New Jersey Court of Errors and Appeals

CHARLES VANHOUTEN, Plaintiff-Respondent, vs. ADMUND VANHOUTEN, Executor of the Estate of Anthony B. Vanhouten, deceased, Defendant-Appellant.	On Appeal. Action at Law.

BRIEF FOR APPELLANT.

Statement of the Case.

This appeal brings up for review a judgment recovered in the Passaic County Circuit Court on December 17, 1915, by the plaintiff below against the defendant below for $10,091.30, together with the plaintiff's costs of suit.

The suit was brought to recover damages for the breach by the defendant's testator, Anthony B. Vanhouten, of an alleged oral contract, whereby for certain considerations stated in the complaint, he agreed to leave the plaintiff, by bequest in his will, the sum of $10,000.

The testator Anthony B. Vanhouten was twice married. By his first wife he had two children, a

son, Martin, and another child who died in infancy. By his second wife he had two children, Admund Vanhouten, who is the defendant in this suit, and a Mrs. Jennie Hopper.

Anthony B. Vanhouten's son Martin, who died about twenty-five years ago, had two sons, Charles and Frank Vanhouten, Charles being the plaintiff in this suit, and Frank being the plaintiff in an exactly similar suit which was also on for trial at the same term, but was not in fact tried, the parties having stipulated, while the jury were out in this case, that the other case should be also determined according to *its* result.

Besides Charles and Frank Vanhouten, Anthony B. Vanhouten had other grandchildren, who were the children of the defendant Edmund Vanhouten.

Anthony B. Vanhouten made a will in the year 1899 and never afterwards made any other will. At the time that will was made his son Martin was not living. In that will Anthony B. Vanhouten left to each of his grandsons, including Charles and Frank Vanhouten, a legacy of $500, not to be paid, however, until after the death of Anthony B. Vanhouten's widow, who survived him. He left all his estate to his widow for life, and after her death he left the whole estate, subject to the legacies in favor of the grandsons, to the residuary legatees named in the will, who were his son, Edmund Vanhouten, and his daughter, Mrs. Jennie Hopper, whom he appointed as his executors.

The widow of Anthony B. Vanhouten, who survived her husband, died before the commencement of this suit.

Anthony B. Vanhouten himself died on August 25th, 1914, and the will mentioned above was proved by one of the executors named in the will, viz., the defendant, Edmund Vanhouten.

Anthony B. Vanhouten in his lifetime was in the carpentry business, and for many years previous to his death was carrying on that business in partnership with his son, the defendant Edmund Vanhouten, under the firm name and style of Anthony B. Vanhouten & Son.

For some time prior to the alleged date of the contract sued on, Anthony B. Vanhouten's two grandsons, the plaintiff Charles Vanhouten and his brother Frank Vanhouten, were in the employ of the firm of Anthony B. Vanhouten & Son as journeymen carpenters, receiving the same pay as other carpenters doing the like work.

The plaintiff alleged in his amended complaint that on or about the twenty-eighth day of December, 1909, he was in the employ of the said Anthony B. Vanhouten (as a matter of fact he was then in the employ of Anthony B. Vanhouten & Son), and being so employed and about to leave said employment and go to a western state, the said Anthony B. Vanhouten on that day and year entered into a contract with the plaintiff whereby, in consideration of the plaintiff not going to a western state to live (not particularizing whether the plaintiff was not *at that time* to go to a western state or was not to go *at any time* at all to a western state to live) and in consideration of remaining in the employ of the said Anthony B. Vanhouten (not stating for how long a period), and in consideration of the natural affection between the parties, he, the said Anthony B. Vanhouten, agreed that *in addi-*

tion to paying the plaintiff a salary for his work as theretofore, he would, at his death, leave to the plaintiff by bequest in his last Will and Testament, the sum of $10,000, whereupon the plaintiff, Charles Vanhouten, accepted the terms of the said contract and fully performed the same on his part; and it was for the breach of that alleged contract that the plaintiff brought suit.

It appeared during the trial that the plaintiff's brother, Frank Vanhouten, had brought a precisely similar suit against the defendant, in which he claimed that on the same day, viz., December 28, 1909, he, too, was in the employ of the said Anthony B. Vanhouten, and he, too, being so employed and about to leave said employment and go to a western state, the said Anthony B. Vanhouten entered into a contract with him also, whereby, in consideration of his also not going to a western state to live, and in consideration of his also remaining in the employ of the said Anthony B. Vanhouten, and in consideration of the natural affection between the parties, he agreed, in addition to paying him a salary for his work as theretofore, that he would at his death, leave him also, by bequest in his last Will and Testament, another sum of $10,000; and Frank Vanhouten in his suit sued for the breach of that alleged contract by Anthony B. Vanhouten.

The defense to the plaintiff's claim was that it was a fraudulent claim manufactured out of whole cloth.

It will be seen, when we come to discuss the points of law and fact in the case, that the statement of the alleged verbal contract contained in the complaint differed in several material points

from the contract which, as a result of much suggestion on the part of counsel, was elicited from the witnesses during the trial.

The second defense contained in the answer was as follows:

> "The defendant will object that the complaint discloses no cause of action. It fails to show any sufficient consideration for the alleged agreement."

No amendment of the complaint was applied for, and it will be argued later on that in view of the character of the alleged contract, and the fact that the party alleged to have made it was dead, and his mouth closed from denying that any such contract was ever made, and in view of the fact that the point was expressly raised in the answer, it would not be in the interests of justice to permit an amendment at this late date. The party setting up the existence of such a contract, when the other party's mouth is closed by death, should not be permitted to experiment with the statement as to what the consideration of the contract was.

The first point, therefore, which we shall argue before the Court, will be that the complaint is insufficient to support the action, and that upon the record judgment should have been for the defendant.

The plaintiff offered a large mass of testimony under objection, tending to show the friendly relations between the two boys and their grandfather, and his affection for them. The purpose of this evidence, or, at any rate, the effect which it was intended and calculated to have upon the jury, was to make it appear probable that the old man would have made the alleged contract.

The second and only other question to be discussed will therefore be that upon a clear cut issue of whether or not two parties did in fact enter into a certain contract, it was incompetent to prove facts regarding their feelings towards each other as tending to show that they would have been liable to make such a contract.

These questions, and other questions which we do not consider it worth while to discuss, were raised by exceptions or objections to various rulings of the Judge at the trial; also by our grounds of appeal, including grounds which under the former practice in error would have been presented by assignments of the common error.

Specifications of the grounds of appeal intended to be urged.

1. The common errors—the insufficiency of the complaint to sustain the action, and that by the record the judgment should have been for the defendant and not for the plaintiff (p. 101, ll. 21-31).

2. The refusal of the Court to grant a motion made by counsel for the defendant, to dismiss the complaint upon the ground that the alleged contract set forth in the complaint was too uncertain and indefinite in its terms and in the statement of its consideration, to constitute an agreement in the legal sense of the term, or to form the subject of redress in an action at law (p. 17, ll. 37-41; p. 18, ll. 1-42; p. 19, ll. 1-40; p. 101, ll. 32-40).

3. The admission by the Court, over the objection of the defendant, of testimony offered by the plaintiff, designed to show a relationship of natural affection existing between the parties (p. 17,

ll. 29-40; p. 18, ll. 1-42; p. 19, ll. 1-40; p. 102, ll. 10-14).

4. The refusal of the Court to nonsuit on motion of the defendant (p. 46, ll. 20-41; p. 47, ll. 1-40; p. 102, ll. 14-20).

5. The refusal to direct a verdict for the defendant on motion of the defendant (p. 88, ll. 30-34; p. 102, ll. 20-21).

6. The refusal of the Court to charge, as requested by counsel for the defendant, that the alleged contract, as set forth in the complaint, was not sufficiently mutual, definite and certain as to its terms and consideration, to entitle the plaintiff to any relief as a result of its breach by Anthony B. Vanhouten (p. 93, l. 1; p. 97, ll. 1-10; p. 102, ll. 22-30).

The Argument.

POINT I.

(Under specifications 1, 2, 4, 5 and 6.)

The complaint is insufficient to support the action. Judgment for that reason should have been for the defendant.

This point was directly raised by the second defense contained in the defendant's answer (p. 5, ll. 28-30). After that answer was filed the complaint was amended (pp. 6-7), but no change was made in the statement of the contract, its terms or consideration. The only change made was to alter the allegation contained in the original complaint, that the plaintiff was a nephew of Anthony B.

Vanhouten (p. 3, ll. 1-2) into an allegation that he was a grandson of Anthony B. Vanhouten (p. 6, ll. 23-24), and to change the date upon which the alleged contract was averred to have been made from December 28, 1910 (p. 3, l. 3), to December 28, 1909 (p. 6, ll. 23-24).

The alleged contract was thus set forth in the amended complaint:

> "That on or about December 28, 1909, he, the plaintiff, was in the employ of the said Anthony B. Vanhouten, now deceased.
>
> "That being so employed and about to leave such employment and go to a western state, the said Anthony B. Vanhouten on that date entered into a contract with the plaintiff.
>
> "By which contract in consideration (1) of the said plaintiff not going to a western state to live, and (2) in consideration of his remaining in the employment of the said Anthony B. Vanhouten, and (3) in consideration of the natural affection between the parties, he, the said Anthony B. Vanhouten, agreed that (1) in addition to paying the plaintiff a salary for his work as *theretofore* (2) he would, at his death, leave to the plaintiff by bequest in his last Will and Testament, the sum of $10,000.
>
> "Whereupon plaintiff accepted the terms of the said contract and fully performed the same on his part."

The obvious defects in this pleading lie (1) first, in the fact that the pleader does not state whether the agreement on the part of the plaintiff, which was stated as the consideration for the agreement on the part of Anthony B. Vanhouten, was

that he, the plaintiff, would not *at that time* go to a western state to live, or would not *at any time at all* go to a western state to live, and (2) secondly, in the fact that it does not state for how long a period he agreed to remain in the employment of the said Anthony B. Vanhouten. Apart from these uncertainties there may be (3) a question as to the sufficiency of the alleged consideration, to render the agreement one which will be enforced by a court of justice. Certainly that last question would be a debatable one in a court of equity, though it may be that in a court of law the adequacy of the consideration will not be inquired into.

The uncertainties above pointed out in the complaint are, however, we submit, fatal to the enforcement of the alleged contract.

That ambiguities in pleading must be construed most strongly against the pleader is elementary.

Stephens & Condit Transportation Co. v. *Central Railroad,* 33 *N. J. Law,* 229.

It is a maxim in pleading that everything shall be taken most strongly against the party pleading, or, rather, that if the meaning of the words be equivocal and two meanings present themselves, that construction should be adopted which is most unfavorable to the party pleading, because it is to be presumed that every person states his case as favorably to himself as possible.

Chitty on Pleading, 237*.

Certainty and accuracy must be observed in the *substantial parts of the complaint* which state *the cause of action itself.* Thus *in assumpsit* the con-

sideration of the contract and the contract itself must be fully stated.

Chitty on Pleading, 261*.

It is quite clear from the language of the contract that the plaintiff would have complied with the letter of the agreement on his part, as therein stated, had he remained in the employment of his grandfather, Anthony B. Vanhouten, for a year or for a month, or, perhaps, even for a week. The complaint is absolutely silent on the subject of how long he was to remain in such employment, and such uncertainty, we submit, destroys the legal efficacy of the contract.

> "To form the basis of a legal obligation an offer must be so complete that upon acceptance an agreement is formed which contains all the terms necessary to determine whether the contract has been performed or not."
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> *Page on Contracts,* §27;
> *Butler* v. *Kemmerer,* 67 *Atl. Rep.,* 332;
> *In Re Purves Estate,* 46 *Atl. Rep.,* 369;
> *United Press* v. *N. Y. Press Co.,* 164 *N. Y.,* 406.

Another question which suggests itself is as to the effect of the averment in the pleading, that part of the consideration upon which the agreement on the part of the testator rested was *"the natural affection between the parties."* It is to be observed that the pleader does not state that natural affection between the parties was the *motive* which induced the testator's promise, but that it actually constituted part of the *consideration* for the promise.

> "By the civil law and the modern continental law the consideration is the *cause* of the contract. This principle is quoted, and

apparently adopted, by Plowden; and it has been recently acknowledged by high judicial authority, and the *cause* discriminated from the *motive.*"

Parsons on Contract (9th Ed.), 465.
Thomas v. *Thomas,* 2 *Q. B.,* 851.

Motive, pure and simple, is in law no part of the consideration. Feelings of affection, gratitude or beneficence may be the moving cause of a contract, and yet the receipt of the nominal consideration by the promisor will be regarded by the law as his only motive.

Am. & Eng. Encyc. of Law (2nd Ed.), Vol. 6, p. 672.

Where, however, the pleader of his own volition divides up the consideration for the promise into three separate considerations for that promise:

(1) The promise of the plaintiff not to go a western state to live;

(2) His promise to remain in the employment of the said Anthony B. Vanhouten;

(3) The natural affection between the parties, how much of the promise rested upon the first consideration stated, how much upon the second and how much upon the third, it is impossible to determine. The promise constituting an executory contract could receive no support from that part of the consideration alleged, which consisted of "the natural affection between the parties."

"A promise founded upon considerations of affection or gratitude is deemed in law a mere beneficence and cannot be the foundation of a legal action."

Am. & Eng. Encyc. of Law (2nd Ed.), Vol 6, p. 679, and cases cited in Note 1.

Neither can the alleged promise of the testator obtain much support from the second consideration stated, in view of the fact that the complaint alleges that plaintiff was to continue receiving his salary as theretofore.

The first consideration stated, viz., the promise of the plaintiff not to go to a western state to live, while it involved no benefit to the testator, possibly involved some detriment (though of the slightest character) to the plaintiff, and while not only must there be a consideration to support any simple contract, and that consideration must be valuable, what constitutes value in the eye of the law may in general terms be said to consist either in some right, interest, profit or benefit accruing to the party who makes the promise, or some forbearance, detriment, loss, responsibility, act, labor or services given, suffered or undertaken by the other to whom it is made.

Am. & Eng. Encyc. of Law (2nd Ed.), Vol. 6, p. 678.

We presume, therefore, that in this Court, sitting as a Court of law, the mere promise of the plaintiff to abandon his intention of going to a western state to live, although he was surrendering no definite or, for the matter of that, indefinite promise of getting employment there, would be considered an *act suffered* by the plaintiff, sufficient, *if standing alone,* to furnish the consideration for a promise on the part of the testator to bequeath to the plaintiff either $10, $10,000 or $10,000,000.

That neither the contract as alleged in the complaint or established by the proofs would have received anything but scant consideration in the Court of Chancery, and that that Court would have

afforded no relief in respect of it will be apparent from a perusal of the case of *Drake* v. *Lanning* (opinion by Vice-Chancellor Pitney), 49 *N. J. Eq.*, 452, from which we quote freely as follows:

Quotation, p. 456:

> "I will consider, first, the objection of want of consideration.
>
> "It is well settled that a sufficient consideration for a contract may consist of either a benefit to the promisor or a detriment to the promisee, or both combined. * * * With regard to the detriment to the defendant, the single fact from which that can be inferred is this: 'That she and her son Thomas had made up their minds to remove from the mortgaged premises,' and that the testatrix was desirous that they should remain upon them, and that she, the defendant, agreed 'to remain on the said farm with her son Thomas, and to cultivate and operate the premises.' There is here no allegation that the defendant had in contemplation the engaging in any other business or occupation, or had within reach any other means of subsistence, or that she abandoned or lost any opportunity which she had to improve her condition, or that it was part of the agreement that the defendant should make any material improvements upon or additions to the farm or buildings or fences thereon. The contract was simply that she should continue to live upon the farm and cultivate it. Here, again, I cannot see that there is any inference to be drawn that such continuing to live upon the farm and cultivate it would be any detriment to the defendant. The presumption would be quite the other way—that it would be a benefit to her. * * *

"The law governing contracts of this class is well settled in this state. A man, or, as in this case, a woman, may enter into a binding contract to dispose by will, in a particular manner, of the whole or any part of his property, real or personal. If the character of the contract or its subject-matter be such as requires it to be in writing, in order to satisfy the statute of frauds it may, though made by parol, nevertheless, be enforced in this court on the score of part performance by the one party to the extent of irretrievably altering his position, so that it would be a fraud upon him to refuse the performance of the other part of the contract. But whether witnessed by a writing, or resting wholly in parol, like all other enforceable contracts, it must be founded on a sufficient consideration, either of benefit to the one party or of detriment to the other, or of both combined. I can conceive of no ground upon reason or upon principle, and can find no authority for any exception in this respect in favor of this class of contracts. On the contrary, it seems to me that this fundamental rule should be observed and enforced with greater, rather than less, rigor in such cases. To relax it would be to open the door to the proving and establishing of wills made by parol, and in contradiction, it may be, of a written will executed with all the statutory formalities. I concur in what is said by the annotator of the third American edition of *Fry Spec. Perf.*, §223:

'Such a contract is regarded with suspicion and will not be sustained, except upon the strongest evidence that it was founded upon a valuable consideration and was the deliberate act of the decedent.' * * *

> "My conclusion from this review of the authorities is that the contract set out in the cross-bill in this case is void *for want of any consideration.*"

It will be noted that in that case the learned Vice-Chancellor held the contract there under review void for want of *any* consideration, not merely unenforceable in equity for want of *sufficient* consideration. It may, therefore, be a question for this Court to determine, though sitting as a Court of law and not as a Court of equity, whether under that authority, which has been frequently referred to and followed in later cases, the alleged verbal contract which was the subject-matter of the judgment recovered in this suit, was not in like manner void for want of any consideration—a mere *nudum pactum*.

Our chief reliance under Point I, however, is upon the *uncertainty* of the contract, or, rather, the uncertainty of the consideration of the contract, as stated in the complaint.

That it is essential to the validity of an agreement of the character of that now in question, that it should be mutual and as well definite and certain, both as to its terms and subject-matter, see *Vreeland* v. *Vreeland*, 53 *N. J. Eq.*, 387.

The questions involved in the argument so far presented in support of Point I, in so far as such questions needed any further amplification than by reference to the complaint itself, were raised in the Court below by a motion made by counsel for the defendant to dismiss the complaint (pp. 18-19); by a motion by counsel for the defendant to nonsuit, made at the conclusion of the plaintiff's case (pp. 46-47); by a like motion made for a direction

of a verdict for the defendant (p. 88, l. 30 *et seq.*) and by the refusal of the Court to charge, as requested by counsel for the defendant, that the alleged contract as set forth in the complaint was not sufficiently mutual, definite or certain as to its terms or consideration to entitle the plaintiff to any relief as a result of its breach by Anthony B. Vanhouten (p. 93, l. 1; p. 97, ll. 1-10).

It must be admitted that the testimony as given at the trial by the plaintiff's witness Frank Vanhouten (if believed) established a contract more certain in its terms than that set forth in the complaint; in other words, that the complaint, if amended so as to correspond with the proofs put in by the witness Frank Vanhouten, would not be open to the criticisms for uncertainty above exploited; at all events, not to the same extent. The testimony supplying the defects in the complaint was, however, wrung out of the plaintiff's star witness Frank Vanhouten by suggestive, if not actually leading, questions, and it was not until his cross-examination that he testified that the contract was that he was to remain in the employ of the said Anthony B. Vanhouten *until he (Anthony B. Vanhouten) died.*

On his direct examination Frank Vanhouten testified as follows:

> "A. Well, as near as I can recollect, we went in the house and sat down, and Grandpop says, 'Well, well, well, well.' He says, 'Now, I guess you have forgot all about that by this time. I don't think that amounts to much now, going out there, that is only a sudden idea of yours.' 'Well,' Charley says, 'now, I have decided to go. The more I think about it the more anxious I am to go.' 'Well,'

he says, 'now, you better not think too sudden about this. I have been thinking, considering this myself.' He says, 'I thought at first that you did not mean anything by it, but now it looks as if you did.' And then Grandpop says, 'I don't want you boys to leave me, because you are the only two I have of the first union.' He said, 'Your grandmother was the first, my first choice. Your father was the only son that grew up of her, and I have always had a great deal of care and love for you. I have felt that it was my duty, because you were alone and your father was dead and there was no one to look after you. I would not want you to go there and be among strangers and not be here when I am gone.' So he says, 'Now, I will tell you what I will do with you, Charley.' He says, 'If you stay here and give up that idea of going West, I will give you $10,000.' "

Then comes the suggestive question:

"Did he say when? A. When he died, he said. He told him when he died that he would give him $10,000, and then he said—Charles says, 'Well, I would like to do as you want me to do, but my young lady has something to say. I am engaged to her and she thinks that if we went out there we would get married sooner.' He says, 'Well, well, never mind about her now; she had better come here and I will talk to her and show her what is best.' Then Charley turned to me and asked me what I had to say about it, and I says, or I was about to say, and then Grandpop says, 'Never mind Frank now, it is up to you. You decide for yourself. If you don't want to do it, why don't do it.'

> And Charley says, 'Well, I will accept, Grandpop, I will do as you say.'
>
> "Q. You say that your grandfather said, 'If you stay home and give up this idea.' What idea did he say to give up? A. About going West.
>
> "Q. And where did he say to stay? A. 'Here,' he says."

Then another suggestive question:

> "Did he say anything about the work or the continued work? A. Why, yes, he wanted him to work there. He says, 'I want you to work here and stay where I am.' He says, 'You have always been in the shop here, and I would like to have you at this business and be where I am.
>
> "Q. Was there any further talk about it then? A. Well, I cannot remember any more" (p. 28, l. 39, to p. 30, l. 25).

It will be observed that there was nothing said in this interview with reference to the bequest of $10,000 being in addition to paying the plaintiff a salary for his work as theretofore.

It was not until his cross-examination that in answer to the question put by Mr. Kireker:

> "When your grandpop talked to you and your brother Charles at his house, how long was it that Charles was to stay here in town? A. Why, until he died. He said, 'If you stay here by me until I die, why you will get $10,000.' "

Neither he nor Charles were then living with their grandfather; they never lived with him (p. 35, l. 38, to p. 36, l. 16).

In view of the fact that in the complaint as originally drawn there was no mention made that part of the consideration for the testators' promise was that the plaintiff was to remain in his employment *until he died* (p. 3, ll. 13-16), and of the further fact that the second defense contained in the defendant's answer objecting to the complaint as failing to show any sufficient consideration for the alleged agreement (p. 5, ll. 28-30), put the plaintiff upon inquiry to ascertain if he had fully stated the true consideration for the agreement in his complaint; and in view of the fact that though the complaint was afterwards amended no change in the statement of the consideration of the contract was made, but that statement still remained uncertain and indefinite as to the period of time during which the plaintiff was to remain in the employ of the said Anthony B. Vanhouten; and in view of the fact that when Mr. Ward had finished his direct examination of Frank Vanhouten there was even then no evidence on that subject, and that the evidence on that subject was elicited only by suggesting the subject to him on cross-examination; and in view of the fact that the point was raised by the defendant by motion made to dismiss the complaint on that ground (pp. 18-19) and by a request to charge (p. 97, ll. 1-10), and still no amendment was applied for, we submit that it would not be in the interests of justice that the plaintiff should at this late date be allowed to amend the complaint, especially in view of the fact that Frank Vanhouten's testimony as to any transactions with the testator, would all have been inadmissible had Frank Vanhouten been a party to the suit.

Frank Vanhouten, on cross-examination, testified that he had a similar suit pending in the Passaic Circuit Court, and that his grandfather had

promised him $10,000 also, and that he was to be a witness in Charles' suit, and Charles was to be a witness in his (p. 36, l. 17 *et seq.*).

In Frank Vanhouten's suit, a stipulation was entered into, whereby it was agreed in open court that a like verdict should be entered in his case to that rendered and entered in Charles Vanhouten's case, which verdict was being considered by the jury at the time of making said stipulation (p. 97, l. 12 *et seq.*).

Under the Practice Act of 1912, both Charles and Frank could have joined in one action against the defendant, their alleged causes of action having a common question of law and fact, and arising out of the same transaction.

Section 4 of the Practice Act provides that:

> "Persons interested in separate causes of action may join if the causes of action have a common question of law or fact and arose out of the same transaction or series of transactions."
>
> Hartshorne's Prac. Act, page 15, Section 4.

Had, therefore, one suit been brought, instead of two suits, both Charles' and Frank's mouths would have been closed as to any transaction with the testator.

We draw the attention of the Court to a case very similar in facts to those which in that case would have been presented.

Larison v. *Polhemus*, 36 *N. J. Eq.*, 506.

Headnote 1:

In case a father enters into a parol agreement with two of his sons that if they will take charge of his farms and earn for him a given sum, he will then give up the farms to them, and they take charge and earn the sum named, and thereafter, until the father's death, by his consent, retain all the issues and profits, the taxes on the farms being assessed to him in their presence, no foundation is laid for a decree in favor of the said sons against the other heirs at law of the father to convey said farms.

2:

In such case, the alleged agreement being with both respecting the same subject-matter, the result of which they were mutually and equally interested in, they cannot testify in behalf of each other as to transactions with or statements by the intestate.

