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BILL OF COMPLAINT.

(Filed November 12, 1924.)

IN CHANCERY OF NEW JERSEY.

*To his Honor, Edwin Robert Walker, Chancellor of  
the State of New Jersey:*

Complainant, Elizabeth Howells, of the Borough  
of Woodlawn, Beaver County, Pennsylvania, re-  
spectfully shows: 10

1. That she is the sister of Robert Daley, of Mar-  
gate City, Atlantic County, New Jersey.

2. That Robert Daley on or about the 8th day  
of June, 1921, inter-married with one Ellen Mont-  
gomery Barstow, widow of Charles Barstow, of At-  
lantic City, New Jersey. 20

3. That the said Robert Daley and his said wife,  
Ellen Montgomery Daley, lived together continu-  
ously from the date of their marriage until the 4th  
day of September, 1924, when the said Ellen Mont-  
gomery Daley departed this life.

4. That the said Ellen Montgomery Daley was  
seized of two parcels of land, situate in Ventnor  
City, New Jersey, known and designated as Nos. 104 30  
and 106 South Portland Avenue, each of said par-  
cels being fifty (50) feet in front by sixty-two and  
one-half (62½) feet in depth, on which was erected  
two cottages.

5. That after the marriage of the said Robert

Daley and Ellen Montgomery Daley, the said Robert Daley, at the request of the said Ellen Montgomery Daley, furnished the moneys with which to make repairs and improvements to said properties, and personally supervised the making of said repairs, as well as the transaction of all other business pertaining to them, at the request of the said Ellen Montgomery Daley.

- 10 6. That the said Robert Daley was possessed of personal property, as well as an interest in real estate, situate and known as No. 225 North Jackson Avenue, Margate City, New Jersey, and that on the 28th day of December, 1922, the said Robert Daley and the said Ellen Montgomery Daley entered into an agreement, wherein the said Robert Daley expressly agreed to execute a will, devising all his property, real and personal, to the said Ellen Montgomery Daley, and the said Ellen Montgomery Daley expressly agreed that in consideration of the said Robert Daley executing a will to her of all his property, and looking after her properties for her, and furnishing such moneys as were necessary in making repairs to her properties, as well as furnishing the moneys theretofore expended by him in making repairs to her said properties, she, the said Ellen Montgomery Daley, would execute a will, devising all her estate to the said Robert Daley.
- 20
- 30 7. That pursuant to said agreement, the said Robert Daley and Ellen Montgomery Daley went to the office of William T. Leek, in Atlantic City, N. J., on the said 28th day of December, 1922, and engaged the said William T. Leek to draw for each of them a will devising all the estate from each to the other, and after the drawing of said will, the said Robert

Daley, in furtherance of said agreement, and in the presence of William T. Leek and Andrew P. Johnson, did declare said paper writing, so drawn by the said William T. Leek, to be his last will and testament, and did request the said William T. Leek and Andrew P. Johnson, who were then both present, to witness the execution thereof by him as his last will and testament.

8. That said will was executed and the attestation clause thereto affixed, and witnessed by the said William T. Leek and Andrew P. Johnson, in the presence of the said Robert Daley, and in the presence of each other, all being present at the same time, and immediately thereafter, the will of the said Ellen Montgomery Daley, having been written by the said William T. Leek, the said Ellen Montgomery Daley did declare the same in her last will and testament, in the presence of William T. Leek and Andrew P. Johnson, and requested them to witness the same as such, whereupon the said will was executed by the said Ellen Montgomery Daley, the attestation clause thereto affixed, and witnessed by the said William T. Leek, and Andrew P. Johnson, in the presence of the said Ellen Montgomery Daley, and in the presence of each other, all being present at the same time.

9. That said wills were handed to the said Ellen Montgomery Daley for safe keeping.

10. That about the latter part of July, 1924, the house of the said Robert Daley and Ellen Montgomery Daley was burglarized, and a valuable diamond ring and papers of the said Robert Daley and Ellen Montgomery Daley disappeared, among others being the wills of the said Robert Daley and Ellen Montgomery Daley hereinabove mentioned.

11. That thereafter, to wit, on or about the 15th day of August, 1924, the said Ellen Montgomery Daley was taken ill and departed this life on the fourth day of September, 1924, as above stated.

10 12. That diligent search was made by the said Robert Daley for the will of the said Ellen Montgomery Daley, and also the will of the said Robert Daley, but that the said Robert Daley has been utterly unable to locate or find such wills, or either of them, and charges that the said wills have been lost or stolen at the time said dwelling house was burglarized.

20 13. That after the death of the said Ellen Montgomery Daley, the said Robert Daley did give, sell, assign, transfer and set over to complainant all his interest and estate in the real estate and personal property, of which the said Ellen Montgomery Daley died seized, and to which the said Robert Daley was entitled by virtue of the will so executed by the said Ellen Montgomery Daley, in favor of the said Robert Daley, executed and witnessed in the presence of the said William T. Leek and Andrew P. Johnson, a copy of which assignment is hereto annexed and made a part hereof.

30 14. That the said will of the said Ellen Montgomery Daley was never revoked, and that the said Robert Daley, upon her death, became the owner as legatee and devisee of all the real and personal property of which she died seized.

15. That after the decease of the said Ellen Montgomery Daley, one Ghertine Ripperger Martin, of Morrisville, Pa., and one Madaline Ripperger Fra-

ser, of Chicago, Ill., made claim that they were daughters of the said Ellen Montgomery Daley, and claimed that they were entitled to the real and personal property of which the said Ellen Montgomery Daley died seized, there having been no children born of the marriage of Robert Daley and the said Ellen Montgomery Barstow.

16. That the said Ghertine Ripperger Martin thereupon applied to the Surrogate of Atlantic County, New Jersey, to be appointed administratrix of the estate of the said Ellen Montgomery Daley. 10

Complainant shows that she is without remedy, except in this Honorable Court, and prays:

1. That a writ of subpoena issue out of this Honorable Court, directed to the said Ghertine Ripperger Martin and Madaline Ripperger Fraser, who are defendants in this suit, directing them and each of them without oath to answer each and every allegation herein contained. 20

2. That it be decreed that said will of the said Ellen Montgomery Daley was executed and witnessed pursuant to the laws of this State, and that the will of the said Ellen Montgomery Daley be established by the decree of this Honorable Court, devising all the lands and real estate, of which she died seized, and all of the personal property, of which she died possessed to the said Robert Daley. 30

3. That complainant be decreed to be the owner in fee of the lands of which the said Ellen Montgomery Daley died seized, and of the personal property of which she died possessed, charged with the

payment of the debts due by and from the said Ellen Montgomery Daley, upon her decease.

4. That an injunction issue restraining the said Ghertine Ripperger Martin and Madaline Ripperger Fraser, their servants and agents, from setting up any claim of ownership to the said real and personal property, of which the said Ellen Montgomery Daley, died seized.

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5. That complainant has such further and other relief in the premises as shall be equitable.

JOHN C. REED,  
*Solicitor for and of Counsel  
with Complainant.*

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AMENDED BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

(Filed July 7, 1925.)

Between

ELIZABETH HOWELLS,  
*Complainant,*  
 and  
 GHERTINE RIPPERGER  
 MARTIN and MADALINE  
 RIPPERGER FRASER,  
*Defendants.*

On Bill to Establish  
 a Will.  
 Amended Bill of  
 Complaint.

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20

*To his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:*

Complainant, Elizabeth Howells, of the Borough of Woodlawn, Beaver County, Pennsylvania, respectfully shows:

1. That she is the sister of Robert Daley of Margate City, Atlantic County, New Jersey.

30

2. That Robert Daley on or about the 8th day of June, 1921, inter-married with one Ellen Montgomery Barstow, widow of Charles Barstow, of Atlantic City, New Jersey.

3. That the said Robert Daley and his said wife,

Ellen Montgomery Daley, lived together continuously from the date of their marriage until the 4th day of September, 1924, when the said Ellen Montgomery Daley departed this life.

10 4. That the said Ellen Montgomery Daley was seized of two parcels of land situate in Ventnor City, New Jersey, known and designated as Nos. 104 and 106 South Portland Avenue, each of said parcels being fifty (50) feet in front by sixty-two and one-half ( $62\frac{1}{2}$ ) feet in depth, on which was erected two cottages.

20 5. That after the marriage of the said Robert Daley and Ellen Montgomery Daley, the said Robert Daley, at the request of the said Ellen Montgomery Daley, furnished the moneys with which to make repairs and improvements to said properties, and personally supervised the making of said repairs, as well as the transaction of all other business pertaining to them, at the request of the said Ellen Montgomery Daley.

30 6. That the said Robert Daley was possessed of personal property, as well as an interest in real estate, situated and known as No. 225 North Jackson Avenue, Margate City, New Jersey, and that prior thereto he was possessed of an interest in real property on 132 South St. James Place, Atlantic City. That prior to the 28th day of December, 1922, the said Robert Daley sold his interest in the property on St. James Place, Atlantic City, and deposited the proceeds thereof with the said Ellen Montgomery Daley in a joint account in the Boardwalk National Bank and that in consideration thereof and in further consideration of the use of the

joint moneys in and about the maintenance of the properties hereinafter mentioned belonging to the said Ellen Montgomery Daley and in consideration of the further expenditure of other moneys of the said Robert Daley in and about the maintenance of the said properties and of his time in the management thereof and the renting thereof, and upon further consideration that the said Robert Daley do make and execute a will of all his property to the said Ellen Montgomery Daley, the said Ellen Montgomery Daley did enter into an agreement with the said Robert Daley wherein for and in consideration of the things hereinbefore mentioned the said Ellen Montgomery Daley agreed to execute a will devising all of her property, both real and personal, to the said Robert Daley.

7. That pursuant to said agreement, the said Robert Daley on or about the 28th day of December, 1922, made his will devising all of his estate, both real and personal, to the said Ellen Montgomery Daley and in performance of said agreement and in compliance therewith the said Ellen Montgomery Daley did on the same date and at the same time make her will devising all of her property, both real and personal, to the said Robert Daley. That both wills were made and duly executed in the presence of Robert Daley and of Ellen Montgomery Daley and of Andrew P. Johnson and of William T. Leek.

8-A. That in reliance upon the premises and considerations hereinbefore recited, said Robert Daley continued to expend moneys upon the properties of the said Ellen Montgomery Daley and to devote his time to the management thereof, until the time of the death of the said Ellen Montgomery Daley on September 4, 1924, as hereinafter recited.

8-B. That by the execution of the agreement to make mutual wills between Ellen Montgomery Daley and Robert Daley the mutual wills of Ellen Montgomery Daley and Robert Daley became irrevocable, except upon notice each to the other, and said Robert Daley, alleges that he was never given notice by the said Ellen Montgomery Daley that she intended to revoke her said mutual will, and that by  
10 reason of the death of the said Ellen Montgomery Daley, her said mutual will became irrevocable.

9. That the said wills were handed to the said Ellen Montgomery Daley for safe keeping.

10. That about the latter part of July, 1924, the house of the said Robert Daley and Ellen Montgomery Daley was burglarized, and a valuable diamond ring and papers of the said Robert Daley and  
20 Ellen Montgomery Daley disappeared, among others being the wills of the said Robert Daley and Ellen Montgomery Daley hereinabove mentioned.

11. That thereafter, to wit, on or about the 15th day of August, 1924, the said Ellen Montgomery Daley was taken ill and departed this life on the fourth day of September, 1924, as above stated.

12. That diligent search was made by the said  
30 Robert Daley for the will of the said Ellen Montgomery Daley, and also the will of the said Robert Daley, but that the said Robert Daley has been utterly unable to locate or find such wills, or either of them and charges that the said wills have been lost or stolen at the time said dwelling house was burglarized.

13. That after the death of the said Ellen Montgomery Daley, the said Robert Daley did give, sell, assign, transfer and set over to complainant all his interest and estate in the real estate and personal property, of which the said Ellen Montgomery Daley died seized, and to which the said Robert Daley was entitled by virtue of the will so executed by the said Ellen Montgomery Daley in favor of the said Robert Daley, executed and witnessed in the presence of the said William T. Leek and Andrew P. Johnson, a copy of which assignment is hereto annexed and made a part hereof. 10

14. That the said will of the said Ellen Montgomery Daley was never revoked, and that the said Robert Daley, upon her death, became the owner as legatee and devisee of all the real and personal property of which she died seized.

15. That after the decease of the said Ellen Montgomery Daley, one Ghertine Ripperger Martin, of Morrisville, Pa., and one Madaline Ripperger Fraser, of Chicago, Ill., made claim that they were daughters of the said Ellen Montgomery Daley and claimed that they were entitled to the real and personal property of which the said Ellen Montgomery Daley died seized, there having been no children born of the marriage of Robert Daley and the said Ellen Montgomery Barstow. 20

16. That the said Ghertine Ripperger Martin thereupon applied to the Surrogate of Atlantic County, New Jersey, to be appointed administratrix of the estate of the said Ellen Montgomery Daley. 30

Complainant shows that she is without remedy, except in this Honorable Court, and prays:

1. That a writ of subpoena issue out of this Honorable Court, directed to the said Ghertine Ripperger Martin and Madaline Ripperger Fraser, who are defendants in this suit, directing them and each of them without oath to answer each and every allegation herein contained.

2. That it be decreed that said will of the said Ellen Montgomery Daley was executed and witnessed  
10 pursuant to the laws of this State, and that the will of the said Ellen Montgomery Daley be established by the decree of this Honorable Court, devising all the lands and real estate, of which she died seized, and all of the personal property, of which she died possessed, to the said Robert Daley.

2-A. That the promise and agreement to make a will by the said Ellen Montgomery Daley in favor of the said Robert Daley be decreed to be a contract,  
20 and irrevocable; and that the same be enforced and the rights of the said Robert Daley thereunder or in any manner in the estate of the said Ellen Montgomery Daley be enforced against the said defendants and each of them and that the defendants be decreed to make a good conveyance in law of all of the real estate of which the said Ellen Montgomery Daley died seized and of all of the personal property that has or may come into their hands or either  
30 of them and that they account for all profits, income or property that may have or shall come into their hands.

2-B. That the agreement so made and entered into by and between Robert Daley and Ellen Montgomery Daley to make, execute and acknowledge mutual or reciprocal wills may be specifically per-

formed, said Robert Daley having performed said agreement in full on his part.

3. That complainant be decreed to be the owner in fee of the lands of which the said Ellen Montgomery Daley died seized, and of the personal property of which she died possessed, charged with the payment of the debts due by and from the said Ellen Montgomery Daley upon her decease.

4. That an injunction issue restraining the said Ghertine Ripperger Martin and Madaline Ripperger Fraser, their servants and agents, from setting up any claim of ownership to the said real and personal property, of which the said Ellen Montgomery Daley died seized. 10

5. That complainant have such further and other relief in the premises as shall be equitable.

JOHN C. REED,  
*Solicitor for Complainant,* 20  
*Elizabeth Howells.*

## ANSWER.

IN CHANCERY OF NEW JERSEY.

(Filed December 10, 1924.)

10

Between

ELIZABETH HOWELLS,  
*Complainant,*

and

GHERTINE RIPPERGER  
MARTIN and MADALINE  
RIPPERGER FRASER.*Defendants.*

Answer.

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Defendant Ghertine Ripperger Martin, of the City of Morrisville, State of Pennsylvania, and defendant, Madaline Ripperger Fraser, of the City of Chicago, and State of Illinois, answering the complaint of complainant, say:

1. That they have no knowledge or information as to the contents of paragraph 1, and pray proof.

30

2. They admit paragraph 2.

3. They deny paragraph 3.

4. They admit paragraph 4.

5. They deny paragraph 5.

6. They deny paragraph 6.

7. They have no information as to the contents of paragraph 7, and pray proof, except that they specifically state that they do not believe it.

8. They have no information as to the contents of paragraph 8, and pray proof, except that they specifically state that they do not believe it.

9. They have no information as to the contents of paragraph 9, and pray proof, except that they specifically state that they do not believe it.

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10. They deny paragraph 10.

11. They admit paragraph 11.

12. They deny paragraph 12.

13. They have no knowledge or information as to the contents of paragraph 13, and pray proof.

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14. They deny paragraph 14.

15. They admit paragraph 15.

16. They admit paragraph 16.

WILLIAM CHARLTON,  
*Solicitor for Defendants.*

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ANSWER TO AMENDED BILL OF  
COMPLAINT.

IN CHANCERY OF NEW JERSEY.

(Filed October 24, 1925.)

10

Between

ELIZABETH HOWELLS,  
*Complainant,*

and

GHERTINE RIPPERGER  
MARTIN and MADALINE  
RIPPERGER FRASER,  
*Defendants.*

On Bill, etc.  
Answer to Amended  
Bill of Complaint.

20

The answer of Ghertine Ripperger Martin, of the City of Trenton, County of Mercer and State of New Jersey, and Madaline Ripperger Fraser, of the City of Chicago, County of Cook and State of Illinois, and Ghertine Ripperger Martin, administratrix of the estate of Ellen Daley, deceased, defendants, respectfully shows:

30

1. Defendants have no knowledge as to the truth of paragraph 1 and pray proof.

2. They admit paragraph 2.

3. They have no knowledge as to the truth of paragraph 3 and pray proof.

4. They admit paragraph 4.
5. They deny paragraph 5.
6. They deny paragraph 6.
7. They deny paragraph 7.
8. They deny paragraph 8-A.
9. They deny paragraph 8-B. 10
10. They deny paragraph 9.
11. They deny paragraph 10.
12. They admit paragraph 11.
13. They admit paragraph 12, except that deny the existence of the wills and that they have been lost or stolen at any time. 20
14. They deny paragraph 13, and say that no copy of said assignment is attached to the bill of complaint.
15. They deny paragraph 14.
16. They admit paragraph 15.
17. They admit paragraph 16. 30

**FIRST DEFENSE.**

The amended bill of complaint prays for relief inconsistent with the prayer of the original bill.

SECOND DEFENSE.

10      The assignment by Robert Daley to the complainant was without consideration and in fraud with intent to evade the law of New Jersey with respect to testimony offered in matters involving the administrators of deceased persons. (Evidence Act, Compiled Statutes N. J., page 2218, par. 4.)

THIRD DEFENSE.

This action is to establish a contract between husband and wife and as such is unenforceable under the laws of this State.

WILLIAM CHARLTON,  
*Solicitor for Defendants.*

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ORDER.

IN CHANCERY OF NEW JERSEY.

(Filed December 30, 1924.)

Between

ELIZABETH HOWELLS,  
*Complainant,*

and

GHERTINE RIPPERGER  
MARTIN and MADALINE  
RIPPERGER FRASER,  
*Defendants.*

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Order.

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Upon reading and filing the duly verified petition of Madaline Ripperger Martin, administratrix of the estate of Ellen Daley, deceased, and upon motion of William Charlton, Esq., her solicitor,

It is, on this 30th day of December, A. D., nineteen hundred and twenty-four, ordered, first, that Madaline Ripperger Martin, administratrix of the estate of Ellen Daley, deceased, be joined as a part defendant in this cause; second, that the title of this cause hereafter shall be "Between Elizabeth  
Howells, complainant and Ghertine Ripperger Martin, Madaline Ripperger Fraser, and Madaline Ripperger Martin, defendants; third, that the solicitor for the complainant, file an amended bill of complaint, and serve the same upon William Charlton,

30

Esq., solicitor for Madaline Ripperger Martin, administratrix, within ten days from the date of this order; fourth, that Madaline Ripperger Martin, administratrix of the estate of Ellen Daley, deceased, file her answer to said amended bill of complaint, within ten days after service of the same upon her, and fifth, that the present date for final hearing in this cause, continue to be fixed, as the date upon which the final hearing of said cause will be heard, regardless of the additional pleadings herein ordered.

E. R. WALKER,  
C.

Respectfully advised,  
R. H. INGERSOLL,  
V. C.

ORDER.

IN CHANCERY OF NEW JERSEY.

D-57-38.

(Filed July 7, 1925.)

Between

ELIZABETH HOWELLS,  
*Complainant,*

and

GHERTINE RIPPERGER  
MARTIN and MADALINE  
RIPPERGER FRASER,  
*Defendants.*

Order.  
On Bill, etc.,

10

20

This matter being opened to the Court by John C. Reed, Esquire, solicitor and Emerson L. Richards, Esquire, of counsel with the complainant, in the presence of William Charlton, Esquire, of counsel with the defendants and it appearing that due notice has been given of this application and upon good cause shown by affidavits and otherwise:

It is on this 7th day of July, A. D. 1925, on motion as aforesaid ordered, that the said complainant have leave to amend her bill of complaint in this cause and amend her bill in accordance with the prayer of the petition presented, as she shall be advised, and that she shall serve a copy of the amended bill upon the defendants or their solicitor within ten (10) days from the date of this order, and that the de-

30

fendants shall have twenty (20) days in which to file an answer to the amended bill; and

It is further ordered that the complaint have leave to present testimony in support of the amendments made to her bill of complaint.

E. R. WALKER,  
*Chancellor.*

Respectfully advised,  
R. H. INGERSOLL,  
V. C.

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TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between

ELIZABETH HOWELLS,  
Complainant,

and

GHERTINE RIPPERGER  
MARTIN, *et al.*,  
Defendants.)

On Bill, etc.,  
Final Hearing.

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Atlantic City, N. J., February 25, 1925. 20

TESTIMONY.

Before HON. R. H. INGERSOLL, Vice-Chancellor.

30

APPEARANCES:

For the complainant, JOHN C. REED, Esq., and  
MESSRS. BOURGEOIS & COULOMB.

For the defendants, WILLIAM CHARLTON, Esq.

ROBERT DALEY, sworn for the complainant.

Direct examination.

By Mr. Bourgeois:

- Q. Mr. Daley, you live where?  
A. 225 North Jackson Avenue, Margate.
- 10 Q. How long have you lived in Margate?  
A. Will be two years in May.  
Q. Where did you live prior to living in Margate?  
A. 106 South Portland Avenue, Ventnor.  
Q. How long did you live there?  
A. From September, 1922, until May.  
Q. Where did you live before that?  
A. 132 South St. James Place.  
Q. Atlantic City?  
A. Atlantic City.
- 20 Q. How long have you lived in Atlantic City or  
had you lived in Atlantic City?  
A. Since May, 1921.  
Q. Is that when you came to Atlantic City, May,  
1921?  
A. Yes.  
Q. Where was your home prior to that?  
A. Pittsburgh.
- Q. Mr. Daley, did you know Ellen Montgomery  
Barstow before her death?
- 30 A. Oh, yes.  
Q. Was she related to you?  
A. We were married.  
Q. When were you married?  
A. June eighth, 1922.  
Q. I show you what purports to be——

Mr. Charlton: Your bill shows 1921 and I think 1921 is the fact.

Mr. Bourgeois: 1922 is when they were married; if it says 1921, I will ask to amend to make it 1922.

The Court: Says 1921.

Mr. Bourgeois: I ask leave to have that amended and make it 1922. 10

The Court: If there is no objection, it will be amended.

Q. I show you what purports to be a marriage certificate between Robert Daley and Ellen Montgomery Barstow by H. Eugene Durell, rector of the Church of the Ascension, and ask you what is that?

A. That is my marriage certificate. 20

Mr. Bourgeois: I offer it in evidence; it gives the date June eighth, 1922.

(Certificate admitted and marked Exhibit C1.)

Q. After your marriage did you and your wife, Ellen Montgomery Daley, live together?

A. Yes, sir.

Q. Until what time?

A. Until her death September fourth, 1924. 30

Q. During that period of time were you much in one another's company?

A. Very much.

Q. Were you frequently separated from one another?

A. Never.

Q. For how long a period would you be apart from one another?

A. Well, I never was away over night, I don't think a period of six hours at any stretch during our married life.

Q. Now, at the time you married her were you possessed of some property, real or personal property?

A. I possessed the hotel.

10 Q. What hotel?

A. The Daley Hotel.

Q. Where was that?

A. 132 South St. James Place.

Q. Did you have any partner in that enterprise?

A. I had a partner.

Q. Who was it?

A. Ella Carroll.

Q. After your marriage to your wife did she become interested in the hotel property?

20 A. Yes.

Q. In what way?

A. Fifty-fifty basis.

Q. I know, but how did she get her interest?

A. She bought Mrs. Carroll's end of it out, her share.

Q. Then you and she owned it half and half?

A. Yes.

Q. What became of the hotel?

A. We sold it.

30 Q. What became of the moneys that were received from the hotel?

A. Were deposited jointly.

Q. In what bank?

A. In the Boardwalk National.

Q. Jointly you mean so either of you could draw it?

A. Yes, we both had to sign the checks .

Q. Did your wife have any other property other than the interest in the hotel?

A. She had properties on Portland Avenue.

Q. What were they?

A. Cottages.

Q. What numbers of them?

A. 104 and 106 South Portland.

Q. After you had sold the hotel where did you go to live?

A. We went down to 106 South Portland Avenue, 10  
Ventnor.

Q. Will you tell the Court whether or not there was any arrangement made between you and your then wife about the repairs and so on?

A. Well, I looked after the house and there was considerable repairs done and considerable work to be done around the house and I had men working there, I had my men working there and I assisted also with the work.

Q. Were there any moneys expended on them? 20

A. Yes, was quite considerable money.

Q. Any moneys of yours expended on them?

A. Plenty.

Q. What?

A. Yes.

Q. Now did you have some real estate at that time as well as personal property?

A. No, I didn't have any.

Q. Just the personalty?

A. Yes.

30

Mr. Charlton: What personal property?

Q. Did you have any other personal property than this money that was in the bank?

A. I brought some stuff down from the hotel; I brought some furniture and rugs and that for the houses, we fixed the houses up.

Q. Now about the real estate, did you have at that time an interest in some Margate property?

A. Later we bought property in Margate.

Q. How was the title to that property taken?

A. The Margate property?

Q. Yes.

A. It was jointly.

Q. Was there any personal property that went  
10 down to the cottages on Portland Avenue that belonged to you

A. Oh, yes.

Q. What was it like?

A. Well, I bought considerable stuff down there and then I bought rugs, but I just don't remember; I made a list of them down there, beds.

Q. I show you what purports to be a list and ask you if that is the list you made?

A. That is the list.

20

Mr. Charlton: Let me see that.

Mr. Bourgeois: I am going to let you see it.

Q. Can you recall what those articles of furniture were that went from the hotel down to 104 and 106 South Portland Avenue?

A. Not right off; I know I brought some rugs  
30 down, a couple of lamps, a screen and a bed, really a load, I don't just remember right off because I didn't pay much attention to it.

Q. Where are those articles at the present time?

A. They are scattered between 104 and 106.

Q. But they are still down there, are they?

A. They are still there.

Q. Do you know them, when you go there and see them, can you tell which they were?

A. Oh, yes.

Q. Now, was there ever an agreement entered into between you and Mrs. Daley with reference to the making of a will or wills?

A. Yes.

Q. What was that agreement?

A. Well, she decided that we better make a will out.

Q. I don't mean that part now, I mean with regard to the property here and the money that you were going to spend on the property and so on? 10

A. Well, only thing is a will, she made the will; I didn't keep account of everything; she didn't keep account; she practically kept the books, but we agreed to give everything to one another; we made a will out to that effect.

Q. Where did you go to make the will out to that effect?

A. To Mr. Leek, William T. Leek.

Q. When was it you went there? 20

A. Had the will signed for December twenty-eighth.

Q. What year?

A. 1922.

Q. Did Mr. Leek actually make them out?

A. He made the wills out for us.

Q. You say that your wife died on the fourth of September, 1924?

A. 1924.

Q. After her death did you make a search for the wills or for her will? 30

A. After she died, yes.

Q. What sort of a search did you make?

A. Well, I searched the whole house, up and down, all through the house, and I couldn't locate them and I thought probably that she had put them in a safe deposit vault.

Q. Let me ask you, after they were signed, what became of them?

A. I gave them to Mrs. Daley for to keep, to take care of.

Q. Then you searched through the house and you searched through the safe deposit vault?

A. Yes.

Q. Did you find them?

A. I did not find them.

10 Q. Did you make more than one search through the house?

A. I searched for a month or more.

Q. Anybody else besides you make the search?

A. My sister and I.

Q. Were you ever able to find them?

A. Never was able to locate them.

Q. Did there come at a time when your home was burglarized?

A. Yes.

20 Q. When was that?

A. I don't just know the exact date, I think it was the latter part of July, I am not just positive about the date.

The Court: What year?

A. 1924.

Q. How long was that before your wife was taken ill?

30 A. Well, my wife was practically taken real ill about August fifteenth but she had been ailing for from about the first of August she wasn't herself.

Q. Now was this theft, this theft took place before your wife was taken sick or after she was taken sick?

A. Just as she was taken sick, just about the time she was taken sick because she went to bed.

Q. What, if anything, was taken, that you know of was taken?

A. The only real thing that we missed at the time was Mrs. Daley's ring; she had a three-stone ring and she missed that more than anything else. Of course, we didn't look for papers or anything else. There was a great deal of her silk underwear was taken and her hat was taken, her paradise hat was taken; we didn't miss that, I didn't miss that until after she was dead because she never used it and I didn't know anything about it, but I know she had that.

Q. Where was this ring, if you know? Where had she kept that? 10

A. She kept that, as far as I know, she used to keep it in her dresser drawer.

Q. Where were the papers kept?

A. Were kept in a box.

Q. After her death did you make a search through the box?

A. Yes.

Q. What did you find in there? What didn't you find, rather? 20

A. I didn't find anything in the box.

Q. Was anything lost, anything gone that you know of besides the ring, and, assuming these wills had been taken, then was there anything else besides that gone?

A. Yes, my insurance for my car was taken and there was several other papers that I never paid much attention to was in there belonged to her.

Q. Was your insurance alive?

A. They were alive, alive until February, this month. 30

Q. You say that you never was able to find any of them?

A. No.

Q. Did you make any complaint about the fact that you house had been entered?

A. Yes, I called up the prosecutor and he sent down two gentlemen, two detectives, and we stated our case to them and they were unable to locate—at that time we hadn't missed, I hadn't missed the papers, but the ring, I just mentioned to Mr. Lodovico and Mr. May about the ring, that was the only thing we were interested in because we never thought of anybody taking the papers.

Q. Now, Mr. Daley, you say you went to Mr. Leek's office and he drew two wills, one for you was  
10 that and one for your wife?

A. One for my wife and I.

Q. Who was present at the time those wills were executed—were they executed?

A. Yes, they were executed.

Q. Who was present at the time they were executed?

A. Mr. Johnson.

Q. Who else?

A. That is all, Mrs. Daley, Mr. Leek and I.

20 Q. Who were the witnesses to those two wills?

A. Mr. Leek and Mr. Johnson.

Q. Do you know how it came about that Mr. Johnson was a witness?

A. Well, I went after Mr. Johnson. Mr. Johnson is located around the corner and I had bought my radio from Mr. Johnson and he was the only one in the vicinity I knew very well and I asked him to come around and witness our wills, and he agreed to come around and do it.

30 Q. That was Andrew P. Johnson?

A. Andrew P. Johnson, yes.

Q. After you and he came back, what was done with regard to the wills?

A. Well, we came back and Mrs. Daley asked

Mr. Johnson if he would witness the will and I asked him around in the store, in his store, and he came around and witnessed the wills, and Mr. Leek read the wills, and Mrs. Daley signed the wills and I signed them and then Mr. Leek and Mr. Johnson signed them.

Q. When Mrs. Daley signed her will where was Mr. Johnson and Mr. Leek?

A. They were right there in the same room.

Q. And when they witnessed the wills where was she, Mrs. Daley? 10

A. We were all right together.

Q. Now, had you been talking about the making of these wills prior to the day when they were made?

A. We have spoke about it several times and Mrs. Daley, it was through her suggestion that the wills were made, we decided to go up and make the wills.

Q. Do you remember what the contents of the wills were, especially her will, both of them, as a matter of fact? 20

A. They were both practically the same.

Q. What was it?

Mr. Charlton: If the Court please, might I ask if there is a draft of these wills in existence?

Mr. Bourgeois: We have no draft of them at all.

A. It was sort of a form that I imagine that Mr. Leek has, that I wanted all my bills paid, my funeral expenses, all the bills was necessary, and then I willed everything to her, real and personal property, and she done likewise. 30

Q. She did likewise?

A. She done the same, very same.

Q. What was it her will said, do you remember?

A. It stated the same, after funeral expenses had been paid and all just bills that she willed to me the personal and real estate that she possessed.

Q. Was there any executor appointed?

A. She was appointed executrix of my will and I was appointed executor of her will.

Q. You say after the wills had been executed and witnessed then you turned them over both to her?

A. Both to Mrs. Daley.

10 Q. Where did you go after that, when you came out of there, do you recall?

A. We went right home.

Q. Was your will signed also, that is, did you sign it in the presence of these two witnesses?

A. I did.

Q. Were they both present?

A. They were both present.

Q. Were you present when they both signed it?

A. We were all together when the four of us  
20 signed it.

Q. When the whole thing was done you were all right there?

A. Right in the same room.

Cross-examination.

By Mr. Charlton:

Q. What was your business in Pittsburgh before  
30 you came here?

A. I was a salesman.

Q. For what?

A. Automobiles.

Q. What make?

A. Well, I was with the Mack Truck.

Q. How long since you had worked before you came here?

A. I always worked.

Q. What brought you to Atlantic City?

A. Well, I came here with the Dempsey Camp, to go with Dempsey.

Q. Came here with a lady named Mrs. Carroll, didn't you, or following her?

A. No, I didn't know Mrs. Carroll.

Q. When did you meet Mrs. Carroll?

A. I met Mrs. Carroll during my visit here.

Q. When was that?

10

A. I think it was in April or in May, it was during May.

Q. Didn't you know her before you came here?

A. Never saw her before.

Q. Now did you have any money or property when you came here?

A. Yes.

Q. What did you have?

A. Oh, I had a few thousand dollars.

Q. A few thousand dollars?

20

A. Yes.

Q. Where did you keep it?

A. In the bank.

Q. What bank?

A. Bank of Pittsburgh.

Q. What bank?

A. Bank of Pittsburgh.

Q. What is the name of the bank?

A. The Bank of Pittsburgh.

Q. The Bank of Pittsburgh?

30

A. Yes.

Q. You had an account there in May, 1921?

A. 1921.

Q. Several thousand dollars, did I understand you to say?

A. Yes, sir.

Q. Who bought the St. James Place property, you or Mrs Carroll?

A. I did.

Q. How much did you put up?

A. Half.

Q. How much was half?

A. Well, we bought it on a payment basis, we paid

---

Q. How much did you put up?

10 A. I think we put up twenty-five hundred dollars to start with.

Q. How much did you put up?

A. Half.

Q. In cash?

A. Cash.

Q. Sure Mrs. Carroll didn't give it to you?

A. No.

Q. Now Mrs. Daley bought Mrs. Carroll's share for ten thousand dollars, didn't she?

20 A. Yes.

Q. And the property was sold for nineteen thousand dollars, wasn't it?

A. No.

Q. Wasn't it? How much was it sold for?

A. Forty-seven thousand.

Q. How much did you get out of the settlement when the property was sold?

A. I got half.

Q. How much was half?

30 A. Half of the ten thousand.

Q. Half of the ten thousand?

A. Yes.

Q. Well, what became of the other ten thousand that represented you share?

A. I don't understand you.

Q. Mrs. Daley bought Mrs. Carroll's half, didn't she, for ten thousand?

A. Yes.

Q. Then when you sold the property, what became of your supposed share?

A. Well, Mrs. Carroll wouldn't sell her share for five thousand, she only had five thousand dollars interest in it and Mrs. Daley lost five thousand dollars on the transaction.

