

# In Chancery of New Jersey.

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Between

HENRY MIDMER, *et al.*,  
*Complainants,*  
*and*

THEODOSIA ANN MIDMER, *et al.*,  
*Defendants.*

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*On Bill, etc.*

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Examination of witnesses in above stated cause taken at the law office of Henry S. White, No. 125 Washington street, Jersey City, New Jersey, on the thirty-first day of December, A. D. 1873, before Henry S. White, one of the masters and examiners of the Court of Chancery of the State of New Jersey, in the presence of Jonathan Dixon, solicitor, 20 and of counsel for the complainants, and of Thomas N. McCarter, solicitor, and of counsel for the said defendants.

*Joseph Hilton*, a witness produced on the part of the aforesaid complainants, being duly sworn, deposes and says :

I knew John H. Midmer in his life time ; knew him for twenty-five or thirty years ; at that time he lived, I think, at 317 Water street in New York city ; he was living with his parents and was quite young ; his parents are both dead ; his father died in about 1847 or 1848, and his mother

died, I think, in about 1851 or 1852; John had a sister named Eliza—now married, do not know her husband's name, and William and Henry are all that I know. I did not of my own knowledge know of John's owning any real estate in New York, but learned it from him; I cannot say where it was, I do not recollect the street, but up town and the westerly part of the town; the time he had it was about the time of his mother's sickness; before her death he said he had bought a house and lot from Judge Beebe, and had bought it in his own name; he told me he bought it with his mother's money and she supposed it was in his mother's name; that there was not much and by keeping it all together he could make something and it would be better for all concerned; he said there was three thousand dollars, to the best of my recollection; he said his mother gave him the money to buy the house and lot, and that he bought it in his own name for fear some of the heirs would squander it if it was divided; he said afterwards in conversation with his brother William that they should all have their rights in the property—not specifying any property, referring to what he had invested for her—when he and William would quarrel; William's wanting him to divide was after their mother's death; I learned from John that he had sold that property; he did not tell me where the proceeds had gone. Afterwards, about 1853 or 1854, he told me he owned some Third avenue railroad stock, and he was thinking about selling it and spoke about the price, at 80; he never said anything to me about that stock being sold for the family. I heard from him and other members of the family about his being interested in a tract of land, eight acres, in Greenville; I don't know that I ever heard John Midmer say anything in particular about it except that I heard him say he owned it; I never heard him say anything about his brothers and sisters having any rights in it; there was considerable quarrelling among them—between him and William—about it; I have heard conversation between John and William of a quarrelsome character in regard to it, with reference to giving him what he was entitled to; William would say to him that he had means that belonged to him and he wanted it; John said

he would get every cent of it, he did not want to wrong him out of it ; I never heard any reference to the Greenville property in any of their conversations, heard no reference to any particular place ; At the time of his mother's death John was not engaged in anything further than attending to her affairs ; he resided with his mother until she died, after that he lived in Water street in the house where his mother had formerly lived ; before her death she had moved up to Third avenue where she died, then John returned to Water street ; his aunt lived with him in 10 Water street ; a short time afterwards John and his aunt moved to Greenville but not to the eight acre tract. I think that Henry had lived on the eight acre tract before that, but not after John moved there ; when John moved there I think Henry lived with him ; I think William was the oldest of these children, then John, Henry and Eliza. William was not at that time, before his mother's death, steady, he used to drink too much ; I never knew him to do anything else wrong ; his business was working at caulking, something about shipping ; I reside at No. 11 20 Pike street, New York city. Am a physician.

Before his mother's death John worked at ship carpentering, with Mr. Webb as a journeyman or apprentice ; he served his time with Mr. Webb, but do not think he served it out ; after that he built a yacht in company with Mr. Downing ; it was a small yacht ; twenty or twenty-five tons ; it sold for twelve or fifteen hundred dollars, or in that vicinity ; John's interest in it was his labor.

And being *cross-examined* by Mr. McCarter, saith :

I do not recollect how much he realized out of the sale of 30 the yacht.

JOS. HILTON.

Sworn and subscribed to this thirty-first day of December, A. D. 1873, before me.

HENRY S. WHITE,  
*Master in Channery of New Jersey.*

The examination of witnesses in this cause was adjourned to January 5, 1874, at 3 P. M., at same place.

January 5, 1874, the examination in above entitled cause was adjourned to January 21, 1874, at 4 P. M., at same place.

Examination of witnesses in above entitled cause continued this twenty-first day of January, eighteen hundred and seventy-four, and taken at the law office of Henry S. White, No. 125 Washington street, Jersey City, New Jersey, before  
 10 Henry S. White, one of the Masters and Examiners of the Court of Chancery of New Jersey, in the presence of Jonathan Dixon, solicitor, and of counsel for the complainants, and of Thomas N. McCarter, solicitor, and of counsel for the said defendants.

*Welcome R. Beebe*, a witness produced on the part of the aforesaid complainants, being duly sworn, deposeth and says :

I reside in New York City ; am a lawyer ; I knew John  
 20 H. Midner in his life time ; I think I knew him as early as 1842 or 3 ; he was then a boy ; for many years I knew him quite intimately, but saw less of him the latter years of his life ; I had business with him ; he was in my office as a friend almost every day ; can hardly say as an occupant ; perhaps spent most of his time there for several years ; I knew of his owning a house and lot on Twenty-eight street, in New York City.

30 (Being shown a paper which is marked C 1, for reference) —he is asked whether that paper describes the property referred to ?

A. Yes, sir ; he bought this property from me.

Q. This paper indicates that it was conveyed to him by Ray & King for \$4,537.50, on November 1st, 1851—please state how it was he bought it from you ?

A. I contracted to buy it from the grantors in that paper,

a large number of lots on Twenty-eighth street on which I covenanted to erect dwelling houses and which I did do, Ray & King were to receive back on the completion of the houses, on each house, a mortgage for \$4,537.50; this house was one of those; by my direction they conveyed this house to Mr. Midmer for just the amount of the mortgage, which he gave on taking the conveyance; my best recollection is that the price he paid me was \$7,500; he paid the difference between the mortgage and the price in cash to me; at that time I don't think he was engaged in any business, except as an assistant in his mother's house after the death of his father; I have no doubt he told me where he got the money which he paid to me, but the recollection of it has gone from me, and I can only speak inferentially of it; I know that up to that time he had been in no business nor had any means of acquiring any money; his father, in his life time, and his mother after the death of the father, continued the business, which was that of seamen's boarding house; from my knowledge of them I knew they had been measurably prosperous and had means ahead; the father and mother had means ahead, and the mother held on very closely to them after the death of the father; I had no knowledge of his having any other way of his obtaining the money except from his mother, and from what I know of him and his means I am quite satisfied he had no other way of procuring the money; my impression is he owned that house a year or two; he sold it to a man by the name of Hart; I think Mitchell Hart; he received Third Avenue Railroad stock for the house; I should have said if my attention had not been called to the consideration in the deed to Hart, which seems to be \$8,500, that he received the same that he paid me, taking the stock at par, about thirty shares; I know he received as many as thirty, and am not sure but that he got over that amount, but that I speak of with great indefiniteness; he did not get all the stock at the time he conveyed the house, a few shares were kept back, my impression is four or six, which were kept by Hart to cover any possible contingency as to any incumbrances which might exist above the mortgages; Midmer afterwards got those retained shares, my very distinct impression is

several years after the stock had arisen above par, he got them through my agency and efforts ; my best recollection is those surplus shares were worth between 130 and 140 when he got them ; upon giving it more thought, am not entirely confident we did not agree upon a sum in cash instead of taking the shares ; I know of Mr. Midmer's owning some property on Newark Bay, nearly opposite property he owned on Point Breeze ; at the time I saw the property it was used for gardening purposes ; probably seven or eight  
 10 acres in size ; cannot speak confidently ; know it covered quite a large piece of ground ; my own impression is that he told me he got from either Sheriff Merseles or his father, I think his father ; I think when I first saw it, it could not have been a great while after he bought it ; I know he was talking about the purchase and told me what he paid for it ; I think \$350 per acre or thereabouts ; I speak with great uncertainty ; I did not charge my mind with it ; I cannot tell with certainty how long before the purchase from Merseles the sale to Hart was, but I think not long, and my  
 20 strong impression is that his anxiety to make the sale to Hart was to furnish means to buy the property on Newark Bay ; John and myself were in the habit, not unfrequently, of going over on Newark Bay to fish and on several occasions I crossed this property ; on the occasion when I had this conversation with him he did not say anything about the interest of the family, but on another occasion he did ; I saw Henry and William there (his brothers) and William was preparing a wagon load of truck to go to market ; they had a working man there ; I said to him, do William and  
 30 Henry work on the place, and he said yes ; my recollection is I said to him you will have hard work to get a living off from this ; he told me, well, they could afford to rough it for awhile, the property would grow to be very valuable and would make them all well off, as they were all interested ; that is the substance of what I recollect.

Well, I have no distinct recollection of his having mentioned it on any other occasion, although when I was over there I saw the boys working on the place.

Since sitting here and testifying I recollect hearing John  
 40 Midmer say that he had let Merseles have that stock for the

place and that it had run down so Merseles had lost all his money, pretty much all; the stock run down and before John got his last shares it run up—the ones that had been retained—and John's telling me about Merseles having lost by the shares having run down was before John got his last shares; he first negotiated and purchased the Point Breeze property and that is the way he first got acquainted and came to purchase this property on the Bay; he expressed to me his anxiety to buy that property on the Bay; my impression is he said he could get it for three hundred or three hundred and fifty dollars an acre and he expressed a desire to sell the house on Twenty-eighth street, and use the proceeds to make the purchase; when he got this offer for the Third Avenue Railroad stock he determined to take it; I tried to dissuade him but he persisted; I think he had a little money and he paid that down on the Point Breeze purchase and I think he borrowed the money to pay the balance of what he had to pay down; borrowed it of some New York man; I think it was from McClay.

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And upon being *cross-examined* by Mr. McCarter, saith :

It must have been so long after the purchase that they were engaged in cultivating it; my impression is that it was a year or two after the purchase that he spoke of his brothers being interested in the property; I should think his mother died in 1851 or 2; I cannot speak with accuracy, about; but my impression is she survived her husband three or four years, and he was killed in 1847, I think; I think within four or five months past my attention has been first called to remembering the conversations with John H. Midmer, and I will say that more of them have come to my recollection since sitting here being examined, than existed in my recollection before; my recollection about when he was married is very indefinite; the first time I saw her was when I came over to New York Bay to fish.

*Re-direct* by Mr. Dixon :

John H. Midner did not own any other house in New

York; I say no; I don't think it possible he could and I not know it.