> "* * * The language employed in the answer to express the agreement is:
>
> "'That heretofore, and about the year 1865, the said intestate entered into a certain agreement with the said defendants, his sons, whereby they respectively agreed that as soon as their earnings amounted to $12,000, and that sum was invested at interest in the name of the intestate, so that said intestate and his wife would have enough to live on, that he, the said intestate, would, in consideration thereof and of their earnings heretofore by them made and from time to time applied to his use, convey to them by good and sufficient deeds in fee simple the said Croft farm to this defendant John Polhemus, and the said Hendrickson farm to this defendant George W. Polhemus.'

"To establish this allegation the defendants have both been sworn. It is conceded that no person except the father and sons had any knowledge of the agreement, unless it may be such as shall be gathered or inferred from fragments of conversations or remarks of the father made several years afterwards. So far as the evidence of the sons related to any transactions with or statements by their father, it is objected to. The provisions of the Act of 1880 were invoked to sustain this objection. I think the objection should prevail. See *Smith* v. *Burnet*, 7 *Stew. Eq.*, 219, and the same case on appeal, 8 *Stew. Eq.*, 314, in which the opinion of the Chancellor is unanimously affirmed. *Besson* v. *Cox*, 8 *Stew. Eq.*, 87.

"It is, however, insisted that John can speak in George's interest and George in John's, notwithstanding the transactions and statements in which they were both interested occurred at the same time. In my judgment, the spirit which prompted the proviso in the act includes this offer, and that the testimony cannot be considered. It was only one contract; the father on one side and the sons on the other. * * * If this insistment should prove tenable, the statute would always be unavailing in case there should be two or more parties to one side of an agreement, who should survive and their interests thereunder were divisible. But most manifestly all the temptations to perjury would remain. The witness cannot affirm the contract as to the other parties without affirming it as to himself. I fear that such a construction would open the way for combinations and conspiracies against

> the estates of decedents quite too difficult for the most vigilant to unravel or expose.
>
> "The evidence of John and George being rejected, what proof is there of the agreement?"

That case was relied on with approval by Vice-Chancellor GREEN in the case of *Matthews* v. *Hoagland*, 48 *N. J. Eq.*, 457-475.

Every consideration which prompted the Legislature to pass the law which operates to prevent the plaintiff from testifying as to transactions with his grandfather applies with equal force to Frank's testimony, except for the controlling fact that he was not a party to the suit. It is perfectly plain in the case at bar that the defendant was entirely at the mercy of these two young men. They might just as well have proved an agreement on the part of the testator to give them each $20,000 as to give them each $10,000. They could have stated the consideration for the contract to be anything they chose to swear to. We submit that the plaintiff, having twice solemnly stated in his original complaint and in his amended complaint what the terms and consideration of the alleged contract were, it would be an abuse of the power of amendment, which power is always intended to be used by the courts so as to further and not impede the administration of justice to permit the complaint to be amended at this time so as to correspond with the proofs emanating from so suspicious a source.

In construing the statutes permitting amendments to be made, the rule should invariably be kept in mind that "a thing within the intention is within the statute though not within the letter; and a thing within the letter is not within the statute unless within the intention." This is one of the gen-

eral rules in the American Standards of Construction of Statutes.

People v. *Utica Ins. Co.*, 15 *John* (*N. Y.*), 380.

POINT II.

(Under Specification 3.)

The Court's admission, over the objection of the defendant, of testimony designed to show a relationship of natural affection existing between the parties, was error injuriously affecting the substantial rights of the defendant. Such testimony prejudiced the defendant in maintaining his defense upon the merits.

Although the suit was brought on an alleged express contract stated to have been made on a day certain, the great mass of the testimony offered on the plaintiff's side was directed to establish the great love and affection the testator at all times displayed toward the plaintiff and his brother, and the whole atmosphere at the trial was invaded and permeated by testimony designed to present a picture of these two disinherited orphan boys, children of the only offspring of the testator's first wife, and their wicked uncle, the defendant. Any layman present in court and hearing the testimony would inevitably have concluded that the suit was one to set aside the testator's will on the ground of undue influence. Mr. Ward, in summing up, even suggested that there might be another will in existence which was not forthcoming. In fact, the Trial Judge, in

charging the jury, found it necessary to make these remarks:

> "This, gentlemen, is a suit upon contract, and can only be dealt with in that way. It is purely a question as to whether there was a contract made, and whether both parties carried out the contract or not. Counsel's last remarks, as I remember them, were to the effect that even if this $10,000 was allowed, the plaintiff would not be getting as much as some of the other heirs of the estate. That you have not anything to do with. We are not here, gentlemen, to equalize Mr. Vanhouten's benefactions. You are not here to substitute your judgment for the judgment of Mr. Vanhouten as to how he should leave his money. That is a privilege reserved to every man himself, and if the plaintiff in this case relied solely upon the generosity of Mr. Vanhouten, and, relying upon that generosity, expected to be compensated for staying there in that way, and he was disappointed, then he cannot recover at all" (p. 89, ll. 16-33).

The following is an incomplete summary of the objectionable testimony which we claim injuriously affected the substantial rights of the defendant:

> FRANK VANHOUTEN: "Q. Did your grandfather ever display any affection towards your brother? A. He did. I recall when we met him in the yard and he put his arm around our shoulders.
>
> "Q. From the start, I mean. Around Christmas time have you any recollection of what he would do, or his attitude towards you and towards your brother? A. He

would be very friendly and would be very glad to see us, and asked whether we were warm and comfortable, and asked mother and gave her money" (p. 17, l. 29 *et seq.*).

"Mr. Humphreys: I don't want to object unnecessarily, but it does seem to me that the question to determine here is whether the contract was made, and to go into any lengthy discussion of actions during numerous years, during which Anthony B. Vanhouten manifested affection for these young men, is, to my mind, irrelevant. The contract is the thing. Was the contract made? Natural affection is no consideration for an executory contract, and to prove natural affection does not help Mr. Ward any. It seems to me the question is whether the contract was made.

"Mr. Ward: If the Court please, counsel for the defendant, in his opening, stated that he would prove the improbability of the contract being entered into. Now, the consideration set up in the complaint is for these things: To refrain from going West; continuing in his employment as they had worked theretofore, and natural love and affection.

"The Court: Is that consideration set out?

"Mr. Ward: Yes, sir.

"Mr. Humphreys: Let me see in regard to that. Perhaps I am anticipating matters. I think we are entitled to have these matters clearly stated. In the first place, the contract is altogether too uncertain, etc., etc." (p. 18, l. 5 *et seq.*).

* * * * * *

"The Court: I will admit the testimony showing the relationship between the parties" (p. 19, ll. 39-40).

"Q. Will you just tell the Court and jury what you really saw, if anything, of the manner in which your grandfather treated your brother in those early days? A. He used to come in and greet us and put his arms about us and ask mother if we were warm and comfortable, and said he did not want us to want for anything while he lived, and he made a general fuss over us and showed every affection that he could show" (p. 20, ll. 1-13).

"Q. This was before your brother went to work? A. Well, he greeted him and told him he thought a good deal of him; said that he was a Vanhouten and he would take care of the boy when he died, and showed every display of affection" (p. 21, l. 2 *et seq.*).

"Q. When he said that you were a Vanhouten, or, at least, that your brother was a Vanhouten, do you remember what he said about that? A. Why, he used to make a remark about a V on my brother's forehead" (p. 21, l. 26 *et seq.*).

"Q. Just tell the Court and jury how he would greet you and how he would act to your brother on those occasions? A. Why, he would ask him how he was getting along and whether he was glad that he had come back with him, and hoped that he would not think about going in anything else; that he had helped him all he could in his business and he was very sorry it had not paid, but, he says, 'I feel that you have done all that you could.' He often put his hand on either of our shoulders; he often done that" (p. 22, l. 12 *et seq.*).

"Q. Did your grandfather ever say anything to you with reference to the way he felt towards your brother? A. Why, he often did. Why, he would mention the fact that Charley had tried hard. He says: 'That boy has done his level best to make that business pay. I feel heartily sorry for him.' He says: 'I don't regret anything that I have ever done for him.' He says: 'I know he is slaving there day and night and done all he can.' And he said many things there that I cannot just recall. It was probably about the business over there, and he told me that he hoped that as soon as it did not go good he would be back with him where he had been before" (p. 23, l. 15 *et seq.*).

"Q. Do you remember, after your grandfather's return from this trip, anything that he said to your brother and you and how he greeted him, etc.? A. Why, he seemed very glad to see him and said that he was glad he had given up that business. He says he seemed to have worried himself sick, and he said there was no necessity for it, since it did not pay. He says: 'I would have liked to see the young man make a success of it, but I am glad to see him back again with me'" (p. 24, l. 30 *et seq.*).

All the above testimony, and a great deal more like it, was put in after the Court had ruled, notwithstanding counsel for the defendant's objection, that he would admit the testimony showing the relationship between the parties.

Counsel for the defendant's objection to the admission of the testimony was made at page 18 of the printed case, lines 9-21. The consideration of that objection was interrupted by a motion made by

counsel for the defendant (p. 18, l. 34, to p. 19, l. 38), and the Court's ruling, admitting, over counsel's objection, the testimony showing the relationship between the parties, appears on page 19 at lines 39-40.

We submit that such evidence was incompetent and that its admission injuriously prejudiced the defendant's defense.

Such evidence could not tend to render more or less probable the facts in issue within the meaning of the text stated in 11 Am. & Eng. Encyc. of Law, page 502, as follows:

> "Where the evidence tends to prove facts other than those in issue, which by experience have been found to be so associated with the facts in issue as to render the existence of the latter more or less probable, such evidence is said to be indirect or circumstantial."

It would not seem, under this rule of evidence, that it would be permissible to infer from the fact that a grandfather felt affection for his grandchildren that he probably made any such contract with them as claimed in the present suit.

In Note 3 to the above text, *State* v. *Avery,* 113 Mo., 475, is quoted as follows:

> "Circumstantial evidence is the proof of certain facts and circumstances in a given way, from which the jury may infer *other connected facts* which usually and reasonably follow according to the common experience of mankind."

Under this definition of circumstantial evidence it would not seem that the fact of affection felt by

a grandfather for his grandson had any connection with a contract on his part, to pay a certain sum by the terms of his will, for services to be rendered by the grandson in his employment.

The evidence in regard to love and affection of the grandfather for the plaintiff was not competent for the following reasons:

1. It was not relevant or material.

The test of relevancy stated in *Thayer's Preliminary Treatise on Evidence,* cited on page 6 of *Stephen's Digest* (Beers N. J. Ed.), is logic and general experience. Certainly by no rule of logic can it be inferred that because a grandfather felt affection for his grandson he would agree to pay him a certain definite sum of money to continue in his employment. General experience does not lead to any such conclusion; because general experience is that grandparents do feel affection for their grandchildren, whereas any such contract as that alleged is exceedingly exceptional.

2. It is not corroborative evidence.

In Vol. 7, Am. & Eng. Encyc. of Law, page 866, corroborative evidence is defined as follows: "Technically corroborative evidence may be defined to be additional evidence proving similar facts, or facts calculated to produce the same results as facts already given in evidence."

Applying that definition to the present case, there was the evidence of Frank Vanhouten that he was present at a certain interview at which an express oral agreement was entered into between the grandfather and the plaintiff, at which interview the plaintiff informed his grandfather that he had determined to go out West, and the grandfather stated

to him that if he would abandon that intention and remain with him, he would leave him $10,000 by his will.

Corroborative evidence would be such as tended to prove that such an interview in fact took place; for instance, that some other witness saw the three parties together at the time and place of the alleged interview, or that before the alleged interview the plaintiff had indicated an intention to go West, and that shortly after the time of the alleged interview he abandoned such intention, or it might consist of evidence that after such interview the grandfather had made statements that he had entered into some agreement with his grandson to induce him to remain with him, or that his grandson had promised to remain with him; or any evidence tending to support any of the details of Frank Vanhouten's story of the alleged interview, or of the making of the alleged contract, or of its terms.

3. The evidence was not cumulative, as defined in 11 Am. & Eng. Encyc. of Law, page 491, viz., that "cumulative evidence is additional evidence of the same kind tending to prove the same point as other evidence already given. Evidence of other and different circumstances tending to establish or disprove the same fact is not cumulative."

To sum up this point—as stated in *Taylor on Evidence* (1897), Volume 1, pages 2^5, 2^6:

> "Competent evidence is that which is admissible as tending to prove the existence or non-existence of facts in issue. The definition points to a central fact in the law of evidence, viz., that it is based upon *logic*. In fact the modern trial is an appeal to the test of reasoning as the result of a long historical

development from other tests of truth more mechanical, sacramental and formal used by ancestors more or less remote. * * *

"It naturally follows that a Court charged with the responsibility of insisting upon the observance of the rules of logical reasoning, will permit the jury, which it holds within these rules, to consider only such facts as meet the same requirement, *i. e.,* which have a logical tendency to establish the existence of the fact or facts whose existence is in issue or dispute. * * *

"The logical relation of one fact to another is termed 'relevancy.' Of this the law furnishes no test. The test is furnished by the ordinary principles of logic or a conscious perception of the relation. * * *

"The law of evidence becomes, therefore, so to speak, a series of exclusions. These owe their existence principally to two lines of considerations, (1) the necessity for trying cases within reasonable limits of time, (2) *the presence of the jury." (Note: It is with this latter consideration that we are concerned in arguing this point.)* * * *

"The average jury is composed of men selected by chance from the general community, brought together for a short time and for a limited object, with minds usually entirely untrained in the difficult art of justly balancing the weight of conflicting statements. Jurymen almost of necessity are seldom given to reasoning with logical exactness, and are, therefore, apt to jump across logical chasms or breaks in a chain of proof, especially at times when sympathy or prejudice is aroused."

Taylor on Evidence, Vol. 1, p. 2.

Now, then, the precise point we make is that while perhaps it might be argued that evidence tending to show love and affection entertained by the testator for his grandson might have a tendency to establish the probability that the testator, *as a result of such affection,* might make a substantial provision for his grandson in his will, no possible argument could be made that such evidence would have a tendency to establish the probability that the grandfather would, *for a valuable consideration,* make such provision in his will. The contract sought to be proved was an express promise to devise *for a valuable consideration.* We submit that evidence as to natural affection existing between the parties could not possibly have any bearing on the probability or improbability of the testator entering into a contract of that kind. Assuming that such evidence has a tendency to establish the probability that the testator, as a result of such affection, would make a substantial provision for his grandson in his will, such testimony certainly has no tendency to establish the existence of a valuable consideration for making such provision; on the contrary, such testimony rather excludes the idea of any valuable consideration. So far as proof of the existence of natural affection has any bearing upon the subject at all, it would tend to show that the promise to make the devise resulted from the existence of such affection and from no other cause.

Yet the jury would be absolutely unable to draw this distinction, and the great probability is that the jury argued that because the evidence showed that the testator possessed this great affection for his grandchildren that it was altogether probable that he had entered into the contract in question, and in this way the admission of such testimony affected the substantial rights of the defendant, and

prejudiced him in maintaining his defence upon the merits.

See also *Thayer on Evid.*, page 516.

> "The law of evidence undoubtedly requires that evidence to a jury shall be clearly relevant and not merely slightly so; it must not barely afford a basis for conjecture, but for real belief; it must not merely be remotely relevant, but proximately so."

It must not be gathered from the above that we at all concede that evidence of the existence of love and affection between a grandfather and grandson would have any tendency to establish a probability that the grandfather had promised to leave the grandson by his will $10,000, or any other sum.

For the above reasons we respectfully submit that the judgment in the Court below should be reversed.

JOHN B. HUMPHREYS,
C. FRANK KIREKER,
Of Counsel with the Appellant.

New Jersey Court of Errors and Appeals

CHARLES VAN HOUTEN,
Plaintiff-Respondent,
vs.
EDMUND VAN HOUTEN, Executor of the Estate of Anthony B. Van Houten, deceased,
Defendant-Appellant.

BRIEF ON BEHALF OF PLAINTIFF AND RESPONDENT.

Statement of Facts.

The defendant by this appeal seeks a review of the judgment recovered in the Passaic Circuit Court by Charles Van Houten against the Estate of Anthony B. Van Houten, deceased, for the sum of $10,000.

The judgment is the result of an action brought by Charles Van Houten against the Estate of Anthony B. Van Houten, his grandfather, to recover the sum of $10,000 due by virtue of a contract made December 28, 1909, whereby the plaintiff agreed to give up the plan he had formed of leaving his home in Paterson and the employ of his grandfather and taking up his residence in the West. In consideration of his abandoning this plan and remaining with his grandfather, his grandfather promised to leave him the sum of

$10,000 in his last will and testament. The contract is set forth in the amended complaint at page six in the State of Case, paragraph three.

The deceased, Anthony B. Van Houten, was a wealthy manufacturer, residing in Paterson, and who died August, 1914, leaving a last will and testament made in 1899, whereby he left the plaintiff the sum of $500. Anthony B. Van Houten had been married twice. By his first wife, he had one child, a son, the father of the plaintiff in this case. At an early age, the plaintiff went to work in his grandfather's shop, who was engaged in the business of wood turning, manufacturing window sashes, etc. A few years after the death of his wife the deceased, Anthony B. Van Houten married again and by this marriage had two children, one of whom is the executor of the Estate. After his father's death, the plaintiff and his brother continued to live with their mother and to work in the shop of their grandfather.

It appears from the evidence in the case, that the plaintiff entered the shop of his grandfather when he was about fourteen years of age, (p. 20, line 20) and continued to work there until after the death of his grandfather in 1914. The testimony of the witnesses for the plaintiff show clearly that the old man was extremely affectionate towards the plaintiff. He would meet them in the workyard, put his arms around them, constantly inquired about their health and how matters were going at their home, and if they wanted for anything, if so, to let him know; and took great pleasure in the thought that the plaintiff had a birthmark shaped like a letter "V" on his forehead. The plaintiff and his brother were constant visitors at his grandfather's home. (P. 21) On these occasions he showed every mark of affection.

The plaintiff had several years before left the employment of the grandfather and embarked in the confectionery business but went back to work for the deceased, at his request. (P. 24, L. 1 to 5) He continued to work with his grandfather, constantly visiting him as before. This continued until shortly before Christmas, 1909, when as a result of a letter the plaintiff had received from an intended brother-in-law in the West, who had painted glowing prospects of conditions there and urged him to come out, that the plaintiff finally decided to do so. He told this to the grandfather, and imparted the information also, that the intended brother-in-law was receiving $30 a week in the West and he, plaintiff, thought he could do as well. His intended wife was urging him to give up his employment here and accepting the invitation of the intended brother-in-law and go to California. (P. 26 and 27).

When the plaintiff told this to his grandfather, his grandfather urged him to drop the idea, saying to him the second time he spoke about it, that "he should get the foolish notion out of his head; that rolling stones gathered no moss;" and "you are better off with me here than with a lot of strangers;" and, "Charlie, you know you have got back here and we are all together; there is no use of you thinking about that, [going West] and besides it is near Christmas you might as well give it further consideration and not go at it too quick." Q. "Was there anything said as to when you had intended to go West?" A. "Why, he wanted to know when he thought about going, and *Charles said that early in the new year that he would go.*" (P. 27 lines 27 to 40) After Christmas, to be exact, the Monday following Christmas, which fell on Saturday, the subject was brought up again. The plaintiff introduced the subject and

the following conversation as testified to by the witness, Frank Van Houten, ensued:

"Grandpop says, "Well, well, well, well."
"He says, Now, I guess you have forgot all
"about that by this time. I don't think that
"amounts to much now, going out there,
"that is only a sudden idea of yours.'
"'Well,' Charley says, 'Now, I have de-
"cided to go. The more I think about it the
"more anxious I am to go.' 'Well, he says,
"now, you better not think too sudden about
"this. I have been thinking, considering
"this myself.' He says, 'I thought at first
"that you did not mean anything by it, but
"now it looks as if you did.' And then
"Grandpop says, 'I don't want you boys
"to leave me, because you are the only two I
"have of the first union.' He says, "your
grandmother was the first, my first choice.
Your father was the only son that grew
"up of her, and I have always had a great
"deal of care and love for you. I have felt
"that it was my duty, because you were
"alone and you father was dead, and there
"was no one to look after you. I would not
"want you to go there and be among stran-
"gers and not be here when I am gone.' So
"he says, 'Now, I will tell you what I will
"do with you, Charley,' he says, 'If you stay
"here and give up that idea of going West,
"I will give you $10,000. Q. Did he say
"when? A. When he died, he said. Q.
"Tell us all of that that you remember? A.
"He told him when he died that he would
"give him $10,000, and then he said—

"Charles says, 'Well, I would like to do so "as you want me to do, but my young lady "has something to say. I am engaged to "her and she thinks that if we went out "there we could be married sooner.' He "says, "Well, well, never mind about her "now; she had better come here and I will "take to her and show her what is best.' "Then Charley turned to me and asked me "what I had to say about it, and I says, or "I was about to say, and then Grandpop "says, 'Never mind Frank now, it is up to "you. You decide for yourself. If you "don't want to do it, why don't do it.' And "Charley says, 'Well, I will accept. Grand-"pop, I will do as you say.'"

"Q. You say that your grandfather said, "'If you stay home and give up this idea.' "What idea did he say to give up? A. "About going West. Q. And where did he "say to stay? A. 'Here,' he says." (Pages 29 and 30).

That it was the desire of the grandfather that the plaintiff remain. (P. 20, lines 5 to 15.)

In the course of the conversation, he said, "I want you to work here and stay where I am, you have always been in the shop here, and I would like to have you at this business and be where I am." (P. 30, lines 15 to 20.)

It appeared in the course of these different conversations that the deceased had always had a particularly strong affection for the plaintiff because of the fact that plaintiff and his brother were the children by his only child of the first marriage. (P. 29, lines 15 to 25). According to Frank Van

Houten, the old man repeated this agreement to their mother. (P. 31, lines 30 to 40).

He sent for the plaintiff's fiancee, afterwards, his wife, Lettie Van Houten and urged her to have the plaintiff change his mind about going West. She tells a very impressive story as to how the old man urged her to talk to Charlie about the matter and ask her to keep Charlie satisfied. (P. 43) She was corroborated in this by Frank Van Houten (P. 32, lines 30 to 40).

Her whole story is very interesting and strongly corroborates the plaintiff in every detail. (P. 44 and 45).

While it might have been urged that Frank and Lettie Van Houten, were interested witness, no such claim could have been made with regard to the testimony of an entirely disinterested witness, Roy Ensor, whose testimony appears at page 30 of the State of Case. He testified that he was a frequent visitor at the home of the Van Houten's, and that he had a conversation with old Mr. Van Houten with reference to the plaintiff as follows:

> "Why, after New Years of 1910, I went
> "out with Frank and on our way along he
> "said to me, 'Come on, we will stop over
> "and see my grandpop.' So, I stepped
> "over and seen his grandpop. And he said
> " 'Mr. Ensor, you know the boys, Frank
> "and Charley, had the idea of going West.'
> "I said, 'Yes, they told me.' He said, 'Yes,
> "they were going out West.' and he said,
> " 'But they changed their minds now. I
> " made a promise to them. I promised
> "them both, each of them, if they stayed

"here with us and worked the same as they "had been working in the shop and stayed "by me, that when I died I would leave "them both, Charley and Frank, $10,000, "apiece." (P. 39, lines 5 to 30).

It will thus be seen that on the part of the plaintiff there was positive testimony as to the making of the contract from three witnesses, Frank Van Houten, Lettie Van Houten and Roy Ensor. The condition of affairs with regard to relationship and situation of the parties undoubtedly left in the minds of the jury no question but that a con tract as testified to upon the part of the plaintiff had in fact been made by the deceased.

On the part of the defendant not one witness was produced in direct denial of this contract.

Not one witness was produced to show that the deceased had ever made any hostile or unindly statements to the plaintiff.

Not one witness was produced to show that there was an absence of affection between the deceased and plaintiff.

From nearly all the witnesses of the defendant, there was evidence which would indicate the affection and interest on the part of the deceased towards the plaintiff.

Not one witness was produced that in anywise reflected upon the character of the plaintiff either as to his veracity or as to his general character, as bearing upon the likelihood of whether or not the deceased would have made such a contract with him.

On the part of the defendant there was produced, aside from the executor, who did not testi-

fy to any material fact, John E. Vreeland, an employee of executor, Martin Ryerson, an employee of the executor. Harry Struck, an emlpoyee of the of the executor, Harvey Dougherty, an employee executor, Charles M. Berdan, an employee of the executor, Mary Streinz, and employee of the executor, Thomas Updegraf, a lumber salesman to the executor and Jennie Hopper, a sister of the executor, and a legatee to practically one-half of the estate of the deceased.

It will thus be seen from the foregoing, that all of these witnesses were interested, and yet in the testimony of every one of them, reading between the lines, it can be found that their testimony coroborates the story of the plaintiff. All of these witnesses testify to evidence of a purely hearsay character, generally with regard to fault-finding about the work of the plaintiff. Not a scintilla of the evidence introduced had to deal with anything said or done in the presence of the plaintiff.

The character of the questions, and the objection that was made to them, and the court's ruling, whereby objections of counsel for plaintiff were over-ruled, and the hearsay evidence complained of, admitted can be seen at pages 52 and 53.

