

New Jersey Court of Errors and Appeals.

WILHELMINA SCHIPPERS, EXE-

CUTRIX, ETC.,

Defendant in Error,

and

RHEINHOLDT HERMAN KEMPKE,

Plaintiff in Error.

On Bill.

Brief of Charles B. Dunn and Michael Dunn,
of Counsel with defendant, Rheinholdt Herman Kempkes.

STATEMENT OF FACTS.

The complainant, Wilhelmina Schippers, brings this suit as one of the executors of the last will and testament of Elizabeth Kempkes, deceased, against Rheinholdt Herman Kempkes.

The testatrix was the mother of the complainant and the defendant, and of Genoviva Gross. Her will bears date November 21st, 1903. The testatrix died November 23rd, 1903, and the will was probated December 4th, 1903, in the office of the Surrogate of Passaic county.

The three children above named were appointed executors by the will, but Mrs. Gross renounced and did not qualify, and letters testamentary were

issued to the complainant and her brother, the defendant.

The undisputed evidence (p. 100) shows that the testatrix was a widow, and came to this country from Germany about the first of January, 1891, and began keeping house here with her two sons, Peter and Herman, who were working in the silk mill at Paterson. When she arrived she had less than one hundred dollars in money (p. 110, l. 20). Herman had been in this country for several years prior to this.

The two sons arranged with their mother that she should take charge of their earnings, and run the house, and that whatever was saved would be for the benefit of herself, Peter and Herman, as the other children were married and were away and were able to take care of themselves.

In pursuance of this arrangement, the two sons went to work and contributed their earnings to their mother, with the exception of \$2.00 per week, retained for spending money. Afterwards, on March 7th, 1891, the mother opened a bank account in the Paterson Savings Institution in her own name, with the knowledge and consent of her two sons, Peter and Herman. They continued living together until the month of March, 1893, when Herman left home and took a position in a silk mill in Pennsylvania, where he remained for four years, until March, 1897, when he returned to Paterson and resumed living with his mother and brother under the same arrangement as before, and he continued to live with his mother until April, 1903, when he got married, and after that, down to his mother's death, he continued to take his lunch with her at noon time.

Her son, Peter, remained with her until October 12th, 1900, when he left and went back to Europe, and he died there in September, 1903. Her son, Herman, continued to live with her until his marriage in April, 1903, as above stated, and she continued to keep house after that until her death in November, 1903.

The uncontradicted evidence also shows that Peter and Herman became engaged in the silk business (p. 120), and they were engaged in that business at the time that Peter left for Europe in October, 1900. It also appears (p. 101), that while they were living with their mother, they purchased a piece of property on Wayne avenue, on which Peter built a house worth about \$3,500, and that the whole property was worth about \$6,000 (p. 102, l. 5). The Bridge street property was also purchased, and the title to both was taken in the name of Peter for himself and Herman (p. 108).

The uncontradicted evidence further shows (p. 107), (p. 108), that when Peter decided to go back to Europe, that he went with Herman to the office of Philip Briody, an attorney-at-law, of this state, in the city of Paterson, to settle up his business affairs, and he wanted to convey by deed all the property to his brother Herman, who was going to remain here, and who was still living with his mother; that during the conversation concerning the conveyance, it was then suggested by Mr. Briody that on account of Herman then having a divorce suit pending with his wife, that it would be better to transfer the title of those lands to the mother, Elizabeth Kempkes, to hold for Herman, so that if he desired to sell the same, he could do so, and his mother could make a good deed, where-

as, if it was in Herman's name, he might have trouble and delay in giving a proper deed to the purchaser.

As to the personal property it was arranged that a bill of sale for the goods and chattels in the business, and a bill of sale for the household goods in the home of his mother, should be made by him to Herman, as the divorce suit would not interfere with him holding and disposing of that. In pursuance of this arrangement, two bills of sale were made by Peter Kempkes to Herman Kempkes, bearing date October 9th, 1900, both of which were recorded in the Passaic County Clerk's office on October 11th, 1900, and are marked "Exhibits D-1 and D-2". (P. 184.) At the same time, a deed was made by Peter Kempkes to the testatrix, Elizabeth Kempkes, marked "Exhibit D-6" which said deed bears date October 9th, 1900, and was recorded in the Passaic County Clerk's office, on October 11th, 1900, by which the title to the Wayne avenue property and the Bridge street property was conveyed to her.

Before Peter went away, he had taken out an insurance policy in the Prudential Insurance Company, on which the annual premium was \$21.75, and which policy was payable to his estate. During the first year of his absence, (p. 106) the premium was paid by Herman. Afterwards, it was arranged with Peter that he ought to make it payable to his mother, if she was living, or to Herman, in case she was dead, and then they would keep up the premiums on it. This transfer of the policy was made payable in this way, and the premiums were afterwards paid by Herman and his mother. Peter having died in September, 1903, and his

mother surviving him, she became entitled to the proceeds of this insurance policy, which amounted to \$1,271.50. The same was collected after her death by her executors and treated as a part of her estate. (P. 106.)

She also held a real estate mortgage in her own name against her daughter, Wilhemina Schippers, and husband for the sum of \$500.00. This was also treated as a part of her estate by the executors.

The undisputed evidence also shows that in November, 1903, (p. 32) the defendant, R. Herman, had negotiated a sale of the Bridge street property with Mr. Louis Brich for the sum of \$3,000.00. This was one of the pieces of property conveyed to his mother by Peter Kempkes when he left for Europe in October, 1900, (Exhibit D-6, p. 184) and which he intended to convey to Herman, but, as stated above, he conveyed it to his mother instead to avoid any trouble about giving a deed as Herman was involved in divorce proceedings with his wife. On this property there was a thousand dollar mortgage, which was paid out of the selling price, and there was also some interest and other expenses paid out, leaving a balance of \$1,870.00, as the net proceeds of sale. This money was taken to the Paterson Savings Institution and deposited by Herman and his mother on November 12, 1903, to the credit of their joint account which they had there. This bank account stood in the names of "R. Herman Kempkes or Eliza Kempkes." At the death of the mother, there was a balance to the credit of this account of \$1,811.26. The bank book was in the possession of the defendant, R. Herman

Kempkes. R. Herman draw out from this account, after the death of the testatrix, the sum of \$500.00 leaving in the bank a balance of \$1311.26, at the time this bill was filed. In making up an inventory of the estate of the testatrix, the complainant in this case, being one of the executors, claimed that the money standing to the credit of this account was a part of the estate of her mother, Elizabeth Kempkes. The defendant, Rheinholdt Herman Kempkes, denied this claim, and insisted that the money in the bank to the credit of this account belonged to him and not to the estate, and that as survivor, he had a right to draw the same.

Efforts were made to bring about an adjustment without litigation, but they were unsuccessful. The complainant filed this bill to compel the defendant to pay over all the moneys to the credit of this Savings Bank account to the executors of the estate of said Eliza Kempkes, and to obtain an injunction restraining the defendant and the bank from withdrawing the same except by decree of this court.

The vice chancellor decreed that the said money belonged to the estate of Eliza Kempkes, and not to the defendant, R. Herman Kempkes, and that the said defendant was not entitled to the ownership thereof. He further decreed that the Patterson Savings Institution should pay over this money to the executors to be deposited with the other funds of the estate. He further decreed that the defendant should pay a counsel fee of seventy-five dollars to the complainant's solicitor, besides the taxed costs.

From this decree, an appeal (pp. 1-5) was taken,

and the whole matter is now before this court for decision.

I.

We contend that the complainant has failed to establish by a preponderance of the evidence that the money due on this Savings Bank account belongs to, and is to be administered as a part of the estate of Elizabeth Kempkes, deceased.

The rule of law applicable to cases of this kind is well considered and stated in the case of *Dunn vs. Houghton*, 51 Atl., 71. That was a contest between executors and one claiming the account as donee of the testatrix. In that case, the money was deposited in an account with the Emigrants Industrial Savings Bank of New York, and was credited to "Mary King or niece Katie Pender." The signatures of both were placed upon the book kept by the bank for that purpose, and the court says, that in the absence of other evidence both of these persons entered into the usual depositor's contract with the bank, and the bank entered into such contract with both of them, and after a lengthy review of the evidence adduced, and of the cases bearing upon the question, the court holds that the niece was entitled to the fund on the death of her aunt who made the deposit. The court further held the following to be the law, "The creation of the original contract with the Savings bank by the testatrix vested a complete

contract right in the complainant which the complainant could use to recover money from the bank ; and such rights being vested with a distinct donative purpose, and not for the use or convenience of the testatrix, the case is presented of a complete gift *inter vivos*."

"The fact that under the contract the donor had the power to collect the entire debt due from the bank and make the donation of no value to the donee does not alter the legal character of the transaction as a gift."

WHAT IS THE EVIDENCE BEFORE THE COURT IN RESPECT TO THE ACQUISITION OF PROPERTY AND THE CREATION OF THIS BANK ACCOUNT?

That the defendant, R. Herman Kempkes, (p. 100) came to this country about twenty-six years ago, and was engaged working here in the silk business ; that in 1890, at his instigation, the testatrix, being a widow, came over from Germany in company with another son, Peter Kempkes, and about the first of January, 1891, they began house-keeping. The sons worked in the silk mill, and arranged with their mother to keep house for them and to take care of the earnings, and that whatever was saved would be for the benefit of her, Peter and R. Herman, as the other children were married and had gone away, and were able to take care of themselves.

P. 110, l. 20, that the testatrix brought very little

money with her from Germany—not a hundred dollars.

That in pursuance of this arrangement, the two sons went to work and contributed their earnings to their mother for the maintenance of the household, and to save up for them. On March 7, 1891, their mother opened a bank account in the Paterson Savings Institution. There she made deposits from time to time from the moneys contributed to her by her sons, Peter and R. Herman, and whatever she was able to save out of the small income which she was receiving from her husband's estate in Germany, which amounted to about ninety dollars a year, down to the year 1899, (p. 103, l. 25) and after that for two years she received about one hundred and fifteen dollars a year (p. 105) to 1901, and after that she only received fifty dollars a year up to her death in 1903, making in all for a period of thirteen years the sum of eleven hundred and forty dollars, or an average of \$87.70 per year. This was just about enough to keep her in clothes.

The evidence also shows (p. 110) that in July, 1899, she went to Germany to settle up her husband's estate; and returned with \$1,658.81 which was deposited in said savings bank on July 28, 1899, and that she never received any other money from Europe (l. 1 to 20); that R. Herman and Peter lived with their mother until March, 1893, when R. Herman went to Pennsylvania, and did not return until 1897 (p. 100, l. 20), and that after that he continued living with his mother and brother, the same as before, until October, 1900, when his brother Peter decided to return to Europe, (p. 101); that during the period, from 1895 to 1900, he and his brother purchased two

pieces of property, one in Bridge street, and the other on Wayne avenue, but the title was taken in Peter's name (p. 101, l. 20, 23) ; that on the Wayne avenue property a two story frame house was built by Peter, costing about thirty-five hundred dollars (p. 102, l. 4), and the whole property at the time of the death of the testatrix was worth about \$6,000 ; there was a mortgage upon the same for \$2,600, leaving an equity of \$2,400 in the Wayne avenue property. That on the twelfth of October, 1900, Peter decided to return to Europe ; at that time, he and R. Herman were engaged in the silk business under the name of Kempkes Brothers, and the evidence shows that Peter intended to convey all the property to R. Herman, both real and personal (p. 108), but at the suggestion of Mr. Briody, the attorney, to whom they went to have the papers drawn, owing to the fact that R. Herman was involved in a divorce suit with his wife, the title to this property on Wayne avenue, and on Bridge street was transferred to the testatrix as a matter of convenience and to avoid any complications in case R. Herman could find a customer to purchase the same, as they wanted to sell them both. The testatrix spoke to Mr. Brick about selling it to him, after he had purchased the Bridge street property ; he mentioned it in his testimony as the "Totowa House" (p. 24, l. 25) that being the name of the section of the city in which it is located. The deed conveying this property to the testatrix from Peter, bears date October 9, 1900, and is recorded October 11, 1900, in the Passaic County Clerk's office. Two bills of sale, one for the furniture in the house in which testatrix was

living (Exhibit D-2) and the other for the interest in the goods and chattels of the business carried on by Kempkes Brothers (Exhibit D-1) both bear date October 9th, 1900, and were both recorded in the Passaic County Clerk's office on the same day as the deed to the testatrix ; this was the day before Peter went away to Europe. After Peter left, the defendant, R. Herman, continued to live with his mother and carried on his business and looked after the property and the rents (p. 142, l. 24), and aided in paying the taxes on the property which had been allowed to accumulate (p. 109, l. 30). This testimony stands uncontradicted and shows the interest and the rights of R. Herman Kempkes and his mother in the Bridge street property and the Wayne avenue property and in the bank account.

EVIDENCE AS TO THE TRANSFER OF THE BANK ACCOUNT.

P. 110, l. 40, in the month of February, 1903, R. Herman had a conversation with his mother, and suggested to her that she was getting along in years, and as he had contributed toward the money used in acquiring the property, she ought to make some kind of a paper as protection and security to him in case she should die. She told him that she did not like to make a will. P. 111, l. 10, he then said to her, "this is no encouragement to me the way things are now; I am very doubtful whether it comes back. The Schippers [meaning the complainant and her husband], never bother about you at all. There is Eva, she lives in Brooklyn. We

always contributed money to her and toward her support." That his mother then said, "We go to the bank and whatever will be in the bank that will be your money."

He further says (l. 25) that he and his mother went to the bank and had a talk there with Mr. Merselis, the treasurer, and Mr. Botbyl, one of the tellers who could speak German. On p. 113, l. 25, on arriving at the bank he met Mr. Merselis and said "Now, mother is dealing with the bank all these years and she wants that money whatever is in the bank to be transferred over to me, that she or I are the only owners of it." That Mr. Merselis called in another man who understood German so that she would understand and be contented; that after it was explained to his mother she said, "Yes, I want that; it don't belong to the other children. Whatever is in the bank is money that belongs to my son and me—but not to the other children." That Mr. Merselis then said we will make it out "R. Herman Kempkes or Eliza Kempkes" (p. 114, l. 10); "is that right, Mrs. Kempkes?" and she said "yes;" (l. 20) Mr. Merselis further said to her, "Now you can take that bank book and take all the money out, and so can R. Herman Kempkes draw all the money out. Whoever has that bank book owns that money. If you come without the book we cannot give you any money; if Herman Kempkes comes to the bank without that book he cannot get any money. The one who possesses the book owns the money, he said, it belongs to and is in the name of you two." He further says that his mother understood everything perfectly and often afterwards remarked to him not to mention to the other children anything

about it, and when they started to quarrel after the death of the testatrix, they did not know the money was in the name of the defendant, R. Herman, and payable to him as survivor.

A review of the evidence of Mrs. Schippers and Mrs. Gross shows that they had no knowledge of the transfer until they were informed by R. Herman after the death of the mother. He further says (p. 112) that Mr. Merselis wrote the words on the back of the book above the name of his mother, "R. Herman or," and that he wrote the same words inside of the book.

The testimony of R. Herman Kempkes is fully corroborated by the officers of the bank as to the transfer of the bank account to him by his mother and that she understood and intended that whatever stood to the credit of that account at the death of either would belong to the survivor.

Edo I. Merselis, the treasurer of the savings institution since 1869, testifies (p. 157), that he knew Mrs. Kempkes, the testatrix, and identifies the two bank books, the first one numbered 42,105, (Exhibit D-3) and the second one numbered 92,441 (Exhibit D-4). On p. 158 he says, that she was an active, intelligent woman, and on the fourteenth of February, 1903, she and her son R. Herman Kempkes, "came into my office and Mr. Kempkes said (p. 159) that his mother would like to have his name added to the pass-book so that either could draw. I asked Mrs. Kempkes if that was her wish and she said yes. She did not speak English very perfectly so that I got the teller, Mr. Botbyl, who speaks German, that he might make her fully understand the nature of the change that either could draw in their lifetime, or the survivor in

case of death could draw the money, and he talked to her in German and reported that she understood perfectly. I then called the clerk, and had Mr. Kempkes and Mrs. Kempkes sign the signature cards and added Mr. Kempkes' name on the book." He identifies the signature card (Exhibit D-50) (p. 183), and saw them sign it. P. 160, he further says, that under the rules and regulations of the bank in regard to deposits made in that way the money is to be paid to the survivor. He further testifies that when an old bank book became filled up it was the custom of the bank to transfer the account to a number 2 book in the same ledger, or if that ledger is running full, to transfer the account to a new number in a new ledger.

In this case the old book became full and was transferred to a new number and a new book. A new signature card was taken (p. 160, l. 21), and both signed their names to it. He identifies the card and it is offered in evidence and marked D-51, (p. 183). He further testifies (p. 161, l. 22), that he last remembers seeing Mrs. Kempkes on November 12, 1903; that she then called at the bank with Mr. R. Herman Kempkes, and with Mr. Dunn, her solicitor, and paid off a mortgage held by the bank for a thousand dollars, and made a deposit of eighteen hundred and seventy dollars. On p. 162, he says, the mortgage was paid from some money he had in hand, meaning R. Herman Kempkes, and it was not deducted or taken out of the bank. The deposit was the balance they had. He further says, (l. 5) that her condition that day was as active, and that she was just as intelligent, as he had observed her before.

The testimony of the defendant is also corrobor-

ated by *Justice G. Botbyl*, who had been a teller in the bank for over nineteen years before Mrs. Kempkes opened her account; that he knew her since she opened the account in 1891, and from that time until her death he had been continuously in the employ of the bank, and had occasion to frequently meet the testatrix personally. He speaks German. As to the change in the names on the account he says, (p. 164) on February 14th 1903, the name R. Herman Kempkes was added. As to how the change came to be made, he says, "Mr. Kempkes and his mother were in Mr. Merselis' office, and Mr. Merselis came to my cage and said 'I wish you would come over to Mrs. Kempkes and speak German to her.' He says, 'Her son wants his name added on the book and ask her if that is her wish'. So I asked Mrs. Kempkes in German if she wanted her son's name added on the book, and she said 'yes' I says, 'Do you understand that either can draw?' She says 'Yes, I do'. I says, 'And you understand in case of death of either the survivor can draw it?' and she says 'yes' and she wanted the name added on the book."

He further testifies to the signatures that were then made in his presence on the book and on the cards, and says that Mrs. Kempkes understood perfectly what she was doing, that there is no doubt about it; that during the time he had known her (p. 165, l. 12), she was an active, intelligent woman for a person of her years, and capable of attending to business. He further says (l. 20) that when the old book was full, that they took the signatures of Mr. Kempkes and Mrs. Kempkes on another card for a new book, and the balance was

transferred to this book, and he identifies the new card and book.

The new card and book were made out and signed on October 19, 1903, (Exhibit D-4), (p. 183).

REMARKS.

We contend that this evidence, which stands uncontradicted in the case, clearly shows that the property on Wayne avenue, worth about \$6,000, and in which there was a clear equity of \$2,400, and the property on Bridge street, which was afterwards sold for \$3,000, and in which there was a clear equity of \$2,000, after paying the mortgage held by the savings bank, and the money in the savings bank, was all the product of the earnings of R. Herman Kempkes, Peter Kempkes, and such part as may have been saved by their mother out of the income of ninety dollars a year which she received from Germany, together with the sixteen hundred and fifty-eight dollars which she brought over in July, 1899.

It was under these circumstances, and for these reasons, that R. Herman Kempkes spoke to his mother about making some kind of a paper to protect and secure him in case of her death. (P. 111.)

She told him that she did not want to make a will, but after talking the matter over with him said, "We will go to the bank, and whatever will be in the bank, will be your money."

They did go to the bank, and there explained to Mr. Merselis, the treasurer, that she wanted that account changed, that she wanted it put in her

name and in the name of R. Herman Kempkes, so that either could draw the money, and in case of death of either that the survivor could draw the money. The account was so changed on February 14, 1903. When the new book was made out on October 19th, 1903, he and his mother were again required to go to the bank, a new card was signed by them, and the new book was made out "R. Herman Kempkes or Eliza Kempkes," the same form as adopted in February, 1903, and the account was continued in that form to the present time.

The evidence of Mr. Brich, Mr. Merselis, and the defendant also shows that on November 12, 1903, the day the Bridge street property was sold, and the transaction was closed, that R. Herman Kempkes went with his mother to the savings bank, and there paid off the thousand dollars mortgage held by the bank against the property; and that they then deposited the sum of eighteen hundred and seventy dollars, as is shown by the bank book No. 92,441 which was the balance of the proceeds of the sale of this property, which had been conveyed to her by her son Peter when he left for Europe in 1900. This conveyance to her being so made, under the undisputed evidence instead of to R. Herman in trust and for convenience, to enable her to make a deed if they got a chance to sell it, R. Herman at the time being involved in a divorce suit with his wife, did not take title lest he might have trouble in giving a clear deed.

She held title to this property in trust for herself and R. Herman and she knew it. She knew that it was not her property. When Peter made a deed to her instead of to R. Herman she knew noth-

ing about it in advance ; there was no sale or purchase price paid. It was a voluntary conveyance to her. The deed was made out to her but she was in ignorance of it until informed by R. Herman and Peter in October, 1900, just before he left for Europe, when it was placed on record with bills of sale to R. Herman.

Under these circumstances we contend that after the Bridge street transaction was closed, and the sale made to the satisfaction of herself and R. Herman, that it was the just, honest, and the only thing for her to do, to go with R. Herman to the bank, and place this \$1,870, the proceeds of this sale in their joint names so that either could draw, or in case of death the survivor could draw out this money. Peter was then dead ; these two people were alone interested in that money. She knew what she was doing, She did not act under compulsion in making the deposit. She was carrying out her intention, that whatever was to the credit of that account at her death should belong to and go to the survivor, R. Herman.

Mr. Merselis saw her there at the bank on November 12, 1903, with her son, R. Herman, at the time the mortgage was paid and this money was deposited (p. 161, l. 25). It was the last time he recollects seeing her, and (p. 162) he testifies as follows :

Q. "Do you remember her condition on that day, whether she was just as active and intelligent as before ?

A. Certainly she was. "

The testimony of Mr. Botbyl (p. 164, l. 30) shows that she clearly understood that either could draw and that in case of the death of either, the survivor

could draw out any money to the credit of this account, and it was with that interest and for that purpose she wanted the name of R. Herman Kempkes placed on the pass book and on the books in the bank.

What stronger evidence could we have of the purpose of the mother ?

Mr. Merselis and Mr. Botbyl are clearly disinterested witnesses, and the probative force of their testimony taken in connection with the uncontradicted facts in the case justifies the court in concluding that it was the intention and purpose of the deceased that in case of her death any money to the credit of this account should be drawn by and belong to her son, R. Herman Kempkes.

In considering the mind of Mrs. Kempkes, the deceased, at the time, November 12, 1903, when this deposit was made of the proceeds of this sale, it should be borne in mind that her son Peter had died in Europe on September 7, 1903, about two months before, and that she then had proceedings pending for the collection of a life insurance policy on his life which was not paid until after her death, and which amounted to over twelve hundred dollars ; that some of the premiums on this had been paid by R. Herman after Peter went away. Peter changed this policy after going to Europe and made it payable to his mother, or in case she was dead to R. Herman instead of to his estate as it was originally drawn (p. 106, l. 7). R. Herman was to be the beneficiary in case his mother was not alive when Peter died.

This bears strong evidence that R. Herman, Peter and the mother were working together, and were interested in the protection of the survivor.

The complainant in the case and her sister, Mrs. Gross, both admit that they never did anything for their mother, but that she had helped them, and when she died she held a mortgage against the property of the complainant's husband, Henry Schippers, for the sum of five hundred dollars, and for two years before her mother's death Mrs. Gross admits (p. 78, l. 25) that she never called on her mother.

The defendant, R. Herman, was her protector, and on him she had to depend for assistance.

In addition to the facts here stated it should also be noted that when Mrs. Kempkes was taken sick she immediately sent for her son, R. Herman, and gave him the key to the bureau drawer in which she kept deeds, and papers, and the bank books (p. 122, l. 10) and told him to take charge of them; that he took possession of the papers and bank book, and has had possession of them ever since (l. 15).

During her sickness, when her daughters Mrs. Schippers, the complainant, and Mrs. Gross came there the mother never said a word to them in regard to these papers and bank book which had been delivered to R. Herman Kempkes.

The complainant (p. 58, l. 20-30) admits that she never saw the Savings Bank book before her mother's death, and that she never contributed a penny to her mother after she came to this country.

Another significant fact showing that Mrs. Kempkes, the testatrix, in her last sickness, did not regard that this savings bank account was any part of her estate, is shown by an inspection of her will (Exhibit C-6, p. 179).

No mention is made of this Savings Bank account in the will, although other matters of a similar nature are mentioned.

According to the testimony of Mrs. Schippers (p. 50, l. 16) there was no mention made of the money in the savings bank at the time the will was being drawn, and nothing was said about this bank book until complainant went with her brother, R. Herman, to have the will probated at surrogate's office over ten days after the mother's death.

No mention is made of it when the will is read over to the testatrix.

We contend that this fact is wholly in keeping with the understanding which the mother had in regard to the savings bank account. She knew that R. Herman as the survivor would have that money, and it would have been improper for her to have made any change in that arrangement. She had told R. Herman to say nothing about it to his sisters. She undoubtedly acted in keeping with that instruction, and made no mention of it to them. They did not know about the account until told by R. Herman some days after their mother's death.

In the face of these facts, and the law as settled in our state up to this time, the decision of the learned Vice Chancellor in this case is clearly wrong and should be reversed. To allow it to stand will lead to the greatest confusion and make it almost impossible for members of the bar to know what advice to give when a case of this kind is presented to them.

The evidence shows that this money in the bank was the result, in a large measure, of the contri-

butions made by R. Herman, and Peter, before Peter went away to Europe, and by R. Herman after Peter had gone away.

Their money had been invested in this real estate.

An examination of a copy of the entries in the two bank books, which are exhibits in the cause, and which are annexed to this brief for convenient reference, will show that the accumulations in this account were not made from the small income of eighty-seven dollars a year which the mother received from Europe.

The evidence demonstrates to the Court the reason why the testatrix put this account in the name of herself and son, and that it was her intention at the time that he, as survivor, should have the money to the credit of this account.

An analysis of this testimony, and giving to it its full effect will show that the learned Vice Chancellor, in considering this case, in his oral opinion, overlooked many important facts and failed to accord to the evidence its full probative force as recognized and required by other decisions of courts of this State and other states in similar cases.

See Hoboken Bank vs. Schwoon, 62 N. J. Eq., 503.

In that case the account in the bank stood to the credit of "Helena Roche or Hy Schwoon, payable to either or survivor." This was a suit of interpleader brought by the bank. The executors of

the estate of Mrs. Roche claimed title, and the defendant Hy Schwoon claimed title to the account; the Court held that Hy Schwoon was entitled to the same.

The circumstances which the Court found sufficient to justify its conclusion in the Hoboken case in favor of the survivor are all present in the case now under consideration.

The bank book was entered upon the books of the bank in the same form as in the Hoboken case, and in addition to that the mother had delivered over the book to the son before her death, thereby making his right to draw this money as survivor absolute and unquestioned.

In *Dennin, Adm'r, vs. Hilton*, 50 Atl., 600, the same rule was applied to an account in substantially the same form on the books of the bank. In that case the donor, Miss Jones, had the following entry made in the Brooklyn Saving Institution, "Money on this account to be paid to either party; in case of death of either one the survivor to draw the balance."

The court holds, that this made a joint account between the bank and these two parties.

The court says, "This bank book is in my judgment evidence of a debt. It is perfectly well settled that the relation subsisting between a depositor in either a savings bank or an ordinary discount bank is that of debtor and creditor. The depositor is the creditor, and the bank owed her that money. She says to the bank, and the bank agreed to it, 'I want you to understand that that money is due to me and William B. Hilton jointly.' The bank changes the form of the indebtedness

and the proof of the indebtedness and gives to her this book."

Later Miss Jones leaves the house of Captain Hilton and goes to the hospital, and leaves with him the bank books, and gives him some instructions as to some disbursements to be made. Shortly afterwards she dies with Captain Hilton in possession of the bank books. The suit was then started to have them declared to belong to the estate of Miss Jones and not to Captain Hilton.

In commenting on the relations and rights of the parties, the learned Vice Chancellor used this language: "Now is there any reason why this transaction should not stand? Is there anything in the law to prevent this woman's desires from being carried out? Is there anything disgraceful or disreputable in Captain Hilton accepting this gift from the woman for whom he held such an affection, and who held such affection for and was so grateful to him and his wife? I think not."

The Court further says: "Now the subject of the gift here is the right to recover money, a chose in action; and the evidence of the indebtedness consists of the savings bank book, and she vests the right to demand that money in herself and Captain Hilton jointly. Now that is a vested right; that is, in my judgment, a delivery, so to speak. But she not only does that—she hands him the bank books; gives the whole power to him."

The court further holds, that the mere fact that Miss Jones had for a long time prior to going to the hospital retained possession of these books is of no consequence in the case in view of the fact that she made a delivery to him before her death.

In *Industrial Trust Co. vs. Scanlon*, 58 Atl., 786, (R. I.) the Court held, where a deposit in the bank was redeposited in the names of the original depositor and his brother, and the brother, though not present at the time, was afterwards called upon to sign his name in the bank and was given the book by the depositor, and told that it was his, and that he could draw the whole or any part of the deposit as he pleased, the brother became a joint owner of the deposit, and was entitled to it on the death of the original depositor. The facts in the case show that at different times the original depositor withdrew portions of the money, but with the knowledge of the brother, but the court held this did not affect the transaction.

Another point urged in this case against the gift was that the donor could defeat it by drawing the deposit when he had possession of the book, but the court held that this could also apply to the donee if he had possession of the book; that there was but one book and both parties could not hold it at the same time, and the mere fact that one has possession of it ought not to be conclusive against the rights of the other.

The court held that the survivor was entitled to the money.

See also, *McElroy vs. National Savings Bank* 8 App. Div., 192, 40 N. Y., Supp., 340.

See also, *Metropolitan Savings Bank vs. Murphy*, 82 Md., 314, 33 Atl., 640.

In the last case there was a joint account between the husband and wife with the bank and the court held that the wife was entitled to the money as survivor.

The law as stated in all the cases cited is followed with approval by the later cases in our own state and particularly in *Dunn vs. Houghton*, 51 Atl., 171.

Guided by the authority of the cases just cited the defendant under the evidence in this case is entitled to the money. Here we have established by uncontradicted evidence that R. Herman and his brother Peter worked and contributed their wages to their mother, and she was saving it in this bank account for the benefit of them; that property was purchased in the name of Peter; that it was held by him for the benefit of R. Herman; that it was conveyed to the mother in trust by a voluntary deed; that R. Herman continued to help pay for it; helped collect the rents after Peter went to Europe; attended to the sale of it. That before that he had urged his mother to make some will or other paper for his protection; that she did not want to make a will, but put this bank account in such form as advised by the bank officials would insure to his benefit in case he survived his mother. That she was competent to contract on this subject, and did contract, intelligently with the bank, is admitted. There was no other motive that prompted her to make this change in the bank account except to give special protection to the defendant, R. Herman. She was bright, ac-

tive and intelligent when the Bridge street property was sold, as testified to by Mr. Merselis who saw her and did business with her on the very day that the greater part of this balance in the bank was deposited to the joint account. She was intelligent and had her faculties about her when she sent for R. Herman on Thursday, November 19, 1903, when she was taken sick and gave him her keys to the drawer in which the bank book and her private papers were kept, and told him to take them, She knew he could draw the money on this bank book because he had done so before, and she had his name put there so that he could do so, and could draw the account in case of her death.

Then when she makes her will and talks about her property she makes no mention of this bank account, clearly showing that she regarded that that would belong to R. Herman in case of her death.

He was entitled to this money by virtue of the contract with the bank, and he was entitled to it from his mother by reason of the fact that he had created it and she was holding it in trust for him, his brother Peter being dead, having died in September as the property was sold in November, 1903.

What stronger evidence could there be of donative purpose, and of an intention that the survivor should take the money to the credit of this account, corroborated as it is by the records in the bank and the testimony of the officers of the bank, and by the conduct of the testatrix from the time the account was first changed to their joint names in February, 1903, to the date of her death?

We therefore contend that this decree should be reversed.

II.

What is the evidence presented by the complainant to establish that this Savings Bank account belongs to the estate, and not to R. Herman Kempkes ?

(1) The complainant relies upon some admissions alleged to have been made by the defendant after the death of his mother that are inconsistent with his present claim of ownership to this money.

An examination of the testimony of the complainant and the witnesses sworn on her behalf will simply show this, that on the day when the complainant and her brother, the defendant and co-executor, went to the surrogate's office to probate the will, a dispute arose between them in regard to the savings bank account (p. 50). At that time R. Herman had drawn out of the account five hundred dollars, and had given one hundred of it to each of his sisters on account of the extra expenses to which they would be put in regard to the funeral, and at the time (p. 120) nothing was said by him to her as to where the money was drawn from. He also said (p. 52) that he had paid the hospital and funeral expenses.

On p. 51 she testifies that the defendant said that he wanted them to agree to allow him to have control of the real estate forever, and to allow him to retain \$300, or he wouldn't divide the money up that was in the bank.

On p. 68, 69, Mrs. Gross testifies that he told her that the money from the house on Bridge street

was in the bank, and that unless she would consent to give him \$300, he would not divide it. P. 69, l. 12, she states that he said, "That is my money in the bank. I wont give it to you unless you give me \$300," that she replied to him that it was her mother's money, and that he said, "You can't take it, it is in my name." Mrs. Gross also says, that he spoke about paying off the mortgage for \$2,600 on the Totowa house (p. 73).

Henry Schippers (p. 82) testifies, that the defendant, R. Herman Kempkes, in conversation with him said, that unless the complainant would consent to his having \$300, she wouldn't get anything out of this money. On p. 85 he says, R. Herman wanted the \$300 the same as the other children. On p. 86 he says, that Herman wanted to pay off the \$2,600 mortgage on the Totowa property. On p. 87 that he wanted to use the insurance money from Peter Kempkes' policy and the rest of the money in the bank to pay off this mortgage, and and he wanted control of the property.

William Otten, another witness for the complainant, says that the defendant, R. Herman Kempkes told him that the money from the Bridge street property was in the bank in his name and his mother's, and unless the sisters were willing now to give him \$300, he would take the money for himself, and would not give them any (p. 91). P. 93, he says, that at another time the defendant said (l. 20) that if they did not give him the \$300 he would claim the whole amount that was in the bank.

Fred Von Seide, pp. 95, 96, testifies that he had a conversation with the defendant, R. Herman Kempkes, when they were talking about going to

court and about settlement, that he advised him to settle, but that defendant replied that he could not do it as the complainant did not want to give him that \$300.

On page 124, when the attention of the defendant, R. Herman Kempkes, was called to these conversations, he says, that he suggested to his sisters about paying the mortgage off on the Totowa property, and using his money for the purpose until they had a chance to sell the property, but he wanted to have charge of the rents and get back all his money, this \$1,811, and that he made some figures in regard to the matter. That he also stated (p. 126) that they should contribute the three hundred dollars which was left to each of them in the will, toward the payment of the mortgage, and then consent that an equal allowance be made to him so that they would have equal shares under the will, independent of the \$1,811, and that when the property was sold they would then get back the money which they had contributed from their legacies, and he would get back the money which he contributed from the bank account, and \$300 besides (p. 136, l. 10). They refused to settle on this basis (p. 131, l. 10-30).