W. R. BEEBE.

Sworn and subscribed to this twenty-first day of January, A. D. 1874, before me.

HENRY S. WHITE,  
*Master in Chancery of N. J.*

Examination of witnesses in the above entitled cause continued this fourteenth day of July, A. D. 1874, at the law office of Henry S. White, 125 Washington street, Jersey City, before Henry S. White, one of the masters and examiners of the Court of Chancery of New Jersey, in the presence of Gilbert Collins, Esq., solicitor, and of counsel with the complainant.

*Richard C. Downing*, a witness produced on the part of the complainants, being duly sworn, deposes and says:

I reside at White Plains, Westchester County, New York. My place of business is 34 Park Row, New York city; an attorney and counsellor at law; I knew John H. Midmer; my acquaintance with him began in 1848 or 1849; I knew him from that time till his death intimately; I think Mr. Midmer died in the fall of 1872. A few months previous to his decease he was at my office and spoke to me about drawing his last will and testament for him. He consulted me in regard to drawing this will; he said among other things, there were certain interests in some real estate in which his brothers and sister were interested with himself, and which was standing in his name, and which he would like to protect by his will. I did not draw this will; he was taken sick soon afterwards; I think it was the last time I saw him that he talked about his will; he had spoken to me before about it; we were old and warm personal friends; his idea seemed to be to protect his brothers and sister by this will; he did not order me to draw it, and gave

me no specific instructions how to draw it; he said he would come again, this was the last time I saw him, and give me instructions. He consulted me more particularly in reference to other matters of a business nature to which his will was to have reference. He did not specify the particular land in which his brothers and sister had an interest except that it was land in New Jersey, and, from his remarks, I was led to believe it was land in New Jersey and near where he lived.

R. C. DOWNING. 10

Sworn and subscribed to this fourteenth day of March, A. D. 1874, before me,

HENRY S. WHITE,  
*Master in Chancery of N. J.*

(It is agreed by defendants' counsel that the foregoing testimony of Richard C. Downing may be read in the cause in the same manner as if taken on due notice, on condition that said Downing be produced for cross-examination on the request of defendants' counsel, and subject to the objection that parol testimony to prove a trust in lands is incompetent and illegal.)

Examination of witnesses in above stated cause continued this thirtieth day of July, A. D. 1874, and taken at the law office of Henry S. White, No. 125 Washington street, Jersey City, New Jersey, before Henry S. White, one of the masters and examiners of the Court of Chancery of New Jersey, in the presence of Jonathan Dixon, Esq., solicitor, and of counsel for the complainants, and of Thomas N. McCarter, Esq., solicitor, and of counsel for the said defendants.

*William Midmer*, a witness produced on the part of the complainants, being duly sworn, deposes and says :

(The examination of this witness is objected to by the counsel of Theodosia Ann Midmer and Leon Abbott, executor of John H. Midmer, deceased, because they are sued in their representative capacity.)

I live in Greenville ; am a brother of John H. Midmer ; my other brothers and sisters are brother Henry and sister Eliza Anderson ; my father died in 1847 ; my mother died in 1852. I remember about my mothers investment in a house and and lot in New York City ; John told me she  
 10 bought a lot from Judge Beebe in Twenty-eighth street ; he took me up and showed me the lot ; Judge Beebe lived adjoining. He said he paid \$5,500 ; he said mother gave him the money that he paid on it ; I think he said the money that was paid on it at that time was \$1,000 ; he said nothing else at that time ; he said he paid \$2,800 altogether ; he told me that he had paid the \$2,800 after he told he had paid \$1,000 ; I believe he told me he had paid the \$2,800 altogether on it about the time he sold it, or shortly before that ; he said he got the rest of the \$2,800 from mother ; I  
 20 knew that because he had no money of his own and mother told me so ; John, himself told me so ; John did not say in whose name he took the deed ; I did not know in whose name he took the deed until after mother's death ; I don't recollect how long before mother's death he showed me the house ; it was before mother's death ; the sale or trade of the house was after mother's death ; I think about a year ; I found out in whose name the title was, when he was going to record the deed for the property in Jersey ; I found it out then ; my brother Henry, John and myself went to  
 30 record the deed in the Hudson County Court House ; just under the hill I said to my brother John, let me see that deed ; I said I don't see my name there nor my brother's ; he said, "I didn't think that made any difference, before I would wrong you or either one of you I would have my arm chopped off. If it is divided up now it won't amount to much ; by letting it lay there we will have something to fall back on in our old age." I thought that was all right ; I was not the steadiest young man in those days and I let him go ahead ; my brother Henry he sanctioned it too, said that

is all right ; he said that in about five or ten years we can sell it so that we won't want another cent ; he said you have seen enough about property since we have been in this country to know that too ; he said if father had bought property when he came here we could all have been independent, instead of buying those old boats. Since that time he has offered to settle up with me and divide two or three different times ; I found out that the New York property was in John's name when I went to the records in New York about six months ago ; before that I thought it was in my mother's 10 name ; I had no reason to think different ; I knew he had no money of his own ; that New York property was sold for \$7,500 ; he took stock on Third avenue railroad at par ; he told me so the same day ; I was with him in the City Hall Park, New York ; he told me he sold it for \$1,500 more than he gave for it ; I did not see him get the stock ; he said he traded it off with Mr. Hart for stock in the Third avenue ; he did not say anything about the ownership of that stock, to whom it belonged.

I know it came from Hart for the house ; I don't know 20 anything more about it ; the deed I spoke about going up to the Hudson County Clerk's office to record was a deed of property in Greenville, New Jersey, about eight acres, that was bought of Jacob M. Merseles ; I think he gave \$650 per acre ; that is what he told me, at the same time before he had taken the deed to the clerk's office to record ; he talked to me about the purchase before he bought ; I was with him every day negotiating about trading this property off with Mr. Hart ; my brother Henry was working on that farm (eight acres) at that time ; he worked on 30 it before John bought ; I did nothing more about the trade to Hart than to go with John to see Hart till it was accomplished ; I stood a little to one side while John and Hart talked ; John came and told me it was all fixed, it was all right.

I had nothing to do with the purchase of the Greenville tract from Merseles ; I knew when those negotiations were going on ; Merseles spoke to me about it ; those negotiations were pending at the time of the sale of the New York property to Hart ; John gave to Merseles for the Green- 40

ville property Third Avenue Railroad stocks ; I know that for we had some stock left, and the next week the stock went down to 95 and it continued to go down to about 37 ; Merseles asked me what did you do with the rest of that stock that you had.

(Conversation with Merseles objected to.)

I told him we had it still ; he says how did you keep it ; I made the remark we might as well keep it as give it away ; the spring following it went up to about par ; I said  
10 we had some stock left—by we I mean the family ; I considered it all in one, me and brothers ; the stock was in John's name ; I know John considered it so ; I know it because he used to say we had better do so and so ; he never did anything without consulting us ; he kept letting me know according as the stock went up.

Q. When he spoke of it did he speak of it as his own stock ?

(Question objected to as leading.)

A. No, sir ; he said that stock is going up every day.  
20 All the stock went to Merseles except those we reserved ; they were eight shares ; he told me all about it ; he told me about selling those shares ; they were pretty near par ; he was going to get married ; he sold it to Mr. Hart ; one particular time we were all three together, himself, brother Henry and me, that was seven or eight years after he bought this place ; he said now we are all three together, and, he said to me, when you get a little gin in you, you are not satisfied ; my brother Henry said what is the matter with you, let it lay there, let the property stay where it is, if you  
30 get it you will go and spend it, I am doing more to keep it there than what you are ; Henry said this ; I said, well, all right, let it stay there ; there was no settlement in that conversation ; in 1865 he offered me \$1,750 an acre for mine ; I said I would lease it out ; I had waited now a good while and I now wanted all it was worth ; I asked him what that property was worth an acre ; he said about \$2,000 ; I

wanted a choice lot on the property that I had picked out ; he asked me whereabouts I wanted it ; I showed him ; he said you had better take on the corner of Jackson avenue ; he said that is the better property, take it on the sunny side and you will have the sun all day ; he said I could take five lots there, then I could please myself who built along-side of me, and I could sell what property I had of my own and build a good house ; I told him I would look on the map and see how I liked that ; they talked of making a map of Greenville at that time ; he was one of the Greenville com- 10  
missioners at that time ; I looked on the map and told him I liked that better ; he said that was going to be a wide street—Atlantic street ; I told him I liked that better than what I had picked out ; he said there is where your head is clear ; the property laid right up on top of the hill ; I did not take those five lots for the man's lease had not run out, and they had not commenced to cut through yet ; this matter was talked over with John afterwards ; this matter about the five lots was three years ago ; nothing was said about how I was to take those five lots, whether I was to 20  
pay for them or not ; very often John and I had conversations about it ; told him you cannot tell what might happen ; he said I have got no family if it did, I am worth altogether about a hundred thousand dollars and you will get a share of what I have got, independent of what I have got up there ; he told me he had property in Bayonne, some fourteen lots, and property laying all over ; he said I have got no children and my wife will get her thirds.

My mother left no property besides that only some cemetery lots she bought, and he got that in his own name ; she 30  
gave him the money to buy ; they were in Greenwood cemetery ; I never got any share of my mother's property ; I am the oldest son, John the next ; John had charge of mother's affairs ; I was a little wild in those days ; I remember no conversation with my mother in John's presence.

*Cross-examined by Mr. McCarter.*

(So much of the above testimony as consists of the declarations of John H. Midmer or of conversations with

other persons, or of declarations of Henry Midmer or of the witness' mother, is objected to as hearsay and as incompetent to prove a trust in lands.)

I am fifty years old ; my business at present is sarsaparilla business ; have been in that business about eighteen months ; before that was a caulker ; carried on that business here in the city ; I carried on that business about thirty-five years or over ; am a man of family ; have been married twenty-six or twenty-seven years ; John was two years and four or  
 10 five months younger than I ; John was born in 1827 ; I did not live with my mother when she died, I lived in Avenue A, 18th ward ; John lived with his mother.

I think it was about twelve months from the time John bought the Twenty-eighth street property before he sold it ; I knew when he sold it ; it was after mother's death ; mother did not make a will ; I did not make a deed for that property when it was sold.

Q. If you thought the title was in your mother's name how did you suppose John could sell it after your mother's  
 20 death without your making a deed for it ?

