

1896
vol 221

COURT OF ERRORS AND APPEALS.

Between	
WILLIAM H. TENBROOK and PHILIP	
TENBROOK, partners,	
trading, etc.,	Brief
Appellants,	of
and	Appellants.
FANNIE J. KELLY, <i>et als</i> ,	
Respondents.	

In the case in chancery, a bill was filed, printed on page 5 *et seq.* of Printed Case, by the respondents, excepting Fannie J. Kelly, to restrain a tax sale, and for other purposes. The appellants and others were made parties, p. 11. This bill was answered by the appellants, Printed Case, pp. 14-24. Afterwards, in September, 1895, appellants filed their bill, pp. 36-51. The answer of the respondents to this bill is printed on pages 54-62 of Printed Case. The testimony was taken under appellants' bill, and is printed on pp. 72-115. The appellants filed a petition for a rehearing, which is printed pp. 116-120. The conclusions of the Vice Chancellor who heard the case, and who refused to entertain the petition for rehearing, are printed pp. 120-121. Final decree appears on p. 122, and the notice of appeal on p. 124.

In this case actions of ejectment were brought by the respondents, excepting Fannie Kelly, against the appellants and others. Both the bills mentioned above relate to these actions of ejectment, that filed by the respondents to conserve the property pending their actions of ejectment, and that filed by the appellants to restrain those actions.

The questions raised by the action of ejectment relate to eleven lots with houses thereon known as Nos. 819, 823, and 825 Dauphin street, Nos. 239, 241 Chestnut street, and Nos. 1024, 1026, 1028, 1030, and 1032 South Fourth street, in the city of Camden. The property in dispute is now in the possession of a receiver for the purposes as stated of conserving it from unpaid taxes, etc., pending litigation.

PROOFS.

The proofs offered by the complainants are to the effect that Samuel J. Kelly, the testator under whom the complainants claim, died seized of the property in December, 1886, testate of a will devising the real estate in question to the defendant, Fannie J. Kelly.

Fannie J. Kelly's title was transmitted to the complainants by a sheriff's deed, recorded in Book 204 of Deeds of Camden county, page 24, Ex. C. 2. This is an ordinary sheriff's deed under common law execution against Fannie J. Kelly. The certified copy of the will offered in evidence was marked Ex. C. 1. See Printed Case, p. 36, l. 27-35.

LINE OF PROOF.

Under the direction of the court the line of proof was limited to making out an equitable defence, the Vice Chancellor who heard the case holding that the case at law should deal with the line of legal proof above referred to, and that the proof in this action should go to show what, if

anything, was transmitted by Fannie J. Kelly to the complainants under the sheriff's deed, Ex. C. 2., irrespective of the will of her husband and any rights of hers thereunder.

COMPLAINANTS' FOUNDATIONS OF EQUITABLE DEFENCE.

The complainants in showing the interest of Fannie J. Kelly in this property have limited their proof to two branches :

(1.) That Fannie Kelly, as the widow of Samuel J. Kelly, the testator, transmitted by her claim of testamentary right and by virtue of a sale thereunder, by her agent, the sheriff, whatever interest she had in the property, and that if her dower right in the premises, irrespective of the will of her husband, were only a chose in action, such right of dower, whatever it may be, passed in equity to the complainants under the sheriff's deed, Ex. C. 2., which conveyed all of Fannie Kelly's interest in the *locus in quo* to the complainants. (2.) That Fannie J. Kelly was the owner, under the married woman's act of an interest in the premises in question by virtue of her contributions to her husband's business and estate, which under the married woman's act she was powerless to convey to him. She was also powerless to contract with him concerning the same.

DETAILS OF PROOF.

(1.) The details of proof as to the dower question are the sheriff's deed and the complainants' possession thereunder, Printed Case, p. 6, l. 25-30, and p. 91, l. 1-15; which the actions of ejectment complained of seek to oust and the fact that Fannie Kelly was in possession under the will (see her bill and answer thereto, Printed Case, pp. 5-25) and represented herself as owner to the complainants, on

the faith of which the complainants went to large expense to acquire her title in this property, by virtue of their judgment against her, and her present repudiation of the will with an attempt on her part to release to and bestow her dower upon other parties.

(2.) The details of proof as to Fannie Kelly's interest in the premises in question are (a) as to her ability to aid her husband in his business and estate, (b) as to her actually aiding him in that way, (c) as to action on his part equivalent to an admission that he was thus aided by her, and (d) proofs and admissions binding his heirs, the plaintiffs in the actions at law, sought to be restrained.

THE DOWER QUESTION.

(1) A discussion of the question of dower, apposite to this case, will be found in the opinion of Chief Justice Beasley in giving the judgment of the Supreme Court in the case of Wade vs. Miller, reported in 3 Vr. 296. The situation in this case in which the widow is placed is not at all that of the widow in the case just referred to. Mrs. Kelly elected to take this property under the will and acted in regard to it, so that her dower stands extinguished in case the will stands. But suppose the will does not stand, and is rendered nugatory through the action of herself and her children by the cases at law. Then Mrs. Kelly's position is, having represented to the complainants in this case that she owned the property in question, whereby they were induced, at large expense, to acquire her title by sheriff's deed, she is now attempting by repudiating the will to hold rights in the *locus in quo* against her own deed made by her agent, the sheriff. The question therefore is, not only whether Mrs. Kelly is equitably estopped from making this claim of dower by reason of the expense and loss which the complainants have incurred on the faith of her title in these premises, but

also whether her deed by the sheriff to the complainants embodied with it an equitable assignment of the right of dower which she is now attempting to set up by her deed of release of May 25, A. D. 1895, recorded July 9, 1895, in Camden county, in Book 208 of Deeds, page 36, etc., mentioned in paragraph 29 of the bill. This is the paragraph added to the bill by the amendment thereto of March 30th, 1896, by the order of that day, and has not been answered or denied. It is not thought necessary to offer in evidence a copy of this release, as the making of it stands alleged in the pleadings and is not denied. It is submitted in support of this branch of the complainants' case that as stated in paragraph 29 of the appellants' bill embodied in said order of March 30th, 1896, that the complainants have acquired all of the rights of Fannie Kelly in the premises, and that she cannot now assert or exercise any rights therein, and that the complainants are entitled to the protection of this court in retaining, whatever her rights were on both of the grounds above stated, see Printed Case, pp. 70-71. Furthermore, it is claimed that they stand in her shoes and that if her rights in the premises prove to be less than the complainants claim to have obtained, the complainants are entitled in equity to be subrogated to Mrs. Kelly's rights in the premises, whatever they may prove eventually to be. Again, on the doctrine of *Leonard vs. Steele*, 4 Barb. 20 (referred to in *Snook vs. Snook*, 16 Stew. 132) Mrs. Kelly took the premises in question subject to her right of dower therein and conveyed the same with her other estate in the premises to the complainants. If her other estate in the premises fails this ought not in equity to disturb the conveyance to the complainants of her dower rights therein.

MRS. KELLY'S EQUITABLE INTEREST

(a) Mrs. Kelly's ability to aid her husband in his business and estate was proved beyond question. Mr. Cow-

perthwaite swore that he paid her about \$1,300 in May, 1872, just before she married her husband, see Printed Case, page 93, l. 30-35, and copy of refunding bond, Ex. C. 4. Mr. Burrows swears that Mr. Kelly was about to marry a lady worth \$10,000, see Printed Case, p. 109, l. 1 to 3. The will of Mrs. Groff, Ex. C. 5, showed that she left to Fannie Andrews, her daughter, now Fannie Kelly, the house and lot, 320 Mickle street, and all her household goods and furniture; in the codicil of the will Fannie Kelly appears to be the only daughter of Adelia J. Groff. By the proceedings annexed to the will it appears that Fannie Andrews was the administratrix c. t. a. of her mother, Adelia J. Groff, and the Surrogate certifies that he has carefully examined the books and records of his office and that Fannie Kelly gave bonds as administratrix in \$1,000 without surety, and that she has never filed any inventory or appraisal of her mother's estate, or filed, or allowed by the court any account of or concerning the same. See certificate, part of Ex. C. 5. That Adelia J. Groff had title to 320 Mickle street, so that she could transmit it to her daughter, appears by the deed, Ex. C. 6, by Henry Chapman to Adelia J. Haines, Mrs. Groff's name before she married Andrews. In the respondents' answer, paragraph 8, Printed Case, p. 58, l. 30-35, the defendants aver that the house, 506 Linden street, was rented and furnished with money belonging to Mrs. Kelly, being proceeds of certain securities inherited by her from her mother.

(b) As to her actually aiding him in that way: Mrs. Kelly's statements in this particular are full and explicit, the most important is, Printed Case, p. 113, l. 25-35, p. 114, l. 1-4, where she made the statement that the property left her by her late husband did not equal the amount he received from her, including the interest, to the time of his death; so that, he gave her, she says, "but that which was her own." Her statements to other witnesses are to the same effect; the

Misses Henry, Mr. Tenbrook, Mr. Walton, Mr. Pratt, and Mr. Drake, all testifying, with the exception perhaps of Mr. Walton and Mr. Pratt, to the effect that her contributions to her husband's estate made the property in question hers. It also appears by the testimony of Mr. Groff that from the time of his marriage to his death Samuel J. Kelly lived in the house of his wife, 320 Mickle street; the testimony of Mark Miller, to the effect that Mrs. Kelly took charge of the business and personal estate of her husband without inventory or appraisement, as if it were her own, before the will was proved, are facts from which the inference fairly arises that she was dealing with an estate which was her own and for which she was accountable to no nobody.

(c) Admissions of Samuel J. Kelly: That Samuel J. Kelly made a will and that he signed an instrument in the nature thereof giving the whole of his property to his wife, and that his intention was that she should be his sole heir and devisee, is not denied by the answer, and it appears by the record that such was the case. The fact by which it is proposed to defeat the will is that only one witness instead of two signed the will in the presence of the testator. This alleged fact has no influence (even if admitted, and it is denied) to question or modify Samuel Kelly's expressed intention to give all his property, real and personal, to his wife. Such an intention and such an act on the part of the testator is inconsistent with the idea that his wife had not already an equitable interest in his estate. A man with five children and a young and attractive woman as a wife, of marriageable age, as was the case, would not have given all of his property to her to the exclusion of his children unless there had been a reason of the kind suggested.

(d) Proofs and admissions binding the heirs of Samuel J. Kelly to the effect that Mrs. Kelly had the equitable and actual ownership of the property in question:

Under the act to amend the law relating to property of

married women, revision approved March 27, 1874, page 637; General Statutes, p. 2013, sec. 3, the real and personal property, etc., which any married woman received since July 4, 1852, is her sole and separate property, as though she were a single woman. A married woman under this act was as capable of receiving and dealing with her property, subject to the limitations in the act contained, as any other person above majority. But this power of dealing with her property is subject to one general exception, viz.: in relation to her dealings, in respect to her property, with her husband. In that respect the husband or wife cannot contract with or sue each other.

Therefore the ground upon which the complainants stand is that Mrs. Kelly took the property in question, by will, from her husband, in satisfaction of what he owed her for moneys advanced. If it be claimed that she gave him the money, which she contributed to his business, the reply is that she could not give it to him because she could not contract with him. If it be contended that there is no will, the reply is that Mrs. Kelly took possession of the property and had possession of it under the will; if then it be contended that her possession under the will goes for naught, in case the will is destroyed by the actions of ejectment, the reply is, at least she had actual possession, and such possession as a court of equity would protect her in, upon showing that she had possession of her own property and not of her husband's. It would not be necessary for her to establish by suit the amount of her claim against her husband.

So far as she is concerned we have proved admissions of hers which we contend are binding on her, and are as binding upon her children, unless she can deny the admissions, or they can disprove the facts contained in them. An answer not under oath is prayed for and therefore the answer is not proof of anything, except in so far as it admits the complainants' case. There is no proof in support of the facts contained in the answer.

I am aware that this view of the married woman's act is not in conformity with some of the authorities on the subject and that it has been held that a married woman can give to her husband a property.

In the first place, it nowhere appears that the property in question was given by Mrs. Kelly to her husband.

But if it was, the contention of the complainants is that such gift would not be effectual under the circumstances of this case. The law of married woman in this State differs from that of other States ; furthermore, there has been a general and steady development in the trend of judicial construction upon the statute in question and the end is not yet. Unless the frame of the statute is changed the inevitable conclusion must be reached that a wife cannot give her property to or otherwise effectually contract with her husband, as I understand has lately been decided in the Supreme Court in a replevin case in which the opinion was read by Mr. Justice Ludlow. The action of the children in permitting Mrs. Kelly to remain in charge of the business of her husband, and the action of the children in permitting Mrs. Kelly to remain in possession of the property in question, as admitted in the nineteenth paragraph of the respondents' answer, p. 60; and the action of the defendants as admitted in the thirteenth paragraph of the respondents' answer, p. 59, in permitting Fannie Kelly to sell the property to pay her debts ; and the action of Fannie Kelly, mentioned in the sixteenth paragraph of the respondents' answer, p. 60, l. 3-10, that she offered the property to be held in trust for the purpose of allowing the income to pay her debts, are all facts which seem to me are binding on these children. The one central binding fact, however, is that Fannie Kelly's admissions are to the effect that she put her money into this property, and that fact, if it binds her, is such proof of the fact of her interest in advance of the interest of her children as will bind her children.

Counsel for the Kellys contended below that this application was in the nature of a creditor's bill, and that the claim made in behalf of the Tenbrooks to be subrogated to the rights of Fannie Kelly is outlawed. On the view of the law taken by the appellants, as the relationship of debtor and creditor could not exist between husband and wife because of their inability to contract with each other, the husband was necessarily the trustee for, but not the debtor of, his wife.

It was claimed by the respondents in their argument below that Mrs. Kelly's admissions were not against interest at the time made, but had become so by the changed circumstances of the case. It is contended on the part of the appellants that Mrs. Kelly's admissions were as much against her interest at the time she made them as now.

In dealing with the petition for rehearing Judge Reed stated that the question presented by the petition was one which was necessarily involved in the cause as decided. The point made, he said, was that Fannie J. Kelly by her acts and declarations to the appellants has (so far as any interest that she might hold in the property as dowress) estopped herself from setting up that she has such an interest. That meant, the Vice Chancellor proceeded, that by reason of her conduct her unassigned inchoate interest as dowress, which upon general principles is not the subject of levy and sale, became liable in equity to the payment of her creditors. But if that should be admitted, upon which question no opinion, the Vice Chancellor stated, need then be expressed, it could not avail the appellants in this suit, and while the ejectment suit was pending the asserted rights of the appellants were that they were owners in fee by virtue of their purchase of the widow's interest, and that as the case then stood she was the devisee, and her election to take as such has renounced her right to dower, or her right has merged in her title as devisee, and that only by an admission that the will is a nullity, or after an adjudication to

that effect, can the question raised by the petition be litigated in chancery. On these grounds the prayer of the petition was refused.

But an inspection of the prayer of the petition for rehearing will disclose that it was intended not to restrain or to make any admissions concerning the ejectment suits, but that it sought to retain the bill of the appellants, without dismissal, with the view, in case the ejectment suits resulted against the appellants, of allowing the appellants to come in by petition under that bill to have their chose in action of Mrs. Kelly's dower, so equitably acquired by them, set off to them and the release of dower of Mrs. Kelly to the heirs of Samuel J. Kelly declared void. The appellants therefore contend, that instead of requiring the appellants to file a new bill for the sake of raising a question, in case it becomes necessary, now fairly raised by the pleadings as they stand, the bill of the appellants ought to be retained for the purpose of raising, if necessary, this very question, instead of putting the parties to the expense and delay of new pleadings and a new suit.

Mrs. Kelly, it will be remembered, was engaged in business. She took her husband's business and continued to manage and conduct it as her own. This fact is stated in the bill, shown by the proofs, and admitted in the answer. The answer states that she conducted this business for the benefit and support of her children and herself. The words of the answer are, "that she ran said business for the benefit and support of her children and herself, but without securing the consent of her said children, for the reason that they were all of such tender age, that they were unable to understand any matters connected with the estate of said Samuel J. Kelly, and that so far as she knows said children had no knowledge of their legal position."

It will thus be seen that Mrs. Kelly was a woman engaged in business in her own name, but for the benefit of

the heirs of her deceased husband. It is therefore suggested that if the reason for keeping a widow's dower right beyond the reach of levy and sale has ceased to exist, the principle has ceased to exist; and that if the widow is engaged in trade the reason for thus keeping her dower right has ceased to exist. Especially is this so when the heirs of Samuel J. Kelly, the very persons who seek to avail themselves of this widow's dower right, were benefited by the trade carried on by this widow.

As to widow's power of disposal of her dower by assignment see

3 Pom. Eq. Jur. 1383 n. 3.

Potter vs. Everitt, 7 Ir. Eq. 152.

Thompkins vs. Fonda, 4 Paige 448.

As to bar of dower by estoppel see

Jones vs. Powell, 6 John's Ch. 194.

Stewart Husband and Wife, Sec. 276.

As to married women as traders see

14 Amer and Eng. Ency. Law 667, ix.

Respectfully submitted,

HERBERT A. DRAKE,

Counsel for Appellants.

This indenture, made the fourth day of January in the year of Our Lord one thousand eight hundred and ninety-five (1895), between George Barrett, Sheriff of the county of Camden and State of New Jersey, of the first part, and William H. Tenbrook and Philip Tenbrook, trading, etc., as Tenbrook & Bro., of the city and county of Philadelphia and State of Pennsylvania, of the second part, witnesseth, that whereas, on the twenty-third day of December, Anno Domini eighteen hundred and ninety-three, a certain writ of fieri facias issued out of the New Jersey Supreme Court, directed and delivered to me, the said George Barrett, then and still being Sheriff of the said county of Camden, in the words and form following, to wit :

We command you as before we have commanded you that of the goods and chattels of Fannie J. Kelly and Mary Jane Coutts, defendants, in your county, you cause to be made the sum of five hundred and forty-four dollars and nine cents, which to the Camden Safe Deposit & Trust Company, plaintiff, lately in our Supreme Court at Trenton, before the justices of our same court, were adjudged for its damages which it had sustained, as well by occasion of non-performance of a certain contract by the said defendants then lately made, as for its costs and charges by it about its suit in this behalf expended, whereof the said defendants were convicted as appears of record; and if sufficient goods and chattels of the said defendants cannot be found in your

county, whereof the damages aforesaid may be made, then we further command you that you cause the whole, or the residue, as the case may require, of the said damages to be made of the lands, tenements, hereditaments and real estate whereof the said defendants were seized on the twentieth day of July, eighteen hundred and ninety-three, or at any time afterwards in whose hands soever the same may be; and that you have that money before our justices aforesaid, at Trenton aforesaid, on the third Tuesday in February next, to render unto the said plaintiff for its damages aforesaid, and have you then and there this writ.

Witness, Mercer Beasley, Esquire, Chief Justice, at Trenton aforesaid, the twenty-third day of December, A. D. eighteen hundred and ninety-three.

BENJ. F. LEE,
Clerk.

GREY & GREY,
Attorneys.

Which writ was duly recorded in the office of the Clerk of the New Jersey Supreme Court in A 31 of Process, page 684.

And whereas sufficient goods and chattels of the said Fannie J. Kelly and Mary Jane Coutts could not be found, I, the said Sheriff, did seize and take all the following described lots of land situate in the city of Camden, county of Camden and State of New Jersey, bounded as follows:

No. 1. Beginning at the southeast corner of Mount Vernon and Fourth streets, thence southward by the east line of Fourth street sixty-four feet, thence eastward parallel with the south line of Mount Vernon street sixty feet to a corner, thence northward parallel with the east line of Fourth street sixty-four feet to the south line of Mount Vernon street, thence westward by the south line of Mount Vernon street sixty feet to the place of beginning and known as Nos. 1024, 1026, 1028, 1030 and 1032 South Fourth street.

No. 2. Beginning at a point in the west line of Dauphin street at the distance of one hundred and thirty-four feet south from the south line of Pine street and corner to a three feet wide alley, and runs thence south along said west line of Dauphin street forty-eight feet more or less in front or width and extending of that width between parallel lines westward eighty-two feet more or less in length or depth, and known as Nos. 819, 821, 823 and 825 Dauphin street, together with the free use and privilege in common of said three feet wide alley with other owners bordering thereon forever.

No. 3. Beginning at a point in the north side of Chestnut street at a distance of one hundred and forty feet westward from the northwest corner of Locust and Chestnut streets and extending thence northward parallel with Locust street one hundred feet to a corner, thence westward parallel with Chestnut street twenty-eight feet to a corner, thence southward parallel with Locust street one hundred feet to a corner in the north line of Chestnut street, and thence eastward along the north line of Chestnut street twenty-eight feet to the place of beginning, and known as Nos. 229 and 231 Chestnut street.

And whereas, the said Sheriff did seize and take all the hereinbefore particularly described lots or pieces of land and premises, with the appurtenances, and did advertise the same for sale at public vendue, on the thirtieth day of November, in the year of our Lord one thousand eight hundred and ninety-four, at the Court House in the city of Camden, in said county of Camden, and in the State of New Jersey, at the hour of two o'clock in the afternoon of said day, by advertisements, signed by himself, and put up at five or more public places in the said county of Camden, one whereof was put up in the Fifth ward and one in the Sixth ward of the city of Camden, county of Camden, in said State, in which all of the said real estate is situate, at

least four weeks before the time appointed for selling the same, and did likewise cause the same to be published in the *West Jersey Press* and *Camden Daily Telegram*, two newspapers printed and published in said county of Camden, in which the said lands are situate, and circulating in the neighborhood of the said land, at least once a week for four weeks successively next preceding the time so as aforesaid appointed for selling the same, and being one newspaper, the *West Jersey Press*, printed and published at the city of Camden, said city being the county seat of said county of Camden, and at the time and place so as aforesaid appointed and advertised for selling the same, the said Sheriff did publicly adjourn the sale of the said lands and premises to the seventh day of December, 1894; at which last mentioned time and place so appointed the said Sheriff did further adjourn the said sale to the fourteenth day of December, 1894, and at which last mentioned time and place so appointed the said Sheriff did further adjourn the said sale to the twenty-first day of December, 1894, and at which time and place so last appointed the said Sheriff did expose the same to sale by public vendue, and William H. Tenbrook and Philip Tenbrook, trading, etc., as Tenbrook & Bro., bidding for tract No. 1, fifty dollars; for tract No. 2, twenty-five dollars, and for tract No. 3, twenty-five dollars, and for each of said tracts being the highest bidder, the same were, between the hours of twelve and five o'clock in the afternoon of the day last aforesaid, struck off and sold to the said William H. Tenbrook and Philip Tenbrook, trading, etc., as Tenbrook & Bro., for the sum of one hundred dollars, that is to say, fifty dollars for tract No. 1, twenty-five dollars for tract No. 2, and twenty-five dollars for tract No. 3.

Now this indenture witnesseth, that the said George Barrett, Sheriff as aforesaid of the said county of Camden, for and in consideration of the said sum of one hundred dollars to him in hand paid, by the said William H. Tenbrook

and Philip Tenbrook, trading, etc., as Tenbrook & Bro., at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath and by these presents doth grant, bargain, sell and convey unto the said William H. Tenbrook and Philip Tenbrook, trading, etc., as Tenbrook & Bro., their heirs and assigns, all the said lots or pieces of land and premises, with the appurtenances, to have and to hold unto the said William H. Tenbrook and Philip Tenbrook, trading, etc., as Tenbrook & Bro., their heirs and assigns, as fully as the said defendants were seized of, or entitled unto, at or before the judgment aforesaid, to the only proper use, benefit and behoof of the said William H. Tenbrook and Philip Tenbrook, trading, etc., as Tenbrook & Bro., their heirs and assigns forever.

And the said George Barrett, Sheriff as aforesaid of the said county of Camden, doth covenant and agree to and with the said William H. Tenbrook and Philip Tenbrook, trading, etc., as Tenbrook & Bro., their heirs and assigns, that the said George Barrett, Sheriff as aforesaid, hath not done or suffered to be done, any act or thing whereby the said premises, or any part thereof, are, or may be charged or encumbered in estate, title or otherwise.

In witness whereof the said George Barrett, Sheriff as aforesaid, hath hereunto set his hand and seal this fifth day of February, eighteen hundred and ninety-five.

Signed, sealed and delivered

in the presence of

GEORGE BARRETT,

SAM. P. JONES.

Sheriff, [SEAL.]

(The name "Couts" should be spelled "Curts.")

STATE OF NEW JERSEY, }
CAMDEN COUNTY. } ss.

Be it remembered, that on this fifth day of February in the year of our Lord one thousand eight hundred and ninety-five, before me, the subscriber, a Master in the Court

of Chancery in said State, personally appeared George Barrett, Sheriff of the county of Camden, in said State, who is, I am satisfied, the grantor named in the foregoing deed, and I having first made known unto him the contents thereof, he acknowledged that he signed, sealed and delivered the same, freely, as his voluntary act and deed, all of which is hereby certified.

SAM. P. JONES,
Master in Chancery.

STATE OF NEW JERSEY, }
CAMDEN COUNTY. } ss.

George Barrett, Sheriff of the said county of Camden, in the State of New Jersey, being duly sworn according to law, upon his oath saith, that the land and real estate described in this, the above deed, made by me to William H. Tenbrook and Philip Tenbrook, trading, etc., as Tenbrook & Bro., was by me sold by virtue of a good and subsisting execution, as is therein recited; that the money ordered to be made has not been to my knowledge or belief paid or satisfied; that the time and place of the said sale of the said land and real estate was by me duly advertised, as required by law, and that the same was cried off and sold to a bona fide purchaser for the best price that could be obtained.

GEORGE BARRETT.

Sworn and subscribed before me, the subscriber, a Master in the Court of Chancery of the State of New Jersey, on this fifth day of February, Anno Domini eighteen hundred and ninety-five, and I, having examined the deed above mentioned and written, do approve the same and order it to be recorded as a good and sufficient conveyance of the land and real estate therein described.

SAM. P. JONES,
Master in Chancery.

APPENDIX B TO BRIEF OF APPELLANTS.

EXHIBIT C 5.

In the name of God, amen, I, Adelia J. Groff, of the city and county of Camden, State of New Jersey, being of sound mind, memory and understanding (for which blessing I thank God) do make and publish this my last will and testament, in manner following, that is to say :

I give and bequeath unto my beloved daughter, Fannie J. Andrews, all of my household goods and furniture of every kind and description.

I also give and devise unto my said daughter, Fannie J. Andrews, the house and lot, No. 320 Mickle street, Camden, N. J., in which I now reside, to her, her heirs and assigns forever.