Q. Mrs. Carroll had five thousand in the hotel?

A. That is all.

Q. How much did you have in it? 10

A. Five thousand.

Q. When did you put the rest in?

A. We put it in in payments during the summer.

Q. Your own money?

A. Own money and what we made out of the hotel.

Q. How much cash did you get when you sold it?

A. Well, we made ten thousand dollars on it.

Q. Made ten?

A. Ten.

Q. And you had ten in it? 20

A. Yes.

Q. Then you only got half of one ten, how do you explain that?

A. Well, we paid thirty-seven thousand dollars for it and sold it for forty-seven thousand dollars; we made ten thousand dollars on the transaction; Mrs. Daley paid ten thousand dollars to Mrs. Carroll and lost five thousand on the transaction, she wanted to get in the hotel business.

Q. Who wanted her to get in it? 30

A. Mrs. Daley wanted to get in it.

Q. At your solicitation?

A. No, not my solicitation.

Q. She wanted to go in on her own accord?

A. On her own accord.

Q. I suppose you opposed it?

- A. No, I didn't oppose it.
- Q. Wasn't Mrs. Carroll about to have you arrested?
- A. Not that I know of.
- Q. At the time Mrs. Daley bought her out?
- A. No, sir; not that I know of.
- Q. Have you ever been convicted of a crime?
- A. No.
- Q. Sure of that?
- A. Positive.
- 10 Q. Where did you deposit the money you got from this settlement?
- A. We made a joint account at the Boardwalk National.
- Q. Joint account?
- A. Joint account.
- Q. Have you any bank book here?
- A. I have my checks there; there is the checks that was made out; I didn't bring the bank book with me.
- 20 Q. Joint account?
- A. Joint account.
- Q. And the money was put in the joint account?
- A. The money was put in that came from the hotel.
- Q. Then you didn't get any money yourself?
- A. No, not personally, no.
- Q. Now, as a matter of fact, wasn't it all Mrs. Daley's money?
- A. No, it wasn't Mrs. Daley's money.
- 30 Q. What became—did you close your bank account in Pittsburgh?
- A. Yes.
- Q. When did you close it?
- A. Well, when I left Pittsburgh.
- Q. In May, 1921?

A. Well, I might have closed it before, a little before.

Q. Close it before?

A. A little before, I don't know, a month or so before.

Q. When you came to Atlantic City then you didn't have any bank account, is that right?

A. I don't know whether I had closed the bank account at the Pittsburgh National or the Bank of Pittsburgh; I think I still have a deposit there; I am 10 not positive of that.

Q. You are not positive?

A. I think I have a little money in bank; I don't think I really closed the account up.

Q. When did you draw the bulk of your several thousand dollars?

A. I always carried money with me.

Q. On your person?

A. Person.

Q. Then you didn't have it in bank, you had it on 20 your person?

A. I always carried money on my person and I made money here.

Q. How much did you have in bank when you came to Atlantic City?

A. I don't just remember.

Q. Did you have a couple of thousand dollars?

A. I don't just remember.

Q. Before you remembered, didn't you, that you had it in bank; were you sure about it? 30

A. Yes.

Q. Now you might have had it with you, carried it around?

A. Yes.

Q. Did you open a bank account in Atlantic City when you came here?

- A. Not until after I bought the hotel.
- Q. Where did you open that account?
- A. Boardwalk National.
- Q. Whose name was that in?
- A. In my name.
- Q. In your name alone?
- A. In my name alone.
- Q. Mrs. Carroll have any account?
- A. I don't know anything about Mrs. Carroll's
- 10 affairs; I think she had an account.
- Q. Wasn't she a partner in the hotel?
- A. Yes.
- Q. Where did you bank the hotel money?
- A. We didn't have a whole lot to bank; we paid our bills.
- Q. Didn't you bank them?
- A. Yes, we banked.
- Q. Where?
- A. I banked them over in my account.
- 20 Q. Then the account you call yours was really the hotel account, wasn't it?
- A. No, it wasn't the hotel account.
- Q. You had a few thousand dollars, after you put up your twenty-five hundred to buy your half interest you opened an account with the balance of the money, is that it?
- A. Yes, with the money I had.
- Q. That was the money you had carried around in your clothes?
- A. Yes.
- 30 Q. But after you bought the hotel you put it in bank?
- A. Yes.
- Q. When did you buy the hotel?
- A. I think I bought it June twenty-third, 1921.
- Q. Then you were carrying around this money from May until June?

A. Yes.

Q. Although you had a bank account in Pittsburgh?

A. I always kept a bank account.

Q. Regardless what was in it?

A. Yes.

Q. When did you close your bank account at the Boardwalk National, you and Mrs. Daley?

A. Well, we didn't close our bank account at the Boardwalk National until— 10

Mr. Bourgeois: There isn't anything of this cross-examination, just allowed it to go on.

Mr. Charlton: May it please the Court, this is the assignor, it seems to me he is the principal party.

The Court: So far as the testimony goes yet he is the entire party.

20

Q. When did you close your account at the Boardwalk National, you and Mrs. Daley?

A. I don't know; it was in the early part of 1924 or the latter part of 1923.

Q. Mrs. Daley always had an account of her own, didn't she?

A. She kept a personal account.

Q. Was there any money left in the Boardwalk account when you closed it?

A. Very little.

30

Q. Then where was your money?

A. Why we had invested it in properties.

Q. What property did you invest it in?

A. Well, we bought the Avolyn property, 110 South Avolyn.

Q. You and Mrs. Daley or just Mrs. Daley?

- A. Just Mrs. Daley and I.  
Q. Mrs. Daley and you?  
A. Yes.  
Q. What money bought that?  
A. Our money, our joint account.  
Q. Where did it come from?  
A. The bank.  
Q. Boardwalk National?  
A. Boardwalk National.
- 10 Q. I thought you said that was reduced to practically nothing?  
A. You asked me when I closed it.  
Q. You sold the property, didn't you?  
A. Yes.  
Q. At a little profit?  
A. A nice little profit.  
Q. Proceeds put in the Boardwalk Bank?  
A. In the Boardwalk Bank.  
Q. Now that increased your account, didn't it?
- 20 A. Increased our account until we bought the other property, Jackson Avenue.  
Q. What property did you buy?  
A. We bought the other property on Jackson Avenue, Margate.  
Q. And you bought that in your joint name too, didn't you?  
A. Joint name.  
Q. After you bought that property did you and Mrs. Daley divide the balance in the Boardwalk
- 30 Bank?  
A. Well, we never done any dividing at all, or we never figured that way.  
Q. How did you get your money out?  
A. What money you speaking of?  
Q. Out of the Boardwalk Bank, your share?  
A. Well, my share is in my properties.

- Q. In your properties?  
A. Yes.  
Q. Now you also own a boat, don't you?  
A. Beg pardon?  
Q. You own a boat also, don't you?  
A. We don't own the Avolyn property.  
Q. A boat?  
A. No, I don't own a boat.  
Q. Who owns the boat?  
A. I have no boat. 10  
Q. Who bought the boat?  
A. I did.  
Q. You did and you paid for it with your money?  
A. Yes, we paid for it.  
Q. We paid for it?  
A. Yes.  
Q. Now you bought the boat, what do you mean  
when you say "we paid for it?"  
A. Well, we bought it together.  
Q. Who put up the money for it? 20  
A. We did.  
Q. Out of what bank did it come?  
A. Out of the Boardwalk National.  
Q. Who kept the boat up?  
A. Well, I guess I kept it up.  
Q. Out of your bank account?  
A. Well, it didn't require a great deal to main-  
tain a boat.  
Q. What work have you done since you married  
Mrs Daley?  
A. In the real estate business. 30  
Q. With whom?  
A. With myself.  
Q. Where is your office?  
A. 225 North Jackson Avenue.  
Q. At your home?

A. Yes.

Q. That has been your only occupation?

A. That is all, and my boats; I had my boats last summer.

Q. Your boats?

A. I had my boats last summer, yes.

Q. You bought them?

A. Sure I bought them, we bought them together, jointly.

10 Q. You bought them jointly?

A. Yes.

Q. Who put up the money for them?

A. We both put it up.

Q. Where did it come from, what bank account?

A. I don't just remember whether it came from the Boardwalk Bank or whether it came from my bank, whether it came from my bank account now or whether I paid cash for them.

20 Q. When you say your bank, what bank do you mean?

A. I had an account over here on the corner.

Q. Atlantic Safe Deposit?

A. Safe Deposit.

Q. When did you close that out?

A. Well, I closed that up in the spring, I guess.

Q. Spring of 1924?

A. Yes.

Q. About when did you open it?

A. I just don't remember the dates.

30 Q. How long?

A. I always kept an account at the Atlantic Safe Deposit from the time I came to Atlantic City.

Q. You own an automobile, don't you?

A. Yes.

Q. Who bought that?

A. Mrs. Daley gave me the automobile.

Q. She bought that?

A. She bought that.

Q. Do you know how she paid for it?

A. I don't know; she had that before I married her.

Q. She did?

A. Yes.

Q. Now, did you contribute to the upkeep of the Portland Avenue properties, did I understand you to say?

10

A. I did.

Q. From what funds?

A. From my joint account.

Q. From your joint account?

A. Yes.

Q. Have you the cancelled checks from that joint account here?

A. Yes.

Q. All of them?

A. All of them.

20

Q. Have you the statement of the bank that goes with those checks, slip of paper like this?

A. I don't know whether I ever kept that; I have the checks.

Q. When did you get those?

A. Oh, I have had them since we closed that account, when we closed the account at the bank I got the checks.

Q. But in the meantime Mrs. Daley always had a bank account in Ventnor in her own name?

30

A. Always had a personal account.

Q. Where was settlement for the Margate property?

A. In Mr. Leek's office.

Q. Mr. Leek a personal friend of yours, was he?

A. I never saw the gentleman before.

Q. Never saw him before? Do you know Nellie Lockman, a colored lady, servant?

A. Yes, I think I do, Nellie; I don't know her last name.

Q. Ever talk to your wife about a will in her presence?

A. Not in my presence, no.

Q. Did you ever talk to your wife about a will in Nellie Lockman's presence?

A. No.

10 Q. Do you know Mrs. Wray?

A. Yes.

Q. Ever have a talk with her about a will?

A. Never.

Q. Never?

A. Not that I know of.

Q. Know Mr. Carroll here?

A. I know Mr. Carroll.

Q. Ever see him before?

A. Oh, yes.

20 Q. Were you ever robbed before?

A. Yes.

Q. How many times were you robbed?

A. Well, the time I employed Mr. Carroll, Mrs. Daley had misplaced her jewelry and we thought it had been taken.

Q. Misplaced it?

A. Misplaced it.

Q. You found it, didn't you?

A. No, I didn't find it.

30 Q. Didn't you tell Mrs. Daley you found it?

A. No, I didn't tell Mrs. Daley I found it; she found it herself.

Q. Did you report the robbery to the prosecutor's office?

A. I did.

- Q. And these gentlemen came down, didn't they?  
A. Yes.  
Q. And there was no difficulty for you to find the jewelry, was there?  
A. I didn't find it, Mr. Charlton.  
Q. You didn't tell them you found it?  
A. No.  
Q. Mrs. Daley found it?  
A. Mrs. Daley found it.  
Q. Hidden under an oil stove, something or other? 10  
A. Upstairs.  
Q. How many robberies did you have?  
A. That was about the only one; we had another robbery, a party stole Mrs. Daley's fur one time when we lived 106.  
Q. You were robbed three times?  
A. Two or three times.  
Q. Nothing was ever missing, was there?  
A. The fur was missing, and this last robbery the ring was gone and the papers. 20  
Q. Mrs. Daley have other jewelry?  
A. Very little.  
Q. What became of it?  
A. Well, there is some of it around.  
Q. What became of the good jewelry she had?  
A. She had no valuable jewelry only the ring, only valuable jewelry she had.  
Q. Didn't you either sell or pawn it for her?  
A. No, I ain't pawned nothing.  
Q. Didn't sell it for her? 30  
A. No.  
Q. Her own jewelry?  
A. No.  
Q. During the years you lived with her?

A. I never—

Q. During the years you lived with her, you didn't pawn her jewelry or sell it?

A. Never.

Q. You were working?

A. I was always working.

Q. Was any of the other jewelry stolen?

A. No.

Q. Just this one ring?

10 A. That is the only ring she missed; I didn't know what jewelry she had except some of the stuff I gave her.

Q. That wasn't in this box, was it?

A. No.

Q. Then the thief came in the house and took the ring and went to the box and took out the wills?

A. I don't know what he done.

Q. Was there any indication of robbery, anything broken open?

20 A. No, that was the funny part of it.

Q. Nothing broken open?

A. No.

Q. Evidently inside job?

A. Looked like there was something misplaced, they were gone, I don't know how they got in there, the doors were locked.

Q. There were no papers whatever in the box?

A. Was no papers.

Q. What insurance company were you insured  
30 with?

A. With Gale.

Q. Did you report the loss of the policy to him?

A. I didn't know of it.

Q. You didn't know of it?

A. I didn't bother.

Q. When did you discover it?

A. I discovered it when I went after the wills.

Q. Why, when you were in Mr. Leek's office, did you give the wills to Mrs. Daley?

A. Well, Mrs. Daley, when I had a safe deposit vault at the Boardwalk National, and when we withdrew our account there, I gave up my vault, I told Mrs. Daley to put them in the vault, which I presumed she would do.

Q. In her vault?

A. In her safe deposit vault.

10

Q. In the Ventnor City National?

A. In the Ventnor City National.

Q. When did you discover that she had them in this box?

A. Oh, a couple of weeks after I happened to go there, it was in the cupboard, and I told her then and she said she would and then I never looked afterwards, I never bothered.

Q. Then you never looked into the box again until after her death?

20

A. I never bothered, no.

Q. Then you don't know what might have happened to them in the meantime?

A. I haven't the slightest idea.

Q. This was a few weeks after they were executed that you saw them in the box?

A. Yes, two or three weeks afterwards.

Q. That was why you went up to the safe deposit box in the Ventnor City National and looked after her death?

30

A. After she died, yes.

Q. Thinking they might have been in there?

A. I thought positively they were in the safe deposit box.

Q. Were any locks on this box, is it locked?

A. No.

Q. Kept open?

A. Yes.

Q. Were there any marks on this box to indicate it had been burglarized?

A. I didn't notice that.

Q. All you can say you think the thief opened that box?

A. I don't know whether the thief or what; I have no more idea than you.

10 Q. You don't know whether Mrs. Daley might have torn them up, do you?

A. I haven't the slightest idea.

Q. You know your wife's signature, don't you?

A. Yes.

Q. Did you have this bank account at the Atlantic Safe Deposit and Trust Company open until the spring of 1924, I understand you to say that?

A. I don't know, Mr. Charlton; I don't know when I withdrew, I really don't know.

20 Q. Whenever you withdrew you afterwards carried what you had in cash in your pockets, didn't you, in your clothes?

A. No, I opened an account at the Ventnor Trust Company. I still have an account to the Ventnor Trust.

Q. Did you contribute the moneys to keep the house running?

A. We took it out of the general account.

Q. And put it where?

30 A. Used to maintain the house.

Q. Where did you put the money after you took it out of the general account, did you use that to maintain the house?

A. Well, I was making money.

Q. Who maintained the house during the past summer?

A. I did.

Q. You did?

A. Yes.

Q. Look those checks over and tell me if they are signed by your wife? Keep these separate, please, and look at these too?

A. They are all right.

Q. All those checks bear your wife's signature?

A. Yes.

10

(Bundle of checks, six in number, marked D1 for identification and another bundle, 44 in number, marked D2 for identification.)

Q. What do those checks, drawn to your order, endorsed by you, what are they for?

A. That was for her.

Q. For her?

A. I don't know what we bought with it; she would make a check out to me for her.

20

Q. Wasn't that your spending money?

A. No.

Q. Will you answer my question that I asked you after you seen these checks, who paid the expenses of that house last summer?

A. I did.

Q. You paid the taxes?

A. I paid the taxes and paid the taxes on 104 and 106.

Q. You paid the taxes?

30

A. We paid it out of the general account.

Q. You did?

A. Yes.

Q. That came out of the joint account?

A. Yes, but Mrs. Daley got some money off of my checks.

Q. On what bank?

A. On the Boardwalk National.

Q. When did you close that Boardwalk account?

A. I don't remember.

Q. Think hard now, when did you close it?

A. Well, you can look at those checks, probably tell you pretty near the date.

Q. Here is check, look at it.

A. That is not my account.

10 Q. The taxes were paid out of the joint account?

A. Some of them, some she paid herself, she got her money.

Q. There is the taxes on the Margate property in your joint name, is that paid on the joint account or by her?

A. That was paid by her.

Q. And you gave her the money for that too?

A. Yes.

Q. Who paid the telephone bill?

20 A. She paid all bills and kept the books.

Q. Then she ran the house last summer, didn't she?

A. She done the paying of the bills; she attended to the books; she didn't make any money last summer.

Q. With your money?

A. Well, with our money.

Q. Out of the joint account?

A. Out of the joint account.

30 Q. And when was that joint account closed?

A. I don't know the exact date.

Q. Sometime in 1923, wasn't it?

A. I think is was late in 1923. I think there are some checks there 1924, I am not just positive.

Q. Getting back to the wills again, Mrs. Daley begged you to make these wills, didn't she?

A. She didn't do any begging at all; she didn't have to beg.

Q. It was her suggestion?

A. It was her suggestion.

Q. You never took a lawyer down there and asked her to make one and she refused?

A. Never.

Q. Never did?

A. Never.

Q. But she asked you to make the wills?

10

A. It was through her suggestion we made the wills.

Q. Not from you at all?

A. I wouldn't ask her.

Q. You were not interested?

A. I was interested much as she was.

Q. But not in the making of the wills?

A. The same as she was, exactly.

Q. But you were not interested enough to have them made?

20

A. I never asked her, no.

Q. Your concern came after death when you looked for them?

A. Yes.

Q. You were anxious then to find them?

A. Naturally.

Q. But before that you were not anxious to have them made?

A. No more than she was.

Q. You knew she had two daughters, didn't you?

30

A. I didn't know.

Q. When did you discover that?

A. The Mrs. only mentioned to me once that she had two daughters.

Q. Didn't you talk to one of her daughters on the telephone?

A. Not in my presence.

Q. Didn't you talk to one of her daughters on the telephone?

A. I never talked to one of them.

Q. In the summer of 1923?

A. Never knew them.

Q. When was it you learned she had daughters?

A. She told me, I think, once during our married life that she had daughters and I didn't put much stock in it.

10 Q. You don't know when that was?

A. I don't know exactly.

Q. Whose pictures hung on the wall of your house 106 Portland Avenue, 104, the house you lived in with Mrs. Daley? Who were the two young ladies' pictures hung on the hall?

A. There was never no young ladies hung in the hall.

Q. No pictures?

A. No young ladies.

20 Q. They were not Mrs. Barstow's daughters?

A. There were no pictures, no daughters in that house.

Q. What house you talking about?

A. You said 106.

Q. Let's make it 104, were there any pictures of young ladies?

A. I know nothing about 104.

Q. Didn't you live in there?

A. No.

30 Q. Weren't you in there often?

A. Very seldom.

Q. Pictures of two young ladies hung 225 North Jackson?

A. No.

Q. Did not hang?

A. No.

- Q. You live there?  
A. I live there.  
Q. You know that to be true?  
A. Positive.  
Q. You never knew they were her daughters?  
A. Never knew it and don't know them until this  
day.  
Q. You know a lady named Mrs. Baines?  
A. Yes.  
Q. Used to visit Mrs. Daley quite often? 10  
A. No, she used to be a maid.  
Q. What?  
A. Maid.  
Q. Used to visit you?  
A. No, I say she was a maid. Is that the one you  
mean, Baines?  
Q. Yes, that is right; she used to come often to  
your house to work there?  
A. She worked there.  
Q. She worked there not long before Mrs. Daley's 20  
death, didn't she?  
A. Yes.  
Q. You knew her?  
A. Yes.  
Q. But in fact you once accused her of stealing  
jewelry?  
A. I didn't accuse her, no, I didn't.  
Q. Didn't want her arrested?  
A. I didn't want her arrested.  
Q. When was Mrs. Daley taken sick, did you say, 30  
the last time?  
A. Well, she was ailing from about the first of  
August, I didn't know she was so sick as she was,  
then about the fifteenth, I think, about around the  
fifteenth, I never kept the exact dates, she went to  
bed, she was up and around until the last minute,  
until I sent her to the hospital.

Q. Then she went to the hospital?

A. Then she went to the hospital.

Q. When did she come out of the hospital?

A. She died September fourth, on Thursday morning, she came out that Monday previous to that.

Q. You went with her when she came out, didn't you?

A. I was up there and brought her out.

10 Q. She seemed to be in a perfectly normal state of mind, didn't she?

A. The last three days she wasn't.

Q. When she came out of the hospital?

A. She was in fairly good shape when she came out; then she got in very bad shape.

Q. She got drinking?

A. No, she was helpless.

Q. Didn't she drink after she came out of the hospital?

A. No, she couldn't get out of the bed.

20 Q. Ever beat your wife?

A. Never, never.

Q. Never pushed her in the door?

A. Never.

Q. Never blacked her eye?

A. Never.

Q. Never knocked her teeth out?

A. Never.

Q. Never laid your hand on her?

A. Never.

30

Re-direct examination.

By Mr. Bourgeois:

Q. Mr. Daley, was your wife a drinking woman? Did she sometimes drink?

A. Sometimes she would participate a bit.

Q. I saw some of these signatures looked somewhat unsteady?

A. Yes.

Q. Mr. Charlton asked you about the will; do you know if that will was ever revoked?

A. It was never——

Mr. Charlton: If the Court please, I think he ought to answer that if he understands what revocation means in law. 10

Q. Annulled, destroyed, anything of that kind? Was it ever annulled or destroyed, as far as you know?

A. I never knew of it, no.

Q. Did Mrs. Daley ever say to you that she had revoked it or destroyed it or was going to revoke it or destroy it?

A. Never. 20

Q. About these checks; I didn't quite understand your answer to Mr. Charlton, whether these were all of the checks that you have ever drawn on the Boardwalk National Bank from the joint account or whether they were the checks that were drawn for repairs or upkeep of the house from that account?

A. That is what they were for; they weren't all the checks were drawn; we drew personal checks, she drew checks for her bank account and I have drawn for my private account. 30

Q. These, then, were the checks only that were used for the upkeep of the property?

A. What I figured it out as near as I could come to it.

By Mr. Charlton:

Q. Where are the rest of them?

A. I left them home.

Mr. Charlton: Only the good ones are here.

By Mr. Bourgeois:

Q. These daughters that they have spoken so much about, did they ever visit Mrs. Daley during the time you were married with her?

10 A. Not to my knowledge, no.

Q. Did you ever see them in her life time?

A. Never.

Q. That is all.

---

ANDREW P. JOHNSON, sworn for complainant.

Direct examination.

20

By Mr. Bourgeois:

Q. Mr. Johnson, you live in Atlantic City?

A. Ventnor.

Q. How long have you been a resident of Atlantic County?

A. Fifty-seven years.

Q. During that time you have either lived in Atlantic City or else over—

30 A. In the county.

Q. Where?

A. In the county.

Q. Do you know Mr. Daley, Robert Daley?

A. Yes.

Q. Do you remember some time in December of 1923 or 1922 of being asked to go to Mr. Leek's office and witness a will?

A. I do.

Q. Or more wills, maybe? Did you go?

A. I did.

Q. Will you tell the Court just what was done after you went there as nearly as you recall it, who was there and so on?

A. Mr. and Mrs. Daley, Mr. Leek and myself. Mr. Leek read over the papers——

Mr. Charlton: Pardon me; there is no question.

Q. What was done?

10

A. Mr. Leek read over the papers and I witnessed the signatures and signed as a witness and Mr. Leek also signed.

Q. Now how many of those papers were there, one or two?

A. Two.

Q. What did they provide? You say Mr. Leek read it over, what was the substance of it?

A. The substance of it was that in the event of Mr. Daley's death the property should go to Mrs. Daley; in the event of Mrs. Daley's death the property should go to Mr. Daley.

20

Q. Were you told that they were the wills of Mr. and Mrs. Daley?

A. Don't recall.

Mr. Charlton: I object to that, if the Court please.

The Court: Yes, he has answered, he don't recall.

30

Q. Did you see Mrs. Daley sign her name to the paper?

A. I did.

Q. Was Mr. Leek present with you at that time?

A. He was.

Q. Now where was Mrs. Daley when you and Mr. —did you and Mr. Leek both sign that paper?

A. We did.

Q. Where was Mrs. Daley when you two signed it?

A. Standing within two feet.

Q. Now the other paper, did Mr. Daley sign a paper?

A. He did.

10 Q. Who was present when he signed the paper?

A. Mr. Daley, Mrs. Daley, Mr. Leek and myself.

Q. Did you and Mr. Leek sign that paper as witness also?

A. Yes.

Q. Where was Mr. Daley at the time you signed your names as witnesses?

A. Standing within two or three feet.

Q. The whole thing done right there in the same room?

20 A. Stood right in front of the desk while the whole transaction was being executed.

Cross-examination.

By Mr. Charlton:

Q. Both sign the same paper? Both Mr. and Mrs. Daley sign the same paper under each other?

A. I presume so, yes.

30 Q. It was an agreement in the event of her death he should have the property, in the event of his death she should have it?

A. That was the sense of the paper.

By Mr. Bourgeois:

Q. How many papers did you say there were?

A. Two.

Q. I thought you didn't understand that question. Mr. Johnson, did you understand what he asked? He asked you did they both sign the same paper? Did they both sign the same paper or did they sign different papers?

A. Different papers. I understood, if that was the intent.

By Mr. Charlton:

10

Q. There were two separate papers?

A. Yes.

Q. One signed by each of them?

A. Yes.

Q. Or both signed by each?

A. I don't recall that.

Q. Was one paper a copy of the other?

A. I don't recall, didn't examine them.

Q. Don't know anything more about it than that? 20

A. Only that—

Q. You saw Mr. and Mrs. Daley sign?

Mr. Bourgeois: Let him answer. He is trying to answer.

(Question repeated.)

Q. Only that Mr. and Mrs. Daley—

Mr. Bourgeois: He didn't say that.

30

The Court: Cross-examination, however; you may proceed.

Q. Were there two distinct papers or was one a copy of the other?

A. That I don't know.

Q. Do you know whether each signed a separate paper or both signed both papers?

A. Don't recall because I only witnessed the signatures.

Q. It was very vague to you now, you just remember the signatures?

A. Only remember the signatures and the purpose of the papers.

10 Q. That if he died before her she got the property and if she died before him he got it?

A. That was the sense of the papers.

The Court: How many papers did you sign?

A. Two.

---

20 WILLIAM T. LEEK, sworn for complainants.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Leek, you reside in Atlantic City?

A. I do.

Q. How long have you resided here?

A. About thirty-four years.

30 Q. Do you know Robert Daley?

A. I do.

Q. And did you know Ellen Montgomery Daley in her life time?

A. I did, yes, for the latter part of her life time.

Q. Did there come a time when they came to your office for some business?

A. Yes.

Q. When was that as nearly as you can recall?

A. The latter part of December, 1922.

Q. On how many occasions did they come one or two?

A. Two.

Q. What did they—what was the nature of their business the first time they came?

A. They had been there before on another transaction but not this one but the first time that I saw them I think was on a transaction with Mr. Frees 10 regarding the sale of some property.

Q. But I mean this transaction?

A. This time they came there, and Mr. and Mrs. Daley said they wanted to have their wills drawn and they gave me the data and I told them I would draw them, for them to come back later and sign them, I think it was the next day, if I am not mistaken, they came back.

Q. Did you have them drawn at that time?

A. I did.

20

Q. Then what was done?

A. They signed them.

Q. Did anybody go out for anybody else beforehand?

A. Yes, Mr. Daley went after Mr. Johnson and brought Mr. Johnson around to the office as a witness.

Q. Now then what was done after he came in, after Johnson came in?

A. Mr. Johnson said that I read the wills to Mr. 30 and Mrs. Daley but I don't just recall about that, I either read them or handed them to them for them to read, one or the other; of course they found that they were all right and the wills were executed.

Q. How many papers were there?

A. Two.

Q. One for Mrs. Daley and one for Mr. Daley?

A. Yes.

Q. Were you present when Mrs. Daley signed hers?

A. I was.

Q. Did she know what she was signing?

A. She did.

10 Mr. Charlton: I object to that.

Q. How did she know?

A. I asked her if she declared that to be her last will and testament, as I always do in all cases.

Q. Did you ask Mr. Daley also?

A. I did.

Q. You say Mrs. Daley signed it?

A. Yes.

Q. Who was present when she signed it?

20 A. Mr. Johnson, myself, Mr. Daley and Mrs. Daley.

Q. Did you and Mr. Johnson sign as witnesses?

A. We did.

Q. Where was Mrs. Daley when you signed as witnesses?

A. Right by the desk.

Q. In the same room there?

A. Yes.

Q. Did Mr. Daley sign the will as well?

A. Yes.

30 Q. Who was present when he signed it?

A. We were all present at the same time, Mrs. Daley, myself and Mr. Johnson.

Q. Did you and Mr. Johnson sign as witnesses?

A. Yes.

Q. Where was Mr. Daley when you and Mr. Johnson witnessed his will?

A. He was there at the same time.

Q. Do you remember anything about those wills?

A. No, I don't just recall what was in them. I draw so many wills I can't recall any particular wills.

Q. Was there anything said about debts?

A. Yes.

Q. What?

A. They ordered and directed their funeral expenses and just debts be paid as soon as might be done after their decease; put that in all wills. 10

Q. Was there an executor?

A. Yes.

Q. Who was the executor?

A. I think Mrs. Daley was executor of Mr. Daley's will and he was executor of hers, if I am not mistaken.

Q. Do you remember whether or not the wills were of the same purport or if they were different purports? I mean by that without remembering the language? 20

A. As to the estate you mean?

Q. Yes.

A. No, I don't just recall about that. I expect that I have drawn fifty since that. Like enough, I can't recall any one particular will.

Q. Was Mr. Johnson ever in your office to witness any other wills except these two?

A. No, I don't think so. I don't just recall him being in there.

30

No cross-examination.

MRS. ELIZABETH HOWELLS, SWORN for complainant.

Direct examination.

By Mr. Bourgeois:

Q. Mrs. Howells, you live where?

A. Woodlawn, Pennsylvania.

Q. You are the sister of Mr. Daley?

10 A. I am.

Q. And the complainant in this suit?

A. I am.

Q. Did you know Mrs. Daley in her life time?

A. I did.

Q. How long had you known her?

A. Well, I met her before they were married.

Q. When was the last time that you saw her?

A. August, the first two weeks of August.

20 Q. What year?

Mr. Charlton: When was that?

A. First two weeks in August we were here on a visit.

Q. What year?

A. Last year.

Q. Just before her death?

A. This year, 1924.

Q. I say it was just before her death?

30 A. Yes, it was just before her death.

Q. Now, Mrs. Howells, did Mrs. Daley ever say anything to you with relation to the making of a will?

A. She did.

Q. When?

A. Why when we came on, just as we came on, when we got at their place, we went to the kitchen

---

Mr. Charlton: If the Court please, I am going to object to this, the administrator is a party and this is a party.

Mr. Reed: What ground?

Mr. Charlton: The statute. 10

Mr. Bourgeois: We think, if the Court please, that is is not applicable, the act does not apply. If your Honor wants a case we have it here.

Mr. Reed: We have a case in the Court of Appeals.

The Court: Let me hear one at a time. 20

Mr. Reed: The case is *In re Vise* 80 N. J. Equity, 446.

The Court: I will permit the question.

(Question repeated.)

Q. You may proceed.

A. We started to get lunch and I started to tell her about the trip coming over the mountains, how scared I was, how dangerous it was, and she asked me, she said "Now that is a proof everybody ought to have a will." She said "If you had done as I told you,"—and she had spoke to me before previous about the will—and I said "What do you mean, a will?" She said "Have you and Dave made your 30

will?" I said "No, we haven't." She said "You should. Bob and I have ours made and I have mine made and Bob has his." She said "Everybody ought to have a will made."

Q. Now did she say in what manner——

Mr. Charlton: She hasn't said when this was.

A. This was the first two weeks in August.

10 Q. Did she say anything about what their wills were, what they provided?

A. No, she didn't; she said, before that she had told me but not at that time she hadn't.

Q. What did she tell you before that about them?

A. Well, the year before she had been on, they were on for Christmas and she told me that everything she had was Bob's; she had mentioned that several different times.

Q. What about this?

20 A. Well, she didn't say anything about that.

Q. When she said everything she had was Bob's, did she say that with reference to her will or just a general proposition?

A. She always said "Everything I have got is Bob's and I have that fixed." She told me that "I have got that fixed; we have got our wills to that effect."

Q. We have what?

A. "We have our wills to that effect."

30 Q. Then the last time she just referred to the wills?

A. Again.

Q. Referring to the previous conversation?

A. Yes.

Q. Who was present, Mrs. Howells, beside you and Mrs. Daley at the time this conversation took place in August?

A. My husband was in the kitchen at the time.

Q. Have you the deeds of conveyance or deed of conveyance and bill of sale from your brother to you?

A. Yes, I have.

Mr. Bourgeois: I offer in evidence deed from Robert Daley to Elizabeth Howells bearing date November 10, 1924, recorded in the clerk's office of Atlantic County at May's Landing, in Book 756 of deeds page 168, &c.

10

(Deed admitted and marked Exhibit C2.)

Q. Also a bill of sale from Robert Daley to Elizabeth Howells bearing date November 10, 1924, of record in book of bills of sale #7 at page 40.

(Bill of sale admitted and marked Exhibit C3.)

Cross-examination.

20

By Mr. Charlton:

Q. How much did you pay your brother for these properties?

A. A dollar.

Q. One dollar for each paper?

A. Yes.

Q. And you want us to believe you bought the interest that he might have in this estate for two dollars, is that correct?

30

A. What is that?

Q. Is that correct?

A. I didn't understand.

Q. That you gave him two dollars, one dollar for each paper?

A. Yes.

Q. That is all?

A. Yes.

Q. Why did you buy it?

Mr. Bourgeois: I object to that; that is irrelevant and immaterial, if she did buy it that is the end of it.

10 The Court: On cross-examination, when she said she only paid a dollar for real estate and dollar for personal property, I think admissible.

Mr. Bourgeois: A dollar not mentioned, was not admissible.

The Court: I will permit the question, whether there was a deed and bill of sale, whether there was a valuable consideration or not; I will permit it.

20 (Question repeated.)

A. Because I wanted to.

Q. Did you own it at the time you engaged Mr. Reed to file this bill?

A. Did I what?

Q. Did you have those papers at the time you engaged him to draw this bill?

30 Mr. Bourgeois: I object as irrelevant and immaterial.

The Court: How is that admissible?

Mr. Charlton: It speaks in the papers of a valuable consideration and I was wondering what was meant by it.

Q. When did you go back to your home after you were here last summer?

A. Well, we were here two weeks; we were at their place two weeks.

Q. Two weeks?

A. The first two weeks in August.

Q. You slept right in the house?

A. Yes.

Q. Ever see this box before?

A. I can't see it.

10

(Mr. Reed hands box to witness.)

A. Yes, have seen it.

Q. Where was it?

A. Well, it was sitting on top of the wardrobe.

Q. Out in a room?

A. In a room, yes.

Q. It wasn't kept in a closet?

A. No, not when I saw it; it was on top of the 20 wardrobe.

Q. Who had possession of it when you saw it?

A. Nobody.

Q. Nobody touching it or handling it?

A. No.

Q. Mrs. Daley ever tell you where the wills were?

A. No.

Q. Were you there during the robbery?

A. No.

Q. That was before you came, was it?

A. Yes.

30

Q. You heard about it, of course?

A. Yes.

Q. Tell you the wills were stolen?

A. No.

Q. Never heard of that?

A. No.

Q. But after the robbery Mrs. Daley discussed the wills with you?

Mr. Bourgeois: She hasn't said so.

