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New Jersey Court of Errors and Appeals

HARRY F. EVERETT, JOHN EVERETT and SAMUEL EVERETT, Complainants-Appellants,	10
vs.	On Appeal from the Court of Chancery.
HELEN E. GUNTHER and WILLIAM GUNTHER, her husband, and FRANK A. EVERETT and ANNA EVERETT, his wife, <i>et als.</i> , Defendants-Respondents.	

PETITION OF APPEAL.

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Harry F. Everett, John Everett and Samuel Everett, the appellants in the above entitled cause, respectfully shows that: 30

1. Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date November 26, 1929, in a certain cause in said Court of Chancery wherein the said Harry F. Everett, John Everett and Samuel Everett were complainants and the said Helen E. Gunther and William Gun- 40

Petition of Appeal

ther, her husband, and Frank A. Everett and Anna Everett, his wife, *et als.*, were defendants, in this respect, to wit, that the said decree dismissed the bill of complaint and amended bill of complaint of said complainants.

10 And petitioners appeal from the said decree upon the ground that the same is erroneous in that:

1. The Chancellor erred in dismissing the said bill of complaint and amended bill of complaint upon proofs produced at the hearing of the said cause.

20 2. The Chancellor should have granted the prayer of the said complainants in their said bill of complaint and amended bill of complaint upon the proofs produced at the hearing of the said cause.

30 3. The Chancellor should have decreed that the defendants Helen E. Gunther and Frank A. Everett hold the lands and premises described in the said bill of complaint and amended bill of complaint as trustees for themselves and for these appellants and for the other parties to the said bill of complaint and amended bill of complaint, and to specifically perform the agreement mentioned and set forth in the said bill of complaint and amended bill of complaint were to convey to the said complainants and the other parties to the said cause the said lands and premises according to their respective rights therein, as shown by the proofs produced at the hearing of the said cause.

40 Petitioners therefore pray that the said decree of the Chancellor may be wholly reversed, set

Answer to Petition of Appeal

aside and for nothing holden, and that petitioners may have such other relief in the premises as to this court shall seem proper.

HARRY F. EVERETT
JOHN EVERETT
SAMUEL EVERETT 10
Petitioners.

ARTHUR B. SEYMOUR
Solicitor for and of Counsel
with Appellants.

ANSWER TO PETITION OF APPEAL. 20

NEW JERSEY COURT OF ERRORS AND
APPEALS

HARRY F. EVERETT, JOHN EVERETT
and SAMUEL EVERETT,
Complainants-Appellants,

vs.

HELEN E. GUNTHER and WILLIAM
GUNTHER, her husband, and
FRANK A. EVERETT and ANNA
EVERETT, his wife, *et als.*,
Defendants-Respondents.

On Appeal 30
from the
Court of
Chancery.

The answer of Helen E. Gunther and William
Gunther, her husband, and Frank A. Everett and 40

Answer to Petition of Appeal

Anna Everett, his wife, the above named appellees, to the petition of appeal of Harry F. Everett, John Everett and Samuel Everett, the above named appellants.

10 These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admit that a decree was, on November 26th, 1929, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, these appellees beg leave to refer thereto when the same shall be produced.

20 These appellees are advised and believe that the said decree is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these appellees.

BRENNAN & BROWN,
Solicitors for Appellees.
LEONARD G. BROWN,
Of Counsel.

BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY

71-40

To His Honor, EDWIN ROBERT WALKER,
 Chancellor of the State of New Jersey: 10

The amended bill of complaint of the complainants, Harry F. Everett of the City of Orange, Essex County, New Jersey, and John Everett and Samuel Everett of the City of East Orange, Essex County, New Jersey, respectfully shows:

1. In or about the year 1908 Peter Everett, the father of complainants, died at the City of East Orange aforesaid, intestate, seized in fee of certain lands in the City of East Orange aforesaid known as No. 17 Lake Street, and more particularly described as follows: 20

All that tract or parcel of land and premises situate, lying and being in the City of East Orange, in the County of Essex and State of New Jersey, BEGINNING on the westerly line of Lake Street at a point therein distant 208 feet 1 inch southerly from the southwest corner of Dodd and Lake Streets and at the southeasterly corner of lot No. 38 as laid out on a map of Building Lots at East Orange, New Jersey, lately owned by I. F. Gerry; thence westerly along the southerly line of lot No. 38 and at right angles with Lake Street 141 feet to the easterly line of lot No. 41 on said map; thence southerly along the easterly line of lots Nos. 41 and 42 parallel with Lake Street 50 feet to the northerly line of lot No. 35 on said map; thence easterly along the northerly line of lot No. 35, 141 feet to the westerly line of Lake 30
40

Bill of Complaint

Street; thence along the westerly line of Lake Street north 16 degrees to the point and place of BEGINNING. Being lots Nos. 36 and 37 on said map.

10 2. At the time of his death the said Peter Everett left surviving him his widow, Mary T. Everett, and the following children:

a. The complainants, Harry F. Everett, John Everett and Samuel Everett.

b. George Everett, who has since died leaving Anna Everett, his widow, who has since married Charles Ritter, and the following named children: 20 George Everett, an infant under the age of fourteen years, and Dorothy Everett, an infant over the age of fourteen years.

c. Helen E. Gunther, a daughter, whose husband's name is William Gunther.

d. Frank A. Everett, a son, whose wife's name is Anna Everett, and the said Anna Everett is a lunatic confined in the Essex County Asylum for the Insane, at Cedar Grove, New Jersey.

30 e. Bessie Stoner, a daughter, who has since died leaving two children, Harriet Helen Stoner and Harold F. Stoner, said Harriet Helen Stoner being an infant under the age of twenty-one years and over the age of fourteen years, and a husband, Frank Stoner.

40 3. At the time of his death the said Peter Everett lived with his wife and family at the said house and premises, No. 17 Lake Street, East Orange, New Jersey, and after his death his widow, the said Mary T. Everett, and his chil-

Bill of Complaint

dren, parties to this suit, continued to live at the said house.

4. On or about October 12, 1912, the said Mary T. Everett, widow of the said Peter Everett, and the said George Everett, Bessie Stoner, Helen E. Gunther, Frank A. Everett, and these complainants met at the house of the said Peter Everett, deceased, and entered into an oral agreement at the request of the said Mary T. Everett to give and convey all their right, title and interest in the said tract of land and premises, each having an equal undivided one-seventh part or share in said lands and premises, to the said Mary T. Everett, widow of the said Peter Everett, who had only an estate in dower in the said lands and premises, upon the express promise, agreement and understanding that the said Mary T. Everett would borrow sufficient money upon the said tract of land and premises by way of mortgage for the purpose of connecting the house with the sewer and water mains of the City of East Orange, and for the purpose of improving the house and putting it in a saleable and marketable condition, and that after the said tract of land and premises were sold she, the said Mary T. Everett, would give to each of her children above named his or her equal undivided one-seventh share of the moneys realized from said sale, and upon the further express promise, agreement and understanding that if the said Mary T. Everett did not sell the said lands and premises during her lifetime that she would by her will devise the said lands and premises equally among her said children, giving to each by her will an

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Bill of Complaint

equal undivided one-seventh interest therein; in accordance with the terms of the said agreement these complainants and said George Everett, Bessie Stoner, Helen E. Gunther and Frank A. Everett on or about said date conveyed the said
10 lands and premises by their deed to the said Mary T. Everett; no consideration was paid to her said children by the said Mary T. Everett for the said conveyance.

5. Pursuant to the terms of the said conveyance the said Mary T. Everett took over the whole title to the said lands and premises in fee and borrowed money on the same by way of mortgage, and made the improvements as agreed upon
20 as aforesaid, and used and occupied the said lands and premises and took all the rents, issues and profits therefrom, and paid the taxes thereon during her lifetime, and died on or about July 26, 1928, seized in fee of the said lands and premises, which at the time of her death were of the value of about \$7,000.00 and which were encumbered by a mortgage of approximately \$600.00.

6. The said Mary T. Everett, widow of the
30 said Peter Everett, died leaving a last will and testament, in and by which she bequeathed to these complainants the sum of \$100.00 each and to her grandchildren, Harriet Helen Stoner and Harold F. Stoner, \$50.00 each, and she devised and bequeathed unto her daughter Helen E. Gunther and her son Frank A. Everett, share and share alike, the lands and premises hereinabove described subject to the above mentioned legacies, and devised and bequeathed all the rest,
40 residue and remainder of her estate to the said

Bill of Complaint

Helen E. Gunther and the said Frank A. Everett absolutely and forever, share and share alike.

7. These complainants allege and charge that the said Mary T. Everett was induced to make the said last will and testament by the fraud and undue influence of the said Helen E. Gunther and Frank A. Everett, and that the said Helen E. Gunther and Frank A. Everett fraudulently and with intent to deprive these complainants and the other children of the said Mary T. Everett or their heirs of their just and proper share of the said lands and premises, and for the purpose of getting title to the said lands and premises for themselves, fraudulently and corruptly induced and persuaded the said Mary T. Everett to violate the agreement made as aforesaid as alleged in Paragraph 4 of this amended bill of complaint, and fraudulently influenced and persuaded the said Mary T. Everett to destroy a previous will and testament which she had made in accordance with the said agreement and to make the said last will and testament above set forth, in and by which she devised the said lands and premises and the residue of her estate to the said Helen E. Gunther and the said Frank A. Everett; and these complainants further charge that the said Mary T. Everett, contrary to and in violation of her said agreement, made the said will as aforesaid and did not by her will devise the said lands and premises equally among these complainants and her other said children.

8. Said last will and testament of said Mary T. Everett was duly probated by the Surrogate of the County of Essex and the said Helen E.

Bill of Complaint

Gunther and Frank A. Everett hold the legal title to the said lands and premises as tenants in common.

9. These complainants have demanded of the said Helen E. Gunther and the said Frank A. 10
Everett their share of the said lands and premises and have offered to waive their right to the legacies aforesaid if the said Helen E. Gunther and the said Frank A. Everett would give to them their said share, but the said Helen E. Gunther and Frank A. Everett have refused the demand of these complainants.

10. These complainants are without adequate 20
remedy in the courts of law and therefore pray:

a. That Helen E. Gunther and William Gunther, husband of said Helen E. Gunther, Frank A. Everett and Anna Everett, wife of said Frank A. Everett, Harriet Helen Stoner, Harold F. Stoner, Frank Stoner, Anna Everett Ritter, George Everett and Dorothy Everett, who are the defendants to this suit, may answer this amended bill of complaint and each statement therein made.

30 b. That the said Helen E. Gunther and William Gunther, her husband, and Frank A. Everett and Anna Everett, his wife, by the decree of this Honorable Court may be decreed to specifically perform the agreement made as aforesaid or to hold the said lands and premises described in this bill of complaint as trustees for themselves and for these complainants and for the other parties herein named, according to their respective 40
interests therein, and that they may be decreed to

Answer to Amended Bill

convey to these complainants and the other parties hereto the said lands and premises according to their respective rights therein.

c. That a writ of subpoena may issue commanding said defendants to answer this amended bill of complaint and to abide by such decree as this Court may make in the premises. 10

ARTHUR B. SEYMOUR,
Solicitor and Counsel of Complainants.

ANSWER TO AMENDED BILL.

