Rep. 279.

The conveyance of the lot to Mr. Kip was not an act which in the slightest degree suggests the alleged parol contract to devise it back to the complainant. On the contrary, this

conveyance is a distinct transaction which seems to be a natural and proper one for the parties to make, and does not call for the alleged parol contract, or collateral contract, for its explanation. The alleged parol contract in fact contradicts the complete written contract which the parties made.

That the case of *Losier vs. Hill* is clearly similar to the instant cases may be noted by the following excerpt from the cases.

The Court said :

“The conversation which related to the purchase of the lot for \$1,000. bears every appearance of being a business transaction; the conversation in which it is alleged Mr. Kip agreed to devise the lot back to his sister, with a dwelling house erected upon it, lacks many of the marks of a strict business transaction. While the parties contemplated that Mr. Kip would not live very long, the time of performance was wholly indefinite. Mr. Kip was obliged to build a house upon the lot which would go to his sister at his death, but what the character or value of the house was to be was in no way defined. It is evident that Mr. Kip might have carried out the alleged contract to the very letter in various ways, involving a difference in the value of the pecuniary result to his sister extending over a range of many thousands of dollars.”

The complainant in *Lozier vs. Hill* then testified :

“We talked it over some time. Brother Isaac (a brother who was present during the conversation) persuaded me to let him have it, as he

was ill and needed a home, and we ought to humor him and let him have it; so I did so."

Edward T. Weyer, the father, testified on page 38 of the testimony:

"A We just talked it over and we said, and I said—well, he was always sick, he wanted the business and the property, he wanted that all by himself."

The discussion as regards taking care of the sister Emma then followed.

Other than the actual monetary consideration paid, there was a further consideration for the conveyance, as the testimony clearly discloses.

The respondent's husband, Edward W. Weyer, and Emma Anderson, his sister, and Blanche Weyer, the respondent, had worked since they were children—the latter since her marriage—in the father's bakery shop *without compensation*.

As the Complainant did in *Van Duyne vs. Vreeland* (11 Eq. 370). On page 375 the Court said:

"That said Vreeland received the exclusive services of the complainant from the time he was able to work until he was 25 years old, and continued to work for him, and do his business until he was 33 years old; that the complainant never went to school, but was all this time employed in working on the farm of said Vreeland, performing the duties and work of a common laborer, and never received any pecuniary compensation for his services."

It was held that inasmuch as such services were the real consideration for the promise to devise the property to the complainant specific performance of the agreement should be decreed.

Can it be fairly contended that the father had no intention to repay his children and his daughter-in-law? The proofs clearly show that \$5,000.00 in cash and \$5,000.00 in the form of a purchase money mortgage were received by Emma. The father took back a purchase money mortgage of \$5,000.00 and conveyed the property to his only son, who had worked all his life in the bakery without compensation, and who was the natural person to succeed his father in business. The benefits accruing from the conveyance would partly inure to his daughter-in-law who worked, as the testimony shows, for 18 hours a day without compensation since her marriage to the intestate.

The respondent therefore contends a full and substantial consideration was paid for the conveyance by the father to the son, and the line of cases that the appellants contend admit oral testimony for the purpose of proving a promise to make a will, are inapplicable and the Statute of Frauds bars such testimony which varies the terms of the written contract.

In the case of *Dougherty vs. Dougherty, supra*, a son agreed to take care of his father and mother during their lives, in consideration of the father leaving the lands to him.

Vice-Chancellor Church said:

“The testimony is clear and distinct as to the agreement, and also as to the fact that Adam gave the best years of his life to the services of his parents.”

The father gave no consideration in return for the services of the son, and his payment of the taxes, etc., except he made a promise to convey the lands to the son.

Vice-Chancellor Church said:

“He performed his share of the contract in full, and it would be, in my opinion, a gross fraud to say now that he should not have the agreement carried out in its fullest terms.”

Likewise in the late case of *Antonsanti vs. Van Brunt* (140 A 276), the complainant took title to property in his wife's name and paid for it himself in consideration of her promise to devise the property to him for life, remainder to his children.

Vice-Chancellor Backes said:

“ * * * he has performed his part of the bargain, and the statute is not available to bar relief.” Citing *Johnson vs. Hubbell*, 10 Eq. 332, *Duval vs. Duval*, 54 Eq. 581.

Therefore, in the *Antonsanti* case, as in the cases cited—and as in every case where the Courts have held an exception to the Statute of Frauds—the party making the promise to devise the property, has given no consideration whatsoever for the performance of the contract by the other party.