Mr. Charlton: All right; that is all.

---

10 The Court: I want to call counsel's attention to the fact that the bill says "a copy of which assignment" referring to the assignment of all the property "is hereto annexed and made a part hereof" and there is no such paper attached to the bill of complaint.

Mr. Charlton: Nor was there one on the copy.

20 Mr. Reed: And there wasn't any attached.

Mr. Charlton: That was the purpose of my question to find out why it wasn't.

The Court: I simply asked to see if the file was complete, that is all.

Mr. Bourgeois: Ought we to amend that bill and strike it out?

30 The Court: Yes.

Mr. Reed: Strike that out because it wasn't attached.

The Court: That may be done.

DAVID HOWELLS, sworn for complainant.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Howells, you live where?

A. Woodlawn, Pennsylvania.

Q. And you are the husband of Mrs. Elizabeth Howells who was just on the stand? 10

A. Yes, sir.

Q. Did you know Mrs. Ellen Daley in her life time?

A. Yes, sir.

Q. Were you ever a visitor at their home at Mr. and Mrs. Daley's home?

A. Yes, sir.

Q. When was the last time during her life time?

A. August, twenty-four.

Q. At that time did you overhear a conversation between Mrs. Daley and Mrs. Howells concerning wills? 20

A. I did, sir.

Q. Will you state to the Court what that conversation was and what you heard?

A. Yes, sir. It was on the morning of the fifth, I think, of August, I went out in the kitchen and Mrs. Daley and my wife was out there getting the meal ready, and they were talking, my wife was telling Mrs. Daley about the crowded condition coming over the Allegheny mountains, heavy traffic, and so forth, how dangerous it was, and Mrs. Daley says, "It would be too bad if you got hurt or killed," she says "and you ain't got your wills made," which we hadn't at that time, and she said "You ought to do like me and Bob," she says, "We make our wills out 30

for each other, you ought to do the same.” That was all I ever heard about wills.

Q. How long did you remain there?

A. About ten days.

Q. And that, you say, was in the fourth and fifth of August, prior to her death?

A. Fifth, we left Pittsburgh on the fourth and drove down.

10 Cross-examination.

By Mr. Charlton:

Q. You are Mrs. Howells' husband?

A. Yes.

Q. If she wins you are benefited, of course?

A. Sir?

Q. You benefit by this suit if she should win?

A. I don't know.

20 Q. You just happened to be there and heard that conversation?

A. That is all, sir.

Q. That is all they talked about?

A. That is all I heard; I didn't stay there. I got out soon afterwards.

Q. Just there long enough to hear the conversation?

A. Just go in and out the kitchen, back and forth.

30

FRANK MAY, sworn for complainant.

Direct examination.

By Mr. Bourgeois:

Q. Mr. May, on one occasion were you called upon to go to Mr. Daley's home to investigate an alleged robbery?

A. Yes, sir.

Q. When was that?

A. During the early part of August.

Q. Of what year?

A. 1924, last year.

Q. Who made the request that you go, do you know?

A. Our chief, Mr. Harrold.

Cross-examination:

By Mr. Charlton:

Q. What did you find, Mr. May, any evidence of robbery?

A. There was no evidence showing that with reference to a break, anything of that kind.

Q. No reference to that kind at all?

A. Not a break, no.

Q. Did you examine the property, examine the house, mean by that?

A. No, we didn't examine the house for a break, no.

Q. You looked around carefully?

A. We didn't look around because we questioned Mr. and Mrs. Daley in reference to their loss and they had missed a ring, three-stone diamond ring,

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20

30

set by Tiffany, they claimed valued two thousand dollars.

Q. That was all missing?

A. That was all that they claimed that they had missed.

Q. And you found no evidence of a break or anything?

A. No, sir.

10 Mr. Bourgeois: Was there anyone with you?

A. Mr. Lodovico.

---

LOUIS LODOVICO, sworn for complainant.

Mr. Charlton: His testimony the same?

20 Mr. Bourgeois: Yes.

Mr. Charlton: I will admit it.

The Court: It is admitted Mr. Lodovico will simply repeat the same testimony of Mr. May.

COMPLAINANT RESTS.

PATRICK H. DORAN, SWORN for defendant.

Direct examination.

By Mr. Charlton:

Q. What is your business, Chief?

A. Chief of police Atlantic City Police Department.

Q. You here under subpoena? 10

A. Yes, sir.

Q. Have you any record in your office showing any robbery, reported by Robert E. Daley?

A. I have not.

Q. Or Ellen M. Daley?

A. I have not.

Q. Examine your files for that?

A. Searched the files over, only record we have of Robert E. Daley is a record of extradition to Pittsburgh 1921. 20

Q. Warrant come into your office for that?

A. Yes, sir.

Q. What was the charge?

Mr. Bourgeois: I object as irrelevant and immaterial.

The Court: Sustain the objection.

HARRY H. FRINGS, sworn for defendant.

Direct examination.

By Mr. Charlton:

Q. Mr. Frings, what is your official position?

A. Chief of Police, Ventnor City.

Q. You receive a subpoena to come here today?

A. Yes, sir.

10 Q. In pursuance of the direction of that subpoena did you examine the records of the Ventnor City police department?

A. I did.

Mr. Bourgeois: No claim been made ever been any report there, was there? I object to it as irrelevant.

20 The Court: I will hear you on that, there is no claim.

Mr. Charlton: If your Honor please, it seems to me if robbery it ought to have been reported.

The Court: Testimony is that it was immediately reported to the prosecutor's department. Sustain the objection.

HARRY FULMER, sworn for defendants.

Direct examination.

By Mr. Charlton:

Q. Mr. Fulmer, what was your official position for the prosecutor's office, Atlantic County, if any?

A. County Detective.

Q. And when did you sever your connection with that office? 10

A. First of the year.

Q. 1924?

A. Yes.

Q. Do you know Mr. Daley?

A. Yes, sir.

Q. In your official capacity did you ever investigate any robbery at Mr. Daley's home, alleged robbery?

A. I did. 20

Q. When was that, Mr. Fulmer?

A. To the best of my knowledge along September 1923.

Q. Where did you go to investigate it?

A. Last house on Jackson Avenue in Margate.

Q. Was Mr. Daley there?

A. Yes, sir.

Q. Mrs. Daley?

A. Yes, sir.

Q. What was supposed to be missing? 30

A. Well, we got a message in, Mr. Walters brought an order in, that is a 'phone call in that there was a robbery in Margate City and Mr. Walters and I went down; it was about in the neighborhood of eight o'clock when we got there.

Q. Morning or night?

A. Evening. And we went to the house and Mr. Daley came out and walked out to the car and we sat in the car and talked to him; he told us about the robbery. By the way, Mr. Daley was drunk——

Q. Go ahead. He started giving us a lot of conversation and I told him that I better come back the next day. He started then telling us——

Mr. Bourgeois: I object, if your Honor please.

10

The Court: Yes, no question.

A. He started in to telling me——

The Court: No question.

Q. What happened when you went back the next day?

20 Mr. Bourgeois: I object. This is not relevant at all; it is not material at all. This has reference to a question that Mr. Charlton raised on cross-examination that had not been in the direct examination at all.

Mr. Charlton: This is my case.

30 The Court: He is now assuming, I take it, to show that the fact that Mr. Daley made a report of a robbery is no justification to decide that a robbery had been committed because he had done the same thing before and found no robbery. To that extent I will permit it. It has no other relevancy at all.

Q. What happened the next day, Mr. Fulmer?

A. I didn't finish that. That night I told him

better come back the next day. We kept right on talking to him, that is he did, kept right on talking to us, and Mrs. Daley came out on the step and started to talk. He told her to go on in the house, he was taking care of the case. He started to tell me a lot of jewelry was missing and if I just recall he mentioned somebody's name, some people was there, he said "if you come back in a day or so or give me your card I will call you up when you are to come down." He says "I will give you a good lead." In a day or so afterwards I went down again, and it was about the same thing, and I wouldn't say just how long, but it was a couple of or three days after that I got a telephone call in the office, he told me that they had found the jewelry, it was underneath the gas stove, that they had hid it there and was no use of my bothering any more with the case.

Q. Mr. Daley talk to you on the 'phone?

A. He did.

Q. What was supposed to have been stolen, Mr. Fulmer?

A. There was jewelry, I think there was a necklace was mentioned, the main thing, if I am not mistaken.

Q. Just jewelry?

A. Just jewelry; there was a necklace mentioned in it.

No cross-examination.

30

CHARLES WALTERS, called.

Mr. Bourgeois: If it is admissible I will admit it, but I don't think it amounts to a thing.

Mr. Reed: We will admit he will say the same thing, he went down there, but we don't admit it is admissible.

The Court: Under those circumstances we need not swear Mr. Walters.

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10    MARCUS M. CARROLL, sworn for defendants.

Direct examination.

By Mr. Charlton:

Q. Mr. Carroll, where do you live?

A. 12 South Montgomery Avenue, Atlantic City.

Q. What is your business?

A. Private detective.

20    Q. How long have you been such?

A. Private detective about three years, detective prosecutor's office quite a number of years, Camden County.

Q. Do you know Mr. and Mrs. Daley?

A. I do.

Q. Did you ever have any occasion to do any private detective work for either of them?

A. Mr. Daley.

Q. When?

30    A. September the twelfth, 1923, I believe.

Q. 1923?

A. Yes.

Q. What was the nature of the work that you were supposed to do?

A. Robbery.

Q. Robbery of what?

A. Jewels.

Q. Mr. Daley report it to you?

A. He did.

Q. Did you make an investigation?

A. I did.

Q. Where?

A. 225 North Jackson Avenue.

Q. Margate City?

A. Margate City.

Q. Just tell us what happened when you got to the house? 10

Mr. Bourgeois: I object. I don't quite understand.

The Court: I will sustain the objection to that. How can that be admissible?

Mr. Charlton: I want to show in furtherance of the other testimony that I have offered that Mr. Carroll went there and the jewelry was supposed to be stolen, that he made a complete search, a day or two later he was told the jewelry was found in a place where he had made a search and where it was not two days before, to show the nature of the supposed robbery. 20

The Court: I will permit it if that is the purpose.

Mr. Bourgeois: What does that have to do here? Suppose all that is true, are you going to try to fasten that on Daley when his wife was there and the man was there? 30

The Court: I don't know whether it is or not. If it is not, it is valueless, if it is not done, but I

can't anticipate the details of the testimony. I will permit it.

Q. What happened when you got to the house?

A. When I arrived at the Daley home I saw Mr. and Mrs. Daley. Mrs. Daley was, the condition of Mrs. Daley, her face was blackened, her eyes, both of them blackened, and when she went to talk to me Mr. Daley wouldn't permit her to talk to me.

10

Mr. Bourgeois: I ask that be stricken.

The Court: Let it be stricken.

Q. Go ahead.

Mr. Bourgeois: If the Court please, I ask that question be made more specific.

20

The Court: Yes, you are entitled to that.

Q. When you got to the Daley house did you talk to Mr. and Mrs. Daley about the jewel robbery?

A. I did.

Q. With which one did you talk?

A. Both.

Q. What did they say about it?

30

A. The first thing Mr. Daley told me that—I wanted to search the house, I told him perhaps find it in the house; he told me not to do it, that there were a woman by the name of Mrs. Baines that had been in the house doing some work and to go right up and arrest her.

Q. Did you do it?

A. I did not, I told him I would not.

Q. Did you search the house?

A. I sent Mr. Daley for Mrs. Baines; Mrs. Baines came down. I talked to her, got her former address in Philadelphia, and her and I searched the house and Mr. Daley was with us on the lower floors. We searched it thoroughly, went upstairs in the attic and Mr. Daley did not come up with Mrs. Baines and I.

Q. You and Mrs. Baines went up to the attic?

A. Mrs. Baines and myself. There were an oil stove up there, one cylinder oil stove and I picked 10 that oil stove up and I moved it I suppose three foot from where it was; there were nothing under that oil stove but the floor; there were nothing in that oil stove.

Q. You looked in it?

A. I positively did. Came down stairs and Mr. Daley and I then went out in the garage and looked and he told me there was no use looking any further, that Mrs. Baines was the woman and he employed 20 me and I should arrest her. I told him I wouldn't do it. We came into the house. I got a list of the stolen jewels from Mr. Daley and Mrs. Daley and the appraised valuation that they put on the jewels themselves. I got in touch with the Philadelphia police department, Mr. McLaughlin—

Mr. Bourgeois: I object.

The Court: Yes.

Q. Don't tell us about that. What happened 30 afterwards with respect to these jewels? Were any marks of a robbery?

A. Positively no. Mr. Daley and I went all through the windows outside and inside. There were a little mark on a window facing the bay. Mr. Daley said that was a mark that he put there himself. I

said "Now this is the only mark all over the house and looks like anybody trying to get in." He said "No, that mark was there." He said "I made that mark myself."

Q. What happened afterwards? Were the jewels recovered?

A. I got word from the prosecutor's office that they had been found under that oil stove.

Q. Did you see Daley about that?

10 A. I went down to see Mr. Daley; he was out in the bay fishing, I think. I talked to him. I says "Well, you found the jewels?" He said "Yes, funny place to find them, wasn't it?" I said "Yes, it was." I went up to see Mrs. Baines then.

Q. Did he tell you where they were found?

A. Yes, under the oil stove.

Q. Where did Daley tell you they were found?

A. Under the oil stove.

Q. One you moved?

20 A. One I had moved, yes.

Q. Were there any other oil stove there?

A. No other oil stove there.

Q. Mrs. Baines was with you when you moved the oil stove?

A. She positively was.

Q. How long after you had made the search was it the jewels were found?

A. I think about four days.

Q. Who did Mr. Daley say found them if anybody?

30 A. Well, Daley said he had found them under the oil stove.

Q. He said he found them?

A. He said he found them.

Q. Was there any time during that investigation you were alone with Mrs. Daley?

A. Yes, there were.

Q. When was that?

A. When I sent Mr. Daley after Mrs. Baines.

Q. What was her condition?

A. Very bad.

Q. Any marks on her?

A. Yes.

Q. Both eyes blacked?

Mr. Bourgeois: I object to that, immaterial.

10

The Court: How is that immaterial?

Mr. Charlton: If the Court please, I think it is immaterial to show that this man beat the woman.

The Court: How are you going to show it by this witness?

Mr. Charlton: I think I can if the Court will permit me.

20

The Court: If you can show it by this witness you may do so, but what the woman told him wouldn't be admissible.

A. She told me it was by Mr. Daley.

Mr. Bourgeois: I ask that be stricken out.

The Court: That may be stricken; it is not responsive to any question. Sustain the objection to the question as now propounded.

30

Q. Did you hear Mr. Daley say anything to Mrs. Daley while you were there?

A. I did.

Q. What did he say to her?

A. He brought in a bottle of whiskey and he poured out a glass full of whiskey and handed it to her and he said, "Damn it, have a shot of scotch." She says "I don't want it." He said "Take it or I will knock your damn head off."

Q. He said that to her?

A. He did; she took it and he poured out another one and I looked at him. He said "Take it or I will give you a damned sight worse than I gave you the other night." She said "Yes, I got the marks of it  
10 right here."

Q. She said that?

A. She did.

Q. In his presence?

A. In his presence; he was standing there.

Q. Did he say anything about not talking to you?

A. He did.

Q. What did he say?

A. She started to tell me about more jewels she  
20 had in the deposit box and how thankful she was she didn't have them all out of it, that the amount of jewels was stolen was just a few of what she had. He told her to shut her God damned mouth and he would do the talking if there was any talking to be done around here.

Q. He said that?

A. He positively did.

Q. In that language?

A. In that language.

Q. When he left to go to get Mrs. Baines did he say  
30 anything to her then?

A. Warned her not to talk to me.

Q. He told her that?

A. He did.

Q. What did he say when he came back with Mrs. Baines, what was the first question?

A. He brought her back and I should arrest her.

Q. Say anything to his wife?

A. Asked her if she had been talking to me.

Q. What did she say?

A. "No."

Q. You talk to Mr. Daley about the case after the jewels were found? Did you tell him what you thought of the robbery?

A. I told him that at the house night after they were found, day they were found. 10

Q. What did you tell him?

A. I told him when he was insisting upon the arrest of Mrs. Baines for him to get his thinking cap on, that he was the only man around the house and he could think where those jewels were and his head struck the ceiling. Wanted to know if I intended to say he had them. I told him I spoke good English and he could use his own judgment.

The Court: Do you mean that, his head struck 20 the ceiling?

A. I mean his head got excited, that is what I mean.

Q. Have you a list of the jewels supposed to be stolen from that house?

A. I have.

Q. Where is it, Mr. Carroll?

(Paper produced.)

30

Q. Is this from your office file?

A. Yes.

Mr. Bourgeois: We have no objection if it is relevant. I don't think it is relevant at all.

The Court: I will permit it.

(Paper marked Exhibit D3.)

Q. Mr. Carroll, did you procure copies of the Daily Press of September 4, 5 and 6, 1924?

A. I sent one of my men out for them.

Q. Where did you get those papers?

A. From the Atlantic Press office.

10 Q. Went there yourself?

A. No, Mr. Bunting was there.

Mr. Bourgeois: They are objected to because they are not relevant.

Mr. Charlton: I want to show the death notice.

Mr. Bourgeois: The death notice?

20 Mr. Charlton: Yes.

Mr. Bourgeois: That is not relevant either.

Q. You didn't get them?

A. Mr. Bunting.

Cross-examination.

By Mr. Bourgeois:

30 Q. Mr. Carroll, on which visit was it you told Mr. Daley he was the only man there, for him to get his thinking cap on?

A. First visit.

Q. After that you continued to go down there and work on this job, did you, for some days?

A. No, I only worked two days.

Q. Now, Mr. Carroll; do you mean to tell me—

A. I was down there three days, charged him for two.

Q. Do you mean to tell this court, after you told Mr. Daley, who was your employer, in his own home that he was the man who had stolen the goods, that he permitted you to remain down there and search through his house?

A. He did.

Q. Didn't order you out?

10

A. He did not.

Q. And you continued to go?

A. I did.

Q. Also do you mean to tell the court after you became convinced that there was no robbery that Mr. Daley himself was the man who had taken those jewels, that you continued to work for him trying to find out where they were?

A. I didn't tell him he took the jewels, I told him to get his thinking cap on.

20

Q. That is what the fair import was, that is what you meant?

A. That is what I did mean.

Q. Do you mean to tell me you still continued to work on that same job down there for him?

A. I do.

Q. Charged him for your time?

A. I do.

Q. And he paid you?

A. He did.

Q. First day you went down there you charged him ten dollars?

30

A. I did.

Q. Then you worked for him for five hours without any charge at all, didn't you?

A. Yes, sir; no charge at all.

Q. If you thought he was the man who had taken that jewelry why did you work for him for nothing?

A. Because he insisted I get Mrs. Baines and I compromised in this way that I would go to Philadelphia and get Mrs. Baines' and her husband's record, if they had any, that I would go to the neighborhood to find out their living conditions.

Q. Why would you do that, if you thought he was the one took the jewels without pay? Why did you  
10 do it for nothing?

A. Mr. Daley insisted upon it.

Q. What?

A. Mr. Daley insisted.

Q. On your doing it for nothing?

A. No.

Q. You didn't make any charge for it?

A. No, I didn't; I excluded it. I was down there.

Q. I want to know why?

A. I was only there about two hours that day,  
20 about four hours that next day, instead of charging for two days I charged him for one day, I put the bills into one, and made that charge for one day.

Q. You charged him for one day and then said the next day "five hours, operatives services, no charge."

A. Because there wasn't three full days.

Q. If that is so you had put up a false bill on him, didn't you?

A. No.

30 Q. Why? "One operative's services ten dollars" that was one day?

A. That was one day.

Q. You say you didn't put in a day, only put in one hour that day, two hours another time?

A. Second day I put in five hours, made my charge for it.

Q. Then if you didn't put in a false bill why did you say no charge, why were you tell him "no charge" when you charged him the day before?

A. I didn't charge the day before; I was there full day the day before.

Q. Didn't you say you spent two hours first day, five hours second day?

A. No, I said there was two days I hadn't put in a full day.

Q. What two days?

A. I went there Wednesday, Thursday and Friday, Wednesday I was there pretty near all day.

Q. Wednesday put in all day and you charged him for it?

A. Yes, I charged him ten dollars for it.

Q. That was the day you told him to get his thinking cap on?

A. Yes, sir.

Q. You thought he was the person who took that jewelry, why did you go back the next day and work five hours without any charge?

A. I next day I didn't work without any charge, in this sense of the word, the third day the hours was added to the second day, and a full day made out of it; ordinarily, if I am only out an hour I charge a full day, but I didn't in Mr. Daley's case.

Q. If you charged for the second or third day and made the whole charge in the third day why did you tell him in that bill for the second day you made no charge?

A. There was no charge made there on that particular day; the two days were combined.

Q. You now say you made the charge on the third day; that is so, isn't it?

A. Wait until I get hold of this. Mr. Bourgeois, first thing I want you to understand, if we are called out on a case—

Q. I don't care anything about that.

A. —for one hour we charge a day.

Mr. Bourgeois: I ask that be stricken.

The Court: Let that be stricken. Answer the question.

A. Wednesday there was a charge of ten dollars, eighty-five cents car fare.

10 Q. And that day you spent the entire day investigating this case?

A. Yes, sir; I did.

Q. On Wednesday?

A. Yes, sir.

Q. The next day you spent five hours, you made no charge?

A. No charge.

Q. Next day you spent two hours, as I understand you to say?

20 A. Yes, sir.

Q. And you added five hours of the day before and made a day's charge?

A. Made a day's charge.

Q. Then on the third day you charged up all your time on that third day, also all the time you spent on that second day?

A. I put Wednesday's charge in Thursday's charge and made a day of it.

30 Q. Why did you then say to him, when you sent the bill, for Thursday, "5 hours operator's service no charge?"

A. There were no charge that day, put in the next day.

Q. You charged the next day?

A. Yes.

Q. Why did you tell him no charge?

A. Simply charging the man three days, only charged two, and I wanted him to know it.

Q. You now say you did charge him, on the bill you say you didn't charge him?

A. Didn't charge him for that day.

Q. You now say you did charge him for that?

A. It was added to that, instead of giving three days, charges only made two.

Q. You charged five hours on the second day on the third day charge?

A. Not directly, indirectly I did, but not directly I didn't charge him for the day's work, only charged him two days. 10

Q. Then you don't consider a charge unless particularly made?

A. I should have charged three days, only charged two days.

Q. How was it that you would work on this charge for seven hours, or more than seven hours on two days when you believed that there was no robbery and you believed that Daley himself was responsible? 20

A. I did believe Daley and like any other officer we like to get to the bottom of it. If Mr. Daley had not insisted upon the arrest of Mrs. Baines I wouldn't have been on the case two hours.

Q. And you told him the first day that you would not arrest her?

A. I did.

Q. Why did you keep on the work?

A. I was going to satisfy Mr. Daley by going to Philadelphia and getting the record of Mr. and Mrs. Baines, if they had one. 30

Q. Why would you do that if you told him he was the one responsible?

A. To satisfy Mr. Daley.

Q. You didn't care anything about this, you were willing, in other words,?

A. Yes, a man always has pride in his work.

Q. You were willing to go on and work for him and try to find out where this man was even though you thought there wasn't a thing in it, weren't you?

A. No, I don't work for nothing, I get paid for it.

Q. You didn't work for nothing except half days?

A. Well, I gave Mr. Daley that.

10 Q. You don't mind putting in five hours for nothing?

A. I gave Mr. Daley five hours for nothing. I don't see where you should object to me giving five hours for nothing.

Q. You gave him Thursday for nothing but charged on Friday?

A. I might have charged Thursday and Friday together, don't make any difference.

Q. You just gave it to him a little bit?

20 A. Is there any overcharge there? I can't understand why a man is censured for knocking ten dollars off a bill.

Q. What do you call this? Do you think it is a perfectly honest bill?

A. I think it is more than honest; I was foolish for not charging three days.

Q. Then you think it was perfectly honest for you to have charged for the time you spent on Thursday and Friday on your Friday's bill?

30 A. Didn't make any difference whether charged two days; yes, I think it was honest, sure.

Q. You think it was perfectly honest, after you have charged for Thursday and Friday's services on Friday, to have told him that you made no charge at all for Thursday?

A. Sure.

Q. That is all.

A. Didn't make any. I gave him that five hours, told him so on the bill.

The Court: There is no question. You have answered it.

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MRS. SOPHIE BAINES, sworn for defendants. 10

Direct examination.

By Mr. Charlton:

Q. Mrs. Baines, where do you live?

A. Just at present I live 2162 Conlyn Street, Germantown.

Q. Philadelphia?

A. Yes.

Q. Do you know Mrs. Daley and Mr. Daley, did you know her when she was living? 20

A. I do, yes.

Q. How did you come to know Mr. Daley and Mrs. Daley?

A. Well, I don't just recall that, but in the winter time—

Q. Did you work for them?

A. Yes.

Q. What kind of work did you do?

A. Housework. 30

Q. When was the last time you worked for them?

A. Why Christmas a year ago.

Q. Christmas, 1923?

A. Yes, not on Christmas day, but right before Christmas a year ago.

Q. 1923?

- A. Yes.
- Q. When did you begin to work for them?
- A. That I couldn't say; I don't remember.
- Q. Were they married at the time you began?
- A. Yes.
- Q. Where were they living?
- A. Jackson Avenue, 225 Jackson Avenue, Margate.
- Q. How often were you in the house working?
- 10 A. Oh, I couldn't say how often I had been there but quite often.
- Q. Quite often?
- A. Yes.
- Q. Did you ever see any photographs of girls in that Daley house?
- A. I did, yes.
- Q. Where did they hang?
- A. Why in the living room on the wall toward the bath room.
- 20 Q. How large were they?
- A. Just a picture about that long.
- Q. Of two different girls?
- A. Yes, (indicating size.)
- Q. Have you ever seen the original of those pictures?
- A. I have had a pretty good look at them.
- Q. Are the originals in this court room today?
- A. I couldn't say.
- Q. Look like the pictures?
- 30 A. Well, I don't just remember them, as they were babies, see.
- Q. Those were young pictures?
- A. Yes, these were children.
- Q. How long did those pictures hang on the wall to your knowledge?
- A. All the time I ever went in there.

Q. In the living room?

A. Yes.

Q. Ever talk to Mrs. Daley about those pictures?

A. I did.

Q. What did you say to her and what did she say to you?

Mr. Bourgeois: I object.

The Court: Sustain the objection.

10

Mr. Charlton: Your Honor rules we are not allowed to offer anything Mrs. Daley said?

The Court: Yes, in connection with a matter so far remote as this is. The question now is limited to these photographs, as I understand it. Sustain the objection to what she may have to say about those photographs.

Q. Ever head Mrs. Daley say anything about the 20 photographs when Mr. Daley was there?

Mr. Bourgeois: I object.

The Court: I will permit that, when Mr. Daley was present.

(Objection withdrawn.)

A. No, not when Mr. Daley was there. She told me by herself when I was cleaning around. 30

Q. Ever talk to Mrs. Daley about wills?

A. Why, yes.

Q. Remember when you talked to her, how many times?

A. Well, it was just about the, about when I had

looked at the picture of the children, and she told me——

Mr. Bourgeois: When was it?

Q. You can't say what she told you about the pictures, but what did she say about the wills?

Mr. Bourgeois: When was it?

10 The Court: You are entitled to fix the time.

Q. When was it as near as you can tell us?

A. I think it was September a year ago.

Q. September, 1923?

A. Yes.

Q. All right, what was said about wills?

A. Mrs. Daley told me that she had no will and that she hoped whatever she had Mr. Daley wouldn't ever have anything, that she hoped that her children

20 would get what she had.

Q. Her children?

A. Yes.

Q. Now did she ever talk to you at any other time about wills?

A. No.

Q. Have you seen this wooden box?

A. No, I never saw that.

Q. Never saw it?

A. Never saw it.

30 Q. Have you cleaned that house from top to bottom?

A. Yes.

Q. Never saw that box?

A. Never saw it.

Q. Did you clean in the closets?

A. Yes.

Q. Clean on top of the chest in the bedroom or living room, did you clean all the furniture, dust it off and clean it?

A. Yes, everything.

Q. You never saw that box?

A. I never saw that box.

Q. And you were there until just before Christmas, 1923?

A. Yes.

Q. Have you ever seen Mr. Daley strike Mrs. Daley? 10

Mr. Bourgeois: I don't see how that is relevant. I will object to that.

The Court: I will permit it to test the credibility, when he said he never did, for that purpose only.

Q. Ever see him strike her?

A. No, I never saw him strike her, but she has had 20 marks on her face.

Mr. Bourgeois: I object to that.

The Court: Sustain the objection.

Q. Have you seen marks on her?

A. Yes.

Q. Did you ever hear him use profane language to her? 30

A. I did.

Q. Once or more than once?

A. Well, more than once.

Q. Mrs. Daley ever tell you anything about wanting to leave her husband?

A. Yes.

Mr. Bourgeois: I object to that.

The Court: Sustain the objection.

Mr. Bourgeois: Ask it be stricken out.

The Court: Yes.

Mr. Charlton: If the Court please, that is im-  
10 portant to show what might have happened.

The Court: I will sustain the objection.

Q. Much drinking go on in the house?

A. Yes, quite a little.

Q. By Mr. Daley or Mr. and Mrs. Daley?

A. Both.

Q. You say much, what do you mean?

A. What did you say?

20 Q. Heavy drinking?

A. Yes.

Q. Did they both get drunk?

A. Yes.

Q. Often or seldom?

A. Quite often.

Q. Ever see Mr. Daley offer his wife whiskey?

A. Yes.

Q. She object to drinking it?

A. Yes.

30 Q. What did he do then?

A. Tell her to take it.

Q. Make her drink it?

A. Yes.

Q. Do you know Mr. Carroll?

A. Yes, I do.

Q. Were you present at the Daley home when

there was a search made for some supposed stolen jewelry?

A. Yes.

Q. Did you go around with Mr. Carroll to look for it?

A. I did.

Q. Mr. Daley go with you?

A. No, on the first floor only.

Mr. Reed: These questions are very leading. 10

The Court: Seems to be no objection made to them.

Mr. Reed: I am objecting now.

The Court: There is no objection made now, Mr. Reed.

Mr. Reed: I object to the question on the ground 20 it is leading.

Mr. Charlton: It has been answered.

Mr. Reed: Move it be stricken out.

The Court: Yes, it may be stricken because it is leading. I will permit it to be stricken.

Q. Who made the search in the attic, if anybody? 30

A. Mr. Carroll and I.

Q. Mr. Daley along with you?

A. No.

Q. What did you do in the attic, you and Mr. Carroll?

A. Why we took everything apart up there and

we looked underneath that oil stove, was the only oil heater in the house.

Q. Only one in the house?

A. Only one in the house. We looked underneath that, opened it inside and looked, we looked through everything up in the attic.

Q. Was the oil heater left in the same place it was before you touched it after you got through with it?

A. Yes.

10 Q. Or was it moved?

A. It was left in the same place; we didn't move it.

Q. You looked under it?

A. Yes.

Q. Nothing under it?

A. Nothing at all.

Cross-examination.

20 By Mr. Bourgeois:

Q. When did you go there to work first?

A. Well, I can't recall the exact date when I first went there to work.

Q. Was it in 1922 or 1923?

A. 1923.

Q. Was it in the spring time or summer?

A. I think it was in the spring time.

Q. Early spring?

30 A. Early.

Q. Was it early as this, February?

A. No, not quite that early.

Q. March, how is that?

A. Somewhere around April.

Q. Did you live right in the house?

A. No, sir.

- Q. Where did you live?  
A. I lived 9714 Monmouth Avenue.  
Q. Monmouth Avenue?  
A. Yes.  
Q. Where is Monmouth Avenue?  
A. About a square above where, the Thoroughfare, where Mr. Daley lived.  
Q. They were then living where in Margate?  
A. 225 Jackson Avenue.  
Q. You would go there in the morning? 10  
A. Yes.  
Q. Then go home and sleep at night?  
A. Yes.  
Q. Did you sometimes go home during the day time?  
A. At lunch time Mrs. Daley allowed me to go home and get my husband's lunch, then go back again.  
Q. You lived with them that way for how long a time? 20  
A. Well, until just before Christmas a year ago.  
Q. That is Christmas, 1923?  
A. Yes.  
Q. You were living with them at the time this jewelry was lost, weren't you?  
A. No.  
Q. Weren't you?  
A. I was living in Margate but not with the Daley's.  
Q. I mean you were working there? 30  
A. Yes.  
Q. And you were also working there after it was found?  
A. Yes.  
Q. Continued to work there until the December following September?

A. Yes.

Q. That was lost or mislaid, whichever it was, in September, as I recall?

A. Yes, I think it was.

Q. Tenth or twelfth, somewhere along there?

A. Yes, sir.

Q. And you continued to work for them and go back and forth to your home until the following December?

10 A. Yes.

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MRS. MARGARET WRAY, SWORN for defendants.

Direct examination.

By Mr. Charlton:

20 Q. Mrs. Wray, where do you live?

A. Portland Avenue, South Portland Avenue.

Q. What number?

A. 16.

Q. Ventnor?

A. Ventnor.

Q. Do you know Mr. and Mrs. Daley?

A. Yes.

Q. How long have you known them?

30 A. Well, I have known Mrs. Daley for eight years, and I didn't know him until they got married or a while before it, when he was coming there.

Q. See Mrs. Daley often?

A. Yes, she was a particular friend of mine.

Q. At the place you live on Portland Avenue is that a dwelling or a business place?

A. No, it is a store; I have a little store there.

- Q. You have a store?  
A. Yes.  
Q. Mrs. Daley deal with you?  
A. Yes.  
Q. Used to come in your store often?  
A. Yes.  
Q. Ever talk to Mrs. Daley about her husband?  
A. Yes, she talked to me about him.  
Q. Once of many times?  
A. Every time she came. 10  
Q. When did you see Mrs. Daley last?  
A. I seen her in June. Last June 1924.  
Q. Was she talking about him then?  
A. Yes, she surely was, she came to me for borrowing money, she said she hadn't a penny in money.

Mr. Bourgeois: I object.

- Q. Did she often borrow money from you? 20

Mr. Bourgeois: I object. Wait, don't answer that.

The Court: How can that be relevant?

Mr. Charlton: If the Court please, I think I am entitled to show what this woman's life was with the man who represents in his bill that he put up money as the result of what he owned, the value and the interest he had in these things, of his own work, they made this agreement whereby a will should be executed. Now I want to show that he never had anything, all he ever had was given him by her. I think I am entitled to show that. 30

The Court: How does the fact that she had no money sustain that viewpoint?

Mr. Charlton: He says he never gave her anything or didn't at that time.

The Court: I will sustain the objection.

Q. What did Mrs. Daley say about her husband?

A. She said that; she says "He is all the time nag-while, not I guess for six months.

10 Q. You can't tell anything about borrowing money.

A. That is all right. And she said "I am all worried to pieces."

Mr. Bourgeois: I object to that; she may have said a thousand and one things about her husband that wouldn't be relevant.

20 The Court: Yes, it must be limited to something relevant in this case.

Q. What did she say about her feeling toward her husband?

30 A. She said that; she says "He is all the time nagging at me to make a will and if it wasn't for some of the neighbors he would have killed me in the month of April. He had a lawyer, Reed, and some other witness,"—I forget their names—"and because I wouldn't sign papers for him he beat me black and blue, but I screamed so loud some of the neighbors heard me and came to my rescue."