A. I did not know anything about it ; I supposed at the time John sold it I had an interest in it ; John got twenty-eight shares of stock for it ; that is what was coming to us after we paid off the mortgage ; I forget now how much the mortgage on the property was ; the stock was in one hundred dollar shares ; John turned the stock over to Merseles is the reason I did not get my shares ; I cannot tell you how many shares Merseles got ; the stock he got did not pay for the whole property ; my brother told  
 30 me there was an \$800 mortgage on the property ; he paid \$650 an acre and there was eight acres ; twenty shares of the stock went in payment of the lands at par, the balance of the purchase money has never been paid—has been transferred from mortgage to mortgage ; he left a mortgage of \$800 on it ; that is what he told me.

Q. How did your brother pay the difference between the twenty shares of stock and the mortgage of \$800 and what the land cost, eight acres at \$650 per acre ?

A. It has never been paid ; I don't know how Merseles

got his pay; John did not owe Merseles at the time of his death; Merseles had been paid before John's death. John told me he used eight shares of that stock besides what he put in the land; he sold it; he paid me about \$50 of the proceeds; I got it from that sale and not generally; he sold it to Mr. Hart about a year after buying this property; he never exactly accounted to me for the balance; I know where the money went; I did not give him anything to show for that fifty dollars; John got married seventeen or eighteen years ago, in 1856 or 1857; I did not hear the 10 whole of the negotiations between John and Hart for the New York property; I did not hear the consummation; he came outside and told me it was all fixed and we came over to New Jersey at the same time. I came to New Jersey to live in 1855; John came about the same time, 1855 or '56; my mother done no business at the time she died; she had not done much business after my father died; my father did not leave much estate; shares in some steamboat that he had; steamboat "Diamond." I partly settled my father's business, and my brother did; he was involved in 20 debt and we turned back pretty much all that we had that he had bought; mother had no real estate independent of my father, but two or three thousand dollars or more personal property; my father kept a seaman's boarding-house, and the \$2,000 or \$3,000 was left when he died; father did not leave any estate when he died any more than what mother had; the money mother had had been my father's money; there was no administrator or executor appointed on my father's estate, not that I recollect; I know that the money my mother had was left by my father's es- 30 tate, for there was no other way she could get it; I do not know how she had it invested; I have seen it; she had \$1,000 or \$1,500 in her bed, in money; I did not count it; she would count some out to me once in a while; I could not tell how much; not a great deal at one time; I do not know how mother was maintained after father's death; John was with her and I boarded there until after I was married; John was talking about his father-in-law's death and said they all wanted to be divided with; we were on a horse-car; he says that is all right; then I said, John what is our 40

place up here worth an acre? he said \$2,000 an acre; I said I will take \$1,750 an acre for mine; he said I will give it to you; I said never mind, I will lease it out to some one else, I have been working for it a good while and I want all it is worth. It was three years ago that John told me he was worth three hundred thousand dollars; I did not know of what his property consisted; I do not know what property he did have, all of it; I lived near him; once in a while he would tell me about his property; I could not  
 10 find his lots in Bayonne; the assessor sent a notice to me and Mr. Abbett; I told him I could not find the property; they made me a diagram, and the property on the diagram was not in his name; my brother at the time of his death owned two houses in Jersey City, and his residence that I knew of; this residence he told me he had been offered \$35,000 for and I think it was worth it; I sold the Jersey City lots for \$2,400; \$2,000 mortgage on it; it did not pay expenses over and above the mortgage; that is all the real estate I know of except this land in controversy; I suppose  
 20 he had personal estate to the amount of \$1,500 or \$2,000, may be more; we filed an inventory as executors; I believe it was about \$1,500. I was present when John's will was made; its contents were made known to me before his death; I heard it read in his presence; I afterwards proved the will as one of his executors; but I did not know what I was doing at that time; I was told since that I was signing away my rights; my sister objected to the will otherwise I should. His residence was mortgaged for \$5,000; he never had paid but \$1,000 on it; the property he got of Merseles  
 30 has been sold by executors; I joined in making a deed of it through the advice of my counsel; it sold for about \$35,000, may be a little more; I am engaged with my brother and sister in the prosecution of this suit; I contribute to the expense of it.

Fifty dollars is all I ever received from John without I earned it; I earned money from him when he was sheriff; I acted as deputy, and when he was in the stone business at Weehawken was foreman; had an interest in the business; he had a partner after a while named Devlin.  
 40 He paid me no salary; he did not make anything in that

business; while I was in the stone business I got about \$80 or \$100; got half of what the partner got; except what I have earned he has only paid me the fifty dollars; I have always had to work for my living; I did not get a dollar from him in seven years; I always made good wages and saved money when I did not drink; I was addicted to habits of intemperance; sometimes I would go six months without drinking and then drink for a week; these habits continued for thirty-five years; I have never been much embarrassed for money, if I had \$25 I thought I was all 10 right; sometimes I had two or three hundred.

*Re-direct:*

This is an agreement made by Mr. Abbett and Mrs. Midmer with Henry, Eliza and her husband, and myself, under which the conveyances of the property in question were executed; the signatures are those of Leon Abbett and Theodosia Ann Midmer.

(Offered in evidence by complainants and marked Exhibit C 1.)

(Objected to by defendants' counsel because not alluded 20 to in the bill nor in anywise in issue in this cause).

WILLIAM MIDMER.

Sworn and subscribed to this thirtieth day of July, A. D. 1874, before me.

HENRY S. WHITE,  
*Master in Chancery of N. J.*

(Counsel for complainants offer in evidence copy of record of deed made by Robert Ray and John A. King, executors to John H. Midmer, dated November 1, 1851, for \$4,537.50, conveying lot on Twenty-eighth street, in City of New 30 York; Acknowledged August 9, 1852 and August 11, 1852; Recorded December 7, 1852. Marked Exhibit C 2.)

(Also copy of the record of a deed made by John H. Midmer to Mitchel Hart, dated November 10, 1853, for \$8,500, conveying the same property on Twenty-eighth street, subject to a mortgage to the above executors for \$4,537.50; Acknowledged November 10, 1853; Recorded November 11, 1853. Marked Exhibit C 3.)

(Both of these papers are objected to by defendants' counsel on the ground that they are not so authenticated as  
10 to be competent evidence.)

Examination of witnesses in above stated cause continued this eighth day of February, in the year eighteen hundred and seventy-five, taken at the office of Henry S. White, No. 125 Washington street, in Jersey City, New Jersey, before Henry S. White; one of the masters and examiners of the Court of Chancery of the State of New Jersey, in the presence of Jonathan Dixon, Esq., solicitor, and of  
20 counsel for the complainants, and of Thomas N. McCarter, Esq., solicitor, and of counsel for the defendants.

*Francis A. Esty*, a witness produced on the part of the complainants, being duly sworn, deposes and says:

I live at Plainfield, New Jersey; I was in business with Daniel Romaine; the firm name was Esty & Romaine; our business was grain and feed, in New York City, on the  
30 corner of Washington and Murray streets; our partnership commenced in the spring or fall of 1852, and continued about three years; I knew Jacob M. Merseles, now deceased, the old sheriff; we had business dealings with Jacob M. Merseles, now deceased; we sold him horse feed; he made payment to us on account in railroad stock; Third  
avenue railroad stock; the representative value of the stock was one thousand dollars; I do not recollect the par value of the shares; I believe that was in 1853; we had other Third avenue railroad stock besides this one thousand  
40 dollars we got of Merseles; we had some we got of Mr.

Goelz of Hoboken, about four hundred dollars; we had none other than two lots; we had no business dealings with John H. Midmer, deceased, that I am aware of; I did not know him.

And being *cross-examined* by Mr. McCarter counsel for the defendants saith :

What I have to fix the date when we got the stock is I know it must be as early as 1854 by my partnership with Mr. Romaine, and I have been shown a paper showing the transfer to have been in the fall of 1853; Mr. Dixon showed 10 me that paper.

F. A. ESTY.

Subscribed and sworn at Jersey City this 8th day of February, A. D. 1875, before me,

HENRY S. WHITE,  
*Master in Chancery of N. J.*

(A transcript from the stock ledger of the Third Avenue Railroad Company offered in evidence by Mr. Dixon, counsel for the complainants, and it is admitted by the counsel for the defendants to be a true copy and that it may be 20 used in lieu of the books of the company, and marked Exhibit C 4, for the complainants.)

(The counsel for the defendants withdraws his objections to Exhibits C 2 and C 3 on the part of the complainants, for want of proper authentication. The complainants also offer an agreement, the execution of which by Leon Abbott and Theodosia Ann Midmer is admitted and which I mark Exhibit C 5 on part of the complainants.)

The counsel for the complainants hereupon declared their testimony closed.

HENRY S. WHITE,  
*Master in Chancery of N. J.*

## IN CHANCERY OF NEW JERSEY.

Between

THEODOSIA ANN MIDMER, *Ex., &c.*,  
*Def't.**and*HENRY MIDMER, *et als.*,  
*Compl'ts.**Depositions.*

Examination continued this second day of April, A. D. 1875, at the office of Henry S. White, No. 125 Washington street, Jersey City, N. J., before me, Henry S. White, a Master and Examiner in Chancery of New Jersey, in presence of Jonathan Dixon, Esq., counsel for complainant, and Thomas N. McCarter, counsel for defendants.

*William Brinkerhoff*, a witness produced on the part of the defendants, being duly sworn, deposes and says:

Am an attorney and counsellor at law practising in Jersey City; I knew John H. Midmer in his life time; I received some of the proceeds of sale in which Mr. Gibson acted as auctioneer for the executors of John H. Midmer of  
20 property then in the township of Greenville; it was the property he got of Merseles; I received \$8,451.95 from the purchasers; that money was paid to me because I had commenced proceedings for one Berry, who held a mortgage on the property, for foreclosure of the mortgage, which mortgage remained a lien on the property at the time of the sale, and as I refused to allow Mrs. Berry to release lot by lot as

the deed was delivered, Mr. Abbett, who was acting executor, suggested that I receive the proceeds of that sale and apply it to the payment of the decree of Berry agst. Midmer and others, and render the surplus, if any, to him or have it subject to his order; this having been explained to each of the purchasers who called at my office in reference to the matter, they paid their respective amounts due on last payment to me and received their deeds from me, with probably one or two exceptions; I appropriated of the proceeds of the monies which came to my hands as per understanding 10 of Mr. Abbett, executor, the sum \$5,624.36 for decree, taxable costs and execution fees in matter of Berry agst. Midmer and others on the mortgage I spoke of; I paid Henry Young, attorney, of Newark, by order of Mr. Abbett, executor, the sum of \$1,361.49; I paid taxes or on account of taxes for the years 1870, 1871, and 1872, the sum of \$1,075.91; I paid Dixon and Collins, attorneys, in Jersey City, the sum of \$242.44; I paid for recording eight mortgages sixteen dollars, adding to the amount received by me for drawing mortgages and recording them there was a 20 balance still due the estate of \$184.25, which was paid as follows: Henry Schmidt, for drawing mortgages, paid by order of Mr. Abbett, \$52.50; paid Leon Abbett, executor of John H. Midmer, deceased, \$131.75, which balanced the account between us; for that I took the executor's receipt, or certificate or statement of its correctness; the mortgage spoken of was one given by John H. Midmer and wife to Mrs. Berry two or three years previous to his death.