The rule being indicated by Vice-Chancellor Pitney in *Kastell vs. Hillman* (53 N. J. Eq. at p. 53) when he stated:

“There is little room to contend that the deed complained of has any valuable consideration.”

The proof in that case clearly showing no consideration was paid.

In accord:

- Johnson vs. Hubbell*, 10 N. J. Eq. 332.
- Van Duyne vs. Vreeland*, 12 N. J. Eq. 143.
- Davison vs. Davison*, 13 N. J. Eq. 246.
- Pflugar vs. Pultz*, 43 N. J. Eq. 440.

Duvale *vs.* Duvale, 54 N. J. Eq. 581.

McEvoy *vs.* Brook, 89 N. J. Eq. 37.

Cooper *vs.* Colson, 66 N. J. Eq. 330.

The respondent further strenuously contends that the proofs are neither clear nor convincing, as the cases require the evidence to be. Vice-Chancellor Church so held in the case of *Dougherty vs. Dougherty*, (*supra.*) in stating:

“The testimony is clear and distinct as to the agreement, and also as to the fact that Adam gave the best years of his life to the services of his parents.”

And it is worthy of note that the respondent and her husband performed like services in the instant case.

Professor Pomeroy, in dealing with the essential character of such acts in part performance of a parol contract as remove it from the operation of the statute of frauds, and the proper mode of proof of such acts, states the law as follows:

“A plaintiff cannot, in the face of the statute, prove a verbal contract by parol evidence and then show that it has been partly performed. This course of proceeding would be a virtual repeal of the statute. He must first prove acts done by himself or on his behalf which point unmistakably to a contract between himself and the defendant which cannot, in the ordinary course of human conduct, be accounted for in any other manner than as having been done in pursuance of a contract, and which would not have been done without an existing contract; and although these acts of part performance cannot of *themselves* indicate all the terms of the agreement sought to be enforced,

they must be consistent with it, and in conformity with its provisions when these shall have been shown by the subsequent parol evidence. It follows, from this invariable rule, that acts which do not unmistakably point to a contract existing between the parties, or which can be reasonably accounted for in some other manner than as having been done in pursuance of such a contract, do not constitute a part performance sufficient in any case to take it out of the operation of the statute, even though a verbal agreement has actually been made between the parties. It is for this reason, among others, that payment of the purchase price, in whole or in part, is not of itself a sufficient performance to obviate the statute, because the mere payment of money by one man to another does not, in the ordinary course of human conduct, indicate the existence of a contract between them; the fact of such payment is reasonably explicable in many other ways than as having been done in pursuance of a contract." Pom. Spec. Perf. 108.

In most cases the contract itself has been admitted.

Johnson vs. Hubell, supra.

Van Duyne vs. Vreeland, supra.

Davison vs. Davison, supra.

Pflugar vs. Pultz, supra.

Duvale vs. Duvale, supra.

McEvoy vs. Brook, supra.

Cooper vs. Colson, supra.

In the late case of *McEvoy vs. Brook* (89 N. J. Eq. 37) Vice-Chancellor Leaming said:

"But a further, and I think unsurmountable, difficulty is found in doubts which must be

said to exist as to whether defendant in fact engaged to repurchased the lots.

“In all suits for specific performance clear proofs of the contract are required to support that form of extraordinary relief. But to enforce specific performance of a parol contract for the sale of real estate, it is even more imperative that the proofs of the contract shall be clear and convincing. In *Eyre vs. Eyre*, 19 N. J. Eq. 102, 104, that rule is expressed as follows:

“‘But, if I only doubted, the relief must be denied. The complainant or actor, in all cases, must prove his case to the satisfaction of the court; but in these cases, where the provisions of the statute of frauds are to be set aside by some act of specific performance, clear proof is eminently required. This salutary statute should not be lightly dispensed with. And the uncertainty and unreliability of much of the evidence in this case shows the wisdom of that statute and throws a doubt over the doctrine of equity that part performance will take the case out of it.’”

Justice Fort, speaking for the Court of Errors and Appeals, in *Cooper vs. Colson* (66 N. J. Eq. 330) said:

“In every case, in order to take the case out of the statute on the ground of part performance, irrespective of other questions, two things are requisite. The terms of the contract must be established by the proofs to be clear, definite and unequivocal, and the acts relied on as part performance must be exclusively referable to the contract. *Wallace vs. Brown*, 2 Stock. 308; *Brown vs. Brown*, 6 Stew. Eq. 650.