IN CHANCERY OF NEW JERSEY. 20

Between HARRY F. EVERETT, <i>et als.</i> , <div style="text-align: center;">Complainants,</div> <div style="text-align: center;">and</div> HELEN E. GUNTHER, <i>et als.</i> , <div style="text-align: center;">Defendants.</div>	}	On Bill &c. 30
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The Answer of the defendants Helen E. Gunther and William Gunther, of the City of Newark, County of Essex and State of New Jersey, and Frank Everett, of the City of East Orange, County of Essex and State of New Jersey:

These defendants, answering the Amended Bill of Complaint, say: 40

Answer to Amended Bill

1. They admit the allegations in paragraphs 1, 2, 3, 6, 8 and 9 of the Bill of Complaint.

2. Then deny the allegations in paragraph 4 of the Complaint, except that they admit the conveyance from George Everett, Bessie Stoner, 10 Helen E. Gunther, Frank A. Everett, Harry F. Everett, John Everett and Samuel Everett, to Mary T. Everett.

3. They admit the allegations in paragraph 5, except that they deny that the said taking of title was in pursuance of the terms of any agreement.

4. These defendants deny the allegations in 20 paragraph 7 of the Complaint.

5. These defendants allege that the conveyance of the premises known as No. 17 Lake Street, in the City of East Orange, to the said Mary T. Everett, was not made in pursuance of any agreement for or otherwise with the said Mary T. Everett that she would reconvey or will the said premises to the persons conveying to her, but was made freely and voluntarily to the said Mary T. 30 Everett, their mother, without any agreement or expectation of a return from her.

BRENNAN & BROWN,
Solicitors for Defendants Helen
E. Gunther, William Gunther
and Frank Everett.

(Formal replication filed.)

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

10	Between HARRY F. EVERETT, <i>et als.</i> , Complainants, and HELEN E. GUNTHER, <i>et als.</i> , Defendants.
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Newark, New Jersey,
November 14th, 1929.

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Before: HON. JOHN H. BACKES, Vice-Chancellor.

Appearances:

ARTHUR B. SEYMOUR, Esq., Solicitor for Complainants.

BRENNAN & BROWN, Solicitors for the defendants, by L. G. BROWN, Esq.

30

JOHN F. EVERETT, called as a witness on behalf of the complainants, being first duly sworn, testified as follows:

Direct-examination by Mr. Seymour:

Q. Mr. Everett, where do you live? A. 376 Prospect Street, East Orange.

Q. Mr. Everett, what was your father's name? A. Peter.

40

John F. Everett—Direct

- Q. Did he die in or about the year 1908? A. Yes, sir.
- Q. What was his widow's name? A. Mary.
- Q. How many children did he leave? A. Seven.
- Q. What are their names? A. Frank, Mary, Harry, John, Samuel and George. 10
- Q. Is George dead? A. Yes, sir.
- Q. Did he leave a widow? A. Yes, sir.
- Q. What is her name now? A. Anna Ritter.
- Q. Did he leave children? A. Two children.
- Q. What are their names? A. Dorothy and George.
- Q. Are they under 21? A. Yes, sir.
- Q. There was a daughter Daisy? A. Mary.
- Q. A daughter of Peter? A. Daughter Mary. 20
They called her Daisy.
- Q. Is she dead? A. Yes, sir.
- Q. Did she leave a husband? A. Yes, sir.
- Q. What is his name? A. Frank Stoner.
- Q. Did they leave children? A. Two children.
- Q. What are their names? A. Francis and Helen.
- Q. That is, a boy named Harold F. Stoner? A. Yes, sir.
- Q. And a girl named Harriet Helen Stoner? 30
A. Yes.
- Q. Are they under 21? A. They were at that time; they aren't at the present. The boy is 26 years old.
- Q. Is Harriet under 21? A. Yes, sir.
- Q. Or Helen? A. Yes, sir.
- Q. You have given us all the children, their widows, their children, and so forth? A. Yes, sir.
- Q. Did your father leave a will? A. No, sir. 40

John F. Everett—Direct

Q. When he died did he own certain real estate on Lake Street, known as No. 17 Lake Street, East Orange? A. Yes, sir.

Q. What did that consist of? A. Well, it consisted of a one-family house of six rooms and a
10 lot next door.

Q. When your father died did he live there? A. Yes, sir.

Q. After his death, who continued to live there? A. The whole family, mother and all the children.

By the Court:

Q. And their families? A. No, sir.

Q. None were married at that time? A. Yes. No, none married at that time.

20 By Mr. Seymour:

Q. Do you recall after your father's death having a conversation with your mother in relation to the transfer of the property to her? A. Yes, sir.

Q. Where did that conversation take place?

By the Court:

Q. All you children made a deed to your mother? A. Yes, sir.

30 Q. The lawyer wants to know how that came about. A. Well, how it came about, we were approached to come up. Mother wanted us to sign over the property to her, because she said the City of East Orange had compelled us to put in the sewerage and that she didn't have any money to do it, and the only way she could do it was by signing up. "At the time of death," she said, "I have no intentions of selling. At the time
40 of death I will see that you all get your equal share."

John F. Everett—Direct

By Mr. Seymour:

Q. Who was present at that conversation? A. All the boys and the two girls and my mother and a man named Mr. Greer and a man named Howlett.

Q. Where did this take place? A. 17 Lake 10 Street.

By the Court:

Q. You were all living there? A. I beg your pardon, I wasn't living there; I was married at that time, at the time we signed over.

By Mr. Seymour:

Q. Mr. Greer was there? A. Yes, sir.

Q. Mr. Howlett was there? A. Yes, sir.

Q. I show you a deed. Is that the deed that was signed at your mother's house? A. Yes, sir.

Mr. Seymour: I offer it in evidence.

(The paper referred to was received in evidence and marked Exhibit C-1.)

Q. Has your mother since died? A. Yes, sir.

Q. Do you know whether she left a will? A. Yes, she left a will.

Mr. Seymour: I offer in evidence a copy 30 of the will, if the Court please.

(The paper referred to was received in evidence and marked Exhibit C-2.)

Q. After your father's death and after the conveyance, do you know whether your mother sold the property? A. Not as I know of; no, sir.

Q. Have you ever received a share of the proceeds of any supposed sale? A. No, sir.

Q. Or any money representing your share? A. 40 No, sir.

John F. Everett—Cross

CROSS-EXAMINATION by Mr. Brown:

Q. You were not living at home at the time when the deed was made, Mr. Everett, were you?

A. No, sir.

10 Q. Were there any other brothers or sisters married, not living at home at that time? A. Yes, sir.

Q. Who were they? A. Daisy—Mary, rather.

Q. Were there any others? A. At the time it was signed?

Q. Yes, sir. A. No, just me and, I think, Daisy, and my brother Frank.

20 Q. Is Frank living at home? A. Not now. I could not just say. I don't think so. No, Frank wasn't living at home at that time.

Q. You say that you were approached and summoned to your mother's home for the purpose of executing a deed. Who approached you? A. One of my sisters.

Q. Which sister? A. Daisy—Mary.

Q. How old was she at that time? A. At that time she was about 24 years old, I should judge.

30 Q. Did she tell you what the purpose of the meeting was? A. Yes, she said that the purpose of the meeting was that the City had compelled mother to put in the sewerage, and mother could not get it done because she didn't have the money and could not get up any money unless the boys signed over the deed to her.

Q. At the time when you went to your mother's house what was said about your signing over the property? A. At the house that night?

40 Q. Yes. A. We were told we were all going to get our equal share.

John F. Everett—Cross

Q. Who told you that? A. Mother.

Q. Are you sure of that? A. Positively.

Q. Isn't it a fact that you voluntarily signed the deed that has been offered in evidence and that at that time you had no expectation of ever receiving a share of the property? A. No, sir; 10 that isn't.

Q. Did your mother tell that same thing to all the children? A. Yes, she told them all.

Q. Did someone ask her about it that night, or did she state it voluntarily? A. They asked her in regard to why she wanted to sign over at that time and she told them, "None of you need to be afraid. You will all get your equal share at death. I have no intention of selling the prop- 20 erty."

Q. How long ago was this? A. Sixteen years ago—seventeen.

Q. 1912? A. 1912.

Q. Do you know whether or not your mother subsequently raised a mortgage on the property? A. That I could not say.

Q. As far as you know, she never raised any money as a result of having the property conveyed to her; isn't that true? A. Not that I know 30 of; no, sir.

Q. Do you know whether or not she had shortly before that time received a legacy from one of her sisters—before the time the conveyance was made? A. Well, there was some talk that she got done out of some money, but I don't know whether what she got was less. She was supposed to get some money, but she was done out of it, so I don't know whether she got it or not. 40

John F. Everett—Cross

Q. About something she did not get—a legacy?

A. Yes.

Q. Do you know whether or not your mother had need of the money at the time? A. Well, the chances are at that time she was—

10 Q. Please answer my question. A. Do I know she was in need of money?

Q. You say that without knowing whether or not she had been defrauded of a legacy? A. No, sir.

Q. Have you ever been convicted of a crime? A. No, sir.

Q. Weren't you once convicted of assault and battery?

20 Mr. Seymour: I object to that as being an improper way of proving a conviction.

A. Yes, I was arrested for assault and battery in East Orange.

By the Court:

Q. Were you convicted? A. Convicted and fined \$10.

Q. By a jury? A. No, sir; not by a jury; by Judge Stacey in East Orange.

30 Q. What did you do? Hit somebody? A. Why, I had an argument with the owner of the property.

Q. And hit him? A. No, there was no hitting. He just told a big lie. That was the whole thing about it.

Q. He said that you had hit him? A. He said I hit him; yes, sir. He also had me arrested on an embezzlement charge of \$10, and the charge
40 was thrown out.

John F. Everett—Re-direct

By Mr. Brown:

Q. About how long prior to the time when this deed was executed, October 15th, 1912, was it that you had lived in the home of your mother?

A. That I had lived in the home of my mother?

Q. Yes. A. I didn't live there. 10

By the Court:

Q. How long before did you quit? A. Well, I should judge about three years—two years, something like that. About two or three years.

By Mr. Brown:

Q. Did you know, prior to your mother's death whether she had made a will? A. No, sir; but my sister Helen had said that she had made a 20 will.

Q. Did you ever make any objections to your mother? A. Then, after mother died, Mrs. Meyers, I was talking to her—

By the Court:

Q. Did you ever ask your mother about it? A. No, sir.

By Mr. Brown:

Q. You weren't concerned at that time? A. No, 30 sir; I wasn't.

Q. You weren't concerned until the will that has been probated was read to you; is that right?

A. That is right.

RE-DIRECT EXAMINATION by Mr. Seymour:

Q. Mr. Everett, do you know whether Mr. Greer and Mr. Howlett, the witnesses to the deed, are living or dead? A. No, sir; they are both dead. 40

Harry Everett—Direct

HARRY EVERETT, called as a witness on behalf of the complainants, being first duly sworn, testified as follows:

Direct-examination by Mr. Seymour:

10 Q. Where do you live, Mr. Everett? A. 88 William Street, East Orange, New Jersey.

Q. Are you a brother of John? A. Yes, sir.

Q. Are you a son of Peter and Mary? A. Yes, sir.

Q. Were you present at the conference in the house on the night when the deed was signed? A. I was.

20 Q. First tell us how you came to be there and then tell us what took place. A. My sister told me—my sister is dead—that mother wanted us to sign the property over so she can get the sewer in, because the City of East Orange was compelling her to put the sewer and water in the house. They all got together. I was at North Park and Dodge. They sent over to North Park and Dodge for me. I came over to the house. When I came there my four brothers and my sisters and Mr. Greer and Mr. Howland, was in the dining room
30 and they asked me to sign the papers so she could have this done.

Q. Who asked you to? A. My mother. If she could not have this done she could not have the sewer put in, and the City of East Orange compelled her to do it, and I signed these papers with the understanding—

By the Court:

40 Q. Oh, no. Just tell us what happened. A. She asked us to sign the papers.

Harry Everett—Cross

Q. You tell me what happened. I will tell you what the understanding was. A. She told us that if we signed them papers that we should never be afraid, we would all have our equal shares if she died. That was the reason I signed them papers for my mother. 10

CROSS-EXAMINATION by Mr. Brown:

Q. Were you living at home at the time the conference took place? A. I was.

Q. How long after that time did you get married? A. Oh, I have been married twelve years now. Fifteen years I am married.

