

INDEX

	Page
Notice of Appeal.....	1
Grounds of Appeal.....	2
Judgment Record	7
Complaint	7
Answer	9
Judgment	10
Testimony	11
Court's Charge to the Jury.....	85
Defendants' Exceptions	92
Plaintiff's Exhibit—Will (off'd p. 77).....	93
Defendants' Request to Charge.....	95
Defendants' Trial Memorandum.....	95

TESTIMONY.

Plaintiff's Witnesses:

Arthur Hirschberg,	Direct	11
	Cross	26
Grace Spivak,	Direct	42
	Cross	50
Josephine Maines,	Direct	55
	Cross	59

	PAGE
Gertrude Herman,	
Direct	59
Cross	68
Harry Horowitz,	
Direct	72
Cross	74
REBUTTAL.	
Sadie Hirschberg,	
Direct	77
<i>Defendants' Witness:</i>	
Harry Horowitz,	
Recalled, direct	74
Recalled, cross	75

50 194 0228 12071 1-1-28

Notice of Appeal.

(Filed, January 20, 1928.)

10

New Jersey Supreme Court

PASSAIC COUNTY.

SADIE HIRSCHBERG,	}	Plaintiff,
v.		

HARRY HOROWITZ and DAVID COHN, as Executors of the Last Will and Testament of Israel Horowitz, deceased, Defendants.	}	Action at Law

20

To

Messrs. WARD & MCGINNIS,
Attorneys of Plaintiff.

30

TAKE NOTICE that the defendants appeal to
the Court of Errors and Appeals from the whole of
the judgment entered in this cause.

COHN & COHN,
Attorneys of Defendants.

40

Grounds of Appeal.

(Filed, February 6, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	SADIE HIRSCHBERG, Plaintiff-Respondent,	}	On Appeal.
	v.		
	HARRY HOROWITZ and DAVID COHN, as Executors of the Last Will and Testament of Israel Horowitz, deceased, Defendants-Appellants.		

20 The appellants state the following grounds of appeal:

1. The court refused to non-suit the plaintiff, although a non-suit should have been granted pursuant to defendants' request.
2. The verdict is contrary to law.
3. No evidence was produced in support of the contract set forth in the complaint.
4. The charge of the court was contrary to law.
5. The verdict of the jury, under the charge of the court, was based on facts not involved in the issue raised by the pleadings.
6. The court charged the jury:

40 (a) "The suit is based upon a contract which Mrs. Hirschberg says she had with Mr.

Grounds of Appeal.

Horowitz, deceased, whereby she was to render certain services for him, whereby he was to pay her at the close of his life, or after his death, a sum equal to the value of his estate."

(b) "But there was testimony with respect to the contract by others who were present and by others who testified that the deceased at different times subsequently expressed himself as having made such a contract. I have reference to Mrs. Maines, whom you will recall for ten months prior to the death of Mr. Horowitz lived next door, and to her testimony with respect to the conversations that she had and how they came about, with respect to the disposal of his property, over the back fence. There is also the testimony of the nurse, whose name I have forgotten, who was told, she says, by the deceased that he wished to see the plaintiff, Mrs. Hirschberg, on the Sunday night preceding his decease; that Mrs. Hirschberg was summoned by her to the sick bed, and that Arthur Hirschberg, her husband, accompanied her, at which time there was a declaration by him to the effect that there was this existing contract. And at that time, the testimony of that witness is, there were instructions given that an attorney be summoned, because the question was asked the deceased whether he had provided for the carrying out of this contract by the provisions of his will."

(c) "Now, you will recall that the plaintiff's contention is that after her marriage she continued to live with Mr. and Mrs. Horowitz and did so for a period of about four years, during which time two children were born to them; that then there came some friction, or at any rate, the elder couple suggested that they

10 better have a home of their own, the children annoyed them, and so they established a home of their own, I think the testimony was on November 1, 1922; that they maintained that home independently of the old folks from that time until March 1, 1923; that some weeks after they had made that move—I think the testimony was five or six weeks, the proposition was made to them by Mr. Horowitz to return, that he missed them, that he missed the children; and then it was that the contract had its inception, then it was that he offered as an inducement for them to come and resume living with him and taking care of him and his wife; that he offered them compensation, and that he made the contract with them that if they would do that they would have whatever he had when he got through with it.”

20 (d) “Now, it is true, as counsel for the defendants says, that we have in this State a statute known as the Statute of Frauds, which requires, under certain conditions, that contracts be in writing. But that statute says that contracts to work or for services must be in writing if the services referred to in the contract are to be performed within a year. This contract is not within the Statute of Frauds, in the opinion of the court, because it was not to be performed within a year, necessarily. No one could tell how long it might take. And so I say that all that you must decide in this case is, under the evidence, whether or not there was such a contract.”

30 (e) “There is no dispute that it was not in writing. My ruling is that it need not have been in writing. My ruling is that if there was a contract, as is alleged by the plaintiff, it was an enforceable contract.”

40

(f) “The contract, it is contended, was that Mrs. Hirschberg was to receive all of his belongings; in other words, all of his property or all of his estate.”

(g) “The only testimony we have with respect to the estate is the testimony of Mr. Harry Horowitz, that the estate amounts to a little over eleven thousand dollars, and on cross examination it developed that there had been no commissions paid the executors, and there were still some administration expenses to be paid, as I recall it.” 10

“Now perhaps it may not be important as to the exact amount of your verdict, because if your verdict is larger than the estate it cannot be paid, because there is nothing to pay it with. If, on the other hand, there are bills that must be paid out of the funds that the executors have, they would have to be paid if they were a prior claim against the estate, that is, prior to this claim. That would be true if they were commissions to executors and accounting fees. So the testimony that you have is a little over eleven thousand dollars, and that means, I assume, eleven thousand dollars, at any rate. That is the only definite amount, perhaps, that you could fix.” 20 30

7. The action should have been brought by the husband of the plaintiff who is entitled to her earnings and wages for the services testified to.

8. The defendants' testator was seized of real property at the time it is claimed that the alleged contract was made, as well as at the time of his death.

9. The court erred in holding that an oral agreement that decedent would devise his real estate and 40

bequeath his personal property was valid with respect to the personal property and in admitting evidence in reference thereto.

10 10. The court admitted illegal evidence on behalf of the plaintiff, to wit, testimony in reference to the alleged oral contract.

11. The court refused to strike out all the testimony as to the alleged oral contract although it appeared that defendants' testator had died seized of real property.

12. The following question to the witness, Arthur Hirschberg was admitted:

20 "What was the understanding that was had between you and Uncle Israel, as you knew him, with reference to your living there at the time?"

13. The court erred in permitting the witness Arthur Hirschberg to testify that the plaintiff told his sister (Mrs. Gertrude Herman) and Mrs. Maines that she had decided to go back with her uncle.

30 14. The court erred in permitting the witness Harry Horowitz to testify that the value of the estate at the present time was a little over Eleven thousand (\$11,000) Dollars.

40 15. The court erred in permitting the witness Harry Horowitz to testify that the house was sold and all the estate was converted into cash after decedent's death, and that he, acting as an executor of the decedent's estate, sold it to one Hickey.

16. The court erred in permitting the plaintiff to testify as to the services rendered by her for the decedent.

COHN & COHN,
Attorneys for Defendants-Appellants.

10

Judgment Record.

NEW JERSEY SUPREME COURT:

SADIE HIRSCHBERG, Plaintiff,	}	Action at Law	20
v. HARRY HOROWITZ and DAVID COHN, as executors of the Last Will and Testament of Israel Horowitz, deceased, Defendants.			

Harry Horowitz and David Cohn, as executors of the Last Will and Testament of Israel Horowitz, deceased the defendants in this cause, were summoned to answer unto Sadie Hirschberg, the plaintiff therein, in an action at law upon the following complaint:

30

(Summons issued September 13, 1926.)

Complaint.

(Filed September 20, 1926.)

The plaintiff, by her attorneys, Ward & McGinnis, complains of the defendants as follows:

40

1. Plaintiff is a resident of the City of Paterson, County of Passaic and State of New Jersey.

2. Defendants are the Executors of the Last Will and Testament of Israel Horowitz, deceased, and have duly qualified as such, and have taken upon themselves the administration of the estate of the said Israel Horowitz, deceased.

3. Israel Horowitz died on the 8th day of December, 1925.

4. In his lifetime, and on or about the 1st of March, 1923, the plaintiff and the said Israel Horowitz, agreed to and with the said Sadie Hirschberg, that if she and her husband would give up, the home occupied by them and return and remain with him, the said Israel Horowitz and his wife, during their lives, assisting and caring for them and acting as a companion, that he, the said Israel Horowitz, would devise and bequeath to her, the said Sadie Hirschberg, and to her absolutely, his entire estate of which he would die seized and possessed.

5. The said plaintiff, Sadie Hirschberg, accepted said offer, and remained with the said Israel Horowitz and his wife until their respective deaths and cared for them and acted as a companion to them, in accordance with the terms of said contract.

6. That the said wife of Israel Horowitz, died on, to wit, November 24th, 1925, and thereafter on, to wit, the 8th day of December, 1925, the said Israel Horowitz died.

7. The said Israel Horowitz did not by any Last Will and Testament, or in any other way, comply

with the contract by leaving his estate to the said Sadie Hirschberg, but wholly failed to do so.

8. That after the Last Will and Testament of the said Israel Horowitz was proven, plaintiff made a demand upon them for the fulfillment of said contract, but the said executors have wholly failed and refused to pay the said estate or any part thereof.

Plaintiff avers the value of said estate is \$12,000, for which amount judgment will be demanded, no part of same having been paid.

WARD & MCGINNIS,
Attorneys of the Plaintiff.

Answer.

(Filed October 2, 1926.)

Defendants who reside in the City of Paterson, Passaic County, in the State of New Jersey, say that:

1. As to the allegation in paragraph "1" of the complaint, defendants have no knowledge or information thereof sufficient to form a belief.

2. Defendants admit paragraphs "2", "3" and "6".

3. Defendants deny every allegation in paragraphs "4", "5" and "7".

4. Defendants deny every allegation in paragraph "8" except that the plaintiff made a demand on the defendants for the sum of \$12,000 and that they refused to pay to the plaintiff the whole or any part of the estate of Israel Horowitz, deceased.

COHN & COHN,
Attorneys for Defendants.

Judgment.

(Judgment entered January 14, 1928.)

This case was tried before Judge Newton H. Porter, with a jury, at the Passaic Circuit on January 11th, 1928.

10 The jury rendered a general verdict against the defendants and in favor of the plaintiff for \$9,000.00.

Whereupon it is adjudged that the plaintiff, Sadie Hirschberg, do recover of the said defendants, Harry Horowitz and David Cohn, as executors of the Last Will and Testament of Israel Horowitz, deceased, the sum of Nine thousand Dollars damages, together with her costs which have been taxed at the sum of making in the whole the sum of

20 Damages \$9,000.00
Cost
\$

WM. S. GUMMERE,
C. J.

30 I, Edward J. Kelleher, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

IN TESTIMONY WHEREOF I have set my hand and seal of said Court at Trenton, this first day of February, A. D. nineteen hundred and twenty-eight.

40 EDWARD J. KELLEHER,
Clerk.

NEW JERSEY SUPREME COURT,
PASSAIC COUNTY.

SADIE HIRSCHBERG,
Plaintiff, 10
v.
HARRY HOROWITZ and DAVID
COHN, as executors of the Last
Will and Testament of Israel
Horowitz, deceased,
Defendants.

Paterson, N. J., January 11, 1928. 20

Before—Hon. NEWTON H. PORTER, J., and a jury.

APPEARANCES :

For Plaintiff: Messrs. WARD and MCGINNIS.
For Defendant: Messrs. COHN and COHN.

A jury was duly called and sworn.

Mr. McGinnis opened the case to the jury on behalf of the plaintiff. 30

Mr. Cohn opened the case to the jury on behalf of the defendant.

ARTHUR HIRSCHBERG, sworn.

Direct Examination by Mr. Ward:

Q. Whereabouts do you reside, Mr. Hirschberg?
A. I live at 142 Spring Street, Passaic, New Jersey. 40

Q. What is your occupation? A. Shoe salesman.

Q. You are married? A. Yes.

Q. To whom? A. Mrs. Sadie Hirschberg.

Q. She is the plaintiff in this suit? A. Yes, sir.

Q. When were you married? A. In February 22, 1920.

10 Q. Did you know Mr. Horowitz, Mr. Israel Horowitz, in his lifetime? A. Why, after I met my wife and was married to her was the only time I knew. I lived with him.

The Court: I didn't get your name.

The Witness: Arthur Hirschberg.

Q. How long before your marriage did you know Mr. Horowitz? A. About four months.

20 Q. You were married where? A. Paterson, New Jersey.

Q. I mean at whose home? A. We were married at the Hebrew Free School in Paterson.

Q. I see. Do you know where your wife was living before you married her? A. Yes.

Q. Where? A. 242 Van Houten Street, Paterson, New Jersey.

Q. With whom? A. Mr. Israel Horowitz.

30 Q. Before your marriage did you have any arrangement or understanding with Mr. Horowitz with reference to your home, your future home? A. No, sir.

Mr. Cohn: I object.

The Court: I think that is a proper question.

Q. After your marriage? A. After our marriage.

40 Q. Did you have any understanding? A. Yes, sir.

Q. With Mr. Horowitz? A. Yes, sir.

Q. With reference to your home? A. Yes.

Q. And as a result of that understanding where did you and your wife take up your home? A. At 242 Van Houten Street, Paterson, New Jersey.

Q. With whom? A. Mr. Israel Horowitz.

Q. And who else? A. Mrs. Horowitz. 10

Q. Who composed the family at that time? A. Mr. Israel Horowitz and Mrs. Horowitz and my wife and myself lived together.

Q. With them? A. With them.

Q. How was Mr. Horowitz known? A. I don't quite—

Q. How did you generally address him? A. As uncle.

Q. Uncle what? A. Uncle Israel.

Q. And Mrs. Horowitz? A. As Aunt Ray. 20

Q. Now, after your marriage for how long a period of time did you continue to stay at their home? A. For about four years.

Q. And under what arrangements?

Mr. Cohn: I object to that, if your Honor please, to testimony as to any arrangements, unless it is shown whether it was in writing or oral.

Mr. Ward: I will ask that. I think it is perfectly proper. 30

The Court: You may ask that.

Q. Was this arrangement in writing or oral? A. It was oral.

Q. And what was it?

Mr. Cohn: I object to any testimony as to an oral agreement or understanding, because the Statute of Frauds says that any agreement, any contract or sale of real es- 40

tate or for the devise of real estate is unenforceable unless there is a memorandum in writing and signed by the party to be charged therewith.

10 Mr. Ward: This is, of course, merely leading up to the circumstances surrounding the making of the agreement upon which we depend, and I believe that it is within your Honor's discretion to permit all of the circumstances that surround the living together of these two couples.

The Court: I will allow it subject to its being stricken out.

20 Mr. Cohn: May I submit to you authorities which state plainly that no evidence is admissible as to any understanding, agreement, or contract relating to real estate unless it is in writing?

Mr. Ward: It is elementary, of course; we all know that.

The Court: We don't know that it applies to real estate yet.

30 Mr. Cohn: The complaint alleges, and the opening statement alleges, that the contract which was made between the decedent and this plaintiff was an agreement to devise all of his real estate and to bequeath all of the personal property of which the decedent died possessed. That is their complaint.

The Court: It would be competent, even on your own statement it would be competent with respect to the bequeathing of any personal property.

40 Mr. Cohn: No, sir. We have authorities which hold that such a contract is indivisible, and if it applies as to real estate it applies as to the personal property.

Mr. Ward: Counsel does not understand—

The Court: I will allow it for the reason that I stated, subject to its being stricken out.

Mr. Cohn: We would like to have our exception noted. 10

The Court: You may have it, of course.

Q. What was the general understanding, Mr. Hirschberg?

Mr. Cohn: Of course, it is to the entire line of this testimony.

The Witness: What was the question?

The Court: I understand, the objection and the ruling are the same and an exception is noted. 20

Q. What was the general understanding had between you and Mr. Horowitz—

Mr. Cohn: I object to the question.

Mr. Ward: Now, will you kindly permit me to finish my question?

Mr. Cohn: I beg your pardon, Mr. Ward. I thought you had finished.

Mr. Ward: I had not. 30

Q. What was the understanding that was had between you and Uncle Israel, as you knew him, with reference to your living there at the time.

Mr. Cohn: I object to the question on the ground it calls for a conclusion. He should state what conversation he had, and not what his understanding was.

The Court: I will allow it. 40

Mr. Cohn: Exception, sir.

The Court: You may have it.

By the Court:

10 Q. You may answer. A. The understanding that we had was that I was to live with my wife at his home, at 242 Van Houten Street, and pay half of everything, including rent, coal, gas and food.

By Mr. Ward:

Q. And was that continued for any length of time? A. For four years.

20 Q. Then what happened, Mr. Hirschberg? A. Why, I will say that the children were born to my wife, and they kind of got on the nerves of the old folks, Mr. Israel Horowitz and Mrs. Ray Horowitz. And one evening after supper, coming home, why, we finished our supper, and Mr. Horowitz said to my wife, "Sadie, Aunt Ray says that the children seem to be getting on her nerves, and I think it is best that you move out and build a home for yourselves."

Q. That was four years after your marriage? A. Yes.

30 Q. And at that time there were two children born to your wife? A. Yes, sir.

Q. Living, of course, with you? A. Yes.

Q. Now, as a result of that what did you do? A. Why, within fifteen days I had moved out and built a home for myself.

By the Court:

40 Q. You didn't build it in fifteen days? A. I rented a place, your Honor. Pardon me.

By Mr. Ward:

Q. Whereabouts? A. In Paterson, New Jersey, on 31st Street.

10 Q. What were the relations between you and your wife, Sadie Hirschberg, and your Uncle Israel, or Uncle Israel and Aunt Ray? A. I don't quite understand you, Mr. Ward.

Q. Well, what was the feeling between you during that period of time? A. The feeling was friendly; we had no hard feelings.

Q. Was it cordial or not? A. It was cordial.

Q. How soon after Mr. Horowitz said this was it that you moved out completely? A. Within about fifteen days after the night we had spoke it over.

20 Q. How soon after you established yourselves in your new home was it that Mr. Horowitz came to see you, if at all? A. Within about two weeks after I had it established.

Q. Was he accompanied by anyone? A. He was accompanied by his wife.

Q. Now, after that how often did they come to see you? A. Why, about every other week.

Q. How often did you go to see them? A. About the same, every other week.

30 Q. So you saw each other about weekly, did you? A. Yes.

Q. And whereabouts? A. At their home and at my home.

Q. Had you ever had any talk with Mr. Horowitz about your wife and about the length of time during which she had lived with them prior to your marriage to her? A. No, sir.

40 Q. During the period of time that they visited you and you visited them, back and forth, what were your relationships? A. Why, the relationship

was very friendly, and Mr. Horowitz had spoke to my wife about coming back and living with them again.

By the Court:

10 Q. In your presence? A. Yes, sir.

By Mr. Ward:

Q. How often had he spoken of that? A. Several times.

Q. And when did this first begin, that he asked that you come back? A. Oh, about four or five weeks after I had already moved into my new home.

20 Q. What did he say? A. Why, he said to my wife, "Sadie, we miss you. We miss the children. We miss Arthur, and we want you to come back, and if you do come back," he says, "I will give you everything that I own when I die."

30 Q. What did your wife say to that? A. My wife spoke it over with me. She said to me, "Here we just opened a home, we never had a home of our own. I would rather stay here for a little while." "Well," I says, to her, "You may think it is all right to stay here. You know you love him." She says, "Yes, I love the old folks, and I would like to go back with them." And we decided to go back with them.

40 Q. What was said, if anything, by your wife to Mr. Horowitz about going back? A. Well, she said, "Uncle Israel, we have got a home now, which we never did since we are married. We like our home, we like our children, and we are a loving couple, and I don't see why I should really break up my home again." Uncle Israel said, "Well, you know, Sadie, that we love you, practically all your life we

loved you as a child. Why not consider and come back? A. After I die I will give you everything I own, when I die."

Q. What did your wife finally say to this? A. She thought the matter over and consulted me, and we—and she agreed upon going back to live with them. 10

Q. When was it that your wife agreed or consented to go back? A. Why, about five or six weeks after we had moved into our other home.

Q. Where was it—withdraw that, if your Honor please. Did she tell anyone besides yourself that she had decided to go back— A. Yes.

Q. —with her uncle? A. She did.

Q. Or with Uncle Israel? A. She did, and at the time—

Q Whom did she tell? 20

Mr. Cohen: I don't see the materiality of any conversation as to what she told others.

Mr. Ward: That is just it, sir. I think we will prove it was the uncle himself to whom she announced it.

The Court: I will allow it. If it is not material we will strike it out.

A. She told my sister, Mrs. Gertrude Herman, about it. 30

Q. Anyone else? A. Yes. I believe she told Mrs. Maines.

Q. I don't want to make any inquiry with reference to anyone except Mr. Horowitz. A. I see.

Q. Do you know whether or not your wife told Mr. Horowitz that she would go back and live with them? A. I do.

Q. When was it that she told him that? A. About seven or eight weeks after we had already 40

made arrangements on this condition of going back.

Q. What did she say? What was the conversation had between Uncle Israel, or Mr. Horowitz, and your wife?

By the Court:

10

Q. Were you present? A. Yes, sir.

Q. You may answer. A. What my wife said to Mr. Horowitz and Aunt Ray was at my home at the time. She said that being that we have been living together so long and that you are not well and you need us, we certainly will come back together.

Q. What else? A. And live together as we did before.

20

Q. What else, if anything? A. And Mr. Horowitz said to my wife, "All right, Sadie, under those conditions, remember that I promise to give you everything, that when I die you will get everything that I possess."

By Mr. Ward:

Q. Was there anyone else present at the time?

A. Why, on one occasion there was a sister of mine present.

30

Q. Who is she? A. Mrs. Gertrude Herman.

Q. When was that, if you remember? A. The night that we had agreed to move back.

Q. That was the night you agreed to move back? A. Yes, sir.

Q. Pursuant to the arrangement or the agreement that you made, the understanding you had, did you go back? A. I don't quite understand you, Mr. Ward.

40

Q. After you had this arrangement with Uncle

Israel did you go back to live with him? A. Why, I told Uncle Israel that I wanted to finish the month out or give the landlord notice to move out of his place, which I did.

By the Court:

10

Q. And then did you go back to your Uncle Israel? A. I moved back to Uncle Israel's house.

By Mr. Ward:

Q. When was that? A. That was March 1, 1923.

Q. Where were they living at that time? A. They were living at 242 Van Houten Street.

Q. When you first went back whereabouts did you live? A. Why, Uncle Israel asked me to take the flat downstairs, and said that in time we will move down together as we always did.

20

Q. Who would move down together? A. Uncle Israel and Aunt Ray.

Q. Did they, as a matter of fact, come down? A. Yes, sir, they moved.

Q. When you were there? A. I was there and helped move down their furniture.

Q. And then for how long a period of time did you live downstairs together? A. I should judge about a month or five weeks, and they asked to be moved back upstairs again.

30

Q. Did you do so? A. Yes.

Q. Did you go with them or not? A. I moved back upstairs with them.

Q. And this arrangement that you had with reference to bearing half of the expense of the house, was that kept by you? A. Yes, sir.

Q. Now, for how long a period of time did that continue, Mr. Hirschberg? A. That continued until their death.

40

Q. When was that? A. About two years later.

Q. From the time, or at the time you and your wife went back to live with Mr. Horowitz and his wife, what was the condition of their health? A. Their condition was not well. They were both sickly people.

10 Q. And do you know whether or not your wife did anything for them personally? A. Yes, sir.

Q. What? A. In regards to taking care of their special diets, washing of their personal clothing, keeping house, cooking, and taking care of the table.

Q. Who kept house in general there? A. My wife did.

Q. Who did the cooking? A. My wife.

Q. Was there any housemaid? A. No, sir.

20 Q. What was the condition of health of Mrs. Horowitz? A. She was sickly.

Q. And Mr. Horowitz? A. Also sickly.

Q. Did they grow better at any period before their death? A. No, sir, they did not.

Q. And for the last six months prior to their death what was their condition? A. Their condition was very poor. Mrs. Horowitz was bed-ridden and Mr. Horowitz, towards the end, was also bed-ridden.

30 Q. For how long a period of time was Mr. Horowitz bed-ridden before his death? A. I should judge about five weeks.

Q. And for how long a period of time was Mrs. Horowitz bed-ridden before her death? A. About ten weeks.

Q. They died within what period of time of each other? A. Thirteen days apart.

40 Q. Was there any time when Mrs. Horowitz was taken away to a sanitarium in an endeavor to effect a cure? A. Yes, sir.

Q. When was that? A. In the summer before she died.

Q. Where was she taken? A. To Dr. Land's Sanitarium up in Morristown, New Jersey.

Q. Do you know whether or not Mr. Horowitz ever visited her there? A. Yes.

Q. For how long a period of time was she there? 10
A. Yes, six weeks.

Q. Who took him up there? A. I did.

Q. After that Mrs. Horowitz returned to their home? A. Yes, sir.

Q. Was there any change in the conduct of the household from the time that you went back to live there up to the time of their death? A. Well, we had our little spats now and then.