Q. That was in the month of April?

A. "And I will show you the marks he left on my body." She took me inside and showed me.

Q. Were there marks on her?

A. Yes, they was.

Q. What did she say about making a will?

A. She said to me "I won't see you no more; I feel I will never see you again, but you are always good to me, treated me kind, but I want to warn you in this way, I will never make a will for Daley because he has treated me so brutally, I don't mind him taking all my money and spending it, if he didn't beat me up so, and he don't let me come near you or any of my old acquaintances at all," and she says "I want you to see after mine after I go, that you will see they are notified; will you promise me that, Mrs. Wray, as I know you wouldn't promise it if you didn't want to do it." I give her my hand, I think I never see her no more. 10

Q. Last time you saw her?

A. Last time I saw her.

Q. She mention her daughters to you?

A. She mentioned her daughters, she wanted her children taken care of that she had deserted, that was her words. 20

Q. That was the last time you saw her?

A. That was the last time I saw her.

Q. She said she never expected to see you again?

A. Yes, she did.

Q. Did she say anything else about Mr. Daley?

A. Well, he was all the time abusing her, wanting her to make a will and get her money, she didn't want him to have a cup of coffee, she said, after she was buried, belonging to her. 30

Q. She said that?

A. Yes, she did.

Q. A short time after Mrs. Daley died did Mr. Daley come to see you?

A. Yes.

Q. Whatever did he say?

A. The day she was buried he wanted me to go to

the funeral but I told him I couldn't, I done all I could for her when she was alive but I didn't want to see her dead, that I had my business there to take care of. So he came the second time, I had made this promise and I wanted to find out whether these girls was notified, and then he came a second time and I asked him how about her will, did she make a will. He said "Oh, yes, she made a will a year ago and she left everything to me by law and I made a will also and I left everything to her" and I said

10 "What did you have?"

Q. What did he say to that?

A. "She told me you had nothing," I said.

Q. What did he say?

A. And he says "Why, oh, I had plenty," he says—and I says "well, listen here, what did she say about those two daughters? Didn't she mention them in the will?" "No, no, she didn't mention them in the will, everything is mine." I says "What

20 you better do for them then, they will come in for their little bit, I should think they ought to, because she wanted them to get something," I said. "No, she didn't," he says. "Yes, she did." He said "I came today to borrow fifty dollars; you give me that fifty dollars, I want that fifty dollars."

Q. He came to borrow fifty dollars?

A. Yes.

Q. What did you say to him?

A. I said he would have to give me good security.

Q. Did you tell him that you knew it wasn't true

30 about the will?

A. I told him I would make him a present if he would show me the will, and I says "You know you beat her up and all because she wouldn't sign a will to you." And he says "Hush, hush, there is money in it if you keep quiet on that, don't mention that," he says.

Q. What did he say?

A. Hush, hush, there is money in it if you keep quiet on that. You are my friend, Mrs. Wray, let me have that fifty dollars and you are my friend."

Q. This was shortly after she was buried?

A. Shortly after she was buried, same month of September, latter part of September.

Q. Now what did he say when you mentioned the daughters, did he say anything about them?

A. He says they were—I says "I know one of 10 her daughters was in with some friends seven years ago when at a visit to her mother." He says "She is in Chicago." Well, I says, "that is all right; there is another daughter living near to Wilmington, for I know she told me where she lived." I said "I had the address some place, but I couldn't find it or I should certainly write her know about her mother's death." So when he said "Well, they will get nothing," he said.

Q. Now what did he say when you said to him 20 you would give something to see the will, did he offer to show it to you?

A. He says, no—I said "Have you the will with you? I will make you a present of the price of a bottle of whiskey if you show me that will." He says "No, I ain't got it here with me," he says "It is in the safe deposit box Ventnor Bank."

Q. Did he say anything about, ever say anything to you about having been robbed?

A. No, but she did; she told me about it; she told 30 me the reason—

Mr. Bourgeois: I object.

The Court: How can that be admissible?

Q. When you say she told you about it the last time you saw her was June, 1924, wasn't it?

A. Yes.

Q. Then anything she spoke about was prior to that?

A. Yes, she told me about the robbery, after she asked me did I hear about the robbery in the papers.

Mr. Bourgeois: I object.

10 The Court: Sustain the objection.

Q. Did you see the death notice in the paper?

A. Yes.

Q. What name did it appear under?

A. Bailey.

Q. Bailey?

A. Yes, I showed it to my daughter, I said "Look, this is a funny thing."

20 Mr. Bourgeois: I object and ask be stricken out.

The Court: Yes.

Cross-examination.

By Mr. Bourgeois:

Q. Mrs. Wray, you say you asked Mr. Daley to show you the will?

A. Yes.

30 Q. And you thought may be he would be carrying it around to show to anybody wanted to look at it?

A. Don't know what he may be liable to do.

Q. Why did you think he would show it to you? Why did you think he would have it to show to you?

A. He was very anxious to get money and thought it would strengthen him for money.

Q. Did you call up his sister, immediately after Mrs. Daley's death, for Mr. Daley to come around to see you?

A. No, never knew his sister, never saw his sister until today.

Q. Did you call Mr. Daley up and ask him to come around to see you?

A. I 'phoned to his place several times.

Q. After her death?

A. After her death.

Q. Asking him to come around to see you?

A. Not exactly; I said how was everything? He said "I will be up there, and let you know."

Q. Didn't you ask him to come around to see you? Didn't you tell him you had something of importance to tell him?

A. Not exactly nothing of importance.

Q. Didn't you tell him there was something of importance you wanted to tell him?

A. No, not me.

Q. When he came around there didn't you tell him to look out for these folks, these girls are going to come in here and try to get things?

A. Not for to look out for them; I said they will come in for their share.

Q. Didn't you tell him "These girls are going to come down and claim this property?"

A. No, because I hadn't seen the girls.

Q. Didn't you tell him they were going to come?

A. No.

Q. Didn't Mrs. Daley come to you, I think before she was married, may be to Mr. Daley, and complain to you because you had cashed a check for one of these daughters?

A. No.

10

20

30

Q. And didn't you tell her, didn't she tell you that she never intended them to get anything; she didn't want anything to do with them?

A. No.

Q. Never came to you at all?

A. No.

Q. Did you tell Mr. Daley that she did?

A. No.

Q. Before Mr. Daley was married to Mrs. Daley  
10 didn't you tell him in your store that one of these girls came to you and wanted you to cash a check for fifty dollars and you did cash one for thirty-five dollars?

A. I never spoke to the man until he was married to her.

Q. I am asking you if you didn't tell him that?

A. No.

Q. And didn't you tell him that Mrs. Daley—I  
don't mean that you told him before he was married  
20 but this happened before he was married—that Mrs. Daley had come and found fault with you because you had cashed this check and said she never wanted her daughters to have anything to do with them?

A. No.

Q. Never said anything like that?

A. No, for I never cashed no checks for the girl.

Q. Mrs. Wray, didn't you ask Mr. Daley to get  
for you a ton of coal?

30 A. No.

Q. Did not?

A. No, sir.

Q. And was it not after you had asked him to get  
you a ton of coal that your feelings changed?

A. A ton of coal? What about a ton of coal?  
There was one left in one of Mrs. Daley's houses  
which the family that lived there, name of Michael

of Germantown, ordered me to get the remaining part and left that to that effect with the real estate man, Mr. Kelly that rented to them.

Q. And you wanted Mr. Daley to get that?

A. I says "There is coal down there that Mrs. Michael left for me." He says You can have it and welcome, go any time and get it."

Q. Who told you that?

A. Mr. Daley told me.

Q. Afterwards?

A. Yes, way afterwards.

10

Q. You went and got it?

A. We went and got it when we were authorized to get it.

Q. From Mr. Daley?

A. No, by Mr. Daley.

Q. Who authorized you to get it?

A. Lawyer Charlton.

Q. Charlton authorized you to get it?

A. Yes.

Q. Without pay?

20

A. Paying.

Q. Without paying for it?

A. It didn't belong only to Mrs. Michael, surely, no.

Q. You didn't pay for it?

A. No, I didn't pay for it.

Q. Up to that time your feeling was different from what it has been since, wasn't it?

A. No, my feeling was numb.

Q. When was it you got the coal?

30

A. Who was it that got it?

Q. When was it you got it?

A. It was after the sale, after the sale was supposed to be.

Q. After her death?

A. Oh, yes, sure, sure.

MRS. NELLIE LOCKMAN, sworn for defendants.

Direct examination.

By Mr. Charlton:

Q. Mrs. Lockman, where do you live?

A. 1308 Baltic Avenue.

Q. Atlantic City?

10 A. Yes, sir.

Q. How long have you lived in Atlantic City?

A. Sixteen years.

Q. Did you know Mrs. Robert Daley, formerly Mrs. Charles Barstow?

A. Yes, sir.

Q. In what capacity did you know her?

A. Well, I lived with Mrs. Barstow when she lived in the Santa Rita Apartment; I worked for her five years.

20 Q. You lived with her five years before she married Daley?

A. Yes, sir.

Q. Were you living with her when she married him?

A. Yes, sir.

Q. Do you remember when she first became acquainted with him?

A. Yes, sir.

Q. Did he used to come to see her?

30 A. Yes, sir.

Q. Where was she living then?

A. 106 Portland Avenue.

Q. Ventnor?

A. Yes, sir.

Q. Where was he living?

A. He was living in the St. James Hotel.

Q. In Atlantic City?

A. Yes, sir.

Q. Did he used to come down and see her?

A. Yes, sir.

Q. How did he dress?

Mr. Bourgeois: I object as irrelevant and immaterial.

The Court: I will permit that.

10

Q. How did he dress?

A. Well, he called down there I guess, I judge about very near six months and he wore the same suit the whole time he was calling to see her.

Q. Did he appear to be flush with money?

A. No, sir.

Mr. Bourgeois: I object to that as irrelevant and immaterial.

20

The Court: Yes, sustain the objection.

Mr. Charlton: If the Court please, I want to contradict the allegation of the bill this was a man of property.

The Court: Yes, but that is entirely too far to ask a maid if a man appeared to be flush with money. That is too much of a conclusion.

30

Q. Did you ever see Mrs. Barstow give him money?

Mr. Bourgeois: I object to that as irrelevant and immaterial.

The Court: I will permit it.

A. Yes, sir; she has given me checks ten or fifteen to go to the Ventnor Bank to get money to give to him to come up town.

Q. And the money was passed to him?

A. Yes, sir.

Q. To come up town?

A. Yes, sir.

10 Q. Remember when Mrs. Barstow and Mr. Daley were married?

A. No, I don't know the exact date.

Q. But you remember the occasion of their marriage?

A. Yes.

Q. Where did they go to live right after they were married?

A. In the Hotel, St. James Place.

20 Q. Remember whether Mrs. Barstow or Mrs. Daley put up any money to get in there?

A. Yes, sir.

Q. Did you know Miss Carroll?

A. Yes, I know of Mrs. Carroll; I have heard Mrs. Barstow speak of her.

Q. Did you go to work for them down to the St. James Hotel?

A. Yes, sir, they had been there about a week.

Q. When you went down to work?

A. Yes, sir.

30 Q. How long did you work for them at the St. James?

A. I worked there from May up until the last of September.

Q. Where did they move after they left St. James Place?

A. Back to 106 Portland Avenue.

Q. Did you work down there for them?

A. Yes, I went down there and worked for about a week.

Q. Worked by the week?

A. Yes.

Q. When is the last time you saw Mrs. Daley?

A. The last time I saw Mrs. Daley for to talk to her was about three years ago.

Q. About what?

A. About three years ago.

Q. Three years ago?

10

A. Yes.

Q. They were married in June, 1922?

A. Yes.

Q. That is not three years yet?

A. Three years ago.

Q. Do you mean that when you say that?

A. No, I don't mean that when I say that.

Q. Where were they living when you talked to her last?

A. They were living on St. James Place.

20

Q. Last time you talked to Mrs. Daley?

A. Last time I talked to Mrs. Daley.

Q. Didn't you talk to her when she lived on Portland Avenue after she left St. James Place?

A. Yes.

Q. Then they weren't living on St. James Place?

Mr. Bourgeois: You cross-examining your witness?

30

A. You see I couldn't get the dates just right because I was backwards and forwards with the lady.

Q. You remember when they moved to Margate?

A. No, I wasn't with them when they was to Margate.

Q. Where was she when you talked to her last?

- A. On Portland Avenue, 106.  
Q. Had she then moved from St. James Place?  
A. Yes, sir; gone back.  
Q. Gone back to Ventnor?  
A. Yes, sir.  
Q. Did you ever see Mr. and Mrs. Daley drinking?  
A. Yes, sir.  
Q. Very often?  
10 A. Sure.

Mr. Bourgeois: That is objected to as irrelevant and immaterial.

The Court: I will permit it.

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Recess taken to 1.30 P. M.

20

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AFTERNOON SESSION.

Trial of the cause resumed at 1.30 P. M.

MRS. NELLIE LOCKMAN, resumed

Direct examination, resumed.

30

By Mr. Charlton:

Q. Mrs. Lockman, do you remember hearing Mr. and Mrs. Daley talk after they were married, right after they were married?

A. Yes, sir.

Q. Did you hear any conversation about papers?

A. Yes, sir.

Q. Where did that take place?

A. That taken place in St. James Place.

Q. When?

A. That was in 1902.

Q. 1922?

A. Yes, sir.

Q. What time of the year?

A. It was in the summer directly after they were 10  
married.

Q. Right after they were married?

A. Yes, directly after they were married; I don't  
remember just the date.

Q. What did he say to her and what did she say  
to him?

A. What did he say to her and what did she say  
to him? He asked her about making a will and she  
said "Bob, don't bother me about making a will;  
I will never make no will way you mistreat me; how 20  
you figure I make a will to you?"

Q. What did he say to that?

A. He says "Well, I think you should make a  
will." he says, "Way you carry on, you should make  
a will." That was in St. James Place.

Q. What did she reply to that?

A. She said: "It is all right; I will never make  
any."

Q. Did you ever hear him ask her anything about  
where she kept her papers? 30

A. Yes, sir.

Q. Tell us about that?

A. He asked her—that was before he was married  
to her.

Q. Before he was married?

A. Yes, sir; he tantalized her, he worried her ter-  
ribly about her important papers and she told him,

she says "Bob, I will never tell you where I keep my important papers at."

Q. That was before they were married?

A. Yes, sir; that was before; that was on Portland Avenue, 106.

Q. Was Mrs. Daley a woman of some means?

A. Yes, sir.

Q. Did you ever see Mr. Daley beat his wife?

A. Yes, sir.

10 Q. More than once?

A. No, no more than once.

Q. Just once?

A. Just once; I heard his threats.

Q. Where did that take place when you saw it?

A. St. James Place, about two weeks after he was married.

Q. Do you know what caused the beating?

A. Yes, sir.

Q. What?

20 A. It was a lady came there one day and was asking after Mr. Daley and she says "Is Mr. Daley in?" I says "No, Mr. Daley isn't in, but Mrs. Daley is in," so she——

Mr. Bourgeois: I object.

The Court: Yes.

30 Q. You can't tell that; what did he do when he struck her?

A. He came in, she says to him, "Was some one here asking for you." She said "I was supposed to be a housekeeper." He says "Oh, hell, don't go chastising me about those damn women around here, about you housekeeper," so he went on, and said some more words about it and he strikes her

and knocks her down.

Q. What did he hit her with?

A. Hit her with the fist.

Q. Where did he strike her?

A. He struck her right here.

Q. Between her eyes?

A. Yes.

Q. Were there any marks left here?

A. She had a place on her eye black down to here.

Q. Did you help her, treat her?

10

A. Yes, sir; I did.

Q. You saw him knock her down?

A. I saw him knock her down; I stopped it.

Q. You stopped it?

A. Yes, sir; he knows I stopped it. It was in the night too.

Q. Did he ever strike her other than that to your knowledge?

A. No, not to my knowledge; I didn't see him strike her.

20

Q. Were you ever in the house when you heard the sounds of a blow?

A. Yes, sir.

Q. What house was this?

Mr. Bourgeois: If the Court please, I object to that; I suspect that is not relevant.

Mr. Charlton: I haven't asked anything yet. It is contradicting him that he never beat her.

30

The Court: I will permit it so far.

Q. Where was this?

A. This was in Portland Avenue, that was before, before he married her.

Q. Before he married her?

A. Yes, sir.

Q. Did you ever hear sounds of blows after he married her?

A. Yes, sir.

Q. Where?

A. In the St. James Place Hotel.

Q. Where were those sounds coming from in respect to where you were?

10 A. I was in the kitchen and their bed room was right between the kitchen and the lobby.

Q. Right next to the kitchen?

A. Yes, sir, right next to the kitchen.

Q. Who were in the room where the sounds of the blows came from?

A. No one but Mr. Bob and Mrs. Daley.

Q. Just Mr. and Mrs. Daley?

A. Yes, sir; that is all.

Q. What sort of sounds were they?

20 A. He struck her and knock her down; she had bruises on her body.

Mr. Bourgeois: I object to that and ask it be stricken out.

The Court: Yes, that is not responsive.

Q. What sort of sounds were they? What did they sound like?

30 A. Just like strike a person and fall.

Q. Did you hear the body fall?

A. Yes, and heard her telling him "Bob, you stop beating me."

Q. At the time these blows sounded?

A. Yes, sir.

Q. Did that happen once or more than once?

A. Oh, that happened more than once.

Q. Often?

A. Yes, sir.

Q. What did you do after you heard those blows, you sit where you were?

A. I would go there and say to him "Mr. Bob, why don't you stop?" He would pretend "This damned woman makes me mad; I am under the influence of liquor and she oughtn't to bother me."

Q. You would go into the room where they were?

A. Yes, sir, he knew it.

10

Q. What was Mrs. Daley's condition when you would go in?

A. She would be crying.

Q. She have any marks on her?

A. Yes, sir, bruises.

Q. Where did you see marks on her?

A. On her face and on the body.

Q. Did you ever see her on the floor when you went in?

A. Yes, sir.

20

Q. Right after these blows sounded?

A. Yes, sir.

Q. Did you ever have to help her up?

A. Oh, yes.

Q. Was there ever any time that she was compelled to go to bed as the result of these beatings?

A. Yes, sir.

Mr. Bourgeois: I object and ask that be stricken out and I am going to suggest to your Honor that Mr. Charlton cease these leading question. 30

The Court: Yes, sustain the objection. Overrule the question.

Q. Was Mrs. Daley ever confined to her bed for any reason while you were with her?

A. Yes, sir.

Q. Where was she living at that time?

A. St. James Place, James Hotel.

Q. What was the cause of her being confined to her bed?

A. Her eyes was all blacked, she couldn't go out on the street on account of that.

Q. Who blacked her eyes?

A. Mr. Bob.

10

Mr. Bourgeois: I object unless appears she knows.

The Court: Yes.

Q. Do you know who blacked her eyes?

A. Yes, sir, I heard him when he struck her.

Q. You heard him when he struck her?

A. Yes, sir.

20

Q. How long was she in bed?

A. I guess she was in bed eight or ten weeks.

Q. Did you attend her?

A. Yes, sir.

Q. Did you ever hear Mrs. Daley tell her husband anything else about a will?

A. She always told him she would never make a will, and him, "He would keep on chastising me about a will, the way you treat me, I will never make no will."

30

Q. Did she ever say anything about if she did make a will what she would do?

A. Well, she says if she ever make a will, she says

Mr. Bourgeois: I object. The question is leading.

The Court: Yes, leading.

A. She says "If I ever make a will I will never leave you nothing."

Q. Hear her say that too?

A. Yes, sir.

Q. Did you ever see Mr. Daley offer his wife whiskey?

A. Why sure I have.

Q. Many times?

10

A. Many a time and she would tell him "Bob, don't insist on my drinking; I will never get off this drink; why do you insist on me drinking whiskey all the time?"

Q. What did he say?

A. He would say, "Oh, Hell, come on, go to it."

Q. And would she take it then?

A. He would make her take it.

Q. Did you hear the conversation between them before these beatings that he gave her?

20

A. Conversation?

Q. Before he beat her up did you hear the conversation between them?

A. Oh, no, not so very much; he never want me around there so very much.

Q. Did Mr. Daley ever bring a man down to 106 Portland Avenue?

A. Yes, sir.

Q. Who admitted them to the door?

A. I opened the door.

Q. Did you hear any of the conversation between them and Mrs. Daley?

30

A. No, I didn't hear it; they went right in the room; I never bothered; I went on to the kitchen.

Q. Did you see that man leave?

A. Yes, sir.

Q. Did you have a talk with Mrs. Daley about it?

A. Oh, Mrs. Daley—he went on out with the man, standing out there—Mrs. Daley came back “What you think, that guy bringing somebody down there for me to make a will, sign some papers; he must have thinks I am crazy.”

Mr. Bourgeois: Mr. Daley there at that time?

10 A. Mr. Daley was outside.

Mr. Reed: Who is this man supposed to be, Mr. Charlton?

Mr. Bourgeois: Mr. Daley there at the time she said that to you?

20 A. Mr. Daley outside talking to the man out on the porch.

Mr. Bourgeois: I ask that be stricken out.

The Court: Yes.

Mr. Reed: Who was the man?

Mr. Charlton: A lawyer, I haven't been able to find out who.

30 Q. Is this the gentleman here?

A. No.

Q. Is the man in the room?

A. Sir?

Q. Is he in the room, the man?

A. No, I didn't see the man was down there; he is a slim fellow.

Q. Have you ever seen Mrs. Daley's jewelry?

A. Yes, sir.

Q. Did she have much jewelry?

A. Yes, sir; she had quite a few pieces of jewelry.

Q. Quite a few pieces?

A. Yes, sir.

Q. Do you know what became of them?

A. No, sir; I do not.

Q. Did you ever see any photographs hanging in the Daley home?

10

A. I saw her two little girls, I put on the wall when we first moved to 106 Portland Avenue, I moved her down there.

Q. How did you know they were her little girls?

A. Because she told me so.

Mr. Bourgeois: I ask that be stricken out.

The Court: Yes.

Q. Was Daley there?

20

A. No, he wasn't there then.

Q. Was this before they were married?

A. Yes, before she met Mr. Bob.

Mr. Charlton: Now I think they are pertinent.

The Court: No; sustain the objection.

Q. Where did these photographs hang?

A. They hung by the dresser then.

30

Q. In 106 Portland?

A. Yes, sir.

Q. Did you ever hear Mrs. Daley talk with Mr. Daley about her daughters?

A. No, I never heard her talk to Mr. Bob about the daughters.

Q. Among Mrs. Daley's jewels were any necklaces?

A. She had a solid set of pearls and then a pair of artificial pearls.

Q. Real pearls?

A. Real pearls.

Cross-examination.

10 By Mr. Bourgeois:

Q. I suppose you are a pretty good judge of real pearls, aren't you?

A. She said they are real pearls; pearls is kind of grayish looking, isn't it? Isn't a real pearl kind of grayish?

Q. That is your judgment that they were real pearls?

20 A. She said they were real pearls; I never taken them and had them tested to see what they were.

Q. Did Mr. Daley drink?

A. Mr. Daley drink?

Q. Yes.

A. I should say he did drink.

Q. Swear too?

A. Swear? Why sure he swore; he cussed me out many a time.

Q. Did Mrs. Daley swear sometimes?

A. Yes, she swore too.

30 Q. Did she drink?

A. Yes, she drank too. She didn't drink to no extreme until she met Mr. Daley.

Q. Did she chew gum?

A. I guess she did when she felt like it.

MRS. GHERTINE P. MARTIN, sworn for defendants.

Direct examination.

By Mr. Charlton:

Q. Mrs. Martin, where do you live?

A. I live in Morrisville, Pennsylvania.

Q. Who was your mother? 10

A. My mother was Mrs. Robert Daley.

Q. Do you have any sisters?

A. I have one sister.

Q. What is her name?

A. Her name is Madalene Ripperger Frazier.

Q. Is she a sister of the same mother?

A. She is a sister of the same mother.

Q. Mrs. Martin, when did you last see your mother alive?

A. The last time I seen mother alive was before 20  
her marriage to Mr. Daley, summer before her marriage to Mr. Daley.

Q. You have never seen her since?

A. I have never seen her since but I have talked to her over the telephone in Mr. Daley's home.

Q. When was the first time you ever saw any of her effects or property?

A. I saw her effects and property, I won't say property but I will say her effects, in the apartment when she was Mrs. Barstow. 30

Q. The last time?

A. The last time I seen them? That was in the summer that I seen her before her marriage to Mr. Daley.

Q. Before the marriage?

A. Yes, sir.

Q. You have seen them after her death, haven't you, since you have been appointed administratrix?

A. Yes, I have seen her property.

Q. But not until you were appointed?

A. Not until I was appointed administratrix.

Q. You had no cause to know of her belongings?

A. No, sir, nothing belonging to my mother only the effects in the home of Mr. Daley, when I went down there after my mother's burial.

10 Q. And you made no search of those effects?

A. I made no search of nothing.

Q. Has any of those come into your possession?

A. I have nothing belonging to my mother.

Q. Nothing all we have?

A. I have nothing belonging to my mother.

Q. Mrs. Martin, did you have occasion to go to the Ventnor City National Bank yesterday?

A. I did, sir.

20 Q. Did you get from that bank any cancelled checks?

A. I did, sir.

Q. Who gave them to you?

A. Mr. Westcott.

Q. Solicitor of that bank?

A. The solicitor of the bank gave me the checks.

Q. Are these the checks and papers given to you by Mr. Westcott yesterday (showing witness papers marked Exhibit D1 and 2 for identification.)

A. Yes, those are the checks, Mr. Charlton.

30 Q. What did you do with them, after you got them?

A. I brought them to your office.

Q. Intact?

A. Intact, put them in my brief case and brought them to your office.

Q. Give them to me?

A. I gave them to you.

(Checks marked Exhibits D1 and 2.)

No cross-examination.

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MRS. MADALENE R. FRAZIER, SWORN for defendants.

Direct examination.

By Mr. Charlton:

10

Q. Mrs. Frazier, where do you live?

A. I live in Cheseapeake Beach, Maryland.

Q. Do you know Mrs. Ghertine Martin?

A. I do.

Q. Is she related to you?

A. She is my sister.

Q. Who was your mother?

A. Mrs. Ella Barstow.

Q. Was she afterwards married to anybody?

20

A. She was, to Mr. Daley.

Q. Married to Mr. Daley?

A. Yes.

Q. When did you talk last with your mother?

A. I think it was about the first week in August I was here in Atlantic City.

Q. Did you talk to your mother?

A. No, I didn't talk to her but I called up.

Q. When was the last time you spoke to your mother?

30

A. When I spoke to her personally?

Q. Yes.

A. Right after my baby was born and my baby was born in October a year previous to that.

Q. What year?

A. In 1919.

Q. That is the last time you saw her?

A. That is the last time I talked to her personally to have a conversation with her.

Q. Have you ever seen her effects or gone through them?

A. No, I have not.

Q. Since that time?

A. No, I have not.

Q. Did you ever talk to Mr. Daley?

10 A. I talked to Mr. Daley one time over the telephone.

Q. When was that?

A. That was summer a year ago, about the first week in August.

Q. 1923?

A. Yes.

Q. Who made the call, did you call him or he call you?

A. I made the call myself.

20 Q. Where did you call?

A. I called at their home in Margate City.

Q. On the telephone?

A. On the telephone.

Q. Who answered man or woman?

A. A man answered the telephone.

Q. Did he say who he was?

A. He said that he was Mr. Daley.

Q. What did you say to him?

30 A. I said "Could I talk to my mother?" He said "Why, who are you?" I said "I am her daughter." He says "No, you can't talk to her," and I heard my mother at the telephone and she said "Let me talk to her," and he said "No, you can't talk to her, get away from the 'phone." I said "Mr. Daley, I am coming out there." He says "If you do, I will kick you off the porch." That is what he said to me.

Q. That was the first week in August, 1923?

A. That was the first week in August.

Q. 1923?

A. Yes, sir.

Cross-examination.

By Mr. Bourgeois:

Q. You didn't know Mr. Daley?

A. No, I didn't know Mr. Daley, absolutely. 10

Q. Never had seen him?

A. I never had seen him.

Q. That is all.

By the Court:

Q. That is the first time you had attempted to talk to your mother since 1919?

A. That is the first time; we were never allowed to talk to her.

Q. Who prevented you from talking to her? 20

A. Mr. Daley.

Q. Did he prevent you from talking to your mother before he was married to her?

A. Before? Before they were married I talked to my mother but after my mother married Mr. Daley he wouldn't allow my sister and I to talk to her.

Q. You have just testified the last time you saw her to talk to was 1919; the testimony here is that they were not married until 1922; in that three years didn't you talk to her or attempt to? 30

A. Only the time I tried to call her on the telephone.

Q. What time was that?

A. That was the first week in August.

Q. What year?

A. 1923.

Q. Then from 1919 to 1923 you never attempted to talk to your mother at all?

A. Well, no; we never really knew where she lived or where she was at.

Q. Didn't know while she was Mrs. Barstow, you didn't know where she was?

A. Yes, I knew when she was Mrs. Barstow where she was and I found out through information in Atlantic City where she was living at the time that I called her on the telephone.

10 Q. I call your attention to the fact that your mother was not married to Mr. Daley until 1922; I am asking you from 1919 to 1922 whether you made any attempt to see your mother?

A. That I just can't recall.

By Mr. Charlton:

Q. Where were you living, Mrs. Frazier, during those years?

20 A. I was living in Philadelphia.

Q. Philadelphia?

A. Yes.

Q. When did you go to Chicago?

A. Last winter.

Q. Your father and mother divorced?

A. Yes.

Q. Father still living?

30 A. My father still living ? That is who I am living with now is my father and former stepmother.

MRS. SOPHIE BAINES, recalled.

Direct examination.

By Mr. Charlton:

Q. Mrs. Baines, were you ever in the home of the Daleys at any time when Mr. and Mrs. Daley were discussing Mrs. Daley's daughters? 10

A. Not together they weren't; Mrs. Daley told me that alone.

Q. She told you about it?

A. Yes.

Q. You weren't there?

A. She told me herself alone.

Q. That is all.

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(Newspapers offered in evidence.) 20

Mr. Bourgeois: What is the purpose?

Mr. Charlton: The purpose is to show after Mrs. Daley's death there was inserted a newspaper advertisement another name and that not only ran one day, but ran the three full days the notice appeared in the paper, obviously indicating an intent to deceive relatives. 30

The Court: Can you connect that with Mr. Daley?

Mr. Charlton: He inserted it.

Mr. Bourgeois: Undertaker usually does that sort of thing.

The Court: Can you prove he did? If so I will admit it. If you can prove that I will admit the question; no use encumbering the record unless you are able to connect Mr. Daley with that.

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ROBERT DALEY, recalled.

10 Direct examination.

By Mr. Charlton:

Q. Mr. Daley, who put the advertisement in the paper?

A. Mr. Gormley said he would attend to it.

Q. Did you see it in there?

20 A. I didn't notice the paper but I know Mrs. Wright went around, I know that, to put the notice in, and tried to get Mrs. Daley a little write-up too.

Q. Did you see the notice in the paper?

A. I saw the notice in the paper but I noticed the paper was spelled wrong.

Q. Did you do anything?

A. I called up and tried to put it in again; there was a lot of others.

Q. But you didn't put it in again?

30 A. I asked them and Mrs. Wright went to the Press over on Mediterranean Avenue and tried to get a decent write-up, didn't seem to want to do it.

Q. Talking now about the error in the name?

A. I don't know much about that. I wasn't worrying about that; I didn't know that until afterwards.

Q. That didn't concern you?

A. Mr. Gormley told me he would attend to that; that was in his agreement.

Q. And you noticed the error in the paper?

A. I don't think I noticed it until after the funeral when I was told about it.

Mr. Bourgeois: Who was Gormley?

Mr. Reed: The undertaker.

A. The undertaker who attended to that. I didn't.

Mr. Charlton: If the Court please, I don't know whether Mr. Reed is testifying. 10

The Court: I don't know whether the fact that you haven't the witness on the stand has anything to do with it.

Mr. Reed: I don't want to testify.

DEFENDANTS REST.

20

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COMPLAINANT'S REBUTTAL.

ROBERT DALEY, recalled.

Direct examination.

By Mr. Bourgeois:

Q. Mr. Daley, I want to find out more about this box. 30

Mr. Bourgeois: I didn't know, if your Honor please, when I examined him first, that this was the box.

Q. I show you what appears to be a stained oak box and ask you if that is the box in which the wills and the insurance policy of which you have spoken were last seen by you?

Mr. Charlton: If the Court please, I think he has already testified to that.

Mr. Bourgeois: He testified about a box, didn't  
10 say what box it was.

The Court: I will permit it under the circumstances.

A. That is the box.

Q. To whom did that box belong, whose was it?

A. That was mine.

Q. Where did you have it? Where did it come from?

20 A. We brought that from the hotel.

Q. It was your property?

A. Yes.

Q. Where was it kept in your home down on Portland Avenue?

A. I usually kept it in my chifforobe, sometimes I would put it up on top.

Q. What papers were there in there excepting those you have mentioned, this insurance policy and the two wills?

30 A. Well, I had some little papers, some contracts I had drawn up, had drawn up for the hotel, that was in there; they were nothing to do with—

Q. Were any of Mrs. Barstow's papers in there, I mean Mrs. Daley's papers in there other than the will?

A. No, she had no papers.

Q. Where did she keep her papers?

A. Her papers was kept in a drawer of sort of a chiffonier she had a big envelope she kept her papers, they are still there.

Q. Now it has been testified here by the last witness, Mrs. Frazier, that in August of 1923 she had a telephone conversation with you; was that true?

A. I never remember ever talking, never saw them, never heard of them. I only heard of them once during my whole life with Mrs. Daley.

Q. Did anybody have a telephone conversation with you asking to see your wife and you refused to let your wife talk with them? (10

A. Never, never would I do a thing.

Q. Now when was the first time you saw either of these two daughters?

A. The first time I saw Mrs. Frazier was when she was on the stand here just now and the other, Mrs. Martin came, I buried Mrs. Daley on Saturday and I think it was the following Monday or Tuesday, I think it was Monday, that she came down to the house; that is the first I ever saw her. 20

Q. Did you ever refuse to let your wife communicate with her daughters?

A. Absolutely no.

Q. Did she ever express any desire to communicate?

A. I don't really believe she knew where they lived; she never spoke to me about them and I never questioned her about them, didn't interest me.

Q. Never spoke about them? 30

A. Never spoke about them to me.

Q. Now this Lockman woman who was just on the stand, she worked at the hotel, I believe?

A. She worked a short while for us, yes, sir.

Q. She says she worked down on Newport Avenue?

A. Portland.

Q. Portland Avenue.

A. Yes, she worked a little while there, a few days.

Q. For a week?

A. I don't remember, may be a couple of days at a time.

Q. She says a week. When was it you went down there?

A. We went down there after I had closed the hotel up after Labor Day, I just don't know.

Q. 1922?

A. 1922, yes, sir.

Q. Why didn't she keep on working for you?

A. Well, she kind of slowed up and I didn't need her and she kind of, Mrs. Daley had kind of got a little cross, it seems every time Nellie would get in a little distress she would put her ring in Mrs. Daley gave her and she was always wanting Mrs. Daley to take it out of hock and for personal reasons I dismissed her.

Mr. Charlton: I think that ought to be stricken out.

The Court: I think I will let it remain.

Q. You discharged her?

A. I discharged her.

Q. Did you ever see her after that time?

A. Never saw her until today.

Q. She says you struck Mrs. Daley in the forehead and blackened her eye down way on the cheek bone and that she lay in bed there for three weeks after that time, Mrs. Daley did; is that true?