He further testifies that he never admitted to anyone that this money in the savings bank was not his (p. 123, l. 15-20).

REMARKS.

A review of the testimony of these witnesses on behalf of the complainant does not furnish any proof that the defendant, R. Herman Kempkes,

made any admissions or statements inconsistent with his ownership of the bank account.

All the conversations had with him were concerning some settlement of the dispute without going to court. Propositions were made by him to them which were not accepted, and therefore have no binding force, but nowhere in the testimony of any of them is there to be found a statement by him admitting that this money in the savings bank did not belong to him, but to the estate.

We therefore contend, that the probative force of the evidence presented under the first point of this brief is in no way weakened or overcome by anything contained in the testimony of the witness for complainant.

(2) The complainant also seeks to destroy the validity of this transfer upon the ground that it was not intended to be absolute, but that the account was put in the two names for the convenience of the mother.

In support of this contention the only witness produced is William Otten.

On p. 91, l. 20-30, he claims that on Sunday following the death of the mother he had a conversation with R. Herman about the bank account; he says, "Then he took the bank book out of his pocket; he showed me that the money that was put in the bank from the Bridge street house that was sold he put it in his and his mother's name. I asked him did he put it that way because it was his mother's money. So he answered that he can

go and draw the money when his mother could not go for it." Again, on p. 93, he testifies as follows: "Q. Did he say anything to you about how it came to be in his name? A. He only did that in case his mother can't go and he could draw the money."

The defendant, R. Herman Kempkes, on p. 143, l. 10, contradicts this statement; he also contradicts it on p. 123, l. 10-15.

His testimony throughout the case both on direct and cross examination contradicts it.

REMARKS.

We contend that this statement of Mr. Otten is wholly incredible. He claims it was made after a dispute had arisen between the complainant and defendant as to the ownership of this bank account; after he had consulted counsel, as will be seen by his testimony on p. 135, where Lawyer Weiss and Lawyer Dunn, representing the respective parties, were trying to affect an adjustment. He was claiming to be the absolute owner of this bank account, and yet this witness would have the court believe that he made the statement that his name was only put in it with his mother's so that he can go and draw the money when she could not go for it. Such a statement is unreasonable and false, and was never made by R. Herman Kempkes. There was nothing in the physical health of his mother up to the time of her last sickness that would make it necessary to have the name of the defendant put on the bank book for her convenience. The evidence of Mr. Merselis and Mr.

Botbyl, the officers of the Bank, is all to the effect that, from the time the bank account was opened in 1891 down to the time of her last visit to the bank, when Mr. Merselis saw her, November 12, 1903, she was bright, active, intelligent, competent to transact business, and able to get about without assistance. To the same effect is the testimony of the complainant, Mrs. Schippers, on p. 53, l. 30 ; p. 54, l. 1-5 ; and to the same effect is the testimony of Mary Kempkes (p. 152). This change was made February 14, 1903, and there is no evidence to show that at that time she was in any way troubled or annoyed in going out to the bank whenever it was necessary for her to do so.

We therefore contend that the uncontradicted, undisputed evidence in the case is that when R. Herman Kempkes' name was put on this bank book and on this bank account with his mother, there was no fact, and no condition existing that would suggest to him or to her that it would be convenient for her to make this change in the account.

When the new book was opened, and the new card signed, and both went to the bank, and left their signatures, on October 19, 1905, nothing had occurred during the period from February 14, 1903, down to that time, that would suggest to the minds of either of the parties that R. Herman's name was placed there for convenience. His mother was then just as well and as active as before. It was a pleasure to her, as he says in his testimony, to go to the bank, and there is no testimony tending to show that it was any trouble to her, or that it would be any advantage to her to have the name of R. Herman on the book simply

to draw money for her purposes, and it was not necessary to have it on to make deposits.

During the whole period, from the time his name was put upon the book down to her death, the uncontradicted evidence shows that there was only one sum withdrawn by him alone when she was not present at the bank; all the other drafts made between February 14, 1903, and the date of her death were drawn out by her.

The evidence also is (p. 148) that she was taken suddenly ill on Thursday morning, November 19, 1903, suffering from strangulation of the intestines, and on Saturday, the twenty-first, the doctors decided that an operation would be necessary to save her life, and she was taken to the hospital and operated upon, and died on Monday, November 23, and the next day, the 24th, R. Herman, being in possession of the bank book, goes to the bank and draws \$500 on this account, gives part of it to his sisters to help them prepare for the funeral, uses part of it for funeral expenses, and the balance uses for himself.

What then is there in the history of this transaction, after this dispute arose as to the ownership of this money, that would suggest to R. Herman Kempkes' mind the thought that this joint account was only placed in his name for the convenience of his mother? If he had such a thought, is it reasonable to believe that he would have mentioned it to Mr. Otten so that it could be used to defeat and to contradict him in the claim of ownership which he was making?

The testimony of Otten, that this account was changed so that R. Herman could go and draw the money when his mother could not go for it, is pure

invention, and is put into this case by him at the instigation of others to enable them to defeat an honest claim.

To show how absolutely unreliable and reckless his statements are it is only necessary to refer to his testimony as to her physical condition (p. 93); he says, she was sickly, she wasn't very well (l. 30). In this respect he is contradicted by the complainant, by Mr. Merselis, Mr. Botbyl, R. Herman Kempkes, and Mary Kempkes, who all testify that she was a strong, healthy, active, intelligent and well woman.

The learned Vice Chancellor in commenting upon the testimony of Mr. Otten has lost sight and forgotten some of the material facts and contradictions in his testimony which we have here pointed out.

The evidence of R. Herman Kempkes already set forth, impeaches him, and on p. 142, when he was asked whether Mr. Otten was a respectable man in the neighborhood and a property owner, his reply was, "That some speak good and some speak bad of him." On p. 143 he says, that Otten kept a beer saloon, and that he used to go in there and get a glass of beer. There is no evidence showing an intimate or confidential relation with Mr. Otten; and it is therefore unreasonable that he would make an admission to him that this bank account was transferred to him only for the convenience of his mother.

There is another fact in this record that we contend proves conclusively that this testimony of William Otten is false. He says that he had the interview the Sunday following Mrs. Kempkes' death, (p. 90, l. 27) that would be about November 29, 1903. On December 31, 1903, (on p. 23 of the

case) he made an affidavit which is annexed to the bill in this cause and is a part of the record. These affidavits were procured for the purpose of substantiating the facts as to the ownership of this bank account as stated in the bill. They were undoubtedly carefully prepared, and we have reason to presume that every material fact of which a witness had knowledge would be incorporated in his affidavit which was to be used in obtaining an injunction; this would be especially so if he had knowledge of the fact to which he now testifies, that R. Herman Kempkes' name was only put into this bank account for convenience. The conversation which he relates took place before the making of this affidavit, about a month. The other affidavits contain statements made by the defendant, but in the affidavit of William Otten you will find no mention of any of the facts to which he now testifies. Why? He never had such a conversation.

We submit that it would be unsafe and dangerous in a court of equity to allow the testimony of this witness Otten to overthrow the mass of uncontradicted evidence from credible witnesses, and from documents, and books in the bank, that go to support the defendant's case. His testimony is an after-thought, and is put in here to supply a missing link, and the learned Vice-Chancellor was not warranted in according to it the weight which he did in his oral opinion.

R. Herman Kempkes' name was put on that book, and it was made a joint account so that the survivor could draw whatever there might be standing to its credit.

You must also bear in mind that this change was

made February 14, 1903, ten months before the Bridge street property was sold, but reading the testimony of Otten, as to his conversation with R. Herman, you would conclude that the account was only put in that form after they got the money for the property. This shows conclusively that the defendant never had such a conversation with Otten.

III.

We further contend that the decree allowing counsel fee and costs to the complainant in this case is inequitable and should be reversed.

Under the present practice the court is given a very wide discretion in respect to the allowance of counsel fees, but we contend in this case that the complainant was not entitled to succeed, and that even though this court should conclude adverse to this contention that still, under the law, it is not such a case as would warrant a court of equity in penalizing a suitor for defending his rights under such evidence as is presented in this case; that in so doing it has exceeded the bounds of discretion, and the decree in this respect should be reversed.

GENERALLY.

In this case, we respectfully submit that, under the evidence, the defendant had an equitable right

to this fund and particularly to the part of it derived from the sale of the Bridge street property ; that he had an equitable right also to the moneys in the bank preceding this deposit because of his contributions to that account, which is undisputed and uncontradicted.

In addition to this we have a contractual obligation made in solemn form ; made for the very purpose of creating a joint account between this defendant and the bank ; made with the consent of the bank, and they acknowledge that when it was made that, under their by laws and rules, whatever money stood to the credit of that account, at the death of either, would be paid to the survivor.

In addition to that we have the mother, the moment she is taken sick, place this bank book in the custody and possession of the defendant, so that he can enforce his contract with the bank.

Under these facts, and the evidence in the case, uncontradicted and unimpeached, and under the law that we have cited, the decree of the Court of Chancery should be reversed, and the defendant R. Herman Kempkes should be decreed to be the owner and the person lawfully entitled to receive this bank account.

Respectfully submitted,

CHARLES B. DUNN,

MICHAEL DUNN,

Of Counsel with the Defendant, R. Herman Kempkes.

COPY OF ENTRIES IN BANK BOOK NO. 42105.

DATE.	DEPOSITS.	DRAFTS.	BAL- ANCE.
1891.			
Mar. 7.	135.00		135.
July 3.		120.	15.
Aug. 4.	30.		45.
Sep. 19.	25.		70.
Oct. 29.	50.		120.
Dec. 9.	35.		155.
1892.			
Jan. 7.	45.		200.
Apl. 2.	40.		240.
Sep. 1.	60.		300.
Oct. 8.		250	50.
Nov. 1.	50.		100.
Int. to Nov. '92.	4.25		104.25
Dec. 3.	50.		154.25
1893.			
Jan. 16.	25.75		180.
Feb. 15.	20.		200.
1894.			
Jan. 2.		75.	125.
Int. to Nov. '93.	6.02		131.02
Feb. 10.		25.	106.02
Apl. 20.	76.		182.02
28.		100.	82.02
May 25.	40.		122.02
Sept. 10.	45.		167.02
Dec. 21.	50.		217.02
1895.			
Jan. 14.	50.		267.02
May 23.	50.		317.02
Nov. 1.		300.	17.02
Dec. 11.	30.		47.02
1896.			
Jan. 21.	25.		72.02
Int. to Nov. '95.	12.34		84.36
Mar. 13.	40.		124.36
Apr. 9.	22.		146.36
Aug. 29.	40.		186.36

DATE.		DEPOSITS.	DRAFTS.	BAL- ANCE.
Oct.	6.....		110.	76.36
Nov.	10.....	25.		101.36
1897.				
Feb.	1.....	250.		351.36
	1.....	30.		381.36
Mar.	1.....	45.		426.56
	15.....		200.	226.36
May	1.....	150.		376.36
Jul.	10.....	50.		426.36
Int. to May	'97.....	5.23		431.59
Aug.	14.....	50.		481.59
Nov.	1.....	50.		531.59
Dec.	30.....	50.		581.59
1898.				
Jan.	27.....	50.		631.59
Feb.	28.....	50.		681.59
Int. to Nov.	'97.....	7.11		688.70
Mar.	14.....	70.		758.70
Apr.	1.....		170.	588.70
May	2.....	55.		643.70
	3.....	180.		823.70
Int. to May	'98.....	9.86		833.56
	26.....		130.	703.56
Jun.	3.....		100.	603.56
Jul.	22.....	50.		653.56
Sept	1.....	60.		713.56
Oct.	29.....	60.		773.56
Dec.	13.....	60.		833.56
1899.				
Jan.	30.....	100.		933.56
Apl.	1.....	50.		983.56
	11.....		30.	953.56
Jul.	28.....	1,658.81		2,612.37
Aug.	9.....		237.	2,375.37
	11.....		130.	2,245.37
	15.....	125.		2,370.37
Sep.	12.....	60.		2,430.37
Int. to May	'99.....	26.11		2,456.48
Sep.	16.....	243.89		2,700.37

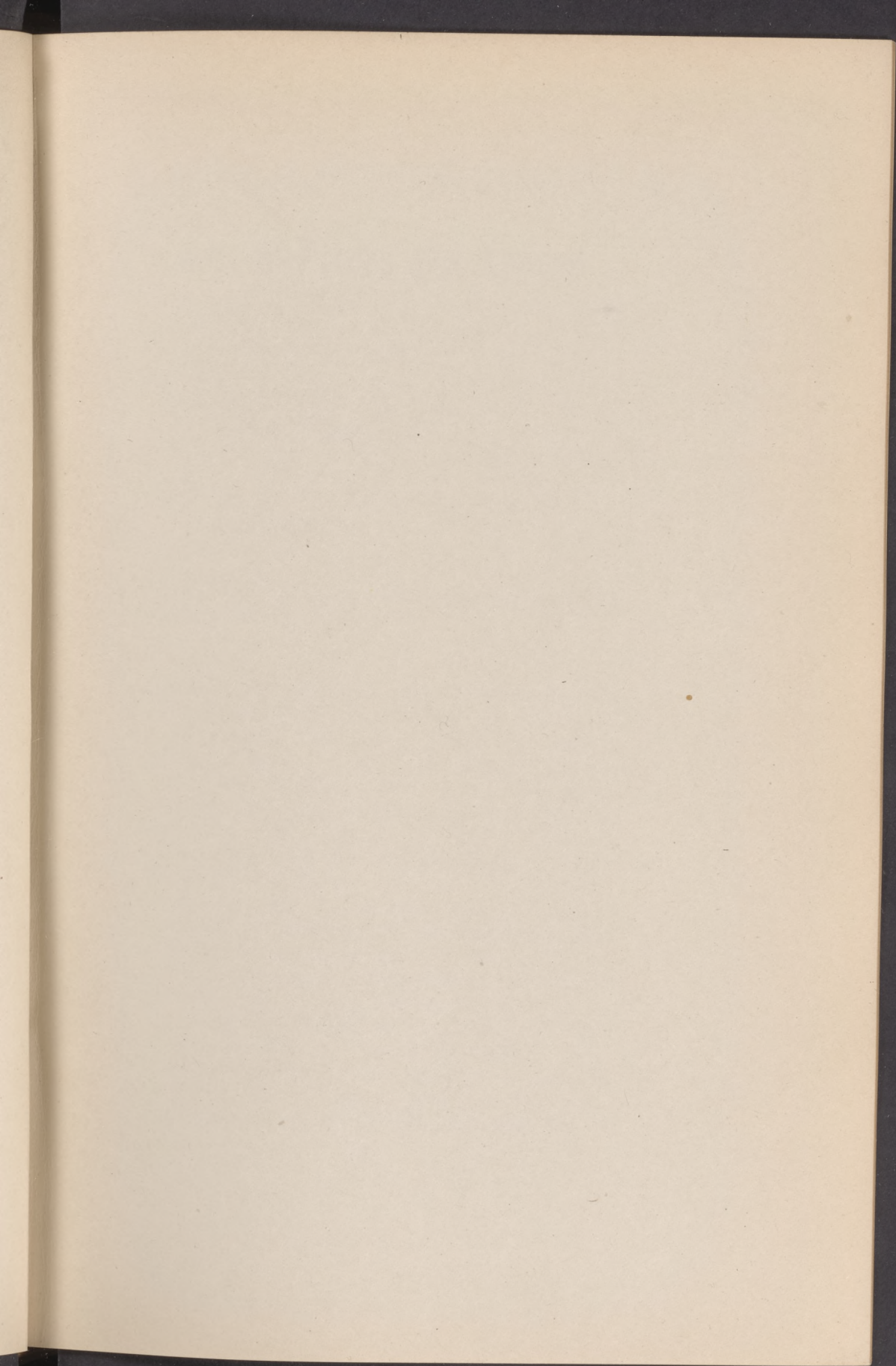
	DATE.	DEPOSITS.	DRAFTS.	BAL- ANCE.
	Sep. 21.....	150.		2,850.37
	28.....		100.	2,750.37
	Oct. 18.....		500.	2,250.37
	Nov. 1.....		100.	2,150.37
1900	Feb. 19.....		500.	1,650.37
	Mar. 22.....	50.		1,700.37
	27.....		30.	1,670.37
Int. to Nov. '99		28.25		1,698.62
1900	Apl. 3.....		370.	1,328.62
	Jun. 15.....	100.		1,438.62
	May 18.....	125.		1,553.62
Int. to May '00		23.24		1,576.86
	Jul. 17.....		130.	1,446.86
	Aug. 8.....		30.	1,416.86
	Oct. 9.....		200.	1,216.86
	Nov. 24.....	255		1,471.86
	Dec. 8.....	75		1,546.86
1901.	Feb. 16.....	70		1,616.86
Int. to Nov. '00		21.28		1,638.14
	May 3.....	60		1,698.14
	8.....		5.	1,693.14
	June 6.....		60.	1,633.14
	22.....		100.	1,533.14
	July 9.....	65		1,598.14
Int. to May '01		24.55		1,622.70
	Jul. 22.....	150.		1,772.70
	Aug. 3.....		40.	1,732.70
	10.....	60.		1,792.70
	Sep. 11.....	35.		1,827.70
	Oct. 11.....		35.	1,792.70
	21.....		90.	1,702.70
	Dec. 2.....		25.	1,677.70
1902.	Jan. 6.....	70.		1,747.90
	Feb. 4.....	53.		1,800.70
	Apr. 9.....	60.		1,860.70

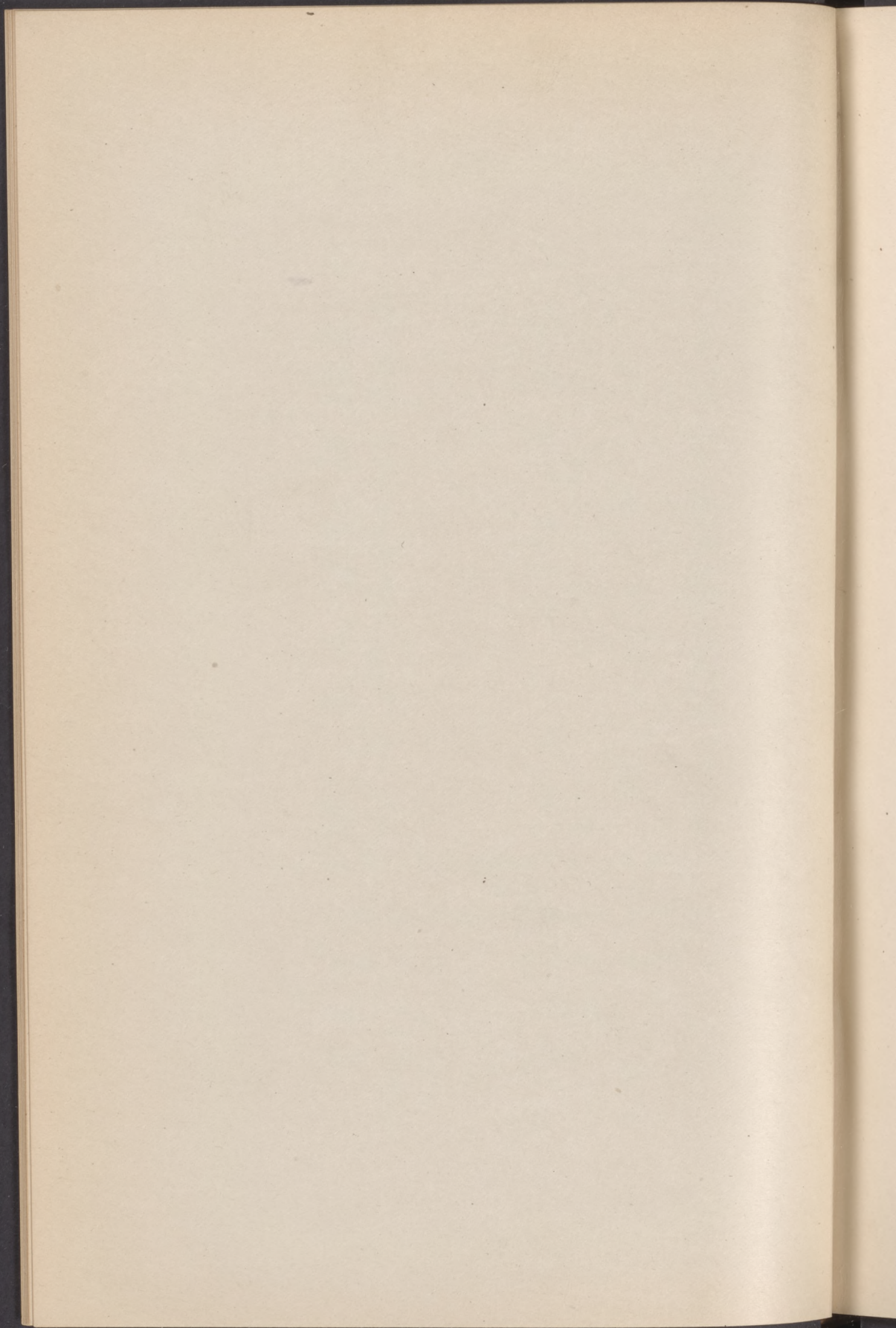
	DATE.	DEPOSITS.	DRAFTS.	BAL- ANCE..
	May 10.	80.		1,940.70
Int. to	May '92.	59.45		2,000.15
	July 1.	5.		2,005.15
	1.		2,000.	5.15
	14.	5.		10.15
	Aug. 4.	50.		60.15
	12.	10.		70.15
	Sep. 10.	60.		130.15
	Oct. 18.		30.	100.15
1903.	Jan. 17.	45.		145.15
	Feb. 14.	119.40		264.55
Int. to	Nov. '02.	.57		265.12
	Feb. 28.		30.	235.12
	Mar. 21.	60.		295.12
	Apr. 10.	55.		350.12
	May 1.	35.		385.12
	9.		80.	305.12
	23.	45.		350.12
	Jun. 15.		50.	300.12
	20.		25.	275.12
	27.	30		305.12
	July 2.	22.		327.12
	7.	23.		350.12
	24.	50.		400.12
	29.		350.	50.12
	29.		23.	27.12
	Sep. 26.	87.		114.12
	Oct. 19.	2.14		116.26

(This account was transferred to new bank book
92,441)

Copy of entries in bank book, 92,441.

	DATE.	DEPOSITS.	DRAFTS.	BAL- ANCE..
1903.	Oct. 19.	116.26		116.26
	19.		100.	16.26
	Nov. 12.	1,870.		1,886.26
	12.		50.	1,836.26
	14.		25.	1,811.26
	24.		500.	1,311.26





Court of Errors and Appeals.

Between

WILHELMINA SCHIPPERS,
ex., etc., Complainant,
and

RHEINHOLDT HERMAN KEMPKE
et als., Defendants.

On bill, etc.,

Appeal from
Court of
Chancery.

Brief of Robert E. Van Hovenberg, of counsel with the complainant.

On the 7th day of March, 1891, Elizabeth Kemkes deposited with the Paterson Savings Institution the sum of \$135.00. She received from the bank a book numbered 42,105, in which the said sum was placed to her individual credit. It remained in this form, being, from time to time increased by deposits, decreased by drafts, until the 14th day of February, 1903, at which time there was remaining a balance to her credit of \$116.26.

On the 14th day of February, 1903, she went to the bank accompanied by her son Rheinholdt Herman Kempkes, and so changed the form of her account that since then until the day of her death it stood in the joint names of her and her said son.

The above facts are necessarily undisputed. The bank book (Exhibit D-3) speaks for itself.

During the time that the account was in their joint names. Mrs. Kempkes made numerous deposits increasing it, and she also decreased the ac-

count by drafts against it. At her death on the 20th day of November, 1903, there remained to the credit of the account the sum of about \$1,811.00. This suit has been instituted to determine the ownership of that fund. The complainant claims that the fund belongs to the estate and should be paid to the executors. The defendant, Rheinholdt Herman Kempkes claims that when his name was joined with his mother's in the account she intended to, and actually did give the fund to him, or whatever should remain thereof after her death. Saying that he had contributed towards the fund, and that therefore she wished to protect him in case she died. (It might be well to mention here that he failed to establish the fact that he contributed towards the fund, it being admitted that it belonged solely to his mother. (Case page 171 to 173.) The defendant, the Paterson Savings Institution is entirely disinterested and ready and willing to pay the fund to either of the parties; a decree pro confesso, having been entered against it.

The Complainant is a daughter of the said Elizabeth Kempkes, deceased, and one of the executors of her estate. The defendant, Rheinholdt Herman Kempkes, is a brother of the Complainant, and also an executor of the estate of his mother.

It is admitted (case page 171 to 173) that the fund was originally the sole property of Mrs. Kempkes.

Naturally, therefore the first question to present itself is: Did she intend to give the money then on deposit and whatever balance should remain at her death, to her son, or was the change made solely for her convenience? If she did intend to give it to him did she accomplish that purpose? By the method adopted did she make a valid gift *inter vivos*?

The first testimony to throw any light on her intention is that relating to what took place at the time Mr. Kempkes's name was added to the account. All the direct evidence relating to that is testimony of

the defendant and two disinterested witnesses produced by him, viz.: Mr. Edo I. Merselis and Mr. Justice G. Bottbyl, officers of the Paterson Savings Institution.

The defendant, Mr. Kempkes, says, that his mother said: (P. 11, l. 15) "We go to the bank, and whatever will be in the bank that will be your money." It can be inferred from his following testimony that his mother meant him to have what balance should remain at her death, for following on the same page, l. 28, "and then she says she wanted my name put on the book in case anything happened to her, that the money should be my protection." And again (p. 113, l. 15) he says his mother said: "I will protect you in the bank, but I don't want to make a will." This is a little different from his first version of what was said by his mother.

There is only one meaning that can possibly be inferred from these different statements he says were made by his mother, and that is, she intended him to have what remained at her death without the necessity of making a will. Evidently trying to avoid the necessity of complying with the Statute of Wills.

And again on page 115, l. 30, etc. he gives another account of what occurred which again differs from the other two accounts. Here he says it was his mother's intention to so change the account that they would be joint owners of it. He says Mr. Mercelis then made it as follows: "R. Herman Kempkes or Eliza Kempkes" and said (case, p. 114,

5) "*The one who possesses the book owns the money.*"

It is natural that a person in recounting what took place at a transaction which occurred a year or more previous could not be exact in repeating the details thereof. In fact, if he were exact—never deviating in any particular—it would, in my opinion, be apt to stamp his testimony with suspicion. But, nev-

ertheless, he would remember and be able to state the purport of what occurred, and no matter how many times he stated it the general purport should be the same.

In reading the testimony of this defendant in this particular what are we to believe? 1st. Did his mother intend to give the fund absolutely to him? 2nd. Did she intend he should have whatever remained thereof at her death? Or did she wish to constitute herself and him joint owners thereof? According to his testimony she must have intended all three, for he gives us in answer to different questions those three different accounts.

For the present we will pass from these contradictory statements made by the defendant.

The next testimony directly bearing upon the transaction is that of Mr. Mercelis and Mr. Bottbyl. These two gentlemen are absolutely disinterested, and it will be noticed that their remembrance of what occurred does not vary in the least—the general purport of the transaction given by them in answer to different questions, is always the same—and yet it differs materially, in my opinion, from that given by the defendant.

(Case, p. 159, l. 3, etc.) Mr. Mercelis relates what took place: "On the 14th day of February, 1903, Mrs. Kempkes and her son R. Herman Kempkes, came into my office and Mr. Kempkes said that his mother would like to have his name added on the pass-book *so that either could draw*." "I asked Mrs. Kempkes if that was her wish and she said 'Yes.' She didn't speak English very perfectly, so I got the Teller, Mr. Bottbyl, who speaks German, that he might make her fully understand the nature of the change, that either could *draw* the money, and he talked to her in German and reported that she understood perfectly. I then called the clerk and had Mr. Kempkes and Mrs. Kempkes sign the signature cards, and added Mr. Kempkes's name on the book." On cross-examination (case, p. 163, l.

4, etc.) "Mr. Kempkes said that his mother wanted his name on the book so that *either might draw*, and I asked Mrs. Kempkes if that was her wish, and she said it was."

Mr. Bottbyl (case, p. 164, l. 21, etc.) "Mr. Kempkes and his mother were in Mr. Mercelis's office and Mr. Mercelis came to my cage and said, 'I wish you would come over to Mrs. Kempkes and speak German to her,' He says, '*Her son wants his name added on the book*, and ask her if that is her wish.' So I asked Mrs. Kempkes in German if she wanted her son's name added on the book and she said 'yes.' I says, 'Do you understand that *either can draw*?' She says 'yes, I do.' I says, 'And you understand in case of death of either the survivor *can draw it*?' And she says, 'Yes' and she wanted the name added on the book."

Looking at the testimony of these two gentlemen without considering that of the defendant, it is an easy matter to see exactly what occurred at the bank.

Mrs. Kempkes and her son went to the bank. They saw Mr. Mercelis. The defendant did the talking (case, p. 163, l. 4.) He said his mother wanted his name added to the account so that either could draw the money. Mr. Mercelis asked her if that was her wish. She said it was. He then explained, with the help of an interpreter the effect of the change, telling her either could draw the money, or the survivor. The son's name was then added to the account. Nothing at all said about a joint ownership of the fund. Nothing about the survivor owning what balance remained. And nothing about an absolute gift of the fund to her son. There is a vast difference between empowering a person to *draw* your money, and *giving* it away.

How can we reconcile this testimony with that of the defendant. Is it right or just that we should blend them together and deduce from the mixture a compound pertaining directly to neither, but pre-

senting a different matter in which it is impossible to recognize the leading features of either? No. We must adopt one or the other. One stands and the other falls. And is there any doubt which we must accept? We have a most interested and partial witness—the defendant. On the other hand two absolutely disinterested and impartial witnesses—officers of the bank. I respectfully submit there is no choice. The testimony of the bank officers must be received to the exclusion of that of the defendant. And they are his witnesses.

Mrs. Kempkes then added her son's name to the account so that either could draw or the survivor. What light does that throw upon the case?

First. It may have been done for her convenience. She was 75 years old. If she were sick, or for any other reason could not go to the bank, her son (who lived with her most of the time, and always ate his dinner with her) could go in her place; and at her death, could draw out what money was necessary for the expenses of her last sickness and funeral.

Second: It may be that she did intend to give him the fund, or what balance remained thereof after she was through with it; it is possible, by a stretch of the imagination, to infer that much, although it is to be presumed that if she wished to give him the money she would have said so.

In transactions of this nature there are always circumstances surrounding them which points unmistakably to the true condition.

What are the circumstances surrounding this transaction and growing out of it that show her intention?

We must first consider in support of the first proposition what would be the natural and probable consequence of an arrangement of this nature made for the convenience of Mrs. Kempkes.

She would naturally retain possession of the bank book, giving it to her son only to allow him to draw money for her. And that is exactly what she did do.

According to defendant's testimony (case p. 116, 1. 7 and 10) he only drew money from the bank once, and then it was rainy, and his mother did not wish to go out. He says he remembers making two deposits. This clearly shows that his mother never meant to give him the money absolutely. If she had why did she keep the pass-book, making it impossible for him to draw the money? Why, if she intended giving it to him, did she have her name continued in the account? This eliminates one element heretofore considered. But, did she intend him to have what balance remained at her death?

The fact of his drawing money once for his mother, when it was too rainy for her to go out; and the fact that his mother retained sole possession of the bank book, increasing and decreasing the account from time to time, are two circumstances directly in support of the contention that his name was added only for the convenience of his mother.

And further by looking at the will of his mother (Ex. C-6) it appears that she had an account in a bank in Germany which was in the joint names of herself and son, but, she never understood that by reason thereof her son owned any part of the money, because in her will she disposes of that money as her sole property. This shows conclusively that, for some reason, she was in the habit of having her son's name joined with hers in her bank accounts. And it also conclusively shows she did not understand that an account made in such a form gave the same to her son, but that she still looked upon it as her sole property.

What has the defendant offered to show a donative intention.

It must be remembered, that, although hardly possible to reconcile the numerous discordant decisions in cases of this kind, yet they are all uniform in declaring that: A donative intention is absolutely necessary to constitute a valid gift; that

the fact of an account in joint names is not a presumption of gift; and that the burden of proving a donative intention rests upon the donee.

Dunn vs. Houghton, 51 Atl. 76; *Taylor vs. Coriell*, 57 Atl. 810, 66 N. J., Eq. 262, and numerous cases therein cited.

He says his mother told him she wished him to have what was in the bank; that she said it at the bank, to both him and to Mr. Mercelis and Mr. Bottbyl. But, these two gentlemen fail absolutely to corroborate him. The differences in their testimony and his has been noticed heretofore.

From the conflicting stories he tells, it is impossible to infer a donative intention on the part of his mother towards him, on the contrary the circumstances surrounding the matter point directly to the contention of convenience being the sole motive to cause Mrs. Kempkes to change the form of her account.

In face of the circumstances above mentioned, namely: retention of the pass-book, using the money as her own, drawing it out and making deposits; donee having possession of the book only once, and then solely for his mother's convenience; and her habit of placing accounts in this form, understanding it did not change the ownership thereof; I respectfully submit he has absolutely failed in proving a donative intention.

Aside from these circumstances we have the conduct of the defendant immediately after the death of his mother, as testified to by the complainant, by Mrs. Gross, by Mr. Schippers, William Otten and Fred Von Siede.

The complainant says, that (case p. 51, l. 2 etc. and l. 30 etc.) her brother, the defendant, told her if she and Mrs. Gross would give him \$300.00 he would then divide the money in the bank in his and his mother's names jointly; if they refused to give him \$300.00 he would then keep it all. The complainant is corroborated in this by her sister,

Mrs. Gross (case p. 67, l. 10 etc.) by Mr. Schippers (case p. 82, l. 10) and by two disinterested witnesses, William Otten (case p. 91, l. 4) and Fred Von Siede (case p. 85, l. 30 etc.)

Mr. Schippers (case p. 80, l. 23 etc.) (Ex. C-5) and Mrs. Gross (case p. 67, l. 30 etc.), also (Ex. C-4) produce written statements given to them by the defendant which he said showed the assets of the estate, and in these statements he included the money on deposit in the bank in his and his mother's names jointly.

This evidence establishes beyond any doubt the ownership of the fund in question. The defendant himself, who now claims to own the fund, did, immediately after the death of his mother, look upon it as the property of the estate and not his. It was only when his sisters refused to give him \$300.00 from the estate that he undertook to claim title to the fund. The defendant attempts to explain his conduct by saying he only meant to loan the money to the estate for the purpose of paying off a mortgage. But would he offer to *divide* it between his sisters, if in reality he meant only to loan it to the estate?

I think his explanation far too inadequate to overcome the testimony of five witnesses.

All of which directly contradicts the claim of a gift inter vivos. It shows that there was no donative intention on the part of the deceased.