Q. Well, aside from that. I mean with reference to one-half—or the dividing of the expenses of the household. A. That continued right to their death. 20

Q. Do you recall any particular occasion or occasions when Mr. Horowitz referred to this arrangement that he had with your wife? A. Yes, sir.

Q. Now, give us any particular occasions that you can recall. A. One occasion he came back from Morristown after making arrangements about bringing Mrs. Horowitz back from the sanitarium, I told Uncle Israel that my wife was not getting along very well, because she is not—you ought to do something about, in order to get some help into the house. Uncle Israel says, "Now, Arthur, you know what we promised Sadie. Make the best of it and when I die," he says, "everything I have will go to her." 30

Q. And that was about when? A. Oh, I should judge about three months before they died.

Q. Now, was there any other occasion that you 40

recall, specific occasion, I mean? A. Why, about four months before that, there arose in the house—I told Uncle Israel that Aunt Ray is not well and you are not well. “There is too much work for my wife. I think you ought to get help.” He says, “Now, see that Sadie makes the best of it and does what she can; we love her as a child. We love her as parents. Do what you can to make her do what she can, and when I die,” he says, “there is no question that everything that I have got will go to you,” that is, to my wife.

10

Q. To your wife? A. To my wife. He says, “You know what that means to the children and yourself.”

Q. Is there any other occasion that you recall that anything was said about this agreement or arrangement between you, I mean between Uncle Israel Horowitz and your wife? A. Well, it arose again, that towards the end my wife was in a run down condition, and I had the talk with him to the effect that the best thing for her to do is to go away for a rest, and Uncle Israel said to me—

20

Q. Not quite so fast. I want all the jurors to understand what you say. A. Do you want me to start at the beginning?

Q. No. A. That Sadie is run down, really can't keep up the burden of carrying the house on her shoulders. And Uncle Israel said to me, “Now, don't let that worry you; you know things will come to you and your wife when I die, everything that I have, and if you act the way you have been acting,” and so forth. “There is no question that I will give her everything that I own.” I spoke to Uncle Israel that “My wife is run down.” He says, “We will try and make the best of things,” so we did.

30

Q. Any other occasion when you discussed matters with your Uncle Israel? A. That would be all.

40

Q. That is all you recall? A. That is all.

Q. What was his attitude towards your wife, Sadie? A. As a father would be to a child.

Q. And this is your wife sitting here now, is it not (indicating)? A. Yes, sir.

Q. During the last few months, the last six months, that you lived with Mr. and Mrs. Horowitz were you able to go out at all or take your wife out, at least? A. No, sir. 10

Q. Why not? A. Because they were both bed-ridden and somebody had to stay home with them.

Q. And you stayed home with them, did you? A. Absolutely.

Q. And this special diet that was prepared for each one of them, by whom was it served to them? A. By my wife.

Q. During the last few weeks, I believe, there were trained nurses in your home? A. Yes, sir. 20

Q. Is that correct? A. Correct.

Q. For how long a period of time was that? A. About five weeks.

Q. And that continued up to the time of the death— A. Of the death.

Q. —of both? A. Yes, sir.

Q. Do you recall the Sunday night before the death of Mr. Horowitz? A. Yes, sir, I do.

Q. And do you remember being present when there was any conversation had between you and the nurse who was attending him at the time? A. Yes, sir. 30

Q. Will you just tell us about that, please? A. The nurse called me into the room and said, “Mr. Horowitz wants something to say to you.” I walked into the room where Mr. Horowitz was bed-ridden and I says to him, “What was it, Uncle Israel, you wanted”—

Q. Was there anyone else with you there? A. My wife, myself and the nurse. 40

Q. I see. A. And he said to me, "Arthur," he says, "you know, the unforeseen will happen," and he says, "Now, remember, everything that I have goes to your wife, Sadie." I said to Uncle Israel, "Uncle Israel, have you stipulated that into a will?" Uncle Israel said, "It will be taken care of. 10 I want to see the lawyer." The next morning we called the lawyer. I have to go to business and nobody was in the room at the time that the lawyer was in there, and that was the end. He died the following night.

Q. I see. Was there any other conversation after that, had between you and Mr. Horowitz? A. That was the last conversation I had with him.

Q. At that time his wife had already died, had she not? A. Yes, sir.

20 Q. Now, was there anything else said on that Sunday night by your uncle, or by Mr. Horowitz, rather? A. I don't quite—

Q. With reference to your wife? A. No, not that I can recall. The only thing that he said was that everything I own will go to your wife, Sadie.

Mr. Ward: I think it is admitted that no part of the will, so far as demand—

30 The Court: The pleadings admit the demand.

Mr. Ward: Yes, sir. Cross-examine.

Cross Examination by Mr. Cohn:

Q. What was the name, or what is the name of the nurse that was present when you had this conversation with Mr. Horowitz on the Sunday before his death? A. Miss Spivak.

Q. What is her address? A. That I cannot say.

40 Q. Is she in court? A. Yes, sir.

Q. Did you say that Mrs. Horowitz was bed-ridden for five weeks before she died? A. Yes, sir.

Q. And she also had a nurse for five weeks before she died; is that right? A. Yes, sir.

Q. How long was Mr. Horowitz bed-ridden before his death? A. About four weeks.

Q. About four weeks? A. Yes, sir. 10

Q. Would you say it was ten weeks, or did I misunderstand you? A. About four weeks.

Q. And did you have a nurse during the four weeks that he was bed-ridden? A. The nurse took care of him also, the same nurse.

Q. There was a nurse who took care of both Mr. and Mrs. Horowitz during the weeks that they were bed-ridden? A. Yes, sir.

Q. Now, how long did you know Mr. Horowitz? A. Six years. 20

Q. About six years? A. About six years. Can I correct myself on that, please? About five years.

Q. In what year did you meet him? A. 1919.

Q. 1919? And you married your wife, Sadie Rosenberg, on February 22, 1920? A. Yes, sir.

Q. At that time what was your occupation? A. As shoe salesman.

Q. How much were you making a week? A. Fifty dollars a week.

Q. Fifty dollars a week. And directly after your marriage you took up your home where? A. At 242 Van Houten Street. 30

Q. That is, at the home— A. At the home of Israel Horowitz.

Q. —of Israel Horowitz? A. Yes.

Q. What arrangement did you make at that time for sharing the expenses or paying the rent, if any? A. We were to share half, and I paid half rent.

Q. How much rent did you pay? A. Twenty-five dollars a month. 40

Q. Did you pay twenty-five dollars a month from the very beginning? A. From the first month on.

Q. And you paid one-half of the household expenses? A. Yes, sir.

Q. Did you pay one-half for the light? A. Half for coal, gas and electricity.

10 Q. For coal, gas and electricity? A. Yes.

Q. And that continued for how long a period? A. About four years.

Q. Four years? That brings us down to about 1924, from 1920 to 1924? A. Somewhere around that date.

Q. You were still a salesman? A. Yes, sir.

Q. How much were you making then? A. The same amount.

20 Q. You moved from the home of Israel Horowitz when? A. About that date, four years, about.

Q. Fix the date, won't you please? A. I just can't remember the date.

Q. What month of 1924 or 1925? A. November.

Q. When? A. November.

Q. November, 1924? A. Yes.

Q. How many children did you have at that time? A. Two children.

30 Q. And what were their respective ages? A. One was three and the other was about a year and a half—no, pardon me—one was two and the other about nine months. That is what it was.

Q. Did you ever go into any business on your own hook? A. Yes, sir.

Q. What business? A. Shoe business.

Q. When did you go into the shoe business? A. I just can't remember the date when it was.

By the Court:

40 Q. What year? A. I believe it was in 1923 or 1924; I just don't remember.

By Mr. Cohn:

Q. How long were—

By the Court:

Q. Was it before November, 1924, when you moved away from the old folks? A. Yes, sir, I was already in business. 10

By Mr. Cohn:

Q. How long were you in the shoe business? That may help you fix the date. A. About eighteen months.

Q. About eighteen months. Now, tell us about what month and year you went into the shoe business? A. I just can't remember the date, sir. 20

Q. Well, now, who furnished the capital for your shoe business? A. Myself.

Q. From whom did you get the money? A. From whom?

Q. Yes. A. From my wife.

Q. Oh! And how much did you get from your wife to go into the shoe business? A. Two thousand dollars.

Q. Yes. Do you know where your wife got it? A. Yes. 30

Q. Where? A. At the time of her marriage she was given a fifteen hundred dollar present.

Q. Where did she get the other five hundred? A. Other presents that came in, and she had saved a few dollars of her own while living with Mr. and Mrs. Horowitz.

Q. Did she ever work herself outside of the home of Israel Horowitz? A. No, sir.

Q. How long had she lived with Israel Horowitz? A. From a child up. 40

Q. How old was she when she went there? A. I should judge about eight years old.

Q. Eight years old, yes. And she never worked from the time that she was eight years of age until the time that you married her, outside of the home of Israel Horowitz? A. Not outside of the
10 home.

Q. Did she go to school? A. Yes, sir.

Q. And she was fed and clothed and maintained in school by Israel Horowitz? A. Yes.

Q. And how old was she when you married her? A. About twenty-five.

Q. Twenty-five. You say she got a present from Israel Horowitz of \$1,500? A. \$1,500.

Q. Yes. Now, when you moved from the home of Israel Horowitz how much rent did you pay in your
20 apartment in 31st Street? A. Forty-five dollars.

Q. With Israel Horowitz you had been paying twenty-five? A. Yes, sir.

Q. How much money were you making a week at that time? A. Fifty dollars.

By the Court:

Q. You were in business then? A. I was in business, drawing fifty dollars a week.

30 By Mr. Cohn:

Q. Business was good at that time, wasn't it? A. Yes, sir.

Q. And it was a real hardship for you to give up this home and move back to the home of Israel Horowitz, wasn't it? A. It was, yes.

Q. You say business was very good during that time? A. No.

40 Q. Now, tell us the condition of the business

about March 1, 1923, when you claim this agreement was made. Tell us the condition of your business. A. The condition of business was fair.

Q. Weren't you borrowing money? A. Which every business man does.

Q. I am asking you— A. Yes, I did.

Mr. Cohn: I ask to have the answer
10 stricken out. I am asking him whether he was borrowing money.

The Court: He says, "Yes, every business man does."

Mr. Cohn: I ask that the latter part of it be stricken out as not responsive.

The Court: The latter part is, "Yes, I did."

Mr. Cohn: But what every business man
20 does I don't want to know.

The Court: I will let it stand.

Mr. Ward: You don't want to know what every business man does.

Mr. Cohn: I take an exception.

Q. Did you borrow any money from Israel Horowitz at that time? A. I did.

Q. In March? A. I don't remember the date.

Q. Weren't you being sued at that time by creditors? A. No, sir.
30

Q. Weren't there four or five suits pending against you or started against you between March and August, 1923?

Mr. Ward: I object to that, if your Honor please. There is no relevancy, materiality. It is not proper cross examination. I don't know whether it is true or not, but he answered he didn't borrow any money from Mr.
40 Horowitz.

The Court: He said he did, didn't he?

Mr. Cohn: He said he did.

Mr. Ward: I beg your pardon, sir. But it doesn't make any difference. We can't go into the merits of the suits.

10 The Court: It may be that counsel has some object in mind that is material.

Mr. Cohn: Yes. The issue in this case, if your Honor please, is the probability or improbability of this alleged contract story.

The Court: He has said that he bore half the expenses, and it may be material to show that he was not in a position to do that because of the pecuniary difficulties he might have been in at that time. I will allow it.

20 By Mr. Cohn:

Q. As a matter of fact, weren't you petitioned into bankruptcy in July or August, 1923?

Mr. Ward: I object to that, if your Honor please. It is absolutely collateral, not proper cross examination.

The Court: I allow it. It may have some materiality. You have an exception.

30 Mr. Ward: Exception.

By the Court:

Q. What is your answer? A. Yes sir.

By Mr. Cohn:

40 Q. You borrowed money—wasn't a suit started against you in April about April 3, 1923, by Lazarus Fried and Sons, Incorporated, for \$76.60?

Mr. Ward: I object to that, if your Honor please. It is irrelevant.

The Court: Well, I don't know that it has very much, but it may have some materiality, and, as I have pointed out, it may have some materiality with respect to his credibility as to whether or not he did at the time that he 10 said pay half of the expenses of the house.

Mr. Cohn: I want to show, if your Honor—

The Court: He has testified that he paid part of the living expenses, he paid half of everything. Now, if it is not material for any other reason it might be, and probably is, to discredit his statement to that effect. The mere fact that he was sued, the mere fact that he went through bankruptcy does 20 not, of course, in itself disprove his statement that he did pay half of the living expenses. People that are being sued still have to pay the butcher and eat sometimes. I think I will allow it.

Mr. Ward: Exception.

Q. Were you sued in May, 1923, by Rice and Hutchins?

(Question repeated by the stenographer.) 30

A. Yes, sir.

Q. Wasn't a suit started against you in May, 1923, by Rice and Hutchins for about five hundred dollars?

Mr. Ward: Now, I object to that, if the court please. There might have been all sorts of merits to a defense—

The Court: Certainly, certainly. 40

Mr. Ward: —and the mere starting of a suit—

The Court: This is long before he left the house of the old folks, anyway.

Mr. Ward: Yes, sir.

10 The Court: But I will allow it. It may be material. But don't cover the record with a lot of things that are not of any materiality.

Mr. Ward: Exception.

By Mr. Cohn:

Q. Was a suit started against you in June of 1923 for about \$211? A. It is possible. I don't remember.

20 Q. And these suits crystallized into judgments against you? A. No, sir.

Q. Did any of them? A. Never had a judgment against me.

Q. Do you mean to say that the suit of the Hood Rubber Products Company against Arthur Hirschberg for \$211, that judgment was not obtained against you? A. Not that I know of.

30 Q. Was a suit started against you in August, 1925, or 1923, by R. F. Goodrich Company, against Arthur Hirschberg, for \$308.50? A. I can't remember that.

Q. When were you petitioned into bankruptcy? A. I don't quite remember the date.

Q. Was it in 1923? A. I don't remember.

Q. When was this agreement with Israel Horowitz made, or when do you claim it was made? A. Well, I don't remember the exact date. Put that to me again.

40 Q. What month and what year, please?

By the Court:

Q. When was the arrangement made with Mr. Horowitz that he was going to give his money to your wife? A. That is after we had moved out.

Q. When did you move out? A. 1922, I believe it was. 10

Q. Didn't you say that you moved out on the 1st of November, 1924, and moved back the 1st of March, 1923? A. No, 1922. Back in 1923.

Q. 1922, and moved back March 1, 1923; is that right? A. 1923, your Honor.

Q. Now, when was it, if you know, that the arrangement was made? A. Why, during November and March, the time I had moved back, the arrangement was made that we move back.

Q. How long after you moved away from him? 20 A. About six weeks.

Q. That would bring it in December, wouldn't it, of 1922? A. I believe it would.

By Mr. Cohn:

Q. Do you know whether Mr. Horowitz had a stroke away back in 1917? A. I do.

Q. You know that he did have a stroke? A. I do know he had a stroke. 30

The Court: What?

Mr. Cohn: He had a stroke in 1917.

The Court: All right.

Q. Now, what was the difference in the work done or in the life after you and your wife returned to the home of Israel Horowitz from what it was before? A. I don't quite understand you.

(Question read by the stenographer.) 40

A. Why, it wasn't any different up to the present time and we moved back until they got real sick.

Q. When did they get real sick? A. The exact time I couldn't remember.

Q. Wasn't it five or six or four or five weeks before they died? A. No, much before that.

10 Q. How much before that? A. About a year or so before that.

Q. Well, wasn't Israel Horowitz out every day of his life, until a few weeks before he died? A. Till about six weeks before he died.

Q. Six weeks? A. Six months. Pardon me.

Q. Six months? A. About six months.

Q. Was he confined to his home for six months previous to his death? A. Not entirely that six months, no.

20 Q. Well, for how many months or how many weeks prior to his death was Israel Horowitz confined to his home? A. I should say about eight weeks.

Q. In other words, until eight weeks before his death he was out almost daily? A. Walking, yes.

Q. Yes. Didn't Mr. Horowitz bring your meals to your place of business almost daily? A. No, sir.

Q. Did he ever do it? A. Once or twice.

30 Q. And did you or your wife ever go out to the movies of an evening? A. Probably once or twice a year.

Q. Who took care of the babies then? A. The babies were asleep.

Q. Mr. and Mrs. Horowitz were home? A. Mrs. Horowitz's sister was there at the time we went out.

40 Q. But in the couple of years you went to the movies a couple of times, and then the babies were taken care of by Mr. Horowitz's sister? A. No,

Mrs. Horowitz's sister was there several evenings when my wife and myself went out to the movies.

Q. Under what name^{was} your wife married? A. Miss Rosenberg.

Q. Oh, Sadie Rosenberg? A. Yes.

Q. Not Sadie Horowitz? A. No, sir.

Q. Now, when you went back, moved back, you 10
paid twenty-five dollars toward the rent expenses in the place of the forty-five dollars that you had been paying on 31st Street; is that right? A. That is right.

Q. And you continued to pay twenty-five dollars instead of forty-five dollars until the date of Mr. Horowitz's death? A. Yes, sir.

Q. Of course, when you lived on 31st Street you paid all the household expenses? A. I did.

Q. Now, didn't Mrs. Horowitz go out until a 20
few months before her death? A. No, sir.

Q. Where was she confined? A. She was confined at home for almost a year before she died.

Q. I thought you said that she went to the hospital or sanitarium in Morristown? A. Pardon me, your Honor, can I explain this?

The Court: You may answer the question.

The Witness: All right, sir.

30

By the Court:

Q. The question is, I thought you said that she went to the Morristown Sanitarium? I suppose that is a question. A. She was carried out of the house to be taken to the Morristown Sanitarium.

By Mr. Cohn:

Q. Who carried her out of the house? A. I and 40
the ambulance driver.

Q. The ambulance driver and you carried her out of the house? A. On a stretcher.

Q. And did you carry her to Morristown, too?

A. We put her in the ambulance and took her to Morristown.

10 By the Court:

Q. Did you go along? A. Yes.

By Mr. Cohn:

Q. Who took care of her in the sanitarium?

The Court: If you know.

20 Q. If you know. A. I don't quite understand.

By the Court:

Q. Who took care of her in the sanitarium, if you know? A. Why, I assume the doctors.

Q. You don't know? A. No, sir.

By Mr. Cohn:

30 Q. Your wife did not take care of her in the sanitarium in Morristown? A. No, sir.

Q. What was the answer?

The Court: No, sir.

A. No, sir.

Q. During the several years that you lived at the Horowitz home didn't Mrs. Horowitz ever do any cooking? A. Why, at first, she did when she was able to.

40 Q. You say you had little spats there? A. Now and then, yes.

Q. With the Horowitzes? A. With the Horowitzes.

Q. Now, do you know whether there are any next of kin of Mr. Horowitz?

Mr. Ward: I object to that.

A. I don't. 10

Mr. Cohn: I will withdraw the question, then.

The Court: He said he doesn't know.

Q. Now, tell us the daily mode of life in this Horowitz home during the time that you lived there, what your wife really did. A. Why, she did the housework, she did the cooking, took care of the home, took care of the furnace while I wasn't at home, did the washing and so on and so forth. 20

Q. Did the Horowitzes ever take in a washing woman? A. They took a house cleaner once a week.

Q. Oh, a house cleaner once a week? Did they ever take in a washer-woman? A. No, sir.

Q. Who did the washing? A. Most of the washing was done by my wife.

Q. Oh, most? A. Yes.

Q. Did Mrs. Horowitz do any washing? A. Not towards the end she didn't. 30

Q. But towards the beginning? A. During the first year or so, yes.

Q. Then, your wife did not do all of the work? A. She did all of the work outside of a little washing.

By the Court:

Q. And a little cooking? A. All of the cooking. 40

Q. No, at the beginning, you said, Mrs. Horowitz did some of the cooking, didn't you, when you first went to live there? A. My wife used to cook for them before she was married.

10 Q. Didn't you say that Mrs. Horowitz did some of the cooking in the early days? A. In the early days, yes.

By Mr. Cohn:

Q. And then took in a house cleaning woman once a week, didn't they? A. Once a week, or maybe once in two weeks. That I just can't remember, whether it was every week or not.

20 Q. Now, tell us the first conversation that Israel Horowitz had with you in reference to this alleged understanding or agreement. Tell us the date of it and what was said. A. I don't quite understand you, Counsellor.

(Question read by the stenographer.)

The Witness: The exact date I cannot remember.

Q. Give us the month and the year. A. It was around, perhaps, in December.

30 Q. What year? A. In the year 1922, I believe.

Q. What was said and who were present? A. Why, Mr. Horowitz said to my wife while I was present—

Q. Where was this? A. At my home.

Q. At his home? A. At my home.

Q. At your home. A. He said, "Sadie, we miss you."

Q. This is in 1922? A. I believe it was. I am not sure of the date, sir.

40 Q. Weren't you living with Israel Horowitz, in the same apartment, in 1922?

Mr. Ward: One moment. You have asked for the conversation, unless you withdraw that question I think the witness should be permitted to continue.

Mr. Cohn: I think the witness answered the question. I will let him amplify it just as soon as I find out where and when. 10

The Court: He answered that. In his own home.

Q. Where was your home?

Mr. Ward: He was asked to state what was said, sir, and he was then interrupted by counsel.

Mr. Cohn: I withdraw that question.

20 Q. Where was this home where this conversation took place? A. 31st Street, Paterson, New Jersey.

Q. And this was in 1922? A. I can't just remember the exact year it was.

Q. Now, who were present? A. My wife, my sister, and myself.

30 Q. What was said? A. Uncle Israel said, "Sadie, you know we like you as a child; we raised you as a child. You love us as parents, and you lived with us so many years, and we want you to move back with us. If you do move back, after I die everything that I have will go to you."

Q. Was that the entire conversation? A. Well, I can't remember every word for word that was in that conversation, sir.

Q. And what did your wife say in reply? A. My wife says, "Uncle Israel, you know we just opened our home and we like our home, we are satisfied, but I will talk it over with Arthur," which she did.

40 Q. And that is all she said to him at that time? A. She would think it over.

Q. Now, when was the next time that you spoke together about it? I mean you or your wife and Mr. Horowitz. A. The next time he came up to the house.

Q. When was that? A. I believe it was the following week.

10 Q. What was said then and there? A. My wife and I had discussed the matter and we decided to go back and live with him, and when we told Mr. Horowitz that we would go back and live with him, we had decided to, Mr. Horowitz says, "I am mighty glad, because we miss you and we miss the children, and as I say, when I die everything that I have will go to you," that is, to my wife.

Q. The only other person who was present was your sister, a Mrs. Herman? A. Yes.

20 Q. Was she present the second time at the— A. She was present every Sunday afternoon at my home. She kept my wife company every Sunday afternoon at home.

Q. Was she present during the second conversations? A. During the conversation, yes, sir.

Q. How many rooms were there in the apartment on 31st Street? A. Five.

Q. How many rooms were there in the Horowitz apartment? A. Five.

30

Mr. Cohn: That is all.

GRACE SPIVAK, sworn.

Direct Examination by Mr. Ward:

Q. What is your occupation or profession? A. I am a graduate nurse.

40

Q. Sit down, please. And you reside where? A. I reside at 445 East 26th Street.

The Court: A little louder.

Q. Did you know Mr. and Mrs. Horowitz in their lifetimes? A. I did.

Mr. Cohn: Will you please speak a little louder, Miss Spivak?

10

The Witness: I will try to.

Q. Did you attend them? A. I took care of Mrs. Horowitz at first. I was called on the case when she was in the hospital.

Q. I see. And when was that? Do you recall? A. That was in October of 1925.

Q. For how long a period of time were you on the case? A. Well, I should judge I was on about six weeks.

20

Q. During that time did you ever have any conversation with Mr. Horowitz? A. Well, I had conversation with both patients, as a nurse usually does; when you are with a patient they talk to you.

Q. Did you ever have any conversation with Mr. Horowitz with reference to Sadie Hirschberg? A. Well, Mr. Horowitz would speak in general of their home life to me, and he often spoke of Sadie to me as their daughter. I have always known Sadie to be their daughter, and then I later learned she was only an adopted daughter, and they told me about her.

30

Mr. Cohn: I object to that as a conclusion, being an adopted daughter.

The Court: It doesn't do any harm.

Mr. Cohn: No.

