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(Filed October 9, 1926.)

BILL OF COMPLAINT

IN CHANCERY OF NEW JERSEY

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

The Complainant, Essie T. W. Mayer, of the Village of Ridgewood, County of Bergen and State of New Jersey says:

1. Complainant is the wife of George C. Mayer and her maiden name was Essie T. Watters, and she resides with her husband at 186 Hillcrest Road in the Village of Ridgewood, aforesaid.

2. That complainant had a sister Elizabeth who intermarried with one Henry J. McCormick in or about the year 1908, who died in or about the year 1912 leaving his wife and one son named Henry W. McCormick him surviving.

3. That the said Henry J. McCormick in and by his last will and testament gave and bequeathed to his widow, among other things, three hundred and fifty shares of the preferred capital stock of the United States Gypsum Company hereinafter mentioned.

4. That on or about October 14, 1914 the said Elizabeth W. McCormick, then living in the Borough of Brooklyn, City and State of New York, executed and delivered to complainant an assignment of said three hundred and fifty shares of said preferred stock in trust to receive the income, interest and profits therefrom and use the same for the support, maintenance and education of Henry W. McCormick, said son of said Elizabeth, until he should arrive at the age of twenty-one years, and thereafter to pay the same to the said Henry W. McCormick until he should become

twenty-five years of age, and upon the said Henry W. McCormick arriving at the age of twenty-five years thereupon to transfer and assign said certificates or the re-investments thereof or the monies realized therefrom to the said Henry W. McCormick.

Said agreement further provided that in the event of the death of the said Henry W. McCormick before he should reach the age of twenty-five years that the said complainant should thereupon transfer to the said Elizabeth said certificates or the re-investments thereof with all income then in her hands as such trustee.

Said agreement further provided that in the event of the death of the said Elizabeth prior to the said Henry W. McCormick reaching the age of twenty-five years and in the event of said Henry W. McCormick before he reaches the age of twenty-five years, the complainant should, upon the death of the said Henry W. McCormick, transfer said certificates to the executor or administrator of the said Elizabeth to be distributed according to her last will and testament or the statutes in such case made and provided.

And said agreement further provided that subject to the direction of the said Elizabeth, during her life, the complainant was authorized to sell the said securities and re-invest the sums received therefrom in good bonds and mortgages, or in public securities, subject to the direction and approval of the said Elizabeth.

Said agreement further provided that the said Elizabeth thereby reserved the right and power to revoke the trust thereby created.

All of which more fully appears by the said

agreement, a copy of which is hereto annexed.

5. That upon the execution of the said agreement the said Elizabeth caused the certificates for three hundred and fifty shares of said preferred stock to be transferred upon the books of the said corporation into complainant's name as trustee of Henry W. McCormick, and thereupon delivered said certificates to complainant.

6. That after the delivery of said certificates as aforesaid, and in October 1914, the said Elizabeth intermarried with one Garrett R. Tucker who now resides in the Village of Ridgewood, aforesaid.

7. That after the marriage of the said Elizabeth to the said Garret Tucker, as aforesaid, the said United States Gypsum Company, then a corporation of the State of New Jersey, re-organized its business and became incorporated under the laws of the State of Illinois, and that in the distribution of the stock of the company made upon such re-organization complainant had issued to her by said company a new certificate for three hundred and fifty shares of the preferred stock of said corporation, which still stands in her name as trustee as aforesaid.

8. That after such re-organization of said United States Gypsum Company it at intervals declared a number of stock dividends payable in the common stock of said corporation and that by virtue of her ownership of the said three hundred and fifty shares complainant received from said corporation and now holds one thousand six hundred and ninety shares of the common stock of said corporation of the par value of $20 per share and that certificates thereof were issued to

her in her name as trustee as aforesaid, to wit, in the name of Essie T. W. Mayer, Trustee of Henry W. McCormick, in which name all the certificates of stock aforesaid, both preferred and common, now stand.

9. That on July 13, 1926 the said Elizabeth departed this life leaving her survivng her husband, the said Garrett R. Tucker, and three children born of her marriage with him, and also leaving a last will and testament of which complainant has no copy and which has not yet been presented for probate, but in and by which will, complainant has learned from an inspection thereof, she constituted the said Garret R. Tucker the sole executor thereof.

10. That from the time of the creation of the said trust complainant kept the said certificates in a safe deposit box in Brooklyn, to which box she and her sister Elizabeth had exclusive access for some years, but that afterwards access thereto was obtained, with the permission of the complainant and said Elizabeth, by said Garrett R. Tucker; that on moving from Brooklyn to Ridgewood in January 1925, the contents of the said box in Brooklyn was removed and re-deposited in a safe deposit box in the Second National Bank of Paterson, to which only the said Garrett R. Tucker and said Elizabeth had access. The removal of the contents of said box, including said certificates, was made with the knowledge and approval of complainant as complainant was then on the point of moving with her family to Ridgewood and shortly afterwards did so.

11. That upon the death of the said Elizabeth said Garrett R. Tucker removed all the said cer-

tificates together with the original of said trust agreement from said safe deposit box and since that time has claimed that said certificates of stock constituted part of the assets of the estate of said Elizabeth and that he, said Garrett R. Tucker, is entitled to hold the same as executor of the said Elizabeth; that said last will and testament of said Elizabeth operated to revoke the said trust agreement and that he is entitled to have a transfer of said shares of stock made by complainant upon the books of the said corporation into his name as executor of the last will and testament of said Elizabeth and, therefore, refuses to make delivery of the said certificates to complainant, and claims that the said trust agreement is revoked and cancelled.

Complainant is without adequate remedy at law and therefore prays:

(a) That said Garret R. Tucker and Henry W. McCormick, who are the defendants herein, may answer this bill of complaint, without oath, and each statement herein.

(b) That said Garrett R. Tucker may make a full and true discovery and disclosure of the facts within his knowledge as to the existence of said last will and testament of said Elizabeth and of the contents of her said last will and testament and as to what matters and things therein contained, if any, operate as a revocation of said trust agreement.

(c) That if it shall appear by such discovery, or otherwise that the said trust, and the gifts, grants and powers therein contained have not been revoked, that this court shall by its decree establish the same and shall so adjudge and de-

clare and shall also adjudge and declare that the said certificates of stock and said trust agreement are held by said Garrett R. Tucker in trust for this complainant and shall order and direct said Garrett R. Tucker to deliver all said certificates of stock and said trust agreement to complainant.

William I. Lewis,
Solicitor of Complainant.

(Copy)

This Agreement, Made this 14th day of October, 1914, Between Elizabeth W. McCormick, of the Borough of Brooklyn, City and State of New York, party of the first part, and Essie T. Watters, of the same place, party of the second part,

Witnesseth:

The party of the first part, for a good and sufficient consideration, does hereby sell and assign to the party of the second part three hundred and fifty (350) shares of the preferred stock of the United States Gypsum Company, in trust, however to receive the income, interest and profits therefrom and use the same for the support, maintenance and education of Henry W. McCormick (the son of the party of the first part) until he arrives at the age of twenty-one (21) years, and thereafter pay the same to said Henry W. McCormick until he becomes twenty-five (25) years of age, and upon the said Henry W. McCormick arriving at the age of twenty-five (25) years, then to transfer and assign said securities, or the re-investments thereof or the moneys realized therefrom, to the said Henry W. McCormick.

In the event of the death of said Henry W.

McCormick before he reaches the age of twenty-five years the said party of the second part shall thereupon transfer to the party of the first part said securities, or the re-investments thereof, with all income then in her hands as such trustee.

In the event of the death of the party of the first part prior to said Henry W. McCormick reaching the age of twenty-five years and in the event of said Henry W. McCormick dying before he reaches the age of twenty-five years, the said party of the second part shall, upon the death of said Henry W. McCormick, transfer said securities to the executor or administrator of the party of the first part to be distributed according to her last will and testament, or the statutes in such case made and provided.

Subject to the direction of the party of the first part during her life the party of the second part is authorized to sell the securities hereinbefore transferred and re-invest the sums received thereon in good bonds and mortgages, or in public securities, subject to the direction and approval of the party of the first part.

The said party of the first part hereby reserves the right and power to revoke the trust hereby created.

In Witness Whereof, the parties hereto have subscribed their names and affixed their seals the day and year first above written.

Elizabeth W. McCormick,
Essie T. Watters.

State of New York,
City & County of New York.) } ss.

On this 14th day of October in the year one thousand nine hundred and fourteen, before me,

the subscriber, personally came Elizabeth W. McCormick to me known and known to me to be one of the persons mentioned and described in and who executed the foregoing instrument, and she personally acknowledged that she executed the same.

M. G. Crawford,
Notary Public, No. 632
N. Y. Co.

State of New York,
City & County of New York.) ss.

On this 14th day of October in the year one thousand nine hundred and fourteen, before me, the subscriber, personally came Essie T. Watters to me known and known to me to be one of the persons mentioned and described in and who executed the foregoing instrument, and she personally acknowledged that she executed the same.

M. G. Crawford,
Notary Public, No. 632
N. Y. Co.

(Filed January 5, 1927.)
IN CHANCERY OF NEW JERSEY

Between
Essie T. W. Mayer, Trustee,
Complainant,
and
Garrett R. Tucker and Henry W. McCormick (an infant),
Defendants.

On Bill, &c.

ANSWER OF DEFENDANT GARRETT R. TUCKER

The answer of defendant, Garrett R. Tucker, to Complainant's Bill of Complaint.

This defendant, answering the bill of complaint, says that:

1. Paragraph 1 is admitted.
2. Paragraph 2 is admitted.
3. Paragraph 3 is denied. Said Henry J. McCormick bequeathed to his widow, Elizabeth, or Elizabeth W. McCormick, only one hundred seventy-five (175) shares of preferred stock of United States Gypsum Company (at that time a New Jersey corporation, now an Illinois corporation) consisting of certificate B-177 for fifty (50) shares and certificate A-1786 for one hundred and twenty-five (125) shares, of the par value of One hundred ($100.) dollars each, against which was an offset of fifty (50) shares of preferred stock of the Gypsum Company certificate B-177 transferred to Percival S. Jones, in full payment of a claim

in favor of said Jones against Henry J. McCormick, which transfer was completed in April, 1912. He also bequeathed to her one (1) share of common stock of United States Gypsum Company, certificate B-1256, of the par value of One hundred ($100.) dollars. The market price at the date of his death of the preferred stock was Seventy-six dollars and seventy-five ($76.75) Cents per share, and of the common stock, Ten dollars and fifty ($10.50) Cents per share.

4. As to the allegations of paragraph 4, this defendant admits that a true copy of said trust agreement is attached to said bill of complaint and made a part thereof.

5. As to the allegations of paragraph 5, this defendant has not sufficient knowledge or information to form a belief and leaves same for complainant to prove.

6. Paragraph 6 is admitted.

7. Paragraph 7 is admitted.

8. As to the allegations of paragraph 8, this defendant has not sufficient knowledge or information to form a belief, but leaves same for complainant to prove.

9. As to the allegations of paragraph 9, this defendant admits that his said wife, Elizabeth died on July 13th, 1926, leaving her surviving her husband, this defendant, her said son, Henry W. McCormick, her daughter, Elizabeth Watters Tucker, her son, Garrett Rezeau Tucker, and her son, James Louis Tucker, the latter being the three children born of her marriage with this defendant, and states that her last will and testament was duly probated in Bergen County Surrogate's Office, and Letters Testamentary issued thereon, to this defenadnt, on October 16th, 1926. This defendant further states that in and by said last will and testament, he was not only made the executor thereof, but also the trustee thereunder, as will hereinafter more fully appear.

10. As to the allegations of paragraph 10, this defendant admits that for a time after the creation of said trust said certificates were kept in a safe deposit box in Brooklyn to which complainant and said Elizabeth W. M. Tucker, and this defendant had access, and that thereafter this defendant and his said wife, in view of the fact that they were then living in the State of New Jersey, had the contents of the safe deposit box in Brooklyn placed in Second National Bank of Paterson, including the Gypsum Stock certificates hereinbefore referred to, and that said certificates of stock were placed in said safety deposit box in Second National Bank of Paterson with the full knowledge and approval of complainant, and were there left under the sole supervision and control of this defendant and his said wife, because they were considered by all parties concerned as belonging to the said Elizabeth W. M. Tucker.

11. Paragraph 11 is admitted, and this defendant says that he did the various acts therein mentioned by reason of the power and authority vested in him under the said last will and testament of the said Elizabeth W. M. Tucker, a true copy of which said will is annexed to this answer and made a part hereof.

12. This defendant further answering says that said certificates of stock so held in trust as aforesaid were removed by said Elizabeth W. M. Tucker and this defendant to Paterson with the

intention that the said Elizabeth W. M. Tucker would revoke the said trust and execute a new one for the benefit of all her children, but that she hesitated in so doing on account of the heavy Federal tax which would be incurred in the re-transferring and dividing up of said certificates among her husband, and all her said children, and in lieu of so doing executed her said last will and testament, hereinbefore referred to, on September 5th, 1924, in which she intended to revoke and did in fact and in law revoke, said trust agreement.

13. Upon the execution of said trust agreement and until the death of said Elizabeth W. M. Tucker, complainant as soon as she received dividend checks on said stock would endorse them immediately and give them to either Elizabeth W. M. Tucker or this defendant. Complainant never inquired how said funds were used and always considered that the dividends from said stock belonged to her said sister. After the birth of the said children of this defendant and the said Elizabeth W. M. Tucker, she always stated and asserted that the said child by her former husband and the said three children born of the wedlock with this defendant were all her children and that she loved them all the same and in the disposition of her estate intended to treat them all the same, and in her said will revoking said trust agreement she so states.

14. Defendant insists that in and by the said last will and testament of said Elizabeth W. M. Tucker, a true copy of which is hereto annexed and made a part hereof, but is not set up paragraph by paragraph, in order to avoid repetition

in this answer, that said trust agreement is revoked and that said stock belongs to him, as executor and trustee under said last will and testament.

Wayne Dumont,
Solicitor for defendant, Garret Rezeau Tucker.

The following is a true copy of the last will and testament of Elizabeth W. M. Tucker referred to in the foregoing answer and expressly therein made a part thereof.

Know All Men By These Presents, That I, Elizabeth W. M. Tucker, of the Borough of Brooklyn, City and State of New York, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all former Wills by me at any time heretofore made.

First: I direct that my funeral expenses and just debts be paid by my executor as soon after my death as may be practicable.

Second: I give, devise and bequeath to my husband, Garret Reseau Tucker, One-fifth of my estate as well real as personal as his own absolutely and forever.

All the rest, residue and remainder of my estate wheresoever situate, I give, devise and bequeath to my Executor and Trustee hereinafter named, In Trust Nevertheless, to invest, re-invest and keep the same invested for the following uses and purposes:

(a) To divide the residue of my estate into four equal shares.

(b) To invest and re-invest and to collect and receive the rents, issues, income and profits of one of said equal shares and to apply the net income derived therefrom to the support, maintenance and

education of my daughter, Elizabeth Watters Tucker, for and during the term of her natural life, and at her death to pay the principal of such share to any child or children of my said daughter, share and share alike, and in the event that my said daughter should die without issue living at the date of her death, then and in such case, to divide her said share equally between my three sons hereinafter named, upon their attaining the age of thirty years as hereinafter stated, provided however, that if, in the judgment of my said Executor and Trustee, it should be for the best interest of my said daughter to have the principal of her said share in lieu of the income thereof, then and in such event my said Trustee is hereby authorized, empowered and directed, at his or her discretion, to pay the principal of said sum to my said daughter at such time as my said Trustee deems fit after my said daughter shall have attained the age of thirty years.

(c) To collect and receive the rents, issues and profits of the other of said parts or shares and to apply the net income derived from each of such shares to the support, maintenance and education of each of my sons, Henry W. McCormick, Garrett Rezeau Tucker and James Louis Tucker, until each shall reach the age of thirty years when the principal of the shares so held in trust for the son reaching the age of thirty years shall be paid over to him absolutely.

(d) In case any of my children shall die before reaching the age of thirty years leaving issue surviving, such issue shall take the principal of the share its parent would have taken if living, share and share alike.

(e) In case any of my said children shall die before reaching the age of thirty years without leaving issue surviving, the principal of the share set apart for the child so dying shall be paid over to his or her surviving brothers and sister or the issue of any deceased brother or sister share and share alike per stirpes and not per capita.

(f) In construing and carrying into effect any of the provisions of this, my Last Will and Testament, my son Henry W. McCormick is to be considered and treated as though he were a full brother of my other children hereinbefore mentioned.

(g) If, in the judgment of my said Executor and Trustee, it is for the best interest of any of my said sons to receive the principal of their said shares after attaining the age of twenty-one and before attaining the age of thirty years, then and in such event I authorize, empower and direct my said Executor and Trustee at his or her discretion to pay to each of my said sons the principal of his said share at such time as my said Trustee deems fit after such child shall have attained the age of twenty-one years.

Third: I hereby nominate, constitute and appoint my husband, Garrett Rezeau Tucker, to be the Executor and Trustee of this my Last Will and Testament without bond, hereby authorizing and empowering him to sell either at public or private sale and at such times and in such manner and upon such terms and conditions as he may deem most advantageous for the best interests of my estate, the whole or any part of my estate which I may die seized and possessed of or

any interest therein and to execute and deliver any and all conveyances, deeds or other instruments that may be necessary to transfer said property or to carry out the intention of this provision.

In the event that my said husband, Garrett Rezeau Tucker, shall pre-decease me or die before the termination of his duties as Executor and Trustee under this my Will, I hereby nominate, constitute and appoint my sister, Essie T. W. Mayer, Executrix and Trustee under this Will without bond with all the powers originally conferred upon my said Executor.

In Witness Whereof, I have hereunto set my hand and affixed my seal this fifth day of September, in the year One Thousand Nine Hundred and Twenty-four.

Elizabeth W. M. Tucker, (Seal)

The Foregoing Instrument consisting of four pages, was signed, sealed, published and declared by the abovenamed Testatrix, Elizabeth W. M. Tucker, to be her Last Will and Testament, in the presence of us, whereupon we, at her request, in her presence and in the presence of each other, have hereunto affixed our names and places of residence as witnesses thereto this fifth day of September, 1924. The words "without bond" in line 4, paragraph 3, page 3, and line 11, page 4, having been interlined before signing.

E. B. Holmes, residing at Stroudsburg, Pa.
Marjorie C. Hood, residing at Stroudsburg, Pa.
Alice L. Fox, residing at Stroudsburg, Pa.

(Filed June 14, 1927.)
IN CHANCERY OF NEW JERSEY

Between:
Essie T. W. Mayer,
Complainant,
and
Garrett R. Tucker, et als,
Defendants.
} On Bill, etc.

ORDER FOR FILING OF AMENDED ANSWER

The Court, at the conclusion of the hearing in this cause on the 26th day of May, Nineteen Hundred and Twenty-seven, having heard in open court the arguments of William I. Lewis, solicitor for and of counsel with complainant, and of John Drewen, of Perkins and Drewen, solicitors for and of counsel with defendant, Garrett R. Tucker, as to whether or not the said defendant should be given leave to file an amended answer herein; and the court having considered the argument of the respective counsel,

It is on this 14th day of June, Nineteen Hundred and Twenty-seven, Ordered that the said defendant have leave to file amended answer in this cause; and it is further ordered that the amended answer of the said defendant hereto attached be and the same hereby is filed accordingly.

Respectfully advised,
John Bentley,
V. C.
E. R. Walker,
C.

(Filed June 14, 1927.)
IN CHANCERY OF NEW JERSEY

Between:
Essie T. W. Mayer,
Complainant,
and
Garrett R. Tucker, et als,
Defendants.
On Bill, etc.

AMENDED ANSWER OF DEFENDANT, GARRETT R. TUCKER

The amended answer of defendant, Garrett R. Tucker, to complainant's bill of complaint.

This defendant, by way of amended answer to the bill of complaint filed in this cause, says:

1. He admits paragraph one.
2. He admits paragraph two.
3. He denies paragraph three. Said Henry J. McCormick bequeathed to his widow, Elizabeth W. McCormick, only One Hundred and Seventy-five (175) shares of the preferred stock of the United States Gypsum Company, consisting of Certificate B-177 for Fifty (50) shares and Certificate A-1786 for One Hundred and Twenty-five (125) shares, of the par value of One Hundred ($100)) dollars each, against which was an offset by Fifty (50) shares of the preferred stock of the United States Gypsum Company, Certificate B-177 transferred to Percival S. Jones, in full payment of a claim in favor of said Jones and against the said Henry J. McCormick, which transfer was completed in April, 1912. The said Henry J.

McCormick also bequeathed to his wife, the said Elizabeth, one share of the common stock of the said United States Gypsum Company, Certificate D-1256 of the par value of One Hundred ($100) Dollars.

4. Paragraph four is denied except as hereinafter set forth. This defendant admits that a true copy of a paper writing purporting to be a trust agreement and signed by the said Elizabeth W. McCormick, and the complainant, is annexed to the said bill of complaint.

5. Answering paragraph five, this defendant admits that the said Elizabeth W. McCormick caused certificates for Three Hundred and Fifty (350) shares of the preferred stock to be transferred upon the books of the said corporation in complainant's name as trustee of Henry W. McCormick. He denies that the said Elizabeth delivered the said certificates to the complainant.

6. He admits Parargaph six.

7. He admits Paragraph seven.

8. Defendant admits that the United States Gypsum Company declared stock dividends, but denies that complainant owned or had any interest in the certificates of stock referred to in paragraph eight of the bill.

9. Answering the allegations of paragraph nine, this defendant admits that the said wife, Elizabeth, died on July 13, 1926, leaving her surviving her husband, this defendant, her said son, Henry W. McCormick, and three children born of the marriage of the said Elizabeth and this defendant, said children being a daughter, Elizabeth Watters Tucker, and two sons, Garrett Rezeau Tucker and James Louis Tucker. The Last Will

and Testament of the said Elizabeth was duly probated in the office of the Surrogate of the County of Bergen, State of New Jersey, and Letters Testamentary were issued thereon by the said Surrogate to this defendant under date of October 16, 1926. In and by the said Last Will and Testament this defendant was designated as executor thereof and also as trustee. A true copy of the said Last Will and Testament is hereto annexed, marked Exhibit A and made a part of this answer.

10. Answering paragraph ten, this defendant admits that for a time after the signing of the said paper writing purporting to be a trust agreement, the certificates of stock were kept in a safe deposit box in the Security Safe Deposit Company of Brooklyn, New York, to which the complainant and the said Elizabeth and this defendant had access. Thereafter, as hereinafter particularly set forth, the said Elizabeth caused the contents of the said safe deposit box in Brooklyn to be removed to the State of New Jersey, and placed in a safe deposit box in the Second National Bank of Paterson, said contents including the certificates of stock mentioned in the said trust agreement. Said stock certificates were caused by the said Elizabeth to be placed in the safe deposit box in the Second National Bank of Paterson to which box the said Elizabeth and this defendant had exclusive access and where the said stock certificates and the other contents of the said box were kept under the control of this defendant and of the said Elizabeth, his wife.

11. Defendant admits the allegations of paragraph eleven with reference to the removal of

said certificates by this defendant, and that he claims that said stock certificates constitute a part of the Estate of his deceased wife, Elizabeth Tucker; and that this defendant is entitled to have said certificates of stock transferred to him as executor and trustee of the said Elizabeth Tucker. And this defendant alleges that said paper writing in the form of a trust deed never was and never became operative, and that complainant and said Elizabeth Tucker disregarded every provision thereof, from the time it was signed to the death of the said Elizabeth, except the transfer of the certificates to the name of the complainant and the collection of the dividends thereon. And defendant further alleges that in contravention of the terms and provisions of said paper, complainant delivered all of the income received from said certificates of stock to said Elizabeth or this defendant; and the complainant did violate every provision of said paper writing from the time it was signed to the time of the death of the said Elizabeth.

For further answer to the bill of complaint, this defendant says:

1. During the summer of 1914 defendant became acquainted with the said Elizabeth, sister of the complainant, the said Elizabeth then being the widow of one Henry J. McCormick and the mother of an infant son then about three years of age, Henry W. McCormick. A short time after their becoming acquainted, defendant and the said Elizabeth became engaged to marry, and were married on the 21st day of October, 1914.

2. At the time of defendant's engagement to the said Elizabeth, she was the owner (unknown

to this defendant) of a substantial number of shares of common and preferred stock of the United States Gypsum Company, which had been bequeathed to her by her husband, the said Henry J. McCormick.

3. During the summer of 1914 and immediately upon their learning of the likelihood of the marriage of this defendant with the said Elizabeth, the complainant as well as the complainant's parents and other members of her family, strongly and persistently urged, and by constant importunity and pleading did endeavor to persuade the said Elizabeth not to marry this defendant, and to dispose her mind and feelings against this defendant. In their said endeavors, the complainant and all the other members of her family pursued the practice of repeating to the said Elizabeth divers statements in derogation of the moral character and good repute of this defendant, which statements they did represent to the said Elizabeth were the subject of common rumor of and concerning this defendant.

4. After a constant effort in the manner aforesaid to cause the said Elizabeth to be disposed against this defendant and to decline to enter into marriage with him, it was made known to the complainant as well as to the other members of her family by the said Elizabeth, that such efforts were, and would continue to be, of no avail.

5. Thereupon the complainant and the other members of complainant's family did persuade and induce the said Elizabeth to sign the paper writing purporting to be a trust agreement, mentioned in the Bill of Complaint, and a copy of which is annexed thereto.

6. The signing of the said paper writing was induced and brought about solely by reason of the pretended apprehension of the complainant and of the other members of the complainant's family, and urged by them upon the said Elizabeth, of the unhappy outcome of her marriage to this defendant, and of the defendant's proving to be a harsh, faithless and unworthy husband, and of the fraudulent, wrongful and selfish contriving by this defendant, as husband of the said Elizabeth, to gain unto himself her property and wealth, so that the said Elizabeth and her said son, Henry, should be completely deprived thereof. Thus it was that the signing of said paper writing was induced by complainant and her family, for the protection of the interests of the child, Henry, solely against such unhappy outcome of the said marriage.

7. Immediately upon the marriage of this defendant to the said Elizabeth, they lived together, having always with them the said Henry; and three other children were born to the said Elizabeth of her marriage with this defendant. These children are a daughter, Elizabeth Watters Tucker, age ten years; a son, Garrett Rezeau Tucker, age eleven years; a son, James Louis Tucker, age eight years. From the time of said marriage in October, 1914 until the death of said Elizabeth on July 13, 1926, the said Elizabeth and the defendant lived together with the said Henry and their other children. The home life of the defendant and the said Elizabeth was unalterably peaceful and happy, and at no time during her marriage and not until after the death of the said Elizabeth, did the said son, Henry,

know that this defendant was not his father. He was given this defendant's family name, which he still retains and by which he is still known at school. All of the four children were reared together without the least distinction of one from the other as to parentage and all as the children of common parents, and all were the equal objects of the care and love of the said Elizabeth, their mother.

8. The marriage of the said Elizabeth and this defendant occurred one week after the signing of the said paper writing, purporting as aforesaid. The said Elizabeth did not share the apprehensions which the complainant and other members of her family pretended, and because the said Elizabeth was also otherwise unwilling that the said paper writing should become operative and effective as a trust agreement, she, at all times, definitely refrained from the making of any gift in trust under such agreement, and at no time did she consummate the making of such a gift. But on the contrary, from the signing of the said paper writing until her death, the said Elizabeth did prevent the complainant from carrying out as trustee the provisions contained in said writing, and from effecting the operation of any gift in trust thereunder, in that the said Elizabeth did at all times require that the income, interest and profits on the shares of stock set forth in the said paper writing be by the complainant immediately delivered upon their receipt to the said Elizabeth or to this defendant. And the said Elizabeth did at no time permit the complainant to retain said income, interest and profits or to use the same for the support, maintenance and education of the said Henry or for any use pursuant to the terms and purposes stated in said writing. And the complainant did at all times from the signing of the said writing until the death of the said Elizabeth immediately negotiate and deliver to the said Elizabeth or to this defendant any and all income, interest and profits from the said shares of stock. And the complainant never used the said income, interest and profits nor any part thereof for the support, maintenance and education of the said Henry. But all of the income, interest and profits were placed by the said Elizabeth in the joint funds of herself and this defendant, and were used without regard to anything contained in said paper writing, and as the said Elizabeth and this defendant saw fit; and the support, education and maintenance of the said Henry were defrayed out of the joint funds of this defendant and his said wife and in like manner and from the same source as were those of all the other children of the said Elizabeth.

9. And the said Elizabeth never permitted the complainant to have exclusive possession of the certificates of the shares of stock mentioned in the said paper writing. But the complainant, upon the signing of the said writing and pursuant to the requirements of the said Elizabeth, did place the said certificates in a safe deposit box of the said Security Safe Deposit Company of Brooklyn, New York City, in the joint names of the complainant and the said Elizabeth; and to this box on the 24th day of January, A. D. 1922, this defendant was given access by the application of the said complainant and said Elizabeth. On the 10th day

of December, 1924, the entire contents of the said safe deposit box were removed by defendant, at the direction of the said Elizabeth, to a safe deposit box in the Second National Bank of Paterson, New Jersey, and to this box the complainant was at no time given access, and the certificates placed therein did continue thus to be out of the possession and control of the complainant, and in the exclusive possession of the said Elizabeth and of this defendant, and were so at the time of the death of the said Elizabeth.

10. The said Elizabeth, at all times from and after the signing of said writing, and from and after her marriage, acted and dealt with reference to the stock mentioned in the said writing and the income, interest and profits thereof in keeping with the fact that she had never permitted any trust to operate or become effective; and with the fact that she had always required the delivery to her of the income, interest and profits of the said stock and that she did require and receive such income, interest and profits; and with the fact that the said paper writing had never been permitted by her to become effective as a trust agreement; and that she had never made any gift in trust thereunder for the support, maintenance and education of the said Henry. The said Elizabeth, in all her said conduct and dealing with and concerning the said stock and the income therefrom, intended by means thereof and by her refusal to permit the said paper writing to become operative as a trust agreement, that she should not be deprived of her property in the said stock, but that the same should remain her property and be lawfully hers for disposition by Last Will and Testament or otherwise.

11. On the 5th day of September, 1924, said Elizabeth did make her Last Will and Testament, a true and exact copy of which is marked Exhibit A and annexed hereto as aforesaid. And this defendant doth allege that the words "my estate" as used by the said Elizabeth in her said Last Will and Testament are intended to mean the entire property of the said Elizabeth, as testatrix, including the shares of stock mentioned in the said trust agreement and the increase thereof.

The acts of dominion and ownership exercised as aforesaid by the said Elizabeth over the said shares and over the income, interest and profits thereof were and are inconsistent with the existence or the continuance of the said trust and were done by the said Elizabeth in the understanding that she had prevented the taking effect of any gift under the said trust, and it was at all times also understood by her that her said acts of dominion and ownership had had that result, and upon that understanding she did regard the said stock as her property and part of the estate to be distributed in and by her Last Will and Testament.

And at the time of the making of her Last Will and Testament, the said Elizabeth also knew and understood, and expressed the fact that she knew and understood, that the circumstances of her life which prevailed at the time of the signing of the said paper writing and by which the signing was induced, no longer existed. And at the time of the making of her will, she had equal regard for all of her four children as the

objects of her bounty and it was her express purpose, in her testamentary distribution, not to distinguish one of the said children from any other of them.

12. This defendant doth further allege that the fact that the certificates stood of record on the books of the corporation in the name of the complainant as trustee was at all times regarded by the said Elizabeth as an incident and not of the essence of the trust. And the actual re-transfer of the said certificates to her name was never regarded as a necessary condition either to the revocation of the trust or to her preventing the same from becoming effective.

13. And this defendant does hereby fully renounce any and all right, title or interest that he now has or which otherwise he might be decreed by the court to have, in the property to which the said writing purporting to be a trust agreement refers, to the end that the same may be equally divided amongst the four children of the said Elizabeth. And this defendant shows that he has filed with the Clerk of this Court an assignment in writing duly executed by him whereby he has assigned all such right, title and interest to the said four children, share and share alike.

Wherefore, this defendant prays that it be decreed by this Court that the said paper writing purporting as aforesaid was at no time of any force or effect as a trust deed, and that no gift in trust was at any time effectually made thereunder; or that it be decreed that the said paper writing was revoked by the said Elizabeth by means of the matters and things in this answer set forth. And this defendant further prays that

all of the said stock and property, together with the increase thereof, mentioned or referred to in the said paper writing purporting to be a trust agreement, be decreed to be the property of the said Henry W. McCormick, Elizabeth Watters Tucker, Garrett Rezeau Tucker and James Louis Tucker, equally as the heirs of the said Elizabeth.

Perkins & Drewen,
Solicitors for and of counsel with
defendant, Garrett R. Tucker.

EXHIBIT A

Know All Men by These Present, That I, Elizabeth W. M. Tucker, of the Borough of Brooklyn, City and State of New York, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all former Wills by me at any time heretofore made.

First: I direct that my funeral expenses and just debts be paid by my executor as soon after my death as may be practicable.

Second: I give, devise and bequeath to my husband, Garrett Rezeau Tucker, one-fifth of my estate as well real as personal as his own absolutely and forever.

All the rest, residue and remainder of my estate wheresoever situate, I give, devise and bequeath to my Executor and Trustee hereinafter named, in Trust Nevertheless, to invest, re-invest and keep the same invested for the following uses and purposes:

(a) To divide the residue of my estate into four equal shares.

(b) To invest and re-invest and to collect and receive the rents, issues, income and profits of one of said equal shares and to apply the net

income derived therefrom to the support, maintenance and education of my daughter, Elizabeth Watters Tucker, for and during the term of her natural life, and at her death to pay the principal of such share to any child or children of my said daughter, share and share alike, and in the event that my said daughter should die without issue living at the date of her death, then and in such case, to divide her said share equally between my three sons hereinafter named, upon their attaining the age of thirty years as hereinafter stated. Provided However, that if, in the judgment of my said Executor and Trustee, it should be for the best interest of my said daughter to have the principal of her said share in lieu of the income thereof, then and in such event my said Trustee is hereby authorized, empowered and directed, at his or her discretion, to pay the principal of said sum to my said daughter at such time as my said Trustee deems fit after my said daughter shall have attained the age of thirty years.

(c) To collect and receive the rents, issues and profits of the other of said parts or shares and to apply the net income derived from each of such shares to the support, maintenance and education of each of my sons, Henry W. McCormick, Garrett Rezeau Tucker and James Louis Tucker, until each shall reach the age of thirty years when the principal of the shares so held in trust for the son reaching the age of thirty years shall be paid over to him absolutely.

(d) In case any of my children shall die before reaching the age of thirty years leaving issue surviving, such issue shall take the principal of

the share its parent would have taken if living share and share alike.

(e) In case any of my said children shall die before reaching the age of thirty years without leaving issue surviving, the principal of the share set apart for the child so dying shall be paid over to his or her surviving brothers and sister or the issue of any deceased brother or sister share and share alike per stirpes and not per capita.

(f) In construing and carrying into effect any of the provisions of this, my Last Will and Testament, my son, Henry W. McCormick, is to be considered and treated as though he were a full brother of my other children hereinbefore mentioned.

(g) If, in the judgment of my said Executor and Trustee, it is for the best interest of any of my said sons to receive the principal of their said shares after attaining the age of twenty-one and before attaining the age of thirty years, then and in such event I authorize, empower and direct my said Executor and Trustee at his or her discretion to pay to each of my said sons the principal of his said share at such time as my said Trustee deems fit after such child shall have attained the age of twenty-one years.

Third: I hereby nominate, constitute and appoint my husband, Garrett Rezeau Tucker, to be the Executor and Trustee of this my Last Will and Testament without bond hereby authorizing and empowering him to sell either at public or private sale and at such times and in such manner and upon such terms and conditions as he may deem most advantageous for the best interests of

my estate, the whole or any part of my estate which I may die seized and possessed of or any interest therein and to execute and deliver any and all conveyances, deeds or other instruments that may be necessary to transfer said property or to carry out the intention of this provision.

In the event that my said husband, Garrett Rezeau Tucker, shall predecease me or die before the termination of his duties as Executor and Trustee under this my Will, I hereby nominate, constitute and appoint my sister, Essie T. W. Mayer, Executrix and Trustee under this will without bond with all the powers originally conferred upon my said Executor.

In Witness Whereof, I have hereunto set my hand and affixed my seal this fifth day of September, in the year One Thousand Nine Hundred and Twenty-four.

Elizabeth W. M. Tucker, (Seal)

The Foregoing Instrument, consisting of four pages, was signed, sealed, published and declared by the above named Testatrix, Elizabeth W. M. Tucker, to be her Last Will and Testament, in the presence of us, whereupon we, at her request in her presence and in the presence of each other, have hereunto affixed our names and places of residence as witnesses thereto this fifth day of September, 1924. The words "without bond" in line 4, paragraph 3, page 3, and line 11, page 4 having been interlined before signing.

F. B. Holmes residing at Stroudsburg, Pa.
Marjorie C. Hood residing at Stroudsburg, Pa.
Alice L. Fox residing at Stroudsburg, Pa.

IN CHANCERY OF NEW JERSEY

Between Essie T. N. Mayer, Complainant,
and
Garrett R. Tucker, Defendant.
} On Bill, &c.

Transcript of the testimony taken in the above-stated cause, on final hearing, at the Chancery Chambers in Jersey City, on Thursday, March 24, 1927, at 10:15 in the forenoon, before His Honor JOHN BENTLEY, Vice Chancellor.

Appearances:

William I. Lewis, Esq.,
For the Petitioner;
John Drewen, Esq.,
For the Defendant.
Arthur R. Bailey,
Official Shorthand Reporter,
75 Montgomery St., Jersey City.

GARRETT R. TUCKER, the defendant, sworn in his own behalf, testified as follows:

Direct Examination by Mr. Drewen.

Q. Mr. Tucker, where do you reside? A. 107 Fairmount Road, Ridgewood, New Jersey.

Q. You are one of the defendants in this case? A. I am.

Q. Were you the husband of Mrs. Elizabeth McCormick Tucker, named in the bill of complaint in

this case as the creator of the trust? A. I was.

Q. When were you married to the said Elizabeth Tucker? A. October 21, 1914.

Q. Where? A. In the home of her mother in Brooklyn.

Q. And at the time of your marriage to Elizabeth was she a widow? A. She was.

Q. How long had she been a widow? A. I think three years.

Q. Did she have any children by her former marriage? A. She had one.

Q. What is his name? A. Henry W. McCormick.

Q. And is that the Henry W. McCormick mentioned in the bill of complaint? A. Yes.

Q. And at the time of your marriage to Henry's mother how old was Henry? A. About four years old.

Q. And now he is 16. When you married Mrs. Tucker where did you first go to reside? A. She resided in my home.

Q. Where? A. Delaware Water Gap, Lehigh County, Pennsylvania.

Q. How long did you and Mrs. Tucker reside there? A. Four or five years.

Q. Then where did you reside? A. For a short time at 81st Street, Brooklyn; and after that, 2475 North Avenue, Bridgeport.

Q. Connecticut? A. Yes, for slightly over two years; and from there we went to Second Avenue, near 77th Street in Brooklyn for about five more years.

Q. And then after that five-year period you came to Ridgewood? A. We came to Ridgewood.

Q. What was the date of your coming to Ridgewood; do you recall? A. January the 8th, 1925.

Q. Were there any children born of your marriage? A. We had three.

Q. Are they still living? A. They are.

Q. What are their names? A. Garrett, Jr.

Q. How old is Garrett now? A. Eleven years.

Q. And the next child? A. Elizabeth.

Q. How old is Elizabeth? A. Nine. She has just turned 10.

Q. And Garrett, you say, is 11 years old today? A. Yes.

Q. And Elizabeth, 10? A. Yes.

Q. What is the name of the next child? A. James Lewis.

Q. How old is James? A. James is 9—no, he is 8. He will be 9 very shortly. There are so many birthdays it is hard to keep track of them.

Q. Now, during the period of your marriage to Mrs. Tucker, was there any time when you lived separate? A. No.

Q. Always resided together? A. With one exception. I think when I went to Bridgeport I was living up there for probably a couple of months looking around and getting a home ready to move into.

Q. Where were the children when you were there? A. With Mrs. Tucker.

Q. But that was just— A. Temporary.

Q. Now, aside from that one short period of time did you and Mrs. Tucker and the four children always live together in one household? A. We did.

Q. Including Henry, your step-son? A. Yes.

Q. That continued up to the time of Mrs. Tucker's death, did it? A. It did.

Q. When did Mrs. Tucker die? A. July 13 of this year.

Q. No, you mean last year? A. I beg pardon, last year.

Q. Where did she die? A. In Ridgewood, 107 Fairmount Road.

Q. Now, prior to your marriage to Mrs. Tucker, did she say anything to you in regard to making a trust agreement? A. She did.

Judge Lewis—I object, if Your Honor please.

The Court—Upon what ground?

Judge Lewis—There is no relevancy to it, so far as the issues in this case are concerned.

The Court—I suppose it is offered for the purpose of proving what the intention of the creator of the trust was.

Mr. Drewen—Exactly.

Judge Lewis—Then, sir, I submit that no such conversation could be used for the purpose of varying the terms of a written declaration of trust. The document will speak for itself.

The Court—Well, I am going to do what I have so often said, there being no jury here. I will allow it and deal with it when I come to decide the case. For that reason, I will overrule the objection.

Q. How long was that before your marriage to Mrs. Tucker, about? A. Well, it was very shortly before we were married. We were married October

the 21st, and I don't think it was more than a week before that.

Q. All right; what did Mrs. Tucker say? A. Well, I remember very distinctly that we were driving from Resica Falls in Pennsylvania to Marshall's Creek—in between those points—when Mrs. Tucker said that she had something she would like to speak of if she married me and that was, to use her own language, "My folks have persuaded me to make a trust agreement in favor of Henry, because they do not know how the marriage will turn out;" and I told her that I thought it was the only thing to do, because we had only known each other such a short time; it was only 10 days or so.

Q. Well, that is the conversation? A. Yes.

Q. Now, do you know whether or not, at the time Mrs. Tucker made the statement to you to which you have just referred, the agreement had already been made? A. No, I do not know it. I think she told me she was going down to complete it. She was living in my hotel then.

Q. When did you first see the paper writing purporting to be the trust agreement, as the one to which you have referred? A. Well, I knew it was in existence, but I don't think I saw the paper until after I had access to the box. I might have, but I don't recall it.

Q. I show you a paper writing endorsed "Duplicate Trust Agreement" and ask you if that is the paper you first saw (handing paper to the witness)? A. Yes, this is the one she told her sister was lost. That is the paper that I saw.

Mr. Drewen—I offer it for identification.

(The same is marked D-1 for identification.)

Q. When did you first see this paper marked D-1 for identification? A. She kept it in a tin box. She had a "strong box" where she put her private papers.

Q. Was that in your home that it was kept? A. It was always in our home.

Q. Now, when this stock under the trust agreement was transferred in the name of Mrs. Mayer as trustee for Henry McCormick, where was the stock placed; do you know? A. In the Dime Savings Bank. It is not called the Dime Savings Bank; I don't know the name, but it was in some security vault under the Dime Savings Bank regime.

Q. Was it kept there in a safe-deposit box? A. It was.

Q. Now, at the time of your marriage to Mrs. Tucker, so far as you know, the stock was kept in that box? A. I was told it was in that box.

Q. Told by whom? A. My wife.

Q. And do you know who had the keys to that box? A. My wife and her sister Mrs. Mayer. Pardon me, her name then was Essie Watters.

Q. How long did that continue, about? A. I should say it was a period of five years.

Q. Then what took place? A. Mrs. Tucker wanted me to have access to the box, and she asked her sister if it would be—

Q. Well, omitting the details, she spoke to her sister about it? A. Yes, she spoke to her sister.

Q. And then what happened after Mrs. Tucker

spoke to her sister about your having access to the box? What was done with the box? A. The usual procedure was that the other party give consent in writing—

Q. Just answer the question; what was done, regardless of the procedure. Did you get access to the box? A. I did.

Q. Did you get the key? A. I did.

Q. Who was it that gave you the key? Do you recall? A. Well, my wife told me that Essie, who was Miss Watters then, wanted to remove some of her personal things out of the box, and then she would give me the key.

Judge Lewis—Your Honor, it isn't responsive. I am not objecting upon that ground, but I understand this evidence will all come under the objections I have made?

The Court—Oh, certainly. And, further than that, this is entirely incompetent what his wife said about what the complainant wanted.

Mr. Drewen—I didn't ask for that.

The Court—I'm not saying this for your benefit; I'm saying this for the benefit of the witness (addressing the witness). All you were asked is who gave you the key.

A. Mrs. Tucker.

Q. And when you and Mrs. Tucker each had a key to this box do you know whether Mrs. Tucker's sister, Mrs. Mayer, still had a key? A. I do not know.

Q. Now, at the time you got the key to this

box in Brooklyn in which these trust certificates were kept, did Mrs. Mayer have any of her personal belongings in that box also? A. No.

Q. Had there been any in it before that, do you know? A. I know only from what my wife told me.

Q. All right. Now, after you and Mrs. Tucker had a key to this box in Brooklyn, how long did that arrangement continue? A. Possibly (witness pauses).

Q. Approximately. A. Well, about three more years.

Q. And then it was that you moved to Ridgewood? A. Yes.

Judge Lewis—If Your Honor please, at this point may I inquire, for the purpose of making an objection if my surmise is right, whether this line of evidence is now offered for the purpose of showing, in itself, a revocation of the trust. If that is the purpose, I want to object to it, because no such claim is made in the answer. At least, I didn't notice any such issue as that.

Mr. Drewen—If Your Honor please, while this case appears to be, on its face, the revocation of a trust it is really the construction of a will. Under the cases which I have examined, I don't think there will be any controversy between us in regard to that. This is the way in which a court gets jurisdiction when it comes to the cognizance of a purely equitable right. And the purely equitable right in this case is, that they have a right

to enforce this trust, and in the enforcement of that trust we must inquire whether that trust exists. There can be no pertinent inquiry along that line without finding out what this testator meant when she made the will—everything attending the circumstances of this trust; everything concerning the attitude of these people toward the trust after it was made; the change in the relationship between the Mrs. Tucker at the time of the marriage or before her marriage, and the Mrs. Tucker who made the will—the fact that she then had three children by this man; that they had lived in harmony in the meantime. She says in the will that all property of which she died seized and possessed she gives equally, share and share alike, to her husband and four children. Above all things, what Your Honor wants to know is what she intended to do by this will, what she wanted to dispose of, and when she said "All the property that I die seized of and possess—"

Judge Lewis—That is the very point. She didn't say "all the property I die seized of;" she says, "I give all the rest, residue and remainder of my estate." That is the language of the will.

Mr. Drewen—Let us read it.

The Court—Well, that is the language of the will, "all the rest, residue and remainder of my estate I give, devise and bequeath to my executor and trustee." But, of course, I don't see that that makes any difference.

Mr. Drewen—No, it doesn't make any dif-

ference. But Your Honor can understand it better by reference to these trust certificates. I want to show that she still collected the dividend checks; that during the lifetime of this paper which on its face was designed to take effect during the lifetime of these people, it was never given that effect because the creator of this trust got these dividend checks herself from the trustee; she herself provided for the maintenance of the cestui under this trust. Nothing was done under this trust during the lifetime of these parties except the mere mechanics of it, Mrs. Tucker reserving the right to say what should become of this stock. She reserved the right to revoke the trust, and she kept that stock, as I want to show now.

The Court—Did she expressly retain the authority to terminate the trust?

Mr. Drewen—Yes, sir.

The Court—She did?

Mr. Drewen—Yes, sir, in the trust agreement.

The Court—Well, of course I want to know this story as completely as I can.

Judge Lewis—Let me interrupt Your Honnor right at this point: I realize all that and I know the practice of the court in that respect, but Mr. Drewen has waived his finger around a sore spot, you might say, in this case. If Mr. Drewen is offering the evidence concerning various declarations made by the

testator, concerning various transactions that relate to the subject of the trust—if he is doing that for the purpose of construing the will, why, then I think he has no right to do it, as a matter of law. You can't prove what a testator means by language used in the will by the oral statements of the testator.

The Court—Well, ordinarily that is so, and I must confess that my understanding was that the only exception is where the language is ambiguous.

Mr. Drewen—Will your honor hear me on that?

Judge Lewis—I want to make it clear, first, because I am resolved to make as expeditious disposition of this case as possible, and that is why I took the course I did this morning. Now, then, if the evidence is confined to that point that I have stated, I am still quite willing to rest where I was; but if this evidence is now offered for the purpose of showing, in itself, a revocation of the trust under the power reserved in it, then of course if it had been so revoked there is no question about the construction of the will; the will passes the estate to Mrs. Tucker. If she revoked the trust, of course the assets of the trust would be hers and they would pass by her will. There is no question about that. But if it is proposed to show a revocation of the trust in this way by going into a life history of the donor and the donee of the trust and the husband of the donor and all the things that occurred from the time of the

trust in October, 1914, down to the death of the testatrix, why I am forced to go into the trial of a long case. Every fact which they adduce under this line of testimony I have a right to deny; and already I have made some memorandum here of facts pointing in that direction which I do not expect to deny. But it means the taking of testimony by deposition. It will mean the taking of testimony over in Brooklyn; it will mean the taking of testimony in Chicago where the office of the United States Gypsum is. There are myriad little details which might be brought out, pro and con, if it is possible to revoke this trust by any such line of proof. Besides, there isn't any foundation for all this in the pleadings.

Mr. Drewen — If Your Honor please, Judge Lewis can't of his own motion confine the scope which reason, and logic, and necessity gives to this case. Your Honor doesn't care what Judge Lewis thinks, or what I think. As Your Honor has said, you want to know the whole story in order to decide it, whether we go from Dan to Beersheba to get the truth. Your Honor doesn't care whether we go to Chicago or Brooklyn to get the testimony. Your Honor wants to know the facts.

The Court—All the competent, relevant, material facts.

Mr. Drewen—Yes, sir; nor can Judge Lewis and I disagree as to the scope of this inquiry here. Expressly, there is reserved

in this deed of trust the power to revoke it. Expressly, there is reserved in this deed of trust direction as to the use, the sale, and all that sort of thing of the corpus. As I said before, this is really and essentially a case to construe a will, because if, in the construction of this will the Court finds that the testator intended to subordinate this stock which we contend was a part of her estate—if she intended to make that a scheme of inequality, then she is not bound to a continuance of this trust, and having done that, the trust is revoked.

Judge Lewis—Answering Mr. Drewen, I say that the trust is not revoked by the will. If it is claimed to be revoked by the will, then I am ready to go on and I don't want to put in any evidence. But if it was revoked prior to the will, then that is another thing. If it is revoked by the will, then I don't care; this evidence is plainly incompetent.

Mr. Drewen—Certainly. I say it is revoked by the will. But how can we find out whether it is revoked by the will except by finding out what the will means. How can we find out what the will means? Only by finding out what the testator intended, by all the circumstances which show a change in the testator's life; the relation which she brought to her husband, the three children that she bore him and the fact that she loved him deeply; the fact that she lived in perfect harmony with him; the fact that everything that she did with these children showed that she in-

tended to deal with them equally in the disposition of her bounty; the fact that she told the scrivener of the will what she intended to do in her will. Now, Judge Lewis may object and say "You have no right to do that because that is parol testimony." My answer is that such testimony is entirely proper.

Judge Lewis—Now, if Your Honor please, as I understand it counsel stands upon an ambiguity in the will which is to be construed by oral evidence—declarations from the testator, conduct of the testator and so forth. Now, to make that kind of evidence admissible there must be ambiguity. The question is, as to whether the words "my estate" are ambiguous. That is a question that is well settled in New Jersey. (Counsel then reads from 87 Equity.)

The Court—Well, I am going to do what I originally intended to do and what I have have already done. If I exclude this line of proof I practically decide the entire case. If I let it in, I can deal with it in my decision, and, frankly, my mind is not clear as to whether it is competent proof or incompetent proof. But if I rule it out now and come to the conclusion that it is competent I will have then rendered it impossible for me to do what I think I ought to do. I will overrule the objection, and the objection shall stand and go to all testimony of this defendant showing the relations between him and his wife and all statements made by him and her regarding this trust fund or her will.

Judge Lewis—Now, if Your Honor please, may I ask if, in the productions of the proofs so to be elicited, it becomes necessary for me to produce evidence I may do so?

The Court — Of course, I will. You needn't ask it.

Judge Lewis—We will get a commission or anything else we need for that purpose.

Mr. Drewen—There's no objection to it.

The Court—You will have the fullest opportunity to meet any facts that you think you ought to.

Q. (Question read by the stenographer) In other words, what was done with that Brooklyn box? A. My wife was taken seriously ill—

The Court—No, no; what was done with the contents of the box.

Q. When you moved from Brooklyn over to Ridgewood were the contents of the box moved? A. The contents of the box was moved to the Second Nat. Bank at Paterson.

Q. Who moved them? A. I did.

Q. And at that time where was Mrs. Tucker? Was she ill? A. She was, in the Paterson St. Joseph's Hospital.

Q. How long had she been in the hospital, about? A. One day.

Q. And aside from the day she spent in St. Joseph's Hospital had Mrs. Tucker been ill during that period? A. She had been ill for some time.