A. Positively, no.

Q. Did you ever strike your wife?

A. I never did.

Q. She says you both drank and you insisted on Mrs. Daley drinking and threatened her that she must drink; is that true?

A. No, positively, no.

Q. Was it necessary to compel Mrs. Daley to drink?

A. Many a quart I poured out she would get in on me.

(Question repeated.)

10

A. Absolutely no.

Q. Did she drink before or at the time you met her?

A. She drank a long time before from what I understand.

Q. Then after you met her did her habit in that regard change, did she drink any more, less, or the same thing?

A. I couldn't say. Why she drank so much I couldn't absolutely do nothing with her and I tried to prevent it but I couldn't do anything with her. 20

Q. Now Mrs. Wray testified that she did not send for you after your wife's death; will you tell me whether or not she did?

A. My sister stayed with me—

Mr. Charlton: Won't you answer the question.

Q. Were you told that she wanted you to come there?

A. Told—

30

Mr. Charlton: I object to that.

(Question repeated.)

A. I didn't get the question.

The Court: I will permit that.

A. Yes.

Q. Did you go?

A. I went.

Q. What did she say to you?

A. She told me that the daughters was coming in on me and I had to be very careful, as Mrs. Daley had always spoken very ill of the daughters and  
10 wouldn't have nothing to do with them. I says I don't know nothing about it, we have a will and that is all there is to it, and she asked me for the ton of coal Mrs. Nichol had told her, I says "Sure, Mrs. Wray, you can have it" and I was to get a truck for her, she said, and I was busy at the time.

Q. And you didn't do it?

A. Didn't get it and the coal is gone, been missing since the sale.

Q. She says you came there and told her that she  
20 was your friend, is that a fact?

A. Positively no; I never bothered with Mrs. Wray.

Q. Now Mr. Carroll said that you wanted your wife to have a glass of Scotch when he was there; do you remember that incident?

A. I don't remember. We took a drink many a time together.

Q. You and your wife?

A. She didn't need any coaxing any more than I  
30 do.

Q. If Mr. Carroll was there would you and your wife take a drink without offering him any?

A. I don't remember when Mr. Carroll was there because we were busy seeking this jewelry.

Q. I am asking you whether you two would have done the drinking or whether you would have asked Mr. Carroll?

A. I don't think I would; I think I did ask him if we had any in the house.

Q. I was just wondering whether it was Mr. Carroll who got the glass of Scotch or whether your wife, do you know?

A. I don't just remember.

Q. Now, Mr. Daley, Mr. Carroll says that he told you that first day that you had him down there about that what you thought was a robbery that he believed that you did it—did he tell you that?

10

A. I should say he didn't.

Q. Then he says, when you went out to get Mrs. Baines, that you told your wife not to talk with him about the robbery while you were gone; did you tell your wife any such thing as that?

A. I should say not; we tried to get it.

Q. Who discovered where those jewels were or these jewels under the stove, under the oil stove?

A. Mrs. Daley discovered them and I went up to Mrs. Baines and told her, I ran right up and got her, and they both started to cry, the two of them. I told her that Mrs. Daley went upstairs and there they were under the—but I wasn't upstairs when she discovered them.

20

Mr. Charlton: Under what?

A. Under the stove, the oil stove; that is where she said she found them.

Q. Now, Mr. Daley, had anybody that you know of been upstairs where the oil stove was between the time that Mrs. Baines and Mr. Carroll had left, between the time they came down from there and the time that your wife told you that she had found the jewels except maybe your wife?

30

A. That is all; was nobody ever in the house from that time.

Q. The contention is here that you were abusive to your wife, that you cursed her, struck her and so on and so on; what was your family life?

A. My family life was from June eighth until September fourth, there wasn't a period that I was ever over six hours away; I was never away at night, months at a time I never left the house; there is times last summer six or eight weeks, six weeks at a stretch I never took my car out of the garage, never left.

10 Q. What was your family life with your wife? Did you quarrel or get along?

A. We got along fine, very good.

Q. Did you go out together?

A. We took in theatres and we had a nice little home, had chickens and everything to make a home place, a big garden last summer and we just worked together.

20 Q. On the cross-examination there was some question about a boat, who used the boat, who used it?

A. Well, I went in the boat business. Mrs. Daley didn't like me to be up town so I thought, on account of the beach front we had, and the pier, I felt that we could do pretty good with boats, so we bought some row boats and hired them out for fishing; I think I had fifteen boats and I bought a little motor boat.

Q. She ever go out with you?

A. Many times.

30 Q. Fishing?

A. Very often, we used to go fishing very often.

Q. Did you have any neighbors down there?

A. I have some neighbors have been fishing right with us.

Q. Who are your neighbors that would be close to you?

A. Well, Mrs. Franks lived right next to us,

rented the cottage next to us, she saw us go every day, there wasn't a day, and Mrs. Zeller.

Q. Mrs. who?

A. Mrs. Zeller, she lived the second house; she was quite a fisherwoman and we used to go fishing together, saw us every day; there was no question because we lived out on the front, out on the sidewalk, on the porch and out on the pier.

Cross-examination.

10

By Mr. Charlton:

Q. Let an ideal life, ideally happy?

A. I was very happy with her.

Q. You never beat her?

A. I never beat her.

Q. How long was it between the time Mr. Carroll went up the attic stairs and the jewels were found?

A. I think it was two or three days. I don't know; 20  
I called Mr. Carroll up immediately and told him.

Q. But you have just sworn here that in that time 38  
nobody went up those stairs?

A. That I know of; there was nobody in the house to go, Mrs. Daley and I, nobody came in the house.

Q. But it was possible for somebody to have gone up there some time during that time?

A. I don't think so because I didn't leave the house.

Q. You were in the whole time?

A. I got in the house, I stayed in the house. 30

Q. In sight of the stairs?

A. Inside, around the porch; I didn't go up town.

Q. Where you could see the stairs?

A. Yes.

Q. It was impossible for Mrs. Daley to have gone up those stairs?

A. I couldn't say about Mrs. Daley; I don't think Mrs. Daley went up.

Q. Didn't you find the jewels?

A. No, sir; Mrs. Daley found the jewels.

Q. Did you go to Mrs. Wray to borrow fifty dollars?

A. Never borrowed ten cents off of her; wouldn't think of it.

10 Q. You had money, I suppose, when your wife died?

A. I had some money, yes.

Q. You didn't go to Mrs. Wray to borrow fifty dollars?

A. I should say not.

Q. Didn't have any conversation with her about the question of the security?

A. What security?

Q. That you were to give her for the fifty?

20 A. Absolutely none; I wouldn't think of borrowing off of her.

Q. Did she ask you to let her see the will?

A. Never mentioned no will to me.

Q. Never mentioned it?

A. I told her everything was all set, I wouldn't do my business with Mrs. Wray.

Q. That was at the end of September?

A. It was after she telephoned, my sister answered the telephone.

Q. It was the end of September?

30 A. No, it was right after Mrs. Daley died.

Q. After you had been there in the box to find a will?

A. We were still searching for it.

Q. And you had started to search?

A. Oh, yes; we started that after we found out they weren't in the box.

Q. Did you tell Mrs. Wray the will was up in the Ventnor City National safe deposit box?

A. I never expressed my business with Mrs. Wray.

Q. She has invented if she says—

A. She can do what she likes; I didn't tell her my business.

Q. Mr. Daley, was there anything in that box that was of value to anybody but you?

A. There wasn't a thing in there except my will, Mrs. Daley's.

Q. Was it of any value to anybody but you? 10

A. Yes, my will to Mrs. Daley was valuable.

Q. Was it valuable to anybody except you, any of the papers in that box, were they worth anything to anybody except you?

A. That one will was worth something to Mrs. Daley.

Q. Other than that?

A. Other than that everything was mine, was only a few papers in there. 20

Q. Were any of your papers worth anything to anybody except you or Mrs. Daley?

A. None; wasn't worth a thing to anybody.

Q. Wouldn't have been worth anything to any thief, would they, any of those papers?

A. Not that I know of.

Q. They had no value?

A. They had no value only to me.

Q. Only to you?

A. So far as I can see.

Q. That is all. 30

By Mr. Bourgeois:

Q. Was Mrs. Baines still working for you when Mr. Carroll and she made the search and after?

A. Mrs. Baines worked after, we had her doing some work after the robbery.

Q. Was she working for you at the time this search was going on?

A. Yes, that day, I think was the day I telephoned to Mr. Carroll to come down.

Q. That is all.

---

10 MRS. IVA B. FRANZ, sworn for the complainant.

Direct examination.

By Mr. Bourgeois:

Q. Mrs. Franz, you live where?

A. I live 2234 Franklin Street, Philadelphia.

Q. Where did you live during the summer of 1924?

20 A. 223 Jackson Avenue, Margate.

Q. How near to Mr. and Mrs. Daley?

A. I judge about fifty feet away.

Q. Did you know them?

A. Yes, sir.

Q. Know Mrs. Daley well?

A. Very well.

Q. Did you ever see them around their home or in their home?

A. Seen them all the time there.

Q. During a period of how many months?

30 A. From the first of June until the first of October and previous to that the summer I had from August until the first of October the same cottage.

Q. During that period did you have an opportunity of observing how they got along together?

A. Very agreeable so far as I—

Q. I asked did you have any opportunity?

Mr. Charlton: I ask that be stricken.

The Court: Yes.

Q. Did you have the opportunity to find out, to observe?

A. Yes.

Q. What was their conduct to each other?

Mr. Charlton: I object until it is shown she 10  
availed herself of the opportunity.

The Court: I will permit it.

Q. What was their conduct to one another?

A. Agreeable and congenial.

Q. Ever hear any rough words from Mr. Daley to his wife?

A. Not to her.

Q. Ever see anything that indicated he might 20  
strike her, in a threatening attitude, anything of  
that kind towards her?

A. No, sir.

Q. Did they go out together, do you know?

A. Occasionally went to the moving pictures.

Q. Would they be together at their home?

A. Always.

Q. Where?

A. 225 Jackson Avenue.

Q. I know, where would they be, where would you 30  
see them?

A. In and out of the house, at home all the time.

Q. During that period were the windows open so  
you could have heard what was going on?

A. The whole house was open.

Q. Do you know whether they went out ever on  
boats together?

A. Yes, sir; went together fishing and they were around the house all the time together.

Q. Now, Mrs. Franz, did Mrs. Daley ever have any conversation with you about her daughters?

A. She allowed to me that she had——

Q. You can answer that yes or no.

A. Yes, sir.

Q. What did she say about them?

10 Mr. Charlton: If the Court please, I object. I want to know when it was.

The Court: Yes, entitled to that, fix the time.

Q. When was this?

A. Why it was during last summer.

Q. Summer of 1924?

A. Yes, sir.

20 Q. Can you tell me what month it was in?

A. I was there from the first of June on until the first of October, I was around the house all the time, same as she was, we had conversations every time.

Q. Sometime between the first of June and the time she died which was the fourth of September?

A. Yes, I know.

Q. Tell me what she said to you?

A. Well, she said she had these two daughters, but she had never heard from them, didn't even know where they were.

30 Q. Did she ever say anything about what she intended to do with her property to you?

A. I was always under the impression, the way she spoke——

Mr. Charlton: I object.

Q. Not the impression, what she said.

A. That she said that when things would be Bob's and things would be hers, that is the way she expressed it, she even asked me did I have a will, she knew we were childless, that is how the conversation arose.

Q. Where were you when that conversation took place?

A. On her porch.

Q. Front porch?

10

A. Her porch facing the bay. We were talking there one afternoon, several times.

Q. Just you and she alone?

A. She and I were alone, when she was talking that.

Q. Had she ever talked to you before or after, did she, about the same thing, about a will?

A. She probably dwelt much on those subjects of business.

Q. How did it come up that she told you Bob was to have hers and she was to have his?

20

A. Well, because I had first talked to her about a girl, that I had raised, see, and she wanted to know then if I was going to provide for this girl, and she, of course, knowing that this girl isn't adopted, and I said well, I didn't know what I would do, I would wait until the troubles were all over, and see how it would turn out, and she said "Well, you know, my daughter is dead and gone," and she said, that is when the subject came up about her two daughters, she even didn't mention their names to me, she said she didn't know where they were and nothing about them, she hadn't seen them since they were babies.

30

Q. Then the same conversation in which she said that her daughters, that she hadn't heard from them, she didn't even know where they were, she said what

she had was to be Bob's and what he had was to be hers?

A. That is what she said.

Cross-examination.

By Mr. Charlton:

10 Q. Was she drunk or sober when she was talking to you?

A. She was sober when she was talking to me this time.

Q. Nearly always drunk, wasn't she?

A. No, I wouldn't say that.

Q. Did you ever see her drunk?

A. I have seen her drunk, yes, sir.

Q. Drink with her?

A. No, sir; I did not.

20 Q. You never drank with her?

A. No, sir; I did not.

Q. What business is your husband in?

A. Police business.

Q. Is he Charles Franz?

A. No, he is not.

Q. How do you spell your name?

A. F-r-a-n-z.

Q. What is his first name?

A. William.

Q. Who is Charles?

30 A. I guess that is the man in Margate, the butcher.

Q. Works for whom?

A. For himself.

Q. Is he related to your husband?

A. Brother.

Q. He is a brother?

A. Yes.

Q. Was he around your house often?

A. The brother?

Q. Yes.

A. No, sir.

Q. What business is he in?

Mr. Bourgeois: I object.

A. He is in the butcher business I just told you.

10

The Court: Just told you in the butcher business.

Q. I think that is her husband.

A. No, it is not.

Q. You were just there for the summer, were you?

A. From the first of June until the first of October.

Q. Out a great deal with the Daleys, weren't you?

A. Never out away from the place.

Q. Weren't you out with them socially?

20

A. Not away from the place.

Q. Didn't go fishing with them?

A. Yes, on the bay, but that wasn't away from the place.

Q. Ever present in the Daley home when there were drinking parties there?

A. Yes, I was.

Q. You were a guest, weren't you?

A. I was no guest; I was a neighbor.

Q. But you were a guest at these parties?

30

A. I was no guest to no parties.

Q. Did you ever see Mr. Daley strike his wife?

A. I did not.

MRS. ANNA ZELLER, sworn for complainant.

Direct examination.

By Mr. Bourgeois:

Q. Mrs. Zeller, you live where?

A. Third house from Daley's.

10 Q. From Mr. Daley?

A. Yes.

Q. How long have you lived there?

A. Six years.

Q. Did you know Mrs. Daley?

A. Oh, yes.

Q. And Mr. Daley?

A. Yes.

Q. Mr. and Mrs. Daley have lived down there about two years, I think, haven't they?

20 A. Yes, sir.

Q. Have you had an opportunity of observing their home life?

A. Yes, what I see of it, yes.

Q. I want you to tell me what you saw and what opportunity you had to see it? Did you ever visit them in their home?

A. Yes.

Q. Would you see them around their home?

A. Yes.

30 Q. On the porch and in the yard and different places?

A. Yes, I saw Mrs. Daley; she was very contented when I saw her, fixing her garden with flowers.

Q. Now, Mrs. Zeller, will you tell the Court what their home life was, how did they get along together, so far as you could see?

Mr. Charlton: If the Court please, I don't think she has qualified until she tells us how often she has seen them; she may have only seen them once.

Q. Did you see them frequently?

A. Oh, yes, every day, almost; I live right there and if I looked out the window they were out I see them, when I would go down fishing they would be on the porch and I would see them; we were out fishing very often.

10

Q. Now tell me how they got along together, just what their life with each other was, as near as you know?

A. How they got along, indeed I don't know but what I saw of them they got along very nicely.

Q. Did you ever know Mr. Daley to speak roughly to his wife?

A. No.

Q. Did you ever know of his striking his wife or threatening to strike her?

20

A. No, sir.

Q. Did you know if they were pleased—did they go around together?

A. Oh, yes; they went out fishing, they took her in the automobile very often down to the city here.

Q. Do you know if he was most of the time home with her when she was home?

A. Yes.

Cross-examination.

30

By Mr. Charlton:

Q. Much drinking go on in that house?

A. Yes, I guess there was.

Q. Mrs. Daley often drunk?

A. I can't say often; I know I saw her drunk.

Q. Him drunk too? Does that mean "yes?"

A. Well, as I said before, I don't know how they were inside, but what I saw outside, that is all.

The Court: The question was did you see Mr. Daley drunk?

A. Yes.

10 Q. Often?

A. What would you call often? I don't know.

Q. Let it go at that. That is all.

---

MRS. ELIZABETH HOWELLS, recalled.

Direct examination.

20 By Mr. Bourgeois:

Q. Mrs. Howells, you were with your brother and his wife more or less while they were married, were you not?

A. Yes, sir.

Q. How much of the time were you with them?

A. Well, I have been with them both summers, since they have been married, and they was with me one winter.

30 Q. Lived right there with them?

A. Right with them.

Q. Tell the Court what their home life was towards one another?

A. Well, it was very happy; he never went away from her because she was sort or jealous of him and he never did get out of the house, he was just always there.

Q. You say she was jealous of him?

A. Very jealous.

Q. Then she cared for him, did she?

A. Yes, indeed.

Q. And did he apparently care for her?

A. Very, very much.

Q. Was he attentive to her?

A. Very attentive.

Q. Do you know whether they were pals, did they go around to gether?

A. Oh, my, yes; she let everybody know they were pals. 10

Q. Did you ever hear him use any rough or uncouth language to her?

A. No.

Q. Ever see him threaten or attempt to strike her?

A. No, indeed.

Cross-examination.

20

By Mr. Charlton:

Q. Your brother doesn't use profanity?

A. What?

Q. Your brother doesn't use profanity?

A. He never used it in front of me.

Q. You never heard him swear?

A. No, I never have.

Q. Never saw him drink?

A. Yes, I have saw him drink.

Q. Ever see Mrs. Daley drink? 30

A. I have.

Q. Ever see her drunk?

A. Very often.

Q. And he too?

A. No.

Q. He remained sober?

A. No, I guess he didn't, but I never seen him.

Q. At the time you were there in August was she drunk very often?

A. No, she was not.

Q. She wasn't?

A. No.

By Mr. Bourgeois:

10 Q. Mrs. Howells, just one question. Soon after Mrs. Daley's death did some woman, a Mrs. Wray, call you up?

A. Yes, she called, got a call and I told her I was Mr. Daley's sister; she said "This is Mrs. Wray in Ventnor." I told her Mr. Daley wasn't at home, he had gone up town on some business; she said "It is very important I should see him immediately" so I told my brother as soon as he came in, I wouldn't  
20 let him take his hat off until he went up and I don't know what passed.

---

EDWARD D. SMITH, sworn for complainant.

Direct examination.

By Mr. Bourgeois:

30 Q. Mr. Smith, you live where?

A. I live at the present time?

Q. Yes.

A. Blackwood, New Jersey.

Q. Did you ever live in Atlantic City?

A. I lived in Atlantic City from April until September.

Q. April until September what year?

A. 1922.

Q. At that time did you work for Mr. Daley down at the hotel?

A. I was in Mr. Daley's employ.

Q. Did you have an opportunity of observing the relation of Mr. Daley to his wife, how they got along together?

A. Yes, sir.

Q. See them daily, did you, frequently? 10

A. Every day.

Q. What was their conduct to one another?

A. Very agreeable.

Q. Did she apparently care for him?

A. She liked Bob; she told me she liked him.

Q. Did he apparently care for her?

A. He does.

Q. Considerate of her, was he?

A. Yes, sir.

Q. Did you ever hear him use any rough or uncouth language toward her? 20

A. No, sir.

Q. Or to her?

A. No, sir.

Q. Ever see him attempt to strike or offer to strike her?

A. Never.

Q. That was during all the summer of 1922?

A. Yes, sir.

Cross-examination.

30

By Mr. Charlton:

Q. Mr. Daley doesn't swear?

A. I didn't hear him swear to his wife, no.

Q. He doesn't swear anyway?

- A. I didn't hear him swear.  
Q. Was Mrs. Daley sick at any time at the hotel?  
A. Not at the time I was there, no, sir.  
Q. Sure of that?  
A. I am sure of that.  
Q. Ever see her with black eyes?  
A. I never did.  
Q. You are from where?  
A. Blackwood now.  
10 Q. You subpoenaed to come here?  
A. Yes, sir.  
Q. Expenses paid?  
A. I don't know anything about the expenses.  
Q. Don't you know that your expenses are being paid?  
A. I didn't come for that; I didn't realize that I was to be paid at all.  
Q. Just came voluntarily? Mr. Daley is a friend of yours?  
20 A. A friend? I worked for him.

The Court: I will strike that question out; he just answered he was subpoenaed, didn't come voluntarily if he was subpoenaed.

- Q. Friendly with Mr. Daley?  
A. I have known Bob for quite a while, yes.  
Q. Knew him for years before you worked for him, didn't you?  
30 A. Yes, I have.  
Q. Where are you from originally?  
A. I was born and raised in Pittsburgh.  
Q. You knew Mr. Daley in Pittsburgh?  
A. I surely did.  
Q. For years?  
A. Yes, sir.

By Mr. Bourgeois:

Q. He is an all right kind of a fellow?

A. Found him always that way.

Q. Let me ask you one question, I overlooked, two questions; while you worked there that summer did the colored woman who just came by the name of Lockwood work there?

A. I believe I saw the lady.

Q. After Mr. Daley moved out of the hotel do you know whether some of the personal properties in the hotel went down to the house on Portland Avenue? 10

A. I was the man that got the man to take the furniture down to 106 Portland Avenue.

Q. And you went down there and saw it went in there?

A. I was in my Ford coupe behind the men when it went in, after it went in I don't know anything about it.

By Mr. Charlton:

20

Q. That was the furniture came out of the hotel, wasn't it?

A. Sir?

Q. Furniture came out of the hotel?

A. Yes, sir.

Q. Owned by Mr. and Mrs. Daley?

A. They were married. I was there when they got married.

30

Mr. Bourgeois: I want to offer in evidence these checks. In the main case I didn't know that they would be material at all, but I think, in view of the cross-examination, that they ought to go in now. They are the checks Mr. Daley says were used in making the repairs to that house.

Mr. Charlton: I am going to object, if the Court please, because they are not all here; there is no proof where the rest of them are; there is no statement of account.

The Court: Mr. Daley testifies he has them at home; unless there can be some reason for certain number of checks selected——

10 Mr. Bourgeois: These, he says, are all the checks that were given for the particular properties, that is the repairs to the house, that is the only thing in this case.

The Court: If that is the situation I will permit them.

20 Mr. Bourgeois: That is what he said they were. I don't think they are material but I think they ought to go in.

(Checks admitted and marked Exhibit C4.)

Mr. Bourgeois: They are put in for the purpose of supporting the allegation in the bill about the moneys he paid. I assume that is not material if the will followed out and they were executed, at the same time some question was made about it, and I think ought to go in.

30

ROBERT DALEY, recalled.

Cross-examination.

By Mr. Charlton:

Q. Where did you find these deeds?

Mr. Bourgeois: That is objected to as irrelevant 10  
and immaterial.

Mr. Reed: It is admitted in the pleadings.

The Court: The Court hasn't the slightest idea  
to what we are addressing the present question at  
all.

Mr. Bourgeois: I think Mr. Charlton is trying to  
got something for the administration of the estate. 20

Mr. Charlton: Not at all. My purpose is to show,  
your Honor, all of Mrs. Daley's papers are found  
except the will; that is my purpose.

The Court: I will permit it for that purpose.

Q. Where did you find these papers?

A. They were in her papers; she had some papers  
in the drawer. 30

Q. In what drawer?

A. In the bureau.

Q. In the bureau?

A. In the bureau drawer, yes, sir.

Q. These were there?

A. They were there.

Q. Where did you find the deed from the Victoria Finance Corporation?

A. They were there.

Q. That was there, too?

A. All those papers.

Q. Where did you find the title policy of the Atlantic Guarantee and Title Insurance Company?

A. Same place.

10 Q. Title Policy of the South Jersey Title and Finance Company?

A. Same place.

Q. They were where she usually kept her papers?

A. Yes; she kept them separate, her own papers.

Q. Where did you find the deed from Albert Freas to Robert Daley, et ux?

A. Same place.

Q. All her papers were there except the wills?

A. Yes, sir.

20

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FRANK SINGER, sworn for complainant.

Direct examination.

By Mr. Bourgeois:

30 Q. Mr. Singer, you live where?

A. 9713 Thoroughfare Avenue.

Q. Is that anywhere near where Mr. Daley lives?

A. Just about half a block.

Q. Do you know Mr. Daley?

A. Very well.

Q. Did you know his wife in her life time?

A. Yes, sir.

Q. How long have you known them?

A. Since they moved into Margate two years, three years.

Q. How much have you seen of them since they moved to Margate?

A. When I came from Philadelphia to Margate I would see a great deal of Mr. and Mrs. Daley.

Q. Where?

A. At their home.

10

Q. What did you do?

A. I just casually go in there to pay a visit.

Q. In there daily, were you?

A. Sir?

Q. In there each day?

A. Very much each day, sometimes in the morning, sometimes in the evening, again wouldn't be there two or three days.

Q. For the whole year, two years?

A. Not quite two year; I go to Philadelphia a 20 great deal.

Q. Did you have an opportunity of observing what their conduct was to one another?

A. Pleasant.

Q. You had an opportunity to observe it?

A. Yes, sir.

Q. It was pleasant, you say?

A. Pleasant.

Q. Did they seem to be fond of one another?

A. Very fond.

30

Q. In one another's company much?

A. Very much.

Q. Did you ever see them go out together?

A. See them in the boat, see them in the automobile.

Q. Did you ever hear Mr. Daley use any rough or uncouth language to his wife?

A. No, sir.

Q. Did you ever see him strike or offer to strike his wife?

A. No, sir.

No cross-examination.

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The Court: I would like to ask counsel for what  
10 purpose were these Boardwalk Bank checks offered in evidence?

Mr. Bourgeois: They are offered in evidence for the purpose of showing that he spent money on these buildings.

The Court: The testimony is that these checks show clearly that this is a joint account.

Mr. Bourgeois: Yes, but their joint money and  
20 went down on those buildings, so half of that, so far as the money—

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ANDREW S. ORR, SWORN for complainant.

Direct examination.

30 By Mr. Bourgeois:

Q. Mr. Orr, you live in Atlantic City?

A. Yes, sir.

Q. You are, what you are, commissioner of vehicles?

A. Just a regular citizen.

Q. Do you know Mr. Daley?

A. I do, yes, sir.

Q. Did you know Mrs. Daley in her life time?

A. Yes, sir.

Q. Did you ever have any opportunity of observing their family life, how they got along together?

A. Yes, sir; I visited them many times, both in the cottage on the south side of Ventnor and back in Margate, been there, and been out with them on several occasions.

10

Q. What was their conduct to one another?

A. I thought they were a very congenial couple, very congenial couple.

Q. Did you ever hear Mr. Daley use any uncouth or rough language to his wife?

A. No, sir; I never did.

Q. Did you ever see him strike or offer to strike his wife?

A. Never, no, sir.

Q. Do you know if they were pals?

20

A. They were; they were very palley.

Cross-examination.

By Mr. Charlton:

Q. Mrs. Orr with you on these occasions?

A. No, sir.

Q. Any other ladies?

A. No, sir.

30

Q. Mr. Daley never swore at her ?

A. I never heard Mr. Daley swear all during our meetings, when I was with them; they were really and truly, on my honor, they were a very congenial couple.

Q. How many times did you see them?

A. Oh, dozens of times.

Q. Drinking parties?

A. Yes, many time meet me when they were out in their automobile; I would stand and talk to them quite a while; they were really and truly a very congenial couple.

TESTIMONY CLOSED.

10

The Court: I have no doubt but that two wills were made and executed by Daley and his wife and I have no doubt but that the contents of those wills has been substantially proven. Without doubt each of them, particularly the will made by Mrs. Daley, was a will first directing her funeral expenses and debts to be paid in the usual form as probably found in form books. Mr. Leek remembers that because  
20 he says he puts it in all. That is probably the situation. There is no question but that Mrs. Daley named Mr. Daley as executor of her will and that he named her as executrix of his will. The testimony of Mr. Daley as to the remaining fact in the will that each gave all of their property to the other, I think is substantially corroborated by Mr. Johnson. The fact that he, Johnson, as a layman did not remember the wording, only remembered the result,  
30 in to witness a will, and he probably, if he heard them at all, only heard each read once.

Now the only question before me, under the circumstances, is, has the presumption, which I think it is clear arises in cases of this sort that the will was destroyed or cancelled by destruction by the testatrix, been overcome by the evidence? While it

is true that the testimony is that these wills were in this particular box, which was Mr. Daley's box, it is equally true that she had access to this box because she placed them there and Daley did not know they were there until afterwards. He saw them and it is quite clear that, under such circumstances, a box, which apparently is a box easily opened and was in the chifforobe of the husband at times and other times on the top of that piece of furniture, would be naturally accessible by the wife.

10

So it resolves itself, gentlemen, down, I think, entirely to the question has or has not the testimony produced before me been sufficient to overcome the presumption that Mrs. Daley destroyed this will?

I will be very glad to have you file briefs and Mr. Bourgeois and Mr. Reed may take fifteen days, serve a copy upon Mr. Charlton and he have ten days to reply, that will have them in my possession upon my return.

20

Mr. Charlton: I want to reserve the right to argue the fact question.

The Court: Most assuredly, if it is necessary to do that, and to argue the question of law.

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Atlantic City, N. J., March 17, 1925.

(Trial of the cause continued.)

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APPEARANCES:

For the defendants, WILLIAM CHARLTON, Esq.  
For the complainant, no one appearing.

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JOHN S. WESTCOTT, sworn for defendants.

Direct examination.

By Mr. Charlton:

Q. Mr. Westcott, you are a practicing member of  
20 the bar?

A. I am.

Q. Do you have any position at the Ventnor City  
National Bank?

A. I am trust officer and solicitor.

Q. Do you have supervision of the safe deposit  
boxes?

A. It comes under my supervision.

Q. Did you know Mr. Daley and Mrs. Martin?

A. I know a man introduced himself as Mr. Daley  
30 and Mrs. Martin.

Q. Has there ever been any occasion on which that  
safe deposit box was opened by Mrs. Martin other  
than a time you were there?

A. No.

Q. You have the record?

A. I have the record here. Just a moment. The  
box has not been opened excepting in my presence.

Q. At any time did Mrs. Martin either put in or take out any papers or articles of any kind?

A. Only at a former hearing here, there was delivered by me to Mrs. Martin, that is jointly taken out of the box, a handkerchief and three unset stones, presumably diamonds, and two insurance policies, fire insurance, one an automobile, and one on—I guess they are both automobiles.

Q. Did Mrs. Martin put anything into that box at any time to your knowledge? 10

A. She returned to me and she and I jointly on that same day returned to the box the handkerchief and the three unset stones and the two insurance policies. They were taken out again this morning and are now in the possession of Mrs. Martin.

Q. She put nothing else in the box at any time?

A. No.

Q. Did Robert Daley make a search of that box in your presence?

A. On the eleventh day of September last Mr.— 20  
pardon me just a moment—a day or two previous to the eleventh day of September Mr. Daley came in in regards to the box and wanted it opened. I called Mr. Blumberg, who is the state appraiser for this county, and made an appointment at that time. At the time of the period of appointment Mr. Daley said he was unable to find the keys, but a day or two later, which was the eleventh of September Mr. Daley advised me that he had found the keys, and Mr. Blumberg and Mr. Daley went through the box 30  
in my presence at 10.20 o'clock in the morning.

Q. Was there any will or other document found there?

A. The papers were found by Mr. Daley, Mr. Blumberg and myself; there was no wills found or papers purporting to be wills.

Q. No draft of a will?

A. None whatever, sir. At least Mr. Blumberg and Mr. Daley made the special examination and they said not and I agreed with them. Mr. Blumberg at that time gave me the formal release of the state as to having examined the box.

Q. That is all.

A. Here is the record of the box; it shows the period of time.

Q. What does that card show, Mr. Westcott?

10 A. This is a record card of the box number 153, safe deposit box of the Ventnor City National Bank. By the way Mrs. Martin, the box was opened for Mrs. Martin on the twenty-fourth day of February and not being able to get the keys box 153 had to be chiselled open by Leigh, the locksmith, and then we had to provide or did provide for Mrs. Martin, for this estate, box 157. It shows that the box was opened last previous to September on the twelfth day of May of 1924.

20 Q. Suppose, Mr. Westcott, you read the entire card showing the date the box was opened and the dates on which it was subsequently opened by Mrs. Daley?

A. You mean to say all the openings?

Q. I think they are important in this case.

A. The box was originally taken on November twentieth, 1918, box 153. This card here does not go back to 1918. This record card goes back to 1919, twenty-sixth day of September.

30 Q. Don't read anything earlier than January first, 1293; read from then on.

A. April 19, 1923, 12.55 P. M. opened by Ella M. Barstow. November 22, 1.40 P. M. opened by Ellen M. Barstow. Then appears endorsement of Ellen M. Barstow Daley on 5/12/23, I should say it was, 2.25 P. M. opened by Ellen M. Barstow Daley. Opened 9/11/1924 10.20 A. M. B. Louis Blumberg.

On the second, twenty-fourth, 1925, 2.30 P. M. box 153 was chiselled open.

Q. That is all in your record?

A. Signed——

Q. The date you say in May, are you sure of the year on that, Mr. Westcott?

A. I would say it was in May, 1924.

(Adjourned to March 18, 1925, 10. A. M.)

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Atlantic City, N. J., March 18, 1925.

(Trial of the cause resumed at 10.00 A. M.)

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APPEARANCES:

10 For the defendants, WILLIAM CHARLTON, Esq.,  
ROBERT DALEY in person.

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The Court: Mr. Daley in court or represented?  
Mr. Daley, are you represented by counsel?

Mr. Daley: No, they are both in court.

20 The Court: You may take the testimony.

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MRS. GHERTINE R. MARTIN, recalled.

Direct examination.

By Mr. Charlton:

Q. Mrs. Martin, since you were here before have  
you been to the Ventnor City National Bank?

30 A. Yes, I have.

Q. When did you go there?

A. Our trial was the twenty-fifth of February and  
I went there the morning of the twenty-sixth.

Q. Did you go into the safe deposit box of your  
mother?

A. Yes, I did.

Q. Did you take anything from that box?

A. I took two policies and three unset stones.

Q. I show you what purport to be two policies of insurance and ask you if those are the policies you took out?

A. Yes, those are the policies, Mr. Charlton.

Q. I show you what purport to be three unset stones and ask you if those are what you took out?

A. Yes.

Q. And this handkerchief?

10

A. And the handkerchief.

Mr. Charlton: I want to offer this handkerchief and the three stones in evidence.

(Handkerchief and three stones admitted and marked Exhibit D4.)

(Automobile liability policy of the General Casualty Surety Company, #58576, to Robert Daley, expires August 19, 1924, admitted and marked Exhibit D5.)

20

(Automobile policy #A01556 Hanover Fire Insurance Company of New York, expires August 13, 1924, admitted and marked Exhibit D6.)

Q. Did you go through that box, Mrs. Martin, for any other papers, did you look all through it?

A. Yes, I looked all through the box, but those were the papers I was interested in.

Q. Were there any other insurance policies on automobiles there?

30

A. No, none to my knowledge.

The Court: You want to ask any questions, Mr. Daley?

Mr. Daley: No.

JAMES F. MARTIN, sworn for defendants.

Direct examination.

By Mr. Charlton:

Q. Mr. Martin, you the husband of Mrs. Martin?

A. Yes, sir.

10 Q. Were you with her on any occasion since the last time we were here, since the trial, when she went to the Ventnor City National Bank?