The Court: It is only her thought. She simply says she always thought she was an

40

adopted daughter; that is all it amounts to—

Mr. Cohn: No objection.

The Court: —as I understand it.

Q. Did you ever have any conversation with Mr. Horowitz with reference to Mrs. Hirschberg? A. 10
Mr. Horowitz—

Mr. Cohn: Now, the answer to that is yes or no.

By the Court:

Q. Yes or no. A. Oh, yes, I did.

Mr. Ward: I contend, sir, counsel cannot interrupt the witness in that way. He can ask that the answer be stricken out after. 20

Mr. Cohn: I can make my objection.

Mr. Ward: And there again counsel is wrong, because that is not a proper objection.

The Court: I took it he was objecting to the witness's answering because of its not being responsive.

Mr. Cohn: And volunteering information that Mr. Ward would like. 30

The Court: She said she had such a conversation.

By Mr. Ward:

Q. How many times did you have conversations with Mr. Horowitz?

The Court: About that subject, I suppose you mean? 40

A. Various times. Various times. I don't just remember the number of times, but he would always speak of her to me as his daughter and how wonderful she was to them. That is all. I can't just say how many times. I don't make any notation of those things.

Q. Now, you say you were on the case how long? 10

A. I was on the case about six weeks. First I took care of Mrs. Horowitz, then I took both patients.

Q. And how long were you on the cases at home? About? A. About a week at the hospital.

Q. That would be about five weeks at home; is that correct? A. Oh, about.

Q. How long after you began taking care of the cases at home, both cases, did you have any talk with Mr. Horowitz, if you can remember about how long? A. I don't remember, not just how long it was. In the evenings he would sit and talk with me and we would try and make the evenings pass, and he would speak of his daughter Sadie to me and of his home life and of past times, as a patient does to a nurse. 20

By the Court:

Q. How old a man was he? A. Oh, he was about seventy. I can't remember just how old he was. 30

Q. An old man? A. Quite old, yes. Quite old.

By Mr. Ward:

Q. How old was she, Mrs. Horowitz? A. She was about sixty-nine, I think, if I am not mistaken.

Q. She was quite old, also? A. Yes, she was quite old; both were.

Q. And you did the nursing? A. (No audible answer.) 40

Q. Who did the housekeeping? A. Mrs. Hirschberg.

Q. What was Mr. Horowitz's attitude with relation to Mrs. Hirschberg? A. As a father to a daughter.

10 The Court: That isn't always the same.

The Witness: No. Very friendly and adoring.

Q. As a good father toward a good daughter?
A. That is the idea; as my father is to me.

Q. What was the attitude of Mrs. Horowitz towards Mrs. Hirschberg? A. As a mother to a daughter, very friendly.

20 Q. Now, do you recall any specific conversation that you had with Mr. Horowitz about his daughter, Sadie, and about anything in particular? A. Well, after the folks went to sleep I would sit—

Mr. Cohn: If your Honor please, the question was whether she recalls any conversation. That is either yes or no, whether she recalls. I don't want a speech.

Q. I assume that you do? A. I do.

30 Q. I don't assume that you are intending to make any speech before this jury, are you? A. No, sir.

By the Court:

Q. The answer is, "I do"? A. Yes.

By Mr. Ward:

40 Q. Now that we have it that you do remember, will you tell us when the first conversation took

place, about anything specific? A. I don't just remember the dates or how long after I was there—a week or so after. He spoke to me about the—about Sadie and about how good she had been to them and all she had done for them, and he said he hoped that—

10 Mr. Cohn: I ask that that all be stricken out.

The Court: I will let it stand.

Q. What else did he say? A. He said—

Mr. Cohn: Now, if your Honor please, I object to this question as being incompetent, for the same reason that I raised at the beginning of the case, that if there is to be any testimony of any conversation relating to an agreement for the transfer or the giving of real estate and personal property at this man's death, that it is incompetent. 20

The Court: I will allow it for the same reason I allowed the other, and grant you an exception.

Mr. Cohn: I take an exception.

By the Court:

30 Q. What else did he say?

Mr. Cohn: My reason being the Statute of Frauds.

The Court: Certainly.

A. What do you want to know?

Q. What else did he say to you? A. He told me how good Sadie had been to them.

40 Q. Yes, you told us that. A. And that he had

promised her all he had at the time of his death. He told me that in the matter of conversation.

Q. How many times did he tell you that, if more than once? A. I don't remember.

Q. Did he tell you that more than once? A. He did.

10 Q. Did he tell you whether or not he was going to carry out that arrangement? A. He did.

Q. What did he say to you about that? A. Well, the night before he died he asked to see Sadie, and I told Sadie's husband to please call her, and he did. He called her in the room and he started to speak to her about the inevitable and that he was going to die and that he wanted her to know that she was to have everything he had.

20 Q. Who else was there, besides you and Mrs. Hirschberg, at that time? A. And Mr. Hirschberg.

Q. All right. What else did he say at that time? A. At that time he said, "I promised you everything I have", and he said, "I want you to be good to your sister."

Q. Anything else? A. Well, they talked on. Sadie didn't want him to speak of dying, but he said it was inevitable and it was best to be understood, and that he wanted to see his lawyer in the morning.

30 Q. Did he mention the lawyer's name? A. Yes.

Q. Did the lawyer come? A. He came as I was going off duty.

Q. The next morning? A. The next morning.

The Court: Proceed.

Mr. Cohn: I ask to have stricken out all this testimony as being declarations of testamentary intention.

40 The Court: I will let it stand, for the moment, anyhow.

By Mr. Ward:

Q. Was that the last conversation you had with him about Sadie?

The Court: The only purpose of the testimony is with respect to the contract; that is the only reason I am allowing it. 10

Mr. Ward: She distinctly said that he stated, "I promised you." That is the import of the evidence.

The Court: I understand.

Q. Was there anything said by Mr. Horowitz after that, later on?

The Court: In that connection, I suppose you mean. 20

Mr. Ward: Pardon me?

The Court: In that connection?

Mr. Ward: Yes.

A. He had told me about how he had—

By the Court:

Q. After that. Later on. Was that the last he ever mentioned that subject to you? A. Well, it was that night, after they had gone to bed I spoke with him again. 30

By Mr. Ward:

Q. What did he say? A. He said he wanted to make—Oh, will by Sadie, because Sadie had been so good to him. He said, "I promised her if she came back to live with me I would give her everything." 40

Q. Was that all that was said at that time? A. And other things we spoke of in general, about how—how he considered her as a daughter.

By the Court:

10 Q. Miss Spivak, Mrs. Horowitz had died then, had she not? A. Yes, your Honor.

By Mr. Ward:

Q. Now, how soon after that did Mr. Horowitz die? A. Thirteen days after Mrs. Horowitz.

By the Court:

20 Q. But how long after that conversation? A. I beg your pardon. I beg your pardon. He died—this was Sunday night, and he dies Tuesday morning, three a. m.

By Mr. Ward:

Q. And between the Saturday night and Tuesday morning did you have a further talk with him about Sadie Hirschberg? A. He had a turn for the worse.

30 Q. I see. And nothing further was said? A. Nothing further was said.

Mr. Ward: Cross examine.

Cross Examination by Mr. Cohn:

Q. How long had you known Mr. Horowitz? A. I lived on the same street. I don't know just how long.

40 Q. About how long? A. Oh, I should judge about twelve years.

Q. Twelve years. I suppose you have known Sadie Hirschberg about twelve years or more? A. About that.

Q. And did Mr. Horowitz use the word inevitable that you have used a couple of times? A. He did.

Q. Was Mr. Horowitz an educated man? A. He spoke well. 10

Q. Do you know whether or not he could write English? A. Well, I don't know.

Q. And he used the word inevitable? A. He did.

Q. Did you live near Mr. Horowitz? A. We lived about a block above.

Q. You have discussed this case with Sadie Hirschberg, haven't you? A. In what manner? When?

By the Court: 20

Q. At any time. A. Oh.

By Mr. Cohn:

Q. I mean, you have talked about this claim with Sadie Hirschberg several times, haven't you? A. Yes.

Q. And you say that Mr. Horowitz told you that he had promised to give all his property to Sadie Hirschberg? A. I didn't say property. He said he promised to give Sadie all. 30

Q. Promised to give Sadie all. All of what? A. All of his belongings.

Q. All of his belongings. And how many times did he say that to you? A. I don't recall just how many times. He said it on different occasions.

Q. And you were there five or six weeks? A. About that.

Q. Well, was he very sick during the entire five or six weeks, or was it only during the last few 40

days? A. During the last few days. Before his death he got so that he didn't speak hardly at all.

Q. How many times did he mention to you about this promise to Sadie? A. Different occasions he spoke.

10 Q. On how many different occasions? A. I can't recall.

Q. What other private matters did he discuss with you? A. About their home life, about his life, about himself.

Q. Did he speak to you about his brothers and sisters? A. He told me he had brothers.

Q. Did he tell you how many brothers and sisters he had? A. He did.

20 Q. Did he tell you anything about the circumstances of his brothers and sisters? A. Nothing in particular.

Q. Nothing in particular. Well, did he tell you anything in general about the circumstances of his brothers and sisters? A. Well, some things, he did.

Q. What did he tell you? A. He spoke of his brothers and of his sisters and of their homes, their families, a general conversation.

Q. Did he tell you that any of them were in poor circumstances? A. No.

30 Q. What did he tell you about them? A. He told me about where they lived and how many different children; there were quite a few, I don't just remember which was which.

Q. Did he say he was on good terms with his brothers and sisters? A. I believe he did.

Q. He was on friendly terms with his brothers and sisters. Do you know the relationship between Sadie Hirschberg and Israel Horowitz? A. I don't get you.

40 Q. Just tell us what the relationship is between Sadie and the late Israel Horowitz. A. They con-

sidered her a daughter. They spoke of her as their daughter.

Q. I didn't ask you what he considered. I asked you whether you knew what relationship Sadie—

Mr. Ward: Will you please stand back, Mr. Cohn, so I can see the witness? 10

A. I always—

Q. I asked you whether he told you as to the relationship that existed between them. A. He told me that she was a cousin.

Q. Do you know whether or not she was? A. He took her in as his daughter; she was a cousin of his, because I asked him where he got his adopted daughter at the time, because I thought she was his daughter. 20

Q. Did he tell you whether she was a third or a fourth cousin? A. I believe he mentioned.

By the Court:

Q. What did he mention? A. That—I don't remember whether it was the third or fourth. He said she was a cousin, but just how distant I don't remember.

By Mr. Cohn: 30

Q. And he spoke to you about the will he had made or a will he was going to make? A. He requested to see the lawyer; that was all I know.

Q. Did he tell you about the will that he had made? A. No, he didn't.

Q. Did he tell you about any of the charitable bequests that he had made in his will? A. No, he didn't.

Q. All that he told you was about this promise 40

to Sadie, but he made no mention about bequests to different institutions, did he? A. He didn't say anything.

Q. Do you know or did he mention the fact that he belonged to different institutions, charitable institutions?

10

Mr. Ward: I object to that as irrelevant.

Mr. Cohn: I will leave out the word charitable.

Mr. Ward: I object to it as irrelevant.

The Court: I will allow it.

Mr. Ward: The conversation, of course, to which this witness's attention is directed was with reference to his—

Mr. Cohn: It is cross examination—credibility.

20

The Court: As to her credibility, of course. We may be here a long time if she tells all that he told her in those weeks, so don't go too far.

Mr. Cohn: No, I will just ask the question and then I will not proceed any further.

The Court: You may answer.

A. What was the question.

30

By the Court:

Q. Did he tell you about any institutions that he was a member of? A. Yes, I believe he belonged to the hospital, and I don't know whether the temple. He spoke of things—

By Mr. Cohn:

40

Q. Did he mention anything about the Hebrew Free School? A. He did.

Q. Did he mention to you whether he left them any money? A. He did not.

Mr. Ward: Don't answer, please, until I object.

The Court: She already answered that, however, by saying he had mentioned no bequests or charitable ideas that he might have had.

10

Mr. Cohn: That is all.

JOSEPHINE MAINES, sworn.

Direct Examination by Mr. Ward:

Q. Where do you live, Mrs. Maines? A. 246 Van Houten Street.

20

Q. Did you know Mr. Horowitz in his lifetime? A. Just ten months.

Q. Ten months before he died? A. Yes.

The Court: A little louder, so the jury can hear you, please.

The Witness: All right.

Q. Did you ever have any conversations or talks with him? A. I did.

30

Q. About how soon after you first met him or knew him did you have your first conversation with him? A. One month.

Q. And after that did you ever have any conversation with him about his daughter, or his foster daughter? A. Most every week.

Q. I see. What was said upon those occasions by Mr. Horowitz?

40

Mr. Cohn: If your Honor please, I enter the same objection as to any conversations as to a promise to give real estate, as being incompetent under the statute of frauds.

The Court: I will allow it and grant you an exception to all of this line of testimony.

10

A. The question, please?

By the Court:

Q. What did he say to you about Mrs. Hirschberg? Isn't that the question? A. Must I tell how it led up to that?

Q. No, no. Just what did he say?

20

Mr. Ward: May I—

The Court: Let me ask a question, first.

Q. Did you live near him? A. Next door.

Q. And that is how you came to know him, because you were a next-door neighbor? A. Yes, I was a new neighbor and so, of course, he got interested in me and asked me questions which made me, in turn, ask him.

Q. And you got quite friendly with him, did you? A. I did.

30

Q. Where would you see him, Mrs. Maines? A. Every time I went in the yard to hang out clothes he would be in the yard with the children, and then he would come over to the fence and talk to me about the house I lived in.

Q. So that this conversation was over the fence, mostly, and that brought up the question?

By Mr. Ward:

40

Q. Under the clotheslines? A. Yes.

Q. Now, do you recall any time after he had asked you these certain questions to which you have referred, when you asked him any questions as a result of the questions that he had asked you?

A. Yes, I asked him. He kept asking me what I was going to do with all the money I made in that house, and then I, in turn, asked him what he was going to do with his, and then he told me.

10

Q. Now, what did he say? A. He said to me, "What are you going to do with all your money when you die? There is no family. What are you going to do?" I said, "What are you going to do with yours?" And he put his hands out and said, "Oh, my Sadie! Oh, my Sadie! She is all what I have got. I promised her if she came back I give her what I have got."

Q. Now, did he say that to you more than once, Mrs. Maines? A. Yes, sir, twice.

20

Q. I beg your pardon? A. Just twice.

Q. Twice? A. Yes.

Q. And the first occasion was about a month after you moved there? A. Just a month after I moved there.

Q. And when was the second occasion? A. Well, probably about the following week, because he talked to me every time I came out in the yard.

Q. What occurred on that second occasion that led up to his saying this? A. He told me the conversation of her moving away.

30

Q. Will you tell us about that, what he said, please? A. He told me—he asked me about children, did his children annoy me and I said no, they didn't annoy me. And then he told me.

Mr. Cohn: Your Honor, I object to these conversations as hearsay.

The Court: There isn't any hearsay about what the man told her.

40

Mr. Cohn: These are not admissions or disclosures against interest. They are simply declarations of testamentary intention, and I ask to have it stricken out on that ground.

10 The Court: I don't think there is anything in that. I will allow it. You may have an exception.

Mr. Cohn: Exception.

By the Court:

20 Q. What did he say about children? Did the children annoy you, and you said no? A. I said no, and he said they did at first, but when they were away they missed them terribly, and he went and asked Sadie to come back, and that if she did he promised to give her all he had for coming, that she was a faithful daughter to him, and all they had done.

By Mr. Ward:

Q. Were you perfectly friendly with him at the time of his last illness? A. Perfectly friendly; never visited in the homes or anything.

30 Q. You never visited him at home? A. Never visited the home.

Q. I don't suppose you do know who did the housework at his home? A. No, outside of seeing Sadie through the windows as I did mine.

By the Court:

40 Q. You knew Mrs. Hirschberg, didn't you? A. Yes. Pardon me for saying Sadie; I knew Mrs. Hirschberg.

By Mr. Ward:

Q. From your general observations as you saw her in her home through the windows? A. Yes, and hanging clothing out.

10 Q. Hanging clothing out? A. Yes, hanging things out of the window. She had a pulley line to hang out in the rear and I had to go in the yard, and that is how the old man would talk with me.

Q. Did you see her doing work there? A. Just moving around the kitchen; I could see that.

Mr. Ward: Cross examine.

Cross Examination by Mr. Cohn:

20 Q. Mrs. Maines, you lived at this address, 246 Van Houten Street, for about eight or nine months prior to the death of Mr. Horowitz? A. Ten months.

Q. Did Mr. Horowitz ever pay you a visit? A. Never.

Q. And you never visited at his home? A. No.

Q. And you have been quite friendly with Sadie Hirschberg for the nine or ten months, haven't you? A. Yes.

30 Q. You are still friendly with her? A. Still friendly.

Mr. Cohn: That is all.

GERTRUDE HERMAN, sworn.

Direct Examination by Mr. Ward:

40 Q. Mrs. Herman, you are a sister of Mr. Hirschberg, are you not? A. Yes, sir.

Q. And do you remember the time when your brother married Sadie Horowitz, as she was known? A. Yes, sir.

Q. And after that did you visit—

10 Mr. Cohn: I object to the characterization, because it is not a fact. It has not been—

Mr. Ward: I will withdraw that last question.

The Witness: It is a fact. I knew her as Sadie Horowitz only.

Mr. Ward: One moment. Do not, please, talk while the lawyers are talking, because we are very jealous of our province.

The Witness: I beg your pardon.

20 Mr. Ward: Will your Honor permit that to stand?

The Court: Oh, yes.

Q. Did you ever visit your brother and sister-in-law after your brother's marriage? A. Yes, sir.

Q. Do you know who did the work there? A. I do.

Q. In the Horowitz home? A. I do.

30 Q. Who did it? A. Well, when they were first married the old lady was quite helpful. She used to do a little cooking and she used to sit down and dry the dishes, but Sadie had most of the housework. She did the cleaning, the windows, the scrubbing, the buying, cleaning of the vegetables, did the washing of all the silk underwear, and they used to send out the big pieces of laundry.

Q. I see. A. Certainly did.

By the Court:

40 Q. Did they bring in a woman to clean once a week? A. Not at that time they didn't. It was a

long time after, and I would say it was very hard for Sadie to do all that work.

Q. Not quite so fast. A. I am just a little bit nervous today. It wasn't until after I had spoken to Mr. Horowitz.

By Mr. Ward:

10

Q. When was that, Mrs. Herman? A. Well, that was, I would say about six or seven months after they were married.

Q. Do you remember the birth of the first child? A. I do.

Q. And that was born while Mrs. Hirschberg was living in the home of Mr. and Mrs. Horowitz? A. Yes, sir; that is right.

Q. What was the name of that child, please? A. 20 Goldy.

Q. Born about how long after they were married? A. Well, I really can't tell you. I don't just remember the exact date.

Q. Do you remember the birth of the second child? A. I do.

Q. And that was born about how long after? A. I should judge about twenty-two months after.

Q. Now, after that do you recall Sadie Hirschberg and Mr. Hirschberg moving from the home of the Horowitzes? A. I do. 30

Q. Do you know where they went? A. I do.

Q. Where? A. To 31st Street.

Q. Did you visit them there? A. Yes, I did.

Q. Do you remember when Mr. Hirschberg and Mrs. Hirschberg moved to their home on 31st Street? I mean the date. A. I don't.

Q. How long after they moved to 31st Street did you visit them there? A. Well, I went there directly and helped her straighten out her home, and then I was in and out there every other day; I 40

was in and out there all the time, because I was the one that went to look after the apartment for her because she couldn't go out on account of the children.

10 Q. How long after Mr. and Mrs. Hirschberg moved into their home was it that Mr. and Mrs. Horowitz came to see them, if you know? A. How soon after?

Q. I didn't hear you? A. Soon after.

Q. Do you know whether or not those visits continued? A. Yes, they did.

Q. As long as Mr. and Mrs. Hirschberg lived in their apartment at 31st Street? A. Yes, yes.

20 Q. With what frequency did you visit the Hirschbergs? A. Why, whenever I would go out to do my shopping I would go over to see Sadie.

By the Court:

Q. Were you neighbors? A. I lived on 31st Street and 21st Avenue, and she lived right near the park, and I used to walk across to see her.

Q. That doesn't mean anything to me. A. Yes, we were neighbors.

Q. You see, I don't know the geography up there. A. All right.

30 By Mr. Ward:

Q. Were you there Sunday afternoons? A. Well, 'most every Sunday afternoon I would go over there.

40 Q. Do you recall any occasion upon a Sunday afternoon about five weeks after Mr. and Mrs. Hirschberg had moved into their home, when any conversation took place between Mr. Horowitz and Sadie Hirschberg with reference to her living with him? A. I do.

Q. What was that conversation?

Mr. Cohn: If your Honor please, I address my objection again to that line of testimony.

The Court: I will allow it.

10 Mr. Cohn: On the two grounds, that is, testamentary declaration and the statute of frauds. Exception. 10

A. Mr. Horowitz asked Sadie to come back and live with him, and I was there at the time, and I said to Mr. Horowitz I thought it best for them to stay by themselves with their children, and that I thought it would be a very good thing. I thought it would be a good thing if Mrs. Horowitz got a maid, and let Sadie stay in her own home and have Mr. and Mrs. Horowitz live by themselves. Then Mr. Horowitz said to us, "Well, I am getting to be an old man, and I miss the children and I miss Sadie, so for my part I want her to come back, because that is all I have, is my Sadie." And he said to me, "Mrs. Herman, I promise you and I promise Sadie that if she comes back to me, that when I die all I have is hers." And I then turned around and I said to him, "Well, you mustn't think of death." He said, "Well, that does come, anyway." And I said, "Well, it is up to them, but I don't think it is practical. I think it would be very hard for Sadie." He said, "Well, we will try and manage; the children will be there and Sadie will help and Mrs. Horowitz will do the best she can," and he said, "I believe we can manage." Then I went home. 20 30

Q. Now, you don't know whether Sadie gave any definite answer at that time or not, do you? A. At that time she did not. 40

Q. Were you there a week later? A. I was.

Q. Did you hear the conversation that took place between Mr. Horowitz and the foster daughter?
A. Yes, sir.

10 Q. What was it, please? A. It was again the same as I said before. And then I said to Sadie, I said, "Well, after all, Sadie, you know, it is your dad. He has really been just like a father to you. I would really advise you to go back." And she said, "Well, I have talked it over with Arthur, and we can't decide." I said, "Just as he says, he has no children, and he has nobody else but you, and I would really advise you to go back, because, after all, when he does go there will be something in store for you." So I advised her to go back.

20 Q. What did she say to Mr. Horowitz at that time? A. At that time she said she would go back, and Arthur was going to give notice on his apartment and they would come back.

Q. Do you know whether or not they did go back after that? A. They did.

30 Q. Now, just going back for a moment, Mrs. Herman: In detailing part of that conversation you said that Mr. Horowitz said the same thing at that time. What did he say on that second Sunday? A. He said again if she came back he promised to give her everything he has when he dies.

Q. How soon after that did they return to Mr. and Mrs. Horowitz's home, if you know? A. Well, I don't know the exact time, but it was very soon after when they went back, because this conversation kept going on, and they couldn't make up their minds until I really urged them to go back.

Q. And then they went back? A. Then they went back.

40 Q. Did you visit Mrs. Hirschberg after she returned? A. Yes, sir, I did.

Q. To the Horowitz's home? A. Yes, I did.

Q. Do you know who did the work there then?
A. I do.

Q. Who did it? A. Sadie did most of the work.

10 Q. There has been something said about some woman who was brought in once a week to do the cleaning, I think. When was that? About how soon after Sadie returned? A. Well, I don't really know just how soon after, only through conversation over the phone, I knew that now and then Sadie would call up the employment bureau and get a woman in to help with the cleaning, but it wasn't a regular thing.

Q. It was not a regular thing? A. No, sir, it was not.

20 Q. Do you remember when Mrs. Horowitz was taken ill, seriously ill? A. I do.

Q. How long before her death was that? A. Well, I just don't remember it; I can't say.

Q. About how long was it? A number of months or weeks? A. It was a number of months, I think, almost a year before she died when she was taken sick, as I used to visit her regularly.

Q. And who took care of her? A. Sadie did.

30 Q. Of course, she was away at the sanitarium for a time? A. Yes, at that time I used to go down and help Sadie.

Q. I beg your pardon? A. At that time I used to help Sadie do her marketing down on River Street and get her vegetables and poultry, and then bring it up to her; she couldn't go leave the old man, you know.

Q. Do you recall the serious illness of Mr. Horowitz? A. I do.

40 Q. When was that, do you remember, about how long before he died? A. During the time that the old lady was sick he was taken sick.

Q. Now, after Mrs. Hirschberg and Mr. Hirschberg again took up their home with Mr. and Mrs. Horowitz, did you have any talk with Mr. Horowitz about the arrangement that he had made with them? A. I did.