Q. Now, when you moved the contents of the box from the Brooklyn institution to the Second National Bank in Paterson were you doing it un-

der anyone's direction? A. Mrs. Tucker's direction.

Q. Did Mrs. Tucker tell you where to place these stock certificates after they were moved from the Brooklyn bank? A. She did.

Q. And then you moved them to the Second National Bank at Paterson? A. Yes.

Q. Now, when they were placed in the Paterson bank in whose name, or names, was that box taken? A. I had opened the box—

Q. In your name, are you going to tell us? A. No, in our joint names.

Q. Whose are your joint names? A. Mrs. Tucker and myself. The box had already been opened.

Q. What do you mean by that, "the box had already been opened"?

The Court—The box had already been secured?

A. Yes, the box had already been secured.

Q. Were there any other properties or securities placed in the Paterson box, in addition to what we shall call the "trust certificates"? A. Yes.

Q. What, briefly? A. Other stocks of her estate.

Q. Whose estate? A. Mrs. Tucker's estate.

Q. Then there was other personal property of Mrs. Tucker's in that box aside from these trust certificates; is that correct? A. Yes.

Q. Did Mrs. Mayer, the complainant, ever have a key to that box that you are now referring to? A. She did not.

Q. Are you and Mrs. Tucker the only persons that had keys to the box at any time? A. We were.

Q. During the lifetime of Mrs. Tucker? A. We were.

Q. Now, from time to time during the life of this trust-agreement do you know whether or not the United States Gypsum Company declared stock dividends on the stock that was under the trust? A. It did.

Q. When those stock dividends, stock dividend certificates, or dividend stock certificates came to Mrs. Mayer do you know what she did with them? A. Gave them immediately to my wife, Mrs. Tucker.

Q. What did Mrs. Tucker do with these dividend certificates that were turned over to you by Mrs. Mayer? A. They were put in the safe deposit box with her other securities.

Q. Do you refer to the securities in the Second National Bank in Paterson? A. I am referring to the Brooklyn box and also to the Second National Bank in Paterson, whenever a dividend was declared.

Q. But when once the stock certificates were transferred from the Brooklyn box to the Paterson box that was the end of any Brooklyn box? A. It was.

Q. So that when the dividend stock certificates were turned over by Mrs. Mayer to Mrs. Tucker after you left Brooklyn you said they were placed in the Paterson box? A. They were.

Q. Now, during the continuance of this trust agreement and before Mrs. Tucker's death, the dividend checks were paid on this stock, were they not? A. They were.

Q. Do you know what Mrs. Mayer did with those checks when she would receive them? A. Endorse them and give them immediately to Mrs. Tucker or myself.

Q. And was that uniformly so? A. Always.

Q. Well, when Mrs. Tucker was well and about, were the checks given by Mrs. Mayer to you or to Mrs. Tucker? A. Whoever happened to be at her home first, either myself or Mrs. Tucker.

Q. At Mrs. Mayer's home? A. Yes.

Q. By the way, how long was Mrs. Tucker ill in her last illness? A. She was really ill over a year, but confined to her bed about six months, more or less.

Q. And during the period of Mrs. Tucker's illness who received the dividend checks from Mrs. Mayer? A. Mrs. Mayer gave them to me and I deposited them in our joint account.

Q. Now, after the dividend checks were turned over by Mrs. Mayer, either to you or to Mrs. Tucker, what was done with the checks, by either you or Mrs. Tucker, whoever received them? A. We deposited them to our joint account.

Q. Bank account? A. Bank account.

Q. In whose name was the bank account? A. In the name of Garrett R. or Elizabeth W. M. Tucker.

Q. And Elizabeth was your wife? A. Yes.

Q. Now, did you have any other depositories except the depositories that were in the joint names of both of you? A. No.

Q. Henry, you say, was about four years old when you married his mother? A. Between four and five.

Q. Now at any time during the period subsequent to the date of this trust agreement did Mrs. Mayer ever devote any part of the income from the trust certificates to the education, maintenance, or support of Henry? A. She did not.

Judge Lewis—I object to that. That, of course, is under the same general objection?

The Court—Well, your objection goes to any testimony of that kind.

Q. This bank account, into which the dividend checks that were received from Mrs. Mayer were deposited—what was that used for? A. For our general household expenses—for all.

Q. Did that include the education, maintenance and culture of the children? A. All the children the same.

Q. Do you recall the occasion upon which Mrs. Tucker made the will that is referred to in the pleadings in this case? A. I do.

Q. Where was that will made? A. In Stroudsburg, Penn., Mr. Holmes's office.

Q. And at or about that time were you and Mrs. Tucker spending some time up there? A. Yes, we were spending the summer in the mountains, and Stroudsburg is about 20 miles away from our camp.

Q. Do you know Mr. Holmes, by whom this will was drawn? A. I do.

Q. Mr. Holmes is a practicing attorney in Stroudsburg? A. He is.

Q. I call your attention to the fact that this will is dated September 5, 1924; during the summer had you and Mrs. Tucker come down to the city from the mountains during the period of

your vacation during the summer? A. It is probable, but I don't think so.

Q. Do you remember an occasion when you were with Mrs. Tucker and she went to Mrs. Mayer, her sister, and obtained a copy of the trust agreement that Mrs. Mayer had? A. I remember that.

Q. How long was that before the will was made? A. I don't remember the day, but it was prior to our going away on our vacation one evening.

The Court—Vacation when?

Q. Yes; when did you go away on your vacation? A. The last of June. We usually arrived about the first of July in Pocono.

Q. That was 1924? A. That was 1924, yes.

Q. How long before the last of June on which you left for the Poconos was it that Mrs. Tucker went to her sister to get this trust agreement? A. I don't remember that, but it wasn't very long. It might have been two weeks and it might have been two months; I don't remember. But I remember that we walked down together. Of course, what my wife told me isn't—

Q. No, no. You walked down together—you and Mrs. Tucker walked down to Mrs. Mayer's home? A. Yes.

Q. And you were living at that time in Ridgewood? A. Yes.

Q. And when Mrs. Tucker got to her sister's home did she ask for anything? A. She asked her sister for the trust agreement.

Q. And did her sister give it to her? A. She did.

Q. What did your wife do with the trust agreement when Mrs. Mayer gave it to her? A. She kept it.

Q. Where was it kept; do you know? A. Well, it wasn't always kept in the same place.

Q. Well, where? A. It was taken with her to the mountains and shown to Mr. Holmes.

Q. At the time this will was drawn? A. At the time the will was drawn.

Q. Very well. Now, when Mrs. Tucker showed to Mr. Holmes the trust agreement did she say anything about the trust agreement to Mr. Holmes, or did Mr. Holmes say anything to her about it? A. Yes, she said that she would like to make a new will, and she would like to dispose of the trust agreement; and Mr. Holmes asked her if she thought the emergency had passed that called for the trust agreement, and Mrs. Tucker said "Yes, it has."

Q. Well, did Mrs. Tucker say anything to Mr. Holmes as to what she wanted to do with the trust agreement? A. She said she wanted to revoke the trust agreement.

Q. Now, was it on that same occasion that this conversation occurred that you now relate, that the will was actually executed? A. It was.

Q. By the way, that will was probated, was it not? A. It was.

Q. In the office of the Surrogate of Bergen County? A. Yes.

Q. Do you remember when it was probated? The certificate doesn't say? A. In October.

Q. Last past? A. Yes.

Q. Did you obtain a certified copy of that will from the Surrogate? A. I did.

Q. Is that it (showing witness paper)? A. Yes.

Mr. Drewen—I offer it in evidence.
(Admitted and marked Exhibit D-2)

Q. Now, at the time of the visit of Mrs. Tucker to Mrs. Mayer, when she obtained D-1 for identification—

Mr. Drewen—I think I will offer it in evidence now.
(Admitted in evidence as Exhibit D-1)

Q. At the time that Mrs. Tucker received from her sister the trust agreement was it the duplicate trust agreement that is now marked Exhibit D-1, or was it the other one which I show you (counsel showing witness D-3)? A. This is the one that she received from her sister.

The Court—Indicating the one not yet in evidence.

Mr. Drewen—The one endorsed "Trust Agreement." I offer the one endorsed "Trust Agreement."

Judge Lewis—I would like to have that marked for identification.

Mr. Drewen—I am offering it in evidence.

Judge Lewis—Has it been identified?

Mr. Drewen—Yes, sir.

The Court—It has been identified now by the witness. Do you want to cross-examine him?

Mr. Drewen—You may read it, Judge, if you want to.

Judge Lewis—This has not been marked yet?

The Court—No, that is the one that the witness says was obtained from the complainant by the decedent.

Q. (By Judge Lewis) Which agreement do you say is the one that was obtained by Mrs. Tucker from Mrs. Mayer? A. The one you are holding in your hand.

Q. How do you distinguish it from Exhibit D-1? A. D-1 is marked "Duplicate." This is the original.

Mr. Drewen—They are identical, aren't they?

Judge Lewis—I don't know.

The Court—Do you want an opportunity now to examine them in detail?

Judge Lewis—No, I simply want to be able to identify what he is talking about.

The Court—I understand that it is offered in evidence?

Mr. Drewen—It is offered, yes.

The Court—Have you any objection?

Judge Lewis—Except under the general objection that prevails through all this.

(The document is marked Exhibit D-3.)

Q. The trust agreement, then, marked D-3 is the one that Mrs. Mayer gave Mrs. Tucker? A. Yes.

Q. D-1 and D-3 are duplicate originals, are they not? A. They are.

Q. At the time that Mrs. Tucker obtained D-3 from Mrs. Mayer where was D-1; do you know? A. D-1 was in her tin box.

Q. In Mrs. Tucker's tin box? A. Yes.

Q. In the home? A. In our home, in her wardrobe closet.

Q. And if Mrs. Tucker really wished to get a copy of the trust agreement in order to show her attorney—

Judge Lewis—That is argumentative.

The Court—I should think it is going to be.

Mr. Drewen—All right; I won't press it.

The Court—She could have resorted to the copy in her possession. I see what you mean. We won't quarrel over the logic of that.

Q. At the time of your visit to Mr. Holmes with Mrs. Tucker, did you make a will? A. I did.

Q. Making Mrs. Tucker the sole beneficiary in the will? A. I did. I gave her everything.

Q. Now, after the will was made, and you and Mrs. Tucker returned home from the mountains, what was done with the trust agreement that Mrs. Tucker had obtained from her sister? A. The trust agreement—

Q. Where was it placed? A. The trust agreement was in her tin box.

Q. Who put it there? A. She did.

Q. Mrs. Tucker? A. Yes.

Q. So that in the tin box she had both agreements in the same place? A. They weren't in the same place. While they were in the tin box they were in there separate and apart from each other. They didn't rest against each other.

Q. Yes, but they were both in the box? A. They were in the box.

Q. How long did they continue to remain there? A. (Witness pauses.)

Q. Were they there when Mrs. Tucker died? A. Until Mrs. Tucker died.

Q. And were they, at any time in the meantime, either of them, restored to Mrs. Mayer? A. No.

Q. Where does Henry attend school? A. At the Manlius Military Academy, Manlius, New York.

Q. Where does Garrett attend? A. At Manlius.

Q. How long has Henry been up at Manlius? A. This is his second year.

Q. How long has Garrett been there? A. This is his first year.

Q. Did Mrs. Tucker, or you, or anybody consult Mrs. Mayer with regard to the expense for the maintenance and education of the boy Henry at Manlius? A. No.

Q. Who determined that Henry should go to Manlius? A. Mrs. Tucker and I went up to Manlius.

Q. Both of you? A. Yes, Mrs. Tucker and I.

Q. Was the expense of Henry's education at Manlius drawn from this joint account that you have referred to? A. It never has been and is not now.

Q. (By the Court) How was it paid? A. Out of our joint bank account. Pardon me, I didn't get your question.

Q. Now, at the time of the visit to Mr. Holmes, on the occasion when this will was drawn, was anything said by Mrs. Tucker or to her, when Mr. Holmes was present, concerning the transfer of the certificates that were issued in the name of the trustee? A. Yes.

Q. What was said of that by Mrs. Tucker and by Mr. Holmes to Mrs. Tucker? A. She wanted to find out the expense of the transfer.

Q. Yes, go ahead. A. That is, I don't know the technical words to use in transferring stock. I imagine—

Q. Well, did she find out the expense? A. She did.

Q. From Mr. Holmes? A. She did.

Q. As a result of finding out the expense did she express any course that she would take concerning that matter? A. That is the reason she did not transfer them at that particular time, because it would have been quite an expensive procedure.

Q. Now, Mr. Tucker, when those three children came along did they all live together as brothers and sister at the home with Henry? A. They always did.

Q. Was there any distinction made in the home between Henry and the other children? A. Never.

Q. What is the name by which Henry's mother called him? A. Henry Tucker.

Q. Do you know whether or not he is known now as "Henry Tucker" at Manlius? A. In school he is known as "Henry Tucker."

Q. Was he known in school here as "Tucker"? A. Always.

Q. And how, through his years up to the present time, did the boy address you? A. Daddy.

Q. Do you know whether or not, upon any occasion, Mrs. Tucker made any definite statement to Henry as to your relationship with the boy? A. Yes, when we moved from Bridgeport to Brooklyn.

Q. At that time how old was he? A. That was probably four or five years ago. Henry at the dinner table said, "Daddy," or "Mother, is it true that Daddy is not my father?" She says, "It is not, Henry; there's your daddy and the only daddy that you know."

Q. Pointing to whom? A. Pointing to me.

Q. What can you say to the court with regard to the spirit in which you and your wife and the children lived together? A. I might say that our friends and our acquaintances—

Q. No, no. A. —considered us an ideal couple. There was never a misunderstanding of any kind, or a harsh word. Our children have never heard that in the family.

Q. Now, then, in regard to the relationship as between yourselves—you and Mrs. Tucker and the four children taken together—were there ever any discussions or differences between you and Mrs. Tucker based upon the different paternity of Henry and the other two? A. No. The only discussion was that Henry's mother distinctly did not want him to know that I was not his daddy, in order that I might exercise parental care over the boy.

Q. But perhaps you don't get my question: Did the fact that Henry was not the brother of the whole blood with the other three children—did that fact ever create any differences between you and Mrs. Tucker? A. No, we both loved them the same.

Q. Now, did Mrs. Tucker ever make any statements with regard to her attitude toward these three children—the four children, by the way—did she make any statement of that nature to Mr. Holmes at the time the will was drawn? A. She did.

Q. What did she say? A. She said it was a great satisfaction that the feeling between Henry and his daddy—the affection between Henry and his daddy was so marked; and repeatedly all through our lives Mrs. Tucker said, "You have no idea how grateful I am for the esteem in which you hold Henry."

Q. All I want to know is, whether or not Mrs. Tucker ever said anything to Mr. Holmes on the occasion of the drawing of the will, about the state of her feelings toward the four children? A. Yes, she said, "Mr. Holmes, they are all my children and I love them all the same, and I want to divide my estate equally between them."

Q. Did Mrs. Tucker and you ever, between the two of you, plan for the future of these children? A. We did.

Q. What plans did you discuss for Henry?

Judge Lewis—We are going far afield. It is a matter of time, that's all.

The Court—Yes; you are getting rather far afield.

Mr. Drewen—I suppose, Your Honor, in a case of this kind, the most important thing to know—

Judge Lewis—I will withdraw the objection. We will probably save time.

Mr. Drewen—I don't want to pursue it any further than I have to. If Your Honor will

bear with me just a second until I look over this—

The Court—We will take a recess for four or five minutes.

Mr. Drewen—(After recess) That is all I have on direct examination.

Cross Examination by Judge Lewis:

Q. When you were married in 1914 to Mrs. Tucker what was your business? A. I was in the summer resort business at Delaware Water Gap, Penn., and the name of the house was the Cataract House. I was not selling any liquor.

Q. Were you at that time a man of considerable money—means?

Mr. Drewen—That is objected to, on the ground that it is absolutely incompetent and immaterial.

The Court—I overrule the objection.

A. I had an estate at that time worth anywhere from—oh, say, around $30,000. I was not a pauper.

Q. You were not a pauper? A. No, sir.

Q. How long did you continue in the summer resort business? A. I think about four years.

Q. At the same place? A. At the same place.

Q. And then after that what did you take up? A. When the war broke out the summer resort business was not very profitable; so I rented the summer resort and we went—I went to Bridgeport and made a connection with the Remington Arms, and was employed at the Remington Arms for about two years as a production clerk.

Q. At what salary?

Mr. Drewen—That I object to on the same ground.

A. Well, I don't remember the salary. I am sorry; I would be very glad to tell you.

Q. It wasn't large enough to make an impression? A. Large enough to live on and run our house.

Q. Large enough to build a house on, did you say? A. Large enough to pay the expenses of the house; yes, sir.

Q. Didn't Mrs. Tucker contribute to the living expenses at the house? A. Her dividends were very small at that time.

Q. Did she contribute to the expenses of the house, is the question. A. She did.

Q. Now, when you left the Remington Arms job what was the next one? A. I was managing the hotel San Rafael, on 45th Street between 5th and 6th Avenues, New York.

Q. At a salary? A. Yes, sir.

Q. How much? A. I don't remember that.

Q. How long were you there? A. I think I was there two or three years. I think three years.

Q. And after that where did you go? A. After that I made a connection with the Knox Motors Co. as sales manager, in the capacity of bringing a dishwashing machine on the market.

Q. How long were you engaged in that? A. That lasted for about a year.

Q. And then what did you do?

Mr. Drewen—If Your Honor please, might I at this time object to this line of examination, on the ground that it is immaterial and has nothing to do whatever with the enquiry here, as to what the testator's intent was in making this will?

The Court—You have opened up the matter of their lives.

Mr. Drewen—Yes, but such as I have gone into has bearing upon the intention, or the reasonable indications of the intention, of the testator. I can't see what this examination can do in the way of helping Your Honor to determine what she meant in the will.

The Court—No, but it might do this: It might effectually contradict what he says about the marital atmosphere in the home.

Q. (Question read by the stenographer.) A. The next thing I was connected with was the Phoenix Mutual Life Insurance Company.

Q. Soliciting insurance? A. Yes, sir.

Q. How long did you keep at that? A. I was connected with the Phoenix Mutual Life when my wife died.

Q. Did you make a lot of money in these various employments?

Mr. Drewen—I ask that my objection go to this.

The Court—Yes, to the entire line of testimony as to his employment and his means.

A. Well, that depends upon what you call a lot of money.

Q. How much stock have you got outside of the

U. S. Gypsum Company? A. Oh, I might have eight or nine hundred shares.

Q. Worth how much money? A. I think it is worth about $95 a share.

Q. And did you buy that stock from the proceeds of your earnings in these various employments that you have spoken of? A. Well, Judge Lewis, I have bought and sold stock besides the different things I have been in and have been fairly successful in that line, on the side.

Q. How many shares of stock have you dealt in? A. Well, not having my books here I couldn't tell you that exactly.

Q. What stock besides that Gypsum stock did you deal in? A. Well, I have dealt in other stocks, but mostly in Gypsum, because I have made a special study of that.

Q. Well, you were familiar with that class of stocks at the time you were married? A. Yes, I was.

Q. Mrs. Tucker obtained that Gypsum stock from her husband, didn't she—her first husband? A. I imagine so. I don't think she had anything before she married him.

Q. Well, let us assume that that is so. I am asking you if it isn't so that she got her Gypsum stock from her first husband? A. Well, I don't know. I know she had some Gypsum stock when I married her.

Q. And you know, don't you, that her husband before he died had some Gypsum stock? A. I do, from reading some sort of will.

Q. And her husband, McCormick, was the father of this infant defendant McCormick, wasn't he? A. He was.

Q. And before Mrs. Tucker married you she made this trust in favor of this son McCormick, didn't she? A. Yes, she made the trust October 14th and she married me on the 21st.

Q. A week before? A. Yes.

Q. Now, when you were married you went to live with Mrs. Tucker up at the Delaware Water Gap at this hotel? A. No, she went and lived with me.

Q. Well, that is the place, is it? A. That is the place.

Q. How long did you continue to live there? A. About four years.

Q. Was Mrs. Tucker in the habit of going back and forth to Brooklyn during that four years quite often? A. Not very often, no.

Q. Well, once in a while? A. Yes, occasionally. She went in to see her doctor occasionally.

Q. She also went in to see her sister, a trustee in this trust matter, didn't she? A. Not that I know of. Did she go in to see her?

Q. You didn't know that she visited her sister in Brooklyn? A. In regard to the trust matter? No, I didn't know that.

Q. No, I didn't say in regard to the trust matter; I said, didn't she visit her sister in Brooklyn during the four years that she was living with you in Delaware Water Gap? A. Yes, naturally.

Q. And was that frequent or otherwise? A. It was not frequent.

Q. Did Mrs. Tucker go to the deposit box in Brooklyn, in the Dime Savings Bank that you have spoken of, shortly after your marriage? A. I

couldn't answer whether after or before; I know it was thereabouts.

Q. Do you know whether or not she rented that box jointly with her sister Mrs. Mayer, the trustee? A. I do not know that. I know that she had the box and that Mrs. Mayer had access to it.

Q. Do you know whether that box was rented from the Dime Savings Bank on the 11th of December, 1914? A. I don't know that. I would have to look at the records.

Q. You wouldn't say it wasn't? A. No, I would not.

Q. Do you know the number of the box in the Dime Savings Bank taken by your wife and sister-in-law? A. No, I do not.

Q. You don't know that? A. No, I do not. The number didn't make any difference; the number of the key and the number of the box was different. I remember that.

Q. You are pretty sure that that box was taken about the time of your marriage? A. I think it was.

Q. And do you know that your wife and Mrs. Mayer had exclusive access to that box from the time it was rented for many years afterwards? A. Well, I wouldn't say "many years"; about five years.

Q. Well, would you say that it wasn't weeks? A. I wouldn't say it wasn't; I think, according to my memory, it was about five years.

Q. Who then obtained access to it? A. I did.

Q .And Mrs. Mayer through your wife gave the bank consent to giving you access? A. I didn't ask for it.

Q. I didn't ask you for that; I asked you if she

didn't consent to your having access to it? A. I didn't ask for the key to the box.

Q. Did you get a key from the bank? Or did you use your wife's key? A. Well, my wife gave me a key; I don't know whether it was Mrs. Mayer's key or her key.

Q. She didn't get any from the bank? A. Not that I remember.

Q. You would say that? A. Yes; not that I remember.

Q. Was there any change made in that box, do you know; I mean when you got access to the box was there a new box taken out or was it the old box that you had access to? A. It was the same box, and Mrs. Mayer asked once to move some of her things out before—

Q. I ask that the question be read and the witness be instructed to answer it. (Question read by the stenographer.) A. The old one, as far as I know.

Q. Was there any change made in the box between the time that you got access to it and the time you went to Ridgewood? A. It runs in my mind—

Mr. Drewen—What does he mean by "change"?

A. It runs in my mind that there was a larger box procured.

Q. Who procured it? A. My wife and I.

Q. Well, Mrs. Mayer also, didn't she? A. I don't know whether she was considered in it or not; I don't think she was.

Q. That is your idea: At the time the larger box was taken Mrs. Mayer wasn't considered? A. Yes.

Q. Did she have any access to it? A. Her name was still on the box, yes. She had access to the box and always did until the box was closed there.

Q. That is what I want: She always had access to that box. Now, when did you first see the inside of any of these boxes? A. Well, just what do you mean, Judge Lewis, by "inside of the box"? The contents of the box, you mean?

Q. When did you first see inside of the boxes—any one of them? A. Why, in buying and selling Gypsum stock I went down quite often.

Q. And you made most of the trips to the box over what period? A. From the time I received the key.

Q. And the date of that you can't tell? A. It runs in my mind about five years.

Q. But you didn't go to the box until you received the key; is that right? A. I don't remember.

Q. Now, Mr. Tucker, what was the pass-word for that box? A. Henry.

Q. You couldn't get permission from the officers of the bank unless you knew the pass-word, which was "Henry"? A. That's right.

Q. How long had that pass-word been used? A. From the time the box was opened until the time the box was closed.

Q. And when you say "opened" you mean opened by Mrs. Tucker and Mrs. Mayer? Is'nt that so? A. Well, I don't know who it was opened by.

Q. Well, they did rent it? A. Yes, I imagine so.

Q. Now, again I ask you whether you can more definitely fix the time when you got access to the box by the presentation of this key than five years? A. Not unless I went to the records of the Dime Savings Bank.

Q. You haven't any record of that here, have you? A. I have not.

Q. Have you a record of the first view you had of the inside of that box? A. You mean the first time I opened the box?

The Court—Or the time you saw it opened.

A. Why, the first time I ever opened the box? No, I couldn't remember the first time.

Q. Well, the first time you saw it opened, or about that time, what did you see inside of the box? A. Why, I saw insurance papers—fire insurance papers.

Q. Were they in the front of the box— A. And different private papers.

Q. Wait a minute. Were these insurance papers in the front of the box? A. I don't know whether they were in the front or back.

Q. Whose insurance was it? A. Insurance on the house.

Q. Issued to whom? A. Issued to Mrs. Tucker and myself.

Q. What house? A. Now, wait a minute; I am ahead of my story here. The house on Ridge Boulevard was in Mrs. Tucker's name, I think. I don't recall that, but I think it was. I don't recall that.

Q. Where is Ridge Boulevard? A. Ridge Boulevard was in Brooklyn, our home.

Q. And there was an insurance policy on that in the box? A. Yes.

Q. Now, what else was there? A. There was stock certificates of 100 Gypsum Company stock.

Q. Were those with the policy or were they separate from the policy? A. Well, they were all together, as I recall it. They were together. It was only a small box and one lying on top of the other, like these, for instance, folded up, of course.

Q. How many files did they make? A. I don't remember that.

Q. Was Henry's stock in the same file? A. All together, yes.

Q. All in one bundle? A. I don't know what you are driving at.

Q. I don't intend to let you know, either; I want you to answer the questions. A. Yes.

Q. They were all together? A. They were all together, yes.

Q. Fastened with rubber bands or a piece of tape? A. Not necessarily, that I remember.

Q. I am not saying "necessarily"; I am asking you whether they were. A. I don't know; I don't remember.

Q. Were there any envelopes in the box that contained papers? A. There might have been.

Q. Now, were they in the back of the box or the front of the box? A. I don't know.

Q. You don't remember? A. I don't remember.

Q. Do you remember what else there was in there? A. I think there was some jewelry in there

—a watch that belonged to Henry, and some stock certificates, and I think my wife had some jewelry in there from time to time.

Q. She had some jewelry in it, too? A. She did.

Q. And you saw a watch belonging to Henry? A. Henry's father, yes.

Q. In an envelope or outside? A. No, it was in a mahogany case.

Q. Did you make careful examination of the box to ascertain what was in that box? A. You mean, did I make an inventory of the box?

Q. Well, I didn't ask you that, did I? A. I asked you what you meant.

Q. I ask you if you made a careful examination of the contents of the box? A. No, I did not. Yes, I did, once.

Q. When? A. Years afterwards. Several times afterwards I examined the box to see what was in there.

Q. When? A. I think—let me see: Well, I wouldn't know just when, but I examined the box carefully to see what was in there.

Q. When? A. Well, I couldn't tell you that.

Q. Did you see Henry's stock in there, or the stock held for Henry in trust? A. Yes, I saw some stock in the name of Essie Watters held in trust for Henry McCormick.

Q. You saw that, did you? A. Yes, I saw that.

Q. Well, that must have been in what year? A. Probably anywhere from 1920 to 1922; I wouldn't be able to know that.

Q. Now, you are pretty sure that in 1920 or 1922 you saw a certificate of stock, or certificates of stock, in the name of Essie T. Watters? A. Well, I think I saw that stock in 1915, a little bit earlier.

Q. How did you come to see that? A. I think my wife had some stock in the name of Essie Watters, trustee of Henry McCormick. It isn't clear in my mind at all. I am trying to recall the incident. It isn't clear in my mind at all.

Q. Don't you know whether what you have told us is true? A. No, I couldn't swear to it.

Q. When did you see stock in the name of Essie Watters in trust for Henry McCormick? A. I couldn't tell you the year.

Q. But you did see stock there in that box in the name of Essie T. Watters? A. Yes.

Q. I will suggest to you this fact so that you can consider it, that Mrs. Mayer, whose name was Essie T. Watters, was married in June and that she changed her name? A. She was married about that time, yes.

Q. And her name was then changed. Now, I will ask you whether or not it was only a short time after Mrs. Mayer's marriage that the stock was changed from the name of Essie T. Watters to Essie T. Mayer? A. I don't remember.

Q. Don't you know that at some time that stock was changed from the name of Essie T. Watters to the name of Essie T. Mayer? A. I don't remember that.

Q. You don't recall that? A. No.

Q. How many envelopes were there in that box? A. I couldn't tell that.

Q. When you had access to the box what shares of stock did you find in the box besides this stock that was subsequently transferred to Mrs. Mayer? A. Why, there was what we called trustee's stock, and stock in the name of Elizabeth McCormick or

Elizabeth M. Tucker, and some stock standing in my name in the Highland Oil Refining Co. and American Drug Syndicate, I think it is called. I remember I had several shares of stock of my own in there.

Q. Well, you are now speaking of the Highland Oil Refining Company and stock of the American Drug Co. stock as your stock? A. Yes.

Q. Were you the holder of that stock all at one time or at different times? A. I owned all these different stocks at one time.

Q. And they were in the box at one time? A. Yes.

Q. How many shares each? A. I can't tell you.

Q. Were there ten? A. Oh, yes.

Q. Were there fifty each? A. I couldn't tell you.

Q. They didn't represent a fortune? A. Oh, no.

Q. And the rest of them were Gypsum stocks, were they? A. Yes.

Q. Standing in the name of your wife and Mrs. Mayer as trustee; that's right, isn't it? A. Yes.

Q. And then, latterly, there was stock that came into your name. Now, how did you get that stock? A. Why, by—you mean the reason I had the stock?

Q. No, no; how did it come to stand in your name? A. Because I bought it.

Q. How many shares? A. I couldn't tell you how many shares at once. It might have been 20—

Q. In the beginning, and when? A. I don't remember that.

Q. And were those transferred to you in your name? A. They were.

Q. From the name of Mrs. Tucker? A. No.

Q. Whose name? A. I bought them.

Q. From whom? A. From my broker in New York.

Q. Compton? A. Well, I bought of several brokers in New York. Yes; I bought quite some through Compton.

Q. Was there any stock that once stood in your wife's name that now stands in yours? A. I don't think there is any now.

Q. You don't think so? A. No, sir.

Q. What makes you think that? A. Because there was some stock transferred in error that was re-transferred and the dividends returned.

Q. Have you returned the dividends? A. Yes, sure.

The Court—I suppose your cross-examination will last some sime. It is now one o'clock and we will take recess until 2 o'clock.

Q. You say, as I understood you, that at last you discovered exactly what was in the box in Brooklyn; that you knew its contents? A. Yes; that is, I think I knew it in a general way.

Q. About when was that? A. Judge Lewis, I couldn't tell you. I went to the box quite often.

Q. When did you begin to go into the box quite often? A. After I had access. That was the reason I was given access to the box.

Q. So that you could go into it quite often? A. Yes.

Q. And for what purpose? A. For the safekeeping of our securities, as we would buy and sell securities, and so forth.

Q. Buy bonds? A. Yes. We were quite active on the market.

Q. And that was so in Broklyn? A. Yes.

Q. As well as in Paterson? A. Yes.

Q. And by "quite active" you mean what? A. I mean by buying and selling securities, getting out different papers and jewelry and taking them back and forth.

Q. For the purpose of speculation? A. Well, you can call it whatever you want.

Q. Well, you bought and sold in order to get a gain on the market? A. Yes.

Q. Did you ever sell stock short? A. Yes, I did; had quite an interesting experience. I sold stock in about two minutes before closing time and was in the place three minutes before opening time and they told me I had a $300 gain.

Q. Did you ever sell any Gypsum stock short? A. Yes, I did.

Q. When? A. I am sorry I can't tell you the dates.

Q. You can't answer it? A. No, I would have to guess at it.

Q. Well, how long before you left Brooklyn was it that you sold short? A. I couldn't tell you just the time.

Q. Did you ever sell it short while you lived in Ridgewood? A. I couldn't tell you.

Q. Now, you say you removed the contents of the box from Brooklyn to Paterson? A. Yes.

Q. And to the box in Brooklyn you and your wife and Mrs. Mayer had access? A. Yes.

Q. Now, did you make any memorandum of the contents of that box at the time you moved it from

Brooklyn? A. I did not. My wife was not in very good condition and two doctors said she had appendicitis, and she wanted me to rush down and get the securities and bring them up; and I even remember that I missed the train and the next train would bring me too late, after the bank would be closed, and I wired the dispatcher of the Chicago train and got them to stop and leave me off in Paterson.

Q. Now, when was your wife taken sick that you speak of? A. We moved January 8th, and I think it was around February or March that she was taken with this so-called appendicitis.

Q. Now, then, Mr. Tucker, don't you know that that box at the Dime Savings Bank was given up and closed in December, 1924? A. Yes, but it wasn't closed right away when we took the things out of it.

Q. What? A. We did not close it as soon as we removed the securities.

Q. You mean you moved the securities before December, 1924? A. I moved the securities when Mrs. Tucker was lying in the hospital.

Q. That isn't the question: Do I understand you to say that you moved the securities before December, 1924? A. Yes.

Q. Your wife was taken sick in the following March, you say; you mean she was taken sick in March, 1924? A. Was that 1924 or 1925? Now let's get these dates straight.

Q. I am straight enough. A. Well, I am trying to get it straight. Yes, it was 1924.

Q. (By the Court) When did you move to Ridgewood? A. January 8, 1924.

Q. And you moved to Ridgewood in 1924?

The Court—Three years ago.

A. No; we have lived there—it was 1924 or 1925.

Q. January, 1925. I can aid you in that if you want to take my word for it. A. Yes, January, 1925. I'm sorry I can't remember dates.

Q. (By the Court) That would be 2 years ago? A. Yes, two years ago this January; that's right.

Q. Now, then, in the preceding December you gave up the box in the Dime Savings Bank, didn't you—December, 1924? A. No, I don't think so.

Q. What? A. I don't think so, if my memory serves me correct. We weren't in Ridgewood, and we wouldn't certainly give up the box in the Dime Savings Bank if we were not in Ridgewood.

Q. I want you to take into consideration the fact that you, as you say, went to Ridgewood to live in January, 1925; I am asking you if you didn't give up the box in the Dime Savings Bank in December, 1924. A. 1925, it would be. We moved in 1925.

Q. You moved in January, 1925, you say? A. Yes.

Q. And I ask you again, didn't you give up the box in the Dime Savings Bank in December, 1924? A. No.

Q. A month before you moved? A. No, we did not, not to my knowledge.

Q. Well, when did you give it up? A. Judge Lewis, I'm sorry; I should have gone to the Dime

Savings Bank and refreshed my memory on those things. I know it was sometime after we moved that we moved the securities. It might have been December, 1925.

Q. When did you move the securities? A. My wife was in the St. John's Hospital in Paterson at the time. The date I do not know.

Q. Well, that doesn't give us any date, of course.

The Court—He says he doesn't know it.

Q. You don't know when you gave it up? A. No.

Q. Do you know whether or not you gave it up before you moved to Ridgewood? A. After we moved to Ridgewood. I think it was somewhere along in February or March, in 1925, that we moved the securities from Brooklyn to Paterson.

Q. Now, I'm not asking you when you moved the securities to Paterson; I am asking you when you gave up the box? A. I'm sorry, I can't recall the date.

Q. Did you take the securities directly from the box in Brooklyn to Paterson and deposit them in a box there? A. I did.

Q. The same day? A. The same day.

Q. Now, have you any memorandum which will show you what you took out of the box in Brooklyn and what you put into the box in Paterson? A. I have not. I was in too much of a hurry to make a train, and the only thing on my mind was the safe conduct of the bonds, or the stock and certificates and what not from one box to the other. I was assuming quite a responsibility in the transfer.

Q. Yes. Did you remove the securities the same day that you gave up the box in Brooklyn? A. I answered that. Yes, sir. No, wait a minute; pardon me; I didn't get your question.

Q. (Question read by the stenographer.) A. No. I answered that "no" before.

Q. When did you do so, after or before you gave up the box? A. Before I gave up the box I removed the securities.

Q. How long before? A. It might have been six and it might have been nine months. I know there was quite a lapse of time. The reason--

Q. Now, Mr. Tucker, I want to say to you that our information from the Dime Savings Bank is that you gave that box up December 10, 1924. A. December 10th?

Q. 1924.

Mr. Drewen—Is that a question?

A. I think your information is wrong from the Dime Savings Bank.

Q. And that you opened the box in the Second National Bank on March 13, 1925. A. That sounds correct.

Q. Now, was Henry's—we will call it—"trust stock" in the box in Brooklyn when you took the contents out and moved it to Paterson? A. Yes.

Q. What other things were in the box that you can remember? A. Stock in my wife's name, and stock in my name. I don't know if there was any jewelry there or not or if that had been taken out.

Q. Was there anything besides stock in your wife's name and stock in your name, and stock in

the trustee's name, other than possibly jewelry? A. Not that I remember. There might have been some insurance policies.

Q. And that would be all, would it? A. I don't remember of anything else.

Q. Now, were there various stocks divided into various certificates? A. Yes, it was more than one certificate.

Q. How many certificates covered the stock in the name of the trustees? A. Well, I couldn't answer that. I didn't count them; I just grabbed them. Everything that was in the box I made sure it was carefully taken out and deposited in our box.

Q. How many certificates were there there covering the stock in your wife's name? A. I couldn't tell you that—how many.

Q. How many certificates were there covering stock in your name? A. I couldn't tell you that. I made no inventory.

Q. Were they separated in any way? A. Not that I remember.

Q. Were they kept in envelopes? A. Not that I remember.

Q. Did you ever see any of those stocks in envelopes? A. There might have been, Judge Lewis, but I don't remember.

Q. When you put them in the box in Paterson were they in envelopes? A. I don't think so.

Q. How many certificates were there deposited in the box in Paterson on the trustee's side? A. I couldn't tell you the number.

Q. Did you put all that was in the Brooklyn box in the same way in the Paterson box? A. Yes.

Q. And the same way in regard to yours? A. Yes.

Q. And the same way in regard to your wife's? A. Yes.

Q. You identified them, however, so as to see that there was a difference in these stocks, didn't you? A. No, I don't think I did. The main thing to my mind was to make the transfer in safety.

Q. You had been in the habit of taking some of these certificates out, as you say, and selling them? A. Yes.

Q. And then when you would get other certificates you would put the new certificates back again, wouldn't you? A. Yes.

Q. And when you would take the certificates out, as you did as I understand it, you kept selling these shares back and forth, in Paterson and in Brooklyn, and buying other certificates during all of this period? A. Yes.

Q. But you never sold any of the stock, did you, that stood in the name of Mrs. Mayer as trustee? A. I didn't, no.

Q. Nor did anyone else do it? A. I don't know, I don't think so.

Q. But you never sold any of those stocks, even though you were selling Gypsum Company stocks short, did you? A. We had a great many Gypsum shares in the bank when I sold Gypsum stock short. I had plenty to cover all that I sold.

Q. I know, but your saving interest on the money didn't necessitate your borrowing money on the stock if you sold?

Mr. Drewen—I object.

The Court—This is cross-examination, but I think he should answer it "yes" or "no".

Q. I ask you if you wouldn't have saved money by using stock that was in the box for delivery instead of borrowing it if you sold short? A. Yes, we would, technically.

Q. Technically? Materially, wouldn't you? A. I cannot answer that question except in this way—

Q. Well, you have answered it. So far as you know, Mr. Tucker, those 350 shares of stock that stood in Mrs. Mayer's name and the stock issued as dividends upon it always remained in her name, from the day that they were issued to Mrs. Mayer until the present time; isn't that so? A. It is.

Judge Lewis—I have served notice to produce the certificates that stand in Mrs. Mayer's name.

(Witness produces papers.)

Judge Lewis—I don't want them to get out of your hands.

Q. Now, will you please describe the certificates you now produce, by their number and the number of shares contained in each certificate. A. You mean you want me to call the numbers off? I couldn't do it without the stock.

Mr. Drewen—Do it with the stock.

A. Well, there is B4206, U. S. Gypsum common, 100 shares.

Q. Let me see the date of the certificate. A. It is December 27, 1924.

Q. Give the date in each case, too. A. B-204, U. S. Gypsum Common, 100 shares, December 27, 1924. B-4205, U. S. Gypsum Common, 100 shares, December 27, 1921. B-1464, U. S. Gypsum Common, 100 shares, January 10, 1921. B-1465, U. S. Gypsum Common, 100 shares, January 10, 1921. B-1466, U. S. Gypsum Common, 100 shares, January 10, 1921. B-1463, U. S. Gypsum Common, 100 shares, January 10, 1921. B-10462, U. S. Gypsum Common, 100 shares, January 10, 1921. B-1461, U. S. Gypsum Common, 100 shares, January 10, 1921. B-1460, U. S. Gypsum Common, 100 shares. January 10, 1921. B-3259, U. S. Gypsum Common, 100 shares, December 22, 1923. B-5145, U. S. Gypsum Common, 100 shares, December 28, 1925. B-5144, U. S. Gypsum Common, 100 shares, December 28, 1925.

These are parts of 100: C-949, U. S. Gypsum Common, 50 shares, January 10, 1921. C-1366, U. S. Gypsum Common, 37 shares, March 9, 1921. C-2491, U. S. Gypsum Common, 39 shares, January 6, 1922. C-4580, U. S. Gypsum Common, 82 shares, January 2, 1923. C-7607, U. S. Gypsum Common, 81 shares, December 22, 1923. C-12396, U. S. Gypsum Common, 81 shares, December 27, 1924. C-21,-055, U. S. Gypsum Common, 20 shares, December 28, 1925. All of which is U. S. Gypsum Common.

U. S. Gypsum Preferred: A-261, U. S. Gypsum Preferred, 100 shares, Jan. 7, 1921. A-260, U. S. Gypsum Preferred, 100 shares, Jan. 7, 1921. A-259. U. S. Gypsum Preferred, 100 shares, Jan. 7, 1921. D-1152, U. S. Gypsum Preferred, 50 shares, Jan. 7, 1921.

This last one is parts of 100. That is all. That is the original shares of which these were dividends.

Q. Whose name, for the sake of the record, appears on each one of those certificates as the holder? A. Essie T. W. Mayer, as trustee of Henry W. McCormick.

Q. Is the name of the holder the same in each and every one of the certificates which you have just described? A. I will look. (Witness examines certificates.) I don't want to jump at a conclusion. They are the same.

Q. What is the date of the first certificate? A. The date of the first certificate would be preferred stock. It is January 7, 1921 (witness handing it to counsel and counsel examines it).

Q. Can you explain why it is that the date of the certificates is generally January 6, 1921, when the stock was originally issued to Mrs. Mayer in 1914? A. I cannot.

Q. Was there a substitution of certificates, for instance, that you know of? A. I know there was a change from the Jersey Company to an Illinois Company.

Q. Do you know the date of that change? A. I do not. I think that change was 1915.

Q. I call your attention to the transfers in blank on the back of the certificates which has never been signed by anyone; none of the transfers has ever been signed by anyone. A. I think that is the general practice, even if it is sent to Chicago.

Q. When stock standing in your wife's name was sold by you from time to time she was in the habit of endorsing the transfer, wasn't she, or giving you a power of attorney to do so? A. She signed a power of attorney.

Q. And gave you power to sign for her; is that

it? A. To act for her; and also the general custom —do you want that? Yes, I have several powers that she has executed for me to act for her.

Q. No, I asked you if she didn't give you a power to sign her name on the transfer of the certificates where that was necessary. A. Not on the transfer of the certificates. We never did it that way.

Q. Didn't you have to get the certificates that stood in her name? A. Yes.

Q. In those cases didn't she sign the transfer on the back? A. No, never.

Q. Didn't you, either? A. No, nobody. Wait a minute: We were instructed by our broker to send in different mail a power of attorney in one mail and the stock in blank in another mail. Now, I imagine that was so that it wouldn't get—

Q. If you did that—if she executed transfers for any stock that she was selling that required her signature affecting the person? A. You mean the same powers?

Q. Well, whatever the modus operandi was; she signed it? A. (No answer.)

Q. Now, are these certificates that you have just produced the same certificates that you took out of the Second National Bank box on the morning of your wife's death? A. They are.

Q. Are they the same certificates which you offered to return to me? A. They are.

Q. Shortly afterwards? A. They are.

Q. When you took the stock out of the box did you also take either one of these instruments marked D-1 and D-3? A. I don't think so.

Q. You don't know whether— A. You mean in July? I thought you meant out of the Brooklyn box. No, I did not.

Q. You didn't take them out of the box? A. Not out of the safe deposit.

Q. Where did you take them from? A. I didn't take them. They were in my wife's tin box, in our closet, in our wardrobe.

Q. Where? A. In our home.

Q. Both Exhibits D-1 and D-3? A. They were both in the tin box.

Q. Had you ever seen them before you saw them in the tin box there after your wife's death? A. I saw the one when the will was being drawn, and I had seen the other one a number of times.

Q. You saw them when the will was drawn, you say? A. Yes, when the will was being drawn Mrs. Tucker had D-3. That was Mrs. Mayer's copy.

Q. Where was D-1? A. In the tin box.

Q. How do you know if you hadn't seen it before the time you took it out after her death?

Mr. Drewen—There's no testimony as to that.

Judge Lewis—I will withdraw that and it may be stricken out.

Q. Now, the tin box, you say, was in the wardrobe? A. Yes, sir.

Q. On the occasion when you had it before a will was drawn? A. No, Mrs. Tucker took D-3 agreement with her to the country and we had it up there all summer in our possession.

Q. What country is that? A. Pocono Mountains. We spent the summer at Pocono Mountains, and we went from there down to Mr. Holmes to have this will drawn.

Q. And D-3, you say, she had with her all summer? A. Yes, Mrs. Mayer's copy.

Q. And you say that Mrs. Tucker had lost D-1; that is what you said first, isn't it? A. No, I didn't say so; I said she told her sister she lost it.

Q. Why did she tell her sister she had lost it? A. To get possession of D-3.

Q. Well, she wasn't telling her sister the truth, then; is that the idea? A. Well, evidently not.

Q. Why should she attempt to deceive her sister? A. In going down to the house Mrs. Tucker said, "When my family know that I am going to break this trust agreement they are going to tell me I am an awful ninny." Those are just the words she said.

Q. And, therefore, she concealed the fact from her sister; is that so? A. Yes, sir.

Q. Never told her sister that she was going to revoke the trust? A. I don't know what she told her sister, but I know what she told me.

Q. As far as you know, she deceived her sister by saying she wanted D-3 for some purpose other than the revocation of the trust, because she had lost her other one; is that right? A. I don't get you.

Q. She said she had lost D-1 and borrowed D-3 because she had lost D-1? A. She wanted to get it to revoke the trust.

Q. But what she told her sister, I am talking about. What she told her sister was, that she had lost D-1 and, therefore wanted to get D-3? A. That's right.

Q. And that is all you know about that. Were you with her? A. I was with her.

Q. At the time? A. Yes, sir.

Q. And Mrs. Mayer gave her D-3? A. Yes.

Q. Where did Mrs. Mayer have it? A. She

went upstairs. I don't know where she had it, but she went upstairs and came down with it.

Q. Now, this was in Mrs. Mayer's house in Ridgewood? A. Evidently.

Q. What? A. Yes.

Q. And just about drawing the will and you visited the house there in your wife's company? A. Yes, sir.

(At this time Mr. Drewen asks to be excused to telephone about a case and the Court declared a recess of five minutes.)

Q. The question is read as follows: And just about drawing the will and you visited the house there in your wife's company? A. May I correct that statement? She wasn't drawing the will when she asked for the document. She got the document before she left, sometime in May or June.

The Court—She executed the will on the 5th of September following.

Q. And then she asked for the document in June of 1924? A. Sometime along in May or June.

Q. Now, who was present when she asked for that document besides yourself and Mrs. Mayer? A. I couldn't tell you that. I didn't make a note of that.

Q. How did you go to Mrs. Mayer's; did you go by automobile? A. We walked.

Q. Where did you walk from? A. From 107 Fairmount Road down to Mrs. Mayer's house, I think 186 Hillcrest Road.

Q. 107 is your house? A. Yes; about two blocks.

Q. And Mrs. Mayer's house is 186 Hillcrest Road you speak of? A. Yes.

Q. And you walked from your house down there? A. Yes.

Q. How long after you moved to Ridgewood did Mrs. Mayer move there? A. Shortly afterwards. I would say about six months.

Q. And then this document was in her possession for how long a time? A. In my wife's?

Q. In your wife's possession?

The Court—From the end of June until Sept.

A. Until the time of her death.

Q. She had this in her possession at the time of her death? A. Yes.

Q. But the purpose, you say, she had in her mind when she asked for it was, so that she could use it in the drawing of her will. Is that right?

Mr. Drewen—No, that isn't right. I object to the question, because it assumes an unwarranted assumption of fact. I understand that the question is based upon the assumption that the witness has testified that his wife got this agreement for the purpose of using it in the drawing of the will. I say there is no such testimony to that effect, and I object to it upon that ground.

Judge Lewis—Well, I know it is there; that is what he testified to.

Q. Didn't you testify that you went down to Mr. Holmes' office and that you took this instrument with you to Holmes, or that your wife did, and it was taken for the purpose of consulting Holmes about the revocation of the trust by a will? A. Yes, in drawing a new will.

Q. Drawing a new will? A. She had a will when she went down to see him.

Q. The will you speak of is the will which has been probated and is in evidence? A. Yes.

Q. Which was executed, I suppose, on the date of its date? A. Yes.

Q. September, 1924? A. Yes.

The Court—Now, I don't understand that to mean that Mrs. Tucker secured possession of D-3 for the purpose of drawing the will. I don't understand that. It turns out that she did use it subsequently.

Judge Lewis—My impression of the testimony is, sir, that it was obtained at that time for that purpose, and she said, "If I let these people know I am going to revoke this trust it will create a family row"; so she told her sister that she had lost her copy and she wanted the other one; but what she was having in mind then was the revocation of the trust by the will.

The Court—That was the impression I drew, but not for the purpose of drawing a new will.

Judge Lewis—Well, that could be verified

by the record, but I think the witness so testified.

Q. (By the Court) So that there may be no misunderstanding, did Mrs. Tucker express any reason to Mrs. Mayer for wanting her copy D-3? A. I don't remember. I think she told Mrs. Mayer that she was going to draw a new will. I don't remember.

Q. Now, I understand you to say, substantially, that when you went to Mr. Holmes' office Mrs. Tucker told Holmes that she wanted to revoke the trust by her will? A. She did tell Mr. Holmes that she wanted to revoke the trust.

Q. By her will? A. Well, I don't know how. I woudn't know the legal phrase of that at all, how it would be done, but that she would do it.

Q. You took her there for that purpose? A. Yes. I had used him.

Q. She had met him through you? A. Yes. Mr. Holmes had known Mrs. Tucker ever since 1914 when we were married—known her for a good many years, and she thought a lot of Mr. Holmes, too.

Q. Now, did she say to Mr. Holmes that she wanted to so draw her will that it would revoke the trust? A. As I remember it, she gave Mr. Holmes the trust agreement with her old will and told Mr. Holmes that she wanted to revoke the trust agreement. Then we entered into a discussion of how much it would cost at that particular time to transfer this back to her name.

Q. Have you finished? A. Yes. There was a discussion as to how much it would cost to transfer this stock back to her name, and—I don't know the legal phrase that was used at the time.

Q. What legal phrase had to do with the cost of transferring it back to her name? A. Well, she wanted to convey the idea to Mr. Holmes that they were all her children and that she wanted them all to be used alike, and Mr. Holmes says, "Do you think the emergency that caused this document is passed?" and she said "Yes." I remember very distinctly he spoke very slowly and in a drawl, and he says, "Mrs. Tucker, do you feel that the emergency that called for the creation of this trust is passed?" and Mrs. Tucker says, "I do."

Q. That was before the will was started, wasn't it—while he was drafting the will or preparing for it? A. Those things were done in notes. He was making notes, and when he finished his notes we went out to dinner at the Penn-Stroud Hotel, and he told us to come back about two or three o'clock and he would have them all ready to execute; and we came back and we were in a hurry to get home to the children on the hill and the lake up there, and my wife was very much exercised to get back.

Q. Now, it was at that time that the question of the cost of having a reconveyance was had and discussed between Mrs. Tucker and Mr. Holmes? A. Yes.

Q. And it was then that Mrs. Tucker made up her mind that it was too expensive and she would do it by her will. Is that right? A. Yes.

Q. And not, as you said in your answer, when you moved the stock from Brooklyn it was with the intention of revoking the trust and executing a new one for the benefit of all the children? A. Well, I didn't draw the answer.

Q. You didn't draw the answer? A. No.

Q. Did you tell Dumont what you wanted to put in the answer? A. I told Mr. Dumont and he was sick and his assistant drew it. Mr. Dumont told me his assistant drew the answer.