There can be absolutely no doubt that the evidence in this case does not tend to prove a donative intention within the rule required for such purpose, and that the only inference is that the money was deposited in their joint names merely as a convenience for the mother; that she did not intend to part with her property in it; and that she always claimed and exercised a right of absolute ownership over it; and that if any gift of this fund to the son was intended it was limited to take effect after her death, and falls within the rule announced in *Stevenson vs.*

Earl, (N. J. Err. & App., Oct. 3, 1903), 55 Atl. 1901, 65 N. J. Eq. 721.

Taylor vs. Coriell, (N. J. Chr. Apr. 5, 1904), 57 Atl. 810. 66 N. J. Eq. 262.

The utmost we can infer from the testimony of the defendant is that the donor intended him to have whatever remained after she had exercised absolute control during her life, making it a testamentary disposition of funds, without complying with the Statute of Wills.

Stevenson vs. Earl, *ibid.* (65 N. J. Eq. 721).

Taylor vs. Coriell, *ibid.* (66 N. J. Eq. 262).

It might be claimed that when the account was opened there was a contract entered into between the bank, his mother and himself, under which he obtained a irrecoverable interest in the fund, so that all question of testamentary disposition is removed. Undoubtedly, there was a contract between the mother and son on the one side and the bank on the other, by the terms of which the bank became their debtor to the extent of the amount due on the account, and that either presenting the book might draw the fund; but under such a contract, in order to avoid the application of the law of wills it must appear that the donor had surrendered all control over the subject matter.

Cover vs. Stein, 67 Md. 449-10 Atl. 231, 1 Am. St. Rep. 406. *Haines vs. Rogers, et al*, 62 Atl. 272.

Stevenson vs. Earl, 65 N. J. Eq. 721.

Taylor vs. Coriell, *ibid.* (N. J. Ch., 57 Atl. 810.) 66 N. J. Eq. 262.

If it were not so it would be an easy matter for a person by entering into such a contract, to use property as he pleased during his lifetime and give what remained to whom he wished with total disregard to the Statute of Wills.

Stevenson vs. Earl, *ibid.* (65 N. J. Eq. 721.)

In the case of *Stevenson vs. Earl*, *ibid.* the Chief Justice, speaking for the Court of Errors and Appeals, in defining the requirements of a gift inter

vivos, said: "But in order to legalize such a gift, there must be not only a donative intention, but also, in conjunction with it, a complete stripping of the donor of all dominion or control over the thing given.

Cook vs. Lum, 55 N. J., L. 375.

It is clear from the testimony in this case that Mrs. Kempkes intended to, and did retain control and dominion over the fund.

The most liberal construction we can possibly give to the evidence of the defendant in his favor, is that his mother intended him to have whatever remained after her death.

Laying aside for the sake of argument, all question of donative intention, assuming that the defendant has succeeded in proving a donative intention, what effect would that have upon the case?

There is no pretence that Mrs. Kempkes lost all control and dominion over the account at any time. She retained the effective means of control—the passbook—in her possession until just before her death, when the complainant says she told her to get it out of the bureau drawer. The defendant says she told him to take charge of all the papers in the bureau drawer. He did take all the papers out of the drawer, among which was the pass-book. Even if she did tell him to get the papers out of the drawer, and in that way he got the book, it is an insufficient delivery. *Dunn vs. Houghton*, *ibid.* During Mrs. Kempkes's life she exercised exclusive ownership over the fund, drawing, using, and depositing according to her inclination. Therefore even with a donative intention the case falls within the doctrine established in the case of *Stevenson vs. Earl*, *ibid.*, and *Taylor vs. Coriell*, *ibid.*, for the stripping of the donor of all dominion or control over the gift is wanting. *Kelley vs. Home Savings Bank*, 44 Misc. 102, 89 N. Y. Suppl. 776.

There was no trust in favor of the defendant for the indispensable element—the absolutely parting

with "that interest which had been hers up to the time of the declaration" is not present."

Stevenson vs. Earl, ibid. (65 N. J. Eq. 721.)

The case of the Hoboken Bank for Savings vs. Schwoon, et als., 50 Atl. 490 differs from this case in this, that the bank book was placed in the hands of a friend to be delivered to donee at the death of donor. Which stripped donor of all dominion over the gift.

In the case of *Denin vs. Hilton*, 50 Atl. 600, there was no evidence of joint names for convenience sake, and there was a delivery of the bank book to donee during donor's life.

The case of *Penn. R. Co. vs. Stevenson*, 54 Atl. 696, was reversed by Court of Err. & App. *Stevenson vs. Earl, ibid.*

The case of *Green vs. Tulane, et als*, 28 Atl. 9, 52 N. J. Eq. 169, differs in this that there was a delivery of the property to a third person by the donor in his lifetime, with instructions to give same to donee at his (donor's) death.

In the case of *Cook vs. Lumm*, 55 N. J., 1. 375, 26 Atl. 803, Beasley, C. J., in delivering the opinion of the Supreme Court said regarding what would legalize a gift of a Chose in Action, that the cardinal principle was this "that the transfer was such that, in conjunction with the donative intention, it completely *stripped* the donor of his *dominion* over the thing given, whether that thing was a tangible chattel or a chose in action.

In the present case the original deposit, a gift of which is claimed was partly withdrawn, and again added to by Mrs. Kempkes, wherein it differs from the case of *Dunn vs. Houghton*, N. J. Ch., 51 Atl. 71.

I respectfully submit that, looking at this case either in the light of a donative intention having been proved, or with such an intention lacking, a decree should be rendered in favor of the complainant.

ROBERT E. VAN HOVENBERG.

Of Counsel with the Complainant.

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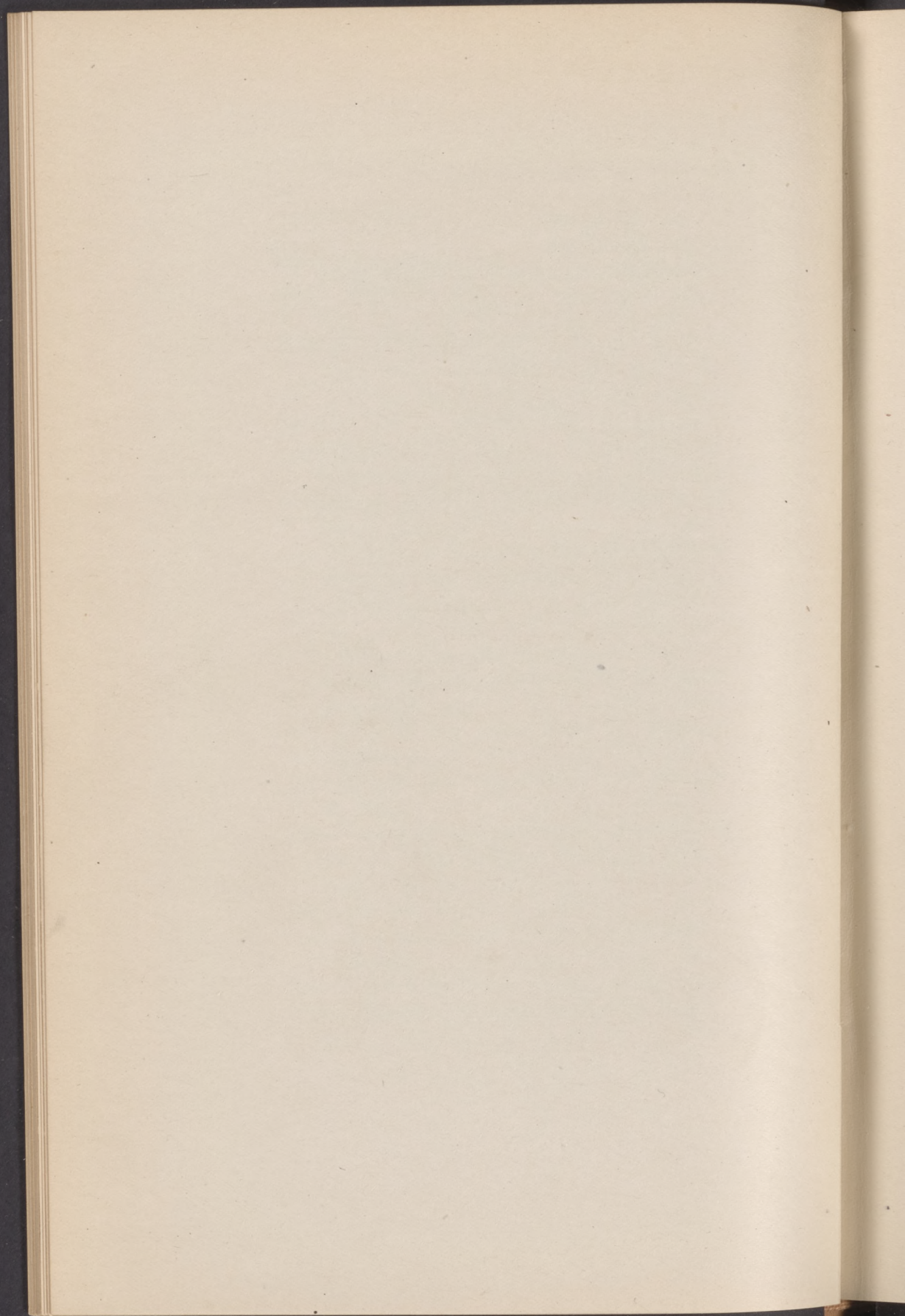
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IN CHANCERY OF NEW JERSEY.

Between
WILHELMINA SCHIPPERS, EXE-
CUTRIX, ETC.,

Complainant,

and

RHEINHOLDT HERMAN
KEMPKEs AND THE PATERSON
SAVINGS INSTITUTION,

Defendants.

On Bill, Etc.

10

Notice of Appeal.

The defendant, Rheinholdt Herman Kempkes, hereby appeals from so much of the final decree made in this Court in the above stated cause on November 8th, A.D., 1905, which orders, adjudges and decrees that all the money deposited with the Paterson Savings Institution in both accounts numbers 42,105 and 92,441 in the joint names of "R. Herman Kempkes or Eliza Kempkes" is money belonging to the estate of Elizabeth Kempkes, deceased, and not to the defendant, Rheinholdt Herman Kempkes, nor has the said Rheinholdt Herman Kempkes ever had or been entitled to the ownership thereof; also from that part of the said decree, which orders that the Paterson Savings Institution, its officers, agents or employees, pay over the said money, now on deposit with it in the joint name of "R.

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Herman Kempkes or Eliza Kempkes," being account number 92,441, the same having been transferred from account number 42,105, to Wilhelmina Schippers and Rheinholdt Herman Kempkes, executors of the estate of Elizabeth Kempkes, deceased, to the end that it may be deposited with other funds of the estate; and also from that part of said decree which orders that the said defendant, Rheinholdt Herman Kempkes, within five days after service upon
 10 him of a copy of said decree and the taxed bill of costs, to pay to Robert E. Van Hovenberg, of counsel with complainant, the sum of seventy-five dollars as a counsel fee, and also the taxed costs of suit, and that in default of such payment an execution issue therefor, according to the practice of this Court, to the Court of Errors and Appeals in the last resort in all causes.
 Dated November 29th, 1905.

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CHARLES B. DUNN,

Solicitor of Defendant, Rheinholdt Herman Kempkes.

MICHAEL DUNN,

Of Counsel.

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

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MICHAEL DUNN,

Of Counsel with Defendant, Rheinholdt Herman Kempkes.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

WILHELMINA SCHIPPERS, Ex-

ECUTRIX, ETC.,

Respondent.

and

RHEINHOLDT HERMAN KEMPKE

Appellant.

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Petition of Appeal.

The petition of Rheinholdt Herman Kempkes, the appellant in the above stated cause, respectfully shows, that your petitioner finds himself aggrieved by the decree made in the Court of Chancery by his Honor, William J. Magie, Chancellor of New Jersey, bearing date the eighth day of November, nineteen hundred and five, wherein it is adjudged and decreed that all the money deposited with the Paterson Savings Institution in both accounts numbers 42,105 and 92,441 in the joint names of "R. Herman Kempkes or Eliza Kempkes" is money belonging to the estate of Elizabeth Kempkes, deceased, and not to the defendant Rheinholdt Herman Kempkes, nor has the said Rheinholdt Herman Kempkes ever had, or been entitled to the ownership thereof; also from that part of said decree which orders that

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the Paterson Savings Institution, its officers, agents or employees pay over to Wilhelmina Schippers and Rheinholdt Herman Kempkes, executors of the estate of Elizabeth Kempkes, deceased, the said money now on deposit with it in the joint names of "R. Herman Kempkes or Eliza Kempkes" being account number 92,441, the same having been transferred from account number 42,105; to the end that said money may be deposited with other funds of the estate; and also from that part of the said decree which orders that the said defendant Rheinholdt Herman Kempkes within five days after service upon him of a copy of said decree and the taxed bill of costs, pay to Robert Van Hovenberg, of counsel with complainant, the sum of seventy-five dollars as a counsel fee and also the taxed costs of suit, and that in default of such payment an execution be issued therefor.

And your petitioner humbly appeals from the parts of the said decree which decrees as aforesaid, upon the ground that the same is erroneous, for that the said money deposited with the Paterson Savings Institution in both accounts numbers 42,105 and 92,441 in the joint names of "R. Herman Kempkes or Eliza Kempkes" belong to the said Rheinholdt Herman Kempkes, and that he is entitled to the ownership thereof, and that the said Paterson Savings Institution and its officers, agents or employees should pay the same over to him, and not to the said executors of Elizabeth Kempkes, deceased, and that he should not pay the costs and counsel fee of the said complainant.

Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden.

And that your petitioner may have such relief in the premises as to this honorable Court shall seem meet.

CHARLES B. DUNN,

Solicitor of Appellant. 10

MICHAEL DUNN,

Of Counsel with Appellant.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

	Between	}	<i>On Appeal, etc.</i>
	WILHELMINA SCHIPPERS, EXE-		
	CUTRIX, ETC.,		
10	<i>Respondent,</i>		
	and		
	RHEINHOLDT HERMAN	}	
	KEMPKEs,		
	<i>Appellant.</i>		

Answer.

20 The answer of Wilhelmina Schippers, execu-
trix of the last will and testament of Elizabeth
Kempkes, deceased, respondent to the petition
of appeal of Rheinholdt Herman Kempkes, ap-
pellant.

30 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 there-
to, nevertheless, says and admits that a decree
was, on the eighth day of November, nine-
teen hundred and five, made and entered
in the Court of Chancery, by his Honor,
William J. Magie, Chancellor, in the cause
for that purpose mentioned in the said
petition, as is therein stated; but as to
the substance and form thereof this respondent

prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity, and she prays that the same may be affirmed, with costs to be adjudged to this respondent.

ROBERT E. VAN HOVENBERG,

Solicitor for and of Counsel with Respondent.

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IN CHANCERY OF NEW JERSEY.

	Between	}	<i>On Bill, etc.</i>
	WILHELMINA SCHIPPERS, Ex-		
	ECUTRIX, ETC.,		
	<i>Complainant.</i>		
10	and		
	RHEINHOLDT HERMAN	}	
	KEMPKE, ET ALS.,		
	<i>Defendants.</i>		

Order.

20 Upon reading and filing the bill of complaint and affidavits annexed thereto: It is, on this second day of January, A. D., 1904, on motion of Robert E. Van Hovenberg, of counsel for complainant, ordered, that the defendants, the said Rheinholdt Herman Kempkes and the Paterson Savings Institution, show cause before the Chancellor, at his Chambers, in the city of Jersey City, on Monday, the eleventh day of January, instant, at ten o'clock in the forenoon, why an injunction should not issue, pursuant to the prayer of said bill.

30 And it is also ordered, that until this order shall be made absolute or be discharged, the said defendant Rheinholdt Herman Kempkes absolutely desist and refrain from withdrawing any of the aforesaid money deposited in the

joint names of Elizabeth Kempkes and himself, until the further order of the honorable Court : and that the said the Paterson Savings Institution, its officers, agents and employees absolutely desist and refrain from paying to said Rheinholdt Herman Kempkes or any person he may designate, any or all moneys deposited in the said, the Paterson Savings Institution, in the joint names of said Elizabeth Kempkes and Rheinholdt Herman Kempkes until the further order of this Court. 10

And it is also ordered, that a copy of this order, together with a copy of the said bill and affidavits thereunto annexed, be served, with in three days from the date hereof personally on the president of the said Paterson Savings Institution, if he can be found in this state, or if he cannot, then upon one of the directors of said corporation resident in this state, and upon Rheinholdt Herman Kempkes personally. 20
The copies so served need not be certified.

Respectfully advised.

EUGENE STEVENSON,

V. C.

W. J. MAGIE,

C.

IN CHANCERY OF NEW JERSEY.

To his Honor, William J. Magie, Chancellor of
the State of New Jersey :

10 Humbly complaining, shows unto your Honor,
your oratrix, Wilhemina Schippers, Executrix of
Elizabeth Kempkes, deceased, of the Township
of Manchester, in the County of Passaic, and
State of New Jersey, is one of the children of
Elizabeth Kempes, deceased, who resided at the
City of Paterson, and who departed this life on
the twenty-third day of November, one thousand
nine hundred and three, testate.

20 Your oratrix further shows, that in and by
the terms of the last will and testament of the
said Elizabeth Kempkes, after providing for the
payment of some bequests therein mentioned,
the remainder of her estate is given to her three
children, to-wit, your oratrix, Wilhemina Schip-
pers, Rheinholdt Herman Kempkes and Geno-
feva Gross, in equal portions.

30 Your oratrix further shows, that said Elizabeth
Kempkes, deceased, appointed your oratrix,
Wilhemina Schippers and Rheinholdt Herman
Kempkes, the brother of your oratrix, and Geno-
feva Gross, the sister of your oratrix, executors
of her said will, and that on the fourth day of
December, one thousand nine hundred and
three, said will was proved, and your oratrix
and said Rheinholdt Herman Kempkes were
duly authorized, by the Surrogate of the County
of Passaic, to take upon themselves the admin-
istration of the estate of the said testatrix.

Your oratrix further shows, that at the time of the death of the said Elizabeth Kempkes, she had on deposit in the Paterson Savings Institution, the sum of one thousand eight hundred and eleven dollars, it being part of the proceeds of the sale of some real estate which she had disposed of a short time prior to her death, to one Louis Brick.

Your oratrix further shows, that after the death of the said Elizabeth Kempkes your oratrix learned from her said brother, Rheinholdt Herman Kempkes, that the said sum of one thousand eight hundred and eleven dollars had been deposited in the joint names of himself and the said Elizabeth Kempkes, their mother, and he gave your oratrix a written statement showing, among other things, an item of one thousand eight hundred and eleven dollars belonging to the said estate of Elizabeth Kempkes. 10

Your oratrix further shows, that she has received from said Rheinholdt Herman Kempkes the sum of one hundred dollars, which he paid her of his own volition, informing your oratrix at the time that it was a part of the one thousand eight hundred and eleven dollars, so deposited, as aforesaid, and that he intended to pay their sister, the said Genofeva Gross, the like amount, and also take the same amount himself, which your oratrix believes he did, and after deducting the said amounts, there remained in the Paterson Savings Institution, the sum of one thousand five hundred and eleven dollars, belonging to the estate of the said Elizabeth Kempkes, deceased, one third of which, 20 30

in and by the terms of the said will of the said Elizabeth Kempkes, belongs to your oratrix.

Your oratrix further shows, that she has a number of times requested her brother, the said Rheinholdt Herman Kempkes, to draw the said money from the bank, and place it with the other funds belonging to the said estate, and that he has absolutely refused to do so, unless he was allowed to retain the sum of three hundred dollars, which he said he was entitled to.

Your oratrix further shows, that she and her said sister, Genofeva Gross, refused to permit him to retain the sum of three hundred dollars, and insisted that he deposit the said sum together with the other money of the estate.

Your oratrix further shows, that on the thirtieth day of December, nineteen hundred and three, she called to see the said Rheinholdt Herman Kempkes and again requested him to have an inventory made of said estate, and to include therein the said sum of one thousand eight hundred and eleven dollars, but this he refused to do, and said that the money belonged to him, and that he would do with it as he pleased.

Your oratrix further shows, that the said Rheinholdt Herman Kempkes has absolute control of said money, and your oratrix believes that he intends to appropriate the same to his own use, and thus deprive your oratrix and her said sister, Genofeva Gross, of their rightful portion thereof.

All which things are contrary to equity, and tend to the manifest wrong and injury of your oratrix in the premises.

In consideration whereof, and forasmuch as your oratrix has no adequate remedy in the premises, except in this Honorable Court :

To the end, therefore, that the said Rheinholdt Herman Kempkes, and the Paterson Savings Institution, its officers, agents, and employees, may without oath answer the premises according to law, and may in particular, set forth and show whether there was not a deposit in the said the Paterson Savings Institution in the joint names of said Rheinholdt Herman Kempkes and Elizabeth Kempkes, deceased, on the twenty-third day of November, nineteen hundred and three, of the sum of one thousand eight hundred and eleven dollars, and how much thereof, if any, the said Rheinholdt Herman Kempkes has since that time withdrawn ; and that the said Rheinholdt Herman Kempkes be restrained from withdrawing from said Bank, for his own use, any of said money, and that he show what money he has withdrawn therefrom, and render an account of what he has done with the same, and that he be ordered to replace any sums that he may have applied to his own use herefrom, and deposit, in the joint names of the executors of said estate, the entire amount with the other funds of the estate, there to await the proper distribution of the same, and that in the meantime the said the president, directors and company of the Paterson Savings Institution, its officers, agents, and employees, be restrained from paying the said money deposited in the said Paterson Savings Institution in the joint names of Rheinholdt Herman Kempkes and Elizabeth Kempkes,

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to the said Rheinholdt Herman Kempkes, or to any other person by his order ; and that the said Rheinholdt Herman Kempkes be restrained from drawing from the Paterson Savings Institution for his own use any of the said money deposited therein in the joint names of the said Elizabeth Kempkes and Rheinholdt Herman Kempkes ; and that your oratrix may have such other and further relief as to your Honor shall seem meet, and as shall be required by the circumstances of the case, and as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your oratrix, not only the State's writ of injunction, issuing out of and under the seal of this Honorable Court, directed to the said Rheinholdt Herman Kempkes, requiring and commanding him absolutely to desist and refrain from withdrawing any of the aforesaid money deposited in the joint names of Elizabeth Kempkes and himself, until the further order of this Honorable Court ; and also directed to the said the president, directors and company of the Paterson Savings Institution, its officers, agents and employees, requiring and commanding it and them absolutely to desist and refrain from paying to said Rheinholdt Herman Kempkes, or any person he might designate, any or all moneys deposited in the said, the Paterson Savings Institution in the joint names of said Elizabeth Kempkes and Rheinholdt Herman Kempkes, until the further order of this Honorable Court, but also the State's writ of subpœna, issuing out of and under the seal of this Honorable Court, to be directed to

the said the president, directors and company of the Paterson Savings Institution, and Rheinholdt Herman Kempkes, commanding them, and each of them, by a certain day and under a certain penalty, therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there without oath, to answer all and singular the said premises, and to stand to, abide by, and perform such order and decree therein as to your Honor shall seem meet, and as shall be agreeable to equity and good conscience. 10

And your oratrix, as in duty bound, will ever pray, &c.

ROBERT E. VAN HOVENBERG,

Solicitor for and of Counsel with Complainant.

STATE OF NEW JERSEY, {
COUNTY OF PASSAIC, } ss.

Wilhemina Schippers, the above-named complainant, being duly sworn according to law, on her oath says: That she has heard the above bill read and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters that are therein stated to be on her information or belief, and as to those matters she believes it to be true. 20

WILHELMINA SCHIPPERS.

Sworn and subscribed before me, this second day of January, A. D., 1904. 30

ALBERT COMSTOCK,

Notary Public of N. J.

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

Wilhemina Schippers, being duly sworn, according to law, upon her oath, says, that she is one of the children of Elizabeth Kempkes, deceased, that her mother died on the twenty-third day of November, 1903, testate, that after the payment of a number of bequests mentioned in her will the estate of the said Elizabeth Kempkes, deceased, is left to this deponent, her sister Genofeva Gross, and her brother Rheinholdt Herman Kempkes, in equal portions; that at the time of the death of the said Elizabeth Kempkes she had a deposit in the Paterson Savings Institution of about \$2,000.00, the same being part of the proceeds of the sale of some real estate which she had a short time prior to her decease sold to Louis Brick; that the said money was deposited in her mother's name, and in the name of her brother Rheinholdt Herman Kempkes, that immediately after the death of the said Elizabeth Kempkes her son, the said Rheinholdt Herman Kempkes, took entire charge of said estate and has continued in control thereof up to the present time; that this deponent has had a number of conversations with said Rheinholdt Herman Kempkes in regard to the estate, and he has always admitted, up to today, that the said money was a part of the estate of his mother, said Elizabeth Kempkes, but wanted her and her sister to agree to let him retain \$300.00 out of it for his own use, claiming that he was entitled to that amount, but they have

absolutely refused to do so; that shortly after the death of her said mother, her said brother paid to this deponent and to her sister the sum of \$100.00 each, remarking at the time that he had taken it from the amount deposited in the Paterson Savings Institution belonging to their mother at the time of her death; that deponent is desirous that an inventory be made at once of said estate, and called on her brother this morning and requested him to have the same done at once, and include in it the balance of the money belonging to said estate which is on deposit in the Paterson Savings Institution, as aforesaid; that her brother told her that he would not do so, that said money belonged to him, and was not part of said estate, that she and her sister were not entitled to any part of it, and if they did not do right he would keep it all.

10

WILHEMINA SCHIPPERS. 20

Sworn and subscribed to before me this 31st day of December, A. D., 1903.

ALBERT COMSTOCK,

Notary Public

of New Jersey.

30

STATE OF NEW JERSEY, }
 PASSAIC COUNTY. } ss :

10 Genofeva Gross, of full age, being duly sworn according to law on her oath says, that she is one of the children of Elizabeth Kempkes, deceased, that her mother died on the 23rd day of November, 1903, testate, that after the payment of a number of bequests mentioned in her will the balance of the estate is left to this deponent, her sister, Wilhemina Schippers, and their brother, Rheinholdt Herman Kempkes, in equal portions.

20 That her said sister, Wilhemina Schippers, and her brother, have qualified as executors of the said last will of Elizabeth Kempkes, deceased, and have taken upon themselves the administration of the said estate, but that the said Rheinholdt Herman Kempkes has taken entire control thereof, and will not proceed to have an inventory taken thereof.

30 That after the death of the said Elizabeth Kempkes, her said brother informed this deponent and her sister that there was on deposit in the Paterson Savings Institution the sum of eighteen hundred dollars, which their mother, said Elizabeth Kempkes, had placed there a short time prior to her death, that the same was deposited by her in his and her names, jointly, that he was entitled to three hundred dollars thereof, and that if she and their sister, Wilhemina Schippers, would agree to let him have that amount he would divide the balance remaining in said bank equally among the three, which this deponent and her sister absolutely refused to

do; that prior to this conversation the said Rheinholdt Herman Kempkes gave this deponent a check for one hundred dollars and told her that it was a part of the money on deposit in the Paterson Savings Institution belonging to their mother, and at the time handed her a statement showing that the said sum of eighteen hundred dollars was in said bank. That the share of said Rheinholdt Herman Kempkes in the remainder of said estate of said Elizabeth Kempkes, deceased, will not amount to the sum of fifteen hundred dollars to the best of deponent's knowledge and belief, and this deponent is afraid and is reasonably sure that said Rheinholdt Herman Kempkes will appropriate the same to his own use, and that he is not a man, in the judgment of this deponent, financially responsible and from whom they could recover the said money in case he should do as he has said that he would in regard to it. 10 20

GENOFEVA GROSS.

Sworn and subscribed to this 31st day of December, 1904, before me.

WM. M. RYSDYK,

Master in Chancery of New Jersey.

STATE OF NEW JERSEY, {
COUNTY OF PASSAIC. } ss :

30

Henry Schippers, being duly sworn, according to law, upon his oath, says, that he is the husband of Wilhelmina Schippers, who is one of the daughters and devisees of Elizabeth

Kempkes, deceased, that he knows of his own knowledge that during the month of November, 1903, the said Elizabeth Kempkes, since deceased, sold a piece of property she owned, the same being situate on Bridge street, Paterson, N. J., to Louis Brick, for the sum of \$3,000.00 ; that after said sale he saw the said Elizabeth Kempkes at her house, and that she informed this deponent that she had deposited the proceeds of said sale in The Paterson Savings Institution, and that she had paid a small bill and intended to pay another out of said proceeds, and that she was going to the bank for the purpose of drawing some money to pay a bill ; that deponent had occasion to go to said bank and that he meet the said Elizabeth Kempkes there, and that she informed him that she had drawn some money from the bank.

Deponent further says, that after the death of said Elizabeth Kempkes, her son Rheinholdt Herman Kempkes, who is one of the executors mentioned in the said last will and testament of said Elizabeth Kempkes, handed this deponent a statement of the moneys belonging to the estate of Elizabeth Kempkes, deceased, that said statement contained an item showing that there was deposited in the Paterson Savings Institution the sum of \$1,811.00, that afterwards deponent, his wife, and sister Mrs. Genofeva Gross had a conversation with Rheinholdt Herman Kempkes in regard to said money and asked him to deposit the same with the other money belonging to the estate, it having been deposited by said Elizabeth Kempkes in her name and that of said Rheinholdt Herman

Kempkes, that the said Rheinholdt Herman Kempkes thereupon refused to do so unless they all allowed him to retain the sum of \$300.00, claiming that he was entitled to that amount, that deponent's said wife and sister refused to do so and insisted that it belonged to the estate and should be inventoried as a part thereof and deposited with the other money, that thereupon said Rheinholdt Herman Kempkes absolutely refused to do so, and up to the present time has kept entire control of the said money. 10

Deponent further says, that a short time after the death of the said Elizabeth Kempkes, the said Rheinholdt Herman Kempkes gave to the wife of this deponent and to her sister Mrs. Genofeva Gross the sum of one hundred dollars each, and informed them that he had taken a like sum, and that the same came from the amount deposited in the Paterson Savings Institution at the time of the death of Elizabeth Kempkes. 20

HENRY SCHIPPERS.

Sworn and subscribed to before me this 31st day of December, A. D., 1903.

ALBERT COMSTOCK,

Notary Public

of New Jersey.

30

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

10 Louis Brick, of full age, being duly sworn according to law, upon his oath says, that he resides at number twenty-two High street, Paterson, N. J., that he was acquainted with Elizabeth Kempkes who died November, 1903, that on the eleventh day of November, 1903, he completed the purchase of a piece of property, situate on Bridge street, Paterson, N. J., from said Elizabeth Kempkes for the sum of \$3,000.00, which sum he paid her for the same ; at the time of said purchase the said property was subject to mortgage for \$1,000.00 which at the time the deed was delivered was paid, and that at that time the said Elizabeth Kempkes told this deponent that she intended to place the money in the Paterson Savings Institution, and afterwards
20 pay off a mortgage that was on some property that she owned at the Passaic Falls and with the balance, together with some insurance money which she received at the death of her son at that time, she would visit Germany.

LOUIS BRICK.

Sworn and subscribed to before me this 31st day of December, A. D., 1903.

ALBERT COMSTOCK,

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Notary Public of New Jersey.

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

William Otten, being duly sworn, according to law upon his oath says, that he resides at No. 378 Union avenue, Paterson, N. J., that he was well acquainted with Elizabeth Kempkes, the mother of Rheinholdt Herman Kempkes, that she frequently visited his house, in fact, she called there almost every day for the purpose of seeing his wife, that said Elizabeth Kempkes told this deponent that she had sold her Bridge street property, and also mentioned the fact that she had deposited the greater part of the proceeds in the Paterson Savings Institution. 10

Deponent further says, that the conversation took place with the said Elizabeth Kempkes a few days prior to her death.

WILLIAM OTTEN.

Sworn and subscribed to before me this 31st day of December, A. D., 1903. 20

ALBERT COMSTOCK,

Notary Public of New Jersey.

IN CHANCERY OF NEW JERSEY.

	Between	}	
	WILHEMINA SCHIPPERS, EXE-		
	CUTRIX, ETC.,		
10	<i>Complainant,</i>		<i>On Bill, etc.</i>
	<i>and</i>		
	RHEINHOLDT HERMAN	}	
	KEMPKEs, ET ALs,		
	<i>Defendant.</i>		

Answer.

20 The answer of Rheinholdt Herman Kempkes, one of the defendants, to the bill of complaint of Wilhemina Schippers, Executrix of Elizabeth Kempkes, deceased, complainant.

30 This defendant, answering says : that he admits that the said Wilhelmina Schippers, the complainant in the bill of complainant filed in this cause, is an executrix of the last will and testament of the said Elizabeth Kempkes, and is also one of the children of the said Elizabeth Kempkes, deceased, and that the said Elizabeth Kempkes in her lifetime resided in the City of Paterson, and that she departed this life on the twenty-third day of November, A. D., nineteen hundred and three, testate.

And this defendant, further answering, admits that in and by the terms of the said last

will and testament of the said Elizabeth Kempkes, after providing for the payment of some bequests therein-mentioned, the remainder of her estate is given to her three children, to wit: the said Wilhemina Schippers, Genofeva Gross and this defendant, in equal portions.

And this defendant further answering says, that he admits, that the said Elizabeth Kempkes, deceased, appointed the complainant, Wilhelmina Schippers, and Genofeva Gross and this defendant, executors of her said last will and testament, and that on the fourth day of December, A. D., nineteen hundred and three, said will was proved and the said Wilhelmina Schippers and this defendant were duly authorized, by the surrogate of the county of Passaic, to take upon themselves the administration of the estate of the said testatrix. 10

And this defendant further answering denies that at the time of the death of the said Elizabeth Kempkes and she had on deposit in the Paterson Savings Institution the sum of one thousand eight hundred and eleven dollars. 20

And this defendant further answering denies that after the death of the said Elizabeth Kempkes, this defendant informed the said complainant that the said sum of one thousand eight hundred and eleven dollars had been deposited in the joint names of himself and the said Elizabeth Kempkes, their mother, and he also denies that he gave the complainant a written statement showing among other things an item of one thousand eight hundred and eleven dollars belonging to the estate of Elizabeth Kempkes, but says, that the following are 30

the facts concerning said money : that at the time of the death of the said Elizabeth Kempkes there was an account in the said Paterson Savings Institution and the sum of one thousand eight hundred and eleven dollars was deposited to the credit of the same, but that the said account was in the names of Elizabeth Kempkes or Herman Kempkes (meaning thereby this defendant) and the money thereon on deposit was
 10 the money of this defendant, and not the money of the said Elizabeth Kempkes, deceased.

And this defendant further answering says that he did give the said complainant a written statement which said written statement set forth, that the said one thousand eight hundred and eleven dollars was deposited in the names of Elizabeth Kempkes or Herman Kempkes, but the said written statement did not show or set forth that the said sum belonged to the estate of
 20 the said Elizabeth Kempkes, deceased.

And the defendant admits that the said complainant received from this defendant the sum of one hundred dollars which he paid her of his own volition, and he also admits that he informed her at the time that it was a part of the money which was drawn by him from the moneys on deposit in the said Savings Institution and that he intended to pay their sister, the said Genofeva Gross, the like amount, but this
 30 defendant denies that he so paid the said money as the money of the estate of the said Elizabeth Kempkes, but that he paid the same from his own money deposited as aforesaid, and that he did the same actuated by a brotherly feeling toward his sisters, and with a desire of assisting

them to make necessary arrangements for the funeral.