Q. How often? A. Well, very often.

10 Q. How long after their return did you first have any talk with Mr. Horowitz about this arrangement? A. Why, when Arthur went back to live with Mr. Horowitz he had a little difficulty about paying his half share of the coal, gas, electricity, and rent, and so forth, and I spoke to Mrs. Horowitz and I said to her that it might have been best if they didn't ask for it, so Mr. Horowitz then said to me, "I want him to know. He is a family man, he just must have responsibilities. After all, it will come back to him some day." I said, "What do you mean, it will come back to him?" He said, "You know I have promised everything I have to Sadie, and what is Sadie's is his." That is what he said.

Q. Now, do you remember any other occasion when you had a conversation with Mr. Horowitz, when he mentioned any such fact as that? A. Before Arthur was married to Sadie I understood she was an adopted daughter, but I once questioned Mrs. Horowitz—

30 Q. Mr. Horowitz? A. Mrs. Horowitz. And she said to me then, she said, well, she used to call her—

Q. That was before they were married? A. Yes. And Mrs. Horowitz then said to me, "Mrs. Herman, while we haven't real legal adoption papers"—the Jewish people don't do that—she said, "but Sadie is my husband's cousin and he feels to her as though he is her father. We have raised her, and we are always going to do what is right by

her." And then when they were married it always worried me, because I couldn't see why she was adopted without legal papers, and I spoke many, many times, but of course it simply never was, and then after they were married we spoke about it again.

Q. How long after their marriage was it? A. 10 That was right after they were married I spoke of it again.

Q. Now, going to the time when they returned—when they left the Horowitz home, that is three or four months or four or five months, and returned— A. Yes.

Q. You have mentioned one conversation that you had with Mr. Horowitz. Do you remember any other conversation that you had about the arrangement he had with his daughter, or his foster daughter, Sadie Hirschberg? A. When he was sick in bed. I once asked Arthur was there any will made out and he said he didn't know. And then in an indirect way we got talking, and I was sitting at the foot of the old man's bed, and I asked him then. I said, "Have you got a will made out, Mr. Horowitz?" He said, "Well, what difference does it make?" He said, "Everybody knows Sadie is my daughter; I have nobody to leave it to, and who else is going to get it but she," and so that was the conversation. 20 30

Q. At any other times did you ever have any talks with him with reference to any arrangement such as you have mentioned? A. I don't just remember any more.

Q. I beg your pardon? A. I don't know of any more.

Q. You were friendly right up to his death? A. Oh, yes.

Q. After Mrs. Hirschberg returned to the home 40

of Mr. and Mrs. Horowitz, what did you see her do there with reference to the housework, taking care of the old people? A. Well, I saw her attending them just like a nurse. I shouldn't tell this, but I know it to be a fact, that one time the old lady fell out of bed—

10

By the Court:

Q. Is that what somebody told you? A. Arthur told me this himself.

Q. Don't tell us what he told you. A. All right, sir.

Q. That is not evidence. A. All right.

By Mr. Ward:

20

Q. This care on the part of Sadie Hirschberg continued right up to the time that the nurses were called in? A. Even when the nurses was there Sadie had to help her and change the bed, and with all those things.

The Court: There is no dispute about that, is there?

Mr. Ward: I guess not, sir. Cross-examine.

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Cross Examination by Mr. Cohn:

Q. Was it anything unnatural for Sadie to help the Horowitzes? A. I don't know.

Mr. Ward: I object to that. One moment, Mrs. Herman.

The Witness: I don't know. Why unnatural?

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The Court: I don't know that it has any materiality.

Mr. Ward: I don't think this witness has qualified as an expert on what is natural.

The Court: It is just her opinion; I will let it stand.

Q. How long had the Horowitzes taken care of Sadie Horowitz? 10

The Court: To your knowledge.

Q. To your knowledge. Sadie Rosenberg, rather. A. They took her when she was eight years old.

Q. Eight years old? A. Yes, sir.

Q. And they kept and boarded her up until she was married at the age of twenty-five; is that right? A. I think so.

Q. You know, as a matter of fact, that she never worked out of that home, don't you? A. No. 20

Q. No what? A. She didn't work outside of the home. No. How could she?

Q. How many years did they send her to school, do you know? A. She went to the last grade in school.

Q. In grammar school? A. That is all. That was all.

Q. They maintained her, they clothed her, and they schooled her from the time that she was eight years old until she was twenty-five; is that right? 30

A. I believe you are right.

By the Court:

Q. And you only know because you have been told? A. Only because I have heard it.

By Mr. Cohn:

Q. Did Sadie tell you? 40

The Court: Of course, this is hearsay.

Mr. Cohn: I am asking her whether Sadie, the plaintiff, told her.

10 A. Only from what I learned, because I didn't know her until when she became engaged to Arthur, because I am not a Patersonian.

Q. You are the sister-in-law of this plaintiff? A. I am.

Q. In other words, you are the sister of her husband? A. Right.

Q. Do you know of your own knowledge what relationship, what blood relationship, exists between Sadie Hirschberg and Israel Horowitz? A. Well, truly, I never knew.

20 Q. Well, that is enough. You knew she was married under the name of Sadie Rosenberg? A. Well, I knew her as Sadie Horowitz until the day that they took out their license.

Q. Marriage license? A. And then I wanted to find out why it was Rosenberg, and then she told me she was related to Mr. Horowitz.

Q. Now, was Mr. Horowitz a sick man in November or December, 1922? A. I can't remember dates; I am sorry.

30 By the Court:

Q. Just a moment. Was he a sick man at the time that they, Mr. and Mrs. Hirschberg, went housekeeping? Was he a sick man at the time you met him at their home, when this conversation—
A. No, he wasn't sick.

Q. He had been paralyzed? A. That I don't know about.

40 Q. Had he had a stroke? A. I couldn't tell you that.

Q. Any evidences of it? A. Not that I know of, only that he was an old man.

Q. He walked very well? A. Yes, he was very conversational and in good health, as far as I could see.

By Mr. Cohn:

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Q. He was in good health until when? About when? A. Until shortly before he was taken ill that time.

Q. As a matter of fact, he went out daily until a few weeks before he died? A. That I can't say.

Q. Well, how long was he confined to his home, if you know? A. Well, quite a while before he went to bed. It was weeks and weeks and weeks before he went to bed, because every time I would come there he was either indoors or sitting on the porch. 20

Q. Do you know whether he was connected with different institutions in Paterson? A. I do not.

Mr. Ward: I object to that question, sir.

The Witness: No, sir, I do not.

The Court: I will allow it. I don't think it has much materiality, but it might. What is the answer?

The Witness: I don't know. 30

Q. Do you know whether he was a regular attendant at the Barnert Temple?

Mr. Ward: If your Honor please, what difference does it make?

The Court: I don't know.

Mr. Ward: The only ground upon which this question can be pressed is as affecting the witness's credibility. Is there any question in your Honor's mind that this— 40

The Court: I will allow it.

Mr. Ward: Where it is discretionary with your Honor—

The Court: I will allow it. It won't do any harm.

The Witness: I don't really know.

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Q. Do you know whether he was interested in the Barnitt Free School? A. I don't know.

Mr. Ward: I object to that.

The Court: I will allow it.

Q. Do you know whether he attended divine services every morning until about five or six weeks prior to his death? A. I don't know.

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Q. At the Barnert Temple, I have reference to? A. That I don't know.

Mr. Cohn: That is all.

HARRY HOROWITZ, sworn.

Direct Examination by Mr. Ward:

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Q. You are one of the executors of the estate, of the last will and testament of Israel Horowitz? A. Yes.

Q. When did he die? A. On December the 8th, 1925.

Q. You duly qualified as executor afterwards? A. Yes.

By the Court:

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Q. What was the date of death, Mr. Horowitz? A. On December the 8th.

Q. What year? A. You mean Mr. Horowitz?

Q. Yes. A. 1925.

By Mr. Ward:

Q. And you have since fulfilled the duties of executor of the estate? A. I believe I did.

10

Q. Now, how much is the value of the estate at the present time?

Mr. Cohn: I object, if your Honor please, unless it is shown that there has been an accounting. I don't think that this witness is qualified to state the value of the estate.

The Court: If he isn't he will so state.

Mr. Cohn: I also object on the ground it is incompetent.

The Court: I will allow it.

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Mr. Cohn: Exception.

The Court: You may have it.

Q. Go ahead and tell us. A. What is it you want to know?

(The question was read by the stenographer.)

By the Court:

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Q. What is the value of the estate?

Mr. Cohn: I object, also, on the ground that it calls for a conclusion.

The Court: Certainly, it couldn't be otherwise in that sort of a question. I will allow it.

Mr. Cohn: Exception.

A. At the present time about a little over eleven thousand dollars.

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Q. Eleven thousand and a little over. That is all.

The Court: Cross-examine.

Cross Examination by Mr. Cohn:

10 Q. Have attorneys' allowances been made? A. No, sir.

Q. Has there been any accounting filed? A. No, sir.

Mr. Ward: We rest, sir.

Plaintiff rested.

20 Mr. Cohn: If your Honor please, we now move that all of the testimony as to any conversations as to an agreement to devise and bequeath real and personal property be stricken out, on the ground that it is in violation of the statute of frauds.

The Court: I would like to hear counsel on that.

(Colloquy off the record.)

The Court: I will reserve decision on your motion.

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DEFENDANTS' TESTIMONY.

HARRY HOROWITZ, recalled.

Direct Examination by Mr. Cohn:

Q. Mr. Horowitz, at the time your brother died of what did his property consist? I mean at the time of his death. A. Consisted in real estate.

40 Q. What real estate? A. A piece of property,

a two-family house, frame building, in 242 Van Houten Street.

By the Court:

Q. Is that where he lived? A. Yes, sir.

By Mr. Cohn:

Q. And outside of that can you tell us the amount of the personal property that he— A. You mean in cash?

The Court: Cash or stocks and bonds or money in the bank.

A. About three thousand dollars over all.

By the Court:

Q. Three thousand dollars outside of the house? A. Three thousand dollars, about.

By Mr. Cohn:

Q. That is, that was his gross estate, of real estate, real property, and personal property? A. Right.

Mr. Cohn: That is all.

Cross Examination by Mr. Ward:

Q. That house was sold, was it? A. Yes.

Q. And after all the estate was converted into personal—

Mr. Cohn: I object to this on the ground it is immaterial, what happened after the decedent's death.

The Court: Yes, I don't think that is material.

Mr. Cohn: I ask to have it stricken out.

Mr. Ward: That is necessary, in view of the fact that we are going to offer the will, sir.

10 The Court: All right.

Mr. Cohn: Will your Honor note our objection?

The Court: Yes. I will allow it if there is any—if you have something in mind that might make it material.

By the Court:

20 Q. It was all converted into cash? A. It was, with the exception of a few jewels.

Q. A few what? A. Jewels.

By Mr. Ward:

Q. After that this property was sold by you? A. Yes.

Q. That was done because of the will that was left by Mr. Israel Horowitz?

30 Mr. Cohn: I object on the ground that it calls for a conclusion, if your Honor please. I have no objection to the will going in evidence.

The Court: The question is withdrawn, I suppose.

Mr. Ward: No, I was not going to withdraw the question, because I think it is proper, but your Honor suggests it and I will withdraw it.

40 Q. To whom did you sell the property?

Mr. Cohn: I object to the question as immaterial and irrelevant.

The Court: I will allow it. Maybe it is material.

Mr. Cohn: Exception.

A. A gentleman by the name of Hickey. 10

Q. Hickey? A. Hickey.

Q. And you sold it acting as executor of the Estate of Israel Horowitz; that is true, isn't it?

A. Yes.

Mr. Cohn: I object to the question as calling for a conclusion.

Mr. Ward: He knows for himself if he is an

The Court: I will allow it.

Mr. Ward: That is all. 20

Mr. Cohn: We intend to rest.

Defendants rested.

The Court: Now you may offer the will. (Paper marked Exhibit P-1.)

PLAINTIFF'S REBUTTAL. 30

SADIE HIRSCHBERG, sworn.

Direct Examination by Mr. Ward:

Q. Mrs. Hirschberg, you are the wife of Arthur Hirschberg? A. I am.

Q. And the plaintiff in this suit? A. I am.

Q. Do you recall when you first went to live with Mr. Israel Horowitz? A. I do. 40

Q. How old were you at that time? A. I was eight years old.

Q. And you lived with him for how long? A. Until they died.

By the Court:

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Q. Except the time that you lived with your husband in the other location? A. Yes, the four months that we were away from them.

By Mr. Ward:

Q. You were attending school at the time you first went to live with them? A. I did.

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Q. While you were attending the school, or during the first period of time that you lived with them— I will withdraw that, if your Honor please. When did you graduate from grammar school? A. 1908.

Q. How old were you then? A. Fourteen.

Q. Fourteen? A. Fourteen.

Q. And from the age of eight until the age of fourteen did you do anything about the home of the Horowitzes? A. I did.

Q. What? A. It was assisting with the dishes and sweeping and dusting, as a child would.

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Q. And after you graduated from grammar school what did you do with reference to the household of the Horowitzes? A. I stayed right at home and assisted with the housework.

Q. You were married when you were twenty-five, were you? A. I was.

Q. And prior to that time had you been doing the housework of the Horowitzes? A. Right along.

Q. Consisting of what? A. Everything that had to be done.

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The Court: A little louder.

A. Everything that had to be done in the home.

Q. Just tell us what had to be done. A. In regard to sweeping, dusting, scrubbing, and washing the little things; all the big things were sent out.

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By the Court:

Q. And you washed the dishes and made the beds? A. I did.

Q. You forgot those.

By Mr. Ward:

Q. And you did the cooking, too? A. I did when Mrs. Horowitz went away.

20

Q. After your marriage you continued to live with the Horowitzes, did you not? A. I did.

Q. For how long a period of time? A. Four years.

Q. And during that four years were there any children born to you? A. Two.

Q. After the expiration of the four years was there anything said by Mr. Horowitz to you? A. Yes.

Q. What was that?

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Mr. Cohn: I object to any conversation.

The Court: About what? Is this with respect to the—

Mr. Ward: This is in general, sir, showing the condition that prevailed and what led up to the making of the contract.

The Court: I think she might testify to that, perhaps, but not with respect to the contract.

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Mr. Ward: If your Honor please, yes, with reference to the contract as well, for the reason that they have placed the executor upon the stand, and in placing the executor upon the stand they have made it possible for her to testify.

10 The Court: I don't understand that to be the rule.

Mr. Ward: I understood the rule to be so, sir.

The Court: If they had opened the door by asking anything about that, but they didn't.

Mr. Ward: Irrespective of that, sir, I contend that the very moment they placed the executor upon the stand and made him a witness—

20 Mr. Cohn: We did not place him on the stand.

The Court: You did, on your own case.

Mr. Ward: Oh, yes, you did.

Mr. Cohn: I simply called him for further cross-examination.

The Court: Oh, no.

Mr. Cohn: It was not our case. If your Honor please, I didn't intend to put in any defense at all. I simply asked that the witness be recalled.

30 The Court: I did not so understand it.

Mr. Ward: Oh, no. He had only the one witness, he said, a short witness.

Mr. Cohn: I didn't make any statement about having one witness. We wanted to have the witness recalled for the purpose of bringing out what was real estate and what was personal property, not even to testify.

40 The Court: You put him on as your witness, as I understood.

Mr. Ward: After we rested, yes.

The Court: Mr. Ward had rested. Then you didn't ask permission to re-examine him. But I don't understand the rule to be as Mr. Ward says, any way, so it isn't important. (Lengthy colloquy off the record.)

The Court: Is there anything else you 10 want to ask this witness?

By Mr. Ward:

Q. After your marriage to your husband, I believe you said four—some years after your marriage to your husband— A. Yes.

Q. —you left the home of the Horowitzes; is that true? A. I did.

Q. How long were you absent from the home of 20 the Horowitzes? A. Four months.

Q. And then did you return to their home? A. I did.

Q. What was the health of Mrs. Horowitz at that time? A. Her condition was poor.

The Court: "Her condition was poor."

Q. Speak up a little louder, please, so these gentlemen can hear you. A. Her condition was poor.

Q. And when you moved back to the Horowitz 30 home, where did you first go, the first or second floor? A. The first floor.

Q. And did you or not bring your belongings there? A. I did.

Q. All of your household goods? A. Yes, I did.

Q. How soon after that, if at all, did Mr. Horowitz—the Horowitzes—join you in living downstairs? A. Just about a month after we came.

Q. How long did you live downstairs then? A. 40 A very short time.

Q. For about how long? A. Just for about five or six weeks.

Q. And then where did you go? A. Then we all moved upstairs again.

Q. Who did the housework then? A. I did.

10 Q. Was it necessary to take care of Mrs. Horowitz to any extent? A. At times it was.

Q. What was her trouble, Mrs. Hirschberg? A. Heart trouble.

Q. When did she become seriously ill? A. About a year before her death.

Q. And when did Mr. Horowitz become seriously ill? A. Seriously, about five weeks before his death.

Q. And when was it that nurses were engaged to take care of Mr. and Mrs. Horowitz? How long before their deaths? A. Five weeks.

20 Q. How long before the death of Mrs. Horowitz? A. She had a nurse six weeks before her death.

Q. Six weeks? A. Yes.

Q. Up to the time that these nurses were engaged, who took care of Mrs. Horowitz while she was ill? A. The nurses did.

Q. No, up to the time they were engaged? A. Oh, I did. I did.

30 Q. And what did you do? Will you describe, please, to the court and jury some of the services rendered by you, some of the things you did? A. I did all the general housework and had to take care of her, because she was not really capable of taking care of herself at times, and did the cooking, special diets for each one of the patients.

Q. For which one of them? A. Each one of them.

Mr. Cohn: I object and ask that any testimony as to a conversation with this—

40 The Court: He is not asking her for any conversation.

Mr. Cohn: I mean as to transactions or doing something in the presence of the decedent.

The Court: I think there isn't any doubt but what she may say what she did, but that is all cumulative. It has all been testified to, and it isn't really in dispute, and it isn't 10 really rebutting anything, because there was nothing brought in by the defense.

Mr. Ward: In view of the fact that there is some doubt about that in your Honor's mind—

The Court: There isn't any doubt in my mind.

Mr. Ward: That is all.

Mr. Cohn: Your Honor will reserve decision on my motion for a nonsuit? 20

The Court: Of course. I have suspended judgment on that.

(A recess was taken until two o'clock p. m.)

Afternoon Session.

The Court: Has counsel satisfied himself as to the matter we discussed? 30

Mr. Ward: I have no desire to press that, sir.

The Court: I will allow, then, the record to stand as counsel intended it, that he was merely calling back Mr. Harry Horowitz for further cross-examination, rather than as a witness in his own behalf. I don't know what the record will show. I understood Mr. Ward to say, "That is the plaintiff's case," and I thought Mr. Cohn called 40 Mr. Horowitz as his first witness in defense.

10 Inasmuch as you say that you didn't do that, or at any rate you didn't intend to do that, certainly the record ought to be straight, and not according to my recollection. And so I will permit the record to stand as you say, that you simply called him for further cross-examination, and rested without the introduction of any testimony.

Now, with respect to the motions that were made for a non-suit and for the elimination of the testimony given on the ground that it is against the decisions under the Statute of Frauds, all of which motions I reserved decision on: The motions are denied.

20 In the opinion of the Court, this is not concerned with a promise for a devise, nor can it amount to a promise to convey, which would bring it within the Statute of Frauds, but it is, rather, an agreement for the payment of money for services performed. For that reason the motions are denied.

30 I think the cases that you cited are on the theory that there was an agreement to convey, that is, an agreement to sell or an agreement to make a will in their favor. I think that is distinguishable for the reasons that I have stated, that the contract, it seems to me, was in consideration of my living with you and providing the services that you require, you will pay me for it, and the payment that you will give me is the value of your estate upon your death.

You may have an exception to my ruling.

40 Mr. Cohn: I take an exception to your Honor's ruling on the grounds your Honor mentions, and on the further ground that

this is an action which should have been brought by the husband of the plaintiff and not by the plaintiff. In other words, an action which is for services rendered by the wife, such as have been testified to in this case, companionship and household duties and all that, notwithstanding the Married Women's Act, we contend that such an action should have been brought in the name of the husband and not by the wife, the husband being entitled to all of the wife's wages. 10

The Court: You may have an exception, of course.

(Mr. Cohn summed up to the jury on behalf of the defendants.) 20

(Mr. Ward summed up to the jury on behalf of the plaintiff.)

(The Court charged the jury as follows):

Court's Charge to the Jury.

PORTER, J.

Ladies and gentlemen of the jury: 30

You have been empaneled to try an issue of fact raised in a suit in this court brought by Sadie Hirschberg against Harry Horowitz and David Cohn as the executors of the last will and testament of Israel Horowitz. The suit is based upon a contract which Mrs. Hirschberg says she had with Mr. Horowitz, deceased, whereby she was to render certain services for him, whereby he was to pay her at the close of his life, or after his death, a sum equal to the value of his estate. You are 40

called upon to find the facts, which is always the function of the jury, and the only function for a jury to perform. All questions of law devolve upon the court to decide, but all questions of fact are decided by the jury. And it is your duty, under your oath of office, to decide the question of fact.

10 You will, of course, take as a correct statement of the law what the court tells you the law is.

Counsel for the defendants, the executors of this estate, raised certain questions of law during the progress of the trial and at the close of the trial which were decided by the court adversely to the defendants. That need not concern you at all, because those were questions purely of law, and you are only concerned with questions of fact. The

20 question of fact which you are to decide is whether or not there was a contract existing between the plaintiff here and Israel Horowitz, deceased, and you will find that fact from the testimony that has been adduced here. The burden is on the plaintiff to satisfy you that what she contends for is true, and she must satisfy you to that effect by the preponderance of the testimony. The clear weight of the testimony must be on that side of the question; it must predominate on that side. Now, Mrs.

30 Hirschberg herself could not testify with respect to conversations that she had with the deceased about this contract, because it would be contrary to the rules of evidence, and for that reason she was not permitted to testify with respect to the conversations that took place between the deceased and herself on that point. But there was testi-

mony with respect to the contract by others who were present and by others who testified that the deceased at different times subsequently expressed himself as having made such a contract. I have

40 reference to Mrs. Maines, whom you will recall for

ten months prior to the death of Mr. Horowitz lived next door, and to her testimony with respect to the conversations that she had and how they came about, with respect to the disposal of his property, over the back fence. There is also the testimony of the nurse, whose name I have forgotten, who was told, she says, by the deceased that he wished to see the plaintiff, Mrs. Hirschberg, on the Sunday night preceding his decease; that Mrs. Hirschberg was summoned by her to the sick bed, and that Arthur Hirschberg, her husband, accompanied her, at which time there was a declaration by him to the effect that there was this existing contract. And at that time, the testimony of that witness is, there were instructions given that an attorney be summoned, because the question was asked the deceased whether he had provided for the carrying out of this contract by the provisions of his will.

And the further testimony is that such instructions were carried out and that the next day an attorney did come. Now, it seems that after the decease of Mr. Horowitz a claim was made by the plaintiff here against the executors who were named in the last will and testament which was dated the 12th of November, 1920, which you will observe from the date is prior to the time of the entering into of this contract, which the testimony says was in November or December of 1922.

This will had not been revoked by destruction or by the making of a new will, and the will was probated and the executors qualified—Mr. Horowitz, who was on the stand, and Mr. David Cohn.

Mrs. Hirschberg made a claim against the estate and the executors, which was rejected. I believe it is admitted in the pleadings that there was a claim made. So that she could not bring suit under

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the law until she had first made a claim against the estate and they had disputed it, as was done in this case. Then she brought her suit here, which she had a right to do, and the executors had a right, nay, it was their duty, to defend this suit and not to pay this claim until it was adjudicated by a court and jury.

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At any rate, they, the defendants, followed that course, and they come here saying, "We deny that there was any such contract." They very frankly say, "We have no testimony to introduce, because how can we produce testimony of a negative nature? Testimony has been given, and the plaintiff's contention is that this contract was made in the presence of certain people, and, of course, the only people that can testify to that are the people who were present. They know we have no testimony to refute that, but we say, we ask the jury to scrutinize that with the greatest of care, because it is not according to common sense that a man would make such a contract," and inferentially they say, "If he did, why didn't he live up to it? He didn't make a will changing the will that was then in existence and which was in existence at the time he died; and we ask you to disbelieve the plaintiff in this suit and her husband, who are interested parties, and their sister, who is perhaps interested because of her relationship. The only people disinterested, therefore, are the nurse and the neighbor. The nurse might be interested because she was well acquainted with Mrs. Hirschberg and had been for a number of years."

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And they say it is unbelievable, also, because of the fact that there was nothing unusual that existed between the plaintiff and the deceased; that she owed him a duty because of the fact that he had clothed and housed and educated and reared her

from the time she was eight until her marriage, and then had given her a handsome wedding present of fifteen hundred dollars at the time of her marriage.