MARTIN RYERSON admitted that he had had a talk with the deceased about the report that the plaintiff was going to California (P. 53), and that the deceased had said that he wished Frank had stayed in California. That the old man in going through the shop, made a special mention to the witness with regard to Frank and Charles about their work (P. 58, lines 15-20), that he seemed to be anxious, about the boys in their future. Q. "He did seem to be somewhat anxious about these boys' future, didn't he? A. "Yes." (P. 59, lines

8-10. Q. "He seemed to be interested in them, to the extent he said he did not know what would become o fthem after he died?" A. "Yes, sir." Q. "That is true, is it not?" A. "Yes, sir." (59, lines 10-25).

This witness, as it will be seen from his evidence, was particularly hostile to plaintiff and his brother.

JOHN E. VREELAND, testified for the defendant, that it was the habit of the plaintiff and his brother to come down to the office every evening, to see their grandfather, instead of going out the usual way with the other workers; that it was customary for them to do this in order to pass the time of day with their grandfather. He gave the following significant testimony:

The Court:

"What boys do you mean?"

The witness: Charles and Frank. It was customary on their part always to come down and pass the time of the day with their grandfather, or something like that. This evening in 1913, Charles, after passing the time of day with his grandfather, said to his grandfather, "Grandpop, I wish you would give Frank and I each one of those houses on Madison Ave., we would like to own a house apiece and we would have a good start in life." And Mr. Van Houten looked up and says, "Well, I guess not. If you want a house, earn it, the same as I did." (P. 64, lines 35-40; P. 65, lines 1-25).

Was this not a significant piece of testimony that these young men thought enough of their grandfather to stop each night to talk to him, and that the bond of affection between them and their grandfather was so strong, that they felt that they might ask him for a present of a house? And if the deceased was dissatisfied with their ability to work and to get along, and he did have this love and affection, as has been testified, was it not reasonable to suppose that knowing of the hostile feelings on the part of their uncle, the executor, that it would be necessary for the grandfather to make a special provision for them in his will?

THOMAS A. UPDEGRAF for the defendant, on cross examination admitted that the old man seemed to feel that he owed them an obligation, on account of the fact that they were his grandsons, and that he would have to do something for them right along. (P. 70 and 71.)

HARVEY DOUGHERTY testified that immediately after the death of old Mr. Van Houten, Frank Van Houten in the presence of Charles Van Houten said that the old man had agreed to leave them each $5,000. (P. 74.) It appeared from cross examination that the witness had $10,000 in mind, $5,000 for each of the boys and that he had made a mistake. (P. 75, lines 10-20.)

HARRY STRUCK testified that he had talked with the boys from time to time and they had said that their grandfather had promised to provide for them in his will. (P. 76.)

CHARLES M. BERDAN testified substantially to the same effect; that Charles Van Houten, the plaintiff, had said to him that the will was not correct.

MARY STREINZ, a domestic, in the employe of the executor, incidentally let drop that the question of Charles Van Houten going West, was the subject of conversation in the house. Her testimony was: A. "Well, I heard him tell that they did not amount to very much down in the shop." —Q. "What else?"—A. "And at the time that Mr. Charles Van Houten wanted to go West, he said he wished he would go." (P. 79, lines 25-28.)

On cross examination she testified that she had heard old Mr. Van Houten tell the family that the boys (meaning plaintiff and his brother) were contemplating going West. (P. 79, line 40.)

JENNIE HOPPER, daughter of the deceased, by his second wife also testified on behalf of defendant. The testimony of this witness is most important, as it shows beyond all question that the plan of the plaintiff to go West was not something which has come into existence since the death of his grandfather, but a matter that he must have discussed with his grandfather, as it was the subject of discussion in the Van Houten family. This was not denied by either Edmund Van Houten, the executor, or by his sister, Jennie Hopper, the other beneficiary under the will.

It will thus be seen from the foregoing evidence that on this plain question of fact that a fair trial was had for the defendant; that no one recognizes this better than counsel for defendant when he failed to challenge the weight or sufficiency of this testimony, either by motion for nonsuit or for a direct verdict. Nor did he seek a rule to show cause to review the case on the weight of evidence.

The evidence thus summarized, clearly shows that at least substantial justice was done to de-

fendant, even to the extent of disregarding the plain rules of evidence prohibiting the introduction of hearsay evidence and opinions of the witnesses for the defendant.

WE WISH TO IMPRESS UPON THE COURT THAT ONLY TWO POINTS OF LAW ARE INVOLVED IN THIS APPEAL, AND WILL BE CONSIDERED IN THIS BRIEF. NO QUESTION OF FACT IS INVOLVED.

Counsel for appellant rests his entire argument upon two technical law points, the first of which challenges the sufficiency of the complaint in stating the contract, which is discussed between pages 7 and 24 of his brief, and the second, which charges the admission of testimony designed to show the relationship of affection between the parties, which was admitted only to show the probability of the making of such a contract. It is our intention to reply to appellant's brief in the same order.

POINT I.

The Complaint sufficiently sets forth a cause for action.

In discussing this point it seems almost necessary to resort to a discussion of elementary principles of the law of pleading.

The complaint charges specifically that plaintiff was "about" to do two things necessarily connected with each other. One, to leave the employment of deceased, Anthony B. Van Houten

and, two, to leave that employment, because he intended to go west "to live." We call the court's attention to these words "about" and "to live" as we shall discuss them further.

That in consideration of the plaintiff not going West to live and remain in the employ of the deceased, the deceased, promised to make a bequest in his last will and testament of $10,000.

Defendant's counsel claim that the defect in the pleadings is, that the plaintiff did not state that he would not at that time go to a western state to live, or would not at any time go to a western state to live, and secondly, that he did not state for how long a period he was to stay in the employment of the said Anthony B. Van Houten, deceased. We deny that there was uncertainty in the contract, or that the parties were required to make it any more definite. It is submitted that the plaintiff did not have to AT THAT TIME GO WEST, that was not his intention. He was about to go West. and accordingly he stated in his contract that he was about to go West.

The word "about" has been construed in a mass of cases, which are gathered together in Corpus Juris, Vol. 1, under subject "about" commencing at page 334. Amongst the definitions of the word are, "nearly," "approximately," "in the immediate neighborhood of," "around," "in proximity to" and "not far from."

No cases cited in appellant's brief to show that a specific day or date would have to be agreed upon to make the contract binding nor does he seem to seriously contend that such is the law. At most, it would be a question of evidence as to when the plaintiff intended to go West. If we turn to the evidence in the case, we find it very

clearly set out as to when the plaintiff intended to go, and which clearly shows that the word "about" was as definite as the contract could be pleaded, and in fact stated exactly what the contract was.

On this point the testimony of Frank Van Houten shows that his first conversation with his grandfather respecting his *going West to live* took place two weeks before Christmas, 1910 (P. 26, lines 5-35); that they had a second conversation on the subject about a week later. (P. 27, lines 15-25); that at that time it was distinctly stated as to when Charles Van Houten intended to go West. The testimony is as follows: Q. *"Was anything said as to when you had intended to go West?"*—A. *"Why, he wanted to know when we thought about going, and Charles said that early in the New Year that he would go.* (P. 27 at bottom), and it was with this understanding as to time that the parties made their contract on the 28th of December, whereby as part of the consideration the plaintiff agreed to give up the intention of going West early in the next year.

The next objection to the contract on this point is that it was uncertain as to how long he intended to live there. We contend that this has no bearing on the contract. If he had intended to only live a day in the West as suggested by counsel in his brief, and had given up his plan to go West to live that one day there, he would have strictly speaking complied with his contract, but we contend that the words *"to live"* implied the idea of the taking up of a permanent abode in the West.

That it was his intention to take up his permanent abode in the West, may be further gathered

from the fact that he had been to California once before and had remained there for seven months. (P. 37, lines 1-10) That Frank Van Houten had heard from their brother-in-law, who was in the West, that he was doing well and making thirty dollars a week. (plaintiff was receiving about $15.00 a week from his grandfather) (P. 27, lines 1-10).

The next contention on this point is that the contract did not state how long the plaintiff should remain in the employ of Anthony B. Van Houten. It is contended that appellant's points as to uncertainty is not well taken here. The law does not require that parties shall fix a definite time as to the period of employment under such circumstances. As a matter of fact, the evidence again showed what was really intended by the parties. It is quoted in appellant's brief that the intention of the parties was that the plaintiff remain in the employ of the deceased the remainder of his life. Q. "When your grandpop talked to you and your brother Charles at his house, how long was it that Charles was to stay here in town?"—A. "Why, until he died."—Q. "Until Charles died?"—A. "No, until grandpop died." (P. 35, line 40 &c.)

Over and over again it has been held by the courts that contracts of this kind are legal. We call the court's attention to the case of King vs. King, 63 Ohio, 363, 52 L. R. A., 157, where the court upheld a contract by which a person agreed to live with another and take care of him during his life. There are numerous cases of the same character, in this state.

Counsel seems to have forgotten the rule that evidence should not be pleaded. This contract

does set out a certain definite agreement between the parties. *When that contract was made as set forth in the pleadings, there was a distinct change of position on the part of the plaintiff.* He gave up his intention of leaving the employment of his grandfather, and of taking up his abode in a western state, where he expected to earn twice the salary he was earning with his grandfather, in addition to the hope of doing still better. Whether or not he could have done better, of course, is problematical, but he was a young man with hope and ambition, and no one realized better than he that the situation in his grandfather's shop was such that with his uncle (the present executor) managing the grandfather's business, and the uncle's own son also brought to the business, and with some antipathy existing between the uncle and the plaintiff, that there was no hope for the future if he remained in his grandfather's employ. He had before him the almost certain knowledge that with his grandfather's death, the best he might expect from his uncle, the defendant in this case, would be employment as a journeyman carpenter with no favors shown, and it was a substantial contract and a real consideration moving from him, when he gave up his intended change of residence and all his ambitions to stay with the grandfather to gratify the deceased's whim and desire for his company and companionship. It was a sufficient substantial change of position as to justify the receipt of the consideration of $10,000 as set forth in the complaint. We repeat, that all of these matters were questions of evidence, not of pleading.

The very fact that counsel did not take advantage of his right under the Practice Act, to have

made a motion to strike out the complaint because of alleged uncertainty or to have demanded more certain pleadings, or a bill of particulars, as it was his right to have done, shows sufficiently that none knew better than he that the complaint did set forth a sufficient cause of action.

It is an elementary priciple of law, that evidence should not be pleaded, and that contracts should only be pleaded to their legal effect. It is only necessary that:

> "The declaration, complaint or petition must show a binding agreement between the parties." (9 Cyc. P. 712.)
>
> "The plaintiff may if he chooses set out the contract in suit in *haec verba,* but this is not necessary, for it is sufficient to plead a contract according to its legal affect." (9 Cyc. P. 713.)
>
> "In order to avoid prolixity, so much of the contract as is essential to the cause of action should be set forth and no more, and this also may be stated according to its legal effect." (9 Cyc. P. 714).

Even if the complaint were not sufficiently specific, which for a moment we do not concede, yet, any such defect was cured by the verdict.

It is conceded by counsel for the defendant that a legal contract was testified to by the plaintiff, a contract which we contend in every way was within the contract pleaded, thus showing the highly technical nature of the contention.

The significant admission of counsel for defendant as to this, is found in his brief at page 16, and is as follows:

> "It must be admitted that the testimony as given at the trial by the plaintiff's witness, Frank Van Houten (if believed) established a contract more certain in its terms than that set forth in the complaint; in other words, that the complaint, if amended so as to correspond with the proofs put in by the witness, Frank Van Houten, would not be open to the criticisms for uncertainty above exploited."

Under this point, counsel also discussed the sufficiency of the contract in law, the weight of evidence, etc., all of which it seems should have more properly appeared under another point. The phase of discussion appears on the 20th page of the brief.

At the outset, defendant's counsel criticises the failure of Charles Van Houten and Frank Van Houten, for not having joined their claims in one cause for action, notwithstanding that they had distinct contracts. It is a fact that counsel for plaintiff offered to try both cases together, but this was objected to by counsel for defendant. Defendant's counsel then naively contended:

> "Had, therefore, one suit been brought instead of two suits, both Charles' and Frank's mouths would have been closed as to any transaction with the testator." (P. 20 of appellant's brief).

He then proceeds to argue the legal effect if this had been done. This of course involves purely an academic discussion, because counsel did not join the two cases together in one complaint, and sec-

ondly the discussion which follows on the botton of page 20, as to what would have happened *IF* plaintiff had arranged his pleading to suit the defendant's views should receive little consideration at the hands of the court, as we are dealing only with a separate and distinct contract between defedant and Charles Van Houten.

Lest, however, his contention should have any weight with this court, we will call attention to the fact that the case cited in appellant's brief, Larison v. Polhemus, 36 N. J. Equity., 506 is not at all in point. The case was cited by defendant's counsel on his motion for non-suit. The Larison case was a case in which the father entered into a parole agreement with his two sons, by which they were to take care of him and his farm, in which event he would give them the farm at his death. The court of course refused to permit the two sons to testify after their father's death about this contract, for the simple reason as the court said that, *It was only one contract the father on one side and the sons on the other.''*

Frank Van Houten's testimony at page 26, beginning at line 20, and on pages 27, 28 and 29, lines 1 to 25, shows how impossible it is from this testimony, to deduce joint contract with Frank and Charlie.

In a long colloquy between Charles Van Houten, the plaintiff and his gradfather, which dealt solely with Charlie's intention, it ended up with the grandfather saying, ''Now, I will tell you what I will do with you, Charlie, ''if you will stay here and give up that idea of going West, I will give you $10,000.'' (Page 29, lines 25-30). And when the plaintiff turned to his brother to ask him what he thought of it, the grandfather said *''Never*

mind about Frank, now, this is up to you.. You decide for yourself, if you don't want to do it, why don't do it." And Charlie said: "Well, I will accept, grandpop.. I will do as you say." (P. 29, lines 40-45; P. 30, lines 1-5.)

All through the testimony it appears beyond question that the contract made with the plaintiff in this case, was a contract entirely independent from any arrangements that the deceased may have made with Frank Van Houten, and *if the court in this connection will carefully read the brief of counsel for the appellant, it will note that there is not a single quotation of evidence to support the view that there was a joint contract made with Charles and Frank Van Houten.* There was no mention in the argument for non-suit, that it was a joint contract. There was no motion for directed verdict on the ground that it was a joint contract. There were no request to charge that the evidence showed that there was a joint contract.

We repeat, there could be no question, but that there was a distinct and separate contract between the deceased and the plaintiff in this case, and not a joint contract between the deceased on the one hand and the plaintiff and his brother on the other.

The argument advanced by counsel for defendant in discussing this part of the case is one that should have weight only in an appeal to a jury, as it of course clearly deals with the weight, not the admissibility of the evidence. For instance, counsel says in his brief at page 23, "It is perfectly plain in the case at bar that the defendant was entirely at the mercy of these two young men." Yet, this statement is untrue.

The evidence of both the plaintiff, Charles Van Houten, and his brother Krank Van Houten, could have been excluded and there would still appear evidence in support of the contract, thus, the testimony of Roy Ensor, which begins at page 38 of the state of case details the contract in full, as shown by a conversation between Mr. Ensor and Anthony B. Van Houten, deceased; the contract as substantially testified to by Frank Van Houten, is testified to by Mr. Ensor. (P. 39, lines 1-25.)

LETTIE VAN HOUTEN, who at the time of the making of the contract was the fiancee of Charles Van Houten, also had a conversation with the deceased, and to her he detailed the contract (P. 43, lines 15-25). She corroborates Charles Van Houten as to how the old man came to talk to her about this contract. She testifies as did Charles Van Houten, that Anthony B. Van Houten, deceased, had sent for her in orde rto have her use her influence with Charles Van Houten, to change his mind with regard to going West. Also from the testimony of some of the witnesses for the defendant inferences may be drawn that a contract was made of some kind.

THOMAS A. UPDEGRAF, a witness for the defendant, testified, that he had a conversation with the old Mr. Van Houten, part of which was the following: Q. "And he said that he had to look after them?—A. *"He said he was doing for them right along, and he would have to do it."—Q.."He would have to do it?"—A.."Yes, sir."* (P. 71, lines 10-15.

HARRY DOUGHERTY, another witness for the defendant, testified that he had a conversation with Frank Van Houten in the presence of the plaintiff Charles Van Houten, immediately after

the death of old Mr. Van Houten, in which the witness said, that Frank Van Houten had said to him that their grandfather had promised to leave them $5,000. (P. 74, line 10, etc.). It can be readily seen that the witness had $10,000 in mind as much as $5,000, as to the amount that was mentioned by Frank Van Houten.

CHARLES M. BERDAN, for the defendant, testified to a conversation with the plaintiff immediately after the death of old Mr. Van Houten; that plaintiff had said to him that the will was not correct and did not read correctly, in that the amount left to him and Frank was too small. That on that occasion the plaintiff used the significant expression that he thought some of the figures had been dropped off the will That these remarks of the plaintiff and his brother immediately after the death of old Mr. Van Houten are entitled to some consideration, as it shows that at that time the contract, upon which this action is founded was then uppermost in their minds. However, these questions are purely of fact, and cannot be dealt with under the exceptions raised and argued in this case.

THERE WAS NO FAILURE OF CONSIDERATION.

Thi smay be regarded as perhaps a sub-division of point one. It is discussed generally by counsel for defendant in his point with the other question therein raised. Defendant contends that inasmuch as the consideration of love and affection was executory that therefore it was not a sufficient consideration to support the contract. That

the rule is, that love and affection will not support an executory contract.

Whether this is the law or not is immaterial. Conceding for the moment that defendant's contention is correct, there were still two considerations shown, besides love and affection, viz., that (1) the plaintiff would not go West, and that (2) he would remain in the employ of Anthony B. Van Houten, deceased. There is perhaps no rule of law better established than that partial failure of a consideration will not defeat a contract. This thoroughly well settled principle of law has been followed a number of times in this State. The general rule is stated as follows:

> "If one of two considerations for a contract is void, merely for insufficiency, and not for illegality, the other if sufficient will support the contract.
>
> 6 *Ruling Case Law, Sec.* 92.
>
> "This is also true if part of the consideration is void."
>
> 6 *Ruling Case Law, Sec.* 92.
>
> "Or if there is a distinct failure of part of the consideration."
>
> 6 *Ruling Case Law, Sec.* 92.

In notes to the above, is cited the case of King vs. King, 63 Ohio, 363, 52 L. R. A. p. 157. The Syllabus in this case is as follows:

> 1. "A contract by which a person agrees to live with and take care of another during his life, and further agrees not to marry during such service, in consideration of the agreement of the other that he

will provide for her amply, sufficient to make her comfortable and well off is not necessarily an invalid contract. Although the promise not to marry is in itself a void promise, as against public policy, yet it is but an incident to the main engagement, which is for labor and care; and, if that service be fully performed, and the recipient fails to perform his engagement during life, the other may maintain an action against the estate on the contract.

2. "In such case the mischiefs likely to ensue to the public by permitting a recovery notwithstanding the void stipulation would be less than those likely to follow a holding which would encourage the violation of contracts and the repudiation of just obligations after full value had been received."

This general rule of law has been followed in this State in the following cases:

Erie Railway Co., ads Union Locomotive and Ex. Co., 35 N. J. L. p. 240.

Stewart vs. Lehigh Valley Railroad Co., 38 N. J. Law p. 505.

Frank vs. Freeholders of Hudson County, 39 N. J. Law, p. 347.

Siedler vs. Freeholders of Hudson Co., 39 N. J. Law, p. 632.

The case of King vs. King, (52 L. R. A., p. 157), was in many respects similar to the case at bar. The plaintiff brought an action to recover upon a contract, whereby he agreed to live with

the decedent, and take care of him during life and refrain from marriage in the meantime. That the consideration thereof was that a provision would be made in the decedent's last will, etc. The court held that that part of the contract where the plaintiff agreed not to marry was void, but that part of the contract whereby the plaintiff agreed to care for the decedent was valid, and that this valid consideration would support the whole consideration.

Said Justice Spear in delivering the opinion of the Court:

> "The consideration moving to the agreement on the part of Howland to make ample provision for his niece, was on its face twofold: One, the promise to perform the service agreed upon; the other not to marry during the continuance of such service. The first was a valid promise, and of itself sufficient to support the promise of the other party; the second was a void promise, not affording any consideration whatever. As given in text books and numerous decisions, the general rule is that, if one of two considerations for a promise be merely void, the other will support the promise, although if one of two considerations be unlawful, the promise of the other party is void; and yet this rule has many exceptions, as will be shown later on. That is, if one of two considerations is void merely for insufficiency and not for illegality, the other will support the contract. Widoe v. Webb, 20 Ohio St. 435, 5 Am. Rep. 664; Metcalf, Contr. 246; Chitty,

Contr. 988; 1 Parsons Contr. 456; Comstock Contr. 24; Pikard v. Cottels, Yelv. 56; Bliss v. Negus, 8 Mass. 51; Carleton v. Woods, 28 N. H. 290; Woodruff v. Hinman, 11 Vt. 592, 34 Am. Dec. 712; King v. Sears, 2 Cromp. M. & R. 48; Erie Ry Co., v. Union Locomotive & Exp. Co., 35 N. J. Law, 240; Bradburne vs. Bradburne, 1 Cro. Eliz. 149. This distinction between a contract merely void and illegal contract would seem to be an important one. Courts as a general proposition, are open for the enforcement of contracts; not for their destruction. So that, where parties have deliberately entered into a contract valuable to them, and one has received the full advantage of it, the general policy of the law is to exact proper performance by him who has thus obtained the advantage; and some substantial defect should be shown before a court will refuse enforcement." (52 L. R. A., p. 159).

In the case of Erie Railway Co., ads. Union Locomotive and Express Co., the court held:

> "Where a contract is for the doing of two or more things, which are entirely distinct, and one of them is prohibited by law, and the others are legal, such illegality of the one stipulation cannot be set up as a bar to an action for a breach of one of the valid stipulations." 35 *N. J. Law, p.* 240. See opinion by Beasley, Chief Justice.

In Stewart vs. Lehigh Valley Railroad Co., 38 N. J. Law, p. 505, the Court of Errors and Ap-

peals approved of the principle laid down in the case of Erie Railroad Co., ads. Union Locomotive and Express Co.

In the case of Frank vs. Board of Chosen Freeholders of Hudson County, Justice Reed in his opinion said:

> "The policy of the law is to save statutes and contracts where a part is tainted with illegality or unconstitutionality, and give force to all parts not involved with the vicious provisions. Where there are several distinct stipulations in a contract, some of which are opposed to public policy and thereby illegal, the courts will enforce the legal stipulations. Erie Railway Co., v. Union Locomotive and Express Co., 6 Vr. 240."

The foregoing cases will be noted, deal with illegality and consideration, whereas, at most, the part of the consideration complained of in this case was merely as to its insufficiency.

Where the question is merely failure of part of the consideration for insufficiency, as distinguished from an illegal or unlawful consideration, the general rule is laid down in Cyc. as follows:

> "When there is a failure of a part of a "lawful consideration, the part which fail-"ed is simply a nullity and imparts no "taint to the residue. In such a case as "no particular amount of consideration is "required, the promise may be enforced. "In other words, if there is a substantial "consideration left, it will be sufficient to "sustain the contract." (9 Cyc. 370).

In support of this, numerous cases are cited, amongst which is the case of Allen v. Bank of the United States, 20 N. J. L., page 620.

There the court held: (Syl. 2).

> "A partial failure of consideration is no "defense at law, to an action on a note or "check, where the amount to be deducted on account of such failure is unliquidated."

The court in its opinion said:

> "Again, the counsel for the plaintiff in "error, insisted that the bank could not in "law recover, because the evidence show- "ed a failure of consideration; upon the "supposition that the declarations of Mr. "Colt on the day of the sale amounted to "an agreement, that the gangway was to "go with the lots, and as a consequence of "the sale of it to a third person, the lots "are less valuable. Under this view of the "case, there is not a total but a partial "failure of consideration. *Now it is well "settled that the partial failure of consid- "eration is not a good defense at law, if "the amount to be deducted on that account "be unliquidated."*
>
> *Greenleaf v. Cook, 2nd Wheaton Rep.* 13; 11 *Johnson Rep* 50; *and cases cited in notes to Chitty on Bills,* 88-89.

Other cases in point:

> "To defeat a contract for failure of consideration the failure must be entire." *Johnston v. Smith,* 86 *N. C.* 498.
>
> "If one or more of several considerations are insufficient, but not illegal, and

the remainder are good and sufficient, the good will render the promise valid." *Wesleyan Seminary v. Fisher,* 4 *Mich.* 515.

"That a license to use a void patent was one of the considerations for A's obligation under a contract does not render the contract void, there being other considerations upon which it can be upheld." *Washburn & Moen. Mfg. Co., v. Wilson,* 48 *N. Y. Super, ct.* (16 *Jones & S.*) 159.

"In an action on a contract, recovery cannot be defeated by showing a partial failure of consideration." *Evans v. Williamson,* 79 *N. C.* 86.

POINT II.

The Court properly admitted testimony showing the relationship of natural affection between the parties.

The particular questions objected to appear in defendant's brief at pages 25 to 28.