A. I was with Mrs. Martin on the morning of the twenty-sixth.

Q. Of what?

A. Of February.

Q. This year?

A. Of this year.

20 Q. And were you there when the safe deposit box was opened in the Ventnor National Bank?

A. I was in Mr. Westcott's office but I didn't go to the vault, to the deposit box.

Q. Did you see the box opened in his office?

A. I saw the box opened in his office.

Q. Did you see Mrs. Martin take anything out of the box?

A. Mrs. Martin requested Mr. Westcott to go over the contents of the box with her and to look for any papers that might have a bearing on the case.

30 Q. Were any papers found?

A. Two policies.

Q. Are those the policies? (Referring to D5 and and D6.)

A. Yes, sir.

Q. I show you what purport to be three unset stones in a handkerchief and ask you if those were found in the box?

A. Yes, sir; those three stones and the handkerchief.

TESTIMONY CLOSED.

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ORAL ARGUMENT BY MR. CHARLTON.

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DAVID E. GARDINER, sworn for defendants.

Direct examination.

By Mr. Charlton:

Q. Mr. Gardiner, what is your present occupation?

A. Assistant secretary Chelsea Title and Guaranty Company.

Q. Do you have with you any of the official books of the Chelsea Title Company? 20

A. I do.

Q. Do you have any record of a conveyance of a property on St. James Place to Ella Carroll and Robert Daley?

A. I do.

Q. Will you recite the deed as you have it there, names of the parties to the deed?

A. Deed from Ella McNamara and William J., her husband, and Ellen Hughes, widow, of Atlantic City, to Ella Carroll and Robert Daley of Pittsburgh, Pennsylvania; deed dated October 17, 1921, recorded October 22, 1921, book 662 of deeds page 462. 30

Q. What property is it?

A. Conveys premises in Atlantic City on the west line of St. James Place five hundred fifty-five feet

south of Pacific Avenue, runs west parallel with Pacific Avenue seventy-five feet, south parallel with St. James Place thirty-five feet.

Q. You need go no further.

A. Consideration of the deed was twenty-seven thousand dollars, revenue nineteen dollars, recites subject to a mortgage of eight thousand dollars which the parties of the second part assumes and forms a part of the consideration of this deed.

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Atlantic City, N. J., December 17, 1925.

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TESTIMONY.

Before HON. R. H. INGERSOLL, Vice-Chancellor.

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APPEARANCES:

For the complainant, JOHN C. REED, ESQ., and  
EMERSON L. RICHARDS, ESQ.,

For the defendants, WILLIAM CHARLTON, ESQ., and  
C. L. COLE, ESQ.

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ROBERT DALEY, sworn for complainant.

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Direct examination.

By Mr. Richards:

Q. Mr. Daley, in your former testimony you mentioned the fact that you and Mrs. Daley had agreed to make wills. Will you tell me when Mrs. Daley and you first talked about such an agreement?

Mr. Cole: This is objected to. I intended to make a motion to strike the testimony in the case so far as it might tend to establish the alleged wills. This testimony is objected to on the ground that it is within the statute which prohibits testimony of transactions. Now there was an objection made by Mr. Charlton previously and your Honor overruled

30

it and I am not finding fault with that because as the case was then before you it was a case of an attempt to establish a lost will and there was a case or cases which seems to say that testimony was all right. Now the bill has been amended so as to set up an agreement to make a will, which presents, I think, an entirely different situation and, therefore, at the very threshold I want to object to that testimony and, of course, I am predicating my objection upon the  
 10 notion that this transfer or alleged transfer, whatever you call it, from this gentleman to his sister, I think was covinous, without consideration, and was a patent case of an attempt to avoid the statute. If your Honor wants to hear me, I have some cases on both phases that I want to call your attention to.

The Court: Yes.

Mr. Cole: The first case is *Moosbrugger v. Swick*,  
 20 86 Law, page 419, opinion of Judge Garrison, and I think the syllabus states the case:

“Whether or not a claim against the estate of a decedent is covinously assigned in order to enable the assignor, its beneficial owner, to avoid the disqualification of the fourth section of the Evidence act and to give testimony as to transactions with the deceased, is a question of fact to be decided by the trial court preliminarily to ruling upon the admissibility of the testimony of such witness and in a  
 30 proper case the court may, by amendment, join such beneficial owner as a plaintiff in the action in order to prevent a fraud upon the statute.”

Now another case is *Clendemin against Clancy*, 82 Law, 418, and the syllabus there I think is enough:

“O'Rourke assigned to plaintiff a claim for services rendered by him to the defendant's testator; the assignment was in good faith for a valuable con-

sideration consisting of the cancellation of a debt due from O'Rourke to the plaintiff and the giving to O'Rourke of the plaintiff's note; the amount of the consideration was less than the face of O'Rourke's claim—Held, that it was error to exclude O'Rourke's testimony; the interest that under proper practice might disqualify him as a witness is not the indirect interest of a creditor of the plaintiff in the action, but a direct property interest in the recovery itself."

10

And that case cites some other cases, the point being, however, it all goes to the question whether this assignment is really a good faith thing for a valuable consideration. In the case I have just cited there the court held that it was.

The next case is *Platner v. Ryan, Executor*, 76 Law 239. There again I think the syllabus states the case:

"The beneficial owner of a claim against the estate of a decedent cannot avoid the disqualification of 20 the fourth section of the Evidence act, and render himself a competent witness against the executor in a suit for the recovery thereof, by assigning his claim to a third party without consideration, and upon the understanding that the recovery shall be for his (the assignor's) sole benefit."

I spend only a moment to say that this case seems to me is one that is clearly an effort to avoid the statute. At best it is a mere gift. A dollar is expressed for the land and a dollar is expressed for the 30 bill of sale. It is true that his sister said that she actually gave him two dollars. It seems to me there isn't any court can close its eyes to the fact that there was some ulterior purpose in making that assignment.

Now the question is, is the case, assuming that this suit was brought by Daley rather than by his

sister, within the statute? That, I think, is also disposed of in *Colfax v. Colfax*, 32 Equity 206.:

“A son, who was also one of the administrators of his father’s estate, filed a bill for the specific performance of a contract to convey a house and lot to him, alleged to have been made by his father, in consideration of his services. He made defendants to the bill his brothers and sisters, as his father’s heirs at law, and, also, his father’s widow, as co-administrator.—Held,

10

1. That the widow, as an administratrix, represents the creditors, since the lands in question may be needed to pay decedent’s debts, and hence she is a proper party.

2. That heirs at law are within the purview of the statute excluding parties as witnesses where the other parties “sue or are sued in a representative capacity,” and, consequently, even if the administratrix were not a proper party, the complainant would not be a competent witness.

20

There is another case, opinion by Chief Justice Beasley.

I might add a further objection at this time, although I probably would not have to do it, I shall ask that this testimony, in any event, be limited to personal property. This is a contract clearly within the statute of frauds so far as it attempts to deal with real estate, and I have authority on that phase of the question when we come to it later on in the argument.

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Mr. Richards: If your Honor please, all this law is clearly inapplicable to the situation here. In fact, the last case read by Judge Cole is rather authority

in our favor. There is a well defined class of cases recognized by the law in this state in which a party to a contract of making mutual wills can press that claim and can testify in it. It is not within the statute but outside of the statute. However—and I think that Daley could have brought this suit in his own name—at the time that this suit was started he had assigned this claim to his sister. His sister was presented here as a witness. She was cross-examined. Her testimony was not impeached and there was no attack upon her credibility. She swore that she paid Daley two dollars for the property and other valuable consideration. That was the way the deed read and that was not challenged. Now, undoubtedly Daley was advised that he had no chance to bring this action in his own name, that is, original action, therefore, he had something that was valueless to him. Therefore, if the consideration does seem inadequate, it must be remembered that he was giving to his sister something that was of no value to him but which might prove valuable to her. 10 20

Now we have met the statute inasmuch as Daley has no interest in this property at all and there is no challenge that he has, and, besides that, the situation that we now meet is the entirely different one of an attempt to establish a contract for the making of these wills which is a matter of conscience with this court and it would seem to me that the court ought to receive the testimony as to the making of this agreement. This matter was originally gone into when your Honor made the original order permitting the amendment. It was subsequently taken up to the Court of Errors and the appeal from your Honor's decision was dismissed so that, under the circumstances, it seems to me that we have a right to present this line of testimony and, of course, it is discretionary with your Honor. 30

Mr. Cole: There is no discretion about it. This case is within the statute. There is no discretion. Counsel alludes to the previous proceeding. That was a bill to establish a lost will and the testimony that was offered at that time to establish the loss was competent testimony and was not, I think, within the statute. There is a case which my friend has in mind which rules such evidence in. After the case had been fully heard and your Honor had intimated  
10 that you were not satisfied that the evidence had met the presumption of construction of that will, then application was made to amend this bill to make it a case to establish a contract to make a will, so now we are confronted with a contract expressed to make a will. Now for the first time we make our objection. It is the first time we had the opportunity to do it and it is the first time was any occasion to do it.

Now there is another case of Clawson against Pryor, 67 Equity 201 which is to the same effect. I  
20 would like to see a case, if there is a case, that rules contrary to what I have cited. I would be very glad to have the citation.

The Court: I will permit the testimony subject to the objection. If I find it is objectionable, I will later strike it out.

(Question repeated.)

30 "A. Shortly after we were married, about a week afterwards, Mrs. Daley brought the subject up about making wills, owing to the fact that she had had considerable trouble on her previous marriage with Mr. Barstow, who hadn't made no will, and had left her in a terrible muddle and terrible expense, so she said she had nobody, that she didn't bother with

her sisters and they didn't bother with her and there was nobody in the world that she wanted to have any of her belongings only me, and if I would agree to will her what I possessed she would agree to will me what she possessed, so we talked the matter over and later on we made wills, we were to—

Q. Did you agree to that?

A. I agreed to make a will to that effect.

Q. Where were you living at that time?

A. We were living at the Hotel, Daley Hotel. 10

Q. Did you go and make the wills at that time?

A. No, we didn't make the wills at that time.

Q. When did you again talk about this matter?

A. Well, we didn't discuss the wills again. On several occasions later during the summer, but we really didn't discuss them to any extent until we moved to 106 South Portland Avenue and then the matter came up again and while we were transacting some other real estate business Mrs. Daley asked me had we better make the wills that we agreed to up in the hotel, so I think the following morning we went up to Mr. Leek's office and made the wills to that agreement. 20

Q. Did Mrs. Daley ever, after you made the wills, inform you that she had revoked her will?

A. No; Mrs. Daley never mentioned that to me.

Cross-examination.

By Mr. Cole:

30

Q. Did you know at the time of this alleged agreement what property Mrs. Daley had?

A. I did.

Q. What did you understand she had?

A. In property?

- Q. That is what I am talking about, property?  
A. 106 South Portland Avenue and 104 South Portland Avenue and at that time she was part owner, half owner with me in the hotel.
- Q. Anything else?  
A. In properties? No.
- Q. No personal property at all?  
A. She had her personal property.
- 10 Q. That is property; tell us all about that.  
A. I don't know exactly what she had.  
Q. Do you know at all what she had in personal property?  
A. The furniture and her clothing, that is all.  
Q. Any jewelry?  
A. She had a little jewelry.  
Q. What was the two Portland Avenue properties worth?  
A. I haven't any idea.
- 20 Q. Have you any idea now?  
A. Well, I have an idea.  
Q. What is your idea as to how much it is worth?  
A. I figure the property is worth about, the two of them, about fifty thousand.  
Q. What was the value of her interest in the hotel?  
A. She had a half interest.  
Q. What was the value of it?  
A. Well, she paid ten thousand dollars for her interest.
- 30 Q. What was the value of it irrespective of what she paid for it?  
A. I don't know what the value would be.  
Q. Was it worth ten cents?  
A. It was worth twenty thousand dollars.  
Q. Any more than that?  
A. Probably more.  
Q. How much more?  
A. I don't know.

Q. What do you think?

A. Well, I held it for about twenty thousand more, thirty thousand more.

Q. What was her personal property worth?

A. I don't really know her personal property, the exact figures.

Q. Give us your best judgment?

A. I would say about five thousand dollars.

Q. Now at that time, that is to say at the time that you say this agreement was made, what did you possess in the way of property? 10

A. Half of the—I had half of the hotel.

Q. What else?

A. I had some properties out in Absecon.

Q. What are they? Tell us so we can locate them, please. Put on the record what property you owned in Absecon.

A. I haven't got the deeds. They are in the first ward in Absecon.

Q. Did you ever see them?

A. I have passed them. 20

Q. Do you know where they are? Could you find them now? Do you still own them?

A. Still own them; still on record.

Q. Could you find them if you had to hunt for them?

A. Oh, yes.

Q. How long have you owned them?

A. Thirteen years.

Q. What did you give for them?

A. I figured about five thousand dollars. 30

Q. I didn't ask you that; what did you give for them?

Mr. Richards: I object, if your Honor please. That is not competent, what he gave for them. He

just stopped Daley from doing the same thing a minute ago.

The Court: It is one element of proof. Permit it.

Mr. Richards: If your Honor please, what he gave for them thirteen years ago and what they were worth in 1922 is a different proposition.

10 The Court: You are discussing the probative force. It is admissible. The Court says the probative force may be weak but it is an element.

Q. What did you give for them?

A. Mr. Al Adams owed me a bill of something like four to five thousand dollars and I took the properties for the bill.

Q. What else did you own?

A. Well, my effects and clothing.

20 Q. Is that all?

A. That is all.

Q. How many lots are there in Absecon?

A. Three.

Q. Unimproved?

A. Unimproved.

Q. Timber land?

A. No, high land.

Q. What?

A. No timber land.

30 Q. No timber on it?

A. No.

Q. Ever had an offer for them?

A. No.

Q. Ever tried to sell them?

A. No.

Q. Ever had anybody put an estimate of value for you?

A. No.

Q. Have you paid the taxes on them?

A. I paid some. I owe a little taxes on them.

Q. How much taxes do you owe?

A. I don't know.

Q. Have you any idea?

A. I haven't any idea right now.

Q. Why haven't you paid the taxes on them?

A. I kind of didn't bother with them. I have  
been putting it off and didn't pay the taxes. 10

Q. This alleged contract that you say that you had  
had in the making of a will was performed, wasn't  
it, by the wills being made?

A. The alleged contract?

(Question repeated.)

A. Yes.

Q. Now have you ever assigned to anybody this  
alleged contract to make a will?

A. I sold to my sister. 20

Q. I ask you whether you have assigned to any-  
body this alleged contract to make a will?

Mr. Richards: That is objected to on the ground  
it calls for a conclusion.

The Court: No, I will permit that.

Mr. Cole: Calls for a fact, I should think. 30

Q. Did you ever sign any paper assigning your  
interest in your wife's estate other than the deed and  
the bill of sale which were introduced at a previous  
hearing of this cause?

A. I don't just understand that question.

Q. Well, you understand, don't you, that you have

parted with all your interest in this estate of your wife's?

A. Yes.

Q. How did you do that, in what way?

A. You mean how did I dispose of them?

Q. Yes.

A. Why I sold them to my sister.

Q. Two dollars?

A. Well that was the transaction, maybe she gave me more, but she gave me two dollars.

10 Q. She gave you that much anyhow?

A. Yes; she gave me two dollars.

Q. That is what the papers said you got for it, a dollar apiece?

A. A dollar apiece.

Q. Then you no longer have any interest in your wife's estate because by the two papers, a deed and bill of sale heretofore offered in evidence, you attempted to part with it all, is that correct?

A. Yes.

20 Q. You signed no other paper?

A. Absolutely none.

Q. Who drew the bill of sale?

A. I give it to my lawyer.

Q. Who drew the bill of sale?

A. I give it to my lawyer to draw.

Q. Who was your lawyer?

A. Mr. Reed.

Q. Did he draw it?

A. Yes, sir.

30 Q. Who drew the deed?

A. I don't know; I left that entirely up to him.

Q. How did you come to execute these papers, the deed and bill of sale?

A. I left that entirely to my lawyer, Mr. Reed.

Q. You left the whole thing to him?

A. I left the whole thing.

Q. Was your sister present when the deed was signed by you?

A. Yes.

Q. In Mr. Reed's office?

A. Yes.

Q. Who else was there?

A. I think—I am not positive whether the girl was there, Mr. Reed's girl.

Q. How did your sister come to be there?

A. She was stopping with me at the time and came with me. 10

Q. Why did she come with you?

A. To sign the papers.

Q. To sign which papers?

A. To sign the deed.

Q. She did? Did she sign it?

A. I signed the deed; I don't know whether she signed it; yes, sure.

Q. Sure what?

A. Sure she signed it. 20

Q. Sure about that, are you?

A. Yes.

Q. That was the reason she came up, was it, to sign the deed?

A. Yes; and discuss the case.

Q. Discuss what case?

A. My case. I needed advice on it.

Q. What advice did you need?

A. Well, I need a lot of advice right now.

Q. I am inclined to agree with you about that. I want to know why your sister had to come up to the lawyer's office with you? What advice did she want, if any? 30

Q. Well, I didn't want any legal tangles; I didn't know.

Q. What legal tangles were you expecting?

Mr. Richards: That is objected to, if your Honor please, remote.

The Court: Yes, sustain the objection.

Q. Were you expecting any legal tangles?

Mr. Richards: Objected to.

10 The Court: Permit that.

A. Well, I always did expect them on properties.

Q. From whom?

A. From the people I am doing business with.

Q. Who are they?

A. With her or anybody else.

Q. What legal tangles were you anticipating?

20 Mr. Richards: I object, if your Honor please. It seems to me that is entirely too remote.

The Court: I will permit it on cross-examination.

Mr. Richards: In the first place it is not a part of the direct examination. I didn't ask him anything about this line of questions at all. I confined it entirely to the contract.

30 The Court: There may be something in that but I think a case of this sort—

Mr. Richards: In fact I let him go a long ways afield in this thing but this isn't cross-examination at all of anything that was brought out in direct examination.

Mr. Cole: Senator, don't let me go any further afield than you think I ought; make the objections.

The Court: Technically this is not cross-examination of this witness.

Q. Did you read these papers before you signed them?

A. Yes.

Q. Sure about that?

10

A. Yes.

Q. How many papers are there?

Mr. Richards: I object to that, your Honor please.

Q. How many papers did you sign?

Mr. Richards: Not cross-examination.

The Court: Sustain the objection; not cross-examination. 20

Mr. Cole: He is a party to the cause, I think.

The Court: Yes, but we are now entering upon a phase of it on which this witness has not been examined at all at this time.

Mr. Cole: Also goes to the question of good faith in this transaction.

30

The Court: Yes, sustain the objection.

JAMES DALEY, JR., sworn for complainant.

Direct examination.

By Mr. Richards:

Q. Mr. Daley, what relation are you to Elizabeth Howells in this case?

A. Nephew.

10 Q. I presume then also a nephew to the preceding witness?

A. Yes.

Q. Where do you live?

A. Steubenville, Ohio.

Q. Were you at any time a guest of Mr. and Mrs. Daley when they were living in Ventnor or Margate, I am not sure which?

A. I was.

Q. When was that?

20 A. The middle of January, 1923.

Q. Now at that time do you recall any conversation with Mrs. Daley concerning these wills?

A. I do.

Q. And do you recall any conversation about an agreement concerning wills?

A. Yes, sir.

Mr. Cole: I think these questions are leading and I object to them.

30

The Court: Quite leading.

Mr. Richards: I wanted to make a short cut. I know you have another case and I am not in very good shape myself.

Q. Tell us what the conversation was, Mr. Daley?

A. The conversation was to the effect—

Q. Who did the talking?

A. Aunt Nellie.

Q. All right, tell, as near as you can, her words, what she said about these wills?

A. She said that her and Uncle Bob had made an agreement that upon the death of either one of them, that if she died she was to will Uncle Bob her property and possessions and if he died he was to leave 10  
her his property and possessions, and that is all I know of the case. At that time it didn't appear to me as anything important.

Cross-examination.

By Mr. Cole:

Q. How old are you?

A. Twenty-three. 20

Q. Where do you live?

A. Steubenville, Ohio.

Q. With whom?

A. With my people.

Q. Father and mother?

A. Yes, sir.

Q. When did you leave Steubenville, Ohio, to come to Atlantic City in 1923?

A. At that time I wasn't living in Steubenville, Ohio. 30

Q. Where were you living?

A. Wheeling, West Virginia.

Q. What time did you leave Wheeling, West Virginia to come to Atlantic City in 1923?

A. I had left shortly after Christmas for New York.

Q. When did you leave New York to come to Atlantic City in 1923?

A. Right before I came to Atlantic City.

Q. When was that?

A. I don't remember the exact date.

Q. Give us your best judgment?

A. Well, it was close to the middle of January.

Q. Were you alone?

A. I was alone.

10 Q. Where did you stop in New York?

A. At my aunt's.

Q. What is her name?

A. Mrs. Jacob Langstein.

Q. How long did you stay?

A. A little over a week.

Q. What was her address then?

A. I don't remember.

Q. Did you know what her address was then?

A. I had marked it down, yes, sir.

20 Q. Can't recall it now?

A. Can't recall it.

Q. New York City?

A. Yes, sir.

Q. Apartment house?

A. Yes, sir.

Q. Can't you give us any idea where it was you stopped in New York with your aunt?

A. No, I can't think of the name of the apartment house. My uncle at that time was—

30 Q. Had you arranged previously to your coming to Atlantic City where you were to stop?

A. No, sir.

Q. Did you know where you were going to stop when you left New York?

A. Yes, sir.

Q. Where?

A. With my Uncle Bob wherever that would be.

Q. How did you know that?

A. I don't understand the question, how did I know it?

Q. How did you know you were going to stop with him when you came to Atlantic City?

A. Well, I don't know how I knew it, but, as he is a relative of mine, he is my father's brother, and if that isn't enough—

Q. In other words you assumed that you were going to stop with him, didn't you, when you left New York? 10

A. Yes, sir.

Q. When had you previously been to Atlantic City?

A. Never.

Q. First time in 1923?

A. No, I had been here with my people once before.

Q. Did you know where your uncle lived when you started from New York?

A. I had his address, yes, sir.

Q. What was it? 20

A. 106 Portland Avenue.

Q. What city?

A. Ventnor.

Q. Where did you get it?

A. He had been corresponding with my father.

Q. How long were you there?

A. Close to two weeks.

Q. Who were in the house besides you during that time?

A. Just my uncle and his wife and myself. 30

Q. No one else?

A. They had servants there but I don't remember them, didn't know them by name.

Q. Recall their names?

A. No, sir.

Q. Who were present during this conversation you have related?

A. How is that?

Q. Who were present during this conversation you have related?

A. Uncle Bob and my aunt and myself.

Q. What time was it?

A. In the evening.

Q. What time in the evening?

10 A. Right after dinner in the evening; I don't remember exactly.

Q. What room in the house was it?

A. In the parlor.

Q. Who opened the conversation?

A. I don't remember. I don't remember as to how the conversation was opened.

Q. Is that all the conversation took place on that occasion?

A. No, sir.

20 Q. Can you recall any other conversation?

A. Not anything as to that effect. Of course there was—

Q. Have you talked with your uncle since about this?

A. About that occasion?

Q. Yes.

A. Only to tell him that I knew of it.

Q. When did you tell him that?

A. Upon my arrival in Atlantic City.

30 Q. When?

A. Tuesday morning.

Q. Did you come alone?

A. Yes, sir.

Q. How did you come to come?

A. He had written me and asked me if I remembered that.

Q. Have you the letter he wrote you?

- A. No, sir; I have not.
- Q. What did you do with it?
- A. It is home.
- Q. When did you arrive?
- A. Tuesday morning.
- Q. Of this week?
- A. Of this week.
- Q. This is Thursday. Where did you talk with him about this?
- A. How is that? 10
- Q. Where did you talk with him about this?
- A. At his home.
- Q. Who were there?
- A. He and I.
- Q. What did he say in the letter as to this conversation?
- A. Well, he had remembered that—
- Q. No, what did he say in the letter?
- A. He asked me if I remembered the conversation that took place that evening in Portland Avenue. 20
- Q. Is that all?
- A. And that was all, I think.
- Q. Did he say what conversation?
- A. Conversation as to an agreement.
- Q. Agreement about what?
- A. About the will.
- Q. This letter say that?
- A. I don't remember.
- Q. Why did you say it was about the will?
- A. I can't state the words of the letter. 30
- Q. Did his letter want to know if you remembered what conversation took place or only a part of it?
- A. Well, he just wanted to know what I knew.
- Q. Knew about what?
- A. About the case.
- Q. What case?
- A. About the case here this morning.

Q. Had you ever heard of the case before?

A. No, sir.

Q. Did he tell you what the case was about?

A. He did.

Q. What did he say it was about?

A. He told me that the will had been lost, that is all of any consequence.

Q. Let us determine what the consequence is. We may think it of more consequence than you. Is that all he told you about what the case was about, lost  
10 will?

A. That is all I remember.

Q. That is all.

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HENRY H. McALEES, sworn for the complainant.

Direct examination.

20 By Mr. Richards:

Q. Mr. McAlees, what was your business in 1923?

A. Real estate.

Q. Do you remember having any conversation with Mrs. Daley concerning her will or hers and Mr. Daley's will?

A. Yes, sir.

Q. Can you fix the time, about, when that conversation took place?

30 A. It was in the early spring of 1923.

Q. Where were you at the time?

A. At Mr. and Mrs. Daley's residence, 106 South Portland Avenue.

Q. Mr. Cole will be very curious so I will ask you, what were you doing there?

A. I went there purposely to get the listing for the summer rental of Mr. and Mrs. Daley's properties.

Q. And did you remain to talk with them a while?

A. Yes, sir; I stayed there a couple of hours.

Q. During that time did some conversation arise about the wills?

A. There did.

Q. Will you tell us how the conversation occurred?

A. Mr. and Mrs. Daley and myself were seated in the parlor and Mr. Daley had a radio set and during the time we were sitting there talking about different things a lecture came on the radio telling of wills. Mrs. Daley says to me "Have you made out your will?" I said "No" jokingly and laughed. I says "I have nothing to make a will out for." Mrs. Daley, in the presence of Mr. Daley and myself, said that they, Mr. Daley and Mrs. Daley, had mutually made an agreement whereby at the time of death anything ever happened to them automatically the wills would be transferred to one another, other wise a mutual agreement between Mrs. and Mr. Daley. 10

Q. Did she use the word "mutual?"

A. Yes, sir.

Q. She used that?

A. Yes, sir.

Q. That is not a word of yours?

A. No, sir.

Cross-examination.

30

By Mr. Cole:

Q. Did you know where this lecture came from over the radio?

A. No, sir, I do not.

- Q. Were you there when it started?  
A. Yes, sir.  
Q. Was there no announcement?  
A. There was an announcement there but Mr. and Mrs. Daley and I was talking about different things and I guess we didn't pay no attention to it.  
Q. Did you pay any attention to it?  
A. No, sir.  
Q. And you didn't get the station?  
10 A. No, sir; I did not.  
Q. Don't you know what city it came from even?  
A. No, sir; I couldn't tell you.  
Q. How long had you known Mrs. Daley before that?  
A. Mrs. Daley, sir?  
Q. Yes.  
A. Oh, in the neighborhood of four years.  
Q. Had you ever done any business for her?  
A. No, sir.  
20 Q. How long have you known Mr. Daley?  
A. Neighborhood of ten years. Possibly eleven.  
Q. You knew Mrs. Daley through Mr. Daley?  
A. Yes, sir.  
Q. How did you come to be acquainted with Mr. Daley?  
A. Acquaintance from Pittsburgh.  
Q. When he lived there?  
A. Yes, sir.  
Q. You lived there?  
30 A. Yes, sir.  
Q. Was that your home at that time?  
A. Yes, sir.  
Q. What was your business then?

Mr. Richards: Objected to.

The Court: I will permit it on cross-examination.

Q. What was your business?

A. I was conductor on the Baltimore and Ohio Railroad.

Q. When did you cease to be a conductor on the Baltimore and Ohio?

A. I left there in 1921, quit there on account of my health, came to Atlantic City.

Q. When did Mr. Daley leave Pittsburgh?

10

Mr. Richards: That is objected to.

A. That I don't know, sir.

Q. Did you find him here when you came in 1921?

A. Yes, sir.

Q. Where is your real estate office?

A. At that time it was out on Ventnor Avenue next to the Ventnor Theater.

20

Q. Are you still in the real estate business?

A. Yes, sir.

Q. You have been a friend of Mr. Daley for years then, haven't you?

A. Quite a long time, yes, sir.

Q. Tell us again what the conversation was about wills?

A. There was—Mrs. Daley says that Mr. and Mrs. Daley had made a mutual agreement between them both that at the time of their death that whoever was the remaining surviving person would get the property which was left, what ever is left them.

30

Q. Is that all?

A. Yes, sir.

Q. Nothing more was said?

A. Not to my knowledge, no, sir.

Q. About anything?

A. No.

Q. That was the beginning and end of the conversation?

A. That is all, just accidentally came on the radio and didn't know where it came from when the will proposition came up.

Q. Mrs. Daley did all the talking?

A. Mr. Daley was there too and Mrs. Daley.

10 Q. Did he do any talking?

A. He verified the statement about the wills is all.

Q. What did he say?

A. He said that the agreement was mutual in case Mrs. Daley would die he would get all the property.

Q. He also used the word "mutual?"

A. Yes, sir, both.

Q. Both used it?

A. Yes, sir.

20 Q. Did you tell that in answer to Senator Richards' question about his having talked about a mutual will?

A. Yes, sir; that he was present.

Q. Then they both talked about mutual wills, did they?

A. Yes, sir; that they had both made them out.

Q. Did they tell you the wills had been executed, that they had actually signed them?

A. I seen the wills—

30 Q. No, did they tell you the wills had actually been signed?

A. Yes, sir.

Q. Executed?

A. Yes, sir.

Q. Then they told you that they had in fact executed mutual wills, didn't they?

A. Yes, sir.

Q. In other words it was a past performance? It had been done, hadn't it?

A. Yes, sir.

Q. Then was the conversation about the fact that they had executed mutual wills or that they were going to do it?

A. That was already done, that is my understanding.

Q. What occasion was there, then, for this talk about an agreement to make wills if she told you and he told you that it had actually been done? 10

A. That they had made a mutual agreement between them.

Q. Is that the wills that they talked about, was the wills, the mutual agreement?

A. Mutual agreement of the wills, yes, sir.

Q. I say did they tell you that the wills that they had executed was the agreement they were talking about?

A. The mutual agreement of the wills, yes, sir. 20

Q. Now when before today did you talk with anybody about this?

A. I guess it was a week or so ago.

Q. With whom did you talk?

A. Mr. Daley.

Q. Where?

A. On Atlantic Avenue.

Q. How did it come about?

A. I met him down the street was all and he asked me if I recalled anything in regards to the transaction at the house at the time I was out there at the renting and I told him I did. 30

Q. Were you a witness in the previous hearing of this case?

A. No, sir.

Q. Did you know it was going on?

A. No, sir.

- Q. Have you been here right along?  
 A. Yes, sir.  
 Q. Mr. Daley know that? Has he known that you  
 have been here right along?  
 A. I suppose he has.  
 Q. That is all.

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10 ELLA ADAMS, sworn for complainant.

Direct examination.

By Mr. Richards:

- Q. Ella, did you know Mr. and Mrs. Daley?  
 A. I did.  
 Q. Work for them?  
 A. Yes.  
 20 Q. When did you work for them?  
 A. What?  
 Q. Where did you work for them?  
 A. The hotel, St. James Place.  
 Q. Ever work for them down at Portland Avenue?  
 A. Yes.  
 Q. Now you worked for them at the hotel I suppose during the summer of 1922, is that right?  
 A. 1922.  
 Q. That is when they had the hotel. During that  
 30 time did Mrs. Daley ever say anything to you about  
 making wills or an agreement to make wills with Mr.  
 Daley?  
 A. Yes, she did.  
 Q. What did she say to you at that time?  
 A. I asked her about who she was going to make  
 the will to, and she had been drinking, so I had been  
 attending to her there, so I asked her, and she says

she has no one to give no will to but Mr. Daley, and she said that was all fixed, got that all fixed.

Q. How did she say it was fixed?

Mr. Cole: I object; let her state the conversation.

Mr. Richards: What I am trying to get.

The Court: Yes, give us the conversation.

Q. Was there any further conversation at that time? 10

A. No, no more.

Q. Now did you ever have any other conversation with her?

A. Yes, down at Portland Avenue.

Q. When was that?

A. That was 1922—May 1923—I was working down there.

Q. Did she at that time say anything about the wills or an agreement to make the wills? 20

A. She said the agreement was all fixed and she had made all her will to Mr. Daley, what was left, what she had was made to Mr. Daley, anything would happen to her, and if Mr. Daley would die, shen she would get what was, you know, what was left for her.

Q. Whatever he had?

A. What he had, yes.

Cross-examination. 30

By Mr. Cole:

Q. Whom did you know first Mr. or Mrs. Daley?

A. I know Miss Daley first.

Q. What?

- A. I know Miss Daley first.  
Q. Miss Daley—you mean Mrs. Daley?  
A. Mrs. Barstow.  
Q. When did you first know her?  
A. It was either 1915 or 1916, something like that.  
Q. Where did you say this first conversation took place?  
A. It was at the hotel.  
Q. St. James Place?  
10 A. Yes.  
Q. When was that?  
A. That was 1922.  
Q. What time?  
A. It was April.  
Q. April 1922?  
A. Yes.  
Q. Who were present?  
A. What?  
Q. Who were present?  
20 A. Who was present? Was myself and her is all, just us two.  
Q. In April, 1922?  
A. Yes.  
Q. What part of the hotel?  
A. It was in the kitchen.  
Q. And the second conversation took place in Portland Avenue?  
A. Portland Avenue.  
Q. In May, 1923?  
30 A. It was in May, 1923.  
Q. Now, how did you come to be here today?  
A. Mr. Daley, I was asked by Mr. Daley.  
Q. When?  
A. Last week.  
Q. What did he say to you?  
A. He asked me would I come up and state what

I know about Mrs. Daley in the case, about the will, you know, and I told him I would.

Q. Is that the first time he spoke to you about it?

A. Yes.

Q. Had not spoken to you about it before?

A. No.

Q. Hadn't you told him before what you are telling us now?

A. Told him before?

Q. Hadn't you told him before, a few days ago, 10 what you have been telling on the stand?

A. Yes, before.

Q. Where did you tell him?

A. He came to the house.

Q. When?

A. I don't know when.

Q. He came to your house?

A. Yes.

Q. Where do you live?

A. 207 North Maryland Avenue.

20

Q. How long ago was it he came to your house?

A. I guess it has been about a month now or so.

Q. What did he say when he came there?

A. Asked me whether I would come up, you know, and help him out on this case, you know.

Q. No, I don't know; I am trying to find out.

A. About the will case, you know, and I said, yes, I would do all I could, I told him I would help him out because she told me that the will was made—

Q. How—

30

Mr. Richards: Let her finish her answer.

(Answer repeated.)

Mr. Richards: Go ahead; what else were you going to say?

A. I forget now—she told me—I told him I would help him out about the will case, she told me about it, I heard her say them words, you know, that she was going to, if anything happened, everything was willed to him and if anything would happen to him she would get it all, she would get what is left her.

Q. Did you meet her in April, 1922?

A. I got that in April and I was to the hotel and I went down to Portland—

10 Q. Did she tell you at the hotel in April, 1922, that she made a will leaving everything to Mr. Daley?

A. Yes.

Q. Sure about that, are you?

A. Yes, sure.

Q. And also told you that he had made a will leaving everything to her?

A. Yes.

Q. In April, 1922?

A. Yes.

20 Q. At the hotel?

A. At the hotel.

Q. How did Mr. Daley know that you knew anything about these wills?

A. How did Mr. Daley know?

Q. Yes, he came to your house to get you to come here as a witness; how did he know that you knew anything about these wills?