And this defendant further answering denies that one-third of the residue on deposit in the Paterson Savings Institution, belongs to the complainant, or that any other sum therein deposited as aforesaid is the property of said complainant or the estate of the said Elizabeth Kempkes, deceased.

And this defendant further answering admits that the said complainant has requested him, the said Rheinholdt Herman Kempkes, to draw said money from the bank and place it with the funds belonging to the estate, and that this defendant has refused so to do, but he denies that it is because he is not allowed to retain the sum of three hundred dollars, but the truth of the fact is, that he has so refused because the money deposited in the said Paterson Savings Institution as aforesaid, is his own money and belongs to his own separate estate. 10 20

And this defendant further answering admits that on the thirtieth day of December, A. D., nineteen hundred and three, the complainant called to see the said defendant and again requested him to have an inventory made of the said estate and so include therein the said sum of one thousand eight hundred and eleven dollars, but this he refused to do, because said money belonged to him, and he had a right to do with it as he pleased. 30

And this defendant further answering admits that he has absolute control of the said money, but he denies that the said complainant or the

said Genofeva Gross are entitled to any portion thereof.

And this defendant submits to this honorable Court that all and every of the matters in the said complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief in this court; and this defendant hopes he shall
 10 have the same benefit of this defense as if he had demurred to the said complainant's bill.

And this defendant humble prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

CHARLES B. DUNN,

Solicitor for and of Counsel With the Defendant.

IN CHANCERY OF NEW JERSEY.

Between

WILHELMINA SCHIPPERS, EXE-
CUTRIX, ETC.,*Complainant,*

and

RHEINHOLDT HERMAN
KEMPKE AND THE PATERSON
SAVINGS INSTITUTION,
*Defendants.**On Bill, Etc.* 10**Order.**

This matter coming on to be heard, in the presence of Robert E. Van Hovenberg, of counsel with the complainant, and Charles B. Dunn, of counsel with the defendant, Rheinholdt Herman Kempkes, no one appearing for the Paterson Savings Institution, and on proof of service of the order to show cause heretofore granted herein : It is, on this sixth day of February, A. D., 1904, ordered that the restraint upon the defendants imposed by the above mentioned order be continued until the further order of this court. 20

And it is further ordered that the said money deposited with the Paterson Savings Institution in the joint names of Elizabeth Kempkes and Reinholdt Herman Kempkes may be drawn therefrom by the said Rheinholdt Herman Kempkes, 30

if he first give a bond to Wilhelmina Schippers,
executrix of the estate of Elizabeth Kempkes,
deceased, with sufficient surety, to be approved
by this Court, conditioned for the payment of
the said money as may be directed by this Court.

Respectfully advised,

EUGENE STEVENSON,

V. C.

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IN CHANCERY OF NEW JERSEY.

CHANCERY CHAMBERS, JERSEY CITY, N. J.,
NOVEMBER 16, 1904.

Between	}	
WILHELMINA SCHIPPERS, EX-		
ECUTRIX, ETC.,		
<i>Complainant,</i>		10
<i>and</i>		<i>On Bill.</i>
RHEINHOLDT HERMAN		
KEMPES, ET ALS.,		
<i>Defendants.</i>		

Transcript of shorthand notes of testimony
taken in the above stated cause, at the Chancery
Chambers, in the City of Jersey City, New Jer- 20
sey, before his Honor, Eugene Stevenson, Vice
Chancellor, on Wednesday, the sixteenth day of
November, 1904.

PRESENT:

ROBERT E. VAN HOVENBERG, for the com-
plainant.

CHARLES B. DUNN, for the defendant, Rhein- 30
holdt Herman Kempkes.

LOUIS BRICH, sworn on behalf of the com-
plainant ;

Direct Examination by Mr. Van Hovenberg :

Q. Where do you live, Mr. Brich ?

A. Paterson, New Jersey.

Q. Whereabouts—what street ?

A. 22 High street.

Q. Did you know Elizabeth Kempkes ?

A. Yes.

Q. The mother of—

10 A. The mother of Mr. Herman Kempkes.

Q. Did you have any transaction with her in November, 1903 ?

A. Yes ; I bought a house from Mrs. Kempkes.

Q. Where was that property situated ?

A. It was 17 Bridge street.

Q. What was the price ?

A. \$3,000.

Q. How did you pay her, by check or cash ?

20 A. I paid her \$2,500 by check and \$500 cash ;
and Mr. Dunn he made me the deed.

Q. Was that the check (showing paper) ?

A. Yes.

Q. Where was this drawn, in Mr. Dunn's office ?

A. Yes.

Said check is offered in evidence
and marked Exhibit C-1 for the complainant.

30 Q. At the time did you know what Mrs. Kempkes did with that money ?

A. Mr. Dunn made me the deed, and after I give him the money and check for Mrs. Kempkes he went to the bank to take out the

bond and mortgage ; and in about two hours Mr. Dunn give me my deed and give me the paper from the bank, and Mrs. Kempkes went with me and said the house was mine—it belonged to me.

Q. When you bought this property did the Savings Bank have a mortgage on it ?

A. Yes.

Q. How much was that mortgage, do you know ?

10

Q. \$1,000.

Q. And that is the paper that you spoke of, the mortgage that was paid off at that time ?

A. Yes, at that time.

By the Court :

Q. Was that the only mortgage on it ?

A. Only mortgage.

Q. And that was paid off ?

A. Yes, I got the paper here.

20

Q. And you got the deed free and clear ?

A. Yes, free and clear.

Q. Where did you give this check of \$2,500 to Mrs. Kempkes—where was it ?

A. It was by the lawyer. I paid him the money. That was a certified check.

Q. And where was it ?

A. The money was in the American Trust Company.

Q. And whereabouts was it you gave the money in the Trust Company ?

30

A. It was in the Romaine building, in Mr. Dunn's office.

By Mr. Van Hovenberg :

Q. Is this the deed that you received for that property (showing witness paper) ?

A. Yes, it is made out to my children.

Said deed is offered in evidence and marked Exhibit C-2 for the complainant.

10

Q. And that is the bond that you got back from the Savings bank ?

A. Yes.

The same is offered in evidence and marked Exhibit C-3 for the complainant.

20

Q. Did Mrs. Kempkes say anything in the bank about what she was going to do with this money ?

A. No.

Q. Did she afterwards tell you what she had done with the money ?

A. After I came to the house she told me she would like to sell the Totowa house, and if it can be sold, she would like to go to Germany.

Q. That conversation took place after you had bought the property ?

30

A. After I get the deed in my pocket to go home, she went with me.

Q. But she told you she wanted to sell the other property, where was that ?

A. It was on the road going from the lawyer's office to the Bridge street house—on the road.

Q. Tell me what was said about the money

and about the other property—the Totowa property?

A. She said she would like to sell the Totowa property if it can be sold, she wants to go to Germany?

Q. Did she say anything about the money that she had received from the Bridge street property?

A. Nothing at all.

Q. Nothing more than that?

10

A. No.

Cross-Examination by Mr. Dunn:

Q. Who was the lawyer that you paid the money to for the deed?

A. Charley Dunn—to you.

Q. To me?

A. Yes.

Q. Do you remember who was present with Mrs. Kempkes at the time?

20

A. The son was there.

Q. And you stayed in my office in the Romaine building until I returned with the papers?

A. Returned from the bank.

Q. Then Mrs. Kempkes, she went down with you also to the house?

A. Yes.

Q. On Bridge street, and did she notify the tenants?

A. Yes.

20

Q. That you had purchased the property?

A. Yes.

Q. You walked down, did you?

A. Yes.

Q. You had negotiations with Mrs. Kempkes before you bought this property, didn't you?

A. Well, Mr. Kempkes come to me—Herman Kempkes—he come to me one day and wanted me to buy the property in Bridge street. He showed me this place, and after I went with him and his mother—because he told me it belonged to the mother—to make out the papers, and afterward I come to you and I give you \$100
10 deposit, and after a few days I should come and pay him the rest.

Q. That is all you know about it?

A. Yes.

Q. Did you not speak about buying that Totowa avenue property of hers at the time?

A. I didn't want to buy it.

Q. Did you make an offer for the Totowa avenue property?

A. He came to me one time and says he
20 wanted some one to buy it.

Q. How long had you known Mr. Kempkes, the son?

A. About eight or nine years.

Q. How long had you known Mrs. Kempkes?

A. That was the first time I had seen her.

Q. When you went up to her with the son to make arrangements about the price, did she talk to you and discuss the price with you—Mrs. Kempkes—and tell you how much she wanted?

A. She told me that she was willing to sell
30 the property for \$3,000.

Q. And then when you talked to her what did she say?

A. That she was satisfied.

Q. When you came out of the Romaine Building, Mr. Herman Kempkes and his mother were with you?

A. Yes.

Q. Did you have anybody else with you?

A. Nobody else—no.

Q. How far did Herman go with you that day towards Bridge street—where did he leave you?

A. Mr. Kempkes came to my house to show the property. 10

Q. I mean when Mrs. Kempkes and you went down to notify the tenants, you say that Herman went with you?

A. No, he was not with me.

Q. Where did he leave you?

A. 22 High. I go from the office to Washington street and from Hamilton avenue to the house.

Q. Then Herman didn't go with you?

A. No. 20

Q. Just Mrs. Kempkes?

A. Yes.

Q. How many blocks is that?

A. It is about six blocks.

Q. From the office to 17 Bridge street?

A. Yes.

Q. And this was November 11th, 1903?

A. 1903.

By the Court :

30

Q. You have been telling us about this talk you had with Mrs. Kempkes about buying another piece of property for \$3,000?

A. I bought this property for \$3,000.

Q. Did you buy it at the time you gave this check ?

A. Yes.

Q. Where was that property ?

A. 17 Bridge street.

Q. Was \$3,000 the price ?

A. Yes.

Q. I understood you to say it was \$8,000 ?

A. No, \$3,000.

10 Q. And you gave \$2,500 by check and \$500 in cash ?

A. Yes.

Q. How did you come to look that property up ? What put you in the notion of buying it ?

A. The son came to me and he told me he would like to sell the property in Bridge street —Mr. Herman Kempkes.

Q. That was the first you heard about it ?

A. Yes.

20 Q. Did you know Mr. Herman Kempkes ?

A. Eight years I know him.

Q. Did you know his mother ?

A. No, I didn't the first time.

Q. Did you ever know his mother until you met her in Mr. Dunn's office ?

A. Never saw her before.

Q. When Mr. Herman Kempkes came to you about this property, did he say whose property it was ?

30 A. He said it belonged to the mother—that is what he said.

Q. Did he say anything different from that at any time ?

A. No.

Q. Down to the time you bought it ?

A. Yes, he showed me the property and the same day I bought it.

Q. The same day?

A. The same day.

Q. You said a moment ago that you saw Mrs. Kempkes, the mother, for the first time in Mr. Dunn's office?

A. No, in the house, judge.

Q. In the house—what house? A. In the house where she lived in Totowa avenue. 10

Q. How did you come to see her there?

A. I go with the son, with Herman Kempkes, the son. He showed me the property and afterwards I went to the mother.

Q. And then you went up to the mother?

A. Yes.

Q. Did the son tell you what the price would be?

A. \$3,000, and he go to the house and tell the mother the house is sold to Mr. Brich for \$3,000. After dinner we all three went to the lawyer. I give him a deposit of \$100 and after a few days there was ready a deed, and I paid him the check and \$400 more. 20

Q. The same day you went down to look at the house you went up to Mrs. Kempkes' house at Totowa. What did you go there for?

A. I wanted to see the owner.

Q. Did she agree to the sale when you went up there? 30

A. Yes, the making of the price.

Q. Wasn't the price made up before you went there?

A. No.

Q. Didn't the son tell you what the price would be?

A. The son tell me it could not be sold less than \$3,000.

Q. Did you try to get it for less?

A. I didn't say nothing with the mother—I was satisfied.

Q. Did you tell the son you were satisfied before you went up there?

10 A. Well, I wanted to see the mother.

Q. Why?

A. Because maybe the mother didn't want that price.

Q. And after you saw her and satisfied yourself, you came down to Mr. Dunn's office and deposited \$100?

A. Yes.

Q. Was any writing made?

A. Yes.

20 Q. Did you sign it?

A. Not me.

Q. She did?

A. She did.

Q. Where is that paper, do you know?

A. I don't know—with the lawyer.

Q. It was a few days after that that you came back with the money?

A. Yes.

Q. When this check was given?

30 A. Yes.

WILHELMINA SCHIPPERS, sworn in her own behalf:

Direct Examination by Mr. Van Hovenberg:

Q. You are the daughter of Mrs. Kempkes who is deceased ?

A. Yes.

Q. And you are one of the executors of her will ?

A. Yes.

Q. And the sister of Mr. Kempkes ?

A. Yes.

Q. When did your mother die ?

10

A. The 20th day of November, on the morning at eight o'clock, in the hospital.

Q. 1903 ?

A. 1903.

Q. After your mother's death did you see your brother and have any conversation with him in regard to the estate ?

A. No ; I was in the hospital with mother, and I stayed there until she died, and when I got home my brother had every paper and the bank books and all and the deed. He put it in his satchel and took it up home and I never seen the papers.

20

Q. I want you to tell the first time after your mother died that you spoke to your brother about the money and so on, that your mother left. Tell us what you said to him and what he said to you.

A. Not the first day we didn't talk.

Q. When did you talk ?

30

A. Only in the afternoon he says to me, "Say, Mina, I can get some money on the bank. I got some money and you need some money." I says, "I need some money." "Well," he

says, "I think I will take some money." So that went on, and Tuesday morning I go down to mother's home, and he says, "Well, I went to the bank and I want to take \$100 for Eva"—for my sister and for me and for himself. Then in an hour he come back and he paid me \$100 and he kept a \$100 for himself. He says, "I didn't take \$100 for Eva." He didn't bring the \$100 up for Eva on account she comes from Brooklyn and it is not necessary that he carry it around and he will give her a check for it.

10

Q. What bank was this money in, Mrs. Schippers?

A. In the Savings Institution. I know my mother was in that bank.

Q. Did he say anything in regard to how much was in the bank at the time?

A. No, not a word.

20

Q. Did you know how much was in the bank?

A. No, only my mother says that the money was there.

Q. Did you know what money your mother had in the Savings bank when she died?

A. No, not how much.

Q. Did you know that your mother had sold a piece of property in Bridge street?

A. Oh, yes; sure.

Q. Did you know what she got for it?

A. Yes, she told me.

30

Q. Did you know where that money was?

A. Yes, she told me she put it in the Savings bank. She told me she put \$1800—

Mr. Dunn :—I think that is leading.

The Court :—Do you object?

Mr. Dunn :—I merely suggest that to counsel.

Q. Where was your mother living just before she went to the hospital ?

A. 186 Wayne avenue.

Q. Did you visit your mother there sometimes ?

A. Well, I was sick before that time. I had not been there for five weeks—but on the 19th of November I made her a visit, and when I come in mother was sick. She lay on the lounge, and Herman he sat there. So when I come in he opened the door, and he says, "Mother is sick." He come there every time for his dinner, and he was there. She started sick that night before. 10

Q. Well, what conversation did you have that day with your brother and your mother ?

A. That day, nothing. I attended to her to the next day, until Thursday. On Friday morning we called the doctor. 20

Q. Did you have any conversation that day with your brother in regard to your mother's property or anything ? Did you have anything to say ? Did he say anything ?

A. No.

Q. There was nothing said ?

A. No, only after the doctor was here, my brother he wanted her—mother—to make a will. He was quarrelling with mother all the summer to make a will. 30

Q. I want to know what took place while your mother was in bed. He asked her to make a will, you say ?

A. Yes.

Q. I want to know just what passed between your mother and brother and yourself.

By the Court :

Q. How long was this before she died ?

A. This was on Friday and she died very suddenly on Monday.

10

*The Court :—*When did she make her will ?

*Mr. Van Hovenberg :—*The 21st day of November.

By Mr. Van Hovenberg :

Q. What did he say to your mother while she was in bed that day about making a will ?

A. I was not in the bedroom : I was in the kitchen, and at that time he went in the bedroom and asked her to make a will.

20

Q. Did you hear what he said to her ?

A. No.

Q. You couldn't hear ?

A. Yes, he went in and out. He couldn't say much.

Q. Then you didn't hear him ask her anything ?

A. No, only what mother tell me—that Herman was here—my mother told me that.

30

*Mr. Dunn :—*Then I ask that her testimony here be stricken out. She said that she heard Herman ask his mother to make a will, and now

she says her mother told her he asked her to make a will.

The Court :—Is any of this testimony competent, Mr. Van Hovenberg ?

Mr. Van Hovenberg :—I think it is, yes ; because I think it will develop that he went from there as her messenger to go for a lawyer to come and draw the will. 10

The Court :—If there is any possible future aspect of this case that will make this testimony competent, it can be admitted or readmitted, but as it stands now, it is mere hearsay. I don't know of any rule by which that is competent. That testimony will be excluded.

20

Q. Did your brother leave the house that day while you were there ?

A. Yes, for the time that he went for a lawyer.

Q. Did he go out ?

A. Yes.

Q. Did he say anything to you before he went out what he was going for ?

A. No.

Q. Didn't tell you where he was going ?

30

A. No.

Q. How long was he gone ?

A. Not very long—may be a half hour.

Q. Was anybody with him when he came back ?

A. Mr. Merz was with him.

Mr. Dunn :—I want to know if November 19th is the day she is speaking of now.

The Witness :—No, this was the 20th.

Q. He brought Mr. Merz there ?

10 A. Yes.

Q. Was there anything done that day ? Did she make her will that day ?

A. Mother wasn't satisfied with Merz, because she says Weiss was better. She told Merz she wasn't satisfied, she wants Weiss. She was talking with Merz, and after Merz went away Herman said, "Well, mother wants it and the thing can be settled."

20 Q. Was the will written there in the house that day ?

A. No, on this other day, just before she went to the hospital.

Q. That was written the next day ?

A. Yes.

Q. The next day was what—Saturday ?

A. Yes.

Q. She was home on Saturday ? She had not gone to the hospital ?

A. She went to the hospital at one o'clock.

30 Q. Were you at her house on Saturday morning ?

A. I was there always from the time I stepped in.

Q. Was your brother there ?

A. Yes.

Q. Was her will made and signed by her that day ?

A. Yes ; on her bed.

Q. On Saturday morning ?

A. Yes.

By the Court :

Q. Who drew the will ?

A. Herman wrote the will on the paper and mother says that everything that is here in this country she would share between us three—between Herman, Eva and me. 10

Q. Mr. Herman Kempkes wrote out the will ? No lawyer was there ?

A. No.

Q. I am speaking of the day when the will was signed—on Saturday. There was no lawyer there then ?

A. No. 20

By Mr. Van Hovenberg :

Q. Who brought the will to the house ?

A. Merz was the lawyer.

Q. Then Mr. Merz came to the house with the will on Saturday morning ?

A. Yes.

By the Court :

Q. Did he bring it already made ? 30

A. Already made—all finished.

Q. You were telling us a moment ago of your mother saying that she wanted to have the property divided equally among the three child-

ren. Was that before the will was brought to her?

A. Well, that was on Friday, and this was Saturday.

Q. And who did she say that to?

A. To me and my brother.

Q. Did she tell it to Mr. Merz?

A. No.

10 Q. Do you know how Mr. Merz found out how the will was to be drawn?

A. I didn't speak with Mr. Merz at all until he come with the will to be signed.

Q. Then you don't know how Mr. Merz found out out how the will was to be drawn?

A. No.

By Mr. Hovenberg :

Q. When this will was signed, was Herman there in the house?

20 A. Herman was there and I was there, when he read the will to us ; then Herman went for the witness—and he read it on mother's bed.

Q. Who told Mr. Merz to write the will?

A. Herman.

By the Court :

Q. Do you know that?

A. Herman bring the paper up.

By Mr. Van Hovenberg :

30 Q. Herman took the paper to whom—Mr. Merz?

A. Yes.

Q. What paper?

A. The way mother told him to make the

will. He wrote it on a paper and then he brought the paper up.

By the Court :

Q. How do you know that ?

A. I was in mother's house.

Q. How do you know your brother took that paper to Mr. Merz ?

A. It was the same way it read as he did read it up in the house to mother on the bed. 10

Q. How do you know he took that paper to Mr. Merz ? Did you see him go off with it ?

A. Yes, sure, I scen him go off with it.

Q. Did your mother say anything at the time she signed the will, did she tell your brother how she wanted the will drawn ? That is, did you hear her tell him ?

A. He says, "What you have in this country, that be divided into three shares." And mother says, "Yes. You divide that between your two sisters and you—all that belongs to me." 20

Q. Did she have any property in Germany ?

A. Yes. That should be divided in Germany. My brother had a mortgage on that.

*The Court :—*Is that all the will ?

*Mr. Van Hovenberg :—*The will disposes of the whole estate.

By Mr. Van Hovenberg :

30

Q. Was there anything said by her when you and Herman were present, in regard to any money that she had in any bank ?

A. No—she told me that she has the

money in the Savings Bank. I know that—she always tell me that.

Q. Was there anything said by her when you and your brother were there, about any money she had in the bank? Did she speak to you about it at all?

A. Yes, she put the money in the bank from the property. She told me she paid the interest from it and she had left \$1,800.

10 Q. The time this will was signed—that day?

A. She didn't say anything that day.

Q. Did your brother say anything that day, or any of those days just before your mother died, about any money that was in the bank belonging to your mother?

A. No, sir, he didn't say anything about the bank.

20 Q. After your mother died, what did your brother say, if anything, in regard to the money that was in the bank?

A. The first day after mother's death, he didn't tell me only what I told before.

Q. What did he say—anything else that he said about it?

A. Nothing for the first days; he only talked with me about this money when we went to record the will in the Court House.

Q. What did he say to you then?

30 A. He called us out in the hall and he says to my sister and me, "You give me charge of the whole property." I says, "you can have it for the present." "No," he says, "I want it forever—forever I want it. I want it forever," he says. "Well," I says, "you won't get it forever." And we went in and when we were finished he

jumped up and he went to my sister, he says, 'Eva, you have to give me \$300, or I won't divide the money with you in the bank. If you don't do that, I will keep that money. That is my money. I have my name on the book' and it was his money. I told him "show me the book and show me the papers." He says, "I don't have to show you anything." I says. "Why not?" He says "You wait."

Q. Do you know where the bank book of your mother was kept? 10

A. In the bureau—in the top drawer she kept all the papers together.

Q. Who has got the book as far as you know?

A. At the time I was in the hospital he took everything out of the drawer.

Q. Did you see that bank book of the Savings Bank in the drawer?

A. Yes.

Q. And that book was there when your mother was taken to the hospital? 20

A. Yes.

Q. Have you had any other conversation with your brother about that money? Did you talk to him again?

A. No. Then he got quarrelling with Mr. Schippers.

Q. Have you ever talked with him about it since?

A. No, he says that one day at the Court, he has got his name on the book, and he wanted to get \$300 and then he would share the money with us. If we did not want to give him that he will keep the money himself. He says he 30

paid out of the bank the hospital, he paid the funeral and all expenses, he paid from the bank.

By the Court :

Q. Would you recognize the Savings Bank book if you saw it now ?

A. Sure.

10 *Cross Examination by Mr. Dunn :*

Q. When did you see the bank book last ?

A. Before I went to the hospital with mother.

Q. That is, on the very day she went to the hospital ?

A. Yes, on the morning before she went to the hospital I was in the drawer—my mother tell me to take the keys. In the excitement I forget the keys.

Q. Did you see whose name was on it ?

20 A. My mother's name—but I couldn't read English.

Q. Didn't understand Herman's name was on it ?

A. No, I didn't notice that. Mother never remembered that his name was on it.

Q. How many books was there ?

A. There was one German book and that book.

30 Q. The German bank book was for a bank in Switzerland ?

A. No, in Crefeld, Germany.

Q. And the other book was the Savings Institution book ?

A. Yes.

Q. So you are sure there were only two books

there, the Savings Institution and the German book ?

A. Yes, those books were there.

Q. And they were in the bureau in the top drawer ?

A. Yes.

Q. Now, you had not been to the house for five weeks before that time ?

A. That is before I had been over to the hospital.

10

By the Court :

Q. When did she first take sick ?

A. From Thursday.

Q. What day of the week was it she died ?

A. Sunday or Monday.

Q. How many days before that was it that she was taken sick ?

A. From Wednesday to Thursday night she took sick, and on Thursday afternoon I come in and I stayed there until Saturday.

20

Q. And she went to the hospital for an operation ?

A. Yes.

Q. Was that operation performed by the doctor ?

A. Yes.

Q. And she died as a result of it ?

A. The operation was on Saturday night, and she died from Sunday to Monday night.

30

Q. What was her general condition of health before she was taken sick ?

A. She was as healthy as I am. She was just

like everybody—sometimes she didn't feel good ; but she was a healthy woman.

Q. What was her age ?

A. Seventy-five.

Q. Was she active ?

A. Oh, yes.

Q. And how about her business ? Did she attend to it herself ?

10 A. No, Herman attended to the business. She couldn't read and write. She couldn't write her own name. When she had anything to write Herman writes it for her.

Q. She wrote her name on this check (showing witness exhibit C-1). That is the way she wrote ?

A. That is all she could do.

Q. Who collected the rents of her houses ?

A. She did and Herman did, you know.

20 *By Mr. Dunn :*

Q. Was that the first time you ever saw that bank book ?

A. Yes, that was the first time.

By the Court :

Q. Who lived with your mother ?

A. She was all alone, and Herman come every dinner time for his meals.

30 Q. You are married and live where ?

A. In Haledon.

Q. And your mother lived in Totowa ?

A. Yes.

Q. And where did Herman live ?

A. He lived in Pompton.

Q. Is he married ?

A. He was married a half year before mother died, and he get a small mill in Paterson.

Q. Where was this place where your mother lived—did she own it ?

A. Yes.

Q. And did she occupy it alone or did she rent part of it ?

A. She has tenants down stairs and a small house on the side. 10

Q. How many rooms did she live in ?

A. She has six rooms.

Q. Did anybody live with her ?

A. Herman lived with her three years. He is three times married now. He paid board to my mother.

Q. He boarded with his mother until the last time he got married ?

A. Yes.

Q. And then he went to Pompton ? 20

A. He lived in Pompton, yes ; but every afternoon when he was at Paterson he was there for his dinner.

By Mr. Dunn :

Q. He took dinner at his mother's house nearly every day ?

A. Yes.

Q. He had a mill in Paterson and came down every day and took dinner with his mother ? 30

A. Yes.

Q. Up to the time of his marriage he lived continuously with his mother from 1897 right down ?

A. Oh, no.

Q. How many years did he live with her?

A. He lived with my mother five years. He married in 1895. He lived three years, something like that, with his wife—1897.

Q. And then from 1897 down to the time he got married last year, he lived with your mother?

A. Yes, he paid her board.

10 Q. He lived there?

A. Yes.

Q. And slept there?

A. Yes.

Q. When did you come to this country?

A. Last May sixteen years.

Q. Do you know when Herman came to this country?

A. He was ten years before that in this country.

20 Q. Ten years before you came?

A. Yes, he is twenty-five or twenty-six years in this country.

Q. When did your mother come?

A. She come two and a half years after us. She was in this country nearly thirteen years when she died.

Q. And where did she come to when she came here?

30 A. Well, she had Herman and my brother Peter—lived with my mother.

Q. So that your mother and Peter—Peter is dead now?

A. Yes.

Q. He died last year?

A. Yes.

Q. In Germany?

A. Yes.

Q. So that Peter, Herman and your mother kept house together and lived together right straight on down for how many years?

A. Many years—Herman only lived I think one year, and then his wife wanted to have a divorce or something—

Q. Never mind that—how many years did Herman and your mother live together?

10

A. He lived in the city of New York. He married the second time. He didn't live with my mother then.

Q. How long was he away from your mother?

A. He was away from my mother—he was married ninety—something like five years.

Q. From 1897 then down to the time he got married last spring, he lived continuously with your mother in her house there, didn't he?

A. Yes.

20

Q. His brother lived there, too, Peter?

A. Yes.

Q. When did Peter leave this country this last time?

A. I think that is four years.

By the Court:

Q. Was Peter married?

A. No—he is dead.

Q. Was he married?

30

A. He married in Germany—afterwards he died.

By Mr. Dunn :

Q. That is, after he went abroad four years ago he got married in Germany ?

A. Yes.

Q. That was in 1900 Peter went to Germany, and he has never been back since, has he ?

A. No.

10 Q. So that since 1900, your mother and Herman have kept house alone up until last spring ?

A. My mother kept house, and my brother boarded with her.

Q. She kept no other boarders did she ?

A. No.

Q. Herman lived with her from 1900, the time your brother left for Germany, until he got married ?

A. Yes.

20 Q. So that, up to the time of the day that Mr. Merz came there to draw this will, you had never seen your mother's Savings Bank book ?

A. No.

Q. You never knew she had an account in the Savings Bank, did you ?

A. Oh, yes ; I know she always had a bank. She was in the bank before—in a building loan.

Q. From the time that you came to this country, did you ever contribute one penny towards your mother's support in this country ?

30 A. No.

Q. You have lived in Paterson ever since you arrived in this country ?

A. Yes.

Q. And have you during that time received money from your mother ?

A. Yes.

Mr. Van Hovenberg :—I don't see what this has got to do with this. I have let Mr. Dunn go on in this way to try to see whether it has got anything to do with this question whether this money in the bank belonged to this deceased or belonged to this defendant. That is the point at issue.

10

The Court :—The pleadings do not disclose the real foundation for the claims of the respective parties here, and the Court is left to surmise, although the inference, I think, is quite clear as to what the real contention will be. But as the matter now stands I am not disposed to exclude any testimony which shows the relations of the mother with the son or with the daughters, social or financial. It may be that this testimony is immaterial. I am rather inclined to think that it is not material now, but I shall allow it.

20

Mr. Van Hovenberg :—The bill states distinctly that this money was the proceeds of the sale of that real estate.

30

The Court :—Proceed, Mr. Dunn. I have ruled that you can go on with this examination.

Q. How much money did your mother advance to you since you have been in this country?

A. Only a mortgage for \$500, and I have to pay my interest for that.

Q. Is that all that she has loaned you?

A. That is all.

Q. She never gave you any other money?

A. No, never.

10 *By the Court :*

Q. You mean that mortgage that is on your property now, madam?

A. Yes.

By Mr. Dunn :

Q. And that is still owing?

(Question not answered.)

20

Q. How many times was Mr. Merz at your mother's house?

A. He came on the morning—Herman brought him up—he got it finished and then he come again.

Q. He came in the morning and then he went away, did he, and then he came back again? He was there twice?

A. Yes.

30

Q. Now, when he came there in the morning, were you there—at first, I mean now?

A. I was there.

Q. Did he go in and see your mother when he came there first? Did he talk to your mother?

A. When he brought the will—yes, he read the will.

Q. I mean the first time he came there, did he talk with her?

A. No; the first time she wanted Weiss.

Q. Did you talk with her about making a will?

A. My mother says to me that she wanted to make a will. She says that is the best.

Q. Now, did you tell her what to put in the will? 10

A. No; she tell us what to put in it, and Herman says to her, "Mother, what is in this country, that belongs to us three?" My mother says "Yes, what is in this country, that belongs to you three."

Q. Your mother talked it over with you about this will?

A. No.

Q. You heard her say whatever was in this country she wanted to give to the three children? 20

A. Yes; Herman and me was there.

Q. You have other brothers and sisters on the other side?

A. Sure; there was one in Germany.

Q. You were there when she said that she wanted it to go to the three?

A. Herman says that first, and my mother says, "Yes."

Q. Were you there when she said anything about leaving \$700 to Herman? 30

A. Yes.

Q. What did she say about that?

Q. She says, "Nina, Herman owes me \$700."

I says, "Herman, come in and hear what mother says." And she says, "For that \$700, what he owe me, I give you \$300." I says, "Eva must have what I have." "Well," she says, "all right."

By the Court :

Q. When was this ?

10 A. When Herman put it on the paper.

By Mr. Dunn :

Q. You were in there alone with her when you talked about this \$700 first ?

A. Herman was in the next room. The door was open. She lay in the dining room.

Q. You were there when she spoke about the money on deposit in the Volksfreund bank in Crefeld, Germany ?

20 A. Yes.

Q. What did she say about that ?

A. That was to be divided.

Q. When she spoke about the money in the Volksfreund bank in Crefeld did she say anything about that in the Savings bank ?

A. No.

Q. That was the only bank that she spoke of, the money in the Volksfreund bank ?

A. Yes, that should be divided in five shares.

30 Q. Your father, he is dead, isn't he ?

A. Oh, twenty years.

Q. And your father's property has been divided, hasn't it ?

A. Yes, she divided that five years ago.

Q. She went back to Germany and she divided

the property and gave all the children what was coming to them from the father?

A. Yes, each got his share.

By the Court :

Q. When was that?

A. Five years ago.

By Mr. Dunn :

10

Q. You got a share, too, didn't you?

A. Yes, I got a share as well as the others.

Q. When you and your husband came to this country, you had not received your share yet, had you?

A. No, I had \$200 from my mother and I paid her interest for it.

Q. Did you get anything from your brother at that time in Germany?

A. No.

20

Mr. Van Hovenberg:—I object to any such question as that.

Mr. Dunn:—I want to lay a foundation for something else, but I don't think it amounts to anything, and so I withdraw the question.

Q. Were you in the habit of visiting your mother very often?

30

A. Oh, yes, sure. The last time I was sick, she came up to the house. She told us when she got the house sold and got \$100 paid on it.

Q. In the last three years, hasn't there been

times—four or five years—times that you did not visit your mother once a year ?

A. Sure I have visited my mother quite very many times.

Q. How many times a year ?

A. I cannot remember the times. I cannot state how many times. When I was up the last time she was crying and said that Herman wanted her to make a will, and his wife said one
10 day that she should make a will because he stayed with her and tended to her business.

Q. How long ago was that ?

A. Two months when he was married. He quarrelled with mother every day, and when he couldn't make anything with my mother his wife come up with him.

Q. After your mother's death, you say that nothing was said in reference to this money in the bank until the day the will was recorded. Is
20 that right ?

A. Yes—he started quarrelling with me that morning.

Q. There was no dispute up to that time. Everything was harmonious, everything was adjusted, and that was the first time of any quarrel ?

A. Yes.

Q. Who was present with you when you took the will up for probate ? Who was with you ?

A. My sister and my husband, and Mr. Otten.
30 He was there, too.

Q. Anybody else ?

A. Mr. Cliff.

Q. You went up to the house after the will was probated, didn't you ?

A. No, I went home.

Q. Didn't you divide the furniture up?

A. We did that before. We divided it because he wanted to rent the place out. I wanted to leave it stand, but he says, "No, I have a tenant."

Q. And you authorized him to rent it and collect the rent, didn't you?

A. Well, for the present, yes.

Q. You got a share of the furniture?

10

A. Yes, I did.

Q. That is before the will was recorded?

A. Yes.

Q. And at that time didn't Herman tell you that all that furniture belonged to him alone and did not belong to your mother; that he had bought it from Peter?