"She in no way changed her mode of living, or course of life, or life work, because of them. What she did was of such a character as to be easily and adequately compensated on the quantum meruit. There is nothing to establish that she had abandoned any other plan of life work or calling to devote herself to the deceased in consideration of the promised conveyance of a farm. Most scrupulous care should be exercised by the courts in this class of cases, and especially where one of the alleged contracting parties is dead. An allegation of an agreement to convey is easily made, and casual conversations or jocular remarks of intent to devise or convey at death can readily be turned into serious import. The statute declares that agreements to convey land not in writing are void. If equity is to overthrow the statute, on the ground that, owing to the peculiar character of the facts in a given case, it would be a fraud not to hold one of the contracting parties estopped from setting up the statute, such power should be exercised upon the most clear proof, not only of the contract to devise or convey the land in question, but of the fact that the rendition of the services was wholly referable to the contract to convey, and solely predicated upon that agreement, and that proper and adequate compensation for the services cannot otherwise be made, because of the fact that, in reliance upon the contract, it appears reasonably probable that the complainant has irretrievably changed the whole course of his life and circumstances in order to fulfill his part of the agreement."

The mental attitude of the appellants and the witness, Greger, toward the respondent is apparent

throughout and their entire testimony unconvincing.

III.

Should the conveyance be considered a gift—although, as the testimony clearly shows, an ample consideration was given—the only inference that can be deduced from the testimony is that there existed a plan or scheme—upon which the Courts look with favor—on the father's part to make a final provision for the members of his family, including the respondent, his daughter-in-law, who had worked faithfully without compensation.

First, the plan or scheme to make a final provision is shown because the youngest daughter, Irene, who had not worked in the bakery, received nothing when the conveyance was made to the son, indicating the father would provide for her in the future from his other properties; while her sister, Emma, received \$10,000.00 for her share, although she intended ceasing work upon her marriage to the witness, Anderson. And the only son received the property—his wife sharing in the benefits thereof—after the payment of \$5,000.00 to Emma Anderson in cash and subject to the two purchase money mortgages amounting to \$10,000.00.

Second, the plan or scheme to make a final provision is also clearly shown because had the father demanded that his son promise to devise the property to him (the father) or his daughters, what was the purpose in the payment of \$10,000.00 to the daughter, Emma, who worked without compensation in the store to the exclusion of the daughter, Irene, who did not work in the store.

It is obvious that the son and his wife, the respondent, were intended to carry on the business, and the payment of \$10,000.00 to Emma and \$5,000.00 to the father represented earnings in the

business for a period of many years, clearly indicating the father's intention to make a final and complete disposition of the business to his son. Otherwise, the son received no benefit whatsoever, especially if his span of life was to be as short as the appellants testify they believed it to be.

Therefore it is quite clear (disregarding the actual consideration paid) that the plan or scheme was to make a final provision for those—including the respondent—who in justice deserved compensation for years spent in arduous labor in the bakery shop.

The rule is well settled that the services rendered by the children, Emma and Edward Weyer, and Blanche Weyer, the respondent, were a valuable consideration for the conveyance, as well as the \$15,000.00 paid.

Ordinarily the services rendered by children to parents are deemed gratuitous, yet it is well settled that where such services are indispensable, and had the services not been rendered by the children, but must have been obtained from a stranger for compensation, a presumption will arise that the children were to be paid for such services.

DeCamp vs. Wilson, 31 N. J. E. 656.

In re Millans Estate, 2 Misc. 300, 134 A. 360.

In re McDonalds Estate, 4 Misc. 542, 133 A. 884.

IV.

To permit oral testimony to vary such a written agreement, would abrogate the Statute of Frauds.

The respondent contends that to permit such testimony is to open the door to unlimited fraud. In the instant case the respondent's husband paid an actual valid consideration for the property, and having died is not present to deny or affirm the

agreement alleged to have been made and, according to the appellants' testimony, his wife, the respondent, strangely was never present at the time of the alleged discussions, although a stranger, Greger, was. That a consideration was paid cannot be questioned, and the contract made by the intestate for his own and his wife's benefit should not be impaired.

Oral testimony, to prove a promise to execute a will in return for the conveyance of a valuable property, is allowed in order that no fraud may be practiced on the party who has already performed under the contract, yet to allow such oral testimony in the instant case is to open the door to fraud, which the exception to the Statute of Frauds was made to prevent.

Vice-Chancellor Stevenson so held in *Lozier vs. Hill*, see page 9 of this brief.

Respectfully submitted,

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with Complainant-Respondent.*