It is my wish and I desire that my said daughter, Fannie J. Andrews, and my husband, Nathan F. Groff, should reside in said dwelling, both having the use of my household goods whilst they both remain unmarried ; if my said daughter should marry she is not to deprive my said husband the use of the dwelling or of said household goods whilst he shall remain a widower ; if my said husband, Nathan F. Groff, shall marry, then said use of dwelling and household goods shall cease, and they become wholly and solely the property of my said daughter, Fannie J. Andrews.

In testimony whereof I, the said Adelia J. Groff, have to this my last will and testament, subscribed my name and affixed my seal this eighteenth day of October, one thousand eight hundred and seventy (1870.)

Signed, sealed, published and
declared by the said Adelia J.
Groff, to be her testament and ADELIA J. GROFF.
last will, in the presence of us [SEAL.]

ELIZABETH WILLIAMS,
ELIZABETH B. LETTS.

I, Adelia J. Groff, the within named testator, do hereby make and publish this codicil to my last will and testament this twenty-second day of October, A. D. 1870, in manner following, to wit :

Item. I do hereby make the following addition and change in my last will and testament. It is my will that in case my beloved daughter, Fannie J. Andrews, should die without lawful issue, then I give and bequeath the house and lot, No. 320 Mickle street, in which I now reside, and all the household furniture belonging to me, to my dear husband, Nathan J. Groff, his heirs and assigns forever.

In witness whereof I have hereunto set my hand and seal, the day and year first above written.

Signed, sealed, published and
declared by the said Adelia J.

Groff, as a codicil to her last will ADELIA J. GROFF,
and testament, in the presence of [SEAL.]

ELIZABETH B. LETTS,
ABBIE F. HORN.

STATE OF NEW JERSEY, }
CAMDEN COUNTY. } ss.

Elizabeth B. Letts, one of the subscribing witnesses to the foregoing codicil to the within last will and testament, being by me duly sworn, deposeth and saith that the said Adelia J. Groff, deceased, the testatrix therein named, sign and seal the same, and heard her publish, pronounce and declare the last above instrument to be a codicil to her last will and testament, and that at the doing thereof the said testatrix was of sound and disposing mind and memory so far as this deponent knows and as she verily believes ; and that Abbie F. Horn, the other witness whose name is thereunto subscribed, was present at the same time with this deponent and witnessed the signing and execution thereof, and signed her name as a witness to the said codicil at the same

time with this deponent, in the presence of the said testatrix, and in the presence of each other.

Sworn and subscribed at
Camden, the fourteenth day
of March, A. D. eighteen
hundred and seventy-two, ELIZABETH B. LETTS.
before me, Surrogate of the
county of Camden,

DAVID B. BROWN,
Surrogate.

STATE OF NEW JERSEY, }
• CAMDEN COUNTY. } ss.

Elizabeth B. Letts, one of the subscribing witnesses to the foregoing last will and testament, being by me duly sworn, did depose and say that the said Adelia J. Groff, deceased, the testatrix therein named, sign and seal the same, and did hear her publish, pronounce and declare the first above written instrument to be her last will and testament, and that at the doing thereof the said testatrix was of sound and disposing mind and memory, so far as this deponent knows and as she verily believes; and that Elizabeth Williams, whose name is subscribed to said will as a witness, was present at the same time with this deponent, and with her witnessed the signing and execution of the same, and signed her name as a witness thereto, at the same time with this deponent, at the request and in the presence of the said testatrix, and in the presence of each other.

Sworn and subscribed at
Camden, the fourteenth day
of March, A. D. eighteen ELIZABETH B. LETTS.
hundred and seventy-two,
before me, Surrogate of the
county of Camden,

DAVID B. BROWN,
Surrogate.

STATE OF NEW JERSEY, }
 CAMDEN COUNTY. } ss.

Fannie J. Andrews, administratrix with the will annexed, of Adelia J. Groff, deceased, being by me duly sworn, did depose and say that the foregoing writing contain the true last will and testament and codicil thereto of the said Adelia J. Groff, deceased, the testatrix therein named, so far as she knows and as she verily believes, that she will well and truly perform the same by paying first the just debts of the said deceased, and then any legacies in the said testament specified so far as the goods, chattels and credits of the said deceased can thereunto extend; that she will make and deliver to the Surrogate of the county of Camden, within the time required by law, a true and perfect inventory of all and singular the goods and chattels, rights and credits of the said deceased, that have or shall come to her knowledge or possession, or to the possession of any other person or persons for her use, and render a just and true account when thereunto lawfully required.

Sworn and subscribed at
 Camden, the fourteenth day
 of March, A. D., eighteen
 hundred and seventy-two,
 before me, Surrogate of
 Camden county,

FANNIE J. ANDREWS.

DAVID B. BROWN,
Surrogate.

STATE OF NEW JERSEY, }
 CAMDEN COUNTY. } ss.

To all to whom these presents shall come, greeting:

Whereas, Adelia J. Groff, late of the county of Camden, in the State of New Jersey, departed this life, having

made and executed a last will and testament and codicils, which has been duly proved, according to law, before the Surrogate of the county of Camden; and whereas, the said testatrix failed to appoint any executor thereof, therefore I, David B. Brown, Surrogate of the county of Camden, do hereby appoint Fannie J. Andrews administratrix of all and singular the goods, chattels and credits of said deceased, who is duly authorized to administer the same agreeably to said will and codicil.

In witness whereof, I have hereunto set my hand and seal of office, this fourteenth day of March, in the year of our Lord one
 [SEAL.] thousand eight hundred and seventy-two (1872.)

DAVID B. BROWN,

Surrogate.

STATE OF NEW JERSEY, }
 COUNTY OF CAMDEN. } ss.

I, George S. West, Surrogate of the county of Camden, do hereby certify that the foregoing is a true copy of the last will and testament and codicil of Adelia J. Groff, deceased, together with the proofs thereof, upon which letters of administration cum testamento annexo, were granted unto Fannie J. Andrews, a devisee named in said will, she first giving bond to the ordinary of the State of New Jersey in the sum of one thousand dollars, letters granted March 14th, A. D. 1872. I further certify that I have carefully examined the books and records of my office and find that there has never been any inventory and appraisement or an account filed and allowed.

Filed March 14th, 1896, and recorded in the Surrogate's office of the county of Camden, in Book D of Wills, page 426, etc.

In testimony whereof I have hereunto set my hand
and affixed my official seal, at Camden,
[SEAL.] this twenty-third day of April, A. D.
1896.

GEORGE S. WEST,
Surrogate.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	}	
WILLIAM H. TENBROOK, <i>et al.</i>		No. 82, November
trading, etc.,		Term, 1896.
Appellants,		
and		Argument and Brief
FANNIE J. KELLY, <i>et als</i> ,		of Respondents.
Respondents.	}	

ARGUMENT.

This is an appeal from a decree of Vice Chancellor Reed, dismissing the bill of complaint filed by appellants.

The appellants are merchants of Philadelphia and judgment creditors of Fannie J. Kelly, one of the respondents.

The respondents are Fannie J. Kelly, debtor of appellants, and wife of Samuel J. Kelly, deceased, and Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly and Leona S. Kelly,* children of Samuel J. Kelly and Fannie J. Kelly, and heirs-at-law of Samuel J. Kelly, deceased.

Appellants secured judgments against Fannie J. Kelly in June and July of 1893.

Samuel J. Kelly, husband of Fannie J. Kelly, died in 1886, after having attempted to make his last will and testament, wherein he devised all his real estate, the property

*and Florence G Van Sciver (nee Kelly)

in controversy in this litigation, to his wife, Fannie J. Kelly.

After a previous unsuccessful attempt (see Printed Book, p. 57, paragraph 6) the alleged will of Samuel J. Kelly was admitted to probate by the Surrogate in December, 1893. This vested the apparent title in Fannie J. Kelly, the debtor of appellants, and appellants thereupon made levies upon the real estate and sold the same at Sheriff's sale and bought in the same for one hundred dollars, although the property was unencumbered except for \$600 taxes due the city of Camden, and was worth ten thousand dollars. Fannie J. Kelly had other judgment creditors, who were present at the sale but who refused to bid for the properties because of the well known defect in Fannie J. Kelly's title, by reason of the will of Samuel J. Kelly being void and null at law. Appellants, after the sheriff had conveyed the properties to them, immediately took, or tried to take, possession of the premises. (See P. B., page 7, line 3.)

The heirs-at-law of Samuel J. Kelly immediately brought three several actions of ejectment against the appellants and the persons in possession of the properties in controversy.

Shortly after these actions of ejectment had been brought appellants filed a bill of complaint in chancery alleging that they had an equitable defence to the actions of ejectment, and praying for an injunction against them.

The bill of complaint attempts to secure one or more of three reliefs :

1. To have Samuel J. Kelly declared to be a trustee of Fannie J. Kelly, and the properties in question decreed to be her properties, and therefore subject to her debts.

2. To have Samuel J. Kelly declared to be a debtor of Fannie J. Kelly, and the properties charged with the indebtedness shown.

3 To have the inchoate right of dower of Fannie J. Kelly decreed to be a subject of execution, and to be decreed to have been sold under the judgments and sheriff's sale of the properties, and the purchasers at that sale to be decreed to be the owner of such dower right.

The bill of complaint alleges that Samuel J. Kelly died leaving the will set forth therein. This is denied in the answer, the answer being duly sworn to. The validity of a will cannot be tried in equity.

The bill also alleges that although the title to the property in controversy was in Samuel J. Kelly at the time of his death, that Fannie J. Kelly was the real beneficial owner thereof, and that Samuel J. Kelly was a trustee for her. The answer admits that the title was in Samuel J. Kelly but denies that Fannie J. Kelly was the real and beneficial owner thereof, and sets forth that the properties were bought and improved with the individual funds of Samuel J. Kelly, and that she had no interest in the same. There was no proof offered which disproves this allegation of the answer. And furthermore, the statute of frauds would intervene to prevent parol testimony being taken as evidence of a trust.

The trust which it is attempted to prove is not a resulting trust, inasmuch as it is not claimed by the appellants, nor is it attempted to be proven by the evidence that Fannie J. Kelly advanced any money whatsoever in the *character* of a *purchaser*. The only evidence which could be tortured into having any bearing upon a trust is the very meagre testimony which was introduced in attempting to show that Fannie J. Kelly had *loaned* money to her husband. Admitting, for argument, that the evidence thus introduced had sufficient probative force to prove the allegation that money was so loaned, it would simply make Mr. Kelly a debtor to his wife. No evidence of what amount, if

any, Mrs. Kelly advanced is offered. The heirs-at-law occupy the same legal position that Samuel J. Kelly did before his death. No acknowledgment in writing of a trust has been introduced, and where the person who is alleged to be the *cestui que trust* herself denies the existence of a trust, in the absence of some writing showing a trust, the mere statement made by the alleged *cestui que trust* many years after the period when such trust was alleged to have been created, that the alleged *cestui que trust* had advanced to the alleged trustee some moneys, is not sufficient to establish a trust.

Appellants have produced no proof whatever that Samuel J. Kelly was a trustee for Fannie J. Kelly. What evidence was attempted to be introduced on this point was objected to, and at best is but hearsay. It consisted entirely of the statement that Fannie J. Kelly told one or more persons, *after the probate of the alleged will*, that she was the owner of the properties in question. This is merely consistent with the probate of the will. This is clearly not a declaration against interest. A declaration against interest must be an acknowledgment detrimental to the interests of the speaker *at the time the acknowledgment was made*. If at the time the declaration was made it was *in favor* of the interests of the speaker, no matter in what light subsequent changes may place it, it can never become proper evidence. The reported cases all show that where admissions of this kind have been admitted as evidence that the admission at the *time it was made* was against the interest of the speaker. If a declaration in favor of the person making it could by subsequent change of circumstances become admissible as a declaration against interest, because at the time of its offer as evidence it had happened to become a declaration against the interest of the speaker, such a principal would be a prolific source of schemes to defraud. However, no admission would bind the heirs at law.

The Vice Chancellor, however, admitted evidence of

these statements and admissions by Fannie J. Kelly "on the ground that the predecessor in title stands upon the same footing as the party himself to the suit, if made before title passed. Anything this lady said before she signed the release of her dower is good against her, but it cannot bind the other parties except so far as the dower interest is concerned." That is to say, that this testimony was not admitted as any evidence of a trust, inasmuch as whatever dower right Fannie J. Kelly had, existed, independent of any trust and by virtue of a legal marriage to Samuel J. Kelly, and any disposition of her dower right would be binding upon the heirs without any evidence being introduced at all. But whatever rights appellants would have in the dower right would be a legal interest and if reachable at all is so by legal process and not by equitable proceedings. So that however we view its admission, it is irrelevant. It is a question how far Mrs. Kelly can be deemed to be a "predecessor in title," inasmuch as these equity proceedings are based upon the assumption that the common law defence is nil. And this being so, it is a practical admission that the will (under which Mrs. Kelly takes title) is null and void, and therefore she had no title. And if it is to be considered, for the purposes of the equity proceedings that she had no title, how can she be deemed to be a predecessor in title? And again, these admissions can not be in disparagement of title, because an admission in disparagement of title must be made by a person in possession, and Mrs. Kelly never had possession of these properties as owner. Whose predecessor in title is Mrs. Kelly? Certainly she is not the predecessor of the heirs at law, for they claim adversely to her title. At most she is the predecessor of the appellants, who claim through Mrs. Kelly's title. An admission in disparagement of title binds only her successors in title, and does not bind those who claim through another source. There is not the faintest testimony that is, or could be, binding upon the heirs-at-law.

The bill of complaint further alleges that Fannie J. Kelly stated that the properties were at the death of Samuel J. Kelly, and had been for a long time before, her individual properties. The answer denies that Fannie J. Kelly ever made any such statement, and alleges the truth to be that after the alleged will was admitted to probate, that she frequently stated that the properties were hers, as she believed them to be. This statement was but consistent with the apparent title with which the will invested her, and can not be stretched to refer to the title to the properties previous to the probate of the will. The evidence on this point amounts to nothing and consists of the following :

Arthur B. Pratt, sworn on part of complainants.

Q. What did Mrs. Kelly tell you about this property, Mr. Pratt, before you bought it ?

Mr. Hall. Objected to on the ground that it is not evidence.

A. Why, she told me the property was hers, left to her in the will, her property.

See Printed Book, p. 85, line 3, etc.

Wm. H. Tenbrook, sworn. (The complainant.)

A. About this particular property in dispute—the only—there were several conversations about this property—the first one was after the will was put on probate ; she came over there to my place of business and she produced a certified copy of the will and she said, “ now I will soon be able to pay you and all my creditors all I owe.” Well, now, I am glad to hear that, because we need the money very much. “ Yes,” she said, “ I have got the will, I have found the will and put it on record and all the property is mine.”

See Printed Book, p. 97, line 10.

Same witness.

I read the will all over, and I saw that it was put on probate several years after her husband's death, and I knew the only one that could object would be the children, and I said, "don't your children object to the will?" and she says, "no, because they know the property was virtually mine," or words to that effect.

The only significant words in this answer are, "they know the property was virtually mine." These words are logically interpreted in reference to the attempt made by Samuel J. Kelly to devise to Fannie J. Kelly the properties in question; interpreted with reference to the moral right (if any) which the abortive will gave Mrs. Kelly. The will was signed by Samuel J. Kelly prior to his death in 1886, and it remained in Mrs. Kelly's possession until December, 1893, and during that time she may have assumed that the properties were morally hers, and after the probate of the will that they were legally hers, and in consequence of this that during all that while that "they were virtually hers."

(See P. B., p. 98, line 8, etc.)

Herbert A. Drake. Sworn on part of complainants.

"Several times during the interval between the levy and the advertisement of the property for sale, Mrs. Kelly called upon me as the attorney or solicitor for Tenbrook & Brother, and stated to me that it made no difference whether the will was effectual or not, that the property belonged to her anyhow, that she had advanced money to her husband to purchase it with, and to improve it, or words to that effect."

(P. Book, p. 100, line 6.)

Not one word about Samuel J. Kelly being a trustee. A mere statement that Mrs. Kelly had advanced money to

Mr. Kelly, and because of this advance of money she claims to be the owner. The pleadings show that Samuel J. Kelly and Fannie J. Kelly were married about 1871. That he died in 1886, and that the judgments were obtained long subsequent to 1886. No matter how much money Mrs. Kelly advanced to her husband, so that it was not done to defraud her creditors, it can be attacked by no one, not even by herself after these many years, and a fortiori, not by one who became a creditor long subsequent. Should Mrs. Kelly herself attempt to secure any relief after the great lapse of time since the making of the loan, by coming into the Court of Chancery and attempting to have a trust established, the court would promptly dismiss her complaint because of laches. Certainly those who claim under her are entitled to no greater rights or relief.

The bill also alleges that Fannie J. Kelly had large and ample means of her own. This is denied by the answer, and the proof shows only thirteen hundred dollars as having been paid to her about 1872 from her mother's estate, and that she was the owner of a small property on Mickle street, Camden.

The answer is under oath and denies all those material parts of appellants' allegations.

As to the second relief sought, to have Samuel J. Kelly's properties charged with the amount advanced by Mrs. Kelly, the proof of indebtedness consists of the evidence of S. S. E. Cowperthwaite, who testifies that he paid in May, 1872, as executor, etc., to Mrs. Fannie J. Kelly, \$1,262. Secondly, that of counsel for appellants, Mr. Drake, that Mrs. Kelly told him that she had "advanced" money to Mr. Kelly; thirdly, that of Emily E. Henry, who testified that Mrs. Kelly told her that she (Mrs. Kelly) had "given" Mr. Kelly bonds and securities in his business.

The word "advanced" used by the witness, Mr. Drake, is rather indefinite and can be interpreted to mean "given" as well as not. The only other witness testifies that Mrs. Kelly told her she had "given" Mr. Kelly certain things. All these admissions were made after the will had been probated. This testimony is merely hearsay and certainly can not bind the heirs-at-law, however it might bind Mrs. Kelly. But if there ever had been any indebtedness in favor of Mrs. Kelly it has long since been outlawed, and appellants certainly can take nothing by suit which the creditor herself could not recover. If Mrs. Kelly had given money to her husband, in the absence of a fraud upon her creditors, the gift would be perfectly valid. There is no fraud shown. The creditors who now attack the gift, if any, became creditors long afterwards.

As to the third relief sought, that against the inchoate right of dower which Mrs. Kelly had.

The sole question which is at all involved in this equity proceeding is, can a mere right of dower, before being set apart, be sold under a common law judgment and whether or not the judgment sale passed to the purchasers at the sale, the dower interest of the defendant, Fannie J. Kelly? A mere right of dower is not such an estate as can be conveyed by judgment sale. Nor can it be conveyed by the widow, but it may be released by her to the heir. It is a purely legal estate, if it rises to the dignity of an estate, and reachable at law.

On the other hand, the evidence submitted, i. e., the deeds for the property offered in evidence show that some of the properties were purchased before Samuel J. Kelly married; that he carried on a business founded a half century before his death, and which was a profitable, successful business during the time he carried it on. From this it is evident that he had the individual means to purchase the

properties which were in his name at the time of his death.

The legal title of Samuel J. Kelly to the properties in question is fully established and admitted. To disprove his title it requires full and positive disproof. No quantity of evidence which falls short of fully disproving his title will be effective. Mere preponderance of evidence is not enough.

BRIEF.

The appellants applied to the Court of Chancery for relief by way of equitable defence to three several actions of ejectment brought by the heirs-at-law of Samuel J. Kelly against the appellants and the tenants in possession.

Samuel J. Kelly held title to the three several tracts of land in controversy, at the time of his death. He attempted to devise the same by will to his wife, Fannie J. Kelly.

The heirs-at-law claim that the paper purporting to be the will of Samuel J. Kelly is not a legal, valid will, and therefore bring said actions of ejectment.

Appellants are creditors of Fannie J. Kelly, and upon the probate of the alleged will they levied upon the properties passed by the will to Fannie J. Kelly, and sold the same at sheriff's sale. Appellants are therefore proper defendants in ejectment.

Appellants by their bill of complaint seek to impose upon the properties in controversy a resulting trust in favor of Fannie J. Kelly as the *cestui que trust*, by reason of the purchase money for said properties having been furnished by Fannie J. Kelly.

There is absolutely no evidence whatever that Fannie J. Kelly furnished the purchase money.

If the court should admit as evidence the admissions of Fannie J. Kelly there would then be merely slight evidence (if any) that Fannie J. Kelly either gave, loaned or ad-

vanced an indefinite sum of money, and it is not clear which she did, to her husband. However, these admission should not be admitted as evidence, because they are not admission against interest, but on the contrary are admission in favor of the party making them.

A declaration against interest is received upon the ground of the "extreme improbability of its falsehood. The regard which men usually pay to their own interest is deemed sufficient security both that the declarations were not made under any mistake, or want of information, etc."

Greenleaf on Ev., vol. I, sec. 148.

Neither should they be admitted in disparagement of title. Firstly, because they are not in disparagement of title, but in favor of title. And secondly, because they are not made by a party in possession. Declarations in disparagement of title must be made by a person in possession, and there is no evidence that Fannie J. Kelly ever had possession.

Greenleaf on Ev., vol. I, sec. 109 ;

Horner vs. Stillwell, 6 Vr. 310 ;

Miller vs. Feenane, 21 Vr. 33.

Neither should these admissions be admitted as an admission by a "predecessor in title," because Fannie J. Kelly was not the predecessor in title of the heirs-at-law, for the heirs claim adversely to her chain of title. And secondly, for the purposes of this suit, what rights Fannie J. Kelly may have exist independent of any will or devise, and consequently whatever title she may have received by the devise is to be entirely thrown out of the case, and therefore it is to be considered that she never held any title. The validity of the will can not be tried in equity.

Detwiller v. Hartman, 10 Stew. 355.

Trustees v. Wilkinson, 9 Stew. 141.

Trustees v. Wilkinson, 11 Stew. 514.

Boylan ads Meeker, 4 Dut. 312.

Consequently any evidence relating to the existence of a will is inadmissible, and likewise is all derivative evidence, such as sheriff's deed, etc. The derivative title which appellants have not being admissible in equity, Fannie J. Kelly can not be deemed to be any one's predecessor, for whose predecessor would she be if not appellants' ?

But granting that these admission were properly introduced in evidence, what effect would they have? The admissions merely have some slight probative force to show that Fannie J. Kelly loaned some money, amount not shown, to her husband, Samuel J. Kelly. This would not make him a trustee, but merely a creditor.

No trust will result unless the person advance the money in the character of a *purchaser*; for if A discharge the purchase money by way of loan to B, in whose name the conveyance is taken, no trust will result in favor of A, who is merely a creditor of B.

Lewin on Trusts, vol. I, star page 163.

"If the money paid for the twenty-eighth street lot was not the money of the mother, or if John (the holder of the title) received it as a loan or an advancement from his mother, there was no resulting trust. * * *" Did the person who seeks to prove the trust have a right to the conveyance of the property in controversy, at the time it was purchased, is the pivotal question.

Midmer v. Midmer's Ex. 11, C. E. Gr. (26 Eq.) 302.

Nothing short of certain, definite, reliable, and convincing proof will justify the court in divesting one man of title to lands, evinced by a regular deed, and putting it in another.

Midmer v. Midmer's Ex. 11, C. E. Gr. 302.

"Independent of the statute of frauds, parol evidence to raise an express trust against the terms of a written instrument, is received with great caution, and must be clear

to warrant a court in establishing a trust. *Sayre vs. Fredericks*, 1 C. E. Gr. 205. In cases within the statute of frauds, when the trust is sought to be raised as a resulting trust from the payment of the purchase money, the proof must be very clear of the payment of the purchase money by the person in whose favor a trust by implication of law is sought to be established. The fact must be distinctly established by satisfactory evidence.

Cutler v. Tuttle, 4 C. E. Gr. (19 Eq.), 560. (Ct. Errors and Appeals.)

But, however this may bind Fannie J. Kelly, it would not be binding upon the heirs, because there is no privity of estate between Fannie J. Kelly and them.

There must be privity of some kind between parties to have the admissions of one bind the other.

Greenleaf on Ev., vol. I, sec. 174.

The attempt to charge the lands with a debt of Fannie J. Kelly's on the slight proof offered hardly needs discussion. A gift by the wife to the husband at a time when she was not indebted, and in the entire absence of fraud of any kind, is perfectly valid. It is not admitted, however, that Fannie J. Kelly did make any gift to her husband, and it is expressly denied in her answer, under oath. The testimony on this point is subject to the same objections as the admission as to the trust. They are hearsay, not declarations against interest, and would not bind the heirs-at-law. To obtain equitable relief creditors must prove fraud and show the application of a definite sum of their creditors' money.

Of the effect of a failure upon the part of appellants to prove a certain, definite, exact amount of money to have been loaned or advanced by Mrs. Fannie J. Kelly to Samuel J. Kelly.

The first and second reliefs sought by appellants are to establish resulting trusts; in the first instance, a trust for

the entire estate, on the ground that Mrs. Kelly furnished the purchase money in the character of a purchaser ; in the second instance, for a part of the estate, to the extent of the moneys advanced or loaned.

As to either, fraud would have to be proved, after which proof of a definite amount of money being used or advanced would have to be made. Suppose the court desired to charge these properties with any moneys loaned or advanced by Mrs. Kelly to her husband, in the event of a fraud upon creditors being determined, for what amount would they be chargeable? No amount whatever is shown to have been so advanced, nor is any definite amount even claimed to have been so advanced. The court cannot determine without evidence what amount was advanced by Mrs. Kelly. The court cannot make a decree on a mere guess.

In the absence of positive proof as to the exact amount of a married woman's funds used in the purchase of property in the name of her husband, it is a presumption of law that the whole amount used for the purchase of the property belonged to the husband. This is the principle underlying all the decisions concerning fraudulent conveyances between husband and wife.

Horton vs. Dewey, 53 Wis., 413.

Seitz vs. Mitchell, 4 Otto (U. S.) 580, 582.

Cramer vs. Reford, 17 N. J. Eq. (2 C. E. Gr.) 367.

Glann vs. Younglove, 27 Barb., N. Y., 480.

To create a resulting trust it would be necessary to show that the money paid by her was paid as a definite aliquot part of the consideration of the purchase and then the trust will arise accordingly ; but unless the payment advanced be of a definite part of the consideration money, as such no trust will arise by implication of law.

White vs. Carpenter, 2 Paige (N. Y.) 218.

Sayre vs. Townsend, 15 Wend. (N. Y.) 647.