Q. Well, it is your answer; you told whoever the draftsman was that Mrs. Tucker had removed the stock from Brooklyn with the idea of revoking the trust and making a new trust for the benefit of all her children, and found that the Federal tax was so high that she wouldn't do it and decided, therefore, that she would do it by her will? A. No, I couldn't say that.

Q. Well, did Mr. Holmes read the will to your wife? A. I don't remember that. I know we were in a hurry to get back to the children.

Q. Were you with her all the time there? A. Yes.

Q. Did you see somebody there by the name of Hood? A. Yes.

Q. And somebody by the name of Fox? A. Yes.

Q. Did you see them sign their names as witnesses to the will drawn by Mr. Holmes? A. I don't remember seeing them sign their names.

Q. Did you see your wife sign her name? A. I don't remember that.

Q. When you came in from the hotel, as I understood you to say you did to Mr. Holmes' office, and the will was all ready, who produced the will? A. We were having two wills drawn; my wife was having her will drawn and I was having my will drawn, both at the same time.

Q. You don't answer the question: Who produced the will? A. You mean Mrs. Tucker's will?

Q. Yes. A. Mr. Holmes.

Q. Where was it in his office? Has he got more than one room? A. Yes, he has three rooms.

Q. Was it in his own office when it was produced? A. Yes.

Q. To your wife? A. Yes.

Q. You saw that? A. Yes.

Q. Now, then, was your will produced at the same time by Mr. Holmes? A. I think Mrs. Tucker's will was completed first.

Q. And then yours? A. And then mine.

Q. Was it handed to your wife to read? A. I think it was.

Q. Did she read it? A. (Witness pauses.) I am trying to think whether she did. I think she did. I'm not positive of that at all, but I think she did.

Q. Did she say anything to Mr. Holmes before she signed the will, or at that time, concerning the manner in which that will revoked any trust? A. Well, there was a discussion just before the will was executed, as I recall it. I think in that connection is where part of the discussion came up about the tax, and Mr. Holmes said he was hazy on the Illinois tax. I don't recall it very clearly.

Q. Well, did your wife ask him how the will of hers revoked the trust? A. I don't recall that.

Q. You've been married since this suit was started again, haven't you? A. I have.

Q. And didn't you and your present wife go up to see Mr. Holmes and ask him whether Mrs. Tucker hadn't told him to put a revocation of the trust in the will? A. No, I didn't ask him.

Q. Or words to that effect? A. No, I didn't.

Q. You went up there to see Mr. Holmes and to get his testimony as to what occurred at the time

Mrs. Tucker asked him to draw the will? A. I went to see Mr. Holmes to ask him whether I should surrender the contract and these stock checks.

Q. You don't answer the question: You went up there, not only with your present wife but you took Mr. Dumont with you, didn't you? A. This was after the suit?

Q. I am talking about after the suit started, and I am asking you if you didn't go up there to find out what Mr. Holmes would have to testify to about the occurrences surrounding the execution of your wife's will? A. Yes.

Q. And you asked him, didn't you, whether Mrs. Tucker hadn't said to him: "I want you to draw a will revoking this trust," and that he answered, "She didn't say any such thing," or words to that effect? A. No, I don't remember him saying that.

Q. He refused to testify that she directed him to draw a will revoking the trust, didn't he? A. I don't remember that.

Q. Well, he refused to testify as you expected he would testify? A. I don't remember.

Q. Don't remember anything about it. But Mr. Holmes isn't here; you haven't subpoenaed him and you haven't asked him to come here as a witness? A. I asked him if he would.

Q. You haven't asked him to come here as a witness, have you? A. Not today.

Q. Or any other day? A. Yes. If he is needed we will have him.

Q. No, no; but you didn't expect to need him or to have him, did you? A. I didn't think we needed him.

Q. That is a roundabout way of answering, but

I guess that's good enough. Do you know how many dividends Mrs. Mayer received on the Gypsum stock which she held in trust? A. You mean from the time it was created?

Q. Cash dividends. A. From the time it was created?

Q. Yes. A. No.

Q. Do you know whether she received a dividend in the very same year in which she was made trustee? A. No, I don't.

Q. Do you know whether she received a cash dividend of $525. in December, 1914? A. I don't remember that.

Judge Lewis—I would like to ask Mr. Drewen—and I don't think it will affect Your Honor's judgment about the matter if I talk out aloud—I have a statement showing the whole amount of these cash dividends from the company to Mrs. Mayer, and if Mr. Drewen is willing to have that go in I will offer it.

Mr. Drewen—May I say this without prejudice to myself: There is one item there—

Judge Lewis—I have made one mistake which I have corrected.

The Court—Mr. Drewen, have you any objection to this being introduced as the defendant's proof, you, of course, not being bound by it, and that if you find any error you are at liberty to correct it?

Mr. Drewen—That is all right.

The Court—That is all you want, Judge, isn't it?

Judge Lewis—Well, I think so.

The Court—You don't intend to definitely and perpetually bind his client as to the correctness of it?

Judge Lewis—Oh, no.

The Court—You just want his consent?

Judge Lewis—I will put the question in another way, because I don't want to, if I can avoid it, take that evidence.

Q. I show you a statement purporting to have been made by the U. S. Gypsum Co. of the various transactions concerning this trust stock, and I show you a dividend made in Dec. 1914 of $525 in cash, and ask you if it is safe to assume that that was a dividend made to Mrs. Mayer.

Mr. Drewen—I object, on the ground that the question itself calls for a conclusion, and the answer would be more so, whether this witness thinks it is safe to assume it.

Judge Lewis—Well, he could answer that if he wants to. I want to get that in without putting the whole thing in.

Mr. Drewen—Well, I withdraw my objection.

The Court—I understand you have no objection to it being marked in evidence?

Mr. Drewen—Your Honor has correctly stated my position.

The Court—He makes no objection to the informality of the proof if you want to have that marked in evidence.

Judge Lewis—All right, sir; I will put it in evidence.

Mr. Drewen—Subject to correction.
Judge Lewis—Yes.
(The same is marked Exhibit D-4.)

Q. Now, Mr. Tucker, those dividends were all handed over by Mrs. Mayer to Mrs. Tucker as she received them? That is, by endorsing the checks for the dividends. Is that right? A. Yes, sir.

Q. And I now refer to all the dividends appearing on that statement Exhibit D-4. Have you seen it? A. I have not seen it.

Q. Well, look at it. A. (After looking at D-4) I don't see how I can swear to it, something I don't know anything about, Judge Lewis. I have no tabulated record of this; I have no way to tell whether all these were handed over.

Q. Well, you just testified that they were handed over. (Judge Lewis hands statement to the Court, the Court looks at it and hands it back to counsel.) When your wife died where were the certificates of stock that you have produced here? A. In the Second National Bank of Paterson, in safe deposit box.

Q. And did you take them out of the box? A. I did.

Q. That morning? A. That morning.

Q. How long after your wife's death? A. Why, Mr. Mayer and Mrs. Mayer came up to the house—

Q. The question is, how long after your wife was dead was it that you took the certificates out of the box? A. Well, it wasn't very long.

Q. Was it three hours? A. Well, I am not sure just when Mrs. Tucker died.

Q. Well, when did you think she died? Did you leave your house that morning of her death? A. I did.

Q. Do you know whether she was dead or not when you left? A. Yes.

Q. Was she? A. Presumably.

Q. And you left the house at what hour? A. I don't recall the hour.

Q. Was it before 10 o'clock?

Mr. Drewen—If Your Honor please, I don't want to be captious, but after Mrs. Tucker's death occurred what possible bearing could it have? If Your Honor thinks it has a bearing I won't say a word.

The Court—Possibly it is to affect the credibility of the witness.

Mr. Drewen—I don't see how it affects his credibility. I object, on the ground that it has nothing to do with this case, and it is immaterial.

The Court—Well, you see you drew a great deal of testimony from this witness that Judge Lewis thought was quite as incompetent. Now, among other things, he testified as to the atmosphere and feeling existing within the family, and if Judge Lewis can now impeach what he said in that respect he has a right to do it.

Mr. Drewen—By showing that something occurred afterwards?

The Court—Yes, conduct from which he will argue in trying to convince me that what he says is untrue.

Q. And it wasn't long before you had the certificates out of the box; before noon of the morning

on which your wife died; isn't that true? A. Mr. Mayer went over with me to empty the tin box, according to some instructions that Mrs. Tucker and I had had.

Q. I didn't ask you for all that; I asked you if you didn't take the certificates out of the box on the morning of the day on which your wife died? A. It is possible I took them by noon.

Q. And you took all the certificates out? A. I emptied the box.

Q. Hers as well as the trust certificates? A. Yes.

Q. And you spent the next two or three days in New York trying to get the transfer of those certificates? A. No, it didn't take that long.

Q. But you did spend some little time in getting them transferred? A. No, it didn't take me very long to get the transfer.

Q. For that purpose you used blank certificates and your powers of attorney which your wife had given you? A. I had some signed, too. I know I asked Mrs. Mayer to sign.

Q. Don't you want to answer the question? A. Why, some of the stock was endorsed.

Q. You didn't tell your broker that your wife was dead at the time you transferred it? A. I did not.

Q. You didn't tell people in the bank that your wife was dead when you took the certificates out of the bank? A. Yes, I told Mr. Seddon.

Q. When? A. Before I went down to take the things out of the box, and Mr. Mayer was standing alongside of me when I told him.

Q. You mean in the bank? A. In the bank; yes, sir.

Q. You transferred these into your own name, didn't you—those that you could transfer? A. I did.

Q. That belonged to your wife? A. I did.

Q. And you drew the dividends out, didn't you? A. I did.

Q. That accrued subsequently? A. I did.

Q. Your wife died July 13, 1926; is that right? A. Right.

Q. Now, when did you re-marry?

Mr. Drewen—I make the same objection.
The Court—It may be noted.

Q. When did you re-marry? A. November 17th.

Q. 1926? A. 1926.

Judge Lewis—I think that is all, sir.

Re-direct Examination by Mr. Drewen:

Q. Mr. Tucker, when you came down from the Water Gap to undertake these successive interests that Judge Lewis was asking you about this morning, why was that done—at whose suggestion? A. We were living in a summer resort—

Q. No, who suggested that you come down from the place of your business? A. Mrs. Tucker. She says, "I don't wish to raise the family in the environment of a hotel."

Q. How many years had you been engaged in the summer hotel business? A. I was raised in

that line; never knew anything else when I left, and I didn't want to leave.

Q. That was your life's work? A. Yes.

Q. Why did you leave? A. My wife insisted, and we talked it over and we finally concluded it was for the best interest of the children that we leave.

Q. Having left that field of activity where you had spent your whole life, as you say, did you have trouble in assembling yourself in something else? A. Naturally, it would be hard to get into some other line and make connections.

Q. Do you know what this fund of capital stock of the United States Gypsum Company amounted to after you married Mrs. Tucker? Do you know the capital stock? A. I do.

Q. What I want to know is, can you tell the court what increase, if there was an increase, there was in the fund of stock in the Gypsum company, from the time of your marriage to Mrs. Tucker up to the time of her death? A. I can only tell you in generalities. I know there was some back dividends amounting, I think, to about 43 per cent. that was paid on the preferred stock in common stock. There is where the most of it came; but the dates I don't recall, and I don't recall how many stock dividends. I think one of 5 per cent, the next of 10 per cent., the next 30 per cent., and the next year 15 per cent., and so on.

Q. Well, in the increase of the value of that stock holding that Mrs. Tucker had, or you both had, did the fact that you dealt in this stock, as you have described, contribute in any way to that increase? A. Yes, indeed. I even went to the Dime Savings Bank and had a mortgage put on our

home to buy some of this stock when it was at a very low figure, say, around $40 a share, and it went up to $210. That wasn't a bad deal, was it?

Q. Now, we come to this question that has been gone into as to the powers of attorney: Did Mrs. Tucker at that time leave the matter of dealing with this stock to you? A. Entirely.

Q. Are you the one that had the negotiations with the brokers in connection with this stock? A. Yes.

Q. How did you deal with the stock, in the name of Mrs. Tucker, or simply did you always have to have recourse to her to have it transferred? A. As I explained to the court, we always sent the stock in one envelope and the powers of attorney in another envelope, so that they would never be together if the mail was lost.

Q. (By the Court) That isn't what your lawyer asked: Did you always have to resort to Mrs. Tucker whenever you wanted to transfer shares registered in her name? A. Well, she always supplied me with powers.

Q. Then she did not? A. I always spoke to her about any transfer.

Q. I know, but did you have to go to her in the case of a change? A. No, I did not have to. I had powers to do that.

Q. Who executed those powers? A. I did.

Q. Who signed them—who executed them? A. Mrs. Tucker.

Q. I show you some 15 or 25 of them and ask

you if they are certificates executed by Mrs. Tucker? A. They are.

Q. Were they executed in connection with the business and the transactions that you have just described? A. They were.

Q. Dealing with the stock standing in the name of Mrs. Tucker? A. Yes.

Q. And some of these, I notice, are signed by the name of Garrett R. Tucker—half of them, I think, or nearly half—and the remainder of them are signed in the name of Mrs. Elizabeth McCormick Tucker; how did that come to be; did you sign some of them yourself in connection with this stock? A. Yes, I did. If she wanted to execute my stock I thought she might.

Q. In what way would Mrs. Tucker want to execute your stock? A. My health hadn't been so awfully good and it isn't today, and Mrs. Tucker and I went to an attorney and were advised—

Q. Well, never mind the details; but these powers were signed by you in blank? A. Yes.

Q. To permit Mrs. Tucker in any exigency to do the same thing with the stock in your name that you could do with stock in her name? A. There was a perfect understanding.

Q. Is that right? A. Yes, sir; yes.

Q. Now, when Mrs. Tucker died did you or did you not understand that your right to act under the powers that had been executed by her during her lifetime survived her death? A. Why, yes; we were so instructed what to do by her attorneys—by Mrs. Tucker's attorney that settled her estate.

Q. You mean the lawyer that settled her estate that came from Mr. McCormick? A. Yes; the

lawyer told me what to do—Mr. Julien, of Wingate and Cullen.

Q. Where are they located? A. In Brooklyn.

Q. Now, did the instructions of the attorney, Mr. Julien, have anything to do with your going to the Second National Bank and getting the certificates out after the death of Mrs. Tucker? A. Well, he said to us, "If anything happens to either one of you—if your husband passes away—don't put on a long face; pin a rose on you, and empty the box before it is closed on you." Those are the very words he used, and I followed his instructions.

Q. Now, when you went to the Second National Bank you told Mr. Seddon that Mrs. Tucker had expired? A. Yes.

Q. Who is he? A. Mr. Seddon is the bank's attorney.

Q. He is connected with the bank? A. He is connected with the bank, and I understand he is in the office upstairs with Judge Lewis.

Q. And who was with you at the time you had this conversation with Mr. Seddon? A. Mr. Mayer, Mrs. Mayer's husband.

Q. And is he the gentleman whose signature appears here on one of these powers as the witness to the signature of Mrs. Elizabeth McCormick Tucker? A. Mr. Mayer signed that after she had passed away to do this very thing.

Q. Did he sign as a witness to Mrs. Tucker's signature? A. Yes, he did.

Mr. Drewen—I offer these blanks in evidence.

(Marked as one exhibit C-1.)

Q. Now, you have testified here, in answer to a question on cross-examination, that the stock certificates, or some stock certificates you offered to return to Judge Lewis; did you so testify? A. I did.

Q. When was such an offer made by you? A. I think the day was Saturday, and I think it was about four weeks ago. I don't recall the date.

Q. Where was that conversation or transaction had? A. In Judge Lewis's office.

Q. And who was present besides yourself? A. Mrs. Mayer, Judge Lewis, and one of Mr. Dumont's assistants, a lawyer.

Q. What did you go to Judge Lewis's office for with Mrs. Mayer? A. Why, we went to have a settlement—to settle.

Q. First, let me ask you: Before you went to Judge Lewis's office did you have any conversation with the complainant, Mrs. Mayer? A. I did.

Q. And did you and she arrive what you regarded as an agreement as to the disposition of this trust? A. We did.

Q. What was it that you understood you agreed to do about that—you and she? A. That a trust company was to handle the trust funds and not Mrs. Mayer, to get away from any influence that might be brought to bear on the boys.

Q. Now, when you went to Judge Lewis's office was any proposal made to you that was contrary to your understanding of what had been agreed upon between you and Mrs. Mayer? A. Oh my, yes. They wanted me to sign the rights and title of all my children away and I don't know what else. It was altogether a different thing.

Q. Was there anything else done or transacted between you and Mrs. Mayer after you really understood what they wanted you to do? A. No, I was through.

Q. Now, is that the transaction that you have in mind when you say that Judge Lewis asked you about the stock certificates and you offered to return them to him? A. Yes.

Q. Is that the extent of the transaction had before Judge Lewis concerning this stock? A. Yes.

Q. What else was usually kept in this tin box in which the two trust agreements were placed by Mrs. Tucker? A. Why, estate papers, settling up Mr. McCormick's estate.

Q. Anything else? A. And personal things relating to Mr. McCormick's estate.

Q. Did you ever actually talk with the man who told you he was a man in Mr. Dumont's office? A. No, I did not.

Q. Now, we come to Mr. Holmes. Do you remember when you went up to see Mr. Holmes whether I was with you? A. You were.

Q. Did I talk with Mr. Holmes as to what transpired at the time Mrs. Tucker wanted him to draw this will? A. Yes.

Q. For the purpose of revoking the trust agreement? A. You did.

Q. Do you remember whether or not I asked Mr. Holmes to come down to testify at this hearing? A. You did.

Q. Do you recall whether Mr. Holmes told us his reason for not wanting to come down here; that it was something connected with a country lawyer? A. He talked something about a lawyer up in the Styx.

Q. Do you remember what he said? A. I'm sorry, I don't.

Q. Do you remember (of course, I don't want to lead this witness, and I don't want to testify myself)—

The Court—Well, let us hear your question. I have very great power over leading questions.

Mr. Drewen—I will be as chaste as I can.

Q. Mr. Tucker, do you remember whether or not Mr. Holmes, when he was asked concerning the language of the will carrying out the express intention of Mrs. Tucker to revoke the trust—do you remember whether or not he said anything about a bungling country lawyer? A. I remember that very distinctly.

Q. What did he say?

The Court—Now Mr. Drewen wants you to tell us.

Q. Tell what you recall, if you recall it.

The Court—As nearly as you can just what was said.

A. Well, I remember Mr. Holmes referring to himself as a country lawyer, living up in the Styx, and I think he said, "I am afraid I have bungled all this thing."

The Court—He was certainly very frank about it.

Mr. Drewen—So frank that he didn't like to come here and testify.

The Court—Is that all you want in answer to your question?

Mr. Drewen—Yes. I think that is all.

Recross Examination by Judge Lewis:

Q. Was there any trouble with the will that he drew? He drew a good-looking will like that (showing witness paper)?

Mr. Drewen—I object, on the ground that it calls for a conclusion.

The Court—This is cross-examination of what you brought out.

Q. You say that when you came to the office of William I. Lewis, Mrs. Mayer was there, and someone from Mr. Dumont's office; was there anyone else in Mr. Lewis's office? A. Yes, a lawyer by the name of Rosenkrans.

Q. William Rosenkrans? A. I don't know his name. I had seen him around the office two or three times.

Q. You offered to return the stock, did you not? A. I did until after I got there.

Q. Did you offer to return the stock? A. I did, but not after I read—

Q. I want a direct answer to my question.

Mr. Drewen—That calls for an explanation.

The Court—No, it calls for a yes-or-no an-

swer, and any explanation can be made on redirect.

A. Yes.

Q. And I declined to take the stock unless it was with the understanding that a final decree should be entered in this case; isn't that so? A. Well, that wouldn't mean anything to me, Judge, because I don't know what that means.

Q. Didn't Mr. Rosenkrans, when I said to him that I wanted some settlement incorporated in the final decree in the cause, state that he wasn't authorized to do anything except to come there and give up the stock and that he wouldn't come to any terms about a decree? A. Well, he hadn't read the paper.

Q. Didn't I hand a paper to him? A. You did.

Q. To Mr. Rosenkrans? A. Yes, sir.

Q. What paper was it? A. Some legal paper; I don't know what paper it was; I couldn't identify it if I saw it.

Q. Didn't I say that I would draft a decree and send it to Mr. Dumont's office for his acquiescence? A. Well, you might have after.

Q. No, then and there. A. As I recall it, you gave him a document to read.

Q. I gave? A. As I recall it, and he said "This is not according to the instructions I had."

Q. Did Mr. Dumont after that show you a paper of which that is a copy, marked "Final Decree"? A. I don't think he did, no.

Q. Now, you say that I showed the paper to Mr. William Rosenkrans? A. I think you did.

Q. And because of the contents of that paper you

refused to give up the stock; is that right? A. Yes.

Q. Now, you say what I wanted, or what we wanted, was to have you sign away all the rights of yourself and your children and everything in that?

Mr. Drewen—He didn't say that.

Q. Well, words to that effect.

The Court—That is what I understood him to say. What did you understand?

Mr. Drewen—That he was to sign away the rights of his own children in this trust stock.

A. That is what I meant.

The Court—While we are on this subject, Mr. Tucker's testimony on that particular phase of the case is very unsatisfactory, because I don't understand it, and it is necessary that I do understand it if I am going to decide this case. Mr. Tucker, let me ask you this:

Examination by the Court:

Q. Just what was it that you say was demanded of you when you went to Judge Lewis's office to consummate the settlement, that caused you to refuse to go through with it? A. Well, I tried to get in touch with Mr. Dumont a number of times, and it would be sometimes three days before I could get hold of him. He wasn't well. And I made an appointment to meet him at his office and he prom-

ised me he would be there, but when I got there he was not there. Mr. Rosenkrans was there, and it was at that particular time that Mr. Rosenkrans told me that he drew the answer and he knew all about the case, and so forth and so on, and that's the first that I knew that Mr. Dumont was not handling the case; it was being handled by Mr. Rosenkrans, and he called up Judge Lewis and made an appointment, and we went over there with the understanding that there was a settlement in mind with Mrs. Mayer and me at that time; and that settlement was, that we had been very unhappy during the Christmas season, the children home, and so forth, and Mrs. Watters wrote me a very strong letter.

Q. Mrs. who? A. Mrs. Watters, my mother-in-law, wrote a very strong letter, to the effect that I had spoiled her Christmas and the Christmas of the whole family was destroyed, and made a very strong appeal that this should be settled. Another reason was, that Mr. Adams, a brother-in-law, told me that the family was very anxious to settle. And so, with their strong appeal, and the fact that I hadn't had a happy Christmas at all with the babies at home and my wife deceased, I got in my car one morning, and I called Mr. Adams up before I went down and I says, "Charley, will you be home a few minutes? I am coming down to sign the Locarno." And he said he would; and I said, "From what you tell me it is altogether a different idea from what I had in mind that they want to do." And I went down and I met Mrs. Adams and Mrs. Watters, and we talked things over, and we thought we had come to a settlement. I have always felt that Mrs. Watters

was the one that was handling the whole thing for her daughter.

Then Mrs. Watters, and Mrs. Adams, and Mr. Adams got in my car, and we all drove up to Mrs. Mayer's, and I put the matter up to her and after we talked the thing over very plainly as to what would be a very happy solution we felt that we could be very happy together. That has always been my idea, providing they would put this in a trust foundation and have the trustee a company that was competent to handle it, because Mrs. Mayer, I felt, had not had the experience in handling sums of this size and kind. That was first and foremost in my mind, for two reasons: One reason was, to get rid of any influence that they might exercise over this boy—

Q. I understand all this and have understood the salient features of it right along; but I don't understand what you were asked to submit to when you reached Judge Lewis's office that caused you to refuse to go through with it. A. Well, Judge Lewis also said—Oh, I also told Mrs. Mayer, or Mrs. Mayer told me that she didn't want any of her sister's money, and I felt that that was the reason she was doing this, because she wasn't mentioned in her sister's will. And she said, "I don't want one cent of my sister's money"; and I said, "then we can begin to do business." And the first thing, Judge Lewis said that Mrs. Mayer was entitled to certain commissions, and it ended up by his saying, "Then this will have to be decided in the courts, or in the Court of Chancery once and for all," and, as I got it, that my children would have no right or title to this at any later date. In other words, I should break the

wife's will by signing the rights and titles of the children away to this particular trust fund that she willed to the children.

Q. That was the principal thing. A. That was the meat of the matter, and I objected to it.

By Judge Lewis:

Q. Now, didn't I say to Mr. Rosenkrans that before the matter could be settled I would want to have a decree entered in this suit—a final decree, disposing of it? A. I think you did.

Q. And didn't I say that why I wanted a decree was, that this trust was in full force and effect? A. That you said it was in full force and effect?

Q. Didn't I say that this trust was in full force and effect? Didn't I say that? A. I don't remember it.

Q. And didn't I say that I wanted it decreed that Mrs. Mayer, as trustee under said trust agreement, is entitled to have the certificates of stock of the Gypsum Company, mentioned in the bill of complaint— A. Yes, but how could I say the instrument was in effect?

Q. I say, didn't I say before I would take a certificate that I must have a decree of that kind, or consent to a decree of that kind? A. Well, I don't recall the language that was used.

Q. That I should have a decree requiring you to pass them over to Mrs. Mayer; didn't I say that? A. I don't remember that.

Q. And that I should have an allowance for counsel fees to myself out of the trust fund? A. I remember that very distinctly (witness and counsel smiling).

Q. And that there should be an allowance out of it to the counsel on the other side. Didn't I say that? A. I don't remember that.

Q. And didn't Mr. Dumont show you a decree which I then drafted, and afterwards sent to him for approval? A. I saw some kind of a complete surrender, whatever that was.

Q. You saw what? A. I saw some kind of a complete surrender, whatever that was.

Q. Isn't that the decree, that I showed you a copy of a little while ago? A. It might be, but it doesn't look like it to me.

Judge Lewis—I hate to go into this collateral matter; it has nothing to do with the merits of the case, as I look at it; but it is such an absurd thing.

Q. Mr. Dumont showed you a letter which I wrote to him? A. (continuing) I didn't see Mr. Dumont; he was sick.

Q. No, afterwards. A. The only time I saw Mr. Dumont—

Q. Didn't he show you that letter afterwards? A. No, he did not.

Q. This letter reads: My Dear Mr. Dumont—I am enclosing draft I have prepared for the final decree in the above-stated cause, dated February 21st. A. No.

Q. And underneath, written in Mr. Dumont's handwriting, and signed by him: "Duly received with thanks, Wayne Dumont." Didn't he show you that? A. No.

Q. And didn't he show you the decree (exhibit-

ing paper to witness). This was with it. A. I didn't see Mr. Dumont from the time I was in the office with Mr. Rosenkrans until the time I went to his home and told him I would like to get somebody else.

Q. To bring the matter to a close shortly: You came to my office with Mr. Rosenkrans that morning, ready to deliver up those certificates of stock without one word, or without any sort of an agreement to be signed about it; isn't that so? A. No; I had very different things in my mind.

Q. But you didn't disclose them. A. Well, we talked them all over.

Q. You didn't have anything in writing, did you? A. No; we talked them all over.

Q. You handed these certificates of stock to me, on the table? A. No, I put them on the table and showed you that I had them right there.

Q. Now, didn't you hand them over so that I could take them? Didn't you come there with the idea that you were going to give up those certificates of stock and drop the matter? A. Oh, no; I had a very definite idea in my mind.

Q. What was your definite idea? A. I told you. It was to get rid of the influence over that boy.

Q. Well, I won't pursue it any further; that is all.

The Court—Does that close the case?

Mr. Drewen—Except possibly I want to say this: Your Honor may want Mr. Holmes here. If Your Honor does want him here I am perfectly willing to ask him to come, or to take his testimony wherever he is. It is

Stroudsburg, Penn. He is a nice, quiet, slow-speaking man.

The Court—I don't know whether I ought to indicate whether or not I want certain proof submitted. I have been wondering, would there be any privilege?

Mr. Drewen—I don't think so. I understand the rule as to privilege is, that the client is the only one who can invoke it.

The Court—Well, if any of the testimony that has been adduced today is of any materiality, is competent and of importance, it seems to me that Mr. Holmes' testimony would be very important.

Mr. Drewen—It would seem so.

The Court—Is he the only witness?

Mr. Drewen—He is the only other witness I can think of now.

The Court—How much time would be required to put in any other proof that you may have?

Judge Lewis—I am willing to let this case go without any further proof, just as it stands.

The Court—Was the examination and cross-examination of Mr. Tucker finished?

Judge Lewis—Mr. Drewen said that he had closed his case, except possibly he would bring down Mr. Holmes.

Mr. Drewen—I want to state to the Court my recollection of that. I can recall the closing scene by reason of what Your Honor said to me, which I will read from the record: "The Court—Does that close the case? and

I answered: Except possibly I want to say this: Your Honor may want Mr. Holmes here. If Your Honor does want him here I am perfectly willing to ask him to come, or to take his testimony wherever he is * * "

Now, in regard to Mr. Holmes, we did not know until Tuesday of this week that Mr. Holmes could not be here today. Mr. Holmes, of course, is willing to come here. We can't compel him to come here, but he will come We think his testimony is important and that he should appear before Your Honor. He says that he can come any day next week, or any other time, of course, that Your Honor may fix, as long as he has notice in advance sufficient to allow him to make other arrangements so that his coming here will not conflict with his other appointments. Judge Lewis may wish to close his case before we proceed, and I give Your Honor the exact situation so far as Mr. Holmes is concerned and the closing of our case.

The Court—I don't understand that there is any application other than the application to hear the testimony of Mr. Holmes, and if Judge Lewis is willing to proceed with that reservation he may do so.

Judge Lewis—If Your Honor will allow me a moment to consider it.

The Court—Certainly.

Judge Lewis—I think we had better go on, sir, with the understanding that Mr. Holmes is to be produced within a very limited period and we will be at liberty then to put in anything that we desire in response to what he said.

The Court—You may be assured that you will have that opportunity.

Judge Lewis—I would like to ask Mr. Tucker a few more questions.

GARRETT R. TUCKER, recalled for further cross examination, testified as follows:

Cross Examination by Judge Lewis (continued):

Q. Mr. Tucker, have you yet filed an inventory of the estate your late wife left and disposed of by her will annexed to the answer in this cause? A. The inventory has been taken, Judge Lewis, and it is in the hands of Mr. Dumont, I think. We have a copy of that inventory. That inventory was taken, I think, in October or November last. We have a copy of it.

Q. Mr. Tucker, let me call your attention to the fact that you are in the habit of not responding to the question. I asked you if you had filed an inventory in the surrogate's office yet of that estate. A. Judge Lewis, I do not know anything about the proceedings that have been taken; I don't know whether it is filed or not.

Q. That is not responsive. I want an answer to my question.

The Court—The last part of it, I think, is responsive; he says "I do not know." The question called for one of three answers, "yes," or "no," or "I don't know."

A. I don't know.

Q. You don't know whether it is filed or not? A. No.

Q. Have you sworn to any inventory? A. I have.

Q. Of your wife's estate? A. I have.

Q. Your late wife's estate? A. I have.

Q. What was the amount of the inventory? A. I don't remember.

Q. Was it $100,000 in value? A. I don't remember, Judge Lewis.

Q. Was it $200,000? A. I don't remember.

Q. Was it $300,000? A. I don't remember.

Q. Was it $400,000? A. I don't remember.

Q. Was it $500,000? A. I don't remember, Judge Lewis.

Q. Have you no idea? A. I have not at this time, no. I did not refresh my mind on it.

Q. Do you know what the assets of your late wife's estate consisted of? A. I wouldn't know without looking over my books.

Q. Have you your books with you? A. I have not. I don't mean books; I haven't any books. I mean the accounts which I have—memorandums, we may call them.

Q. It depends purely on memoranda, does it? You have no books and it depends wholly on memoranda? A. It does.

Q. Did she not have 275 shares of preferred stock of the Gypsum Company? A. Judge Lewis, I couldn't tell you the exact amount. I would only have to guess at it.

Q. Didn't you, in the week of her death, get those 275 shares transferred into your name? A. I

wouldn't know the amount; it has been a long time.

Q. Did she not have 2413 shares of the common stock of that company? A. I know she had common and preferred; the amounts I wouldn't know.

Q. Couldn't you tell within a thousand, or two thousand, or three thousand shares? A. I imagine around 2400 shares would be about right; I couldn't tell you the exact number.

Q. You had those shares transferred into your name also of the Gypsum Co. within a week after her death? A. Transferred in my name?

Q. Yes. A. I did.

Q. And you are named personally as executor of the will?

Mr. Drewen—If Your Honor please, that was all gone into on cross-examination before; it was explained by the witness. I don't think it would make any difference, anyway. I don't know whether he is doing this for the purpose of refreshing his memory, but it has all been brought out.

Judge Lewis—No, it has not, I am sorry to say.

The Court—I don't recall whether this exact line has.

Q. (Question read by stenographer.) A. I am.

Q. And you also drew the dividends on that stock, did you not? A. The dividends were mailed to me.

Q. Well, you cashed the checks, didn't you? A. I did.

Q. And you were finally compelled to put back

those shares in the name of your wife; isn't that so? A. I did.

Q. And they so stand today—that is, your late wife—is that so? A. Yes.

Q. And they so stand today, do they not? A. I couldn't tell you.

Q. Why can't you tell? A. I don't know whose name they are in today; I haven't got possession of them.

Q. Where are they? A. They are in Chicago.

Q. The certificates? A. Yes.

Q. You sent the certificates that were made out in your name back to Chicago to be transferred by the company into your late wife's name again, did you not? A. To be re-transferred, as they were transferred in error.

Q. Whose error? A. My error.

Q. What error was that? A. I was advised by an attorney—I want to get this straight—I was advised by an attorney in Brooklyn to keep our securities in two different boxes—safe-deposit boxes—and that in case anything should happen to myself or my wife, my wife would have the executed powers of attorney, if that is what they are called, of my stock and I have the powers of her stock, and, to avoid any red-tape, that I should go down to the safe-deposit box and empty the box, having the powers of attorney of this stock, as my own and have it transferred. This was also talked over by my wife and myself in Mr. Seddon's presence, and when I went to the bank I went with Mr. Mayer, Mrs. Mayer's husband, and told Mr. Seddon that the wife had passed away, and I repeated the story to him that the wife and I had told him before—I don't know if

I have it straight—the explanation of how we should do it, because it has been about three years since we had this advice in Brooklyn. But, however, I explained it to Mr. Seddon, that Mrs. Tucker had passed away and now I came over with Mr. Mayer to get the securities and close the box; and then I went down and emptied the box; and after I had the box emptied I told Mr. Bond—is that the name of the man who had charge of the securities vault?

Q. Yes, he is right here. A. I told Mr. Bond that Mrs. Tucker had passed away this morning. He says, "Well, I don't think, then, you should take these securities."

Mr. Drewen—May I ask at this time what the question is?

Judge Lewis—Yes, I asked him what the error was that he made the transfer.

The Court—(Addressing the witness) Now, you told Mr. Bond that your wife had died, and he said he didn't know whether it was proper for you to take the contents of the box.

A. —and he said, or asked me, if I had seen Mr. Seddon, and I told him I had, and I think he went up to see Mr. Seddon while Mr. Mayer and I waited downstairs, and I don't recall what he said when he came back, but I do know that we had a little conversation over the matter, and I said, in a joking way, "Well, possession is nine points of the law." There were no objections raised that I shouldn't take it, and with the advice I had I didn't know any different. I was advised to take it, and Mr. Seddon

didn't seem to raise any objections, and Mr. Mayer knew what I went over for. I didn't break in the bank and take it, and it was all open and aboveboard and they knew exactly what I was doing and there were no objections raised at all at the time

Q. Now, will you please tell me— A. (Interrupting) If there was an error that is what I would call the error.

Q. What was the error that caused you to make this transfer of stock from your wife's name into yours? A. I don't think I could answer your question, Judge Lewis.

Q. You can't answer that? A. No, I do not know the technique.

Q. Well, I will ask you why you transferred that back to your wife's name afterwards. A. Well, I transferred that back because Mr. Dumont told me that I had committed an error—

Q. An error? A. —and I should transfer that back. So I did, together with the dividends and all that went with them.

Q. Now, what was that error that you had committed? A. I really don't know.

Q. What was it that the lawyer in Brooklyn was helping you to avoid? A. That I don't know.

Q. How did he tell you what red-tape could be avoided by that? A. He said very distinctly, "Now, Mrs. Tucker, if anything happens to your husband, don't go down with a long face; pin a rose on you and go down with a smile and take the securities out, and it will save you a lot of trouble."

Q. Why should she pin a rose on and go with a smile? A. Well, I don't know; that was his advice.

Q. Might I suggest, that such appearance would destroy any thought in the bank that there had been a death in the family?

Mr. Drewen—Is that a question?

Judge Lewis—Yes.

Mr. Drewen—Then I object to it, in that form.

Q. I ask you if that was your thought? A. Well, I didn't go over to the bank with a rose pinned on, and I explained to the gentleman that the wife had passed away before I took the securities.

Q. That is all right; now so much for those securities. What were they worth, about, the 275 shares of preferred? A. Well, I imagine they were worth a little over par.

Q. And have they increased in value since? A. No, they have decreased.

Q. What was the common worth? A. Well, now, wait a minute. I imagine the preferred is about—it hasn't changed very much. It might have changed two or three dollars a share, but not very much. The decrease has been in the common.

Q. Decrease in value or in the market price? A. Well, I would say in value.

Q. What was the common stock selling for when you went there? A. Well, that is in the inventory, and runs in my mind around 156 or '65, or something like that.

Q. What has it been selling for recently? A. Well, it sold yesterday for 98. Now, of course, added on that is 35 per cent. dividend.

Q. I wish you would answer the questions and nothing more.

Mr. Drewen—He asks the witness a question and the witness proceeds to tell him.

Q. What was it worth? I didn't want the dividends yet. What was it selling for last month, the common stock? A. Why, it has been selling—last month I think it was anywhere from 101 or 102.

Q. What was it selling for last March, Mr. Tucker?

Mr. Drewen—Might I object as immaterial and irrelevant.

A. I think about the same price.

The Court—I confess I don't see the materiality of it, but this is cross-examination.

Judge Lewis—I promise to connect it.

The Court—All right.

Q. What was it worth last March? A. Well, it is pretty hard for me; I don't recall from day to day, unless I would refresh my mind.

Q. What was it worth last February? A. I don't know; that's too far back.

Q. Last January? A. I do remember January, right after the stock dividends were declared. I anticipated the stock dividends and sold around $35 off.

Q. That is to say, the stock that was selling for about 156 when your wife died you say went down?

A. Yes, there is a difference in July and January, six months.

Q. Why don't you answer?

Mr. Drewen—May I ask that the witness be permitted to answer?

Judge Lewis—Your Honor, I asked a simple question.

The Court—Of course, that question calls for a yes-or-no answer. Cross-examining counsel is entitled to a categorical answer. The answer was "yes," and then he undertook to explain some difference in the price between July and January. That is a matter he may explain on redirect examination.

Judge Lewis—I want him to explain now, sir, but I want to get it in my way.

Q. The price of 156 for stock your wife held at the time of her death persisted until about January, didn't it, for the common? A. No.

Q. How much did it fall? A. I don't remember, Judge Lewis, but I know it dropped.

Q. They had declared a stock dividend, had they not, payable on that stock in January, 1927; isn't that so? A. Yes.

Q. And that was the cause of the depreciation in the market value of the stock, wasn't it? A. I imagine so.

Q. And it came down quite sharply until it got about the same market price per share as was asked at the time the stock dividend was issued? A. I don't know whether I get your question.

Q. (Question read by the stenographer.) A. Well, it dropped lower than the stock dividend.

Q. Has the common stock at any time since January sold for less than 95? A. I don't know that it has.

Q. Has it sold at any time for more than $100 a share since last January? A. I think it has.

Q. How much more? A. I couldn't tell you. I have seen it quoted 104, but how much more I don't know.

Q. Now, were there any other— A. (Interrupting) May I make an amendment to that: I think right after it went ex-dividend for a very short period. I think it has been quoted on the market at 110, but I never saw it selling for that. I think there is a quotation at 110.

Q. It would be selling ex-dividend in December of 1926, wouldn't it? A. Ex-dividend cash, but not stock. Get that?

Q. I am willing to get that. A. Ex-dividend cash but not stock.

Q. Then you would say that those assets of your wife's estate were worth about the figure that you have given that they sold in the market for at the time of her death; is that right? A. Well, I don't know whether you could market a large amount at the same price.

Q. You think it might be worth less than the market price because of the larger amount of stock; is that the idea? A. I don't know, I say, how that might affect it.

Q. Well, somewhere about that figure that you give as the market price should be applied to the

total number of shares belonging to her at the time of her death? A. I think that would be fair.

Q. And do you know how much that would amount to? A. No, not unless I would figure it up.

Q. You have never figured that? A. Well, Judge Lewis, it has changed with the different stock dividends and cash dividends that have been paid. The amount has been changed about every quarter.

Q. Now, the variance of value of the common stock has not been below the figures you are speaking of in your testimony? A. Yes. The lowest that I have seen from, maybe 165 or whatever it was at the wife's death it has decreased. I think it has been down as low as 94.

Q. And is that largely by reason of the stock dividend not being declared and paid in March of 1927? A. No, Judge Lewis, it is not.

Q. What was the other cause? A. Well, they have had a great deal of competition lately in Texas.

Q. I don't want to go into that, if that is so; but the natural result of the stock dividend would be to drop the value of the shares when a dividend was made? A. Of course, in the main it would, but when you look over the history and see that the other 35 per cent. dividend was paid, it jumped higher than it was when the dividend was declared.

Q. Well, I think you have told us all I want on that. Now, what other assets did your late wife have when she died?

Mr. Drewen—May I object to this as incompetent, irrelevant and immaterial, and urge upon Your Honor that I think it is immaterial because this issue involves only the

question as to the trusteeship of the fund, on the basis of their allegation, or, as they allege in their complaint, as to the stock of this Gypsum Company? Now, if Judge Lewis's question is going to take in all the assets of the deceased Mrs. Tucker I say it has no bearing on this issue.

Judge Lewis—If Your Honor please, it is perfectly proper cross-examination to affect the credibility of the witness; and I propose, sir, and the matter can be stricken out if I don't do it—I propose to connect this with the proofs that will be of the greatest importance upon the issue in this very matter.

The Court—On that condition I will overrule the objection.

Q. Now, what other assets did your wife have in her estate at the time of her death than the shares of stock that we are talking about? A. Why, Judge Lewis, I made a sworn statement in the inventory and I couldn't recall it.

Q. Mr. Tucker, you mean to tell us here that you don't know whether your wife had anything more than this stock in her estate? A. That was the major portion of her estate, yes.

Q. It was? A. Yes, sir.

Q. What was there besides this stock? A. Well, there were a few shares of subsidiary companies of the Gypsum Company, Culxver and Port Clinton Railway and how many I don't know; and Erie and Michigan Navigation, how many I don't know. The men that took the inventory had them in their possession and we counted them.

Q. Would the whole value of the balance of the assets of her estate amount to $20,000? A. I don't think it would.

Q. You don't think it would? A. No.

Q. That is all.

Redirect Examination by Mr. Drewen:

Q. Mr. Tucker, this Mr. Mayer whom you have been speaking of is related to the complainant in this case how? A. Mr. Mayer is the husband of Mrs. Mayer.

Q. The complainant? A. The complainant.

Q. Now, these stocks about which you have been questioned this morning, when they were transferred to your name after the death of your late wife, and the dividends on stock which were paid and returned—is that stock which was at any time in this so-called trust fund? A. No.

Judge Lewis—If Your Honor please, I now desire to offer in evidence a copy of a petition filed by the defendant Garrett R. Tucker in the Bergen Co. Orphans' Court on or about March 28, 1927, for the adoption of Henry W. McCormick, a minor, together with the affidavits of Garrett R. Tucker, and the consent to the adoption by Henry W. McCormick, and the acknowledgement of Henry W. McCormick before a Master in Chancery; and I propose to read one portion of that petition.

Mr. Drewen—Let me make an objection to that, and to any evidence or any documents having to do with the adoption of Hen-

ry W. McCormick, as irrelevant and immaterial.

Judge Lewis—I propose to show its materiality by what I shall shortly read.

The Court—Objection overruled.

(The same is marked Exhibit C-2.)

Judge Lewis—And I ask to read it.

The Court—Go ahead.

Judge Lewis—Your Honor will recall probably that the statute regulating the adoption of infants provides that a petition shall be filed by the applicant, which shall set forth the property of the minor who is to be adopted, and a description of that property is as follows: This was filed March 28th last.

"The said child is not possessed of any interest whatever in real property, so far as your petitioners know and as they verily believe; the said child is, however, the beneficiary of a trust fund created for his benefit by his mother. Your petitioner Garrett R. Tucker is trustee of said trust, which is constituted wholly of securities and have a present market value, approximately of $204,180."

and that is sworn to by him.

JOHN B. H. BOND, sworn on behalf of the complainant, testified as follows:

Direct Examination by Judge Lewis:

Q. Where do you live, Mr. Bond? A. In Paterson, N. J.

Q. Street address, please. A. 908 East 27th Street.

Q. What is your business? A. I am with the Second National Bank in Paterson.

Q. In what capacity? A. I have charge of the safe deposit vaults.

Q. And for what period of time have you had charge of those boxes? A. Since, April, 1923.

Q. Please state what your general business is as custodian or officer in charge of those boxes. A. I suppose I might be called the manager of the safe deposit department. I receive the customers, I rent the boxes, I collect the rents and wait upon the customers when they come in.

Q. And do you keep any records? A. I do.

Q. When a person comes to rent a box and you rent it, what evidence of the transaction is retained by you? A. We have a card, and the customer renting the box signs the card.

Q. Do you know Garrett R. Tucker, the defendant in this suit? A. I do.

Q. Did he rent a box in the Second National Bank from you? A. He did.

Q. Did he sign a card at the time? A. He did.

Q. Have you the card with you? A. I have.

Q. Will you please produce it. A. (Witness produces card and hands it to counsel.)

Q. Are you familiar with Mr. Tucker's signature? A. Yes, sir.

Q. Is this his signature to the card? A. It is.

Q. And is that your name written underneath as a witness? A. Yes, sir.

Q. Was the card filled in when it was signed? A. Yes, sir.

Q. And what was the date upon which that box was rented to Mr. Tucker? A. The 13th day of March, 1925.

Judge Lewis—I offer the card in evidence. (Admitted and marked Exhibit C-3.)

Q. Have you the card which shows the number of times anyone, entitled to enter a box rented to Mr. Tucker, entered the box? A. I have.

Q. Have you the card with you? A. I have.

Q. Will you produce it? A. (Witness produces card and hands it to counsel.)

Q. Does the card bear the signature of Mr. Tucker? A. It does.

Q. And what else does it show? A. The dates of entry to the safe-deposit box.

Q. When you say "the signature of Mr. Tucker," am I right in supposing that it is his signature in each case—he signed it himself? A. Yes, sir.

Q. And thereby got access to the box? A. Yes, sir.

Q. What is the last date of access by him to the box? A. July 13, 1926.

Judge Lewis—I offer the card in evidence. (Admitted and marked Exhibit C-4.)

Judge Lewis—Might I ask, if Your Honor please, in order not to break up the records, whether those two cards, having been marked, may not be read into the record? (Addressing counsel) Have you any objection to that?

Mr. Drewen—No, sir.

Judge Lewis—Well, they can be produced again, or copies made of them.

The Court—Well, what about copies furnished by the bank?

Mr. Drewen—That would be all right.

A. We have no copies.

The Court—(Addressing the witness) Would there be any great difficulty in getting copies of these from the bank?

A. I don't think so. But how would you reproduce the original writing?

The Court—Reproduce it on the typewriting machine.

A. That would be very simple, yes.

Q. Do you recall the visit at the bank by Mr. Tucker on July 13, 1926? A. I do.

Q. Was there anything unusual or extraordinary about what occurred in the course of business upon that visit which impressed it upon your recollection? A. Yes, sir.

Q. Please tell the court what occurred when Mr. Tucker was at the bank on July 13th, 1926, which was impressed upon your memory. A. Mr. Tucker, accompanied by Mr. Mayer, came to the safe deposit department on the morning of July 13th, 1926. He handed me his key for the safe deposit box. It was opened, and the box was delivered to him, and he went to one of the booths, accompanied by Mr. Mayer. I went back to my desk. In a few

minutes Mr. Tucker called me to the booth and said, "I want to tell you something: Possession is nine points of the law, isn't it?"

I replied: "I have heard that quotation somewhere".

Mr. Tucker said: "Mrs. Tucker died in the early hours of this morning".

I said to him, "Mr. Tucker, if I had known that before I had opened the box, under the law I couldn't have done so". At that time the box was empty; he had possession of the securities, or the contents of the box, and I couldn't do very much; but I said: "I would like you to talk to Mr. Seddon about this before you go upstairs, because of the great irregularity committed".

Q. Well, did you talk to Mr. Seddon? A. I telephoned to Mr. Seddon, and Mr. Seddon came downstairs.

Q. Tell us what conversation occurred then, that you recall. A. I don't know whether I can recall the exact conversation at that point.

Q. Well, the substance. A. We talked about the fact that Mr. Tucker had entered the safe-deposit box and took out the contents, and that his wife had died. We talked about the irregularity that had occurred.

Q. (By Mr. Drewen) Was Mr. Tucker there at that time? A. Was Mr. Tucker downstairs?

Q. When you had this conversation with Seddon. A. Mr. Tucker was downstairs.

Q. (By the Court) Was he where he could hear it? A. We were all standing together.

Q. (By Mr. Drewen) Was Tucker there?
A. Mr. Tucker was there, yes.

Q. Tell us what Mr. Seddon said. A. I cannot do that, because I don't recall that conversation.
Q. The substance of it.

The Court—What did they talk about?
A. Mr. Tucker gave me the impression that he was acting—

Mr. Drewen—Just a moment, please. I think that is improper.

The Court—I agree with you.

Q. What was the substance of what he said—of what you three talked about, Mr. Tucker, Mr. Seddon, and yourself? A. In talking about the thing that occurred, Mr. Tucker said that he was acting under the advice of counsel, and that he was doing something to avoid trouble, and that everything was all right—everything was all right that he was doing.

Q. Well, when you told Mr. Seddon that Mr. Tucker had opened the box and taken the contents out without telling you about his wife's death did Mr. Seddon say anything, indicating whether or not he knew of the wife's death until that time?
A. He did not.

Q. Did not what? A. Did not say anything that indicated that he knew about Mrs. Tucker's death before coming downstairs.

Q. Did he say anything that indicated that he didn't know it? A. No.

By the Court:

Q. You say that you sent for Mr. Seddon? A. I telephoned to Mr. Seddon to come downstairs.

Q. When he came down there you told him what had transpired, did you? A. Yes.

Q. Do you remember what he said, as the result of learning what you told him? A. I don't know what Mr. Seddon said at that point.

Q. You mean, you don't know or you don't remember? A. I don't remember what Mr. Seddon said at that point.

Q. Do you remember anything that he said to Mr. Tucker, or that Mr. Tucker said to him? A. I do not.

Judge Lewis—I think that is all of my examination.

Cross Examination by Mr. Drewen:

Q. Where was Mr. Mayer at the time you were first informed by Mr. Tucker, as you say, of the death of his wife? A. Sitting with Mr. Tucker in the booth.

Q. Did Mr. Mayer say anything? A. I don't recall what Mr. Mayer said, if anything.

Q. It was a brief time you were in the booth with Mr. Tucker and Mr. Mayer? A. Yes.

Q. And then where did you go, right upstairs to Mr. Seddon's office? A. I didn't go upstairs; I telephoned from my desk upstairs and asked him to come downstairs.

Q. How shortly thereafter did Mr. Seddon come downstairs? A. Oh, perhaps a minute or two.

Q. And isn't it a fact that Mr. Seddon indicated, by what he said, that Mr. Tucker had been up to see him before Mr. Tucker was downstairs to the box? A. Mr. Seddon didn't indicate anything about Mr. Tucker seeing him.

Q. Well, what was Mr. Seddon's statement, in response to what you said to him? A. I can't recall what his response was. The fact was stated that Mrs. Tucker had died.

Q. What I want to know is simply this: You have stated that you communicated to Mr. Seddon what you had learned from Mr. Tucker; what did Mr. Seddon say; that is all. A. I don't know what he said to Mr. Tucker.

Q. Well, what did he say to you while Mr. Tucker stood there, making up this group of three, as you say, when you were present? A. I don't recall what was said.

Q. All right; you don't recall? A. No.

Redirect Examination By Judge Lewis:

Q. I understand you to say that you were informed by Mr. Tucker of his wife's death, in the booth or after he had come out of the booth? A. He was still in the booth.

Q. And he told you that? A. Yes, sir.

Recross Examination by Mr. Drewen:

Q. How long have you known Mr. Mayer? A. How long have I known Mr. Mayer?

Q. Yes. A. I met Mr. Mayer 3 or 4 years ago, and have seen him very frequently.

Q. Very friendly with him? A. I know Mr. Mayer.

WILLIAM P. SEDDON sworn on behalf of the complainant, testified as follows:

Direct Examination by Judge Lewis:

Q. Your residence. A. I am a resident of the City of Paterson, residing at 396 East 28th Street, and have been a practising attorney since 1911, with offices at No. 9 Colt Street during that period; and counsellor-at-law since 1914.