A. No, he says, "The furniture belongs to me." I says, "Why don't you take it when you got married?"

20

Q. Didn't he tell you he bought it from Peter? Didn't he show you the bill of sale?

A. I couldn't read and write.

Q. You can read and write?

A. I cannot read English.

By the Court :

Q. The question is whether he showed you a bill of sale.

A. No, he never showed me anything.

30

By Mr. Dunn :

Q. He told you that he owned it, didn't he?

A. No. "There is some furniture," he says, "I bought it."

Re-Direct by Mr. Van Hovenberg :

Q. When your mother came from Germany, she had money—had means, hadn't she, of her own ?

A. Yes.

10 Q. Did she ever receive any money from your brother for her support ?

A. No, my brother always got money from her. When he needs money, he looks to her.

Re-Cross Examination by Mr. Dunn :

Q. How much money did she bring from Germany ?

20 A. I cannot just say, but I know she had quite some money. I never was after her money.

Q. You don't know then ?

A. Only I know that she has plenty of money to live. That is all what I know.

GENEVIEVA GROSS, sworn for the complainant :

Direct Examination by Mr. Van Hovenberg :

30 Q. Where do you live, Mrs. Gross ?

A. Brooklyn, New York.

Q. Are you a sister of Mr. Kempkes ?

A. Yes.

Q. After your mother died did you see your brother ?

A. Yes.

Q. How many days after your mother died ?

A. The day she was in the hospital I seen him.

Q. Did your brother call to see you after your mother died ?

A. It was on a night after she was buried—she was buried in the morning—and on the night I was up to Pompton with him ; and that night he said to me, and he say, “mother, she sell the house, and that money is in the bank,” and that is his money “and I won’t give it to you before you give me \$300. I want \$300.” He says, “my money is in that bank.” 10

Q. Where was he when he said this to you ?

A. In Pompton, in the house, in the kitchen.

Q. When was this, after your mother died—how long ?

A. No, on the day she was buried.

Q. Did he ever call to see you at your home in Brooklyn ? Did your brother come to see you in Brooklyn ? 20

A. Yes.

Q. After your mother died ?

A. After my mother died.

Q. What did he say to you there ?

A. He say, “I want to divide the money.”

Q. Did he give you any paper ?

A. He gave me a check for \$100.

Q. Did he give you anything else ? 30

A. He give me a paper and what money is in the bank and what money went to my sister.

Q. Have you got that paper with you ?

A. That is the paper (producing paper).

Q. Your brother gave you this paper in your

house in Brooklyn? Did you see him write it?

A. Yes, on my table.

Q. When was this, Mrs. Gross?

A. That day when he give me the check.

Q. How long was this after your mother had died?

A. I think it was a week—yes, the next Sunday after she was buried—a week after.

Q. Did he write this paper?

10 A. Yes.

Q. You saw him write it?

A. Yes.

Q. Did he tell you what these figures were?

A. He says "that is the money that is from the house—in the bank—\$1,811. That is in the bank. I will give it to you when you give me \$300."

Q. Did he tell you what all these other figures meant?

20 A. Yes.

By the Court :

Q. Give us the figures. You said this figure at the top, \$1,811.26 was the amount he said was in the bank?

A. Was in the bank from the house.

Q. And what about \$300 did you say?

30 A. And that \$300, he gave my sister a \$100, and \$100 himself that day he brought in a check to me.

Q. And did he say, then, anything about his having \$300 for himself out of it?

A. He says, "Give me \$300. If you don't do that I won't divide it."

Q. Did he give any reason why he would not divide it unless you gave him \$300?

A. No.

Q. Did he give any reason why he would not divide the money unless you let him have \$300?

A. I don't know what you mean.

Q. Did he say whose that money was, that \$1,811?

A. That is mother's, he said.

Q. He said it was his mother's money?

10

A. Yes.

Q. Did he say what he was going to do with it?

A. "That is my money in the bank. I won't give it to you unless you give me \$300." I says, "It is mother's money." He says, "You can't take it; it is in my name."

Q. And what did you say?

A. I says, "Mother wanted to lay off that money on the mortgage on the Totowa house."

20

Q. Did he say anything about this next figure, \$1217.50? Did he tell you what that was?

A. Yes, that was the money from the insurance.

Q. Go on. Now, how about the next, \$500?

A. That is the money for my sister and the mortgage on the house. My sister got a mortgage on the house, \$500. And mother give her \$500.

Q. And your brother said that was the amount of her mortgage?

30

A. Yes.

Q. Go on, the next.

A. And \$113. My mother she was insured. \$113 insurance was that money.

Q. Go on, \$774. Did he tell you what that meant?

A. That he takes off—my brother got \$700 in the shop from my mother.

Q. Is this what he told you?

A. Yes, he got \$700 and my mother made in the will \$300, me and \$300 more for my sister—and my brother got \$700—and my brother got \$400 more.

10 Q. Do you mean that your brother said that his mother had given him \$774—lent him that, or given him that? Tell us again in your own way what your brother told you about that \$774.

A. He got that in the shop.

Q. Who did?

A. My brother did. My mother give it to him.

Q. Loaned it?

20 A. My brother give a mortgage.

Q. Did he say anything about a mortgage?

A. Yes, my mother—

Q. One moment—did your brother say anything about the mortgage when he put that \$774 down?

A. I forget.

Q. Go on, Mrs. Gross.

A. \$2,600. That is the mortgage on the house at Totowa. I counted all them things up. And \$300 I get before everything was divided.

30 Q. Over on this side of the paper, I see the figures \$774. Did he explain that to you?

A. I don't know. I cannot remember.

Q. Where did he make these figures?

A. In my house—in my brother's house.

Q. Up in Pompton?

A. No, in Brooklyn.

Q. And your brother made these figures in your house?

A. In my house the day when he brought me the check for \$100.

Q. And was he sitting at the table?

A. Yes, in the kitchen.

Q. And made all these figures?

A. Yes.

10

Q. Was the paper blank when he began?

A. Yes.

By Mr. Van Hovenberg:

Q. Did you see your brother afterwards here in Paterson after the funeral?

A. Yes.

Q. And did he say anything to you then about the money?

20

A. He always say he would divide it when we give him the \$300. He always says that.

Mr. Van Hovenberg:—I offer this paper in evidence.

The paper about which the witness has just been testifying is offered in evidence and marked Exhibit C-4 for the Complainant.

30

Cross Examination by Mr. Dunn:

Q. Your brother, you say, made this down in Brooklyn—he made all these figures at that time?

A. Yes, that time—he give me the check.

Q. And you and your brother were friendly, then ?

A. Yes ; he comes up to see me and brought me the money.

Q. And that day down there, did you notice whether he had the bank books with him ? Did he have any bank books or papers with him ?

A. My brother took all the papers on the day my mother was in the hospital—take all the
10 papers out of the bureau and take them with him.

Q. You saw him make these figures ?

A. Yes.

Q. When he made these figures here, wasn't that for the purpose of showing how much there was and how much money your mother had brought to this country ?

A. No ; he says, "That is what you get and that is what Mina get."

20 Q. Wasn't this statement made by him at that time to show the amount of money that had been saved by your mother over and above what she had brought to this country ?

A. I don't know what you mean.

Q. Didn't he go to work and make this statement for the purpose of showing—

A. I cannot understand you.

30 Q. Didn't he make these papers for the purpose of showing you just how much money your mother had brought to this country and how much more money she has now ?

A. I don't know.

Q. Your mother never worked after she came to this country ?

A. She got board from my brother.

Q. She didn't go out to work?

A. No; my mother got interest from the house and she got interest from Germany. Sometime she said, "He always come to me for money," and she was crying sometimes. When she got to fix something on the house or something, then she give my brother the money to pay it, and my brother get the receipts in his name, and it was my mother's money.

Q. How much interest did she get from Germany each year? Did she get \$100 a year? 10

A. I don't know that.

Q. You remember very distinctly about these figures, and what was said in reference to this figure of \$600?

A. That was the \$600 what my brother takes from this \$1,800, and pay everything, to pay the doctor, the hospital and undertaker, and everything—he paid this \$600 from the \$1,800, and this is what he paid me and my sister and pay himself. 20

Q. What is the \$137?

A. I don't know.

Q. That makes \$774?

A. Yes, that is what that was.

Q. You have stated here that \$774 was the mortgage.

A. Then he counted off what it is, then he says, "It is not money enough to pay off the mortgage on the house—on the Totowa." Mother's will was to pay off that mortgage on the house at Totowa. 30

Q. Did he want you girls to use the money that you got from the insurance to pay this mortgage off? Was anything said about that?

A. I don't know what you mean.

Q. Weren't you trying to arrange an adjustment of this whole affair with Mr. Weiss, with reference to paying off this mortgage?

A. I don't know.

Q. You were present with Mr. Weiss and your sister there in my office?

A. What do you mean?

10 Q. Didn't Mr. Weiss and your sister meet together for the purpose of adjusting this thing so you would not have any lawsuit about it? Do you remember that?

A. I don't know what you mean.

Q. Settling the thing?

A. No, I cannot—

By the Court :

20 Q. Did you have a meeting with your sister and your brother and Mr. Weiss in Mr. Dunn's office in Paterson?

A. No.

By Mr. Dunn :

Q. Didn't you meet in my office with your brother and sister?

A. No, not with Mr. Weiss.

30 Q. But in my office with your sister and your brother? Weren't you there over an hour one day in reference to this matter?

A. I don't know.

Q. Didn't you see Mr. Weiss with me at the German bank when this money was deposited that was received from the insurance company?

A. That was the insurance company. In that office I was with my sister.

Q. And did you come over to my office that day?

A. Yes, and you say to me that "It was always your mother's will to pay off that mortgage on the house."

Q. And wasn't the whole matter adjusted by you and Mr. Weiss and your sister on that day, that Herman should take charge of the property? 10

A. Not Mr. Weiss.

Q. That Herman should take charge of the property? Wasn't that agreed to?

A. No.

Q. And you agreed to allow Herman to collect the rents of the property?

A. Yes, I say Herman can collect the rents on the property. It is better than to take it to some other man. 20

Q. When Herman made that statement to you about those figures, wasn't that for the purpose of showing the money received by your mother from Germany?

A. That is all that is here.

Q. You got your share from Germany, didn't you?

A. No, my mother she give me none of my father's money.

Q. Since you have been in this country, had you advanced any money to your mother? 30

A. I never got a cent from my mother.

Q. Did you ever give her any money?

A. I worked for years. I worked in Germany

for 24 years, and my brother was away from home nineteen years.

Q. Your mother was away from home too, wasn't she?

A. My mother?

Q. She lived over here with Peter and Herman, didn't she?

A. Yes, with Peter and Herman.

Q. Who brought her over here?

10 A. I brought her over.

Q. Herman brought you over and he brought you to this house in Paterson?

A. I lived with Herman and Peter.

Q. You kept house for Peter?

A. Yes.

Q. And how long were you here before you got married?

A. I was seven months. And then I was married two years, and then Peter went to Ger-
20 many and took mother over.

Q. During the time that you have lived in this country, you never supported your mother at all?

A. I never got a cent from my mother.

Q. And she never got a cent from you?

A. In Germany she got all my money—in Germany. My brother was away 19 years and I stayed home 24 years.

30 *Re-Direct by Mr. Van Hovenberg:*

Q. Do you remember the day that your mother was taken to the hospital? Were you at her house the day she was taken to the hospital?

A. I don't know my mother was sick. My brother write me a letter that my mother was sick. I didn't know she was so bad. It was on Saturday morning. Then I hurried up and went over on Saturday afternoon. On a Saturday afternoon I come in my mother's house at Totowa, and everything was locked, and then my niece come down and she said, "Aunt Eva, grandmother is to the hospital—she has an operation." Then I said, "Well, I will go over to the hospital to see her." She says, "she can't. Papa is over there, and he will come back and tell you." 10

Q. Did your brother come to the house while you were there that Saturday?

A. No, I didn't see my brother until the next day.

Q. Did you see him the next day at your mother's house?

A. Yes. 20

Q. Did you see him take the papers and the bank book from the bureau drawer?

A. Yes, he took all the papers off the bureau, and took them when my mother wasn't there. She was in the hospital.

Q. Was there a bank book there?

A. Yes. I didn't see what all the papers he took was.

By the Court :

30

Q. Did you see him take the papers?

A. Yes.

Q. You were there?

A. Yes, I was in the house.

Q. You saw him ?

A. Yes, I saw him take the papers with him.

Re-Cross Examination by Mr. Dunn :

Q. Did you know that your mother had a deposit in the Paterson Savings Institution before that time—before her death ? Had you ever seen her bank book ?

10 A. I have seen her bank book—she told me. She gives sometimes my brother money, and my brother give it back.

Q. Did you know the bank book was in Herman's name before her death—as well as hers ?

A. I didn't know. Herman told me that—"It is my name in the book. I won't give you the money."

20 Q. Did you visit your mother within the last four or five years ? How often a year would you visit your mother ? How often would you come up and see her in Paterson ?

A. Not every week and not every month.

Q. As often as once a year ?

A. Three or four times a year.

Q. And wasn't there a period of two years you didn't visit her at all, before her death ?

A. I want to come over and see her and she write back, no you need not come over.

Q. That is the reason you did not come ?

30 A. I got everything ready to go over to see her, and I read her letter not to come. She says it is too much trouble when I come. Then I stay home and Herman write me a letter that she was sick.

HENRY SCHIPPERS, sworn for the complainant:—

Direct-Examination by Mr. Van Hovenberg:—

Q. You are the husband of Mrs. Schippers ?

A. Yes.

Q. Do you know Mr. Kempkes ?

A. Yes.

Q. Have you had any conversation with him in regard to the estate left by your mother-in-law, since her death ? 10

A. Yes.

Q. When was the first conversation that you had with him ?

A. The first one was down there in the house when the mother went to the hospital.

Q. What was said either by him or by you ?

A. Well, when mother was to the hospital, then he went and took right away two books out and he took all the papers that was in the drawer and he took the bank book, and his wife got a satchel and took all the insurance papers that were in the top drawer. 20

Q. Who was there when he did this ?

A. My sister was there and my children was there. My wife was at the hospital.

Q. What did he say in regard to any money left by Mrs. Kempkes ?

A. After mother went to the hospital, when she died, I got an undertaker to take care of her. Mr. Kempkes I could not find him in the shop, and I couldn't find him anywheres around in the town, and I engaged a man. 30

Q. I want to know what he said to you ? Tell me what he said to you, if anything.

A. One night we were watching there—home and he took the bank book from his pocket, and he says, “Here, Henry, is the amount of \$1,811 and we want to make this thing right and straighten these things out. That is money that mother left in the Savings Institution.” That is what Mr. Kempkes said that night.

10 Q. What else did he say at that time ?

A. He says “we want to straighten it up and divide this money what is in the Savings Bank, this money \$1,811.”

By the Court :

Q. Did he say anything about the way it should be divided, how ?

A. Three equal shares.

Q. Did he say that ?

20 A. Yes, he did. Three equal shares—belonged to each child—to my wife and Mrs. Gross and to him. That was the idea. I have got a statement that he give me after the funeral.

Q. Is this the paper that you hold ?

A. Yes, he give me that the 26th of November.

Q. Did Mr. Kempkes give you this statement ?

30 A. Yes, 26th of November last year.

Q. Did he write this in your presence ?

A. No, he give me that at Totowa out near Mr. Keller’s drugstore.

The statement is offered in evidence

and marked Exhibit C-5 for the Complainant.

Q. I call your attention to this figure here, \$1,217.

A. That is from the life insurance.

Q. And this figure \$1,811 ?

A. That is the Saving Institution.

Q. Did he say so ?

A. Yes.

10

Q. \$110 ?

A. That is insurance.

Q. \$500 ?

A. That is my mortgage on my property.

Q. What does that foot up to ?

A. He put the whole amount together, \$3,637.76, and then there is \$300 for funeral expenses—he took off \$300 and left \$3,337.76, and \$2,600 that is on the mortgage on the property up at the Falls. He took that out, and \$300 is, you know, what my wife and him and Mrs. Gross got, and that leaves the rest \$437.76.

20

Q. Did he say anything amount this amount of \$437.76 ?

A. That is the last when everything was paid.

Q. What did he say about it ?

A. That is the whole amount of what we have got coming if we divided everything up.

By Mr. Van Hovenberg :

30

Q. What did he say about this amount, \$2,600 ?

A. He want to lay that mortgage off, and then

he wanted to have the power over this property.

Q. What mortgage?

A. That mortgage on the Falls.

Q. Belonging to Mrs. Kempkes?

A. Belonging to Mrs. Kempkes—Elizabeth Kempkes.

Q. Did you have any conversation with him afterwards in regard to the estate or money?

10 A. Yes, he told me afterwards. I met him—no, he says, “I have found out something else. I found out that money belong to me; but I want to have \$300 or I won’t divide it. If you give me \$300—you talk with your wife—if you don’t give me \$300 she won’t get nothing.”

Q. Did he give you any reason why he wanted \$300?

A. Yes, on account of that. Now, he got \$700, on his mortgage on the shop and there was a great deal of racket about it.

20 Q. I want to know if he gave you any reason why he wanted to take this part of the money?

A. Yes, his machinery was wearing out. He says that mother give him \$700. His machinery was all junk. He wants \$300 like his sisters. That is the reason why he said that. I understood that all right.

By the Court :

30 Q. When was this that you had this last talk?

A. This here is the 26th, the day after the funeral.

Q. He gave you that piece of paper with the figures on it the day after the funeral?

A. Yes.

Q. And when was it after that that this other talk occurred?

A. It was just that night when we were watching around there.

Q. You say that sometime after that he told you that he had found out that his name was in the book?

A. Yes, that was that same day.

Q. Same day?

A. Yes, he told me he wanted \$300 when he give me that. When I met him down at Keller's drugstore at Totowa. 10

Q. What time was it when he gave you that piece of paper?

A. That was the 26th of November.

Q. Where were you?

A. Down at Totowa.

Q. At the Totowa house?

A. Right against Mr. Keller's drug store. We went there to ask about the doctor's fee for mother, and we were dissatisfied; and he gave me that paper. 20

Q. Did he make the figures on the paper there?

A. No, he give that all finished up and handed it to me.

Q. How long after that was it that the other talk occurred?

A. All this same morning. This thing all happened the same morning for this \$300 that he wanted. He says, "You go home and tell your wife that I want that \$300. If I don't get that \$300 you won't get nothing." 30

Q. He told you that when he gave you the paper?

A. Yes, and that other, the night I was watching my mother-in-law he says that that night.

Q. I am asking you about the 26th of November. What was said to you by him about the bank book, that is, all you can recall of it?

A. He says to me, "There is the bank book, and I show you \$1,811 there."

10 Q. You are telling me about what took place the night you were watching. What did he tell you about the bank book the day at the drug store when he gave you that piece of paper—the 26th of November?

A. He didn't say anything about the bank book that day.

Q. Did he give any reason why he would take all that money?

20 A. No, he didn't say that at all. I was with him the morning when he bought that lot and he wanted to draw some money out on checks out of the Savings Bank.

Q. I am not asking you about that now. You said a little while ago that when he gave you that paper at the drug store that he told you that he wanted to have \$300?

A. Yes, that is right.

Q. And he said that if you didn't give him the \$300 he would take it all, this \$1,811, himself?

30 A. That's right.

Q. And I understood you to say that he had found out that his name was in the book. Tell me what he said on that subject. What did he say about the book?

A. I didn't say that he did say anything else.

I say only that I found out after, you see ; then he wanted the \$300.

Q. You mean to say he didn't say that when you were watching and he showed you the book ?

A. Yes, he showed me the book, and said that is the money we have got in the Institution and the money is to be divided between the three children.

Q. Did he give any reason on the 26th of November when he gave you that paper and said he wanted the \$300, and if you didn't give him the \$300 he would take all that \$1,811—did he give any reason why he would take all that \$1,800 ? 10

A. No ; he says he wanted to have \$300, the same as the other children.

Q. Didn't you think it was strange that he said he would take it all from the estate ?

A. I know very well—that man never paid his board. 20

Q. Did you ask him how he was going to get \$1,800 ?

A. No ; he go to the bank and want to draw it. He don't know how he got it. He don't know how he draw that money out. He never put a dollar in the bank.

Cross Examination by Mr. Dunn :

Q. This was on November 26th ?

A. Yes. 30

Q. Hadn't he given your wife \$100 ?

A. Yes.

Q. He had drawn that out of the bank ?

A. Yes.

Q. When did he give that to your wife ?

A. I guess you know—the first or the second day. I don't know just exactly—when the mother was dead.

Q. Either the day your mother died or the next day ?

A. I can't say. I didn't see when he give it to her.

Q. You weren't there ?

10

A. I was there but I wasn't in the room.

Q. When he made this statement, or gave that to you, that was on November 26th ?

A. Yes ; the day after the funeral.

Q. He had then drawn out the \$500 ?

A. Yes ; he was scared. He put it in the Second National Bank then.

Q. He gave your wife \$100, and gave your sister \$100, and paid all the undertaker's expenses ?

20

A. He put that money in the bank and give his sister a check. He made a check out for the Second National bank.

Q. You said you hired the undertaker ?

A. Yes—he make the expenses \$50.00 more—he wasn't satisfied.

Q. Who paid that ?

A. He did.

Q. Herman paid it ?

A. From mother's money.

30

Q. When he gave you that statement on November 26th he spoke about paying off this mortgage on the Totowa avenue property ?

A. Yes.

Q. That mortgage was how much—\$2,600 ?

A. \$2,600, that's right.

Q. And was your sister present at the time he made this statement?

A. No, I got that at Totowa. He stepped in front of Keller's drug store. I and he were alone. Nobody was present.

Q. You have stated here that he wanted to use this money to pay off the mortgage on that property, but he wanted power over the property. He wanted to control it?

A. Yes.

10

Q. And providing that was paid off—and your wife refused that?

A. Yes.

Q. And your sister-in-law?

A. Yes.

Q. And that was the condition on which he wanted this mortgage paid off?

A. Yes.

By the Court :

20

Q. What condition?

A. He wanted to take this money from the insurance, from my brother-in-law's insurance, Peter Kempkes, he wanted to take this money from the insurance, and take this money what was the rest in the bank, and from this Savings Institution, wanted to take that money to pay this \$2,600 off. Mr. Kempkes thought his brother-in-law and sisters were little babies.

Q. What was this insurance money?

30

A. \$1,217.

Q. Life insurance on Mr. Kempkes' life?

A. Yes. His brother died a couple of months before mother died.

Q. And then it was insurance money that belonged to the mother, insurance on the life of Peter, belonging to the mother?

A. Yes.

Q. And the money was paid just after she died?

A. Yes.

Q. So that it was her money?

A. Yes.

10 Q. Was there any objection made to having the money used to pay off this \$2,600 mortgage?

A. Yes, we didn't want to do it. We can save our money ourselves.

Q. The Totowa property went to the three children?

A. Yes, and the money.

Q. Then if the \$2,600 mortgage was paid off, they would all be that much richer?

A. Yes.

20 Q. But you would rather have the cash and leave the property with the mortgage on it?

A. Yes, that's right—sell it. That's what we want.

By Mr. Dunn:

Q. That was the condition of that arrangement, that Herman should have power over that property?

30 A. And we wouldn't give him any power.

Q. You are not on very friendly terms with Herman?

A. Oh, no; no wonder when any man has got anything like that against a brother-in-law.

Q. You ordered him out of your house?

A. Yes, he mistreated my wife. I don't want that man coming up and raising trouble in my house when I am not home.

Q. So you ordered him out?

A. Yes.

Q. Did Herman say anything about having you pay that \$500 mortgage at that time?

A. Yes.

Q. What did you say to that?

A. He said he would like to have that paid. 10

Q. If that \$500 was paid off you would have enough money to pay off the \$2,600?

A. We would be able to pay off that mortgage at any time.

Re-Direct by Mr. Van Hovenberg :

Q. Have you had any conversation other than what you have told us about, in regard to this money, with Mr. Kempkes? Ever talk to him anything more than you have stated here? 20

A. Not that I know of—only what I did say before.

WILLIAM OTTEN sworn for the complainant.

Direct Examination by Mr. Van Hovenberg :

Q. Where do you live?

A. In Paterson. 30

By the Court :

Q. Whereabouts?

A. 378 Union avenue.

By Mr. Van Hovenberg :

Q. Do you know Mr. Kempkes ?

A. Yes.

Q. Did you know his mother ?

A. Yes.

Q. Do you know when his mother died—
about when ?

A. Yes.

10 Q. Did you see Mr. Kempkes one day after his
mother died ?

A. Yes, I seen him on the same day.

Q. Where did you see him, Mr. Otten ?

A. In the house.

Q. He came to your house ?

A. Yes.

Q. Did he say anything there to you about
any money that his mother had left ?

A. No, he spoke nothing about this money.

20 Q. I want to know what Mr. Kempkes said
that day when he came to your house ? Did
he say anything about his mother's business ?

A. He never talked about his mother's business. He said his mother was dead and he was
looking for an undertaker.

Q. You saw him afterwards ?

A. It was on the next Sunday.

Q. And what did he say that day ?

30 A. He came to the house in the afternoon, one
o'clock. He come to the house and told me to
make the mother give \$300 to the sisters and
him, and him \$300. I said, "Your mother
make that paper, and do you think it is right
this way ?" And he showed me a bank book
and this book has the money from the house in

Bridge street. She put it in the bank, and he says, "put in my name and my mother's name." I says, "What do you mean by putting in your mother's name?" He says. "If my sisters don't give me now \$300 I will take this money for myself—give me \$300 then I will make it all right. If they wont give me \$300 it is all my money, and I will not give them not one cent."

(Through an interpreter.)

10

Q. Did Mr. Kempkes call at your house one Sunday?

A. Yes.

Q. Did he have any conversation with you there in regard to his mother's estate?

A. Yes.

Q. What did he say?

A. He says he knew how the testament read, she left \$300 to the rest and not him \$300. That was the will of his mother. It should be accepted the way the will was made. Then he took the bank book out of his pocket; he showed me that the money that was put in the bank from the Bridge street house, that was sold, he put it in his and his mother's name. I asked him did he put it that way, because it was his mother's money. So he answered that he can go and draw the money when his mother could not go for it. And he said if his sisters would not comply with the order that he should get \$300 the same as the rest, he would keep the money for himself.

20

30

Q. Were you a witness to this will of Mrs. Kempkes?

A. Yes.

Q. Are you a man of property—own property in Paterson?

A. Yes.

Q. Are you a married man?

A. Married.

Cross Examination by Mr. Dunn: (Through the the Interpreter.)

10 Q. What time of day was this that Herman spoke to you?

A. It was after dinner—about one o'clock.

Q. On Sunday?

A. Yes.

Q. Where did the conversation take place?

A. With me and my wife upstairs, home.

Q. Was your wife present?

A. Yes.

Q. How long had you known Mr. Kempkes?

20 A. Six years.

Q. And who did you tell about this conversation in reference to the bank book? Who did you tell it to first?

A. He and his brother-in-law come to my house and had a conversation about dividing the money, and he says he wanted the \$300, and Mr. Dunn said that was not right; that was the will of his mother and they should let it go the way the will was made.

30 Q. Was Mr. Schippers with Herman at that time?

A. They were together.

Q. When this took place, Herman and Schippers were together?

A. Yes.

Q. Did Herman give any reason why he should keep all this money?

A. No, he didn't say any reason. He says he will do it the way he said. He wanted \$300 or not divide it.

Q. Did you see the bank book?

A. I did not see the inside, but I seen the initials in it.

Q. Did you see Herman's name on it?

A. Yes.

Q. Whose name was on first, Mrs. Kempkes' or Herman's?

A. I don't know.

Q. How long did they stay there that afternoon?

A. About a half hour.

Q. Didn't Herman say that all the money in that bank book was his?

A. He didn't say that. But he says if they don't give him the \$300 he would claim the whole amount that is in the bank.

Q. Did he say anything to you about how it came to be put in his name?

A. He only did that in case his mother can't go and he could draw the money.

Q. How long had you known Mrs. Kempkes?

A. About six years.

Q. She was always a bright, active, strong woman, wasn't she?

A. She was sickly. She wasn't very well. She go around but she didn't feel sometimes very good.

Q. Didn't she always attend to her business?

A. Yes, she done it all herself. She worked around in the garden, too.

Q. Wasn't she a bright woman—intelligent?

A. Yes.

Q. You said you were one of the witnesses to the will. Who came to get you to witness the will?

A. Herman Kempkes.

Q. Do you remember whether it was in the morning or afternoon?

A. In the morning.

10 Q. What did he tell you?

A. His mother wanted to make a testament—a will—and I should be a witness.

Q. And when you went up to the house, who was present there?

A. Mrs. Schippers and Herman Kempkes, and Mr. Merz and Arthur Cliff.

Q. Cliff was the other witness?

A. Yes, he was the other witness.

Q. Where was Mrs. Kempkes?

20 A. She was in bed.

Q. Was she very weak?

A. Yes. I asked her if she was satisfied—if she got all her mind on this at the present time to make a will. I asked her this question, and she says, yes she knew everything that was brought to her.

Q. Who was in the bedroom at this time?

A. That was Otten, Mr. Cliff, Merz and Mrs. Kempkes that was in bed.

30 Q. Was Mrs. Schippers there?

A. No.

Q. Did you have any conversation with anybody at that time?

A. No.

Will of Elizabeth Kempkes offered in evidence and marked Exhibit C-6 for the complainant.

FRED VON SIEDE sworn for the complainant:

Direct Examination by Mr. Van Hovenberg:

- Q. Where do you live ? 10
 A. Paterson.
 Q. Do you know Mr. Kempkes ?
 A. Yes.
 Q. Did you know Mrs. Kempkes, his mother ?
 A. Oh, yes.
 Q. Have you seen Mr. Kempkes since his mother has died and spoken to him ?
 A. Yes.
 Q. How many times ?
 A. I think two or three times. 20
 Q. The first time when did you see him ?
 A. At my house.
 Q. Did he call to see you ?
 A. Yes, he came and met his wife at my house.
 Q. Did he say anything to you in regard to any money or property left by his mother ?
 A. Yes, he told me about this case.
 Q. What did he say ?
 A. He told me he wanted \$300 from his sisters first, and he was willing to divide the whole money—the whole property. The other way he would give nothing to her—he would take all the money. 30
 Q. Did he have the bank book with him ?

A. No, I didn't see that.

Q. Did he say what this amount of money was—how much there was?

A. Not to me, how much.

Q. Did he tell you what bank it was in?

A. In the Savings bank. I knew that before.

Q. Did he tell you whose money it was?

A. He didn't tell me whose money it was—I know, his mother told me before.

10 Q. Did you ever see him again and talk to him about it?

A. Yes.

Q. What did he say about it the next time you saw him, if anything?

A. I said to him it was the best way to settle the case without the Court.

Q. What did he say?

20 A. He says, "I cannot do it. She don't want to give me that—this \$300. I can't settle with those people."

Q. Who did he mean?

A. Mr. Kempkes said he can't settle it with the people of this case.

Q. What else did he say, if anything?

A. No, didn't say nothing more.

Q. Did you ever talk to him again about the case—did you see him another time?

A. Sure.

Q. What did he say another time?

30 A. Just the same. I see him other times, and I say every time, it is the best way for him to settle the case out of Court.

Mr. Dunn :—No questions.

JOHANNES SCHMITTER sworn for the complainant.

Direct Examination by Mr. Van Hovenberg :

Q. Where do you live ?

A. Paterson.

Q. Do you know Mr. Kempkes ?

A. Yes.

Q. Did you know his mother ?

A. Yes.

10

Q. Have you talked to Mr. Kempkes since his mother died ?

A. No.

Q. Did you ever talk to Mr. Kempkes—was Mr. Kempkes ever in your house ?

A. No.

Q. You never talked to him since his mother died ?

A. No.

Q. Did you talk to his mother when he was there ?

20

A. Yes.

Q. Did he hear you talking with his mother ?

A. Yes.

Q. What did Mrs. Kempkes say, if anything ?

*Mr. Dunn :—*I object to what Mrs. Kempkes said.

*Mr. Van Hovenberg :—*In the presence of Mr. Kempkes ?

30

*The Court :—*Yes, the witness is trying to relate a conversation between Mrs. Kempkes and herself.

(Through an interpreter.)

Q. Did Mrs. Kempkes talk to you about the property on Bridge street that she had owned?

A. Yes.

Q. What did she say?

A. She had \$3,000 paid out on that house on Bridge street.

By the Court :

10 Q. Was Mr. Herman Kempkes there?

A. No.

By Mr. Van Hovenberg :

Q. Was Mr. Herman Kempkes with his mother at any time when she spoke to you in regard to this property or her money?

A. It was in my own house that I had a conversation.

20 Q. He never was with his mother then?

A. No.

*Mr. Dunn :—*No questions.

COMPLAINANT RESTS.

RHEINHOLDT HERMAN KEMPKE sworn in his own behalf.

30 *Direct-Examination by Mr. Dunn :*

Q. Mr. Kempkes, you are the defendant in this case—one of the defendants?

A. Yes.

Q. And the son of Elizabeth Kempkes?

A. Yes.

Q. Where were you born?

A. I was born in a village near Crefeld, Germany.

Q. When did you come to this country?

A. 1880, on the third of May I landed in New York. The next day I came to Paterson—on the fourth.

Q. What was your business?

A. Silk weaver.

10

Q. Did you start to work in Paterson at that time?

A. Yes.

Q. What firms were you employed by?

A. Grimshaw Brothers, Johnson & Cowdin, and John Hand. John Hand was the last firm.

Q. You were the first of the family to come to this country, were you?

A. Yes.

Q. When did your brother Peter come?

20

A. In 1887 I went back to Europe and stayed four months in the old country, and my brother Peter and Eva made up their mind to come along with me. I was doing very well in this country, and mother says, "as soon as I can sell the property here, I will come. I wish I could go along." My father was dead in 1884. So I brought Eva, now Mrs. Gross, and Peter Kempkes, I brought along with me, and we started housekeeping here on the corner of 16th street and State street.

30

Q. You and your brother lived with your sister?

A. Yes.

Q. When did your mother come over ?

A. Mother come over in 1890, and she come to live with Peter and myself. And when mother—the first week when we gave her some money to start housekeeping, he says to her, “Now, mother, how do you want it, do you want us to pay board, or which way will we arrange to keep house?” “Well,” she says, “I don’t like to see any of my children paying board to me. You give me your earnings; of course, you must keep pocket money, whatever you will have to use, and whatever will be saved in this country, it is only for the two of you. The others are married, and their estate is settled in Crefeld.”

Q. And you and Peter continued to live with your mother ?

A. We continued to live with mother. I kept \$2.00 a week, and Peter kept \$2.00 a week.

Q. How long did you live with your mother ?

A. She landed between Christmas and January of 1890—between Christmas and New Year’s—and I stayed with mother until up to 1893. In the month of March, 1893, I left—it was the time when the big strike was in Paterson. I went to Pennsylvania and got a situation there as foreman in the ribbon mill—in that place I was three years, and was back again in the same month, March, 1897. I had been away just four years.

Q. And did you continue living with Peter ?

A. Yes ; the same way again. Mother never wanted board from us. I gave mother after my marriage—I didn’t support my wife for quite a while. I gave my money to my mother.