Q. Which sister approached you? A. My sister Daisy—Mary, rather. 20

Q. You say that you were living at home at the time? A. Yes.

By the Court:

Q. Daisy is dead? A. Yes, she is dead now.

By Mr. Brown:

Q. Didn't you know that there was to be a family meeting on that particular night? A. No, sir; I didn't.

Q. Your sister asked you to stay home with your brothers and sisters; isn't that so? A. She asked me where I was going. I told her I was going to North Park and Dodge Streets, where I always hang out on the corner, and she came out after me. 30

Q. How many were present at the meeting? A. Five boys and two girls.

Q. Weren't there more than that? A. Well, one of my sister-in-laws was there. 40

Harry Everett—Cross

Q. Was only one of your brothers married at that time? A. I don't remember whether Johnny and Frank was married or not.

Q. If I tell you that Frank was married would you say that his wife was present? A. I never
10 remember seeing his wife there.

Q. You don't remember that? A. No, I don't remember that.

Q. You didn't ask your mother prior to the time you executed the deed whether or not it was her intention to remember the children, share and share alike, did you? A. I did.

Q. You yourself asked the question? A. Yes, sir.

20 Q. Did anyone else raise a question about it? A. Not as I know of. That was the reason I signed them papers.

Q. Do you know whether or not your mother had received a legacy from one of her sisters shortly before this time? A. I know nothing about her business.

Q. You and your mother never got along together, did you? A. No, I didn't. I was the downward boy in the family.

30 Q. Have you ever been convicted of a crime? A. I was only for drunkenness. I was never fined, either.

Q. Did you know prior to your mother's death whether she had made a will? A. Only from what I heard.

Q. Did you hear a rumor to that effect? A. Yes, sir; long before my mother died.

Q. How long before? A. Seven years ago.

40 Q. Did you question your mother about it? A. No, sir.

Harry Everett—Re-direct

Samuel Everett—Direct

Q. You never raised a question? A. No, sir.

Q. Weren't you concerned with your interest in the property? A. It didn't bother me.

Q. It bothers you now? A. Yes, sir.

10

RE-DIRECT EXAMINATION by Mr. Seymour:

Q. Mr. Everett, had you had any trouble with your mother aside from that caused by your drinking habits? A. No, sir.

By the Court:

Q. Do you still keep it up? A. No, sir. Sixteen years since I took it—since I got married.

20

SAMUEL EVERETT, called as a witness on behalf of the complainants, being first duly sworn, testified as follows:

Direct-examination by Mr. Seymour:

Q. Where do you live, Mr. Everett? A. No. 2 Long Street.

Q. Are you married? A. Yes, sir.

30

Q. Are you a son of Peter Everett and Mary Everett? A. Yes, sir.

Q. Were you present at the family conference on the night when the deed was signed? A. Yes, sir.

Q. Tell us how you came to be present and what took place there. A. I was living home at the time, and mother wanted the property signed over to her so she could have repairs made to the

40

Samuel Everett—Direct

place—she was compelled to have the sewer in—
and she asked me to get the boys together and
sign the property over to her so she could—she
was figuring on raising a mortgage at the time.
So they all got together, my oldest sister, Mary,
10 who is dead—got together, and they all agreed
to sign, with the understanding they would al-
ways get an equal share if anything happened to
her.

Q. What did your mother say about such an
understanding, if anything? A. She said that one
was just the same as the other to her, it didn't
make any difference.

By the Court:

20 Q. You have said that there was an understand-
ing. What did your mother say? A. She said
that the understanding was—

Q. No, no; what did she say? You are giving
the understanding that is in your mind. What
did your mother say? A. That is what my mother
said.

Q. What did she say? A. She said she would
give them all equal shares—each and every one
alike.

30 Q. When? A. She said that before the papers
were drawn up.

Q. You were giving it then. When was your
mother giving it back to you? A. At the time
of death.

Q. Was a mortgage put on the property? A.
I believe there was a mortgage at that time put
on it.

40 Q. Did she put the sewer in? A. She did after-
wards. After it was signed over, she put the
sewer in.

Samuel Everett—Cross

Q. How soon after? A. Within a year's time.

Q. Did she repair the property? A. Just little—just minor things.

Q. Did she receive money for those purposes?
A. No, I believe that she got it off—I don't know whether it was a sister or her mother. 10

Q. What? A. She got it off her sister or her mother that died.

Q. When did this sister or mother die? Before your mother made you sign the deed? A. That I really could not say.

Q. Who was your mother's sister? What is her name? A. I don't know what her sister's name was. She lived in Brooklyn.

Q. You don't know your mother's sister's name? A. I really forget it just at the present time. 20

Q. How long before your mother died did your mother's sister die? A. Yes, she died before my mother.

Q. How long before? A. That I really could not say.

Q. Did your mother's sister die before you signed the deed? A. No, no. I don't think she did. 30

Q. What is that? A. I really could not tell you whether she did or not.

Q. You don't remember that? A. No, sir.

CROSS-EXAMINATION by Mr. Brown:

Q. Do you know of your own knowledge whether your mother placed a mortgage on the property shortly after the deed was executed?

The Court: He doesn't know. 40

Samuel Everett—Cross

A. There was a mortgage on the property, if I ain't mistaken.

The Court: He said there was a mortgage on the property.

10 The Witness: There was a mortgage at the time on—Williams in East Orange.

Q. You knew that your mother's sister had died and left your mother some money, didn't you? A. Yes, sure; I know that she left some money.

Q. What was the name of the lady who died? A. I told you I can't recall it.

Q. Were you living home at the time? A. Yes, sir.

20 Q. Who approached you and asked you to attend the conference? A. My mother asked me herself.

Q. When you all gathered in the room, who put the question to your mother as to what your respective rights were? A. My sister-in-law, John's wife.

Q. It wasn't your brother Harry who asked the question? A. Harry asked the question, too, personally himself.

30 By the Court:

Q. What did the sister-in-law ask? A. The sister-in-law asked what reason did she have to sign it, because she was married to my brother, and she wanted to know why she had to sign it. She didn't think she had anything to do with it.

Q. What was her name? A. That is John's wife.

40 Q. What did she ask your mother about it? A. She asked my mother, she said, "Why have I got to sign for it?"

Samuel Everett—Cross

Q. Is that all your sister-in-law said? A. Well, I guess that is all she said.

By Mr. Brown:

Q. You yourself did not ask the question as to whether you would be taken care of in the event of your mother's death? A. At the night the papers were signed? 10

Q. Yes. A. Sure I did.

Q. Whom did you ask that question? A. I asked my mother.

Q. In whose presence? A. They were all present at the time, my brothers and sisters.

Q. Did each of the brothers ask that question prior to the time he signed the deed? A. Not that I know of, no. 20

By the Court:

Q. Did the sister-in-law? A. The sister-in-law did, yes.

Q. What did she say about it? A. She just asked my mother, "What reason have I got to sign it?"

Q. Then she— A. She didn't ask about money or anything like that.

Q. Did she ask whether she was to get anything? A. She didn't ask whether she was to get anything, no. 30

By Mr. Brown:

Q. So far as you know, you were the only one who raised the question? A. No, I am not the only one.

Q. Who else did? A. I believe my brother, Harry.

Q. Do you know that he did? A. Yes, I was there when he asked her. 40

Josephine Everett—Direct

Q. Are you sure of that? A. Yes.

Q. How about your brother John? A. Well, I would not say for sure.

(A recess was taken until two o'clock.)

10

JOSEPHINE EVERETT, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

Direct-examination by Mr. Seymour:

Q. Where do you live? A. 376 Prospect Street, East Orange.

20 Q. Are you the wife of John Everett? A. Yes, sir.

Q. Were you present at the conference of Mrs. Everett and the children at her house when the deed was signed? A. Yes, I was.

30 Q. Tell us how you came to go there and what happened while you were there. A. Well, I lived two doors from my mother-in-law, and my husband came down after me to go up and sign the paper and when I went up I said to my mother-in-law, "Well, why do I have to sign the paper?" and she says, "Well, if you don't sign you hold it up," she said. "Of course, the children don't have to worry. They will all get their equal share."

Q. Who was there at the time? A. Who was there at the time? Why, my husband was there, my sister-in-law, Helen Everett, Frank Everett, Samuel Everett and Henry Everett.

40

Josephine Everett—Cross

Q. All the children? A. All the children, but I don't remember Frank Everett's wife being there.

CROSS-EXAMINATION by Mr. Brown:

Q. Did you at that time mention anything 10
about getting a share from Mrs. Everett's estate?

A. Did I mention anything about it?

Q. Yes. A. Well, I may have mentioned something to my sister-in-law. She is the only one I ever bothered with. I spoke to her at one time when this trouble was going on. I said to her, "Well, Helen, why don't you get one of the boys," I said, "and it would be better to pay the boys and settle it outside of Court." As far as 20
anything else, I don't remember saying.

Q. I understood you to say, Mrs. Everett, that Mrs. Everett, Senior, said at that time that all the children would get their equal share. Did she make that statement in response to a question asked of her by you? A. Well, when I said to Mother Everett—I said, "Why do I have to sign?" because I was only a daughter-in-law and I was only in the family about two years.

She said, "Well, if you don't sign you will hold 30
it up. The children don't have to worry," she said, "they will all get their equal share."

Q. You hadn't suggested to the mother that you were worried about it, had you? A. Me?

Q. Yes. A. Why, I never brought that up to my mother-in-law. I thought too much of her to bring anything like that up to her.

Q. Did you hear any of your brothers-in-law question the elder Mrs. Everett as to what would 40

Ada Everett—Direct

happen in the event of her death? A. No, I didn't.

Q. Did you hear Mr. Harry Everett ask her the question as to whether she would be protected in the event of her death? A. Never.

10 Q. Or Mr. John Everett? A. No, sir; never.

Q. As far as you know, you were the only one who raised any question about the signature? A. Yes, because I thought I didn't have any interest in her affairs.

20 ADA EVERETT, called as a witness on behalf of the complainants, being first duly sworn, testified as follows:

Direct-examination by Mr. Seymour:

Q. What is your husband's name? A. Sam Everett.

Q. How long have you been married to Sam Everett? A. Fifteen years.

Q. After you were married to Samuel Everett did you visit Mrs. Everett, Sr.? A. I always did.

30 Q. Frequently? A. Yes.

Q. Did you have any conversation with her concerning this property? A. Many a time she told me that if anything ever happened to her, her children would all get an equal share.

Q. How frequently did she say that, Mrs. Everett? A. Well, I should think about a couple of times before she died.

40 Q. How frequently between the time you first knew her and the time of her death did she say it? A. I could not exactly say.

Ada Everett—Cross

Q. More than once? A. Oh, more than once, yes.

Q. Do you recall anything that brought about such a statement by her? A. Well, it might be a death in the neighborhood, and she would hear about a will or something like that and she would bring up the remark and she would always say her children would never have to worry and she would always look after them. 10

CROSS-EXAMINATION by Mr. Brown:

Q. Were you alone with Mrs. Everett at the times when you were talking about her property? A. Sometimes.

Q. Approximately how often did those conversations take place? A. Well, there would be a death in the neighborhood or something like that, and she would happen to read it and read of somebody's will and pass a remark about it. 20

Q. Can you recall any specific instances when you spoke to her about her property? A. No, I never brought it up. She had always brought it up herself.