Q. Are you connected with the Second National Bank of Paterson? A. I am.

Q. In what capacity? A. Principally in charge of the mortgage loans and the Trust Department, under the general supervision of our general counsel, Judge Lewis.

Q. Do you recall a visit to the bank of Garrett R. Tucker, the defendant in this case, on the day of his wife's death? A. I do.

Q. Who was with him? A. Mr. George Mayer, his brother-in-law.

Q. Where did you first see Mr. Tucker, or Mr. Mayer, on the occasion of that visit? A. In the basement of the bank building where the safe-deposit vault is located.

Q. How did you come to go down there? A. Someone informed me in the bank that Mr. Tucker and Mr. Mayer were downstairs. I do not recall Mr. Bond telephoning me, but it may have been that that is how my attention was called to it; but someone called my attention to the fact that Mr. Tucker and Mr. Mayer were downstairs in the safety-deposit vault.

Q. Well, why did you go downstairs? A. Someone had called my attention to it, that either I

was needed there or that I should go down to see them, but I don't recall, honestly, how.

Q. Did you go down? A. I did go downstairs.

Q. Up to that moment of your going down did you know anything at all about Mrs. Tuckers' death? A. I did not know Mrs. Tucker was dead when I went downstairs.

Q. Had you seen Mr. Tucker or Mr. Mayer up to that time? A. I did not know they were in the building; I had not seen them.

Q. When you went downstairs who was there? A. When I went down to the foot of the stairs I met Mr. Mayer at the foot of the stairs, before you enter the railing or the iron bars that lead into the safe-deposit vault, and I did not see Mr. Tucker when I first went down the steps.

Q. Then did you see Mr. Tucker and Mr. Bond eventually? A. Eventually I did, but not when I first went downstairs.

Q. What did Mr. Bond say to you? A. I first met Mr. Mayer.

Q. I asked you what Mr. Bond said to you. A. Mr. Bond told me of Mr. Tucker's actions, and the fact that he had entered the safe-deposit box, taken the securities out, and after he had the securities in his pocket he informed Mr. Bond that Mrs. Tucker had died.

Q. Was that the first intimation you had as to Mrs. Tucker's death? A. No, when I came down to the foot of the stairs I met Mr. George Mayer, and Mr. George Mayer informed me that Mrs. Tucker had died that morning.

Q. Where was Mr. Tucker? A. He was inside of the iron bars.

Q. Do you know whether or not he had had the

securities out of the box? A. I didn't know anything about that then; I didn't see Mr. Tucker then.

Q. When did you see him? A. The bars of the iron railing was about four or five feet distant from where I talked with Mr. Mayer, and Mr. Tucker and Mr. Bond came to the gateway, and I first saw Mr. Bond and Mr. Tucker then—

Q. What did Mr. Bond say to you? A. Mr. Bond told me that Mr. Tucker had opened the safe-deposit box, which was in the joint name of himself and Mrs. Tucker, and had taken the securities out of that box without the necessary waivers or producing letters showing that he was entitled, as a representative of the estate, to do that.

Q. Did you say anything in reply? A. I did.

Q. What did you say? A. I don't recall my exact words.

Q. Well, the substance. A. I told Mr. Tucker that it was very irregular; he had done something that was not right, and he represented that he was acting under advice of counsel and he had the securities and wanted to know what we were going to do about it.

Q. Well, the first intimation of the death of Mrs. Tucker came from Mr. Mayer at the foot of the stairs when you were going down in response to Mr. Bond's call; is that right? A. Yes, sir; on somebody's call, I can't say whose.

Q. Well, who else could have called? A. I can't honestly say that I remember Mr. Bond telephoning.

The Court—I understand him to say that he couldn't even say that he had a telephone call; somebody called him.

A. That's right. I first learned of Mrs. Tucker's death from Mr. George Mayer, and Mr. Tucker never told me to this day that his wife was dead.

Cross-Examination by Mr. Drewen:

Q. Mr. Seddon, in going into the banking rooms from the street your office is on the left as you enter? A. Yes.

Q. And about what time of the morning was it that you say you were caused to go down the stairs? A. I would say it was before 10 o'clock.

Q. What time do you arrive at the office in the morning? A. In the bank?

Q. Yes. A. Often a quarter to 10 or half past 9.

Q. You don't remember what time you arrived that morning? A. No, I do not.

Q. How long had you been there, would you say, before you were called downstairs? A. I would rather not say; I don't remember.

Q. You can't state? A. No, I honestly can't.

Q. How long have you known Mr. Mayer? A. Since 1902.

Q. You had known him about 23 years when this occurred? A. Yes.

Q. And when you got down to the foot of the stairs and saw no one there but Mr. Mayer, it was then that Mr. Mayer told you about Mrs. Tucker's death? A. Yes, sir.

Q. Can you tell us what he said? A. Mr. Mayer, as I recall it, said, "Do you know Mrs. Tucker died this morning?"

Q. I see. And that conversation, whatever it was that you had with him, lasted but a very short time? A. It did.

Q. About a minute, perhaps? A. A very short time.

Q. And then what did you do and where did you go? A. Approaching this gateway from the inside were Mr. Bond and Mr. Tucker.

Q. And who spoke first to you, Mr. Bond? A. Very likely; I don't recall.

Q. And was Mr. Mayer present when Mr. Bond spoke to you? A. Within four or five feet.

Q. Mr. Tucker there? A. Oh, yes.

Q. And have you stated the full extent of the conversation that you had with Mr. Bond and with Mr. Tucker, with regard to the removal of the contents of the box? A. I have.

Q. Did Mr. Tucker give you the name of the counsel by whom he had been advised? A. No.

Q. Did you ask him? A. I did not.

Q. In other words, you didn't prosecute any inquiry into Mr. Tucker's mental processes in removing the contents of that box, did you? A. Under the circumstances I didn't think it was necessary.

Q. I just asked you if you did? A. I did not.

Q. So that am I right in assuming, Mr. Seddon, that the conversation between you and Mr. Tucker and Mr. Bond about the removal of the contents of the box lasted the best part of a minute? A. I would say yes, a very short time.

Q. And Mr. Tucker left in the interim? A. Mr. Tucker left and went upstairs ahead of me, and inside of two minutes when I came upstairs he was

transferring his wife's account to his own name at another desk.

Q. You had no conversation after you left downstairs? A. No.

Q. You knew the first Mrs. Tucker, didn't you? A. Quite well.

Q. How long had you known Mrs. Tucker? A. Since her removal to Ridgewood.

Q. That is, from Brooklyn? A. Yes.

Q. From Brooklyn over to Ridgewood? A. Yes.

Q. Do you recall whether Mr. Tucker, in the company of Mrs. Tucker, spoke to you with regard to the restrictions of the removal of the contents of a safe-deposit box? A. I do not.

Q. In case of death? You do not remember that? A. I do not.

Q. Now, isn't it a fact, Mr. Seddon, that on the morning of July 13th, the morning in question, both Mr. Mayer and Mr. Tucker called on you upstairs in your office first and then proceeded to go downstairs? A. It is not.

Q. Do I understand you to say it is not a fact, or that you don't recall? A. It is not a fact that Mr. Tucker ever told me that his wife was dead, at that time or any other time. I never learned from Mr. Tucker that his wife died.

Q. That is all.

Examination by the Court:

Q. Why did you let him leave with those securities? A. He had taken an undue advantage of the bank, and if he had been acting under the advice of counsel as he said he was, I assumed that he was

acting within his rights and we as a bank were quite helpless in his having the securities and as a box renter having some rights.

Q. You knew the requirements of the transfer inheritance tax laws? A. We have attempted to comply with those requirements where the box has not been surrendered because the waiver has not been produced.

Q. Why didn't you demand that he return them to the vault? A. We informed him that it was irregular; that he was doing something which was not right; but when he said he was acting under the advice of his counsel it was apparent that he was acting in what I thought was a proper manner, and he assured us that we would be protected.

Redirect Examination by Judge Lewis:

Q. In order to carry the thought out, were the securities in his physical possession?

The Court—In his pocket, he has already said.

(Mrs.) ESSIE T. W. MAYER, the complainant, sworn in her own behalf, testified as follows:

Direct Examination by Judge Lewis:

Q. Mrs. Mayer, you are the complainant in this case? A. I am.

Q. And where do you reside? A. 186 Hillcrest Road, Ridgewood, New Jersey.

Q. When did you move to Ridgewood, N. J.? A. In March, 1925.

Q. Where did you move from? A. Brooklyn, New York.

Q. The late Mrs. Tucker was your sister, was she not? A. She was.

Q. And did she and her husband live in Brooklyn at one time? A. They did.

Q. Did they move from Brooklyn to Ridgewood? A. They did.

Q. Before you moved to Ridgewood, or after? A. Before.

Q. How long before? A. They moved to Ridgewood in January, 1925.

Q. Do you happen to know the date? A. I believe it was January 10, 1925.

Q. How do you remember that date? A. Well, —(witness pauses).

The Court—It is probably not the 10th.

Judge Lewis—My recollection is, that Mr. Tucker testified to it being the 8th; I'm not sure.

A. Well, it was early in January; I know that. It was before the 15th of January, because after the 15th I went to Saranac Lake to bring my youngest sister home, and they had already moved to Ridgewood at that time.

Q. After you moved to Ridgewood, N. J., you continued to live there ever since? A. Yes.

Q. In the same place? A. In the same place.

Q. When you and your husband married? A. In June, 1915.

Q. Where were you living then? A. In Brooklyn.

Q. And did you continue to live in Brooklyn until you moved to Ridgewood? A. We did.

..Q. Where in Brooklyn? A. Well, we lived at three different places in Brooklyn; we lived at 424 Seventy-fifth Street; and at 632 Seventy-seventh Street; and 445 Seventy-fifth Street.

Q. Was anyone living with you, or you living with anyone else? A. We were living in the home of my father and mother.

Q. Did you go to live with your father and mother at the time of your marriage? A. We did.

Q. And then did you live in the same house with your mother until you moved to Ridgewood in March, 1924? A. We did—March, 1925.

Q. 1925, I mean. And your father died when? A. On December 25, 1924.

Q. What was your husband's business? A. My husband was Second Vice-President of the Paterson Parchment Paper Co. of Passaic.

Q. You were raised in Brooklyn? A. I was.

Q. Your husband was a Passaic County boy? A. He lived in Haledon, New Jersey; I don't know the county it is in.

Q. He had known Mr. Seddon, who has been on the stand, before he was married; is that right? A. I believe so.

Q. They had gone to school together? A. I understand that they went to High School together.

Q. This Paterson Parchment Paper Company—are people known as the Leonards connected with that? A. Yes, they are the pincipal owners.

Q. People of substantial means, are they? A. Yes, they are.

Q. Now, Mrs. Mayer, I want you to begin back in 1914, or prior thereto; who made up the family of your father and mother at that time, prior to 1914, and after the death of Mr. McCormack? A. My father, mother, and my sister Mrs. McCormack, and my sister Edith—

Q. Who is now— A. Mrs. Adams—and Mrs. McCormick's son Henry, and myself.

Q. And the Henry referred to is the Henry W. McCormick about whose trust fund we are having all this litigation about? A. He is.

Q. What were the relations between you and your sister Mrs. Tucker; affectionate or otherwise? A. Yes, were were devoted, always.

Q. When Mr. McCormick died how soon did she go to live with you and your father and mother? A. Immediately after his burial.

Q. And how old was Henry then? A. About 9 months old.

Q. In the interval, between that time last mentioned and 1914 inclusive, was she in the habit of going on vacations? A. Yes.

Q. Would you accompany her? A. Yes, at times.

Q. Did you accompany her in 1914 to the Delaware Water Gap? A. I did.

Q. What month? A. In May, Decoration Day, we went to the Delaware Water Gap.

Q. Was Henry, the son, there? A. I don't believe he was on that visit.

Q. Do you know whether she met Garrett R. Tucker in the hotel at that time? A. She hadn't known him before that.

Q. But she met him there? A. Yes, she met him at that time.

Q. How long did you stay at the hotel? A. Well, I stayed at the hotel just over the holiday.

Q. How long did she stay? A. She spent that entire summer at that hotel, but at that time she had the boy with her.

Q. She had taken the boy up? A. Yes.

Q. Were you engaged in any employment at that time? A. Yes, I was.

Q. What were you employed in doing? A. I was a stenographer in the office of Charles E. Bedford, of the Vacuum Oil Company.

Q. In New York City? A. New York City.

Q. And their offices were where? A. At 61 Broadway.

Q. Now, when did you first hear that your sister contemplated marrying Garrett R. Tucker? A. Well, in the summer of 1914; during that summer, early in the summer.

Q. Did you have any conversation with her about her marriage? A. About her marriage?

Q. Yes. A. Oh, yes, I had many conversations with her about that.

Q. Did the rest of the family have conversations about it?

Mr. Drewen—Do you refer to before or after the marriage?

Judge Lewis—Before.

A. (no answer).

Q. I show you Exhibits D-3 and D-1 in this cause

and ask you if you have seen them before? A. Yes, I have.

Q. When did you first see them? A. I saw them on the day they were signed first.

Q. Tell us how they came to be signed; tell the whole story from the time you first heard until those agreements were signed. A. Well, in the fall when my sister returned home from the Delaware Water Gap and had definitely decided to marry Mr. Tucker my father talked over the matter with her of putting aside some of her estate for her boy before this marriage took place, and she decided that that would be a very good plan, and she consulted her attorney, who was ex-Judge Farrand of New York; and she asked me if I would become trustee of this trust fund and in case of her death look after the interest of her boy. And I said I would. Then, on the 14th of October, 1914, she and I went to Judge Farrand's office where we had this agreement, or both of them, read over to us and we signed them.

Mr. Drewen—I don't wish to interrupt the witness, but I want to be sure that this is all under the same objection that I made at the previous hearing.

The Court—It is all subject to the same objection.

Q. Now, what stock had she gotten from her husband, Mr. McCormick? A. Well, she had gotten a considerable amount of U. S. Gypsum stock.

Q. Did the estate consist principally of Gypsum stock at the time she signed this agreement? A. Yes, it did.

Q. Had she gotten all she had from her husband? A. Absolutely everything.

Q. Was anything said at the time as to the reason for her placing stock in trust for the benefit of her son? A. Yes.

Q. What was said? A. My father told her that he thought that she should lay by a certain proportion of her estate in trust for her boy. He was her only child by Mr. McCormick, and he felt before she remarried she should place a certain amount in trust for him, so that he would always be provided for.

Q. When the agreement D-1 was signed where were the certificates of the Gypsum Company; where did your sister keep the certificates? A. I believe she kept them in a safe-deposit box down in the financial district in New York; I don't know just the name of the bank.

Q. The agreement, I understand you to say, was executed in ex-Judge Baron's office? A. Yes.

Q. Were the certificates there at the time? A. The certificates were.

Q. The certificates of stock, I mean; were they in his office at the time? A. Yes, they were.

Q. What was done with those exhibits, the agreements, when they were executed? A. I was given the original copy of that agreement (the witness indicating Exhibit D-3).

Q. What was done with the stock certificates? A. Well, they had not been transferred to my name at that time.

Q. What name did they stand in? A. I don't know what name they stood in at that time.

Q. What was done about their transfer to you, if anything? A. My sister sent those certificates

to the U. S. Gypsum Co. and had them transferred to my name as trustee of Henry W. McCormick, and they were returned to me personally.

Q. Returned to you personally where? A. In Brooklyn.

Q. How? By mail or otherwise? A. No, by mail.

Q. From whom? A. From the Gypsum Company.

Q. Do you recall about what time they were returned to you? A. Why, I should say about a month later.

Q. Was your sister married after the execution of that agreement? A. Yes.

Q. How long after? A. One week.

Q. Had she sent the stock to the Gypsum Company before she was married to have it transferred to you? A. I believe she had.

Q. And you got it afterwards from the Gypsum Company, after she was married? A. Yes.

Q. When you got the stock you got the agreement also, Exhibit D-3, in your possession? A. Yes.

Q. Did you have a talk with your sister about the safekeeping of those securities? A. I did.

Q. What was the result of that conversation? A. Well, we decided the very best way to safeguard them was to rent a safe-deposit box in Brooklyn in our joint name, and we chose a safe-deposit box in the Security Safe Deposit Company, because that was located in a very—well—

The Court—Convenient?

A. Yes, convenient place. It was down in the heart of Brooklyn, very accessible.

Q. Very close to your home? A. Not close to my home, but within 15 minutes of my office, and right in the shopping district in Brooklyn.

Q. You were going back and forth to New York at that time? A. Yes.

Q. And you continued to go back and forth to New York until you were married? A. Yes, in June.

Q. In June, 1915, I understand you to say? A. Yes.

Q. When did you open the box in Brooklyn? A. We opened it in December, 1914.

Q. And you had something to refresh your memory as to the date? A. Yes, I had, but I remember that day.

Q. You went to the bank, or deposit company I mean, alone or with somebody? A. No, with my sister.

Q. And when the box was opened who signed the card? A. Why, I believe we both left our signatures.

Q. Were you given the keys to the box? A. Yes.

Q. How many? A. She received one and I received one.

Q. What did you put into that box? A. I put into that box the certificates of the U. S. Gypsum Company stock, 350 shares of preferred stock and my copy of this trust agreement.

Q. Were the certificates and the agreement put together? A. Yes, they were.

Q. How were they kept together? A. They were put in an envelope, separate and apart from anything else that was put in that box.

Q. And was there any mark on that envelope? A. Yes, it was marked "Henry" across the outside of the envelope—"Henry" or "Henry's stock."

Q. You can't remember exactly; it was either one or the other? A. It was either one or the other.

Q. What was the password which you had to give the bank officials in order to get access to the box? A. "Henry."

Q. Was anything else put in that box at that time by your sister? A. I believe that day she did put in some other securities belonging to herself.

Q. Anything in the way of jewelry? A. Not at that time. Yes, I would like to correct that: That day she did put in some jewelry; she put in a little case containing a gold watch monogram belonging to Henry's father, and which has been kept for him, and that was placed on top of the trust stock and the trust agreement.

Q. Did you put anything of your own in that box? A. Never anything of my own.

Q. Did anyone besides Mrs. Tucker put anything in the box belonging to them? A. Well, nobody else had access to that box but Mrs. Tucker and myself.

Q. Did you put in anybody's else property? A. For a short time I hade an envelope there which contained securities belonging to my father.

Q. Shortly after the trust agreement was executed I understood you received the dividend from the Gypsum Company; can you remember these various dividends of stock as you got them from the

company, or do you rely on memoranda? A. I don't remember them accurately.

Q. Well, when was the first dividend, and for what amount? A. Well, the first dividend was received by me in December, immediately after the execution of this agreement.

Q. Was that cash or stock? A. No, that was cash, quarterly dividend on the preferred stock.

Q. And then was the check made out in your name? A. Oh yes, as trustee.

Q. In your maiden name? A. In my maiden name.

Q. Had the stock been transferred into your maiden name at that time? A. Yes, it had.

Q. And did that stock continue to stand in your maiden name, as well as all stock dividends that came afterwards until the reorganization of the company, or something of that kind, out in Illinois? A. It did.

Q. I show you Exhibit D-4, and ask you if that exhibit refreshes your memory as to the dividends in stock that were declared upon the stock given by you to your sister in trust at the time of the execution of Exhibit D-3, at or about the time? A. Yes, it does.

Q. Now, please tell us the stock dividends that you received, from the time you became trustee down to the last stock which you have received as a dividend. A. The first stock I received was 150 shares of common.

Q. In 1915? A. Yes. In 1920, 37 shares of common; in 1921, 39; in 1922, 82; in 1823, 181; in 1924, 381; and in 1925, 220.

Q. Now, there follows, as I recall from that statement, a dividend of 591 shares which you have not received? A. No.

Q. They are held by the corporation pending the settlement of this suit, as I understand it? A. Yes.

Q. When those stock dividends were sent out by the Gypsum Company, to whom were they sent? A. To me.

Q. And how? A. By registered mail.

Q. And how addressed, to you? A. To me as trustee.

Q. When you got the certificates, so long as you lived in Brooklyn, what did you do with them? A. I placed them personally in my box in the safe-deposit company.

Q. Using your own key? A. Yes, always.

Q. And did you go alone to put them in the box? A. Yes, I believe I did. I don't ever remember being accompanied by anybody.

Q. Now, I ask you when you received the dividends. I see one dividend for 1924; can you recall about that? A. I recall receiving some shares in December, 1924.

Q. When did you receive it? A. Between Christmas and New Years of 1924.

Q. Now, do you recall what you did with those particular securities? A. Yes, I remember that particularly.

Q. Well, please tell us what you did with those? A. My father had just died, and I was very much upset over that; and prior to that, early in December, the safe-deposit box in Brooklyn had been closed, the one to which I had access. I was under the impression that another box had been rented in Pater-

son, so I gave that stock dividend to Mrs. Tucker and asked her to put it with the rest of the certificates which I understood she had taken to Paterson.

Q. Were the relations between you and your sister relations of confidence during all your life? A. Yes.

Q. Were they relations of absolute trust and confidence between you? A. Absolutely; we had implicit faith in one another.

Q. Are you the Mrs. Mayer that is mentioned in the will, that she selected as trustee in case Mr. Tucker died? A. Yes, I am.

Q. When were the certificates that stood in your maiden name, as trustee for Henry W. McCormick, transferred from your maiden name to your married name? A. That was at the time of the reorganization of the Gypsum Company from a New Jersey corporation to an Illinois corporation.

Q. Who was the transfer agent; do you recall? A. Some bank in Chicago.

Q. I show you a paper purporting to be a letter, dated December 11, 1920, signed by someone as secretary of the Continental Commercial Trust and Savings Bank, and ask you if you received that letter? A. Yes, I did.

Q. Had you before the receipt of that letter sent the stock on to be transferred into your married name as trustee? A. Yes.

Q. And you sent the stock on, too, to be so transferred? A. Yes.

Q. And did this letter come to you from the bank? A. Yes, it did.

Judge Lewis—I offer this in evidence, if Your Honor please.

(Admitted and marked Exhibit C-5.)

Q. Did you continue to hold the key to the box in the Dime Savings Bank until that box was closed? A. I did.

Q. When Mr. Tucker got access to the box did you give up your key so that he could get access? A. No, I did not.

Q. When did you give up your key? A. I gave up my key just a day or two before the box was closed; I gave it to my sister.

Q. Why did you give it to your sister at that time? A. My sister came to my home and said, that inasmuch as the box expired on the 11th of December, and inasmuch as we were all moving to Ridgewood after the first of the year she thought it would be a good idea if we did not continue a box in Brooklyn but rented another box in Paterson; and she said she would attend to the matter, because at that time I was very, very busy. My father lay on his death-bed and I was caring for him.

Q. Now, please explain to the court what it was that engrossed your attention exclusively during that period; explain the circumstances at that time which made it necessary for you to devote your time exclusively to him. A. My youngest sister had a breakdown in health and was at that time at Saranac Lake, and my mother was there caring for her. My father had been ill for months and I was keeping house and caring for my father at that time. He had been so ill Thanksgiving that I had to send a message to my mother

that I felt he needed her more than my sister did, and as soon as she could arrange to get a nurse at Saranac Lake she came back. My father died on the 25th of December, and on the 10th of December, 1924, the box was given up.

Q. How often during the period from 1914, when the box was opened, until it was closed, did you have in your possession and see the certificates that stood in your name in the Brooklyn box? A. Only when I went to the box.

Q. And you went to the box to deposit the new certificates, as I understand it? A. Yes; but I went more frequently than that.

Q. You did go more frequently than that? A. Yes.

Q. What was the occasion of your other visits? A. Why, when I went to put securities in the envelope that belonged to my father, or to take them out, which were in that box; and I did go there on a number of errands for my sister, possibly putting in stock for her and taking out stock and sending it away, when she lived in Delaware Water Gap.

Q. Well, that was how many years after her marriage? A. Oh three, possibly four.

Q. And then she went from the Delaware Water Gap with her husband to Brooklyn for awhile? A. Yes, they spent that winter in Brooklyn, I believe, during this three or four year period. Then they lived in Bridgeport for awhile, and then came back to Brooklyn.

Q. The Gypsum Company stock didn't become particularly and conspicuously attractive until three or four years ago, did it? A. No; after the war.

Q. After the war, you say? A. Or during the war.

Q. Do you mean after the war started on the other side or after it closed? A. Oh no, after it closed.

Q. During all this period when you received the checks from the Gypsum Company for the cash dividends, what did you do with them? A. I endorsed them and gave them to my sister.

Q. And why did you do that, Mrs. Mayer? A. Well ,because we had considered the matter and had decided that that was the best thing to do with them to provide for the boy that I should turn the cash dividends over to her, and that she would provide for his maintenance, education and support with those dividends.

Q. And in the beginning they, Mr. and Mrs. Tucker, were living mostly in Brooklyn, were they not? A. Well, they lived—

Q. Until they moved to Ridgewood? A. Yes, for about five years they lived in Broolyn.

Q. But, I say they lived there mostly? A. Yes.

Q. Was there a change in their mode of life about the time that they moved to Ridgewood? A. Yes, their house in Ridgewood was very much more expensive and they had to have very much more help when they went to Ridgewood, and they lived very much more extravagantly than they had ever lived before.

Q. After the removal from Brooklyn to Ridgewood did you get another stock dividend from the company? A. Yes, I did.

Q. Did you give that to your sister? A. Yes, I did.

Q. Did you have any conversation with her at the time? A. Yes, I did.

Q. Concerning it? A. Yes.

Q. What was said between you? A. I asked her at that time whether I had access to the Paterson safe-deposit box, and she said, "well, she didn't know; she wasn't sure, and if not she would arrange it."

Q. And what was done then about that particular stock dividend? A. Well, I gave her that stock dividend to put into the box at that time.

Q. And did she tell you that she had done it? A. No.

Q. It was one of the certificates produced here at the last hearing by Mr. Tucker, was it not? A. Yes, it was.

Q. What was your sister's health at the time she came to Ridgewood—her general health? A. Well, she was in fair general health at that time.

Q. Did she become sick at all after she came to Ridgewood? A. Yes, she had frequent attacks of what we thought was neuritis, and at one time she had an attack of what they thought was appendicitis.

Q. When did the attack that they thought was appendicitis occur? A. That occurred in March, 1925.

Q. While she was living in Ridgewood? A. While she was living in Ridgewood and just before I moved to Ridgewood.

Q. And did you see her at the time of the attack at all? A. Yes, I did. My mother and I came and saw her the day she was in St. Joseph's Hospital in Paterson.

Q. How long did she stay there? A. I believe she was there only a couple of days under observation, because that did not turn out to be appendicitis.

Q. When did you last see Exhibit D-3 in Brooklyn? A. Did you say "when"?

Q. Yes, when? A. I last saw that in the safe-deposit box.

Q. That has been mentioned here? That is to say, the large new safety-deposit box or the old one? A. I saw it in the Brooklyn safe-deposit box.

Q. In the large box or the small one? There was a change in the box in Brooklyn, wasn't there? A. Yes, there was. No, it was in the old box.

Q. Did you take it out of the box? A. No, I did not.

Q. Didn't you take Exhibit D-3 out of the box after you moved? A. No, I never did.

Q. Did you have D-3 in your possession in Ridgewood? A. Oh no, never.

Q. Or D-1? A. No.

Q. Did Garrett R. Tucker and your sister, his wife, come to your house in Ridgewood and ask you for D-3? A. No, they did not.

Q. Did your sister then tell you, or tell you at any time, that she had lost D-1 and wanted your copy? A. No, she did not.

Q. Did you give D-3 to your sister at any time? A. No.

Q. And the last you ever saw of D-3 was in the safe-deposit box in Brooklyn; is that right? A. Yes, that's right.

(Recess until 2 o'clock.)

Judge Lewis—If Your Honor please, I have subpoenaed Mr. Rosenkrans and Mr. Dumont. I want to make clear on our side the transaction that occurred in my office and I want to use them for that purpose. I will call Mr. Rosenkrans now.

(The witness, Mrs. Mayer, steps aside.

WILLIAM V. ROSENKRANS, sworn on behalf of the complainant, testified as follows:

Direct Examination by Judge Lewis:

Q. You reside in Paterson, Mr. Rosenkrans? A. Yes, sir.

Q. And have practiced law there for how many years? A. About 20 years.

Q. Your office is— A. In the Romaine building.

Q. With your brother? A. Yes, sir; Addison P. Rosenkrans.

Q. Where is Mr. Dumont's office? A. At the present time in the United Bank Building.

Q. Do you remember a period when Mr. Dumont was ill? A. Yes, sir.

Q. Were you requested during that time by him to help him out in doing some of his matters? A. I helped him but in many matters and tried many cases for him—accident cases mostly.

Q. Do you know Garrett R. Tucker, the defendant in this case? A. This Mr. Tucker over here (pointing to Mr. Garrett R. Tucker)?

Q. Yes. A. I do.

Q. Do you recall sometime in January, 1927

being requested by Mr. Dumont to come to my office, or to accompany Mr. Tucker to my office? A. I do.

Q. Please state your instructions by Mr. Dumont? A. Mr. Dumont called me up on the telephone on a Saturday morning, and told me that he had a bilious attack and couldn't come down, and that Mr. Tucker was coming into the office to go with him over to your office, and he asked me would I go over to your office with Mr. Tucker and speak about the delivery of stock. When Mr. Tucker came I spoke to him about it and told him about Mr. Dumont's illness, and asked him just what he wanted; and he spoke about the stock and the subject matter of the Chancery suit—I don't recall now what stock; Gypsum, wasn't it?

Q. Yes. A. And we talked about it somewhat, and he told me he had talked to Mrs. Mayer and some other members of the family about it, and that he concluded that he was wrong; that he wanted to turn the stock over to Mrs. Mayer in your office and step out of the picture. And I told him I didn't know very much about it, but—oh, I told him before we went over there that I would dictate to Miss Kosch, Mr. Dumont's stenographer, a receipt for all the stock—I think there were 123 shares—so that he would have something to show that he had physically delivered it, and I did have such a receipt dictated, and then went over to your office.

Q. With Mr. Tucker? A. With Mr. Tucker.

Q. Had there been an arrangement for a meeting at my office? A. I believe there had.

Q. Did you telephone me, or did I telephone you? A. I wouldn't say which; I wouldn't recall that.

Q. What time of the day was it? A. Well, it was Saturday morning; might have been 10 o'clock, or half past 10.

Q. And could you tell about what time in the month it was; what the date was? A. Why, I should say around January the 15th.

Q. When you got to my office who was present? A. You were there, and Mrs. Mayer, and Mr. Tucker, and myself.

Q. Was there anyone else? A. Not that I recall, no.

Q. Was there anyone else from Mr. Dumont's office? A. No.

Q. Did you have a talk with Mr. Tucker about the matter before you came to the office? A. Yes, about as I have outlined.

Q. When you got to the office, please tell the court what occurred in the office? A. Well, when we came to your office Mr. Tucker had the stock in his pocket.

Mr. Drewen—I can't hear you.

I say, when we came to Judge Lewis's office Mr. Tucker had the stock in his pocket and I had the receipts in my possession. When we got over there we sat in front of that long table in your private office. Mr. Tucker sat close to the table and I sat back a little ways; and Mr. Tucker took the stock out of his pocket and laid it on the table, and told me he had come there to deliver the stock, and I proceeded to get the receipts out

of my pocket, saying to Judge Lewis, if we delivered the stock I thought we ought to have receipts showing delivery. Then Judge Lewis stated that the mere physical delivery of the stock wouldn't decide the case, that it would still be open to evidence, and stated that he wanted more than that; that he wanted a final decree signed in the case to establish the trust so that the question wouldn't arise again; and also that that decree should contain counsel fee. There was no decree at the time prepared.

Q. Was there anything said as to an additional reason for a decree, in respect to the payment of the dividends on the stock, Mr. Rosenkrans, in order to get the Gypsum Company to pay the dividends to Mrs. Mayer? A. Yes, there was something said about that.

Q. What was said about that? A. Mr. Tucker stated that he would write to the company—the Gypsum Company—and send them a note, if I remember rightly, recommending the payment. I believe it was to be similar to the note which was sent before.

Q. What was the note that he sent before; was that discussed? A. I think it was. And you stated at that time if either party sent in a note to the company they would naturally want more than a memorandum from someone; they wanted a decree or something to find out how it was disposed of. Then I recall further in that conversation that the stock was on your table and there was no form of decree there at that time; at least, I didn't see any form of decree. I am talking about a decree in the Court of Chancery. And after some talk, Mr. Tucker

turned to me and wanted to know about the stock. "Well," I said, "you may as well deliver it at the time the decree is signed and determined upon"; and he put the stock in his pocket.

Q. Did you say anything about the extent of your authority in the delivery of the stock—as to whether you were authorized to do anything more than to deliver? A. No, I told you then that I couldn't determine upon the decree; I just went over there to do what Mr. Dumont told me.

Q. Was there any arrangement then made for the preparation of the final decree? Was I to draw a decree? A. I think you were, but you were to submit it to Mr. Dumont.

Q. Now, did I give you or Mr. Tucker any paper on that day? A. None at all.

Q. Did I ask that any paper that I had in my possession be signed by Mr. Tucker or anyone else? A. You did not.

Cross Examination by Mr. Drewen:

Q. Mr. Rosenkrans, you said, early in the direct examination, something about your having helped to draft the bill; did you say that, while you were assisting Mr. Dumont in his practice? I may not have understood you clearly. A. I think I said in my direct examination that I told Mr. Tucker that I knew something about the case; that Mr. Dumont had gone over the case with me, and that I had dictated to his stenographer a form or draft of the bill—or answer, rather. Whether that was the answer which was filed I don't know.

Q. When you tell us the conversation that you had with Mr. Tucker do you attempt to give us

the words that were used by Mr. Tucker, or only the sense of the conversation as you understood it at the time? A. I can't give you those words, because, knowing what I did about it, I was impressed by what he said he did about it. It was a peculiar situation and it holds in my memory.

Q. Now, you have stated, have you not, the extent, and the full extent, of your conversation with Mr. Tucker at the time that he came to you in regard to turning over this stock? A. Oh, no, we talked about other matters.

Q. No, I mean on the subject. A. On the subject, yes.

Q. And you didn't make any inquiry or go into the reasons that lay in Mr. Tucker's mind for such determination? A. I did not, no; naturally not.

Q. How long were you and Mr. Tucker in Mr. Lewis's office on that day in question? A. Might have been an hour. I don't recall.

Q. How long were you talking with Mr. Lewis in the presence of those concerned, on this subject? A. I say it might have been an hour.

Q. No, all told, transacting this business? A. Might have been an hour, yes.

Q. Now, isn't it a fact, Mr. Rosenkrans, that on that day some paper, or some document, was brought to your notice which, by reason of your limited authority you had received from Mr. Dumont, you would not take the responsibility, or something of that sort? A. That is not a fact, no.

Q. How many times were you in Mr. Lewis's office with Mr. Tucker? A. Once.

Redirect Examination by Judge Lewis:

Q. When you left my office did you report the results of the conference there that had just been finished between you and Mr. Tucker and me? A. I did, to Mr. Dumont.

Q. You have testified now to the events as they occurred? A. Naturally.

Recross Examination by Mr. Drewen:

Q. By the way, Mr. Rosenkrans, do you know whether it was understood that your visit with Mr. Tucker at Mr. Lewis's office was so that final papers were to be signed and executed? A. When I went over there?

Q. Yes, or before you went over there; was that your understanding? A. No. As I said on my direct examination, I went over there for one purpose.

Q. What was that? A. That he was going to deliver the stock to Mrs. Mayer and pass out of the picture.

Q. You didn't intend that Mr. Tucker should deliver the stock without papers that would conclude this litigation? A. That is the idea that caused me to draw the receipt, so that he could say that he had delivered the stock to Mrs. Mayer, the trustee.

WAYNE DUMONT sworn on behalf of the complainant, testified as follows:

Direct Examination by Judge Lewis:

Q. You have practiced law in the city of Paterson for the last— A. Thirty-one years.

Q. And you were at one time counsel for Mr. Garrett R. Tucker, the defendant in this case? A. I was.

Q. You heard Mr. Rosenkrans's testimony which has just been delivered to the court? A. I did.

Q. Did Mr. Rosenkrans report to you what had occurred at my office? A. He did.

Q. I show you a carbon copy of a letter, dated January the 4th, 1927, addressed to you and written by me, and ask you if you received the original of that letter? A. I did; I recollect it.

Judge Lewis—I offer that carbon copy in evidence, marked Exhibit C-6, and is as follows:

January 4, 1927.

Wayne Dumont, Esq.,
Counsellor at Law, 126 Market St.,
Paterson, N. J. Mayer v. Tucker.

Dear Wayne:

I am enclosing herewith a copy of the replication in the above-stated cause which has been filed. I also enclose notice of application on January 18th for an order of reference. Will you be good enough to acknowledge service on the notice and return it to me?

Yours very truly,

Q. I show you a carbon copy of a letter, dated February the 9th, 1927, addressed to you and written by me, and ask you if you received the original of that? A. I did.

Judge Lewis—So as to enable Your Honor to follow this testimony I will read my letter of February 9th to Mr. Dumont:

I have just received a letter from Vice-Chancellor Bentley of which the following is a copy:

Dear Judge Lewis:—Mr. Bailey has taken up with me your proposed order of designation in Mayer v. Tucker. It is ordinarily a difficult thing for me to finish a motion day in Jersey City in time to catch my train home, and inasmuch as a final hearing must succeed all motions I think it would be somewhat a dangerous thing for you to set the cause down for hearing in Jersey City on a motion day. If there are any issues of law or fact to be decided. If the matter can be disposed of inside of an hour I would suggest that you agree upon my next motion day in Paterson, which will be February 28th, and where the motion list is not so heavy.

If this is agreeable to you and any other counsel engaged, Mr. Bailey will so mark it, upon your advising him of your agreement.

Yours very truly,
John Bentley."

Will you please let me know what you think of it?

Yours very truly,
Wm. I. Lewis.

Q. Do you recall whether you telephoned to my office that that date would be agreeable? A.

I either telephoned you, or told you, or wrote you, I don't know which.

Q. Well, this memorandum is made by my stenographer; see if that won't help you (handing paper to witness). A. Probably telephoned.

Q. I show you a letter, dated February 17th, 1927, and ask you if you received the original of that letter from me? A. Yes, sir.

Judge Lewis—This letter reads:

Dear Mr. Dumont:

I got a memorandum of your telephone call the other day, saying that February 28th would suit you for the settling of the decree in the Mayer-Tucker matter. It will also suit me. I am now writing to Mr. Bailey to inform the Vice-Chancellor that we will be ready at the Chancery Chambers in Paterson on February 28th. As soon as possible I will draft the form of decree and send a copy of it to you for your consideration.

Q. Do you recall whether that date was subsequently changed, owing to the death of Vice-Chancellor Griffin? A. I recall that some date was changed referring to that.

Q. I show you the original of a letter, dated February 18th, 1927, signed by you, and ask you if you wrote that letter to me? A. That is my signature, sir; and that is my letter.

Judge Lewis—This letter reads:

Dear Judge:

Your letter of February 18th, 1927, received. I will be glad to receive your draft of

the decree at the earliest moment that you can, with convenience draft it, because I want to take it up with you, and also with Mr. Tucker.

You and I have about agreed upon the proposition that the decree is to contain, so that if it is sanctioned by Mr. Tucker, after reading the same, we can go on on the twenty-eighth.

I believe there will be no difficulty about it, as I understand all parties are agreeable to getting all matters completed and disposed of, at the earliest possible moment.

Q. I show you carbon copy of a letter, dated February 18th, 1927, addressed to you from me; did you receive the original of that letter? A. Yes, sir.

Judge Lewis—And this letter reads:

Dear Mr. Dumont:

I send this as a memorandum for your use that we have agreed upon March 2d, 1927, at the Chancery Chambers in Paterson, as the time and place for the hearing in the above cause.

Q. February 21st, 1927, did you receive this letter, addressed to you and signed by me? A. Yes, sir; I did.

Judge Lewis—This letter is:

My dear Mr. Dumont:

I am enclosing draft I have prepared for the final decree in the above stated cause.

Q. Did you get the draft in that letter? A. I did; I got the draft.

Q. Is this the original letter that I sent you with the draft? A. Yes.

Q. And it is the same as the carbon I just read? A. Yes.

Q. And you returned that letter to me on the 23d of February, did you? A. I indicated there on the letter received from you "2-23-27. Duly rec'd and thanks."

Q. What is written under the letter is "Duly rec'd and thanks; Wayne Dumont"? A. That is my handwriting, and this is the carbon copy that you enclosed of the draft.

Judge Lewis—I offer the carbon copy of the final decree that I drafted at that time, and ask that it be received.

Mr. Drewen—I object to it.

Judge Lewis—Why, it is a part of the whole thing. It will aid us as to what occurred at the office at that time when Mr. Tucker was in the office with Mr. Rosenkrans, and whether I then had a paper signed which I wanted him to sign and which I showed to Mr. Rosenkrans, and which Mr. Drewen says changed his mind entirely; he was through, his testimony is, "he wanted me to sign away all the rights of all my children." That is what he testified to that I wanted him to do, and I want to show that this was the decree,

drafted in pursuance of the understanding, as Mr. Rosenkrans has already testified was the understanding.

The Court—It seems to me it is admissible.

(The same is marked Exhibit C-7.)

Q. Mr. Dumont, when you received the draft of the decree did you have any communication with Mr. Tucker? A. A letter was written to Mr. Tucker enclosing the draft of the decree, or a copy of it. Mr. Tucker came to see me some days later.

Q. Did he say anything to you indicating that he was unwilling to sign that decree at any time?

Mr. Drewen—Of course, that is objected to on the ground as leading, and as calling for a conclusion. We realize that we are privileged, but we don't insist upon our privilege. We are willing to have Mr. Dumont tell anything that was said to his client.

The Court—You would rather have him testify than Judge Lewis?

Mr. Drewen—Exactly.

Q. Then I will ask you, Mr. Dumont, if you will tell what occurred when you sent the letter with the draft of the decree to Mr. Tucker. A. The draft of the decree was sent to Mr. Tucker. The following Sunday, I think, Mr. Tucker came up to my house. It certainly was a Sunday he was there; it might have been the following Sunday and it might have been a Sunday later than that; and he said, showing the decree to me, "I don't want this decree; it surrenders all my rights."

I said, Mr. Tucker, do you remember your having

come to me at my own office and having stated to me, without consultation with me and through a personal friend of you and Mrs. Mayer, that you went down to Mayers and asked them whether or not a settlement couldn't be reached in this matter? And he said, "Yes, I remember that."

I said, "Now, Mr. Tucker, I had nothing to do with that, did I?"

And he said "no."

"You did it of your own accord?"

He said, "Yes."

I said, "You did it without consulting me?"

"Yes," he said.

"What, do you remember, was settled between you and Mrs. Mayer?"

He said she was to get the stock and carry out the trust.

I says, "That is exactly what you told me." I says, that is all this decree intends to do. You are going to surrender the stock and have it so that Mrs. Mayer can have it," but I said, "First, it will have to be turned over and put back into the estate." I don't know whether he had done it or not yet, but at that time it stood in his name.

"Well," he said, "it takes away all the rights of my children," and he had been so advised.

I said, "I don't care who advised you about that, it is the effect of the decree to carry out what you told me yourself"; and thereupon I went into some other room, and I told him I was through, and he told me he was through with me. He said that he had consulted Mr. Perkins' firm—whoever they were—and then I told him the reason why I wouldn't go on, and the present wife and two friends were out-

side in the automobile. He didn't take off his overcoat. He came in the sun parlor of my own house and the two of us sat there and talked, and that was the extent and substance of the conversation that I have repeated.

Judge Lewis—I would be perfectly willing to go further if Your Honor wants me to, but I don't feel that I ought to ask Mr. Dumont to disclose anything excepting his relations and Mr. Rosenkrans, through him, with me.

The Court—That ends the transaction?

Judge Lewis—That is the end; yes, sir. I would like to ask one more question: I noticed Mr. Dumont possibly had one thing in mind when he was testifying about another.

Q. The stock that was standing in Mr. Tucker's name was his wife's stock, wasn't it, not the trust estate's stock? A. It was the stock standing in his name that he spoke to me about.

Q. You had to do with the trust stock, didn't you? A. Oh, yes.

Q. Did I understand you to say that you thought the trust stock was standing in his name? A. No, as I understand it, the trust stock wasn't standing in his name. It may have been; I don't know. I am pretty positive it wasn't but he had some stock in his own name.

Cross-Examination by Mr. Drewen:

Q. Did you retain the original papers in the matter of the estate of Mrs. Tucker—the first Mrs. Tucker? They are still in your possession, are they not?

A. Nothing in my possession that isn't in his possession, or a copy of it, except an inventory which I have, but the values of which he never gave me and never gave me the data. I have that in my possession.

Q. When I refer to papers in your possession, I mean original papers, so that there can't be one original in your possession and another in his. Are there any other papers in your possession? A. There is a mortgage, I think, or an assignment of mortgage. That is all that is in my possession. It has nothing to do with the stock.

Q. Is there an inventory in your possession? A. There was an inventory taken in pencil by Mr. Morse and a Mr. King. I suggested Mr. King to Mr. Tucker.

Q. There was an inventory taken, was there not? A. I wouldn't call it a complete inventory; a memorandum, and he was to finish it, and that was never filed. I never got the data.

Q. What were the names of the gentlemen that acted as appraisers? A. George L. King, Deputy Surrogate of Passaic County, and he got Mr. Morse, I think. I don't know whether his name is Morse or not, but a gentleman in the employ of a corporation, living in Boonton.

Q. Isn't it a fact that Mr. Morse and Mr. Kinney did file a final appraisement of the estate? A. No, they signed at the end of it, in which was a statement of this stock that stood in the name of the trustee. He wanted it noted as being in his possession and claiming it as a part of the estate. I told him that wouldn't make any difference—wouldn't help at all—but he wanted such a statement; and you have the document right here in court and can see that it is signed. It couldn't be signed until all

parties had subscribed to it, the values of which he was going to ascertain from some stock broker.

Q. And you say for the want of that data of values it has not been completed? A. For the want of that and two or three other things which he had to put in and which he said he would furnish and never finished.

Q. Did he tell you what they were? A. He didn't. They were things of minor importance that were not in there.

Q. Now, Mr. Dumont, isn't it a fact that the appraisal and inventory was signed by Mr. Tucker? A. Mr. Tucker's name was on this in two or three instances but it is not dated or filed.

Q. His signature is on it? A. His signature is on it, and you can have it, just as I have told you. He furnished the list in pencil.

Q. Now, I have asked you, have I not, to turn over to me—that is, your firm—the papers that you now refer to, haven't I, Mr. Dumont? A. No, you asked me to turn over to you the papers that pertain to it, and I told you that I had no papers in the matter of this estate that he didn't have a carbon copy of. That is eactly what I told you. And he has a carbon copy of this inventory.

Q. I will say to you that he has turned over to me a carbon copy of that, but there is the original that bears the signatures of these men, and I have asked you for that. A. You have asked me for that, and I told you it was not complete. You have a copy that is completed. You asked me for the return of that page that has this memorandum on and I gave it to you.

Mr. Drewen—I ask, Your Honor, that the answer be stricken out; I have asked no question that calls for it.

The Court—That is true, and you have the same right on cross-examination that was given to Judge Lewis over your objection this morning. The answer may be stricken out.

Q. Mr. Dumont, the simple question is, have I or have I not asked you to turn that paper and all other papers that you have—original papers—over to us? A. You have asked me, or your office has. I don't remember having any requests from you, but someone in your office made the request to have all papers turned over, and I made the statement just as I make it now.

Q. And that was not done? A. I haven't any completed papers in my possession of which you haven't a carbon copy, excepting this mortgage.

Q. Complete or incomplete, you haven't anything that you haven't turned over? A. No, sir; I have not. You are entitled to anything I have, if you want it.

Q. Do you remember having received this letter from our firm, dated March 7, 1927 (showing witness paper)? A. Yes, sir; I do.

Q. You did not respond to that letter, did you? A. I responded to it over the telephone to the same man that does all of the talking. It seemed to me that whenever I tried to get you you were out; I will tell you that very frankly.

Q. The letter of March 7th referred to reads as follows:

Judge Lewis—It hasn't been offered yet. I would like to look at it.

Mr. Drewen—I will offer it.

Judge Lewis—Of course, this examination of Mr. Dumont is very remote from the subject I asked him.

Mr. Drewen—It isn't remote from the subject you asked him this morning why he didn't file an inventory.

Judge Lewis—I would be very glad to have him produce that inventory.

Mr. Drewen—I offer this letter in evidence, dated March 7th, from our office to Mr. Dumont.

(Admitted and marked Exhibit D-5.)

Mr. Drewen—The letter is as follows:

Dear Mr. Dumont:

I am sorry that I was not able to get to your office on Wednesday last. This was due to the pressure of a number of other things and found it impossible to do so.

I am enclosing herewith a form of Consent of Substitution, which we understand to be in accordance with your views of the situation, it being understood, of course, that the matter of your counsel fee is to be taken up by the Court at the conclusion of the case.

Won't you kindly sign your consent to the original of the enclosed order and return in the envelope herewith?

If you will indicate when it will be convenient for you to turn such papers and files as you have over to our representative, we shall arrange to call for them accordingly.

Thanking you and with best wishes for the continued improvement of your health, we are

Very truly yours,

Q. Now, let me ask you, Mr. Dumont, if you received our letter of March 12th, five days after Exhibit D-5? A. Yes, sir; I did.

Q. Did you address a reply to that letter? A. I called up your office and got this same young man.

Q. Did you address a reply to that letter? A. I did not, and I will tell you and the Court why, if you want to know.

Q. No, I just want to know whether you replied, and you say no?

Mr. Drewen—I offer this letter in evidence of March 12, 1927, addressed to Mr. Dumont.

(Admitted and marked Exhibit D-6.)

Mr. Drewen—The letter is as follows:

March 12, 1927.

Dear Mr. Dumont:

Won't you kindly let us hear from you in reply to our letter of a week or so ago, in which we asked that you return to us the substitution and what other papers you have. If there is any question as to this won't you please get in touch with Mr. Drewen on the telephone.

We would appreciate very much your assisting us in this behalf.

Thanking you, we are

Yours very truly,

Redirect Examination by Judge Lewis:

Q. Mr. Dumont, why didn't you reply to the letter? A. I called Mr. Drewen up firstly and left a message with his office to have him call me up, which, as far as I know, he never did. When the

second letter followed, I called up again and tried to get him, but he was out, and I requested that he call me. And the reason I didn't do it was this: On the morning when this matter came up it was agreed or suggested by Vice-Chancellor Bentley, in the presence I think of yourself and Mr. Drewen, that the question of fees in this matter would be settled between counsel, or if counsel couldn't agree the Vice-Chancellor would fix it; and I said that anything that was done would be agreeable to me. Mr. Drewen was coming down to see me about that matter and didn't come, and his letter here, marked Exhibit D-5, says: "I am sorry I was not able to get to your office on Wednesday last." I didn't feel that I would like to give the substitution, under those circumstances, although I didn't interfere at all in the case and had no feeling in the matter, but I thought the question of counsel fees should be settled. I didn't understand that it was to be at the end of the case. The day Mr. Tucker was up to my house last he said to me, "I am much obliged for what you have done." Of course I didn't take that straight, exactly.

Q. You didn't take that as exclusive? A. I didn't take it for anything; I simply did, like you, stood back and stood on my rights as any man will.

Q. Mr. Dumont, can you remember what was in that inventory you have spoken of? A. The inventory was taken on a slip of paper, I know, in lead pencil—two or three slips, probably. When I say "slip" I mean the entire number of things were taken that way. That is the way I understood from Mr. Kinney was the way in which they put them down. I know they made the inventory at the house, and from that list I drew the inventory itself, and when

the inventory was completed and ready for signature they came down.

The Court—The question that was asked you was, whether or not you remember any of the things that were in the inventory.

A. Pardon me. I simply wanted to give the details. I can only say there were a lot of shares of stock of the U. S. Gypsum Company, five or six loose articles, or seven, and three or four other things. Most of the inventory was of the U. S. Gypsum Company stock.

Q. Was the inventory in final form? A. It was in form to be signed up by these men.

Q. Was it signed up? A. I believe Mr. Morse and Mr. Kinney were both there for that purpose; when they were sworn I wasn't there and they didn't sign the oath, but they signed at the end of this paper.

Q. But there is no question about the appraisement? A. They hadn't finished the appraisement. It was merely taken in shorthand by the stenographer in the office.

Q. Could you produce that? A. Absolutely.

Q. Will you do so at the next session? A. I will give it to them or to you or anyone else, whatever the court directs.

Q. Well, you say you didn't know the value. A. It was not cmplete, for the simple reason that these other things that were to be put in weren't brought there.

Q. "These things" that you speak of were trifling things? A. The things that I speak of were minor things.

Q. What was the total amount; can you recall that? A. I cannot, because it wasn't figured up. It was figured up on an adding machine and ought to be somewhere, but the minor things were stock that had no value, practically, but they had to be put in anyhow.