A moment's consideration of the character of the case must make it readily appear that the admission of this evidence was perfectly proper. Charles Van Houten, the plaintiff, with his brother, were the only children of a deceased son, and only child by a first marriage. In consequence, the grandfather had a particular strong affection for the plaintiff. If the question of relationship or natural love and affection existing between the parties, the exchange of visits and the companionship existing between the parties were to be eliminated from all consideration in the case, still

such a contract as set out could be made, as a matter of law, but surely the jury, composed of common sensed, matter-of-fact men, would wonder why a contract should be made for the payment of a sum as large as $10,000, where the consideration for it would be merely that the promisee would remain near the promissor, giving up a change of domicile, and remaining in the employ of the promissor as a journeyman carpenter

The evidence thus introduced, of love and affection and of the relationship and companionship of the parties was not offered as in itself consideration for the contract, but as dealing with the *probability* as to whether or not such a contract had been made. No one realized more than counsel for the defendant, that such surrounding circumstances should be thrown upon the background of this contract, so that the jury would know whether or not such a contract had probably been made. That counsel for the defendant thus recognized at the outset, the reasonableness of the admission of this class of evidence appears in his statement, in opening his case to the jury, when he said that he would prove the improbability of the contract having been entered into, (P. 18, L. 22-30), and *from the further fact that nearly all the evidence for the defense is made up of the same class of evidence, in attempting to show a condition in the testator's mind from the various surrounding circumstances that such a contract would not likely have been made.*

If there was any error made, it was by the trial judge, in admitting this negative testimony of the defendant.

"Where a claim for service is made against an estate, and the claimant proves that the intestate has made declarations tending to show that he expected to pay for the services, the defense cannot be allowed to show that he had made declarations of a different character." Van Fleet v. Van Vleet, 14 N. W. 671, 50 Mich. 1.

Am. Digest Vol. 8, P. 271. (Dec. Ed.)

"The declarations of a person since deceased cannot be made evidence on behalf of his representatives any more than on his own behalf while living for the purpose of showing the terms of a parol contract made by him for the conveyance of lands, and which is sought to be enforced against such representatives." *Wilson v. Wilson,* 6 *Mich.* 19. *Am. Digest Vol.* 8, *P.* 271. (Dec. Ed).

The defendant was properly protected in his charge as well as in the rulings of the court. The court in its charge to the jury distinctly stated the contract to the jury to the effect that its terms were:

"That if the young man would continue to work there, refrain from going out West, and remain until he, Anthony B. Van Houten, died, he would give him $10,000. This gentlemen, is a suit upon contract, and can only be dealt with in that way. It is purely a question as to whether there was a contract made, and whether both parties carried out the contract or not." (P. 89. L. 1-20).

The court as requested distinctly charged that the natural love and affection between the parties was not a sufficient consideration for an executory contract of the character stated in the complaint, nor for any part thereof. (Request 3, P. 93, L. 10-20).

This evidence was justified upon the following principle: the fact in issue was whether or not the contract was made. The fact, relevant to the fact in issue, was the previous relationship of the parties and the surrounding circumstances. We again repeat that it was only in the latter sense that the evidence of the relationship of the parties was presented to the jury.

We quote the following from McKelvey on Evidence, Section 98:

> "Logical relevancy is the first essential to the admissibility of all evidence. Only that which is logically relevant is admissible."
>
> "Stephen defines the word 'relevant' as meaning 'that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself *or in connection with other facts,* proves or *renders probably* the past, present, or future existence or non-existence of the other.'" *Steve. Dig. Ev. Art.* 1.

Counsel proposes to cite authorities, which in a measure illustrate this general rule.

In the case of Riggs vs. Powell, cited in Cyc. 16, page 1186 (note 72), 142 Ill, 453, 32 N. E. 482, the Supreme Court held:

"Where the issue is whether a note formerly belonging to intestate, and found after his death in possession of his widow, had been by him endorsed to her, evidence as to his declarations in regard to his intention to provide for her is competent."

The court in its opinion said on this point:

"It is also objected that it was error to permit this and other witnesses to testify to the declarations of deceased, as to his intentions in reference to providing for the appellee. This proof was competent, as directly tending to show that such a gift as here claimed might probably have been made; that it was perfectly consistent with his avowed purpose and feelings. How far it should go in connection with other evidence was for the court, but we think it was plainly relevant."

The rule of evidence is discussed in 16 Cyc. pages 1180 to 1184, subject, "Evidence." We quote from this work:

"Statements by a person may constitute relevant evidence as to the condition of the declarant's mind. As direct evidence of the fact asserted such declarations are incompetent."

The note to this quotation is as follows:

"(22) In re Mullin, 110 Cal. 252, 42 Pac. 645; Mooney v. Olsen, 22 Kan. 69; Shailer v. Bumstead, 99 Mass. 112; Sargent v. Bur-

ton, 74 Vt. 24, 52 Atl. 72. "A man's words show his mental condition. It is common to prove insanity by the party's sayings as well as by his acts. One's likes and dislikes, fears and friendships, hopes and intentions, are shown by his utterances; so that it is generally true that, whenever a party's state of mind is a subject of inquiry, his declarations are admissible as evidence thereof. In other words, a declaration which is sought as mere evidence of an external fact, and whose force depends upon its credit for truth, is always mere hearsay if not made upon oath; but a declaration which is sought as evidence of what the declarant thought or felt or of his mental capacity, is of the best kind of evidence." Mooney v. Olsen, 22 Kan. 69, 77, per Brewer, J. See also Thorn v. Cosand, 166 Ind. 566, 67 N. E. 256."

16 *Cyc. page* 1180.

"Friendship. Declarations of a person are competent to show the friendly nature of his feelings."

16 *Cyc. page* 1183.

"Declarations may precede, accompany, or follow the occurrence of the principal act."

16 *Cyc. page* 1183.

Conclusion.

It is respectfully submitted that there was no error in the rulings of the Trial Judge, and that the verdict of the jury, in which substantial justice was done both parties should in all respects be affirmed.

Respectfully submitted,

WARD & MCGINNIS,

Of Counsel with Plaintiff-Respondent.

March Term, 1916.

INDEX.

PLEADINGS, ETC.

TESTIMONY.

Notice of Appeal.

Passaic County Circuit Court

CHARLES VAN HOUTEN, Plaintiff, vs. EDMUND VAN HOUTEN, Executor, &c., of the Estate of Anthony B. Van Houten, deceased, Defendant.	Action at Law. Notice of Appeal.

To:

Messrs. WARD & MCGINNIS,
Attorneys of Plaintiff.

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

C. FRANK KIREKER,
Attorney of Appellant.

Judgment Record.

IN THE PASSAIC COUNTY CIRCUIT COURT.

CHARLES VAN HOUTEN,
Plaintiff,

vs.

EDMUND or ADMUND VAN HOUTEN, Executor of the Estate of Anthony B. Van Houten, deceased,
Defendant.

Edmund or Admund Van Houten, executor of the estate of Anthony B. Van Houten, deceased, the defendant in this cause, was summoned to answer unto Charles Van Houten, the plaintiff therein, in an action at law upon the following complaint:

Complaint.

The plaintiff, Charles Van Houten, by Ward & McGinnis, his attorneys, complains of the defendant as follows:

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

2. That the said Anthony B. Van Houten, now deceased, died on the 25th day of August, 1914, leaving a last will and testament, wherein he appointed Admund Van Houten as his executor, which said will was duly probated by the Surrogate of the County of Passaic; that said executor is a resident of the City of Paterson, County of Passaic, aforesaid.

3. That the plaintiff avers that he was a nephew of the said Anthony B. Van Houten, now deceased, and on or about the 28th day of December, 1910, was in the employ of the said Anthony B. Van Houten, now deceased. Being so employed and about to leave said employment and go to a western State, the said Anthony B. Van Houten, on the day and year aforesaid, entered into a contract with the plaintiff, whereby, in consideration of the said plaintiff not going to a western State to live, and in consideration of remaining in the employ of the said Anthony B. Van Houten, now deceased, and in consideration of the natural affection between the parties agreed in addition to paying the plaintiff a salary for his work as theretofore, would, at his death, leave to the plaintiff by bequest, in his last Will and Testament, the sum of $10,000. Thereupon plaintiff, Charles Van Houten, accepted the terms of the said contract and fully performed the same on his part.

4. Plaintiff avers that notwithstanding said contract and agreement, the said Anthony B. Van Houten died on the 25th day of August, 1914, leaving a last Will and Testament, and failed and neglected to make any provisions whereby the said sum of $10,000 should be bequested to the said plaintiff, nor did he make any other provision in his lifetime, nor in his will, whereby the said Charles Van Houten was to receive the sum of $10,000.

By reason of the foregoing premises, the plaintiff will claim the sum of $10,000 for damages, with interest from the 25th day of August, 1914, the date of the death of the said Anthony B. Van Houten, deceased.

WARD & McGINNIS,
Attorneys of Plaintiff.

Answer.

The defendant answered as follows:

Defendant, Edmund Van Houten (who resides at 231 Hamilton Avenue, Paterson, New Jersey), executor of the estate of Anthony B. Van Houten, deceased, who has been sued in this action by the name of Admund Van Houten, executor, etc., answering, says:

FIRST DEFENSE.

1. He admits the first paragraph of the complaint.

2. He admits the second paragraph, saving that he avers that his Christian name is Edmund and not Admund, as therein alleged.

3. He avers that the plaintiff was the grandson and not the nephew of the said Anthony B. Van Houten, as alleged in the third paragraph of the complaint. He further avers that on and prior to the 28th day of December, 1910, and from thence up to the time of the death of the said Anthony B. Van Houten, and for several months thereafter, the plaintiff was in the employ (under wages computed by the hour) not of the said Anthony B. Van Houten personally, as alleged in the said complaint, but of a firm trading under the style and name of A. B. Van Houten & Son, composed of the said Anthony B. Van Houten and the defendant, the latter in his individual capacity.

As to the plaintiff's intentions on or about December 28, 1910, or at any other time or times to leave the employment of the said Anthony B. Van Houten, or the said A. B. Van Houten & Son, or to go to a western State to live, the defendant has not

any knowledge or information thereof sufficient to form a belief, but the defendant denies that the said Anthony B. Van Houten made the contract alleged in the said third paragraph of the complaint, or any contract whatsoever with the plaintiff to bequeath any sum of money whatsoever to the plaintiff at the time stated in said paragraph of said complaint, or at any other time or times.

4. Reiterating his denial of the existence of said alleged contract in the third and fourth paragraphs of the complaint mentioned, the defendant admits the death of said Anthony B. Van Houten, as in said fourth paragraph is alleged, and that he left a last Will and Testament, and avers that thereby the said Anthony B. Van Houten voluntarily, and not in performance or part performance of any contract whatsoever, bequeathed to the plaintiff the sum of $500 and nothing further payable after the death or remarriage of his widow who survived him.

SECOND DEFENSE.

1. The defendant will object that the complaint discloses no cause of action. It fails to show any sufficient consideration for the alleged agreement.

THIRD DEFENSE.

1. There was not, in fact, any sufficient consideration for said alleged agreement.

C. FRANK KIREKER,
Attorney for Defendant.

Amended Complaint.

The plaintiff amended his complaint as follows:

The plaintiff, Charles Van Houten, by Ward & McGinnis, his attorneys, complains of the defendant as follows:

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

2. That the said Anthony B. Van Houten, now deceased, died on the 25th day of August, 1914, leaving a last Will and Testament, wherein he appointed Edmund Van Houten as his executor, which said will was duly probated by the Surrogate of the County of Passaic; that said executor is a resident of the City of Paterson, County of Passaic, aforesaid.

3. That the plaintiff avers that he was a grandson of the said Anthony B. Van Houten, now deceased, and on or about the 28th day of December, 1909, was in the employ of the said Anthony B. Van Houten, now deceased. Being so employed and about to leave said employment and go to a western State, the said Anthony B. Van Houten, on the day and year aforesaid, entered into a contract with the plaintiff, whereby, in consideration of the said plaintiff not going to a western State to live, and in consideration of remaining in the employ of the said Anthony B. Van Houten, now deceased, and in consideration of the natural affection between the parties agreed in addition to paying the plaintiff a salary for his work as theretofore, would, at his death, leave to the plaintiff by bequest, in his last Will and Testament, the sum of $10,000. Thereupon plaintiff, Charles Van Houten, accepted

the terms of the said contract and fully performed the same on his part.

4. Plaintiff avers that notwithstanding said contract and agreement, the said Anthony B. Van Houten died on the 25th day of August, 1914, leaving a last Will and Testament, and failed and neglected to make any provision whereby the said sum of $10,000 should be bequested to the said plaintiff, nor did he make any other provision in his lifetime, nor in his will, whereby the said Charles Van Houten was to receive the sum of $10,000.

By reason of the foregoing premises, the plaintiff will claim the sum of $10,000 for damages, with interest from the 25th day of August, 1914, the date of the death of the said Anthony B. Van Houten, deceased.

WARD & McGINNIS,
Attorneys of Plaintiff.

Judgment.

This action was tried before Judge GEORGE S. SILZER, with a jury, in the presence of the counsel of the respective parties, at the Passaic County Circuit Court, on December 9th, 10th and 13th, A. D. 1915.

The cause having been heard and submitted to the jury, they returned their verdict as follows: Ten thousand and ninety-one dollars and thirty cents ($10,091.30), in favor of the plaintiff.

WHEREUPON it is adjudged that the plaintiff, Charles Van Houten, recover of the defendant, Edmund or Admund Van Houten, executor of the es-

tate of Anthony B. Van Houten, deceased, the sum of Ten thousand and ninety-one dollars and thirty cents ($10,091.30), and his costs, which are taxed at the sum of

Judgment entered and signed December 17th, A. D. 1915, at 11.10 A. M.

JNO. J. SLATER,
Clerk.

Certificate.

STATE OF NEW JERSEY, }
COUNTY OF PASSAIC, } SS.:

I, JOHN J. SLATER, Clerk of said County, and Clerk of the county courts thereof, DO HEREBY CERTIFY that the foregoing is a transcript of the judgment record *in re* Charles Van Houten, plaintiff, vs. Edmund or Admund Van Houten, executor of the estate of Anthony B. Van Houten, deceased, defendant, as the same is taken from and compared with the original entry thereof in Book "Y" of Circuit Court Judgments for said County, on pages 130, &c., now remaining of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said courts and County, at Paterson, this twenty-ninth day of December, A. D. nineteen hundred and fifteen.

(Seal)

JNO. J. SLATER,
Clerk.

Testimony.

PASSAIC COUNTY CIRCUIT COURT.

CHARLES VAN HOUTEN, Plaintiff, vs. ADMUND VAN HOUTEN, Executor, etc., Defendant.	Before: Hon. GEORGE S. SILZER, *J.*, and a jury.

Paterson, N. J., December 10th, 1915.

APPEARANCES:

Messrs. WARD & MCGINNIS, for the Plaintiff.

C. FRANK KIREKER, Esq.; JOHN B. HUMPHREYS, Esq., for the Defendant.

(A jury being duly impaneled and found satisfactory, they were sworn.)

(Mr. Ward opens for the plaintiff.)

Mr. Humphreys opens for the defendant.)

CHARLES VAN HOUTEN, the plaintiff, sworn as a witness on his own behalf, testifies as follows:

Direct examination by Mr. Ward.

Q. How old are you? A. Twenty-nine years old.

Q. When were you twenty-nine years old? A. December 4th last.

Q. How long have you lived in Paterson? A. Until the present time.

Q. From the time of your birth? A. Yes, sir.

Q. What relationship, in his lifetime, did An-

thony B. Van Houten bear to you? A. He was my grandfather.

Q. What was your father's name? A. Martin Van Houten.

Q. Do you know how many children Anthony Van Houten had by his first wife? A. I believe two.

Q. And your father was the only one to live to reach the age of maturity, was he not? A. Yes, sir.

Q. The other child died when he was young? A. Yes, sir.

Q. How old were you when your father died? A. I was four years old.

Q. How much older than you is your brother? A. He is two years older.

Q. Whereabouts did you live at the time your father died? A. I believe on Belmont Avenue.

Q. What is the earliest recollection that you have of your grandfather? About what age? A. Well, perhaps, six years of age.

Q. Where were you living at that time? A. I believe on Jackson Street.

Q. Your mother supported the family? A. Yes, sir.

Q. Do you know whether your grandfather assisted you in any respect? A. Always.

Q. But your mother worked, I believe, in the mill? A. Yes, sir.

Q. From the time that you first recollect your grandfather up to the time when you first went to work was about how many years? A. Just give me that again.

Q. How old were you when you went to work? A. Nine years old.

Q. Whereabouts did you go to work then? A. I believe in a silk mill on Railroad Avenue.

The Court: How is this important?

Mr. Ward: Love and affection, sir. That

is one of the considerations set up in the contract.

Q. During this time, from your earliest recollection, up to the time when you went to work, do you know whether or not your grandfather, Anthony B. Van Houten, visited your home? A. He did.

Q. And at Christmas time would he ever come to you there? A. Yes, sir.

Mr. Humphreys: I think that is objectionable, coming too close to transactions with the grandfather, his testifying as to visits, etc. I don't think it is material either.

The Court: It does not seem so to me, Mr. Ward.

Mr. Ward: This is not the contract itself.

The Court: No. But it is a transaction with the deceased.

Mr. Humphreys: The statute says "any transaction."

The Court: The statute says that he cannot testify to any transaction had with the deceased.

Mr. Humphreys: And also if the transaction should be with a third party, still it would be excluded. The plaintiff cannot testify to any transaction with his grandfather himself, or by anybody else with the grandfather.

The Court: What do you say to that, Mr. Ward?

Mr. Ward: I will strike that whole testimony out.

The Court: Then that is an academic proposition at present.

Q. Were you ever employed by your grandfather? A. Yes, sir.

Q. How old were you at that time? A. About sixteen years old.

Q. How long did you continue to work on that job? A. Why, two years, and then a balance of six years, about eight over all.

Q. When did you go back to work? A. Altogether?

Q. You worked two years, you say? A. Yes, sir.

Q. Then you stopped; for how long a period? A. Perhaps for three years, and then I went back.

Q. Then you went back, and you continued to work until when? A. Until after his death.

Q. Were you working there in December, 1909? A. Yes, sir.

Q. And you continued to work there until after his death? A. Yes, sir.

Q. When did your grandfather die? A. The 25th of August, 1914.

Q. When did your mother die? A. The 2nd of July, 1914.

Q. In December, 1909, did you have any plan with reference to going West? A. Yes, sir.

Q. When was that, about? A. Why, about two weeks before Christmas.

Q. Had you any friends or relatives in the West? A. Yes, sir.

Q. Who were they? A. My wife's brother-in-law.

Q. What was his name? A. Mr. Greer.

Q. Where was he? A. In Dillingham at that time.

Q. Dillingham where? A. In Washington.

Q. You did not go West, however? A. No, sir.

Q. From December 28th, 1909, up to the time your grandfather died, did you ever go West? A. No, sir.

Q. From December 28th, or about that time, 1909, to the time of your grandfather's death, did you or not continue in the employment that you had prior to that time? A. I continued there.

Mr. Ward: Of course. it is admitted that the plaintiff did not receive the $10,000? I don't think there is any question on that, but I will ask it.

Q. Did you ever receive $10,000 from your grandfather? A. No, sir.

Cross-examination by Mr. Kireker.

Q. You continued, you say, in the employ of your grandfather, or A. B. Van Houten & Son, from December, 1909, until the time of his death? A. Yes, sir.

Q. Do you remember being in partnership with your brother under the name of Van Houten Brothers? A. No, sir.

Q. You do not? A. No, sir.

Q. Do you remember having an advertisement put in the *Paterson News?* A. Not myself, no, sir.

Q. I might read it to you and it might refresh your mind a little bit: "All kinds of screens made to order, also porch enclosures. Leave order at Van Houten Brothers, care of someone at 54 Lafayette Street, Paterson, New Jersey." Does that refresh your mind at all? A. In regard to that ad., yes.

Q. Weren't you one of the Van Houten Brothers? A. No doubt about that, I was.

Q. You and your brother Frank? A. Yes, sir.

Q. Then you were in business with him? A. No, sir.

Q. What was the significance of this advertise-

ment? A. Why, I was just out and had a little time I was laid off, and we done a little jobbing; it might have been a joke that somebody put in; it was not put in by me.

Q. You think it was a news item and not an advertisement? A. It positively was in the *News*.

Q. I say, did you consider it was an advertisement or a news item? A. It was some joke; it was more of a joke than anything; we did not continue.

Q. Do you remember buying any stuff from A. B. Van Houten & Son under the name of Van Houten Brothers? A. Myself? No, sir.

Q. Do you know of anything being bought there for the firm in 1913? A. I cannot recollect that.

Q. Do you recollect going down to A. B. Van Houten's office and seeing Mr. Vreeland? A. I have seen him many a time.

Q. And asking him to figure for you upon the cost of enclosing a porch? A. No, sir.

Mr. Ward: This evidence I object to. I don't see that it is relevant; even if these young men did take such work when they were laid off from time to time.

The Court: I understand that a portion of the direct examination was intended to show that he had been in the employ of A. B. Van Houten for a certain length of time, and this is cross-examination upon that point.

Mr. Ward: No, I don't think it is, because if they took outside jobs, it makes absolutely no difference in this case, so long as they continued in the employ that they had at the time in the manner in which it was before.

The Court: I will permit it.

Mr. Ward: I won't press the objection.

Q. You say you never went down there to the office during the time along in 1913 and asked Mr.

Vreeland to figure for you upon some work that was in prospect for Van Houten Brothers? A. Positively not, no, sir.

Redirect examination by Mr. Ward.

Q. After December 28th, 1909, did you continue in your employment as you had before that time? A. Exactly.

Q. And during this period of employment, after December 28th, 1909, were there ever any times when you were laid off? A. Yes, sir.

Q. Was that in the regular course of the work as it had been theretofore or not? A. Yes, sir.

Q. Was there anything unusual about that? A. No. We looked for it.

Q. Before that time when you had been laid off in former years if you could earn any extra money, had you done it? A. Yes, sir.

Q. At odd jobs? A. Yes, sir; I was advised by my uncle to do so.

Q. By the defendant in this case? A. Yes, sir.

Q. That had been your method of work before? A. Yes, sir.

Q. And after that had you also done the same thing? A. Yes, sir.

Q. If you were laid off a few days here and there, you tried to make money, didn't you? A. If we could get it, yes, sir.

Q. On any of those occasions did you actually work on any of your grandfather's houses? A. Yes, sir.

Q. He owned property, I believe, aside from the works? A. Yes, sir.

Q. I believe you are married now, are you not? A. Yes, sir.

Q. In 1909 were you engaged to be married or not? A. Yes, sir.

Q. To whom? A. To Lydia Gorman.

Q. Is she your present wife? A. Yes, sir.

Q. What relationship, if any, did Mr. Greer bear to her? A. A brother-in-law.

Q. Mr. Greer is here in Court? A. Yes, sir.

Recross-examination by Mr. Kireker.

Q. What do you mean by saying you worked on your grandfather's houses? Do you mean during the time you had no employment, and you were laid off, and you went up there voluntarily and worked upon those houses? A. No, sir; I do not. We were laid off; there did not seem to be anything to do, according to my uncle's story or statement, and we would come in some way in contact with my grandfather, not knowing if he was in the office, on the street, and the old question would arise, "What is the matter with you?" "Well, Grandfather, things don't seem to look very bright for all of us any longer." "Well, you can come up to my house and do this and that." The exact houses or the exact words I cannot recall, but I remember that.

Q. Were you paid for this work you did on your grandfather's houses that you now refer to? A. Yes, sir.

FRANK VAN HOUTEN, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Ward.

Q. How old are you? A. I am about thirty years of age.

Q. You are a brother of the last witness? A. I am.

Q. And a grandson of Anthony B. Van Houten? A. I am.

Q. Or you were a grandson of his in his lifetime? A. I was.

Q. What was your father's name? A. Martin Van Houten.

Q. Do you know whether or not he was the only son of your grandfather by his first marriage? A. He was.

Q. The only child to reach the age of maturity, was he not? A. He was.

Q. How old were you when your father, Martin Van Houten, died? A. About eight years old. About seven years old.

Q. Do you remember the event? Do you remember it well, or don't you? A. I have a faint recollection.

Q. Do you remember your grandfather at that time? A. I have a recollection of him, yes.

Q. From that time on did he ever visit your home where you and your mother and brother were living? A. He did.

Q. How often about, in your opinion, would he visit your home? A. Several times a year.

Q. Did he ever display any affection towards your brother? A. He did.

Q. Will you just tell the Court and jury any occasion you now recall, or as many occasions as you recall, when he displayed affection towards your brother and you? A. I recall when we met him in the yard and he put his arm around our shoulders.

Q. When was this? After you had gone to work for him? A. Yes, sir.

Q. From the start I mean. Around Christmas time have you any recollection of what he would do, or his attitude towards you and towards your brother? A. He would be very friendly and would

be very glad to see us, and asked whether we were warm and comfortable, and asked mother and gave her money.

Mr. Humphreys: I don't want to object unnecessarily, but it does seem to me that the question to determine here is whether the contract was made, and to go into any lengthy discussions of actions during numerous years, during which Anthony B. Van Houten manifested affection for these young men, is, to my mind, irrelevant. The contract is the thing. Was the contract made? Natural affection is no consideration for an executory contract, and to prove natural affection does not help Mr. Ward any. It seems to me the question is whether the contract was made.

Mr. Ward: If the Court please, counsel for the defendant, in his opening, stated that he would prove the improbability of the contract being entered into. Now, the consideration set up in the complaint is for these things: To refrain from going West; continuing in his employment as they had worked theretofore, and natural love and affection.