Freeman vs. Kelly, 1 Hoffman (N. Y.) 90.

Green vs. Drummond, 31 Maryland, 71.

Baker vs. Vining, 30 Me., 121.

Cutler vs. Tuttle, 4 C. E. Gr., 549.

It is said "no case has been found where a resulting trust has been known to arise where the amount is unknown and no satisfactory evidence is offered of the portion which each paid."

Baker vs. Vining, 30 Me., 121.

Quidort's, etc., vs. Pergeaux, 3 C. E. Gr., 472.

The remaining relief sought is to secure what dower interest Fannie J. Kelly had in the lands of her husband.

A dower right is a purely legal right, and if reachable at all, is so by proceedings at law. No dower was ever set apart for the widow, and it was released by her to the heirs-at-law. There is no equitable defence to the ejectment proceedings in this.

"Until dower is assigned the widow's right in the land of her husband is a mere chose in action. She has no seisin in law, nor can she exercise any act of ownership over the land. Her right cannot be levied upon and sold under execution, nor is it assignable at law."

Pollitt vs. Kerr, 4 Dick. 65, 67.

Wade vs. Miller, 3 Vr. (32 N. J. L.) 296, 306.

The case of Wade vs. Miller, 3 Vr. 296, cited by appellants' counsel in favor of the right to seize and sell the dower right, does not apply to the case at issue, inasmuch as that case considers a merger of dower interest when the legal title was vested in the owner of the dower right. And that very question, whether or not Fannie J. Kelly has a legal title, is the very question in issue in the ejectment proceedings and can not be either affirmed nor denied in equity proceedings. Whatever case appellants have must be outside of these lines.

The defendants offered no evidence, counsel not deeming it at all necessary. The mere fact that appellants offered more evidence than the respondents has no effect, because a legal right once admitted must be fully disproved. Nothing short of full disproof will be effective.

Starkie on Ev. (10th Am^{ed} ed.) star page 817.

The above principle applies to this issue, inasmuch as the equitable defence goes upon the ground that the legal title is against the complainants in equity and is, therefore, fully established.

The decree below should be affirmed.

Respectfully submitted,

THOMAS B. HALL,

Of Counsel with Respondents.

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM H. TENBROOK AND
PHILIP TENBROOK, PARTNERS,
TRADING AS TENBROOK &
BRO.,

Appellants,

and

FANNIE J. KELLY, WALTER A.
KELLY, CLARENCE F. KELLY,
LEONA S. KELLY AND FLOR-
ENCE G. VAN SCIVER AND
ALBERT E. KELLY,

Defendants. }

10

PETITION OF
APPEAL.

FILED OCTOBER 20
20, 1896.

30

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

The petition of William H. Tenbrook and Philip
Tenbrook, partners, trading as Tenbrook & Bro., the

appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery, by His Honor Alexander T. McGill, Chancellor of New Jersey, bearing date the day of August, in the year eighteen hundred and ninety-six, wherein your petitioners were complainants and the said appellees were defendants, in this respect, to wit, that the said

10 decree adjudges that the bill of complaint filed by your petitioners in said Court of Chancery be dismissed with costs, thus denying to your petitioners the relief sought in and by their said bill. And your petitioners humbly appeal from the said decree, and from every part thereof, upon the ground that the same is erroneous, for that the said decree should have granted to your petitioners the relief sought by the prayer of the said bill of complaint, and should have, among other things, enjoined and restrained

20 the said Walter A. Kelly, Clarence F. Kelly, Leona S. Kelly, Florence G. Van Sciver and Albert E. Kelly from further proceedings in a certain suit of ejectment, in which they are plaintiffs and your petitioners and others are defendants, for the possession of Nos. 1024, 1026, 1028, 1030 and 1032 South Fourth street, in Camden, New Jersey, and from bringing said suit on to trial or otherwise proceeding therein, and from bringing on to trial, proceeding in, or prosecuting two certain other actions of ejectment brought by the same

30 plaintiffs against your petitioners and others as defendants, for the possession of Nos. 819, 821, 823 and 825 Dauphin street, in said Camden, in one action, and Nos. 229 and 231 Chestnut street, in said Camden, in the other action, which three actions are brought in the Supreme Court and the venue thereof laid in Camden county; and also for that the said decree should have granted to your petitioners the relief sought by

the prayer contained in an amendment to the said bill of complaint, incorporated therein by an order to amend the said bill, made on the thirtieth day of March, A. D. 1896, as paragraph 29 of said bill, which prayer is to the effect that a certain deed of release made by the said Fannie J. Kelly to the said Walter A. Kelly, Clarence F. Kelly, Leona S. Kelly, Florence G. Van Sciver and Albert E. Kelly, dated the ninth day of July, A. D. 1895, and recorded in the office of the Register of Deeds in and for Camden county, in Book 208 of Deeds, page 10 36, &c., by which she releases to them all manner of dower and right or action of dower, among other things, in the lands above mentioned, may be decreed null and void and of none effect, so far as your petitioners are concerned.

Your petitioners therefore pray that the said decree of the said Chancellor may be to the extent and in the particulars aforesaid reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem ²⁰ meet.

H. A. Drake

Solicitor for Appellant.

H. A. Drake

Of Counsel with Appellant.

COURT OF ERRORS AND APPEALS.

	Between	}	
	WILLIAM H. TENBROOK AND		
	PHILIP TENBROOK, PARTNERS,		
	TRADING AS TENBROOK &		
10	BROTHER,		
	Appellants,		ON APPEAL.
	and		ANSWER.
	FANNIE J. KELLY, WALTER A.		FILED OCTOBER
	KELLY, CLARENCE F. KELLY,		28, 1896.
20	LEONA S. KELLY AND FLOR-		
	ENCE G. VAN SCIVER AND		
	ALBERT E. KELLY,		
	Defendants. }		

The answer of the above named respondents to the petition of appeal of the above named appellants.

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are
 30 contained to be true, for answer thereto, nevertheless, say and admit that a decree was, on the day of August, eighteen hundred and ninety-six, made and entered in the Court of Chancery, in the cause for the purpose mentioned in the said petition, as is therein stated; but as to the form and substance thereof, these respondents pray to refer thereto when the same shall be produced.

And these respondents are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

Signed,

THOMAS B. HALL,

Solicitor for and of Counsel with Respondents.

IO

To the Honorable Alexander T. McGill, Chancellor of the State of New Jersey :

Humbly complaining sheweth unto your Honor, your orators, Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly and Leona S. Kelly, by Edwin C. Hall, their next friend, of the city and county of Camden and State of New Jersey, and your oratrix, Florence G. Van Sciver, of the same place; that for a number of years prior to the twelfth day of December, A. D. 1886, one Samuel J. Kelly was the owner in fee simple of all the following described lots of land, situated in the city and county of Camden and State of New Jersey, and bounded as follows: No. 1. Beginning at the southeast corner of Mount Vernon and Fourth streets; thence southward by the east line of Fourth street sixty-four feet; thence eastward parallel with the south line of Mount Vernon street sixty feet to a corner; thence northward parallel with the east line of Fourth street sixty-four feet to the south line of Mount Vernon street; thence westward by the south line of Mount Vernon street sixty feet to the place of beginning, and known as Nos. 1024, 1026, 1028, 1030 and 1032 South Fourth street.

Tract No. 2. Beginning at a point in the west line of Dauphin street, at the distance of one hundred and thirty-four feet south from the south line of Pine street,

and corner to a three feet wide alley, and runs thence south along said west line of Dauphin street forty-eight feet, more or less, in front or width, and extending of that width between parallel lines westward eighty-two feet, more or less, in length or depth, and known as Nos. 819, 821, 823 and 825 Dauphin street. Together with the free use and privilege in common of said alley.

Tract No. 3. Beginning at a point in the north side of Chestnut street, at the distance of one hundred and
 10 forty feet westward from the northwest corner of Locust and Chestnut streets, and extending thence northward parallel with Locust street one hundred feet to a corner; thence eastward parallel with Chestnut street twenty-eight feet to a corner; thence southward parallel with Locust street one hundred feet to a corner in the north line of Chestnut street, and thence eastward along the north line of Chestnut street twenty-eight feet to the place of beginning, and known as Nos. 229 and 231 Chestnut street.

20 And your orators further show, that on the said twelfth day of December, A. D. 1886, the said Samuel J. Kelly died intestate, and that upon this day the aforesaid lots of land descended to your orators in fee simple; that since the death of the said Samuel J. Kelly, his wife, Frances J. Kelly, has had the use and benefit of the said properties until a recent date, when they were sold for the debts of the said Frances J. Kelly; that upon the seventh day of December, A. D. 1893, a paper purporting to be the last will and testa-
 30 ment of the said Samuel J. Kelly was admitted to probate by the Surrogate of the county of Camden; that after the admission of said paper purporting to be said will, which pretended will devised all the estate of said Samuel J. Kelly to his wife, the said Frances J. Kelly, the creditors of the said Frances J. Kelly advised the aforesaid properties for sale; said sale was advertised to

take place on the thirtieth day of November, 1894, but was postponed from week to week until the twenty-first day of December, 1894, when the said properties were sold to William H. Tenbrook and Philip Tenbrook, trading, &c., as Tenbrook & Bro., for the sum of one hundred dollars, although said properties are worth ten thousand dollars and are clear of all incumbrances, except city taxes amounting to about six hundred dollars.

And your orators further show, that Frank J. Burr¹⁰ is the agent of the estate of Samuel J. Kelly, and for many years rented and had charge of the aforesaid properties to the advantage of the estate, but that shortly after the sale of said properties to Tenbrook & Brother, one Walter Humphreys, acting as the agent of Tenbrook & Brother, called upon the respective tenants of said properties, and after showing said tenants the deed for said properties induced many of the tenants to attorn to him as landlord, and by reason of this action upon the part of William Tenbrook and Philip Tenbrook, and their agents, they have been²⁰ collecting the rents for many of these properties and otherwise interfering with the tenants thereof; that said Frank J. Burr has, under the advice of counsel, retained or attempted to retain charge of the aforesaid properties and has rented many of them to various tenants, immediately upon hearing of which the said Walter A. Humphreys visits said tenants and by threats, showing them said deed of sale and other means, either induces the tenants to pay the rent to him or else so annoys or³⁰ frightens said tenants that they immediately vacate the premises, or else refuse to pay rent to anyone; that this continual harrassing and dispute as to whom to pay the rent is destroying the value of the properties and causes the loss of a great many dollars of rent; that said Walter A. Humphreys is so persistent in trying to

secure possession of said premises that he offers to rent these properties for much less than the regular rental and less than the properties should be rented for, and by means of other actions and doings of the said Walter A. Humphreys the said properties are being destroyed and the income thereof lost.

And your orators further show, that said paper purporting to be the will of Samuel J. Kelly is not such will, and that actions of ejectment have recently been
 10 brought by your orators against the tenants of said properties and the said William H. Tenbrook and Philip Tenbrook, trading, &c., as Tenbrook & Brother, to recover title to said properties, the real purpose being to set aside, in effect, the probating of said pretended will, said will being defective in that it was not properly executed.

And your orators further show, that there are judgments against said Frances J. Kelly amounting to several thousand dollars, upon some of which execu-
 20 tions were issued and levies made upon these properties, and that at the sale thereof none of these judgment creditors would bid upon the properties for the reasons that Tenbrook & Bro. had prior executions, and because they all knew that the said Frances J. Kelly had no real title to the same, the said William H. Tenbrook and Philip Tenbrook having knowledge of this fact as fully as the others, which facts account for the small sum bid for the properties.

And your orators further show, that the attorney of
 30 said William H. Tenbrook and Philip Tenbrook went to the City Counsel of the city of Camden and requested him to advertise and sell these properties for taxes, and complying with said request the said properties were advertised to be sold for taxes upon the sixth and twentieth days of June, instant, respectively; that the sale to take place upon the sixth day of June did not take

place, but was postponed for two weeks, at the request of your orators' attorney.

And your orators further show, that they did not have notice of the sale of said properties for taxes until within about ten days prior to the sixth day of June, and that they were unable to raise the six hundred and odd dollars necessary to pay these taxes at this time.

And your orators further show, that owing to the disputed title to these properties and the infancy of the owners thereof, it is impossible to secure advances of money upon them for the purpose of paying off the taxes. 10

All of which actions, doings and pretences of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orators in the premises.

In tender consideration whereof, and forasmuch as your orators are without adequate remedy in the premises at and by the strict rules of the common law, and can only obtain relief in this Honorable Court, where matters of this kind are properly cognizable and relievable; 20

To the end, therefore, that the said defendants may, without oath, to the best and utmost of their respective knowledge, remembrance, information and belief, full, true and perfect answers make to all and singular the matters aforesaid, as fully and particularly as if the same were here repeated, and they and every of them distinctly interrogated thereto; and that a receiver may be appointed to collect the rents of the said premises now due, or hereafter to become due, and to have sole charge of the said properties with such powers as may be necessary to properly care for the same; and that the said William H. Tenbrook and Philip Tenbrook, trading, &c., as Tenbrook & Bro., or either of them, and the said Walter A. Humphreys, and the attorneys, 30

agents or employes of the said William H. Tenbrook and Philip Tenbrook, be enjoined and restrained from further collecting said rents or otherwise interfering with the management of said premises; and that the said tenants, to wit, Benjamin F. Pierce, Antoni Nossardi, James McParlen, Joseph Knockbarr, Jerry W. Everingham, Henry Smith, Berthold Decker, Mary Lanning, Minnie Warner, be enjoined

and restrained from paying over to the said William H. ¹⁰ Tenbrook and Philip Tenbrook, Walter A. Humphreys or any person other than the said receiver, any of the rents and profits of the said premises, until the further order of this Court; and that the said City Counsel, J. Willard Morgan, be enjoined and restrained from selling the aforesaid premises for taxes until the further order of this Court; and that your orators may have such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

²⁰ May it please your honor, the premises considered, to grant unto your orators, not only the State's writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said William H. Tenbrook and Philip Tenbrook, trading, &c., as Tenbrook & Bro., enjoining and restraining them and each of them, and their attorneys, agents or employes, from collecting the rents of, or otherwise interfering with the management of the said premises, and directed to the said Walter A. Humphreys, enjoining and restraining ³⁰ him from collecting the rents, or otherwise interfering with the management of the said premises, and directed to the said tenants, Benjamin F. Pierce, Antoni Nossardi, James McParlen and Joseph Knockbarr, restraining them from paying over to any person other than the receiver, any of the rents and profits of the said premises, and directed to the said J. Willard Morgan, City

Counsel, enjoining and restraining him from selling the said premises for taxes, but also the State's writ of subpoena, issuing out of and under the seal of this honorable court, to be directed to the said William H. Tenbrook and Philip Tenbrook, trading, &c., as Tenbrook & Bro., Walter Humphreys, Benjamin F. Pierce, Antoni Nossardi, James McParlen and Joseph Knockbarr, Jerry W. Everingham, Henry Smith, Berthold Decker, Mary Lanning, Minnie Walker, J. Willard Morgan, commanding them and each of them, by a certain day, and under a certain penalty, therein to be expressed, to be and appear before your honor, in this honorable court, then and there to answer all and singular the said premises, and to stand to, abide by, and perform such order and decree therein as to your honor shall seem meet, and shall be agreeable to equity and good conscience. And your orators, as in duty bound, will ever pray, &c.

THOMAS B. HALL,
Solicitor for and of Counsel with Complainants.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN. } ss.

FRANK J. BURR, of full age, being duly sworn according to law, upon his oath says, that he is the Frank J. Burr mentioned in the foregoing bill of complaint; that he is and has been for years the agent for the estate of Samuel J. Kelly and has had charge of and rented the properties described in the foregoing bill of complaint; that shortly after said premises were sold one Walter Humphreys, acting as agent for Tenbrook & Bro., called upon the respective tenants of said premises and after showing them a deed for said premises induced many of them to attorn to him as agent and landlord, and that said Humphreys has been collecting rent for some of said premises; that deponent

has been endeavoring to retain possession of said premises and has rented some of them and is collecting the rents thereof; that the said Humphreys has called upon his tenants and by means of threats and otherwise either induces the tenants of the premises to pay the rent to said Humphreys or else so annoys and frightens said tenants that they vacate the premises; that this continual harrassing and dispute as to whom to pay the rent is destroying the value of the properties, causes the loss of a great many dollars of rent, and if continued in will gradually depreciate the value of said premises; that said Humphreys is so persistent to rent these premises that he is offering to rent them at a rental much less than they are worth; that Humphreys' general actions and conduct is such that it drives the tenants out of the properties and creates general dissatisfaction among them.

FRANK J. BURR.

20 Sworn and subscribed to before me this tenth day of June, A. D. 1895.

THOMAS J. PETERSON,
Notary Public.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN. } ss.

FRANCES J. KELLY, being duly sworn according to law, upon her oath says that Samuel J. Kelly was the owner in fee simple of the land and premises described in the foregoing bill of complaint; that he died on the twelfth day of December, A. D. 1886; that since the death of the said Samuel J. Kelly, deponent has had the use and benefits of the said premises until the same were sold at Sheriff's sale for the debts of deponent; that a paper purporting to be the will of the said Samuel J. Kelly was probated in December, 1893, by the Surrogate of Camden county; that until the month of September, 1893, or thereabouts, the said will had but one

subscribing witness thereto, and that the other name of, a person who undertook to be a subscribing witness at the time of the execution of the will was at that time added to the paper by the advice of legal counsel; that said will devised the entire estate of the said Samuel J. Kelly to deponent; deponent further says that there are judgments to the amount of several thousand dollars against her; that the real owners of the said premises, except one, are infants and unable to raise any money at this time. 10

FANNIE J. KELLY.

Sworn and subscribed to before me, this tenth day of June, A. D. 1895.

HENRY I. BUDD, JR.,
M. C. C. of N. J.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN, } ss.

THOMAS B. HALL, of full age, being duly sworn according to law, upon his oath says, that the premises 20 mentioned in the foregoing bill of complaint are advertised for sale for taxes by J. Willard Morgan, City Counsel of the city of Camden; that the sale has been postponed until the twentieth day of June, 1895, at deponent's request; that said City Counsel informed him that the attorney for Tenbrook & Bro. requested him to advertise and sell said premises for the taxes due upon them; that deponent believes that complainants did not receive notice of said tax sale more than ten days prior to the date fixed therefor, and not personally even then, nor do they all still know of the same. 30

THOMAS B. HALL.

Sworn and subscribed to before me, this tenth day of June, A. D. 1895.

J. H. SUBERS,
Notary Public.

[L. s.]

IN CHANCERY OF NEW JERSEY.

	Between	}	
	WALTER A. KELLY AND OTHERS,		
	BY EDWIN C. HALL, THEIR		
	NEXT FRIEND, AND FLORENCE		
10	G. VAN SCIVER,		
	Complainants,	}	ON BILL, ETC.
	and		ANSWER.
	WILLIAM H. TENBROOK AND		
	PHILIP TENBROOK, TRADING		
	AS TENBROOK & BROTHER,		
20	AND OTHERS,	}	
	Defendants.		

The joint and several answer of William H. Tenbrook and Philip Tenbrook, trading as Tenbrook and Brother, two of the defendants in this cause, to the bill of complaint of Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly and Leona S. Kelly, by Edwin C. Hall, their next friend, and Florence G. Van Sciver, complainants.

These defendants, William H. Tenbrook and Philip Tenbrook, trading as aforesaid, for answer unto so much and such parts of the complainants' bill of complaint as it is advisable and necessary for them to make answer unto, answering say:

1. That it is true, as stated in said bill, that the titles of the lands mentioned in said bill, and known as Nos.

1024, 1026, 1028, 1030 and 1032 South Fourth street; Nos. 819, 821, 823 and 825 Dauphin street, and Nos. 229 and 231 Chestnut street, were in Samuel J. Kelly, deceased, at the time of his death, which, as these defendants are informed and believe, occurred in December, in the year one thousand eight hundred and eighty-six; but these defendants deny that the said Samuel J. Kelly, deceased, was the owner of said lands and state and protest that the same were owned by Frances J. Kelly or Fannie J. Kelly, the mother of said complainants, and that although the title of said lands was in the said Samuel J. Kelly at the time of his death, the beneficial ownership thereof was in the said Fannie J. Kelly, and that, as these defendants further state and protest, the said Fannie J. Kelly provided the money for the purchase and improvement of the said lands, and that the same always were her's and always were regarded as her's. 10

2. These defendants admit that the said Samuel J. Kelly died on the 12th day of December, 1886, but deny that he died intestate, and also deny that on that day said lands descended to the complainants; and they admit that since the death of the said Samuel J. Kelly the said Fannie J. Kelly has had the use and benefit of the said lands until a recent date, when they were sold for her debts; and that, as these defendants state and protest, said lands continued, after as before the death of the said Samuel J. Kelly, who, in his lifetime, stated that his wife was possessed of large means, to be considered as the property of the said Fannie J. Kelly by reason of her aforesaid ownership thereof and interest therein, and by reason of the devise of the title thereof to said Fannie J. Kelly, as more particularly hereinafter stated. That as these defendants are informed and believe, and are ready to prove, at the time of the death of the said Samuel J. Kelly he was the owner and man- 20 30

ager of a large and profitable business, in the city of Philadelphia, Pennsylvania, and at the same time had moneys on deposit in one or more of the banks of said Philadelphia, and stock for the carrying on of his said business, and moneys owing to him by his customers and others, and a deposit of about one thousand four hundred trade dollars in the Camden Safe Deposit and Trust Company, at Camden, New Jersey, besides other property held by him; that the said
 10 Fannie J. Kelly, immediately on the death of the said Samuel J. Kelly, took possession of his business and estate, and carried on said business and managed and conducted the same, and collected in all outstanding bills of her said husband's business, and received the same from the creditors of her deceased husband, and took custody and possession of the moneys on deposit in said Philadelphia as aforesaid, and obtained and took
 20 possession of the said trade dollars, and collected interest on moneys which had previously been due and owing the said Samuel J. Kelly in his lifetime; that she took no inventory or account of the stock on hand, in the said business, or which remained unsold at the time of the death of the said Samuel J. Kelly, but went on with, and transacted the business as it had been done before the death of the said Samuel J. Kelly, with notice to and full knowledge of the complainants, and without objection on their part; that shortly after the death of the said Samuel J. Kelly, the said Fannie
 30 J. Kelly rented an expensive house, in a fashionable part of the said city of Camden, and furnished said house expensively, with notice to and full knowledge of the complainants, from and out of the proceeds of said business and the rents and issues of the said lands, and becoming involved in her said business, or for some other reason, permitted the taxes on said lands to remain unpaid, and with notice to and full knowledge

of the complainants, used the entire income of the said lands and business, for her living expenses, and neglected to pay the taxes on the said lands, and to make the necessary repairs to the houses and improvements thereon, all with the full knowledge of the complainants.

3. That on the seventh day of December, 1893, the last will and testament of the said Samuel J. Kelly was proved before the Surrogate of the county of Camden by the said Fannie J. Kelly, executrix herein named, ¹⁰ wherein and whereby all the estate of the said Samuel J. Kelly was devised and bequeathed to the said Fannie J. Kelly, as by copy of said will and probate thereof hereto annexed will appear; and shortly thereafter the said Fannie J. Kelly undertook to make sale of the said lands, without objection from or claim of ownership by the complainants; that these defendants and others, the judgment creditors of the said Fannie J. Kelly, delayed advertising the said lands for sale under and by virtue of their judgments and executions thereunder, because ²⁰ of the promise of the said Fannie J. Kelly to apply the proceeds of the said sale to the satisfaction of their several judgments; that the said Fannie J. Kelly frequently requested these defendants, directly and through their attorney, to delay the Sheriff's sale under their judgment, hereinafter mentioned, until after she had consummated the sale of said lands which she had made for the benefit of these defendants and others, her judgment creditors, whereupon she would apply the proceeds of such sale to the payment and satisfaction of said judgments, in order to convey a clear title under said will of said Samuel J. Kelly; that, as these defendants state and protest, the said sale of the said lands by the said Fannie J. Kelly, as devisee aforesaid, was actually made, and made with the full knowledge of the complainants, and that, as these defendants further state ³⁰

and protest, the said Fannie J. Kelly frequently stated to these defendants, both directly and indirectly, and with the knowledge of the complainants, that the said lands were purchased, and the improvements thereof made with money belonging to her sole and separate estate, and that said lands really belonged to her in the lifetime of the said Samuel J. Kelly, and before his death, and before the said probate of his said last will and testament.

10 4. That on or about the 21st day of December, 1894, the said lands were sold at Sheriff's sale to these defendants, and bid off to them at the sum of \$100 on a judgment of the Camden Safe Deposit and Trust Company against the said Fannie J. Kelly and another; that the said lands, with the houses thereon, as the defendants are credibly informed, are not worth over \$9,000, and that no city taxes have been paid thereon since the payment of the taxes for the year 1891; that
20 the taxes on said lands for the year 1892 and all subsequent years, with large amounts of interest and costs, are overdue and unpaid; that the same amount to considerably over the sum of \$600.

5. That the said Fannie J. Kelly owes to these defendants about \$2,000, and that she is their judgment debtor to about that sum; that on or about the 21st day of June, in the year 1893, these defendants recovered in the Supreme Court of Judicature of New Jersey a judgment in an action on contract against the said Fannie J. Kelly for goods, wares and merchandise sold
30 and delivered to her in her said business in Philadelphia, to which she succeeded on the death of her husband as aforesaid, for the sum of \$1,740.38, damages and costs, which with interest remains wholly due and unpaid by her to these defendants except to the extent of \$16.70 recently received on account thereof; that about the same time the Camden Safe Deposit and

*Trust Company recovered a judgment in said Supreme Court for \$442.75, damages and costs, or some other sum, against the said Fannie J. Kelly and one Mary J. Curts, which judgment has since been assigned, so that it is now held for and by these defendants; that said last mentioned judgment remains wholly unpaid and unsatisfied except to the extent of about \$60.00.

6. That the said Frank J. Burr is not the agent of the estate of the said Samuel J. Kelly, but is now and for a long time has been the agent of the said Fannie J. Kelly, and rented said properties while in her possession and use, since her said husband's death, as in said bill stated, for her, and made advances to her as such agent, in excess of the amount collected by him as rents and incomes of and from the said lands; that these defendants having purchased said lands as aforesaid at a Sheriff's sale as aforesaid, which had several times been postponed at the request of the said Fannie J. Kelly, on the representation that she would settle, pay and satisfy the said judgment of these defendants, and these defendants, under their said Sheriff's deed and the said will, standing of record duly proved as aforesaid by the said Fannie J. Kelly, with notice to and full knowledge of the complainants, quietly and peaceably took possession of the said lands as the lands of the said Fannie J. Kelly, through their agent, Walter B. Humphreys, who found many of said houses vacant and all in bad repair, and since that time have collected rents from some few of the said houses, as under said will and Sheriff's deed they have a right to do; that since that time the possession of these defendants has been forcibly interfered with, as more particularly stated in the answer of the said Walter B. Humphreys in this cause.