(Mrs.) ESSIE T. W. MAYER resuming the stand, testified as follows:

Direct Examination by Judge Lewis (continued):

Q. Did your sister ever tell you that she wanted D-3 for the purpose of making a new will? A. No, she did not.

Q. When was the first time after your sister's death on July 13, 1926 that the thought of this trust agreement and trust stock came to your mind? A. I would say that was on the day after my sister was buried.

Q. What makes you say that? A. Mr. Tucker came to my home with a copy of her will which he asked me to read.

Q. At your home in Ridgewood? A. Yes.

Q. Did he have anything else besides the copy of the will? A. He had a copy of his will, and had a copy of that trust agreement.

Q. Do you know whether it was D-3 or D-1? A. No, I don't know which it was.

Q. What was his purpose in coming there with the will and with the trust agreement, so far as you learned from what he said? A. He asked me to read the will, and when I had finished reading the will he asked me whether or not we could make one of the trust and the estate.

Q. What did you say to that? A. I said I didn't understand him.

Q. Did he attempt to explain further as to what he meant? A. Yes; he said that in that will she had said that she wished all her children to share equally and that by that she meant in the trust also.

Q. That is what he said to you? A. Yes.

Q. What did you reply then, if anything, or the substance of your reply? A. Well, I said that she had said in her will she wished them to share equally in the estate, but the trust had nothing to do with the estate; that that was separate and apart.

Q. Was that all that occurred on that occasion? A. Practically, yes.

Q. You say that was the day after your sister's burial? A. It was the morning after her burial.

Q. Now, was there any conversation between you then as to where the trust stock was? A. Not that morning.

Q. When was the next time he spoke to you about it? A. Why, that would be on Friday morning. When I went to his home early Monday morning he was on the point of leaving for the Pocono Mountains, and I went to his home early; I believe it was the following Monday morning. In the meantime I had thought over what had been said during that conversation, and knowing that he was leaving for Pocono, I went up there and demanded a copy of that trust agreement, which he had in his possession. I had no copy in my possession at that time.

Q. What else did you demand, if anything? A. I asked him then where the stock was. I knew that he had taken securities out of the Second National Bank safe-deposit box, and I asked him if he had

also taken the trust securities, and he said he had; and I asked him where they were, and he said in his safe-deposit box.

Q. Did he say where his safe-deposit box was? A. No.

Q. Did he say whether he had opened a new box? A. No, he didn't say.

Q. Was there anything else that occurred in that conversation when you went over there on Monday morning, when he was starting for Pocono? A. Yes, I said, "I want a copy of that agreement."

He said, "I want that agreement to show Mr. Holmes when I go up to Stroudsburg." I says, "You have no right to that. You are going by automobile and that is very dangerous; if anything happens to you I will have no copy of the trust agreement." I said, "It is mine; you have no right to it."

And he says, "I won't give it to you."

I says, "If you will give it to me I will go home immediately and make a typewritten copy and send it to you and it will get there almost as quickly as you will."

And he says, "No, I won't give it to you." "And as soon as you come back," I says, "I want you to give me that stock," and he says, "What do you mean; are you going to hold up the dividends on that stock?"

I says, "Certainly I am."

He says, "I will not give you this trust agreement," and he said he was about to go to the city, and he said, "We are wasting time," and he got up and went out the front way and talked with the Italian laborer in the front of his house and dismissed me.

Q. Is that all that occurred on that occasion? A. That was practically all.

Q. That was the Monday following the day of your sister's death, I understand you to say? A. Yes, I believe it was the following week.

Q. Not the day after the death but the Monday after the funeral, and the funeral was Thursday, as I understood you to say, and the first conference was on Friday when Mr. Tucker came to your house, and the second conference that you have just been talking about was held the Monday following? A. Yes, sir.

Q. Now, when did you next see Mr. Tucker? A. I believe it was the following Sunday evening, when he came to my home.

Q. How long was he gone away? A. I think it was one week.

Q. And when he came to your home was there a conversation you and him? A. Yes.

Q. Was there anyone else present at that time? A. My mother was present.

Q. During the whole conversation between you and Mr. Tucker? A. Yes, I believe she was.

Q. Now, what was said at that conference? A. Well, he told me then that Mr. Holmes would not handle this matter for him, the settling of the estate, I believe he meant by that, but referred him to a New Jersey lawyer; and then he took from his pocket a little memorandum he had, showing the comparative inheritance of the three Tucker children and Henry McCormack. He said, if the trust remained Henry would be a very wealthy man, whereas the other children would only have a small amount compared to what Henry would get, and he

said that wasn't fair to the other children. Do you want me to tell the whole story?

Q. Yes. A. And I says, "Yes, it is certainly fair to the other children; why shouldn't he receive more than the others?" I didn't say "inherit"; I didn't mean that.

And he said, "Well, Lee," meaning my sister, "wished them all to share equally; wished to have them all have the same."

I says, "She never told me anything like that." I says, "Just what would you want me to do?"

He said, "What I want you to do is to divide the trust fund into fifths, to be divided among the children and myself—not to put it back into the estate but to divide it into fifths and to give it to each one of them."

Q. Well, what did you say to that? A. Oh, I said I couldn't do that; "it isn't mine to give; it is trust funds and I can't do anything of that kind."

Q. Was that all that occurred at that conversation? A. No, there was more; it was a lengthy conversation.

Q. We want to get it all, Mrs. Mayer. A. Well, I will tell you as much as I remember. He said that through his manipulation that fortune had been accumulated, and I said, "No, it has not been accumulated through your manipulation; that fortune has accumulated from the original and the stock dividends that have been added to it by the Gypsum Company"; I said that the trust fund had accumulated from the very beginning and likewise my sister's estate, and it was through no manipulation of his that she had accumulated such a large fortune. They had all inherited a great deal and they wouldn't have inherited anything if it hadn't been for the

fortune that had been left by Henry J. McCormack.

Q. Anything else that you can recall that was said? A. No, I believe that was the substance of that conversation.

Q. When did you see him next? A. Why, after that I believe he was home with his family for a week or two, and then he went away again to Pocono Mountains, and after he returned that time —not immediately upon his return but shortly after, he telephoned me one day, and he asked me if I would go to Paramus Cemetery to look over the plot that he had been contemplating purchasing there on which to erect a mausoleum, and I said I would and I did go, and we returned to my home and Mr. Tucker came in, and I believe that was the next conversation I had with him about this matter.

Q. And at about what month would you place that at? A. I would say that was in September.

Q. Well, when you came back from the cemetery where did you come back to? A. To my home.

Q. Was there any further talk that day about the trust agreement and the trust stock between you and him? A. No.

Q. Did you have any talk about the trust agreement or the trust stock after that? A. We had talk about the trust—about turning the trust stock over to him.

Q. Well, what was said? A. When we came back into my home Mr. Tucker took out of his pocket another memorandum and on one side was listed the income of my sister's estate and on the other side was listed the expenses of the household. The household expenses amounted to approximately $10,000 and the income as shown on that statement added to about $7,000; and he says, "You see I can't

possibly run my household on the income we have." And I said, "I don't believe that statement is correct; you haven't included your income on the stocks in your name"; and I says "the only thing to do is to cut down expenses" and he said, "Well, I don't understand why we can't get together on this matter—this trust matter?" He said "Has Lee (meaning my sister) ever done anything for you financially?" and I says "No, she never has." He says, "Well, she should have done something for you." He says, "Now, there isn't any reason, if you would divide the trust stock in fifths and give it to us, there isn't any reason why you shouldn't share in the amount that would be paid for inheritance tax." And I said, "You and I can't come to any agreement like that; the only thing for us to do is to see a good lawyer and get his advice." Then he says, "I don't know who is such;" and I says, "I am waiting for Judge Lewis to come back." I had never met him at that time. And I said, "If you would be satisfied to go to him we will go and see him," and I immediately called him up and made an appointment for some future day.

Q. Had you, in the meantime before calling at my office, talked with anyone about this other matter? A. Yes, on the Monday morning after, I called on him and demanded a copy of that trust agreement. I went and saw Mr. Seddon, who was in his office, within an hour, and I told him that Mr. Tucker had refused to give me my agreement, and I detailed the whole conversation, and after he heard it all he said, "I can't handle this matter for you; my connection with the bank takes all my time." And he said, "In the meantime, don't worry about it. Is the stock all in your name?" I says, "It is."

He says, "Has it been endorsed on the back of it?" And I said, "No." He says, "Don't worry about it, because unless they forge your signature they can't touch that stock." And I said, "I don't believe that Mr. Tucker would do that." And then I went to see you with Mr. Tucker and it was the first time I had ever been in your office.

Q. Do you recollect what was said by you and Mr. Tucker when you were in my office? A. Well, we went to your office and Mr. Tucker did all the talking that morning. He told you the whole story from beginning to end.

Q. Did he have the trust agreement with him? A. Yes, he did.

Q. Had you any copy of the trust agreement up to that time? A. No, I didn't.

Q. Do you recall hearing some question that was put by me as to the effect of the trust agreement? A. Yes.

Q. Do you recall whether anything as to your power as trustee of the stock was under discussion at the time, in reference to the expenditures of the income derived from it? A. Oh yes; Mr. Tucker said then that he was in need of funds, and he asked you whether or not I would be permitted to pay him something for the support of this boy at the present time, on account of this misunderstanding, and he said that he had already made an outlay of several hundred dollars. The boy had been entered in Manlius School that fall, and that he had made this expenditure of seven or eight hundred dollars and that he thought it might be within my rights to reimburse him to that extent.

Q. Was there some discussion about a larger

sum for the maintenance of the house? A. Yes, and you told me at that time that you didn't think that I could; that it wasn't within my rights to pay out any moneys.

Q. You have just mentioned the Manlius School; can you tell me how it happened that Henry McCormack was sent to Manlius School? A. Yes.

Q. Just tell how he happened to be sent there. A. My sister was contemplating selecting a school to which to send this boy, and she was considering a number of them, and she was talking the matter over with me, and I told her I knew very little of boys' schools, but that there was one which my brother-in-law had attended and that was this Manlius School.

Q. What was that man's name? A. Theodore Leonard; and I arranged with Mr. Leonard to go and talk over the arrangement with my sister about the Manlius School, which he did; and it was after that that they visited Manlius School.

Q. It was as the result of a conference in my office that you directed me to file a bill in this case, was it not? A. Yes, it was.

Q. Now, pending the litigation, were there any steps taken by Mr. Tucker toward a settlement of the litigation between you and him? A. Yes, about the middle of January.

Q. When did you first hear of his desire to settle this litigation? A. I think it was about the 11th of January.

Q. Whom did you hear it from? A. My sister telephoned me.

Q. And between the bringing of the suit and the 11th of January Mr. Tucker married again, did he not? A. Yes.

Q. Do you remember the date of the marriage? A. Mr. Tucker told me the 17th of November.

Q. Do you know how long before that date his wife had been in Ridgewood? A. She had been in his home there for a month before that time.

Q. Did Mr. Tucker come to your house for any purpose, and if so state to the court? A. My sister telephoned me, and she said that Mr. Tucker told her that he was unusually anxious to settle the matter, and she said "he would like to see you" and I invited him over, and Mrs. Adams, my sister, and my mother who is living there now, and Mr. Tucker came over, and he said "I have come to sign the Locarno."

I said, "Just what do you mean?"

He said, "I am sick and tired of this whole thing and I would just like to be friendly and drop the matter."

And I said, "Just what is your proposition?"

Q. By the way, had he told any members of your family that he was married again? A. No. And he said, "I am willing to let the trust remain just as it is." I said, "Of course, if that is all you want I am perfectly willing." And we went on with a long conversation about the matter. During the conversation some days before I said that I would be perfectly willing to turn it over to a trust company or to an administrator; and I said, "It isn't that I want to keep this thing for myself; I want to preserve it for the boy, and if that will bring about the desired end I am perfectly willing to do that." And we had a long conversation. He had gone to a new firm of attorneys and they had given him some information. Attorneys just love to handle a case like this because the money is right there. Well, they

told him if the case was settled it would save money for him and for the boys, and he said we would settle without wasting any more money on attorneys.

I said I had filed a bill of complaint and wanted to finish the matter in a businesslike way. Well, we agreed, and I supposed that he did. There was a long conversation, and he told me how unhappy he had been, and we told him we were very unhappy, too, because he had kept the children away from us. And on Christmas he had returned the gifts we had sent them, and we were very happy that the matter was settled. That was the substance of our conversation.

Q. How often would you go to your sister's house when she was living, Mrs. Mayer? A. You mean when she was ill?

Q. After she was married; after you came to Ridgewood. A. When we were in Ridgewood I saw my sister practically every day. We were a devoted family, and there was no estrangement of any kind while my sister was alive.

Q. How about the boy Henry? Did you see him often? A. I saw him very often. He was very fond of my mother and my mother was very fond of him.

Q. Was there any period of time when he lived with your mother? A. Yes, he lived with my mother before she married Mr. Tucker.

Q. And after you were married did she live with you? A. No, just visited; never lived with me.

Q. How often would she see you or your family? A. Oh, every day or two.

Q. Your relations were friendly up to the time she married Mr. Tucker? A. Yes, they were.

Q. How long was Mrs. Tucker confined to the house before she died? A. She was under the care of a trained nurse from February until July.

Q. February, 1926? A. Yes, until July, 1926.

Q. What was the trouble she was suffering from? A. It was septic endocarditis.

Q. Was she confined to her room for a long time? A. Yes; confined to bed for those months?

Q. From February to July? A. Yes.

Q. How often were you at her house during that period? A. Well, I or my mother or sister spent every afternoon with her during that period.

Q. Were you present with her when she died? A. No.

Q. When did you know that she was dead? A. It was about 7 or a quarter after 7 on the morning of July 13th.

Q. When was it that you saw her last before she was dead? A. The afternoon before.

Q. And you had gone home about what time? A. Oh, about 5 or 5:30.

Q. And she was surrounded by her immediate family during that period? A. During all of that period.

Q. Now, having heard the conversation with Mr. Tucker on or about the 11th of January what steps did you then take to consummate the arrangement? A. I telephoned to your office and you were not able to see me until Saturday of that week, and on Saturday I went to your office.

Q. When did you call me up? A. I called you up right then; I believe it was right then that I called you up when Mr. Tucker was in my house.

Q. (By the Court) On the 11th? A. On the morning of the 11th.

Q. Did you call me up personally or did you get my office? A. I spoke to your clerk.

Q. That morning? A. Yes, I believe I did that morning.

Q. Do you happen to know that I was constantly engaged in court during the whole of the month of January and the first few days of February? A. Yes, you told me that you were on an important matter.

Q. It doesn't make any difference what the matter was, but I wasn't able to take the matter up promptly? A. No.

Q. And you did find that I was so engaged that I couldn't take the matter up at once? A. Yes.

Q. Did you come to my office on the Saturday following the 11th? A. Yes, I did.

Q. Do you remember about when you arrived at the office? A. Yes; I arrived there about half past 10 or 11 o'clock.

Q. And had you seen Mr. Tucker before you got to my office? A. Yes, I met him that morning on the street and he was on his way to his lawyer's office.

Q. Did you have any conversation with him? A. Yes, for a minute.

Q. What was the conversation? A. He said to me, "I have the stock in my pocket, but the trust agreement I forgot to bring; will it make any difference?" I said, "No, I don't believe it will." He says, "I am going to Mr. Dumont's office now;" and I says, "I am going to see Judge Lewis."

Q. Did you have any reason to know at that time that Mr. Tucker was to come to my office? A. The

morning that I called you up Mr. Tucker was there, and when I called you up it was all arranged that it was all right to come there to see you together, and when I told you about that you said, "Oh, no, I must see you alone for a few minutes," and then I told him to arrange to be at Mr. Dumont's office at that same hour and after I had seen and talked with Judge Lewis we would then have a joint conference, and that was what he was going to do.

Q. And did you relate to me what had occurred? A. Yes.

Q. Now, tell us what occurred at that conference when Mr. Rosenkrans and Mr. Tucker came there. A. Well, they came in and sat down. Mr. Tucker took the stock out of his pocket and put it on your table, and, in substance, the conversation was this, that they had come to settle the matter and deliver the stock; and you said, "Well, of course, I don't believe we would care to accept that stock now until we have a final decree from the court." You spoke then to Mr. Tucker. You said: "Of course, Mrs. Mayer's position has been questioned and we must have the trust reestablished. It has all been questioned. We must have a decree for that purpose, and we must have a decree for another reason: You have written to the Gypsum Company, telling them to withhold the payment of dividends to her and they know that there is litigation pending." And he suggested that "I might write a letter over my signature"; and you said "If I were counsel for the company that wouldn't be enough and I don't believe the company's attorneys would be willing to accept that." And then you said, "I must have a decree covering counsel fees."

Q. Did anyone say anything to that proposition? A. Mr. Tucker or Mr. Rosenkrans—I believe Mr.

Rosenkrans said, "Well, I don't believe we have to go through all that; this is entirely different from litigation. We can do it in a friendly way, and it can be a friendly suit from now on."

Q. Was that arrangement acceded to or not by Mr. Rosenkrans and Mr. Tucker? A. Yes, they said that would be satisfactory.

Q. What was said about the stock? A. Mr. Rosenkrans said, "Well, Mr. Tucker, I think you had better keep the stock until we get such a decree."

Q. Did Mr. Rosenkrans say anything about his authority to act, do you remember? A. He said, "Of course I am not authorized to go into this any further; I was just sent here to deliver the stock."

Q. Now, during that conference at any time did I produce any paper that I wanted Mr. Tucker or Mr. Rosenkrans to sign? A. No, you did not.

Q. Had I known anything at all about the settlement until you had come to the office about 15 minutes before? A. No, none of the details.

(At 4 o'clock the further hearing was adjourned to Thursday, May 28, 1927, at 10 o'clock in the forenoon.)

Hearing of Thursday, May 26, 1927, 10 A. M., Chancery Chambers in Jersey City.

All counsel present as before.

(Mrs.) ESSIE T. W. MAYER resuming the stand, testified as follows:

Direct Examination by Judge Lewis (continued).

Q. I omitted to ask you, Mrs. Mayer whether you received a key of the second box when the second box was opened in the Trust Company Safe Deposit building in Brooklyn? A. Yes, I did.

Q. How did you get that key? A. My sister gave it to me.

Q. And when did you part with it, at the time you testified to in December? A. Yes.

Q. 1924? A. Yes.

Q. And that was the key you delivered to her? A. Yes, when the box was finally closed.

Q. What notice have you received, of any sort and of all sorts, of the application for the adoption by Garrett R. Tucker of the infant Henry W. McCormack? A. I have received no notice.

Q. How did you get knowledge of the proceedings? A. Why, a friend of mine saw the legal notice printed in one of the Ridgewood papers and telephoned me that she had seen this notice, and then, of course, I secured a copy of the paper and found the notice.

Q. Did any of the members of your family get any other notice of that application? A. No.

Mr. Drewen—I suppose the witness doesn't know what notice the family got; they can state that for themselves.

Judge Lewis—I propose to show they didn't get notice.

Mr. Drewen—And I propose to show that we gave the notice that the law prescribed.

Judge Lewis—That is what I am talking about, and that is the only notice.

Mr. Drewen—Exactly.

Q. How frequently did you see your sister, the late Mrs. Tucker, after you moved to Ridgewood up to the time of her death? A. Why, nearly every day.

Q. Did she at any time express to you any desire to revoke the trust she had made in favor of Henry W. McCormack? A. No, she never did.

Q. Did she ever express to you any intention of revoking the trust in question? A. No.

Q. Did she ever give to you any notice, written or otherwise, that she had revoked the trust in question? A. Never.

Q. Did she ever ask you to transfer to her any of the shares of stock which stood in your name as trustee under that trust? A. She did not.

Cross Examination by Mr. Drewen:

Q. Mrs. Mayer, when was it that your sister and you first conversed on the subject of discontinuing the box in Brooklyn; do you remember the date? A. Why, yes, it was in December—December, 1924, early in the month.

Q. How long after that was it, if you know, that the box was actually discontinued and the contents removed? A. Why, the box was closed on the 10th of December, just a few days after that.

Q. Now, how long before that, that is to say, how long before the time that you and your sister discussed the closing of the box, was it that you were spoken to with regard to giving Mr. Tucker access to the box? A. Well, Mr. Tucker received access to the box in January, 1922. That would be almost three years.

Q. Two years, wouldn't it? A. No, December, 1924.

Q. That's right; you are right. Now, during that period of three years from the time that Mr. Tucker had access to the box and the time the box was

closed what, of your own personal property, was there in that box? A. Nothing.

Q. But prior to the access of Mr. Tucker to the box you had something in the box? A. Not belonging to me personally.

Q. Well, belonging to your father? A. An evelope containing securities belonging to my father.

Q. Anything else besides that that was not the property of Mr. Tucker or his wife? A. No, I don't believe I ever had a thing belonging to myself in that box.

Q. Now, after Mr. Tucker had access to the box you took things out of the box, didn't you? A. That envelope belonging to my father.

Q. And you took it out of the box after you were consulted by your sister in regard to giving her husband access to the box, didn't you? A. No; I couldn't say just when I took that envelope out of the box, but it was not necessarily after Mr. Tucker had access to the box.

Q. Was it after you had been told that his wife wanted him to have access to the box? A. I don't believe that had anything to do with it.

Q. Well, Mrs. Mayer, isn't it a fact that after your sister indicated that she wanted her husband to have general access to the box jointly with the other holders of it that you then did go to the box for the purpose of removing some of the contents of the box? A. You mean, contents belonging to me?

Q. No. A. No, I don't believe I did.

Q. I am not including any papers in the box that you didn't have the right to take out. Now, do you understand the question? A. I think I do. Perhaps I had better hear that question again.

Q. I will reframe the question: At or about the time that you were first spoken to about Mr. Tucker having access to the box, isn't it a fact that you went to he box for the purpose of getting some of its contents? A. I don't remember ever doing that.

Q. Then it isn't clearly in your mind whether you did or did not? That is what you intended to answer, isn't it? A. Well, yes.

Q. Now, when did you first state to Judge Lewis the story that you have just told on the stand in this case? A. I first visited Judge Lewis with Mr. Tucker on September 23d, but I saw Judge Lewis again on September 24th, I believe it was.

Q. But you did, prior to the opening of the hearing of this case, tell Judge Lewis all of the details that you have stated in your testimony here, did you not? A. I believe so, yes.

Q. And you told everything that is included in your testimony? A. Yes.

Q. And about how long before these hearings were opened was it, would you say, that you had completely told Judge Lewis all those things? A. Well, I had many conferences with Judge Lewis. I told him all those things, I believe, by the time my complaint was filed.

Q. And you regarded it as a matter of some importance, didn't you, that you did not have possession of this trust agreement itself? A. I did.

Q. And you stated that to Judge Lewis, that you did not have it? A. I did.

Q. And you explained to him the circumstance that you stated here concerning your not having the trust agreement? A. I did.

Q. Now when Mr. Tucker testified in this case that his wife, your sister, obtained the agreement

from you at your home prior to her visit to Pennsylvania to see Mr. Holmes, that was the first time you had heard that story, was it? A. That was.

Q. And during the time that Mr. Tucker gave his testimony on that day about that trust agreement you sat beside your counsel, Judge Lewis, all the time, didn't you, in this court-room? A. Yes.

Q. Throughout the entire giving of that testimony; is that right? A. Yes.

Q. And you say, do you not, that when Mr. Tucker told of his wife getting that trust agreement—the one that you had—that was in direct conflict with what you had told Judge Lewis concerning the fact that you did not have possession of it at the time of her death? A. Yes.

Q. Isn't it a fact, Mrs. Mayer, that after Mr. Tucker had testified on the first day, March 24th, you told Judge Lewis the circumstance that you have now testified to as to your not having the trust agreement in your possession? A. (Witness pauses.)

Q. Do you understand the question? A. I don't think I do.

Q. All right; that is my fault. Isn't it a fact that it was not until after Mr. Tucker testified about his wife getting the trust agreement from you—I say not until after that—that you told Judge Lewis the facts that you have now testified to concerning your not having possession of it? A. No, I don't believe it was.

Q. You say you do not believe it was; that is the fact; that is your answer, you do not believe it was? A. Yes, I told Judge Lewis all of the facts in this case before that first hearing.

Q. Well, for the sake of being perfectly clear, will you just isolate in your mind this one fact in regard to the possession of this trust agreement. As to that one thing I ask you, whether or not it was after Mr. Tucker testified that you told the circumstances to your counsel? A. No, it was not.

Q. Well, is there any uncertainty about that in your mind, Mrs. Mayer? A. No, there is not.

Q. You have already told us, have you not, that you believed that it was before Mr. Tucker testified that you told it? A. You mean that I did not have the trust agreement—how I happened not to have the trust agreement? Is that your question?

Q. No; my question is entirely a matter of when it was that you communicated these statements of fact to Judge Lewis concerning your not having the trust agreement. Do you understand me now? A. I told Judge Lewis all about not having the trust agreement before that hearing.

Q. Well, are you sure that you did, or is it only a matter of belief that you did? A. I did.

Q. Well, why did you testify a moment ago that you believed that you did? You did so testify, didn't you? A. Well, I may have.

Q. What was the date of your sister's marriage to Mr. Tucker? A. October 21, 1914.

Q. When was it that you first heard of the likelihood of such an event? A. About June, 1914.

Q. Did your sister communicate it to you? A. She may have told me first.

Q. Now, you had many conversations with your sister between June and the time of the marriage itself, about her marriage to Mr. Tucker, didn't you? A. I did.

Q. Very many, in fact? A. No, I didn't have very many.

Q. Just many? A. I couldn't have had very many, because she was in Water Gap and I was in Brooklyn for the entire summer.

Q. How often did you see your sister that summer, from June to October?

Judge Lewis—What year?

Mr. Drewen—1914, that summer of the marriage.

A. Why, I spent my vacation at Delaware Water Gap that summer, and then I didn't see her again until she came in.

Q. How long were you at the Water Gap? A. About two weeks.

Q. When did you go to the Water Gap? A. I don't remember just when; probably the first of August.

Q. Was it then that your sister told you about her engagement, or her attachment for Mr. Tucker? A. Oh, no; it was earlier than that.

Q. But during that two weeks you did discuss it every frequently, didn't you? A. Yes.

Q. With her daily? A. Yes.

Q. And those two weeks of your lives you spent together? A. Yes.

Q. Did you then discuss with her this question of a trust estate for Henry? A. No.

Q. Didn't mention it to her? A. No, not at that time; it was later than that.

Q. How's that? A. I believe it was later than that.

Q. How late? How long after? A. Well, I should say it was after she returned home from her vacation.

Q. When did she return? A. As I remember it, it was after Labor Day.

Q. And you and your parents had discussed that between you, had you not, before you saw your sister about it? A. No, I had not.

Q. Were you present when your father spoke to her, as you have testified, about her separating some property for Henry? A. No.

Q. Who told you that that had occurred? A. As I remember it, she told me when she asked me if I would become trustee. I didn't think very much about it at that time.

Q. But there was a time when you yourself did begin to speak to your sister about that matter after her return home in September? A. Not until the time that she asked me if I would become trustee.

Q. You had never mentioned it? A. I don't remember of having mentioned it. She may have spoken to me, but I never mentioned it to her.

Q. Do you mean to say that that was never discussed in your family circle by your mother and your father and you before that trust agreement was made? A. Shortly before, possibly, but not during that summer before Mrs. Tucker came home.

Q. And the whole basis of that advice to Mrs. Tucker was the uncertainty of the character of the man whom she was to make her husband, wasn't it? A. No, I wouldn't say that.

Q. Well, what? A. Mr. McCormack had left his estate entirely to my sister, had made no provision for the boy, and it was because he had left this and my sister was anticipating this other marriage that my father thought she should provide for that boy.

Q. I am talking about your conversations with your sister. I assume that you did not hear what your father said? A. No, I don't believe I did; I don't remember it.

Q. You knew, did you not, that your sister could have provided for Henry regardless of the marriage to Mr. Tucker? A. She could have?

Q. Yes; you realized that? A. Yes.

Q. Then there was a fear, was there not, that the marriage to Mr. Tucker would prevent, or cause the likelihood that Henry would not be provided for? A. Yes; we had heard many rumors regarding Mr. Tucker.

Q. I see. And it was the rumors regarding Mr. Tucker that went into your counsels regarding this separate estate? A. Yes.

Q. And, of course, these rumors that you heard were conveyed to your sister about Mr. Tucker? A. Yes.

Q. You conveyed some of them yourself, didn't you? A. I believe so.

Q. And it was done for the purpose of dissuading your sister from the marriage, wasn't it? A. It was.

Q. Now, after the marriage of Mr. Tucker to your sister your association with your sister continued as before? A. Yes.

Q. You spent a good deal of time in her company? A. Yes.

Q. And I presume also in her husband's company? A. I did.

Q. Your sister was a very fond mother, wasn't she? A. She was.

Q. And would you say now, Mrs. Mayer, that your sister had even, as a mother, extraordinary devotion for her children? A. She did.

Q. There were three children born to your sister of the marriage to Mr. Tucker, weren't there? A. There were.

Q. And you yourself have been attached to those children, haven't you? A. Yes, I have.

Q. And your sister was very much devoted to them, wasn't she? A. She was.

Q. Your sister, from anything that you could observe, with all the fondness that she had for her children gave it equally to all four? A. I wouldn't say that.

Q. You wouldn't say that? A. No.

Q. Then what do you say about it, that she had greater affection to Henry than for the other three? A. I have always felt that he was her favorite.

Q. She never told you that? A. No, but I have many, many times noticed that she favored him.

Q. She never told you that, did she? A. No.

Q. And what you are telling us about this separate place that Henry had in her affections was a matter of your feelings about it, wasn't it? A. Intuition.

Q. How many years passed between the birth of Mrs. Tucker's son Rezeau until Mrs. Tucker's death?

The Court—Which one is Rezeau?

Mr. Drewen—The oldest one.

A. I will have to think of that.

Q. Perhaps I can help you. A. Well, 11 years.

Q. And for many years your contact with your sister was very close? A. Very close.

Q. And as the other children came along, Betty and James, and grew in the household, they lived together as children of the same parents, didn't they? A. Yes.

Q. And in no way that you could perceive was there the slightest circumstance indicating that these children weren't children of the same parents? A. No.

Q. And it was in this domestic circle created by the marriage and by the coming of three more children that there was manifested to you this extraordinary affection as a mother that your sister showed? A. She was a very fond mother, yes.

Q. (By the Court) You say that you thought that Henry was her favorite child; you mean just as almost all parents have some one child that they seem to care more for and favor? A. Well, she worried so much more about him, apparently—worried so much more about him always. Yes, I might say that she did favor him in that way. She didn't say that she favored him.

Q. She probably would have denied that she favored any one over the others? A. She probably would.

Q. Is James the youngest? A. Yes.

Q. How old is he? A. Oh, about eight.

Q. By the way, you regard all these children as very attractive children? A. I do.

The Court—All children are attractive if you give them a chance.

Mr. Drewen—I know.

Q. Now, Mrs. Mayer, you had some conversations, didn't you, with your sister with regard to your acting under this trust in case of her death? A. Not acting under the trust in case of her death.

Q. Well, I call your attention (counsel turning to the record in this cause, page 156). What is there on your mind that you expect? If I have misstated it, what is the correct solution? A. I know how it appears there.

Q. You do? A. Yes. There, I believe it says that I will act as trustee and take care of the boy in case of her death; but I don't believe that is what I meant to say exactly.

Q. When was your attention first called to that statement in this testimony, after you made it, as appears in this transcript? A. I read that testimony yesterday.

Q. And was that the first time that it occurred to you? Just exactly what you said on that point? A. That is the first that I saw that it appeared that way. It was not my intention to so state it.

Q. How was it your intention to state it? A. She asked me if I would become trustee of this trust and if I would always take care of the boy, and I said that I would.

Q. That is what you say you intended to say, but it says here in the record: "And she asked me if I would become trustee of this trust fund, and in case of her death look after the interest of her boy."

The Court—"She consulted her attorney, who was ex-Judge Farrand of New York; and she asked me" and so forth.

Q. So that, so far as you intended to state it, there was no association, necessarily, with the death of your sister at all, was there? A. No.

Q. And you now say, that when your sister made this request of you, there was no contemplation of your doing it after her death, or in the event of her death? A. Not after her death.

Q. How is it, then, that you so clearly incorporate in your statement in this testimony that it was in case of her death that you would look after the interest of her boy? Can you explain that? A. I think the way I have put it now explains that to you.

Q. Explains what to me? A. I say if I said that she asked me to take care of the boy in case of her death I didn't mean that; she asked me to become trustee and look after her boy. But that hasn't anything to do with the exercising of my powers as trustee.

Q. You are getting ahead of me, Mrs. Mayer. I want you to explain to this court how it is that you so clearly incorporated in this statement the fact that you were to look after the interest of the boy in the case of your sister's death, when you now say that her death had nothing to do with it. Can you explain it? A. Why, yes, I can. She asked me if I would always take care of her boy in case of her death, not to look after his interest in the trust.

Q. Oh, so she did ask you to look after her boy in case of her death? A. She did.

Q. Then what do you say is wrong with this

testimony? A. She didn't ask me to look after his interest in the trust.

Q. So the word "interest" is what you object to? A. I do.

Q. What you now say is, that you were to look after the boy in case of her death? A. She asked me that at that time.

Q. But, as a matter of fact, you did conduct yourself with regard to this trust, did you not, just as if you were to really act as trustee only in the event of your sister's death, didn't you? A. No, I wouldn't say that.

Judge Lewis—If Your Honor please, I object to all this sort of cross-examination. I object to any parol evidence for the purpose of varying or contradicting the terms of the trust agreement.

The Court—I don't know what Mr. Drewen's purpose is. I assume it is for the purpose of impeaching the testimony of the witness. I don't want to make him state his purpose on cross-examination.

Mr. Drewen—I won't dwell on it.

Q. It was your sister who provided for the education and maintenance of Henry, wasn't it? A. Out of the trust dividends.

Q. Now, won't you please answer the question?

Judge Lewis—That was an answer to your question: "Out of the trust dividends."

Mr. Drewen—I ask that "out of the trust dividends" be stricken out as not responsive.

The Court—I suppose that does call for a

"yes" or "no" answer, and I suppose the answer is "yes."

Judge Lewis—I object to the question, sir, upon the ground that the question doesn't ask anything that is clear to her, as to whether she provided. There should also be included in the question an interrogatory as to whether she provided in a certain way. It might include taking him in a horse and wagon to school.

Mr. Drewen—The witness hasn't said it wasn't clear.

The Court—I overrule the objection. She can make as full an explanation as she pleases on redirect.

Q. You say it was Mrs. Tucker who provided for the education and support of Henry? A. Yes, actually.

Q. And on each occasion of the receipt of a cash dividend you turned it over to Mrs. Tucker, did you not? A. I did.

Q. And on some occasions they were delivered by you to Mr. Tucker? A. They were.

Q. How long before Mrs. Tucker's death would you say it was that the last half dividend was turned over? A. About the first of July.

Q. And your sister died on the 13th? A. Yes.

Q. And that was given by you to Mr. Tucker, wasn't it? A. No, it was not.

Q. What did you do with it? A. I took it up and gave it to my sister. She was in bed, but I gave it to her.

Q. Now, when was it, Mrs. Mayer, that you

asked your sister whether or not you had access to the Paterson box? A. That was after the receipt of the stock dividend in 1925. The stock dividend came in December of 1925.

Q. And how long after it, the latter part of 1925 in the same month was it that you asked her whether you had access to the Paterson box? A. Shortly after the receipt of that stock.

Q. What did your sister say? A. She said she wasn't sure, but if not she would see about it.

Q. Was that the end of it? A. That was the end of it.

Q. Did you ever bring the subject up to her again? A. No, I didn't, because shortly afterwards she was taken seriously ill.

Q. And there was never any mention of that subject at all between you after that? A. Not again.

Q. And you never made any inquiry of any other person, to find out whether you had access to the Paterson box? A. I never did.

Q. How long after the marriage of your sister was it that the first cash dividend was received from stock that was in your name as trustee? A. I received that in December, 1914.

Q. And you endorsed that check over and gave it to your sister? A. Yes.

Q. And that is all that took place about that, you simply endorsed it over and brought it immediately to your sister? A. We had a conversation about it before that.

Q. What conversation? A. We had considered the matter—

Q. No, what was the conversation? A. Well,

I can't tell you just all of that conversation, but it was decided between us in that conversation—

Q. Can't you tell me what was said by both of you? A. No, I can't remember just what was said.

Q. But it was as the result of what was said that you then and thereafter until your sister died turned over all the cash proceeds to her? A. Yes.

Q. There was never any discussion of the same subject again between you and your sister, was there? A. Not after that decision.

Q. You said in your direct examination that after your sister's death you knew that Mr. Tucker had removed securities from the Paterson box, did you? A. I did.

Q. Well, you knew that from the fact that you were present when your husband and Mr. Tucker started out from the house that morning to go to the bank, didn't you? A. I didn't know it, no, not from that.

Q. Weren't you present when Mr. Mayer and Mr. Tucker left your home at Ridgewood to go to the Paterson bank? A. I was.

Q. You knew where your husband was going? A. I knew they were going to Paterson, yes.

Q. You knew where they were going in Paterson? A. I knew they were going to the bank.

Q. Wasn't it from that that you knew that Mr. Tucker had taken the securities from the box? A. No, it was not.

Q. How did you know it? A. They returned at noon to have luncheon, and it was then that I knew that Mr. Tucker had taken the securities out of that box.

Q. Well, Mrs. Mayer, you knew in the morning the purpose for which they left to go to Paterson, didn't you? A. I did not.

Q. Didn't your husband tell you? A. My husband didn't know.

Q. What? A. He didn't know.

Q. He didn't know? A. No.

Q. I show you the signature on the first paper in exhibit C-1, purporting to be that of George C. Mayer, and ask you if you know that signature? A. Yes.

Q. Is that your husband's signature? A. It is.

Q. And you were present when that was signed, weren't you? A. I don't think so. I don't remember seeing it signed.

Judge Lewis—It was signed by whom, Mr. Drewen?

Mr. Drewen—By her husband.

Q. (By Judge Lewis) Were you present when that was signed by your husband? A. No, I was not.

Q. Well, I asked you a moment ago if you were present and you said you didn't remember, and now you say you weren't. A. I don't remember being present. That was the morning my sister died.

Q. Yes, I understand. The decision that you and your sister came to at the time you handed her the first dividend check was, that she was to receive all the dividend checks from this trust stock, was it not? A. Yes.

Q. And that decision, as I have stated it, was the only decision that you and your sister had arrived at on that occasion? A. It was not the full understanding.

Q. Whose understanding was it? A. The understanding that my sister and I had after the conversation in regard to the dividend check.

Q. Haven't you stated it fully? A. You see, there was a decision.

Q. You said that first. A. There was a decision. You have asked me to relate the conversation, word for word, which I can't do.

Q. I'm not asking you that now; I'm asking you whether or not I have not myself correctly stated the decision that you and your sister came to, when I say that the decision you came to was that you were to turn the cash proceeds of his trust stock over to your sister? A. That was the decision.

Q. I think that is all.

Redirect Examination by Judge Lewis:

Q. What was the nature of the relations between you and your husband and Mr. Tucker, up to the time of your sister's burial? A. (Witness pauses.)

The Court—How did you get along with Mr. Tucker up to that time—you and your husband and Mr. Tucker?

A. We were friendly—very friendly.

Q. Did you, before any testimony was taken in this case, read the bill of complaint filed in it and the answer of the defendant? A. I did.

Q. You say that the decision of yourself and your sister, upon the occasion in regard to which Mr. Drewen has asked you, was to turn the checks for dividends over to her? A. That's right.

Q. You said that that was the decision, and you attempted to say it was not the understanding—the

full understanding, or words to that effect; what did you have in your mind by way of explanation of that decision? A. The understanding was that I was to turn those checks over to her with which she would provide for his maintenance, education and support.

Q. When your sister died where were you and your husband Mr. Mayer? A. We were in our own home.

Q. When did you hear she was dead? A. About 7 o'clock in the morning.

Q. How did Mr. Mayer come to go to Paterson with Mr. Tucker? A. Mr. Tucker asked him to accompany him to Paterson; he wanted to have his car washed and he wanted to go to the bank.

(Mrs.) EDITH W. ADAMS sworn on behalf of the complainant, testified as follows:

Direct Examination by Judge Lewis:

Q. Where do you live, Mrs. Adams? A. 117 Linwood Avenue, Ridgewood.

Q. Are you the youngest daughter of the three daughters of your father Mr. Watters, and sister of Mrs. Mayer and the late Mrs. Tucker? A. I am.

Q. Did you live with your father and mother in Brooklyn? A. I did.

Q. And who else was living there at that time, say, about the year of 1924? A. Why, my sister Mrs. Mayer and her husband and the little girl Helen—

Q. Whose little girl? A. Mrs. Mayer's little girl.

Q. In that year were you yourself sick? A. I was.

Q. And did it cause you to go away from home? A. Yes.

Q. And where to? A. Saranac Lake.

Q. And who was with you there? A. My mother.

Q. What was the condition of your father's health at that time? A. My father had not been well for years and his condition became very serious while we were away during that year.

Q. Who was taking care of you? A. My sister Mrs. Mayer.

Q. Do you remember your mother being called back home about that time, December 24th? A. At Thanksgiving, 1924.

Q. And your father died how long afterwards? A. On Christmas day, 1924.

Q. Were you home? A. I was not.

Q. When did you move to Ridgewood? A. In March, 1925.

Q. At the same time that your sister Mrs. Mayer moved and your mother? A. Yes. I had come home from Saranac Lake in January and we all moved in March.

Q. That was of the year— A. 1925.

Q. Were the Tuckers—Garrett R. Tucker and his wife and family—at Ridgewood at that time? A. Yes, they were.

Q. They had moved before you went there? A. Yes.

Q. Were you then married? A. No, I wasn't.

Q. How soon after were you married? A. I was married in October, 1926, about a year and a half after.

Q. And up to that time did you continue to live with your mother in Ridgewood? A. Yes, in Mrs. Mayer's home. Mother and I lived with Mrs. Mayer in Ridgewood.

Q. When you were married did you change your place of abode? A. Yes.

Q. Where did you go? A. I moved to 117 Linwood Avenue, Ridgewood.

Q. While you were living at your sister's house —Mrs. Mayer's house—did you see your sister the late Mrs. Tucker more or less frequently? A. Practicaclly every day.

Q. Where? A. Well, we lived just within a few blocks of each other, and before she was taken sick she either came to our house or we went down there after she was sick in bed, and spend every afternoon with her with the exception of two or three times I visited in the city.

Q. Did you ever have a conversation with her in Ridgewood which caused the trust that she had made in favor of Henry W. McCormick to be spoken of? A. I did.

Q. When was that conversation? A. I can't say the exact date, but I imagine it was about two or three weeks before she died.

Q. Now, please tell the court what that conversation was—the substance of it—between you and her. A. We were just having a general conversation and, somehow or other, we got on the subject of money and the comparative wealth of different people that we knew, and she said in a laughing way, that somebody had said to her, "You with all your millions?" And she said, "I don't know where they get the idea that I am so wealthy, because" she said,

"I really haven't got so much." And she went on to say that "of course, the Gypsum stock is worth a little now; I haven't so much because half of that is Henry's."

Q. Now, was there anyone else present? A. No, there wasn't.

Q. At that conversation? A. No.

Q. Was there anything else said, in substance? A. Well, I don't remember what else was said. Of course, we did go on talking all the afternoon and I don't remember what else was said on the subject.

Q. Do you remember, after your sister's death, having a conversation in which Mr. Tucker and your mother and Mrs. Mayer participated, at your house or your mother's house somewhere, after Christmas, 1926? A. Yes, I do.

Q. About when was that? A. About the middle of January, 1927.

Q. Now, please tell the court what was said at that conversation by any and everyone that was present at it. A. Mr. Tucker, early in the morning, called up our house and talked to my husband and said that that he was coming down; didn't say what for.

Q. What day of the week was it? A. Why, I'm not sure; I think it was Tuesday.

Q. It was not a Sunday or Saturday? A. No.

Q. Well, proceed. A. About 15 minutes later he arrived, and after talking for a few minutes with my husband he asked for mother, and mother and I went in and Mr. Tucker spoke to both of us, and he said that he would like to settle this matter; that he had been very unhappy,and that he couldn't sleep nights. He hadn't been well and it had been preying on his mind, and he was very anxious to

get it settled. Not only that, he had seen a firm of lawyers that had advised him that the best thing to do would be to settle. He said, I believe, that he had been in to see my husband on one or two occasions—

Q. At the office in New York? A. In New York before that, and he told my husband that he thought—

Mr. Drewen—Just a moment. I object to that, of course.

A. Well, I thought you wanted the whole story.

The Court—Is this what he told you or what your husband told you about what he told your husband?

Q. I want you to say what was said in your presence by Mr. Tucker and you and your mother that morning when you say Mr. Tucker came over to your house, somewhere—whatever date it was in January that you mentioned.

The Court—Now you just reached the point where you said that he had answered your husband at his office.

A. Well, I will take that out. He said that he had always been under the impression that my sister, Mrs. Mayer, was out after the money, but that Charley, my husband, had told him that that was not so, that she probably would not keep this trust, that she might put it with a trust company if she felt that that was a better thing to do after this case had been settled; and so Mr. Tucker said, when he heard that, that it changed his whole attitude and,

of course, in that case he would be willing to settle. And we said that we would all be very glad to have the matter settled in that way, because that was all we wanted. He said that he was willing to allow the trust to stand, and we said it was the right thing to be done. And so we said that we would talk it over with my sister; and I telephoned to her and she said she would be glad to talk it over, and we all went up to her house.

Q. Your sister Mrs. Mayer? A. Yes. And he told her about the same thing that he had told us; and she said to him, "What is your proposition?"

And he said, "I have no proposition."

And she said, "You mean to let this trust stand?"

He said, "That is exactly what I mean."

And she said, "Of course in that case I would be perfectly willing to settle, and glad to, because that is the only way that would be right." And after that we had a general conversation on the matter.

Q. When Mr. Tucker came to your mother's house, or your house, as you say, in the first instance was there anything said about any communication being had by your mother? A. I think he mentioned a letter that mother had written him just after Christmas.

Q. Had you sent any Christmas present to Mr. Tucker's children at Christmas time? A. Yes, sir.

Q. You yourself? A. Yes.

Q. And any other members of the family? A. Yes, we all sent presents.

Q. And what became of them? A. They were returned, unopened.

Q. By whom? A. Mr. Tucker, I presume.

Mr. Drewen—I ask that that be stricken out.

The Court—That may be stricken out.

Q. Do you know how they were returned? A. They were returned by Western Union messenger.

Q. Do you know who took them to the Western Union? A. Yes, the man in the Western Union office told us that Mr. Tucker did.

Mr. Drewen—I ask that that be stricken out.

The Court—It may be stricken out as hearsay.

Cross-Examination by Mr. Drewen:

Q. Mrs. Adams, you remember when your sister Mrs. Tucker became seriously ill and was confined to her bed? A. Yes, I do.

Q. How long was that before her death? About a year, wasn't it? A. About six months.

Q. And during that period of six months you visited your sister pretty often? A. Very often.

Q. Was it daily? A. I would say daily.

Q. And I understand you to have said that the only exceptions to those daily visits were days when you made other visits in New York? A. Yes.

Q. When did you usually go to see your sister, in the morning or afternoon? A. Afternoon.

Q. And you would spend how much time with her, as a rule? A. While the nurse was out, from about 3 or 6.

Q. Was the nurse out every afternoon? A. Yes.

Q. And you went there to keep your sister's company and serve her the best you could; is that right? A. Yes, I did.

Q. Now, you talked a good deal to your sister during those visits? A. I did.

Q. Every day? A. Every day.

Q. How long before your sister's death did these visits cease? A. The afternoon before.

Q. So it went on right down almost to the end? A. Yes.

Q. During the three weeks preceding your sister's death you saw her every day? A. I did.

Q. And did you spend the time on those days for three weeks from 3 to 6 in the afternoon? A. There were some days when she was too ill and in very great pain that I didn't stay with her three hours.

Q. But you were with her and spent some time in conversing with her every day for those three weeks? A. Yes.

Q. How many days were there of those three weeks that your sister was in so great pain that you couldn't converse with her? A. I couldn't say how many days.

Q. The last time you saw her was July 12th? A. Yes.

Q. Did you converse with her that day? A. I did.

Q. And spent how many hours with her? A. I spent one hour with her that day.

Q. Now, can you tell us what you and your sister discussed on that day—the day before her death—what you talked about? A. I cannot. I was not alone with her on that day.

Q. Who else was with her? A. I remember

that afternoon very distinctly. Do you want me to tell you about it?

Q. I just want you to simply answer the questions. Who else was there at your sister's home? A. At the time, there was my mother, the man that is now my husband, and my sister Mrs. Mayer; I think that was all.

Q. How long were those persons in your sister's room that afternoon? A. I should say about an hour.

Q. Conversing generally? A. Yes.

Q. Can you tell us any of the conversation? A. I don't remember it.

Q. Do you remember any of the conversation that took place the day when you were all in your sister's room? A. Those last few days she had gotten out of bed and walked and we talked about how far she could walk each day. She thought she was getting better because she walked a little every day, and we talked about her condition, and tried to encourage her.

Q. Can you tell us what you and your sister discussed? I don't ask you to tell the substance of the conversation but the topic or theme of the conversation that you had with your sister on these days of the three weeks preceding her death? A. There was no special theme; just general conversation.

Q. Conversation that rather wandered over a number of subjects, did it? A. Yes.

Q. Can you tell us what any of those subjects were? A. (Witness pauses).

Q. If you can't, say so. A. No, nothing of any importance.

Q. Now, can you tell us what you and your sister discussed throughout the early part of the six

months period in which you paid visits to her? A. I cannot.

Q. You have no recollection of anything that you talked about? A. Just general conversation.

Q. You can't tell us anything that was said? A. No, I cannot.

Q. So that the one conversation, the one exchange of words that passed between you that you do remember in that period of six months, sufficient for you to state the language used, is that with regard to Henry's ownership of half of the stock? A. I remember that distinctly.

Q. How long were you in the room with your sister that day? A. I don't remember exactly how long, for I was spending the afternoon with her.

Q. You have said it was three weeks before her death. A. I wouldn't say the day exactly. I say it was a few weeks before her death.

Q. I think you said three weeks. A. I think I said two or three weeks.

Q. Were you there an hour that day? A. I think I was.

Q. Two hours? A. I should say two hours.

Q. Were you there three hours? A. Probably three hours.

Q. Talking with her all that time? A. She may have slept a part of the time. I may have read to her. I was talking to her a part of the time.

Q. What brought about this subject of comparison of wealth? A. I don't remember exactly.

Q. You can't tell what introduced that subject in the conversation? A. No, I can't.

Q. You don't remember that at all? Before this subject of the ownership of the Gypsum stock was touched upon who were the families you were dis-

cussing with your sister? A. One or two families that we know.

Q. In Ridgewood? A. The one that I am particularly thinking of is in Brooklyn.

Q. And you have told us all that was said between you and your sister, or by your sister, in regard to the ownership of this Gypsum stock? A. I don't know that I have told all; I have told you all that I remember.

Q. May there have been something in that conversation that you don't remember? A. I don't think so.

Q. Your belief is that you have told us all that you said? A. I can't remember what I answered to that; it probably went on.

Q. No, what I ask you, Mrs. Adams, is this: It is your belief, is it not, that you have told us all that your sister said to you on that subject? A. I have told you all that I remember on that subject.

Q. When did you first repeat that conversation after it occurred? A. I repeated that to the family when I went home, I think probably the next day.

Q. What was the occasion for that? A. I don't remember.

Q. Can you tell me any particular reason why you repeated that conversation to the family? A. It made an impression on me.

Q. Why? A. Because I knew of the trust that my sister held for Henry; I also had always known that my sister, Mrs. Tucker, had the power to revoke it, and when she mentioned the trust it made an impression on me.

Q. Who told you about the terms of this trust? A. I didn't know of the terms of the trust.

Q. How did you know as much of the trust as

you have spoken of here? A. I simply knew there was a trust; I knew that my sister had the power to revoke it.

Q. How did you know that? A. More'n I can tell you now. I was in the family and I had heard about it.

Q. You had heard your sisters discuss about this power to revoke the trust? A. I don't know about discussions, but I knew about the trust.

Q. You cannot tell how you came upon the knowledge of the details of the trust and the power to revoke it, can you? A. I cannot.

Q. When you say that you spoke to the family about it do you include Mrs. Mayer? A. Yes, I do.

Q. You repeated that conversation to Mrs. Mayer? A. I do not remember repeating it; I don't remember the occasion on which I repeated it, but I told the family who was present.

Q. And you think it was the next day you told it? A. It might have been the same day and it might have been the next day.

Q. And the day that Mr. Tucker came to your home, did Mrs. Mayer go to your home or he go to Mrs. Mayer's home? A. We all left and went up there to her home.

Q. You included? A. Yes.

Q. These presents that you have spoken about, they were sent by messenger, weren't they? A. They were.

Judg Lewis: Can you produce the letter that was written by Mrs. Watters, the mother of the complainant, to Mr. Tucker shortly after Christmas, 1926?

Mr. Drewen—I have it, I think. (Counsel produces letter and hands it to Judge Lewis.)

Judge Lewis—Any objection to my offering it in evidence?