They say there was a natural duty owing by her to him because of the affection that he had shown to her during those years that she had been living with them, and what more natural thing than that she should look after them in their extremity, when they became ill and sick. And so the defendants say that she only did what she should have done considering what her relatives had always done for her, and therefore it is unbelievable that she was induced to do the things she did do because of Mr. Horowitz's promise that he would compensate her for it by giving to her his property.

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Now, you will recall that the plaintiff's contention is that after her marriage she continued to live with Mr. and Mrs. Horowitz and did so for a period of about four years, during which time two children were born to them; that then there came some friction, or, at any rate, the elder couple suggested that they better have a home of their own, the children annoyed them, and so they established a home of their own, I think the testimony was on November 1, 1922; that they maintained that home independently of the old folks from that time until March 1, 1923; that some weeks after they had made that move—I think the testimony was five or six weeks, the proposition was made to them by Mr. Horowitz to return, that he missed them, that he missed the children; and then it was that the contract had its inception, then it was that he offered as an inducement for them to come and resume living with him and taking care of him and his wife; that he offered them compensation, and that he made the contract with them that if they

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would do that they would have whatever he had when he got through with it. The plaintiff says it was because of his offer to do that, which they accepted, that they went back, moved back as soon as they could conveniently do so after they had considered it and made up their minds themselves and given proper notice to their then landlord; that they ask to be compensated for the services that were rendered, or rather, that Mrs. Hirschberg be compensated under the terms of the agreement.

Now, it is true, as counsel for the defendants says, that we have in this State a statute known as the Statute of Frauds, which requires, under certain conditions, that contracts be in writing. But that statute says that contracts to work or for services must be in writing if the services referred to in the contract are to be performed within a year. This contract is not within the Statute of Frauds, in the opinion of the court, because it was not to be performed within a year, necessarily. No one could tell how long it might take. And so I say that all that you must decide in this case is, under the evidence, whether or not there was such a contract.

There is no dispute that it was not in writing. My ruling is that it need not have been in writing. My ruling is that if there was a contract, as is alleged by the plaintiff, it was an enforceable contract. You are the sole judges of the testimony and the weight that it should receive, and you must be satisfied from the testimony that the burden of proof that I have spoken of prevails on the side of the plaintiff, that it predominates. You may take into consideration in weighing it whether the witnesses were interested or not. What interest have they in the outcome of this suit? Is a proper thing for you to consider and inquire into. Is it

clear, is it definite, and is it convincing? Must also be inquired into by you before you render your verdict. Now, if you find that there should be a verdict here for the plaintiff, the next inquiry, of course, is what should the amount of that verdict be? The contract, it is contended, was that Mrs. Hirschberg was to receive all of his belongings; in other words, all of his property or all of his estate. There is no testimony in the case as to whether she knew how much that would be, and I assume that she could not have known what it would be at the time the contract was made, if you find there was one made, because she had no way of knowing, even though she knew what he was possessed of then, what he would spend in the interim, and what he would be worth when he died. He might be worth more than he was then, or he might be worth less.

The only testimony we have with respect to the estate is the testimony of Mr. Harry Horowitz, that the estate amounts to a little over eleven thousand dollars, and on cross examination it developed that there had been no commissions paid the executors, and there were still some administration expenses to be paid, as I recall it.

Now, perhaps it may not be important as to the exact amount of your verdict, because if your verdict is larger than the estate it cannot be paid, because there is nothing to pay it with. If, on the other hand, there are bills that must be paid out of the funds that the executors have, they would have to be paid if they were a prior claim against the estate, that is, prior to this claim. That would be true if they were commissions to executors and accounting fees. So the testimony that you have is a little over eleven thousand dollars, and that means, I assume, eleven thousand dollars, at any rate. That is the only definite amount, perhaps, that you could fix.

The verdict that you must render is either for the plaintiff for the value of the estate as you understand it to be, or if you do not believe the stories of the witnesses for the plaintiff and you are not satisfied that the contract existed that was testified to, after considering all the testimony, your verdict
10 must of necessity be then in favor of the defendant, no cause of action.

But in either event you must base your verdict solely upon your own recollection of what the testimony was and not upon anything that I have said, if I have stated it incorrectly. My memory may have been at fault. If I have in my charge mistaken any of the testimony, you will please disregard any such misstatement that I have made.

You may now retire.

20

Defendants' Exceptions.

Mr. Cohn: I would like to take an exception to that part of your Honor's charge wherein you stated that the amount that they were to bring in was eleven thousand dollars, if they found for the
30 plaintiff.

Another exception to the charge; that the contract was not within the Statute of Frauds.

And the third exception; that the agreement of the decedent was to leave the value of his estate to the plaintiff.

The Court: You may have them.

40

Plaintiff's Exhibit.

I, ISRAEL HORWITZ, of the City of Paterson, County of Passaic, and State of New Jersey, being of sound and disposing mind and memory, and considering the uncertainty of this life, do make, publish and declare this to be my last WILL and TESTAMENT as follows, hereby revoking all other and
10 former Wills by me at any time made.

First, after my lawful debts are paid, I give and bequeath (1st) to the MIRIAM BARNERT MEMORIAL HEBREW FREE SCHOOL ASSOCIATION, of Paterson, New Jersey, now occupying the building known as MIRIAM BARNERT MEMORIAL HEBREW FREE SCHOOL, the sum of Two Hundred (\$200.00) Dollars.

2nd. I give and bequeath to the NATHAN AND MIRIAM BARNERT MEMORIAL HOSPITAL ASSOCIATION, the sum of Two Hundred (\$200) Dollars. 20

3rd. I give and bequeath to GEMILATH CHASODIM (Hebrew Free Loan Association of Paterson, New Jersey) the sum of Two Hundred (\$200.00) Dollars.

4th. I give, devise and bequeath all the rest, residue and remainder of my estate, of every kind and nature, real or personal, whatsoever and where-soever situate, unto my brother, HARRY HORWITZ and my friend, DAVID COHN, in trust to invest and re-invest, change the investments from time to time, manage and care for the same, and to apply the income and profits thereof, to the use and benefit of my beloved wife, RACHAEL HORWITZ, as long as she remains unmarried, and upon her death or re-marriage to divide the said principal of my estate, with all accruals thereof, among my surviving sisters and brothers, the issue of any deceased sister or brother to take their parents' share, and in the event that there is no issue, the said share to be divided equally, share and share alike, among
30 my surviving sisters and brothers. 40

I hereby appoint, nominate and constitute, as Executors and Trustees of this my last Will and Testament, HARRY HORWITZ and DAVID COHN, and request that they be not required to furnish any bond or bonds for the performance of their duties either as Executors or as Trustees.

10

IN WITNESS WHEREOF, I have hereunto subscribed my name, and affixed my seal, the Twelfth day of November, in the year one thousand nine hundred and Twenty.

ISRAEL HORWITZ (L. S.)

Subscribed by Israel Horwitz the Testator named in the foregoing Will, in the presence of each of us, and at the time of making such subscription, the above Instrument was declared by the said Testator to be his last Will and Testament, and each of us, at the request of said Testator and in his presence and in the presence of each other, signed our names as witnesses thereto.

20

FELIX SIMON Residing 112 Ellison St., Paterson, N. J.

FLORENCE DENN Residing 470 Main St., Paterson, N. J.

30

PASSAIC COUNTY SURROGATE'S COURT.

I, FREDERIC BEGGS, Surrogate of the County of Passaic, do certify the annexed to be a true copy of the last Will and Testament of Israel Horwitz late of the County of Passaic, deceased, and that Harry Horwitz and David Cohn, the Executors therein named, proved the same before me, and are duly authorized to take upon themselves the Administra-

40

tion of the Estate of the Testator agreeably to the said Will.

(Seal)

WITNESS my hand and seal of office the twenty-first day of December in the year of our Lord one thousand nine hundred and twenty-five.

10

FREDERIC BEGGS,
Surrogate.

Defendants' Request to Charge.

The contract, if not in writing, should be proved by disinterested witnesses and the evidence must be definite, clear and convincing.

20

Defendants' Trial Memorandum.

(Submitted to the Trial Court.)

NEW JERSEY SUPREME COURT,
PASSAIC COUNTY.

SADIE HIRSCHBERG,
Plaintiff,
against

30

HARRY HOROWITZ and DAVID
COHN, as Executors of the Last
Will and Testament of Israel
Horowitz, deceased,
Defendants.

Action at Law.

STATEMENT OF ISSUE.

The complaint alleges that on or about March 1st, 1923, the defendants' testator agreed that if

40

the plaintiff and her husband would give up the home occupied by them and return and remain with him and his wife during their lives, assisting and caring for them and acting as a companion, he would devise and bequeath to her absolutely his entire estate of which he would die seized and possessed; that the plaintiff accepted said offer and remained with defendants' testator and his wife until their respective deaths (Dec. 8th, 1925, and Nov. 24th, 1925), and cared for them and acted as a companion to them; that defendants' testator did not devise and bequeath his estate to the plaintiff; that plaintiff made a demand on the defendants to fulfill said contract, but the defendants refused to pay over said estate (valued at \$12,000) or any part thereof; and plaintiff demands judgment for said amount.

The answer denies that defendants' testator made the alleged contract.

I.

An oral agreement to devise real property, or to devise and bequeath real and personal property, is void under the Statute of Frauds.

30 Act for the Prevention of Frauds and Perjuries, C. S. 2610, Sec. 5.
Browne on the Statute of Frauds, 5th Ed., Secs. 263, 266.
Lozier v. Hill, 68 Eq., 300, 59 At., 234.
Cooper v. Colson, 66 Eq., 328.
McElroy v. Ludlum, 32 Eq., 883.
Smith v. Smith, 28 L., 208.
Pond v. Sheean, 132 Ill., 312.
Ludwig v. Bungart, 48 App. Div., 613.
40 Lasher v. McDermott, 173 App. Div., 79 (1916).

Banta v. Banta, 103 App. Div., 172.
Gould v. Mansfield, 103 Mass., 408.
Jackson v. Stearns, 58 Ore., 57; 113 Pac., 30.
Wallace v. Long, 105 Ind., 522.
Beardsley's App., 83 Conn., 34.
Horton v. Stegmyer, 175 Fed., 756, 760. 10
Hale v. Hale, 90 Va., 728.
Gooding v. Brown, 35 Hun, 148.
Trout v. Ogilvie, 182 Pac., 333.
Nelson v. Schoonover, 89 Kan., 388.
Grant v. Grant, 29 Atl., 15.

In *Smith v. Smith* (supra), Green, C. J., says:

“* * * The evidence in the cause would have warranted the jury in finding that the plaintiff erected the buildings with the consent and approbation of his father, upon his express promise that the farm should be his upon his father's death, by deed or devise. The contract to transfer the land, being within the Statute of Frauds, was void, and cannot form the foundation of an action. The plaintiff, therefore, clearly could not sue upon the special contract.” 20

II.

At law, a verbal contract void under the Statute of Frauds is not taken out of the Statute by part performance, or even by complete performance.

Lozier v. Hill, 68 Eq., 300;
Cooper v. Colson, 66 Eq., 328;
McElroy v. Ludlum, 32 Eq., 828;
Smith v. Smith, 28 L., 208;
Browne on the Stat. of Frds., 5th Ed. Sec. 40
118;

Hartwell v. Young, 22 N. Y. S., 486;
Galvin v. Prentice, 45 N. Y., 162;
Oddy v. James, 48 N. Y., 685;
Booker v. Heffner, 95 App. Div., 84;
Wallace v. Long, 105 Ind., 522.

10

III.

Recovery may be had on a quantum meruit for the value of the services, but not in an action for breach of contract.

Eaton v. Eaton, 35 L., 290;
McElroy v. Ludlum, 32 Eq., 828;
Murray v. Schuldt, 73 L., 489;
Smith v. Smith's Admrs., 28 L., 208;
Jackson v. Stearns, 37 L. R. A. (N. S.);
Grant v. Grant, 29 At., 15;
Wallace v. Long, 105 Ind., 522;
Lisk v. Sherman, 25 Barb., 433;
Booker v. Heffner, 95 App. Div., 84;
Matter of Sherman, 53 N. Y. S., 376;
Fuller v. Reid, 38 Cal., 100.

20

IV.

30 Where services have been performed under an oral and unenforceable contract for the purchase of lands, recovery may be had only for the actual intrinsic value of the services rendered, without reference to the contract or the value of the land which was to have been conveyed.

McElroy v. Ludlum, 32 Eq., 828;
Grant v. Grant, 29 At., 15;
Wallace v. Long, 105 Ind., 522;
Fuller v. Reid, 38 Cal., 100;

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Sands v. Arthur, 84 Pa. St., 479;
Hertzog v. Hertzog's Admr., 34 Pa. St.,
418; overruling Jack v. McKee, 9 Pa.
St., 235;
Erben v. Lorillard, 19 N. Y., 299;
Jackson v. Stearns, 58 Ore., 57;
Banta v. Banta, 103 App. Div., 172, 93 10
N. Y. S., 393;
Baxter v. Kitch, 37 Ind., 554;
Hershman v. Pascal, 4 Ind. App., 330;
Lisk v. Sherman, 25 Barb. (N. Y.), 433;
Harsha v. Reid, 45 N. Y., 420;
Rawdon v. Dodge, 40 Mich., 699;
Lane v. Colby, 95 App. Div., 11.

In Fuller v. Reid, 38 Cal., 100, Sprague, J.,
delivering the opinion of the Supreme Court, said: 20

“* * * In an action for damages resulting to plaintiff from a breach, on the part of the defendant, of a *valid* contract between the parties for the conveyance of land by defendant, in consideration of money paid or services rendered by plaintiff, the measure of damages would obviously be the value of the land agreed to be conveyed, but in assumpsit for the recovery of money paid, or services rendered upon a void contract for the conveyance of land, the measure of plaintiff's relief is the money he has advanced, with interest, or the reasonable value of the services rendered, without reference to, and disconnected with, the express contract, the defendant's liability in such case rests upon an implied promise or assumpsit, and evidence of the value of the land stipulated to be conveyed by the express void agreement is inadmissible as a measure 30 40

10 of the value of services rendered by plaintiff, or the measure of indebtedness of defendant upon his implied promise to refund money advanced by plaintiff, would, in effect, allow a party in one breath to disaffirm and claim the benefit of the same contract as valid and subsisting, and substantially enable him to recover as for breach of a valid express contract in a simple action of assumpsit upon an implied contract."

V.

A court of law in the trial of an action at law, cannot exercise the power of a court of equity.

20 Schurmeier v. Conn. Mut. Life Ins. Co.,
137 Fed., 42;
Bennett v. Butterworth, 11 How. (U. S.),
669.

In Schurmeier v. Conn. Mut. Life Ins. Co. (supra), Sanborn, Circuit Judge, delivering the opinion of the court, said:

30 " * * * In the Federal Courts an action at law cannot be maintained in equity, nor is an equitable cause of action or an equitable defense available at law. While in many of these states, statutes exist which permit the joinder of causes of action at law and in equity in the same suit, this course is not permissible in the Federal Courts. In truth, the difference between causes of action at law and in equity is matter of substance and not of form, and no legislative enactment can really re-
40 move it. In the national courts, this ineradic-

able difference is as sedulously preserved in the forms and practice available for their maintenance, as it is in the natures of the causes themselves and in the principles upon which they rest. A legal cause of action may not be sustained in equity because there is an adequate remedy at law and it is only when 10 there is no such remedy that a suit in equity can be maintained. Equitable causes and defenses are not available in actions at law, because they invoke the judgment and appeal to the conscience of the chancellor and the free exercise of that judgment and conscience is forbidden in actions at law by the rule which entitled either party to a trial of all the issues of fact by a jury. (Citing cases.)"

20

VI.

If a part of an entire contract is void under the Statute of Frauds, it is void *in toto*.

Pond v. Sheean, et al., 132 Ill., 312;
Gould v. Mansfield, 103 Mass., 408;
Trout v. Ogilvie, 182 Pac., 333;
Harsha v. Reid, 45 N. Y., at page 420;
Grant v. Grant, 29 At., 15 (Conn.);
Fuller v. Reid, 38 Cal., 100;
Thayer v. Rock, 13 Wend., 53.

30

VII.

The defense of the Statute of Frauds is available under an answer denying that deceased ever made any promise to devise the land to the plaintiff.

Lozier v. Hill, 69 Eq. 300, 59 At., 234;
Fanger v. Caspary, 87 App. Div., 417.

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VIII.

Plaintiff's testimony as to transactions with decedent is inadmissible.

- 10 Evidence Act, C. S. of N. J., page 2218,
Sec. 4;
Clawson v. Brewer, 67 Eq., 201, 58 At.,
598.

IX.

A party cannot testify in an action against an estate as to a conversation had with decedent, though a third person was present at the time, and has testified in regard thereto.

- 20 Healy v. Malcolm, 66 App. Div., 501, 73
N. Y. S., 259;
Glasgow v. Glasgow, 209 App. Div., 884,
205 N. Y. S., 559.

X.

- 30 The husband alone is the proper plaintiff for services rendered, such as assisting and caring for the testator and his wife and acting as a companion to them, in an action, when the engagements for such services were made with the wife and the services were performed by her.

- Wooster v. Eagen, 88 L., 687.

XI.

The contract, if not in writing, should be proved by disinterested witnesses and the evidence must be definite, clear and convincing.

- 40 Re Housman's Estate, 169 N. Y. S., 277.

[47113]

33

New Jersey Court of Errors and Appeals

SADIE HIRSCHBERG,
Plaintiff-Respondent,

vs.

HARRY HOROWITZ and DAVID
COHN, as executors of the Last
Will and Testament of ISRAEL
HOROWITZ, deceased,
Defendants-Appellants.

Action at Law.

On Appeal
from Supreme
Court,
Passaic
County.

BRIEF FOR APPELLANTS.

This is an appeal from a judgment of the Supreme Court for \$9,000.00 damages entered in this cause on January 14, 1928, after a trial before Hon. Newton H. Porter, C. C. J., and a jury.

The complaint alleges that on or about March 1st, 1923, Israel Horowitz, the defendants' testator, entered into an agreement with Sadie Hirschberg, the plaintiff, "that if she and her husband would give up the home occupied by them and return and remain with him, the said Israel Horowitz and his wife, during their lives, assisting and caring for them and acting as a companion, that he, the said Israel Horowitz, would *devise and bequeath to her*, the said Sadie Hirschberg, and to her absolutely, *his entire estate of which he would die seized and possessed*; that the said plaintiff, Sadie Hirschberg, accepted said offer, and remained with the said Israel Horowitz and his wife until their respective deaths (December 8 and No-

vember 24, 1925) and cared for them and acted as a companion to them in accordance with the terms of said contract; that said Israel Horowitz did not, by any last will and testament, or in any other way, comply with the contract by leaving his estate to the said Sadie Hirschberg, but wholly failed to do so" (p. 8, l. 18); that after the will of Israel Horowitz was proven, the plaintiff made a demand on the defendants (the executors) to fulfill said contract, but said defendants refused to pay over said estate or any part thereof; that the value of said estate is \$12,000, for which amount plaintiff demands judgment.

The answer denies that Israel Horowitz, defendants' testator, made the alleged contract.

The complaint is based on an alleged special contract. It is not an action for the value of plaintiff's services. It is not a suit in equity for specific performance, where the doctrine of part performance might be called into play.

It should also be noted that there is no allegation of fraud in the complaint and the record contains no proof or even intimation thereof.

In our recital of the facts, we ask the court to bear in mind that all of the testimony in this cause was given by plaintiff's witnesses; and that the defendants did not introduce any testimony by way of defense, because, as will appear from the very nature of the case, that was impossible.

The alleged contract was oral (p. 13, l. 33).

The defendants' testator died seized and possessed of real and personal property of the value of about \$11,000.

The plaintiff was a second or third cousin of the said Israel Horowitz. When she was eight years of age, she was taken into the home of the Horowitzes, who were a childless couple. She was sent

to school, boarded, clothed and suitably maintained by them. They were very kind and affectionate towards her and she, likewise, was kind and affectionate towards them. She went to school until she was fourteen years of age, when she was graduated from a grammar school. She assisted Mrs. Horowitz about the house, performing household duties somewhat after the fashion of a child in similar circumstances—washing dishes, making beds, sweeping and house-cleaning, according to her years. She never worked outside of their home. At the age of twenty-five, she married Arthur Hirschberg, a shoe salesman. As a wedding present, the Horowitzes gave her \$1,500.

She was never legally adopted, and was married under her own name of Sadie Rosenberg.

Upon her marriage (February 22, 1920) she and her husband took up their residence with the Horowitzes, paying \$25 monthly as rent, and in addition, one-half of the household expenses. They lived together in a five-room apartment in a two-family frame dwelling house, the property of Israel Horowitz, at No. 242 Van Houten Street, Paterson, N. J. They continued to reside there until November 1, 1922, during which time two children were born unto them.

The plaintiff's husband occasionally had spats with the Horowitzes (p. 23, l. 18; p. 38, l. 40). Because of the fact that the children were getting on the nerves of the Horowitzes (p. 16, l. 20), the Hirschbergs moved to East 31st Street, Paterson, about November 1, 1922. Their relations continued to be friendly.

Some time prior thereto, Hirschberg had gone into the shoe business with \$2,000, which he received from his wife; \$1,500 of this was the wedding gift of the Horowitzes, and the remaining

\$500 was moneys which had been saved by the plaintiff while living with the Horowitzes, and wedding presents.

Arthur Hirschberg testified that in November or December, 1922, about four or five weeks after their removal into their new home, and on several occasions, Israel Horowitz said to him and his wife, that if she and her family would return to his house and live with them, he would give her everything when he died (p. 18, l. 20); and that his wife thought the matter over, consulted him and about five or six weeks after they had moved into their new home, she agreed or consented to go back (p. 19, l. 10).

The only other witness who testified as to being present when Israel Horowitz made said promise was Gertrude Herman, a sister-in-law of the plaintiff. She was a frequent visitor at their home and occasionally saw Israel Horowitz.

The plaintiff produced two other witnesses who testified that Israel Horowitz had made declarations at different times to the effect that he had promised the plaintiff that if she would return to his home with her husband and children, he would leave her everything he had when he died. One was Grace Spivak, a nurse, who had known the plaintiff, as well as the decedent, for about twelve years, and who attended the Horowitzes in their last sickness. The other was Mrs. Maines, who resided next door at 246 Van Houten Street, and had known decedent ten months. About one month after she met him, and also on one other occasion (p. 57, ll. 20-30), Israel Horowitz told her, in backyard conversations, that he had promised the plaintiff that if she came back, he would give her all he had when he died (p. 57, l. 18). Mrs. Maines never visited the Horowitzes, nor they, her.

Throughout the trial, defendants objected to all the questions addressed to the alleged oral agreement, as incompetent by reason of Section 5 of the Statute of Frauds, which requires that any contract or sale of lands, tenements or hereditaments or any interest in or concerning them be in writing to be enforceable; and also to the questions as to the alleged declarations of decedent on the ground that they were merely declarations of testamentary intention and not admissions against interest. Said objections were overruled and exceptions duly taken.

When the Hirschbergs moved to East 31st Street, the rent of their five-room apartment was \$45, and naturally, there was no sharing in the household expenses. They lived there about four months (November 1, 1922, to March 1, 1923). When they moved back to the Horowitzes, about March 1st (which is the date the complaint alleges the agreement to have been made), Hirschberg's shoe business apparently was not very good. He admits that he borrowed money from Horowitz in March, 1923, and that several suits were instituted against him between that time and July or August, 1923, when he was petitioned into bankruptcy (pp. 31-34).

His sister, Gertrude Herman, testified that "when Arthur went back to live with Mr. Horowitz, he had a little difficulty about paying his one-half share of the coal, gas, electricity and rent, and so forth" (p. 66, l. 12). Of course, when they returned, it obviously meant a considerable saving for the Hirschbergs. The rent was \$25 monthly instead of \$45, and one-half of the household expenses was borne by the Horowitzes, although they were only two elderly people and the Hirschberg family consisted of four persons.

When they moved back to the Horowitz house at No. 242 Van Houten Street, they lived by themselves for about one month on the first floor (p. 81, l. 37), and then the Horowitzes moved downstairs. After a few weeks the Hirschbergs and Horowitzes moved into the apartment upstairs.

When Israel Horowitz was *in extremis*, he spoke to Miss Spivak, his nurse, about his brothers and sisters, of their homes, and of their families (p. 52, l. 25). It is a significant fact that his will, in which he devised and bequeathed his entire estate (after the death of his wife and the payment of certain charitable bequests) to his sisters and brothers and their issue, was made November 12, 1920, about ten months after the marriage of the plaintiff, and about two years prior to the making of the alleged agreement (Pltff's. Exhibit, p. 93).