Q. And from 1897 you and Peter lived with your mother down to what time—with Peter ?

A. Until 1900.

Q. What became of Peter, then ?

A. In 1900, on the 12th of October, Peter went to Europe.

Q. During this time that you lived there together was any property purchased ?

(Question not answered.)

10

ADJOURNMENT TO 1.45 P. M.

AFTERNOON SESSION.

RHEINHOLDT HERMAN KEMPKE, heretofore sworn, recalled for further examination in his own behalf :

Direct Examination (continued) by Mr. Dunn :

20

Q. While you and your mother and Peter were living together in Paterson, was any property purchased by any of you ?

A. Yes.

Q. By whom ?

A. It was purchased, and it was put in Peter's name, but I was joined to it. My name was not joined to it, but it was understood that Peter and I had the property.

Q. Was that the property that your mother lived in when she died ?

30

A. Yes.

Q. After you bought that property, did Peter build on it ?

A. Yes, built a two-story frame house, worth about \$3,500.

Q. What was the whole property worth?

A. The property is worth, I think, \$6,000.

Q. After your brother Peter went back to Germany, did he ever come back here?

A. No, sir.

Q. He died there?

A. He died there the 7th day of September a
10 year ago.

Q. And you continued living there, did you not, with your mother up until the time you were married?

A. Yes.

Q. When were you married?

A. I got married on 29th of April, 1903, six months before mother died.

Q. Continuously from 1897 to the 29th of April, 1903, you lived with your mother?

A. Yes.
20

Q. Now, there has been some talk here about her yearly income from the other side. How much did she get a year?

A. My mother she got an income—she had 3,000 marks in Volks bank.

Q. How much did that yield her a year?

A. The Volks bank is now in liquidation. Since the last three years we didn't get a dollar.

Q. Prior to that how much did she get from the bank?
30

A. It was according to the dividends. Sometimes \$60 to \$65. The highest was \$65. a year—that was the highest. Between \$60 and \$65.

Q. Did she have any other source of income outside of that from the other side ?

A. From the time she had the house—before my brother bought the house, and then took charge of it, and the city they had so many alterations on the house, so there was never so very much over. Sometimes there was 100 marks over. It was about \$25 a year over. Then in 1898, mother went to Europe and she sold the house to my brother Wilhelm, the oldest brother in the family. She sold it to him for 15,000 marks—that house, and she made a clear deal of it, so that every child knew what to get and what mother got. 10

Q. That is the property that came from your father ?

A. Yes.

Q. What I asked, Mr. Kempkes, is how much annual income did your mother get from the other side. Now, we have got from the bank about \$65.00. 20

A. About \$65.00 a year from the bank and about \$25.00 from the house as long as it was let out.

Q. That was about \$90.00 a year ?

A. That was up to 1898.

Q. Now, from 1898 down, what was her income ?

A. From 1898, my brother had to pay the life rent to her. As long as she lived he had to pay the interest to mother. He sent over 5 per cent. on 4,000 marks. That was 200 marks a year. 30

Q. What is the value of a mark ?

A. Between 23 and 24cents.

Q. That is about \$50.00 a year ?

A. It is about four marks to a dollar.

By the Court :

Q. You say your brother paid your mother interest on 4,000 marks. Did that include the money in the bank ?

A. No.

10 Q. That is what he paid for the house ?

A. Yes. He paid her 15,000 marks and then it was 4,000 marks she left to my brother to pay interest on at 5 per cent. a year ; and this mother had a right to as long as she lived, but after a year after mother's death, this 4,000 marks, 1,000 marks to me, 1,000 marks to Eva and 1,000 marks to my sister Mina and 1,000 marks to Peter. Mother just got the interest, that was 200 marks a year. I can show you where mother put the rest of the 15,000 marks in the bank.

20 Q. Did she own that house on the other side ?

A. Yes, my father purchased it. He left everything to mother, until 1898, and mother went abroad to settle up the affair.

By Mr. Dunn :

Q. And all the papers were signed over there, dividing up the different shares of different children ?

30 A. Yes.

Q. I want to get from you the money, the actual income, that she was receiving from the other side from the time that they brought her over here until she died ?

A. About \$90.00 a year in American money—

not from the beginning. It was after she was here about two years.

By the Court :

Q. And then it was increased when the land was sold ?

A. Then it came up to \$90.00.

Q. You say she got at first \$60.00 from the bank ?

A. Yes, that was always until the last three years. 10

Q. And while she owned the house she got about \$25.00 ?

A. That would make about \$90.00.

Q. And then after the house was sold she got interest on 4,000 marks, or 200 marks ?

A. Yes. The \$65.00 stopped the last few years since the Volks bank went into liquidation.

Q. When was the house sold ? 20

A. 1898. In the year 1901 the Volks bank went into liquidation, and it is not settled yet.

Q. And then the income stopped ?

A. Yes.

Q. Your mother got from the other side \$65.00 through the bank and about \$25.00 from the house, making \$90.00 in all down to 1898 when the house was sold ?

A. Yes.

Q. And then she got \$120 a year from the other side for about two years ? 30

A. Two years.

Q. And then she only got \$45.00 ?

A. Only got \$45.00.

By Mr. Dunn :

Q. The insurance policy that has been spoken of here, that was on your brother Peter's life in the Prudential Insurance Company ?

A. Yes.

Q. And after Peter went back to the other side who kept up that policy, who paid the premiums ?

10 A. The last year Peter was here, him and I run a silk business in Paterson.

Q. I want to know who kept the premiums up after he left.

A. The last year it was kept up by Peter and myself out of the business. After Peter left I kept up the premiums until the last year. Not any one of the children paid anything to it. I always paid it out of my own pocket—\$21.75.

20 *By the Court :*

Q. The policy on your brother's life ?

A. Yes.

Q. In what company ?

A. In the Prudential.

Q. Payable to your mother ?

30 A. It was just to his estate. Then after I paid it—when Peter went, it was paid out of the business—and then I paid it, and in the meantime I wrote to Peter I was willing to keep up the policy if he transferred it over, instead of the estate, mention somebody, mother or me—if mother is living that mother could have it—and that if she was dead, that I could have it. So he did.

Q. He transferred it to your mother ?

A. To mother and myself.

By Mr. Dunn :

Q. In case she was living, and then to Herman, in case she was dead ?

A. Yes.

*The Court :—*That is hardly the proper way to prove it. 10

*Mr. Van Hovenberg :—*This doesn't enter into the case, as I can see, at all.

*The Court :—*I am going to allow a wide range of inquiry in this case. The difficulty is that the real ultimate issues are not set forth in the proceedings at all. We have a bare proposition on one side that this money belongs to the estate, and on the other hand, that it belongs to the defendant. The only qualification of that is that the bill states it is proceeds from the sale of this land. That leave us entirely without any definition of the real issue here, which is the origin of this fund. No suggestion is made in the pleadings about that. 20

Q. When Peter in 1900, went back to Germany, did he make any conveyance of his real estate ? 30

A. Yes. He left on the 12th of October in the evening, and after supper, he says, "Now, Herman, I am going to Europe, and I trans-

fer all the property to you." So Peter and I went both to the Briody Brothers at that time. And he wanted to transfer all the property in my name. Then Philip Briody told him—I was in a divorce suit—so Philip Briody, he mentions, he says, "I wouldn't advise that; there may be a chance to sell the property at some time, and Herman can buy it, but he can't sell." Then Briody says, "You can put all the chattels that
 10 you possess in Herman's name, and the others you had better put in your mother's name." So it was transferred then—the property, real estate—in mother's name, and the chattels in my name.

Mr. Dunn :—I offer bill of sale dated October 9th, 1900, made by Peter Kempkes to Herman Kempkes. Conveys all the goods and chattels of the
 20 firm of Kempkes Brothers on property No. 203 Main street.

The same is admitted in evidence by consent and is marked Exhibit D-1 for the defendant.

Mr. Dunn :—Bill of sale dated the same day, made by the same parties, conveying certain goods and chattels at No. 186 Wayne avenue, Paterson,
 30 New Jersey.

The same is admitted in evidence by consent and is marked Exhibit D-2 for the defendant.

Q. Mr. Kempkes, was the real estate so conveyed to your mother and the personalty to you that day?

A. Yes.

Q. Now, will you just tell us how your mother came to put your name with hers in this bank book—I show you a bank book of the Paterson Savings Institution, marked 42,105 and made to R. Herman Kempkes or Eliza Kempkes.

10

The same is offered in evidence and marked Exhibit D-3 for the defendant.

Q. Is that the first bank book that your mother had when she came to this country?

A. Yes.

Q. And she continued using that until it was all filled up?

A. Until it was all filled up.

Q. Originally that bank book was in your mother's name? 20

A. Yes.

Q. Now, will you just tell the Court how it came to be placed in your name?

A. It came to be placed in my name—during all those years I had attended to business for my mother. When mother left for Europe, for the last three years there was checks to be paid. Mother was very close down in her bank account—I can show you by the date there—and four years' taxes were back on the property, and it amounted to about \$500 or \$600 on taxes that we had to pay on the property on Wayne avenue. I contributed my sum to it from the business, to pay the taxes. From the 30

beginning, 1900—to 1900—this is my earnings, from Peter and myself. I was working in Baer's and in Johnson's & Cowdin's and in Hand's, where I draw between \$30.00 and \$40.00 every two weeks. I gave that money to my mother. Here is the first payments on May 7th. There was \$65.00 what she got from Europe, and what we had saved here; that made the first payments here. It belonged to the three of us, and all through here we let mother deposit, and I went with her sometimes, and sometimes mother went alone, but most of the time we went together. Now, when she went to Germany on the 28th of July in 1898, I think it is—then she come back from Germany and she deposited \$1,658.81; that is the money mother brought from Europe, and that is all the cash money mother ever brought from Europe, except a few dollars in change. When she landed she didn't have a hundred dollars.

By the Court :

Q. Mr. Dunn asked you to state all the circumstances about the change in the bank book when your name was added. Tell all about it.

A. That happened in February a year ago.

Q. February, 1903?

A. 1903.

30

By Mr. Dunn :

Q. Just give us the conversation—what happened?

A. I says to mother, "Mother, you are getting

quite an age. There is Eva and Mina Schippers. They have their children brought up. They never did you a favor. Who has done all the work for you and held this property up and all that is there? You ought to make some kind of a paper to protect me in case you die." And that day she says, "I don't like to make a will." I says, "Give me some kind of a security. This is no encouragement to me the way things are now. I am very doubtful whether it comes back. The Schippers never bother about you at all. There is Eva, she lives in Brooklyn. We always have contributed money to her and her support." So mother, she says, "We go to the bank and whatever will be in the bank that will be your money." That is what mother tell me. So, we went to the bank and had it made that way. 10

By the Court :

20

Q. State what happened at the Savings Institution, Mr. Kempkes.

A. We went to the Savings bank; and we went in the private office to Mr. Merselis, and mother had a talk with Mercelis and I, and one man, the man with the light hair, understood a little German and Merselis called him up; and then she says she wanted my name put on her book in case anything happened to her that money should be my protection. 30

Q. Go right on—what was done? What did you do?

A. Then we signed a card each one—mother

and I signed a card. And when that book was filled we had a new book there.

Q. And that new book was made out that day?

A. No, sir; that was on the old book. That was about half full.

Q. You turn to the old book and tell us when it was that you went to the bank?

A. I think it was in February.

10 Q. February, 1903?

A. 1903, yes—in that month.

Q. And then the old book was still used, was it, after that?

A. Yes; it was not filled.

Q. Was the old book altered in any way that day?

A. Yes, it was.

Q. Who did it?

A. Mr. Merselis in the bank.

20 Q. What alteration did he make?

A. He put it "R. Herman Kempkes or Eliza Kempkes." And he asked mother if she was satisfied that way.

Q. He wrote then these words: "R. Herman or"—I call your attention to the fact that that is a different ink—"R. Herman or" is different ink from "Eliza Kempkes." Are those words, "R. Herman or" the words that he added?

30 A. Yes, that was made by the bank, and that was made by the bank (indicating on Exhibit D-3).

Q. You mean the words "R. Herman or"—those particular words were added that day?

A. Yes.

Q. Did Mr. Merselis do it?

A. Yes.

Q. With his pen?

A. Yes.

Q. You saw him do it?

A. Yes, on a little table right there near his desk.

Q. I call your attention to the cover—did he make the corresponding addition on the cover, the words “R. Herman or”?

A. Yes, just the same way. It was made in the bank. 10

Q. You have told us all the talk there was that day about that change, Mr. Kempkes?

A. That is the way it come to me—mother, she says, “I will protect you in the bank, but I don’t want to make a will. It is always time to make a will.”

Q. That was before you went to the bank she told you that?

A. Yes. She didn’t want to make her testament. 20

Q. I am asking you to state whether she said that in the bank or before you went to the bank?

A. Before we went to the bank.

Q. Do you think you have told us everything that occurred at the bank?

A. We went into Merselis’ office, and Merselis told us to take a seat, and then he said what was our request. And then I says, “Now, mother, she is dealing with the bank all these years, and she wants that money, whatever is in the bank, to be transferred over to me, that she or I are the only owners of it.” And Mr. Merselis asked her then, through that man in the 30

bank—with the light hair—he came in and understood German, so mother would understand it very well, otherwise he didn't want to do anything or make a change, and he wanted that she should be very contented with what they did. Then mother says, "Yes, I want that—it don't belong to the other children. Whatever is in the bank is money that belongs to my son and me—but not to the other children." That
 10 is the way mother expressed herself. That way it was made out. "Now," Mr. Merselis says, "we will make it out 'R. Herman Kempkes, or Eliza Kempkes.' Is that right, Mrs. Kempkes?" And she said, "Yes."

Q. Did he tell her the effect of that?

A. Yes.

Q. What did he say about it?

A. He says, "Now, you can take that bank
 20 book and take all the money out and so can R. Herman Kempkes, draw all the money out. Whoever has that bank book owns that money. If you come without that book we cannot give you any money. If Herman Kempkes comes to the bank without that book he can't get any money. The one who possesses the book owns that money," he says. "It belongs to and is in the name of you two." That is what Mr. Merselis says to her—explained it to her, so she could understand. He gave a great deal of
 30 trouble to her. Mother understood everything perfectly; and often she says, after that, "never mention to the others anything about it." And when they started to quarrel, they knew nothing about that money was put in my name.

By Mr. Dunn :

Q. When the old book was filled up, and then a new book was issued, what was done at that time ?

A. We went over the same thing, whether that new book should be made in both names again. "Yes," mother said ; "I want it just the same way as that—R. Kempkes or Eliza Kempkes." That is what mother says.

10

By the Court:

Q. Were you there ?

A. Yes, I was there, and when the mortgage was paid off, he asked again, and mother consented.

By Mr. Dunn :

Q. Did you have to sign anything when the new book was issued ?

20

A. I had to sign cards again.

Q. And your mother had to sign cards too ?

A. Yes, mother had to sign cards and I had to sign cards.

By the Court :

Q. Did you ever draw any money during the lifetime of your mother ?

A. Yes.

30

Q. When ?

A. I drew it here—not on this new book—the old book. I draw this \$30.00 here (referring to book).

Q. Give us the date ?

A. February 28th, 1903, I draw \$30.00.

Q. How did you come to do that?

A. We had to pay some fixing for the house.

Q. Repairs?

A. Yes.

Q. Why didn't your mother go and draw it?

A. It was such a rainy day. It was quite rainy.

Q. Did you make any other draft?

10 A. No, that is the only time I drew it—and here I deposit \$30.00 and \$50.00.

Q. What deposits are those?

A. June 27th and July 24th. I remember well, those too. I deposited this money.

Q. And with those exceptions, all the drafts and deposits were by your mother?

A. My mother was always lively, and she went to the bank. It was always a pleasure to her when she had money to bring to the bank.

20 This \$350.00 we drew when she had lost that case that Schippers said she didn't need to pay. \$350.00. It was on the 29th of July when that was paid to Mr. Dunn, and we took a mortgage on the Bridge street house. There was \$350.00 that lawsuit cost us, that was paid out of this book.

Q. You say that the expenses of this lawsuit that your mother was in was paid out of this account?

30 A. Yes, she paid \$350.00 and we took a \$1,000 new mortgage—we gave to the Savings bank to pay off the process.

By Mr. Dunn :

Q. What balance did you have in the bank after you paid that expense ?

A. There was \$50.00 after that.

Q. What is the date of that transaction ?

A. 29th of July, last year.

Q. When you sold this property, or when this property was sold to Mr. Brich, who spoke to Mr. Brich concerning it ?

A. I had sold that property first to Chapelle before the flood—a week before the flood for \$4,000. He paid \$50.00 to bind the bargain and the balance he would pay on the second of November. So the flood started in and after the flood Chapelle did not want to accept the house. He said he would sooner lose the \$50.00 than buy the house. 10

Q. Was that in the flood district ?

A. Yes ; the water was about twelve feet in the house—or cellar. So, after he disposed of it, the house was all empty—upstairs was one family. I thought to myself, “I know Mr. Brich a couple of years ago he wanted to buy that house.” I says to my mother, “I will go and see Mr. Brich ; he has offered to me \$3,000 a couple of years ago for that house ; now, if I can sell it today for that, I will let it go.” So I went to Mr. Brich on a Saturday, and I wanted to have him go over and look at the house. 20

Q. Your mother had not seen him yet ? 30

A. No ; didn't know Mr. Brich. So we made an appointment on a Monday morning, that I would be at Mr. Brich's house and he was going over with me to 17 Bridge street, and he would

inspect the house and see if it was suitable, and if it was he was going to buy it. So I asked \$3,200 for the house. I says, "\$4,000 it was worth before the flood, but I will allow you \$800 off the house." No; he offered me \$3,000, down in the basement. He said the most he would give is \$3,000. I says, "The house is yours." He says, "Can you sell the house?" "Yes," I says, "When I say the house is sold, it is yours." So he went right up—he didn't go to his house—we went right up to the Falls. I says to mother, "Mother, get ready; I have sold the house. Get ready, and we will go to Lawyer Dunn, and have the contract made." So I took mother right in the next room and she was satisfied. So Mr. Brich, and my mother, and myself, we went to your office, and he deposited a \$100, to bind the bargain.

10

Q. That was in the month of October?

20

A. That was that same time.

Q. Just before the flood?

A. I sold it twice, and I sold it before and after the flood. It was the first week or second week in November, I think.

By the Court:

Q. Look at this book (showing witness book).

A. November 11th. That is the very day—two days I sold the house to him.

30

Bank book No. 92,441 offered in evidence and marked Exhibit D-4 for the defendant.

By Mr. Dunn :

Q. That was November 11th ?

A. Yes.

Q. The transaction was closed. Now your mother when she came down to sign the agreement, she was a good, healthy, strong and able body ?

A. Yes.

Q. And she came down again to sign the deed ? 10

A. Yes.

Q. And was present when the transaction was closed ?

A. Yes.

Q. Were you present all the time ?

A. Yes.

Q. And after the transaction was closed, did you accompany her to the bank, or did she go alone ? 20

A. It was Mr. Dunn—yourself—and mother and I. The three of us went to the bank. We paid off the mortgage and the balance was added to the book.

Q. There is an entry there of \$1,870 on November 12th. Is that the day that the transaction was closed, November 12th ?

A. Yes, November 12th.

Q. The balance of the money went towards paying off the mortgage to the Savings Institution, and this was deposited—credited in this book ? 30

A. Yes, in our account.

Q. After your mother's death, I see 24th here—\$500. Did you draw that money out ?

A. Yes.

Q. What did you do with that money?

10 A. This money I added to my fund in the Second National Bank, and I says to Mina, "You are—I suppose you want some money on account of this extra expenses—" I know her husband was all the time without work—and she says, "Yes", she would like to get some money. "Well," I says, "I will go in and get some money, and give you \$100." So I give her \$100. So I says, "Eva, I will give \$100. She has been very unfortunate lately." So I give both \$100. I didn't tell them I would take that from the Savings Bank, or where I would take it from. I give each \$100, from my own account.

Q. Now, was any question raised at all as to where you got the money at that time?

A. No, they didn't raise any question at all. They were only too glad to get some money.

20 Q. After you were married, did you visit your mother from day to day?

A. Yes, every day I was in Paterson—at least I had four meals a week in her house. Generally twice a week I had to go to New York.

By the Court :

Q. Where was your mill?

A. In the Essex mill.

30 Q. Where is that?

A. On Mill street. It belongs to the Water Company. Before that, I was with my brother at the corner of Main and Ellison streets. We had a silk business; now I have got a weave shop.

Q. How long have you had that weave shop?

A. Since right after my brother died.

Q. How long were you in the Essex Mill—
several years?

A. Since 1901.

Q. Continuously?

A. Yes, continuously.

Q. Down to what time?

A. I am there yet.

Q. And these Essex Mills, is that quite near 10
your mother's house.

A. About fifteen minutes' walk.

By Mr. Dunn;

Q. Who had charge of this bank book?

A. Well, I had charge of it and mother had
charge of it.

Q. Where was it kept?

A. It generally was kept in my mother's
place. 20

Q. Now, there was some testimony given here
that you took that out of a bureau drawer in the
presence of Mr. Schippers and Mrs. Schippers on
the day after—as I understand it—the mother's
death.

The Court:—According to the tes-
timony that was done in the presence
of Mr. Schippers and Mrs. Gross.

Q. Mrs. Gross—that is right—when Mrs. 30
Schippers was at the hospital. Is that true?

By the Court:

Q. Is that true, that was taken out of that

drawer while Mrs. Kempkes was at the hospital—yes or no? Were they taken out of that bureau drawer while your mother was in the hospital or before that?

10 A. No, after mother was in the hospital. It was on Sunday or Monday, I am not sure what day it was—on Sunday or Monday. But, when mother took sick she says to me, “you take care of that drawer.” She whispered to me, because she didn’t want my sister Mina—she didn’t want
her to know that I took the key out of it. I had the drawer locked and I had the key.

Q. Go ahead and tell us what you did.

A. Then mother, she says, “You look after that—you keep the key of the drawer.” Then I took the papers and took them all home—all the mortgages, Mr. Schippers’, and deeds from the estate we have on the Falls, and the bank books—I took it all over to my house and I have
20 got it there yet.

Q. And you have had possession of these ever since?

A. Ever since, yes. I collect the rents and I pay the debts—everything that has been done.

By the Court:

Q. How did you come to collect the rents?

A. I always did before.

Q. And so you thought you had a right to
30 keep on?

A. Yes, they never bothered themselves a bit about it. I just kept on the way as when mother was living.

By Mr. Dunn :

Q. Did you have any understanding with your sisters after the will was probated as to whether you would take charge of the property and collect the rents ? What was the understanding ?

A. That I keep the rents and, every year, or half year, or whatever they want, I am willing to make a statement of what has been done, and what has been collected. Whatever is left over is to be divided among the three of us. 10

Q. Did you ever state to anybody that that money deposited in the Savings bank was a part of your mother's estate—belonged to your mother ?

A. No, sir. I always say it is my money, but it was our joint name, our joint money. But I never says that that money was to the estate.

Q. Here is a statement that I show you. That is your figures, is it ? 20

A. Yes ; they are my figures.

Q. And there has been some talk in reference to it, and we don't seem to be able to understand those figures. Why was that statement made ?

*The Court :—*What is it that is shown the witness—Exhibit what ?

*Mr. Dunn :—*Exhibit C-4.

*The Witness :—*When I went over to Eva's, I spoke to her this way : I says, "now"—she was inclined to have the property sold and all that—I says, "Now, how would it be if we keep that property until we have a chance to sell it frequently ; it will be better—we can obtain a 30

better price, than if we sell it in a hurry." So, I says, "Now, for instance, I have got \$1811.26 in the bank. There is \$1217. \$550 that all come to about \$3578—including my money—I don't want to say that that money is yours—that is, that money was in mother's and my joint name, but mother meant it for me." So I says, "I will give this money to the balance and pay off that mortgage, and then we will have a
 10 clear income every year until we have a chance to sell the property." Then she objected. But, you know, I didn't want to put that thing that I wanted to give them that—I wanted to pay off that first mortgage that is on the property and have full charge of it; take in the rent and pay the taxes and have full charge of it, and get all my money back, this \$1811.

By the Court :

20 Q. Did you tell Mrs. Gross that you expected to take out the \$1,811 ?

A. Yes.

Q. Before or after the selling of the land—you didn't tell her you expected to sell the Totowa ?

A. No, I said we had better wait until we had a good chance to sell it. It is a nice property.

Q. Just tell everything you said about that \$1,811.

30 A. Well, I add that to the amount, I says. I wanted to have it so that we could pay off that first mortgage that was on our property. I wanted to be clear of it and have a clear income.

By Mr. Dunn :

Q. Was she willing to do that ?

A. No—she objected to it.

Q. What did they object to?

A. They wanted to divide it.

By the Court :

Q. Mr. Dunn probably means you to say what Mrs. Gross says. You are telling us now about your having a talk with Mrs. Gross, when you put these figures down, and you told her you would put in the \$1,811? 10

A. Yes, I was going in, join in.

Q. Now, counsel asks you what objection she made? Did she object?

A. Yes.

Q. What did she say?

A. That is so long, I cannot remember. She objected and that is all—that is so long. I don't recall every word.

By Mr. Dunn :

20

Q. What reasons did she give?

A. I couldn't say now. That is so long ago, not that I don't want to, but really I can't remember. I was there in her house—I don't think I was there an hour.

By the Court :

Q. Can you tell us why she should object to your paying your own money, this \$1,811? 30

A. She wanted that \$1,800. I said, "Oh, no, this \$1,800, what is in the bank, mother of her free will give me that. She put it in our separate names. That has nothing to do with the es-

tate." I told her that and I told my older sister about it.

Q. If you told Mrs. Gross that this \$1,811 belonged to you and that it was in your name, why did she object to your putting it into this fund to pay the mortgage off that was on her property as well as yours?

10 A. She didn't want it. She says, "That is not only yours, but it belongs to me also and to Mina." I says, "You haven't got any right to it." I says, "From who did that money come? Mother didn't earn that money. It was earned by us—Peter and me—and given to mother to put in the bank."

Q. Was anything said in that conversation about your having \$300?

20 A. In that conversation—let's see what was that, again. There was something—oh, \$300, was made in the will in favor of Eva and Mina Kempkes—\$300 each—therefore, should have been \$700, given to me—she was going to give me that, but this money what mother says—this \$700, that was a mortgage, Mr. Dunn has got now—I cancelled about a month and a half before mother died. I cancelled that mortgage in the County Clerk's office.

Q. You cancelled the mortgage before she died?

A. Yes, mother had that in my mill.

30 Q. How did you cancel it, by paying her the money?

A. I gave her as much back as she gave me.

Q. In what form?

A. It was in the form of nothing. Your Honor, I want you to understand, this mort-

gage I gave to mother one time—free and clear—not that I needed the money or owed her the money. A man was going to have a judgment against me because I could not pay him at the time a bill of \$450. I says to mother, “I will give you a mortgage on that place—not that I don’t want to pay that amount of money”—but I have to pay her taxes for years back, and I have as much to do as I possibly can. And I says, “I give you a mortgage.”

10

Q. You mean you gave this mortgage that you speak of without receiving any money ?

A. Yes.

Q. And a month before your mother died she signed a cancellation ?

A. Yes, Mr. Dunn has got it.

Q. What was said about \$300 between you and Mrs. Gross ?

A. Well, it come this way : Mother says, “That money you don’t owe to me, and I give you that mortgage back.” My sister Mina she mentioned this \$700. She says \$700 I owe to mother, and she wanted a second mortgage also given, because I had this mortgage cancelled, or she wanted her mortgage off. Mother says, “No, you have got this \$500 in cash money and \$50.00 before ; I cannot give you that money, but I can’t give you that money ; but Herman’s mortgage was only a mortgage given to me so as to secure him, so that his place was not going to be sold.” So my mother says, I should have \$300 more. It was my sister who made the will—it was not my mother.

20

30

Q. I asked you to tell what was said between

you and Mrs. Gross about the \$300. Just what was said and talked about?

A. About this \$300. This was the afternoon, and I just went there and give her that check and only stayed a half hour, and I can't remember very well. I can't say.

Q. You say you told Mrs. Gross that the \$1,811 belonged to you?

A. Yes.

10 Q. That you were willing to put it in and have the fund all applied to pay off this mortgage for \$2,600?

A. Yes.

Q. And you told her further that you were willing to wait and get your money back by degrees and take time to sell the property?

A. Yes.

20 Q. And then you said that something was said about \$300, and then your sister said she wanted her one-third of that money, the \$1,811 and you say that your sister denied that you had a right to it. And then there was something said about the \$300.

A. It was on account of this \$300—because in the estate it says each one is given \$300 extra than I. What for did they have \$300 extra? That was what I object to. I wanted that \$300 as well. I said, "You dispose of this \$300, and Mina dispose of that \$300 and then I want nothing—I only want equal shares."

30 Q. Did you tell her if she would allow you to have \$300 so as to make you equal with them, then you would let this money go in to pay off the mortgage?

A. But not to leave it in all the time. That was not in my meaning. I told her that.

Q. Where was there any gain in that proposition to your sisters ?

A. I thought this way was a good way.

Q. Why the will cleared off your mortgage, if it had not been cleared off already. The will of your mother cleared off that \$700 mortgage.

A. That was cleared off before.

Q. To make it sure the will cleared it off, too ? 10

A. No, it wasn't made off clear. You know, mother was on her death bed and Mina she mentioned this : She says, "The \$700 that Herman owe you, and we are entitled to at least \$30 ." The will was made by Mina. She was the first one to mention it at mother's death bed—to make a will.

Q. You say that this mortgage was given for no consideration now, and your mother very properly cancelled it, when you wanted to have it cancelled. That was some months before she died ? 20

A. Yes.

Q. When she made her will, she also in that will cleared the mortgage off ?

A. Mina thought there was \$700 that I owed mother on the mortgage.

Q. Your mother in her will says, "I give and bequeath unto my son Rheinholdt Herman Kempkes out of the property owned by me in the State of New Jersey, the sum of \$700 which he owes to me." What \$700 was that ? 30

A. I don't know.

Q. Did you owe her \$700 ?

A. No, sir ; I did not. It further reads in the

will that she bequeaths my brother Wilhelm that 4,000 marks which he owe to her. He never owed her a dollar.

Q. Do I understand when your mother made this will on the 21st of November, 1903, you did not owe her \$700?

A. I did not.

10 Q. Do you know what she referred to when she spoke of your owing her \$700? Do you know what she meant by that clause in her will?

A. I do not. I know what Mina meant—from the mortgage. She meant about that mortgage—that I owed her on that mortgage. Between mother and I, we know better.

20 Q. Can you explain how it was that your mother came to sign this will in which she gives you \$700 which she says you owe her, if you did not owe her anything at all? How did she come to say that, do you know?

A. Through my sister Mina.

Q. Then you mean your mother did not understand what she was doing?

A. No, she did not understand what she was doing.

Q. And you think that this statement came from your sister?

A. Yes—I know it.

30 Q. And you think that really your sister referred to a debt on this mortgage that was cancelled—you think that the \$700 mentioned in the will really is the same as the supposed mortgage debt?

A. Yes.

Q. The mortgage is for \$900?

A. We made that mortgage for a \$1,000. What I owed to Mr. Levy was four hundred and some odd dollars.

Q. I call your attention to this chattel mortgage which is produced here.

A. I always thought it was for a \$1,000.

Q. Do you know how your sister then could have referred to \$700 as the debt due on that mortgage?

A. Yes, she always says that I owe that \$700 on that mortgage, but between mother and I, we knew that that mortgage I give to mother to protect myself to keep the mill business. 10

Q. You told your sister, Mrs. Gross, that she (Mrs. Gross) had \$300 in the will and Mrs. Schippers had \$300 in the will, and to be equal, you wanted to have \$300 yourself, if she would let you have that, then you would allow this \$1,811 to go in temporarily?

A. Yes. 20

Q. But afterwards it would all have to be paid back. You understood that?

A. Yes, and they understood it.

Q. And she rejected your offer because she claimed she had an equal share in that \$1,811?

A. Yes.

Mr. Dunn :—Cancelled chattel mortgage, dated December 1st, 1900, offered in evidence.

The same is marked Exhibit D-5 for the defendant. 30

By Mr. Dunn :

Q. I will read you a clause of the will, Mr.

Kempkes: (Reading)—“Fourth. I give and bequeath unto my son Wilhelm Kempkes, resident in Crefeld, Germany, 3,000 marks to be paid to him out of the sum of 4,000 marks which he owes to me; the remaining 1,000 marks of said sum owing to me from my son Wilhelm, I give and bequeath to my son, resident of Nuess, Germany, to be held by him forever.” At the time this will was made, did your brother owe her any money?

10

A. He didn't owe her a dollar.

Q. When she went to Germany in 1898, wasn't all these things settled?

A. Yes, all settled. I give you the papers from the German Court.

By the Court:

Q. When your mother came back, did she not leave 4,000 marks in your brother's hands?

20

A. No, sir. This 4,000 marks were divided 1,000 to Mina, 1,000 to Genevieve Kempkes and 1,000 to R. Herman Kempkes. In 1898 when mother was in Europe, that was.

Q. How long after the land was sold?

A. The same year when the house was sold.

Q. I understood that after the house was sold, there was a division of part of the price of 15,000 marks.

30

A. That was for the house.

Q. And then your mother came back and left 4,000 marks still there?

A. To draw interest. But it was divided already by her and my brothers in the old country, only she had the right to draw interest as

long as she lived, until a half year after her death, it should be divided between the four of us.

The Court :—We have no papers here to show that.

Mr. Dunn :—I will state here that the original paper under the seal of the Court over there I loaned to Mr. Van Hovenberg about three weeks ago, and I have not been able to find it since. 10

Mr. Van Hovenberg :—I was under the impression that it had been returned to Mr. Dunn.

The Court :—You had better have it.

By the Court :

Q. Mr. Kempkes, do I understand that you say that the 4,000 marks which are referred to in this will as a debt due from your brother to his mother, was not the 4,000 marks that your mother left out of the purchase money in Crefeld when she came back to this country? 20

A. No, it was not her money no more. It was divided.

Q. When your mother made this will and undertook to give to William Kempkes, her son, in Crefeld, 3,000 marks out of the 4,000 marks which she says in her will William owed to her, when she did that, do you say that she did not have in her mind this 4,000 marks that she had left over there? 30

A. Yes, she might have had it in her mind that she owed it, but she didn't.

Q. Then, you think your mother—

A. If we go tomorrow we can claim our 1,000 marks and my brother has to pay it.

Q. Then you think your mother did not know what she was doing when she made this will?

A. No, she was suffering so much pain, and all that, that she was not able to make a will—
10 and, as I say, this will was made by my sister.

By Mr. Dunn:

Q. After the will was probated, you qualified as an executor?

A. Yes.

Q. There was no dispute or a fight in reference to the will at that time?

A. Probating the will in the probating office?

20 Q. In the Surrogate's office, yes?

A. Yes, I had quite a quarrel.

Q. There has been no lawsuit in reference to the will—a contest or suit?

A. No.

Q. There is another paper there that I would like to call your attention to, that Mr. Schippers said you gave to him—it is marked Exhibit C-5—and at the time of giving it to him, you stated that you were willing to divide up this money if
30 you got \$300. Now, will you explain to us about that \$300?