Mr. Drewen—No.

Judge Lewis—I offer it, letter dated January 4, 1927, from Mrs. Ellen T. Watters to Mr. Tucker, the defendant.

(Admitted and marked Exhibit C-8.)

Judge Lewis—I will read it:

Exhibit C-8.

Jan. 4, 1927.

Dear Garrett:

I have been wondering at the beginning of the New Year if you are happy over what you have accomplished in the past two weeks. Certainly if it was to cause unhappiness in our home you have done it. The few little Christmas gifts were sent in the kindliest spirit. I thought perhaps the season and past memories would soften you a little, but it is hard to imagine the spirit in which they were returned. Of course I know you can make up to the children in dollars and cents a hundred times over the value of them, but you can never make up for the feeling of hatred you are instilling in their young hearts, and the lies with which you are poisoning their minds.

A few weeks ago when I was in Syracuse the boys both promised to come and see me during the Christmas holidays. I hardly expected Rezeau as I presumed you would keep him away as you have the other children, but Henry said nothing would keep him away,

but evidently his childish mind was changed under the strong influence you exerted over him and things you have told him. Were you afraid he might hear something you didn't want him to know? Then why didn't you come with him and talk the thing over squarely? I haven't a thing to say to Henry that I would not say before you. Do you think that quite fair to the boy to tell him only what you want him to know? But of course that doesn't worry me, as truth always wins out.

Now, Garrett, I am not expecting any favors of you only the respect due Lu's mother and the children's Grandmother. Lu was very dear to me. You have everything belonging to her, even the smallest trinkets, some things which were mine and which would have meant a great deal to me had you offered me any one of them, but you did not. While I do not begrudge these or anything else you have I do feel it terribly that you have embittered the children against all of us unjustly.

You have a great responsibility Garrett in bringing up a family of children. Be careful that you don't do anything that would react against yourself later in life.

Very truly yours,
ELLEN F. WATTERS.

Redirect Examination by Judge Lewis:

Q. Was the time of Mr. Tucker's coming to your house when the conversation which you have related

between him and your mother, of a date later than January 4th? A. It was.

(Mrs.) ELLEN T. WATTERS sworn on behalf of the complainant, testified as follows:

Direct Examination by Judge Lewis:

Q. Mrs. Watters, you are a widow? A. Yes.

Q. And your husband's name was— A. James.

Q. And how many children have you? A. Three. I had three.

Q. What are their names? A. Elizabeth, Essie, and Edith.

Q. And Elizabeth became the wife of Garrett R. Tucker? A. Yes.

Q. You lived in Brooklyn with your husband? A. Yes.

Q. And you moved away from there when he died? A. Yes, I sold my home and went to Ridgewood.

Q. And when did you go to Ridgewood? A. I moved to Ridgewood in March.

Q. What year? A. 1925, I think; I'm not very sure about dates.

Q. Your husband died when? A. On Christmas day.

Q. Of what year? A. 1924.

Q. And have you lived in Ridgewood ever since March, 1925? A. I have.

Q. You remember the conditions at your house in the month of December, 1924, the month your husband died? A. I do.

Q. What was the nature of it? Was the condition a placid one or was there much excitement in the family? A. Well, I don't think you would call it a pleasant one. My husband was very ill and my daughter was away in Saranac Lake.

Q. And who was looking after the house and family? A. My daughter, Mrs. Mayer.

Q. You remember your daughter Elizabeth's death? A. I do.

Q. That was July 13, 1926? A. Yes.

Q. And where was she living at the time? A. 186 Hillcrest Road, Ridgewood.

Q. Where was she then buried? A. She was taken to Greenwood Cemetery and put in a receiving vault there.

Q. Did she have a plot? A. Yes, she had a part of a plot belonging to her first husband.

Q. Where is she buried now? A. I believe she is buried in Delaware Water Gap.

Q. Do you remember, after the funeral of your daughter Mrs. Tucker, seeing Mr. Tucker, Garrett R. Tucker, at your house? A. Yes, I saw him several times.

Q. Well, did you, upon any occasion after the funeral, hear anything that was said between Mrs. Mayer, your daughter and Mr. Tucker? A. Well, yes; I heard a conversation one time.

Q. Did you hear any conversation between them about the trust that had been created in favor of Henry? A. Yes.

Q. Now, is your recollection fairly good about that, Mrs. Watters? A. Well, in just what way do you mean?

Q. Well, do you recall what was said—I mean the substance of what was said? A. Yes, I think so.

Q. Now, please tell us the substance of what was said at that conversation, and if you can before you begin, tell us, please, on what day of the week it was. A. I think this particular evening was a Sunday evening. I don't remember the date.

Q. Now, will you tell us what was said? A. Mr. Tucker came around that evening, and he had a slip of paper with him showing the difference in the amounts that the children would get, and he wanted to know if I thought it would be quite fair to the other children for Henry to have so much more, and we said we thought it was quite fair, because it was really the boy's birthright; it came from his own father.

Q. Did he say anything about what was on this slip of paper you speak of? A. No, I don't remember, only it was the amount that each child would get and one would get so much more than the other, and he didn't think it was quite fair.

Q. Did Mrs. Mayer say anything about that? A. Why, I believe she asked him just what he wanted her to do, and he said he would like to divide it in fifths and give each one a fifth.

Q. Well, was there anything said then by Mrs. Mayer? A. Mrs. Mayer said she couldn't do that; it wasn't hers to give.

Q. That is about as far as you went? A. Yes.

Q. Now, I will show you Exhibit C-8 and ask you if you know the handwriting of that letter? A. I do.

Q. Who wrote it? A. I did myself.

Q. To Mr. Tucker? A. Yes.

Q. Now, did you receive a visit from Mr. Tucker after that shortly? A. Yes.

Q. Please tell us who was present when that visit occurred. A. Well, that morning my daughter and my husband and myself, and Mr. Tucker.

Q. Your daughter Mrs. Adams, you refer to? A. Yes, Mrs. Adams.

Q. Now, please tell us, as nearly as you can remember, what Mr. Tucker said. A. Well, I remember very distinctly I wasn't up when he called, and when I came down he said, "Well, mother, I have come to sign the Locarno," and I must admit I hardly knew what he meant at first; and then he went on to say that he had been very unhappy and wasn't able to either eat or sleep he was so unhappy, and that he had seen some lawyers and that they had advised him to drop the whole thing, it was going to cost so much money on both sides, and he said he had come to the conclusion that it was wrong and that he would like to drop the thing and be friendly again. And I said, "You mean you will allow the trust to remain?" and he said, "That is what I mean;" and I said "That is all we ever wanted."

Q. Mrs. Watters, did you know that Mr. Tucker had married again at that time? A. Not at that time.

Q. When did you learn that? A. I learned that the following Sunday. He invited us all at the home and in this fashion he threw this bomb in among us.

Q. Now, at this talk with you and Mrs. Adams, and I think you said your husband— A. Mrs. Adams' husband.

Q. —Mrs. Adams' husband, did you three go anywhere? A. Yes, Mrs. Adams called Mrs. Mayer

on the 'phone and told her that we were coming up there; and we all got into Mr. Tucker's car and went up there, and the conversation was practically repeated.

Q What conversation? A. Well, he said that he had come to sign the Locarno.

Q. What else, do you remember that was said, Mrs. Watters? A. Well, I really don't remember. We had a lot of general conversation about—I really don't know, misunderstandings and different things, you know.

Q. Try and give us the substance of what Mrs. Mayer said and what he said. A. He said that he was under the impression that Mrs. Mayer was after the money, and he was gad to find out that she wasn't, and he said that every lawyer asked, what did this woman expect to get out of it, and we told him that Mrs. Mayer didn't want anything out of it; only wanted to protect the interest of the boy. He was an orphan and this was put on her without having been sought, and she only wanted to do what she considered to be her duty.

Cross-Examination by Mr. Drewen:

Q. Mrs. Watters, how long before the marriage of your daughter to Mr. Tucker did you know about the likelihood of such a thing? A. Well, I first heard of it about the 4th of July—around the beginning of July; I think it was about the 4th.

Q. And did you hear about it from your daughter herself? A. No, I did not.

Q. Who told you about it first? A. Well, I think Mrs. Mayer. She had been up to the Water Gap and when she came home she told it.

Q. Now, Mrs. Watters, there was a great opposition in the family, was there not, to that marriage? A. Yes, there was.

Q. And every effort had been made to dissuade your daughter, the then Mrs. McCormick, from the marriage? A. Yes.

Q. How long before the marriage was it that you first met Mr. Tucker? A. Well, I don't just remember. It was during that summer sometime, a little after—it might possibly have been August; I don't know, I couldn't say positively, but it was during the summer that I had heard so many reports which came to me and made me feel very badly, and my daughter came to me—came home, and I believe Mr. Tucker came with her.

Q. You say you heard many reports; reports about what? A. About his character.

Q. And they were very derogatory? A. Yes.

Q. You had heard some of those from Mrs. Mayer, had you not? A. Unless it was something that she had been told. Mrs. Mayer didn't know anything about him, any more than I did.

Q. Did Mrs. Mayer repeat what she had heard to you concerning Mr. Tucker? A. That I couldn't say.

Q. Now, Mrs. Watters, when you first met Mr. Tucker it was at your home in Brooklyn? A. It was.

Q. And Mr. Watters met Mr. Tucker at the same time? A. I think not. It was in the afternoon, and I don't think Mr. Watters was there.

Q. Do you remember the occasion upon which your husband first met him? A. I do not.

Q. Now, from the time that you and your family knew of the likelihood of a marriage of Mr.

Tucker and Mrs. McCormick, you and your husband and your other two daughters did all you could to persuade Mrs. McCormick not to marry him? A. No, not after she was determined to marry, we didn't, but in the beginning we did.

Q. And you told your daughter all about the reports that had been received concerning Mr. Tucker's character, you say? A. Yes, she knew it.

Q. You say she knew it; you mean she knew that you had received such reports? A. Yes.

Q. Now, after the marriage of your daughter to Mr. Tucker there was opposition continued against Mr. Tucker, was there not? A. No, there was no opposition after his marriage. We accepted Mr. Tucker.

Q. Were you a frequent visitor at the Tucker home? A. I was.

Q. You got along fairly well with Mr. Tucker? A. Always.

Q. And you regarded their home as a happy home? A. Apparently.

Q. Apparently happy when the three children were born and the four children and Mr. and Mrs. Tucker lived together happily in his household? A. Apparently.

Q. Now, Mrs. Watters, do you remember the first time that mention was made to Mrs. McCormick about creating a separate fund for Henry? A. I do not.

Q. You remember the occasion upon which you heard that first discussed? A. I do not.

Q. Were you present when Mr. Watters discussed it with her? A. I don't remember. I knew there was such a thing; I don't remember the particulars about it at all.

Q. Did you first know of a trust agreement before or after the paper was drawn? A. Well, I really couldn't answer that; it was so long ago, and we didn't think much about it at the time. I couldn't really say whether it was before or after.

Judge Lewis—I would like to recall Mr. Dumont, who is here.

WAYNE DUMONT recalled on behalf of the complainant testified as follws:

Direct Examination by Judge Lewis:

Q. Mr. Dumont, did you bring with you the inventory of Mrs. Tucker's estate? A. Yes, sir.

Q. Which was mentioned in your evidence of last week? A. It is exactly according to the copy that they have and I have brought the original. They have a copy.

Q. Is it complete as to execution? A. No, sir.

Q. Is it complete as to the assets and the character of the assets?

Mr. Drewen—Well, I think the paper speaks for itself.

Judge Lewis—The paper will show what it is, but I want to know whether it is complete so far as Mr. Dumont is informed, and what it consists of.

The Court—Well, was there anything more?

A. There were some items, sir, that Mr. Tucker was to give the values on. Mr. Tucker signed this original which I have here as executed, and the details are here, with Mr. Tucker's affidavit on and Mr. Means' affidavit on it, but neither affidavit is finished, and there are some lead-pencil figures here, made in my office, as to values which were obtained and they are all here, and you are very welcome to have it. You can take it with you at any time. Also, there's the statement of the New Jersey Comptroller.

Q. I think the understanding was that you were to produce the inventory that was made up of Mrs. Tucker's estate by Mr. Tucker? A. Yes, sir.

Q. And that is what you now produce? A. That is what I now produce. The sheets weren't even fastened together.

Q. I notice they're loose; is there any way of fastening them together? A. Why, I had a clip. Here is the copy made for the Comptroller, not finished. A copy of this typewriting, they have. Mr. Tucker was given an exact carbon copy of this.

Q. But the values are not put in? A. Some of the values are not put in at the last time he called, and it was figured up here, but he never came, because he left, the second mortgage and assignment of the mortgage. He took away the bond, saying he was going to get the interest put in and he would bring that back. It never came back. I don't think there is any inventory at all. Here are the figures that were made by Mr. Kinney and Mr. Meade from which this household furniture and this stock was taken.

The Court—Have you any objection to this going in evidence?

Mr. Drewen—I have no objection to it going in evidence.

(The same is admitted and marked Exhibit C-9.)

The Court—Now, are there any objections on the part of either of you gentlemen to Mr. Drewen using this for the purpose of his cross examination?

Judge Lewis—He has a copy.

A. He has a carbon copy.

Mr. Drewen—I have a carbon copy but this is signed by the appraisers and my carbon is not. These appraisers are mentioned. I don't know how available they are.

Judge Lewis—Another thing you will find, Mr. Drewen, is that there is no appraisement; it isn't signed by the appraisers.

The Court—What they have done is to sign the verification.

Judge Lewis—As I understand it, the appraisement is not of the things inventoried.

A. That was the proposition at the time. They didn't have the values and neither one was filled in because this hadn't been finished.

Cross Examination by Mr. Drewen:

Q. Mr. Dumont, what was there in Exhibit C-9 that Mr. Tucker was to furnish which you said he hadn't furnished? A. Values for the small matters,—Erie & Michigan Railway and some others. The girl took it down in her handwriting and then

the valuations Mr. Rosenkrans, who was here at the last hearing, and the young lady were to figure out the valuation and add it in.

Q. (By the Court) Then there is now all the information that he has been instructed to furnish? A. With the exception of that mortgage. That was what held the matter up. Your Honor will see that the mortgage is not drawn.

Q. Mr. Dumont, don't you know, as a matter of fact, that Mr. Tucker telephoned the information concerning this mortgage—bond and mortgage—to your office? A. The young lady said he hadn't; that is all I can tell you. It never came to my ears, sir. Now, I will turn this over to you in open court so that you can take that right with you (witness handing Mr. Drewen second mortgage Wayland to Shlikerman, and assignment of mortgage from Shlikerman to Tucker).

Recess 12:40 to 1:45 P. M.

PAUL E. LAMARCHE, sworn on behalf of the complainant, testified as follows:

Direct Examination by Judge Lewis.

Q. Will you please state your residence? A. 88 Elm Street, Montclair, N. J.

Q. And what is your business? A. Brokerage business.

Q. Are you connected with anyone? A. With Herrick, Berg & Co.

Q. And you have been in that business for how long a time? A. With Herrick, Berg & Co., since 1918.

Q. And you were in that business before that time, were you? A. Since 1903.

Q. You are familiar with the business of a broker? A. Yes.

Q. Will you please tell us how you determine the market value of stocks in your business? A. By looking up records in newspapers which are considered reliable, or the Monitor, or else the sheets of exchanges.

Q. Do or do not those records show sales and purchases of stocks on the market? A. Yes, they do.

Q. And are the sales so made the criterion of value? A. Yes.

Q. And the record that is made of those sales is found in papers that are used by people of your profession in determining the value of stocks? A. The New York Times is always reliable, and the Tribune is always reliable, or the Wall Street Journal.

Q. I show you the New York Times of March 28, 1927, and ask you if it contains the market prices of United States Gypsum stock for some period of time shown there? A. Yes, it does. This is the week previous to March 28th. This is Monday's Times, which shows sales of 275 shares of common stock at 97¾, and it shows sales of 10 preferred stock at 117.

Q. I show you the New York Times for April 4, and ask you if it contains a record of the sales of United States Gypsum stock in that. A. Yes, during that week 100 shares common stock at 95.

Q. What period is covered by that report? A. This is Monday, April 4th; that would be from the 28th of March up to April the 2nd.

Q. And those two copies of the New York Times are taken by you as showing the market price of that stock during that period, are they? A. Yes.

Judge Lewis—I offer those two copies of the New York Times in evidence.

Mr. Drewen—I object to them as incompetent and irrelevant.

Judge Lewis—I can't give Your Honor any authorities upon that subject, but I know it is the common practice to put in evidence the record by brokers as to the market price of stocks sold during a certain time, as shown by the record.

The Court—I have wondered what the use would be. Here is an expert witness, specially skilled in these things, and, from sources that he says are reliable, has read into the record—

Q. Then I ask you as an expert what the market value of United States Gypsum stock was in the week ending March 28th? Is it as stated by you? A. March 28th was Monday, and the ending of that week would be April 2nd. I would say that 95 would be all right for the common and 117 for the preferred.

Q. Your opinion as an expert is that that was the market value of that stock at that time? A. I would so consider it.

Q. And for the week of April 2nd. A. April 2nd would be Saturday, and March 28th would be

that week; that is, the week of March 28th would end on Saturday, April 2nd.

Q. And your opinion for that week would be as you have already stated? A. Yes.

Cross Examination by Mr. Drewen:

Q. In determining the value of securities do you only refer to a newspaper and satisfy yourself with that? A. Reliable newspapers, where they give out all the security values, yes.

Q. That is all you do? A. If the paper is reliable; and, of course, if you want to check up you can check with the Chronicle and other sources.

Q. And you would want to do that if you wanted to make what you call an appraisal? A. No, I would look at the Times and I would be satisfied, or I would look at the Tribune and I would be satisfied.

Q. That is what you actually do do in your profession to determine the value? A. Yes.

Q. As any layman would? A. Yes.

FRANK B. HOLMES, sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. Drewen.

Q. Mr. Holmes, you are a practicing attorney in the state of Pennsylvania? A. Yes, sir.

Q. And have been for how long? A. 34 years this last September.

Q. And you practice where? A. Stroudsburg, Monroe County.

Q. Did you know Mrs. Garrett R. Tucker, now deceased, in her lifetime? A. Yes, sir.

Q. You also knew Mr. Garret R. Tucker, the defendant in this action? A. Yes.

Q. Or you do know him? A. I know him.

Q. How long have you known Mr. Tucker? A. Well, I have known Mr. Tucker a good many years, ever since he was a small boy, but I can't give the number of years.

Q. And how long prior to Mrs. Tucker's death had you known her? A. I think I met Mrs. Tucker in 1913 or 1914. It was certainly before her marriage to Mr. Tucker.

Q. You drew the last will and testament of Mrs. Tucker, did you not? A. Well, I drew a will for her and it may have been her last will; I couldn't say as to that.

Q. I have a copy of it here (showing paper to witness). The will that you drew for Mrs. Tucker, —did you sign it as a subscribing witness? A. Well, I think I did. I wouldn't want to answer that positively without seeing the instrument.

Q. I show you a certified copy of the last will and testament of Elizabeth W. M. Tucker, certified by the Surrogate of the County of Bergen, and ask you if that is a copy of the will that you drew?

Judge Lewis—Is that the one in evidence?

Mr. Drewen—No, I can't find the one in evidence. That is the one that Mr. Dumont gave me this morning.

A. Well, judging from the date of this instrument and the names of the witnesses I have no doubt it is a copy of the paper that was prepared in my office.

Mr. Drewen—I will offer that in evidence, because I can't find the other exhibit.

The Court—You are going to have two of the same exhibit?

Mr. Drewen—I don't know where the other is.

The Court—Well, of course in the event of an appeal only one will be printed.

(The same is marked "Exhibit D-7")

Q. Do you remember the occasion on which this will, copy of which you have just been shown, was executed by Mrs. Tucker? A. Yes, I remember the occasion very well.

Q. And where was the will executed? A. In my private office.

Q. At Stroudsburg? A. At Stroudsburg, yes, sir.

Q. Now, prior to the execution of the will had Mrs. Tucker consulted you with regard to her will? A. Well, we had a consultation about the preparation of a will for her, and another will of her husband.

Q. Did those consultations occur on the date the will was executed or some previous day? A. No, it occurred on the same day.

Q. Now, when Mrs. Tucker spoke to you, or consulted you, with regard to the drawing of her will did she state to you anything with regard to what her property consisted of? A. I don't remember that she did at that time.

Q. Not at that time? A. No.

Q. Well, was there a subsequent time that she did? A. Later on, at a later stage of the same consultation she mentioned certain property which

belonged to her, but I don't recollect that she mentioned it specifically before she gave instructions for the will.

Q. Well, at any time in that conference, considering the whole conference as one thing, did Mrs. Tucker make any mention to you about what her property consisted of? A. Now, may I tell about how this interview proceeded? If I may tell it in my own language I can save you some questions.

Q. That is just what I wanted you to do. A. Well, first of all, she took up the question of the will. She and Mr. Tucker were,—each of them was about to make a will, and I remember two things which she wished particularly. There are two things that remain in my recollection which they wished to do. First of all, they wanted to make certain provisions as to their property. In other words, Garrett wanted to leave his property to her in case of his death, and she wanted to make similar disposition if he survived her. Now, that was one portion of her instructions. The other portion related to the son by a prior marriage; I think his name was Henry, and she had a will with her which had been drawn by some counsel in New York; I don't recollect the name, but she produced that and had me look it over.

Q. A prior will? A. A prior will. I don't recall the date of it; it may have been made before her marriage to Mr. Tucker; but, at any rate, she wanted to have that changed so that Henry, a son by a prior marriage, would be treated, in the event of her death, the same as the other children. She had a couple of boys. I think there were two. I notice there were two mentioned in the other will; I thought there were three.

Well, after receiving these instructions I called in a stenographer and dictated the will in accordance with what she had told me. I remembered that the New York will seemed to have been very carefully prepared, or prepared by a lawyer who was familiar with testamentary disposition, or something of that sort, and in dictating this will to my stenographer I was careful to preserve the phraseology of the New York will in many places, because I thought there might be some reason for it since it would take effect in some other jurisdiction than Pennsylvania, and, therefore, I adhered more closely than I would otherwise have done to the language of that will, and particularly to the language of the attestation clause, which was somewhat different from the language in Pennsylvania; and I signed it as a witness because the other will was signed by three of them and I didn't know what the laws of New Jersey required. I don't usually attest wills myself; I usually have somebody in my office do that.

After I had dictated the will, the stenographer wrote it out on the typewriter, and after that had been done Mrs. Tucker brought up the matter of a certain trustee, and she produced the instrument—

> Q. (By Judge Lewis) What instrument?
> A. An instrument which she called a trust agreement.

—and showed it to me. I remember the general character of it. It was an instrument—of course we are all familiar with the paper; it has undergone some discussion; it was the same trust agree-

ment which you gentlemen have been discussing during the progress of this case—the same one—, and she asked my advice about it. I recollect inquiring into the circumstances under which that agreement had been executed, and she told me that it was made in contemplation of her marriage with Mr. Tucker. I presume it isn't necessary for me to go into the contents of the agreement; it speaks for itself?

Q. No. A. We all know that it disposed of certain property, given to her sister in trust for the purposes mentioned in that agreement. I remember asking her if she thought that the emergency which had led to the execution of that agreement in the first place had passed by, and she thought it had; and I then advised her that I thought she ought to revoke that because in case of her death it was bad to leave outstanding and if it turned up it might lead to considerable trouble.

Now, there was a lot more discussion; I can't pretend to give it all consecutively, and I can't pretend to give the exact language; I only remember the substance of it. I asked her where the property was that was covered by this trust agreement, and she told me that she had it in her possession—Gypsum certificates. I don't remember whether I asked her where the agreement was, since she obviously had that in her possession. I don't remember whether I ascertained if there was more than one copy or not, but I remember asking her where the property was, and she told me that she had it in her possession. And I remember asking her how the certificates were made out of these Gypsum shares of stock, and she said the certificates had been transferred into the name of the trustee in

the agreement, her sister. I think her name was Mrs. Mayer. And I also advised her on that occasion that, in my opinion, it was important that she should have those certificates retransferred.

The whole substance of her conversation was to the effect that this property belonged to her and that she had the right to do what she wanted with it, and I advised her that the certificates should be transferred back, and told her, in my opinion, that the instrument should be revoked.

Q. When you advised Mrs. Tucker that she ought to get the certificates and have them transferred back, did that lead to any other topic between you? A. Yes, that was where the hitch was; she didn't want to have the certificates transferred back.

Q. Why not? A. On account of the tax they would have to pay—a considerable tax to the State of New Jersey.

Q. Did Mrs. Tucker say anything to you at that time about information that she had then acquired about the tax on the re-transfer? A. No, I couldn't say that I remember that. I remember that they spoke of the tax, and they either knew or assumed that there was a transfer tax due on such a transaction.

Q. When you say "that was where the hitch was", just what do you mean, Mr. Holmes? A. I mean, that is what she didn't want to do at the time; she didn't want to have those certificates actually transferred back into her own name.

Q. Did she say what the reason was that she didn't want to do it at that time? A. That tax. She mentioned that as the reason.

Q. Did Mrs. Tucker make any reference to the

regard in which she held these four children, in her conversation with you? A. Yes; yes, she mentioned that.

Judge Lewis—I was going to move to strike out all that has been said by the witness as to what Mrs. Tucker said to him, but I couldn't do it because the witness has been going on. I would like to have it on the record that I move to strike out what Mrs. Tucker said to him that he has now testified to; and I also object to the question as to what Mrs. Tucker said about her love and affection for the children, or her affection for all the children, whatever it was that Mr. Drewen has just put to the witness.

The Court—I suppose that is covered by your blanket objection.

Judge Lewis—Yes, but I thought it having drifted along my objection was lost sight of.

The Court—I will overrule it now and deal with it later.

Q. What did she say? A. She told me that Henry, if that's the name of the son by the prior marriage, had been brought up exactly as if he was Mr. Tucker's own child; in fact, that he didn't know any different—did not know that Mr. Tucker was not his own father, and that she wished Henry to be treated exactly as the other two children.

Q. There happened to be three. A. Well, I thought there were three, but I only notice two of them when I read the will.

Q. Can you tell us, Mr. Holmes, what it was in the conversation between you and Mrs. Tucker that

immediately led up to the statement by her that the property was hers?

Judge Lewis—I object to that. He hasn't testified to that.

Mr. Drewen—All right; then for the sake of vindicating myself I ask Mr. Bailey to read what the witness said.

(The stenographer refers to the testimony and reads: "The whole substance of her conversation was to the effect that this property belonged to her and that she had the right to do what she wanted with it.")

Q. (Question read, to which counsel adds the following): and that she could do with it as she wished. A. Now, I didn't want you to understand me saying that I was quoting her exact words; I said that was the substance of what she said at this interview. Now, in answer to the pending question: In the course of the discussion I remember asking her—no, I won't say that I asked her; I remember her telling me that this agreement had never been executed according to its terms at all, that is, carried into effect by herself and the trustee. She told me that the checks which were sent by the company in payment of the dividends on this stock would come to Mrs. Mayer, but they weren't applied according to the terms of the trust agreement by Mrs. Mayer, the trustee, but Mrs. Mayer was in the habit of sending the checks to her; and always done that, and that she applied them as she saw fit after she got them. Now, I don't know at this moment that I can answer your last question any more fully than that.

Q. Have you told us, Mr. Holmes, all that you can now recall of the conference between you and Mrs. Tucker that you had on that day? A. Yes. In the long answer that I made, where I was giving a narration, I tried to make it as full and complete as I could, and as accurate as I could.

Q. And do you now at this moment recall anything in the conversation that you haven't told us? A. Not a thing, sir; I don't recall it at this moment; if I have dropped anything out I don't know what it is.

Cross Examination by Judge Lewis:

Q. As I understand you, Mr. Holmes, Mrs. Tucker, when she came to you to have her will drawn, never said anything about the trust agreement until after the will was drawn? A. That is my recollection of it, sir. There was certainly nothing said about the trust agreement until after the will had been dictated and the stenographer had gone out.

Q. And the will was not changed from the wording which was dictated by you after the trust agreement had been talked about? A. There was no change made in the will whatever from my first dictation.

Q. You didn't have in mind, then, any question of revoking the trust agreement by the will? A. Oh, no, sir. Of course, I knew that that will did not revoke the trust agreement, and I will answer your question still more fully if you wish me to: The reason that that contains no such clause is because Mrs. Tucker didn't tell me about it.

Q. If she had told you or asked you to revoke the trust agreement by the will you would have

then put in a clause for that purpose? A. Exactly, sir.

Q. When she was talking with you about the trust agreement was Mr. Tucker present? A. My recollection is that Mr. Tucker was in the office throughout that interview. He sat directly in front of me at my desk; Mrs. Tucker sat a little at my left, at the left-hand of the desk.

Q. Did she produce the trust agreement that you speak of? A. Yes, sir.

Q. Or Mr. Tucker? A. No, my recollection is that she took that trust agreement out of a handbag that she was carrying.

Q. Did she tell you, when she said she had the stock in her possession, as to where she had it? A. Well, I couldn't say that I remember that she told me that at all.

Q. I beg pardon? A. I don't remember that she told me where it was, and I don't remember that I asked her where it was, that is where the certificates were physically kept.

Q. Did you know where she was living and had her home at that time? A. I don't know that I knew it. I supposed that she and Mr. Tucker were living over in Brooklyn. That is where I always wrote them.

Q. You did have a conversation with her concerning the revocation of the trust which led up to the question of expense of revocation? A. Yes, sir; it led directly up to that.

Q. And do I understand you now to say, Mr. Holmes, that it was because of that expense that she didn't then revoke the trust? A. I wouldn't like to answer that "yes" or "no" that way. It was because of that state tax that she didn't wish to

have the certificates transferred into her own name immediately, but I can say that that wasn't the thing operating on her own mind in instructing me to insert terms of revocation in the will. I don't know what was passing in her mind except from what she said.

Q. Whatever occurred, she chose to leave things as they were at the time when she came to you to make the will; is that right?

Mr. Drewen—That is objected to, on the ground that it calls for a conclusion.

The Court—Now you are asking him to tell what went through the mind of another person.

Q. Well, did she say anything that indicated that she chose to leave things as they were? A. Well, I can answer it this way, sir: When she left my office at the end of this interview she left them exactly as they were at the time of the execution of this will we are talking about.

Q. You are perfectly clear, Mr. Homes, that Mrs. Tucker had no intention of revoking this trust by her will; is that so?

Mr. Drewen—I must object to that as immaterial and as calling for a conclusion.

Judge Lewis—I will change the question and put it this way:

Q. Did she express any intention to revoke that trust by her will? A. She expressed none.

Q. How is that? A. She expressed no such intention.

Redirect Examination by Mr. Drewen:

Q. Did she express to you anything to the contrary?

Judge Lewis—Now I object to that. That is not redirect. He has told the whole story as to what occurred.

The Court—It is right on your last question on cross-examination.

A. I don't know just exactly how to analyze that question. I said, she expressed no intention of revoking the trust by that will. Now you ask me:—

Q. Did Mrs. Tucker express to you, Mr. Holmes, the intention specifically of leaving the trust intact, so far as the will is concerned? A. No, she didn't express any intention like that, and, as I have already stated, the whole tenor of her conversation was to the contrary of that.

Q. Contrary to what? A. Of leaving this trust intact or this trust in force.

Q. Well now, Mr. Holmes, do you know whether Mrs. Tucker was at that time spending a vacation up in the mountains? A. Well, I believe she was. Of course, I only know from what they told me. They told me they had just come down from the mountains.

Q. Did you see Mrs. Tusker on any subsequent day? A. Not professionally. So far as my office records indicate, the day that will was drawn was the last day Mrs. Tucker was in my office on any professional business. Now, it occurs to me that she and Mr. Tucker stopped in to say "How do you do?" to Mrs. Holmes and myself one time.

Q. You are speaking of a subsequent time? A. Yes. I may be wrong about that. I have an impression of standing in Mrs. Holmes' private office, which adjoins mine, and talking to Mr. and Mrs. Tucker. We were all very fond of Mrs. Tucker and it was quite a pleasurable event for both of us when she dropped in to see us.

Recross Examination by Judge Lewis.

Q. The occasion of the making of the will, as I understand you, was when you saw a trust agreement? A. It was at that same interview; yes, sir.

Q. Did you see it on any other day? A. During Mrs. Tucker's lifetime or at any time?

Q. Yes, during her lifetime. A. Not during her lifetime. I don't think I ever saw Mrs. Tucker again except in a possible case when she called on us socially.

Examination by the Court.

Q. How did she introduce the subject of the assignment of the trust? A. Well, sir—

Q. In understand you to say that it came after the stenographer had gone out to transcribe her notes? A. It was very much in these words: "Now, here is something else I would like to talk to you about", and she produced it from her handbag and handed it to me, and I read it without any notations, and then I began asking her these questions to which I have already alluded.

Q. And from that time on the questioning was all done by you; I mean so far as the trust was concerned, and the answering was done by her? A. Yes, naturally.

Q. So that she never expressed to you what it was she wanted your advice or counsel about in regard to that instrument? A. Oh yes, yes; that was the reason she came in, sir; she wanted to know what I thought about it—wanted my advice upon it. You see, in order to acquaint myself with the situation and details I asked her that question or those questions in order to be sure that the situation was fully before me.

Q. But I understood you to say that the subject was introduced by her producing this document and saying to you, in effect, "Here is something else I want"— A. I want to ask you about, yes.

Q. She didn't say what she wanted to ask you about, did she? A. No, I don't know that she did, but it was perfectly obvious the way she said it that that was what she wanted to ask me about, this trust agreement. That was all the interview covered.

Q. Did she make any response when you told her that you thought she ought to revoke it for the purpose of avoiding litigation after her death? A. I think I said there might be trouble on account of that, and that is the only trouble I had in mind, that led up to the matter of the state tax and her willingness to have the certificates transferred back in her name.

Q. That had only to do with the transferring of the stock? A. It did.

Q. Transferring of the stock separately is a different matter from revoking a trust. A. I understand that, but I got it from Mrs. Tucker and she seemed to comprehend it. Anyway, that was the only feature of the transaction that she talked about.

By Mr. Drewen.

Q. Mr. Holmes, can you explain to the court your use of the word "dangerous". In telling Mrs. Tucker that it would be dangerous to have an instrument like that around. A. Well, I meant exactly what seemed to have occurred, that if she died leaving this instrument outstanding, even though it might have been in her own possession, yet as the existence of that instrument was known to other people someone could be compelled to produce it in court—its production could be compelled, and the danger I meant was that the disposition of this property might be entirely contrary to what she intended. Of course, I didn't say all that to her. You asked me what I meant.

Case Closed.

IN CHANCERY OF NEW JERSEY

Between, Essie T. W. Mayer, Trustee, Complainant, and Garrett R. Tucker, et al., Defendants.	On Bill, etc.

DEPOSITIONS OF WITNESSES

The despositions of Arthur J. Mauger and Mary E. MacMahan, two material witnesses on the part of the complainant in the above entitled cause, of the Borough of Brooklyn, County of Kings and State of New York, sworn and examined before me, a Master in Chancery of the State of New Jersey, pursuant to the statute in such case made and provided, on the 4th day of May, 1927, upon 15 days' notice duly given to the solicitors of the defendant Garrett R. Tucker, and to Hon. Thomas Barber, Clerk in Chancery, Guardian ad Litem of the infant defendant, Henry W. McCormick, as appears by notices attached hereto, in the presence of Garret Van Cleve appearing for Wm. I. Lewis, Esq., solicitor of the complainant, and John Drewen, of the firm of Perkins & Drewen, solicitors for the defendant Garrett R. Tucker, no one else appearing.

State of New York,
City of New York,
County of Kings } ss.

MARY E. MacMAHAN, of full age, being duly sworn on her oath according to law, deposes and says:

By Mr. Van Cleve:

Q. Miss MacMahan, what is your office with the Dime Savings Bank? A. I am secretary to Mr. Arthur J. Mauger, manager of the Security Safe Deposit Company of Brooklyn.

Q. And you have charge of the records of the bank, or any part of it? A. All the records of the company in connection with the safe deposit boxes.

Q. Did you have any records in connection with a safe deposit box of Mrs. Mayer and Mrs. Tucker? A. Yes, this is the record.

Q. This shows the entire record? A. This is the original card and only card.

Q. From your records can you tell what time the box was taken out by either of them, or both? A. The original date—December 11, 1914.

Q. What was done at that time? A. The box was taken out in the joint names of Mrs. Garret R. Tucker and Essie T. Watters Mayer.

Q. Was there any change that took place in regard to the access of the box after that time? A. On January 24, 1922, permission was granted for access to the box to Garret R. Tucker.

Q. And how was that changed at the time? A. He signed the card and it was not effective until

we received the letter from Mrs. Mayer.

Q. You have a copy of the letter? A. This is the copy of the letter.

Mr. Van Cleve—We will have the letter copied into the records.

445 75 St.
Brooklyn, N. Y.

Security Safe Deposit Co.
DeKalb Ave. & Fleet St.,
Brooklyn, N. Y.

Gentlemen:

In regard to safe deposit box 1643 (key 1653) to which I now have joint access with my sister Elizabeth W. M. Tucker, it will be quite agreeable to me for Garrett R. Tucker to be given access to that box also. This matter was taken up with you about one week ago and I am writing this letter at your request.

Yours very truly,
Essie T. W. Mayer.

Jan. 23, 1922.

(EXHIBIT C-1)

19633
118 63119 Due Date Dec. 11/15 No. 8042
15 6.00 Rate $3.00
Pass Word Henry

Signature Mrs. Garrett R. Tucker
Essie T. Watters Mayer
Garrett R. Tucker

Business and
Business Address Tel
Residence 424—75th Street

Birthplace Brooklyn
Remarks

Date Dec. 11/14 Receipt No.
Security Safe Deposit Co., of Brooklyn, N. Y.

(Endorsements)

Dec. 11 1914

The undersigned has rented a safe in the vault of the Security Safe Deposit Company of Brooklyn, and received 2 keys to the safe, and agrees to the Rules and Regulations of the said Company in force at this date, as recited on a receipt issued to me for payment of rent, and such reasonable Rules and Regulations as may be hereafter adopted.

Mrs. Garrett R. Tucker

Dec. 10, 1924

The contents of safe No. 8042 in the vault of the Security Safe Deposit Company of Brooklyn being removed, the said safe with one keys is surrendered by me. All liability of said Company under lease of safe, is hereby released by the undersigned.

Garrett R. Tucker
Elizabeth W. M. Tucker

No deposit.

Mr. Van Cleve offered in evidence the card above referred to and same was received and marked Exhibit C-1.

Mr. Van Cleve offered in evidence the original letter, just copied in the records, and same was received and marked Exhibit C-2.

Q. After access was given to the box to Mr. Garrett R. Tucker, have you any record showing any other change? A. On January 7, 1924, box No. 1643 was changed to a larger box No. 8042.

Q. Was the access to the box, or the names of the parties who were to have access, changed at that time? A. No, conditions remained the same —the same card was kept.

Q. Do the people still have that box? A. It was given up on December 10, 1924.

Q. Was the box surrendered by all the parties at that time? A. No, the box was surrendered by Garret R. Tucker and Elizabeth W. M. Tucker.

Q. Did you get any authority from Mrs. Mayer? A. No, we don't usually bother with all. Any one of the joint tenants can give it up. You can't make any change in the tenants without the permission of the owner but anyone of the joint tenants can give it up.

Q. On this card what are those numbers and various notations that are on there indicate? A. 19633 and 118 under and 15 under that shows the page on which the surrender was recorded.

Q. And what is the next number? A 63119 is the number that was recorded at the time of the change from the small box to the larger box.

Q. What is that due date—December 11, 1915, indicate? A. That shows the box was taken out in 1914 and expired in one year.

Q. Three dollars is crossed off and six written over it, what is that for? A. To show the change in price.

Q. What is this number followed by a number that is crossed out? A. 1643 is crossed out and

a new number 8042 showing the number of a larger box.

Q. And is the number 1643 the original box? A. Yes.

Q. And the password "Henry" what is that for? A. That is the password for identification.

Q. This other information on the card is just as is indicated by the printed matter before the entry—I mean, the residence and birthplace? A. Yes.

Q. And the signatures that are on there are they the signatures of the parties themselves? A. Yes.

Q. Do you know the parties? A. I can't say that I remember them—no.

Q. And the date December 11, 1914, what is that? A. That is the date the box was taken out. We requested Mrs. Mayer to write us that three signatures are O. K. so he evidently came with Mrs. Tucker to sign but we would not let him have access until he had permission from Mrs. Mayer. The pencil marks on the card indicate that this permission was wanted and when we received the letter from her it was erased.

Q. In reply to that request you received this letter from Mrs. Mayer which has been marked Exhibit C-2? A. Yes.

Q. Did the signature on that letter correspond with the signature on the card? A. It agreed with our card except that she did not sign "Waters" out—just signed "Essie T. W. Mayer."

Q. And this letter that is dated January 23, 1922, was received by you, according to your records, on January 24, 1922? A. Yes.

Cross Examination by Mr. Drewen:

Q. Miss MacMahan, during the entire period covered by the records which you have referred to in this testimony, how many boxes were there altogether—only two? A. From December 11, 1914, to the day of surrender just the two boxes.

Q. From that date to what date was the first box held by the tenants? A. From December 11, 1914, to January 7, 1924, that was the date it was changed.

Q. From what date to what date was the second box held by the tenants? A. From January 7, 1924, to December 10, 1924.

Q. So that they over-lapped for a few days? No answer.

Q. The first box was given up when? A. It was given up January 7th, 1924.

Q. The second box was taken the same date? A. Yes.

Q. One was discontinued and the other was immediately rented? A. Yes, we made the change right there.

Q. You yourself don't recollect any of these transactions, do you? A. No.

Q. How long have you been in the position that you testified to? A. Since October 26, 1914.

Q. You are the only person who has charge of these records? A. Mr. Forrest and Mr. Mauger, (the manager) and I. We three handle the work of the desk. I wrote the original card. This is my writing when I first came here. I came here in October.

Q. When the second or final box was given up, what was the transaction that was gone through

with the tenant in order to release the other tenant of the box in order to surrender the tenants and give up the box? A. All the parties have to do is turn in the two keys and sign off a release.

Q. So that in this case do you know whether or not there were three keys turned in? A. Only two keys—we only give two keys.

Q. In spite of the fact that three people have access to it? A. Yes.

Q. Do you happen to know who had the two keys to the box? A. I don't.

Q. Do you know how many keys were surrendered? A. One key marked here. We only received one key. We usually collect a deposit for the key that is not returned but evidently there was a promise to send the other key and we have let it go.

Q. Have you any record showing that any paper or release was signed by Mrs. Mayer for the discontinuance of the second box at the time the paper was signed for its discontinuance by Mr. and Mrs. Tucker? A. No, it was not signed by Mrs. Mayer.

Q. Do your records show that she, Mrs. Mayer, entered into the transaction of discontinuing the second box at all? A. No.

Q. She had no part in it as far as your records show? A. No—you mean Mrs. Mayer?

Q. And do your records show that this transaction was entirely conducted by Mr. and Mrs. Tucker? A. Yes.

By Mr. Van Cleve:

Q. This memo that you have here was taken from the records in your book? A. Yes.

"On December 11, 1914, box No. 1643 was taken out jointly by Mrs. Garrett R. Tucker and Mrs. Essie T. Watters Mayer. Permission to have access was granted to Garret R. Tucker on January 24th, 1922, the date we received Mrs. Mayer's letter dated in her handwriting January 23, 1922. On January 7th, 1924 box No. 1643 was changed to a larger box No. 8042 and on December 10th, 1924, box No. 8042 was surrendered, being signed by Garrett R. Tucker and Elizabeth W. M. Tucker."

Mr. Van Cleve offered the original memo, of which the above is a copy, in evidence. Same was received and marked Exhibit C-3.

Mary E. MacMahan,

Subscribed and sworn to before me
the 4th day of May, A.D. 1927.
A Master in Chancery of New Jersey.

State of New York,
City of New York } ss.
County of Kings

ARTHUR J. MAUGER, of full age, being duly sworn according to law, upon his oath deposes and says:

Direct Examination by Mr. Van Cleve:

Q. Mr. Mauger, this card that is marked Exhibit C-1, does that contain your record in relation to a box that was taken out in the name of Mr. and Mrs. Tucker and Mrs. Mayer? A. Yes.

Q. And that with the endorsement on the back shows the owners of the box from the time it was taken out? A. Yes.

Q. And when Mr. Tucker was given joint access to the box you received this letter that is marked Exhibit C-2? A. Yes.

Q. And this memo which you have, marked Exhibit C-3, was that taken from the records you have in your books here in the company's office? A. Yes.

Q. And the memo is correct according to your records? A. Yes.

Q. What is your position with the company? A. I am secretary of the company.

Q. And you have had access to these records along with Miss MacMahan? A. Yes.

Q. You have been here in active management of this company every day? A. Yes.

Q. And have you been here continuously since 1914, the date that card was taken out, until the present time? A. I have.

Arthur J. Mauger,

Subscribed and sworn to before me
this 4th day of May, 1927.
A Master in Chancery of New Jersey.

(Filed September 30, 1927)

IN CHANCERY OF NEW JERSEY

Between: Essie T. Mayer, Trustee, Complainant, and Garrett R. Tucker and Henry W. McCormick, an infant, Defendants.	On Bill, etc.

FINAL DECREE

This cause coming on to be heard by the Chancellor of the State of New Jersey in the presence of Wm. I. Lewis, of counsel with complainant, as trustee of the infant defendant, Henry W. McCormick, and of Perkins & Drewen, of Counsel with the defendant, Garrett R. Tucker; and the pleadings having been read, and proofs having been taken and considered; and counsel having been heard;

It is on this 30th day of September, A.D. 1927, by the Chancellor of the State of New Jersey, Ordered, Adjudged and Decreed, and the said Chancellor by virtue of the power and authority of this court doth Order, Adjudge and Decree that the agreement and assignment mentioned in the bill of complaint herein, dated the 14th day of October, 1924, made between Elizabeth W. McCormick, deceased, then of the borough of Brooklyn, City and State of New York, and at the time of her death domiciled in Ridgewood, in the County of Bergen in this State, of the first part, and the com-

plainant, (then unmarried and named Essie T. Watters), then residing in said borough and now residing in Ridgewood, aforesaid, of the second part, wherein and whereby said Elizabeth W. McCormick, (afterward married to and at the time of her death being the wife of the defendant Garrett R. Tucker), did sell and assign to said complainant three hundred and fifty shares of the preferred stock of the United States Gypsum Company, in trust, to receive the income, interest and profits therefrom and use the same for the support, maintenance and education of Henry W. McCormick, (the son of said Elizabeth), until he arrives at the age of 21 years, and thereafter to pay the same to Henry W. McCormick until he becomes 25 years of age and, thereafter to dispose of the principal in the manner directed in said agreement or assignment, (a true copy of which agreement or assignment is annexed to the bill of complaint filed in this cause), created a complete and valid donation in trust of said stock as in said agreement set forth and provided. And it is further Ordered, Adjudged and Decreed that said agreement ~~for~~ assignment and the trust thereby created was and is revoked by the terms and provisions of the last will and testament of Elizabeth W. M. Tucker, (formerly the said Elizabeth W. McCormick), bearing date the 5th day of September, 1924, and probated in the office of the surrogate of the County of Bergen on the sixteenth day of October, 1926, a copy of which said last will and testament is annexed to the amended answer of the said defendant, Garrett R. Tucker, filed in this cause; and that all the property which prior to the said revocation constituted the fund which

was subject to the said agreement or assignment did, upon the death of the said Elizabeth W. M. Tucker, become subject to the terms and provisions of the said last will and testament, and became and was a part of the assets of the estate of the said Elizabeth W. M. Tucker, deceased;

And it is hereby further Ordered, Adjudged, and Decreed that the said Complainant make, execute and deliver to the Executor of the Estate of the said Elizabeth W. M. Tucker, deceased, any and all instruments necessary to effect the transfer and assignment to the said Estate of the shares of stock now standing in her name, or otherwise in her possession, as trustee under the said agreement and assignment;

And it is hereby further Ordered, Adjudged, and Decreed that said complainant forthwith pay over to the Executor of the said Estate, all monies received and now held by her as the result of accruals and income from the said stock standing in her name as trustee under the said agreement and assignment, the amount of which monies is hereby adjudged to be $1620.09; and

It is hereby further Ordered, Adjudged, and Decreed that the Executor of the Estate of the said Elizabeth W. M. Tucker, deceased, is entitled to have and receive the stock and property so ordered and decreed to be transferred and assigned to him as aforesaid, as well as any and all of the monies and property now held by her as such trustee, the same to be by the said Executor administered pursuant to the terms and provisions of the said last will and testament and also pursuant to a certain assignment made by the said defendant, Garrett R. Tucker, under date of the

14th day of June, 1927, wherein and whereby the said Garrett R. Tucker does assign, transfer and set over unto the said Henry W. McCormick and unto Garret Rezeau Tucker, Elizabeth Watters Tucker, and James Louis Tucker (all minors and the children of the said Elizabeth W. M. Tucker, deceased), all of the right, title and interest of the said Garrett R. Tucker in and to the shares of stock mentioned in the said agreement and assignment and in and to the income, interest and profits therefrom, the said assignment being to the said four minor children in equal shares, and which said assignment is mentioned in the amended answer of the said defendant, Garrett R. Tucker, filed in this cause, and is in the said amended answer stated to have been filed in the office of the Clerk of this Court;

And it is hereby further ordered, adjudged and decreed that there be allowed and paid out of the fund to the said William I. Lewis the sum of $5,000. as a counsel fee; and to the said Perkins & Drewen the sum of $8,000. as a counsel fee; and to Wayne Dumont the sum of $1500. as a counsel fee for services rendered by him as counsel to the said defendant Garrett R. Tucker prior to the substitution of Perkins & Drewen; and leave is hereby reserved to the parties hereto and their counsel to apply to the court if and when necessary so to do for further directions as to the manner of payment of the said counsel fees;

And it is further Ordered, Adjudged, and Decreed that the parties hereto be reimbursed out of the said fund for their respective costs to be taxed and for disbursements for stenographic transcripts;

And it is further Ordered that the amount of the said taxed costs and disbursements be paid by the complainant out of the said sum of $1620.09 now in her hands.

E. R. Walker,
C.

Respectfully advised,
John Bentley,
V. C.

(Filed October 25, 1927)

NEW JERSEY COURT OF ERRORS AND APPEALS

Essie T. W. Mayer, Trustee of Henry W. McCormick, Complainant-Appellant, and Garrett R. Tucker and Henry W. McCormick, an infant, Defendant-Appellees.	On Appeal from the Court of Chancery

PETITION OF APPEAL

To the Honorable Court of Errors and Appeals, in the Last Resort in All Causes:

The petition of Essie T. W. Mayer, Trustee of Henry W. McCormick, the appellant in the above entitled cause, respectfully shows that—

1. Petitioner finds herself aggrieved by a final decree made in the Court of Chancery of New Jersey by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date September 30th, 1927, in a certain cause in said Court of Chancery, wherein said Essie T. W. Mayer as trustee as aforesaid, was complainant, and said Garrett R. Tucker and Henry W. McCormick were defendants, in the following respects:

(a) That the said decree adjudges that the agreement or assignment mentioned in the bill of complaint in the above stated cause, and dated October 14, 1924, made between Elizabeth W. McCormick, deceased,

(afterwards and at the time of her death the wife of the defendant Garrett R. Tucker) and the complainant (then unmarried and named Essie T. Watters), and the trust thereby created of 350 shares of the preferred stock of the United States Gypsum Company, to receive the income, interest and profits of said stock and use the same for the support, maintenance and education of Henry W. McCormick, (the son of said Elizabeth), until he arrives at the age of 21 years, and thereafter to pay the same to Henry W. McCormick until he becomes 25 years of age and, thereafter to dispose of the principal in the manner directed in said agreement or assignment, (a true copy of which agreement or assignment is mentioned in and is annexed to the bill of complaint in this cause), was revoked by the terms and provisions of the last will and testament of Elizabeth W. M. Tucker (formerly said Elizabeth W. McCormick) bearing date September 5, 1924, and probated in the office of the Surrogate of Bergen County on October 16, 1926, (a copy of which said last will and testament is annexed to the amended answer of Garrett R. Tucker filed in this cause) and that all the property which prior to the said revocation constituted the fund which was subject to the said agreement or assignment did, upon the death of the said Elizabeth W. M. Tucker become subject to the terms and provisions of the said last will and testament and become and was a part of the

assets of the Estate of the said Elizabeth W. M. Tucker, deceased.

(b) That the said decree adjudges that the complainant make, execute and deliver to the executor of the estate of the said Elizabeth W. M. Tucker, deceased, any and all instruments necessary to effect the transfer and assignment to the said estate of the shares of stock now standing in her name or otherwise in her possession as trustee under said agreement or assignment.

(c) That the said decree adjudges that complainant forthwith pay over to the executor of the said estate all monies received and now held by her as the result of accruals and income from the said stock standing in her name as trustee under the said agreement or assignment and the trust thereby created.