Q. When was the last time that the elder Mrs. Everett spoke to you about leaving her property to the children, share and share alike? A. I could not exactly say just when. 30

Q. Was it within the last ten years? A. Oh, within the last two years before her death.

Q. Did she tell you at that time that it was her intention to leave all her property to her children, share and share alike? A. She said she thought just as much of one as she did of the other, and she would always leave them all an equal share. 40

Frank Everett—Direct

Q. Was anyone else present when she said that? A. Well, my sister-in-law. She is dead now.

Q. Did Mrs. Everett ever tell you that she had made a will? A. Yes, many a time.

10 Q. She told you that she had made a will? A. Yes.

Q. Did she ever divulge the contents of that will? A. No, she didn't.

Q. You were not married to Mr. Everett at the time the deed was transferred? A. No, I was married two years later.

Mr. Seymour: The complainants rest.

20

FRANK EVERETT, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct-examination by Mr. Brown:

Q. Where do you live, Mr. Everett? A. 70 Lake Street, East Orange.

30 Q. How long have you lived there? A. I have lived there for the last thirteen years.

Q. Are you married? A. Yes, sir.

Q. Is your wife at this time, and has she been for several years, confined to an institution? A. Yes, sir.

Q. Since then have you lived with your mother during her lifetime? A. My mother; yes, sir.

Q. Did you support your mother? A. Yes, sir.

40 Q. How many other children were living home at the time? A. There was only one other child living home at the time.

Frank Everett—Direct

Q. What is the name? A. Helen.

Q. What is her name now? A. Helen Gunther.

Q. Is she one of the defendants in the suit? A. Yes, sir.

Q. Do you recall an instance in 1912 when you were all gathered in your mother's home for the purpose of executing a deed? A. Yes, sir. 10

Q. You were there? A. Yes, sir.

Q. Will you tell us what happened at that time? A. I was met on the street by Mr. Greer, one of the witnesses of the deed, and he met and told me what was going to occur, and I told him I was perfectly satisfied. He told me the predicament my mother was in, which I never heard—

Q. What did he say? A. He told me the predicament my mother was in at the present time. 20

By the Court:

Q. Please tell what he said. A. He told me the way my mother situated at the present time, that she had no authority to the property at all, and that the only thing she could do with that property was for us to deed that property over and to give her a clear title to it, and the night we was there Mr. Howlett read that paragraph off and asked us then if we knew what we was signing and we said, "Yes." 30

By Mr. Brown:

Q. Who was Mr. Howlett? A. He was the man who had drawn that deed up.

Q. Was he a friend of the family? A. No, he wasn't at that time.

Q. Did he explain to all the children at that time that they were divesting themselves of whatever interest they might have in the property? 40

Frank Everett—Direct

A. Yes, sir; he read that off and explained it clearly to them and asked them if they knew what they was signing and they said, "Yes."

Q. Did anyone object to the transferring of the deed? A. No.

10 Q. Was anything said at that time, in your presence, about an agreement with your mother whereby she would leave the property to all her children, share and share alike in the event of her death? A. No, sir.

Q. Did you hear Mr. Harry Everett or Mr. John Everett, your brothers, ask anything about that? A. No, sir; they didn't.

20 Q. Did you have an understanding with your mother at the time that your share in the property was to be left to you on her death? A. No, sir.

Q. You didn't? A. No, sir.

Q. Do you know whether or not your mother was financially embarrassed at that time? A. She wasn't.

Q. Do you know whether she was in need of ready funds? A. She was what?

30 Q. Do you know if she had any ready cash? A. She had ready cash.

Q. Do you know where she got that cash? A. Yes, sir; she inherited it.

Q. From her mother? A. She inherited from her father, she inherited from her mother, she inherited from her brother, and some from a friend of hers.

Q. Are you sure of that? A. Yes, sir.

By the Court:

40 Q. Where did your mother have the money when you signed the deed? A. Why, it was in

Frank Everett—Direct

the Orange Savings Bank, I believe. It wasn't all there at once, because she got it at different times, but she had enough there at the time to carry all the things she wanted to do.

Q. At the time the deed was signed? A. At the time the deed was signed; yes, sir. 10

The Court: Have you the Savings Bank books?

Mr. Brown: No, sir; this is the first intimation I have of it.

The Witness: There was at that time that this deed was signed—there was money in the Orange Savings Bank at that time. 20

By Mr. Brown:

Q. Do you know how much money? A. That I could not tell you.

By the Court:

Q. Was that all the money your mother had at the time? A. That was in the Savings Bank, yes.

By Mr. Brown:

Q. Do you know how much time expired after the conveyance was made to your mother before she mortgaged the property? A. She never mortgaged the property. 30

Q. Do you know if she ever mortgaged the property? A. The mortgage was on the property long before my father died.

Q. You are sure of that? A. Yes, sir.

By the Court:

Q. Did your mother put in a sewer shortly after you signed the deed? A. About six months 40

Frank Everett—Cross

after she was compelled—she had to do it, on account of the City of East Orange.

Q. You knew that at the time you signed the deed? A. It had to be done.

Q. You knew that your mother had to raise
10 money for that purpose? A. No, she didn't have to raise money because she had money of her own.

CROSS-EXAMINATION by Mr. Seymour:

Q. How do you know that your mother had money of her own? A. Because she had it there in the bank and the bank book herself.

Q. Did she show you the bank book? A. (No
20 answer.)

Q. The first you knew of the proposed transfer to your mother was when Mr. Greer spoke to you? A. Yes, sir.

Q. That was on the street? A. That was on the street.

Q. After he spoke to you, did you have a talk with your mother? A. No, sir.

Q. Do you know who called all the children to the house? A. I believe the people that had drawn
30 the deed up, they had sent word for me to come there, that there was going to be a meeting that night.

Q. How long before the meeting was that? A. About three days.

Q. You didn't say a word to your mother? A. No, sir.

Q. She didn't say anything to you about it? A. She didn't say anything to me about it.

Frank Everett—Cross

Q. The next step, so far as you know, was when all the children gathered at the house to sign the deed? A. Yes, they were all there.

Q. All the children were there? A. There was five brothers, two sisters and a sister-in-law and one brother-in-law. 10

Q. And Mr. Greer and Mr. Howlett? A. And Mr. Greer and Mr. Howlett and my mother.

Q. At that meeting did your mother say why she wanted the deed signed? A. She didn't mention it at all.

Q. Did Mr. Greer say why? A. He didn't say nothing to me at that time because he had already known. 20

By the Court:

Q. Didn't your mother explain to the group why the deed was being signed? A. Not that I know of. I didn't hear it. I suppose they already knew it. That is the reason it wasn't told to them.

Q. Certainly something was said at the time. You surely did not go in there, put your name to a paper and walk out. A. Well, the deed that was there in the house was read to them at the time. 30

Q. Well, there must have been a general explanation. A. I don't remember that because it was Mr. Greer that told me.

Q. Was his entire explanation: "Here is a deed. You are giving the property over to your mother"? A. Oh, yes. It wasn't said, but when he read it off, I knew what it was for. I knew right away he was deeding the property over to my mother, when he was reading the deed off. 40

Frank Everett—Cross

Q. Hadn't you known before that? A. I didn't know except what Mr. Greer told me that he wanted us all to come up and turn the property over to my mother, so that she could have it clear. He said that she was in a predicament.

10 By Mr. Seymour:

Q. Mr. Greer said your mother was in a predicament, didn't he? A. Certainly, he said she was in a predicament.

Q. What predicament was it? A. It was a predicament this way: That she could not do anything with the property at all, and in order to do anything with the property she had to get the signatures of all the children to the house.

20 By the Court:

Q. What do you mean by "get the signatures"? A. Because she didn't own the house, because my father had died without a will.

Q. What did you understand your mother wanted to do with the house? A. She wanted to put water and a sewer in the house.

Q. Why did she have to have a deed to do that? A. She had to have the property—the deed; otherwise, from what we were told, she would have to get all our signatures before she could do it. In other words, we would have to give her permission to do it before she could do it.

Q. Is that what you understood the deed was to take care of? A. I understood the deed was to deed the property right over, so that she could have outright title to it.

Q. So that your mother could put the sewer in? A. So that she could do whatever was needed with the house.

40

Frank Everett—Cross

Q. At that time it was understood that she had to put the sewer in the house? A. Yes, sir.

Q. That would cost money? A. Yes, sir.

Q. Your mother wanted to raise money for that purpose? A. No, she didn't want to raise money for that purpose; she had it. 10

By Mr. Seymour:

Q. At the meeting that night didn't Mr. Greer repeat to the group the statement that he had made to you—that the reason why the deed was to be signed was that your mother had no authority over the property and could not do anything with it? A. Not as I recall.

Q. That wasn't said on that night? A. No, sir.

Q. Didn't anybody raise a question about it? 20
A. No.

Q. Your mother didn't say anything about it?
A. No, sir.

Q. You didn't say anything at all? A. No, sir; I didn't say anything at all.

Q. Did you hear Mrs. John Everett ask why she had to sign the deed, not being a member of the family? A. No, sir.

Q. What did you hear that night? A. I didn't hear a thing that night when I got there. 30

Q. How long were you there? A. Only about ten minutes.

Q. Were the others there before you came? A. Yes. I was there before they came.

Q. Were the others there after you left? A. The others were there after I left.

By the Court:

Q. Were you on friendly terms with them? A. 40
I was on friendly terms with them, but my wife was sickly and I had to get home with her. I had to go out to Orange with her.

Helen E. Gunther—Direct

HELEN E. GUNTHER, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct-examination by Mr. Brown:

10 Q. Where do you live, Mrs. Gunther? A. 23 South Sixth Street, Newark.

Q. Were you living with your mother on Lake Street, City of East Orange, in October, 1912?

A. I was.

Q. How long after that time were you married?

A. I was married in 1921.

Q. How many other sisters and brothers were living at home in 1912? A. My oldest brother,
20 Frank, was home, his two children—

By the Court:

Q. Is he the one who was just on the stand? Is that Frank? A. That is Frank. That is my oldest brother.

By Mr. Brown:

Q. Were any sisters at home? A. No, my sisters were married.

By the Court:

30 Q. You and Frank got your mother's estate under her will? A. Yes.

By Mr. Brown:

Q. Do you recall a conference and meeting at your home in October, 1912, at which time the deed for the property was given to your mother?

A. I do.

Q. Were you present during the entire evening when it happened? A. I was.
40

Helen E. Gunther—Direct

Q. Can you tell us whether or not there was an agreement between your mother and the children as to whether—

By the Court:

Q. What happened at that time?

10

By Mr. Brown:

Q. What, if anything, was said by your mother? A. My mother didn't say anything; my mother cried the whole evening. She was sitting on the couch and she cried the whole evening. She didn't say anything at all. Mr. Greer and Mr. Howlett was there. Mr. Howlett got up and read off a paper and asked us did we understand that paper, did we understand the contents of that paper and were we willing to the agreement, and we all said "Yes."

20

Q. Was any question raised by anybody present? A. Never. I never knew anything about it until my mother's death. That is the first I heard of it.

Q. Did you hear any of your brothers make objection at that time? A. I never did.

Q. Did you take care of your mother during her last illness? A. I had been back and forth to her—I didn't live home—from time to time. I lived in Newark. My mother lived in East Orange; and it was a niece that had stayed home and kept house for my mother that had run the home.

30

Q. Whose daughter was the niece? A. That is the daughter of Frank Everett.

Q. The gentleman who was just on the stand? Who was living in the house at the time of your

40

Helen E. Gunther—Cross

mother's death? A. My brother, his daughter, and a little boy.

Q. That is all? A. That is all.

Q. Do you know whether your other brothers visited your mother's home for several years prior to her death? A. Well, Sam had not visited his mother in over two years, and the other boys was just occasionally dropping in once in a while, not very often.