The Court: Is that consideration set out?

Mr. Ward: Yes, sir.

Mr. Humphreys: Let me see in regard to that. Perhaps I am anticipating matters. I think we are entitled to have these matters clearly stated. In the first place, the contract is altogether too uncertain; the alleged contract is altogether too uncertain and indefinite in its terms and in the statement of its consideration to be a subject for redress in a court of law or in a court of equity. In

the case of *Vreeland* v. *Vreeland,* it was held that in a contract of this kind, where one of the party's mouth was closed by death, it must be absolutely certain and definite in its terms and in the expression of its consideration. And this is not a case in which any amendment should be allowed, because the making of this contract or the not making of it is a matter certainly within the knowledge of these young men. Anthony B. Van Houten's mouth is closed to answer it, and the plaintiff should not be permitted to experiment with the statement of his contract. He is bound by the statement that he made when he made his complaint. He has stated that the consideration was not to go West, to live and remain in his employment, and also a third consideration, natural affection. It does not show how much of the promise was referable to natural affection and how much was referable to the other considerations. And natural affection, of course, it is elementary, cannot be a consideration for an executory contract. And, inasmuch as he has not given us any method of distinguishing how much of the consideration is referable to the natural affection, I submit he cannot succeed upon the contract as stated in his complaint.

The Court: Do you make that as a formal motion?

Mr. Humphreys: I make that as a formal motion to dismiss the complaint.

Motion denied. Defendant excepts.

The Court: I will admit the testimony showing the relationship between the parties.

Q. Will you just tell the Court and jury what you really saw, if anything, of the manner in which your grandfather treated your brother in those early days? A. He used to come in and greet us and put his arms about us and ask mother if we were warm and comfortable, and said he did not want us to want for anything while he lived, and he made a general fuss over us and showed every affection that he could show.

Q. How old were you when you went to work? A. I was about eleven years old.

Q. How long did you continue in your employment before you went to work for your grandfather? A. Why, as near as I can remember, I was employed for a year or a year and a half, something like that.

Q. How old were you when you went to work for your grandfather? A. About fourteen years old, as near as I can remember.

Q. Did you go to work for your grandfather? A. My grandfather always asked my mother why she did not send us down to the shop; he would like to have us there.

Q. After you went to work for your grandfather, how long was it before your brother Charles went to work for him? A. Well, some time after.

Q. About how long, do you know? A. I could not say.

Q. Was it fifty years or twenty-five years or ten years or five years or one year? A. Well, about six or seven years, I think; something like that. I cannot recall.

Q. During that time, up to the time your brother went to work for your grandfather, did your grandfather or not continue to visit your house? A. He did.

Q. Had you ever seen him during that period of

time show any affection towards your brother? A. I did.

Q. In what respect? A. He used to meet us in the yard and put his arms around us.

Q. This was before your brother went to work? A. Well, he greeted him and told him he thought a good deal of him; said that he was a Van Houten and he would take care of the boy when he died, and showed every display of affection.

Q. After your brother went to work, after Charles went to work for your grandfather, Anthony B. Van Houten, will you just tell us whether or not you were ever present when your grandfather showed any affection towards your brother, either at your home or at the shop? A. Why, I know on many occasions he would meet us in the yard and ask us how things were going home, whether we were wanting for anything; he would tell us dad was here before him and he wanted him here also, and he would say a good many things that I could not remember all.

Q. When he said that you were a Van Houten, or, at least, that your brother was a Van Houten, do you remember what he said about that? A. Why, he used to make a remark about a V on my brother's forehead.

Q. Did you ever accompany your brother, or were you ever present, when your brother visited your grandfather? A. I was.

Q. Where was your grandfather, Anthony B. Van Houten, living during this period of time? A. At No. 89 Hamilton Avenue.

Q. Was he living there at the time he died? A. No, sir; he died in Oakland.

Q. Was No. 89 Hamilton Avenue always his place of residence up to the time of his death? A. Yes, sir; it was.

Q. Excepting in the summer vacations? A. Yes, sir.

Q. How often were you present with your brother visiting your grandfather at his home? A. I was with him there often.

Q. Where would your grandfather usually receive your brother? A. Well, usually in the sitting room.

Q. Just tell the Court and jury how he would greet you and how he would act to your brother on those occasions? A. Why, he would ask him how he was getting along and whether he was glad that he had come back with him, and hoped that he would not think about going in anything else; that he had helped him all he could in his business and he was sorry it had not paid, but, he says, "I feel that you have done all that you could."

Q. Did he ever put his hand on your brother's head or anything of that kind? A. He often put his hand on either of our shoulders; he often done that.

Q. At the time your brother entered the employ of your grandfather, where was the business? A. Do you mean my brother's business?

Q. Where was your grandfather's business? A. It was on Paterson Street.

Q. What character of business was it? A. Carpenter and building.

Q. What was the character of your brother's employment there? A. Why, carpenter.

Q. From the time he entered that business, he continued, I believe, for about two years or three years, first? A. Yes, sir.

Q. Were you ever present when he was paid? A. Why, I was.

Q. Did he receive anything but the regular compensation? A. Nothing other than that, not that I know of; I never knew him to receive anything.

Q. After about two years, your brother ceased his employment there, or gave up his employment there, do you know what business your brother was in then? A. He was in the confectionery business.

Q. Do you know how long that business continued? A. Why, as far as I know, about a year and a half, I think.

Q. During that year and a half, do you know of your own knowledge, whether your grandfather ever went to your brother's place of business, ever visited him there? A. I do.

Q. Did your grandfather ever say anything to you with reference to the way he felt towards your brother? A. Why, he often did.

Q. Tell us what he said. A. Why, he would mention the fact that Charley had tried hard. He says, "That boy has done his level best to make that business pay. I feel heartily sorry for him." He says, "I don't regret anything that I have ever done for him." He says, "I know he is slaving there day and night and done all he can." And he said many things there that I cannot just recall. It was probably about the business over there, and he told me that he hoped that as soon as it did not go good he would be back with him where he had been before.

Q. Do you know whether or not there was any reason, whether your brother had received any hurt or any injury or anything of that sort that affected him? A. Charley has had a bad ankle, because I went to New York with him to have it operated upon, and he was there for a week, I believe.

Q. His ankle was weak? A. Yes, sir, very weak.

Q. Your brother finally gave this business up, did he not? A. He did.

Q. The confectionery business? A. Yes, sir.

Q. And, after he gave that business up, do you know where he went to work? A. Why, he went to work with my grandfather.

Q. Why? A. Because Grandpop was telling him that if the business did not pay there was no need of him worrying, that he would like to have him back with him.

Q. When was it, as nearly as you recollect, that your brother came back to work for your grandfather, to your grandfather's place of business? A. Why, as near as I recollect, it was shortly after I came back.

Q. When did you come back? A. I came back to work, I think, in April. I am not sure about that.

Q. Of what year? A. I think it was in 1909.

Q. That is your best recollection, though, you are not sure? A. That is my best recollection.

Q. When your brother did come back to the employment, at your grandfather's place, where was your grandfather at that time? A. I believe he was on a trip. I cannot just recall where he was.

Q. How long after your brother came back to this place of employment did your grandfather return? A. Why, I think my grandfather came back a few—well, shortly after my brother had started in, if my recollection serves me right.

Q. Did you and your brother continue to work there then? A. We did.

Q. Do you remember, after your grandfather's return from this trip, anything that he said to your brother and you, and how he greeted him, etc.? A. Why, he seemed very glad to see him and said that he was glad he had given up that business. He says he seemed to have worried himself sick, and he said there was no necessity for it, since it did not pay. He says, "I would have liked to seen the young man make a success of it, but I am glad to see him back again with me."

Q. Did your brother continue in his employment? A. He did.

Q. When do you think it was, as nearly as you can tell us, that your grandfather came back from this trip? A. I think it was shortly after his birthday.

Q. When was that? A. Some time in the latter part of September.

Q. When was his birthday? A. September 8th.

Q. Your grandfather's birthday was September 8th? A. Yes, sir.

Q. How do you know that? A. Why, we have a record of it in the Bible.

Q. On September 8th then, or some time after that, in the month of September, your brother was employed there, was he? A. He was.

Q. What was he doing at that time, what was his work? A. Why, carpenter work. He went on jobs in the shop part of the time, and part of the time out.

Q. Was there any difference in his work and the work of the other carpenters who were employed there? A. No, sir; none that I could see.

Q. Was there any difference in his pay? A. No, sir.

Q. Did you ever hear your grandfather say anything to him with reference to that? With reference to his working there, etc.? A. Why, he said that he was sorry that he had to be the same as the rest and had to just check up with what all of them had to do, but he said he had to start that way himself; he had worked hard in his time, and he said that he was doing the best by him and he would probably be better off for it.

Q. Do you know whether or not at that time your brother was engaged to be married? A. He was.

Q. And do you know whether or not the girl to whom he was engaged to be married at that time he thereafter married? Did he afterwards marry the same girl? A. He did.

Q. Do you know whether or not in the fall of that year, 1909, your brother had any idea about going West? A. He did.

Q. And when was it that, so far as you know, he first conceived this notion or idea about going West? A. Well, the first he has spoken to me about it, I think, was in the early part of December.

Q. Were you ever present at any interview between your brother and your grandfather when this subject was mentioned? A. I was.

Q. When was that? A. Why, as near as I can recollect, it was about two weeks before Christmas.

Q. How long before Christmas? A. About two weeks.

Q. Where was this conversation? A. That was in my grandfather's house.

Q. Do you remember the day of the week? A. I think it was on a Saturday afternoon; I could not say for sure.

Q. Will you just tell us what was said by your grandfather, and what was said among you all at that time? A. Why, we went in, as we often did, went in, to meet him and sit down and smoked, and Grandpop asked us how things were going in the shop, what we were doing, as he usually did, what we were doing in the shop and how we were getting along, and after that Charley told him that he had heard many good reports from the West, from an intended brother-in-law.

Q. Mr. Greer? A. Mr. Greer, yes, and Grandpop says, "Well, what about that now?" He says, "You don't want to think about anything like that." And he says, "You have always been here with me; there is no use of your thinking about leaving now. You have just got back again." He says, "I was glad to see you get back here." There was no use, he did not think of him thinking about going away again and he dismissed the subject.

Q. What did your brother say about going West? A. Why, he had said that he had good prospects out there; that his intended brother-in-law was doing well, and he did not know why he could not do as well as he did, and he said that he was getting about thirty or more a week, and Lydie was about of the same opinion, and she thought there was no reason why he could not do as well——

Q. She was the lady— A. Why, that was his intended wife, and he was going to marry. And they was going on for some time about that, and then we dismissed the subject.

Q. After that did you see him again on that same subject? A. I did.

Q. How long after that? A. About a week.

Q. Was your brother there or not? A. He was.

Q. Whereabouts was it? A. I think it was in— well, I recall it was in the front room of the house.

Q. The front room of the house? A. Yes, sir.

Q. Will you tell us just what was said by your grandfather and your brother at that time, and by you, too? A. Well, we came in, and he laughed and said, "Well, how are you?"

Q. This was the second time you spoke of it? A. Yes, sir. He says, "Well, I guess you have got that foolish notion out of your head." He says, "You know rolling stones don't gather any moss. You are better off with me here than with a lot of strangers." And then after that he says, "Well, Charley, you know you have got back here and we are all together. There is no use of your thinking about that. And besides, it is near Christmas, you might as well give it further consideration and not go at it too quick."

Q. Was anything said as to when you had intended to go West? A. Why, he wanted to know when we thought about going, and Charles said that early in the new year that he would go.

Q. Are you giving all of the conversation, or as much of it as you can recollect? A. As much as I can remember. He said quite a good deal.

Q. You say he said something about Christmas, tell us what he said about that. A. Why, he said, "Come back after Christmas. You know the holidays are on now, and I would rather you come back after you think it over further."

Q. Did you go back after Christmas? A. We did.

Q. Was that the last conversation that you had about it? A. Why, the last conversation was——

Q. You went back after Christmas, did you? A. Yes, sir.

Q. How do you fix that date? A. Why, it was, I know, between Christmas and New Years; I recall that.

Q. Do you remember what day Christmas fell on that year? A. Well, I think it was on a Saturday.

Q. Was it the next day after Christmas that you spoke to your grandfather, on a Sunday? A. No, it was not.

Q. Do you remember going to work after that on Monday? A. Well, I could not say about that. I may have.

Q. How long after Christmas was it, to your best recollection? A. Well, it was Tuesday or Wednesday, as near as I can recollect.

Q. Whereabouts? A. Why, to the house, we went to the house.

Q. Was your brother there? A. Yes, sir. He was.

Q. Who was present at that time? A. Brother and Grandpop and I.

Q. Will you tell us, as nearly as you recollect, what was said by your grandfather and your brother and you on that occasion? A. Well, as near as I can recollect, we went in the house and sat

down, and Grandpop says, "Well, well, well, well." He says, "Now, I guess you have forgot all about that by this time. I don't think that amounts to much now, going out there, that is only a sudden idea of yours." "Well," Charley says, "now, I have decided to go. The more I think about it the more anxious I am to go." "Well," he says, "now, you better not think too sudden about this. I have been thinking, considering this myself." He says, "I thought at first that you did not mean anything by it, but now it looks as if you did." And then Grandpop says, "I don't want you boys to leave me, because you are the only two I have of the first union." He said, "Your grandmother was the first, my first choice. Your father was the only son that grew up of her, and I have always had a great deal of care and love for you. I have felt that it was my duty, because you were alone and your father was dead and there was no one to look after you. I would not want you to go there and be among strangers and not be here when I am gone." So he says, "Now, I will tell you what I will do with you, Charley." He says, "If you stay here and give up that idea of going West, I will give you $10,000."

Q. Did he say when? A. When he died, he said.

Q. Tell us all of that that you remember? A. He told him when he died that he would give him $10,000, and then he said—Charles says, "Well, I would like to do as you want me to do, but my young lady has something to say. I am engaged to her and she thinks that if we went out there we would get married sooner." He says, "Well, well, never mind about her now; she had better come here and I will talk to her and show her what is best." Then Charley turned to me and asked me what I had to say about it, and I says, or I was about to say, and then Grandpop says, "Never mind Frank now, it is up to you. You decide for yourself. If

you don't want to do it, why don't do it." And Charley says, "Well, I will accept, Grandpop, I will do as you say."

Q. You say that your grandfather said, "If you stay home and give up this idea." What idea did he say to give up? A. About going West.

Q. And where did he say to stay? A. "Here," he says.

Q. Did he say anything about the work or the continued work? A. Why, yes, he wanted him to work there.

Q. What did he say about that? A. He says, "I want you to work here and stay where I am." He says, "You have always been in the shop here, and I would like to have you at this business and be where I am.

Q. "Where I am"? A. Yes, sir.

Q. Was there any further talk about it then? A. Well, I cannot remember any more.

Q. Was there any further talk with you after that?

Mr. Ward: I suppose we are not really concerned with that in this case.

Q. Never mind about that then. There was some further talk, wasn't there? A. Well, there was further talk, yes; I could not remember much about it.

Q. There was further talk? A. Yes, sir; there was.

Q. After that how long did you stay there do you suppose? A. I stayed till a few months after my Grandpop's death.

Q. I mean at the house. A. Why, about a half an hour or so; I cannot recall just how long.

Q. Do you recall any occasion after that when you ever mentioned this promise to him? A. Why, after the New Years, I recall an instance when he did speak about it.

Q. Where? A. At his own home.

Q. Who was present at that time? A. Mr. Ensor.

Q. What did he say at that time? A. He said to Mr. Ensor, "Well, the boys have given up their ideas of leaving me." He says, "I guess they have found out it is better to stay here with their grandfather." And he said other things that I cannot remember.

Q. Do you recall any other occasion? A. Why, I recall a few occasions when mother was living at the house.

Q. Did he ever, in your presence, say anything to your mother about what he had said to Charley? A. Why, yes, he had told mother.

Q. Now, tell us, as nearly as you are able, what he said to your mother about what he had said to Charley?

Mr. Humphreys: Were you present then?
The Witness: I was.

Q. Go on. A. He told my mother that he guessed he had made Charley settle his ideas about going West, and he was very glad he was not going, and he says, "I suppose you are also glad he is not going."

Q. What is that? A. He said to my mother, "I suppose you are glad he is not going," and he says, "I think a good deal of him now; I would like to have him here; now, I have not got long to live." That is all I remember then that I can be positive about.

Q. Do you remember any other occasion when he told your mother anything about what he had promised Charley? A. Well, on another occasion he remarked that he guessed Charley would not have to worry when he died, that there was no need

of worrying about his uncle, and that business that he had failed. He says, "I have just provided for him, and I guess that he won't have to worry about anything like that."

Q. Anything else? A. That is all that I can remember.

Q. Of course, you recall when your mother died? A. Oh, of course.

Q. Where was she buried? A. At Cedar Lawn.

Q. Do you know whether or not your grandfather attended the funeral? A. He did.

Q. Do you remember anything that was said at that time by him in your presence? A. Why, I remember my sister-in-law approached him and saying that we were all alone now——

Q. Who was all alone? A. She said, "The boys are all alone," and the tears were rolling down his checks, and he said, "No, I am with them. Their grandpop is always with them." And words to that effect. I don't just remember all he did say.

Q. How long after that was it that he died? A. Well, it was three or four months, I should think; I ain't sure. I think my mother died July 2nd, and I think he died August 24th. No. Mother died before that. But I know it was a few months.

Q. And, up to the time of his death, did he treat your brother affectionately or not? A. He always did; he always showed a kind interest in him.

Q. Did he ever, in your presence, when your brother was by, refer to the promise that he had made; what he had promised to do? A. Yes, sir.

Q. Tell us about that. A. He would pat him on the back and say, "Well, now, Charley, you will be provided for, and you will be able to get married, and I guess you won't think of the hardships that you had in your early days. You have worked hard and faithfully and good, and you have not disap-

pointed me in anything; you have never got in any trouble and I am proud of you."

Q. From the 28th of December, from the time that your grandfather promised Charley to leave him $10,000 when he died, from that time, up to the time your grandfather died, did Charley ever go West? A. He did not.

Q. Did he continue or not in the same employment at the same place that he had at that time and prior thereto? A. He did.

Cross-examination by Mr. Kireker.

Q. When did you leave the employment the last time of A. B. Van Houten & Son? A. When did I leave it?

Q. When did you leave it for the last time? A. That, for the last time, was, I think, some months after he died. I think in January. I won't be sure about that.

Q. About last winter? A. I think it was.

Q. Where have you been since then? A. I have been to Bridgeport.

Q. What were you doing in Bridgeport? A. I was at the Remington Arms in Bridgeport.

Q. Then where did you go? A. Then I came back, and I have been up to the Dupont Powder Company.

Q. Whereabouts? A. At Haskell.

Q. Then where did you go? A. I am still with them.

Q. You are still up there? A. That is to say, I have a job there.

Q. Did you have any jobs in Paterson since then? A. No, sir.

Q. Did you have any other jobs out of town? A. Well, in Bridgeport.

Q. I mean outside of Bridgeport and Haskell? A. No, not that I can remember.

Q. You can't remember so far back as that? A. Well, no, I can't remember any more. I don't think so. I am pretty near positive I have not had any other jobs since, no, sir.

Q. Do you remember, or do you mean to say, you cannot remember what jobs you have had since the last January? A. Well, I told you I had a job in Bridgeport, and I am with the Dupont Company.

Q. I ask you if you had any other jobs. Now, can't you remember whether you had any other jobs since last January? A. No, I have not.

Mr. Ward: He says, as I understand it, that he is with the Dupont Company now.

Mr. Kireker: Yes, that is as I understand it.

Q. Do you remember going into partnership with your brother along about 1913? A. No, I don't remember.

Q. Don't you remember an advertisement being published in the *Paterson News* under the name of Van Houten Brothers? A. I have seen it. I thought it was an invention of somebody else.

Q. Did you think it referred to you and your brother? A. I know it referred to us.

Q. How did you know that? A. I could read it.

Q. There might be other Van Houten Brothers, might there not? A. There might have been other Van Houten Brothers, but I heard others mention, making mention of it, and I believe it was me, my brother and I.

Q. It gave the address to leave orders at 54 Lafayette Street, is that where you people went? A. I have not worked there.

Q. No, not worked there, but is that where you

went to find out if there were any orders for you? A. I did not go there, no.

Q. That was a saloon there, wasn't it? A. Well, I don't know whether it was or not.

Q. Are you sure you don't know? A. Well, it might have been, I could not say.

Q. Now, you do know it was a saloon there, don't you? Why don't you admit it now? A. Well, I am not used to frequenting saloons.

Q. You know that was a saloon, and that is where you took orders, don't you? A. I did not take any orders there.

Q. They were to be left there, weren't they? A. How do I know? I never got any orders from there.

Q. During that time you were out of the employ of A. B. Van Houten three or four months, weren't you, from along in June, July, August and September of 1913? A. For how many months?

Q. Three or four months. A. In 1913.

Q. Yes, along in the summer time, June? A. I don't recall any three or four months, no.

Q. Do you recall going down to the office and buying stuff there to do some work for Van Houten Brothers? A. Not under Van Houten Brothers. I have bought stuff, but not under Van Houten Brothers, that I can remember.

Q. You were going to work outside, weren't you? A. Well, we used to do odd jobs for different friends. I have often done odd jobs for different friends. In the night time, or when I had a day off. I had lots of friends who asked me to do work which they had, of all kinds, which they do of all men who are in the trade.

Q. When your grandpop talked to you and your brother Charles at his house, how long was it that Charles was to stay here in town? A. Why, until he died.

Q. Until Charles died? A. No. Until grandpop died.

Q. So he said to him, your recollection is, "If you stay here till I die, I will leave you $10,000"? A. "If you stay here by me until I die, why, you will get $10,000."

Q. You were not living with him? A. How is that?

Q. Neither you nor Charles were living there with him? A. No, sir.

Q. You never lived there with him, did you? A. No, we never lived with him.

Q. You have a similar suit, haven't you, to this one, pending in this Court at this time? A. I have.

Q. And upon the idea that your grandpop said the same thing to you, didn't he, at that time, that he would leave you $10,000? A. Why, he did say that.

Q. Well, yes, that is the idea? A. Well, he said it. Never mind about the idea.

Q. Charles is to be a witness in your case, isn't he?

Mr. Ward: Objected to.

Q. Hasn't he agreed to be a witness in your case? A. Why, inasmuch as he has heard it——

Q. Hasn't he agreed to be a witness in your case for you? A. I believe he has.

Q. You know he has. Why don't you say so? You know he has. You are a witness for him and he is to be a witness for you. You might just as well be right out and frank with it and say so and not try——

Mr. Ward: I object to this as argumentative and not proper.

The Court: Yes. It is not proper to lecture the witness. Just ask questions.

Q. You went to California once, didn't you? A. Yes, I did.

Q. How long were you out there? A. Oh, about seven months.

Q. Then you came back and went to work with A. B. Van Houten again? A. Yes, I did.

The Court: When was that you were West?

The Witness: I went West in 1908 and came back in April of 1909.

Q. Do you know anyone by the name of Dougherty who works down in the shop? A. Yes, I do.

Q. Did you ever hear your brother Charles, when you were along, talk to Mr. Dougherty about——

Mr. Ward: I object to the question. It is only proper in any event if it was asked of Charles, and it cannot be asked of this witness.

Mr. Humphreys: But the question should be concluded. What is the question?

Q. Did you ever hear your brother Charles, when you were along, talk to Mr. Dougherty about the legacy of $500 which was left Charles by his grandpop? A. No, I don't recollect that.

Q. Do you know the date upon which your brother Charles was married? A. It was just before my mother's death.

Mr. Ward: I can get that for you if you want.

Q. You stated, didn't you, that at the time of your mother's funeral your grandpop put his hand upon Charles' back and said that he was here and

he should go and be married now, didn't you say that? A. No, I did not say that.

ROY ENSOR, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Ward.

Q. You reside here in Paterson? A. Yes, sir.

Q. And you have for how long? A. For twenty-seven years.

Q. Is that your age? A. Yes, sir.

Q. What is your employment? A. I work up in the Dupont Powder Works.

Q. Did you know Anthony B. Van Houten in his lifetime? A. Yes, sir.

Q. At the time that Anthony B. Van Houten was living did you know Frank Van Houten? A. Yes, sir.

Q. And Charles Van Houten? A. Yes, sir.

Q. When were you married? A. I was married in 1908.

Q. Have you any children? A. I have one.

Q. When was that child born? A. September 25th, 1909.

Q. After the birth of that child did you ever visit Mr. Van Houten's home? A. I did, sir.

Q. Did you ever visit his home with Frank Van Houten? A. Yes, sir.

Q. Do you remember any occasion after Christmas of 1909, or after New Years of 1910, when you visited Mr. Van Houten's home? A. Yes, sir.

Q. When was it? A. It was right after New Years.

Q. Do you remember what day it was? A. I believe it was on a Sunday afternoon.

Q. Did you have any conversation with Mr. Anthony B. Van Houten with reference to Charles Van Houten? A. Yes, sir.

Q. Will you just tell the Court and jury, as near as you can recollect, what was said by him? A. Why, after New Years of 1910, I went out with Frank, and on our way along he said to me, "Come on, we will stop over and see my grandpop." So I stepped over and seen his grandpop. And he said, "Mr. Ensor, you know the boys, Frank and Charley, had the idea of going West." I said, "Yes, they told me." He said, "Yes, they were going out West." And he said, "But they changed their minds now. I made a promise to them. I promised them both, each of them, if they stayed here with us and worked the same as they had been working in the shop and stayed by me, that when I died I would leave them both, Charley and Frank, $10,000 apiece."