No cross-examination.

WM. BRINKERHOFF. 30

Subscribed and sworn at Jersey City, this second day of April, A. D., 1875, before me.

HENRY S. WHITE.

*Master in Chancery of N. J.*

*Mrs. Sarah C. Oakley*, a witness produced on the part of the defendants, being duly sworn, deposes and says :

I reside in Newark, New Jersey ; Mrs. Theodosia Ann Midmer is my sister ; I knew her husband in his lifetime ; I was at his house nearly all the time during his last sickness, covering a period of seven weeks ; I was there when his will was made ; it was made at night ; John H. Midmer and his wife, Henry Midmer and Miss Johnson composed his family ; lawyer Cary wrote his will ; John Midmer  
 10 sent Harry for him and he brought him (Mr. Cary) ; this was nearly seven weeks before John H. Midmer's death ; I heard the will read over to John before it was signed ; it was read twice by Mr. Carey, in the presence of William Midmer, his sister Mrs. Anderson, Harry Midmer, Mr. Smith and Miss Johnson part of the time ; his sister and both his brothers were present when the will was read over ; they were present when it was signed ; neither of them said anything or made any objection to his disposition of the property before the signing of the will ; the night he signed  
 20 the will he was very feeble ; I don't think he expected to get well ; his disorder was Bright's disease of the kidneys ; afterwards I heard no conversation about his property except what his sister said ; I mean Mrs. Anderson ; afterward, about half an hour after the signing of the will Mrs. Anderson said to John, how about that back property ? He said you have all had your shares of that long ago. I remember hearing nothing more about the estate for I did not pay attention to it ; William Midmer did not live with John ; he was there the greater portion of the time during  
 30 John's sickness ; he was there most of the time between the making of the will and John's death ; after making the will John rallied and got better and afterwards sank.

*Cross-examined* by Mr. Dixon, counsel for complainants.

He got better so that he could go about the room ; I do not mean that he got well ; he became able to sit up during the day ; it was about for the period of two weeks that he was able to be up about his room ; he sat up most of the

time not being able to lie down ; when the will was signed his mind was clear, but he was very feeble, not able to stand ; he was in the bed when he signed the will ; some one stood behind him and raised him when he signed the will ; I heard the will read ; Mrs. Theodosia Ann Midmer was there also ; the family expected his early death then ; they sent for his sister to come up for they thought he could not live ; were expecting his death daily ; nothing was said at the time of signing the will in regard to the disposition of the estate ; in the conversation after the signing the will there were but few words between Mrs. Anderson and Mr. Midmer besides the question and answer 10  
which I have before stated, but as I paid no attention I did not hear them ; the will was read twice ; the two readings were the same night ; Mr. Carey was there an hour getting the instructions, drawing the will, attending to the execution, and reading it twice.

SARAH C. OAKLEY.

Sworn and subscribed at Jersey City this 2d day April,  
A. D. 1875, before me,

HENRY S. WHITE,  
*Master in Chancery of N. J.* 20

(Mr. McCarter offered in evidence the original deed from Jacob M. Merseles to John H. Midmer, which is marked Exhibit D 1, on part of the defendants.)

(Certified copy of the last will and testament and letters testamentary of John H. Midmer, deceased, marked Exhibit D 2 on part of defendants.)

(Certified copy of the inventory and appraisement of the goods, chattels, etc., of John H. Midmer, deceased, marked 30 Exhibit D 3, on part of defendants ; also a statement signed by Leon Abbett, executor, exhibiting the amount of claims proved against the estate of John H. Midmer, deceased, marked Exhibit D 4, on part of defendants, it being admitted in evidence by the counsel for the complainants on an

agreement between the solicitors that Mr. Abbett's certificate shall be sufficient proof of the correctness of the statement, the counsel for the complainants reserving the right to object to relevancy.)

*John M. Gibson*, a witness on the part of the defendants, being sworn deposes and says :

I reside and do business in Jersey City ; am a real estate broker and auctioneer ; I knew John H. Midmer in his life time ; I conducted a sale under his executors of part of the  
 10 property of John H. Midmer, deceased ; the property which I sold was situated, I think, on Bergen avenue in that part of Jersey City formerly known as Greenville ; I know Henry Midmer ; there were two sales of the property ; at the last sale Henry Midmer purchased lots one, two, three, four, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four and twenty-eight on block one on the map made for the sale ; I cannot tell whether any of the proceeds of that sale went into Mr. Brinkerhoff's hands ; the first sale was on June 3,  
 20 1873, and was made at my sales room, corner of Greene and Montgomery streets, in Jersey City ; the second sale was on July 31, 1873 ; the two sales covered property in one plot, one parcel ; I think there was one or two dwelling houses on the property sold ; one I remember was sold at the first sale ; that was sold to a man named Alexander McGarran ; I cannot tell positively for whom he bought it ; I heard William say something about that ; I understood from William Midmer that it was bought for him and his  
 30 brother, but all my business about that sale was with Mr. McGarran ; the way William came to tell me about it was he was trying to make some rebate on the auction fees ; I do not know of my own knowledge that he and his brother have since occupied it ; at the first sale I sold only a portion of the back property, about one-half of it, and offered the homestead but did not sell it ; and at the second sale again offered the homestead but did not sell it, but sold the balance of the back property.

JOHN M. GIBSON.

No cross-examination.

Sworn and subscribed this 2d day of April, 1875, before  
me,

HENRY S. WHITE,  
*Master in Chancery of N. J.*

## IN CHANCERY OF NEW JERSEY.

Between

HENRY MIDMER AND OTHERS,

*Compl'ts,**and*

THEODOSIA ANN MIDMER, EX., &amp;C.,

*Def't.**On Bill, &c.*

10 Examination continued this twenty-eighth day of May, A. D. 1875, at the office of Henry S. White, No. 125 Washington street, Jersey City, N. J., by consent, before me, Henry S. White, a master and examiner of chancery of New Jersey, in presence of Gilbert Collins, solicitor, and counsel for complainants, and Thomas N. McCarter, counsel for defendants.

*Michael C. Smith*, a witness produced on the part of the complainants, being sworn deposes and says :

20 I reside in Jersey City formerly Greenville ; I knew John H. Midmer, deceased, in his life time ; I knew the two boys and had seen the sister ; have known them a good many years ; I was present at the execution of the will of John H. Midmer ; was a witness to it ; Mr. Midmer was quite feeble at the time of signing the will ; he was in bed ; he could see ; I thought he could see ; he had to be held up to sign the will ; I held him up ; well, after Mr. Midmer had signed the will, I suppose fifteen or twenty minutes, I don't think it was over that, might not have been quite that, he then asked his brothers and sister if they were

satisfied; Mrs. Anderson said she was not; she thought "the back property ought to go to us." Mr. Midmer said he would see about that another time, and that was the last spoken about the will to my knowledge till the next day.

And being *cross-examined* by Mr. McCarter says:

Mr. Carey, myself, Miss Johnson, Mrs. Oakley, Henry Midmer, William Midmer, Mrs. Drake, and Joseph M. Smith were present at this conversation, and at the time of signing the will.

M. C. SMITH. 10

Sworn and subscribed at Jersey City this 28th day of May, 1875, before me,

HENRY S. WHITE,  
*Master in Chancery of N. J.*

*Thomas Carey*, a witness produced on the part of the complainants, being duly sworn, deposes and says:

I am a practising lawyer, living in Jersey City; I drew the will of John H. Midmer, deceased; the one that was proved before the Surrogate; I was present at its execution; Mr. Midmer at that time was confined to his bed, and 20 physically I should say he was not very strong; my recollection is that they put pillows behind his back when he signed the will; he sat up a little while and then laid down again; this was before he signed the will; a portion of that time he was giving me directions about the will; they raised him up, put pillows behind his back; he commenced to write but his hand became nervous and William I think held his hand, and I don't remember whether he completed the signing or made his mark; after he signed the will he seemed to be somewhat exhausted and 30 laid down upon the bed: after the signing of the will I should judge I was in the room ten or fifteen minutes; I then heard somebody crying in a room opposite that, on the other side of the hall; I saw one or two go in there and

went in there to see what the matter was; I found Mrs. Midmer, John's wife, she was then crying; there was some dispute between her and one of the brothers—she said so, I forget whether Harry or William, in regard to the will; I think there were two ladies in the room where John was after the execution of the will besides Mrs. Midmer, and my recollection is that I was introduced but cannot remember their names; think one was a sister of John; I think one of them sat at the foot of the bed and the other sat towards  
 10 the New York Bay, opposite the side of the bed; I think there was something said by the one that sat at the foot of the bed; by John first or by her first I don't recollect which; my best recollection is that the conversation was as to the disposition of the property by the will; about that time I heard the crying in the other room and went across the hall; I don't recollect what was said; I paid no attention to it.

*Cross-examined* by Mr. McCarter.

This will was prepared and executed in the evening;  
 20 Harry came to my house about ten o'clock at night and requested me to go down with him to the house; I went with him; I suppose I was there about two hours; my instructions as to drawing the will were received from John, in the sick room; I sat close to him; the will was read over to him before he executed it in the presence of the persons who were there; the persons there were those two ladies I have been speaking of, Mrs. Midmer, Harry, William and Michael C. Smith. I know that Michael Smith's son was  
 30 in the house but can't say whether he was in the room; I can't say whether or not Miss Drake and Miss Johnson were in the room; they were in the house.

THOMAS CAREY.