The conclusion is inescapable that Israel Horowitz, a man of very small means, felt that he had done his full duty to the plaintiff in raising her from tender years to womanhood, and then marrying her off. Being childless, his next thought (after his wife) was of his brothers and sisters, his next of kin.

When the Hirschbergs met with business reverses, and had to cut down on expenses, his house and then his home was open to them. That is why they returned.

Hirschberg and his sister, Mrs. Herman, and Mrs. Maines, all testified that much of the housework was done by the plaintiff. It must be borne in mind, however, that considerable of this work was necessitated by her own family requirements. Hirschberg also testified that the Horowitzes took in a cleaning woman on an average of once a week or every other week (p. 39, l. 23; p. 40, l. 15).

The record is absolutely barren of any proof whatever that Israel Horowitz agreed to *devise*

and bequeath to the plaintiff the entire estate of which he would die *seized and possessed*; unless it is to be implied in his alleged promises to leave everything he had to the plaintiff; and we are unable to find any evidence that the alleged agreement was conditioned on the plaintiff's assisting and caring for the Horowitzes and acting as a companion to them.

We desire to call to the court's attention, that defendants' trial memorandum was submitted to the trial court at the very outset of the trial. Our purpose in incorporating it in the state of the case is to apprise this court of the fact that the theory and basis of our defense of this action was specifically called to the attention of the trial court.

It is our contention that the agreement alleged in the complaint is void and unenforceable, as it developed at the trial that the contract was not in writing, and that Israel Horowitz died seized of real property (his house at No. 242 Van Houten Street) of the value of about \$8,000, and possessed of personal property of the value of about \$3,000.

A motion for a non-suit was also made on the ground that the Statute of Frauds prevented a recovery on the special contract, and that this action should have been brought by the plaintiff's husband, because of the nature of plaintiff's alleged services (pp. 84 and 85).

The grounds of appeal, which follow, are comprehended in and will be discussed under these points:

1. An oral agreement to devise and bequeath real and personal property is void under the Statute of Frauds.

2. If a part of an entire contract is void under the Statute of Frauds, it is void *in toto*.

3. Plaintiff's testimony as to transactions relating to the alleged agreement with decedent is inadmissible.

4. The agreement alleged being void, if a recovery is sought for the services testified to, performed at the request of the decedent, the action must be in assumpsit on a *quantum meruit* and must be brought by the husband.

5. No evidence was produced in support of the contract set forth in the complaint.

6. The judgment should be reversed, and the complaint dismissed.

Grounds of Appeal.

1. The court refused to non-suit the plaintiff, although a non-suit should have been granted pursuant to defendants' request.

2. The verdict is contrary to law.

3. No evidence was produced in support of the contract set forth in the complaint.

4. The charge of the court was contrary to law.

5. The verdict of the jury, under the charge of the court, was based on facts not involved in the issue raised by the pleadings.

6. The court charged the jury:

(a) "The suit is based upon a contract which Mrs. Hirschberg says she had with Mr. Horowitz, deceased, whereby she was to render certain services for him, whereby he was to pay her at the close of his life, or after his death, a sum equal to the value of his estate."

(b) "But there was testimony with respect to the contract by others who were present and by others who testified that the deceased at

different times subsequently expressed himself as having made such a contract. I have reference to Mrs. Maines, whom you will recall for ten months prior to the death of Mr. Horowitz lived next door, and to her testimony with respect to the conversations that she had and how they came about, with respect to the disposal of his property, over the back fence. There is also the testimony of the nurse, whose name I have forgotten, who was told, she says, by the deceased that he wished to see the plaintiff, Mrs. Hirschberg, on the Sunday night preceding his decease; that Mrs. Hirschberg was summoned by her to the sick bed, and that Arthur Hirschberg, her husband, accompanied her, at which time there was a declaration by him to the effect that there was this existing contract. And at that time, the testimony of that witness is, there were instructions given that an attorney be summoned, because the question was asked the deceased whether he had provided for the carrying out of this contract by the provisions of his will."

(c) "Now, you will recall that the plaintiff's contention is that after her marriage she continued to live with Mr. and Mrs. Horowitz and did so for a period of about four years, during which time two children were born to them; that then there came some friction, or at any rate, the elder couple suggested that they better have a home of their own, the children annoyed them, and so they established a home of their own, I think the testimony was on November 1, 1922; that they maintained that home independently of the old folks from that time until March 1, 1923; that some weeks after they had made that move—I think the testimony was five or six weeks, the proposition was made to them by Mr. Horowitz to return, that he missed them, that he missed the children; and then it was that the contract had its inception, then it was that he offered as an inducement for them to come and resume living with him and taking care of him and his

wife; that he offered them compensation, and that he made the contract with them that if they would do that they would have whatever he had when he got through with it."

(d) "Now, it is true, as counsel for the defendants says, that we have in this State a statute known as the Statute of Frauds, which requires, under certain conditions, that contracts be in writing. But that statute says that contracts to work or for services must be in writing if the services referred to in the contract are to be performed within a year. This contract is not within the Statute of Frauds, in the opinion of the court, because it was not to be performed within a year, necessarily. No one could tell how long it might take. And so I say that all that you must decide in this case is, under the evidence, whether or not there was such a contract."

(e) "There is no dispute that it was not in writing. My ruling is that it need not have been in writing. My ruling is that if there was a contract, as is alleged by the plaintiff, it was an enforceable contract."

(f) "The contract, it is contended, was that Mrs. Hirschberg was to receive all of his belongings; in other words, all of his property or all of his estate."

(g) "The only testimony we have with respect to the estate is the testimony of Mr. Harry Horowitz, that the estate amounts to a little over eleven thousand dollars, and on cross examination it developed that there had been no commissions paid the executors, and there were still some administration expenses to be paid, as I recall it."

"Now perhaps it may not be important as to the exact amount of your verdict, because if your verdict is larger than the estate it cannot be paid, because there is nothing to pay it with. If, on the other hand, there are bills that must be paid out of the funds that the executors have, they would have to be paid if they were a prior claim against the estate, that is, prior

to this claim. That would be true if they were commissions to executors and accounting fees. So the testimony that you have is a little over eleven thousand dollars, and that means, I assume, eleven thousand dollars, at any rate. That is the only definite amount, perhaps, that you could fix."

7. The action should have been brought by the husband of the plaintiff who is entitled to her earnings and wages for the services testified to.

8. The defendants' testator was seized of real property at the time it is claimed that the alleged contract was made, as well as at the time of his death.

9. The court erred in holding that an oral agreement that decedent would devise his real estate and bequeath his personal property was valid with respect to the personal property and in admitting evidence in reference thereto.

10. The court admitted illegal evidence on behalf of the plaintiff, to wit, testimony in reference to the alleged oral contract.

11. The court refused to strike out all the testimony as to the alleged oral contract although it appeared that defendants' testator had died seized of real property.

12. The following question to the witness, Arthur Hirschberg was admitted:

"What was the understanding that was had between you and Uncle Israel, as you knew him, with reference to your living there at the time?"

13. The court erred in permitting the witness Arthur Hirschberg to testify that the plaintiff told his sister (Mrs. Gertrude Herman) and Mrs.

Maines that she had decided to go back with her uncle.

14. The court erred in permitting the witness Harry Horowitz to testify that the value of the estate at the present time was a little over Eleven thousand (\$11,000) Dollars.

15. The court erred in permitting the witness Harry Horowitz to testify that the house was sold and all the estate was converted into cash after decedent's death, and that he, acting as an executor of the decedent's estate, sold it to one Hickey.

16. The court erred in permitting the plaintiff to testify as to the services rendered by her for the decedent.

POINT I.

An oral agreement to devise and bequeath real and personal property is void under the Statute of Frauds.

Sec. 5 of Act for the Prevention of Frauds and Perjuries:

"5. Promises and agreements not binding unless in writing.—That no action shall be brought * * * (4) upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized." C. S. of N. J., page 2612, Sec. 5.

In *Lozier v. Hill*, 68 N. J. E. 300, we quote from the opinion of Stevenson, V. C.:

"The alleged contract of Mr. Kip to devise the land in question to the complainant is within the Statute of Frauds." *Browne Fraud*, Sec. 263; *Johnson v. Hubbell*, 10 N. J. E. 332; *Gould v. Mansfield*, 103 Mass. 408; *Harder v. Harder*, 2 Sandf. Ch. 17.

"The answer does not set up the Statute of Frauds as a defense, but it denies that Mr. Kip ever made any promise to devise the land to the complainant. Upon such an answer, the defendant has the full benefit of the Statute of Frauds as a defense. (Citing numerous cases.)"

In *Cooper v. Colson*, 66 N. J. E. 328, Fort, J., in delivering the opinion of the Court of Errors and Appeals, said:

"This is a suit in equity for specific performance of an alleged contract for the devise of lands. The bill is filed against the heirs-at-law of Joseph P. Colson, who died intestate, leaving three farms in the County of Salem, in this State.

"The bill states the alleged agreement to have been

"That if your oratrix would continue to live with him (Colson) and act as his house-keeper, to serve him and look after his interests, as she had done, he would compensate her fully and completely; that he would "leave" her a farm; by which words your oratrix charges that said Joseph P. Colson meant, and did intend for your oratrix to understand, that he would make and execute his last will and testament, and would therein, in due form of law, devise to her a farm."

"The prayer of the bill is that the heirs-at-law be decreed

"to convey to your oratrix, her heirs and assigns, the farm and plantation of which the said Joseph P. Colson died seized and hereinbefore particularly described and set forth, known as the "Peterson Farm.""

"The answer denies the agreement as alleged in the bill or any other agreement of like character.

"The proof shows, I think, that the agreement was made, and that Colson frequently stated that he did intend to leave to the complainant the Peterson Farm or that the Peterson Farm was hers, or similar statements which clearly indicate that a parol agreement was made to devise, in consideration of the labor and services of the complainant, the Peterson Farm to her.

"By our 'Act for the Prevention of Frauds and Perjuries,' approved March 27, 1874, it is provided:

"That no action shall be brought * * * upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, * * * unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.'" Gen. Stat., page 1603, Sec. 5.

"An agreement to convey or devise lands wholly in parol is unenforceable at law. It is equally so in equity, unless. * * *

"* * * Most scrupulous care should be exercised by the courts in this class of cases, and especially where one of the alleged contracting parties is dead. An allegation of an agreement to convey is easily made and casual conversations or jocular remarks of intent to devise or convey at death can readily be turned into serious import. The statute declares that agreements to convey land not in writing are void. If equity is to overthrow the statute on the ground that, owing to the peculiar character of the facts in a given case, it would be a fraud not to hold one of the contracting parties estopped from setting up the statute, such power should be exercised upon the most clear proof, not only of the contract

to devise or convey the land in question, but of the fact that the rendition of the services was wholly referable to the contract to convey and solely predicated upon that agreement, and that proper and adequate compensation for the services cannot otherwise be made, because of the fact that, in reliance upon the contract, it appears reasonably probable that the complainant has irretrievably changed the whole course of his life and circumstances in order to fulfill his part of the agreement."

The case of *Smith v. Admrs. of Smith*, 28 N. J. L. 208, was an action at law, and is therefore particularly in point. We quote the following from the opinion of Green, C. J.:

"The contract proved upon the trial of this case, or what the evidence tended to prove, was clearly within the Statute of Frauds and Perjuries. It was a contract for the transfer of an interest in land. The plaintiff, who was tenant from year to year of his father (the defendant's intestate) erected new buildings upon the demised premises upon the authority of his father, who told the plaintiff, to go on and build, and the farm should be his," or, as another witness testified, "to go on and fix what he had a mind to—he had left it to him."

"The evidence in the cause would have warranted the jury in finding that the plaintiff erected the buildings with the consent and approbation of his father, upon his express promise that the farm should be his upon his father's death, by deed or devise. The contract to transfer the land being within the Statute of Frauds, was void and cannot form the foundation of an action. The plaintiff, therefore, clearly could not sue upon the special contract."

Pond v. Sheean, et al., 132 Ill. 312 (1890), although a suit in equity, treats of a situation simi-

lar to the instant case. The opinion of the Supreme Court was delivered by Mr. Justice Craig:

"This was a bill in equity, brought by Hattie Pond, to set aside the last will of Bradner Smith, deceased, and to enforce the specific performance of a parol agreement alleged to have been made on or about Dec. 1, 1857, between Marshall B. Pierce, father of complainant, and Bradner Smith, under which the complainant claims all the property, both real and personal, which the said Bradner Smith owned at the time of his death. * * *"

* * * * *

"The executor and devisees under the Will put in an answer to the bill in which they denied the making of the alleged contract and plead the Statute of Frauds thereto. They also denied all the substantial allegations of the bill. * * *"

* * * * *

"The contract under which complainant was taken into the Smith family was claimed to be proven by one witness, who was present when the contract was made—Mrs. Pierce, now the widow of complainant's father. * * *"

"The declarations of the Smiths on different occasions during the time that Hattie resided with them were proven by several witnesses, to the effect that what they had would be hers when they were through with it, that she would be an heir, etc., but no person now living heard the contract except Mrs. Pierce whose evidence is given above. At the time the arrangement relied upon was made, Smith owned real and personal property, and as heretofore shown, he owned real and personal property at the time of his death. Mary Smith, the wife of Bradner, died May 21, 1885, and the latter died March 31, 1887.

"There is no controversy in regard to the fact that complainant, from the time she was four years of age, until she married, at the age

of twenty-nine, on Oct. 10, 1880, resided with the Smiths as a member of their family. She was boarded, clothed, and educated by them and at the same time, she performed such services as are usual in a family occupying the position in society that the Smiths occupied. So far as appears, she was treated as a child, and no doubt performed the same services and received the same advantages in education, clothing and other respects, that she would have received if she had been a child of the Smiths. Whether Bradner Smith, in raising complainant from infancy to womanhood, in clothing and educating her, in aiding her to consummate an advantageous marriage, in giving her property, did all that, in morals, he should have done, is not a question we are called upon to determine. The complainant seeks by her bill, the specific performance of a parol contract. Under the contract, she claims personal property, choses in action, and real estate, but as she never was in possession of any of the property under the contract, the Statute of Frauds being pleaded, is she entitled to a decree? While other questions are involved, this is the most important one. * * *

* * * * *

"A case much in point is Wallace v. Long, 105 Ind. 522. In that case a child seven years old was taken under an agreement that if she would live with decedent and her husband until their death, they would make her their heir, and at their death, they would will her their entire estate. Property, real and personal, was left, of the value of \$6,000 but no will was made as per the contract. In deciding the case it is said:

"If the Statute of Frauds presents no obstacle to the enforcement of the contract, then, so far as the record discloses, none exists. It cannot, of course, be denied, that if the contract had been in writing, or if, in pursuance of an oral contract, the plaintiff had been put in complete possession, and she had otherwise

fully performed on her part, specific performance could have been enforced. It would then have presented a case analogous in principle to *Mauck v. Melton*, 64 Ind. 414. This much has been said to show that the only impediment in the way of a specific enforcement of the contract involved in this case is the Statute of Frauds. When the title to property is to be acquired by purchase, the Statute of Frauds will operate upon and affect the contract in precisely the same manner, whether the consideration for the purchase is to be paid in services, money, or anything else. In either case, such a contract, being in parol, and entirely executory, cannot be enforced by either party. That the evidence in this case tends to support the view that it was the purpose of the intestate to make provision for the plaintiff's ward by a will, may be conceded; but as the agreement to do so was never manifested in writing, signed by her and as it involved an agreement for a sale of real estate and for the transfer of personal property, such agreement was subject to the operation of the Statute of Frauds, equally with all other agreements for like sales. Because the agreement was not withdrawn from the operation of the statute by part performance, it cannot be specifically enforced; neither can it be the foundation of an action for damages.

"It will be observed that in the case cited, while the agreement was one of the same character as the agreement involved here, the same rule was held to apply as if it was a mere verbal sale of real estate, where no possession has been taken under the contract.

"In view of the authorities, we are able to arrive at but one conclusion, and that is, that the contract relied upon, resting in parol, is within the Statute of Frauds, and void. Conceding that the complainant was taken into the family of the Smiths under an arrangement as testified to by Mrs. Pierce, and that they were to leave her their property when they were

done with it 'in consideration of the future care, nurture and services of complainant,' and treating the surrender of complainant by her father, and such services as she may have rendered, as a payment for the property agreed to be given her, still, as she never obtained possession of any of the property under the contract, under the authorities, the agreement resting in parol, was void by the Statute of Frauds and can not be enforced in a court of equity. It is imposing no hardship upon parties, where the title to real property is involved, to require their contracts to be reduced to writing, and it is the safer rule. Where the terms and conditions of a contract depend upon the recollection of witnesses after the lapse of many years, as is the case here, there is always much uncertainty in regard to what the contract really was; and where the title to real property is involved, no rule ought to be adopted which will encourage the making of such contracts."

In *Lasher v. McDermott*, 173 App. Div. 79 (1916), *Cochrane, J.*, said:

"Without reference to the sufficiency of the evidence to establish the plaintiff's alleged oral contract, it is clear that she cannot prevail on this appeal. The action is at law and not in equity. The contract to make compensation in real estate not being in writing is void under the Statute of Frauds, and whatever relief might be granted the plaintiff in an action in equity, the court is powerless to grant relief in this action beyond what the trial justice has already granted. (Citing cases.)"

In *Ludwig v. Bungart*, 48 App. D. 614 (1900), the alleged agreement was an oral promise by defendant's testatrix to devise and otherwise transfer to the plaintiff, a house in which the promisor

resided and conducted a store, together with the contents of the store, upon her death, if the promisee would collect the rents of certain other premises and have her son perform certain services about the promisor's property and would attend to the payment of the taxes on both properties, and would go to the store and residence of the promisor every evening and stay with her until it was time to close the place. The plaintiff performed the agreement on her part, but received nothing for so doing, inasmuch as the promisor failed to devise the premises in question, or otherwise transfer the same to the plaintiff. Judge Willard Bartlett said:

"The complaint was properly dismissed as to the second alleged cause of action. The gist of that cause of action is the breach of an oral contract for the conveyance or devise of real property. Such an agreement is void under the Statute of Frauds, unless there has been such performance on the part of the plaintiff as to take it out of the operation of that Statute."

Gould v. Mansfield, 103 Mass. 408 (1869) holds that an oral promise to make a will of all the testator's property, real and personal, in favor of a person who, in consideration thereof, agrees to make a similar will in favor of the first testator and makes one accordingly, is a contract for the sale of lands, within the Statute of Frauds.

We quote from the opinion of the Supreme Court, Chapman, C. J.:

"If we look at the character of the act to be done, we find that a will is considered in the nature of a conveyance by way of appointment." Harwood v. Goodright. Cowp. 87, 90. "It doth as effectually give and transfer estates, and alter the property of lands and goods, as

acts executed by deeds in the lifetime of the parties." 1 Shep. Touch. 402. "A devisee comes within the legal definition of one who takes by purchase." Watkins on Descents, 155. And the contract set forth in the bill is a contract to convey by the act alleged, a title in fee simple to lands for a consideration. In Harder v. Harder, 2 Sandf. Ch. 17, such a contract was held to be within the Statute of Frauds, and in Walpole v. Orford, 3 Ves. 402, Lord Chancellor Loughborough so regarded it. See also Browne on Statute of Frauds (3rd ed.), Sec. 263. In the recent case of Caton v. Caton, Law Rep. 1, Ch. 137, and 2 H. L. 127, the same doctrine was held. We see no ground to differ from these authorities, and must regard it as a contract for the sale of lands, within the Statute of Frauds."

We quote from the opinion of Baldwin, C. J., in the case of Schempp v. Beardsley, 83 Conn. 34 (1910):

"In 1885, Agnes Coffey, a single woman of sixty-five, who had not heard from any of her relatives for thirty years and did not know that any of them were still alive, orally agreed with Adam Schempp and his wife that if they would live with her in a house which she was ready to buy for that purpose, and there support her properly as long as she should live, she would give them all her property when she died. She bought a house, a few weeks later, and they, relying on the agreement, moved into it, and supported her there properly as long as she lived. A few years after the purchase, she had their oral agreement put in writing, signed it, and had Adam Schempp sign it, telling him that the effect of this paper would be to give him and his wife all her property upon her death. After her death, fragments of this paper were found in her room, but not enough to form a memorandum in writing which would

avoid the effect of the Statute of Frauds. She died Mar. 19, 1907, leaving a will executed in 1906 and a codicil executed in 1907, which gave all her property to certain relatives. The existence of such a will she fraudulently concealed from the Schempps, and they first learned of it after her death. The value of the support which they furnished her was \$12,500.

* * * * *

"The Superior Court ruled that the agreement under which the Schempps claimed was within the Statute of Frauds and absolutely void; that if any recovery could be had, it must be upon a *quantum meruit* only; and that, on the latter basis, they could recover for all the support furnished since 1885.

* * * * *

"Her contract being in part for the conveyance of real estate, the plaintiffs can support no action upon it. It was not, however, a mere nullity. While the Superior Court has found that it was void, we understand this to be simply a mode of stating that it was within the Statute of Frauds. * * *"

Because of its clarity and forceful application to the facts of the case at bar, we quote at great length from the opinion of the court in *Grant v. Grant*, 29 Atl. 15 (63 Conn. 530), the case being fully stated in the opinion:

"FENN, J.—The plaintiff, now twenty-three years of age, when about four, went to reside with William Grant of Torrington, and his wife, in consequence of a verbal promise made by Mr. Grant to her parents, that if they would let him adopt the child as his own, he would take her with him to his home, and as he and his wife had no children of their own, they would educate and maintain her; that he had some property and when he died the child should have it, what there was left of it, just the same as if she were his own daughter. Im-

mediately after she went to reside in the family, Mr. Grant and his wife commenced calling her 'Tiny Grant', by which name she has ever since continued to be known and called. Mr. and Mrs. Grant were always kind and affectionate towards her, treated her as their own daughter, clothed, maintained and educated her in the district school of the town, and did everything for her which kind and affectionate parents could or would do for their own daughter.

"On the other hand, she was kind and affectionate towards them and did everything for them which a kind and affectionate daughter could or would do for her parents. After she arrived at a suitable age, she assisted Mrs. Grant about the house, washed the dishes, made the beds, did sweeping and house cleaning, according to her years, and ran errands as required. This she continued to do down to the date of Mr. Grant's death. On three or four occasions he was sick, and suffered on each of these occasions for several weeks. On these occasions she waited upon him, nursed and cared for him, and he refused to let anyone else attend upon him. He stated to her that she would be well rewarded for what she had done for him and for his wife. 'You remain with us, Tiny,' said he, 'and after I am gone, you will be well provided for; what I have left shall belong to you.' These remarks and others like them, he made a great many times to the plaintiff, to his wife, and to a number of his neighbors. In consequence of these promises made to her parents and to herself, the plaintiff was induced to remain with Mr. and Mrs. Grant as she did.

"Mr. Grant died March 4, 1893, leaving no children of his own, but a wife and sister survived him. He died intestate, having never adopted the plaintiff in accordance with the laws of this State. She had never requested such adoption, because she did not know or

understand that any legal formalities were required, and expected that Mr. Grant would make the promised provision for her by will. His property at the time of his death consisted of a little over \$12,000 in all; of which about \$1,200 was real estate.

"The above facts, found by a committee are, though in greater detail, in substantial accordance with, and affirmance of, the allegations of the plaintiff's complaint against Mrs. Grant (widow) and as administratrix of the decedent's estate. Upon such recited facts, the claim of the plaintiff, as quoted from the brief in her behalf, was:

"If William Grant had made a will, devising and bequeathing all of his estate to this plaintiff, his widow would first be entitled to one-half of the personal property, and to the use of one-third of the real estate.'

"The plaintiff asks for a decree that the other half of the personal property shall be paid over to her; and that the title to the real estate, subject to the widow's dower, shall be vested in her, or that a decree will be passed giving her an equivalent for these.

"The committee, in addition to the facts above recited, also made the following finding:

"The plaintiff also asks me to find the value of her services to Mr. Grant while she remained in his family, for the purpose of obtaining judgment for the amount, in case she is not entitled to the equitable relief prayed for. On this subject, I find it impossible to place a pecuniary value on the plaintiff's affection and tenderness for Mr. and Mrs. Grant. I find, however, that for the seven years next preceding Mr. Grant's death, on March 4, 1893, her services to Mr. Grant were and are reasonably worth, as a mere servant, \$12 per month, and that interest should be computed thereon, if the above facts will authorize it; and if it is legally and equitably right so to do, I find that this interest ought to be compounded annually.'

"From the foregoing statement, it is manifest that the reservation of this case for advice, made by the Superior Court, presents for our consideration two questions: First, is the plaintiff, upon the facts found, entitled to the specific equitable relief prayed for? And second, if not, is she entitled to recover damages in this action, and upon this complaint?