7. That pending the said Sheriff's sale, and shortly before the same was made, as these defendants recollect and were informed, a proposition was made by the

complainants, through their present solicitor, to these defendants and others, judgment creditors of the said Fannie J. Kelly, to place the said lands in the custody of a trustee or receiver, upon the trust that such trustee should apply the rents, issues and incomes of said lands, over and above the expenses of his trust, to the payment of the judgment creditors of the said Fannie J. Kelly, not in the order of the recovery of the said judgments, or any levy thereunder,
 10 but pro rata, by a dividend of each fund for distribution from said incomes, to each judgment creditor; that these defendants, through their attorney, expressed a willingness to consider such proposition, on condition that each judgment creditor should be paid in the order of the recovery of his judgment against the said Fannie J. Kelly, and that the complainants were unwilling to accede to the aforesaid condition of these defendants, and failed further to press their said proposition; and
 20 these defendants protest that the complainants, by the making of the said proposition, acknowledged the said Fannie J. Kelly as the owner of the said lands, and further protest that any recovery of the possession thereof, by the complainants, whether by this suit or the several suits of ejectment brought by the complainants hereinafter mentioned, is for the benefit and advantage of the said Fannie J. Kelly, the mother of the complainants, and not for the benefit of the complainants, except in so far as the complainants may be indirectly benefitted by their said mother's success through them
 30 as aforesaid.

8. That the paper purporting to be the will of Samuel J. Kelly is such will; that the same stands upon the record of this county unquestioned by the result of any action brought by the complainants or the said Fannie J. Kelly, and that no action has been brought to directly establish that the said Samuel J.

Kelly died intestate or that said will is not his valid last will and testament.

9. That on or about the thirty-first day of May last past, as these defendants admit, the complainants brought three several actions of ejectment, one for the said Dauphin street lands, one for the said Fourth street lands, and one for the Chestnut street lands, against these defendants and the tenants of the these defendants of said lands, which said actions are brought in the most comprehensive manner against the tenants in possession, and these defendants holding title and for mesne profits, all at the same time; that the complainants, directly or through the said Fannie J. Kelly, or her agent, the said Frank J. Burr, are forcibly holding possession of a large part of said lands, while suing for mesne profits as aforesaid, instead of simply bringing one action to settle the title of all said lands and show the defective execution of said will, as claimed in their said bill, while failing to set up in their said bill what the defect in the execution of the said will is, if any exist.

10. These defendants do not know why other judgment creditors of the said Fannie J. Kelly did not make bids, or why said land was not sold at said Sheriff's sale at a higher bid, but these defendants do know that the said will stood, at that time, of record, unchallenged and unquestioned, and that the said Fannie J. Kelly had the real title to the said lands; that the said will is properly proved by affidavits appearing on the record procured to have been made by the said Fannie J. Kelly, the executrix in said will named, as by a copy thereof hereto annexed will appear, and that as these defendants protest, the said Fannie J. Kelly having procured the said will to be proved as the last will and testament of the said Samuel J. Kelly, is not now in position to make, under oath, the statement contained

in the affidavit annexed to the bill filed in this cause touching the manner of the execution of the last will and testament, and that these defendants have no knowledge of a defective execution of said will.

11. That the attorney of these defendants did not request the City Counsel of the city of Camden to sell the said lands for taxes and that the advertisements of the said lands for taxes for sale on the sixth and twentieth days of June, 1895, was not in compliance with the request of these defendants, made either directly or by their attorney; that, as these defendants are informed, said City Counsel stated to the attorney of these defendants that said lands were to be sold for taxes, and that he supposed the attorney of these defendants would object to the making of such sale, and that the attorney of these defendants replied he would not make such objection, and had no such objection to make.

12. That these defendants do not know but they believe that the complainants, either through their attorney or through the said Fannie J. Kelly, had notice of the sale of the said lands for taxes more than ten days prior to the sixth day of June, 1895, and they protest that they had ample notice of and time to prepare for said sale for taxes, and they further protest that the said sale was postponed, not for the purpose of giving the said complainants an opportunity to raise and pay the taxes due on the said lands, but for the purpose of enabling the said Fannie J. Kelly to raise and pay the taxes on the said lands.

13. These defendants deny that, owing to the disputed title to said lands and the infancy of the complainants, it is impossible to secure advances of money upon them for paying off of taxes, and state the truth to be, that such impossibility is owing to the ownership of said lands by these defendants and the prior owner-

ship thereof by the said Fannie J. Kelly that the complainants are unable to raise money on said lands; that the said Florence G. Van Sciver is of full age and married to a man of large and prosperous business; that others of the said complainants, and all except one of them, are over fourteen years of age and nearing their majority.

14. That the manner of taking possession of said land in question in this cause has been under the management of the defendant, Walter B. Humphreys, the agent of these defendants in the premises; that these defendants have given no instructions to the said Humphreys to rent the said lands at other than fair rent, or to do any unlawful act, and they are informed and believe that he has not rented at unfair rent nor done any unlawful act, and that as to particulars of the agency of the said Walter B. Humphreys, these defendants refer to the several answer of the said Walter B. Humphreys when the same shall have been filed in this cause; and these defendants protest that by reason of the remedy at law for mesne profits invoked by these complainants before the beginning of this action, the rate at which these defendants (who are amply responsible financially) are renting the said lands is no concern of the complainants.

15. And these defendants protest that the facts, matters and things in the said bill contained are matters for which the complainants have full and adequate relief at law in the premises, and that their said bill is entirely wanting in equity, and these defendants claim the same advantage of this objection as if they had formally demurred to the said bill; and these defendants are advised by counsel that there is no matter or thing in the said bill contained good and sufficient in law to call these defendants in question in this Honorable Court for the same, but that there is good cause

for demurrer thereunto in that the said bill contains not any matter of equity whereupon this court can found a decree, and also in that said bill lacks proper parties, namely Fannie J. Kelly and Frank J. Burr, who are proper parties thereto, and also in that the complainants had chosen their forum or court before coming into this Court, by bringing the said actions of ejectment in a court of law as aforesaid; and these defendants claim the same advantage of these objections as
 10 if they had formally and separately demurred to the said bill for the grounds and reasons now stated; and these defendants refer to a copy of the summons, affidavit, declaration, filed in one of said three causes at law (to which the other two are similar) as part of this, their answer.

All which matters and things these defendants are ready to aver, maintain and prove, as this Honorable Court shall direct, without this that any other matter
 20 in the said bill contained, and not herein and hereby sufficiently answered, is true to the knowledge and belief of these defendants, and these defendants pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

H. A. DRAKE,

Solicitor for and of Counsel with Defendants.

STATE OF NEW JERSEY, }
 COUNTY OF CAMDEN, } ss.

WILLIAM H. TENBROOK, of full age, being duly
 30 sworn according to law, on his oath saith, that he is one of the defendants in the above entitled cause, and in the above answer mentioned, and the duly authorized agent in this behalf of Philip Tenbrook, the other defendant in the above answer mentioned; that the facts, matters and things contained in the above answer, so far as they relate to himself and said Philip Tenbrook,

are true, and so far as they relate to other persons he believes them to be true.

WILLIAM H. TENBROOK.

Sworn and subscribed this eighth day of June, A. D. 1895, before me, a Master in Chancery of the State of New Jersey.

BENJ. D. SHREVE,
M. C. C.

10

NEW JERSEY, ss: The State of New Jersey to the Sheriff of the county of Camden, greeting:
We command you to summon Benjamin F. Pierce, Antoni Nossardi, and William H. Tenbrook and Philip Tenbrook, trading, &c., as Tenbrook & Bro., to appear before our Supreme Court, at Trenton, on the seventeenth day of June next, to answer to the complaint of 20
Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly and Leona S. Kelly, by Edwin C. Hall, their next friend, and Florence G. Van Sciver, who demand of them the possession of all the following described lot or tract of land situated in the city and county of Camden, and State of New Jersey, bounded as follows: Beginning at the southeast corner of Mount Vernon and Fourth streets; thence southward by the east line of Fourth street sixty-four feet; thence eastward parallel with the south line of Mount Vernon street sixty 30
feet to a corner; thence northward parallel with the east line of Fourth street sixty-four feet to the south line of Mount Vernon street; thence westward by the south line of Mount Vernon street sixty feet to the place of beginning, and known a numbers 1024, 1026, 1028, 1030 and 1032 South Fourth street, and also

mesne profits and damages to the amount of five hundred dollars.

And in default of their appearing and defending this action judgment will be entered against them, and they will be turned out of possession of said land; and have you then and there this writ.

Witness, Mercer Beasley, Esquire, Chief Justice, at Trenton, this thirty-first day of May, A. D. eighteen hundred and ninety-five.

10

BENJ. F. LEE,
Clerk.

THOMAS B. HALL,
Attorney.

New Jersey Supreme Court of the fourteenth day of June, A. D. eighteen hundred and ninety-five.

20 CAMDEN COUNTY, SS.

Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly and Leona S. Kelly, by Edwin C. Hall, their next friend, and Florence G. Van Sciver, the plaintiffs in this action, by Thomas B. Hall, their attorney, demand of Benjamin F. Pierce, Antoni Nossardi and William H. Tenbrook and Philip Tenbrook, trading &c., as Tenbrook & Bro., the defendants therein, the possession of all the following described lot or tract of land situated in the city and county of Camden and State of New Jersey, bounded as follows: Beginning at the southeast corner of Mount Vernon and Fourth streets; thence southward by the east line of Fourth street sixty-four feet; thence eastward parallel with the south line of Mount Vernon street sixty feet to a corner; thence northward parallel with the east line of Fourth street sixty-four feet to the south line of Mount Vernon street;

30

thence westward by the south line of Mount Vernon street sixty feet to the place of beginning, and known as numbers 1024, 1026, 1028, 1030 and 1032 South Fourth street, and also the sum of five hundred dollars for mesne profits and damages. And the plaintiffs say that their right to the possession of the same accrued on the twelfth day of December, A. D. eighteen hundred and eighty-six, and that the defendants wrongfully deprive them of the possession thereof, to their damage five hundred dollars. 10

THOMAS B. HALL,
Attorney of Plaintiffs.

To the above named defendant:

Take notice, that if you intend to make a defence to the above stated action, you are required to appear and file a plea or demurer within thirty days from the date of service hereof upon you, and that in default of the filing of such plea or demurrer, judgment by default will be entered against you. 20

THOMAS B. HALL,
Attorney of Plaintiff.

STATE OF NEW JERSEY, } ss.
CAMDEN COUNTY.

JOHN W. SELL, being duly sworn according to law, on his oath saith, that he is the Deputy Sheriff of the county of Camden, and that he served the annexed summons in ejectment on Benjamin F. Pierce and Antoni Nossardi, the defendants therein named, on the sixth day of June, A. D. eighteen hundred and ninety-five, by delivering to Antoni Nossardi, personally, a true copy thereof, and on Benjamin F. Pierce, by delivering a true copy thereof to Maggie Pierce, wife of 30

said Benjamin F. Pierce, a member of the family above the age of fourteen years, and did at the same time inform the said Antoni Nossardi and Maggie Pierce, that it was summons in ejectment, and that unless they, the said Benjamin F. Pierce and Antoni Nossardi, appeared to the writ at the return day thereof, and put in a plea to the said action, judgment would be entered against them by default, and they would be turned out of possession, or in words to that effect, and at the time
 10 of said service, the said Benjamin F. Pierce and Antoni Nossardi was in possession of the said premises in the said writ mentioned, or some part thereof.

JOHN W. SELL.

Sworn and subscribed before me this seventh day of June, A. D. 1895.

HENRY L. HARTSHORN,
 Notary Public.

Nov. 19, 1886.

20

Knowing the *ucert* uncertainty of Life and being of sound mind I give and *bequeath* all my Property, Real Estate and personal property to my wife, Fannie J. Kelly, making her sole *Executor*. *Signed*,

SAMUEL J. KELLY.

Witness,

MAY MORGANS,
 ANNIE B. DAIL.

30 STATE OF NEW JERSEY, } ss.
 CAMDEN COUNTY,

MAY MORGANS, one of the subscribing witnesses to the within and foregoing last will and testament, being by me duly sworn, did depose and say that this deponent and Annie B. Dail, the other subscribing witness to the last will and testament, were present at the same time and did see Samuel J. Kelly, the testator therein

named, sign his name to the said last will and testament and seal the same, and did hear him publish, pronounce and declare the within and foregoing writing to be his last will and testament, and that at the time of the doing thereof the said Samuel J. Kelly, the testator aforesaid, was of sound and disposing mind and memory, so far as this deponent knows and as she verily believes, and that this deponent and the said Annie B. Dail, the other subscribing witness, did sign their names as witnesses to the said last will and testament at the same time, at the request and in the presence of the said testator and in the presence of each other.

MAY MORGANS.

Sworn and subscribed at Camden, the seventh day of December, in the year of our Lord one thousand eight hundred and ninety-three, before me, the Surrogate of the county of Camden.

GEO. S. WEST, 20.
Surrogate.

STATE OF NEW JERSEY, } ss.
CAMDEN COUNTY, }

FANNIE J. KELLY, the executrix named in the within and foregoing last will and testament, being by me duly sworn, did depose and say that the within and foregoing writing contains the true last will and testament of Samuel J. Kelly, deceased, the testator therein named, so far as this deponent knows, and as she verily believes; that she will well and truly perform the said last will and testament, by paying, first, the debts of the said deceased, and then the legacies, in the said last will and testament specified, so far as the goods and chattels, rights and credits of the said deceased can thereunto extend; that she will make and exhibit into the Surrogate's office of the county of Camden, within the time

required by law, a true and perfect inventory of all and singular the goods and chattels, rights and credits of the said deceased that have or shall come to her knowledge or possession, or to the possession of any other person or persons for her use, and render a just and true account when thereunto lawfully required.

FANNIE J. KELLY.

Sworn and subscribed at Camden, the seventh day of
 10 December, in the year of our Lord one thousand eight hundred and ninety-three.

GEO. S. WEST,
 Surrogate of the County of Camden.

STATE OF NEW JERSEY, }
 COUNTY OF CAMDEN. } ss.

I, GEORGE S. WEST, Surrogate of the
 county of Camden, do certify that the last
 [SEAL.] will and testament of Samuel J. Kelly,
 20 late of the county of Camden, New Jersey, deceased, was admitted to probate.

Fannie J. Kelly, the executrix named therein, proved the same before me on the seventh day of December, A. D. 1893, and is duly authorized to take upon herself the administration of the estate of the testator, agreeably to the said will.

Witness my hand and seal of office, the seventh day of December, in the year of our Lord one thousand eight hundred and ninety-three.

30

GEO. S. WEST,
 Surrogate.

CAMDEN COUNTY SURROGATE'S OFFICE.

In the matter of the probate of	} ORDER FOR PRO-
the alleged Will and testament	
of SAMUEL J. KELLY, deceased.	

BATE.

Application having been made by Fannie J. Kelly, executrix, for probate of the last will and testament of 10 Samuel J. Kelly, deceased, and letters testamentary thereon, and the Surrogate having inquired into the circumstances and taken proof, and being satisfied of the genuineness of the will produced, the validity of its execution and the competency of the testator and the probate of said will and codicils not having been contested, and it appearing that the testator died more than ten days ago, it is, on this seventh day of December, A. D. 1893, adjudged that the instrument offered for probate in this matter is the last will and testament of 20 Samuel J. Kelly, deceased, and the same is hereby admitted to probate; and it is ordered that letters testamentary be issued thereon to Fannie J. Kelly, the executrix named in said will, who may qualify thereunder.

GEO. S. WEST,
Surrogate of the county of Camden.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN. }

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I, GEORGE S. WEST, Surrogate of the county of Camden, do hereby certify that the foregoing is a true copy of the last will and testament of Samuel J. Kelly, deceased, together with the proofs thereof, upon which letters testamentary were granted unto Fannie J. Kelly, executrix named in said will, December 7th, A. D.

1893, also copy letters testamentary, filed December 7th, 1893, and recorded in the Surrogate's office of the county of Camden, in Book 2 of Wills, page 58, &c.

[SEAL] In testimony whereof, I have hereunto set my hand, and affixed my official seal at Camden, this fifteenth day of March, A. D. 1895.

GEORGE S. WEST,
Surrogate.

IN CHANCERY OF NEW JERSEY.

Between	
WALTER A. KELLY AND OTHERS,	
BY THEIR NEXT FRIEND, ED-	
WIN C. HALL, AND FLORENCE	
G. VAN SCIVER,	ON BILL, &C. 10
Complainants,	ANSWER OF
and	WALTER B. HUM-
WILLIAM H. TENBROOK AND	PHREYS.
PHILIP TENBROOK, TRADING	
AS TENBROOK & BROTHER,	
AND OTHERS,	20
Defendants. }	

The several answer of Walter B. Humphreys to the bill of complainants filed in the above case.

This defendant, for answer unto such parts of said bill as it is necessary or advisable for him to make answer, answering says:

That on or about the 14th day of February, 1895, this defendant became the agent of the defendants, William H. Tenbrook and Philip Tenbrook, for the renting of the lands mentioned in said bill; that this defendant did notify tenants in said property of the ownership thereof by said Tenbrook & Brother and afterwards informed the said Burr, by written notice served on him, of the agency of this defendant; that one of said tenants paid rent to this defendant; that

shortly thereafter said Burr commenced against said tenant landlord and tenant proceedings to put said tenant out of possession on three days notice; that said tenant successfully resisted said eviction proceedings; that after the hearing of said proceedings and again after, the decision thereof in favor of said tenant and against said Burr, said Burr stated to this defendant that as he was not agent for Tenbrook & Brother, he would as soon have this defendant succeed him in the agency of said
10 houses as any one, and that he did not propose to interfere with the tenants in the houses, or in the collection of the rents from them by this defendant; that he gave this defendant to understand that Fannie J. Kelly owed said Burr on account of said houses; that several days after the said decision, and after said Burr had told this defendant that he would give up said houses to this defendant, this defendant asked him for the keys of said houses; that he hesitated to do so for fear of incurring displeasure and stated that he would
20 have to see Mrs. Kelly before he could give defendant those keys; that as there was no serious objection to defendant's possession of the said houses, defendant soon after said discussion had locks put on said houses not tenanted, and locked them up and took the keys; that defendant did not persist in taking possession of said houses until he understood from said Burr that there was no serious objection to it; that after defendant had so taken possession, said Burr forcibly took possession of a number of said houses which were with-
30 out tenants, by going to them, without notice to this defendant, and forcibly entering them and removing from them the locks which this defendant had put on said houses, and taking and retaining the said locks; that this defendant has found these houses in very bad condition and repair; that much of the money collected from them in rents has been expended upon them by

this defendant to make them tenantable; that this defendant has been obliged to rent said houses at a low rent because of their bad condition and the lateness of the season; this defendant has not rented any of said houses at less than they should rent for, under the said circumstances of this case; that of the other defendants in said bill named, said Benjamin F. Pierce, Jerry W. Everingham, Henry Smith and Minnie Warner are tenants of this defendant, as agent of Tenbrook & Bro.; that said Antoni Nossardi was not a tenant of said lands¹⁰ when said bill was filed, having moved away on the sixth day of June, 1895; that this defendant does not know James McParlen or Mary Lanning; that James McParlen, Mary Lanning, Joseph Knockbarr and Berthold Decker are not tenants of this defendant as agent aforesaid; and this defendant is advised and believes that the said Antoni Nossardi, James McParlen, Joseph Knockbarr, Berthold Decker and Mary Lanning are not proper parties to the said bill of complaint, and that this defendant is not a proper party to this suit, and this defendant claims the same advantage of said objections to said bill as if he had formally demurred thereto.²⁰

All which matters and things this defendant is ready to aver, maintain and prove as this Honorable Court shall direct, and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

H. A. DRAKE,
Solicitor for and of Counsel with Defendant.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN, } ss.

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WALTER B. HUMPHREYS, of full age, being duly sworn according to law, on his oath saith, that he is a defendant in the above entitled cause; that the facts, matters and things contained in the foregoing answer,

so far as they relate to himself are true, and so far as they relate to other persons he believes them to be true.

WALTER B. HUMPHREYS.

Sworn and subscribed this twenty-fourth day of June, A. D. 1895, before me, a Master in Chancery of the State of New Jersey.

F. C. MEETEER,
M. C. C.

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IN CHANCERY OF NEW JERSEY.

To the Honorable Alexander T. McGill, Chancellor of the State of New Jersey:

Humbly complaining, sheweth unto your Honor, your orators, William H. Tenbrook and Philip Tenbrook, both of the city of Philadelphia, Pennsylvania,
20 trading and doing business under the name, style and firm of Tenbrook & Brother.

1. That on or about the twelfth day of December, A. D. 1886, one Samuel J. Kelly, having first made his last will and testament, in words and characters following, to wit:

Nov. 19, 1886.

Knowing the ucert uncertainty of life and being of sound mind, I give and bequeath all my property real
30 estate and personal property to my wife Fannie J. Kelly, making her sole *Executor Signed*.

SAMUEL J. KELLY.

Witness:

MAY MORGANS,
ANNIE B. DAIL.

2. That at the time of the death of the said Samuel

J. Kelly, the title of the following three tracts of land were in him, the said Samuel J. Kelly, viz:

No. 1. Situate in the city of Camden, in the county of Camden and State of New Jersey, and bounded as follows: Beginning at the southeast corner of Mount Vernon and Fourth streets; thence southward by the east line of Fourth street sixty-four feet; thence eastward parallel with the south line of Mount Vernon street sixty feet to a corner; thence northward parallel with the east line of Fourth street sixty-four feet to the south line of Mount Vernon street; thence westward by the south line of Mount Vernon street sixty feet to the place of beginning, and known as Nos. 1024, 1026, 1028, 1030 and 1032 South Fourth street. ¹⁰

No. 2. Situate in the said city of Camden, and bounded as follows: Beginning at a point in the west line of Dauphin street, at the distance of one hundred and thirty-four feet south from the south line of Pine street and corner to a three feet wide alley, and runs thence south along said west line of Dauphin street ²⁰ forty-eight feet more or less in front or width, and extending of that width between parallel lines westward eighty-two feet, more or less, in length or depth, and known as Nos. 819, 821, 823 and 825 Dauphin street. Together with the free use and privilege in common of said alley.

No. 3. Situated in the said city of Camden, and bounded as follows: Beginning at a point in the north side of Chestnut street, at the distance of one hundred and forty feet westward from the northwest corner of ³⁰ Locust and Chestnut streets, and extending thence northward parallel with Locust street one hundred feet to a corner; thence westward parallel with Chestnut street twenty-eight feet to a corner; thence southward parallel with Locust street one hundred feet to a corner in the north line of Chestnut street, and thence east-

ward along the north line of Chestnut street twenty-eight feet to the place of beginning, and known as Nos. 229 and 231 Chestnut street.

3. That the said Samuel J. Kelly left him surviving his wife, Fannie J. Kelly, and his daughter, Florence G. Kelly, who has since intermarried with Joseph B. Van Sciver, and his children, Walter A. Kelly, Clarence A. Kelly, Albert E. Kelly and
 10 Leona S. Kelly; that the said Walter, Clarence and Albert are minors above the age of fourteen years, and the said Leona is a minor below the age of fourteen years; that the said Fannie J. Kelly was, as your orators are informed and believe, married to the said Samuel J. Kelly sometime prior to 1871; that the maiden name of the said Fannie J. Kelly was Fannie
 20 J. Andrews; that she was the only child of Adelia J. Andrews, formerly Adelia J. Haines; that by, from, through and under her mother, Adelia J. Andrews, and from other sources, as your orators are informed and
 20 believe to be true, the said Fannie J. Kelly, (nee Andrews) became seized and possessed of large amounts of real and personal property.

4. That although the said lands, viz: Nos. 1024, 1026, 1028, 1030 and 1032 south Fourth street, 819, 821, 823 and 825 Dauphin street, and 229 and 231 Chestnut street were in the name of, and the title thereof held by the said Samuel J. Kelly, the said lands and the buildings and improvements thereon in truth and in fact belonged to the said Fannie J. Kelly, who
 30 was the beneficial owner thereof.

5. That the said Samuel J. Kelly stated in his lifetime that his wife, the said Fannie J. Kelly, was possessed of large means; that as your orators are informed and believe to be true, the said Samuel J. Kelly, before the time of his death, and before his intermarriage with his said wife, was engaged in business in said Philadel-

phia; and at the time of his death, he was in conduct and management of a large and profitable business, carried on in his own name; that as your orators charge and believe to be true, the said Fannie J. Kelly owned a large interest in the said business; that at the time of the death of the said Samuel J. Kelly, there were moneys on deposit in one or more of the banks of said Philadelphia, and stock in trade for carrying on said business, and moneys owing by customers thereof, and others, and a deposit of about fourteen hundred trade dollars in the Camden Safe Deposit and Trust Company of Camden, New Jersey, and other property in the name of the said Samuel J. Kelly, at the time of his death, which the said Fannie J. Kelly owned and was interested in. 10

6. That on the death of the said Samuel J. Kelly, the said Fannie J. Kelly, failed and neglected to prove the will of the said Samuel J. Kelly, and did not prove the same until the seventh day of December, in the year eighteen hundred and ninety-three; that on the proof 20 of the said will, the said Fannie J. Kelly made oath that said will contained the true last will and testament of the said Samuel J. Kelly, deceased, the testator therein named, so far as she knew, and as she verily believed, and that she, as the executrix thereof, would faithfully execute the same.

7. That immediately on the death of the said Samuel J. Kelly the said Fannie J. Kelly, without waiting to prove the said will, took possession of the said business, estate and lands, standing in the name of the said 30 Samuel J. Kelly as aforesaid at the time of his death, and carried on the said business and managed and conducted the same and collected in the proceeds thereof, and all outstanding bills of the said business, and received the same from the debtors thereto, and took custody and possession of the business stand, stock

in trade and good will of said business, and of the moneys on deposit as aforesaid, and of said trade dollars, and collected the interest on bills, notes, choses in action and other evidences of indebtedness held in the name of the said Samuel J. Kelly; that she took no inventory or account of stock on hand in said business, or which remained unsold at the time of the death of the said Samuel J. Kelly, and did not, before the proving of the said will, and has not since that time, filed
 10 any inventory or appraisement of the said estate, or of the goods and chattels, rights and credits thereof, but went on with and transacted the said business as it had been done before the death of the said Samuel J. Kelly, with notice to and full knowledge of the said Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly, Leona S. Kelly and Florence G. Van Sciver (nee Kelly), children of herself and said Samuel J. Kelly, and without objection on the part of her said children.