Sworn and subscribed at Jersey City this 28th day of May, A. D. 1875, before me,

HENRY S. WHITE,  
*Master in Chancery of N. J.*

## COMPLAINANTS' EXHIBITS.

## EXHIBIT C I.

Whereas, Henry Midmer, Eliza Anderson and Joseph Anderson her husband, have lately filed their bill of complaint against the executors of John H. Midmer deceased, viz., Theodosia Ann Midmer, William Midmer, and Leon Abbett, in which bill it is claimed that the said John H. Midmer, in his lifetime, and his executors, since his decease, held and hold certain lands in Greenville for the equal benefit of said John H. Midmer, William Midmer, Henry 10 Midmer, and Eliza Anderson, and in which bill a just and equitable division of said lands, or the proceeds of sale thereof, is sought; and whereas, said executors have sold a portion of said lands, and desire to give good title to the purchasers thereof, and to have said Henry Midmer, Eliza Anderson and her husband, and William Midmer, join in conveying and assuring said title. Now, therefore, it is agreed by said Theodosia Ann Midmer and Leon Abbett, with said Henry, Eliza, Joseph and William, that nothing which they may do towards conveying said title 20 to those who may have purchased or may purchase from said executors, shall in any way prejudice any claim which said Henry, Eliza, Joseph and William, or any of them, may have by reason of any facts set forth in said bill, or existing prior to the death of said John H. Midmer.

Witness the hands and seals of said Theodosia Ann Midmer and Leon Abbett, this September 1st, 1873.

LEON ABBETT, [L. S.]  
*Executor of John H. Midmer, dec'd.*

THEODOSIA A. MIDMER, [L. S.] 30  
*Executor of John H. Midmer, dec'd.*

## EXHIBIT C 2.

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ROBERT RAY, et al., *Executors, &c.*, of  
 CORNELIUS RAY, *deceased*,  
 to  
 JOHN H MIDMER.

---

Deed dated November 1, 1851, recorded December 7, 1852, Liber 614, p. 650, of Conveyances, in the office of Register of Deeds, New York County, N. Y. For \$4,537.50 conveys in fee certain land on Twenty-eighth street, New York City.

## EXHIBIT C 3.

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JOHN H. MIDMER,  
 to  
 MITCHELL HART.

---

Deed dated November 10, 1853, recorded November 11, 1853, Liber 639, p. 501, of Conveyances, in said office. For \$8,500 conveys in fee same premises.

## EXHIBIT C 4.

Transcript from the Stock Ledger of the Third Avenue Railroad Company of New York City, as follows :

DR.	JOHN H. MIDMER.		CR.	
1853.			1853.	
Nov. 11.	To Esty & Romaine..	10	Nov. 11. By Henry Hart.....	26
1853.			1853.	
Nov. 14.	" Jacob M. Merseles	16	Dec. 10. " Henry Hart.....	8
1857.				
Jan. 22.	" Henry Hart.....	8		
		34		34

The foregoing is a transcript of the stock ledger. John 10  
H. Midmer bought his stock of Henry Hart, and sold to  
parties as entered above.

New York, July 31, 1874.

CHAS. S. ARTHUR,  
*Sec'y.*

## EXHIBIT C 5.

This Exhibit is an exact duplicate of Exhibit C 1 printed  
above, except that it is dated July 1, 1873, and except that  
the title "Executor of John H. Midmer, dec'd," is not ap-  
pended to the signatures.

## DEFENDANTS' EXHIBITS.

## EXHIBIT D 1.

JACOB M. MERSELES and wife,

to

JOHN H. MIDMER.

Deed dated Aug. 8, 1853, recorded April 8, 1854, Hudson County Deeds, liber 37, page 76, &c., conveys in fee the premises described in the bill of complaint.

Habendum in fee. Full covenant.

10

## EXHIBIT D 2.

WILL OF JOHN H. MIDMER, }  
Dated August 3d, 1872. }

*In the name of God. AMEN :*

I, JOHN H. MIDMER, of the Township of Greenville, in the County of Hudson, and State of New Jersey, being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do therefore make, publish, and declare this to be my last will and testament; that is to say :

30 *First.* I direct that all my just debts and funeral expenses be paid and discharged as soon after my decease as practicable.

*Second.* I give, devise, and bequeath unto my executrix and executors, hereinafter nominated and appointed, all my estate, both real and personal, of whatsoever name, nature, and kind, and wheresoever situated, in trust, nevertheless,

and to and for the following uses and purposes ; that is to say :

It is my will, and I do hereby direct, that out of my said estate, both real and personal, there be paid to my beloved wife Theodosia Ann, yearly, and every year, the sum of three thousand dollars each year, during the period of her natural life, the same to be paid to her in semi-annual payments : And it is my will, and I do hereby direct, that all my said estate, both real and personal, be so fixed, arranged and managed, as to produce the said sum of three thousand 10 dollars per year for my said beloved wife as aforesaid, yearly and every year, during the period of her natural life : And it is further my will and wish, and I do hereby direct, that all the rest, residue and remainder of my said estate, both real and personal, shall be divided between my brothers William and Henry and my sister Eliza, now wife of Joseph Anderson, share and share alike, such division, however, to be subject to the payment of said sum of three thousand dollars per year to my said beloved wife, each year during the period of her natural life, which payment is hereby 20 made a charge upon all my real estate, and all conveyances of my said real estate, and division thereof, as aforesaid, shall be subject to such charge.

*Third.* It is my will and wish, that all my real estate in the said Township of Greenville shall be kept as long as my said executrix and executors hereinafter named shall think advisable, and my reason for this is, that the same will improve in value, and enure to the benefit of all parties ; and I do hereby authorize and empower my said executrix and executors, or the survivor or survivors of them, to make 30 good and sufficient deeds of conveyance in law and equity all of my property to the purchaser or purchasers thereof, as the case may be.

*Fourth.* Should the income of my said estate be not sufficient to pay to my said beloved wife the said yearly sum, as hereinbefore expressed and set forth, then it is my wish and will, that so much of my said property or real estate be sold as may be necessary for the purpose of making such payments to her of said three thousand dollars

as aforesaid, yearly and every year during her life, as aforesaid.

*Fifth.* In the event of the death of any or either of my said brothers or sister leaving issue then it is my will that such issue take the share to which their parent would have been entitled if living; that is in the event of either of my said brothers or sister dying before receiving or being entitled to their share as provided in this will.

*Sixth.* And I do hereby further give and bequeath unto  
10 my said beloved wife, all the furniture and property in my said dwelling house in said Township of Greenville, meaning the property of every description personal in said house; the provisions for my said wife are in lieu of all dower.

Likewise I make, constitute and appoint my said beloved wife, Theodosia Ann, to be executrix and my brother William and friend Leon Abbett to be executors of this, my last will and testament, hereby revoking all other and former wills by me made.

In witness whereof, I have hereunto subscribed my name  
20 and affixed my seal, this third day of August, in the year of our Lord one thousand eight hundred and seventy-two.

his

JOHN H. + MIDMER. [L.S.]

mark

Witnesses, THOMAS CAREY.

M. C. SMITH.

The above and foregoing written will and instrument was signed, sealed, published and declared by the said John H. Midmer as and for his last will and testament in our  
30 presence, and we at his request at the same time and in his presence, and in the presence of each other, signed our names thereto at the end as witnesses and have also hereunto subscribed our names as witnesses.

The words "unto my said beloved wife" last line on 3d page interlined before execution hereof.

THOMAS CAREY.

THOMAS CAREY.

M. C. SMITH.

M. C. SMITH.

Proved by both witnesses October 11, 1872.

## EXHIBIT D 3.

Inventory and appraisement of personal estate of John H. Midmer, deceased, showing the entire personalty to be \$1,824.80.

## EXHIBIT D 4.

Statement of Leon Abbett, Esquire, one of the executors of John H. Midmer, deceased, showing debts proved against his estate to the amount of \$11,750.63.

January 13

1814

Received of the Hon. the Secretary of the Treasury the sum of \$1000.00 for the purchase of the land of John Smith, deceased, for the use of the said Secretary.

To the Hon. the Secretary of the Treasury \$1000.00

Received of the Hon. the Secretary of the Treasury the sum of \$1000.00 for the purchase of the land of John Smith, deceased, for the use of the said Secretary.

To the Hon. the Secretary of the Treasury \$1000.00

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To the Hon. the Secretary of the Treasury \$1000.00

Received of the Hon. the Secretary of the Treasury the sum of \$1000.00 for the purchase of the land of John Smith, deceased, for the use of the said Secretary.

To the Hon. the Secretary of the Treasury \$1000.00

## BILL OF COMPLAINT.

Filed July 12, 1873.

## IN CHANCERY OF NEW JERSEY.

*To the Hon. THEODORE RUNYON, Chancellor of the State of New Jersey :*

Humbly complaining, show unto your honor your orators, Henry Midmer, Eliza Anderson and Joseph Anderson, her husband, of Jersey City, that on or about the eighth day of August, in the year eighteen hundred and fifty-three, by deed of that date, recorded in Hudson County clerk's office, in liber 37 of deeds, page 76, &c., John H. Midmer, now deceased, purchased of Jacob M. Merseles and wife,

All that certain tract or parcel of land and premises situate, lying and being in the then Township of Bergen, County of Hudson and State of New Jersey, beginning at the southwest corner of Bergen road and lane on map A and running thence north twenty-five degrees forty-five minutes west seven chains ninety-six links; thence south sixty-four degrees fifteen minutes west two chains ten links; thence north twenty-five degrees forty-five minutes west ten chains sixty-six links to a stake; thence north sixty-four degrees and fifteen minutes east six chains and eighty-six links to a stake; thence south twenty-five degrees forty-five minutes east ten chains and sixty-six links; thence south sixty-four degrees fifteen minutes west three chains and thirty-four links; thence south twenty-five degrees forty-five minutes east three chains sixty-nine links; thence south sixty-four degrees fifteen minutes west one chain forty links; thence along on north side of lane four chains and fifteen links; thence along the west side of said Bergen road to the place of beginning, containing eight acres more or less; and that the said Merseles and wife by said deed conveyed said land to John H. Midmer in fee simple, as by the record of said deed, to which your orators pray leave to refer, will more fully appear.

And your orators further show unto your honor, that before the purchase of said property the said John H. Midmer, who was the brother of your orators, Henry and Eliza, had money belonging to your orators, Henry and Eliza, and to himself and another brother, William, one of the defendants to this bill, which money had been realized from the sale of property owned in common in equal shares by the said three brothers and sister, John, William, Henry and Eliza; and that before said purchase it was agreed by the  
 10 said three brothers and sister among themselves, that the said John should purchase the premises aforesaid and pay for the same with said money, and should take the title to said premises in his own name and hold the same as trustee for himself and your orators, Henry and Eliza, and their said brother William, in equal shares; that in pursuance of said agreement he did purchase said premises as aforesaid, and paid for the same with the said money, and took the title thereto in his own name as aforesaid, and thence up to the time of his death continued to hold the same in trust  
 20 for himself, his said brother William, and your orators, Henry and Eliza.