"It seems to us that there are conclusive reasons why specific performance, as prayed for, cannot be granted. The alleged contract was wholly by parol, the consideration indivisible; it provided in effect that the plaintiff, upon the death of the defendant's intestate, should succeed to a child's share in all the property of said intestate; and that such property at his death, consisted of real, as well as personal estate. The contract, therefore, was entire. It applied equally to every part of the estate. It concerned an interest in lands, and was within the Statute of Frauds. (Citing cases.)

"In some of the cases, above cited, the alleged agreement, or promise, expressly called for succession to both real and personal property; and in one of them it appeared that real property was owned at the date of the contract. In other cases, the promise did not so expressly embrace both, but was in general language as in the case before us; nor did it appear whether any real estate was owned at the date of the contract. Neither such express language, or such ownership has however, by any of the courts been regarded as controlling considerations, nor ought they to be. The mischief which the Statute was intended to remedy—the setting up parol land titles—would occur equally in either case. And in every case, in which the effect of the contract, if capable of enforcement, would be a transfer of land, and, therefore, in every case where such a result might at the time the contract was made, have been contemplated as its possible effect and afterwards found to be its nec-

essary one, if the contract is enforced, such contract falls within the operation of the Statute.

"But the plaintiff, in the brief presented in her behalf, conceding that the oral contract was within the provisions of the Statute of Frauds, contends that the finding shows such performance upon her part as relieves the case from the operation of the Statute. The adjudications upon the subject of what constitutes sufficient part performance of an oral contract to take it out of the Statute are almost numberless. * * *

* * * * *

"Even if it be imagined that relief by way of damages for breach of contract was intended, it would amount to precisely the same thing. For, waiving the consideration already advanced, based upon the clear provisions of the Statute of Frauds, which would make such a contract of no legal validity (Donahue's Appeal, supra) (62 Conn. 370) it would be impossible to fix the amount of such damages, prior to the final completion of the settlement of the estate; and no jury could legitimately determine such amount and no court, through the form of a judgment at law, as for a liquidated and definite sum, could grant the plaintiff such relief. It would only be through the more flexible and adaptable remedies pertaining to the equitable jurisdiction that the result sought could be attained. That the plaintiff, although including a demand for damages in the complaint, has not contemplated such recovery for a fixed sum, as damages, for breach of contract, is manifest; for not only is no claim therefor made in the brief presented to us in her behalf, but the committee, although making as we have before stated, at her request, a finding of facts not based upon any allegations of the complaint, has nowhere made any such finding as would enable the court, even approximately, to fix the amount of any such judgment. The value of the real

estate, and of the entire property, is indeed approximately found, but there is no statement or suggestion as to the clear estate which would remain after the payment of debts, charges and expenses; for which omissions there can probably be no better reasons than the one already given, that an accurate statement in regard to the matter, at the present time, would, by reason of necessary contingencies, be impracticable.

"And, finally, notwithstanding the finding of the committee, as to the value of the plaintiff's services, made at her request, the plaintiff, in her brief, has advanced no claim for any recovery of that character, and to that extent."

The opinion of the court in *Banta v. Banta*, 103 App. Div. 172 (93 N. Y. S. 393) is very illuminating, and we quote it at length. The action was for breach of an oral contract whereby defendant agreed on his death, to give plaintiff his farm and money in consideration of plaintiff residing on the farm and doing all necessary work about the same. The plaintiff performed on his part, but subsequently was ordered off the farm.

"PARKER, P. J. It seems to me clear that upon this complaint the plaintiff should not have recovered the verdict and judgment which was given him in the court below. The complaint is the same that was dismissed upon the former trial, and it seeks to recover upon the contract, as a valid one, and asks for the damages resulting from its breach, viz., the value of such contract. True, it was held error to dismiss such complaint upon the former trial, but it was entirely on the ground that no such issue had been tendered in this action; and the moment that the defendant's answer was amended and such an issue was presented it became apparent that the issue so ten-

dered must prevail, and that no recovery could be had against the defendant upon the cause of action therein set forth. Upon this trial, however, the plaintiff was allowed to prove, over the defendant's objection, the making of that contract by parol and the defendant's breach of it; and the defendant's motion to dismiss the complaint on the ground that such contract was void by the statute of frauds was denied. This ruling seems to have been made on the theory that, while the plaintiff could not recover damages for the alleged breach, he could recover for the value of the services which he rendered for the defendant during the time he was at work there. But very clearly there is nothing in this complaint to suggest that the plaintiff intended to ask from this jury any such relief. As a matter of law the defendant became liable to pay to the plaintiff the fair value of his services rendered while working under the attempted contract that the defendant subsequently repudiated; but he was not liable to a judgment therefor in an action brought and tried for an entirely different claim. When the plaintiff rested, the defendant took the distinct objection that the plaintiff could not, under this complaint, give evidence of the value of the services rendered to defendant by him, and therefore could not recover for the same in this action; and he also insisted that there was no evidence of the value of such services. In both of such propositions he seems to have been correct. There is no averment whatever in the complaint as to the value of such services, no evidence offered by the plaintiff of their value, and no evidence in the case concerning what the whole extent of such services was, or as to what their actual value was. The defendant then raised the question squarely that a recovery for the value of the services actually rendered could not be had in this action; and plainly same could not be had, for the simple reason that nothing in the

complaint indicated that the plaintiff sought any such relief in this action. *Reed v. McConnell*, 133 N. Y. 425, 31 N. E. 22. Also it is very clear that the issue as to what such services were fairly worth was not tried in this action. Neither party offered evidence upon that question. It was not considered by either party an issue in the action until after the evidence was all closed, and the trial judge left it to the jury to determine what the value of such services was, and instructed them to render a verdict for that amount against the defendant. Very clearly the defendant has never had any trial of that issue. He was not apprised when the trial commenced that he must meet that issue, nor was he at any time during the trial invited to meet it. No evidence was ever put before the jury that enabled them to intelligently determine what the value of such services fairly was, and a comparison of the amount of their verdict with any evidence that can be found in the case on the subject of such value demonstrates how utterly that verdict was a matter of guesswork.

"We are asked upon this argument how the plaintiff can recover anything for the services that he actually rendered the defendant between the time the agreement was made and the time he was driven from the farm, if the jury might not render him a money verdict for the same. No doubt a jury may give him such a verdict whenever he calls the defendant into court to answer to such a claim. Nor would it be necessary for the plaintiff to bring another action to so recover. He might, as soon as the defendant tendered him the defense of the statute of frauds to the agreement between them, have confessed his inability to recover damages for its breach, and have amended the complaint so as to avail himself of his right to recover for the services which he had rendered; and upon such amended pleading that claim could be properly and regularly litigated between the parties. But in

this action the plaintiff has sought to recover not for services rendered, but for the value of an alleged broken contract on the defendant's part. And he insisted upon such a recovery to the extent, even of declining to withdraw a juror and amend his complaint, and of excepting to the charge of the court which permitted the recovery he is now seeking to sustain, and of appealing from the judgment rendered thereon. True, he has now abandoned and withdrawn such appeal, and stands content with the verdict rendered; but his position is emphasized that thus far he has insisted upon his right under the contract to recover damages for its breach, and at no time has sought to recover for the amount which he actually earned.

"I am of the opinion that this judgment should be reversed, and the complaint dismissed."

See also:

Browne on the Statute of Frauds, 5th Ed., Secs. 263, 266;
 McElroy v. Ludlum, 32 N. J. E. 883;
 Jackson v. Stearns, 58 Ore. 57; 113 Pac. 30;
 Wallace v. Long, 105 Ind. 522;
 Horton v. Stegmyer, 175 Fed. 756, 760;
 Hale v. Hale, 90 Va. 728;
 Gooding v. Brown, 35 Hun 148;
 Nelson v. Schoonover, 89 Kan. 388.

Our examination of the many cases under this section of the Statute of Frauds suggests the following test: Would a Court of Equity, on the facts of this case, disregard the injunction of the Statute of Frauds, and grant a decree of specific performance as to the real estate of which the decedent

died seized and of the personal property of which he died possessed? If not, surely a Court of Law should not disregard its clear and salutary inhibition. The plaintiff, or rather her husband, can recover fully for the value of the services rendered in a quasi-contractual action.

(a) At law, a verbal contract void under the Statute of Frauds is not taken out of the Statute by part performance, or even by complete performance.

Lozier v. Hill, 68 N. J. E. 300;
 Cooper v. Colson, 66 N. J. E. 328;
 McElroy v. Ludlum, 32 N. J. E. 828;
 "Smith v. Smith, 28 N. J. L. 208;
 Browne on the Stat. of Frds., 5th Ed. Sec. 118;
 Hartwell v. Young, 22 N. Y. S. 486;
 Galvin v. Prentice, 45 N. Y. 162;
 Oddy v. James, 48 N. Y. 685;
 Booker v. Heffner, 95 App. Div. 84;
 Wallace v. Long, 105 Ind. 522.

In *McElroy v. Ludlum* (supra), the opinion of this court was delivered by Mr. Justice Depue. He said on page 832:

"But if the evidence established the agreement set out in the bill, the complainant would, nevertheless, be debarred of the relief prayed for. The suit is in substance an action to enforce a legal demand. It must, therefore, be decided upon the legal principles by which the right of a party to recover compensation for services rendered, under a contract invalid by the Statute of Frauds, is determined. Performance of a contract invalid by the statute,

will not validate the contract so as to enable a party to enforce it by an action upon the contract. Unless in cases specially provided for in the statute, part performance will not validate the contract at law. The dictum that part performance will make valid a contract invalid by the statute of frauds, is exclusively the creature of equity, and applies only to contracts relating to lands, and does not extend to contracts relating to other matters. (Citing cases.) The only remedy in such cases is by an action on a quantum meruit to recover the value of the services."

(b) Recovery may be had on a quantum meruit for the value of the services but not in an action for breach of contract.

Eaton v. Eaton, 35 N. J. L. 290;
 McElroy v. Ludlum, 32 N. J. E. 828;
 Murray v. Schuldt, 73 N. J. L. 489;
 Smith v. Smith's Admrs., 28 N. J. L. 208;
 Jackson v. Stearns, 37 L. R. A. (N. S.);
 Grant v. Grant, 29 At. 15;
 Wallace v. Long, 105 Ind. 522;
 Lisk v. Sherman, 25 Barb. 433;
 Booker v. Heffner, 95 App. Div. 84;
 Matter of Sherman, 53 N. Y. S. 376;
 Fuller v. Reid, 38 Cal. 100.

In *Smith v. Admrs. of Smith* (supra) the court said:

"But will the law raise an implied promise to pay money when there was an express promise to pay in land? The answer is that the promise to pay in land was void, and, therefore, no promise. If the plaintiff had erected the buildings upon the intestate's land at his request, the law would have implied a promise

to pay for them. The plaintiff is in no worse situation because the defendant made an express promise to pay for the services in a particular mode, which promise is itself a nullity. 'The true principle,' says Mr. C. J. Nelson, is this: 'The contract being void and incapable of enforcement in a court of law, the party paying the money or rendering the services in pursuance thereof may treat it as a nullity, and recover the money or the value of the services rendered under the common counts. This is the universal rule in cases where the contract is void for any cause not illegal, if the defendant be in default.'" *King v. Brown*, 2 Hill 486.

"The principle seems to be perfectly well settled, and is sustained by very numerous authorities, that where a party to an agreement void by the Statute of Frauds fails to execute it, the price advanced, or the value of the article delivered in part performance of the contract, whether in money, labor, or chattels, may be recovered back. (Citing authorities.)

"In all such cases the law raises, by implication, a promise to repay advances made upon the faith of the contract and for which no consideration has been paid."

(c) Where services have been performed under an oral and unenforceable contract for the purchase of lands, recovery may be had only for the actual intrinsic value of the services rendered, without reference to the contract or the value of the land which was to have been conveyed.

McElroy v. Ludlum, 32 N. J. E. 828;
 Grant v. Grant, 29 At. 15;
 Wallace v. Long, 105 Ind. 522;
 Fuller v. Reid, 38 Cal. 100;
 Sands v. Arthur, 84 Pa. St. 479;

Hertzog v. Hertzog's Admr., 34 Pa. St. 418, overruling Jack v. McKee, 9 Pa. St. 235;
 Erben v. Lorillard, 19 N. Y. 299;
 Jackson v. Stearns, 58 Ore. 57;
 Banta v. Banta, 103 App. Div. 172, 93 N. Y. S. 393;
 Baxter v. Kitch, 37 Ind. 554;
 Hershman v. Pascal, 4 Ind. App. 330;
 Lisk v. Sherman, 25 Barb. (N. Y.) 433;
 Harsha v. Reid, 45 N. Y. 415, 420;
 Rawdon v. Dodge, 40 Mich. 699;
 Lane v. Colby, 95 App. Div. 11.

In *McElroy v. Ludlum* (supra), the court held that in an action on a quantum meruit to recover the value of services performed under a special contract invalid by the Statute of Frauds, which stipulates for compensation by the conveyance of property or some other collateral benefit to be conferred, evidence of the value of the property to be conveyed, or the benefit to be conferred, is not competent evidence on the subject of the value of the services rendered.

(d) The defense of the Statute of Frauds is available under an answer denying that deceased ever made any promise to devise the land to the plaintiff.

Lozier v. Hill, 69 N. J. E. 300, 59 At. 234;
Fanger v. Caspary, 87 App. Div. 417.

POINT II.

If a part of an entire contract is void under the Statute of Frauds, it is void in toto.

Pond v. Sheean, et al., 132 Ill. 312;
Gould v. Mansfield, 103 Mass. 408;
Trout v. Ogilvie, 182 Pac. 333;
Harsha v. Reid, 45 N. Y. 415, 420;
Grant v. Grant, 29 At. 15 (Conn.);
Fuller v. Reid, 38 Cal. 100;
Thayer v. Rock, 13 Wend. 53.

In *Pond v. Sheean* (supra), the court said:

"It will, however, be observed that complainant seeks by her bill to recover personal property as well as real estate, and it may be claimed that as to the personal property the agreement is not within the Statute. The contract, however, must be regarded as an entirety, and if void as to real estate, it must also be held void as to personal property. This is a rule of law well established." *Meyers v. Schemp*, 67 Ill. 469.

In *Gould v. Mansfield* (supra), the court said:

"It is unnecessary to consider the provision of the Statute of Frauds as to the personal property, it being indivisible from the real estate in respect to the alleged contract, if indeed there be such property of any considerable value."

At the very outset of the trial, the court's attention was specifically called to this point, and to the authorities sustaining it (p. 14, ll. 30-40).

POINT III.**Plaintiff's testimony as to transactions relating to the alleged agreement with decedent is inadmissible.**

Evidence Act, C. S. of N. J., p. 2218,
Sec. 4.

Clawson v. Brewer, 67 N. J. E. 201, 58 At.
598.

Dickerson v. Payne, 66 N. J. L. 35.

Baker v. Bancroft, Ex'r, 69 N. J. L. 223.

Section 4 of the Act concerning Evidence (Rev.
of 1900) :

"4. PARTY TO CIVIL ACTION; Representative Capacity of other parties; Transactions with Decedents.—In all civil actions any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; provided, this section shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator or intestate represented in said action, unless the representative offers himself as a witness on his own behalf, and testifies to any transaction with or statement by his testator or intestate, in which event the other party may be a witness on his own behalf as to all transactions with or statements by such testator or intestate, which are pertinent to the issue."

The case of Dickerson v. Payne (supra) holds that in an action brought against an administrator to recover for services rendered to the intestate by the plaintiff as housekeeper and nurse, the

plaintiff is not competent to testify to services rendered in the presence of the intestate.

Defendants objected to the testimony of the plaintiff, that she did the cooking and special diets for Israel Horowitz (p. 82, l. 35, and p. 83, l. 1).

POINT IV.

The agreement alleged being void, if recovery is sought for the services testified to, performed at the request of the decedent, the action must be in assumpsit on a quantum meruit and must be brought by the husband.

Wooster v. Eagen, 88 N. J. L. 687.

Kleinert v. Hutchinson, 98 N. J. L. 831.

In Wooster v. Eagen (supra) the opinion of this court was delivered by Mr. Justice Black :

"* * * It is conceded that at common law the husband was entitled to the earnings of his wife, but it is urged in this case, that where the engagement is actually made by the wife with the consent of the husband, the situation is then controlled by the provisions of the Married Women's Act (3 Comp. Stat. p. 3225, Sec. 4) which provides that the wages and earnings of any married woman, acquired or gained in any employment, occupation or trade in which she is employed, and which she carries on separately from her husband, shall be her sole and separate property as though she were a single woman. Tresch v. Wirtz, 34 N. J. E. 124.

"It is obvious that the statute does not apply to this case, for the reason that the wife was not carrying on a separate business, in the course of which she performed these ser-

vices. The case of *Garretson v. Appleton*, 58 N. J. L. 386, in this court, is cited by the appellant. In that case, the action was brought in the name of a married woman against an estate for services which she alleged she rendered to the deceased during his illness. It was conceded by both opinions delivered in that case, that no right of action existed in the wife. There was no difference of opinion in the court on that point."

POINT V.

No evidence was produced in support of the contract set forth in the complaint.

In *Rosseau v. Rouss*, 180 N. Y. 116, at page 121, Vann, J., delivering the opinion of the Court of Appeals, said:

"* * * Thus, the evidence relied upon to establish the contract is, first, the testimony of the mother, who tried to swear \$100,000 into the pocket of her own child, and second, the testimony of witnesses who swear to the admissions of a dead man. The former is dangerous; the latter is weak, and neither should be acted upon without great caution. We have repeatedly held that such a contract must not only be certain and definite, and founded upon an adequate consideration, but also that it must be established by the clearest and most convincing evidence. We have been emphatic in condemning these agreements, because they 'have become so frequent in recent years as to cause alarm.' We have been rigid and exacting as to the sufficiency of the evidence to establish them, and have condemned the proof thereof 'through parol evidence given by interested witnesses.' As 'such contracts are easily

fabricated and hard to disprove, because the sole contracting party on one side is always dead when the question arises', we have declared that they 'should be in writing, and the writing should be produced, or, if ever based upon parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses (citing cases).'"

In *Lozier v. Hill*, 68 N. J. E. 300, Stevenson, V. C., said:

"* * * The proof of a legal contract, as distinguished from a mere declaration of a testamentary intention, is unsatisfactory. Leaving out of view, for the present, the mere form of the contract and the absence of any written evidence of it, the fact that a verbal contract was made as alleged in the bill of complaint certainly ought to be established with reasonable certainty."

In *Holt v. Tuite*, 188 N. Y. 17 (1907), we quote the following from the opinion of Hiscock, J., who delivered the opinion of the Court of Appeals:

"* * * I next pass in order to a consideration of the rules by which we are to determine the weight and force of the evidence and facts which have been recapitulated. Those rules must be reasonably familiar, for recently they have been formulated by this court after much consideration and with deliberation. They have emphasized with increasing decisiveness the caution with which claims of the class to which the present one belongs must be scrutinized and the high order of proof by which they must be sustained. The court has felt compelled to do this by the frequency with which such claims were arising and in view of the dangerous opportunities afforded through them of fraudulently sweeping the

property of a dead person away from those to whom it would naturally pass. These rules must be general in their application and may not be too much shifted in any particular case to meet the necessities and equities, real or fancied, of that particular case.

"In *Shakespeare v. Markham* (72 N. Y. 400, 403) it was said that such contracts 'are properly regarded with grave suspicion by courts of Justice and should be closely scrutinized, and only allowed to stand when established by the strongest evidence.'

"In *Hamlin v. Stevens* (177 N. Y. 39, 48) it was said: 'While such contracts are sometimes enforced by the courts, it is only when they have been established by evidence so strong and clear as to leave no doubt and when the results of enforcing them would not be inequitable or unjust.'

The case of *Rosseau v. Rouss* (supra) is referred to in this opinion approvingly. When the evidence in the instant case is measured by the above tests, it not only does not square with them, but qualitatively as well as quantitatively, is unusually weak, flimsy and unsatisfactory, *and deficient.*

POINT VI.

The judgment should be reversed and the complaint dismissed.

We contend that a false issue was submitted to the jury under the charge of the learned trial court, in that it was instructed that under the agreement alleged, the decedent agreed that he would pay to the plaintiff, at the close of his life, a sum equal to the value of his estate; and that the trial court also erred in charging the jury in reference

to the section of the Statute of Frauds, which requires that contracts for services must be in writing if the services referred to therein are not to be performed within one year from the making thereof. The pleadings do not raise this issue, and no mention of this provision of the Statute of Frauds was made throughout the trial.

It is respectfully submitted that the court also erred in charging the jury that the only definite amount it could fix as its verdict was \$11,000.

This action, having been brought by the wrong party plaintiff, it would serve no useful purpose to send it back for a new trial, in case the judgment is reversed.

Respectfully submitted,

COHN & COHN,
Attorneys for Defendants-Appellants.

02

New Jersey Court of Errors

Sadie Hirschberg,
Plaintiff-Respondent,

vs.

Harry Horowitz and David
Cohn, as Executors of the Last Will and Testament of
Israel Horowitz,
Defendants-Appellants.

On Appeal from Supreme
Passaic County.

BRIEF ON BEHALF OF RESPONDENT

STATEMENT OF FACTS

The complaint alleged that Israel Horowitz, who had lived and worked with plaintiff, Sadie Hirschberg, and her husband would give up the property by them, return and live with the plaintiff for the rest of his life, assist and care for them, he would bequeath to Sadie Hirschberg, his property which he should die possessed. The charges full compliance on

02

New Jersey Court of Errors and Appeals

Sadie Hirschberg,
Plaintiff-Respondent,
vs.
Harry Horowitz and David
Cohn, as Executors of the
Last Will and Testament of
Israel Horowitz,
Defendants-Appellants.

Action at Law.

On Appeal from Supreme Court
Passaic County.

BRIEF ON BEHALF OF RESPONDENTS

STATEMENT OF FACTS

The complaint alleged that Israel Horowitz agreed with plaintiff, Sadie Hirschberg, that if she and her husband would give up the home occupied by them, return and live with them, during their life, assist and care for them, he would devise and bequeath to Sadie Hirschberg, his entire estate, of which he should die possessed. The complaint then charges full compliance on the part of the plaintiff, and failure of the deceased to carry out in his last will and testament, or in any other manner, his part of the contract.

There was an abundance of evidence to support the making of the contract and its performance by Sadie Hirschberg, and at the conclusion of the case the jury awarded the plaintiff \$9,000 as damages for the breach of the contract, which, however, was not the whole value of the estate. The facts leading up to the making of the contract were that

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Attys of Defendants Appellants.*

Israel Horowitz and his wife were childless; that their only relatives were some brothers and sisters, with whom they seldom came in contact. Sadie Hirschberg was a relative and came to live with them as a child of eight years. She was brought up as one of the family and lived with them until she was twenty-five years of age, when she married Arthur Hirschberg.

After her marriage she and her husband occupied one floor of the Horowitz house, and the Horowitzes living on the other floor. This continued for the first two years of their married life, during which two children were born. The advent of the children seemed to have had an irritating effect on the old people, that is, probably crying through the night and the like. In any event, the plaintiff and her husband moved away to a home of their own, although relations between the parties were friendly.

They had no sooner gotten away, however, when the old folks missed the attention which had been showered upon them by the plaintiff, and then Mr. Horowitz commenced a series of importunities to get Mrs. Hirschberg and her husband to move back, and, as an inducement to do so, made the contract upon which this action is founded. By evidence from a number of witnesses, this contract was established, as we shall presently point out. In consequence of these continued efforts, Mrs. Hirschberg accepted the proposition of Mr. Horowitz, broke up her own home and came back to live with the old people, where they continued to live until their death, giving them every possible attention, and giving up every little pleasure of their own.

Mrs. Horowitz died first and a few weeks after her husband died, and it was then discovered that Mr. Horowitz had failed to make any provision in his will. Thereupon, plaintiff brought this action.

THE EVIDENCE IN SUPPORT OF THE CONTRACT

ARTHUR HIRSCHBERG, husband of the plaintiff, testified to his marriage, and as a result of an understanding with Mr. Horowitz, he and his wife took up their residence at No. 242 Van Houten Street, the home of Mr. Horowitz, where they continued to stay for about four years (P. 12 at bottom; P. 13, l. 1-30). The arrangement during this part of their married life was that witness and his wife, the plaintiff, and the Horowitzes were to pay half of the expenses of the house (P. 15, l. 1-8). During this time children were born, and "they kind of got on the nerves of the old folks", so one evening after supper, Mr. Horowitz said to my wife,

"Sadie, Aunt Ray says that the children seem to be getting on her nerves, and I think it is best that you move out and build a home for yourselves" (P. 16, l. 20-28); as a result the young people and their children promptly moved out (P. 16, l. 33).