8. That shortly after the death of the said Samuel J.
 20 Kelly, the said Fannie J. Kelly rented an expensive house in a fashionable part of the said city of Camden and furnished said house expensively from and out of the proceeds of the said business and the rents and issues of the said lands, with notice to and full knowledge of her said children, and took her said children to live with her in the said house, which is numbered and known as 506 Linden street; that thereafter and sometime since the year 1890 the said Fannie J. Kelly, becoming involved in the said business, permitted the
 30 taxes on the said lands to remain unpaid, and with notice to and full knowledge of her said children used the entire income of said lands and business for her living expenses and neglected to pay taxes on said lands, and neglected to make the necessary repairs and improvements thereon, all with full knowledge of her children.

9. That on or about the twentieth day of June, in the year eighteen hundred and ninety-three, your orators, trading as aforesaid, recovered a judgment against the said Fannie J. Kelly for one thousand seven hundred and forty dollars and thirty-eight cents damages and costs, and issued execution thereon at the same time to the Sheriff of Camden county, which execution was placed in the hands of Henry J. West, then Sheriff of Camden county, for execution; that afterwards and on or about the twelfth day of January, A. D. 1894, your orators issued an alias execution on the said judgment, and placed the same in the hands of George Barrett, then Sheriff of Camden county, to be executed. 10

10. That on or about the twentieth day of July, in the year 1893, The Camden Safe Deposit and Trust Company recovered a judgment against the said Fannie J. Kelly and Mary J. Curts, for \$544.09 damages and costs, and issued execution thereon, which was placed in the hands of said Henry J. West, Sheriff as aforesaid; that afterwards said Trust Company issued an alias execution on its said judgment and placed it in the hands of said George Barrett, Sheriff as aforesaid, before said alias execution of your orators was placed in the hands of said Barrett, Sheriff as aforesaid. 20

11. That under the said two judgments, (the latter of which has been assigned for a valuable consideration by the said Camden Safe Deposit and Trust Company and is now owned and controlled by your orators) levies were made upon the said three tracts or eleven lots of land, as the lands of the said Fannie J. Kelly, and the same threatened to be sold under the said executions. 30

12. That thereupon the said Fannie J. Kelly called upon your orators and upon their present solicitor and urged them, and continued to call upon them and to urge them, by herself and through her agents, to

postpone the sale of said lands until the same were sold by said Sheriff Barrett, as hereinafter stated.

13. That during this period of ten months from January in the year of 1894, until December of that year, the said Fannie J. Kelly, in conversations with your orators and their solicitor and others, repeatedly stated that the said lands, though standing in the name of the said Samuel J. Kelly when he died, were then, and for a long period before had been her
 10 property; that she would make efforts to sell them for the purpose of paying your orators and other judgment creditors of her's, and afterwards stated that she had actually sold said lots, or a part of them, for enough to pay your orators and her judgment creditors in full, and that it would be a great advantage to her if your orators would postpone selling through said Sheriff, and permit her to raise the moneys by the said sale she had effected of said lands, to pay your orators, as she promised to do in full.

20 14. That your orators were willing that she should thus raise the moneys to pay them, and accordingly waited a period of about eight months, and until the end of September, 1894, whereupon, by direction of your orators, said Barrett, Sheriff, advertised the said lands for sale for the thirtieth day of November, 1894.

15. That the said sale was postponed by the said Barrett, Sheriff, on the request of said Fannie J. Kelly, from week to week for three weeks, twice with the consent of your orators, to enable the said Fannie J. Kelly
 30 to raise and pay, as she insisted she would be able to do, the moneys due your orators on the said judgments recovered by them.

16. That during the period between the thirtieth of November, 1894, and said Sheriff's sale, on the twenty-first of December, 1894, and shortly before said sale was made, a proposition was made by the said Fannie J.

Kelly and her children, the said Florence, Walter, Clarence, Albert and Leona, through their attorney and solicitor, to your orators and others, judgment creditors of the said Fannie J. Kelly, to place the said lands in the custody of a trustee or receiver, in trust, upon trust that such trustee should apply the rents, issues and incomes of and from the said lands, over and above the expenses of his trust, to the payment of the judgments of the judgment creditors of the said Fannie J. Kelly, not in the order of the recovery of the said judgments, or any levy thereunder, but *pro rata* by a division of each dividend of said incomes among all the judgment creditors of said Fannie J. Kelly; that such judgment debts amounted to about if not quite \$10,000.00; that other judgment creditors holding judgments against said Fannie J. Kelly subsequent to the judgments of your orators (a large number of whom were present by counsel) urged the acceptance of said proposition by your orators and were willing to accept the same; that your orators, through their attorney and solicitor, expressed a willingness to consider such a proposition, on condition that each judgment creditor should be paid in the order of the recovery of his respective judgment against the said Fannie J. Kelly, or his levy thereunder; that said judgment creditors did not favor this modification of said proposition, and the said Fannie J. Kelly and her said children failing to modify the same as suggested as aforesaid, and your orators insisting on their said modification thereof, the said proposition was not further pressed upon your orators.

17. That accordingly, said Sheriff's sale took place, and the said George Barrett, Sheriff of aforesaid, by his deed dated January 4, A. D. 1895, and recorded in the office of the Register of Deeds of Camden county, in Book 204 of Deeds, page 24, &c., conveyed said

lands to your orators, as by reference to said deed, to which your orators refer, will appear, under which said deed your orators took possession of some parts of said lands.

18. That on or about the thirty-first day of May, 1894, the said children of said Fannie J. Kelly, for the purpose of attacking the validity and proper execution of said will, brought three several actions of ejectment against your orators and others, tenants of your orators
 10 in possession of parts of said lands, and that on or about the tenth day of June, 1895, the said children of the said Fannie J. Kelly filed a bill in this Court against your orators, their agent Walter B. Humphreys, and others, the tenants of your orators, to which bill of complaint your orators, and said Walter B. Humphreys, made and filed several answers, on or about the day of June, 1895.

18. a. That said answer contains a full statement and account of said actions of ejectment, to which said
 20 answer, for greater certainly, your orators refer as a part of this their bill of complaint.

19. That in the said bill the children of the said Fannie J. Kelly stated that the said lands had, since the death of the said Samuel J. Kelly, been in the possession of the said Fannie J. Kelly, and that since the death of the said Samuel J. Kelly the said Fannie J. Kelly had had the use and benefit of said properties until a recent date, when they were sold for her debts.

20. That on the filing of the said bill, an order to
 30 show cause was made, which was heard on the eighth day of July last past, upon which hearing this Court made the following order: "It is, on this eighth day of July, A. D. 1895, by the Chancellor ordered that the "interim stay or injunction, contained in the order to "show cause made in this cause, is dissolved and dis- "continued as against all parties to whom it applied;

"but without prejudice to the complainants to apply to
 "have the said stay or injunction renewed."

21. That the allegations in the said answer of your
 orators, to the effect that the said Fannie J. Kelly was
 the actual owner of the said lands prior to the death of
 said Samuel J. Kelly have not been denied by the said
 Fannie J. Kelly, or her said children, and that the said
 Florence Van Sciver, Walter Kelly, Clarence Kelly,
 Albert Kelly and Leona Kelly, have, and each of them
 has, failed to pursue their said action in this Court, and ¹⁰
 are continuing to pursue their said actions of ejectment,
 and have noticed the same for trial at the present Cam-
 den Circuit of the Supreme Court, which began on the
 tenth day of September, 1895, and put them on the
 trial list, where they stand Nos. 51, 52 and 53, and that
 the said causes are stated to be ready for trial and are
 likely to be reached for trial within less than two weeks
 from September 10, 1895, or sometime during the week
 beginning September 16, 1895.

22. That your orators have lately been advised that ²⁰
 their said defense, that the said lands have all along
 been the lands of said Fannie J. Kelly, is an equitable
 defence relating to a person not a party to said suits in
 ejectment, and that the said cannot be set up on the
 trial of said action in a court of law, and that they have
 a right to the benefit of said defence.

23. That your orators have lately, and within the past
 week, been informed and believe that during the year
 1894 the said Fannie J. Kelly negotiated the sale of the
 said lands at Fourth and Mount Vernon streets, in the ³⁰
 city of Camden, with Pratt, of the said city of
 Philadelphia; that she informed said Pratt that she
 owned said houses, and that she took him to Frank J.
 Burr, and that said Burr informed said Pratt that the
 said houses, Nos. 1024, 1026, 1028, 1030 and 1032 South
 Fourth street, in Camden, had been in his, said Burr's

charge, as the houses of the said Fannie J. Kelly, for over ten years then last past; that finally said Pratt purchased the said houses and agreed to pay five thousand dollars therefor, and paid the said Fannie J. Kelly five hundred dollars on account of the purchase money thereof; that he, said Pratt, has never obtained a title for said land, nor a return of his money, although he has always been ready to fully perform his said agreement of sale; that your orators have only recently, and since September 10, 1895, become acquainted with these facts.

24. That the judgments recovered against the said Fannie J. Kelly prior to the judgments of your orators, were paid out of the personal estate of the said Fannie J. Kelly; that your orators are not aware of the amount of indebtedness covered by said judgment.

25. That it was the desire of your orators to file a petition in the said cause of Walter Kelly and others against your orators and others, commencing in this court in June last as aforesaid, and to bring the said Fannie J. Kelly into the said cause as a defendant, and to bring other necessary parties defendant into said cause by cross-bill filed in said cause; that your orators have been advised that new parties cannot be brought into a cause by cross-bill, and that they must file a supplemental bill in the nature of a cross-bill to the said cause.

26. That the said properties have been allowed to fall out of repair, and many of them are vacant, and that the same have been advertised for sale for taxes for the year 1892, but that said sale has not yet taken place; that all the taxes on the said lands for the year 1892 are due and unpaid; and that no taxes on the lands assessed since 1892 have been paid, that your orators are informed and believe that the sale of said lands for taxes would be delayed by the municipal authorities of

Camden, if the incomes from said houses could be applied to said taxes.

27. That your orators state and expect to prove, and therefore aver and charge, that a large part of the rents and incomes from the said houses have been collected by the said Frank J. Burr, agent, and that no part thereof has been paid over to the said municipal authorities of Camden for said taxes; that no part of the rents collected for your orators by their said agent, Walter B. Humphreys, has been paid over to your orators; that the full amount of rents (which is small) collected by the said Humphreys remains in his hands, except such portion thereof as has been paid out on repairs of said houses; that your orators are willing that all rents collected by the said Humphreys, except such as have been expended for repairs as aforesaid, shall be paid to such receiver as shall be appointed in this cause. 10

28. That your orators charge and insist, that the said ownership of the said Fannie J. Kelly of the said lands for and since the death of her said husband, and her attempts to sell the same as her own, and to apply the proceeds to the payment of her judgment debts and the use of the income and proceeds thereof as her own, and the action of her said agent in the collection of said rents, as her rents, were with notice to and full knowledge of said other defendants who filed said bill, namely: Walter Kelly, Clarence Kelly, Albert Kelly, Leona Kelly and Florence Kelly (now Van Sciver); that Joseph B. Van Sciver is the husband of said Florence G. Van Sciver and a proper party to this suit; that your orators are willing to concede to said Pratt whatever rights he may have in the premises. 20 30

But now so it is, may it please your Honor, that the said Fannie J. Kelly, Walter Kelly, Clarence Kelly, Albert Kelly, Leona Kelly, Joseph B. Van Sciver and

Florence Van Sciver, combining and confederating together, and to and with divers other persons, unknown to your orators, but whose names when discovered they pray may be inserted herein, with proper and apt words to charge them, and contriving how to injure your orators, and to defraud them of their said lands, pretend that said will is not properly executed and that the said Fannie J. Kelly did not own the said lands prior to the death of Samuel J. Kelly;

10 whereas, your orators charge and insist that the contrary and contradictory of said pretences are true and that said will was properly executed and said lands and improvements thereon, the property of the said Fannie J. Kelly before the death of her husband, and at that time and since then until sold as aforesaid.

All which actings and doings of said defendants and their confederates are contrary to equity and good conscience and tend to the manifest wrong and injury of your orators.

20 In tender consideration whereof, and for as much as your orators are without relief in the premises, at and by the strict rules of the common law, and can only obtain relief in this Honorable Court, where matters of this sort are properly cognizable and relievable:

To the end, therefore, that the said defendants and their confederates when discovered may (but without oath) full, true and perfect answer make to all and singular the premises, as fully and particularly as if the same were herein repeated and they and each of them

30 thereto particularly interrogated according to their respective knowledge, information, remembrance and belief; and (1) that a receiver be appointed to collect the rents of the said lands and houses thereon, now due or hereafter to become due, and to have sole charge of the said houses and lots, with such powers as may be necessary to properly care for the same and pay the

taxes thereof; (2) that the said Fannie J. Kelly, Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly, Leona S. Kelly, Florence G. Van Sciver and Frank J. Burr, be enjoined and restrained from further collecting said rents or otherwise meddling or interfering with said houses and lands, or with the management thereof; (3) that the said Frank J. Burr may discover and disclose the names of the tenants of the said houses from whom he is collecting rents as agent aforesaid, to the end that they may, if necessary, be made parties hereto; (4) that the said Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly, Leona S. Kelly and Florence G. Van Sciver may be restrained and enjoined from further proceedings in their said suits of ejectment, or either of them, until the further order of this court to the contrary in the premises, and that they may be permanently enjoined therein; and that your orators may have such other and further relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

May it please your honor, the premises considered, to grant unto your orators, not only the State's writ or writs of injunction issuing out of and under the seal of this honorable court, to be directed to the said Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly, Leona S. Kelly and Florence G. Van Sciver, enjoining and restraining them and each of them, their attorneys and agents, from proceeding with, bringing on to trial, or further prosecuting a certain action of ejectment in which they are plaintiffs and your orators and others are defendants, for the possession of Nos. 1024, 1026, 1028, 1030, 1032 South Fourth street, in Camden, New Jersey, against your orators, and from bringing on to trial, proceeding in, or otherwise prosecuting two certain other actions of ejectment brought by the same parties as plaintiffs, against your orators and others as defend-

ants, for the possession of Nos. 819, 821, 823, 825 Dauphin street, Camden, in one action, and Nos. 229 and 231 Chestnut street, Camden, in the other action, which three actions are brought in the Supreme Court and the venue thereof laid in Camden county, and to be directed to the said Fannie J. Kelly, Frank J. Burr, and each of them, and the said Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly, Leona S. Kelly and Florence G. Van Sciver, and each
 10 of them, their and each of their attorneys and agents, enjoining and restraining them from collecting the rents of the said houses and land, and from otherwise interfering or meddling therewith, or with the management thereof, but also the State's writ of subpœna, issuing out of and under the seal of this Honorable Court, to be directed to the said Fannie J. Kelly, Frank J. Burr, Pratt, Joseph B. Van Sciver, Florence G. Van Sciver, his wife; Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly, Leona S. Kelly, commanding
 20 them and each of them, by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience. And your orators, as in duty bound, will ever pray, &c.

H. A. DRAKE,

Solicitor for and of Counsel with Complainants.

30 STATE OF NEW JERSEY, }
 COUNTY OF CAMDEN, } ss.

HERBERT A. DRAKE, being duly affirmed according to law, on his affirmation saith, that Fannie J. Kelly frequently called upon affirmant in the early part of the year 1894 and requested affirmant to delay a threatened

Sheriff's sale of the lands mentioned in the foregoing bill, under the execution of the complainants; that she, among other things, stated that said lands and the improvements thereon before her husband's death belonged to her, and that she had furnished the money to improve them, and that she would sell said lands, and afterwards, that she had sold them, and would apply the proceeds thereof to the payment of the judgment debts of the complainants and others; that affirmant was present at a conference or meeting of the judgment creditors of the said Fannie J. Kelly, called by the attorney who had been acting for her in procuring postponements of said Sheriff's sale, at the office of said attorney, in December, in the year 1894, and the attorney who has brought ejectment suits for her children as stated in the proceedings in this cause, at which it was proposed by and on behalf of said Fannie J. Kelly and her said children that they would consent to placing the lands in controversy in the above cause in charge of a receiver in trust, upon trust to manage the same, collect the rents thereof, and apply the same to the payment of the judgment debts of the said Fannie J. Kelly, pro rata, without priority or preference, a proportionate part of each dividend to be paid to each judgment creditor; that affirmant declined to consider said proposition unless said dividends could be applied to said debts in the order of the recovery of the unsatisfied judgments then against the said Fannie J. Kelly.

H. A. DRAKE.

Affirmed and subscribed this sixteenth day of September, A. D. 1895, before me, a Master in Chancery of New Jersey.

PETER L. VOORHEES,
M. C. C.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN. } ss.

WILLIAM H. TENBROOK, of full age, being duly sworn, on his oath, saith: that he is one of the complainants named in the foregoing bill; that he and his partner, Philip Tenbrook, hold the Sheriff's deed in said bill mentioned; that he knows Fannie J. Kelly, and that she has frequently stated to him that she is, 10 and before the death of her husband was, the owner of the lands in controversy in this cause, and that she frequently stated to him that she had sold, or was about to sell the same, and that she would apply the proceeds of such sale in payment of the judgments recovered by deponent and partner and others against her, and that if necessary she would apply the whole proceeds of sale of all the said lands to the payment of her judgment creditors; that deponent has no notice or knowledge of the improper execution of the said will of Samuel J. Kelly; 20 that the same was procured to be probated by the said Fannie J. Kelly, as appears by the record, as a properly executed will; and deponent further saith, that he has applied to the said Pratt to attend and make affidavit to his said bill, and that said Pratt, not coming in to Philadelphia on Mondays, deponent could not procure his attendance; that as in said bill stated, information in said bill about a sale of said part of said lands is, as was stated to deponent by said Pratt, whom deponent met less than a week ago for the first time, that deponent 30 has been lately advised that it would be necessary for him to set up the defence to said actions of ejectment; that said lands belonged to Fannie J. Kelly, before the death of her husband, in equity, and that such defence could not be made at law in New Jersey; that in other respects said bill is true to the best of the knowledge, information and belief of this deponent.

W. H. TENBROOK.

Sworn and subscribed this 16th day of September, A. D. 1895, before me, a Master in Chancery of New Jersey.

PETER L. VOORHEES,
M. C. C.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN. } ss.

HERBERT A. DRAKE, being duly affirmed according to law, on his affirmation saith, that since the foregoing bill was sworn to by William H. Tenbrook and affirmed to by this affirmant, this affirmant in the eighteenth paragraph, on the eighth page of said bill, has interlined the statement that the purpose of the three actions of ejectment in said paragraph mentioned was to attack the validity and proper execution of the will in said bill mentioned; that on the second page of the bill filed by Walter A. Kelly and others against the complainants and others, it is alleged that said Samuel J. Kelly died intestate, and that the paper purporting to be the will of Samuel J. Kelly is not such will; that said actions of ejectment had been brought to recover the title of said lands, the real purpose being to set aside in effect the probating of said pretended will, said will being defective in that it was not properly executed; that in the opinion of affirmant the making of the said allegation in the said bill is not such an addition thereto as will make it necessary to have the said bill re-sworn to by the said William H. Tenbrook.

30

Affirmed and subscribed this seventeenth day of September, A. D. 1895, before me, a Master in Chancery of New Jersey.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN. } ss.

WILLIAM H. TENBROOK, being duly sworn according to law, on his oath saith, that he has read the foregoing affidavit of Herbert A. Drake, made on this day; that the same is true and that the modification of the eighteenth paragraph of the foregoing bill as above stated has not changed the verity of the said bill, and
10 that the same is true to the best of the knowledge, information and belief of this deponent.

Sworn and subscribed this seventeenth day of September, A. D. 1895, before me, a Master in Chancery of New Jersey.

20

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM H. TENBROOK, ET AL.,

Complainants,

and

FANNIE J. KELLY, FRANK J.

30

BURR AND WALTER A. KELLY,

ET AL.,

Defendants. }

ON BILL, &C.

FILED NOVEMBER

21, 1895.

The joint and several answer of Fannie J. Kelly, and of Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly and Leona S. Kelly, infants, by their guardian, de-

defendants, to the bill of complaint filed in above stated cause, and of Joseph B. Van Sciver and Florence G. Van Sciver, wife of Joseph B. Van Sciver, defendants in said cause.

These defendants respectively, for answer unto so much and such parts of the complainants' bill of complaint as it is advisable and necessary for them to make answer unto, answering say:

1. That they deny that Samuel J. Kelly made the last will and testament set forth in paragraph "one" of complainants' bill of complaint, but aver the truth to be that said Samuel J. Kelly died on the twelfth day of December, A. D. 1886, intestate. ¹⁰

2. They admit that at the time of the death of the said Samuel J. Kelly the title to the three tracts of land described in paragraph "two" of bill of complaint was the said Samuel J. Kelly.

3. They admit that the said Samuel J. Kelly left him surviving his wife, Fannie J. Kelly, and his daughter Florence G. Kelly, who has since intermarried with Joseph B. Van Sciver, and his children, Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly, who are minors above the age of fourteen years, and Leona S. Kelly, who is a minor under the age of fourteen years; that Fannie J. Kelly was married as stated to said Samuel J. Kelly; defendants admit that the maiden name of said Fannie J. Kelly was Andrews, and defendants further deny that said Fannie J. Kelly became seized of large amounts of real and personal property through her mother. ²⁰

4. Defendants deny that although the said lands, viz: 1024, 1026, 1028, 1030 and 1032 South Fourth street, 819, 821, 823 and 825 Dauphin street, and 229 and 231 Chestnut street, were in the name of, and the title thereof held by, the said Samuel J. Kelly, the said lands and the buildings and improvements thereon in truth ³⁰

and fact belonged to the said Fannie J. Kelly, who was the beneficial owner thereof, but aver the truth to be that Samuel J. Kelly bought, paid for and improved the said lands and premises himself, with moneys belonging to himself solely, and that no money or other valuable property of the said Fannie J. Kelly was used to purchase said grounds or to build the improvements thereon, and that the said Fannie J. Kelly had no interest in said premises whatever, either legally or equitably.

5. Defendants admit that Samuel J. Kelly, at the time of his death, and before his intermarriage with his said wife, was engaged in business in Philadelphia, and at the time of his death he was in conduct and management of a large and profitable business, carried on in his name; but defendants are unable to either deny or admit that said Samuel J. Kelly stated in his lifetime that his wife was possessed of large means, and leave the complainants to their proof thereof;

20 defendants deny that said Fannie J. Kelly owned a large interest in the said business of her husband's, but aver the truth to be that said business was owned solely and exclusive by said Samuel J. Kelly, and said Fannie J. Kelly had no interest whatever in the same; defendants admit there was some money on deposit in one or more banks of Philadelphia, and some stock in trade for carrying on business, and a deposit of fourteen hundred trade dollars in the Camden Safe Deposit and Trust Company, of Camden, New Jersey, and other

30 property in the name of the said Samuel J. Kelly, at the time of his death, but deny that it, or any part thereof, was owned by the said Fannie J. Kelly, but aver the truth to be that all of which things were owned solely and exclusively by the said Samuel J. Kelly and that said Fannie J. Kelly owned no interest in them whatsoever; that there were but two small

accounts due the business at the time of Mr. Kelly's death, and only five hundred dollars worth of stock in trade.

6. Defendants deny that said Fannie J. Kelly failed and neglected to prove the will of the said Samuel J. Kelly, but aver the truth to be, that immediately after the death of said Samuel J. Kelly the said Fannie J. Kelly, in company with Jonathan Burr, lately deceased, went to the office of the Surrogate of the county of Camden and offered for probate a certain writing pur-¹⁰ porting to be the last will and testament of said Samuel J. Kelly; that the then Surrogate informed the said Fannie J. Kelly that said paper writing purporting to be such last will and testament was not such last will and testament, and thereupon he refused to admit the same to probate; that some time in the latter part of eighteen hundred and ninety-three, at the advice of one Parrott, who represented himself as a member of the bar of Philadelphia, Pennsylvania, the said Fannie J. Kelly had the signature of one Annie²⁰ B. Dail to be added to said paper writing purporting to be the last will and testament of said Samuel J. Kelly, as a witness thereof, when as a matter of fact said Annie B. Dail did not become a witness to the execution of said paper writing, although the said Annie B. Dail was in the room to act as a witness to the execution of the will and would have become a legal witness to the intended will had she not been called for a short time from the room, and for the thoughtless folding up of said intended will by Mr.³⁰ Kelly and the handing of the same so folded up to her to keep, which distracted the said Annie B. Dail's attention from the fact that she had not signed said intended will as a witness. That after said paper writing was apparently a legal document, the said Fannie J. Kelly, always following the legal advice of said Parrott, again

presented said paper writing to the Surrogate of Camden county, being a different person, who upon the usual formal proofs admitted said paper writing to probate on the seventh day of December, A. D. 1893.

7. Defendants, in answer to paragraph seven of bill of complaint, say that immediately after the death of said Samuel J. Kelly, and after the refusal to probate said will, the said Fannie J. Kelly took out letters of administration, and took possession of the business and assets of said Samuel J. Kelly as administrator, and properly performed her duties as such; that an inventory and account of stock was taken, the stock amounting to about five hundred dollars; that she ran said business for the benefit and support of her children and herself, but without securing the consent of her said children, for the reason that they were all of such tender age that they were unable to understand any matters connected with the estate of said Samuel J. Kelly, and that so far as she knows said children had no knowledge of their legal position.

8. Defendants, in answer to paragraph eight of bill, deny that said Fannie J. Kelly rented an expensive house in a fashionable part of Camden and furnished said house expensively from and out of the proceeds of the said business and the rents and issues of said lands, with notice to and full knowledge of her said children; defendants admit that the taxes upon said real estate were permitted to remain unpaid for several years, but deny that it was with full knowledge of and full notice to her said children, nor did she use the entire income of said estate with full knowledge of her children; but aver the truth to be that said house was rented and furnished with money belonging to the said Fannie J. Kelly, being the proceeds of certain securities inherited by her from her mother.