Q. Do you know what the relations of your mother and your brother Frank were? A. Very close.

Q. Do you know whether or not he was supporting her at the time? A. He had supported her, and whenever anything was said to my mother or questioned, she always said Frank had always done right by her.

Q. Did you know prior to your mother's death that she had made a will? A. I knew my mother had made three wills prior to her death.

Q. Did she tell you that? A. She told me after each will.

Q. Did she ever divulge to you the contents of those wills? A. Only she said—

30 Mr. Seymour: I object to what the contents of the will were.

By the Court:

Q. Did she ever tell you what the contents of the will were? A. She always told me.

CROSS-EXAMINATION by Mr. Seymour:

Q. Mrs. Gunther, in 1908, when your father died, you lived with your parents, did you? A. I did.

40

Helen E. Gunther—Cross

Q. Between the years 1908 and 1912, when this deed was signed, had there been conversation between you and your mother as to the signing of that deed? A. No, nothing. There was no question.

By the Court:

10

Q. Had there been any talk between you? A. No, only that we knew that my mother was going to get title; so she spoke of putting that in her name, and we were waiting for my youngest brother, George, to come of age, 21. We were waiting for that. We all knew that it was going to be turned over to my mother.

Q. In 1912 somebody spoke to you about signing that deed? A. Yes, my mother. 20

Q. Who was it? A. My mother. I was right there in the home.

Q. You were there alone when she spoke to you? A. Well, she had spoken several times. I had lived home then.

Q. Later on it was arranged that the family get together? A. It was arranged.

Q. Do you know who brought about the family conference? A. That I could not say. I wasn't even interested at the time. 30

Q. You were present at the conference? A. I was present.

Q. They all gathered there? A. They all gathered there.

Q. They were all gathered there together? A. They were all gathered there together.

Q. What took place when they all arrived? A. We all arrived about eight o'clock—all was there 40

Helen E. Gunther—Cross

together—and Mr. Howlett and Mr. Greer was there, and Mr. Howlett—

Q. Pardon me. Was the family there before Mr. Greer and Mr. Howlett arrived? A. That I can't recall; and it was the majority of the family. There was some that came in a little later.

Q. Had there been talk among the members of the family about this deed before Mr. Greer and Mr. Howlett arrived? A. Mr. Greer had said to us did we know what we were meeting for.

Q. Pardon me. Before he arrived had there been any talk about it? A. No.

Q. There was some conversation, but not about the deed? A. No, not about the deed. They just talked among themselves about the family. My brother's wife was sick at the time, and they were talking a little about that.

Q. You were there and Mr. Greer and Mr. Howlett came in later? A. Yes, sir.

Q. What was the necessity of their coming there? A. Well, Mr. Greer had been a personal adviser to my mother and he was the one that got Mr. Howlett. He had advised my mother since my father's death—Mr. Frank Greer of East Orange.

Q. He was a real estate man? A. He was a real estate man. He had been a close friend of my mother since my father's death. He came to my mother in all her troubles and all her affairs—supervised everything.

Q. So it was he who brought about this family conference. Tell us what took place after he got there. What was said and done? A. Mr. How-

Helen E. Gunther—Cross

lett got up and read the paper and asked us did we all agree to it and we all said yes. Did we all understand this thoroughly, and we said yes, and we signed the paper. That is all there was to it.

Q. All the time your mother was crying? A. 10
My mother was crying. My mother sat on the couch and was crying the biggest part of the evening.

By the Court:

Q. What was she crying for? A. She felt very bad that she had to get us all together to do that, because the home was bought with money she inherited from her father.

Q. What was she crying about? A. That she 20
had to get us to sign it over because, you know, my father died without a will.

Q. Your father had been dead four years before that? A. He had been dead a number of years. My father is dead 31 years.

By Mr. Seymour:

Q. Twenty-one, you mean? A. Thirty-one years my father is dead.

Q. Mrs. Gunther, do you mean to tell us that 30
there was nothing further said than what you have testified to? A. There wasn't. One talked to the other. My brother John's wife came late, because they were signing the paper. Outside of what she mentioned, we all agreed to sign. I didn't ask anything from my mother; I just signed. I just wanted to give it to her outright at the time, to do just as she saw fit.

Q. Nothing was said about the signing of the 40
deed? A. My mother told me.

Helen E. Gunther—Cross

Q. Did she say why she wanted that deed signed? A. Just that she wanted the title to the place.

Q. She said it that night? A. Not at that night. My mother cried the biggest part of the evening.
10 She had nothing to say.

Q. Did she thank the boys and girls for signing over to her? A. That I don't recall. I won't say that.

Q. Was anything at all said about the property and the reason for signing the property over that night? A. No, only at the time my mother was beginning, compelled for sanitary reasons, to put the water in the house.

20 Q. Who said that? A. She got notice from the Board of Health in East Orange.

Q. You said that something else was said that night. Who said it? A. Mr. Greer.

Q. Tell us what he said. A. He said something concerning about having the water put in.

By the Court:

Q. Was that the reason for signing the deed? A. That is the reason we signed over, so that she could get a clear title, so that she would have the
30 place to do as she seen fit with.

Q. I thought you said your mother waited until the other child was 21. Had it been spoken of right along? A. It had been spoken of right along, but we knew that we were going to sign all the time.

Q. Mr. Greer told you on this night that it was to be turned over because your mother wanted to put in the sewer system? A. My mother
40

Helen E. Gunther—Cross

wanted it in her own name. She wanted it outright herself, and Mr. Greer had been her adviser. He had talked to her right along.

By Mr. Seymour:

Q. Mrs. Gunther, you have just said that on that night Mr. Greer said that that was the reason for making the deed. Will you give us the exact words? A. Those are the exact words. I can't tell you. I don't recall. 10

By the Court:

Q. Oh, give us the substance. A. Well, he just said about putting the water in, having the place turned over to my mother, so that she could have a clear title to the place. 20

By Mr. Seymour:

Q. Did your mother have to put in the sewer system? Was that the reason why she was getting the property? A. She was compelled to put in the water for sanitary reasons. We were borrowing water from the neighbors.

Q. After Mr. Greer said that, do you mean to say that nobody asked any questions about it? A. Nobody asked any questions. 30

Q. Do you mean to say that your mother said nothing about each child getting his share? A. She didn't.

Q. Didn't she say, "You need not worry. You will all get an equal share. You are my children and you will all get the same"? A. She never did. She never said that.

Q. I am talking about this one night. A. And when I signed that over I was perfectly willing— 40

George Meyers—Direct

By the Court:

Q. You have not been asked that; you have been asked whether she said that. A. Said what?

10 (The reporter read as follows: "Q. Didn't she say, 'You need not worry. You will all get an equal share. You are my children and you will all get the same?'")

A. No, my mother didn't say that, not to me.

By the Court:

Q. Was anything of that kind said? A. Nothing of that sort to me.

20 Q. Not to you, but to the children who were there? A. At that meeting there was nothing on that basis said at all, that I heard it.

By Mr. Seymour:

Q. What about any other meeting? A. We never had any other meeting.

By the Court:

Q. You heard or were able to hear everything that night? A. I did. I heard everything.

30

GEORGE MEYERS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct-examination by Mr. Brown:

Q. Where do you live, Mr. Meyers? A. 21 Lake Street, East Orange.

40 Q. How long have you lived there? A. About 38 years.

George Meyers—Direct

Q. Where is your home with reference to the premises, 17 Lake Street? A. Next door to Mrs. Everett.

Q. Did you know the elder Mrs. Everett during her lifetime? A. Very well.

Q. How long had you been acquainted with her prior to her death? A. About 37 years—38 years. 10

Q. Did you know all her children? A. All of them.

Q. Did you talk to Mrs. Everett during her lifetime about her property? A. A good many times.

Q. Did you visit her frequently at her home? A. About every day. 20

Q. Were you very friendly with her? A. Very, indeed. She was like a mother.

Q. What, if anything, did she tell you about her property?

Mr. Seymour: I object to that.

The Court: Sustained.

Q. Were you ever asked to witness a will that Mrs. Everett had drawn? A. Yes.

Q. Do you recall when that was? A. About—I think about seven years ago. 30

Q. Was it in the year 1924? A. 1924? I guess it was. I am pretty sure it was, when I think of it.

Q. Do you recall the circumstances under which the will was executed? A. Will you just explain to me what you mean?

Q. Where was the will signed? A. In my home.

The Court: What has this to do with the case? 40

(Discussion between Court and counsel.)

*George Meyers—Direct
Decision of the Court*

Q. Did Mrs. Everett ever tell you, Mr. Meyers, that she had agreed to leave her property to all her children on her death?

10 Mr. Seymour: I object.
The Court: Sustained.

Mr. Brown: The defendants rest.

20 At this time, if your Honor please, I move for a dismissal of the complainants' bill, on the ground that they have not established any verbal agreement which might alter the will that was made by the deceased prior to her death, and which conveyed the title to the property, which she owned in her own name, to two of her children—Frank Everett and Helen Gunther.

(Further discussion between Court and counsel.)

The Court: The title to the property was in the father of these litigants. He died intestate. Years later the children conveyed to the mother.
30 At her death she devised it to two of the defendants, a daughter and a son. The complainants charge that the children conveyed to the mother upon her promise to leave it to them upon her death, and they sue to enforce the promise. The promise is not made out. I think the deed was an ordinary filial expression of children toward their mother.

40 The mother, at the time the deed was given, had nothing but a little cash and the home, the

Decision of the Court

home that she and her husband had brought into existence, in which they had raised their children—she after her husband died. When the children were able and of age to convey, they conveyed it as a filial duty. In their minds they regarded it as their parents' property; they felt that it belonged to the mother, so they handed it over to her. 10

I am not satisfied that the children handed the house over to the mother upon her promise to give it back to them. I believe none of the children held that obligation against the mother. They reasoned, if they reasoned at all, that the property didn't belong to them, that it was their mother's. They felt she should have it and gave it to her to have it as her own. It may well be that they naturally expected to be equal heirs if their mother had it at death and that this notion also came from what the mother may casually have said of her impartial love for all her children, but that it was promised and that they conveyed on the strength of the promise is not made out. 20

To destroy the effect of so solemn a document and to impose upon it a trust in favor of the children, if that were permissible in law, and that seems to be the effort of the bill—in other words, to read into the deed something which is not type-written there—requires proof of a type not produced here. Taking, however, what we have, it is not convincing of a promise. The testimony of the three contestants is denied by two of the children, and the testimony of the two is supported 40 30

Exhibit C-1

by common, every-day experience and the particular circumstances of this case.

10 It often happens, as it happened here, that a mother is left with small children on her hands and in need, the older children go to work and help the mother raise the younger ones; that the father owned the home, but through a slip the mother does not; and that when the children are old enough they pass the home over to the mother as children should. That is what these children did. So much for the facts.

20 Then we have the rule of law against oral testimony to vary the terms of the deed. That is a completed document and presumed to embody all the arrangements and precludes the testimony.

Furthermore, the Statute of Frauds requires such a promise to be in writing.

The bill will be dismissed.

EXHIBIT C-1.