Q. What else? A. He said, "I know the boys will do as I ask them to do, because they have always done it, and I know they will stay."

Q. Did you ever see the old man after that? Did you ever stop in there? A. Why, perhaps, once in a while.

Q. With Frank? A. Always with Frank. I was always with Frank there.

Q. Can you tell us anything about before that time, the manner in which he acted towards Charley, were you ever present when Charley was there? A. I always went over with Frank.

Cross-examination by Mr. Kireker.

Q. How are you able to fix this date? A. What do you mean, this date?

Q. The date of this conversation. A. I said some time after New Years of 1910; it was on a Sunday afternoon.

Q. I say, how are you able to fix that it was in 1910? A. I remember my child was born in September, September 25th, 1909, and Frank came up to my house to see it on Christmas, and I went out with Frank after that, and I know it was somewheres after New Years of 1910, because it was shortly after.

Q. Did you continue to live in town? A. Yes, sir.

Q. You have always lived in town? A. I have always lived in town, outside of about three months.

Q. When were those three months? A. I went up to Bridgeport for a while.

Q. How long ago? A. About seven or eight months ago.

Q. Just recently? A. Yes, recently.

Q. Were you in town in December, 1910? A. Yes, sir; I have always been in town.

Q. Were you offered any inducement to testify in this suit? A. No, sir.

Q. Were you given any money? A. Not five cents, no, sir.

Q. You were not given $40? A. I should say not.

Q. Were you promised anything? A. No, sir.

Q. Were you well acquainted with A. B. Van Houten? A. Yes, sir; I was over there several times; I have been with Frank.

Q. Was it on a Sunday? A. Sunday afternoon we went over there, when the old gentleman was telling me about Frank and Charley had an idea of going West.

Q. Was anyone else present? A. The old gentleman, Mr. Van Houten, Frank and myself.

Q. Charley was not there? A. Charley was not there at that time, no, sir.

LETTIE VAN HOUTEN, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. Ward.

Q. You are the wife of Charles Van Houten, the plaintiff in this case? A. I am.

Q. How long have you been married? A. Since June 30th, 1914.

Q. Before your marriage to your husband had you known Anthony B. Van Houten in his lifetime? A. I did not.

Q. Before your marriage? A. Before my marriage I did, yes, sir.

Q. Do you remember when your husband was in business in the confectionery business? That, of course, was before he was your husband. A. Yes, sir; I remember.

Q. Do you remember what year that was? A. In 1908. I worked for him.

Q. Did you know Mr. Van Houten at that time, Anthony B. Van Houten? A. During the time I worked for Mr. Van Houten in the store?

Q. Yes. A. I did.

Q. Did you ever see Mr. Van Houten at the business of Mr. Charles Van Houten? A. Very often.

Q. How often would he come there? A. Why, when I first worked there, he used to come once or twice a week, sometimes more, about that.

Q. About once or twice a week? A. Yes, sir.

Q. What would he do there? A. He would always come in, and if Charles was there, he would always converse with Charles; if Charles was not there, of course, he would have to converse with me. He would ask me how business was getting along. How Charley was getting along. And I told him several times Charles was gone to the bank when he was not there, or out on business, and he asked

me how Charley was, and different times I remember I told him that the business was not paying; that Charley was worrying very much, and I told the old gentleman about it, Charles' grandpop, and he said, "Never worry. Tell Charley to come over to see me." "Because," he said, "I don't want those boys to worry about anything. I love those boys and I don't want them to worry."

Q. Do you remember when Charles gave up that business? A. I do.

Q. Do you remember when he went back to work for his grandfather? A. I do.

Q. Did you ever visit his grandfather with him? A. I did.

Q. Were you engaged to be married at that time? A. In 1908 I was engaged, from the first time I was to see Mr. Van Houten, Charley's grandfather. I believe that was in 1910, New Years; that was the first time I was there.

Q. That was the first time you went to see him? A. Yes, sir.

Q. Between the time Charles gave up his store and January, 1910, you did not see the old man? Did you see him at all? A. Oh, I did, very often.

Q. Where? A. I did not get that.

Q. Between the time that Charles gave up the store in September, whenever it was, 1909, between that and January 1st, 1910, did you see the old man, during those three or four months? A. I may have seen him occasionally, but I did not have any talks to him.

Q. Where did you see him on January 1st, 1910? A. At his home.

Q. How did you happen to go there? A. Why, Charley and Frank had been there and talked to him about going West; I wanted to go, too, and the old gentleman says, "Bring Lettie around." So I went over to Charley's house——

Q. Do you know whether or not Charles had had any idea about going West? A. I do.

Q. Did you have any relatives in the West at that time? A. I did.

Q. Who were they? A. My sister and my brother-in-law.

Q. Mr. Greer and his wife? A. Mr. Greer and his wife.

Q. Where were you to see the old man? A. At his house.

Q. When you were to see the old man in January, Mr. Van Houten, January 1st, 1910, will you just tell us what was said there by you and by him, as nearly as you can recollect it? A. Why, I came over there and he came to the door. I wished him a Happy New Year. He said he wished me the same. He told me he hoped the coming year had much joy and happiness in store for us. He said, "You are young, Lettie, just a girl. But I have been speaking to Charley." I said I know he has; Charley told me. He had told me at his home first; he told me he had gone over there. And he said, "I have told Charley and Frank, I have promised them $10,000 apiece, and they are not going West. I hope you are satisfied. Aren't you? Now, that is much better." He said, "Charles would be happy. That he has got good prospects in the West, but I want them here with me. You know they are the only two children that remain of my first union, and I love those boys. I have told you that over and over. And I want them here with me, and now," he said, "they have both promised to stay."

Q. How long did you stay there? A. Not very long, because we were going to New York about fifteen minutes after I got through.

Q. Do you remember another occasion when you saw the old man, saw Mr. Anthony B. Van Houten, when he said anything about this? A. Yes. At the

time we were engaged, he came over to the store, that was in 1908.

Q. That was before? A. Before he had promised the boys the $10,000, yes, sir.

Q. What did he say then? A. He said, "Well, Lettie, I hear you are engaged to Charles and I am very glad." "Now," he said, "I hope you will be a good wife to him, because I want to see those boys happy in more ways than one." And he told me about his wife, his first wife, how she helped him, how he owed a great deal of his success to his first wife, how he had loved her and she struggled with him. "Now," he said, "you will do that for Charles, won't you, when you are married to him?" I said I would. And he spoke of the boys, told me how hard they had always had it, and that they did not have it easy. He said their father dying and leaving them very young with their mother made it so hard. Now, he said, he hoped I would make a good wife for Charley when we got married.

Q. Do you remember after this New Years, do you remember any time when you saw the old man and talked to him? A. Yes. I did see him.

Q. When was it? A. I saw him the time Charley's mother died, at the cemetery.

Q. Do you remember when you were married? A. Yes, sir.

Q. Did you ever see him at his house shortly before you were married? A. Not before I was married.

Q. On the porch? A. Oh, yes, sir.

Q. Tell us about that. A. About two weeks before we were married we went down to rent rooms, the landlord of the rooms which we had engaged lived across the way of Charley's grandpop, and we went down there to rent our rooms and he was sitting on the porch, and when we came back, he

said, "Where are you going?" We told him we were on our way home, and he says, "Come in a few minutes and sit down with me." So we sat there while he talked and we talked; we sat there a while and talked, and he said, "Now, you see, Lettie, you can get married without going West. You thought you could not get married." "But," he said, "a little struggle won't hurt you at first." So he said, "I hope you will be happy. I want to see both of you happy. And when I die, Charles will never want for anything and Frank will never want for anything." He said, "I should have done a lot more for those boys, but for their own sakes, which I cannot explain to you right now, I did not." "But," he said, "they never will want for anything when I go. I will see that those boys are well provided for."

Q. Do you remember when Charley's mother died? A. I do.

Q. And at the time she died do you know whether or not Mr. Van Houten was at the funeral? A. He was.

Q. Will you just relate that incident to the Court and jury? A. I was up to the cemetery, and I spoke to Mr. Van Houten; I told him the boys were all alone, they had no father nor mother, he should come to see them. I said I knew he had always been a father to them, but I said I would like him to come to see them, because I believed it was an awful time for the boys, awful hard for them when they lost their mother. He said he would. He said, "Now, those boys know they will be well taken care of when I die. Now, you be good to them and I will come over and see them often." And he said, "I love those boys." And he said, "You be good to the boys and you do what is right, and I will come over and see you." Oh, he may have said a lot more, but I cannot remember everything just now.

Q. That was the last you saw of him, wasn't it? A. Yes, sir. Until I saw him in his casket up at Oakland.

Q. Did Charles Van Houten, from December, 1909, ever go West? A. He did not.

Q. Do you know whether he continued to work for his grandfather at the same job there? A. He did, yes, sir.

Q. When he did work, I mean? A. Yes, sir.

Q. Do you know whether or not he was there when his grandfather died? A. Yes, sir; he was working there.

No cross-examination.

PLAINTIFF RESTS.

Mr. Humphreys: I move for a nonsuit on the ground that the contract is too uncertain and indefinite in its terms.

The complaint alleges that the plaintiff was about to go to a western State to live, and that, in consideration that he would not go to a western State to live and would remain in the employment of Anthony B. Van Houten, not particularizing when he was to refrain from going to a western State to live, whether he was not to go at that time, or was not to go at any time, and also, that, in consideration that he would remain in the employment of Anthony B. Van Houten, without stating for how long a period, that he would leave him a sum of money.

Now, I submit that is an insufficient complaint upon which to base an action of this kind, where one of the parties to the contract is dead.

The complaint must be construed from elementary principles, mostly against the pleader, and if the plaintiff in this case had remained in the employment of Anthony B. Van Houten for one week after the alleged promise was made, and refrained from going to a western State for a period of one week, he would have performed the contract, and that is too frail a consideration for a promise for such a large sum of money.

The pleader seems to have himself recognized that fact, because he added to the consideration that he alleges as the consideration for the contract, that it was also on account of the natural affection existing between the parties.

Now, as I said before, it is absolutely elementary that natural affection is no consideration for the performance of an executory contract, and he has specifically alleged that that is a part of the consideration for this promise. And, I submit, that being so, the consideration set forth is not sufficient to support the promise.

My other ground is that there is not sufficient evidence to go to the jury in this case, and yet I don't know that I can urge that. I simply ask for a nonsuit upon the grounds stated.

The Court then took a recess until 2 o'clock this day.

AFTER RECESS.

(Counsel argue motion.)

(Motion denied. Defendant excepts.)

Mr. Kireker: I offer in evidence a copy of the will of Mr. A. B. Van Houten.

Admitted and marked "Defendant's Exhibit D-1" of this date.

WILLIAM H. H. VAN HOUTEN, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Kircker.

Q. Are you a relative to the late A. B. Van Houten? A. Yes, sir. A brother.

Q. Did he have any other brothers living that survived him, that were living when he died? A. Yes, one besides me, James Van Houten.

Q. Is he still living? A. Yes, sir.

Q. Has James Van Houten any children? A. Yes, sir.

Q. How many? A. Two.

Mr. Ward: I object to all this as irrelevant.

Mr. Kireker: I want to show just the family situation.

The Court: He may testify to this.

Q. Two children? A. Yes, sir.

Q. Man or women, boy or girl? A. Boy and girl.

Q. You have children? A. One.

Q. Is he married? A. Yes, sir.

Q. Did he have children?

Mr. Ward: Of what relevancy is this?

The Court: I think it is intended to show the relationship, the family relationship, who there is.

Mr. Ward: This is this man's children and then the grandchildren of this man.

Mr. Kireker: I want to show the situation of the Van Houten family.

Q. You say you have a son? A. Yes, sir.

Q. And he is married? A. Yes, sir.

Q. Has he any children? A. Five.

The Court: What relation were you to the deceased?

The Witness: A brother.

No cross-examination.

MARTIN RYERSON, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Kireker.

Q. Where do you reside? A. At Oakland.

Q. Where are you employed? A. At A. B. Van Houten & Son in Paterson.

Q. How long have you been in the employ of A. B. Van Houten & Son? A. Nearly twenty-three years.

Q. What does that partnership consist of, who are the partners? A. Mr. A. B. Van Houten and Admund Van Houten, his son.

Q. Did you ever have occasion to talk with Mr. A. B. Van Houten during the later years of his life with respect to his grandson Charles Van Houten, or his grandson Frank Van Houten? A. I did.

Q. Tell us what the occasions were and what Mr. Van Houten had to say concerning them.

Mr. Ward: Objected to.

The Court: On what theory do you think this is admissible?

Mr. Kireker: We want to show just the situation which existed between Mr. A. B. Van Houten in his mind as he understood his grandsons and as he talked with people.

The Court: In view of the fact that the plaintiff brought out this morning, perhaps

unnecessarily, the fact of the relationship existing between the deceased and the plaintiff, is not this evidence proper to meet that?

Mr. Ward: I don't think so. The opening of the defendant was that he would show the inherent improbability of the contract.

The Court: He also has a right to meet what the plaintiff has presented. Now, the plaintiff's theory, as he conceives it, is that there was a relationship of love and affection existing between these parties. Now, the plaintiff having shown that and having been permitted to do so against objection, don't you think the Court is bound to permit the other side to show that no such relationship existed?

Mr. Ward: I don't think the Court has the right to permit this evidence to be introduced on occasions and times when the plaintiff was not present. The plaintiff's evidence was directed straight to that point. Now, the Court can see, on the face of it, it is an effort on the part of the defendant to perhaps contradict the evidence of this contract by evidence that would not be admissible under that particular form.

The Court: I understand the purpose is to show the relationship of the parties. The plaintiff's proof tended to show that the deceased gave evidences of love and affection to the plaintiff, and this is to meet that proof. The expressions of the deceased himself to third parties.

Mr. McGinnis: If the Court please, all the testimony this morning in that regard was with regard to conversations or acts that took place between the plaintiff and the

deceased, or in relation to statements that the deceased had made.

Now, this is an entirely different situation. The defendant is not attempting to show statements that the plaintiff here made, nor the defendant is not attempting to show conversations had between the deceased and the plaintiff, and evidence of that kind would be on all fours with the character of evidence presented by the plaintiff this morning. There were two classes of evidence presented by the plaintiff this morning only, that is, statements made by the deceased or conversations between the deceased and the plaintiff. This evidence is of an entirely different character.

Objection overruled. Plaintiff excepts.

Q. Will you tell us the occasions of those conversations with Mr. A. B. Van Houten?

Mr. McGinnis: We object to it on the further ground that this is pure hearsay.

Objection overruled. Plaintiff excepts.

Q. Proceed, please. A. I did talk with Mr. A. B. Van Houten frequently. I would advise Mr. A. B. Van Houten.

Mr. McGinnis: We object.

Objection sustained.

Q. Just what Mr. Van Houten said. A. Mr. Van Houten would ask me about different men at the shop, how the work was progressing, and I would tell him. He would ask me about the men on the first floor, then he would ask about the men on the second floor, and then ask about Charley and Frank, if they were working, and I would tell——

Mr. Ward: I object what this witness would tell.

Q. What I want to know is what Mr. Van Houten said to you with respect to these boys. Did he ever make complaints or anything of that sort? A. When Mr. Van Houten would ask me about these different people, I would tell him. Then Mr. Van Houten would make remarks; among the remarks that he made frequently, one was that those boys would never make business men as long as they lived.

Q. Anything else? A. Yes. Another remark he made frequently was that all these boys seemed to care for was 5 o'clock and pay day.

Q. Anything else? A. Another remark he made to me very frequently was——

Mr. McGinnis: I ask that the last answer before this question be stricken out as being mere hearsay.

Motion denied; plaintiff excepts.

Mr. McGinnis: We also object to this last question asked by counsel.

Objection overruled; plaintiff excepts.

Q. Proceed. A. Another remark he made to me very frequently was——

Mr. McGinnis: We object. What the witness is about to testify to is about a remark made by the decedent to him.

Objection overruled; plaintiff excepts.

Q. Proceed. A. Another remark he made to me very frequently was that he did not know what he was going to do with the boys.

The Court: Is this a statement by the deceased?

The Witness: Yes, sir.

Mr. McGinnis: We object to it.

Objection overruled; plaintiff excepts.

Q. Proceed. A. He made the remark very frequently that he did not know what he was going to do with the boys. He would shake his head and say, "I don't know what to do with them." He says, "I suppose I will have to take care of them as long as I live. After that they will have to take care of themselves."

Mr. McGinnis: I object to that, and ask that it be stricken out on the ground that it is irrelevant, immaterial and incompetent and hearsay.

Motion denied; plaintiff excepts.

Q. Did he ever make any remark to you with respect to Frank's return from California?

Mr. McGinnis: Objected to.

Objection overruled; plaintiff excepts.

A. Some time after Frank came back and he heard these reports about Frank——

Mr. McGinnis: I object to that, and ask that it be stricken out.

Motion granted.

The Witness: He said he wished that Frank had stayed in California.

Mr. McGinnis: We object to that, and move to strike it out.

Mr. Ward: We object to it also on the ground that this witness has no right to tell what the deceased said with reference to Frank, and in Charles' case we cannot anticipate that. This is a remark directed at Frank.

Motion granted.

Q. Do you recall the summer of 1913? A. Yes, sir.

Q. Do you know whether Charles Van Houten and Frank Van Houten left the employ of A. B. Van Houten & Son?

Mr. Ward: Objected to as calling for a conclusion.

The Court: He can tell the facts and circumstances. Objection overruled; plaintiff excepts.

A. They did leave.

Q. How long were they out of the employ of A. B. Houten & Son at that time?

Mr. Ward: Objected to as not the best evidence. The books will show.

Objection overruled; plaintiff excepts.

A. About three months.

Q. During that time do you know whether they came about there to buy goods? A. They did.

Q. Did you give them credit?

Mr. Ward: Objected to as immaterial, irrelevant and incompetent.

Objection sustained; defendant excepts.

Q. Did you have any conversation with A. B. Van Houten with respect to their being out of his employ at that time?

Mr. Ward: Objected to as being incompetent, immaterial and irrelevant and the grounds formerly stated.

Objection overruled; plaintiff excepts.

A. Yes, sir.

Q. Did he say anything to you about that time after the boys had left?

Mr. Ward: Objected to on the same grounds.

Objection overruled; plaintiff excepts.

A. Mr. Van Houten did speak to me and he told me not to grant the boys credit over $5, as he had no confidence in any concern that would open an office in a saloon.

Q. As I understand it these conversations that you had with Mr. Van Houten ran over a period of years? A. They did.

Cross-examination by Mr. Ward.

Q. You are still employed by Admund Van Houten, aren't you? A. I am.

Q. He is the real person in the business down there, isn't he? He is practically the owner of the business? A. He and his sister are the owners.

Q. He is running it? A. Yes, sir.

Q. And you know that they are the chief beneficiaries under this will? A. Yes, sir.

Q. You know that? A. Yes, sir.

Q. You have discussed this matter with them? A. Very little.

Q. You were never on very friendly terms with these boys, were you? A. Just as friendly as the others.

Q. As the other workmen? A. Yes, sir.

Q. That was all. No more friendly? A. No, there was no occasion to be.

Q. Answer the question now. A. No more friendly, no, sir.

Q. The fact that they were the grandchildren of Mr. Van Houten and that the grandfather showed them some slight preference rather irritated you, didn't it? A. Not a bit.

Q. It irritated your employer, Mr. Admund Van Houten, did it not? A. I don't know.

Q. Didn't he express his irritation to you? A. On two or three occasions.

Q. Mr. Admund Van Houten? A. Yes, Admund Van Houten on two or three occasions.

Q. Admund Van Houten was the one who was complaining all the time, wasn't he? A. No, sir.

Q. Admund Van Houten was the one who was complaining, wasn't he? A. No, sir. He did not complain at all times. He showed the boys every chance.

Q. Sometimes he complained? He was very anxious to get rid of them down there, wasn't he? A. It did not appear to me that he was when he hired them different times.

Q. Was he or not? A. No, sir.

Q. This little advertisement you have seen before, haven't you? A. Yes, sir.

Q. Since 1913 you have kept that, haven't you? A. No, sir.

Q. Did you cut it out? A. No, sir.

Q. Did you paste it on there? A. I pasted it on there, yes, sir.

Q. And you have carefully preserved that since that time? A. No, sir.

Q. Where has it been preserved? A. It was upstairs in the shop.

Q. Do you know why it was preserved, if there was no such contract as this between Mr. A. B. Van Houten and the boys? A. I don't know why it was preserved.

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

Q. In whose possession was it? A. I cannot tell you.

Q. Who gave you the instructions to get it out and paste it on there? A. I suggested to Mr. Ad-

mund Van Houten that we paste it on something as the wood was broken.

Q. So you wanted to preserve it, didn't you? A. Surely, yes.

Q. You made that suggestion? A. I made that suggestion.

Q. You had that much interest in the testimony, didn't you? A. I did.

Q. You knew that a contract existed between these boys and their grandfather, didn't you? A. No, sir, and I did not believe it did either.

Q. And is that the reason you kept that advertisement? A. No, sir.

Q. So as to show or try to show, if occasion ever rose, when that old man died, that these boys had broken the contract. Isn't that why you did it? A. No, sir, I never knew of the contract.

Q. You did not have any such thing in mind as that? A. I was very confidential with Mr. A. B. Van Houten and he never mentioned the fact of his having a contract with these boys to me.

Q. And yet you wanted to preserve something which would apparently show that they had broken their contract? A. I did not know there was any agreement with him at all. I did not know there was any contract.

Q. Not knowing of any agreement you wanted to preserve something that would apparently show that they had broken their agreement?

Mr. Kireker: He said he did not preserve it.

Q. You suggested it be preserved? A. About four days ago, something like that.

Q. In 1913 that was in the paper? A. Yes, sir.

Q. You are still employed by Mr. Van Houten? A. I am.

Q. And you say that old Mr. Van Houten, in his lifetime, would ask especially about these boys? A. Together with the other men.

Q. Didn't you say in your direction examination that he would ask especially about Frank and Charles? A. I said that he would ask about them with the other men.

Q. Did you not state in your direct examination that he would ask about the men on the first floor, and then would ask about the men on the second floor and then would ask you about Frank and Charles? A. As they were working on the second floor, yes, sir.

Q. You said that, did you not, on your direct examination, what I have just said? A. Yes, sir.

Q. He then did especially mention to you Frank and Charles, didn't he? A. Yes, sir.

Q. So that he did have a greater interest in them apparently than he had in the others, didn't he? A. I would not think so. Because he asked about the other men first.

Q. Did he mention the other men by their first names, too? A. Yes, sir.

Q. He would ask you about each man individually in the shop? A. No, in fact he would ask about different ones individually, not each man.

Q. Each time he would ask you he would go through the list? A. No, part of the list, partially.

Q. And he did the same thing each time? A. Yes, sir.

Q. And he did seem to be more apprehensive about them and somewhat apprehensive about their future, didn't he? A. Only that he was disgusted with them.

Q. Yes or no? A. I don't quite understand your question.

Q. Why did you answer it then at first? A. As I understood it at that time.

Q. So that you have come to the conclusion you have misunderstood it since you answered it the first time? A. Since I answered? I would like to have the question read over.

Q. He did seem to be somewhat anxious about these boys' future, didn't he? A. Yes.

Q. He seemed to be interested in them, didn't he? A. Inasmuch as he said they would have to take care of themselves——

Mr. Ward: Why can't you answer the question?

The Court: He seemed to be interested, is the question.

The Witness: Partially, yes.

Q. And he seemed to be interested in them to the extent he said he did not know what would become of them after he died? A. Yes, sir.

Q. That is true, is it not? A. Yes, sir.

Q. When was this conversation? A. Many times, during the last four or five years.

Q. Do you keep books? A. Yes, sir.

Q. Where are they? A. In the office.

Q. They show the time when the men worked there, don't they? A. Yes, sir.

Q. And they show when the men were absent, don't they? A. Yes, sir.

Q. And you have not got them here? A. I have a couple time books with me.

Q. Have you got them here? A. Yes, sir.

Q. Will you produce them?

Mr. Kireker: What time books do you want?

Mr. Ward: Covering the period this man says they were away for three months.

The Witness: Unfortunately I do not have that book here.

Q. Where it is? A. I cannot find it.

Q. Why can't you find it? Were you told not to produce it? A. No, sir.

Q. Don't you know these boys were never away from that place after 1909, in December, for more than a week at a time? A. I did not say they were.

Q. I understood you to say for two or three months?

The Court: He did not say in 1909.

Mr. Kireker: He said 1913.

Q. Do you wish to correct that now? A. Well, these boys were not away for three months in December.

Q. In December, 1909? A. They were away.

Q. When? A. During the first part of the summer of 1913.

Q. What months? A. May and June.

Q. Where is your time book for that? A. It has unfortunately been destroyed.

Q. By you? A. Possibly.

Q. Why? A. Together with other older books.

Q. Why? You have got some time books there? A. That is true.

Q. Why did you save those and destroy this one that you say covers this period of time? A. We did not know that these had been saved until we made a search for them.