9 & 10. Defendants admit paragraphs nine and ten,

wherein it is stated that judgment was recovered by complainants against Fannie J. Kelley for one thousand seven hundred and forty dollars and thirty-eight cents damages and costs, and execution issued thereon, and a judgment was recovered by the Camden Safe Deposit and Trust Co. against said Fannie J. Kelly and Mary Jane Curts for \$544.00 and execution issued.

11. Defendants admit that levies were made under said executions.

12. Defendants admit that Fannie J. Kelly called upon complainants and their solicitor and urged them to postpone sale of said lands. ¹⁰

13. Defendants deny that said Fannie J. Kelly at any time stated that said lands, though standing in the name of said Samuel J. Kelly, were at the time of his death and for a long period before, or at any time before, had been her property, but aver the truth to be, that after said paper writing was admitted to probate as the last will and testament of said Samuel J. Kelly, she did say that said properties belonged to her, and she believed the same to be true, and defendants admit that she did try and sell the same for the purpose of paying off the judgments held against her, but aver the truth to be, that she did arrange a sale of enough of said property to pay off all indebtedness against her, with one Pratt, who paid five hundred dollars down to bind the bargain, but that when the title of said Fannie J. Kelly was investigated it was found that she had no title to said property, and the sale was not consummated. ²⁰ ³⁰

14. Defendants admit that property was advertised for sale as set forth.

15. Defendants admit that said sale was postponed as set forth.

16. Defendants deny that Florence G. Van Sciver, Walter A. Kelly, Clarence F. Kelly and Leona S.

Kelly made any proposition, at any time, to place said lands in the hands of a trustee, to pay the debts of Fannie J. Kelly, or of any other person, but aver the truth to be that Fannie J. Kelly, for herself and upon her own responsibility, did make such a proposition, expecting her children to permit such an arrangement to be carried out as a mere matter of courtesy toward her, the said Fannie J. Kelly, said proposition being refused by complainants.

10 17. Defendants admit that said lands were sold and conveyed by Sheriff Barrett, as in said bill of complaint set forth.

18. Defendants admit that actions of ejectment were brought against complainants for the purpose of recovering possession of the said property so conveyed by the Sheriff as aforesaid, and that in or about June, 1895, the children of the said Fannie J. Kelly filed a bill of complaint in the honorable court against complainants.

20 18a. Defendants admit that said answer filed to said bill contains an account of said ejectment proceedings.

19. Defendants admit that said bill, filed by said children, states that said lands, since the death of the said Samuel J. Kelly, had been in possession of said Fannie J. Kelly, and that she had the use and benefit of said properties until a recent date, but aver that the rents, issues and profits of said properties were largely used for the use and benefit of her said children, they having no other means of support.

30 20. Defendants admit that the order set forth in paragraph twenty of bill of complaint was allowed.

21. Defendants deny that the allegations in said answer to bill filed by said children, to the effect that said Fannie J. Kelly was the actual owner of said lands prior to the death of said Samuel J. Kelly, have not been denied by the said Fannie J. Kelly or her said children, but aver the truth to be that they have been

denied in the proper manner, and are hereby denied in toto; defendants admit that they have not pursued their said action in this court, for the reason that the purpose of said bill, to wit, the prevention of the sale of said properties for taxes, has been accomplished and there is at present no reason for pursuing said action; defendants admit that the said children of said Fannie J. Kelly are pursuing as rapidly as possible their actions of ejectment and noticed the same for September Term Camden Circuit, 1895, although said actions have not yet been tried. 10

22. Defendants in answer to paragraph twenty-three admit that a sale of certain properties was negotiated with one Pratt, but deny that any of said properties had been in the hands of Burr as the houses of the said Fannie J. Kelly for over ten years last past, but aver the truth to be that said houses have always been entered upon the books of said Burr as the property of the estate of Samuel J. Kelly. Defendants admit that said Pratt never got title nor a return of his money. 20

23. Defendants, in further answering, deny that said Fannie J. Kelly called upon Herbert A. Drake after the will was probated and stated that said lands and improvements thereon before her husband's death belonged to her and that she furnished the moneys to improve them, but aver the truth to be that the said Fannie J. Kelly, after the probate of said will, called upon said Drake and then said that she owned said properties, fully believing that she was the owner thereof. 30

24. Defendants, in further answering, deny that said Fannie J. Kelly ever stated to William H. Tenbrook that she was the owner of the premises in question before the death of her husband, but aver the truth to be that she stated that she owned her own home, and that after the probate of said will has frequently stated that she owned the premises in question.

25. Defendants, in further answering, aver that complainants had ample and full knowledge and information, as did also their solicitor, that said will was illegally probated and absolutely null and void; that said matter was talked over before William H. Tenbrook in person at the Sheriff's office, in Camden, when the solicitor for these defendants requested the Sheriff to make an announcement as to the title, whereupon the
 10 solicitor for said Tenbrook prevented the Sheriff from making said announcement; that said Tenbrook had other ample knowledge of the matter.

All of which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) THOMAS B. HALL,
 Solicitor for and of Counsel with Answering
 20 Defendants.

STATE OF NEW JERSEY, } ss.
 CAMDEN COUNTY, }

EDWIN C. HALL, the guardian *ad litem* of the above named infant defendants, being duly sworn according to law, on his oath says, that he has read the foregoing answer, and that he is informed and verily believes the facts, matters and things therein stated are true.

(Signed,) EDWIN C. HALL.

30 Sworn and subscribed to before me, this nineteenth day of November, A. D. eighteen hundred and ninety-five.

(Signed,) JOHN T. WOODHULL,
 Master in Chancery.

STATE OF NEW JERSEY, }
COUNTY OF CAMDEN, } ss.

FANNIE J. KELLY, of full age, one of the defendants, being duly sworn according to law, upon her oath says, that the facts, matters and things set forth in the foregoing answer, so far as relates to her own acts are true, and so far as they relate to the acts of others, she believes them to be true.

(Signed,) FANNIE J. KELLY. 10

Sworn and subscribed to before me, this sixteenth day of November, A. D. eighteen hundred and ninety-five.

(Signed,) WM. T. BOYLE,
M. C. C.

STATE OF NEW JERSEY, }
CAMDEN COUNTY, } ss.

JOSEPH B. VAN SCIVER and FLORENCE G. VAN SCIVER, his wife, of full ages, being duly sworn, according to law, upon their several oaths say, that they are two of the defendants named in the foregoing answer, and that the facts, matters and things set forth in said answer, so far as relates to their own respective acts, are true, and so far as relates to the acts of others, they believe them to be true. 20

(Signed,) FLORENCE G. VAN SCIVER.
J. B. VAN SCIVER.

Sworn and subscribed to before me, this eighteenth day of November, A. D. eighteen hundred and ninety-five. 30

(Signed) PHILIP SCHMITZ,
Justice of the Peace.

I, ALLAN McDERMOTT, Clerk of the Court of Chancery of the State of New Jersey, the same being a Court of Record, do hereby certify that the foregoing is a true copy of the answer of Fannie J. Kelly

and others, in a cause wherein William H. Tenbrook and others, trading, &c., are complainants, and Fannie J. Kelly, Frank J. Burr, Walter A. Kelly and others are defendants, now on the files of my office.

10 In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Trenton, this twenty-fourth day of December, A. D. eighteen hundred and ninety-five.

ALLAN McDERMOTT,
Clerk.

IN CHANCERY OF NEW JERSEY.

Between

20 WILLIAM H. TENBROOK, ET AL.,

Complainants,

and

FANNIE J. KELLY, FRANK J.

BURR, WALTER A. KELLY,

ET AL.,

30

Defendants.

ON BILL, &c.

REPLICATION.

The complainants join issue on the answer of the defendants, Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly and Leona S. Kelly, infants, by their guardian, Joseph B. Van Sciver and Florence G. Van Sciver, and Fannie J. Kelly.

HERBERT A. DRAKE,
Solicitor for Complainants.

IN CHANCERY OF NEW JERSEY.

Between	
WALTER A. KELLY, ET AL., BY	
NEXT FRIEND, ET AL.,	
Complainants,	
and	ON BILL, &C. 10
WILLIAM H. TENBROOK AND	
PHILIP TENBROOK, TRADING,	
&C., AND OTHERS,	
Defendants,	
and	
Between	20
WILLIAM H. TENBROOK, ET AL.,	
TRADING, &C.,	
Complainants,	ON BILL, &C.
and	
FANNIE J. KELLY, WALTER A.	
KELLY, ET AL.,	30
Defendants.	

This cause being opened to the court by Thomas B. Hall, of counsel with complainants in the first suit, in the presence of Herbert A. Drake, of counsel with defendants in first suit;

It is, upon this twenty-eighth day of October, A. D. eighteen hundred and ninety-five, ordered, that George W. Jessup, of the city of Camden, be appointed receiver in said causes to collect the rents of houses numbers 229 and 231 Chestnut street, 819, 821, 823 and 825 Dauphin street, and 1024, 1026, 1028, 1030 and 1032 South Fourth street, all in said city of Camden, and that he make such disposition of said rents as shall be by this court ordered in the premises.

- 10 And it is further ordered, that the defendants in said causes, Frank J. Burr and Walter B. Humphreys, do turn over to the said George W. Jessup the tenants which they now respectively have or control in any of said houses, and that they do account for all rents collected by them respectively since the first day of January last, from said houses or any of them, and that they pay over any balance of said rents remaining in their hands after any proper deductions therefrom, for commissions or repairs, to the said receiver, George W.
- 20 Jessup, and that they desist and refrain from collecting rents of the said houses, and that the said George W. Jessup give bond for the faithful performance of his trust, as such receiver, in the sum of five hundred dollars, said bond to be approved as to form and security by Richard T. Miller, one of the Special Masters of this court.

ALEX. T. MCGILL, C.

Respectfully advised,
(Signed),

30 ALFRED REED, V. C.

The above order consented to.

(Signed) THOMAS B. HALL,

Solr. for Compl'ts in 1st suit.

H. A. DRAKE,

Solr. for Def'ts in 1st suit.

A true copy.

ALLAN McDERMOTT,

Clerk.

IN CHANCERY OF NEW JERSEY.

Between	}	
WILLIAM H. TENBROOK, ET AL.,		ON BILL, &C.
Complainants,		ORDER OF
and		REFERENCE TO A ^{IO}
FANNIE J. KELLY, FRANK J.		VICE
BURR AND WALTER A. KELLY,	}	CHANCELLOR.
ET AL.,		
Defendants.		

It is, on this fifth day of December, A. D. 1895,
 ordered that the above stated cause be referred to Hon.
 Alfred Reed, one of the Vice Chancellors, to hear the
 same for the Chancellor, and to report thereon to him, ²⁰
 and advise what order or decree should be made therein.

ALEX. T. MCGILL,
 C.

IN CHANCERY OF NEW JERSEY.

	Between	}	
	WALTER A. KELLY, ET AL., BY		
	NEXT FRIEND, ET AL.,		
	Complainants,		
10	and		ON BILL, &C.
	WILLIAM H. TENBROOK AND		
	PHILIP TENBROOK, TRADING,		
	&C., AND OTHERS,		
	Defendants,		
	and		
20	Between		
	WILLIAM H. TENBROOK, ET AL.,		ON BILL, &C.
	TRADING, &C.,		
	Complainants,		ORDER TO AP-
	and		POINT RECEIVER.
	FANNIE J. KELLY, WALTER A.		
30	KELLY, ET AL.,		
	Defendants. }		

This cause being opened to the Court by Thomas B. Hall, of counsel with complainants in the first suit, in the presence of Herbert A. Drake, of counsel with defendant in the first suit.

It is, upon this twenty-eighth day of October, A. D. eighteen hundred and ninety-five, ordered, that George W. Jessup, of the city of Camden, be appointed Receiver in said causes to collect the rents of houses numbers 229 and 231 Chestnut street, 819, 821, 823 and 825 Dauphin street, and 1024, 1026, 1028, 1030 and 1032 South Fourth street, all in said city of Camden, and that he make such disposition of said rents as shall be by this court ordered in the premises.

And it is further ordered, that the defendants in said ¹⁰ causes, Frank J. Burr and Walter B. Humphreys, do turn over to the said George W. Jessup, the tenants which they now respectively have or control in any of said houses, and that they do account for all rents collected by them respectively since the first day of January last, from said houses or any of them, and that they pay over any balance of said rents remaining in their hands after any proper deductions therefrom for commissions or repairs, to the said receiver, George W. Jessup, and that they desist and refrain from collecting ²⁰ rents of the said houses, and that the said George W. Jessup give bond for the faithful performance of his trust, as such receiver, in the sum of five hundred dollars, said bond to be approved as to form and security by Richard T. Miller one of the Special Masters of this court.

ALEX. T. MCGILL, C.

Respectfully advised,
(Signed),

ALFRED REED, V. C.

The above order consented to.

(Signed), THOMAS B. HALL,

Solr. for Compl't nt 1st suit.

H. A. DRAKE,

Solr. for Defn't in 1st suit.

A true copy.

ALLAN McDERMOTT,

Clerk.

IN CHANCERY OF NEW JERSEY.

Between	}	
WILLIAM H. TENBROOK, ET AL.,		
TRADING, &C.,		ON BILL, &C.
Complainants,		ORDER TO
and		AMEND BILL.
FANNIE J. KELLY, ET AL.,	}	
Defendants.		

This matter being opened to the Court by Herbert A. Drake, of counsel with the complainants, on this thirtieth day of March, A. D. 1896, in the presence of Thomas B. Hall, of counsel with the defendants, it is
 20 ordered that the complainants have leave to amend their bill of complaint by the insertion of a paragraph to be known as paragraph 29, which shall be in words hereinafter stated; and it is further ordered that the complainants have leave to amend the prayer to their said bill of complaint in the manner hereinafter stated, and that this order, when filed, including the said two amendatory paragraphs to said bill and prayer respectively, shall be taken and considered to be an amendment to the said bill and as much a part thereof as if it
 30 were regularly incorporated therein.

29. That on or about the twenty-fifth day of May, A. D. 1895, by deed of release dated on that day and recorded on the ninth day of July, A. D. 1895, in the office of the Register of Deeds in and for the county of Camden, New Jersey, in Book 208 of Deeds, page 36, &c., the said defendant, Fannie J. Kelly, as the widow of Samuel J. Kelly, released all manner of dower and right or action of dower which she then had,

of, in and to all and every the lands whereof her said husband died seized, wheresoever the same might be situated, which includes the lands and premises in controversy in this case, and in this bill described, together with the other lands of which the said Samuel J. Kelly died seized, to the said defendants, Florence G. Van Sciver, Walter A. Kelly, Clarence F. Kelly, Albert E. Kelly and Leona S. Kelly, whereby the said last named five defendants claim some additional lien on the lands in said bill described, and hereinafter referred to as the lands and premises in controversy in this cause; that your orators charge that the said Fannie J. Kelly while in possession of and claiming to own the said lands and premises in controversy in this case, by her agent, the Sheriff of the county of Camden, sold to your orators all the right, title and interest therein of her, the said Fannie J. Kelly, howsoever the said right, title or interest inhered in her, and that your orators have acquired all her rights in the premises, and that your orators have expended large sums of money on the faith of the ownership of the said Fannie J. Kelly, in and of said lands and premises in their obtaining and retaining possession thereof, and that she is now equitably concluded from making any disposition of her rights in the said premises against your orators; and that the said deed of release, to which your orators refer, so far as the same affects the said lands in controversy in this case is null and void and of none effect.

Amendment to prayer to be read as if inserted immediately preceding the prayer for general relief in the said bill and as the fifth special prayer of the said bill: (5), And that the said deed of release of the said Fannie J. Kelly to said five other defendants may be decreed to be null and void, so far as the same affects your orators.

IN CHANCERY OF NEW JERSEY.

	Between	}
	WILLIAM H. TENBROOK, ET AL.,	
	TRADING, &C.,	
10	Complainants,	
	and	
	FANNIE J. KELLY, ET AL.,	}
	Defendants.	

Depositions in the above stated cause, taken pursuant to the notice hereto annexed, at the office of Mattson & Magee, No. 41 south Water street, Philadelphia, Pa., on Thursday, the twenty-sixth day of March, A. D. eighteen hundred and ninety-six, at four o'clock in the
 20 afternoon, before Charles V. D. Joline, one of the Masters and Examiners of this Court, in the presence of H. A. Drake, Esq., solicitor of complainants, and Thomas B. Hall, Esq., solicitor of defendants.

It is agreed by counsel that the testimony shall be taken stenographically, and the signatures of witnesses waived.

MARK W. MILLER, sworn.

30 By Mr. Drake:

Ques. Where do you live, Mr. Miller?

Ans. No. 1631 South Sixteenth.

Ques. In what city?

Ans. Philadelphia.

Ques. What is your business?

Ans. Provision business.

Ques. Where?

Ans. Down Second and Market.

Ques. Did you know Samuel J. Kelly in his lifetime?

Ans. Yes, sir.

Ques. Were you ever in his employ?

Ans. I was.

Ques. For how long a period of time?

Ans. Well, from—let me see; why, in the winter time for about seven years, but not in the summer time. 10

Ques. When did he die?

Ans. I can't just tell you the date.

Mr. Hall: I object to the question; he is not a competent witness to say when Mr. Kelly died.

(Objection overruled).

Ques. In whose employ were you at the time of his death?

Ans. Mr. Kelly's. 20

Ques. What became of his business after he died?

Ans. It was placed in the hands of Mr. Groff; Mr. Nathan Groff.

Ques. G-r-o-f-f?

Ans. I guess that is the way they spell it; I don't know.

Ques. Who was Nathan Groff?

Ans. A step-father to Mrs. Kelly.

Ques. How long did Mr. Groff have charge of the business? 30

Ans. Why, he had it in—let's see—the latter part—December, January, February, up to in March.

Ques. What year?

Ans. Year of the death of Mr. Kelly, whenever that was.

Ques. After Mr. Groff ceased to have charge of the

business that Mr. Kelly left when he died, who took charge of it?

Ans. I did, at Mrs. Kelly's request.

Ques. To whom did you make returns for the business?

Ans. Mrs. Kelly.

Ques. How often?

Ans. Every day.

Ques. What did making returns consist of?

10 Ans. Why, paying the cash over to her every day, the receipts and all such expenses as I happened to pay out from time to time, and some things that I had to pay cash that I got no bills for.

Ques. In whose name did you give receipts?

Ans. In whose name? Mrs. Kelly, Mrs. S. J. Kelly.

Ques. To whom were the goods that you bought for this stand, or this business, charged?

Ans. To Mrs. Kelly.

Ques. Who receipted the bills? In whose name were
20 the bills receipted for goods which were purchased of the business?

Ans. Who receipted those bills?

Mr. Hall: I object to the question, on the ground that it is not relevant to the point at issue.

The Master: Upon suggestion of counsel, the Master is of the opinion that he has no power to rule upon depositions taken *de bene esse*.

30 (Question repeated.)

Ques. If any person bought goods of this business which you had charge of, and the goods were delivered and a bill was rendered, who receipted the bill after the money was paid?

Ans. I did, in the name of Mrs. S. J. Kelly, per Miller.

Ques. There was some money in the Tradesmen's Bank of Philadelphia at the time of Mr. Kelly's death, was there not?

Mr. Hall: I object to that as not relevant to the issue.

Ans. So I understood.

Ques. Who drew that money out?

Ans. I understood that Mrs. Kelly did.

Mr. Hall: I object to the answer, inasmuch as it is merely hearsay. 10

Ques. Do you know whether or not any trade dollars were deposited at the Safe Deposit Company, in Camden, at the time of Mr. Kelly's death, belonging to him?

Ans. Yes, sir; there were.

Ques. Who drew these out?

Ans. Mrs. Kelly.

Ques. What disposition was made of them? 20

Ans. They were paid away; part of them was paid to Washington Butcher & Sons, and part to Cheeseborough & Burrows.

Ques. What inventory or appraisement was made of the goods after Mr. Kelly's death when Mr. Groff took charge of the business?

Ans. There was none.

Ques. To whom were returns made when Mr. Groff had charge of the business?

Ans. To Mrs. Kelly. 30

Ques. Who did the buying for this business?

Ans. At what time?

Ques. After you took charge and Mr. Groff left?

Ans. I did.

Ques. In whose name did you buy?

Ans. Mrs. S. J. Kelly.

Ques. Who paid the bills?

Ans. I did.

Ques. I thought you said you turned the money all over to Mrs. Kelly every day?

Ans. So I did, and then she gave it back to me, and I paid the bills once a week.

Ques. Did anybody else besides Mrs. Kelly give any directions about this business when you had charge of it?

10 Ans. Nobody gave any direction; no, sir.

Ques. Who did the business belong to after Mr. Kelly died; the business which Samuel J. Kelly left?

Ans. Belonged to Mrs. Kelly.

Mr. Hall: I object to the question, as the witness is not competent to answer.

The Witness: As far as I know.

20 Ques. At the time of Mr. S. J. Kelly's death, do you know whether he had a bank account at the Tradesmen's National Bank?

Ans. He did have a bank account there; yes, sir.

Ques. Do you know how much money there was in the account?

Ans. I do not.

Ques. Did you know any houses on South Fourth street belonging to Mrs. Kelly?

Ans. I did not.

30 Ques. How did you say the receipts ran when you paid the money away, for this business?

Ans. When I paid the money away?

Ques. Yes.

Ans. In the name of Mrs. S. J. Kelly.

Ques. State whether or not you knew of a Mr. Neff in the cheese business about the time of the death of Samuel J. Kelly?

Ans. I did; yes, sir.

Ques. State whether or not he paid any money to Mrs Kelly after the death of S. J. Kelly.

Ans. I paid two checks away of his for a hundred dollars apiece.

Ques. Who paid them away?

Ans. I did.

Ques. What business did Mr. Neff do with Mr. Kelly in Mr. Kelly's lifetime that you know of?

10

Ans. I know of none; I couldn't say.

Ques. When you took charge, did you make any inventory of the stock?

Ans. I did; yes, sir.

Ques. Where was the stock, on the stalls or at the smoke house?

Ans. On the stalls and in the cellar of the smoke house.

Ques. Where was the smoke house?

Ans. On Relief street.

Ques. How large a business was this, Mr. Miller? What did the sales amount to?

20

Ans. What do you mean; in a week?

Ques. In a week; yes, sir.

Ans. That would be a pretty hard question for me to answer now.

Ques. Do you know what they amounted to in a month or in a year?

Ans. Amounted to in the neighborhood of \$24,000 in a year. Sales vary too much to say how much.

Ques. How long did you continue in charge of this business, after you took charge of it in March, immediately succeeding the death of Samuel J. Kelly?

30

Ans. Very nearly six years.

Ques. In what way did your custom of making returns to Mrs. Kelly and paying bills vary during that six years from the way you have already stated?

Ans. I do not understand that question.

Ques. State whether or not your system of making the accounts and bills to Mrs. Kelly, as already described, was continued by you up to the time that you left the business?

Ans. Yes.

Ques. Or whether it was changed?

Ans. No, it was the same way, except when her son came over, I didn't have to go over to Jersey; it was
10 carried over by him.

Ques. When did he come over?

Ans. About three or four months, or two months, I suppose, before I left, probably.

Ques. What was his name?

Ans. Clarence.

Ques. Clarence what?

Ans. Clarence Kelly.

Ques. In the carrying on of this business, and in the management of this stall, who was under you to help
20 you carry on the business?

Ans. I had two men part of the time, and part of the time one.

Ques. Who paid them?

Ans. I did.

Ques. Who paid you?

Ans. Mrs. Kelly part of the time, and the balance part she told me to take it out herself, that sometimes she forgot; it kept the account more straight.

Ques. When you were paid, were you paid by Mrs.
30 Kelly, or did you take the money, your salary, from the cash returns which you turned over to her?

Mr. Hall: I object to that question as leading.

Ans. Part of the time she paid me, and part of the time I took it myself.

Ques. Which part of the time did you take it yourself, and which part of the time did she pay you?

Ans. The first part she paid me, and the balance of the time, I suppose probably the last two years—probably a little bit longer—I took it out myself before I made the returns.

No cross-examination.

Adjourned until Friday, March 27, 1896, at the same¹⁰ place, at 4.15 P. M.

The hearing of the above case was resumed on March 27, 1896, at 4.15 P. M., at the same place, in the presence of the respective counsel.

ARTHUR B. PRATT, SWORN.

By Mr. Drake:

Ques. Where do you live, Mr. Pratt?

Ans. No. 1425 South Sixth Street, Philadelphia.

20

Ques. What is your business?

Ans. Commission merchant.

Ques. Where is your business?

Ans. No. 8 South Delaware Avenue Market.

Ques. Philadelphia?

Ans. Yes, sir.

Ques. Do you know Mrs. Kelly, Mrs. Fannie J. Kelly?

Ans. Well, I have met with her, yes.

30

Ques. When did you first meet with her?

Ans. I have some paper here to show; I think about the 2nd of February, 1894; I think so; about the 1st of February, 1894.

Ques. How did you become acquainted with her?

Ans. Why, Mrs. Curts first introduced me to Mrs. Kelly.

Ques. What is Mrs. Curts' first name?

Ans. I don't know.

Ques. Where does Mrs. Curts live?

Ans. Fifth street below Federal.

Ques. In what town?

Ans. Camden.

Ques. Did you have any dealings with Mrs. Kelly or Mrs. Curts about any real estate in the city of Camden?

10 Ans. Well (producing paper) here is a letter; you can read that; you can look over that, what you see here. (handing paper to counsel for complainants). An introductory letter, that is all, in regard to buying these houses.

Ques. From whom did you receive this letter?

Ans. Mrs. Curts.

Ques. Was this letter the first you knew about the business?

Ans. Well, Mrs. Curts called there, and wanted to know if I wanted to buy some houses of Mrs. Kelly.
20 I didn't know who Mrs. Kelly was at that time.

Ques. Was that before you got this letter?

Ans. Yes; about two weeks, I think.

Ques. Did you ever get any letters from Mrs. Curts before this time?

Ans. No.

Ques. Have you ever seen Mrs. Curts since this time?

Ans. Several times.

Ques. Did she ever speak to you of having written
30 this letter to you?

Ans. No, I asked her no questions.

Ques. Does the letter relate to some houses she talked to you about before she wrote it?

Ans. I guess so; I never examined it anyhow; I never examined it at all. Mrs. Curts was a friend, that is all.

(Said letter in two sheets is now offered and marked for identification Exhibit C1, each sheet being marked Ex. C1, C. V. D. J., and is read as follows):

CAMDEN CITY, January 31st, 1894.