And your orators further show, that on September 17, A. D. 1872, the said John H. Midmer died seized in fee simple at law of said premises, having first made and executed his will in due form of law to pass real estate, in and by which will he nominated his wife, Theodosia Ann Midmer, and his said brother William Midmer, and his friend Leon Abbett, as the executors thereof, and devised all his real estate to his said executors in trust for the benefit of his said wife and  
 30 his said brother William and your orators, Henry and Eliza, the terms of which trust are more fully set forth in said will, to which, or the record thereof, your orators pray leave to refer, if necessary so to do.

And your orators further show, that after the death of said John H. Midmer, the said executors duly proved the said will before the surrogate of the County of Hudson, wherein the said John resided at the time of his death and died, and took upon themselves the burden of the administration of said estate, and that since that time they have sold  
 40 and conveyed portions of the said premises and received the

purchase price therefor to an amount far in excess of the cost thereof.

And your orators further show, that by reason of the foregoing facts, the said executors have become and are trustees to hold the premises hereinbefore described, or so much thereof as remains unsold, for the benefit of your orators, Henry and Eliza, and the said William, and the estate of the said John, in equal shares, and to divide the proceeds of the sale of any portion thereof that has been or may be sold equally among the same beneficiaries. 10

And your orators further show, that they have applied to the said executors to declare in writing the trusts upon which as aforesaid they hold and have held the said premises, and to divide the proceeds of sale in manner aforesaid, and your orators well hoped that they would have done so, as in equity and good conscience they ought ; but the said Theodosia Ann Midmer and Leon Abbett have refused so to do, and give out and pretend that your orators have no interest in said premises or proceeds except such as they may acquire under and by virtue of said will of John H. Midmer. 20

Forasmuch therefore as your orators are without adequate relief in the premises by the strict rules of the common law, and without the aid of this honorable court, where matters of this nature are particularly cognizable and relievable, and to the end that the said defendants may without oath true, full, perfect and distinct answer make to all and singular the premises, and may be decreed to hold the premises aforesaid, or so much thereof as remains unsold, in trust, one undivided fourth thereof for the benefit of your orator Henry, one undivided fourth thereof for the benefit of your 30 oratrix Eliza, one undivided fourth thereof for the benefit of the said William Midmer, and one undivided fourth thereof as executors of John H. Midmer for the purposes of his will ; and that they may be decreed to make an equal division among the said four beneficiaries, Henry, Eliza, William, and the estate of John, of the proceeds of the sale of any portion of the said premises which they, the said executors, may have sold ; may it please your honor, the premises considered, to grant unto your orators the State's most gracious writ of subpoena issuing out of and under the 40

seal of this honorable court, directed to the said Theodosia Ann Midmer, William Midmer and Leon Abbett, executors of John H. Midmer, deceased, commanding them and each of them, on a certain day and under a certain penalty therein to be expressed, personally to be and appear before your honor in this honorable court, then and there to answer the premises, and to stand to, abide by and perform such decree as may to your honor seem meet, &c., and your orators as in duty bound will ever pray, &c.

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DIXON & COLLINS, *Sol'rs.*  
 JONATHAN DIXON, *of Coun.*  
*with Complainants.*

A true copy.

H. S. LITTLE, *Clk.*

#### A N S W E R .

Filed October 20, 1873.

The answer of Theodosia Ann Midmer and Leon Abbett, two of the Executors of John H. Midmer, deceased, and two of the defendants in this cause, to the bill of complaint of  
 20 Henry Midmer, Eliza Anderson and Joseph Anderson, her husband, complainants.

These defendants now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors, uncertainties, insufficiencies and untruths in the complainants' said bill of complaint contained for answer thereunto, or unto so much and such parts thereof as these defendants are advised are material for them to make answer unto, they answer and say :

30 That they believe it to be true that on or about the eighth day of August, in the year of our Lord one thousand eight hundred and fifty-three, Jacob M. Merseles and his wife Sarah by deed of that date, and recorded in Hudson County clerk's office in liber 39 of deeds, pages 76, &c., conveyed unto John H. Midmer, now deceased, a tract of land and premises, the same described in the complainants' bill, which

deed of conveyance was a warranty deed and conveyed the said land to the said John H. Midmer in fee simple ; subject, nevertheless, to a bond and mortgage of eight thousand dollars to N. Prior, which the said John H. Midmer by the said deed did covenant and agree to pay off, satisfy and discharge, and which said mortgage was excepted out of the covenants of warranty and against encumbrances in the said deed contained.

And these defendants further answering say, that they have no knowledge as to the truth of the allegation in said 10 bill, that before the purchase of said property the said John H. Midmer, who was the brother of the complainants Henry and Eliza, had money belonging to the said complainants Henry and Eliza and to himself and another brother William, one of the defendants in said bill, which had been realized by the sale of property owned in common, in equal shares, by the said three brothers and sister, John, William, Henry and Eliza ; or that before said purchase it was agreed by the said three brothers and sister among themselves that the said John should purchase the premises aforesaid and 20 pay for the same with the said money, and should take the title to said premises in his own name and hold the same as trustee for himself and the complainants Henry and Eliza and their said brother William Midmer, in equal shares ; or that he did purchase said property in pursuance of said agreement, or that he paid for the said property with the said money, or that he took the title thereto and continued to hold the same until the time of his death in trust for himself, the said John H. Midmer, and for his brother William, and for the complainants Henry and Eliza. 30

But these defendants are informed and believe and charge the truth to be, that the said John H. Midmer bought the said lands for his own use, with his own money, and they therefore deny the allegations in said bill that the said John H. Midmer purchased the said land or any part thereof with any money of the said complainants and the said William Midmer or of either of them ; and they further deny that he held the said land in trust for himself or for either of his said brothers and sister ; and they aver and insist the truth to be, that the said John H. Midmer took the title to the 40

said lot in his own name, in his own right, and for his own use, and under no trust for the said complainants or any other person whatever.

And these defendants further answering admit that on the seventeenth day of September, eighteen hundred and seventy-two, the said John H. Midmer died seized in fee simple at law of said premises, and that he had theretofore executed his will in due form of law to pass real estate, and that by said will he nominated his wife, Theodosia Ann  
 10 Midmer, and his said brother William Midmer, and his friend Leon Abbett, also one of these defendants, as the executors thereof; and that by his said will he devised all of his real estate to his said executors in trust for the benefit of his said wife, his said brother William, and the complainants, Henry and Eliza, as will appear by the said will, which is of the tenor and effect following, viz :

In the name of God, amen.

I, John H. Midmer, of the Township of Greenville, in the County of Hudson, and State of New Jersey, being of sound  
 20 mind and memory, and considering the uncertainties of this frail and transitory life, do therefore make, publish, and declare this to be my last will and testament, that is to say :

First—I direct that all my just debts and funeral expenses be paid and discharged as soon after my decease as practicable.

Second—I give, devise and bequeath unto my executrix and executors hereinafter nominated and appointed, all my estate, both real and personal, of whatsoever name, nature and kind, and wheresoever situated, in trust nevertheless  
 30 for the following uses and purposes, that is to say : It is my will and I hereby direct that out of my said estate both real and personal there be paid to my beloved wife, Theodosia Ann, yearly and every year the sum of three thousand dollars, each year during the period of her natural life, the same to be paid to her in semi-annual payments.

And it is my will and I do hereby direct that my said estate both real and personal, be so fixed, arranged, and managed as to produce the said sum of three thousand dollars per year for my said beloved wife as aforesaid yearly  
 40 and every year during the period of her natural life.

And it is further my will and wish and I do hereby direct that all the rest, residue, and remainder of my said estate both real and personal shall be divided between my brothers William and Henry and my sister Eliza, now wife of Joseph Anderson, share and share alike, such division to be subject to the payment of said sum of three thousand dollars per year to my said beloved wife each year during the period of her natural life, which payment is hereby made a charge upon all my real estate, and all conveyances of unpaid real estate and division thereof as aforesaid shall be subject to 10 such charge.

Third—It is my will and wish that all my real estate in the said Township of Greenville shall be kept as long as my said executrix and executors hereinafter named shall think advisable and my reason for this is that the same will improve in value and enure to the benefit of all parties; and I do hereby authorize and empower my said executrix and executors or the survivor or survivors of them to make good and sufficient deeds of conveyance in law and in equity of all my property to the purchaser or purchasers thereof as 20 the case may be.

Fourth—Should the income of my said estate be not sufficient to pay to my said beloved wife the said yearly sum as hereinbefore expressed and set forth, then it is my wish and will that so much of my said property or estate be sold as may be necessary for the purpose of making such payments to her of said sum of three thousand dollars as aforesaid, yearly and every year during her life as aforesaid.

Fifth—In the event of the death of any or either of my said brothers or sister leaving issue, then it is my will that 30 such issue take the share to which their parent would have been entitled if living, that is in the event of either of my said brothers and sisters dying before receiving or being entitled to their share as provided in this will.

Sixth—And I do hereby further give and bequeath unto my said beloved wife all the furniture and property in my dwelling house in said Township of Greenville, meaning all the property of every description personal in said house. The provisions for my said wife are in lieu of dower. Likewise I make, constitute, and appoint my said beloved wife 40

Theodosia Ann to be executrix and my brother William and friend Leon Abbett to be executors of this my last will and testament, hereby revoking all other and former wills by me made.

In Witness Whereof, I hereunto subscribed my name and affixed my seal this third day of August, in the year of our Lord one thousand eight hundred and seventy-two.

his

JOHN H. + MIDMER. [L.S.]

mark.

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Witnesses—

THOMAS CARY,

M. C. SMITH.

The above and foregoing written will and instrument was signed, sealed, published and declared by the said John H. Midmer, the testator, as and for his last will and testament in our presence, and we at his request at the same time and in his presence and in the presence of each other signed our names thereto at the end as witnesses and have also here-  
20 unto subscribed our names as witnesses.

The words "unto my said beloved wife" last line on third page interlined before execution hereof.

THOMAS CARY,

M. C. SMITH.

THOMAS CARY,

M. C. SMITH.

And these defendants further answering admit that after the death of the said John H. Midmer the said executors proved the said will before the Surrogate of the County of Hudson, wherein the said John resided at the time of his death and died; that they took upon themselves the burden  
30 of the administration of the said estate, and that since that time they have sold and conveyed portions of said premises and received the purchase price therefor to an amount far in excess of the cost thereof.

And these defendants further answering deny that by reason of the facts alleged in said bill or for any other reason, the said executors have become and are trustees to hold the premises described in said bill, or any part thereof, for the benefit of the complainants in said bill and the said William

Midmer, or that they are bound to account to the said complainants and the said William Midmer for the proceeds of the sale of any part thereof, or to divide the said proceeds among them, except so far as they may be entitled thereto under the said will of the said John H. Midmer, deceased.