30

THIS INDENTURE,

Made the Fifteenth day of October, in the year of our Lord One Thousand Nine Hundred and Twelve

BETWEEN

FRANK A. EVERETT and ANNA EVERETT, his wife;
FRANK H. STONER and MARY E. STONER, his wife;
40 JOHN EVERETT and JOSEPHINE EVERETT, his wife;

Exhibit C-1

HENRY T. EVERETT, unmarried; SAMUEL L. EVERETT, unmarried; GEORGE H. EVERETT, unmarried; and HELEN A. EVERETT, unmarried, of the City of East Orange in the County of Essex and State of New Jersey, party of the first part; 10

AND

MARY T. EVERETT, widow of Peter A. Everett, of the City of East Orange in the County of Essex and State of New Jersey, party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of 20

One Dollar and other valuable consideration lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to her heirs and assigns, forever, ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of East Orange in the County of Essex and State of New Jersey 30

40

Exhibit C-1

BEGINNING on the westerly line of Lake Street
 at a point therein distant 208 feet 1 inch southerly
 from the southwest corner of Dodd and Lake
 Streets and at the southeasterly corner of lot #38
 as laid out on a map of Building Lots at East Or-
 10 ange, New Jersey lately owned by I. F. Gerry;
 thence westerly along the southerly line of lot
 #38 and at right angles with Lake Street 141
 feet to the easterly line of lot #41 on said map;
 thence southerly along the easterly line of lots
 #41 and #42 parallel with Lake Street 50 feet
 to the northerly line of lot #35 on said map;
 thence easterly along the northerly line of lot
 #35, 141 feet to the westerly line of Lake Street;
 20 thence along the westerly line of Lake Street
 north 16 degrees to the place of BEGINNING. Be-
 ing lots #36 and #37 on said map.

TOGETHER with all and singular the houses,
 buildings, trees, ways, waters, profits, privileges,
 and advantages, with the appurtenances to the
 same belonging or in anywise appertaining;

ALSO, all the estate, right, title, interest, prop-
 30 erty, claim and demand whatsoever, of the said
 party of the first part, of, in and to the same,
 and of, in and to every part and parcel thereof,

To HAVE AND TO HOLD, all and singular the
 above described land and premises, with the ap-
 purtenances, unto the said party of the second
 part, her heirs and assigns, to the only proper
 use, benefit and behoof of the said party of the
 40 second part, her heirs and assigns forever.

Exhibit C-2

IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written.

FRANK A. EVERETT
 ANNA EVERETT 10
 FRANK H. STONER
 MARY E. STONER
 JOHN EVERETT
 JOSEPHINE EVERETT
 HENRY T. EVERETT
 SAMUEL L. EVERETT
 GEORGE A. EVERETT
 HELEN A. EVERETT

Signed, Sealed and Delivered
 in the Presence of

20

EXHIBIT C-2.

I, MARY T. EVERITT, of the City of East Orange, in the County of Essex and State of New Jersey, being of sound and disposing mind, memory and understanding, do make, publish and declare this my last will and testament in manner and form following, that is to say: 30

FIRST: I direct the payment of all my just debts and funeral and testamentary expenses as soon as may be convenient after my decease.

SECOND: I give and bequeath to my son Henry Everitt, the sum of One Hundred Dollars. 40

Exhibit C-2

THIRD: I give and bequeath to my son Samuel L. Everitt, the sum of One Hundred Dollars.

FOURTH: I give and bequeath to my son John Everitt, the sum of One Hundred Dollars.

10

FIFTH: I give and bequeath to my granddaughter, Helen E. Stoner, the sum of Fifty Dollars.

SIXTH: I give and bequeath to my grandson, Harold F. Stoner, the sum of Fifty Dollars.

20

SEVENTH: I give, devise and bequeath unto my daughter Helen E. Gunther and my son Frank A. Everitt, share and share alike, the house and premises known as 17 Lake Street, in the City of East Orange, Essex County, New Jersey, subject, however, to the legacies mentioned in Paragraphs 2, 3, 4, 5 and 6, of this my will.

30

EIGHTH: All the rest, residue and remainder of my estate of whatsoever kind or wheresoever situate, I give, devise and bequeath unto my daughter Helen E. Gunther and my son Frank A. Everitt, share and share alike, absolutely and forever.

NINTH: I nominate, constitute and appoint Leonard G. Brown, the executor of this my last will and testament, and I direct that no bond or bonds or other security be required of him for the faithful performance of his duties as such executor.

40

Exhibit C-2

IN WITNESS WHEREOF, I have hereunto set my hand and seal this third day of January, in the Year of Our Lord One Thousand Nine Hundred and Twenty-seven.

Signed, Sealed, Published and Declared by the 10
above named testatrix, Mary T. Everitt, as, for
and to be her last will and testament, in the pres-
ence of us both present at the same time, who at
her request, in her presence and in the presence
of each other have hereunto signed our names as
subscribing witnesses.

52 MAY.T.1930

New Jersey Court of Errors and Appeals

HARRY F. EVERETT, *et als.*,

Complainants-Appellants,

vs.

HELEN E. GUNTHER, *et als.*,

Defendants-Respondents.

On Appeal
from the
Court of
Chancery.

BRIEF OF COMPLAINANTS-APPELLANTS.

STATEMENT OF FACTS.

In 1908 Peter Everett, father of complainants, died seized of the house and lot No. 17 Lake Street East Orange, New Jersey. He left surviving him his widow, Mary T. Everett, the complainants, and other children, two of whom, Helen E. Gunther and Frank A. Everett, are defendants. The other defendants are children of deceased children of said Peter Everett.

On October 12, 1912, all of the children of Peter conveyed the house and premises mentioned above to their mother, Mary T. Everett, widow of Peter. The complainants charge that this was on the express promise and agreement that the mother would borrow moneys for the purpose of improving the house and putting it in a saleable condi-

tion, and that if the house was sold she would give each child his or her share, and that if it was not sold she would by will devise to each of them an equal interest in the said house and lot. She died leaving a will in which she devised the said house and lot to two children, Helen E. Gunther and Frank A. Everett, subject to certain nominal legacies to the other children. The complainants filed their bill for the purpose of enforcing the said agreement and charging the said house and lot devised to two of the children with a trust in favor of the complainants and all of the defendants, children and grandchildren of the said Peter Everett.

POINT I.

FROM THE TESTIMONY PRODUCED THE CHANCELLOR SHOULD HAVE FOUND THAT SAID AGREEMENT WAS PROVED AND SHOULD HAVE DECREED THAT IT BE SPECIFICALLY PERFORMED AND THAT THE LANDS BE HELD IN TRUST FOR THE PARTIES, COMPLAINANTS AND DEFENDANTS.

From the testimony of John Everett it appears that at a conference between the mother and all of the children and a Mr. Greer and Mr. Howlett, both now deceased, the mother requested the children to sign over the property to her because she said the City of East Orange had compelled her to put in the sewerage and that she didn't have any money to do it, and that the only way she could do it was by signing up, and that at her

death she would see that they all got their equal share (Case p. 16, l. 30; Case p. 18, l. 30; Case p. 19, l. 20).

Harry Everett, another son, testified that all the children were present with Mr. Greer and Mr. Howlett (Case p. 22, l. 20), and on Case page 22, line 30 and page 23, line 10, he says that his mother requested them to sign the deed and said that unless they did so she could not have the sewer put in and that the City of East Orange compelled her to do it and that they need not be afraid, they would all have their equal shares if she died.

Another son, Samuel Everett, who was living home with his mother at the time, said that his mother wanted the property signed over to her so that she could have repairs made (Case p. 25, l. 40), that she was compelled to have the sewer in and was figuring on raising a mortgage, and that all the children agreed to sign with the understanding they would always get an equal share if anything happened to her (Case p. 26, l. 10); that there was afterwards a mortgage put on the house and the sewer was put in (Case p. 26, l. 35).

Josephine Everett, wife of one of the complainants, testified that she was at the meeting between the mother and the children and inquired why she had to sign the paper (Case p. 30, l. 30), and that the mother replied, "Well, if you don't sign you will hold it up. Of course the children don't have to worry; they will all get their equal share."

Ada Everett, wife of one of the complainants, testified that the mother "many a time she told me that if anything ever happened to her her

children would all get an equal share" (Case p. 32, l. 30). She was not married to Samuel Everett at the time and was not present at the conference. She also testified (Case p. 33, l. 40) that the mother told her that she thought just as much of one as she did of the other and that she would always leave them an equal share. That was within the last two years before her death.

This was the case as produced by the complainants. It showed that Mrs. Everett was compelled by the City of East Orange to put in a sewer, that she had to borrow money on mortgage to pay that expense, and that she could not do it without the signatures of her children and their wives, she having only a dower right in the property. This story of the complainants is corroborated by Frank Everett, one of the defendants, who testified (Case p. 35, l. 20) that Mr. Greer, who apparently acted for the mother, "told me the predicament my mother was in at the present time" (Case p. 35, l. 20); "that she had no authority to the property at all" (Case p. 35, l. 25); that six months after the deed was signed she was compelled by the City of East Orange to put in the sewer (Case p. 37, l. 40). On cross-examination he says that Mr. Greer stated to all of the children present at the conference that the mother "was in a predicament" (Case p. 40, l. 10); and on line 16 he says, "She could not do anything with the property at all and in order to do anything with the property she had to get the signatures of all the children to the house;" and on line 26 he says, "She wanted to put water and a sewer in the house;" and on line 36 he says, "I understood the deed

was to deed the property right over so that she could have outright title to it so that she could do whatever was needed with the house," and that at the conference it was understood "that she had to put the sewer in the house" (Case p. 41, l. 1).

Helen E. Gunther, another of the children and one of the defendants, said that at the time of the conference her mother cried the whole evening (Case p. 43, l. 10). At the time of the conference the witness lived in Newark. On page 46 line 26 she states that Mr. Greer "had been a personal adviser to my mother and he was the one that got Mr. Howlett. He had advised my mother since my father's death" (Case p. 46, l. 30). "He had been a close friend of my mother since my father's death. He came to my mother in all her troubles and all her affairs—supervised everything." On Case page 48, line 15 she testified as follows:

"Q. Was anything at all said about the property and the reason for signing the property over that night? A. Nothing only at the time my mother was being compelled for sanitary reasons to put water in the house."

She does not mention anything about putting in a sewer and she denies that there was any conversation about each child getting his share. When compelled to answer responsively the following question on cross-examination

"Q. Didn't she say, 'You need not worry; you will all get an equal share; you are my children and you will all get the same'" (Case, p. 50, l. 10).

her answer is:

“A. No, my mother didn’t say that, not to me”;

and when the Court asked:

“Q. Was anything of that kind said?”

she answered as follows:

“A. Nothing of that sort to me.

Q. Not to you but to the children who were there? A. At that meeting there was nothing on that basis said at all, that I heard of.”

The testimony of Mrs. Gunther is evasive and uncertain.

It is contended that this case presents the usual one of an impoverished mother who is forced to make repairs and improvements to her house, has not the money to do so and is compelled to borrow it, but in order to borrow is required to get the signatures of her children to a deed to put property in her name to which she had only a dower right. A conference was held, the whole matter was explained to the children by Mr. Greer and the mother. It was a somewhat solemn occasion, and the mother, in explaining the matter, was so overcome that she broke down and cried during the whole evening. The Court below found that the deed was given voluntarily, but only one witness, Helen Gunther, testifies to that effect. The three complainants and Frank Everett, a defendant, all substantially say that their mother was in a predicament, needed money and needed the deed. If the deed was voluntary that presented a strong reason why the mother should have made a will giving each child an equal share. If it was the result of the alleged agreement they

are entitled to an equal share, and apparently in the mind of Mrs. Everett were to have an equal share, until January 3, 1927, the date of her will. She died more than fifteen years after the making of the deed. As far as the testimony shows her action in not making a will during all that time indicates that she intended that each child should have an equal share. The provisions of the will show that she was on friendly terms with the complainants because she bequeathed to each of them a legacy. The preponderance of the evidence shows that there was such an agreement as alleged in the bill of complaint and therefore there should have been a decree imposing a trust upon the lands.

POINT II.