A. This money—that has just the same meaning. I cannot say any different. My idea was to clear off that mortgage and after clearing off that mortgage—there was no money to do it,

and I wanted to add mine to it, to clear it off, but not with the intention of giving it to them.

Q. Now, was any attempt made to adjust this matter before you came into Court, before it was brought into Court—was any attempt made to settle this dispute between you before you came into Court with your sisters?

A. Yes. When we left the Surrogate's office—they called me all kinds of names. So, I says, "Now, you take your lawyer and I will take my lawyer, and let the two lawyers settle the whole question together. Whatever they decide I am satisfied with. Lawyer Weiss is a man of good recommendation, and he speaks German and English both perfect," I says, "you engage Lawyer Weiss, and I engage Lawyer Dunn." And whatever they agree to I am willing to do. It was on the same day at noon when we left the Surrogate's office. So they went from the Surrogate's office—Eva and Mina—down to the Court House again and had a conversation with Mr. Weiss. I showed them where his office was there, and I went back and I went to see Mr. Dunn. It was almost settled, as much as I understood, when this Schippers interfered and transferred the matter to Van Hovenberg. And it was all mixed up.

Q. You came in contact with your sisters that day, after, did you not—you had a conversation with your sisters afterwards, in reference to the settlement—what were you willing to do at that time to avoid a lawsuit?

A. I wanted to divide everything equal with them, but I did not mention what was in the bank. I did not mention that at all. Then I

says, "I will add that to what we have, and we will take that and clear up the property, and we will wait until we have a chance to sell it. I have sold the property in Bridge street and I can sell that property. I am fairly acquainted and whenever I can get between \$5,500 or \$6,000 I will sell it. Then we will do far better than if we sold it in a hurry or at auction."

10 Q. Any arrangements made that day whereby you should take charge of the property?

A. Yes, at the time in your office, I think. Then they said for the present I could have charge of the property.

Q. Did you come in contact with your sisters after the insurance policy was paid, in reference to making them an offer of a settlement—adjust this matter? Did you have any conversation with them?

A. At the time—after the insurance?

20 Q. Yes, after the insurance was deposited in the bank. Did you come to any agreement with them?

A. No, we did not come to any agreement.

Q. Did you have any conversation with them that day the money was deposited in the bank?

A. The insurance money? Mina did not want me to hold the slip. She wanted Lawyer Weiss to hold the slip—the certificate of deposit. Lawyer Weiss give the certificate of deposit to me.

30 Q. Can you find it now?

A. I cannot find it after the fire.

Q. But the money is in the bank yet?

A. Yes, but the slip is burnt up. It was in

our bedroom in the drawer—our house and factory burned down at Pompton.

By the Court :

Q. What certificate are you speaking of now ?

Mr. Dunn :—I am speaking now of the certificate of deposit in the German bank over in Paterson. It was a check from the Prudential Insurance Company for the insurance on Peter's life. That was deposited to the joint account of the executors. 10

By Mr. Dunn :

Q. Is Mr. Schippers here on friendly terms with you ?

A. No, sir ; that man would do anything against me that he can possibly think of—worse than a stranger. 20

Cross Examination by Mr. Van Hovenberg :

Q. You boarded with your mother a number of years ?

A. I never boarded with my mother. I lived with my mother under financial circumstances.

Q. Did you pay her ?

A. Yes, everything.

Q. And you lived there ? 30

A. Yes.

Q. Had your meals there and boarded there ?

A. I just lived there as you would have your son live with you.

Q. You were working and had a business all this time ?

A. Yes.

Q. And I understand that you turned the money that you used over to your mother for a number of years ?

A. Yes.

Q. While your mother owned this property in Bridge street, in Totowa, she received rents
10 for it, didn't she ?

A. Yes.

Q. Quite an income ?

(Question not answered.)

Q. When did she buy the Bridge street property ?

A. In 1896—1895 or 1896—either one of the two years. Peter bought that, not my mother.

Q. Did you ever ask your mother to make a will ?

20 A. Yes, I asked mother a couple of times anyway.

Q. And who went for Mr. Merz the day the will was drawn ?

A. I did.

Q. Who instructed Mr. Merz how to draw that will ?

A. I bought a slip of paper along.

Q. Who wrote it ?

A. I wrote it.

30 Q. Did you write on that slip of paper the items contained in this will ?

A. Yes.

Q. "I give to my son \$750 which he owes me" ?

A. Yes.

Q. Did your mother ask you to write it down ?

A. Mina asked me.

Q. Did your mother ask you to write it down ?

A. No, Mina asked me.

Q. You wrote that item, drafted that out, not according to your mother's instructions then, but according to your sister's, and your sister asked you to do that ?

A. If you will allow me to tell the story. 10

Q. Please answer the question.

A. Yes and no. Mother she took sick on Tuesday night and on Thursday morning she sent for me.

The Court :—One moment, Mr. Kempkes, you are here to answer the questions.

Q. Did your mother tell you to put that item in the draft of the will in regard to the \$750 ? 20

A. No, sir.

Q. Who told you to do it ?

A. Mina.

Q. You wrote it down in a draft ?

A. Yes.

Q. Did your mother tell you to make these other items, in fact, did she give you the other items and data ?

A. No, sir.

Q. Did she tell you anything about the way she wanted her estate left ? 30

A. No, it was Mina who made it.

Q. Where were you when Mina gave these instructions ?

A. I was in the same room with mother and Mina—in the same room—and afterwards I was in the kitchen. I wanted first not to go into that, and she made such a quarrel.

Q. Did you draw that out in the presence of your mother?

A. I says, "All right, whatever you say I will write down." That is what I did.

Q. Did you owe your mother \$750 at that
10 time?

A. No, sir.

Q. Did you say anything to your mother when your sister asked you to put in that \$750? Did you make any objection to your mother?

A. I says, "Whatever you say I will write down," and with that instruction I went and wrote.

Q. You were satisfied?

A. Yes.

Q. Then you drew this draft and you went to
20 Mr. Merz with it and was that the day the will was signed?

A. That was on the Saturday when mother came to the hospital.

Q. That you drew the draft—that was on Saturday?

A. That was from Friday to Saturday—that night.

Q. And you went to Merz with this draft?

A. Yes.
30

Q. And did Mr. Merz draw the will according to your written memorandum that you gave him? Is this will according to what you handed to Mr. Merz?

A. As much as I can say.

Q. Who were present besides the witnesses when that will was signed ?

A. Nobody, only mother.

Q. Was Mr. Merz there ?

A. Merz, mother and Mr. Otten and Mr. Cliff.

Q. Do you say that your mother did not know what she was doing ?

A. Well, mother she has been suffering very hard.

Q. Do you say that she did not know what she was doing ? 10

A. I don't think she did at that time—she didn't know what she was doing.

Q. You heard the will read over to her that day ?

A. No, sir ; I was in the next room.

Q. How close—the door open ?

A. No, sir ; the door was shut.

Q. You don't know who read the will to her ?

A. No, sir. 20

By the Court :

Q. You don't know whether it was read or not ?

A. No, we weren't there.

By Mr. Van Hovenberg :

Q. You were anxious to have her make a will ? 30

A. Yes, when she was sound and healthy.

Q. Had you asked her a short time before her death to make a will ?

A. Yes, when we sold the house, I says, "Now, mother, you are sound and healthy now."

make a will, and while you know what it is your duty to do."

Q. Did you ever draft a will for your mother, and ask her to sign it, and tell her that was the kind of a will that you wanted her to make?

A. I did over a year ago.

Q. Anything said in that draft about the \$750?

A. I don't know. It may be two years ago, one I made up with a pencil, or something. I
10 don't know what it is. I made once a copy of something, but if I ever read it to mother, I am not sure.

Q. Was anything said in that draft about the \$1811 that was in the Savings Bank?

A. No, it must have been about two years ago [before mother died, when I made once a description and put it in my bedroom in the drawer.

Q. Your mother always kept possession of the
20 bank book?

A. Not all the time. I did once in a while.

Q. She attended to getting her rents in, didn't she?

A. She collected and I collected.

Q. She was a careful woman about money matters, wasn't she?

A. Yes, she always was very careful.

Q. Do you know Mr. Otten?

A. Yes, as long as he lives in our neighbor-
30 hood.

Q. Is he a respectable man there—a property owner?

A. Some speak good and speak bad of him. I don't know.

Q. You know him to be an honest man?

A. As much as any one. Some time ago we were often in his place, but now I don't go there.

Q. After your mother's death, did you call at his house?

A. I think I did, he has got a beer saloon, and we went in there frequently.

Q. And did you have any conversation with him in regard to the money that was in the bank, this \$1811?

A. I don't recall that.

10

Q. Did you take a bank book out of your pocket and say, "If my sisters"—or words to this effect—"don't agree to give me \$300, I will claim this money. It is my mother's"?

A. No.

Q. You say when Mr. Otten says anything of that sort, he is not telling the truth?

A. I don't say any such thing.

Q. When Mr. Otten says you said that, you say he is not telling the truth?

20

A. I don't say it.

Q. We will take the time that you went to Brooklyn, when you saw your sister and you gave her this statement. What did you say to her?

A. I didn't go there with a statement. I didn't give her that statement. She had a piece of paper lying there, and now, I says, "For instance, we will make it that way."

Q. Had you any conversation before with your sister, about this \$1,811?

30

A. When she claimed that she thought it was hers, her estate, I says, "No, it is not the estate—it is personal."

Q. When you wrote it, were you on friendly terms with your sister?

A. Yes.

Q. Had you disputed about \$1,800?

A. For sure, because after that we couldn't pay off that mortgage.

Q. Those are all your figures—Exhibit C-4?

A. Let me see—some are my figures and some isn't.

10 Q. Point out in the paper the figures that are not yours?

A. There is \$1,811.20, \$1,217.50, \$3,028.76, \$113.30.

By the Court:

20 Q. You are now reading the figures in the left hand column in the middle of the paper below the figures \$268.06 and all that down to the bottom from \$268.06 down to the bottom, you did not write?

A. No.

Q. How about this "\$500—Mina"—you didn't write that?

A. No, sir.

Q. And how about these figures on the right hand side of the paper?

A. That is my figures.

Q. The upper part is in your handwriting?

30 A. Yes.

Q. Down to \$568 is in your handwriting, is it?

A. Yes.

Q. How about this from \$678.13 down? Is that in your handwriting?

A. Yes.

Q. All of that column is in your handwriting ?

A. Yes.

Q. All on this side of the paper is in your handwriting, excepting this portion on the lower part of the left hand column ?

A. Yes.

Q. Turning the paper over, is there anything there that is not in your handwriting ?

A. Yes.

10

Q. All in your figures ?

A. Yes.

Q. I understand that this piece of paper was blank there on the table, and you did this figuring there as you sat there ?

A. Yes, when we sat and talked.

By Mr. Van Hovenberg :

Q. You considered this \$1800 your money ?

20

A. Yes.

Q. But you told your sister you were willing to put it in the estate to pay off the mortgage on the Totowa property ?

A. Yes.

Q. And you would do that if what—if she would agree that you get \$300 ?

A. Not to sell it, I to have charge of it.

Q. And did you ask her for any money ?

A. Out of the estate I wanted \$300.

30

Q. And did you say anything at the time about when this money should be refunded to you ?

A. No, there was no time mentioned. Therefore, I wanted to have charge of the place.

Q. You have had charge of the property since your mother's death all the time ?

A. All the time.

Q. You are collecting the rents there today ?

A. Yes.

Q. Where is that money now, Mr. Kempkes ?

10

Mr. Dunn :—I object to the question. He is executor of the estate authorized by the other executor, according to her testimony, to do it as the agent of the estate, and Mr. Van Hovenberg is asking him where the money is, which he has collected while he has been acting as agent.

The Court :—The question can be answered if you press it and want to go into that question.

20

Q. Did you mother speak English ?

A. Pretty fair for an old lady.

Q. Did she tell Mr. Merselis to change this bank book to your name ?

A. Yes.

Q. Did you go to the Savings bank at any time with Mr. Schippers after the mother died to draw any money ?

A. No.

Q. Didn't you go there one day ?

30

A. No, sir.

Q. Didn't you want to draw some money there and they wouldn't give it to you, because you would not leave the book ?

A. No, sir ; only some time ago I deposited some money there in the Savings Bank, and Mr.

Merselis say that Schippers and Mina had been there and had put an injunction on it.

Q. Did you ever have any conversation with Mr. Otten, with your mother being present, in regard to your owing your mother some money?

A. I never did. Family affairs I don't speak of to other people.

Q. Did you ever hear your mother in conversation with Mrs. Otten in regard to that? Were you ever present at any conversation? 10

A. Not when we speak about family affairs.

Q. Have you ever been at Mr. Otten's place with your mother within the last year or so?

A. Several times I take my mother there, especially in the summer-time, to have a glass of beer.

Q. Did you ever have any conversation with your mother and Mr. Otten together, when your mother said anything about money matters between you and her? 20

A. No, sir.

Q. Where did you get the key to the bureau?

A. From the bureau.

Q. When was it?

A. From the bureau—that first night that mother was sick.

Q. Who had the key at the time?

A. She sent right away in the morning for me to be over there; and Mina—it was mother's christening day—she generally come and pay the interest on \$550, and she was expected about dinner time. 30

Q. You found the bank book in the drawer?

A. Yes, where we generally kept it.

Q. Did you tell your sister, Mrs. Gross, at the

time you saw her in Brooklyn, or any other time that you would divide the balance of this \$1,800, between them if they would consent that you have \$300, otherwise you would keep the money for yourself?

A. No, sir ; I did not.

Q. Did you tell your sister, Mrs. Schippers, that, or words to that effect?

A. No, sir ; I says I was willing to put it up to
10 pay off the mortgage.

Q. Did you ever tell Mr. Schippers that?

A. No, sir.

Q. Did you ever show Mr. Schippers the bank book and tell him if they did not consent to that you would keep the money?

A. I don't think Schippers ever seen the bank
book until today, because mother never wanted
any of the Schippers to be in that drawer. It
was only myself—there never come any of the
20 Schippers or Eva in mother's room in that top
drawer, and when she took sick the first thing
she done was, she says, "You take that key,"
and so I did.

By the Court :

Q. Was she taken sick suddenly?

A. Yes—strangulation of the intestines.

By Mr. Van Hovenberg :

30 Q. I show you a paper and ask you if that is
in your handwriting?

A. Yes ; my handwriting. That paper must
have been left in my bedroom bureau drawer.
That is my handwriting.

Q. What is it, Mr. Kempkes ?

A. I don't know. It is so long ago.

Q. It is written in German ?

A. Yes ; I can translate it. (Reading), "I, Mrs. Elizabeth Kempkes, bequeath my sons, Herman and Peter Kempkes, the house, 17 Bridge street, and lot ; the house, 186 Wayne avenue, and the lot, the house 192 Wayne avenue, and the lot, 188 and 190 Wayne avenue. My son, Herman Kempkes, shall alone be attorney of it until—my son, Peter Kempkes, wishes—there is an opportunity to sell the property. My daughter, Mina, \$500, and my son, Herman, \$700, Crefeld, Volks bank, 3,000 marks, and the dividends, and the money what is here in the Paterson Savings Institution, that together shall be divided in five parts, for Wilhelm, Wilhelmina, Eva, Herman and Peter Kempkes. Then shall my daughter, Eva, get \$275, extra. The mortgage of Herman on his mill, he don't need to pay." This has been made about the time when Peter was about a year in the other country, I think, in 1901, sometime. I draw that and lay it in the bedroom drawer, and so Schippers must have found it in the furniture that was divided.

Q. Your mother would have known what she was doing if she had signed that ?

A. Yes, and that property was not her property. It was Peter's and my property, only it was in mother's name temporary.

The foregoing paper from which the witness has just read is offered in evi-

dence and marked Exhibit C-7 for the complainant.

Q. When your mother bought this property down in Bridge street, was there a mortgage on it?

A. Yes.

10 Q. I mean the other mortgage—not the mortgage that was paid off at the time of the sale of the property to Mr. Brich, but another mortgage?

A. Yes, other mortgage.

Q. Was there another mortgage?

A. Yes.

Q. Didn't your mother pay it off?

20 A. That other mortgage, it was made to her. Dr. Hindle had the first mortgage of \$2,000, and mother had a second mortgage for \$1,500. It was given to her by Peter, but not a cash mortgage.

Q. Well, a mortgage not good for anything?

A. Yes.

By the Court :

Q. On the Bridge street property?

A. Yes.

Q. And then afterwards, I understand you to say, that Peter conveyed it to your mother, did he?

30 A. In 1900. In 1896 Peter failed in Hamilton's Mill. Schippers was his foreman. He fails and then he gives mother that mortgage of \$1,500 to secure his property.

Q. Afterwards, do I understand you to say

that Peter conveyed the property to your mother—not the mortgage—but afterwards did he sell the property to your mother?

A. He just transferred it over, the same night he left for Europe.

Q. That was in what year?

A. In 1900—four years afterwards—1900, on the 12th of October.

By Mr. Van Hovenberg:

10

Q. Didn't a party named Hindle have a mortgage on that Bridge street property?

A. Two thousand dollars.

Q. And didn't your mother pay that off?

A. In 1902, she paid that off.

MARY KEMPKE sworn for the defendant.

Direct Examination by Mr. Dunn:

20

Q. Mrs. Kempkes, you are the wife of Herman Kempkes?

A. Yes.

Q. And when were you married to him?

A. The 29th of April, 1903.

Q. And where were you living at that time?

A. Pompton Lakes.

Q. And engaged in business there?

A. Yes.

Q. And how long did you continue in business there after that time?

30

A. Until last May, when we were burned out.

Q. Your mill was burned and destroyed?

A. Yes.

Q. Were you acquainted with Mrs. Kempkes, Herman's mother, in her lifetime?

A. Yes.

Q. How long had you known her?

A. I had only known her a few weeks before we were married.

Q. And since you were married, before her death, had you had occasion to see her frequently?

10 A. Yes, quite frequently.

Q. What was her physical and mental condition as far as you know?

A. I found her kind of delicate looking woman, thin woman, but still she was strong and robust.

Q. As far as her business ability was concerned?

A. She worked really harder than I would expect in a woman of her age.

20 Q. Was she intelligent?

A. Intelligent, pretty good in figures, and everything. I was surprised.

Q. During that time from the time of your marriage to Herman up to the time of her death, what was Herman's custom in reference to visiting his mother?

30 A. He didn't like to make any change, because the mother was kind of queer in her age, and wanted to have him around her the same as before. He claimed he ought to keep up the habit of giving her money and paying the expenses just the same as before. For quite a while—two or three months—I didn't receive any money at all.

Q. Would your husband eat there nearly every day ?

A. I suppose he ate his dinner once in a while. He went over mostly to see the mother, and she felt more satisfied when he called on her.

Q. Have you called on Mrs. Kempkes with Herman ?

A. Yes.

Q. And their relations were always friendly and happy ? 10

A. Of course, they once in a while had little arguments, as usual, but when I found out it was a quarrelsome family, I never bothered much with them.

Mr. Van Hovenberg :—No questions.

Mr. Dunn :—I would like to offer this deed in evidence. Deed made by Peter Kempkes, single, to Elizabeth K. Kempkes, dated 9th day of October, 1900. 20

The same is received in evidence and marked Exhibit D-6 for the defendant.

The Court :—It conveys the Bridge street property ?

Mr. Dunn :—It conveys both properties, the Totowa property, too. 30

The Court :—The single grantor is Peter—unmarried ?

Mr. Dunn :—Yes, unmarried at that time.

At this point defendant rests subject to the privilege of calling Mr. Merselis and Mr. Keller.

Mr. Van Hovenberg :—I would like the privilege of having another witness here.

The Court :—I understand you now want to rebut the testimony already in.

10

WILLIAM OTTEN, recalled for rebuttal :

Direct Examination by Mr. Van Hovenberg :

Q. Did Mr. Kempkes and his mother ever call at your place together ?

A. Yes, in the house on Bridge street.

20

Objection to the evidence on the ground that the same belonged to complainant's original case.

Objection sustained.

The Court :—This cause is now adjourned for further hearing at a later day, at the request of counsel for the defendant, and upon his agreeing to furnish a copy of the testimony which has already been taken, to the counsel for the complainant and to the Court—that is, one copy for himself, and one to be used by counsel for the complainant and then by the Court.

30

The case now stands that the complainant is rebutting the testimony so far taken by the defendant, and the defendant has rested subject to calling Mr. Merselis and Mr. Keller, and introducing some documentary evidence on either side.

I will let this cause stand over nominally for three weeks from next Monday, in order that the testimony may be written out. On that day I will fix a day for the conclusion of the case. 10

20

30

IN CHANCERY OF NEW JERSEY.
CITY HALL, PATERSON, FRIDAY, MAY 12TH, 1905.

10	Between WILHELMINA SCHIPPERS, EX- ECUTRIX, ETC., <i>Complainant,</i> <i>and</i> RHEINHOLDT HERMAN KEMPKE, ET ALS., <i>Defendants.</i>	<i>On Bill.</i>
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20 Before his Honor, Vice Chancellor Stevenson.
 The parties in the above stated cause met
 with their respective counsel at the above time
 and place, and the taking of testimony therein
 was resumed.

ROBERT E. VAN HOVENBERG for the com-
 plainant.

CHARLES B. DUNN, for the defendants.

30 EDO I. MERCELIS, sworn for the defend-
 ants, testifies as follows :

Direct Examination by Mr. Dunn :

Q. Where do you reside ?

A. Paterson, 349 Park avenue.

Q. And what is your business?

A. Banker.

Q. And where are you employed?

A. Paterson Savings Institution.

Q. And what position do you occupy?

A. Treasurer.

Q. And how long have you been employed in the Paterson Savings Institution?

A. Since the fall of 1869, the year the bank was organized. 10

Q. And have been continuously in their employment to date?

A. Well, with the interruption of about perhaps a year. The bank was open only two evenings a week in 1869.

Q. You were in the bank from 1869 continuously down to date?

A. Yes.

Q. Did you know Mrs. Elizabeth Kempkes in her lifetime? 20

A. Yes.

Q. Was she a depositor in your bank?

A. Yes.

Q. And how long have you known her, Mr. Merselis?

A. Mrs. Kempkes opened an account in 1891 in the Savings Institution.

Q. I show you bank book on the Paterson Savings Institution No. 42,105, and marked Exhibit D-3 in this cause, and I ask you is that the book that she opened? 30

A. Yes.

Q. And the first deposit there of March 7th,

1891, of \$135.00 was her first deposit in your institution?

A. Yes.

Q. And from that time on she continued to do business with this pass-book up until what date?

A. The last entry in the pass-book, September 26th, 1903—October 19th, 1903.

Q. October 19th, 1903?

10 A. Yes.

The Court :—What is the amount of it?

Mr. Dunn :—The last is \$116.26.

Q. And after October 19th, 1903, did she continue to do business with your bank?

A. Yes.

Q. In what manner—what book?

20 A. The old book 42,105 was full and a new book was issued and the account transferred to it. Its number was 92,441.

Q. I show you a book marked 92,441 and marked Exhibit D-4 in this cause, and I ask you is that the book the account was transferred to?

A. Yes.

Q. During the time that Mrs. Kempkes did business with your bank did you have occasion to come in contact and meet her personally—
30 Mrs. Kempkes?

A. Yes.

Q. Do you remember whether she was an active, intelligent woman or not?

A. She certainly was.

Q. Do you remember of any change being

made in the names on the book marked D-3 and when they were made?

A. On the 14th of February, 1903, Mrs. Kempkes and her son R. Herman Kempkes, came into my office and Mr. Kempkes said that his mother would like to have his name added on the pass-book so that either could draw. I asked Mrs. Kempkes if that was her wish and she said yes. She didn't speak English very perfectly, so I got the teller, Mr. Botbyl, who speaks German, that he might make her fully understand the nature of the change, that either could draw either in their lifetime, or the survivor in case of death could draw the money, and he talked to her in German and reported that she understood perfectly. I then called the clerk and had Mr. Kempkes and Mrs. Kempkes sign the signature cards and added Mr. Kempkes' name on the book. 10

Q. Was that signed in your presence? 20

A. Yes, in my office.

Q. Have you that card with you?

A. Yes.

Q. Just produce it, please?

A. (Witness produces card.)

Q. Is that the card (showing witness card just produced)?

A. Yes.

Q. And did you see Mrs. Kempkes and Mr. R. Herman Kempkes sign it? 30

A. Yes.

(The same is offered in evidence and marked Exhibit D 50.)

(Mr. Dunn reads card, Exhibit D 50.)

Q. And what is the rule and regulation of the bank in reference to deposits made in that way as to whether it goes to the survivor or not?

Mr. Van Hovenberg :—I object to that. I don't see that could be binding at all. He has not shown any agreement there between the parties.

10 *The Court* :—Yes, that would be entirely competent.

The Witness :—The money to be paid to the survivor.

Q. When a bank book becomes full, Mr. Merselis, like the old book there, what is the custom of the bank?

20 A. To transfer to either a number 2 book in the same ledger, or if that ledger is running full, to transfer to a new number entirely in a new ledger.

Q. And that was done in this case?

A. In this case it was transferred to a new number ledger. Of course, the new signature card was taken and both signed a new signature card for a new book.

Q. Both signed for this new book?

A. Yes.

Q. Have you that card with you?

30 A. Yes.

Q. Just produce it, please.

A. (Witness produces card.)

The same is offered in evidence and marked D 51.

(Mr. Dunn reads Exhibit D 51.)

Q. 42,105 is the account it was transferred from?

A. Yes, and the amount of it was \$116.25 as shown by the new book to which the transfer was made.

Q. That lead pencil entry, what does that mean?

A. That was a memorandum for some Court notice, not to pay after that entry was made. 10

Q. Restraining order?

A. Yes, restraining order.

Q. Filed in this cause?

A. Yes.

Q. Have you that restraining order with you?

A. I haven't, no, sir. This memorandum was made on the ledger when those orders were filed.

Q. Can you look at the book there and recall any transaction when you last remember seeing Mrs. Kempkes at the bank? 20

A. On November 12th, Mrs. Kempkes called at the bank with Mr. Herman Kempkes, and, I think, yourself, and paid off a mortgage it held, and also at that time deposited \$1,870.00. That is November 12th, 1903. That was the last time that I have any recollection of seeing Mrs. Kempkes.

Q. Do you remember the principal of that mortgage? 30

A. I believe it was \$1,000.00.

Q. And was the money paid from this bank or was it deducted from money--

A. Some amounts he had in hand, and it was not deducted from the bank.

Q. And this was the balance ?

A. Yes, that is my recollection.

Q. Do you remember her condition on that day, whether she was just as active and intelligent as she was before ?

A. Certainly she was.

10 *Cross Examination by Mr. Van Hovenberg :*

Q. Can you state from this book about the amount deposited by Mrs. Kempkes from month to month, aggregating, roughly ?

A. From month to month ?

Q. Yes.

A. Why, the entries on the book are correct. I would have to stop and add up each month.

20 *Mr. Dunn :—*I object to the question.

*The Witness :—*The first deposit was in March, 1900, August, same year, \$30.00. September, \$25.00, and from time to time.

*The Court :—*Mr. Dunn's objection is well taken. You are asking the witness to do merely clerical work. The book shows itself, it is merely a question of adding it up.

30

Q. Who did the most of the talking that day when the account was transferred, Mr. Kempkes or his mother ?

A. When the name was added, Mr. Kempkes and his mother were both there.

Q. And who did the talking ?

A. Who gave the order ?

Q. Yes.

A. Mr. Kempkes said that his mother wanted his name added to the book, so that either might draw, and I asked Mrs. Kempkes if that was her wish and she replied it was. Mrs. Kempkes spoke English but imperfectly. I then called the teller, Mr. Botbyl, who spoke German, to explain to her and see if that was her wish, and he said she understood it perfectly, and that was her wish. 10

JUSTICE G. BOTBYL, a witness produced on behalf of the defendants, testifies as follows :

Direct Examination by Mr. Dunn :

Q. Where do you reside ?

A. No. 709 East 23rd street, Paterson, New Jersey. 20

Q. And what is your business ?

A. Teller in the Paterson Savings Institution.

Q. And how long have you been employed in the Paterson Savings Institution ?

A. Since 1886, nineteen years.

Q. How long have you known Eliza Kempkes ?

A. Well, twelve or thirteen years, I should think. She opened an account in 1891, and I have known her practically since she opened an account. 30

Q. You have worked continuously in the bank since that time ?

A. Yes.

Q. During that period from 1891 until her death, November 23rd, 1903, you had occasion to come in contact with her personally frequently?

A. I saw her every time she came in the bank, if I were in the teller's cage, which I usually was.

Q. And you speak German, Mr. Botbyl?

A. Yes.

10 Q. I show you this book 42,105 in the name of R. Herman Kempkes or Eliza Kempkes, marked D-3 and ask you if that is the original book with which she started her account?

A. Yes.

Q. Do you remember of any change being made in the names on that book?

A. I do, on February 14th, 1903, the name R. Herman Kempkes was added.

20 Q. How did that change come to be made? Tell us, if you know.

Q. Mr. Kempkes and his mother were in Mr. Merselis' office and Mr. Merselis came to my cage and said "I wish you would come over to Mrs. Kempkes and speak German to her." He says "Her son wants his name added on the book, and ask her if that is her wish." So I asked Mrs. Kempkes in German if she wanted her son's name added on the book, and she said yes. I says, "Do you understand that either can draw?" She says, "Yes, I do." I says, 30 "And you understand in case of death of either the survivor can draw it?" And she says yes, and she wanted the name added on the book.

Q. I show you her signature. Is that her signature?

A. Yes.

Q. And that is R. Herman's signature?

A. Yes.

Q. And that book which you have in your hand, there, are you satisfied that she understood perfectly what she was doing, Mr. Botbyl?

A. Oh, yes, there is no doubt about it whatever.

Q. And during your acquaintance with her for that period of nearly fourteen years, what was your opinion as to her being a healthy, active and intelligent woman? 10

A. Why, I always thought she was an active, intelligent woman for a person of her years. She impressed me that way.

Q. And a woman who could attend to her own business?

A. Yes, I never had any doubt about it in my own mind.

Q. When this old book that you have in your hand was filled, what was done with it? 20

A. The balance was transferred to a new account. Of course, that had to be done. When an old book is full, we transfer the balance to a new account making out the new book in the same way in both names and we took Mrs. Kempkes' signature and Mr. Kempkes' signature for the new book.

Q. I show you this card marked 92,441 and ask you if that is the new card and if these signatures are the signatures of Mrs. Kempkes and R. Herman Kempkes? 30

A. Yes, they are.

Cross Examination by Mr. Van Hovenberg :

Q. What was the balance in the old book at the time it was transferred ?

A. 116.26.

The Court :

10 Q. Mr. Botbyl, I notice in the first part of this pass book certain printed rules entitled "Rules and Regulation for Depositors in the Paterson Savings Institutions, Paterson, N. J." There seem to be eleven of such printed rules ?

A. Yes.

Q. Are these the recognized regulations of the bank ?

A. Yes.

Q. Are these the rules referred to on these cards which have been produced here, the signature cards ?

20 A. Yes.

Q. At the top of the signature card I read, "The depositor by following signature assents to the by-laws, rules and regulations of the Paterson Savings Institution." Now, I understand these rules and regulations printed in the front part of this book are the rules and regulations referred to on the card ?

A. Well, there are other by-laws.

30 Q. I will come to that in a minute—they are the rules and regulations ?

A. Yes.

Q. Now, where are the by-laws that are referred to in the card ? Are they printed anywhere ?

A. Yes ; we have them in printed form.

Q. But they are not distributed to the depositors ?

A. No, sir.

Q. Mrs. Kempkes was not then made acquainted with the by-laws when this transaction was had ?

A. No, sir.

Q. Is the German print at the end of the book contained in eleven paragraphs an exact translation of the English rules and regulations in the front part ? 10

A. Yes, I believe it is.

Q. Can you point out here any special regulation requiring a depositor when drawing money to present his pass-book ?

A. Yes, the third : "The deposits shall be entered when made in the books of the institution in a pass-book, and drafts and payments shall be entered in like manner." 20

Q. Anything more ?

A. The latter part of that third clause says, "all entries of moneys paid by an officer of the institution shall be deemed good and valid."

Q. Then there seems to be no rules requiring that the depositor in order to draw out any money shall present this pass-book ?

A. I think that third clause establishes that. "All deposits shall be entered when made in the books of the institution and in the pass-book of the depositor, and all drafts and payments shall be entered in like manner." 30

Q. That is all, is it ?

A. Yes.

Q. The only regulation of the bank requiring

the presentation of the pass-book in order to draw money is what you have read?

A. Yes.

Q. In this third paragraph—"that all drafts or payments shall be entered in like manner" in a book?

A. Yes. We never deviate from that rule. We never make any payments without the books being there.

10 Q. You mean that is your custom?

A. Yes.

Q. Are you quite sure there is no positive rule to that effect printed here or elsewhere? You must observe that the language which you have read from paragraph 3 does not require the presentation of the book in order to make a draft of money, but only provides that the moneys drawn shall be entered in the book. It doesn't say when.

20 A. "All deposits shall be entered when made in the books of the institution in a pass-book, and drafts and payments shall be entered in like manner." That is the way I understand it. Perhaps I might explain that we have a printed copy of the laws of New Jersey relating to Savings Banks, also supplement to the Savings Banks laws, and in that book there is a clause which says on the decease of a depositor—

30 *The Court* :—You needn't give us that.

Mr. Dunn :—I offer the bond and mortgage made by Peter S. Kempkes and Harry Johnson to Frank L.

Hindle for \$2,500 and the discharge of mortgage from Frank L. Hindle.

The Court:—Any objection, Mr. Van Hovenberg?

Mr. Van Hovenberg:—I don't think there is any objection.

Mr. Dunn:—It might serve as a little history. I don't think they have anything to do with the case at all. 10

The Court:—Then I think they ought to be left out of the case.

Mr. Dunn:—The only object of putting them in is to show that this mortgage was paid out of these savings bank accounts, and the accumulations that had been made in it by Mrs. Kempkes and Herman Kempkes and Peter Kempkes, and the book shows for itself the reduction of this amount, where the money went to. 20

Mr. Van Hovenberg:—If Mr. Dunn's object is to show that Mrs. Kempkes paid this mortgage I am perfectly satisfied to allow it to go in.

Mr. Dunn:—The first one I offer is a bond and mortgage made by Peter S. Kempkes and Harry Johnson to Frank L. Hindle, dated February 7th, 1895, amount \$2,500.00. 30

(The said bond is marked Exhibit

D-52 and the said mortgage is marked Exhibit D-53.)

Mr. Dunn :—I offer discharge of mortgage from Frank L. Hindle to Peter S. Kempkes and Harry Johnson, dated June 30th, 1902.

(The same is marked Exhibit D-54.)

10

Mr. Dunn :—I offer a receipt dated July 29th, 1903, for \$1,350.00, payment of Muller mortgage.

(The same is marked Exhibit D-55.)

The Court :—These papers are offered in evidence by consent.

Mr. Van Hovenberg :—Does Mr. Dunn understand that Mr. Kempkes paid this mortgage?

20

Mr. Dunn :—Oh, no, no.

The Court :—I admit them because they are not objected to, but counsel may explain their connection further on.