And these defendants further answering deny that the complainants have ever applied to these defendants as executors to declare in writing the trusts upon which it is claimed in said bill, they hold and have held the said premises, or to divide the proceeds of the sale in the manner in said bill 10 set forth; but to the contrary thereof these defendants insist and show to the court that the said complainants and the said William Midmer have always claimed their interests in said land under and arising out of the will of the said John H. Midmer, deceased, and that the said premises in the said bill described form the principal part of the real estate of which the said John H. Midmer died seized.

And these defendants further answering say that the said complainants and the said William Midmer were all present when the said John H. Midmer made and executed his said 20 last will, and that they were acquainted with the contents thereof at the time it was made; that they knew that by the said last will the said John H. Midmer intended to dispose of the said real estate in the said bill mentioned according to the terms of said will; and that they, at the time of the making of said will, made no claim or demand upon the said John H. Midmer in respect of any supposed trust which existed upon the said land in their favor, nor did they object in any way to his disposing thereof by will in the manner set forth in the said bill. 30

And these defendants further answering say that by the eleventh section of the act of the legislature of the State of New Jersey, entitled "An act for the prevention of frauds and perjuries," passed the twenty-ninth of November, seventeen hundred and ninety-four, it is enacted that all declarations or creations of trust or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is or shall be by law, enabled to declare such trust, or by his or her last will in writing, or else they shall be utterly void and of no effect. 40

And these defendants insist that any trust which, but for the said statute, might have existed in the said land, if any such there should be (which these defendants absolutely deny), is by the terms of said section of the said act, utterly void and of no effect.

And these defendants claim the same benefit and protection of and under the said act, as if the same had been formerly pleaded by these defendants in bar of the said bill of complaint.

- 10 And these defendants further say that if the trust alleged in said bill should be established and these defendants be decreed to account to the said complainants, and the said William Midmer, for their supposed or alleged interest in said lands, according to the prayer and allegations of said bill, that such accounting and payment would dispose and divest so large a portion of the estate of the said John H. Midmer, deceased, that these defendants, as his executors, or the said William Midmer, would not have sufficient assets of said estate remaining to pay the debts of said estate, and
- 20 that it would be impossible to raise the annuity or income of three thousand dollars by the said will devised or bequeathed to this defendant, widow of said John H. Midmer, deceased, or any part thereof; and they insist to this court that if the said complainants or the said William Midmer had or claimed to have any such interest in the real estate of John H. Midmer, deceased, as was alleged and set up in said bill, it was their duty to have made it known at the time when the said John H. Midmer in their presence was making said last will and testament, which made the dispo-
- 30 sition of all of said real estate inconsistent with the case made by the complainants in their said bill.

And these defendants further answering say that the said deed by which the said property was conveyed to the said John H. Midmer was made and executed within less than one month of the period of twenty years before the filing of said complainants' bill; that during all that time the said John H. Midmer had been the occupant and apparent owner of the said premises absolutely and in fee simple, without any notice of any persons whatever of the existence of any

40 such trust or claim in behalf of the complainants as in the

said bill set forth ; that by reason of the ownership of such property the said John H. Midmer obtained credit in the community, and was enabled to contract debts to a very considerable amount on the faith of said property, and on the faith of his being the absolute owner thereof in fee simple ; and that the said complainants having for so long a period acquiesced in the said apparent ownership, and having failed to assert their alleged interest in the same, and having been present and heard and seen the said John H. Midmer dispose thereof by will for the payment of his debts, and for 10 the creation of an income of three thousand dollars a year for his widow, without protest or objection, or without ever making known to him or to any other person that they had such a claim in the said land as they now set up by their said bill, are in equity estopped from making any such claim against the said Theodosia, this defendant, or against the executors of said will, or against the creditors of said John H. Midmer, whose claims would be defeated by the assertion and enforcement of the claim of the complainants.

And these defendants further say, that the great length 20 of time which has elapsed between the time of the alleged creation or inception of said trust and the filing of the complainants' bill, is sufficient to bar the complainants of any right to assert the said trust in this court.

And these defendants further answering, insist that the said William Midmer by joining with these defendants as executor of the said John H. Midmer, deceased, in the proof of the said will, well knowing that thereby the said John H. Midmer undertook to and did dispose of the premises in said bill mentioned, he is estopped from setting up or asserting 30 any disposition of or claim to said premises contrary to that provided for under said sale ; and that the said complainants have recognized the said will, and have claimed and do claim their interest under it, and that such interest cannot be enforced or made available except by applying thereto the property which is the subject of this suit ; and that the said complainants by making claim thereto under the will of the said John H. Midmer, deceased, and accepting or being willing to accept the provision made for them in the said will, have in equity elected to take their rights in the 40

said land under the said will, and have waived and abandoned any right which they might have by virtue of the said supposed or alleged trust in the said bill set forth.

And these defendants deny that any other matter or thing in the said bill contained which is not herein and hereby well and sufficiently confessed and avoided, traversed or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready to aver, maintain and prove as this honorable court shall direct,  
 10 and they humbly pray that they may be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

MCCARTER & KEEN,  
*Sols. of Theodosia Ann Midmer and Leon  
 Abbett, Executors of John H. Midmer, de-  
 ceased, for defendants.*

THOMAS N. McCARTER,  
*Of Counsel.*

The complainants filed a general replication,

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## D E C R E E .

Filed Aug. 5, 1875.

This cause coming on to be heard before the Honorable Abraham V. Van Fleet, Vice-Chancellor, in the presence of Gilbert Collins, of counsel with the complainants and of Thomas N. McCarter, of counsel for the defendants, and the pleadings, depositions, exhibits and proofs having been read and the arguments of the respective counsel being heard and considered and the vice-chancellor having taken time to advise thereon, and it appearing to the vice-chancellor that  
 30 the complainants are not entitled to the relief sought and prayed for by them in their said bill of complaint and he having so advised the chancellor;

It is therefore on this fifth day of August, A. D. eighteen hundred and seventy-five, by the Honorable Theodore

Runyon, Chancellor, ordered, adjudged and decreed, That the complainants' said bill be and the same is hereby dismissed with costs.

THEODORE RUNYON, C.

I respectfully advise his honor the Chancellor to sign the foregoing decree.

A. V. VAN FLEET, V. C.

A true copy.

H. S. LITTLE, *Clk.*

#### OPINION.

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*The Vice-Chancellor:*

This action is brought to establish and enforce a resulting trust in favor of Henry Midmer, Eliza Anderson and William Midmer, and against the executors of John H. Midmer, deceased, to certain lands situate in the County of Hudson. The lands in controversy were, by the will of the testator, devised in trust to his widow Theodosia Ann, his brother William, and his friend Leon Abbett, who are the executrix and executors thereof, and also the defendants in this suit. Henry and William were brothers of John, and Eliza was his sister. The bill is filed by Henry and Eliza and her husband. William is a defendant, but was made so only because he happened to be an executor and proved the will; his interests, feelings and labors have all been with the the complainants, notwithstanding the pledge of fidelity he gave to his brother's estate in proving the will. The bill avers, John H. Midmer on the eighth day of August, 1853, acquired title to the lands in controversy by conveyance from Jacob M. Merseles, pursuant to an understanding with his two brothers and sister, whereby it was agreed he should pay for the lands with money which had been realized from the sale of property owned in common in equal shares, by John and his two brothers and sister, take title in his

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own name and hold them as trustee for himself, his brothers and sister, in equal shares. John H. Midmer died September 17, 1872; his will, bearing date August 3, 1872, was admitted to probate October 11, 1872. The bill in this case was filed July 12, 1873, nearly twenty years after the alleged trust arose, and nearly a year after the will was executed.

The case designed to be made by the proofs of the complainants differs fundamentally from that laid in the bill. 10 The attempt to show by proof of John H. Midmer's admissions and declarations, made quite twenty years prior to the examination of the witnesses, that in 1851 or 1852 (the deed is dated November 1, 1851 and acknowledged August 9 and 11, 1852), he purchased a house and lot situate in Twenty Eighth street, New York City, paid for it with money belonging to his mother, and took title in his own name, contrary to his mother's instructions. The language of the witness Joseph Hilton, who was examined December 31, 1873, more than twenty years after the date of the conveyance, is: "Before his mother's death he told me he 20 bought it with his mother's money and she supposed it was in her name; that there was not much, and by keeping it all together he could make something, and it would be better for all concerned; he said his mother gave him the money to buy the house and lot, and that he had bought it in his own name for fear some of the heirs would squander it if it was divided." The mother died in 1852, but in what month, whether before or after the date of the acknowledgment of the deed to Midmer, is not shown. The father 30 died in 1847. It is proved the house and lot in Twenty-Eighth street was conveyed by Midmer to Mitchell Hart, November 10, 1853, and that he received in payment, stock of the Third Avenue Railroad Company, and that he exchanged some of this stock for the lands in controversy.

It will thus be seen, the complainants by their proofs at least put their claim to an adjudication that these lands are held in trust for them, distinctly on the ground that their brother John held the Twenty-Eighth street lot in trust for their mother, that the lands in controversy were purchased 40 with the proceeds of the sale of the Twenty-Eighth street

lot, and are therefore held subject to the same trust, and that they, as three of the heirs at law of Mrs. Midmer, are entitled to have the trust executed in their favor to the extent of three-fourths of these lands.

In my judgment, the rights of the litigants in this suit must be determined by the effect which shall be given by the court under the proofs, to the deed for the Twenty-Eighth street lot. If the evidence does not clearly demonstrate a trust in favor of Mrs. Midmer to the lot, arising at the time of the execution of that deed, none can be declared 10 in favor of the complainants. Nothing is better settled than that a resulting trust can only arise at the time of the execution of the deed; it cannot be raised from matter arising *ex post facto*. *Cutter v. Tuttle*, 4 *C. E. Green*, 562; *Tunnard v. Littell*, 8 *C. E. Green*, 267. If the money which paid for the Twenty-Eighth street lot was not the money of the mother, or if John received it as a loan or an advancement from his mother there was no resulting trust in favor of the mother, and the complainants have no case. Their 20 right to the lands in controversy being entirely upon the question whether their mother had a right to a conveyance of the Twenty-Eighth street lot; if that was not held in trust for her, these lands are not held in trust for the complainants.