A. Because I was leaving, I was only one, last girl to be there and she would talk to me.

30 Q. Did you tell him?

A. Yes.

Q. When did you first tell him that you knew about these wills?

A. I told him at the hotel.

Q. In April?

A. Yes.

Q. 1922?

A. 1922.

Q. You told Mr. Daley in April, 1922, that Mrs. Daley had told you?

A. Told me about wills.

Q. That she had made a will to him?

A. Yes.

Q. You told him right away?

A. Yes.

Q. Why did you do that?

A. I don't know.

Q. Why did you tell Mr. Daley so far as what Mrs. Daley had told you? 10

A. They were both sitting at the table talking about wills and everything, you know, and I said, "Oh, she told me the same thing." She was telling him about the wills too, you know, and I said "Well, she told me the same thing."

Q. Was that at the hotel in April, 1922, after she told you when you and she were together and no one else around the table when he was present, you all talking about it? 20

A. No, wasn't around the table; it was supper time.

Q. Supper time?

A. Yes, came in for supper.

Q. Then she repeated in Mr. Daley's presence what she told you?

A. Yes, about the will, yes.

Q. And Mr. Daley heard it?

A. Sure.

Q. What did he say? 30

A. He said all right, then. He said "Ella, did you get that?" I said "Yes."

Q. Get what?

A. What she said about the wills.

Q. You mean at that time in April, 1922, he asked you whether you got that?

A. At the supper table.

Q. Meaning what Mrs. Daley said about the wills?

A. Yes.

Q. Did he seem to be anxious about it?

A. No, not so anxious.

Q. Seem to be pleased?

A. Yes, he was pleased.

Q. Wasn't mad about it?

A. No.

10 Q. It was all fixed up, the wills were made in April, 1922?

A. Yes.

Q. And Mr. Daley made his will?

A. Yes.

Q. She said that?

A. Yes.

Q. In his presence?

A. Yes.

Q. Did he say that wasn't so?

20 A. No.

Q. Did he say it was so?

A. He said it was so.

Q. That is all.

By Mr. Richards:

Q. Ella, you spoke about this conversation being in April, 1922; are you sure about the date?

30 Mr. Cole: I object, may it please you Honor.

Mr. Richards: You are not going to trap this witness that way. You know perfectly well you wasn't fair about it when they were married.

The Court: Let's hear the objection.

Mr. Cole: I object to this witness being asked this question after this cross-examination. She has not said she wanted to correct her testimony.

The Court: How is it admissible, Senator? She testified on the direct examination she had a conversation in 1922 and again in 1923.

Mr. Richards: Now down in Mr. Reed's office a little while ago she made exactly the same statement 10 and I asked her the question I am going to ask her now and she then corrected her statement. She will do it again. I don't think it is fair to this witness to leave her under what is a mistake on her part, under the cloud of having given false testimony. I know and Mr. Reed knows and we all know that is not her testimony and does not intend to be her testimony.

The Court: I will permit the question. 20

Q. You spoke about this being in April, 1922, when you had this conversation. Now, Ella, are you sure it was in April or was it later in 1922?

A. I think it is—I don't think it was later.

Q. Do you know when Mr. and Mrs. Daley were married?

A. I think—I don't know exactly it was in May or June.

Q. Was this before they were married or after? 30

A. This was after they were married.

Q. The conversation took place after they were married?

A. Yes.

Q. Now then at that time did she say that they had actually made the wills at that time?

Mr. Cole: I object to putting words in the mouth, it is very leading and it is not re-direct.

The Court: Yes.

Mr. Richards: No, if your Honor please, it is not leading.

10 The Court: Your witness testified what the conversation was first under your examination and then under the cross-examination.

Mr. Richards: If your Honor please, this is an ignorant colored woman. The words that she uses are not exact in their language. It is only the purport of them that can be exact.

The Court: The Court appreciates that fact.

20 Mr. Richards: And I have a right to get from her what the actual conversation was.

The Court: Yes, but you are now leading her in that conversation. I will sustain the objection to this question.

30 Q. What did she say to you concerning—directing your attention to the conversation that you had down at the hotel—what did Mrs. Daley say concerning whether the wills had been made or not?

Mr. Cole: It is objected to on the ground she was asked all that on direct examination and cross-examination. It is a repetition.

The Court: I will permit it.

(Question repeated.)

A. She told me that she was going to make the wills out, the will was going to be made out to Mr. Daley.

Q. That was when you were at the hotel?

A. That was at the hotel.

Q. Now when you were at Portland Avenue what did she say concerning whether the wills had been actually made or not? 10

A. The wills——

Mr. Cole: Objected to on the ground it is leading, putting the words in the witness' mouth and repetition.

The Court: Yes, it is leading. I will permit it so far as repetition is concerned but not the other question. 20

Q. What did she say——

Mr. Richards: Trouble is if I use the right words she won't understand them.

The Court: Can't help that.

Mr. Cole: I wonder how he knows that.

Q. What did she say concerning the execution of the wills down at Portland Avenue? 30

A. She told me that everything was all fixed to Mr. Daley. She had it all made out for him.

Q. That is all.

JOHN GAITHER, sworn for complainant.

Direct examination.

By Mr. Richards:

Q. Did you know Mr. and Mrs. Daley?

A. Yes, sir.

10 Q. Work for them?

A. Yes, sir.

Q. Whereabouts?

A. Jackson Avenue, Margate.

Q. When did you work for them?

A. In January, 1923.

Q. How long did you work for them?

A. Well, I worked off and on for them until around Christmas of the same year.

Q. Of 1923?

20 A. Yes, sir.

Q. Did you ever have any conversation with Mrs. Daley concerning a will or an agreement to make a will?

A. Why, yes, sir.

Q. Will you tell the Court what that conversation was?

30 A. Why it was, I think it was in February, and it was very cold down there, and they didn't have a heating system in yet and I said to Mrs. Daley—we were doing some concrete work on the front steps, Mr. Daley and I—and I said to them "You will freeze to death down here if you try to live down here all winter," and Mrs. Daley said she had made a will and she said "If I die first Mr. Daley will get all I have," and she says "If he dies first I will get all that he has."

Q. Is that all the conversation you remember about it?

A. At that time, yes, sir.

Q. Did you ever have any further conversation with her?

A. She spoke of it once when the, before they got the heating system in; they were using the dining room then for a bedroom and only had a gas stove and gas went out and I went down one morning and found them both sick from the effects of gas and Mrs. Daley said if they had died they made the wills, she said they had both agreed to give each other what each other owned at the time of death. 10

Q. Is that all the conversation you ever remember having with them about the wills?

A. About the wills, yes, sir.

Cross-examination.

By Mr. Cole:

20

Q. When did you say you went to Jackson Avenue, Margate to live—to work?

A. To work? I went there in January, 1923.

Q. Were they living there then?

A. They were just down, had been there I don't know just how long.

Q. Were they living there then?

A. Yes, sir, they were living there then.

Q. And did they continue to live there from that time until Christmas while you say you worked for them? 30

A. Yes, sir.

Q. Jackson Avenue, Margate?

A. Jackson Avenue, Margate.

Q. Now don't you know that they lived at Port-

land Avenue, 106, from September, 1922, until May, 1923?

A. Well, I wasn't there steady at the house. I helped to install an Arcola heating system.

Q. I am asking you whether you don't know that they lived at 106 South Portland Avenue, Ventnor from September, 1922, until May, 1923?

A. Well, they were at Jackson Avenue house every time I worked for them there at the house. I know  
10 they had two houses and moved back and forth but every time I worked for them there at the Jackson Avenue house in Margate.

Q. How did you come to be here today?

A. I was subpoenaed. Got a notice yesterday.

Q. Anybody talk with you about your testimony before today?

A. No, sir.

Q. Nobody at all?

A. No, sir.

20 Q. Sure about that?

A. Yes, sir; absolutely sure.

Q. Not before just before you came on the witness stand nobody talk to you about it?

A. I talked to the Senator there a few minutes down at his office.

Q. When was that?

A. Just before I came into the room.

Q. But not anybody before?

A. No, sir.

30 Q. Now when do you fix the time that you first heard her talk about wills?

A. It was in February, 1923, or January, rather, 1923.

Q. And what did she say?

A. She said—I told them that they would freeze to death down there, was cold in this house, you know, only had a gas stove, and Mrs. Daley said

“Well, if we do, we have made our wills and made an agreement and made our wills and we have agreed to give each other at the time of death all that we own.” She said “If I die first Mr. Daley gets all of mine and if he dies first I get all that he owns.”

Q. In other words, she didn't seem to care whether she froze to death or not?

A. I don't know about that; but that was the conversation.

Q. But in January, 1923, she told you that both she and Mr. Daley had made wills, did she? 10

A. Yes.

Q. Mutual wills?

A. She didn't say mutual; she said a will and agreed to it.

Q. And had made the wills?

A. Yes.

Q. In 1923 in January?

A. Yes, sir; that was in January.

Q. Actually made them?

A. Yes, sir. 20

Q. Was that in Mr. Daley's presence?

A. That was in Mr. Daley's presence; yes, sir.

Q. Did he say anything?

A. No, sir; he didn't say anything.

Q. He said nothing?

A. He said nothing at that time, no, sir.

Q. Not a word?

A. He was talking about the work he was doing.

Q. I am talking about the wills; did he say anything about the wills? 30

A. He said “Yes.”

Q. He did say “Yes?”

A. Yes.

Q. Yes, that they had made the wills?

A. Yes, sir.

Q. In January, 1923, is that correct?

A. Yes, sir.

Q. Don't let's have any misunderstanding about it; you say, do you, that in January, 1923, Mrs. Daley, in the presence of Mr. Daley, told you that they had made wills?

A. Yes, sir.

Q. Each for the benefit of the other?

A. Yes, sir.

Q. And after she had stopped talking Mr. Daley  
10 said "Yes?"

A. Yes, sir.

Q. Now when did she next say something like that?

A. That was around in February when they had the——

Q. The next month?

A. Yes, sir, around when they had the accident with the gas stove.

Q. Then she just voluntarily repeated what she  
20 said in January about the wills?

A. Well not just exactly what she said in January but it was something to that effect.

Q. She said the same thing in February, didn't she?

A. Yes, sir.

Q. They are the only two times that you ever heard anything like that from her?

A. About wills, yes, sir.

Q. You haven't talked with Mr. Daley about this  
30 matter since, have you?

A. No, sir; I haven't seen Mr. Daley until this morning for about six or seven months.

Q. And told nobody about that until Senator Richards this morning?

A. Senator Richards this morning.

Q. Nobody knew what you were going to testify to?

- A. No, sir.  
Q. You have been living here right along?  
A. I have been living here three years.  
Q. Mr. Daley know where you were living?  
A. No, sir; Mr. Daley didn't know where I was living.  
Q. How did they find out where to serve the subpoena?  
A. I don't know. Mr. Salsburg gave it to me last night when I came in. That is the man that I work for. 10  
Q. That is all.

Re-direct examination.

By Mr. Richards:

- Q. You remember when Mrs. Daley died?  
A. No, I do not.  
Q. You were not working for them then? 20  
A. No, sir; not at that time.  
Q. This conversation took place at the Jackson Avenue house.  
A. At the Jackson Avenue house.  
Q. In January and February?  
A. In January and February; I worked for them pretty steady up until around the thirteenth of April that same year.  
Q. Had they just bought the Jackson Avenue house? 30  
A. I don't know; I couldn't say.  
Q. They were fixing it up?  
A. They were fixing it up, yes, sir.  
Q. And they lived at Jackson Avenue after that?  
A. After that, yes, sir.  
Q. When did you work last for them?

A. Why, as for as I can remember, it was around Christmas time of the same year. Around about this time of the year because I helped them fix up the house at Christmas time for some little children, neighbors, that they had them come in on Christmas day; it was around Christmas time.

Q. That is all.

COMPLAINANT RESTS.

10

DEFENDANTS' TESTIMONY.

WILLIAM H. CARROLL, sworn for defendants.

Direct examination.

By Mr. Cole:

- 20 Q. What is your business, Mr. Carroll?  
 A. Real estate business.  
 Q. How long have you been in that business?  
 A. Twenty-six years.  
 Q. Where do you live?  
 A. My place of business is 6401 Atlantic Avenue; my home is 14 South Melbourne.  
 Q. How long have you lived in Atlantic County?  
 A. Thirty years.  
 Q. Did you know Mrs. Robert Daley in her life  
 30 time?  
 A. Yes, sir.  
 Q. How long had you known her before her death?  
 A. Oh, I have known her for probably ten years.  
 Q. Did you ever do any business for her?  
 A. Yes, sir.

Q. What was it; what was the character of it?

A. I placed, last thing I did for her, I placed a mortgage on 106 South Portland in the sum of three thousand dollars.

Q. Did you ever have any talk with her or she with you concerning her husband?

A. Yes, sir.

Q. How often?

A. Well, she came in, I would say from my memory that she must have come in in the first part of May 10 of 1924, she said she was in debt.

Q. May, 1924?

A. Yes, sir; that she owed the Currie Company—

Mr. Richards: Wait a minute. I object to what she said.

Q. May, 1924, what did she say to you concerning her husband?

Mr. Richards: I object. I don't think it is relevant. 20

The Court: I will permit it.

Mr. Richards: I think it ought to be limited, if your Honor please, not what she said generally concerning her husband, only what relates to this amended pleading.

Mr. Cole: That is what it is. 30

Mr. Cole: It should be limited to that.

Mr. Cole: Do I understand the question is allowed?

The Court: I admitted the question.

Mr. Richards: Without any limit?

The Court: Yes.

(Question repeated.)

A. She said she was going to get a divorce—

10 Mr. Richards: Wait a minute. You reading from something?

A. No, I am not reading it at all.

Mr. Richards: Go ahead.

Q. Proceed, Mr. Carroll, and tell us what she said.

A. I answered the question.

Q. What?

20 A. She said she was going to get a divorce.

Q. Was that all?

A. No.

Q. Tell us all she said?

A. She said that he had beat her and one thing another and she couldn't live with him.

Mr. Richards: I ask this answer be stricken out as not responsive and not within the limits of the pleadings.

30

The Court: I will permit it to remain.

Q. In any conversation that she had with you did she ever speak of a will?

A. No, sir.

Cross-examination.

By Mr. Richards:

Q. Did she ever tell you that she had not made a will?

A. No, sir.

Q. You say you have known Mrs. Barstow for about ten years?

A. Yes.

Q. Were you here during the last trial of this case? 10

A. No.

Q. You knew about it?

A. I knew that there was a trial or something about it, yes.

Q. Did you at that time come forward and tell Mr. Charlton what you knew about this case?

A. I didn't tell anybody anything about it.

Q. At the time that Mrs. Daley said she was going to get a divorce had she been drinking?

A. Not that day. 20

Q. Did she drink?

A. She did.

Q. Heavily?

A. Yes, at times.

Q. Do you know whether she had been drinking just previous to this day?

A. That I don't know.

Q. She show any signs of having been drinking that day?

A. She did not. 30

Q. That is all.

DEFENDANTS REST.

TESTIMONY CLOSED

## CONCLUSIONS.

(Filed August 4, 1926.)

IN CHANCERY OF NEW JERSEY.

10

Between

ELIZABETH HOWELLS,  
*Complainant,*

and

GHERTINE RIPPERGER  
MARTIN and MADALINE  
RIPPERGER FRASER,  
*Defendants.*On Bill, etc.,  
On Final Hearing.  
Conclusions.

20

MR. JOHN C. REED and MR. EMERSON RICHARDS for  
the complainant.MR. WILLIAM CHARLTON and MR. CLARENCE L. COLE,  
SR., for the defendants.

INGERSOLL, V. C.:

30) The bill alleges that Robert Daley and Ellen Montgomery Daley were husband and wife; that prior to the 28th day of December, 1922, they agreed to make mutual wills, each devising to the other all his or her property; that on December 28th, 1922, each made a will devising and bequeathing all property, real and personal, to the other; that the wills were handed to the said Ellen Montgomery Daley for safe keeping; that on the 4th day of September,

1924, the said Ellen Montgomery Daley died and that diligent search has been made for said wills and that neither has been found; that no new will or revocation of the will executed by said Ellen Montgomery Daley has been discovered.

The defendants, Ghertine Ripperger Martin and Madaline Ripperger Fraser are daughters of said Ellen Montgomery Daley, and that they claim to be entitled to the real and personal property of which the said Ellen Montgomery Daley died seized, there having been no children born of the marriage of Robert Daley and the said Ellen Montgomery Daley. 10

Upon petition alleging the said Ghertine Ripperger Martin to have been appointed administratrix of the estate of Ellen Montgomery Daley, she as administratrix of said estate was admitted as a party defendant, and has answered.

The prayer of the bill is:

“2. That a writ of injunction issue against the said defendant, Ghertine Ripperger Martin, her servants and agents, commanding them to refrain and desist from selling or exposing to sale any of the goods and chattels herein mentioned and referred to. 20

3. That complainant have such other and further relief as shall be equitable and just.”

That after the death of Mrs. Daley, Daley for the expressed consideration of \$1.00 in each case, made two assignments to the complainant, —one, of the real estate and the other of the personal property of which the said Ellen Montgomery died seized. 30

The wills were drawn by William T. Leek, a scrivener, and executed by Mr. and Mrs. Daley in the presence of Leek and one Andrew P. Johnson.

Mr. Johnson testified that he was present at the

execution of the wills, that Mr. Leek read the papers over, and that "the substance of it was that in the event of Mr. Daley's death, the property should go to Mrs. Daley—in the event of Mrs. Daley's death, the property should go to Mr. Daley."

Mr. Leek testified that upon the instruction of Mr. and Mrs. Daley he drafted the wills in question, and that they were in due form, executed with himself as witness. That each will directed the payment of  
 (10) funeral expenses and just debts, and that Mrs. Daley was named as executor of Daley's will and he of hers.

Mrs. Howells' testimony as to the will was only that Mrs. Daley had told her she had made a will and everything was to be Bob's, &c.

Vice-Chancellor Backes in *Tooker v. Vreeland*, 92 N. J. Eq. 340, on page 342, said:

"The law is well settled, and the proposition  
 is not questioned, that if Mr. and Mrs. Tooker  
 made a compact to dispose of their combined  
 estates, the terms of which find expression in  
 the mutual wills, the contract will be enforced  
 in equity according to its established practice.  
 Equity will not interfere with the probate of the  
 later will, made in violation of the contract, but  
 will enforce the contract against the estate of  
 the survivor by impressing a trust upon the  
 assets. There is a wealth of authority for the  
 relief and the remedy. Many of the cases are  
 gathered by Vice-Chancellor Garrison in *Deseu-*  
 (20) *meur v. Rondel*, 76 N. J. Eq. 394. The early  
 English cases are *Dufour v. Pereira*, 1 Dick. 419.  
 2 Harg. Jr. Arg. 304; *Lord Walpole v. Lord*  
*Orford*, 3 Ves. Jr. 402. See also for collection  
 of cases *Stevens v. Myers*, 91 Org. 114; 177 Pac.  
 Rep. 37. An interesting discussion of the sub-  
 ject is to be found in *Edson v. Parsons*, 155 N.

Y. 555. See also *Rastetter v. Hoenninger*, 136 N. Y. Supp. 961; *Herman v. Ludwig*, 174 N. Y. Supp. 469. An early case in this State on the subject of enforcing contracts to bequeath is *Johnson v. Hubbell*, 10 N. J. Eq. 332, and the leading case is *Duvale v. Duvale*, 54 N. J. Eq. 581; 56 N. J. Eq. 375. See also *Lawrence v. Prosser*, 88 N. J. Eq. 43.

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. 10

The mutual wills do not on their face purport to be contractual. Their reciprocal provisions indicate that they were the result of an understanding between Mr. and Mrs. Tooker, but an understanding does not necessarily spell contract. The vital question is, was it agreed by them that the wills should remain irrevocable after the death of either? 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. The contract may be found in an express promise, or inferred, as a conclusion of fact, from the circumstances surrounding the parties.” 20

An examination of the testimony is convincing that the making of the mutual wills was the result of a contract between them. 30

James Daley, Jr., testifies that Mrs. Daley told him about the middle of January, 1923: “That her and Uncle Bob had made an agreement that upon

the death of either one of them, that if she died she was to will Uncle Bob her property and possessions and if he died he was to leave her his property and possessions, and that is all I know of the case. At the time it didn't appear to me as anything important."

10 The testimony of Henry H. McAlees is that in the early spring of 1923, "Mrs. Daley, in the presence of Mr. Daley and myself, said that they, Mr. Daley and Mrs. Daley, had mutually made an agreement whereby at the time of death anything ever happened to them automatically the wills would be transferred to one another, otherwise a mutual agreement between Mrs. and Mr. Daley."

20 Ella Adams, an ignorant colored maid gave similar testimony, that in May, 1923, Mrs. Daley said: "The agreement was all fixed and she had made all her will to Mr. Daley, what was left, what she had was made to Mr. Daley, anything would happen to her, and if Mr. Daley would die, then she would get what was, you know, what was left for her."

This woman became very much confused upon cross-examination as to the date this statement was made to her—stating that it was in May, 1922. She at all times insisted, however, that the conversation was after the marriage of Mr. and Mrs. Daley (which took place June 8th, 1922).

30 John Gaither states that in January, 1923, Mrs. Daley said: "I told them that they would freeze to death down there, was cold in this house, you know, only had a gas stove, and Mrs. Daley said: 'Well, if we do, we have made our wills and made an agreement and made our wills and we have agreed to give each other at the time of death all that we own.' She said: 'If I die first Mr. Daley gets all of mine and if he dies first I get all that he owns.'"

Mr. Howells testified that Mrs. Daley told him that "we make (made) our wills out for each other and you ought to do the same."

Mrs. Baines testified that in September, 1923, "Mrs. Daley told me that she had no will and that she hoped whatever she had Mr. Daley wouldn't ever have anything, that she hoped that her children would get what she had."

This was after the wills were executed and can bear one of three interpretations: 10

1. That Mrs. Daley had destroyed previous there-to her will.

2. That Mrs. Daley was misleading Mrs. Baines—  
or —

3. That Mrs. Baines is mistaken.

Neither interpretation materially assist in the de- 20  
termination of the question being considered.

Mrs. Wray's testimony is that in 1924, Mrs. Daley said: "He is all the time nagging at me to make a will and if it wasn't for some of the neighbors he would have killed me in the month of April. He had a lawyer, Reed, and some other witness,"—I forget their names—"and because I wouldn't sign papers for him he beat me black and blue, but I screamed so loud some of the neighbors heard me and came to my rescue." 30

Her story cannot be accepted as true. The wills were made in 1922, and manifestly he could not be "nagging her about making a will."

This woman's testimony was not given in a convincing manner, and did not impress me as being a truthful statement.

Nellie Lockman testified that in 1922, directly after they were married, Mrs. Daley said: "Bob don't bother me about making a will. I will never make no will way you mistreat me; how you figure I make a will to you."

If this testimony is true, Mrs. Daley evidently changed her mind, as the wills were made in December, 1922.

10 It is very evident that both Mr. and Mrs. Daley were accustomed to drinking to excess, that she was often under the influence of liquor, and that he was intoxicated perhaps to as great an extent.

It is also evident that the daughters, the present defendants, had little, if any affection for their mother, and the present excuse that they were prevented by Daley from seeing their mother has little weight, as for several years prior to the mother's marriage to Daley they had made no attempt to see her—one living within a short distance from Atlantic City (in Philadelphia).

20 I am convinced that Mr. and Mrs. Daley made a contract to dispose of their combined estates, the terms of which were expressed in the mutual wills and that the contract can and should be enforced.

Having so found, it is unnecessary to determine whether Mrs. Daley destroyed her will, or whether it was stolen from the place in which it was kept.

At the hearing, I permitted the complainant as well as Daley to testify, but quoting Vice-Chancellor 30 Emery in *Clawson v. Brewer*, 67 N. J. Eq. 201, at page 208, "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. 411 (Court of Errors and Appeals, 1899). Complain-

ant's evidence as to transactions with Mrs. Clawson is therefore inadmissible under the statute relating to evidence. P. L. of 1900, p. 363, Sec. 4."

Without deciding whether Daley's testimony is or is not admissable, I excluded its consideration as the assignment to the complainant was made without consideration and it is quite probable his testimony should also be found inadmissible.

A decree will be advised in accordance with these conclusions. 10

Determined: July 22nd, 1926.

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FINAL DECREE.

(Filed October 18, 1926.)

IN CHANCERY OF NEW JERSEY.

20

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Between

ELIZABETH HOWELLS,  
*Complainant,*

and

GHERTINE RIPPERGER  
MARTIN, *et al.,*  
*Defendants.*

On Bill, etc.,  
Final Decree.

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This cause having been referred to the Honorable Robert H. Ingersoll, one of the Vice-Chancellors of this Court, to hear the same for the Chancellor, and

to report thereon to him and advise what order or decree should be made therein, and now coming on to be heard in the presence of John C. Reed and Emerson L. Richards, Esquires, of counsel with the complainant and William Charlton and Clarence L. Cole, Esquires, of counsel with the defendants, and the pleadings having been read and oral testimony having been taken and the Court having taken time to consider the same and it appearing that Ellen  
10 Montgomery Daley, deceased, in the pleadings in this cause mentioned on or about the month of December, 1923, duly made, executed and published her last will and testament in writing in due form of law to pass her real and personal estate and afterwards departed this life without having given notice unto her husband, Robert Daley, of her intention to revoke her said last will and testament, and that said last will and testament was made by and  
20 upon an agreement between the said Ellen Montgomery Daley and her said husband, Robert Daley, to make mutual wills, which said agreement was fully carried out, and which said mutual wills were duly made and executed by each of them and delivered unto the possession of the said Ellen Montgomery Daley, and that the said mutual wills of Ellen Montgomery Daley and Robert Daley were lost or destroyed, by accident or inadvertence and without the knowledge of the said Robert Daley; that the contents thereof have been fully and satisfactorily  
30 proven by the evidence in this cause and that the contract to make mutual wills, Ellen Montgomery Daley for the benefit of Robert Daley; and Robert Daley for the benefit of Ellen Montgomery Daley, has been fully and satisfactorily proved by the evidence in this cause; and that it has been fully and satisfactorily proved by the evidence in this cause that no notice was given by the said Ellen Mont-

gomery Daley unto her said husband, the said Robert Daley, that she intended to revoke her said last will and testament, and that the said last will and testament was irrevocable without such notice unto the said Robert Daley, and the said will ought to be established in all its parts by the order and decree of this Court;

And it further appearing to the satisfaction of the Court that the said Ellen Montgomery Daley, made and executed her will to the following effect: (10

First—That all her just debts should be paid.

Second—That she devised and bequeathed all of her property, real and personal, to her husband, Robert Daley.

Third—And she named her husband, Robert Daley, to be executor of the said will.

And no cause being shown or appearing why the said last will and testament should not be in all things fully established; 20

It is now, on this 18th day of October, A. D. 1926, ordered, adjudged and decreed that the said last will and testament so made, executed and published as aforesaid by the said Ellen Montgomery Daley, by and upon an agreement with her said husband, Robert Daley, to make mutual wills for the benefit of each other and all the devises, bequests and appointments therein contained as hereinabove particularly set forth, be and the same are hereby established in all things and in all parts, and that the said devisee and legatee aforesaid, take, hold, occupy and possess and enjoy his devise and legacy as fully and effectually to all intents and purposes 30

whatsoever as he might, could or would have taken hold, occupied, possessed and enjoyed the same if the last will and testament had not been lost or destroyed and had been duly proven according to law.

And it is further ordered that a transcript of the record of these proceedings be transmitted to the Surrogate of the County of Atlantic to the end that letters testamentary to the executor named in said last will, may be issued to him.

10 And it is further ordered that the question of costs and counsel fees be reserved for further consideration.

E. R. WALKER,  
C.

Respectfully advised:  
R. H. INGERSOLL,  
V. C.

20

30

NOTICE OF APPEAL.

(Filed November 8, 1926.)

IN CHANCERY OF NEW JERSEY.

Between

ELIZABETH HOWELLS,  
*Complainant,*

and

GHERTINE RIPPERGER  
MARTIN, *et al.,*  
*Defendants.*

On Bill, etc.  
Notice of Appeal.

10

20

The defendants, Ghertine P. Martin, Madeline Ripperger Frazer and Ghertine Ripperger Martin, administratrix of the estate of Ellen M. Daley, deceased, hereby appeal from the final decree made in the above entitled cause on October 18, 1926, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, as advised by Hon. Robert H. Ingersoll, one of the Vice-Chancellors, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes. Dated November 2, 1926.

30

WILLIAM CHARLTON,  
*Solicitor for Defendants.*

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

C. L. COLE,  
*Of Counsel with Defendants.*

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PETITION OF APPEAL.

10

(Filed November 8, 1926.)

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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20	Between ELIZABETH HOWELLS, <i>Complainant-Respon-</i> <i>dent,</i> and GHERTINE RIPPERGER MARTIN, <i>et al.</i> , <i>Defendants-Appel-</i> <i>lants.</i>	}	On Appeal from Chancery. Petition of Appeal.
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30 *To the Honorable, the Court of Errors and Appeals*  
*in the last resort in all causes:*

The petition of Ghertine Ripperger Martin, Madeline Ripperger Frazer and Ghertine Ripperger Martin, administratrix of the estate of Ellen M. Daley, deceased, the appellants in the above entitled cause, respectfully shows that:

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, advised by his Honor, Robert H. Ingersoll, one of the Vice-Chancellors, bearing date October 18, 1926, in a certain cause in said Court of Chancery wherein Elizabeth Howells was complainant and the said Ghertine Ripperger Martin and Madeline Ripperger Frazer were defendants, and the whole and every part thereof; 10

And petitioners appeal from the whole and every part of said decree of the Chancellor upon the ground that the same is erroneous in that it grants the relief prayed for in the bill of complainant when it should have denied it and dismissed the bill.

Petitioners, therefore, pray that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioners may have such other relief in the premises as to this Court shall seem proper. 20

WILLIAM CHARLTON,  
*Solicitors for Appellants.*  
C. L. COLE,  
*Of Counsel.*

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ANSWER TO PETITION OF APPEAL.

Formal answer to petition of appeal. 30



EXHIBIT C3

BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS, that I, Robert Daley, of the City of Margate City, County of Atlantic and State of New Jersey of the first part, for and in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration, lawful money of the United States, to me in hand paid, at or before the  
 10  
 ensealing and delivery of these presents, by Elizabeth Howells, of the Borough of Woodlawn, County of Beaver, State of Pennsylvania, of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents doth grant and convey, unto the said party of the second part, her executors, administrators and assigns, all the goods and chattels particularly described and mentioned. All the personal property of which the said Ellen Montgomery Daley died seized, she having died on the fourth day  
 20  
 of September, A. D. 1924.

To HAVE AND TO HOLD the same unto the said party of the second part, her executors, administrators and assigns, forever. AND I do, for myself, heirs, executors and administrators, covenant and agree, to and with the said party of the second part, to warrant and defend the sale of the said personal property hereby sold unto the said party of the second part, her executors, administrators and assigns, against all and every  
 30  
 person and persons whomsoever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the tenth day of November in the year of our Lord one thousand nine hundred and twenty-four.

SEALED AND DELIVERED }  
 IN THE PRESENCE OF } ROBERT DALEY (SEAL)  
 ROCCO T. DELESANTRO

STATE OF NEW JERSEY

ATLANTIC COUNTY, } ss.

BE IT REMEMBERED that on this tenth day of November in the year of our Lord one thousand nine hundred and twenty-four before me an Attorney-at-Law of N. J., personally appeared Robert Daley, who, I am satisfied, is the grantor mentioned in the above bill of sale, and I having first made known to him the contents thereof  
10 he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed. All of which is hereby certified.

ROCCO T. DELESANTRO,  
Attorney-at-Law of N. J.

EXHIBIT C8

DEED—PLAIN WARRANTY

THIS INDENTURE, made the tenth day of November, in the year of our Lord one thousand nine hundred and twenty-four.

BETWEEN Robert Daley of the City of Margate City, County of Atlantic and State of New Jersey, of the first part, and Elizabeth Howells of the Borough of Woodlawn, County of Beaver and State of Pennsylvania of the second part: 10

WITNESSETH, that the said party of the first part, for and in consideration of the sum of One Dollar (\$1.00) and other good and valuable consideration, lawful money of the United States of America, well and truly paid by the said party of the second part to the said party of the first part, at and before the ensembling and delivering of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, release, convey and confirm, unto the said party of the second part, heirs and assigns, ALL (1) All that certain lot, tract or parcel of land and premises situate, lying and being in the City of Ventnor City, County of Atlantic and State of New Jersey, bounded and described as follows: 20

BEGINNING in the Westerly line of Portland Avenue, one hundred feet Southwardly of the Southerly line of Atlantic Avenue and extending thence (1) Westwardly, parallel with Atlantic Avenue, sixty-two feet six inches; thence (2) Southwardly, parallel with Portland Avenue, fifty feet; thence (3) Eastwardly parallel with Atlantic Avenue sixty-two feet six inches to the Westerly line of Portland Avenue; thence (4) Northwardly, and along the Westerly line of Portland Avenue, fifty feet to the place of beginning, and (2) ALL that certain tract or parcel of land and premises situate lying and 30

being in the City of Ventnor City, County of Atlantic and State of New Jersey, bounded and described as follows:

10 BEGINNING at a point in the westerly line of Portland Avenue distant fifty feet South of the Southerly line of Atlantic Avenue and extending thence (1) Westwardly and parallel with Atlantic Avenue sixty-two and one-half feet; thence (2) Southwardly and parallel with Portland Avenue fifty feet; thence (3) Eastwardly and parallel with Atlantic Avenue sixty-two and one-half feet to the west line of Portland Avenue; thence (4) Northwardly and in and along the said west line of Portland Avenue fifty feet to the place of beginning.

20 TOGETHER with all and singular, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances, to the same belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and the profits thereof, and of every part and parcel thereof:

AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, of the said party of the first part, of, in and to the said premises, with the appurtenances:

30 TO HAVE AND TO HOLD the said premises, with all and singular the appurtenances, 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 second part, her heirs and assigns forever.

AND the said Robert Daley, his assigns, heirs, executors and administrators, DOETH by these presents covenant, grant and agree to and with the said party of the second part, her heirs and assigns, that he, the said party of the first part, his assigns, heirs, all and singular the hereditaments and premises herein above described and granted, or mentioned and intended to

be so, with the appurtenances, unto the said party of the second part, her heirs and assigns, against him, the said party of the first part, his assigns, heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same, or any part thereof,

SHALL and WILL WARRANT and forever DEFEND.