DEFENDANTS REST.

30 GENEVIEVA GROSS, recalled for further examination in rebuttal, testifies as follows ;

Direct Examination by Mr. Van Hovenberg :

Q. Mrs. Gross, when you came to America, who came with you ?

A. Peter and Herman and myself.

Q. Who paid the money?

Mr. Dunn :—I don't see where this is a rebuttal.

Mr. Van Hovenberg :—It is rebuttal because he stated that he went to Germany and brought his sister and brother over. My object is to show that the mother paid her way here. 10

The Court :—What has that to do with the case?

Mr. Van Hovenberg :—It will come in to show that Mrs. Kempkes is a woman of means and not dependent upon this man as he is trying to make this Court believe.

The Court :—I have not understood that the defendant claims that he had any title to this money that was placed in the Savings Bank excepting what was given in the transaction between himself and his mother. I remember there is some testimony about the way this family was made up and how the boys worked and the money was given to the mother and so there was a sort of intimation that the property which Mrs. Kempkes acquired belonged to her children, and I think there was testimony that part of the property came from Peter, was there not, Mr. Dunn? 20 30

Mr. Dunn :—That is right.

10

The Court :—There were various family transactions here, but I don't recall that there was any foundation for a legal or equitable title to this fund that can be asserted on behalf of the son Herman Kempkes, excepting what title he gets by this transaction with the bank. Mr. Dunn accepts that view.

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Mr. Van Hovenberg :—But in the defendant's testimony, if the Court please, he explicitly states that for years he turned all his money in to his mother, keeping but a few dollars and that that money was the money with which she bought the Bridge street property. If the Court will turn to Mr. Kempkes' testimony, he will see there that one of the main points is the fact that for years he paid his mother every dollar he got. Therefore, if we could trace back the fund to him, properly speaking he would be entitled to this money. Now he comes here this morning and bases his claim on the transaction at the bank.

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The Court :—It is a matter of no consequence whatsoever what has been testified to in this case in regard to the money transactions between the mother and the son, unless those

transactions are relied upon to give him title to this particular fund. My recollection is that at the conclusion of these 100 pages of testimony which I followed very closely, there was no foundation shown at all for the assertion of any claim to this money back of the transaction between the mother and the son and the bank ; in other words, that this whole suit starts out with the admission on both sides that this \$1,870.00 belonged to Mrs. Kempkes. It was her money and Mr. Dunn now says that it is his view. Now, why should we trouble ourselves about the transactions between the mother and the son prior to that date if they cannot give the son title to this money ? If I am not mistaken the answer sets up title to the defendant Herman Kempkes in this money by virtue of this transaction in the bank.

Mr. Van Hovenberg :—Then the question resolves itself into this, whether the money being placed in the two names that way, whether the survivor takes it ? If that is the case, why, I will drop that line.

Mr. Van Hovenberg (To the witness.)

Q. I show you a paper marked C-4 on the

part of the complainant and ask you who wrote all these figures ?

A. Herman.

Q. Where ?

A. My brother Herman.

Q. Did he write this "500" ?

Mr. Dunn :—She has testified to this before.

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The Court :—Let it appear on the record what papers you are showing the witness.

Mr. Van Hovenberg :—Paper marked C-4.

Q. And he wrote all the figures there ?

A. Yes.

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Mr. Van Hovenberg :—After the last hearing down at Jersey City—the last time the case was up—Mrs. Gross mentioned to me that she had written to her brother in regard to this matter—her brother in Germany—asking him if he had any information in regard to it. She did not receive an answer to her letter. I told her to write again which she immediately did. She has since informed me that on Tuesday of this week she got a reply, and in that reply he states that this defendant made statements to him personally while the defendant was on a visit to

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Germany this last fall directly contradicting his testimony in this case. He says in the letter that his brother told him that he had them in his fingers ; that they would have to do as he wanted them to do ; if they did not he would keep all that money. That the money was deposited in his and his mother's name and although it belonged to the mother's estate, being in his name he would keep it unless they did exactly as he said. And this brother says that he has letters from this defendant and that there are letters from this defendant to another brother William, in which he states distinctly that the money in the bank was the mother's estate and that if the sisters did not consent to divide it with him he would keep it all. 10 20

Mr. Dunn :—That has been the contention of Mr. Kempkes all through this case, that if the sisters did not give him control of the property and take charge of that property until his indebtedness was paid, he would insist upon taking all the money and make no settlement or adjustment with them. He has contended all along that never for one moment even with the furniture—he adjusted it and gave them all and share—but as to this money and the property from the 30

beginning to the end, he has contended that it was his and that it did not belong to the matter.

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The Court :—Mr. Van Hovenberg says he has distinct proof of the admission of the defendant himself to the contrary. Now, you admit that is a matter in controversy here. If he has proof, especially in writing, that the brother made these admissions, isn't that very direct and important testimony bearing upon the very issue that you have referred to? It may be that it is cumulative. I think under the circumstances I will let this matter stand over and see if Mr. Van Hovenberg can make his application in the regular way. I was willing that counsel should make a statement in order to get an idea of what the application would probably be. It is based upon a letter. The letter, of course, must be produced translated, and the excuse for the non-production of this testimony must be shown to the Court by affidavit. Mr. Van Hovenberg must promptly present his affidavits to sustain his application for a further postponement in order to take this testimony of the brother in Germany. He must serve copies of his affidavits on Mr. Dunn by the first of June, and on June 8th, to which the case is regularly adjourned for the

purpose of keeping it regularly before the Court, I will determine whether this further testimony is to be taken or not.

Adjournment to Thursday, June 8th, 1905, at the Court House in Paterson, 9:45 A. M. It was stated by the Court that on this date the argument would not be had, but then a further postponement will be made to enable Mr. Van Hovenberg to take the testimony last referred to, if he is allowed to take it. If not, then on this date the day for argument will be stated.

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EXHIBIT C 4.

	1811 26		
	1217 50	300	
	500	13	
		150	
	3528 76	50	474
	113 30	61	
10	3642 06	200	
	774		
		774	
	2868 06		
	2600		
		3642 06	
	268 06	474	
		3168 06	
		2600	
20	1811 26	568	
	1217 50		
	3028 76		
	113 30		
	3142 06		
	774		
	2368 06		
	600		
30	1768 06		

EXHIBIT C 5.

26 November 1903.

1217 50
 1811 26
 0110
 500

 3637 76

300

Funeral expen.

10

 3337 76

Total

2600

 Schipp 100

737 76

Herm 100

300

Eva 100

 437 76

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EXHIBIT C 6.

In the name of God, Amen. I, Elizabeth Kempkes, of the city of Paterson, in the County of Passaic and State of New Jersey, being of sound, disposing mind, memory and understanding, do make, publish and declare my last will and testament, in manner following, that is to say :

First. I do order and direct that all my just debts, funeral and testamentary expenses be paid by my executors, as soon as conveniently can be done after my decease.

30

Second. I give and bequeath unto my son, Rheinhold Hermann Kempkes, out of the property owned by me situate in the county of Passaic in the State of New Jersey, the sum of seven hundred dollars, which he owes to me; also out of the said property owned by me in said county and state, I give and bequeath unto my daughters, Wilhelmina Schippert, nee Kempkes, and Genoviva Gross, nee Kempkes,
 10 each the sum of three hundred dollars, to them, their executors, administrators and assigns forever.

Third. I give, devise and bequeath all the remaining part of my estate, real and personal, which is situate or which I my own in the county of Passaic in the State of New Jersey, after the payment of the above bequests, unto my three children, viz. : Wilhelmina Schippert,
 20 nee Kempkes, Rheinhold Hermann Kempkes, Genoviva Gross, nee Kempkes, to have and to hold, the same unto them, their heirs, executors, administrators and assigns forever.

Fourth. I give and bequeath unto my son, Wilhelm Kempkes, resident in Crefeld, Germany, three thousand marks, to be paid to him out of the sum of four thousand marks, which he owes to me ; the remaining thousand marks of said sum owing to me from my son Wilhelm,
 30 I give and bequeath unto my son Heinrich Kempkes, resident in Neubs, Germany, to have and to hold the same, unto them, their executors, administrators and assigns forever.

Fifth. I give and bequeath all the money which I have on deposit in the Volksbank in Crefeld, Germany, under the name of my son, R. Hermann Kempkes, unto my five children, hereinbefore named, equally, share and share alike, to have and to hold the same, unto them, their executors, administrators and assigns for ever.

Sixth. I do hereby constitute and appoint my son, Rheinhold Hermann Kempkes, and my daughters, Wilhelmina Schippert and Genoviva Gross, to be the executors of this, my last will and testament, hereby revoking any former wills by me at any time made. 10

In witness whereof, I have hereunto set my hand and seal this twenty-first day of November, A. D., nineteen hundred and three.

her 20
ELIZABETH X KEMPKE (L. S.)
mark

Signed, sealed, published and declared by Elizabeth Kempkes, the above named testatrix, as and for her last will and testament, in the presence of us, who at her request, in her presence and in the presence of each other, at the same time, subscribed our names hereto as witnesses. 30

WILLIAM OTTEN, Paterson, N. J.

ARTHUR CLIFFE, Paterson, N. J.

PASSAIC COUNTY SURROGATE'S OFFICE.

10 I, Charles M. King, Surrogate of the County of Passaic, do certify the annexed to be a true copy of the last will and testament of Elizabeth Kempkes, late of the county of Passaic, deceased, and that Rheinhold Herman Kempkes and Wilhelmina Schippert, the executors therein named, proved the same before me, and are duly authorized to take upon themselves the administration of the estate of the testatrix agreeably to the said will.

Witness my hand and seal of office, the Fourth day of December, in the year of our Lord, one thousand nine hundred and three.

[SEAL]

CHARLES M. KING,

Surrogate.

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EXHIBIT D-3.

Bank Book of the Paterson Savings Institution. In account with R. Herman or Eliza Kempkes. Book No. 42,105. First deposit May 7th, 1891. Last deposit September 26th, 1904.

EXHIBIT D-4.

Bank Book of the Paterson Savings Institution. 10

"In account with R. Herman or Eliza Kempkes." Book No. 92,441. First deposit October 19th, 1903. Last deposit November 12th, 1903. Last withdrawal November 24th, 1903.

EXHIBIT D-50.

Depositor's Card of the Paterson Savings Institution. (Copy). "No. 42,105, Depositor, 20
 "by following signature, consents to the laws,
 "rules and regulations of the Paterson Savings
 "Institution. Eliza Kempkes or R. Herman
 "Kempkes. Residence, 186 Wayne avenue, Pat-
 "erson, N. J. Occupation, silk manufacturer.
 "Date opened, May 7th, 1891. Pass word, Age.
 "Remarks—The name of R. Herman Kempkes
 "added by request of Eliza Kempkes, February
 "14th, 1903." 30

EXHIBIT D-51.

Depositor's Card of the Paterson Savings In-

stitution. (Copy). "No. 92,441. R. Herman
 "Kempkes or Mrs. Eliza Kempkes. Sig. of
 "Eliza Kempkes. Residence, 186 Wayne ave-
 "nue, Paterson, N. J. Occupation, silk manu-
 "facturer. Pass word, age. Date opened, Oc-
 "tober 19th, 1903. Remarks, No. 42,105."

EXHIBIT D-2.

- 10 Bill of sale made by Peter Kempkes to Her-
 man Kempkes. Dated October 9th, 1900. Re-
 corded in Passaic County Clerk's Office, October
 11th, 1900, in Book I of Miscellaneous, page 368.
 Bargains and sells all the household furniture in
 186 Wayne avenue, Paterson, N. J.

EXHIBIT D-1.

- 20 Bill of sale made by Peter Kempkes to Her-
 man Kempkes, dated October 9th, 1900. Re-
 corded October 11th, 1900, in Book I of Miscel-
 laneous, page 367. Bargains and sells all his
 right, title and interest in goods and chattels of
 the firm of Kempkes Bros., in the City of Pater-
 son, N. J., located at No. 203 Main street, Pat-
 erson, N. J.

EXHIBIT D-6.

- 30 Deed made by Peter Kempkes to Elizabeth
 Kempkes. Dated October 9th, 1900. Recorded
 in the Passaic County Clerk's Office, October
 11th, 1900, in Book M-14 of Deeds for said
 county on page 554, etc. Full Warranty Deed,

conveys in fee the following property: First tract—Being a lot on Bridge street, fifty feet from Governor street, known as number three, Block D on Map M, S. U. M., and being lot number seventeen Bridge street on the official map of the City of Paterson. Second tract—Beginning in the northeasterly line of Wayne avenue to a point distant one hundred and fifty feet northeast from Union avenue, thence running northwesterly along Union avenue seventy-five feet; being a plot of ground seventy-five feet frontage on Wayne avenue by one hundred and six feet deep. 10

EXHIBIT D-5.

Mortgage made by Herman Kempkes, trading and doing business as Kempkes Bros., to Elizabeth Kempkes on goods and chattels. Dated December 1st, 1900, and recorded in the Passaic County Clerk's Office in Book M-2 of Chattel Mortgages, page 384, covers the property and the mill known as the Essex Mill on lower Mill street, Paterson, N. J., and all manufactured goods in the commission house of P. S. Searing, in the City of New York. Given to secure the sum of nine hundred dollars from the date hereof, and interest on the same at the rate of six per cent. Affidavit sworn to by Elizabeth Kempkes, December 1st, 1900. 20 30

This mortgage was paid in full by Herman Kempkes to Elizabeth Kempkes, September 16th, 1903. Witness: William Otten. Eliza-

beth Kempkes. *Endorsements.* "This mortgage
having been paid and satisfied in full, the
County Clerk is hereby authorized to cancel the
same." (Signed) her

Witness, Mrs. J. Keller. Elizabeth x Kempkes.
mark

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IN CHANCERY OF NEW JERSEY.

PATERSON, N. J., WEDNESDAY, NOVEMBER 1, 19 5.

Between

WILHEMINA SCHIPPERS, EXE-

CUTRIX, ETC.,

*Complainant,**and*

RHEINHOLDT HERMAN

KEMPKE, ET AL.,

Defendants.

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Conclusions.MR. ROBERT E. VAN HOVENBERG for the 20
complainant.MESSRS. MICHAEL AND CHARLES DUNN
for the defendant Kempkes.

STEVENSON, V. C. (orally). My conclusion in this case is that the complainant is entitled to a decree giving the fund to the estate.

The case is largely one of fact. The testimony is quite voluminous. It would be impossible for me to state in an orderly way all the reasons based upon the evidence, which I examined very carefully since the argument, which have brought me to the conclusions that I have stated. The way in which this case is pre-

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sented is somewhat peculiar. Turning to the bill, it appears that the complainant charges distinctly that the money in question, \$1,811.00 on deposit in the Paterson Savings Institution at the time of the death of Mrs. Kempkes, the testatrix, was her money, but that it was deposited in the joint names of herself and her son, the defendant Herman. The answer denies this allegation, denies that at the time of Mrs. Kempkes' death, she had on deposit in the Paterson Savings Institution the sum of \$1,811.00, and the answer alleges that the following are the facts concerning said money: "That at the time of the death of the said Elizabeth Kempkes, there was an account in the said Paterson Savings Institution and the sum of \$1,811.00 was deposited to the credit of the same, but that the said account was in the names of Elizabeth Kempkes or Herman Kempkes (meaning thereby this defendant), and the money thereon on deposit was the money of this defendant, and not the money of the said Elizabeth Kempkes, deceased." It seems to me that nothing could be plainer than the issue presented by these pleadings. There is nothing to suggest that the defendant claimed a gift. The complainant alleges in the bill that this money irrespective of the form of the account was the property of the testatrix, Mrs. Kempkes. The defendant joins issue on this allegation and alleges that the money deposited in this form was his money and was not the money of the testatrix. That is the issue that was brought on for trial. Now, it is apparent that the evidence does not sustain the conten-

tion of the defendant. The evidence here establishes beyond all doubt that whatever may have been the remote origin of Mrs. Kempkes' estate, whatever the sources may have been through which she derived it, assuming that she received moneys from her son, it is perfectly plain that in law and equity, this money in the savings bank was hers and her son could only get title to it by way of gift.

This fact was so plain that the industrious and acute counsel for the defendant admitted most fully that the only title which the defendant could set up under the evidence in this case to this money, must be based upon a transaction between these parties, Mrs. Kempkes and her son, on the one hand, and the savings bank on the other. In other words, the only title which the defendant could maintain upon this evidence was the title by gift from his mother. Now, such a gift would be a gift of a contract right, not a gift of money. The money was loaned to the bank as the result of this transaction. The transaction between a depositor and a bank is often very incorrectly described. It really is a loan of money. It is not a deposit at all. The bank does not receive the money on deposit, in the strict legal sense of that term. The bank borrows the money, becomes the owner of the money and becomes charged with a contractual obligation to repay an equal amount of money at a future time in accordance with the terms of the banker's contract.

But I am not disposed to stop here and have this case determined with strict reference to the

issue presented by these pleadings. The testimony was taken and the cause was argued upon the idea that the matter in dispute to be determined was whether Mrs. Kempkes in her lifetime did or did not make an effectual gift through this transaction with the savings bank, a gift, which, as I said a few moments ago, in fact, amounts to a transfer of a contractual obligation of the bank to her son, enforceably by him for his own benefit.

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In the case that both counsel have cited, the case of Dunn vs. Houghton, I had occasion to pass upon the legal sufficiency of the external form of a gift of this character, an attempted donation by a contract between the donor and the donee on the one hand, and a savings bank on the other, and I reached the conclusion that the external form of the gift is legally sufficient if the donative purpose be present. Inasmuch as that ruling has not been reversed, or in respect of the matter which I have stated, been at all modified, I shall apply it to this case, and hold that this contract entered into by the savings bank with Mrs. Kempkes and her son would be a sufficient external form to constitute a valid gift if the donative purpose be present. This external form of the gift corresponds with a delivery when a chattel is the subject matter of a gift. Where it is alleged that a chattel is the subject matter of a gift, delivery of the chattel, manual tradition, is a sufficient external form to support the gift if the donative purpose be present. But no external form of a gift, no delivery, if the subject matter of the gift be a chattel, no contract on the part of the third

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party, if the alleged gift be like the one which we are now considering, has any sufficiency, if the donative purpose be lacking. There must be an intention on the part of the donor to vest something in the donee for the donee's benefit, to vest property in him, the donee, which he shall possess for himself, and not for the benefit of the alleged donor, or in trust for the alleged donor.

And now we come to the question which is purely one of fact, whether upon this mass of evidence the conclusion can be drawn that Mrs. Kempkes created this contractual obligation on the part of the bank with her son for her son's benefit and to that extent in derogation of her own property rights. This is the real question of fact, in my judgment, which arises in and determines the majority of these savings bank book cases, these cases where relatives or intimate friends deposit money in a savings bank in a joint account. The question is one of fact whether the original owner of the money who thus has converted a portion of his estate, cash, into a contractual obligation on the part of the savings bank to himself and somebody else, has done that for his own purposes, for his own convenience, or has done it with intent to vest in the third party an absolute beneficial interest in the fund or rather an interest in the contract or contract right. Now, this case is quite different from the case of *Dunn vs. Houghton* to which I have referred. In that case the donor deposited a sum of money in a savings bank so as to make it payable to herself or her niece who claimed to be the donee. The bank en-

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10 tered into a joint contract with the mother
 and the niece, having the incident of
 survivorship, of course, and that is pre-
 cisely what this contract was, a con-
 tract between the savings bank on the
 one hand and Mrs. Kempkes and Herman
 Kempkes on the other, and it had the incident
 of survivorship undoubtedly at law. But in
 20 the case of Dunn vs. Houghton, the money was
 left untouched for a long period of time. The
 whole conduct of the original owner, the donor,
 indicated that the particular fund was set apart
 for the purpose of its becoming the property of
 the niece upon her, the donor's, death. In this
 case the account after the transfer of it, or after
 the creation of it in its present form, in February,
 1903, was an active account. Mrs. Kempkes
 made deposits and made drafts. It amounted at
 20 the time of its creation in February, 1903, to a
 little over \$250.00 or \$260.00. It then was
 greatly reduced, and finally in November, 1903,
 Mrs. Kempkes used this account in the most
 natural way possible as her own by depositing
 in it what to her was a very large sum of money
 \$1,870.00, the proceeds of the sale of land which
 belonged to her. Well, so it would appear that
 if the contention of the defendant is correct, if
 Mrs. Kempkes had died in October, he would
 have received a comparatively small sum of
 30 money ; as she died in November, he has a right
 to receive this very much larger sum of money.
 Presumably, if Mrs. Kempkes could have lived
 a little longer she would have done something
 with this money and perhaps reduced her bank
 account to a very small figure. Now, when we

have this alleged donor dealing in that way with her bank account, keeping it active, certainly there is a very strong suggestion that she did not intend that her son should be personally benefitted by whatever might be found in that bank account at the time of her death. Parents are not in the habit of making gifts of that character; gifts the extent of which is so uncertain.

The first draft, I think, from this account 10
after it was put in its present form in February, 1903, was a draft of \$30.00 made by Herman Kempkes. For years prior to this time Mrs. Kempkes had the account in her own name and made all her deposits, made her drafts, collected her rents, and attended to her own business. This transfer was made, as I said, in February, 1903, and the first draft, I think, after that date, was a draft of \$30.00 made by Herman, and he 20
explains how it was that he availed himself of the power which he had to draw money from this account. He did not draw it because the money was his or for any purpose of his own. He drew it for his mother, if I remember right, he said to pay for repairs on her house, and the reason why he drew it was because it was a rainy day. His mother was a woman of seventy-five years. She lived up at Totowa, and the son thus discloses that the use, and 30
practically the only use, he made of this account, certainly the only use in the way of drawing money from it, was for the convenience of his mother. Thus we have a strong indication that the original purpose in changing this account from an account with Mrs. Kempkes

alone into a joint account with herself and her son, was the same as has been illustrated in scores of cases, namely, in order that the actual owner of the money might be able to draw herself or might be able to trust her son to draw money for her.

10 Now, when we come to take the testimony of Herman Kempkes in regard to the purpose of this change, we meet with a number of very serious difficulties. I will say right here that I am unable to discover any evidence whatever in this case of a donative purpose on the part of Mrs. Kempkes, a purpose to make this deposit and make this contract in order to benefit her son, as distinguished from the purpose to meet her own convenience, apart from the testimony of the son alone. I do not find that there is any corroboration of his testimony in the form of this will. The will which the mother made
20 deals with her estate practically in two parts. She deals with all the estate that she had both real and personal in America, in Paterson, in one way, and she deals with the estate, certain assets which she had in Germany, in another way. It appears, I may say, from the will that she had money deposited in a bank in Crefeld in the name of her son Herman Kempkes and she undertakes by this will to make disposition of that money as her own, which is a very significant fact. There is no evidence, however,
30 offered in regard to this matter to show whether there was such money there, how it was deposited and if it was deposited in Herman Kempkes' name, how it was that the money

was the property of Mrs. Kempkes, if such was the fact.

The officers of the bank who were produced as witnesses entirely failed to corroborate the testimony of Herman Kempkes, so far as that testimony goes to show that Mrs. Kempkes had a donative purpose in creating this contract. I have examined the testimony of Mr. Merselis and Mr. Botbyl, with very great care. It does not give any color to the testimony of Mr. Kempkes to the effect that Mrs. Kempkes intended to make a gift to him of the money, or transfer to him a beneficial interest in it ; or, to speak more accurately, that Mrs. Kempkes intended to create a contractual obligation on the part of the bank to her son Herman Kempkes for his benefit as distinguished from a contractual obligation to him created for her convenience. These gentlemen simply say that this woman came to the bank and transferred the account that stood in her own name to the joint names of herself and son. The son opened the matter and stated that his mother desired to make the change. Mr. Merselis talked with the son and the mother. Then in order to be sure that the mother understood what she was doing he called Mr. Botbyl, who speaks German, and the matter was discussed or talked over between Mrs. Kempkes and Mr. Botbyl in German. Now, Mr. Botbyl and Mr. Merselis simply say that Mrs. Kempkes understood that this change would enable either one of them to draw and that the effect would be that the survivor could draw the balance. Well, now, that is precisely the legal effect of this

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sort of a contract, where there is no intention to do anything more than to place the money where both parties can draw it for the convenience of the real owner. But when we turn to the testimony of Mr. Kempkes, the defendant, we find that he gives a very different account of what took place at the bank. He says: "We went to the sav-

10 Merselis, and mother had a talk with Merselis and I, and one man, the man with the light hair, understood a little German, and Merselis called him up and then she says she wanted my name put on her book in case anything happened to her that money might be my protection." Now, here is a most positive statement of this woman to these bank officials which, it seems to me, must have arrested their attention, explaining why she wanted to have this thing done. It

20 was done for the protection of her son. Mr. Kempkes also testified that his mother said, and this it appears she said in German during a conversation between the mother and Mr. Botbyl, " 'Yes, I want that ; it don't belong to the other children. Whatever is in the bank is money that belongs to my son and me, but not to the other children.' That is the way my mother expressed herself." It is certainly very singular that neither Mr. Botbyl nor Mr. Merselis,

30 who knew this woman, had transactions with her in the bank for many years, and now recall this particular transaction, apparently have no recollection that this statement was made. All that they can remember is that the transfer was to be made in order that both

might draw, and Mr. Merselis took pains, in accordance with his duty as an honest bank official, to explain to this German woman, the depositor, that the effect would be that the survivor could take the whole. There is evidence in the case also that indicates that Mr. Herman Kempkes, the defendant, procured this change to be made in the account of his mother at the bank. It seems that as far back as 1900 he was endeavoring to get his mother to make a will. A draft of a will is produced here in his handwriting, made, I think in 1900, according to which the bulk of the real estate in America, I think, was devised to Herman Kempkes and his brother Peter—at any rate I cannot recall the exact language or provisions of this draft, but it was very beneficial to Herman Kempkes and gave him a much larger share than it gave his sisters. It seems that Mrs. Kempkes was averse to making a will, which unfortunately is a very common phenomenon in human nature, especially among this class of people, and makes a great deal of trouble. She was averse to making a will. According to Herman's testimony, it appears that she finally yielded to his persistence and his urgent demand and made this change in the savings bank account in order to effect a measure of justice in the way of protecting him. That is what he indicates distinctly. She did not want to make a will, but instead of that she would fix it so that he should have what money there might be in the savings bank, and thereupon they went down and made this change. Well, now, if that be true, it does not follow that Mrs. Kempkes had any donative

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purpose whatever. She kept the savings bank book in her possession and it appears that according to the rules of the bank which were explained at the time, the savings bank book had to be presented in order to draw any money. It may be that Mrs. Kempkes, in order to get rid of the solicitations of her son, to stop the annoyance that she was subjected to from him by his demands that she should make a will in his favor, or largely in his favor, said, "Well, I will put the money in the savings bank in both our names," and she may have had an intention to control that fund during her lifetime, as she did, to keep the savings bank book in her possession, as she did, and to prevent him from having any beneficial interest in any money that might be there by drawing it out in her lifetime. I do not think that if what Mr. Herman Kempkes says himself must be taken as true, it makes out a donative purpose on the part of his mother.

But, if that conclusion is erroneous, if Mrs. Kempkes, by making the deposit in the form she did for the reasons stated by Herman, made a complete gift of the contractual obligation to her son, I do not think that the defendant stands before this Court in this case in such a light as to make it possible to base a finding in favor of a gift upon his testimony. He certainly is discredited in a variety of ways. The indications of his character disclosed by the testimony, impeach him. With great readiness he admitted that he had made a mortgage for \$900.00 or \$1,000.00, I think he thought it was, to his mother, a chattel mortgage in order to

defeat a creditor of his, who was suing him or
 demanding from him \$450.00. The mortgage
 is produced. It bears the affidavit of this old
 woman which alleges that the consideration of
 the mortgage was \$900.00 cash advanced by her
 to her son in his business. Well, now, a man
 who admits, with the freedom that Mr. Kempkes
 did, that he has perpetrated a gross fraud like
 this, and in order to effectuate it, has even pro-
 cured his old mother to commit perjury, cer-
 tainly stands before the Court very seriously
 impeached as a witness. He also says that that
 will of his mother is a gross fraud perpetrated
 by himself and his sister together. That is the
 effect of his testimony. He says that his
 mother was incompetent to make a will; that
 the will was dictated by the sister, that he, the
 brother and son, took down the instructions
 from the sister and carried the paper to a man
 named Merz, who drew a will in accordance
 with those instructions; that he brought the
 will back, or it was brought back, and it was
 executed in the presence of two witnesses by
 this old woman seventy-five years of age, and
 that at the time she did not know what she was
 doing. All this he narrates apparently without
 any apprehension of the enormity of the offence
 which he admits he and his sister committed.
 I do not believe that story. The witnesses of
 the will were produced, or one of them at any
 rate. I think only one witness was produced, a
 Mr. Otten, who appears to be a man of some
 property and whose truthfulness the defendant
 does not attack. When asked whether Mr.
 Otten was an honest man, a truthful man, or

something of that sort, Mr. Kempkes declines to make any statement against him. Mr. Otten stands before the Court as an unimpeached witness, and if his testimony is true, Mrs. Kempkes knew what she was doing when she made this will and she was competent to make it.

10 Now, in addition to these things which I have narrated and which very vitally affect the credibility of Mr. Kempkes as a witness generally, it appears also that his statement in regard to what his mother's purpose was in making this change in the bank account is contradicted by his own statements and his own conduct subsequent to the proceeding.

20 Mr. Otten testifies that Herman Kempkes, the defendant, stated to him after Mrs. Kempkes' death, that the account had been put in the form in which it was put, in order that he, Herman, might draw. Mr. Otten testifies as follows: "I asked him did he put it that way so it was his mother's money, so he answered so that he can draw the money when his mother could not go for it." Subsequently the witness was asked again, I think on cross-examination: "Q. Did he say anything to you about how it came to be put in his name? A. He only did that in case his mother can't go and he could draw the money." That is a most direct and positive statement of the common
30 purpose which actuates the creation of this sort of an obligation on the part of the bank to two persons, in the absence of a donative purpose. Here we have the distinct statement of the defendant that the purpose of this action was merely in order that he might draw when his

mother could not go and draw, and, as I said earlier, that is precisely the use that is immediately made by Herman and by Mrs. Kempkes of this change in the form of the account. The rainy day soon came, the old woman could not go down to the bank, money had to be procured for the payment of the repairs to the house, and so Herman went down and exercised this power which the changed form of the bank account conferred upon him and drew out \$30.00 for his mother. 10

I shall not undertake to deal with the mass of evidence largely coming from Mrs. Schippers and Mrs. Gross, the sisters, in regard to the conduct of Herman on the day when and after the will was proved, nor shall I take up these papers on which Herman wrote figures, stated sums, and concerning which figures and sums he made statements according to the testimony of these women and of other witnesses. I am 20 satisfied however, that Herman Kempkes at the time of his mother's death knew that this money in the bank did not belong to him. He acted, according to the testimony of a great many witnesses, and spoke in such a way as to show that he was not conscious that he owned this money, but on the contrary he was of the opinion that it was an asset of the estate which he happened to have the power to control owing to the change which had been made in the bank 30 account. The testimony on this subject is too voluminous for me to undertake to recite any part of it.

For the reasons which I have endeavored to sketch, my conclusion is that there is no testi-

mony in this case which would warrant the conclusion that the defendant, Herman Kempkes, obtained a title by way of gift which he can assert so as to keep this money from the estate. The money, as I said, belonged to Mrs. Kempkes. The savings bank account was put in form in my opinion, in which it was put, for the convenience of the owner of the money, Mrs. Kempkes. There is
10 no evidence that is credible, in my opinion, which would justify the conclusion that Mrs. Kempkes had a donative purpose in conducting her transactions with the savings bank such as would be necessary in order to enable Herman Kempkes to enforce this legal contract which now exists between him and the bank by reason of survivorship, for his own benefit. The contract must be enforced for the benefit of the estate of Mrs. Kempkes precisely
20 as, in my judgment, during the lifetime of Mrs. Kempkes, Herman Kempkes would have been compelled to exercise his right under the contract to draw money from the bank. During her lifetime, if Herman Kempkes had gone to the bank to draw money and had undertaken to appropriate it, I can hardly believe that now upon this evidence it would be seriously argued that he could have appropriated that money to his own use and that he would not have been
30 answerable for it. In my judgment, the character of the contract between these parties and the bank remained unchanged from its inception; the character of Mr. Herman Kempkes' right remained unchanged from the time this contract was created down until the filing of this

bill. He was empowered to draw this money during the lifetime of the mother for her benefit. He now has the power to draw the money, in case the legal contract should be carried out, for the benefit of his mother's estate.

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IN CHANCERY OF NEW JERSEY.

	Between,	}	<i>On Bill, etc. Final Decree.</i>
	WILHELMINA SCHIPPERS, EXE-		
	CUTRIX, ETC.,		
	<i>Complainant,</i>		
	and		
10	RHEINHOLDT HERMAN	}	
	KEMPKE AND THE PATERSON		
	SAVINGS INSTITUTION,		
	<i>Defendants.</i>		

20 This cause coming on to be heard at the pres-
 ent term of the Court of Chancery, in the pres-
 ence of Robert E. Van Hovenberg, of counsel
 with the complainant, and Charles B. Dunn, of
 counsel with the defendant Rheinholdt Herman
 Kempkes, the complainant's bill having been
 taken as confessed against The Paterson Savings
 Institution, and the pleadings and proofs having
 been read, and the arguments of the respective
 counsel having been heard and considered, and
 it appearing to the Court that the complainant is
 entitled to the relief sought and prayed for by
 her in her bill of complaint: It is, on this
 30 eighth day of November, A. D., 1905, by his
 Honor, William J. Magie, Chancellor of the
 State of New Jersey, ordered, adjudged and de-
 creed, and the said Chancellor, by virtue of the
 power and authority of this Court, does hereby
 order, and adjudge and decree that all the money
 deposited with the Paterson Savings Institution,

in both account number 42,105 and 92,441, in the joint names of "R. Herman Kempkes or Eliza Kempkes" is money belonging to the estate of Elizabeth Kempkes, deceased, and not to the defendant Rheinholdt Herman Kempkes, nor has the said Rheinholdt Herman Kempkes ever had, or been entitled to, the ownership thereof.

And it is further ordered, adjudged and decreed that the said defendant the Paterson Savings Institution, its officers, agents or employees, pay over the said money now on deposit with it in the joint names of "R. Herman Kempkes or Eliza Kempkes," being account number 92,441. the same having been transferred from account number 42,105, to Wilhelmina Schippers and Rheinholdt Herman Kempkes, executors of the estate of Elizabeth Kempkes, deceased, to the end that it may be deposited with the other funds of the estate. 10

And it is further ordered, adjudged and decreed that the said defendant, Rheinholdt Herman Kempkes, shall, within five days after service upon him of a copy of this decree and of the taxed bill of costs in this cause, pay to Robert E. Van Hovenberg, of counsel with the complainant, the sum of seventy-five dollars, as and for a counsel fee, and that he also pay together with the said counsel fee the taxed costs of this suit, and that in default of the said payments, execution issue therefor according to the practice of this court. 20

Respectfully advised, 30

EUGENE STEVENSON, V. C.

W. J. MAGIE, C.

A true copy.

VIVIAN M. LEWIS, Clerk.