The Chancellor said that the case was an attempt to vary the terms of the deed and the rule of law was against the admission of oral testimony for that purpose and that the promise alleged should have been in writing under the statute of frauds (Case p. 54, ll. 10 to 20).

It is contended that the contract set forth in the bill and the testimony was a contract to make a will with a good consideration and that it was not required to be in writing under the cases *Kastell v. Hillman*, 53 N. J. Equity 49, 40 Cyc. 1063, paragraph 4.

A court of equity will decree the specific performance of such an agreement upon the principles which govern the Court in the exercise of this branch of its jurisdiction.

Although the agreement is by parol, if there is a part performance of such a character, as upon the principles recognized by the Court, will take a parol agreement out of the statute of frauds, then there is nothing peculiar about an agreement of this kind to exclude it from the operation of those principles.

If one party to a parol agreement has wholly or partially performed it on his part so that its non-fulfillment by the other party is a fraud the Court will compel a performance. *Johnson v. Hubbell*, 10 N. J. Equity 332.

A promise to devise property made for valuable consideration will be enforced; and if the promisor attempts to violate his promise during his life, equity will at once, upon the principle of *quia timet*, impress upon the property a liability to answer the promise. *Duvale v. Duvale*, 54 Eq. 581; affirmed, 56 N. J. Eq. 374.

**IT IS RESPECTFULLY CONTENDED THAT THE
DECREE BELOW SHOULD BE REVERSED.**

ARTHUR B. SEYMOUR,
Counsel for Complainants-Appellants.

New Jersey Court of Errors and Appeals

HARRY F. EVERETT, *et als.*,
Complainants-Appellants,

vs.

HELEN E. GUNTHER, *et als.*,
Defendants-Respondents.

On Appeal
from the Court
of Chancery.

BRIEF OF DEFENDANTS-RESPONDENTS.

Statement of Facts.

In 1908 Peter Everett, father of Complainants, died seized of the house and lot No. 17 Lake Street, East Orange, New Jersey. He left surviving him his widow, Mary T. Everett, the Complainants, and other children, two of whom, Helen E. Gunther and Frank A. Everett, are Defendants. The other Defendants are children of deceased children of said Peter Everett.

The Complainants charge in their Bill of Complaint that on or about October 12th, 1912, all of the children of Mary T. Everett met their mother at her house, and entered into an oral agreement at her request, by which they agreed to convey to her all their interest in the Lake Street property. As widow, the mother had only an estate in dower in said land. They charge that their mother agreed that if she did not sell the premises during her lifetime, she would, by her will, devise it equally amongst her said children, giving to each an equal

interest therein. They charge that she did not keep this agreement, but that she made a last will and testament in which she devised the property to Helen E. Gunther and Frank A. Everett, and left nothing to the Complainants. They say that the mother was induced to make this Will "by the fraud and undue influence of the said Helen E. Gunther and Frank A. Everett"—they ask that the Defendants "be decreed to specifically perform the agreement made as aforesaid or to hold the said lands and premises described in this Bill of Complaint as trustees for themselves and for these Complainants and for the other parties herein named, according to their respective interests therein, and that they may be decreed to convey to these Complainants and the other parties hereto the said lands and premises according to their respective rights therein."

The only witnesses to the transaction with the mother, are the parties to the deed—the Complainants and the Defendants, and the wife of one of them. The only other witness for the Complainants is Ada Everett, who after the conveyance to Mrs. Everett, married Samuel Everett, and who was not present at the time the Deed was signed.

John F. Everett, one of the Complainants, says (p. 16, line 32): "Mother wanted us to sign over the property to her, because she said the City of East Orange had compelled us to put in the sewerage and that she didn't have any money to do it, and the only way she could do it was by signing up * * * she said, 'I have no intention of selling. At the time of death I will see that you all get your equal share.'" This testimony he repeated on page 19.

Harry Everett, another Complainant, testified similarly (Case, p. 23, line 6), "She told us that if we signed them papers that we should never be

afraid, we would all have our equal shares if she died. That was the reason I signed them papers for my mother.”

Samuel Everett, the remaining Complainant, says the same thing (Case, p. 26, line 28), “She said she would give them all equal shares—each and every one alike.”

Josephine Everett, the wife of John Everett, testifies in almost identically the same language (Case, p. 30, line 34).

John F. Everett says (Case, p. 17, lines 18 and 19) that Mr. Greer and Mr. Howlett were both there.

Harry Everett (Case, p. 22, line 20) says that he also remembers this fact.

Samuel Everett does not mention their presence, nor does Josephine Everett.

The testimony of the Defendants Frank Everett and Helen E. Gunther is much more detailed as to the transaction. It will be noted that the story of the Complainants limits the entire transaction to a statement by Mrs. Everett—“I have no intention of selling. At the time of death I will see that you all get your equal share.” The testimony of the Defendants seems much more corroborative in the details that the others should have remembered. He says (Case, p. 35, line 29), “the night we was there Mr. Howlett read that paragraph off and asked us then if we knew what we was signing and we said ‘Yes.’” This sounds like the act of a notary in taking an acknowledgment, the significance of which might be lost upon the witness, but the telling of which points to his truthfulness. He says (Case, p. 36, line 12) that there was no statement made by the mother that she would leave the property to all her children, share and share alike. He states again on (Case, p. 40, line 12) that Mr. Greer had told him that she was in a predicament.

Mrs. Gunther says (Case, p. 43, line 17) that Mr. Greer and Mr. Howlett were there. Mr. Howlett got up and read off a paper and "asked us did we understand that paper, did we understand the contents of that paper and were we willing to the agreement, and we all said 'Yes.'"

Mrs. Gunther says (Case, p. 49, line 30 to line 36) that her mother said nothing about each child getting his share; that she did not say "you will all get an equal share."

Not a word of proof was offered to show the fraud and undue influence charged by the Bill of Complaint.

L A W .

POINT I.

The Vice-Chancellor's findings of fact should not be disturbed.

The Bill of Complaint seeks alternative relief, first, for the Court to decree specific performance, or second, to impress a trust on the land in favor of the Complainants. The action grows out of an alleged breach of a contract to make a will. The majority of decisions on that question in this State deal with agreements to perform certain services—to live with the deceased, or to perform some other act at the request of the deceased in consideration of which the deceased agreed to leave a last will and testament making certain provisions for the Complainant.

We have been unable to find any case in which the only consideration for the agreement to make a will was a conveyance by children direct to a parent in return for which conveyance the parent agreed to make a devise.

In all cases, however, of an agreement to will, the courts have held that the proof must be clear and conclusive. Vice-Chancellor STEVENSON said, in the case of *Van Horn v. Demarest*, 76 N. J. Eq. 386, at page 388:

“The declaration of testamentary intentions and purposes even when the beneficiary of those intentions and purposes acts upon such declaration to his injury, does not necessarily, constitute a contract. The lure of a legacy is often held out to attract attention and service. Personal attention and service are often assiduously rendered in the hope of a legacy.”

In the case of *Howells v. Martin*, 101 N. J. Eq. page 275, the Court of Errors quoted with approval an opinion in an earlier case. It said (p. 278), “In *Vreeland v. Vreeland*, 53 N. J. Eq. 387 (at p. 390), it is said: ‘But a parol agreement of this character because of the situation and relations of the parties to it and the consequent opportunity for the perpetration of fraud, *is regarded with suspicion, and, when its enforcement is sought, is subjected to close scrutiny.* It must not only be mutual, but also definite and certain, both in its terms and as to its subject matter, and it must be clearly proved * * *. So, also, it must plainly appear that that which is alleged as part performance is referable to and was consequent upon the contracts alone, for the purpose of carrying it, into effect!’”

To the same effect is *Tooker v. Vreeland*, 92 N. J. Eq., page 340, in which the court said, on page 342: “That such a contract be enforceable it must be, like all other contracts specifically enforceable in equity, founded upon a valid consideration, certain and defined, equal and fair, *and sufficiently proven*—qualities to which Lord Loughborough said in *Lord Walpole v. Lord Orford*, *supra*, he knew no limitations.” And again, on page 343:

“For the solution of this we must look to the extraneous testimony, keeping in mind that, to establish an agreement, *the proofs must be clear and convincing.*”

It will be noted that no particle of testimony on behalf of the Complainants is produced by a disinterested witness. The only persons testifying are the Complainants themselves or their wives, whose testimony is necessarily colored by their interest in the outcome of these proceedings. In judging of their credibility, the Vice-Chancellor had an opportunity to observe the parties and form his own conclusion as to whether or not he should believe their testimony. It was held in the case of *Shearer v. Schaffer*, 105 N. J. E., page 279: “The trier of facts is the judge of the credibility of witnesses when the testimony is conflicting and does not have to believe a particular witness or witnesses.”

It was held in *Riehl v. Riehl*, 101 N. J. E., page 15, at page 22: “The trier of facts is the judge of the credibility of witnesses and does not have to believe a particular witness or witnesses * * *. And the trier of the facts, whether court or jury, has the right to discredit altogether the testimony of a witness, where there is reason therefor, and to disbelieve him. The Court of Errors and Appeals has held that the jury (and in Chancery the court sits as the jury, in other words, tries the facts), are at liberty to discredit and reject certain testimony.”

The Vice-Chancellor, after full opportunity for an examination of the facts in the first instance, and with an equal opportunity for an observation of the witnesses said: “I think the deed was an ordinary filial expression of children toward their mother.” This summarizes admirably what was the true situation.

POINT II.

If the complainants' case be considered as a suit for specific performance, the testimony of all the complainants' witnesses should be excluded under Section 4 of the Evidence Act.

In a suit for specific performance, the executor is a necessary party. In the case of *Lipp v. Fielder*, 72 N. J. Eq., page 439, the Court of Errors approved an opinion of Vice-Chancellor STEVENS, in which he held that in a suit for specific performance, the executor is a necessary party. The exact quotation is as follows: "Under *Kempton v. Bartine*, 59 N. J. E. (14 Dick.) 149; 60 N. J. Eq. (15 Dick.) 411, and *Wyckoff v. Norton*, 60 N. J. Eq. (15 Dick.) 478, the executor is a necessary party."

In *Clawson v. Brewer*, 67 N. J. Eq., page 201, the court held, on page 208, as follows: "In reaching the conclusion that the contract to devise the property was made by the testatrix, I have not relied on the evidence of the complainant as to his transactions with her. Her executors are parties to the suit, and *they are necessary parties*. *Kempton v. Bartine*, 60 N. J. Eq. (15 Dick.) 411 (Court of Errors and Appeals, 1899). Complainant's evidence as to transactions with Mrs. Clawson is therefore inadmissible under the statute relating to evidence. P. L. of 1900, p. 363, section 4."

If, then, in a suit for specific performance the executor is a necessary party, and it so appears from the above decisions, the suit on behalf of the Complainants must fail. In addition to that fact, if the executor were a party, the testimony of all the Complainants' witnesses would have been incompetent on the authorities just expressed and those which will later be mentioned in this memorandum.

POINT III.

If the bill be considered as seeking to establish a trust, it must fail.

An examination of the deed made to the mother (Exhibit C-1, Case, p. 54), shows, page 56, that it was made to "The said party of the second part, her heirs and assigns *to the only proper use*, benefit and behoof of the said party of the second part, her heirs and assigns forever."