Q. When did you destroy these books? A. I am sure I cannot tell you that.

Q. How long do you keep your time books? A. Well, we seldom refer to a time book after it has been passed.

Q. How long do you keep them? A. We have no specified time for keeping them.

Q. You have not any specified time? A. No, sir.

Q. You keep them as long as you think there is a suit might be brought against you by a working man, don't you, usually? A. No, sir.

Q. You do not keep any records during the period of time that a man might bring a suit against you for work he had done, eh? A. No, sir.

Q. You don't do that, what? Do you answer that? A. You made a statement, I did not take it as a question.

Q. It is a question. We will take it as a question now. A. We keep the books for three or four years usually.

Q. And are these the only particular time books that cover this particular time that you have lost or destroyed? A. There are several books gone, many of them.

Q. But you have older books than the books covering this period of time referred to, haven't you? A. These books we found in a pile of other refuse.

Q. Answer my question. You have older books than the books covering the period of time referred to, haven't you? A. Yes, sir.

Redirect examination by Mr. Kireker.

Q. Where was that advertisement put until within a few days ago, a week or so ago? A. On the second floor of the shop.

Q. Whereabouts on the second floor of the shop? A. One of the men had it. I don't know which man.

Q. Pasted up somewhere? A. Pasted against some piece of board, by the work bench.

Q. And your suggestion as to preserving it, or putting it on this piece of paper was not made until a week or so ago? A. Yes, sir.

Q. You made a search, did you, for books covering the period of 1913? A. Yes, sir.

Q. And the books could not be found? A. No, sir.

Q. There was no particular need of preserving them, was there? A. Not that we knew.

Q. Other books are lost occasionally, aren't they? A. Yes, sir.

Recross-examination by Mr. Ward.

Q. Have these books been destroyed within the last year?

Mr. Kireker: He did not say they were destroyed. He said they were lost.

Mr. Ward: He said he destroyed them. I asked him at whose request.

Q. Have they been destroyed within the last year? A. No, sir.

Q. How do you know that? A. Because we made the usual cleaning up about two years ago.

Q. Two years ago? A. About two years ago, yes, sir.

Q. Two years ago this time? A. Near the first of the year.

Q. How do you remember it was at that time that these boys were not employed there? A. May I have that question over again?

Q. How do you remember it was at that time that these boys were not employed there? A. The books were not destroyed at the time the boys were not employed there.

Q. I ask you why it is that you at this time remember that it was, I think you said, in April, May and June?

Mr. Kireker: Along May and June and July.

Q. May, June and July these boys were not employed there? How do you remember that it was at that time? A. Because they had an account with us at that time, buying goods from us, Van Houten Brothers.

Q. So they were in business for themselves at that time? A. Yes, sir.

Q. And they had an account with you? A. Yes, sir.

Q. And they were buying all their stuff from you? A. I don't know. Buying some stuff.

Q. Don't you know you have only got two bills, or, one bill, showing some stuff bought from you? A. I know they had goods charged in their account, in the account of one of our former customers.

Mr. Ward: I ask that be stricken out.
Motion granted.

Q. I am asking you if you don't know it is only two bills? A. Yes, sir.

Q. Why have you this feeling against these boys? A. I have no feeling against the boys.

Q. Don't you know there is only one bill or two bills that you have against Van Houten Brothers? A. Two bills?

Q. Yes. A. Yes.

Q. So that during this period of three months that you say they were in business and dealing with you and out of work and away from this place and had an account with you, they only contracted two bills, eh? A. With us, yes.

JOHN E. VREELAND, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Kireker.

Q. Where do you reside? A. Maplewood Farm, Paterson.

Q. Where are you employed? A. With A. B. Van Houten & Son.

Q. How long have you been there? A. Fourteen years.

Q. In what capacity are you employed there? A. As bookkeeper.

Q. In the office? A. Yes, sir.

Q. Has Mr. A. B. Van Houten ever spoken to you concerning his grandson Charles, or his grandson Frank, or in your presence?

Mr. Ward: Objected to on the grounds formerly stated.

Objection overruled; plaintiff excepts.

A. Yes, sir.

Q. Do you recall an evening or afternoon after work when Charles and Frank Van Houten came to the office? A. Yes, sir.

Q. And have a talk with Mr. A. B. Van Houten? A. Yes, sir.

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

Q. What did the boys say to him? A. It was the habit of the boys to come down to the office every evening——

The Court: What boys do you mean?

The Witness: Charles and Frank. It was customary on their part always to come down and pass the time of the day with their grandfather, or something like that. This evening in 1913, Charles, after passing

the time of day with his grandfather, said to his grandfather, "Grandpop, I wish you would give Frank and I each one of those houses on Madison Avenue, we would like to own a house apiece and we would have a good start in life." And Mr. Van Houten looked up and says, "Well, I guess not. If you want a house, earn it, the same as I did."

Q. Did you ever hear A. B. Van Houten say anything else, did he ever say anything else to you in regard to the boys, about their work?

Mr. Ward: Objected to on the same grounds.

Objection overruled; plaintiff excepts.

A. Yes, sir.

Q. What did he say?

Mr. Ward: Objected to.

Objection overruled; plaintiff excepts.

A. He spoke about the boys, that he never would make a carpenter, even as long as they lived, anything like their father was. And, another thing, there was times when he would talk about the boys and he often talked about their asking for that house and remarked over it several times, and the general conversation was in reference to the boys, he was disappointed. They never would be carpenters anything like their father, and other conversation was with regard to their coming late to work.

Q. Not getting to work promptly? A. Not getting to work promptly, yes, sir.

Q. He complained of that? A. Yes, sir.

Q. Did he ever suggest that it might be well for them if they went to work anywhere else?

Mr. Ward: Objected to.
Objection overruled; plaintiff excepts.

A. Yes, the conversation was about the boys, about the boys getting late to work, it did not suit him, and that they were to be used as the other men, if they did not do as the other men done discharge them.

Cross-examination by Mr. Ward.

Q. You say that you remember some time in 1913 they had this conversation? A. Yes, sir, I do.

Q. Where were you? A. In the office.

Q. They used to come down to pay their respects to the old man? A. They would come down, probably come down to pay their respects or come down and show us that they did not have to go out the other door, if you wish it.

Q. That is what you guess? A. Yes, sir.

Q. Why are you guessing that way? A. I don't guess that.

Q. Why do you say that? A. Why, they used to come to the office possibly to show anybody else they did not have to go through the door the same as the other carpenters.

Q. You don't like them? A. I had nothing to do with them, it don't matter to me.

Q. You are still working for this company? A. I certainly am.

Q. You have a life job there, haven't you? A. No, sir.

Q. You were hurt down there, weren't you? A. Yes, sir.

Q. Wasn't that the arrangement made with you

at that time, that you were to be given life employment? A. No, sir.

Q. Don't you expect it? A. I may expect it, yes, but there was no arrangement made.

Q. You want to stick to Admund Van Houten, don't you? A. As a man worth sticking to.

Q. Sure? He was left all this money, that is one reason, is it not? A. No, sir.

Q. You know he is the chief beneficiary under this will, he and his sister? A. Yes, I know that, certainly.

Q. It was left between the two of them? A. Yes, sir.

Q. That is one of the reasons, therefore, why you want to stick to him? A. No, no, not at all.

Q. Was it before the Fourth of July that this conversation took place? A. No, sir, in the fall.

Q. In the fall? A. Yes, sir.

Q. You are bookkeeper there? A. Yes, sir.

Redirect examination by Mr. Kireker.

Q. Do you recall along in the late spring and summer of 1913 whether Charles and Frank Van Houten left the employ of A. B. Van Houten & Son? A. Yes, sir, they were not in the employ at that time.

Q. They had left there? A. Yes, sir.

Mr. Ward: I object; the witness says they were not in the employ and counsel says, "They had left there."

Mr. Kireker: Well, they had previously been in the employ.

Mr. Ward: I object to the question and the comment upon it.

The Court: The trouble seems to be you think it does not state the answer properly.

Q. Do you know how long it was before they returned to the employ of A. B. Van Houten & Son? A. Three or four months.

Q. Did they ever come to you at the office there and ask you to figure on any work they had in contemplation? A. Yes, sir, they did.

Q. What sort of work? A. Some friend on Market Street.

Recross-examination by Mr. Ward.

Q. And that was the only job they did ask you to figure on, wasn't it? A. Yes, sir.

Q. And that was the only job they had? A. No, sir, they did other jobbing.

Q. Were you interested in the preservation of this little advertisement also? A. No, sir, I did not know it was there.

Q. You were not interested in that? A. No, sir.

Q. Frequently in the summer your shop was very slack, wasn't it? A. Some summers, yes.

Q. And the men, naturally, would be laid off, wouldn't they? A. Yes, sir.

Q. And these boys would be laid off with the rest then, wouldn't they? A. They would be laid off as their work was finished.

Q. And sometimes that period of slackness would extend over a considerable length of time? A. Sometimes they would be home one day.

Q. And sometimes for much longer than that? A. No. Very seldom for two or three weeks.

Q. But that was the natural thing in the usual course of business, wasn't it? A. Not in the summer time, naturally, in the winter time it was.

Q. I say, that was natural, in the course of business, wasn't it? A. Yes, sir.

Q. Has Mr. Van Houten promised you anything in this matter? A. No, sir.

Q. Do you know the value of this estate? A. I suppose I do.

Q. It is a hundred and fifty thousand dollars, is it not? A. I don't think it is.

Mr. Kireker: I object to that. That is not material and this is not a competent witness to prove the value of the estate.

The Court: I don't think it is cross-examination anyway.

Mr. Ward: Here is a man who says himself that he hopes to be retained in this business for the rest of his life, and it is my contention that it is competent to show that he knows it is a business that is rich enough to be carried on for the rest of his life.

Objection sustained; plaintiff excepts.

THOMAS A. UPDEGRAF, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Kireker.

Q. Where do you reside? A. In Philadelphia.

Q. What is your business? A. Lumber salesman.

Q. Did you know Mr. A. B. Van Houten in his lifetime? A. Well, I have known him for twenty-five years or more.

Q. Did you know him casually or very well or intimately? A. Well, I knew him very well, he and his wife visited me in Philadelphia.

Q. Visited you at your home? A. Yes, sir.

Q. Did Mr. A. B. Van Houten ever express him-

self to you with respect to his grandsons Charles and Frank?

Mr. Ward: Objected to as incompetent, immaterial and irrelevant and hearsay.

Objection overruled; plaintiff excepts.

A. He has.

Q. To what effect has he expressed himself?

Mr. Ward: Objected to on the same grounds.

Objection overruled; plaintiff excepts.

A. He told me he had two grandsons in the mill which he would be very much better off if he did not have them in his employ.

Q. Anything further? Generally? Tell us the general conversation with respect to that?

Mr. Ward: I object to that on the same grounds, and also object to the general conversation as being indefinite.

Objection overruled; plaintiff excepts.

Q. Just tell us what he might have said— A. Well, him and I were very good friends——

The Court: No, what he said?

The Witness: Well, just as I have said before, he said he had two grandsons working there, talking about different ones, and he said he had two grandsons in the mill that he would be better off if he did not have them there, and he was compelled to look after them or do for them in a certain way.

Cross-examination by Mr. Ward.

Q. He seemed to recognize that he owed them an obligation, did he? A. Well, I suppose a relationship.

Q. Did he or not, yes or no? A. Well, I could not answer that question.

Q. From his conversation that was what you gathered, was it? A. Well, I suppose he would on account of being his grandsons. I know I would do it for my people.

Q. And he said that he had to look after them? A. He said he was doing for them right along and he would have to do it.

Q. He would have to do it? A. Yes, sir.

Q. You and Mr. Admund Van Houten are very friendly? A. We are so.

HARVEY DOUGHERTY, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Kireker.

Q. Where do you reside? A. Number 538 Fourteenth Avenue, Paterson.

Q. Have you lived in Paterson a long time? A. For thirty-five years.

Q. Where are you employed? A. With A. B. Van Houten & Son.

Q. How long have you been there? A. For thirty-five years.

Q. Are you acquainted with the grandsons of A. B. Van Houten, Frank and Charles? A. Yes, sir.

Q. Did Mr. A. B. Van Houten ever talk to you concerning the boys?

Mr. Ward: Objected to unless it was when they were present. They were not present, I take it?

Mr. Kireker: No.

Mr. Ward: We object to it on that ground and on the other grounds formerly stated.

Objection overruled; plaintiff excepts.

Q. Did you ever speak to him about the boys? A. Yes, sir.

Q. Tell us what was said.

Mr. Ward: Objected to on the same grounds.

Objection overruled. Plaintiff excepts.

A. He frequently spoke about them in regard to their workmanship, and he frequently asked me, on three or four occasions, in regard to their work, which I told him——

Mr. Ward: Objected to.

Q. Just what he said. A. And he said that he wished they were working for somebody else. He thought it would be a benefit to them and it would be better for him.

The Court: When was that?

The Witness: Oh, these conversations, they were probably in 1910, 1912, etc., I could not call to mind just the year on that; it would be frequently.

Q. How is that? Quite frequently you say? A. Yes, sir.

Q. Are there any further things that you remember of his having said? A. Well, at the time that Frank Van Houten was in California, there was a report came from there——

Mr. Ward: That is objected to.

Q. Just tell us what A. B. Van Houten said. A. Well, I don't know hardly how to answer that question without using the other word, but he said he hoped that he would do well there.

Q. Did he express himself to you as hoping he would be back soon? A. No, sir; never.

Q. Have you had any conversation with Charles Van Houten, the plaintiff in this suit, since Mr. A. B. Van Houten died? A. Well, there was a conversation; it was, I think, about a week or so after Mr. Van Houten died.

Mr. Ward: Objected to. I think the plaintiff should have been confronted with that.

The Court: Not where he is a party to the suit.

Q. Tell us what Charles said to you?

Mr. Ward: Objected to as too general, and on the ground that the plaintiff has not been asked about this.

Objection overruled. Plaintiff excepts.

A. It was one morning——

The Court: How soon was this after Mr. A. B. Van Houten's death?

The Witness: I should judge a week to ten days, probably, not more than that.

The Court: Where did it take place?

The Witness: In front of his shop, in front of A. B. Van Houten's shop on Paterson Street.

Q. What did he say? A. We spoke about the will; he asked me what I thought about the will, and I expressed myself on that, and he says that was a nice way to provide for him, wasn't it, or

"for us," I think that is the way that question was put, because both brothers were there. "Well," I says, "I don't know as to that." And one, I think it was Frank Van Houten, said——

The Court: In the presence of Charles?

The Witness: Yes. Said he had agreed to leave them $5,000.

Q. He said his grandfather had agreed to leave them $5,000? A. Yes, that he had agreed to do that, and it was $500.

Q. Did Charles make any objection to that? Did he undertake to say anything different than that? A. Well, there was some little argument there; I forget just exactly what it was, but there was a question that I raised, my opinion of the will, they could not see it in my way.

Q. Charles did not say there was any fixed amount he expected under his grandfather's will, did he? A. I could not say which of them made that remark, whether it was Charles or Frank, but I am positive it was Frank, quite positive.

The Court: He said $5,000 for each of them?

The Witness: That is the way I understood it.

Q. Did he say anything about possibly the will might have been improperly read? A. Well, they made the remark that they ought to have been there at the time of the reading of the will, that was all of that.

Cross-examination by Mr. Ward.

Q. They told you, I think, that they thought their grandfather had left another will, didn't they? A. I don't think so.

Q. They asked you if you knew anything about another will, didn't they? A. I don't think so. I don't remember that at all, no, sir.

Q. There was something said about another will, wasn't there? A. Not in my presence, at that time.

Q. Didn't you just say that? Didn't they speak to you about another will? A. Not about another will, no, sir.

Q. Or ask you if you knew whether or not their grandfather had drawn another will? A. No, sir.

Q. They said, however, he had made a promise to them? A. Yes, sir.

Q. And don't you know, as a matter of fact, that they mentioned $10,000? A. No, sir.

Q. Well, they said $5,000 each, didn't they? A. I don't think they said each.

Q. That was your impression? A. That was it.

Q. That makes $10,000, doesn't it? A. It would.

Q. Is that the impression that you had at that time? A. Yes, sir, certainly.

Q. They were referring to $10,000? A. They were referring to $10,000, $5,000 each.

Q. They were referring to $10,000, $5,000 each? A. Yes, five for each, that is the way I understood it, the way I took it at that time.

Q. That was your impression at that time? A. Yes, sir.

Q. But you are not certain about it? A. Well, I guess it is plain enough.

Q. I say, you are not certain about it? A. I am certain as to the $5,000; it was $5,000 that was mentioned.

Q. You are not certain that it was $10,000 that was mentioned by these young men? A. No, sir.

Q. And that was very shortly after the will was read, wasn't it? A. Yes, sir.

Q. They told you he had made an agreement with

them or a promise? A. That he had made a promise.

Q. Are you still working there? A. I am.

Q. For Mr. Admund Van Houten? A. Yes, sir.

HARRY STRUCK, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Kireker.

Q. Where do you reside? A. Number 11 Twentieth Avenue, Paterson.

Q. Where are you employed? A. With A. B. Van Houten & Son, Paterson.

Q. How long have you been there? A. Eight years.

Q. Since the death of Mr. A. B. Van Houten have you ever had any conversation with either Frank or Charles Van Houten, grandsons? A. I worked on the bench with them right along at that time, yes, sir.

Q. Did you have any conversation with them?

Mr. Ward: Objected to.

Objection overruled; plaintiff excepts.

A. And they always told me when their grandfather died he would provide well for them. They never mentioned any amount whatever.

Q. Did they ever say to what extent? A. No, sir, they never mentioned no amount whatever.

Q. Since Mr. A. B. Van Houten died did they ever say anything to you? A. About what?

Q. Either one of them about the legacy received by them? A. They did not think the $500 what they had received, what they had left to them, was enough.

Q. Did they undertake to say how much it ought to be? A. No, sir.

Q. They did not say how much it ought to be? A. No, sir.

Q. No amount was mentioned whatever? A. No amount was mentioned whatever.

Q. Except that they did not think the $500 was enough? A. That is all.

No Cross-examination.

Charles M. Berdan, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Kireker.

Q. Where do you reside? A. In Paterson.

Q. Where are you employed? A. With A. B. Van Houten & Son.

Q. How long have you been there? A. For thirty years.

Q. Are you acquainted with Charles Van Houten and Frank Van Houten, grandsons of A. B. Van Houten? A. Yes, sir.

Q. Have you talked with either of them or have they talked with you since A. B. Van Houten died about the will and their legacies? A. Well, they have not had a very big conversation with me, but have spoken some things about it.

Q. What did they say to you, if anything? A. They never had very much——

Mr. Ward: I object to this as too general.

The Court: It is too general, it is as to Frank and Charles.

Q. Did Charles ever say anything to you? A. Well, Charles seems to be the spokesman of the brothers.

Q. I ask you did Charles say anything to you? A. In what way do you mean?

Q. With respect to the legacy under his grandfather's will? A. He occasionally spoke to me about the legacy.

Q. What did he say? A. That is, after the will had been opened.

Q. What did he say? A. He told me that he did not think that the will was correct, was a correct will, as to the way it was read.

Q. In what respect? A. He told me that the amount was too small.

Q. Was Frank present when Charles said this to you? A. Well, Frank was on the opposite side of the bench.

Q. Within hearing? A. Well, I suppose he could hear. I don't know whether he did hear. I could not tell that. But he was within hearing.

Q. Did he mention any amount that he had expected to receive? A. Only after he had found out the amount was in the will, the amount that he mentioned was that, that is, I cannot say that he really mentioned the amount, but he said he thought that there had been some of the figures dropped off of the will. That is just the words he used to me.

Q. Some of the figures dropped off? A. Some of the figures had been dropped off, and after a certain time I went to him and I spoke to him in regard to the matter and I said it was a very serious affair to accuse a man of tampering with a legal paper of that description and I told him if I had any opinions if I were in his place I would hold them still and talk to his uncle, who was the executor.

No Cross-examination.

MARY STREINZ, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Kireker.

Q. Where do you live? A. In Paterson.

Q. Were you in the employ of A. B. Van Houten at any time? A. Yes, sir.

Q. When? A. For the last ten years.

Q. Do you know Charles Van Houten, his grandson? A. Yes, sir.

Q. And also Frank Van Houten, another grandson? A. Yes, sir.

Q. Did you ever hear Mr. Van Houten say anything about the boys?

Mr. Ward: Objected to on the same grounds.

Objection overruled; plaintiff excepts.

A. Well, I heard him tell that they did not amount to very much down in the shop.

Q. What else? A. And at the time that Mr. Charles Van Houten wanted to go West he said he wished he would go.

Q. Anything further? A. No. He said that——

Q. Whatever you can remember. Give us anything you can remember, no matter what it is. Did you hear him express himself more than once? A. Oh, yes, I heard it at different times.

Q. Over how long a period of time? A. Well, five or six years ago.

Q. And then more recently? A. Yes, sir.

Q. Can you think of anything further you heard him say? A. Well, I cannot just recall. I don't know.

Cross-examination by Mr. Ward.

Q. He did tell you, however, that the boys contemplated going West? A. He did not tell me, but I heard him speak to the family.

Q. That the boys thought of going West? A. Yes, and he said he hoped they would stay there.

By Mr. Kireker.

Q. What was your last remark, that he hoped what? A. That he hoped they would stay there if they go.

By Mr. Ward.

Q. During all this time he was living with Admund, wasn't he? He was living with this son here? A. No, sir.

Q. Was not the old man, Mr. Anthony B. Van Houten, living with Admund? A. No, sir, he was not.

JENNIE HOPPER, sworn as a witness on behalf of the defendant, testifies as follows:

Direct examination by Mr. Kireker.

Q. A. B. Van Houten was your father, was he not? A. He was.

Q. Did you live at his home up until the time he died? A. I did.

Q. Of course, you are acquainted with his grandsons, Charles and Frank Van Houten? A. Yes, sir.

Q. During the last few years of his life has he ever spoken to you about the boys? A. He has.

Q. What has he said on those occasions?

Mr. Ward: Objected to on the same grounds.

Objection overruled; plaintiff excepts.

Q. Tell me in a general way exactly what he said on as many occasions as you can remember, what did he say about them? A. Well, he expressed himself as their being a nuisance and he would be glad to have them find employment in other places.

Q. Over how long a period did his remarks about the boys cover, do you suppose, before he died? A. Oh, a long time.

Q. For a long time he was making remarks of that character? A. Yes, he never was in any different atmosphere about them, about the same way always.

Q. To what effect was that? A. Well, that he would much rather they would be some other place, working for other people.

Cross-examination by Mr. Ward.

Q. You have always been more or less unfriendly with these boys, haven't you? A. Unfriendly?

Q. Yes. A. I should not call it that.

Q. On any occasion when they visited their grandfather you would absent yourself from the room? A. Not entirely.

Q. Well, frequently? A. Well, as circumstances, that is all——

Q. You would go to different parts of the house? A. Not necessarily.

Q. Usually? A. No, I cannot say usually.

Q. When the father of these boys died you urged your father, their grandfather, to put them in a Home, didn't you? A. Never.

Q. Is it not true that you objected to your father rendering any assistance to their mother or to them? A. It is not.

Q. Is it not true that whenever you discovered that they were receiving aid or assistance from their grandfather that you objected to it? A. I did not.

Q. You knew that their mother worked? A. I did.

Q. In the mill? A. Yes, sir.

Q. At that time were you living with your father? A. I was.

Q. You knew that this one young man, Charles, went to work at the age of nine? A. Well, I just cannot recall what age. He may have been.

Q. But pretty young? A. Well, I don't know that it concerned me.

Q. I am not asking you that. You knew that the other boy went to work before he was eleven years of age? A. I don't know their ages.

Q. Did you ever visit their mother? A. I don't know whether I did or not.

Q. She was your step-brother's wife? A. Yes, sir.

Q. Or his widow? A. Yes, sir.

Q. And you never visited her? A. Well, I don't know that. I had not done so recently.

Q. Do you not know, as a matter of fact, that you never went to their home? A. No, I cannot say that I know that, no, sir.

Q. Do you recall any occasion when you ever did? A. Well, I might have.

Q. Do you recall any occasion that you ever did? A. Well, that was some time ago. I just don't know whether I did. I may and I may not.

Q. These two boys were the children of a son of the former marriage of your father's, were they not? A. Yes, sir.

Q. And you and your brother Admund B. Van Houten were two children of his second wife? A. Yes, sir.

Q. And there was always some feeling between you and these boys, wasn't there? A. No, sir.

Q. You are one of the beneficiaries, the principal

beneficiary in this will named? A. I am my father's daughter.

Q. You understand my question? A. Yes.

Q. Will you answer it, please? A. Yes.

Q. You mean that you are? A. Yes. I am mentioned.

Q. You and your brother Admund are the two principal beneficiaries under this will, are you not? A. Yes, sir.

Q. And these boys came to see their grandfather frequently, didn't they? A. Well, they did come, yes, when they thought necessary, I suppose.