IN WITNESS WHEREOF, the said party of the first part to these presents does hereunto set his hand and seal dated the day and year first above written. 10

SIGNED, SEALED AND DELIVERED } ROBERT DALEY  
IN THE PRESENCE OF } (SEAL)  
ROCCO T. DELESANTRO

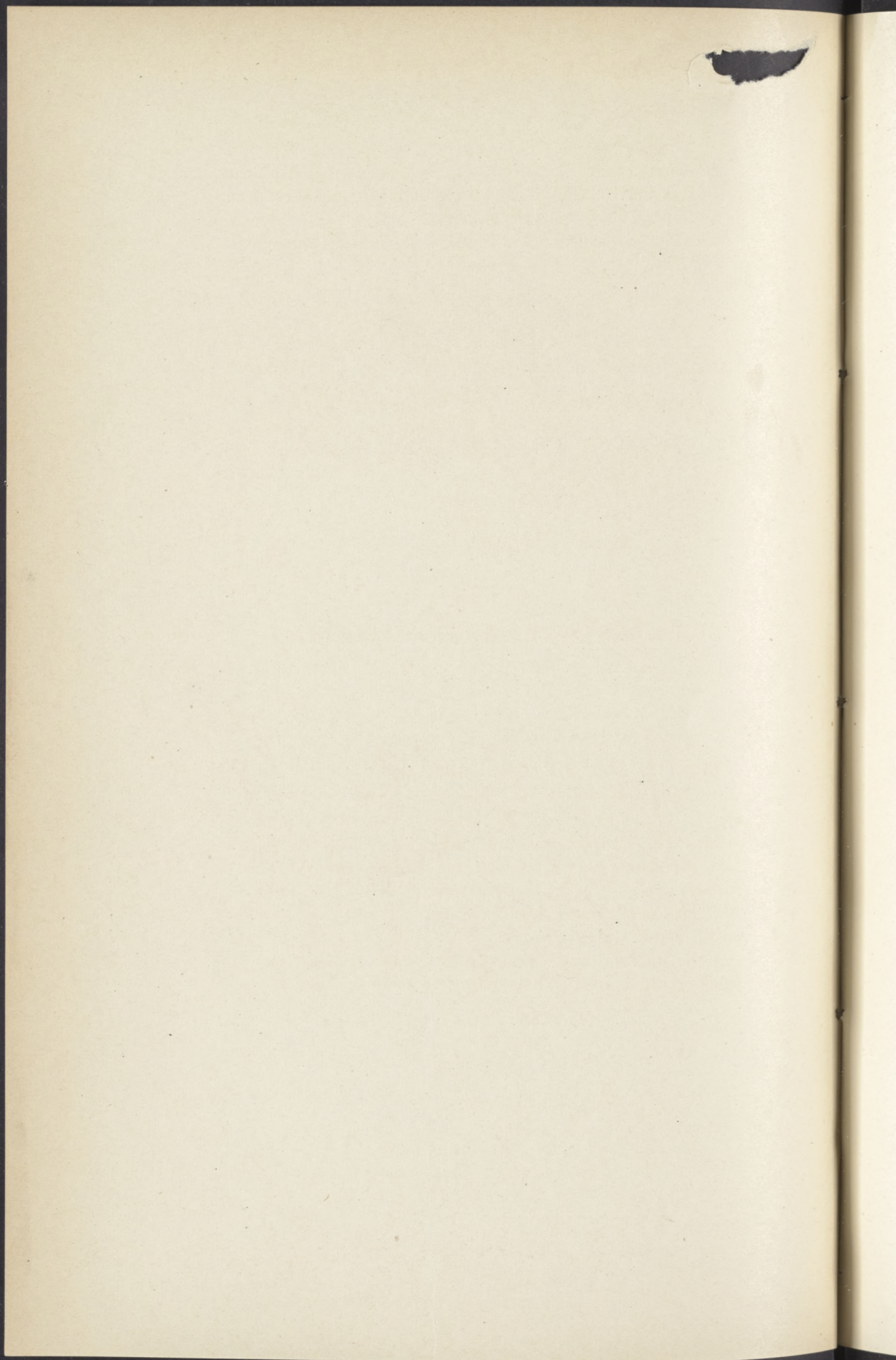
20

STATE OF NEW JERSEY

ATLANTIC COUNTY, } ss.

BE IT REMEMBERED, that on this tenth day of November in the year of our Lord one thousand nine hundred and twenty-four, before me, an Attorney-at-Law of New Jersey, personally appeared Robert Daley, who, I am satisfied is the grantor mentioned in the above deed or conveyance and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed. All of which is hereby certified. 30

ROCCO T. DELESANTRO,  
Attorney-at-Law of N. J.



NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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Between  
ELIZABETH HOWELLS,  
*Complainant-Respondent,*  
and  
GHERTINE RIPPERGER MARTIN and MADALINE  
RIPPERGER FRASER,  
*Defendants-Appellants.*

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ON APPEAL.

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BRIEF OF COMPLAINANT-RESPONDENT.

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FACTS.

Robert Daley and Ellen Montgomery Daley who were husband and wife, entered into an agreement shortly after their marriage in the summer of 1921. Mrs. Daley before her marriage was the widow of Mr. Barstow who died without a will and thereby caused his widow much expense and litigation (page 186, State of the Case). With this experience in mind Mrs. Daley shortly after the marriage suggested that she and her husband make mutual wills leaving all of his or her property each to the other.

At that time Mr. Daley owned a half interest in a hotel in St. James Place in Atlantic City and Mrs. Barstow owned the equities in two houses on South Portland Avenue in Ventnor. Daley testified (page 187, lines 3 to 8, State of the Case):

“A. \* \* \* if I would agree to will her what I possessed she would agree to will me what she possessed, so we talked the matter over and later on we made wills, we were to —

Q. Did you agree to that?

A. I agreed to make a will to that effect.”

The wills were not made immediately, but after the St. James Place property was sold, some other real estate transactions came up and Mrs. Daley then insisted that the agreement be carried out (page 187, lines 19 to 23, State of the Case):

“A. \* \* \* Mrs. Daley asked me had we better make the wills that we agreed to up in the hotel, so I think the following morning we went to Mr. Leek's office and made the wills to that agreement.”

Testimony in support of Daley's testimony, will be discussed in connection with other phases of the case.

The wills after their execution were given to Mrs. Daley for safe keeping. After her death a search was made for the wills and they were not found. There is no reasonable explanation of what happened to the wills except the possible one that they were carried off during a robbery of the house when other things were found to be missing. There was testimony that Mrs. Daley referred to the wills on a number of occasions up until shortly before her death.

The bill alleged *and there was no evidence introduced by the defendants to the contrary*, that thereafter Robert Daley assigned all of his interest in the property devised to him by the wills to his sister, Elizabeth Howells, by deed covering the real estate, and a bill of sale covering the personalty. There is no dispute of the actual contexts of the wills, they provided in the usual form for devise of all the real and personal property of the testator to the devisee.

The bill was first filed to establish the wills as lost, but upon further consideration, counsel after part of the testimony was taken, asked leave to amend the bill and particularly the prayer of the bill so as to obtain a specific performance of the contract to make mutual wills. This amendment of the bill was proposed pursuant to a notice as follows, *and which notice is not printed as a part of the record in the State of the Case*:

“To WILLIAM CHARLTON, Esquire, Solicitor for and of counsel with defendants

Take Notice that on Tuesday, April 21st, A. D. 1925, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, application will be made to the Honorable Robert H. Ingersoll, Esquire, one of the Vice-Chancellors of our Court of Chancery at Chancery Chambers, Atlantic City, New Jersey, for leave to amend complainant's bill of complaint in accordance with prayer of the petition, a copy of which is herewith delivered to defendants and for a further ORDER to re-open the above styled cause and that complainant have leave to take additional testimony in support of complainant's original bill and the bill as it is pro-

posed to be amended in the petition to be presented at the time of the making of this application.

Respectfully yours,  
JOHN C. REED,  
Solicitor for and of Counsel with Complainant.

DATED: April 13th, A.D. 1925.

(Endorsement)

Due and legal service of the within NOTICE, acknowledged this day of April, A. D. 1925.

Solicitor for and of counsel with Defendants.

Argument was had upon the return of the notice and an order entered pursuant thereto.

An appeal was taken from the entry of the above Order to the Court of Errors and Appeals, which appeal was dismissed upon motion.

After the dismissal of the appeal, the cause was brought on for final hearing under the amended bill and additional testimony in support of the original bill and the amended bill, particularly addressed to establish the contract for making mutual wills, was introduced. It should be noted that the original bill alleged an agreement to make wills devising all the real estate to each other and that Daley so testified at the first hearing. The cause, however, at that hearing was tried upon the theory of the establishment of lost wills. This theory was to a large extent abandoned at the second hearing, the complainant preceding upon her rights as the assignee of the contract.

ARGUMENT.

The first point made in appellant's brief, is that there is no evidence to support the allegation that there was an assignment by Daley to complainant. It is admitted that the deed and the bill of sale were introduced at the first hearing. Counsel now seeks to take these documents out of the case by setting up the proposition that none of the evidence taken at the first hearing is available to the complainant and is not a part of the present case.

So far as the State of the Case now before the Court is concerned there might be some warrant for this assertion, because counsel for the appellants either by indifference or design failed to print as a part of the State of the Case the notice permitting the amendment, which notice specifically provided for an order to "reopen the above styled cause and that complainant have leave to take *additional* testimony in support of complainant's original bill." At the time of the second hearing counsel on both sides treated the evidence already in the cause as a part of the evidence to support the amended bill. Frequent references were made to this testimony by both sides. No objection was ever made by counsel for the appellants to the use of this testimony and it is noteworthy that he printed all the original evidence as a part of the State of the Case in the cause, counsel's attention was not called to the fact that this notice above referred to was not in the printed State of the Case until he received appellants' brief.

The appeal having brought up the entire record, the Court has the right to examine the original record and upon such examination it will be found that

the notice and the order, provided that the testimony taken at the second hearing was merely additional testimony and that, therefore, the deed and the bill of sale originally introduced in the cause were properly introduced in evidence.

Since the deed and the bill of sale transferred all of Daley's right, title and interest in the property to the complainant Howell, it follows that all of his right under the contract for the execution of mutual wills went with the assignment.

The right to assign a contract for specific performance is well recognized, *Cope v. Walton Company*, 77 N. J. E., page 512 and *Copy v. Walton Company*, 79 N. J. E. page 165.

Equity regards that as done which ought to be done, and if under the contract wills should have been made devising the property to Daley, the equitable title was in Daley and such equitable title was assigned by the deed and the bill of sale. Equity impresses a trust upon the assets of the estate which is a subject of mutual wills and since the trust is a bare trust, the assignment of the legal estate carries with it the assignment of the equitable estate.

The principles above stated are too elementary to need citation except to invite the Court's attention to the language of Vice-Chancellor Backes in *Tooker v. Vreeland*, 92 N. J. E. page 340.

The second contention is that the contract was not sufficiently established. It is not essential as counsel understands the cases to prove with particularity the *terms* of the contract. It is sufficient to show that there was a contract to make the wills and proof that there was such a contract may be either implied or found from actual evidence; in *Tooker v. Vreeland*, *supra*, the learned Vice-Chancellor recognized this principle on page

346. He said, "Unquestionably Mr. and Mrs. Tooker's primary concern was each other and it may well be that they would have provided, one for the other, in the manner they did *wholly thoughtless of a bargain*; but, be it as it may the fact nevertheless is, that they, in consideration of reciprocal bequests to themselves and those of their choice bound themselves to abide the provisions of the mutual wills and Mrs. Tooker having accepted the benefit of her husband's gift became legally and in conscience bound to carry out the obligation she undertook." This principle was recognized as settled law as early as 1769 by Lord Camden in *Dufour v. Pereira*, 1 Dick 419. In that case the husband and wife had made mutual wills each devising their property to the other. There was no specific testimony of a contract, but the Court held that the making of the mutual wills was itself a contract. "It is a contract between the parties, which cannot be rescinded but by the consent of both, the first that dies carries his part of the contract into execution." To this extent it is submitted that the language of a learned Vice-Chancellor in *Tooker v. Vreeland* to the effect that mutual wills do not purport to be contractual is not the exact wording of the rule and that the Vice-Chancellor so understood it because he immediately continues, "Their reciprocal provisions indicate that they were the result of an understanding between Mr. and Mrs. Tocker."

In *Dufour v. Pereira* Lord Camden continuing; said: "It might have been revoked by both jointly, it might have been revoked separately provided the party intending it had given notice to the other of such revocation, but I cannot be of opinion that either of them could during their joint lives do it secretly or that after the death of either it could be

done by the survivor by another will." In *Walpole v. Orford*, Lord Chancellor Loughborough decided in 1797, "from the co-existence of the instruments and the execution at the same time, I do infer, that they had agreed to make the one a codicil, the other a will." It is unnecessary to discuss the intervening cases all of which recognize this principle, except to again quote from the Tooker case, "The law is well settled and the proposition is not a question that if Mr. and Mrs. Tooker made a contract to dispose of their combined estates *the terms of which find expression in the mutual wills*, the contract will be enforced in equity." In addition to the proposition that the making of the mutual wills is proof to some extent at least that a contract to make the wills pre-existed, we have the actual testimony in the case at bar. That this testimony was no afterthought may be deducted from the original testimony of Daley given at a time when neither his mind nor that of counsel's had been directed to a contract (State of the Case, page 29, lines 13, 14, and 15):

"A. \* \* \* but we agreed to give everything to one another, we made a will out to that effect.

Q. Where did you go to make the will out to that effect?

A. To Mr. Leek, Mr. William T. Leek."

There was ample evidence from Leek and others as to the contents of the wills and their legal execution. After his wife's death Daley made an exhaustive search for the wills and in many parts of his testimony reiterated the facts that as far as he knew the wills were in existence at the time of his wife's death. He directly testifies that his wife never informed him of any intention to revoke the wills (State of the Case, page 187, lines 24, 25 and 26):

“Q. Did Mrs. Daley ever after you made the wills inform you that she had revoked her will?

A. No, Mrs. Daley never mentioned that to me.”

Besides the evidence of Daley, we have that of a number of disinterested witnesses, first that of nephew James Daley, Jr., who testified that his aunt had told him (State of the Case, page 197, lines 7 to 11):

“A. She said that her and Uncle Bob had made an agreement that upon the death of either one of them that if she died she was to will Uncle Bob her property and possessions and if he died he was to leave her his property and possession.”

Another witness was Harry McAlees who testified to a similar declaration made by Mrs. Daley this time in the presence of her husband, Robert Daley. The circumstances were rather unusual, the witness and the Daleys were listening to a radio program at the Daley home during which a lecture was given upon the subject of making wills, whereupon Mrs. Daley declared to the witness (State of the Case, page 203, lines 17 to 20):

“A. \* \* \* that they, Mr. Daley and Mrs. Daley, had mutually made an agreement whereby at the time of death, anything ever happened, automatically the wills would be transferred to one another \* \* \*”

The next witness was Ella Adams, a colored servant of the Daleys. The witness was a rather ignorant colored girl whose memory for dates was not good but whose testimony in relation to the facts

was clear and convincing. She testified that while working for the Daleys at the hotel, which was shortly after their marriage and at the time Daley says they made the agreement to execute the wills, that Mrs. Daley told her in relation to the wills (State of the Case, page 209, lines 1 and 2):

“A. \* \* \* and she said that was all fixed, got that all fixed.”

The matter seems not to have been referred to again by Mrs. Daley until the Adams girl was working for them at Portland Avenue. At that time Mrs. Daley told the witness (State of the Case, page 209, lines 22 to 29):

“A. She said the agreement was all fixed and she had made all of her will to Mr. Daley what was left, what she had made to Mr. Daley anything would happen to her and if Mr. Daley would die, then she would get what was, you know, what was left for her.

Q. Whatever he had.

A. Whatever he had, yes.”

Clearly the first conversation referred to the agreement, the second to the executed agreement. Upon cross-examination she made this point even clearer (State of the Case, page 217, lines 1 to 8):

“A. She told me, that she was going to make the wills out, the will was going to be made out to Mr. Daley.

Q. That was when you were at the hotel?

A. That was at the hotel.”

(State of the Case, page 217, lines 30 to 34):

“Q. What did she say concerning the execution of the wills, down at Portland Avenue?

A. She told me everything was all fixed to Mr. Daley. She had it all made out for him."

Another witness, John Gaither, a colored servant, testified that on two occasions Mrs. Daley referred to the wills (State of the Case, page 218, lines 33 to 37):

"A. \* \* \* Mrs. Daley said she had made a will and she said that 'If I die first Mr. Daley will get all I have,' and she says, 'If he dies first, I will get all that he has.'"

On another occasion (State of the Case, page 219, lines 10 to 13):

"A. Mrs. Daley said that if they had died they made the wills, she said they had both agreed to give each other what each other owned at the time of death."

Upon cross-examination a witness was asked if she had said mutual wills (State of the Case, page 221, lines 13 and 14):

"A. She didn't say mutual; she said a will and agreed to it."

To this testimony the defendants offered no contradiction whatsoever. There was nothing inherently unbelievable in the testimony of the witnesses. They were not impeached or essentially contradicted. It was in the case that Mrs. Daley on occasions drank rather heavily and at such times she undoubtedly discussed her affairs with less reserve and I think it may be fairly inferred from the evidence that she had been drinking when she talked with at least one or two of the witnesses. The question of the wills, however, was one that was undoubtedly on her mind to no little degree. The trouble with her former husband's estate had given her every reason to adopt

precautions in the case of her present husband. He had property. She did not propose to lose it. It was she who suggested the idea of making wills. Undoubtedly it was done as an agreement.

The rule is that such contracts will be enforced in equity if founded upon a valid consideration, certain and defined, equal and fair, and sufficiently proven. Valid consideration in this case, was the undisputed fact that both owned valuable properties. The contract is certain and defined because its general terms are to be found in the will which are not the subject of dispute and because the unimpeached and believable testimony is that they made an agreement to make the wills months prior to the time the wills were actually executed, that the wills were never mutually revoked on notice given one to the other of intention to renew before death, and that Mrs. Daley repeatedly declared to creditable and believable witnesses that she had made such an agreement and that it had been performed by the making of the wills.

The wills were equal and fair, both in the same language gave to the other all that he or she possessed. It is submitted that the unimpeached testimony of five witnesses is sufficient proof of the agreement, coupled with the fact that the law infers an agreement from the fact of the making of the wills.

Upon the latter subject it would seem in reason as if no other inference could be possible. How could two reasonable persons go hand in hand to a scrivener, declare to him their intention to make a will, leaving each the other's property, solemnly execute such wills in accordance with our statutes, without importing a previous understanding? An understanding in this case certainly means a contract or agreement. The mere statement of the proposition indicates that a contract must have pre-existed. By

what language would it be possible for the parties to arrive at a joint project of this kind without their minds meeting upon the subject coupled with the consideration and thereby make the thing that they did, a contract.

For this reason it is submitted that the contract was sufficiently established and that there was ample proof upon which the learned Vice-Chancellor could find that there was a contract, "I am convinced that Mr. and Mrs. Daley made a contract to dispose of their combined estates the terms of which were expressed in the mutual wills, and that the contract can and should be enforced." Counsel further argues that the contract is not equal and fair, that Mrs. Daley had eighty thousand dollars' worth of property, while appellants' counsel estimates Mr. Daley's worth at twenty-five thousand dollars. Certainly this was not such a great discrepancy as would make the contract unconscionable.

It should be borne in mind that this was Mrs. Daley's proposal, that she was more bent upon getting Daley's estate than he was in getting hers and that her reason was her experience with her former husband. We should add to this the fact that Mrs. Daley was not upon intimate terms with her children, that she had not seen them for years prior to her death and that she had neither very much affection for them or they for her, that she had no one else except her husband to whom to leave her property. The rest of appellants' counsel's argument that the instant case would set a dangerous example is best answered by the fact that this alleged dangerous example has existed in the law for at least one hundred and fifty-eight years, and that while Lord Camden might have decided the matter differently had he had the benefit of the advice of the learned counsel

in this case, nevertheless, the doctrine of this leading case having been reaffirmed by the courts of this State in numerous decisions, it must be taken that the law is settled upon the subject and that our courts do not apprehend the same danger by the application of the law as the learned counsel for the appellants.

It is submitted that all of the law governing this case is well stated in *Lawrence v. Prosser*, 88 N. J. E. page 43, and that it is dispositive of all the points raised by the appellants in their brief.

### III.

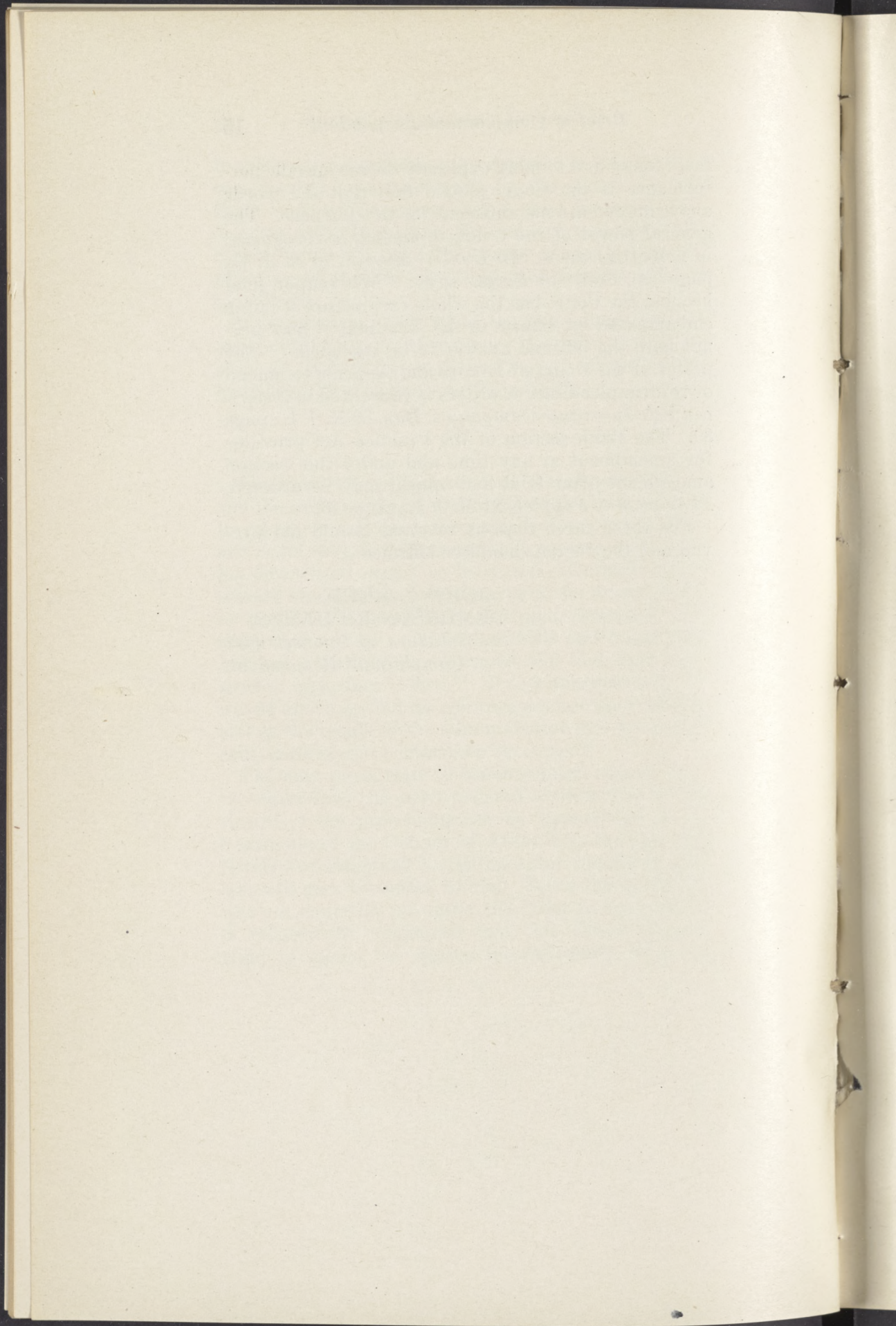
The final decree declares that the agreement "be and the same are hereby established in all things and in all parts and that the said devisee and legatee aforesaid take, hold, occupy and possess and enjoy his devise and legacy as fully and effectually to all intents and purposes whatsoever as he might, could or would have taken hold, occupied, possessed and enjoyed the same as if the last wills and testaments had not been lost or destroyed and had been duly proven according to law." It is submitted that the words above quoted do embrace a trust upon the estate in the hands of the administrator and do specifically enforce and perform an agreement.

The next paragraph to which counsel objects is to the effect that the court ordered a transcript of the record of the proceedings to be transmitted to the Surrogate of the County of Atlantic to the end that letters testamentary to the executor named in said last will may be issued to him. Since the surrogate was not bound to act under the order in any case, it is respectfully submitted that this Court has the right to mould the decree in conformity with the

facts found and to more explicitly decree specific performance if the Court should find that the words above quoted are not sufficient for this purpose. The general power of the Court to amend, is recognized in numerous cases. In *Kuhl v. Martin*, 29 N. J. E., page 586, Court of Errors says: "Whereupon final hearing the Court has the whole case before it but is embarrassed by defects in the pleadings it may permit both the bill and answer to be amended." The power of the Court of Errors and Appeals to amend or reform pleadings or orders is reiterated in *American Life Insurance Company v. Day*, 39 N. J. L., page 89. The 126th section of the Practice Act provides for amendment at any time and under this section amendment after trial and appeal may be ordered, *Thompson v. Pepler*, 91 N. J. L., page 160.

For these three reasons reversal should not prevail and the decree should be affirmed.

JOHN C. REED,  
EMERSON RICHARDS,  
*Solicitors of Counsel with  
Complainant-Respondent.*



# New Jersey Court of Errors and Appeals

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Between  
ELIZABETH HOWELLS,  
*Complainant-Respondent,*  
v.  
GHERTINE P. MARTIN, *et al.,*  
*Defendants-Appellants.*

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ON APPEAL FROM CHANCERY.

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BRIEF FOR APPELLANTS.

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STATEMENT.

Robert Daley and Ellen Montgomery Daley were husband and wife. She died in September, 1924. On November 12, 1924, respondent Elizabeth Howells, a sister of Robert Daley, filed her bill in the Court of Chancery claiming that said Daleys had executed mutual wills which had been lost or stolen and prayed that the will of Mrs. Daley might be established by the decree of the Court of Chancery, which will, it was averred, left all her estate to Robert Daley. The bill alleged the assignment and transfer of the interest of Robert Daley to respon-

dent. Issue was joined on the bill and hearing had; at the conclusion of which (page 170) the Court expressed the view that there was a presumption that the wills had been destroyed by Mrs. Daley and he queried as to whether that presumption had been overcome by the evidence. Thus the matter rested until new counsel entered, when an amended bill was filed, issue joined thereon and testimony taken with the result that there was a decree for respondent, from which this appeal was taken. The amended bill proceeded upon a new theory and a new prayer. The effort was not to establish the will but to establish an agreement to make a will and enforce specific performance thereof. The prayer (2-A, p. 12) reads:

“That the promise and agreement to make a will by the said Ellen Montgomery Daley in favor of the said Robert Daley be decreed to be a contract, and irrevocable; and that the same be endorsed and the rights of the said Robert Daley thereunder or in any manner in the estate of the said Ellen Montgomery Daley be enforced against the said defendants and each of them and that the defendants be decreed to make a good conveyance in law of all of the real estate of which the said Ellen Montgomery Daley died seized and of all of the personal property that has or may come into their hands or either of them and that they account for all profits, income or property that may have or shall come into their hands.”

Prayer 2-B is for specific performance.

Appellants are the children of Ellen Montgomery Daley by a former marriage.

ARGUMENT.

I.

RESPONDENT IS NOT THE ASSIGNEE OF THE  
ALLEGED CONTRACT.

Essentially, the bill is one for the specific performance of an alleged contract between husband and wife. Assuming without conceding, that such a contract is assignable, our submission is that there was no assignment in this case and that so far as the fact is, or the record discloses, respondent is a stranger.

Paragraph 13 (page 4) of the original bill, reads:

“That after the death of the said Ellen Montgomery Daley, the said Robert Daley did give, sell, assign, transfer and set over to complainant all his interest and estate in the real estate and personal property, of which the said Ellen Montgomery Daley died seized, and to which the said Robert Daley was entitled by virtue of the will so executed by the said Ellen Montgomery Daley, in favor of the said Robert Daley,” &c.

Proof to support this averment was offered by the production of a deed for real estate and a bill of sale for personal property from Robert Daley to respondent.

Paragraph 13 of the amended bill of complaint (p. 11) substantially repeats the averments of paragraph 13 of the original bill. It will be noted that there is no averment of an assignment of the alleged

contract or any rights therein or thereunder. Moreover, no proof was offered to show an assignment of such contract. Neither the deed for the real estate nor the bill of sale for the personal property make any reference to an assignment of the contract. The reason is quite apparent. The theory of the original bill being that there was a will giving everything to Robert Daley, the only way in which there could be a transfer of such interest was by deed and bill of sale. At page 192 Daley admitted that there was no assignment independent of the deed and bill of sale. In the effort to cure the weakness of the original bill by setting up a contract and seeking performance thereof the small matter of procuring an assignment of that agreement was overlooked.

But if it could be successfully maintained that either the deed or bill of sale, or both, are sufficient to assign the alleged contract, those papers are not in evidence. They were not re-introduced after the amended bill was filed and they, therefore, cannot be considered in evidence there being no agreement or stipulation that the evidence taken under the original bill founded upon an entirely different theory from the amended bill might be used in support of the amended bill.

## II.

### THE ALLEGED CONTRACT WAS NOT SUFFICIENTLY ESTABLISHED.

The surrogate of Atlantic County appointed one of the appellants administratrix of the estate of Mrs. Daley and she was made a party to the action. Testimony in support of the averments in the amended bill begins at page 181. At the threshold

objection was made to any testimony by Mr. Daley to establish the alleged contract upon the ground that it was violative of the Evidence Act touching transactions, &c. Cases were cited and discussion had and at page 186 the Court stated:

“I will permit the testimony subject to the objection. If I find it is objectionable, I will later strike it out.”

In his conclusions, the Court at bottom of page 234 says:

“At the hearing, I permitted the complainant (respondent) as well as Daley to testify, but quoting Vice-Chancellor Emery in *Clawson v. Brewer*, 67 N. J. Eq. 201, at page 208, ‘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. 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, Sec. 4.’ ”

He then excludes Daley’s and respondent’s testimony from consideration and establishes the alleged contract without resort to either. As stated by him, there was no consideration for the deed and bill of sale which in his conclusions he treats without warrant as an assignment of the alleged contract.

The Court quotes liberally from Vice-Chancellor Backes’ opinion in *Tooker v. Vreeland*, 92 Equity

340, and we shall be content to rely upon that case and those cited therein in support of our contentions.

“First, there must be a contract binding upon both parties that respectively they will execute a will in favor of other. Moreover, the contract must be that such wills shall remain irrevocable after the death of either. And where a bill is filed to establish a contract to make mutual wills, a court of equity is not concerned with the will itself and does not interfere with the action of the probate court.”

Quoting again from *Tooker v. Vreeland, supra*:

“Equity will not interfere with the probate of the later will, made in violation of the contract, but will enforce the contract against the estate of the survivor by impressing a trust upon the assets. \* \* \*

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.”

Considering all the testimony, inclusive of Daley's and respondent's touching the alleged contract it is too uncertain and indefinite to justify a finding of fact that a binding agreement was made between them to execute mutual wills which “should remain irrevocable after the death of either.”

Upon the phase of irrevocability, Vice-Chancellor Backes says:

“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.”

In the instant case the proof is neither clear nor convincing. Nowhere does Daley say that he had agreed with his wife that he would make a will in her favor which should be irrevocable after death, nor is there any language from which it can be implied that there was any such bargain. If the case were one against him to enforce a contract to make a will it could not be supported upon his testimony.

In the consideration of the question of the making of the compact, we insist that no testimony can be considered other than that taken under the amended bill. A quotation or two will suffice to show the feebleness of the testimony on the subject of the alleged contract and its irrevocability. At page 186 we have the total of Mr. Daley's testimony as pertinent to the alleged contract:

“Shortly after we were married, about a week afterwards, Mrs. Daley brought the subject up about making wills, owing to the fact that she had had considerable trouble on her previous marriage with Mr. Barstow, who hadn't made no will, and had left her in a terrible muddle and terrible expense, so she said she had nobody, that she didn't bother with her sisters and they didn't bother with her and there was nobody in the world that she wanted to have any of her belongings only me, and if I would agree to will her what I possessed she would agree to will me what she possessed, so we talked the matter over and later on we made wills, we were to —

Q. Did you agree to that?

A. I agreed to make a will to that effect.”

James Daley, Jr. (at page 197) says:

“She said that her and Uncle Bob had made an agreement that upon the death of either one of them, that if she died she was to will Uncle Bob her property and possessions and if he died he was to leave her his property and possessions, and that is all I know of the case. At that time it didn't appear to me as anything important.”

It will be observed that this testimony is of a unilateral character.

At page 203 Henry H. MacAlees gives his version from which it will appear that the talk was all on the part of Mrs. Daley. To the same effect is Ella Adams (page 209); likewise John Gaither (page 218). Of like character Elizabeth Howells (respondent) page 68; also David Howells, page 73.

The alleged wills were not produced. If ever they existed it seems highly probable that one or the other of the parties destroyed them. There is no proof to indicate that the alleged wills purported on their face to be contractual. As said by Vice-Chancellor Backes:

“The mutual wills do not on their face purport to be contractual. Their reciprocal provisions indicate that they were the result of an understanding between Mr. and Mrs. Tooker, but an understanding does not necessarily spell contract.”

The quoted language might well have been written for the instant case. It may be conceded that wills were executed as stated by Mr. Leek and Mr. Johnson but beyond this the evidence does not approach conviction that the parties had solemnly bargained

to execute mutual wills which were to be irrevocable in character. Respondent's witnesses seem to be somewhat enthusiastic to establish that Mrs. Daley had irrevocably bound herself, but their testimony is woefully lacking to establish the same zeal and enthusiasm on the part of Mr. Daley, and it is the absence of this which fatalizes respondent's claim.

But respondent's case should fail upon the further ground that the alleged contract is not "equal and fair" as stated in the Tooker case. The examination or cross-examination of Daley beginning at page 187 will disclose that the value of the property of Mrs. Daley approximated \$80,000. He either did not know the value of his estate or was unwilling to communicate it. It could not have exceeded \$25,000. They had been married but a short time and there were no children. As already stated, Mrs. Daley had two children. The bargain upon her part to execute a will in behalf of Robert Daley giving all her property to him of the value stated in return for an agreement upon his part to execute a will giving her all his property, of so much less value, was certainly an unequal and unfair bargain.

It would be setting a dangerous example to permit the establishment of a contract to will all of one's estate which might be millions, based upon testimony of so meager, uncertain, indefinite, interested and prejudiced character. One can scarcely read and consider the testimony produced by respondent without a feeling that the effort was to secure the property for the respondent while the lips of Mrs. Daley were sealed in death. A bargain of so important a character as this should have been reduced to writing or else established by the evidence that would place the question beyond the realm of reasonable doubt.

The treatment of the subject by the Court did not indicate that he grasped the necessity of establishing a mutual binding contract irrevocable in character. He seems to have treated the subject as one where Mrs. Daley had agreed to make a will that would be sufficient irrespective of whether his estate could have been obliged to perform the contract.

In essence, the case is one for the specific performance in equity of an alleged contract. Equity never enforces a contract for specific performance unless the proof touching it is clear and convincing and is equitable and fair. In the instant case these qualities are utterly lacking. The alleged contract has to do with real estate exceeding \$50,000 in value and not a writing to show its existence. An easy way to defeat the Statute of Frauds if the alleged contract in this case can be established upon such insubstantial testimony.

### III.

#### THE DECREE IS INAPPROPRIATE.

As the bill is amended, of course, for the sole purpose of having the contract established and performed, the decree should have been confined to those things with the provision that a trust be impressed upon the assets of the estate.

This is clearly shown to be the proper course by the opinion in *Tooker v. Vreeland*, where it is said:

“Equity will not interfere with the probate of the later will made in violation of the contract but will enforce the contract against the estate of the survivor by impressing a trust upon the assets.”

The decree in the instant case is rather one es-

tablishing a lost will than that establishing and enforcing a contract. They even go so far as to say:

“And it is further ordered that a transcript of the record of these proceedings be transmitted to the surrogate of the County of Atlantic to the end that letters testamentary to the executor named in said last will, may be issued to him.”

The decree is fatally defective as to form, is not in keeping with the prayer of the bill, and for this reason should be reversed.

For any one of the reasons above stated the decree is erroneous and should be reversed.

Respectfully submitted,  
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