(d) That the said decree adjudges and decrees that the executor of the said estate is entitled to have and receive the stock and property so ordered and decreed to be transferred and assigned to him as aforesaid, as well as any and all of the monies and property now held by her as such trustee, the same to be by the said executor administered pursuant to the terms and provisions of the said last will and testament and also pursuant to a certain assignment made by the said defendant, Garrett R. Tucker, under date of the 14th day of June, 1927, wherein and whereby the said Garrett R. Tucker does assign, transfer and set over

unto the said Henry W. McCormick and unto Garret Rezeau Tucker, Elizabeth Watters Tucker, and James Louis Tucker (all minors and the children of the said Elizabeth W. M. Tucker, deceased), all of the right, title and interest of the said Garrett R. Tucker in and to the shares of stock mentioned in the said agreement and assignment and in and to the income, interest and profits therefrom, the said assignment being to the said four minor children in equal shares, and which said assignment is mentioned in the amended answer of the said defendant, Garrett R. Tucker, filed in this cause, and is in the said amended answer stated to have been filed in the office of the Clerk of the Court of Chancery of New Jersey.

2. Petitioner appeals from the decree of the Chancellor which decrees, as aforesaid, upon the ground that the same is erroneous in that—

(a) The said agreement or assignment mentioned in the bill of complaint in the above stated cause, and dated October 14, 1924, made between Elizabeth W. McCormick, deceased, and the complainant, Essie T. W. Mayer, and the trust thereby created was not revoked by the terms and provisions of the last will and testament of Elizabeth W. M. Tucker (formerly said Elizabeth W. McCormick) bearing date September 5, 1924, and probated in the office of the Surrogate of Bergen County on Octo-

ber 16, 1926, and that all the property which prior to the said revocation constituted the fund which was subject to the said agreement or assignment, did not, upon the death of the said Elizabeth W. M. Tucker become subject to the terms and provisions of the said last will and testament and become and was a part of the assets of the estate of the said Elizabeth W. M. Tucker, deceased.

(b) That the said decree should not have ordered, adjudged and decreed that complainant make, execute and deliver to the executor of the estate of the said Elizabeth W. M. Tucker, deceased, any and all instruments necessary to effect the transfer and assignment to the said estate of the shares of stock now standing in her name or otherwise in her possession as trustee under said agreement or assignment.

(c) That the said decree should not have ordered, adjudged and decreed that the complainant should forthwith pay over to the executor of the said estate all monies and income from the said stock standing in her name as trustee under said agreement or assignment and the trust thereby created.

(d) That said decree should not have ordered, adjudged and decreed that the executor of the said estate is entitled to have and receive the stock and property so ordered and decreed to be transferred and assigned to him as aforesaid, as well as any

and all of the monies and property now held by her as such trustee, the same to be by the said executor administered pursuant to the terms and provisions of said assignment made by the said defendant, Garrett R. Tucker, under date of the 14th day of June, 1927, and which said assignment is mentioned in the amended answer of the said defendant, Garrett R. Tucker, filed in this cause, and is in the said amended answer stated to have been filed in the office of the Clerk of the Court of Chancery of New Jersey.

(e) The decree denied the relief prayed for in the bill of complaint, whereas, the decree should have sustained the bill of complaint and should have awarded to the complainant the relief therein prayed for

Petitioner therefore prays that the above mentioned portions of said decree by which petitioner is aggrieved as aforesaid may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this court shall seem proper.

William I. Lewis,
Solicitor for and of Counsel
with the Appellant.

(Filed November 3, 1927)

ANSWER TO PETITION OF APPEAL

The Answer of Garrett R. Tucker, the above named appellee, to the Petition of Appeal of Essie T. W. Mayer, trustee of Henry W. McCormick, the above named appellant.

This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on September 30, 1927, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity, and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

Perkins & Drewen,
Solicitor for and of Counsel
with Appellee.

(Filed August 12, 1927)

OPINION

Having no stenographer, it will be impracticable for me to do more than outline the decision I think should be rendered in this case.

A complete and valid trust was created. 3 Pom. Eq. Jur., Sect. 1009. The informality with which it was administered should not be permitted to frustrate the wishes of the creator of it.

The will of the trustor, however, operated to revoke the trust. This is shown by the proof of extrinsic facts. When she spoke of "my estate", it was intended to refer to that estate over which she retained the power of revocation as well as her untrammeled property. Paul vs. Paul, 99 N. J. Eq., 498.

Such evidence aliunde was admissible, as Vice-Chancellor Pitney said in Wiggins vs. Wiggins, 65 N. J. Eq., 417, to resolve "the difficulty or ambiguity, by considering therewith his pecuniary circumstances and his family and social relations." See also 5 Wigm. Ev., sect. 2460 et seq. (2nd ed.)

The list of decisions on page 37 of the supplemental brief submitted on behalf of the complainant are not at variance herewith, because they all recognize the exception to the parol evidence rule in case of latent ambiguities. For example, it was referred to in the case of Griscom vs. Evens, 40 N. J. Law, 402, (affirmed, 42 Id, 579) and I quoted from that case in L'Hommedieu vs. L'Hommedieu, 98 N. J. Eq., 554, what Mr. Justice Depue said about the admissibility of resorting to outside evi-

dence to explain the language used by the testator.

It is not the province of this court to punish the defendant Tucker for his heartless conduct on the morning of his former wife's death or afterwards. Its duty is to determine the questions of law and fact presented.

NEW JERSEY

Court of Errors and Appeals

ESSIE T. W. MAYER, Trustee of Henry W. McCormick, Complainant-Appellant, v. GARRET R. TUCKER and HENRY W. MCCORMICK, an infant, Defendants-Appellees.	On Appeal from Chancery.

BRIEF FOR COMPLAINANT-APPELLANT.

(1)

Statement.

The main question involved in this appeal is, as to whether a certain written, revocable assignment in trust, made by Elizabeth W. McCormick (afterwards Elizabeth W. Tucker) to the complainant (then Essie T. Watters), was revoked by the last will and testament of said Elizabeth W. Tucker, and the trust fund, itself, thereby bequeathed.

The foregoing question arises upon the bill, the original answer, the amended answer and the evidence in the cause; which evidence we claim to have been incompetent, and, if held to be competent, incredible in its essential features.

The material allegations of the bill of complaint (Case, p. 1), filed October 6, 1926, relating to the question under review, are as follows:

That on October 14, 1914, Elizabeth W. McCormick, then a widow, by an assignment in writing, and in duplicate, assigned to the appellant, then unmarried, 350 shares of the preferred stock of the United States Gypsum Company. The following is a copy of the assignment (Case, p. 6):

> "THIS AGREEMENT, Made this 14th day of October, 1914, BETWEEN ELIZABETH W. McCORMICK, of the Borough of Brooklyn, City and State of New York, party of the first part, and ESSIE T. WATTERS, of the same place, party of the second part,
>
> "WITNESSETH:
>
> "The party of the first part, for a good and sufficient consideration, does hereby sell and assign to the party of the second part three hundred and fifty (350) shares of the preferred stock of the United States Gypsum Company, in trust, however to receive the income, interest and profits therefrom and use the same for the support, maintenance and education of Henry W. McCormick (the son of the party of the first part) until he arrives at the age of twenty-one (21) years, and thereafter pay the same to said Henry W. McCormick until he becomes twenty-five (25) years of age, and upon the said Henry W. McCormick arriving at the age of twenty-five (25) years, then to transfer and assign said securities, or the re-investments thereof or the moneys realized therefrom, to the said Henry W. McCormick.
>
> "In the event of the death of said Henry W. McCormick before he reaches the age of twenty-five years the said party of the second part shall thereupon transfer to the party of the first part said securities, or the re-investments thereof, with all income then in her hands as such trustee.

> "In the event of the death of the party of the first part prior to said Henry W. McCormick reaching the age of twenty-five years and in the event of said Henry W. McCormick dying before he reaches the age of twenty-five years, the said party of the second part shall, upon the death of said Henry W. McCormick, transfer said securities to the executor or administrator of the party of the first part to be distributed according to her last will and testament, or the statutes in such case made and provided.
>
> "Subject to the direction of the party of the first part during her life the party of the second part is authorized to sell the securities hereinbefore transferred and reinvest the sums received thereon in good bonds and mortgages, or in public securities, subject to the direction and approval of the party of the first part.
>
> "The said party of the first part hereby reserves the right and power to revoke the trust hereby created.
>
> "IN WITNESS WHEREOF, the parties hereto have subscribed their names and affixed their seals the day and year first above written.
>
> "ELIZABETH W. McCORMICK
> "ESSIE T. WATTERS
>
> "STATE OF NEW YORK, }
> "CITY & COUNTY OF NEW YORK, } ss.:
>
> "On this 14th day of October in the year one thousand nine hundred and fourteen, before me, the subscriber, personally came Elizabeth W. McCormick to me known and known to me to be one of the persons mentioned and described in and who executed the foregoing instrument, and she personally acknowledged that she executed the same.
>
> "M. G. CRAWFORD,
> "Notary Public, #632,
> "N. Y. Co."

Said Elizabeth thereupon caused 350 shares of said stock, then standing in her name, to be transferred on the books of the corporation to the said Essie and new certificates therefor to be issued and delivered to her (Case, pp. 150-153).

The Vice-Chancellor found (Opinion, Case, p. 285) that a complete and valid trust was thereby created, and the decree below so adjudges (Case, pp. 273-274).

That the stock so assigned was part of the stock (increased by stock dividends) bequeathed to the assignor by her late husband, Henry J. McCormick, who had died in 1912. The beneficiary, Henry W. McCormick, was the only child of that marriage and at the date of the assignment was upward of three years of age. The assignee was the sister of the assignor.

That on October 21, 1914, the assignor, Elizabeth, intermarried with the defendant Garret R. Tucker, and in January, 1925, moved from Brooklyn to Ridgewood, Bergen County, in this State; to which place, shortly afterwards, the assignee, with her husband, moved, and where all of the survivors have continued to live.

That on July 13, 1926, Elizabeth died, leaving said Garret R. Tucker, said son Henry, and three children of her second marriage surviving her.

That before Elizabeth died, the Gypsum Company from time to time issued to complainant as trustee 1690 shares of common stock as stock dividends upon the original preferred assigned to her as aforesaid. All of such stock, at the time of Elizabeth's death was in a safe deposit box in the Second National Bank of Paterson.

That upon Elizabeth's death the defendant Tucker removed the certificates standing in appellant's name, and the assignment, from the safe deposit box and refused to deliver them to appellant, claim-

ing them to be part of the assets of Elizabeth's estate by reason of an alleged revocation of the assignment in trust made by Elizabeth in her will.

The Original Answer (Case, p. 9), filed January 5, 1927, admitted all the presently material allegations of the bill and justified the taking and holding of the certificates and assignment (Sec. 11) by "the power and authority vested in him under the last will and testament of the said Elizabeth W. M. Tucker, a true copy of which will is annexed to this answer and made a part hereof" and that Elizabeth (Sec. 12) "executed her last will and testament, hereinbefore referred to, on September 5th, 1924, in which she intended to revoke and did in fact and in law revoke, said trust agreement" and (Sec. 14), "Defendant insists that in and by the said last will and testament * * * said trust agreement is revoked and that said stock belongs to him, as executor and trustee under said last will and testament." A copy of Elizabeth's will is annexed to the answer (Case, p. 13), and reads as follows:

> "KNOW ALL MEN BY THESE PRESENTS, That I, ELIZABETH W. M. TUCKER, of the Borough of Brooklyn, City and State of New York, do hereby make, publish and declare this to be my *Last Will and Testament*, hereby revoking all former wills by me at any time heretofore made.
>
> "FIRST: I direct that my funeral expenses and just debts be paid by my executor as soon after my death as may be practicable.
>
> "SECOND: I give, devise and bequeath to my husband, GARRET REZEAU TUCKER, One fifth of my estate as well real as personal as his own absolutely and forever.
>
> "ALL *the rest, residue and remainder* of my estate wheresoever situate, I give, de-

vise and bequeath to my Executor and Trustee hereinafter named, IN TRUST NEVERTHELESS, to invest, re-invest and keep the same invested for the following uses and purposes:

"(a) To divide the residue of my estate into four equal shares.

"(b) To invest and re-invest and to collect and receive the rents, issues, income and profits of one of said equal shares and to apply the net income derived therefrom to the support, maintenance and education of my daughter, ELIZABETH WATTERS TUCKER, for and during the term of her natural life, and at her death to pay the principal of such share to any child or children of my said daughter, share and share alike, and in the event that my said daughter should die without issue living at the date of her death, then and in such case, to divide her said share equally between my three sons hereinafter named, upon their attaining the age of thirty years as hereinafter stated, PROVIDED, HOWEVER, that if, in the judgment of my said Executor and Trustee, it should be for the best interest of my said daughter to have the principal of her said share in lieu of the income thereof, then and in such event my said Trustee is hereby authorized, empowered and directed, at his or her discretion, to pay the principal of said sum to my said daughter at such time as my said Trustee deems fit after my said daughter shall have attained the age of thirty years.

"(c) To collect and receive the rents, issues and profits of the other of said parts or shares and to apply the net income derived from each of such shares to the support, maintenance and education of each of my sons, HENRY W. MCCORMICK, GARRETT REZEAU TUCKER, and JAMES LOUIS TUCKER, until each shall reach the age of thirty years

when the principal of the shares so held in trust for the son reaching the age of thirty years shall be paid over to him absolutely.

"(d) In case any of my children shall die before reaching the age of thirty years leaving issue surviving, such issue shall take the principal of the share its parent would have taken if living, share and share alike.

"(e) In case any of my said children shall die before reaching the age of thirty years without leaving issue surviving, the principal of the share set apart for the child so dying shall be paid over to his or her surviving brothers and sister or the issue of any deceased brother or sister share and share alike per stirpes and not per capita.

"(f) In construing and carrying into effect any of the provisions of this, my Last Will and Testament, my son HENRY W. MCCORMICK is to be considered and treated as though he were a full brother of my other children hereinbefore mentioned.

"(g) If, in the judgment of my said Executor and Trustee, it is for the best interest of any of my said sons to receive the principal of their said shares after attaining the age of twenty-one and before attaining the age of thirty years, then and in such event I authorize, empower and direct my said Executor and Trustee at his or her discretion to pay to each of my said sons the principal of his said share at such time as my said Trustee deems fit after such child shall have attained the age of twenty-one years.

"THIRD: I hereby nominate, constitute and appoint my husband, GARRETT REZEAU TUCKER, to be the Executor and Trustee of this my Last Will and Testament without bond, hereby authorizing and empowering him to sell either at public or private sale

and at such times and in such manner and upon such terms and conditions as he may deem most advantageous for the best interests of my estate, the whole or any part of my estate which I may die seized and possessed of or any interest therein and to execute and deliver any and all conveyances, deeds or other instruments that may be necessary to transfer said property or to carry out the intention of this provision.

"In the event that my said husband, GARRETT REZEAU TUCKER, shall pre-decease me or die before the termination of his duties as Executor and Trustee under this my Will, I hereby nominate, constitute and appoint my sister, ESSIE T. W. MAYER, Executrix and Trustee under this Will without bond with all the powers originally conferred upon my said Executor."

The amended answer (Case, p. 18) was filed June 14, 1927, and after the evidence was closed. It abandoned the defense of revocation by the will, and set up, instead, that the assignment had been executed by Elizabeth under the pressure of undue influence and that it had never been consummated by a transfer or delivery of the certificates of stock.

At the hearing, a great mass of extrinsic evidence was produced by the defendant for the purpose of showing that it was Elizabeth's intention to revoke the assignment in trust by her will and to make a bequest of the trust fund. It consisted of evidence going to show the circumstances, situation and surroundings of Elizabeth, as well as of parol evidence of her declarations concerning the intent of her will. Such evidence was promptly and continuously objected to on the part of appellant (Case, pp. 6, 40-47, 51, 55, 254, 255) and the Court allowed a general objection to all evidence of the same character (Case, p. 46).

At the close of the evidence produced at the hearing, the learned Vice Chancellor stated his conclusions in the following language (Case, p. 285):

"A complete and valid trust was created. 3 Pom. Eq. Jur., Sect. 1009. The informality with which it was administered should not be permitted to frustrate the wishes of the creator of it.

"The will of the trustor, however, operated to revoke the trust. This is shown by the proof of extrinsic facts. When she spoke of 'my estate,' it was intended to refer to that estate over which she retained the power of revocation as well as her untrammeled property. Paul v. Paul, 99 N. J. Eq. 498.

"Such evidence aliunde was admissible, as Vice-Chancellor Pitney said in Wiggins v. Wiggins, 65 N. J. Eq. 417, to resolve 'the difficulty or ambiguity, by considering therewith his pecuniary circumstances and his family and social relations.' See also 5 Wigm. Ev., Sect. 2460 et seq. (2nd ed.).

"The list of decisions on page 37 of the supplemental brief submitted on behalf of the complainant are not at variance herewith, because they all recognize the exception to the parol evidence rule in case of latent ambiguities. For example, it was referred to in the case of Griscom v. Evens, 40 N. J. Law 402 (affirmed, 42 Id. 579), and I quoted from that case in L'Hommedieu v. L'Hommedieu, 98 N. J. Eq. 554, what Mr. Justice Depue said about the admissibility of resorting to outside evidence to explain the language used by the testator.

"It is not the province of this court to punish the defendant Tucker for his heartless conduct on the morning of his former wife's death or afterwards. Its duty is to determine the questions of law and fact presented."

Accordingly, a final decree was made (Case, p. 273) adjudging that the assignment in trust above mentioned

> "created a complete and valid donation in trust of said stock as in said agreement set forth and provided,"

but further adjudging

> "that said agreement or assignment and the trust thereby created was and is revoked by the terms and provisions of the last will and testament of Elizabeth W. M. Tucker (formerly the said Elizabeth W. McCormick), bearing date the 5th day of September, 1924, and probated in the office of the Surrogate of the County of Bergen on the sixteenth day of October, 1926, a copy of which said last will and testament is annexed to the amended answer of the said defendant, Garret R. Tucker, filed in this cause; and that all the property which prior to the said revocation constituted the fund which was subject to the said agreement or assignment did, upon the death of the said Elizabeth W. M. Tucker, become subject to the terms and provisions of the said last will and testament, and became and was a part of the assets of the estate of the said Elizabeth W. M. Tucker, deceased."

It is from that part of the decree which adjudges that the trust was revoked by the will, and from the subordinate adjudications concerning the dispositions of the trust fund, which follow and depend upon it, as set forth in the petition of appeal (Case, p. 278), that this appeal is taken.

(2)

Grounds of Appeal.

The Grounds of Appeal are:

(1) That the decree erroneously adjudged that the assignment in trust was revoked by the last will and testament of the assignor.

(2) That the decree erroneously adjudged that all the property which prior to such revocation constituted the trust fund became subject to the terms and provisions of the will and a part of the assets of the estate of the testatrix.

(3) That the corollaries of the foregoing adjudications—i. e., (a) that the appellant should transfer and assign the shares of stock held by her under the assignment, to the defendant as executor of the assignor's will; (b) likewise pay over all monies held by her under said trust; (c) that said executor is entitled to have said stock and property—were erroneously ordered, adjudged and decreed by the said decree.

(4) That extrinsic evidence was erroneously admitted to prove that when testatrix in her will said, "I give, devise and bequeath * * * *my estate";* and, in her will said, "All the rest, residue and remainder of *my estate* * * * I give, devise and bequeath," etc. (italics ours), she intended thereby to revoke the trust and bequeath the trust fund.

(5) That evidence dehors the will was admitted to prove the meaning of its clear and explicit language and give it a meaning other than its ordinary, natural and plain meaning.

(6) That the decree, adjudging that the trust was revoked by the assignor's will, was erroneous because an express trust in writing is not revocable by the last will of the donor thereof.

(7) That the decree is erroneous because it does not conform to the case made by the pleadings.

(8) That if extrinsic evidence was admissible for the purpose aforesaid, the evidence produced was not convincing of such intent; nor of sufficient weight to prove the same; and was incredible.

* * * * * *

ARGUMENT.

POINT I.

The trust would not be revoked, nor would the trust fund pass under the will of Elizabeth by a gift of her own estate, and the words "my estate" as used in her will refer only to that estate which was hers, and not to the trust fund, which was not hers.

For the purposes of the argument, on this point, it may be conceded that if the testatrix made an express bequest of the trust fund, that such gift, by implication, would operate to revoke the trust and at the same time bequeath the trust fund. This would be in analogy to the rule under which it is held that an express gift of property over which testator has a power of appointment operates as an exercise of the power. *Blagge* v. *Miles,* 1 Story, C. C., p. 426; *Munson* v. *Berdan,* 35 N. J. E. 376.

But in the present case there is no express gift of the trust fund. The only gift that is made is a

gift of testatrix's own estate. She says, "I give * * * my estate." That is all she gives.

As was decreed by the Court below, the assignment in trust created a complete and valid donation in trust of said stock as in the assignment set forth (Decree, Case, p. 274; Opinion, Case, p. 285).

It seems unnecessary to argue that thereupon Elizabeth ceased to own said stock, or that the appellant was vested with the legal title thereto and Henry W. McCormick with the equitable title. It was no longer a part of her estate. 1 *Perry on Trusts,* §§95-111; *Stone* v. *Hackett,* 12 Gray 227; *Tarbox* v. *Grant,* 56 N. J. E. 199.

Not owning the stock, when Elizabeth made a gift of "my estate" it did not pass the trust fund, for those words, according to their ordinary and natural meaning, included only such property as was hers.

In *Farnum* v. *Penn. Co. for Ins., &c.,* 87 N. J. E. 108, unanimously affirmed by this Court in 87 E. 652, the question of whether the testatrix by making a bequest of "the rest, residue and remainder of *my* estate" had thereby exercised a power she had to appoint to a fund not belonging to her. The Court said:

> "A general devise or bequest by the donee of a power in which the testator refers to the property devised or bequeathed as his property, has been repeatedly held not to be an exercise of the power," and cites *Wooster* v. *Cooper,* 59 N. J. E. 204; *Meeker* v. *Breintnall,* 38 N. J. E. 345; *Ackerman* v. *Ackerman,* 81 N. J. E. 437.

The Court also said (p. 115):

> "The general bequests are of 'my estate.' This in the absence of some controlling inci-

> dent, is to be regarded as relating to the testatrix's own property, and if the general bequests stood alone in the will, the terms used would permit of no explanatory proof that they were meant to include her father's estate." *Griscom* v. *Evens,* 40 N. J. L. 402; 2 *Jarm. Wills* (5th Ed.) 275.

In this case the general bequests stand alone.

In considering the question as to whether a devise or bequest in general terms, as in the present case, will operate as an execution of a power of appointment over real or personal estate, Mr. Jarman says:

> "If the testator had real estate on which the will would operate, it will be presumed, that the devise was made with a view to such property, and not as an exercise of the power." 2 *Jarman* (5th Am. Ed.) 273.

In such case the burden lies upon the person claiming under the appointment to prove that the testator had no other real estate (*Ib.,* note k, *Farnum* v. *Penn. Co., supra,* at p. 116). As to personal property, Mr. Jarman says (*Ib.,* p. 275):

> "even if it should happen that the testator had no other disposable property at the time of making his will, or at his death, than the subject of the power, or that its exclusion from the will will leave nothing for the residuary clause to operate upon, or will leave the personal estate inadequate to the payment of pecuniary legacies, still the appointment does not operate as an appointment under the power."

Possibly this rule was somewhat modified in *Paul* v. *Paul,* 99 N. J. E. 498, to be hereinafter referred to, but not as to its statement of the primary meaning of a general devise or bequest of the testator's estate. The opinion recognizes the rule that the words "my estate" standing alone refer only to testator's own estate.

In *Wooster* v. *Cooper,* 59 N. J. E. 204, 223, the Court said:

> "It seems to be entirely settled that a general devise by the donee of a power, in which the testator refers to the property devised as his property, will not be held to be an execution of the power."

In the present case, the will of testatrix contained no special gifts. The devises and bequests of her estate were general and the interest given to each beneficiary was of an equal share of such estate. It appeared affirmatively that at the date of her will and at the tme of her death she had a large separate estate, upon which the bequests would operate, consisting of at least 2,400 shares of the common stock of the U. S. Gypsum Company and a number of shares of its preferred stock (Case, pp. 120-121). The preferred stock was worth about par and the common about 156 (Case, p. 125). Her own estate apparently approximated half a million dollars (Case, p. 120).

POINT II.

Unless a latent ambiguity can be shown in them, the words "my estate" in the will cannot be held to apply to the trust, either to revoke it or to bequeath the fund, though extrinsic evidence might show that the testatrix intended to so apply them.

The general rule is that extrinsic evidence is not admissible to vary the meaning of words.

3 *Jarman on Wills* (5th Ed.), 705.
3 *Jones on Evidence,* Sec. 475.
Holcomb v. *Lake,* 24 N. J. L. 686.
Woodruff v. *White,* 78 N. J. Eq. 410; aff'd 79 E. 225.
Supp v. *Bank,* 98 N. J. Eq. 242.

In *Cleveland* v. *Havens,* 13 N. J. Eq. 101, evidence was offered to show that both the scrivener of the will and the testatrix understood the will differently from its legal import as deduced from its language and that testatrix had given directions to draw the will so as to make a bequest differing from such legal import.

The Chancellor said:

> "But parol evidence is competent for neither of these purposes. * * *
> "There are no latent ambiguities to be removed. The words of the will are clear, and have a definite and well ascertained meaning. In such case no extrinsic evidence to show a different meaning can be admitted."

In *Griscom* v. *Evens,* 40 N. J. L. 403, aff'd 42 *id.* 579, the controversy was over a devise of land and extrinsic evidence was offered to show by the declarations of the testator to the scrivener what land the testator had in mind, coupled with an offer to prove that the scrivener without authority from the testator had inserted in the will a description of the premises which was false and contrary to testator's intention. Mr. Justice Depue, in delivering the opinion of the Court, said:

> "The import of this testimony was to expunge from the will words which the law regards as the language of the testator, and to alter the terms of the devise. This evidence was illegal."

The opinion then proceeds with a statement of the rules relating to the subject-matter, as follows:

> "By the statute, a writing is made indispensable to the existence of a will, and what has been written cannot be added to, detracted from, or altered by extrinsic evidence. The functions of the court are to ascertain the intention of the testator from the language of the will. Extrinsic evidence may be resorted to, which, in its nature and effect, is simply explanatory of what the testator has written, but no evidence can be received for the purpose of showing what he intended to have written. *Wigram on Wills,* §9. In every case of a controverted construction, the sole question is *non quod voluit sed quod dixit.* Extrinsic evidence of the circumstances, situation and surroundings of the testator, and of his property, is legitimate to place the court which expounds the will in the situation of the testator who made it, and thus enable the court to understand the meaning and application of the language he has adopted; but the testator's intention must ultimately be determined from the language of the instrument, as explained by such extrinsic evidence, and no proof, however conclusive in its nature, can be admitted with a view of setting up an intention inconsistent with the writing itself. 2 *Taylor on Ev.,* §1082. No difficulty, however great, in deciphering the obscure language of the devise, or in unraveling the intricacies in the testator's descriptions of the person or property to which his testamentary disposition should apply, will justify resort to such evidence. With the assistance of such explanatory evidence as has been mentioned, the court may be called upon to harmonize the conflicting provisions of the will, and to reject such descriptive parts as are only false demonstrations; but if, with the aid of such evidence,

the testator's meaning cannot be ascertained, the will will be simply void for uncertainty. *Wigram on Wills,* Prop. VI.

"The only exception to this legal rule is that the declarations of the testator may be resorted to in cases of a latent ambiguity, which arises where there are two or more persons or things, each answering exactly to the person or thing described in the will. In such an event, parol evidence of what the testator said may be lawfully adduced to show which of them he intended; but such evidence will not be allowed to show that he meant a thing different from that disclosed in the will. *Den* v. *Cubberly,* 7 Halst. 308; 2 *Taylor on Ev.,* §§1092, 1093; *Hawkins on Wills,* 9."

In *Burnet* v. *Burnet,* 30 N. J. E. 595, the testatrix devised her estate to "the children of Joseph H. Burnet and Benjamin Howell." Vice-Chancellor Van Fleet held that the will according to its plain grammatical sense showed that Benjamin Howell was the legatee and not his children, and said:

"An attempt has been made, in this case, to show by the introduction of parol evidence, upon whom the testatrix intended to cast the residue of her estate. There is no possible ground upon which an offer of such evidence can be entertained for one moment. Judge Depue has recently stated, with his usual clearness and accuracy, how far the courts may resort to extrinsic evidence in construing a will."

The Vice-Chancellor then quotes at length from the portion of the opinion in *Griscom* v. *Evens, supra,* which is above set forth.

In *Leigh* v. *Savidge,* 14 N. J. E. 124, the controversy was as to whether it was the intention of the testator to charge certain legacies upon his real property. For the purpose of showing that such was his intention the evidence of the scrivener was offered to show the testator's declarations to that effect. As to this, Chancellor Green said:

"So far as the evidence relates to the declarations of the testator as to his meaning and intention, or to the instructions given to the scrivener, or to the understanding of those instructions by the scrivener, the evidence is clearly incompetent, and must be overruled. Parol cotemporaneous evidence is inadmissible to contradict or vary the terms of any valid written instrument. 1 *Greenl. Ev.,* § 275; 2 *Phil. & Amos on Ev.* 753; *Coxe* v. *Bennet,* 1 Green 167.

"The rule applies to all written contracts, whether required by the statute of frauds to be in writing or not. Such evidence is admissible only for the purpose of removing or explaining a latent ambiguity.

"In regard to *wills* the rule is inflexible, that parol evidence of the testator's intention is inadmissible, not only because the written instrument which he has made the depository of his meaning is the best evidence of his intention, but because wills are required by the statute of frauds to be in writing attested by subscribing witnesses. 1 *Greenf. Ev.,* § 289, 290; *Hiscocks* v. *Hiscocks,* 3 Mees. & W. 363; *Yard* v. *Carman,* Penn. 936; *Den* v. *Van Cleve,* 4 Wash. 262."

In *Zabriskie* v. *Huyler,* 62 N. J. E. 697, aff'd 64 *Id.,* 794, the question was as to whether in a gift to "Conkling, his heirs," etc., the word heirs was used by way of limitation or substitution. To prove it was used in the latter sense, parol evidence was offered of the testatrix's belief as to the mean-

ing of her will and of her instructions to her counsel as to the disposition she desired. The Court as to this said:

> "The allegations in the bill in regard to the actual and declared purpose of Mrs. Conklin, her instructions to her counsel with reference ot the drafting of her will as drawn must be excluded from consideration." (Citing *Leigh* v. *Savidge, supra; Griscom* v. *Evens, supra; Burnet* v. *Burnet, supra,* and *Cleveland* v. *Carson,* 10 Stew. Eq. 377.)

In *Farnum* v. *Pennsylvania Co., supra,* the Vice-Chancellor said:

> "At the hearing the defendants were given the widest latitude to prove intention. All of the testimony, aside from that which shows the condition of the testatrix's estate and of the trust fund—the actual conditions as distinguished from what she thought they were from representations made to her—were clearly inadmissible and will be disregarded * * * He [the scrivener] says that she [the testatrix] instructed him to draw the codicil so that all of her property, both the property she had of her own and the trust fund should be included in the disposition of her estate, so that there would be a substantial residue."

Other testimony of a like character was offered in the *Farnum* case for the purpose of showing that when she made a devise of "my estate" she intended thereby to include the trust estate over which, by her father's will, she had a power of appointment. As to this the Court said:

> "Now it may have been Mrs. Batterson's intention to execute the power and it may have been her understanding that she had done so, but it is not our privilege to go beyond her testament for demonstrations. Parol evidence of a testator's declarations, or of representations made to him, tending to show his meaning and intention or understanding of his will, different from its legal significance and effect has been uniformly rejected by the courts as incompetent."

The learned Vice-Chancellor in deciding the present case said:

> "The will of the trustor, however, operated to revoke the trust. This is shown by the proof of extrinsic facts. When she spoke of 'my estate' it was intended to refer to that estate over which she retained the power of revocation as well as her untramelled property. *Paul* v. *Paul,* 99 N. J. E. 498."

It is respectfully submitted that the case of *Paul* v. *Paul, supra,* affords no foundation for the above quoted conclusion. In the *Paul* case, the Court said:

> "The situation presented is that of a testatrix with power to dispose of the trust fund by will and with practically no property of her own to dispose of. In that situation she made a great number of money bequests ranging from $300 to $3000 in amounts, and aggregating, approximately, the amount of the trust fund. Since there was practically nothing for these several bequests to operate on except the trust fund, and under the trust testatrix was clothed with power to make these bequests, it seems unmistakably manifest that in making the bequests she was exercising that power."

In the present case it affirmatively appears that testatrix had a large estate in her own right and

distinct from the trust for her son (Case, pp. 120, 121). Therefore, the foregoing reason for the finding in the *Paul* case is not applicable to the facts of the case at bar.

The second ground of decision in the *Paul* case was that testatrix had failed to expressly designate the estate out of which the legacies were to be paid. The gifts were made without express reference to her estate or the trust fund. Apparently, the only designation of the estate out of which they were to be paid arose by an implication from the language of the residuary clause of her will in which the words "my estate" were used. To overcome the inference to be drawn from the natural meaning of the words, which might show she intended to direct that the legacies be paid out of her own estate and not out of the trust fund the Vice Chancellor, determining that a latent ambiguity was disclosed thereby, acted upon proof that the testatrix had habitually referred to the trust fund as her estate.

Whether the proof was at all necessary to the result reached will not be argued. It would seem under the rule in *Blagge* v. *Miles,* 1 Story C. C. 426, cited and with approval in *Farnum* v. *Penn. Ins. Co., supra,* the mere showing that testatrix had no estate, other than the trust estate, upon which the will could operate, would have justified a finding that she intended to execute the power. It was there said that a power of appointment may be exercised:

> "(1) Where there has been some reference in the will or other instrument to the power; (2) or a reference to the property which is the subject on which it is to be exercised; (3) or where the provisions in the will or other instrument executed by the donee of the power would otherwise be ineffectual or a mere nullity, in other words, it would have no operation except as an execution of the power."

Be that as it may, the learned Vice Chancellor decided that by the showing that testatrix had practically no estate of her own, but that she had a power of appointment over an estate approximately amounting to the sum of her bequests "from one or both of which the bequests may have been intended to be paid" a latent ambiguity was disclosed. If such ambiguity were thus disclosed, then under the rule in *Griscom* v. *Evens, supra,* there could be no doubt as to the competency of the declarations of the testatrix to show which of the estates she intended.

But, while not essential for the purpose of distinguishing *Paul* v. *Paul* from the present case, it is respectfully suggested that the circumstances of that case were not such as to disclose a latent ambiguity. As Justice Depue says in *Griscom* v. *Evens,* a latent ambiguity "arises where there are two or more persons or things, each answering *exactly* to the person or thing described in the will." The trust estate over which Mrs. Paul had a power of appointment did not answer *exactly* to the thing described in her will—i. e., her own estate. (*Farnum* v. *Penn Co., supra.*) Therefore there was no latent ambiguity; and, therefore, no ground established for the introduction of the declarations of the testatrix. The just conclusion reached in the *Paul* case, to paraphrase the language of Agnew, J., in *Bingham's Appeal,* 34 Penna. St. 345, resulted from a *legal presumption* rather than from a *manifestation of intention.*

But in the case at bar, as has been said, no latent ambiguity, such as was said to exist in the *Paul* case, was disclosed. Elizabeth's own estate was large and she made but one devise of it. There were no special bequests.

In *Paul* v. *Paul,* the Vice-Chancellor further held that the testimony disclosed "the custom of testatrix to refer to the trust fund as her estate" and held that evidence competent for the purpose of showing that the testatrix meant the trust estate when she mentioned "my estate" in the will, although there might be no latent ambiguity shown. He so held under the authority of Vice-Chancellor Reed's opinion in *Van Nostrand* v. *Reformed Church,* 59 N. J. E. 19, who in turn relied on the text of *Hawkins on Wills,* which reads:

> "It is to be observed that evidence in the shape of sayings, &c., of the testator may be *in certain cases* adduced to show that he habitually used certain words, even where the description is not equivocal, provided the sense thus sought to be put into them *does not contravene their ordinary and legitimate meaning,* this being distinct from evidence adduced to show in what sense he used the words on the particular occasion of writing the will." (Italics ours.)

It is enough, as to this, to say that there is no evidence that Elizabeth habitually used the words "my estate" in reference to the trust estate.

But, *Van Nostrand* v. *Reformed Church, supra,* was a case of the misnomer of the beneficiary of a charitable use. The name of the legatee used in the will applied to no one, without the aid of extrinsic evidence. In the present case the words "my estate" are clear. Such evidence if admissible and controlling in the present case would result in establishing "an intention inconsistent with the writing itself," and contravenes "their ordinary and legitimate meaning."

It is therefore submitted, that in the present case, there being affirmative evidence that Elizabeth

had an ample estate to answer all the bequests of her will without regard to the trust estate; that no latent ambiguity was disclosed by the evidence and there being no proof, even if admissible, that she habitually referred to the trust fund as "my estate," that the case of *Paul* v. *Paul* lends no support to the conclusions of the Court below.

It is further said in the opinion below:

> "such evidence aliunde was admissible, as Vice Chancellor Pitney said in *Wiggins* v. *Wiggins,* 65 N. J. Eq .417, to resolve 'the difficulty or ambiguity, by considering therewith his pecuniary circumstances and his family and social relations.' See also 5 *Wigm. Ev.,* sec. 2460 et seq. (2d ed.)."

But there was no difficulty or ambiguity to be resolved in the present case. The rule and its limitations are fully expressed in *Griscom* v. *Evens, supra.* The limitation is "that no proof, however conclusive in its nature, can be admitted with a view of setting up an intention inconsistent with the writing itself. * * * The only exception to this legal rule is that the declarations of the testator may be resorted to in cases of a latent ambiguity."

The intention of Elizabeth as disclosed by her will was to make a gift of her own estate. The language is clear and no legal evidence of its being ambiguous was produced. Evidence as to any declaration by her of her intention, if any were offered, would be incompetent.

No such evidence of intention was given or referred to in *Wiggins* v. *Wiggins, supra.* The question in that case was as to whether the testator intended by his will to require that his debts should be charged on the realty in exoneration of the personalty. The only evidence *aliunde* used in con-

struing his will was as to the quantity of his real and personal estate, the encumbrance upon it, the holder of the encumbrance, and the amount of his debts. The language of the will was then construed in the light of these facts. No testimony as to the decedent's declarations of intention was adduced or considered. The evidence actually considered came under the rule in *Griscom* v. *Evens:*

> "Extrinsic evidence of the circumstances, situation and surroundings of the testator, and of his property, is legitimate to place the court which expounds the will, in the situation of the testator who made it, and thus enable the court to understand the meaning and application of the language he has adopted."

The claim in the *Wiggins* case that the Wiggins' will was such as to require the personal estate to exonerate the real estate, was raised by "the existence of debts" and the absence of any express direction for their payment. The presumption was that they were to be paid out of the personalty, unless the person claiming the contrary could "point out something in the will, or in the circumstances of the testator's estate, or both, to show that the personalty should not pay the whole or any part." It was held that the will charged the debts on the realty. (1) Because the devise of the realty was preceded by the words "After all my just debts are paid," which was construed to show the intention of the testator that the gift of the realty was conditioned upon the payment of testator's debts by the devisee. "That is the natural construction of the sentence." (2) Because the only debt owing by the testator was the balance due on a mortgage held by his son, on the very lands devised to him. This followed the rule in *Thomas* v. *Thomas,* 2 C. E. Gr. 356, that in case the decedent leaves a debt due by specialty secured "by way of mortgage upon the lands de-

vised, after the exhaustion of the general residuary fund, the devisee of the mortgaged land cannot call for contribution either on the general or special legatees." The Vice Chancellor said that if necessary, for the solution of the case, to hold the bequest of the personalty specific, he would do so. (3) Because the bequest was to testator's wife and made in lieu of dower, to which she had not dissented. The evidence of surrounding circumstances used by the Vice Chancellor in construing the will in no way altered its language but was merely used to explain its meaning and application. It came within the rule stated in *Griscom* v. *Evens, supra; Halstead* v. *Meeker,* 18 N. J. E. 136; *Nevins* v. *Martin,* 30 N. J. L. 465.

The evidence of extrinsic circumstances in the present case was used for a different purpose than such evidence was used in *Wiggin* v. *Wiggin.* Here it was used to change the plain meaning of the language used by the testatrix.

In *Farnum* v. *Penn. Co. for Ins., supra,* it is said:

> "By law, wills must be in writing, signed and published by the testator in the presence of witnesses; and it would be inconsistent with that law to permit parol proof to be introduced to contradict, add to, or explain their contents. This principle requires an inflexible adherence to it, even if the consequence should be a partial, or even total, failure of the testator's intention. The formalities so carefully provided would be of no value; the statute itself would be virtually repealed, if when the written instrument is supposed not to express the clear intention of the testator, the deficiency may be supplied, and its mistakes corrected by extrinsic evidence."

The conclusion of the Vice-Chancellor, based upon extrinsic evidence, that when testatrix "spoke of 'my estate' it was intended to refer to that estate over which she retained the power of revocation," ascribes an intention "inconsistent with the writing itself" which the rule in *Griscom* v. *Evens* expressly excludes.

It is in express violation of the second proposition laid down by Vice-Chancellor Wigram (*Wigram, Extr. Ev.,* p. 55, Am. Ed. 1872):

> "II. Where there is nothing in the context of the will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."

The learned Vice-Chancellor says in the opinion:

> "The list of decisions on page 37 of the supplemental brief submitted on behalf of the complainant are not at variance herewith, because they all recognize the exception to the parol evidence rule in case of latent ambiguities. For example, it was referred to in the case of Griscom v. Evens, 40 N. J. Law 402 (affirmed, 42 Id. 579), and I quoted from that case in L'Hommedieu v. L'Hommedieu, 98 N. J. Eq. 554, what Mr. Justice Depue said about the admissibility of resorting to outside evidence to explain the language used by the testator."

As to this, we beg to say that the citations referred to were not made for the purpose of showing that extrinsic evidence, including declarations of the testator, is not permissible to explain a latent ambiguity when it is disclosed. ~~They included~~ the ~~case of~~ evidence. The citations were made for the purpose of indicating the rule which excludes extrinsic evidence to prove the intention of the testator when the language used by him is clear, and no latent ambibuity is disclosed. They included the case of *Farnum* v. *Pennsylvania Ins. Co., supra,* unanimously affirmed by this Court for the reasons given below, wherein it was held that, in the absence of a latent ambiguity, the words "my estate" were so clear as to exclude any evidence to show the intention of the testatrix in their use.

POINT III.

No latent ambiguity was disclosed by the evidence in the use of the words "my estate" in the will.

Parol evidence of the declarations of the testatrix as to her intention to revoke the trust and dispose of the fund by her will was admitted at the hearing and perhaps relied upon by the learned Vice-Chancellor in reaching his conclusion that when testatrix "spoke of 'my estate,' it was intended to refer to that estate over which she retained the power of revocation as well as her untrammeled property."

Such evidence was inadmissible, unless a latent ambiguity in the use of the words had been disclosed. No such ambiguity had been disclosed.

The definition of a latent ambiguity given by Justice Depue in *Griscom* v. *Evens,* above quoted,

has become a classic in the literature of jurisprudence. It is perhaps unnecessary, but we hope not impertinent, to quote the language of Lord Abinger in the leading case of *Hiscocks* v. *Hiscocks,* 5 M. & Wels. 363, as stated in I *Jarm. on Wills,* 755, where it is said:

> "In the opinion of the court there was but one case, in which evidence was admissible of the testator's declarations, of the instructions given for his will, and other circumstances of the like nature, which were not adduced for explaining the words or meaning of the will, but either to supply some deficiency or remove some obscurity or ambiguity. That case was where the meaning of the testator's words was neither ambiguous nor obscure, and where the devise was, on the face of it, perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arose as to which of the two or more persons or things, *each answering the words in the will,* the testator intended to express."

In the present case the only foundation attempted to be shown for the existence of an ambiguity in the use of the words "my estate" in the will was the evidence showing the existence of the revocable assignment in trust and the fund held under it. This proof, as we submit we show, created no ambiguity.

However, the decree and opinion conclusively show that if there was any ambiguity latent in the use of the words "my estate," the declarations of the testatrix were used not to apply them to one or more things, each of which answered exactly to the thing described in the will, but to apply them to two things, one of which answered exactly to the thing described in the will, i. e., the testatrix's own

estate, and to another, which did not so answer (*Farnum* v. *Ins. Co., supra*), i. e., to an estate which was not hers.

Under this point may be considered the question as to when under a general bequest property over which the testator has a power of appointment may pass. It is settled that where a testator makes a general bequest of his estate, and it is shown that he has no estate of his own to satisfy the bequests of his will, but that he has a power of appointment over the estate of another which would satisfy the bequests of his will, that his will acts as an execution of the power. The proof of the extrinsic facts necessary to establish a bequest of the trust fund by a general bequest are said by Agnew, J., in *Bingham's Appeal,* 64 Penna. St. 345 (a case cited with approval in *Farnum* v. *Ins. Co., supra*), not to be proof of the testator's intention, but rather a legal presumption—a positive inference from a negative fact, and, therefore, not pertinent under the rule which permits parol evidence of the declarations of the testator to show his intention and thus explain a latent ambiguity.

But the rule, whatever its reason, has no application to the present case, for, as has been said, Elizabeth had an ample estate of her own to answer all the bequests of her will.

The defendant made no effort to prove the amount of Elizabeth's own estate. But on cross-examination in March, 1927, having probated the will in October, 1926, he admitted he had sworn to an inventory of his wife's estate, but could not tell whether it was worth $100,000, $200,000, $300,000, $400,000 or $500,000 and didn't know what the assets consisted of, though (Case, p. 121) he ad-

mitted that she held about 2400 shares of Gypsum stock in her own name and that within a week of his wife's death he had had them transferred into his own name but was compelled to retransfer them. Mr. Lemarche, a broker (Case, p. 246), testified that in March, 1927, the common was worth $95 and the preferred $117 per share and the defendant testified that at his wife's death they were respectively worth $100 and $156 per share (Case, p. 125).

Consequently, as to this matter, no foundation appeared in the case for the admission of extrinsic evidence, either to construe the will or to explain an ambiguity.

POINT IV.

Testatrix could not revoke the trust by her will.

Assuming, which it does not, that the will expressly revoked the trust, it would not be efficacious to that end.

The following is quoted from the text of 26 *Ruling Case Law*, p. 1206:

> "If the right is not exercised during the lifetime of the donor or other person in whose favor it was reserved, and according to the terms of the reservation, the validity of the trust remains unaffected, as though there never had been a reserved right of revocation. * * * generally a valid trust is not affected by the death of the donor, testate, where he dies without having exercised his power of revocation."

Nichols v. *Emery,* 109 Cal. 323.
Dickerson's Appeal, 115 Pa. St. 198.

Lines v. *Lines,* 142 Pa. St. 149.
Notes: 34 A. S. R. 217; 100 A. S. R. 103; 6 Am. Cas. 189.
Truby v. *Pease,* 240 Ill. 513.
Witherington v. *Herring,* 140 N. C. 495.
Wilson v. *Anderson,* 186 Pa. St. 531.
Mollison v. *Ritgers,* 140 Ia. 365.

In *Wooster* v. *Cooper,* 59 N. J. E. 204, 226, the case was that Tacy had a power to dispose of certain property by an *inter vivos* appointment. It was claimed that she had executed that power by her last will and testament. The Court said: "Her act, intended by her to operate after her death, cannot be converted by a court into an act operating immediately [upon the execution of the will] for this would be an execution of the power, not by Tacy, but by the court." Of course, unless so operating, it was not an act done in her lifetime and therefore was not authorized by the power.

POINT V.

The decree should be reversed because it does not conform to the pleadings.

A decree of the Court of Chancery must conform to the case made by the pleadings.

Trainor v. *Le Beck,* 139 At. 16.
Wood v. *Cox,* 92 N. J. E. 307.
Black v. *Keiley,* 23 N. J. E. 358.

The defense set up by the original answer was that the trust was revoked by the will (Case, p. 9).

At the close of the evidence, the Court gave defendant leave to file an amended answer (Case, p. 17).

Afterwards the amended answer was filed. It set up as a defense that the assignment in trust never was and never became operative (Case, p. 18).

It is submitted that the amended answer superceded the original answer and stood as the only answer in the case. To allow both to stand would permit the defendant to rely upon two defenses which are inconsistent with each other. Having replaced his original defense with a new and inconsistent defense, defendant must stand upon his election. Both defences cannot stand.

> "He cannot be permitted to insist upon a defense residing in an averment in his answer which is inconsistent and repugnant to an admission made by him in the very same pleading." *Weidmann Silk Dyeing Co.* v. *East Jersey Water Co.*, 88 N. J. E. 397, 427.

Equitable defenses must be consistent. *Gilbert* v. *Golpin*, 11 N. J. E. 445.

Therefore, no defense based upon the revocation of the trust by the will appearing in the pleadings as amended, the decree should be reversed.

POINT VI.

If it be held that extrinsic evidence was admissible for the purpose of showing that Mrs. Tucker intended by her will to revoke the trust, then we aver that such evidence was not convincing as to such intent; nor of sufficient weight to prove the same; and was incredible.

An effort was made by the defendant Tucker to prove by testatrix's declarations that she intended to revoke the trust by her will. His evidence is the only evidence in the cause to that effect. His testimony is found at page 53 of the printed case (lines

10-25). He says she told Mr. Holmes, the lawyer who drew the will, that "she wanted to revoke the trust." He subsequently reiterated this statement (Case, p. 91, line 10 *et seq.*).

Mr. Holmes, produced as a witness by defendant, testified that nothing was said about the trust until after the will was drawn (Case, p. 256, line 14 *et seq.*). He said, "Of course, I knew this will did not revoke the trust agreement, * * * The reason that that contains no such clause is because Mrs. Tucker didn't tell me about it." When asked, "Q. Did she express any intention to revoke that trust by her will?" he said, "She expressed none" (Case, p. 258, line 32).

To lend an air of probability to the story of the intent to revoke by her will, the defendant related certain circumstances attending an alleged demand by Mrs. Tucker upon complainant for the counterpart of the trust agreement in possession of the latter. The very terms of his narration show the impossibility of its truthfulness. The relevant facts appear as follows:

The will was executed on September 5th, 1924. The Tuckers, who were then living in Brooklyn, moved to Ridgewood, New Jersey, in January, 1925 (Case, p. 77). When the trust agreement was executed in 1914 complainant placed her copy (Ex. D-3) in a box rented jointly with her sister (Case, pp. 154-155). It is unquestioned that it continued to remain in the box until January, 1922, when Tucker obtained access to the box. At some time in December of 1924, and on the same day, Tucker testifies that he removed the entire contents of the Brooklyn box and placed them in the Paterson safe deposit box (Case, pp. 75, 76, 78). The complainant supposed that her copy of the agreement was removed with the contents of the box. She had last seen it in the box in Brooklyn (Case, p. 163).

Under these circumstances Tucker testified that prior to the executing of the will he and his wife walked from their house in Ridgewood to the house of complainant in the same place and, falsely pretending she had lost her own copy of the agreement, Mrs. Tucker asked complainant for hers and that complainant gave it to her (Case, pp. 86-90). Of course this story could not be true because, as appears above, neither family were living in Ridgewood prior to the execution of the will. This could have been no slip of memory for Tucker relates in complete detail the story of the walk he and his wife took from his house to complainant's (Case, p. 88, line 30). Complainant denied the whole story (Case, pp. 163, 186). As a matter of fact there was no reason for complainant's having possession of the copy (D-3). She would have to take it out of the very box in Brooklyn in which she had placed it for safe keeping. The relations between her and her sister were always most affectionate (Case, p. 196). Mrs. Tucker named her as executor of her will in place of Tucker, if he died.

Another example of Tucker's incredibility is found in his account of the removal of the contents of the Brooklyn box to the Paterson bank, when viewed in the light of uncontradicted evidence.

As hereinbefore stated he testified in much detail that the contents was taken out of the Brooklyn box and placed by him in the Paterson box *on the same day* (Case, p. 78, line 20). He fails to fix any day on which this was done, but that he should have so removed the contents was impossible under the circumstances. It was proved by the officers and records of the Brooklyn bank that the box in Brooklyn was given up and closed on December 10, 1924 (Case, pp. 266-267). It was proved by the officers and records of the Paterson bank that the box in that bank was opened March 13, 1925 (Case, p.

134). It is, of course, clear that Tucker could not have taken the papers out of the Brooklyn box later than December 10, 1924, and that he couldn't have placed them in the Paterson box before March 13, 1925. So it was physically impossible for him to have taken them out of the Brooklyn box and placed them in the Paterson box on the same day.