Q. He always made them welcome? A. Yes, sir.

Q. He seemed to be glad to see them? A. Why, yes.

Q. He seemed to be glad to have them come around? A. Why, yes.

Q. He seemed to have an affection for them? A. Affection? My father was not a very affectionate nature.

Q. But he seemed to have an affection for them, didn't he? A. I would not call it any great affection.

Q. About as much as he had for you? A. Well, I don't think as much for them as he had for me, no, sir.

Q. Because you were living right there with him all the time? A. Not necessarily.

Q. And your father, towards the last, was quite feeble, wasn't he? A. Not at all.

Q. Wasn't he quite feeble? A. No, indeed, far from that.

Q. He did not go down to business every day? A. Every day.

Q. Do you remember his buying an automobile? A. Oh, yes.

Q. And do you remember the occasion that he remonstrated with Admund because Admund did

not take these two boys out once in a while? A. No, sir.

Q. Do you remember his saying that these boys ought to be given a ride once in a while? A. No, sir.

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

Q. Of course, they never were, when you or Admund went out, given a ride, were they? A. With me?

Q. Yes. A. Well, no, I cannot say they did.

ARTHUR VAN HOUTEN, sworn as a witness on behalf of the defendants, testifies as follows:

Direct examination by Mr. Kireker.

Q. You are the oldest son, I believe, of Admund Van Houten, are you not? A. Yes, sir.

Q. Where do you live? A. Number 231 Hamilton Avenue.

Q. Where are you employed? A. With A. B. Van Houten & Son.

Q. You are acquainted with your cousins Charles and Frank? A. Yes, sir.

Q. Have you ever had any conversation with either Charles or Frank with respect to your grandfather's will? A. Yes, sir.

Q. Tell us what that conversation was? A. Charles, in February, 1914, asked me what I thought my grandfather was worth, I told him I did not know; he asked me what I thought I would get when he died. I told him I did not expect anything. He says, "I don't see why not. You are related to him the same as we are. We expect to get something."

Q. Did he say what he expected to get? A. No, he did not give any sum at all.

Q. Did he say he expected you to get the same as he did? A. Yes, he said the three of us would get the same, the three cousins.

Q. The three cousins would get the same whatever it might be? A. Yes, sir.

Q. As a matter of fact, you each did get the same, didn't you? A. Yes, sir.

Mr. Ward: I object to that.

The Court: The will speaks for itself.

Q. Do you recall the summer of 1913, along in May, June and July, have you any recollection of that time? A. 1913?

Q. Yes. Do you know of any time that Charles and Frank were not employed at A. B. Van Houten & Son? A. I know they were out for a time, but I am not sure what time it was.

Q. You are not certain what time it was? A. No, sir.

Q. Did you ever talk to them about the business they were in at the time they were out? A. Why, before they went out they told me——

Q. They told you what? A. They told me it would be a pretty good stunt to start out under that old name, Van Houten Brothers.

Q. Why did they think it would be a pretty good stunt? A. Well, I suppose they thought they could get the trade under the old name.

Q. And did they then? A. Yes, sir.

Q. They went out and went into business, did they? A. Yes, sir.

Cross-examination by Mr. Ward.

Q. You don't remember the exact occasion when this was that they were not there, do you? A. No, I don't know the exact time.

Q. And it was during the time, however, when there was no work in the shop, was it? A. Well, there was little work.

Q. I mean, most of the hands were laid off? A. Yes, sir.

Q. It was at that time? A. Yes, sir.

Q. And then, of course, when work picked up they came back, didn't they? A. Yes, sir.

Q. You were employed in the office, weren't you? A. No, sir.

Q. In what capacity? A. In the carpenter shop.

Q. Boss? A. No. I worked with the boys.

Q. You worked with them? A. Yes, sir.

Q. You are one of how many children? A. How many brothers and sisters have I?

Q. Yes. A. I have three sisters and two brothers.

Q. And, of course, you know that this estate was divided between your father and your aunt? A. Yes, sir.

Mr. Kireker: Subject to two legacies.

ADMUND VAN HOUTEN, the defendant, sworn as a witness on his own behalf, testifies as follows:

Direct examination by Mr. Kireker.

Q. Where do you reside? A. Number 231 Hamilton Avenue.

Q. You are the defendant in this suit, are you not? A. Yes, sir.

Q. Do you recall Charles and Frank Van Houten, Mr. A. B. Van Houten's grandsons, coming to you shortly after the death of your father and talking to you about the provisions of his will? A. Charles came to me and asked me what was in the will. I told him that he and Frank and Arthur

had been left $500 each. That is all he said. That is all I said.

Q. Didn't he say anything else? A. No, sir. That is all he asked me.

Q. Didn't he want to have any meeting with you and your sister? A. Not Charley, no, sir.

Q. Did Frank? A. Yes, sir.

Q. Was Charley with him? A. No, sir.

Cross-examination by Mr. Ward.

Q. You and your sister are the principal beneficiaries under this will? A. Yes, sir.

Q. You are the executor of the will? A. Yes, sir.

DEFENDANT RESTS.

FRANK VAN HOUTEN, recalled as a witness on behalf of the plaintiff in rebuttal, testifies as follows:

Direct examination by Mr. Ward.

Q. Did you ever tell Mr. Dougherty that your grandfather had agreed to leave you each $5,000? A. I did not.

Q. What did you tell him he had agreed to leave you? A. I did not tell him anything.

Mr. Ward: I will withdraw the question because the conversation was not with this young man.

Q. During the months of May, June and July, 1913, where were you employed?

The Court: Haven't we been all over that? I understood this young man to say that he had not been away there and he was examined and cross-examined about it.

Mr. Ward: I will leave it.

NO CROSS-EXAMINATION.

CHARLES VAN HOUTEN, the plaintiff, recalled as a witness on his own behalf in rebuttal, testifies as follows:

Direct examination by Mr. Ward.

Q. Do you remember a conversation you had with Mr. Dougherty about a week or ten days after your grandfather's death? A. Why, yes, I do.

Q. Did you at that time say to him that your grandfather had promised to leave you each one $5,000? A. No, sir, it was $10,000.

Q. What did you tell him? A. I told him words to that effect, that it was not carried out the way he promised us.

Q. What amount did you tell him your grandfather had promised to leave you? A. Ten thousand dollars; all I knew.

Mr. Ward: In view of the Court's ruling on the other point, I will not ask about the three months when it is stated they were not at work there.

NO CROSS-EXAMINATION.

TESTIMONY CLOSED.

Mr. Humphreys: I move for the direction of a verdict on behalf of the defendant on the grounds stated in the motion made for a non-suit.

Motion denied; defendant excepts.

The Court then adjourned to Monday, December 13th, 1915, at 10 o'clock A. M.

THIRD DAY.

Paterson, N. J., December 13, 1915.

(Mr. Kireker sums up for the defendant.)

(Mr. Ward sums up for the plaintiff.)

Charge.

The Court then charged the jury as follows:

The Court: Gentlemen of the Jury, Mr. Charles Van Houten sues the estate of Anthony B. Van Houten for damages resulting from what he alleges to be a breach of the contract the terms of which, in effect, were, that if the young man would continue to work there, refrain from going out West, and remain until he, Anthony B. Van Houten, died, he would give him $10,000.

This, gentlemen, is a suit upon contract, and can only be dealt with in that way. It is purely a question as to whether there was a contract made, and whether both parties carried out the contract or not. Counsel's last remarks, as I remember them, were to the effect that even if this $10,000 was allowed the plaintiff would not be getting as much as some of the other heirs of the estate. That you have not anything to do with. We are not here, gentlemen, to equalize Mr. Van Houten's benefactions. You are not here to substitute your judgment for the judgment of Mr. Van Houten, as to how he should leave his money. That is a privilege reserved to every man himself, and, if the plaintiff in this case relied solely upon the generosity of Mr. Van Houten, and, relying upon that generosity, expected to be compensated for staying there in that way, and he was disappointed, then he cannot recover at all.

Thus, you will see the suit is purely upon the theory that there was a contract, and that is the contract which has been detailed here before you, and that that contract was made between these parties.

You see, in 1899, Mr. Anthony B. Van Houten made a will, long before this contract was made, in which he gave to the three children, Frank and

Charles, and the son of Admund, each $500, and gave the balance, after the widow's life right, to Mr. Admund Van Houten and Jane. That was his disposition made in 1899. And you have not anything to do with how he disposed of his property at all. That is not your business at all.

You are here trying the question as to whether there was a contract made between these two parties, A. B. Van Houten, on his part, and Mr. Charles Van Houten, on his part.

So, then, your first proposition is, was there a contract?

Now, the testimony of the witnesses produced on behalf of Mr. Charles Van Houten is that there was such a contract made. You have heard the testimony of his wife and of some young man who was called upon the witness stand. As to the deceased, of course, his mouth is closed. Mr. A. B. Van Houten cannot be brought here to tell whether there was such a contract, or whether there was not, and, to equalize the matter as nearly as the law can, it also closes the mouth of the plaintiff, Mr. Charles Van Houten. It says, "If the deceased cannot be heard to speak here, then, of course, the plaintiff cannot be heard to speak either."

So that you will see it is rather difficult to determine what are the facts where one of the parties is dead, and you have to consider not only the evidence, but all the circumstances and the probabilities. It is a case where you must weigh the interests of the parties on both sides. Here you have on the one side the testimony of Frank, who admitted his interest to the same extent, of $10,000. He has a great interest in sustaining this case, because he is interested in a like case himself. The wife of Charles Van Houten naturally has an interest in the matter, probably a strong interest, in that her husband is interested to the extent of $10,000.

On the other hand, you may also consider the interest that Mr. Edward Van Houten has in not losing $10,000 out of the estate, and the interest of his sister, Mrs. Hopper, in not losing the $10,000 which may be taken out of the estate. You may also consider the interest of the workmen who have employment with that firm, whether they are interested or biased to such an extent that it would affect their testimony.

So you will see you must take into consideration the interests of the parties in the case and all of the witnesses and the circumstances surrounding their testimony, and weigh all that carefully to determine whether or not there was a contract, or whether there was not.

If you determine that there was no contract made by Mr. Anthony B. Van Houten, deceased, to pay Charles $10,000, that is the end of this case. It does not make any difference whether you think Mr. Van Houten did not give enough in his will to Charles, because you will have enough to do when you give your own money away, gentlemen. Mr. Van Houten had a right to do with his property as he pleased. You are not here to upset his will, or try his right to do with his own as he pleased. The question is, was there a contract? If you find there was not any contract, then that is the end of the case, because that is what the suit is for.

If you find that there was a contract, then you take up next the question, did the young man, Charles, live up to his part of it, and remain there during the time called for by the contract?

There is some diversity in the testimony there, gentlemen, but I think the son of Edward Van Houten testified that they were working there all the time except when the place was closed or shut down or something of that kind. You will remember what the testimony was.

If you find that there was a contract, and that the plaintiff, Charles, lived up to his part of it, then the evidence, of course, shows that Mr. A. B. Van Houten, the deceased, did not in his will provide for the payment of $10,000 to this plaintiff Charles; and then you may find that there was a breach of the contract on his part.

And then you come to the question of damages. Now, let me warn you, gentlemen, if you come to the question of damages. This is not a case that you can compromise. I mean by that, that you cannot say, "Well, we will split the difference between the parties." You cannot use that cold and good sense and discretion that is so often left to the jurors to determine what is fair and right between the parties. Here, if the agreement was as the plaintiff's witnesses testify, and the plaintiff kept his part of it, the obligation on the part of Mr. A. B. Van Houten, the deceased, was to pay the $10,000; not eight or five or four or three or fifteen, it was to pay $10,000, if you believe there was a contract. So that the amount involved here, as one of the counsel stated, is $10,000 or nothing. Either there was a contract calling for the payment of $10,000, or there was no contract.

And if you find that there was a contract and that A. B. Van Houten, the deceased, was obligated to pay the $10,000, you may allow interest on that amount, from the 9th of September, 1915, which would be one year from the date of the probate of the will. So that, if you find for the plaintiff, the interest would run from the 9th day of September, 1915.

I have been asked to charge you, by the defendant, a number of requests, as follows:

1. I refuse to charge.

2. It is essential to the validity of such an agreement as that alleged in the complaint that it should be mutual as well as definite and certain, both as to its terms and subject-matter and the statement of its consideration.

I so charge you.

3. The complaint states that part of the consideration moving Anthony B. Van Houten to make the alleged contract was the natural affection between the parties. I charge you that the natural affection between the parties is not a sufficient consideration for an executory contract of the character stated in the complaint, or for any part thereof.

I so charge you.

4. The fact that Frank Van Houten was himself interested in the same contract or transaction in which the plaintiff was interested, although their interests were divisible, deprives his testimony of practically all evidential value.

I refuse to charge you, gentlemen, in that way, but you have a right to consider what interest Frank has in this case, and weigh his testimony accordingly, as you think is proper, and give it that weight which you think is proper.

5. The burden of proof is upon the plaintiff and the plaintiff cannot sustain that burden sufficiently (Anthony B. Van Houten being dead) unless some credible proof of the contract comes from the lips of disinterested parties.

Gentlemen, you have a right to take the testimony of all of the witnesses and consider it; and the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence that there was a contract, that Charles lived up to his part of it and that Mr. Anthony B. Van Houten, the

deceased, did not live up to his part of it, and you are the judges of the weight to be given to the testimony.

6. If you are satisfied by the evidence offered by the defendant of the improbability that any such contract as that sued on was ever made, that evidence should outweigh altogether any testimony proceeding from the lips of the plaintiff's brother on the subject.

Gentlemen, I refuse to charge that, except to say that the burden of proof, as I have stated before is upon the plaintiff, and you are the judges to determine the weight to be given to anybody's testimony who has testified in the case, according as you find they are interested or disinterested, or truthful, from all that you have seen and heard of them on the witness stand.

7. In a case of this kind, where the alleged maker of the contract is dead and his mouth thus closed from denying the making of the contract, the inherent weakness of the testimony coming from the lips of interested witnesses offered by the plaintiff, consequent upon the temptation to perjury which necessarily exists in all such cases, may properly lead you to find a verdict in favor of the defendant, independently of the testimony offered by the defendant, and notwithstanding the fact that the testimony may not add to the inherent weakness of the plaintiff's own case.

I so charge you, gentlemen, and, as I have already stated to you, you will have to carefully consider all of the testimony. You are not obliged to believe any particular witness because the witness swears to his testimony. You may take all of the testimony, weigh the testimony of all of the witnesses, and give it that weight which you think is proper under the circumstances.

8. It does not appear from the evidence that any person except Anthony B. Van Houten (who is now dead) and the plaintiff and his brother had any knowledge of the alleged agreement sued on, unless it may be such as can be inferred from fragments of conversations or remarks of Anthony B. Van Houten made afterwards. It is insisted by the plaintiff that his brother can speak in his interest notwithstanding the transactions and statements in which both he and his brother were both interested occurred at the same time, and amounted to one transaction. I charge you that the testimony of the brother should be considered by you with the greatest caution. All the temptations to perjury on the part of the plaintiff which has led the Legislature to prohibit him from testifying in his own cause under these circumstances similarly also exist with reference to the testimony of his brother. The brother cannot affirm the transaction as to the plaintiff without affirming it as to himself. To accept his testimony otherwise than with the greatest caution would open the way for combinations and conspiracies against the estates of decedents quite too difficult for the most vigilant to unravel or expose.

I so charge you, gentlemen.

Now, take the case, gentlemen, and to state it to you briefly again:

The burden of proof is upon the plaintiff, as I have stated to you.

First determine was there a contract such as the plaintiff alleges?

If there was none, then there is no cause of action.

If you find there was a contract made between the parties, as the plaintiff alleges it was done, and

that Charles Van Houten lived up to his part of it, and that Anthony B. Van Houten did not live up to his part of it, then you come to the question of damages as I have already outlined it to you.

Are there any corrections to be called to the attention of the Court before the jury retire?

Mr. Ward: The plaintiff wishes to note an exception to the Court's charging those of the defendant's requests which were charged.

(Exception allowed.)

Mr. McGinnis: The plaintiff also excepts to that part of the charge which in effect set out just who the witnesses were who testified to the contract and specifically excluded Mr. Ensor and Mr. Van Houten.

The Court: That is in the defendant's request, is it not, excluding the testimony of the wife?

Mr. Humphreys: No, sir. The testimony says it does not appear from the evidence that any person except Anthony B. Van Houten (who is now dead) and the plaintiff and his brother had any knowledge of the agreement, etc.

The Court: You mean after the making of the contract?

Mr. Humphreys: Yes, sir.

The Court: Not after the death?

Mr. Humphreys: No, sir.

The Court: I will let that part stand.

Mr. Humphreys: The defendants except to the Court's refusal to charge the requests submitted by the defendant, except as charged.

(Exception allowed.)

(The jury then retire.)

DEFENDANTS' REQUESTS.

1. The alleged contract, as set forth in the complaint, is not sufficiently mutual, definite and certain as to its terms and its considerations to entitle the plaintiff to any relief as a result of its breach by Anthony B. Van Houten.

(Refused.)

Stipulation.

PASSAIC COUNTY CIRCUIT COURT.

FRANK VAN HOUTEN, Plaintiff, vs. ADMUND VAN HOUTEN, Admx., etc., Defendant.	Before: Hon. GEORGE S. SILZER, *J.*, and a Jury.

Paterson, N. J., December 13, 1915.

APPEARANCES:

Messrs. WARD & MCGINNIS, for the Plaintiff.
C. FRANK KIREKER, Esq., JOHN B. HUMPHREYS, Esq., for the Defendants.

This case being on the day call and called for trial, and the parties and counsel being present in Court, it was, in open Court,

STIPULATED, that a like verdict shall be entered in this case as will be rendered and entered in the case of Charles Van Houten, plaintiff, vs. Admund

Van Houten, Administrator, etc., defendant, which verdict is being considered by the jury at the time of making this stipulation;

SUBJECT, HOWEVER, to the same objections, the same rulings by the Court, and the same exceptions, in favor of either or both parties, and that either or both parties shall have the same rights of appeal, as in the said case of Charles Van Houten, plaintiff, against Admund Van Houten, Administrator, etc., and that the record in the said case so tried shall be used as the record in this case for all purposes, as if this case was tried under that same record.

Exhibit D-1.

Copy of the Last Will and Testament of Anthony B. Van Houten, Deceased.

In the name of God, Amen.

I, Anthony B. Van Houten, of the City of Paterson in the County of Passaic and State of New Jersey, being in good health of body, and of sound and disposing mind, memory and understanding, hereby make, publish and declare this my last will and testament, in manner following:

First: I order and direct that all my just debts and funeral and testamentary expenses be paid by my executors hereinafter named as soon as conveniently may be done after my decease.

Second: I give and bequeath unto my grandsons, Charles Van Houten and Frank Van Houten, sons of my deceased son Martin, and to Arthur B. Van Houten, son of my son Edmund, the sum of five

hundred dollars to each, the same to be paid to them at any time within one year after the death of my wife, as may be most convenient for my executors and for the best interests of my estate.

Third: I give and bequeath unto the Cedar Lawn Cemetery Company the sum of one hundred dollars, the income therefrom to be used by said company in keeping my plot and monument in the cemetery of said company in good order and proper condition.

Fourth: I give, devise and bequeath, all the rest, residue and remainder of my estate, both real and personal, of whatever the same may consist and wherever situate, to my wife Euphemia Frances Van Houten during her widowhood; and upon her death or re-marriage, I give, devise and bequeath my said residuary estate, after the satisfaction of the legacies and payments herein provided for, to be equally divided between my son Edmund Van Houten and my daughter Jane Van Houten, share and share alike, the issue of either of said children who may have died before me to take the parents' share. In case either my said son Edmund or my said daughter Jane shall die before me without leaving issue, then the whole of the said residuary estate shall go to the one surviving, subject to the life estate of my said wife above mentioned. This legacy to my wife is to be received in full satisfaction and in lieu of dower to which she may be entitled. In case my wife should re-marry I give and bequeath unto her the sum of two thousand dollars to be paid to her by my executors out of the residuary estate within one year from the date of such marriage, as may be most convenient to my executors and for the best interests of my estate.

Fifth: I empower and direct my executors hereinafter named, or the survivor of them, to sell, exchange and convey any and all of my real estate, at private or public sale, at such time or times, in such parcels, upon such terms and in such manner in every respect as they shall deem most advantageous to my estate, and to give good and sufficient conveyances for the same.

Lastly: I nominate, constitute and appoint my wife Euphemia Frances and my son Edmund, executors of this my last will and testament, and I direct that they be not required to give security for the performance of their duties as executors, and I hereby revoke and declare null and void any and all wills by me at any time heretofore made.

In witness whereof I have hereunto set my hand and seal this sixth day of September, eighteen hundred and ninety-nine.

A. B. VAN HOUTEN, (L. S.)

Signed, sealed and published and declared by the said testator, Anthony B. Van Houten, as and for his last will and testament in the presence of us, who, at his request in his presence and in the presence of each other have hereunto set our hands as attesting witnesses.

JOHN R. BEAM, 390 Broadway, Paterson, N. J.

WILLIAM PENNINGTON, Little Falls Road, Paterson, N. J.

Grounds of Appeal.

NEW JERSEY

COURT OF ERRORS AND APPEALS.

CHARLES VAN HOUTEN,
Plaintiff-and-Respondent,

vs.

ADMUND VAN HOUTEN, Executor of the Estate of Anthony B. Van Houten, Deceased,
Defendant-and-Appellant.

The appellant states the following grounds of appeal:

1. Because the complaint and the matters therein contained are not sufficient in law for the said plaintiff to have his said action against the said defendant.

2. Because by the record aforesaid it appears that judgment in form aforesaid was given for the said plaintiff against the said defendant, whereas by the law of the land judgment ought to have been given for the said defendant against the said plaintiff.

3. Because the Court denied a motion, made by counsel for the defendant, to dismiss the complaint upon the ground that the alleged contract set forth in the complaint was too uncertain and indefinite in its terms and in the statement of its consideration to constitute an agreement in the legal sense of the term, or to form the subject for redress in an action at law, and upon the further ground that part of

the consideration alleged and sought to be proved as that upon which the alleged contract was based, was the natural affection between the parties, and that natural affection was not a sufficient consideration to support an executory contract.

4. Because the Court admitted testimony offered by the plaintiff, over the objection of the defendant, designed to show a relationship of natural affection existing between the parties.

5. Because the Court refused, at the close of the plaintiff's testimony, to order a judgment of nonsuit to be given in favor of the defendant and against the plaintiff.

6. Because the Court refused to charge the jury that they should find a verdict for the defendant.

7. Because the Court refused to charge, as requested by the defendant's first request to charge, that "the alleged contract as set forth in the complaint is not sufficiently mutual, definite and certain as to its terms and consideration to entitle the plaintiff to any relief as a result of its breach by Anthony B. Van Houten."

8. Because the Court refused to charge, as requested by the defendant's fourth request to charge, that "the fact that Frank Van Houten was himself interested in the same contract or transaction in which the plaintiff was interested, although their interests were divisible, deprives his testimony of practically all evidential value."

9. Because in so declining said fourth request to charge made by the defendant, the Court said, "I refuse to charge you, gentlemen, in that way, but

you have a right to consider what interest Frank has in this case and weigh his testimony accordingly as you think is proper, and give it that weight which you think is proper."

10. Because the Court refused to charge, or did not charge, the jury as requested by the defendant's fifth request to charge, that "the burden of proof is upon the plaintiff, and the plaintiff cannot sustain that burden sufficiently (Anthony B. Van Houten being dead) unless some credible proof of the contract comes from the lips of disinterested parties."

11. Because in so declining, or failing to charge, said fifth request to charge made by the defendant, the Court said, "Gentlemen, you have a right to take the testimony of all of the witnesses and consider it and the burden of proof is upon the plaintiff to satisfy you, by a fair preponderance of the evidence, that there was a contract; that Charles lived up to his part of it and that Mr. Anthony B. Van Houten, the deceased, did not live up to it, and you are the judges of the weight to be given to the testimony."

12. Because the Court refused to charge the jury as requested by the defendant's sixth request to charge that "if you (the jury) are satisfied by the evidence offered by the defendant, of the improbability that any such contract as that sued on was ever made, that evidence should outweigh altogether any testimony proceeding from the lips of the plaintiff's brother on the subject."

13. Because in so declining said sixth request to charge made by the defendant, the Court said, "Gentlemen, I refuse to charge that, except to say

that the burden of proof, as I have stated before, is upon the plaintiff, and you are the judges to determine the weight to be given to anybody's testimony who has testified in the case, according as you find that they are interested or disinterested, or truthful, from all that you have seen and heard of them on the witness stand."

14. Because the Court, in charging the defendant's seventh request to charge, as follows: "In a case of this kind, where the alleged maker of the contract is dead, and his mouth thus closed from denying the making of the contract, the inherent weakness of the testimony coming from the lips of interested witnesses offered by the plaintiff, consequent upon the temptation to perjury which necessarily exists in all such cases, may properly lead you to find a verdict in favor of the defendant, independently of the testimony offered by the defendant, and notwithstanding the fact that the testimony may not add to the inherent weakness of the plaintiff's own case," qualified that part of its charge by saying, "I so charge you, gentlemen, and as I have already stated to you, you will have to carefully consider all of the testimony. You are not obliged to believe any particular witness because the witness swears to his testimony. You may take all of the testimony, weigh the testimony of all of the witnesses, and give it that weight which you think is proper under the circumstances.

C. FRANK KIREKER,
Attorney of Appellant.