It will be seen at a glance, the case attempted to be proved is so widely different from that set up in the bill, that no relief can be given unless the pleadings are amended, so as to raise a new and different issue, or pushed aside as useless machinery. They cannot be pushed aside. If a 30 suitor makes one case by his bill and proves another, he must obtain leave to amend or fail. *Andrews v. Farnham*, 2 *Stock.*, 94; *Howell v. Sebring*, 1 *McCarter*, 90. Leave was asked on the hearing to amend. The application was resisted by the defendants. Undoubtedly the court has power to order an amendment on final hearing, but it is never exercised except where the ends of justice render it necessary, and it can be done without substantially abridging the right of defence. In this case if an amendment was permitted at this time, unless the defendants were afforded 40 an opportunity to make defence to the new case, to put in

their evidence upon the new issue, there would be an actual denial of the right of defence. ~~This~~<sup>It is</sup> obvious leave to amend such circumstances should be refused, unless the refusal will work great and manifest injustice. It should be remarked in this connection the opportunity and means of information of the complainants respecting their case, when contrasted with those of their adversaries, does not, in my judgment, give them a right to extraordinary indulgence. They are seeking to establish a stale claim to a part of their dead

10 brother's lands. In making their case they have had the aid of a living brother, who pretends not only to have been perfectly familiar with the transaction out of which their rights arose, but as one of the legal representatives of the dead brother, has had a right to inspect every paper, pry into every book and examine every source of proofs to be found among the dead man's effects. With such means of information at their command, it seems to me the complainants were bound to have been perfectly familiar with the foundation and history of their claim before exhibiting it

20 formally in court. Besides, they were apprized on the 31st of December, 1873, by the evidence of their witness, Mr. Hilton, of the origin and nature of their claim. He was the first witness examined. If they intended to rely upon the case made by their proofs, application for leave to amend should have been made promptly; if allowed, the defendants would have been afforded a full and fair opportunity to contest the new issue.

If the proofs of the complainants established a case, which, in my judgment, entitled them to relief, I should be inclined

30 to give them an opportunity to obtain it in this suit, upon such terms as would allow the defendants the full right of defence, or otherwise to dismiss their bill without prejudice to a new action, but the proofs fail to convince my judgment that the complainants are entitled to any relief.

The effort always is, in cases of this class, to overcome and destroy a regular formal written title, by showing by evidence less solemn and trustworthy than the written instrument itself, that though the deed says the purchase money was paid by A and the lands were conveyed to him

40 for his own use and benefit, yet in truth he did not pay the

purchase money, but it was paid by B, and the conveyance was not made to A for his own use and benefit, but to him in trust for B. To make such an effort successful, the law, for the safety of titles, requires that the proof shall be of the most convincing and satisfactory kind. Nothing short of certain, definite, reliable and convincing proof will justify the court in divesting one man of title to lands evidenced by a regular deed and putting it in another. *Cutler v. Tuttle*, 4 *C. E. Green*, 560; *Boyd v. McLean*, 1 *Johns., Chy.*, 590; *Lench v. Lench*, 10 *Vesey*, 517. 10

In this case the trust arose more than twenty years before suit brought. If the complainants had had the legal title their right of entry would now be barred by statutory provision, unless its operation had been suspended by disability. They do not assert their claim until after the death of the alleged trustee, when it is impossible for him to meet it either by denial or explanation. This delay, according to the view of a very respectable elementary writer, would of itself be sufficient to overthrow their claim, for he held, parol proof could not be admitted after the death of the 20 alleged trustee to prove a resulting trust. *Sanders on Uses and Trusts*, 127-134. Another goes even further, and denies that a resulting trust can in any case be established by parol proof of the oral admissions of the alleged trustee. *Roberts on Frauds*, 100. These views are no longer regarded as sound; parol proof of oral admission is now admissible, even after the death of the alleged trustee, to establish a resulting trust. *Boyd v. McLean*, *Supra.*; *Freeman v. Kelly*, 1 *Hoffman's Ch.*, 98.

Delay in asserting the claim is, however, regarded as an 30 important circumstance in determining whether there is a trust or not. In *Delane v. Delane*, 4 *Browns P. C.*, 258, where both parties were living, though the proof established the trust, the claim was rejected as stale, there having been an acquiescence of seventeen years under a denial of the trust and possession against it. Added to the great delay shown in this case, it is in evidence that the complainants were all present when the alleged trustee executed his will. Some seven weeks before his death, the will was read in their presence; they knew the land to which they are now 40

asserting title was, by special designation, devised to the executors, with directions to hold it as long as they might deem it advisable, in the expectation of its increasing in value. They also knew that if the claim they now make was well founded, its enforcement would utterly defeat the scheme of the will. By the will, the two brothers and sister take the whole estate, except a small amount of personal property, and an annual payment of \$3,600 to the widow during her life, with full knowledge that their  
 10 brother claimed the right to dispose of these lands as he pleased. They suffered him to go his <sup>grant</sup> ~~game~~ without the slightest warning they intended to make a claim to them, and without giving him an opportunity to make such disposition of his property as he might have deemed prudent if he had known his right was disputed. They were silent when duty required them to speak. They shall not be allowed to speak now, because justice demands they shall be silent.

It is proper to add, in this connection, it is in evidence,  
 20 after the will was executed, the testator asked his brother and sister if they were satisfied with the will, and that thereupon Mrs. Anderson said: "John, how about the back property?" to which the testator replied, according to one witness: "You have all had your shares of that long ago," and according to another, he said he would see about that another time, and there the conversation ended. This query was not an assertion of a claim, and to say that by "back property," the land in controversy, or even the money of the mother was referred to, would be a simple  
 30 fancy or conjecture, quite as likely to fall wide of the truth as to hit it.

The proofs offered, in support of the alleged trust, remain to be considered. They consist entirely ~~of oral proofs~~, of verbal admissions and declarations made years ago by the alleged trustee. No species of evidence is more dangerous. It is fitly characterized by Sir William Grant in *Lench v. Lench*, 10 *Vesey*, 517. He says: There is no material evidence but that of the *cestui que trust*, who is made a competent witness by a release. She swears to no  
 40 fact or circumstance capable of being investigated or con-

tradicted, but merely to a <sup>naked</sup> ~~masked~~ declaration, supposed to have been made by the husband, admitting that the purchase was made with trust money. That is in all cases most unsatisfactory evidence, on account of the facility with which it may be fabricated and the impossibility of ~~con-~~ <sup>recalling</sup> ~~connection~~ <sup>it</sup> tradicting it. Besides, the slightest mistake or failure of ~~connection~~ may totally alter the effect of the declaration. There are no corroborating circumstances by any writing under his hand. In most of the cases there has been at least something in writing—some account by which it 10 appeared the money was laid out. Chancellor Kent, in *Boyd v. McLean*, *supra*, is equally emphatic in speaking of the danger of this kind of proof, and says its admission in cases of this class tends to perjury, and the insecurity of paper titles.

If William Midmer is a competent witness—it is unnecessary to declare whether he is or not—very little weight can be attached to his evidence. His incongruous position, as well as his interest in the case, must, in the estimation of every fair mind, seriously affect his credibility. 20 Besides, the confused condition of his recollection, his slight appreciation of the force of words, and the very little skill he possesses in translating the thoughts expressed by others into language of his own, renders him, in my judgment, wholly unreliable as a witness on a question of the kind under consideration.

None of the admissions which relate to the Twenty-Eighth street lot, so far as can be ascertained from dates fixed by the witnesses, were made later than 1855 or 1856—more than fifteen years before the witnesses attempted to 30 repeat them in evidence. Now, it seems to me an almost incredible feat for an ordinary ~~human~~ memory, after the lapse of fifteen years, to reproduce, with anything like trustworthy accuracy, a conversation occurring under ordinary circumstances, in which the narrator had no special interest, and which he made no effort to retain. It may perhaps be done; but when we consider how great the danger is, the speaker did not fully and clearly express himself, or that the witness misunderstood him, or has mingled subsequent statements, made by other parties, with 40

the original statement; or that a faded memory, in its effort to reproduce an occurrence long past, has honestly substituted fancy for fact, ~~The~~ probabilities are so great against the reproduction being full, exact and complete, that I am unwilling, in this case, at least, on such evidence alone, to destroy a formal paper title which has stood, undisputed for nearly twenty years.

There is not a word of evidence in the case showing a conference between the mother and son, respecting the money on the property. There is not a scrap of written matter tending in the slightest degree to corroborate the parol proofs. Both the Twenty-Eighth street lot and the lands in New Jersey were conveyed subject to mortgages. The lands in New Jersey were subject to a mortgage when the alleged trustee died. It is not pretended the complainants ever contributed, or were asked to contribute, a penny to pay interest on taxes, or claimed any part of the rents or dividends on the stock, or had possession of any part of the lands.

20 The proof utterly fails to convince my judgment these lands were held in trust. I shall, therefore, advise a dismissal of the bill with costs.

## A P P E A L .

Filed and Served Oct. 30, 1875.

The complainants hereby appeal from the whole of the final decree made in this court in above stated cause, dismissing the complainants' bill therein with costs, to the Court of Errors and Appeals in the last resort in all causes of law.

30

GILBERT COLLINS,

*Sol'r for and of Counsel with Complainants.*

Dated October 30th, A. D. 1875.

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

GILBERT COLLINS,

*Of Counsel with Complainants.*

## NEW JERSEY COURT OF ERRORS AND APPEALS

IN THE LAST RESORT IN ALL CAUSES, &amp;C.

Between

HENRY MIDMER ET AL.,  
*Appellants.*

and

THEODOSIA ANN MIDMER ET AL., Execu-  
tors, &c., of John H. Midmer, deceased.  
*Appellees.**On Bill, &c.**Petition of Ap-  
peal.*

*To the Honorable the Court of Errors and Appeals in the 10  
last resort in all causes of law :*

The humble petition of Henry Midmer, Eliza Anderson and Joseph Anderson, her husband, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Theodore Runyon, Chancellor of New Jersey, on advice of his Honor Abraham V. Van Fleet, Vice-Chancellor of New Jersey, bearing date the fifth day of August, in the year of our Lord eighteen hundred and seventy-five, in a certain cause wherein your 20 petitioners were complainants and Theodosia Ann Midmer, William Midmer and Leon Abbett, executors of the last will and testament of John H. Midmer, deceased, the appellees, in above stated cause were defendants, in this respect, that the said decree adjudged that the said complainants' bill should be dismissed with costs, and your petitioners humbly appeal from the whole of the said decree of the Chancellor, on the ground that your petitioners were and are entitled under the evidence produced in said cause to the relief sought and prayed for by them in their said bill of 30

complaint, and pray that the same may be reversed, set aside, and for nothing holden, and that your petitioners may have such relief in this premises as to this honorable court shall seem meet.

Dated November 16th, 1875.

GILBERT COLLINS,

*Solicitor for and of Counsel with Appellants.*