It has been established by a long line of cases that where a use has been declared by a deed operating under the statute of uses, no other uses or trusts not expressed in writing can be shown. Vice-Chancellor BACKES held in the case of *The Board of Missions v. Hebble*, 95 N. J. E., page 117, at page 118: "No resulting trust arises under the latter deed. The use therein is declared to be for the grantee, and where a use is declared by a deed operating under the statute of uses no other use or trust not expressed in writing can be shown. *Coffey v. Sullivan*, 63 N. J. Eq. 296; *Fretz v. Roth*, 70 N. J. Eq. 764. The point was distinctly ruled in *Lister v. Lister*, 35 N. J. Eq. 49, 55, 'Warwick Street property.' The case of *Duvale v. Duvale*, 54 N. J. Eq. 581; modified and affirmed, 56 N. J. Eq. 375, relied upon by Hebble's counsel, is not helpful in his cause. There the property bought by the husband's money was conveyed by the vendor directly to the wife and the presumption of settlement was held to be overcome by the proofs and that a trust resulted in favor of the husband upon his surviving his wife; the trust having been thus modified by the parties."

To the same effect is *Down v. Down*, 80 N. J. E., page 68, which held as follows: "A recital in a deed of a pecuniary, though a nominal, considera-

tion, raises a conclusive presumption of an intention that the grantee is to take the beneficial estate, and destroys the possibility of a trust resulting to the grantor, and no extrinsic evidence is admissible to contradict the recital, except in the case of fraud or mistake; but this rule does not apply where property is purchased by one person, and title is taken by him in the name of another." The learned Vice-Chancellor quotes the following New Jersey cases establishing that principle: "The text above quoted from POMEROY is supported by the following cases in this State: *Baldwin v. Campfield*, 8 N. J. Eq. (4 Halst. Ch.), 891, 903; *Smith v. Howell*, 11 N. J. Eq. (3 Stock.) 349, 359; *Whyte v. Arthur*, 17 N. J. Eq. (2 C. E. Gr.) 521, 523; *Hogan v. Jaques*, 19 N. J. Eq. (4 C. E. Gr.) 123; *Osborne v. Osborne*, 29 N. J. Eq. (2 Stew.) 385; *Stucky v. Stucky*, 30 N. J. Eq. (3 Stew.) 546, 554; *Lovett v. Taylor*, 54 N. J. Eq. (9 Dick.) 311; *Coffey v. Sullivan*, 63 N. J. Eq. (18 Dick.) 296, 303; *Aller v. Crouter*, 64 N. J. Eq. (19 Dick.) 381; *Holten v. Holten*, 72 N. J. Eq. (2 Buch.) 312; *Ashby v. Yetter*, 79 N. J. Eq. (9 Buch.) 196."

It is to this feature of the case that the learned Vice-Chancellor was referring in his opinion, in the court below, and not to the fact that an oral promise to make a will cannot be made. He says (Case, p. 54): "Then we have the rule of law against oral testimony to vary the terms of the deed. That is a completed document and presumed to embody all the arrangements and precludes the testimony. Furthermore, the Statute of Frauds requires such a promise to be in writing." By this, he means that the deed having been made to the mother and expressly stating that it is to her use, comes within that provision of the Statute of Frauds that provides that where a use is declared to be for the grantee, no other use or trust, not ex-

pressed in writing, can be shown. The deed apparently covers the arrangement between the parties. Nothing is said about the agreement to devise.

We contend, however, that the case also comes within Section 5 of the Statute of Frauds. The Court of Errors has recently had occasion to decide the question in the case of *Hirschberg v. Horowitz*, 143 Atl. 351, in which the court held that an oral agreement of testator to devise real and personal property to claimants in consideration for their coming to his home and caring for him and his wife during their natural lives was void under Statute of Frauds 5 (2 Comp. St. 1910, p. 2612). This Court held as follows:

"We think the law is settled that the contract sued on falls within the inhibition of the statute. *Smith v. Smith Adm'rs*, 28 N. J. Law, 208, 78 Am. Dec. 49; *Cooper v. Colson*, 66 N. J. Eq. 328, 58 A 337, 105 Am. St. Rep. 660, 1 Ann. Cas. 997; *Lozier v. Hill*, 68 N. J. Eq. 300, 59 A. 234."

At first glance there may seem to be some contradiction between that line of cases which holds that an oral agreement to make a will is an enforceable agreement and the decision in *Hirschberg v. Horowitz*. This contradiction, however is more apparent than real. In all the cases in which the Court has sustained an oral agreement to make a will, some act was to be done after the making of the agreement, on the part of the promisee, such as the rendering of future services, etc. When the contract so far as the promisee was concerned was completed by the doing of some act, the Statute of Frauds immediately took effect. This was pointed out with great clearness in the case of *Lozier v. Hill*, 68 N. J. E. 300, in which the complainant conveyed land to her brother on his oral agreement to devise it to her. After discussing the

question elaborately Vice-Chancellor STEVENSON held that such a case was within the Statute of Frauds.

POINT IV.

Under any theory, the testimony of all the complainants should have been excluded under Section 4 of the Evidence Act.

An examination of the various cases will show a decided difference of opinion among the Vice-Chancellors. The Court of Errors has apparently never squarely decided this question and has on numerous occasions, expressly avoided deciding that question.

We respectfully contend that the more logical rule would prevent the testimony of the Complainants under such a statute.

The pertinent part of Section 4 of the Evidence Act is as follows: "This section shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator or intestate *represented in said action*, unless the representative offers himself as a witness on his own behalf."

Some of the Vice-Chancellors have decided the question by merely regarding capacity in which parties are described on the record. It seems to us that this is dodging the issue. Vice-Chancellor STEVENS discussed the point in *Kleb v. Kleb*, 70 N. J. E., page 305 (at p. 315): "Mrs. Kleb sues the heirs at law of her husband to enforce his contract in respect of lands descended. Are they being sued in a representative capacity? The question has been twice before the Court of Errors and Appeals, and it has declined to pass upon it. *Wyckoff v. Norton*, 60 N. J. Eq. (15 Dick.) 474; *Kempton v.*

Bartine, 60 N. J. Eq. (15 Dick.) 411. In this court Vice-Chancellor VAN FLEET, *Crimmins v. Crimmins*, 45 N. J. Eq. (16 Stew.) 86; Chancellor MCGILL, *Vreeland v. Vreeland*, 53 N. J. Eq. (8 Dick.) 390, and Vice-Chancellor EMERY, *McKinley v. Coe*, 66 N. J. Eq. (21 Dick.) 70, have thought the evidence admissible, while Chancellor RUNYON, *Colfax v. Colfax*, 32 N. J. Eq. (5 Stew.) 206; Vice-Chancellor PITNEY, *Greenwood v. Henry*, 52 N. J. Eq. (7 Dick.) 447, and Vice-Chancellor GREY, *Kempton v. Bartine*, 59 N. J. Eq. (14 Dick.) 149, 158, have deemed it inadmissible. In this conflict of authority any expression of opinion on my part can have but little weight. It has seemed to me, however, that the reasons for its exclusion are stronger than those for its admission. Vice-Chancellor VAN FLEET's decision seems to rest upon an erroneous conception of what was decided by Chief Justice BEASLEY in *Hodge v. Coriell*, 44 N. J. Law (15 Vr.) 456. That this latter case was correctly decided no one can have any doubt. It was a replevin suit, and the wrongful act alleged was that of the defendant, not that of the defendant's intestate. Chief Justice BEASLEY said: 'The defendant in this writ is called to account for a tort in his own person. With regard to any estate represented by him, the plaintiff has no concern. The defendant could not be sued in this matter in his representative capacity.' How, from a decision put upon this ground—viz., that the defendant was being sued for a tort of his own, not for the wrongful act of his testator—it could be legitimately inferred that the heir at law is not being sued in a representative capacity, when the suit is based upon the act or contract of the ancestor, I am at a loss to understand. The inference appears to me to be an entire *non sequitur*. Chancellor MCGILL simply followed Vice-Chancellor VAN FLEET

without giving the matter, as far as appears, independent consideration, and Vice-Chancellor EMERY thought himself bound by their opinion. On the other hand, it seems to me that the principle upon which *Jones v. Mohn*, 55 N. J. Law (26 Vr.) 407, was decided leads to the opposite conclusion. There the action was brought by plaintiff against the devisees of Mohn to recover money lent to testator in her lifetime. Mr. Justice REED said: "The primary question is, Are heirs and devisees in actions under the statute representatives of the deceased debtor? I think they are. Mr. Bouvier, in his Law Dictionary, tit. "Representative," uses this language: "The heir represents the ancestor; the devisee, his testator; the administrator, his intestate." It seems entirely undeniable that, in actions like the present, the heir or devisee stands instead of and so represents the deceased debtor. * * * The object of the statute is to subject the real estate of the deceased debtor to a liability for all classes of debts left unpaid by such debtor.' It was held, in *New Jersey Insurance Co. v. Meeker*, 37 N. J. Law (8 Vr.) 282, that an action of covenant would lie, under the Heirs act, against heirs and devisees for a breach of covenant against encumbrances contained in a conveyance by an ancestor; that that act was 'applicable to every obligation growing out of contract.' Consequently, if an ancestor has made an agreement to convey real estate, an action to recover damages will lie for breach of it, and under *Joss v. Mohn* the heir in such action will be sued in a representative capacity. Now, if in a suit at law the heir is sued in a representative capacity, it would at least be singular if it were held that, in a suit in equity between the same parties to compel a specific performance of the same contract, the defendant was being sued in a non-representative character. Are

not the obligation and the person the same? Have we not the same ground of liability, viz., the immediate devolution upon the heir of property bound in one form or another to answer for the ancestor's obligation? The court in which relief may be sought and the particular species of relief asked for seem to be irrelevant considerations. That the court may look at the real character of the parties to the controversy is conclusively settled by *Smith v. Burnet*, 35 N. J. Eq. (8 Stew.) 314, and *Adoue v. Spencer*, 62 N. J. Eq. (17 Dick.) 794. *Hodge v. Coriell* did not decide otherwise. All that it decided was that when a defendant was sued for his own tort, he could not, by pleading, change the issue to one involving the acts of his intestate. *Smith v. Smith*, 52 N. J. Law (23 Vr.) 207, rests upon much the same ground as *Haines v. Watts*, 55 N. J. Law (26 Vr.) 149, and does not touch the question under consideration, and *Pal-mateer v. Tilton*, 39 N. J. Eq. (12 Stew.) 40, and *Rairdon v. Sampson*, 67 N. J. Law (38 Vr.) 346, merely decide that the record determines the question of competency; that if the person offered as a witness is not a party to the record, he is competent, no matter what his interest may be. The Court of Errors and Appeals has never decided, nor, as far as I can find, so much as intimated, that if a person called as a witness appears by the allegations of the pleadings to be really sued in a representative capacity, the court may not exclude him, because the pleader has not, in so many words, called him administrator or heir or devisee, and has not expressly alleged that he proceeds against him in that character. In *Smith v. Burnet* it decided just the reverse. If the pleadings or record state facts which show that he is suing or being sued in a representative character, then he is disqualified."

We respectfully urge that the Vice-Chancellor's logic in this opinion is irresistible.

Each of the Vice-Chancellors has apparently had to decide for himself. Vice-Chancellor FOSTER, in the case of *Turner v. Spicer*, 91 N. J. Eq. 412, has considered that a sole devisee is acting in a representative capacity. Vice-Chancellor BERRY, on the other hand, in *Burr v. Bloomsburg*, 101 N. J. Eq., page 615, takes the opposite point of view.

We respectfully submit that the purpose of section 4 of the Evidence Act is to provide that if the suit grows out of a transaction with a deceased person, that no living person, a party to that transaction, can testify. If this were not so, it leaves the anomalous situation of the admissibility of evidence to be determined by some highly technical feature of the case, such as whether or not one of the lawyers has properly described a party.

It is respectfully submitted that the Vice-Chancellor's finding of fact should not be disturbed and that on the questions of law, the appellants have not produced legal reasons for reversing the decision.

Respectfully submitted,

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