The relations between the parties, however, were cordial. About two weeks after they had established their new home, Mr. and Mrs. Horowitz paid them a visit, and thereafter visited them weekly, witness and his wife visiting them frequently in return (P. 17, l. 20-25). About four or five weeks

after the young couple had established their new home, Mr. Horowitz said one day to plaintiff, in the presence of witness,

"Sadie, we miss you. We miss the children. We miss Arthur, and we want you to come back, and if you do come back, I will give you everything that I own when I die.—

Q. What did your wife say to that? A. My wife spoke it over with me, she said to me, 'Here we just opened a home, we never had a home of our own. I would rather stay here for a little while.' 'Well, I says to her, you may think it is all right to stay here. You know you love him.' She says, 'Yes, I love the old folks, and I would like to go back with them' and we decided to go back with them.

Q. What was said, if anything, by your wife to Mr. Horowitz about going back? A. Well, she said, 'Uncle Israel, we have got a home now, which we never did since we were married. We like our home and we like our children, and we are a loving couple, and I don't see why I should really break up my home again.' Uncle Israel said, 'Well, you know, Sadie, that we love you, practically all your life we loved you as a child. Why not consider and come back? After I die I will give you everything I own, when I die.'

Q. What did your wife finally say to this? A. She thought the matter over and consulted me, and we—and she agreed upon going back to live with them" (P. 18, l. 20-40; P. 19, l. 1-20).

In addition to this, plaintiff testified that about seven or eight weeks after, there was another conversation between Mr. Horowitz and his wife on one side and the plaintiff and this witness on the other (P. 20 at top).

"Q. Were you present? A. Yes, sir.

Q. You may answer. A. What my wife said to Mr. Horowitz and Aunt Ray was at my home at the time. She said that being that we have been living together so long and that you are not well and you need us, we certainly will come back together, and live together as we did before.

Q. What else, if anything? A. And Mr. Horowitz said to my wife, 'All right, Sadie, under those conditions, remember that I promise to give you everything, that when I die you will get everything that I possess' (P. 20, l. 12-25).

Then the witness said that arrangements were made whereby they could continue to live out the month at their home, and then go back, on March 1, 1923 (P. 21, l. 1-15).

When they first went back witness and her husband occupied the downstairs flat, and the old people, upstairs, but finally they moved down into the flat of plaintiff and her husband; then after about a month or five weeks, the old folks being of a somewhat restless type, moved to the flat upstairs. All work incident to the moving was done by this witness. This final moving kept the parties together until death terminated the relationship (P. 21, l. 30-40).

Witness testified further that Mr. and Mrs. Horowitz were sickly, and required constant care, companionship, special diet, washing their personal clothing, house-keeping and taking care of the table and the like, all of which was done by the plaintiff, as the old folks had no maid (P. 22, l. 2-18). Mrs. Horowitz was in very poor health. For six months previous to their death Mrs. Horowitz was bedridden and Mr. Horowitz bedridden part of this time. Thirteen days separated them in death (P. 22, l. 25-40). For six weeks of the last year of their life, Mrs. Horowitz was so bad that she was taken to a sanitarium in Morristown, and during this time Mrs. Hirschberg, the plaintiff, continued to look after her house, as well as visit the sick woman, nurse the old gentleman and the like.

The work became so trying on Mrs. Hirschberg, that witness asked Mr. Horowitz to get a maid, or get some help about the house, but the only reply he got was, "Now, Arthur, you know what we promised Sadie. Make the best of it and then," he says, "everything I have will go to her" (P. 23, l. 30-36). This was three months before the death of Mrs. Hirschberg. About a month before this witness had also asked for additional help, but the only reply was: "Now, see that Sadie makes the best of it and does what she can; we love her as a child. We love her as parents. Do what you can to make her do what she can, and when I die, he says, there is no question that everything that I have got will go to you, that is, my wife" (P. 24, l. 2-14).

On another occasion witness complained about the run down condition of his wife, and hinted that Sadie (plaintiff) could not keep up carrying the burden of the house on her shoulders, and Mr. Horowitz replied: "Now, don't let that worry you; you know things will come to you and your wife when I die, everything that I have, and if you act the way you have been acting," and so forth. (P. 24, l. 30-38.)

Witness testified further that it was impossible for him and his wife to go out, because of the condition of the old folks; it was absolutely necessary that someone stay with them, and it was absolutely necessary that his wife prepare special diet for them (P. 25, l. 20-30).

Just before his death, Mr. Horowitz called witness into the room with the plaintiff, the nurse was there also, and as detailed at page 26 at top, the following conversation took place:

"Arthur", he says, "you know, the unforeseen will happen," and he says, "Now, remember, everything that I have goes to your wife, Sadie." I said to Uncle Israel, "Uncle Israel, have you stipulated that into a will?" Uncle Israel said, "It will be taken care of. I want to see the lawyer." The next morning we called the lawyer. I had to go to business and nobody was in the room at the time that the lawyer was in there, and that was the end. H died the following night." (P. 26, L. 1-15.)

GRACE SPIVAK, whose testimony begins at page 42, is a graduate nurse, and took care of Mrs. Horowitz, for the last six weeks of her illness.

She detailed generally through several pages of her testimony the relationship between the parties, and of her own frequent conversations with the old folks. Finally she testified:

"Q. What else did he say to you? A. He told me how good Sadie had been to them.

Q. Yes, you told us that. A. And that he had promised her all he had at the time of his death. He told me that in the matter of our conversation.

Q. How many times did he tell you that, if more than one? A. I don't remember.

Q. Did he tell you that more than once? A. He did.

Q. Did he tell you whether or not he was going to carry out that arrangement? A. He did." (P. 47, at bottom; P. 48, l. 1-10.)

This is the nurse, who the night before his death, was directed by Mr. Horowitz, to call in plaintiff and her husband. On this point, she corroborates Mr. Hirschberg as to the conversation, in which amongst other things the following was said:

"Q. What else did he say at that time? A. At that time he said, 'I promised you everything I have', and he said, 'I want you to be good to your sister.'

Q. Anything else? A. Well, they talked on. Sadie didn't want him to speak of dying, but he said it was inevitable, and it was best to be understood, and that he wanted to see his lawyer in the morning.

Q. Did he mention the lawyer's name? A. Yes.

Q. Did the lawyer come? A. He came as I was going off duty.

Q. The next morning? A. The next morning." (P. 48 entire.)

Again: "A. I promised her if she came back to live with me I would give her everything." (P. 49 at bottom.)

JOSEPHINE MAINES, a next door neighbor of the Horowitzes, whose testimony begins at page 55, testified as to frequent conversations with Mr. Horowitz over the fence (P. 56 at bottom). She recalled the following:

"He kept asking me what I was going to do with all the money I made in that house, and then I, in turn, asked him what he was going to do with his, and then he told me—

Q. Now, what did he say? A. He said to me, 'what are you going to do with all your money when you die? There is no family. What are you going to do?' I said, 'What are you going to do with yours?' And he put out his hands and said, 'Oh, my Sadie! Oh, my Sadie She is all what I have got. I promised her if she came back I give her what I have got.'" (P. 57, l. 10-18.)

To this witness he said that the children had annoyed him when they first came, but after they had moved away they missed them so terribly "and he went and asked Sadie to come back, and that if she did, he promised to give her all he had for coming, that she was a faithful daughter to him." (P. 58, l. 18-22.)

GERTRUDE HERMAN, whose testimony begins at page 59, testified repeatedly to conversations of a like character as given by preceding witness. She recalled a conversation on a Sunday afternoon, in which amongst other things he said:

"Well, I am getting to be an old man, and I miss the children and I miss Sadie, so for my part I want her to come back, because that is all I have, is my Sadie." And he said to me, "Mrs. Herman, I promise you and I promise Sadie that if she comes back to me, that when I die all I have is hers." (P. 63, l. 20-28.)

Witness took up with Sadie and about a week later, a conversation took place again, in the presence of deceased, plaintiff and this witness. In fact, witness took part in the conversation and her testimony on this point is:

"I said, 'Just as he says, he has no children, and he has nobody else but you, and I would really advise you to go back, because, after all, when he does go there will be something in store for you.' So I advised her to go back.

Q. What did she say to Mr. Horowitz at that time? A. At that time she said, she would go back, and Arthur was going to give notice on his apartment and they would come back.

Q. Do you know whether or not, they did go back after that? A. They did.

Q. Now, just going back for a moment, Mrs. Herman; In detailing part of that conversation, you said that Mr. Horowitz said

the same thing at that time. What did he say on that second Sunday? A. He said again, if she came back he promised to give her *everything he has when he dies.*" (P. 64, l. 15-30.)

Witness testified over and over again to this same thing.

This evidence, of course, was sufficient proof to submit to the jury that a contract had been made, and the court will note that it was not a contract to devise real estate, but a contract to give whatever he had, without describing whether it was realty or personalty, such as "All I have", and like expressions used by the deceased.

Of course evidence of this character would support the contract. See *Messenger vs. Paterson Savings Inst.*, (91 N. J. Law, P. 654).

POINT 1

THE CONTRACT SUED UPON AND PROVEN WAS NOT VOID UNDER THE STATUTE OF FRAUDS.

As we pointed out above, "land" was never mentioned in the contract. What was said and testified to was, "I will give you everything I own when I die." (P. 18, l. 23.) "You know things will come to you and your wife when I die." (P. 24, l. 31-34.) "He wanted her to know that she was to have everything he had." (P. 48, l. 18.) "He promised her all he had at the time of his death." (P. 48, l. 1.)

The cases cited by counsel for appellant in his brief, are cases dealing with contracts with regard to real estate. Thus, in the case of *Lozier vs. Hill*, 68 N. J. Eq., P. 300, cited in brief, it appears by the statement of facts in the opinion that:

“A bill is filed to specifically enforce a parol contract to devise a parcel of land, etc.”

As it appears from the quotation in appellants' brief, the *Lozier* case was a suit for specific performance of a contract to devise lands, and distinctly shows that the contract was to have a farm devised. The bill in that case was, that in consideration of her services he had contracted to leave her a farm, and that he would by his last will and testament devise to her a farm.

The case of *Smith vs. Admrs. of Smith*, 23 N. J. L., P. 208, also cited in Appellants' brief, was an action at law upon a promise of the deceased, that if plaintiff would erect certain buildings upon his land, that he would have the farm at his death.

This also was distinctly an agreement to devise land.

These are the only New Jersey cases cited by appellants, and as we have pointed out, clearly deal with contracts to devise land, and in which “land” is specifically mentioned in the contract. In the case at bar, “land” was never mentioned, and the legal proceeding under consideration is not a bill for specific performance to convey, or even an action at law for the value of the land, but distinctly an action at law for the value of the estate, whatever it may be, either as to quantity or kind.

The cases cited in appellants' brief from other States are very little more in point. Thus:

Pond vs. Sheean, et al., 132 Ill. 312 (P. 15 of brief), discloses by the bill of equity, that it was a suit for specific performance to enforce a parol contract to convey *real* and personal property.

Lashes vs. McDermott, 173 App. Div. 79 (P. 19 of brief), was a proceeding for specific performance to convey land under a parol contract.

Ludwig vs. Bungart, 48 App. D. 614 (P. 19 of brief), was an oral promise to devise land.

Gould vs. Mansfield, 103 Mass. 408 (P. 20 of brief), was an oral contract to make a will of testator's property, *real* and personal.

Schempp vs. Beardsley, 83 Conn. 34 (P. 21 of brief), was an oral contract to make a will or deed disposing of a house and *lot*.

Grant vs. Grant, 29 Atl. 15 (P. 22 of brief), and upon which counsel relies to a great extent, discloses that the case was a bill for specific performance, to compel amongst other things *conveyance of real estate, subject to the widow's dower*. Said the Court:

“The mischief which the Statute was intended to remedy—the setting up parol land titles—would occur equally in either case, etc.”

We do not seek title to any land.

Banta vs. Banta, 103 App. Div. 172 (P. 27 of brief), was an action for breach of an oral contract to give plaintiff defendant's *farm*. There also arose in the case, a question of partial performance.

None of these cases deal with an action at law for money damages for the value of an estate, based upon a contract to give an estate, wherein the word "real" or "land" was never mentioned.

Counsel rests his whole contention on the premise that the contract was for the sale or conveyance of land. May we again call the court's attention to the fact that the word "land" or "real estate", or like term does not appear in the evidence from one end of the case to the other? To support appellants' contention, we must read into the contract, language that was never used, and assume that land only was understood between the parties.

Can it be said that the deceased could make a contract to give his estate at his death, which for instance at the time of his death was personalty, and that he might change his contract, on his deathbed, by converting his personalty into realty? Must the court assume that the deceased at the time of his death was possessed of realty only?

It is an elementary principle at law that a contract must be construed so as to uphold it, if possible.

"Where a particular word or words, or the contract as a whole is susceptible of two meanings, one of which will uphold the contract or render it valid, and the other of

which will destroy it or render it invalid, the former will be adopted So where one construction will make the contract legal, and another make it contrary to law, the former construction will be adopted, if reasonable." (cases cited).

13 Corpus Juris, P. 539.

Again:

"No matter how clear the ordinary significance of the words, it has been held that they must not be given a meaning which when applied to the subject matter of the contract will render performance impossible."

13 Corpus Juris, P. 540.

"The case of *Frost v. Tarr*, 53 Ind., 390, arose out of the following facts: The father of Jane Torr agreed with Simeon Frost that Frost should take Jane into his family, board, educate, and clothe her as his own child until she was 21 years old, or was married, and that if she continued so to live with him and his family, and do the ordinary housework usually performed by girls in housekeeping, he would bequeath to her a share equal in value to that given any of his children. It was alleged that she had fully performed; that Frost died without leaving her anything by his will, except \$50; and that he left an estate in real and personal property of the value of \$20,000, the greater portion of which he bequeathed to his son. She demanded judgment for one-

sixth part of the estate, and for \$4,000 damages. It was there said by the Court 'that the contract alleged is one the specific performance of which would not be decreed'; but it does not follow, because a court will not decree specific performance of a contract, that therefore no action for damages will lie upon it when it has been violated. On the contrary, we think such action will lie, and that the damages in this case may be measured by the value of the portion which was promised, and that the plaintiff, in such case, is not limited to the value of the services performed, in the recovery."

In this last case cited, it will be noted that the court refused specific performance, but said *that an action at law would lie for the value of the property*. This is precisely what is asked in this case, viz., damage for the value of the estate, and not a suit for specific performance.

If counsel's contention is correct, the words, "All I possess", "What I own", "all that is mine", and the like, must be construed to mean, that it was the intention of the deceased to, at his death, possess real estate only. May we not urge to the court that following the principle just enunciated, that it would be the duty of the court to construe the language used as meaning that the deceased would leave personalty only, or that the parties had in mind, at the time of the making of the contract, that the deceased was contracting with personalty, and at his death would leave personalty.

There are many cases dealing with contracts, particularly with reference to land and real estate, but the case at bar does not fall within this category. Here, as we insist above, realty was never mentioned, nor may it be implied.

Suppose the contract was that deceased was to leave all his personal property. Surely the question of the Statute of Funds would not arise. If the contract was to devise real property it would surely arise.

If, however, the contract was to leave "property", must the court write in the word "real", or may it write "personal".

POINT II.

THERE IS NO EVIDENCE IN THE CASE TO SHOW THAT THE DECEASED LEFT ANY REAL PROPERTY.

The defendants called as a witness, Harry Horowitz, who is a brother of the deceased, and the said Harry Horowitz by counsel for defendants was asked, whether the deceased left any real property, and the answer was that the deceased left a two family house, frame building, in the City of Paterson, which was occupied by him as his home immediately before his death. (P. 74, l. 35-40.)

Plaintiff contends that the aforesaid evidence is not sufficient as a matter of law to prove that the estate left by the deceased consisted of real property. Ownership of real estate as a general rule is a matter of record, or a matter to be proven by a written or sealed instrument. Plaintiff con-

tends that the failure of the defendants to introduce in evidence the original deed of the deceased, or the recorded deed, was a failure on defendants' part to prove that the deceased was the owner of the premises at No. 242 Van Houten Street, at the time of his death.

See *Clark vs. City of Elizabeth*, 37 N. J. Law, P. 120, and *Hoffman v. Rodman*, 39 N. J. Law, P. 252.

In the *Clark* case, (Syll. 3,) the Court held that a deed was the best evidence of dedication, and the plaintiff in this case contends that a deed is the best evidence of ownership of property by legal analogy.

It was the defendants' duty, under the law, if he desired to make use of the Statute of Frauds as a defense, to prove that the deceased was the owner of real estate at the time of his death, and the only proper method under the rules of evidence to prove such ownership was by producing the best evidence, viz., the original deed of the deceased, or the recorded deed from the Register's Office of Passaic County.

The failure of the defendants to offer in evidence the writing as to the ownership of the premises of the deceased at the time of his death, prevented the said plaintiff from attacking the possible invalidity of such a deed, that is, the deed may have lacked a proper legal acknowledgment before a proper legal officer; it may have lacked through inadvertence the signatures of the parties

thereto; the description may have been that of the premises next door, which by mistake very often happens in describing premises in deeds; it may have failed to recite any consideration, and might only have been a life estate.

How could defendants' witness, Harry Horowitz, as a lay man, testify whether or not, the deceased was, as a matter of law, the legal owner in fee of the premises at No. 242 Van Houten Street in the City of Paterson? There was nothing in the evidence to show how the witness, Harry Horowitz, knew that the deceased, who was his brother, owned the premises at No. 242 Van Houten St. The most that can be said about his evidence is that it is a mere conclusion without any legal effect, and is void of any legal weight as to legal ownership of the premises.

It wasn't the plaintiff's duty to object to the testimony of Harry Horowitz, as to the incompetency of his testimony in relation to the ownership by his brother, the deceased, of the premises at No. 242 Van Houten St., because the law casts a duty on the defendant to prove affirmatively by the best evidence, that the deceased was the legal owner of real estate at the time of his death, in order to take advantage under the Statute of Frauds, if such proof would bring the case within the Statute. Again the failure of the plaintiff to object to the testimony of Harry Horowitz as to what was the nature of the property that the deceased left can not be considered as a waiver by the plaintiff of the incompetency of his testimony as the defendant had to offer some explanation affirmatively as a matter of law why the original deed or the record-

ed deed wasn't offered in evidence, as that was the only proper foundation he could lay before he was entitled to prove ownership of real estate by the deceased at the time of his death by secondary evidence.

POINT III.

WHEN THE REAL QUESTION HAS BEEN FAIRLY TRIED, AND THE ENDS OF JUSTICE WILL BE PROMOTED, THE DECLARATION WILL BE AMENDED ON APPEAL TO SUPPORT THE JUDGMENT.

It is the contention of the plaintiff that the jury found, as a matter of fact, that the plaintiff's services on the quantum meruit were worth \$9,000., for which amount they gave their verdict, irrespective of the fact that the complaint alleged a contract between the plaintiff and the deceased for the value of his estate at the time of his death, or irrespective of the fact that the contract was "that the deceased would leave the plaintiff his entire estate at the time of his death", which was valued at about \$12,000.

The Court of Errors and Appeals, in the case of *Waring v. Jobs*, 138 At. Rep., P. 889, speaking through Judge Hetfield said:

"It is well settled that, when the real question in dispute has been fairly tried, and the ends of justice will be promoted, the declaration will be amended here, in order to support the judgment below."

See also the following cases in this respect:

Levenson Wrecking Co., v. Gatti-McQuaide Co., 93 N. J. L., P. 184.

Klie v. Hollstein, 98 N. J. L., P. 473.

American Popular Life Ins. Co., v. Day 39 N. J. Law, P. 89.

Chess v. Vockroth, 75 N. J. Law, P. 665.

Boniewsky v. Polish Home of Lodi, 136 Atl. Rep., 741.

POINT IV.

AS TO POINT THREE OF DEFENDANTS' BRIEF.

"PLAINTIFF WAS ALLOWED TO TESTIFY AS TO TRANSACTIONS WITH THE DECEASED."

This point is not well taken. The record discloses (P. 82, State of Case), that the witness testified without objection to the question and answered:

"I did all the general housework and had to take care of her, because she was not really capable of taking care of herself at times, and did the cooking, special diets for each one of the patients."

Q. "For each one of them? A. Each one of them."

Then counsel for defendants made an objection but failed to take any exception to the ruling of the Court. As was said in the case of *Messenger*

vs. Paterson Savings Ins., 91 N. J. L., 654, counsel cannot speculate with an answer, and that is exactly what counsel for defendant did.

It is equally well held that if counsel intends to press a point before this court, timely objection should have been made, and exception taken to the ruling of the court. This, however, was not done.

POINT V.

**POINT FOUR OF DEFENDANTS' BRIEF
(THAT THE ACTION SHOULD HAVE BEEN
BROUGHT ON AN ASSUMPSIT) IS A CON-
TENTION WITHOUT MERIT.**

Whatever may be said as to cases on the subject, the recent enactment with respect to married women, allows a married woman to contract on behalf of herself, as fully in all respects as if she were a feme sole.

In *Turner v. Davenport*, 63 N. J. Eq., P. 288, the Court permitted a wife to maintain a bill in equity against a partnership of which her husband was a member. The language of the Court at page 290 with reference to the Married Women's Act is:

"It is well settled at common law that the wages and earnings of the wife became, or would become, by reduction to possession, the absolute property of the husband. Moneys due her were choses in action, which he could reduce to possession.

Our Married Women's act has intervened, if not to entirely change this, certainly to change the presumptions arising from the mere fact of services performed and wages due a wife.

She may now contract with any person.

She may engage to labor or serve in any capacity for wages. She may engage in business on her own account. She may sue for the recovery of debts or wages due her, apart from her husband. ***** By section 11 of our Married Women's act a wife is given express statutory right to maintain a suit in her own name for her wages and earnings which are, by our statute, made her separate property."

Also in the case of *Lewis v. Hunt*, 120 Atl. Rep., P. 650-651:

"The testimony is clear that in addition to the money the deceased saved from her husband's wages she acquired considerable money through her own exertion in maintaining a boarding house, which became her property under the Statute. (3 Comp., St. 1910, P. 3225; *Small v. Pryor*, 69 N. J. Eq., P. 606, 61 Atl., 564)."

In support of point four in the appellants' brief, counsel cites the case of *Garretson v. Appleton*, 58 N. J. Law, P. 386.

The language quoted, however is obiter dicta, for the court held in deciding the case, that this point was not before it, for the reason that the appellant in the lower court, had not directed his exception specifically to this point.

This point also is predicated on the premise that the agreement is void, etc., viz.,

"The agreement alleged being void, if recovery is sought for the services testified to, performed at the request of the decedent, the action must be in assumpsit, etc."

The argument is not squarely before the court, in that the plaintiff did not sue on the theory of quantum meruit; appellant is therefore attempting to have this court decide an academic question.

In defendants' answer, this defense was not pleaded.

"Where it appears from the face of the complaint that the plaintiff has no legal capacity to sue, the objection may be taken by demurrer; otherwise it must be taken by way of answer or a plea in abatement."

30 Cyc., P. 140.

POINT VI.

AS TO POINT FIVE OF DEFENDANTS' BRIEF THAT NO EVIDENCE WAS PRODUCED IN SUPPORT OF THE CONTRACT.

The only argument that counsel for defendant advances in support of this is one New Jersey case, *Lozier v. Hill*, 68 N. J. E., P. 300. The other cases are New York cases.

These cases all deal with discussing general principles and do not point out specifically the exact evidence necessary to support a contract.

We content that the case of *Messenger vs. Paterson Savings*' 91, N. J. Law, P. 654 a Court of Errors and Appeals case, in syllabus one, settled the law

in this State, to the effect that an express contract may be proved by indirect evidence. An examination of the opinion in that case will disclose that it was by various expressions and declarations similar in character to the case at bar, that supported the express contract upon which that action was founded.

We would also refer the Court to the case of *Gomm vs. Gomm*, 69 N. J. L., P. 660; 69 Atl. Rep. 9. 198, a case in the Court of Errors and Appeals of this State, wherein the Court said:

"Wherever compensation is claimed in any case by either parent or child against the other for services rendered or the like, the question whether the claim should be allowed must be determined from the particular circumstances of the case. 28 Am. & Eng. Ency. (2nd Ed.) p. 1060. The evidence offered was relevant, and directly touched upon the issue made by the parties in the pleadings and, as urged, came within the test of relevancy as constituting a group of facts and circumstances in whole or in part negating the fact of the existence of the contract."

Marsh v. Machine Co., 75 N. J. Law, 36-41; 29 Atl., 481, 483.

In the case of *Columbus, H. V. & T. Ry. Co., v. Gaffney*, 61 Northeastern Rep., P. 152, the Court held:

"Where it is averred in a petition that the plaintiff performed services for the defendant, 'at his instance and request', the aver-

ment may be supported by evidence of circumstances under which the services were performed tending to show a contract. Evidence of an express request is not required."

CONCLUSION.

For the reasons above, it is respectfully submitted that the verdict should, in all things, be affirmed.

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Of Counsel.

May Term, 1928.