DEAR FRIEND: According to promise I send The a few lines to tell the that we did not offer them five houses, Mrs. Kelly said as The was a friend of Mine The mite have Them for The five Thousand, providing The would pay hur a sertan amount right away as her 10 man in The market has two big orders to fill and he has not got the Man to fill them, but she ses if she waits two weeks she cannot take less that five thousand and five hundred she was offered five Thousand Two months ago cash and hur Lawyer would not let hur take it war she would not take it now onle she wants some money right away she is not going to tell the Lawyer anything about it she ses she never expected to sell they for that money but as The is a friend of mine that if she has to sacrifice them she will give The the 20 preference. I have begged of her not to sell them to anyone else as The Told me in a couple of weeks The Thought The would take them if The liked them and The Told me The Thought The would put some money in property and is verry cheap it is near caines avenue and handy to the cars and Theres to be a steamboat landing at the foot of Chestnut street and that will be verry valuable before long. People has wanted to buy a single house last week a man wanted to buy one of Them but I Told him That I Thought 30 The would Take Them all so I stopped That. I am going out tomorrow To hunt money fore hur fare I help hur in business I promised hur Mother That if I outlived her That I would see after her welfare and I cannot go back on that. Mrs. Kelley is very poorly and she could not write so she got me to write to The

fore hur and she requested me To ask The To please To come To her house to-morrow. The knows That larger houses that has all convinients in always has more expence attached to them and small houses always rents better than large ones does. The can put Two of them houses Together and make a store on the corner. I will cloase hoping to see The soon. I will be at Mrs. Kelleys.

Yours truly with respect,

10

MARY JANE CURTS.

Mr. Hall: I object to the letter being introduced in evidence. Note the objection.

Ques. After you got this letter did you see Mrs. Kelly?

Ans. Well, I believe not. I had to find out all through Mrs. Curts.

Ques. Did you get any memoranda from Mrs. Kelly about the houses or signed by Mrs. Kelly?

20 Ans. Let me show you this (handing counsel paper.) There is a catalogue of the houses.

Ques. From whom did you receive that?

Ans. I don't know whether that was mailed to me or whether Mrs. Curts fetched it to me; I don't remember.

Ques. Do you know who signed it?

Ans. I don't know who signed it.

(The said paper spoken of by the witness is now marked for identification, Exhibit C2, and is as
30 follows:

I offer the following for sale if all are taken.

4 & Mount Vernon

No. 1024, 26, 28, 30, 32.

Lot, 70x60.

\$6,000

Assessed at fifty-five hundred.

No. 229, 31 Chestnut St.

Lot, 28x100.

2,000

Assessed at \$2,000.

Dauphin St.

No. 817, 19, 21, 23.

Lot, 60x85.

2,000

Assessed at \$2,800.

If all bought by the same party.

FANNIE J. KELLY.

10

Ques. Well, did you buy the houses ?

Ans. Well, I tried to. I made Mrs. Curts an offer and of course they took me up.

Ques. What did you offer for the houses ?

Ans. Five thousand.

Ques. Which houses were they ?

Ans. There is a statement of it catalogued there. That is five there (indicating) the first five mentioned in the catalogue.

Ques. Did you pay any money on account of them ? 20

Ans. Ten per cent; that's \$500.

Ques. Did you get a receipt for it ?

Ans. That is it (indicating paper in the hands of counsel).

Said receipt referred to is marked Exhibit C3 for identification, and reads as follows:

Feb. 3th, '94.

Mrs. Kelly Sold to Arthur Z. Pratt five premises for five thousand dollars No. 1024, 26, 28, 30, 32 south 30 fourth street Camden Received \$500 dollars purchase money on account.

FANNIE J. KELLY.

Ques. When was that money paid, and when was that receipt received by you ?

Ans. At the same time.

Ques. The receipt is dated February 3, 1894; by saying "the same time," do you mean the date of the receipt?

Ans. I do; all the same time.

Ques. Well, did you get a deed?

Ans. I haven't yet.

Ques. Did you make an attempt to get a deed?

Ans. Eh?

10

(Question repeated.)

Ans. Well, I don't know. A time was set for it, and that is the last of it.

Ques. That was the last of it?

Ans. That was the last of it.

Ques. Did you get a letter from Mrs. Kelly in relation to it?

Ans. I have a little note here, a statement here; that is all I know. I can show it to you (handing paper to
20 counsel.) She could meet me, she said.

Said paper is marked Exhibit C4 for identification and reads as follows:

Wednesday Morning.

MR. PRATT: I am going away for a few days, will let you hear from me as soon as I return.

Respectfully

FANNIE J. KELLY.

30

Marked in lead pencil at the bottom "2-14-94 Rec'd."

The Witness: I think it is here as to the return of Mrs. Kelly. When she came back I don't know.

Mr. Hall: I object to that being offered in evidence, and I enter an objection now to any evidence which has

any tendency to show any act of Mrs. Kelly relating to the property in dispute.

Ques. What did Mrs. Kelley tell you about this property, Mr. Pratt, before you bought it?

Mr. Hall: I object to that question on the ground that it is not evidence.

Ans. Why, she told me the property was hers, left to her in the will, her property. 10

Ques. How many conversations did you have with Mrs. Curts about this property?

Mr. Hall: I object to that on the ground that it is not evidence, and not relevant to the issue.

Ans. When she came over there, I asked her how the property stood. She said it was first class property free from all encumbrances. She said when I was tired of it, she would take it off my hands; she said it was clear of all encumbrances; she said she knowed it. 20

Ques. Did Mrs. Kelly say anything to you about her interest in the property after her husband's death?

Mr. Hall: I object to that question on the ground that it is not evidence and not relevant to the issue.

Ques. Where is the other letter you got from Mrs. Kelly, the last one you got?

Ans. Mrs. Kelly?

Ques. Yes. 30

Ans. I don't know.

Ques. Did you receive that letter from Mrs. Kelly also?

Ans. She mailed it to me.

Ques. What date did you receive it?

(Objected to.)

Ans. The day the date on it.

Ques. Camden, April 9, '94?

Ans. That is the time, I suppose; sometime there.

Ques. Did you hear anything from Mrs. Kelly about this property between the letter which you received February 14, 1894, and marked C4, and this letter which I now hold in my hand, dated April 9, 1894?

10 Mr. Hall: I object to that on the ground that it is not evidence and not relevant to the issue; that it is hearsay.

Ans. Well, I tried to get my \$500 back, but I found I was knocked out trying to get it back, regarding the title. I didn't know anything about it. I went to the Title Insurance Company and they tried to fix me up, and they said they could not give me a clear title; that is all I know.

Ques. When did they tell you they couldn't give you
20 a clear title?

Ans. Well, the delivery of the deed was on the 15th of February. It was about the 20th of February they couldn't give me a clear title they said. The deed was delivered on the 15th of February, and she wrote me this note on the 14th that she could not come to meet me you know.

Ques. By this note you mean Exhibit C4?

Ans. Yes; when she said she could not meet me, I thought there was something wrong right away, and so
30 I inquired among my friends and found I was knocked out.

Ques. Have you ever seen Mrs. Kelly to have a talk with her since that time?

Mr. Hall: I object to that on the ground that it is not relevant or material, and that it is heresay, and that anything Mrs. Kelly said or did about the property is not evidence.

Ans. Well, I called there at the house, and we talked about getting my deed. She said she was sorry there was some mistake in the title; she would like me to have the houses, she said. Said something was wrong about the Legislature's laws of the State of New Jersey. That is what we talked about.

Ques. What did she say about handing you your five hundred dollars back?

Ans. Said she would pay the interest on it. I haven't received any yet. 10

Ques. When did she offer to pay the interest on it?

Ans. I guess about a couple of months afterward or so.

Ques. Have you any objection to these papers remaining in the hands of the Master, Mr. Pratt, for the use of the court?

Ans. I have not.

The last letter offered is marked Exhibit C5, and reads as follows: 20

Mr. Pratt:

DEAR SIR: I have been away for the last few days, when I came home I found your note, have given it to Judge Carrow with instructions to attend to it *immediately*. I am as anxious as you, hoping the delay will not be long.

I remain Respect.

MRS. F. KELLY.

Camden, Apr. 9-94." 30

Mr. Hall: I object to having that letter offered in evidence.

Cross-examination.

By Mr. Hall:

Ques. Did Mrs. Kelly offer to allow you to collect the

rents of these properties to enable you to recover your \$500?

Ans. To take a life policy on the property, a policy for four years, but I thought myself if she could not give me a clear title to the property she could not give me a policy on the house.

Ques. Did she offer to allow you to collect the rents?

Ans. I don't remember anything about that; I don't remember anything at all about that.

10

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM H. TENBROOK, ET AL.,

TRADING, &C.,

20

Complainants,

and

FANNIE J. KELLY, ET AL.,

Defendants.

Transcript of stenographer's notes of evidence taken in the above entitled cause before His Honor, Alfred Reed, Vice Chancellor, at the Chancery Chambers, 30 Camden, N. J., April 13th, 1896, at 2.45 P. M.

Appearances:

MR. HERBERT A. DRAKE, for the Complainants.

MR. THOMAS B. HALL, for the Defendants.

Mr. Drake: I offer in evidence a certified copy of the will of Samuel J. Kelly, dated November 19th, 1886.

Mr. Hall: I object to the offer. I don't see how the question of the will can enter into this case in the slightest degree. This is claimed to be an equitable defence to certain ejectment suits. They took title under the probate of the will. In our ejectment suits we claim that the will is not valid and that will be part of our case in ejectment. Now they came in and make application, stating that the equitable title to this property was in one of the defendants, Fanny J. Kelly, before and at the time of her husband's death; secondly, 10 if they take title at all, they must take it as though there had not been any will whatever. They take it as if there was a mutual conveyance from Kelly to some other person, and they have no claim against Mrs. Kelly, and they come in and have a levy under execution—interrupted—

Court: You claim under the will?

Mr. Hall: No, we claim adversely to the will under 20 the ejectment suits.

Mr. Drake: We claim under the will.

Court: This is a claim by creditors trying to reach property in the hands of the wife, and she claims under that will.

Mr. Drake: We set out the will and we claim that it is all right, and we propose to offer the will and the Sheriff's deeds.

The will devises the property to Fannie J. Kelly, and we propose to offer the Sheriff's deed and show that the property was sold as the property of Fannie J. Kelley, by the Sheriff, to the complainants in this cause, and propose to show that we had possession under that deed. 30

Now, the aspect he wants to put us in, is to attack our own will; to bring proof here in support of the

will, which by the record is a perfectly regular and valid will, regularly proved and standing of record, nothing having been done to it at all.

Now, if they are going to take upon themselves the onus of showing that it is a bad will—well, let them do so—it is not for us to come into court and attack our own title; that would be a very injudicious thing to do.

(The pleadings read.)

10 The Court: I will admit the will subject to the objection.

(Marked Exhibit C1.)

Mr. Drake: I offer in evidence the deed by George Barrett to William H. Tenbrook and others, recorded in Book 204 of Deeds, for Camden county, page 24.

(Marked Exhibit C2.)

20 Mr. Hall: I think the Sheriff's deed comes in under the same conditions as the will, as it takes its title in the same shape as the will.

The Court: That is so, and I will admit it in the same manner— if I think the will is bad, then the deed must be bad.

WALTER B. HUMPHREYS, a witness produced in behalf of the complainants, being duly sworn according to law, on his oath saith:

30

Examined by Mr. Drake:—

Ques. Where do you live?

Ans. In Camden.

Ques. What is your business?

Ans. Real Estate.

Ques. Have you any acquaintance with the property

mentioned in the bill of complaint in this case, of William H. Tenbrook and others against Fanny J. Kelley and others, known as numbers 819, 821, 823, and 825 Dalton street, and numbers 239 and 241 Chestnut street and numbers 1024, 1026, 1028, 1030 and 1032 South Fourth street?

Ans. Yes, I took charge of those houses as agent for Tenbrook Brothers.

Ques. The complainants in this cause?

10

Ans. Yes, sir.

Ques. Did you collect any rents?

Ans. Yes, sir.

Ques. Did you spend any money on the property?

Ans. Yes, sir.

Mr. Hall: I object to this as irrelevant testimony.

Ques. Did any of the tenants attorn to you?

Ans. Yes, sir.

20

Mr. Hall: I object as not being relevant.

The Court: I will take it.

Ques. Who?

Ans. Philip and Henry Tenbrook, trading as Tenbrook Brothers, I think it was.

No cross-examination.

Mr. Drake: Did you produce the deeds which I asked you to produce, Mr. Hall?

30

Mr. Hall: My client has the deeds and papers in storage and has been unable to find them so far.

Mr. Drake: We gave notice to produce certain deeds, of which notice I have a copy and offer it in evidence.

Marked Exhibit C3.

It is admitted by the counsel for the defendant, that the deeds mentioned in that notice were executed at the time and by the parties and to the parties mentioned therein.

Counsel for the defendant reserves the right to correct this admission in case it should be found inaccurate as to the details.

- 10 SAMUEL S. E. COWPERTHWAIT, a witness produced in behalf of the complainants, being duly sworn according to law, on his oath saith.

Examined by Mr. Drake:

Ques. Where do you live?

Ans. At Haddonfield.

Ques. How long have you lived there?

Ans. About two months and a half.

Ques. Before living there where did you live?

- 20 Ans. Camden.

Ques. How much of your life have you lived in Camden?

Ans. Seventy-one or seventy-two years.

Ques. Did you know Benjamin Andrews?

Ans. I did.

Ques. Did you know Fanny J. Andrews?

Ans. Yes, sir.

Ques. Do you know her now?

Ans. Yes, sir.

- 30 Ques. Is this the lady sitting here?

Ans. Yes, sir.

Ques. What is the name of Fannie J. Andrews at the present time?

Ans. Fannie J. Kelly, I believe.

Ques. Do you know any estate known as the estate of Ann Andrews?

Ans. Yes, sir.

Ques. Did any of that estate go to Fannie J. Andrews,
now Fannie J. Kelley?

Mr. Hall: I object to the question as irrelevant and immaterial, and I also object to all this line of evidence as immaterial and incompetent, and that the bill does not raise this question.

Court: I will admit the testimony subject to the objection. 10

Ans. Her father's share.

Ques. Her father's share of what estate?

Ans. Ann Andrews.

Ques. Was Ann Andrews the grandmother of Fannie J. Andrews, now Fannie J. Kelly?

Ans. Yes, she was.

Ques. When you paid Fannie Kelly her share of her father's share, did you take any release?

Ans. A refunding bond. 20

Ques. Have you it in your possession?

Ans. Yes, sir.

Ques. Did you ever file it with the Surrogate?

Ans. No, sir.

Ques. Will you please produce it?

(Witness produces paper and hands it to counsel.)

Ques. How much money did you pay Fannie J. Kelly on her signing this refunding bond? 30

Ans. I paid her \$1,006, or altogether \$1,262 I paid her.

Ques. Was that after you took out your commission?

Ans. Yes, sir; it was. \$1,300 and something was the whole amount—\$1,328.75.

Ques. Was that all the share she was entitled to and received at your hands as one of the executors of Ann Andrews?

Ans. That was all.

Ques. In whose handwriting is this refunding bond?

Ans. I don't know. I think it was executed in Peter L. Voorhees' office. I don't know who wrote it.

Ques. Properly stamped is it?

Ans. Yes, sir.

Ques. What is the date of it?

Ans. May 1st, 1872, I think.

10 Mr. Hall: I object to this being put in evidence and I raise my objection to all this line of evidence.

Court: I will take it subject to the objection.

Mr. Drake:

Ques. How did you pay her that money?

Ans. In cash.

Ques. In cash or by check?

Ans. I cannot tell, but I think it likely I paid it by
20 check, but I am not positive of that.

Ques. Do you know the signature of Peter L. Voorhees?

Ans. Yes, sir.

Ques. Is he dead?

Ans. Yes, sir.

Ques. Whose signature is thereto attached as the signature of the subscribing witness?

Ans. Peter L. Voorhees.

Ques. Is that in his own proper handwriting?

30 Ans. I think it is; yes, sir, I am sure of it.

It is admitted that Mrs. Kelly signed the refunding bond.

Mr. Drake: The bond recites "that whereas the said distributive share of the said Benjamin Andrews, together with the interest accrued thereon, now amounts

to the sum of \$1,328.75, and the said Samuel S. E. Cowperthwaite has agreed to pay over the said sum, being the distributive share aforesaid and interest accrued thereon, to the said Fannie J. Andrews, upon being indemnified and saved harmless, &c.

(Paper offered in evidence and marked Exhibit C4,)

Ques. When did you pay this money to Mrs. Kelly?

Ans. On that date.

Ques. The date of the refunding bond?

10

Ans. Yes, sir.

No cross-examination.

WILLIAM H. TENBROOK, being duly sworn according to law, on his oath saith:

Examined by Mr. Drake:

Ques. Where do you live?

Ans. No. 1436 Poplar street, Philadelphia.

20

Ques. Are you one of the complainants in this cause?

Ans. I am.

Ques. Do you know Fannie J. Kelly?

Ans. I do.

Ques. When did you first become acquainted with her?

Ans. I don't think I ever saw Mrs. Kelly until after she commenced to default on her payments—she had been buying goods from us for several years before.

Ques. What is your business?

30

Ans. Pork packers in Philadelphia.

Ques. What was the business of Fannie Kelly, at the time you speak of?

Mr. Hall: I object to the question and to the evidence in general, on the ground that it is irrelevant and

it doesn't make any difference whether this gentleman had any business relations with Mrs. Kelly or not.

Court: I will take the evidence subject to your objection.

Ans. Her business was what we call in Philadelphia "a ham cutter," sells sliced ham in the market.

Ques. Where?

10 Ans. At Second below Elm, east side of Market street.

Ques. Who is in charge of the business?

Ans. A man by the name of Mark Miller, when I was selling to her.

Ques. After you recovered judgment and threatened to sell this land to pay the amount of the judgment, did you see her?

Ans. No, sir; I have not. I think it was all before that; I don't recollect it very well—

Ques. When did you see her?

20 Ans. Well, let me see—I saw Mrs. Kelly several times; she came up to the store several times and then she telegraphed me that she wanted to see me.

Ques. In relation to what and where?

Ans. In regard to the payment of her debt, and when she wired me she wanted to know if I could not lend her some money.

Ques. What did she say to you about this property?

30 Mr. Hall: I object to this—it doesn't make any difference what Mrs. Kelly said to him about this property; it is entirely hearsay and doesn't come within the rules of evidence at all.

Court: It is an admission by a party.

Mr. Hall: I don't know whether she is a party or not; she is nominally a party but not a party in substance.

Mr. Drake: She has answered anyway.

Court: I will admit it on the ground that the predecessor in title stands upon the same footing as the party himself to the suit, if made before title passed. Anything this lady said before she signed the release of her dower is good against her, but it cannot bind the other parties except so far as the dower interest is concerned.

Ans. About this particular property in dispute—the 10 only—there were several conversations about this property—the first one was after the will was put on probate; she came over there to my place of business, and she produced a certified copy of the will and she said “now I will soon be able to pay you and all my creditors all I owe.” Well, now, I am very glad to hear that, because we need the money very much. Yes, she said, I have got the will, I have found the will and put it on record and all the property is mine and as soon as I am settled or as soon as I can sell or raise the money 20 on this property, I will pay you and all the rest of the creditors, and I again told her I was very glad to hear it, as we were very much in need of money just then and she showed me the will, and in fact I read the will.

Ques. Was it the will or a copy, that she showed you?

Ans. A certified copy she brought over. I think it was very much like what you have here—very much the same thing—all the witnesses and the formal part and all that sort of thing. I didn’t pay much attention 30 to that; I simply read the will and it said that her husband had given her everything.

Mr. Hall: I move to strike out this answer as it is simply evidence showing title—he says the first conversation he had was after the will was put on probate.

Witness: Regarding this property, at least that is all I remember.

Mr. Hall: I don't see that it counts for anything because it is all based on the will and it comes back to the will again, and if her title is based on the will, her conversation is immaterial.

Witness: I read the will all over, and I saw that it was put on probate several years after her husband's death, and I knew the only one that could object would be the children, and I said, "don't your children object to the will," and she says "no; because they know the property was virtually mine," or words to that effect. Well, I said, in that case we will not push you; we don't want to be hard on you and we will let the thing go on and you must try to sell the property or raise the money on the property, or anything of that kind, so that we will get our money and get it as soon as possible—that was that conversation at that particular time.

Ques: What other conversation did you afterwards have at any time on the same subject—did you have any?

Ans. No, sir; I don't think she said anything, not on the same subject—I cannot recall that she said anything on the same subject again; I think that was all the conversation I had. I saw her again, though. I don't know whether she wrote me or I went out to see her as to how she was getting on with the sale of this property, and she said that she was not making any rapid headway about the property and that sort of thing and this was some six, eight or nine months after the first conversation. Some six, eight or nine months had gone by and I was beginning to get tired about it and I thought it looked a little like hum-

bug, because she had told me before that she expected to sell it and if she had the property and there was no one ready to buy the property—interrupted—

Ques. Did you finally order the sale of the land to be proceeded with against her?

Ans. About that time, I thought that would bring the matter to some conclusion, to some end. I was tired of it as it was and it had been standing a good many years in that shape.

10

No cross-examination.

HERBERT A. DRAKE, a witness produced on behalf of the complainants, being duly sworn according to law, on his oath saith:

I live in Camden, N. J., and have lived here since 1868. I was admitted to the bar as attorney in 1871 and as counsellor in 1874, and have been practicing as such in the city of Camden since that time.

I know Fannie J. Kelly and I know William H. Tenbrook and Philip Tenbrook, trading under the firm name and style of Tenbrook & Brother, the complainants in this cause. 20

After the recovery of the judgment set out in the bill, some time in the early part of the year 1894, I had obtained a judgment—the will had lately been proved—and I made a levy on the property in question in this case—that is, the Sheriff made the levy under my direction. I found a preceding levy made under the judgment of the Camden Safe Deposit and Trust Com- 30
pany against Fannie J. Kelly and Mary J. Curts, and I directed the Sheriff of Camden county to proceed with that execution and make the money on the levy. Mrs. Kelly came to the office and said that she had the sale under way for a large part of the property in question, and she told me the agents through whom the sale had been made.

I called upon them; they confirmed, as I recollect, her statement, and the order of the Sheriff to sell under his execution and levy was held in abeyance until about September, 1894, when he was directed to again proceed.

Several times during the interval between the levy and the advertisement of the property for sale, Mrs. Kelly called upon me as the attorney or solicitor for
 10 Tenbrook & Brother, and stated to me that it made no difference whether the will was effectual or not, that the property belonged to her anyhow, that she had advanced money to her husband to purchase it with and to improve it, or words to that effect.

This statement I think she made to me several times; and she also stated that she had seen Mr. Tenbrook and talked to him on the same subject.

No cross-examination.

20 Adjourned to April 27th, 1896, 11 A. M.

IN CHANCERY OF NEW JERSEY.

	WILLIAM H. TENBROOK, ET AL.,	}
	TRADING, &C.,	
	Complainants,	}
30	and	
	FANNIE J. KELLY, ET AL.,	
	Defendants.	}

Transcript of stenographer's notes of evidence taken
 in the above entitled cause before His Honor, Alfred

Reed, Vice Chancellor, at the Chancery Chambers,
Newark, N. J., April 27th, A. D. 1896, at 2 P. M.

Appearances:

MR. H. A. DRAKE, for the Complainants.
MR. THOMAS B. HALL, for the Defendants.

HOWARD C. WALTON, a witness produced on the¹⁰
part of the complainants, being duly sworn according to
law, on his oath saith:

Examined by Mr. Drake:

Ques. Where do you live?

Ans. Woodlawn.

Ques. Where is your business?

Ans. 325 Market street, Camden.

Ques. What is your business?

20

Ans. Real estate and insurance.

Ques. How long have you been in that business
there?

Ans. At the present location about six years; that is,
in the present location.

Ques. Do you know Fannie J. Kelly?

Ans. I do.

Ques. Did you ever have any business with her?

Ans. Some little.

Ques. What was the nature of the business?

30

Ans. Well, she wanted us to sell some property for
her.

Ques. Where was the property situated?

Ans. On Dauphin street.

Mr. Hall: I object to this testimony as immaterial.

Mr. Drake: That is all as to that point.

The Court: It is all on the same line, I suppose, as the testimony heretofore given.

Ques. What did she desire you to do with this property?

Ans. Find a purchaser for it.

Ques. As whose property?

Ans. That I cannot say.

Ques. Do you know whether she applied to you to
10 sell it as her property or as the property of somebody else?

Ans. She put it to me and wanted me to sell the property, and I never asked any parties to whom the property belongs to; there was no agreement signed or anything of that sort, but we were to sell the property, that is all.

Ques. Did you see anyone else in relation to it?

Ans. No, sir.

Ques. How long was it in your hands?

20 Ans. I cannot say; it would be all guesswork if I should say.

Ques. Did you find a purchaser?

Ans. We did.

Ques. Was the title made?

Ans. Not to my knowledge.

Ques. What was the difficulty about the making of the title?

Ans. We didn't do the business in the matter at all; there was a lawyer here in town that the purchaser
30 had him attend to his business; he gave the conveyancing to him and the title didn't satisfy him; just what it was I am unable to say, of course, but I can guess a bit at it.

Ques. Don't you know who it was proposed to sign the deed?

Ans. Well, I don't know, no sir, but I can guess.

Mr. Hall: I object to all this.

Mr. Drake: That is all.

NATHAN F. GROFF, a witness produced on the part of the complainants, being duly sworn according to law, on his oath saith:—

Examined by Mr. Drake:

Ques. Where do you live?

Ans. Merchantville.

10

Ques. Don't you live in the City of Camden?

Ans. No, sir.

Ques. Did you used to live in the City of Camden?

Ans. Yes, sir.

Ques. Whereabouts?

Ans. 506 Linden street, last.

Ques. Before that where did you live?

Ans. 320 Mickle street.

Ques. What was your business when you lived there?

Ans. I was a pilot on the steamboat—a steamboat on the River Delaware. 20

Ques. Do you know Fannie J. Kelly?

Ans. I do.

Ques. How long have you known her?

Ans. I have known her I suppose for about forty years.

Ques. Did you know her mother?

Ans. I did.

Ques. What was her mother's name before you married her?

30

Ans. Her name was Andrews.

Ques. You were her mother's husband?

Ans. I was.

Ques. You are not Fannie J. Kelly's father though?

Ans. I am not.

Ques. When did you marry Mrs. Kelly's mother?

Ans. Well, unless I was to refer to documents I

think it would be guess work—but I think it was about the year 1852 or 1854—between 1852 and 1853, or something thereabouts.

Ques. Where did she live at that time?

Ans. Where did I live?