Another example of incredibility is found in his story of the removal of the securities on the morning of his wife's death, July 13, 1926, from the Paterson box. Under the law, the bank would have refused access to the box at that time, if it had been informed of the death of Mrs. Tucker, the joint tenant. Tucker says he informed the bank's officer that his wife was dead before he opened the box (Case, p. 105). Mr. Seddon, the officer, denies this story in detail (Case, pp. 140-143). So does Mr. Bond, who had charge of the safe deposit vaults (Case, p. 135, line 25 *et seq.*). Here we have the evidence of two disinterested witnesses against Tucker's. He was interested. He wanted to get the stock standing in his wife's name and under blank powers previously signed by her transfer the stock into his own name; which plan he carried out. He had the transfers made before his wife was buried and so held them until compelled to make restitution (Case, pp. 100, 121). He says he took the course he did because he had been advised by a Brooklyn attorney, "If anything happens to either one of you—if your husband passes away—don't put on a long face; pin a rose on you, and empty the box before it is closed on you."

Many other instances could be cited from the testimony which impeach the credibility of the defendant, but we think that the foregoing are sufficient for that purpose. If the will of the testatrix is to be varied by parol, the evidence must come from a credible witness and be credible in itself.

In the opinion below it is said:

> "It is not the province of this court to punish the defendant Tucker for his heartless conduct on the morning of his former wife's death or afterwards."

To this we take no exception. The conduct referred to, which included his remarriage within four months of Elizabeth's death, was not adduced for that purpose. It was brought out, on his cross-examination, for the purpose of enabling the Court to know the character of the witness and thereupon make inferences as to his veracity.

It is respectfully submitted that the portion of the decree appealed from should be reversed and remitted to the Court of Chancery with directions that it decree the trust to be established, that it was not revoked by the will, and that complainant, as trustee, is entitled to the stock standing in her name as trustee.

WILLIAM I. LEWIS,
of counsel with complainant.

#51

New Jersey Court of Errors and Appeals

ESSIE T. W. MAYER, Trustee of Henry W. McCormick, Complainant-Appellant, *vs.* GARRET R. TUCKER and HENRY W. MCCORMICK, Defendants-Appellees.	ON APPEAL FROM CHANCERY.

BRIEF FOR DEFENDANT-APPELLEE, GARRET R. TUCKER, AS EXECUTOR AND TRUSTEE UNDER THE WILL OF ELIZABETH W. M. TUCKER.

Statement.

The questions presented to the court on this appeal are:

(a) Whether or not a certain paper writing, purporting to be an assignment in trust by Elizabeth W. McCormick (later Elizabeth W. M. Tucker), taken together with the conduct of the settlor and trustee subsequent to the making of the paper, created a valid and subsisting deed of gift in trust.

(b) Whether or not the terms of the last will and testament of the said Elizabeth W. M. Tucker (conceding the creation of a valid trust) effected a revocation of the trust.

The assignment in trust bears date October 14th, 1914, and is printed on page 6 of the case. The right of revocation, *without limitation as to the manner of revocation,* is expressly reserved in the assignment.

The will bears date September 5th, 1924, and is printed on page 29 *et seq.* of the case.

Facts.

The following is submitted as an epitome of the testimony and evidence covering all the facts in the case, bearing upon the questions involved:

In October, 1914, Elizabeth W. McCormick was a widow and the mother of an infant son (*the cestui que trust*) then about three years of age. She was the owner of a considerable block of the capital stock of the United States Gypsum Company, which had come to her from the estate of her deceased husband. In the summer of 1914 she became acquainted with the defendant Garrett R. Tucker. After a courtship of not many days the couple were engaged to marry (case p. 37, L. 15). The members of her immediate family—she had two sisters, and father and mother were living—appeared to have been greatly devoted to each other. And Mrs. McCormick's parents and sisters all felt a grave concern when they learned of the prospective marriage to Mr. Tucker. He was a stranger to them and to her. And the fears of the family were deepened by rumors which made Tucker out to be a man of bad character. These rumors were repeated sedulously to Mrs. McCormick by her parents and by the complainant, her sister. They denounced Tucker and all of them labored earnestly to dissuade her from the marriage. (Case, p. 150, l. 20; p. 151, l. 20; p. 209, l. 10 *et seq.;* p. 238, l. 25; p. 240).

When all the suasion which they could exert on Mrs. McCormick, as well as the denouncing of her suitor, proved alike unavailing as a means of preventing the marriage, the family then expressed to her their fears for the future welfare and for the property rights of the infant son Henry. They looked with an alarm which they freely expressed at the subjection of the child's welfare to the parental influence and authority of a step-father of whom no especial good had been promised. Mrs. McCormick was persuaded by her father to put "aside some of her property for the boy *before this marriage took place";* and so that Henry "would always be provided for". They feared that by reason of the marriage "*Henry would not be provided for*". (Case, p. 152, ll. 1-12; p. 208-09).

This purpose to provide for Henry against the outcome of his mother's second marriage resulted in the making of the trust agreement in question in this suit. The terms of this agreement are the assignment to the complainant of Three Hundred and fifty shares of the preferred stock of the United States Gypsum Company, in trust, upon the uses stated as follows:

> "To receive the income, interest and profits therefrom and use the same for the support, maintenance and education of Henry W. McCormick (the son of the party of the first part) until he arrives at the age of twenty-one (21) years, and thereafter pay the same to said Henry W. McCormick until he becomes twenty-five (25) years of age, and upon the said Henry W. McCormick arriving at the age of twenty-five (25) years, then to transfer and assign said securities, or the re-investments thereof or the moneys

realized therefrom, to the said Henry W. McCormick.''

The creator of the trust reserved the right to direct the trustee in the sale of the stock and in the re-investment of the proceeds. *The right of revocation is also expressly reserved, without restriction as to the manner of revocation.*

This agreement was made October 14th, 1914. One week later, (October 21st) Mrs. McCormick and Tucker were married. Concerning the trust Mrs. McCormick told Tucker (and this simply corroborates what the complainant and her mother themselves say in the case): ''my folks have persuaded me to make a trust agreement in favor of Henry *because they do not know how the marriage will turn out''*. This was shortly before the marriage (Case, p. 37).

The shares of stock were transferred on the books of the corporation to the name of the complainant (then Essie T. Watters, as trustee). The certificates themselves were kept in a safe deposit box in the Security Safe Deposit Company of Brooklyn until December, 1924. They were then transferred to a safe deposit box in the Second National Bank of Paterson, New Jersey, where they remained until the death of Mrs. Tucker. The trustee was never given exclusive access to or control over the Brooklyn box; and the trustee never had any access whatever to the Paterson box. Control of the Brooklyn box was held jointly between Mrs. Tucker and the trustee, and in 1922, at the request and direction of Mrs. Tucker, her husband, Garrett R. Tucker was also given access to the box. After the closing of the box in Brooklyn, and at Mrs. Tucker's direction, the stock was transferred to the Paterson box. To this box, where the stock was held from March,

1925, until the death of Mrs. Tucker in July, 1926, the trustee was never given a key, nor did the trustee ever have access to the box (Case, pp. 48-50; also testimony of complt. passim). The Brooklyn box was discontinued by the direction of Mrs. Tucker in December, 1924. The Paterson box, where the stock was next kept by Mrs. Tucker, was not rented until March, 1925. In the meantime the stock was not in the possession, custody or control of the trustee, but was apparently held by Mrs. Tucker in her own exclusive custody. In March, 1925, it was placed in the Paterson box, to which the trustee was never given access. The trustee apparently was not even made acquainted with the renting of the Paterson box, for she says that when stock dividends were received as late as December, 1925, she was ''*under the impression* that another box had been rented in Paterson, so I gave that stock dividend to Mrs. Tucker and asked her to put it with the rest of the certificates *which I understood* she had taken to Paterson'' (Case, 157 l, 30). The trustee gave this stock dividend to Mrs. Tucker and asked her to put it in the Paterson box, but Mrs. Tucker never told the trustee that she had done so (Case, p. 162). The stock dividend delivered to Mrs. Tucker, and last referred to, was received by the trustee in December, 1925. And it was at this time that the trustee states that she asked her sister if she (the trustee) had access to the Paterson box; to which the sister responded that she was not sure but she would see about it. The trustee did not press the matter further, giving as the reason that Mrs. Tucker was shortly afterward taken seriously ill. Mrs. Tucker did not become seriously ill until February, 1926. The box was opened in Paterson and the stock placed there in March of the previous year. The one question directed by the complainant concerning

access to the box at the time of the stock dividend in December, 1925 "ended it", and there never was any mention of the subject again (Case 216, l. 10-25).

The stock certificates were not changed from the maiden name of the trustee to her marriage name until this was occasioned by the change of the corporation from a New Jersey Corporation to an Illinois Corporation.

The terms of the trust set forth in the Exhibit D1-D3, were never carried out. The uses upon which the so-called trust was made were never permitted by Mrs. Tucker to operate. The trustee was never permitted "to receive the income, interest and profits therefrom *and use the same for the support, maintenance and education of Henry W. McCormick.*" The trustee was never even permitted to "receive the income," etc., except as an agent of collection for Mrs. Tucker. From the very signing of the paper on October 14th, 1914, until Mrs. Tucker's death on July 13th, 1926, all income, interest and profits were immediately turned over by the trustee to Mrs. Tucker or to Mr. Tucker. These funds were uniformly deposited by Mrs. Tucker or her husband in a joint account of both of them, and used as their own property and as they saw fit. The support, maintenance and education of Henry was defrayed, not out of the income from the stock, pursuant to the trust, but out of the general funds of Henry's mother and step-father, *just as were those of the other children* (three children born of the marraige to Tucker.) Throughout the full period of twelve years this went on without the exception of a single occasion (Case, p. 98, l. 5, etc.; p. 161, l. 7; p. 216, l. 22; p. 217; p. 218, l. 25; p. 219).

Nor was the trustee ever consulted as to Henry's education (case, p. 57, l. 20). The trustee's explanation of the fact that the uses of the so-called trust were never effective is that Mrs. Tucker "asked me if I would become trustee of this trust fund and *in case of her death look after the interest of her boy.* And I said I would" (case, p. 151, l. 10-30); and again "because we had considered the matter and had decided that that was the best thing to do with them, to provide for the boy that I should turn the cash dividends over to her, and that she would provide for his maintenance, education and support with those dividends" (Test., p. 161, l. 5; pp. 212-214; pp. 215, 20, etc.) And it was Mrs. Tucker, not the trustee, who provided for the support and education of Henry right until the time of Mrs. Tucker's death. (Test. *supra*).

In spite of the forebodings that caused anxiety for the safety of the rights of Henry, which brought the so-called trust into being, the marriage turned out well. It proved to be a fruitful and a happy union. Mrs. Tucker became the mother of three more children. Her son, Henry, lived in the new family circle without the least distinction. He was known by his step-father's name. He was taught by his mother to know Tucker as his natural father. The life of this family appears to have been one of unusual happiness and accord. Never was there any distinction made as between Henry and the other children. The children themselves knew no distinction. They were reared together as the children of common parents. (Test. p. 58, 61; test. of Compl. Passim.) And Tucker apparently, as a husband and father had vindicated himself in the esteem of his wife's people. After the marriage they came to respect him. (Test. p. 240, l. 10; p. 241.)

Mrs. Tucker as a mother always showed extraordinary devotion to all her children alike.

Very close contact during eleven years with the new family circle showed complainant herself that Mrs. Tucker was a very fond mother, and during those years, complainant saw "not the slightest circumstance" *to indicate that all four children were not of the same parents.* Complainant had "an intuition" that Henry was favored of his mother, but admits that the mother would probably have denied any preference or favor whatever. (Test. pp. 211-212.)

Mrs. Tucker had three months less than twelve years of life with her husband, Garrett R. Tucker. At the time of her death her children were respectively, fifteen, ten, nine and seven years of age. During the period of her marriage with Tucker, Mrs. Tucker enjoyed a rapidly increasing prosperity and wealth. All of her life with Tucker and in the new and growing family circle was uniformly happy. And on September 5th, 1924, she made her will, just about two years before her death. At the same time her husband made his will leaving all to his wife (Test., p. 56, l. 20, etc.). And when Mrs. Tucker made her will in September, 1924, the value of the capital fund of the Trust stock that had been assigned for the benefit of Henry had increased from about $35,000 when the paper D-1 was made in October, 1914, to upwards of one-quarter of a million. (See Ex. D-4.) And in her will she designated her property by the general term "my estate". At the time of making the will she told the scrivener that in the event of her death she wanted Henry treated the same as the other children; *that Henry did not know that Mr. Tucker was not his own father,* and that she wished Henry to be treated exactly like the other children (Tes., p. 250. l. 30, etc.). Pursuant to her instructions the will was dictated in the form in which it now stands (Ex. D-2). And

while the will was being written, Mrs. Tucker exhibited to the scrivener the trust agreement D-1. She told him it was made in contemplation of her marriage with Mr. Tucker, that she thought the emergency which led to the execution of that agreement in the first place had passed by. She stated that she had the trust property in her possession; that this property belonged to her and that she had the right to *do what she wanted with it.* She stated further to the scrivener that the agreement had never been executed according to its terms at all, that is, carried into effect by herself and the trustee; that the income was not applied according to the trust agreement; that Mrs. Mayer had always sent the checks to her and she applied them as she saw fit after she got them. She did not in so many words tell the scrivener to revoke the trust in the will. All the conversation concerning the trust agreement and its revocation was after the conference concerning the will, and while the will was being written. The scrivener advised the retransfer of the stock to Mrs. Tucker and that she should revoke the trust. Mrs. Tucker mentioned as a reason for not retransferring the stock the expense that would be incident. She did not express the intention of leaving the trust intact so far as the will was concerned. The whole tenor of her conversation was contrary to the leaving of the trust fund intact (Test. of Holmes Passim). There is no testimony that the scrivener told her that in his opinion the will as written did not revoke the trust.

The testamentary disposition of Mrs. Tucker (Ex. D-2) presents a scheme of perfectly equal distribution among her husband and her four children. She names her husband as executor and trustee expressly without bond. The husband and

the four children each are to have one-fifth of her estate. The share of each child is to go to the trustee for designated uses. *Under the trust for Henry, the income is to be applied to his "support, education and maintenance" until he reaches the age of thirty.* The trust for the other two boys is upon the same terms as in the case of Henry.

There is an express provision that in the construing and carrying into effect of the will the son Henry "is to be considered and treated as though he were a full brother of my other children hereinabove mentioned".

Mrs. Adams (complainant's sister and a sister of Mrs. Tucker) testified that a few weeks before Mrs. Tucker's death, in the course of a conversation Mrs. Tucker remarked that half of the Gypsum stock was Henry's. Mrs. Adams had conversations with her sister almost daily for months before her death, and remembers no other conversation, and none of the conversation in question, except so much as referred to Henry's stock (Case, 222, l. 33; p. 227, etc.)

We have thus outlined all the evidence in this case upon which, we submit, in addition to the will itself, the issue depends. The evidence of revocation presented by the will itself will be considered at length under a proper head.

We would call the Court's attention to the thirteenth paragraph of the further answer as contained in the Amended Answer filed in this case (case, p. 28, l. 15, *et seq.*). The defendant, Garrett R. Tucker, renounces any and all interest in the trust fund, and has filed with the Clerk of the Court of Chancery formal document of assignment by which any interest of his which might otherwise be established by decree of the Court of Chancery in the so-called trust property, is transferred and assigned to the three children born to

the testatrix, Elizabeth W. M. Tucker, of her marriage with the said defendant, and to the child of the testatrix by former marriage, the four children to share and share alike in the interest thus assigned. Interest in this issue is therefore confined to the children. That is to say, the interests here are represented, on one hand, by Henry McCormick, infant child of the testatrix by a former marriage, and, on the other hand, by Garrett Rezeau Tucker, Elizabeth W. Tucker and James Louis Tucker, infant children of the testatrix by her second marriage. In effect, the question to be determined is as to whether or not the fund of stock in the so-called trust agreement of October 15th, 1914, shall be decreed to be the property beneficially of the child Henry, to the exclusion of the other three children of his mother, or shall be decreed to be the property beneficially of all four children equally. And this assignment in favor of the four children is woven into the terms of the decree below.

ARGUMENTS.

POINT ONE.

What is relied upon as a trust agreement never became effective as a trust, the terms of the instrument purporting to create a trust were never operative.

The trust for which the complainant contends is a voluntary trust. It is equivalent to a gift and is dealt with by the cases as a gift.

> "A voluntary trust is essentially a gift and must be fully executed to render it effective as such". *Sessna* vs. *Adams*, 93 N. J. E. 276.

Speaking of a voluntary trust in lands this Court held in *Austin* vs. *Young,* 90 N. J. E. 47 that "like other gifts it must be fully completed to become effective as a gift."

In the present case, any trust was by the conduct of the creator of that trust rendered entirely nugatory. Never once did she permit the trustee to function as such. The creator of the trust retained full practical dominion over the fruits of the trust property. The trustee as a result of the settlor's conduct and requirements, was nothing other than an agent through which the income passed to the settlor. The proof is clear that the settlor did not subordinate this income to the terms of the so-called trust agreement, but that the money and income was used "as she saw fit" and the same as her own property. The use upon which the trust, according to its stated terms, was made is the thing which the trustee was never permitted to carry into operation. She could not carry it into operation because the settlor of the trust deed did not permit the trustee on a single occasion to have any of the trust income with which to do so. It was the settlor, and not the trustee, who provided for the education, support and maintenance of the former's son. And she did so out of her own general means, to which general means she contributed the trust income. The means out of which Henry's support, education and maintenance were paid came from the same family fund which the like expenses of the other children were defrayed.

If a voluntary trust is a gift, it is not clear how the complete operation of a gift could be more effectively reserved than it was in the present instance. It seems but fair to say that the transfer of the stock, under the circumstances present in this case, was but a step in the transfer of the

property to be subordinated to the express uses of the trust. And it was but a formal step. Because the purpose for which the transfer of the stock was made—the providing of income for Henry's education, etc.—was never permitted by the settlor to have any effect so far as the trust is concerned. The right to the income the settlor consistently withheld unto herself, and enjoyed it fully to the time of her death.

The most important effect, however, which the circumstances considered under this point have upon the whole question, is realized in their connection with the attitude that the creator of the trust expressed and showed by her conduct toward the whole trust property. It is most important too, to consider that the completeness with which Mrs. Tucker reserved all income to herself provides an explanation for the fact that the certificates were not re-transferred to her name. There was nothing in the practical situation that required it, for she enjoyed, as her own absolute property, the trust stock just as completely as if the stock stood in her name.

Also, the effect of all this upon the significance which Mrs. Tucker as testatrix in this case gave to the words "my estate" as they are used in her will, is most vital.

Here we have a trust in which the trustee was never a trustee except upon paper. Here is a case in which the trustee was prevented from becoming in reality a trustee by the *continued dominion which the settlor exercised over the property which it was necessary for the trustee to have in order to act and serve as such trustee.* It is all very well to say that the trustee was such in her custody—without more—or the corpus of the fund without regard to the income. But there is nothing in what the complainant seeks to establish as

a trust deed which justifies any such separation or distinction. The ultimate disposition of the corpus and the use of the income prior to such disposition are each part of the one thing. And either the gift is completed by the donor or it isn't. If it isn't, it is not a gift. And here both income and corpus are ostensibly part of the one gift. And if this gift can not be separated into parts—the trust deed contemplates no such thing —then the arbitrary and absolute reservation of all income is a reservation of the gift as a whole.

The fact that the trustee explains this whole situation by saying that it was the result of an agreement between herself and the settlor is most important. Because if the settlor had no part in it and the checks were turned over to her as the arbitrary and gratuitous conduct of the trustee, it would be harder to find in the business what might be called the exercise of dominion by the settlor. But it is plain that what was done was required to be done by the settlor throughout the whole existence of the so-called trust deed prior to her death; it was dominion over the property. We need not remind the Court that such dominion as the settlor exercised from 1914 to 1926 was inconsistent with the existence of the trust. Having enjoyed the trust property without let or hindrance, it is easy to see why the settlor must have regarded such porperty always as her property and as "her estate," regardless of the paper writing (d-1), which she had never permitted, during her life, to have practical force or effect upon her property.

POINT TWO.

The trust agreement was made in what the parties regarded at the time as an emergency. There seems to be no dispute as to this. That "emergency" created a certain definite purpose which the agreement was made to attain. The emergency passed before the death of the settlor and with it the purpose of the agreement.

> "No trust can survive the purpose of its creation and where that is accomplished the trust must of necessity terminate."
> 39 Cyc. 97 (62), and cases cited.
> "It is a ground for termination that the necessity for the trust or the purpose for which it was created, have ceased to exist."
> 39 Cyc. 99 (74) and cases cited.

The evidence in this case as to the circumstances that called forth the trust and as to the purpose for which the trust was made is not contradicted. This evidence as it stands in the case was contributed by both sides of the controversy. Clearly it is established that the purpose of the trust was to prevent the hazard of Mrs. Tucker's marriage to a stranger of "ill repute" from endangering her infant son's chance of ever getting his portion of his mother's property. As to this there is no dispute. The danger thus apprehended passed and passed completely. Not only that, but Mr. Tucker appears to have impressed himself upon the life of his wife and her son as well as upon the lives of his own children as husband and father in every right and proper way. Mrs. Tucker's mother testifies that he won the respect of herself and her family. And no completer vindication of the marriage and of its want of prejudice to

Henry and his rights could be required than the description which was given of the new home circle and of the spirit that prevailed there by the complainant herself in her testimony. We respectfully submit at this point, therefore, that these two things are undisputed in this case: That the trust was made to meet a situation definitely apprehended by those who brought the trust about; and that such apprehension was dissolved by the event. That Mrs. Tucker herself clearly understood that the paper D-1 was signed by her in a certain emergency in her life and that the emergency had completely passed is made manifest by her statement to the scrivener at the time of the execution of her will.

The trust, as we have shown, had two purposes: to prevent Mr. Tucker from getting property which might otherwise become Henry's; and to provide income for Henry's education, maintenance and support. We have already seen how the latter of these purposes was completely superseded by Mrs. Tucker herself throughout the twelve years between the making of the agreement and her death. As to the other purpose, it is clear that to establish the trust now is simply to maintain it after the purpose for which it was made has passed; and to make the trust a contradiction, as hereinafter shown, in the light of its own expressed purpose and of the will of Mrs. Tucker, who created it. Henry's interest in his mother's estate (considered as including the trust property), equal to that of his sister and brothers, is secured to him, just as it is to them, under the will of his mother. Still to contend for this separate trust (in addition to the trust created by the will) is to maintain that the purpose of the trust was to afford to Henry a portion of his mother's property equal to the value of the trust fund (a quarter

of a million), over and above the portions to be given to other children subsequently born to his mother. That is not the purpose, never was the purpose and no one in this case maintains that it is the purpose for which the trust agreement was signed.

It should also be noted that any opposition to the argument we make under this point is overcome by the uncontradicted testimony in this case as to the extraordinary love and affection borne by Mrs. Tucker *for all of her four children without distinction or preference.* We need hardly call attention to the fact that another very important circumstance which supports the argument we make here is the almost fabulous increase in the value of the fund made subject to the trust agreement that was signed by Mrs. Tucker in October, 1914. From a value of about $35,000.00 this fund increased until at or about the time of the making of the will in 1924 it had a value of approximately a quarter of a million dollars. We understand that a change in the circumstances of a testator subsequent to the making of a will will not effect the abrogation of the will. That is not the point here. The argument here is that the change in the value of the fund does but emphasize the cancellation by new circumstances of the purpose that underlay the making of the trust. (For the moment we do not mention the very obvious meaning which this change in the value of the trust fund gives to the words "my estate" in Mrs. Tucker's will.) We all know what the trust purpose was; there is no dispute about it. The purpose certainly was not to appropriate a quarter of a million dollars to one child to the exclusion of three other children, all of whom shared equally in the love and affection of their mother by whom the trust was made. For Mrs. Tucker's intention

in the matter of Henry's share of her property we must look to the will, not to the trust agreement. Nor can it be said that the will and the trust agreement must stand together. For the will supersedes the expressed purpose of the agreement. It creates a trust for Henry; it vouchsafes Henry's "protection"—as it does that of all the other children—in the manner of the old trust agreement. Why in the case of Henry is there to be *two trusts with the like purpose?*

By way of noting another important bearing which this great increase has upon the question of an obsolete trust purpose, it should be observed that while the trust was made to prevent Tucker from getting $35,000.00 in property which might otherwise go to Henry, Henry is now the beneficiary under his mother's will of property incomparably greater in value than that which the trust was designed to prevent Tucker from diverting from his step-son.

POINT THREE.

The trust agreement reserves the right of revocation. No particular form or method of revocation is prescribed. Therefore, any act of dominion by which the intention to revoke is clearly evinced is sufficient.

An examination of the cases on the subject of revocation of trust agreements and the like indicates a parallel between the reasoning to be applied to the matter of revoking trust agreements and to the exercise of a power. This parallel is perhaps most clearly shown in the recent case in this Court of *Paul* vs. *Paul,* which is considered later under a separate point in this brief.

In *Cueman* vs. *Broadnax,* 37 N. J. L. 508-512, the Court said:

> "Where a power is given generally, without defining the mode by which it must be exercised, it may be exercised either by deed or will. Nor is it necessary that the power should be executed by deed—a simple note in writing would be a good exercise of the power."

It has been held that the making of a mortgage is such an act of dominion over the property as will work a revocation of a trust. *Geither* vs. *Williams,* 57 Md. 625.

> "But when no particular method of revocation is specified, the revocation may be made by any act or conveyance sufficient to terminate the trust."
>
> 39 Cyc. 94.

It has been very generally held that disposition by will revokes a trust.

> 258 S. W. (Mo.) 1000;
> 112 Misc. (N. Y.) 222;
> 184 N. Y. Sup. 121.

Another case—which we regard as conclusive—to be cited under this head as authority in New Jersey is the case above mentioned of *Paul* vs. *Paul,* 99 N. J. E. 498. The latter case, however, is so important to this whole controversy that we discuss it hereafter under a separate head.

POINT FOUR.

Having shown that a will is an effective means for the revocation of a trust, we come to deal with the will in the present instance. This will presents such an equivocation or ambiguity as to have rendered it proper and necessary for the Court below to construe the will.

We do not seek to contradict, explain or alter the will. But it is incumbent upon the Court under the circumstances of this case to ascertain what significance the testator gave to the words "my estate" as they are used in the will. Under all the circumstances the use of this general term in the will is at worst equivocal. The argument that an equivocation is presented by the use of the general term "my estate" in the will is strengthened, among other things, by the attitude which the testator showed, by her conduct and expression to the trust and to the property under it. To her the trust fund had always been her estate.

The significance *attached by the testator* to the words "my estate" is momentous. The testamentary intent of Mrs. Tucker depends upon *her understanding* of the words used to express that intent: upon whether or not the trust property was understood *by her* to be a part of her estate. The only point we make under this head is that there does exist here such an ambiguity or equivocation as requires construction. What we believe to be the inescapable result of that construction is dealt with later.

In the case of *Coyle* vs. *Donaldson,* 91 N. J. E. 138, the Court construed a will by reason of the uncertainty attached to the meaning of the words

"the coal business now owned by me." And in that case, this Court says: "The definition of the word 'business' or the construction given to it by the Courts in other cases is of little aid in ascertaining *the intention of the testator in this case.* The word is an uncertain and equivocal expression." (Cases cited). If the word "business" is an equivocal expression, we respectfully submit that the term "my estate" as used by the testator in the present case under all the circumstances that prevail here, most certainly presents an equivocation.

The use of the words "my estate" in the present case is an equivocation, because the word "estate" might mean the testator's property including the trust stock or it might mean her property excluding the trust stock. She had a right to give either scope to the meaning of the words as used by her in the will. And the vital thought in the problem is that the mere expression of the intention to do either one or the other, concludes this inquiry in accordance with that intention. That is to say, if the intended meaning was to include the trust stock, *ipso facto,* the trust stock becomes part of the estate. If she intended otherwise, the trust stock does not become part of the estate. The question, therefore, is what meaning did the testator intend to give the words used by her? There is no effort here to change the will in any particular, but simply to learn the significance which the testator attached to the words used by her.

To say that there is an equivocation in the use of the words "my estate" is not at all extraordinary. The equivocal character of the words is manifest in the light of all that went before and in the light of the situation that prevailed at the time of the use of these words in the will. In-

deed, in the lay, practical, non-technical understanding of the testatrix, the trust property had always continued to be "her estate". In her statements to the scrivener she referred to circumstances and acts of dominion by her (proved and admitted in the case) which justified to her mind the attitude and conduct of ownership which she bore toward the trust stock. *She had actually used it always as her estate.* Every circumstance of beneficial ownership she had withheld unto herself; and without exception all the fruits of this beneficial ownership she had used, enjoyed and expended exactly as she did her other property. The use by the testatrix of the words "my estate" with the intention that these words should carry a reference to the trust stock, involved an act of dominion over the trust stock *no more drastic than the dominion which was continually exercised over the trust stock by the testatrix and which all sides admit.*

Where the testator uses a term which might be the designation of one or the other of two mental conceptions, the result is an equivocation. *Van Nostrand* vs. *Board of Reformed Church of America,* 59 N. J. Eq. 19, at 22.

The thing described in the Tucker will is "my estate". This might refer to the estate as increased by the revocation of the trust fund or to the estate without the trust fund. The mere fact of reference to the estate as increased by the trust fund would *ipso facto* result in such increase.

Mrs. Tucker, as testatrix, was the owner of an estate in two senses. She was the owner of an estate in the sense of her property exclusive of the trust fund; and she was the owner of an estate in the sense of such property and *in addition her power of revocation over the trust fund.* That power of revocation was in itself a very tangible

item of property. Potential, yes, *but all that was required was the mere expression of intent to make that potential thing a reality.*

We respectfully submit that it must be obvious that in every practical or lay sense the trust stock continued to be the estate of Mrs. Tucker.

The one qualification of the technical status of that stock as part of her estate was the existence of the trust agreement. And this agreement, it was her understanding, as expressed to the scrivener, had never been carried out.

POINT FIVE.

A construction of the will is proper and necessary in this case. In such construction the Court below properly availed itself of extrinsic evidence to show the circumstances attending the testatrix at the time of the making of the will and at the time of the making of the trust; also extrinsic evidence to show reference by testatrix to the trust fund as part of her estate and to show her dealing with the trust fund as part of her estate; also testimony to show the family relations of the testatrix; and testimony to show the amount and condition of her estate.

The case of *Wilson* vs. *Anderson,* 40 Atl. (Pa.) 1096, is interesting as a case showing how far the Court went by way of inquiry into surrounding circumstances. In that case an effort was made to have the Court decree that a trust had been revoked by a subsequent will. There was no reservation whatever of any right to revoke the deed of trust. And the Court held that the testamentary devise of "all his property" referred to other property owned by the testator outside of the

trust fund. But as stated above we cite the case to show only the extent of collateral inquiry indulged in by the Court. The Court said at page 1097:

> "*Two very material facts in aid of the construction of the papers are found by the court;* first, that the deed was prompted by intemperate and improvident habits of the grantor at the date of it, when he was a young man, only 26 years of age, which habits continued without reformation until his death, 28 years afterwards; second, that at the dates of both deed and will he was possessed of very considerable property, both real and personal, on which the will would operate without affecting the grant specified in the deed."

And again at page 1098:

> "After a careful analysis of the *express purpose, in view of the surroundings* and the fact that during his lifetime the grantor had, by a second formal deed, revoked the trust, a subsequent testamentary disposition was sustained."
>
> "Evidence showing the situation of the testator and the circumstance at the time of the making of the will is admissible."

Johnson vs. *Haldane,* 95 N. J. Eq. 404; 124 Atl. 63; 93 N. J. E. 241; 114 Atl. 406.

> "The Court in construing a will must search the testator's intention in the light of the facts, placing itself as nearly as possible in his position."

Johnson vs. *Haldane,* 95 N. J. Eq. 404.

In *Coyle* vs. *Donaldson,* 91 N. J. Eq. 138 (*supra*), this stated that the meaning and intention of the testator "must be determined not by fixing the

attention upon single words *but by considering the entire will and the surroundings of the testator when he executed the will,* and by ascribing to him so far as his language permits the *common impulses of our nature"* (citing Mr. Justice Dixon in *Torrey* vs. *Torrey,* 70 N. J. L. 673).

> "All other rules of construction and usual meaning of words and phrases are subordinate to the intent of the testator as determined from the language used, in the light of all pertinent circumstances, provided intention is in accordance with established rules of law."

Hiller vs. *Lawing,* 136 Atl. (Me.) 350.

Nor is it necessary that there be an actual latent ambiguity in order to render extrinsic evidence of conversations and the like admissible. Vice Chancellor Leaming in *Paul* vs. *Paul, supra,* cites the case of *Van Nostrand* vs. *Board of Reformed Church,* 59 N. J. Eq. 19, where Vice Chancellor Reed, referring to such extrinsic testimony, among other things, of conversations by and with the testator, says:

> "It is also in evidence that in his conversations with his pastor upon the subject of missions he was accustomed to allude familiarly to the two boards of foreign and domestic missions as the foreign missionary society and the domestic missionary society. This evidence was competent, *although there was no latent ambiguity;* for, says Mr. Hawkins, "It is to be observed that evidence in the shape of sayings, etc., of the testator, may be in certain cases adduced to show that he habitually used certain words, even when the description is not *equivocal,* provided, the sense thus sought to be put upon them does not contravene their ordinary and legitimate meaning; this being distinct from evidence adduced to show in what sense he used the

words on the particular occasion of writing the will." Hawk, Wills, 10; *Duke of Leeds* v. *Amherst,* 9 Jr. 359; Re Fethans Trusts, 1 Kay & J. 528."

The cases are replete with authority for the proposition that:

"The Court will place itself in testator's place in order to determine what he meant by his will."

In re Yates, 126 Atl. (Penna.) 254.

And these cases show that the Court puts itself in the place of the testator by first learning as intimately as possible, all the facts and circumstances that went to make up that "place."

"In the construction of wills effect is always given to the intention of the testator rather than to adhere to the strict technical construction of words and phrases, unless such intention runs counter to some recognized rule of law."

Genung vs. *Best,* 135 Atl. 514 (5 Adv. Rep. 76).

In the case of *Johnson* vs. *Bowan,* 85 N. J. Eq. 76, the Court was called upon to construe the meaning embraced in the words of the will "residue of my estate—all moneys and incomes." The Court held that the language did not mean only moneys and incomes but included the realty.

Where the language of the will is of "doubtful meaning circumstances may be taken into consideration in ascertaining testator's intention." *White* vs. *Graves,* 104 Atl. 205. (Not officially reported.)

"Technical rules of construction are designed to assist the Court in and not prevent

the Court from ascertaining testator's intention."

White vs. *Graves, Supra.*

"In order to discover the intention of the testator the Court may put himself in the place of the party and then see how the terms of the instrument effect the property or subject matter. With this in view evidence is admissible of all the circumstances concerning the author of the instrument."

Leigh vs. *Savidge,* 14 N. J. E. 124.

And Vice-Chancellor Pitney in *Wiggins* vs. *Wiggins,* 65 N. J. Eq. 417, says:

"Fundamental rule in the construction of wills is the ascertainment of the intention of the testator, first, by carefully considering the force of every word of the language used by him; and second, in case of difficulty or ambiguity by considering therewith his pecuniary circumstances and his family and social relations."

"Extrinsic evidence is also admissible in case of latent ambiguity where there are two or more persons or things, exactly answering the persons or things described in the will. In such a case parol evidence may be received of what the testator said to show which of them he meant, but not to show that he meant a person or thing different from the one mentioned in the will."

Burnet vs. *Burnet,* 30 N. J. Eq. 595.

"A latent ambiguity arising on the face of the will (as to what lands the testator meant to include by the words 'my plantation') may be examined by parol."

Holten vs. *White,* 23 N. J. L. 330.

In the construction of a will parol evidence of the circumstances and surroundings attending the

testator is admissible *including testimony of the scrivener as to statements made by testatrix to him.*

Van Fell vs. *Spierling,* 97 N. J. E. 20.

We contend under the authorities cited under this point, and in view of all the circumstances presented in the case, that all the evidence outlined at the beginning of this brief is pertinent and admissible, in addition to the documents themselves.

We have shown too that the testator's intention controls as that intention is revealed in the light of her suroundings and relations.

All the evidence in this case, therefore, is competent and admissible which shows (a) the purpose of the trust and the circumstances under which it was made; (b) the complete change in Mrs. Tucker's life and circumstances at the time of the making of her will; (c) her conduct toward the trust property for the twelve years preceding her death; (d) how she thought and how she acted regarding the trust fund, as shown by her conduct and the statements made by her to the scrivener; (e) her relationship with her children and her love for each and every one of them alike; (f) and the amount and circumstances of her estate at the time of the making of the will and at the time of the making of the trust.

By this evidence it is fairly and justly established that the trust is no longer existent, and that the fund is a part of the estate of Mrs. Tucker and subject to the provisions of her will. Such a result would, in principle, be in strict consonance with what Vice Chancellor Leaming did in the case of *Paul* vs. *Paul,* as hereinafter shown.

POINT SIX.

The will itself shows a clear intention to make the trust fund a part of the testamentary distribution.

The will presents a scheme of perfectly equal distribution. When the will was made, Mrs Tucker knew, and said that she knew, that the trust property was hers to dispose of as she wished. This knowledge and understanding on the one hand and the purpose to distribute her bounty equally on the other are in accord. The question involves definitely Mrs. Tucker's purpose as to Henry's share in her bounty. What was it that Mrs. Tucker desired for Henry in this connection? She desired that he be treated like the rest, as in her will she expressly states. She was obviously not conscious of the existence of any legal arrangement whereby *Henry was to have a quarter of a million dollars over and above the shares of his sister and brothers.* So far from being aware of such a disparity in Henry's favor, she expressed a caution in her will lest Henry be prejudiced in his status as a beneficiary under it. And, therefore, it is that the testatrix provides that in a construction of the will, Henry shall be dealt with as a brother of the whole blood to her other children. Mrs. Tucker made this will with open expressions of equal love and affection for all her children. She told the scrivener that Henry had been reared as a full brother of the other children and *that he did not know that his step-father was not his natural father.* It was in that spirit that she gave the instructions for the making of her will. It is simply inconceivable that *contrary to all these clear and open avowals, Mrs. Tucker intentionally carried through a scheme of distri-*

bution, which would utterly destroy as between her children the feeling of equality between them which she cherished and wished so ardently to preserve.

Another piece of clear evidence in the will itself that it was intended to supersede the trust agreement made ten years before, is the provision for *Henry's testamentary trust.* That trust and the one set forth in the agreement are incongruous. They do not supplement one another; they are in conflict. Both trusts standing together provide a situation where there are two trustees each charged with the same uses for the benefit of the same person.

POINT SEVEN.

The case of Paul vs. Paul, 99 N. J. E. 498, is a precedent in this State for every aspect of the present case.

In *Paul* v. *Paul,* the testatrix was the beneficiary under a trust estate. By the terms of the trust, she had a power of appointment under which she could dispose of the trust fund by her will. She made a will in which she used the expression "my estate". The question decided by the Court was whether or not, by the will, the testatrix had exercised the power of appointment. In other words, did the expression "my estate" include the fund in trust over which she had the power of appointment? The Court held that she had exercised the power of appointment by the will. And this conclusion was reached in spite of the fact that "nowhere in her will does testatrix make specific reference to the power". And in spite of the fact, also, that "standing alone, the instrument would

be declared non-operative upon the trust estate". The Court takes occasion to observe: "when the provisions of the will are viewed in the light of extrinsic circumstances, disclosed by the evidence, it seems impossible to doubt that it was the obvious intent of testatrix to exercise the power given to her under her father's will. Viewed in the light of these circumstances the major provisions of the will are practically futile and without any sane purpose or rational intent with any other meaning attributed to them." And again, "the circumstance that in her will she made no specific reference to the power should not be regarded as sufficient to negative that intent, if by necessary implication the intent is otherwise clearly manifest." (Cases cited.)

The Court's conclusion in *Paul* v. *Paul,* as definite and as decisive as it was, was nothing more or less than a logical and fair inference from the testimony as to circumstances attending the testatrix at the time of the making of her will, and parol evidence of her understanding as to what her "estate" included. The Court's opinion shows just how far it felt warranted in admitting extrinsic evidence:

> "It is clear that this letter and the testimony disclosing the custom of testatrix to refer to the trust fund as her estate cannot be received as evidence in aid of construction except, at most, for carefully limited purposes and in special circumstances, but I am convinced that *in the special circumstances of this case that letter and testimony cannot be wholly ignored."*

This case is also authoritative on the questions relative to latent ambiguity and parol proofs presented by the present issue. The case holds that a latent ambiguity may be created, or revealed,

as a result of parol proofs of surrounding circumstances. We read from the opinion:

> "By these parol proofs of surrounding circumstances a latent ambiguity was created as to whether the combined property or only the meager property of testatrix was by her intended to discharge these legacies. This, to my mind, brings the case within the spirit of the general rule that declarations of a testator may be resorted to in case of a latent ambiguity which arises by reason of two or more persons or things, each answering exactly to the person or thing described in the will."

As to the nature of the words "my estate", *Paul* v. *Paul* says:

> "In view of the nature of the trust, the expression 'my estate', must be given a *highly technical* meaning to overcome its *appropriately popular meaning* * * *. Indeed, it has been held 'estate' in a will is not to be understood as a word of art, but of interpretation, and its meaning may be affected by other clauses and dispositions in the will."

And again:

> "This parol testimony touching testator's statements is not to be considered as showing what testatrix meant to say; since it must be assumed that she meant to say what she did say, but at most is to be considered simply to show what she meant by what she did say, that is, what the words used by her *signified in her mind"*. Citing German Pioneer Verein *v.* Meyer, 70 N. J. Eq. 192.

The following, from the Court's opinion is also peculiarly applicable to the present case. In referring to the conclusion arrived at from all the evidence before it, the Court says:

> "This in no way conflicts with the general rule recognized in this State to the effect that a general bequest by the donee of a power, in which testator refers to the property bequethed as his estate, will be held not to be an exercise of the power, if it be accepted as a fact that in the mind or understanding of testatrix the term 'my estate' embraced the trust estate, *and I am unable to escape the view that in the circumstances of this case the evidence to that effect should not be ignored."*

In the Paul case, the trust fund was not a part of the estate subjected to the will unless the testator meant to include the trust property in the terms of the will. Precisely, the same thing is true in the present case.

We submit the parallel between the Paul case and this case is perfect for every purpose of judicial precedent. The testatrix in the Paul case was said to have the power of appointment over a trust fund. The testatrix in the present case had a power of revocation over a trust fund. The question presented by both cases is whether or not the will affected the exercise of the power. Whatever distinctions there may be made between these two cases are without substance, when both of them are compared in their problem as to the effect which the wills have on the respective trust funds and with respect to the evidence admissible.

On page eight of complainant's brief is the statement that "the amended answer abandons the defense of revocation by the will." We cannot understand why that statement should be made. It is unwarranted, as a reading of the amended answer will show. The same statement is made by counsel under Point V of his brief.

Paragraph 11 of the further answer of the amended answer (page 27) alleges that Mrs.

Tucker made a testamentary disposition of all her estate, including all the property under the so-called trust agreement of 1914; that she did this in and by her will of September 5th, 1924; and that the words "my estate," as used in that will, were intended by the testatrix to mean her entire property, "including the shares of stock mentioned in the trust agreement and the increase thereof."

If these allegations as to the effect of the will have been established, then the testamentary revocation will, as a necessary incident, have been proved. And this is so regardless of other and additional allegations or theories of defense the amended answer may embrace. All the possible facts of testamentary revocation in this case are alleged. Revocation is the conclusion that follows proof of these facts.

Some comment on the case of *Farnum* vs. *Pennsylvania Company,* etc., 87 N. J. Eq. 108, is in order. This case is cited in a number of connections in the brief of complainant's counsel. It should be noted that there were factors present in the Farnum case which are absent here; and there are factors in the present case which were absent in the Farnum case. The question presented by the Farnum case was one relating to the exercise of a power, and while for many purposes such a question presents an analogy to the question brought into court by this case, there is yet an essential distinction in the relationship between the one revoking a trust provision and the property of the trust, in the one case; and between the one exercising a power and the property under the power, in the other case. A kind of emphasis is given this distinction by a quotation from Bingham's Appeal, used by the Vice-Chancellor in the Farnum case at page 117:

"* * * It is possible but not certain that he intended an execution of the power. It must not be forgotten when handling such a question that we are dealing with the property of another and not with that of the donee of the power"

The use of so many words in the further answer that Mrs. Tucker "revoked" the trust by her will would add nothi to the defense set up in this case. Even though her presumption, which is alleged, that the trust had no valid existence ~~which~~ was contrary to law which preserved that existence in spite of all that she did concerning the trust the stock prior to the making of her will, yet, if in her understaning that there was no subsisting trust, she used th words "my estate" to embrace the trust property, there could be no more definite intention than that to revoke the trust, and the trust would be ipso facto revoked. It is further alleged that all of Mrs. Tucker's conduct, including the wil was inconsistent with the existence, "or continuance" of the trust.

a controlling incident. What we have in mind here is the creation by Mrs. Tucker in her will of trust estates for all her children alike, and the point that the creation by the will of the trust estate for Henry can "sensibly" be regarded only as *superseding the trust for Henry as set forth in the agreement of 1914.*

On page 28 of complainant's brief, counsel observes that the conclusion of the Court below is in violation of the second proposition laid down by Vice-Chancellor Wigram (Extr. Ev. page 55 Am. Ed. 1872):

Tucker made a testamentary disposition of all her estate, including all the property under the so-called trust agreement of 1914; that she did this in and by her will of September 5th, 1924; and that the words "my estate," as used in that will, were intended by the testatrix to mean her entire property, "including the shares of stock mentioned
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> "* * * It is possible but not certain that he intended an execution of the power. It must not be forgotten when handling such a question that we are dealing with the property of another and not with that of the donee of the power"

The Farnum case is totally devoid of the background of relationships that we have in the present case, where the relationship, in particular, of Mrs. Tucker *with all her children alike,* provides human and natural implications in favor of the testamentary revocation of the trust, of a most persuasive kind.

The Court says in the Farnum case at page 115:

> "The General residuary bequests are of 'my estate'. This, *in the absence of some controlling incident,* is to be regarded as relating to the testatrix's own property and if the general bequests stood alone in the will, the terms used would permit of no explanatory proof that they were meant to include her father's estate."

The Court speaks of the use of the words "my estate" in *the absence of "some controlling incident."* In the present case there is no absence of a controlling incident. What we have in mind here is the creation by Mrs. Tucker in her will of trust estates for all her children alike, and the point that the creation by the will of the trust estate for Henry can "sensibly" be regarded only as *superseding the trust for Henry as set forth in the agreement of 1914.*

On page 28 of complainant's brief, counsel observes that the conclusion of the Court below is in violation of the second proposition laid down by Vice-Chancellor Wigram (Extr. Ev. page 55 Am. Ed. 1872):

> "II. Where there is nothing in the context of the will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances,* it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."

If we are to conclude that the words "my estate" in Mrs. Tucker's will were *not* intended by her to embrace the property in the trust agreement of 1914, then, we respectfully submit, her will, in the words of Vice-Chancellor Wigram, *supra,* is not "sensible with reference to extrinsic circumstances," because in that event, the will creates a *second* trust for Henry. Upon what uses was this trust created? Upon the same as those set forth in the agreement of 1914. Is there anything "sensible" in the maintaining of two trusts for Henry, the one trust in its purpose being parallel with the other? Is there anything "sensible" in the maintenance of two trust estates with like purposes, but with different trustees? Was there anything "sensible" in Mrs. Tucker's intention—conceding that such was her intention—to reserve and except from the equal distribution designed by her will, a separate fortune in trust for Henry alone, in the face of paragraph (F) of her will, and of her care that among her children there be known or felt no distinction whatever?

Under Point IV of complainant's brief there is cited the case of *Wooster* vs. *Cooper*, 59 N. J. Eq.

204. This is cited as authority for the proposition that "testatrix could not revoke the trust by her will." In the Wooster case it had been previously adjudicated that what the donor of the power had required was an *exercise of the power inter vivos.* It was upon this prior adjudication that the decision in the Court of Chancery on this point was based. That distinction excludes the Wooster case from any application here. Mrs. Tucker in the agreement of 1914 did not restrict herself to a revocation *inter vivos*; her right of revocation was unqualified as to form or method of its exercise.

None of the authorities cited under Point IV sustain counsel's contention that Mrs. Tucker could not properly revoke the trust agreement by her will.

We might mention in passing that in this case there was a substitution of attorneys shortly before the hearing. As an incident to this circumstance, the amended answer was filed. No objection is made upon this appeal to the order of the Court giving leave for the filing of the amended answer. But Point V is devoted to the proposition that the decree does not conform to the defendant's case as made by the amended answer. This is clearly untenable.

The amended answer sets up in full detail all of the facts which it is contended show that the trust agreement was created for a special purpose; that such special purpose was completely served prior to the death of Mrs. Tucker; that Mrs. Tucker never permitted the trust to become effective for its own purpose, but herself reserved and actually controlled the possession, use and enjoyment of the trust property. And in paragraph 11 of the further answer it is, in any event and regardless of the legal consequences of the

precedent facts, alleged that the trust was revoked by the will of Mrs. Tucker *because by her will she made testamentary distribution of all of the property under the trust agreement.* There is no inconsistency or conflict in the scheme of defense embraced in the amended answer.

See also Chancery Rule 52.

Point VI is devoted to the credibility of the defendant Garrett R. Tucker as a witness. The facts set forth at the beginning of this brief as an outline of the testimony in the whole case can be drawn from the testimony given by witnesses other than the defendant himself. The establishment of almost no fact in this case is dependent upon his testimony. The complainant herself, her mother, Mrs. Watters and the attorney, Mr. Holmes, are the persons whose testimony we can afford to rely upon as constituting the structure of facts in this case. All this is said, of course, not for the purpose of conceding any point made in complainant's brief as to the credibility of the witness, Garrett R. Tucker, but for the purpose of showing that all that is said under Point VI is quite beside the issue.

If Elizabeth Tucker intended that the property under the trust agreement should be part of her estate, any shortcoming of her husband, before or since her death, will not be permitted to defeat the testamentary purpose. The real parties in interest here are the four children. Nothing predicated upon the conduct of Garrett R. Tucker should be permitted to prejudice the children, on one side or the other, in this effort to determine their rights under the two documents here chiefly in question. The same answer can be made to the reference on page 38 to the allusion of the Court below to the defendant's conduct on the morning of his former wife's death, and to his remarriage.

We are sure this Court will not undertake to appraise motives like those that must be searched to determine the justice of any denunciation based upon what happened immediately upon the death of Elizabeth Tucker, and upon the event of her widower's taking unto himself a second wife. Even were such motives relevant to determine the question on this appeal, they would not be permitted to operate against the rights of the children, the only parties in interest here.

The Court below must be presumed to have considered the credibility of the witnesses that appeared before it, and the weight and quality of the testimony given by them. But it may, perhaps, be well to say a word as to a feature of the testimony of the witness Edith W. Adams. (Case page 220, etc.) Mrs. Adams was a sister of Mrs. Tucker. She testified as to a conversation with Mrs. Tucker, shortly before the latter's death, relative to the extent of Henry's ownership of the Gypsum stock. And this testimony, we submit, was singular to say the least. Everything in the case indicates, beyond a doubt that prior to Elizabeth's death the members of her family gave no particular thought—that is, after Elizabeth's marriage and the birth of the children—one way or the other to the trust agreement which had been signed by Elizabeth and Mrs. Mayer back in 1914. But in this conversation, according to Mrs. Adams, Elizabeth mentioned Henry's connection with one-half of the stock. And immediately thoughts arise in Mrs. Adams' mind having to do with the terms of the trust agreement and with Elizabeth's reserved power of revocation! Highly technical and very extraordinary thinking under the circumstances. Mrs. Adams says that she immediately went to her home and mentioned Elizabeth's utterance to her mother and her sister. We

take it that the description of this transaction, as given by the witness, impressed the Court below as being neither cogent nor probable. Mrs. Adams had no recollection whatever of her sick-room conversations with her sister, generally, to explain the perfect clarity with which this one conversation stood out in her mind. The difference between her recollection of this one conversation and that of every other conversation she had with her sister during the latter's confinement to her sick-room, is the difference between day and night, as her testimony will at once disclose.

There is probably an explanation of Mrs. Adams' testimony, and one which avoids any imputation of deliberate falsehood on her part. Vague and uncertain recollections are very commonly developed into clear and definite "memories" with the help of a lively animus. Elizabeth may have said something to Mrs. Adams. And she may have said something to her with regard to Henry and the stock. Or she may not. But subsequently there comes to Mrs. Adams, after her sister's death, an animosity toward the defendant, Garrett R. Tucker, that is strengthened and deepened by grief and indignation. It is very easy to understand that in this state of affairs that embraced them all,—Mrs. Adams, her sister and her mother,—they talked things over at length among themselves. Then there was the remarriage that followed hard upon Elizabeth's death. And to cap the climax, this litigation ensues, convincing Mrs. Adams and the rest of her people, as throughout the case they so clearly showed, that the suit was nothing other than an effort of the defendant, Garrett R. Tucker, to take unto himself the patrimony of Henry McCormick. Upon the basis of normal and natural reactions it is not hard to understand how the defendant's

wife's people must have felt about the whole series of events. And we take it that to the Judge who heard it, Mrs. Adams' testimony was thoroughly understood in accordance with observations that have just been made.

We respectfully submit that the decree in the Court of Chancery should be in all things affirmed.

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with Defendant-Respondent.

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