Ques. Where did your wife live?

Ans. That was her residence, 320 Mickle street, at that time.

Ques. What was the name of her previous husband?

10 Ans. Her husband's name was Benjamin Andrews.

Ques. When did he die?

Ans. That I don't know.

Ques. How long did you live with your wife before she died?

Ans. About fifteen years.

Ques. What time did she die—it was about 1870, was it not?

Ans. No, sir; it was later than that; I don't know exactly the year, unless I was to refer to documents.

20 Ques. She left a will, didn't she?

Ans. I don't know.

Ques. Don't you know whether Adelia J. Groff left a will?

Ans. I don't.

Ques. When was Fannie J. Kelly married to Samuel J. Kelly?

Ans. That I cannot tell you, the date.

Ques. Was it after your wife died?

Ans. Yes, sir.

30 Ques. After her husband was married to her where did he live?

Ans. 320 Mickle street.

Ques. How long did he live there?

Ans. Until he died.

Ques. Do you know when that was?

Ans. I cannot recall it to memory exactly—he has been dead about ten years.

Ques. How long after his death did Mrs. Kelly and yourself and the children move up to 506 Linden street?

Ans. That I ain't positive about, the length of time.

Ques. 506 Linden street is a large house, is it not?

Ans. Yes, sir.

Ques. A four-story house?

Ans. Yes, sir.

Ques. A marble front and side yard?

Ans. Yes, sir; a marble front and side yard.

Ques. Are you perfectly sure that Samuel Kelly was living in 320 Mickle street at the time he died? ¹⁰

Ans. I am perfectly satisfied of that.

Ques. Are you perfectly sure that he lived at 320 Mickle street at the time he was married to Fannie J. Kelly until he died?

Ans. Yes, sir.

Ques. What was the name of your wife, Adelia J. Groff, before she married Benjamin Andrews?

Ans. Adelia Haynes.

Ques. Was she a widow or was that her maiden name? ²⁰

Ans. She was a widow.

Ques. Where did her husband live?

Ans. That I don't know.

Ques. Did you know Adelia J. Haynes at the time she married Benjamin Andrews?

Ans. I did not.

Ques. Did you know her when she lived on Third street, above Market?

Ans. I didn't. ³⁰

No cross-examination.

EMILY E. HENRY, a witness produced on the part of the complainants, being duly sworn according to law, on her oath saith:

Examined by Mr. Drake.

Ques. Where do you live?

Ans. 1839 north Seventh street, Philadelphia.

Ques. Did you ever live in Camden?

Ans. Yes, sir.

Ques. How long ago?

Ans. Until about eight months ago.

Ques. Do you know Fannie J. Kelly?

10 Ans. Yes, sir.

Ques. How long have you known her?

Ans. About nineteen years.

Ques. Have you ever had any conversation with her about her property in her husband's estate?

Ans. Well, about—when the will was passed, she brought it to our house and said that it was her money that helped make Mr. Kelly's money—interrupted—

Mr. Hall: I object to that as not having any relevancy
20 to the issues in the cause.

Ques. Was that the whole conversation?

Ans. Oh, about two weeks ago she said she had given Mr. Kelly bonds and securities to help him in his business—this was in her conversation to me, my aunt and I.

Ques. Who were present?

Ans. My aunt and I and Mrs. Kelly.

Ques. How long ago was the other conversation, to which you referred?

30 Ans. Well, I don't know exactly, but it was right after the will had passed, if you know when that was; I cannot give you the date; I don't remember.

Ques. Where did the conversation take place?

Ans. At our house; Mrs. Kelley came to our house when we lived on Linden street, at No. 804.

Ques. Where did Mrs. Kelley live at that time?

Ans. Linden street.

Ques. Did you know the house?

Ans. Yes, sir.

Ques. Have you ever been in the house?

Ans. Yes, sir.

Ques. Was it a plain house or a handsome house?

Ans. A very handsome house.

Ques. And handsomely furnished?

Ans. Yes, sir.

10

No cross-examination.

ANNA M. HENRY, a witness produced on the part of the complainants, being duly sworn according to law, on her oath saith.

Examined by Mr. Drake:

Ques. Are you the sister of Miss Henry, who has just preceded you?

Ans. Yes, sir.

20

Ques. Where do you live now?

Ans. 1839 North Seventh street, Philadelphia.

Ques. Where did you live before that?

Ans. 804 Linden street, Camden.

Ques. Do you know Fannie J. Kelly?

Ans. I do.

Ques. Have you ever had any talk with her about her business?

Ans. Well, no; she never told me much of her business affairs, only that she said a couple of times that she had given Mr. Kelly money to help him in his business.

30

Ques. When did she tell you this?

Ans. Why, about the time the will was going through or after it was passed.

Ques. Who were present at the time of the conversation?

Ans. Just myself.

Ques. Yourself and Mrs. Kelly?

Ans. Yes, sir.

No cross-examination.

WILLIAM H. BURROWS, a witness produced on the part of the complainants, being duly sworn according to law, on his oath saith:

10 Examined by Mr. Drake.

Ques. Where do you live?

Ans. 137 North Eleventh street, Philadelphia.

Ques. What is your business?

Ans. I am in the commission business, grain and provisions.

Ques. Did you know Samuel J. Kelly in his life time?

Ans. Yes, sir.

20 Ques. What business were you in at that time?

Ans. I was in the jobbing business at that time, in the wholesale provision business.

Ques. Did you have any dealings with him?

Ans. Yes, sir.

Ques. Do you recollect about the time that he was married?

Ans. Yes, sir.

Ques. To Fannie J. Kelly?

Ans. I suppose it was the same lady.

30 Ques. Did you have any conversation with him at that time?

Ans. Well, a short time previous to his being married I met him on the street.

Ques. What did he say to you about the lady he was about to marry?

Ans. He told me he was going to be married, and in a general conversation he remarked that she was worth

about ten thousand dollars, and he had something, and that he thought they could get along very nicely together.

Cross-examination.

By Mr. Hall:

Ques. You knew Mr. Kelly quite a number of years before he died, didn't you?

10

Ans. Yes, sir.

Ques. Did you and Mr. Kelly ever have any business together?

Ans. Yes, sir; frequently.

Ques. Do you know how long that business had been established of Mr. Kelly's?

Ans. I don't; he succeeded his father and how long his father had been in business I don't know.

Ques. What kind of a business was it; what volume of business did they do?

20

Ans. Well, I don't know.

Ques. Was it a prosperous business or an unprosperous business?

Ans. I should suppose it was a prosperous business.

Ques. And had it been prosperous for a great many years?

Ans. So far as I know and believe, yes.

Ques. It was reputed among the merchants to be a prosperous business?

Mr. Drake: I object to that line of examination as not being cross-examination, and as incompetent and immaterial.

Question excluded.

Court:

Ques. What year was this you had this conversation with Mr. Kelly?

Mr. Hall: He said it was a short time before they were married, and they were married in 1872.

Mr. Hall:

Ques. Did you know anything about Mr. Kelly's financial condition at that time?

Ans. Only from what he said himself.

Ques. What did he say at that time?

10 Ans. Well, he remarked to me that he was worth some little property, but he never mentioned any amount.

Ques. Do you know the property to which he referred?

Ans. No, sir.

Ques. Your business dealings with Mr. Kelly were quite extensive were they not?

Ans. I didn't consider them quite extensive; you might have done so.

20 Ques. How much a month do you suppose the business dealings amounted to?

Ans. It would be merely guess work on my part; I haven't looked at the accounts for years and I suppose perhaps ten or fifteen and maybe twenty thousand dollars a year.

Ques. Did Mr. Kelly ever do any business with anyone else, to your knowledge, besides you?

Ans. I suppose he did; I don't suppose he bought all his goods from me.

30 Ques. Did you ever see anyone sell him any goods except yourself?

Ans. I cannot say that I did; I have seen other people showing him goods I think, but I cannot remember any circumstances.

WILLIAM SEVERNS, a witness produced on the part of the complainant, being duly sworn according to law, on his oath saith:

Examined by Mr. Drake:

Ques. Where do you live?

Ans. 462 Berkley street, Camden.

Ques. What is your business?

Ans. Carpenter and builder.

Ques. How long have you been such?

Ans. Since 1860.

Ques. Have you been in that business all the time in the city of Camden?

10

Ans. Yes, sir.

Ques. Do you know Mrs. Fannie J. Kelly?

Ans. I do.

Ques. How long have you known her?

Ans. Well, I think I have known her for, I suppose, fifteen to twenty years—fifteen years, possibly.

Ques. Do you know a property in the city of Camden on Devin street, below Pine street?

Ans. Yes, sir.

Ques. And on Fourth street, below Mount Vernon?

20

Ans. Yes, sir.

Ques. Did you ever do any work on that property for Fannie J. Kelly?

Ans. I did.

Ques. When?

Ans. In June or July of 1894.

Ques. Did you ever do any work before that time?

Ans. I done work for her before that time, yes.

Ques. Did you ever have any conversation with her about these houses?

30

Ans. I did.

Ques. Where did you do any work of which you have spoken, on what houses?

Ans. I done work on 231 Chestnut street, 1024 South Fourth street, 1026, 1028, 1030 and 1032 South Fourth street and Devin street Nos. 19, 21, 23 and 25.

Ques. On whose order did you do that work?

Ans. Mrs. Kelly's.

Mr. Hall: I object to all this testimony of transactions that have taken place since the probate of the will.

Ques. What conversations did you have with her about the ownership of these houses?

Ans. I asked her if she owned them.

Ques. What did she say?

10

Ans. She said she did.

Ques. When did you ask her?

Ans. Before I commenced the work; that was in the fore part of June.

Ques. When did you do work on these same houses before?

20

Ans. Well, I had done some two or three years before that, off and on, on different premises—different ones. I don't think I have done any for a couple of years or a year and a half before, but I am not positive about the dates.

Ques. What did she tell you?

Ans. She merely ordered me to do the work, and when it was done it was paid for, and that is all there was about it.

Ques. Has the last work been paid for?

Ans. No, sir.

Ques. When was the first time she spoke to you about the ownership of the houses that you recollect?

30

Ans. It was just before I commenced this work in June; I don't think she ever said anything to me prior to that about the ownership; I asked that question; I knew there had been some difficulty and I asked that question, if she owned the houses at that time and she said she did, and that it would be cash, and she wanted the work done as reasonable as possible for cash.

No cross-examination.

WILLIAM H. TENBROOK, being recalled in his own behalf, saith:

Examined by Mr. Drake.

Ques. You appeared as a witness once before in this case, two weeks before, didn't you?

Ans. Yes, sir.

Ques. Do you recollect what you testified to in regard to a conversation with Mrs. Kelly two weeks ago? 10

Ans. I do.

Ques. State, if you please, whether the conversation then testified to took place before the Sheriff was ordered to proceed with the sale of the properties under the execution?

Mr. Hall: I object to all this as irrelevant, it having occurred since the probate of the will.

Question allowed subject to the objection.

20

Ans. Oh yes, some time before.

Ques. A month before or six months before?

Ans. Well, I should say six months before.

No cross-examination.

It is admitted that Charles Bowman, if he were present, would testify that while he was the manager of a paper known as *The Review*, published in the city of Camden, in January, 1894, he was applied to by Mrs. Fannie J. Kelly for the purpose of contradicting a statement or publication which had been made in *The Review* in reference to her business a few days before that time. And that he would further testify that the statement which Mrs. Kelly then offered for publication contained the following:—"The Kelly Will Case—Reply of Mrs. Fannie J. Kelly. The property left by 30

my late husband, Samuel J. Kelly, did not equal the amount he received from me, including the interest to the time of his death, so that he gave me but that which was my own."

Mr. Drake: I offer in evidence a certified copy of the last will and testament and the codicil thereto of Adelia J. Groff.

10 Mr. Hall: I object to the offer as immaterial.

Marked Exhibit C5.

Mr. Drake: I also offer in evidence a certified copy of the deed by Henry Chapman to Adelia J. Haynes, dated on the day of 1848, acknowledged November 22, 1848, and recorded the same date, in Book I of Deeds for Camden county, page 200, conveying the property known as 320 Market street to Adelia J. Haynes, afterwards Adelia J. Groff; she was
20 the mother of Mrs. Kelly.

(Marked Exhibit C6.)

Mr. Drake: I also offer in evidence, for use in this cause, the testimony taken heretofore *de bene esse*.

Mr. Hall: I object to the admission of the evidence taken *de bene esse*, on the ground that it is hearsay, irrelevant and immaterial. There were a large number of objections entered at the time the evidence was
30 taken, but the Master who took the evidence did not feel that he was authorized to rule upon the objections, and he admitted the testimony subject to objection.

Court: I will take the offer and reserve my decision as to its admissibility.

Complainants rest.

Mr. Hall moves for a dismissal of the bill, on the ground that in the evidence offered there is nothing calling upon the defendants to rebut the evidence of the complainants.

Defendants rest.

To be submitted on briefs.

Case closed.

IN CHANCERY OF NEW JERSEY.

Between WALTER A. KELLY, ET ALS., Complainants, and 10 WILLIAM H. TENBROOK, ET ALS., Defendants.	}	ON BILL FOR INJUNCTION, &C. FILED JUNE 10, 1895.
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Between WILLIAM H. TENBROOK, ET ALS., TRADING, &C., Complainants, 20 and FANNIE J. KELLY, ET ALS., Defendants.	}	ON BILL FOR INJUNCTION. FILED SEPTEMBER 17, 1895.
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To the Honorable Alfred Reed, the Vice Chancellor to whom above causes are referred:

The petition of William H. Tenbrook and Philip Tenbrook, partners, trading as Tenbrook & Brother, 30 parties to the two above stated causes, respectfully shows unto your honor that they desire a rehearing of the argument in these causes for the facts and reasons stated in this, their petition:

1. In these cases the husband of Fannie J. Kelly died seized of the property in controversy in these suits. Fannie J. Kelly, the widow, took possession of the said property as sole devisee under the will of her husband,

which will is now standing properly probated in the Surrogate's office of the county of Camden. The proof that Fannie Kelly took possession of this property appears in the first place by a statement in bill of Walter A. Kelly and others, a part of the record in these cases. The statement of the bill is as follows: "That since the death of Samuel J. Kelly, his wife, Frances J. Kelly, has had the use and benefit of said properties until a recent date, when they were sold for the debts of the said Frances J. Kelly." See bill of Walter A. Kelly, page 2, lines 10 to 13. The same fact appears frequently through the pleadings. The complaint of the bill filed by Walter A. Kelly is, that your petitioners took possession of portions of the property under their Sheriff's deed, on a judgment against Fannie J. Kelly. By the evidence, Mrs. Kelly not only had the use and benefit of the properties, but she made the attempt to sell them, and did actually sell them or some of them as her own, and also took five hundred dollars of the purchase money from Mr. Pratt. She stated not only that the property was hers by will, but that by advances to her husband and assistance to him in his business and in building the properties, they were hers by actual equitable ownership. This she stated to a number of witnesses, to the Misses Henry, Mr. William H. Tenbrook, Mr. Drake, Mr. Pratt, the purchaser, and Mr. Walton, her agent for the sale of the property. Mrs. Kelly also stated to your petitioners that she had sold these properties, or part of them, and asked them to delay the Sheriff's sale until she could make conveyance under the sale, when she would pay your petitioners the amount of their said judgment.

2. Under these circumstances, Fannie Kelly's right of dower was something more than a chose in action. She had accepted the devise under her husband's will in lieu of her claim as doweress against his estate. She was in

the enjoyment of one-third of the property by right of dower, and two-thirds as devisee, and if the will is valid the execution against her and the Sheriff's deed for the sale under it conveys the whole property. If the Sheriff's deed is good it conveys a double interest, namely, Fannie Kelly's dower right in the property, and the remainder of the estate which passed to her by the will. If the Sheriff's deed is not good, she still had
 10 her dower in this property in suit, in actual possession, use and enjoyment. What matters it that she had other property with it? It was not a mere chose in action but an estate in possession and enjoyment. Suppose no question had been raised about the will. Then no question could be raised about the transfer of Mrs. Kelly's dower right by the Sheriff's deed.

3. Mrs. Kelly is estopped, as your petitioners submit, from setting up her claim of dower against your petitioners, either by herself or by any person ^{or} to whom she
 20 may have released the same, because of the faith of Fannie Kelly's claim of ownership in, and possession of, the property, your petitioners proceeded to make Sheriff's sale of the property as hers at great expense. If the will of her husband which she probated and the property of his which she took under it, and had in possession and enjoyment, had not come to her, she would not have given to your petitioners that appearance of ownership which led your petitioners to the large expense of acquiring her title under said will and
 30 the possession of the property under the Landlord and Tenant proceedings mentioned in the pleadings and the consequent litigation in this court.

4. Your petitioners submit that this view of the case was not fully before your honor in the presentment thereof, and they desire further argument thereon. They suggest further to your honor that Mrs. Kelly had the option or the election of taking as doweress or as

devisee. She took as devisee. Having taken as devisee and merged her dower into the residue of the estate, she could not afterwards and after the Sheriff's deed had conveyed to your petitioners, Tenbrook & Bro., her said merged dower, if the Sheriff's deed stood, change her election. The question then would be, what is to become of Mrs. Kelly's merged dower if the Sheriff's deed goes for nought. Can her dower play hide and seek behind her title by devise in her husband's real estate, and when her title by devise fails, can her dower emerge and seek her embrace in safety? What your petitioners seek to suggest is, that Mrs. Kelly's election against her dowry was as effectual against her in one case as in the other. That is to say, that as the merged dower of Mrs. Kelly in these lands passed with the Sheriff's deed, and stays with it as long as it stands, by reason of her own act, committing herself to such divestiture of that estate, it cannot now, in equity, after she by her action has induced your petitioners to take an expensive line of action on the faith of a larger estate in these same lands in her, reinvest in her; and she chose in action, if that is all the dower is, belongs to your petitioners and in equity is available by your petitioners to restrain the actions of ejectment of Samuel J. Kelly's heirs, so far as the one-third part of the rents, issues and profits of said lands for the lifetime of Fannie J. Kelly is concerned, your petitioners being unable, (when Mrs. Kelly had by her deed by her agent, the Sheriff, conveyed to your petitioners all her rights in said lands) to see how she can now attempt to set up rights therein against your petitioners in those very same lands by her said release of dower to the heirs of Samuel J. Kelly.

5. Your petitioners therefore pray that these causes be reheard; that your honor hear further argument on the point above elucidated, and that instead of the bill

of your petitioners being dismissed, as the conclusions filed by your Honor suggest, that said bill be retained with the view, in case said ejectment suits result against your petitioners, of allowing your petitioners to come in by petition under the said bill, to have their chose in action of Mrs. Kelly's dower, so equitably acquired by them as aforesaid, set off to them, and that said release of dower of Mrs. Kelly to the heirs of Samuel J. Kelly be held void.

10

TENBROOK & BRO.,
Petitioners.
By H. A. DRAKE,
Solicitor.

I have read the foregoing petition and conceive there is good cause shown therein for a rehearing.

HERBERT A. DRAKE.
Of Counsel.

20

IN CHANCERY OF NEW JERSEY.

TENBROOK, ET AL.,

vs.

KELLY, ET AL.

} CONCLUSIONS.

MR. H. A. DRAKE, for Complainants.
MR. THOMAS B. HALL, for Defendants.

30 REED, V. C.:

I am unable to discover the faintest trace of an equity to support any decree for the complainant.

If the will is a nullity, then the husband's property passed to his children with the right to dower in the widow.

So far as any interest in the property which the widow may have as dowress, if it has not passed to the

complainants by their purchase under the execution, it is legal interest, which, if reachable at all, is so by legal process. It seems, however, not to be reachable at all before assignment. 4 Dick., 67.

So far as the remainder of the testimony goes, it has but one equitable aspect. This is for the purpose of charging upon the property certain advances which the wife is supposed to have made to her husband which went to the enhancement of the amount and value of the estate of which he died seized. 10

But assuming that the wife had property, it is not proved with any degree of certainty whatever what became of it.

But if it went to the husband, she had the right to give him her property so long as there was no fraudulent intention in respect to her creditors. No such intent appears. The complainants became her creditors after her husband's decease.

Again, the husband left a paper purporting to be a will by which he left this property to the complainant. 20 If this will is valid, complainants have title and the defendant has none. A writ of equity cannot try the validity of this will; nor do the complainants charge that it is a nullity. Indeed it appears that an action of ejectment is pending to try this very question, between the heirs of the husband of the defendant, Mrs. Kelly, and the complainants. We must now assume that the will is valid and that these heirs at law took under the will. Any admission made by Mrs. Kelly, upon which admissions the complainants' case largely rests, cannot 30 be used against the heirs-at-law to strip them of a part of the property of which their father died seized.

I must advise a decree dismissing the bill.

A true copy.

L. A. THOMPSON,

16

Clerk.

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM H. TENBROOK AND
PHILIP TENBROOK,

10

Complainants,

and

FANNIE J. KELLY, FRANK J.

ON BILL.

BURR, ARTHUR PRATT, JOSEPH

FINAL DECREE.

B. VAN SCIVER, FLORENCE G.

VAN SCIVER, WALTER A.

20

KELLY, CLARENCE ALBERT E.

KELLY AND LEONA S. KELLY,

Defendants. }

This cause coming on to be heard at the present term of the Court of Chancery, in the presence of Herbert A. Drake, of counsel with complainants, and Thomas B. Hall, of counsel with defendants, and it appearing to the Court that the complainants are not entitled to the relief sought and prayed for by them in their bill of complaint;

30

It is, on this seventeenth day of August, A. D. eighteen hundred and ninety-six, by Alexander T. McGill, Chancellor of the State of New Jersey, ordered, adjudged and decreed, that the complainants' bill be and the same is hereby dismissed, with costs.

And it is further ordered and decreed, that the com-

plainants pay to the defendants the costs of this suit to be taxed, and that execution issue therefor according to the practice of this Court.

Respectfully advised,

ALFRED REED,

V. C.

IN CHANCERY OF NEW JERSEY.

	Between	}	
	WILLIAM H. TENBROOK AND		
	PHILIP TENBROOK, TRADING		
	AS TENBROOK & BRO.,		
10	Complainants,		
	and		NOTICE OF
	FANNIE J. KELLY, WALTER A.		APPEAL.
	KELLY, CLARENCE F. KELLY,		
	LEONA S. KELLY AND FLOR-		
	ENCE G. VAN SCIVER,		
20	Defendants.		

The complainants hereby appeal from the final decree and from the whole and every part thereof made in this Court, in the above stated cause, to the Court of Errors and Appeals in the last resort in all causes.

H. A. DRAKE,
Solicitor for and of Counsel with Complainants.

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

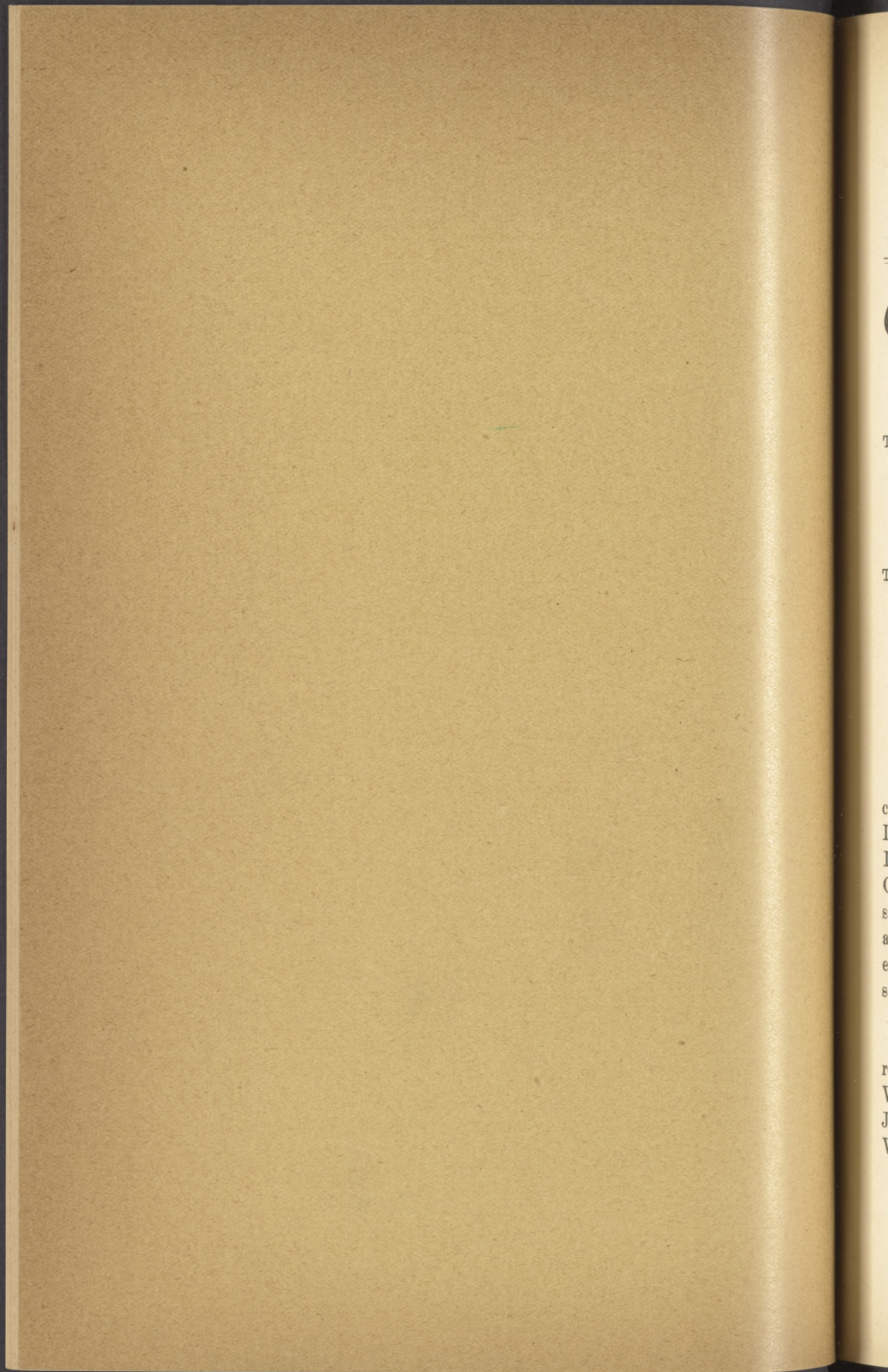
H. A. DRAKE,
Of Counsel with Complainants.

A true copy.

L. A. THOMPSON,
Clerk.

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