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BILL OF COMPLAINT.

Filed May 5, 1928.

In Chancery of New Jersey

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

The complainant, Gladys G. Darling, of the Town of West Orange, in the County of Essex and State of New Jersey, respectfully shows that:

1. She is one of the daughters of William E. Gilmore, who died a resident of Essex County on the seventeenth day of January, 1928.

2. That the said William E. Gilmore left him surviving, in addition to the complainant, his wife, Sarah Jane Dewey Gilmore (the complainant's step-mother), son, Edgar S. Gilmore, and another daughter, Madeline Gilmore Kelly.

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3. The said William E. Gilmore left a last will and testament, dated October 29, 1925, to which was attached a Codicil dated May 16, 1927, which last will and testament was duly probated in the office of the Surrogate of Essex County, on the thirteenth day of January, 1928, and is now recorded in Book D. 8 of Wills in said Surrogate's Office, at page 502, and the executors thereunder, Sarah Jane Dewey Gilmore and the Fidelity Union Trust Company of Newark, N. J., duly qualified and entered upon the performance of their duties as such executors and trustees.

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4. That the said William E. Gilmore left an estate in excess of eight hundred thousand dollars (\$800,000) as evidenced by the inventory

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Bill of Complaint.

filed in the office of the Surrogate of Essex County, on or about April 4, 1928.

10 5. That in and by the said last will and testament, the said William E. Gilmore gave and bequeathed to his daughter Gladys G. Darling, the sum of five thousand dollars (\$5,000) to her, her heirs and assigns forever, and that this is the only mention of the complainant, said Gladys G. Darling, in said last will and testament.

20 6. That after making several other specific bequests in said last will and testament, the said William E. Gilmore gave, devised and bequeathed the rest, residue and remainder of his estate to his executors and trustees to hold in trust, and directed that the said trust estate be divided into three equal parts, designating the same as share No. 1, share No. 2 and share No. 3.

30 7. That as to share No. 1, he directed the executors and trustees to pay over the net income derived therefrom to his said wife, Sarah Jane Dewey Gilmore during her natural life or until she remarries, and directed that upon her death or remarriage the said executors and trustees should pay over and distribute the principal of said share No. 1 and all increment thereof, to his son, Edgar S. Gilmore and his daughter Madeline Gilmore Kelly, share and share alike.

40 8. That as to share No. 2, he directed his executors and trustees to pay over the net income derived therefrom to his son, Edgar S. Gilmore during his natural life, and upon his death to pay over and distribute the principal of said share to the lawful issue of said son per stirpes, but that if said son should not leave lawful issue him surviving, then the said principal and all

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increment thereof, should be paid to the lawful issue of his daughter, Madeline Gilmore Kelly.

9. That as to share No. 3, said William E. Gilmore directed that his executors and trustees should pay the net income derived therefrom to his said daughter, Madeline G. Kelly, during her natural life, and that upon the death of his said daughter he directed the said executors and trustees to pay over and distribute the principal, with income thereof, to the lawful issue of said daughter, and that if said daughter should die leaving no lawful issue, then to pay over and distribute said principal and all increment thereof, to the lawful issue of his son Edgar S. Gilmore, per stirpes. 10

10. And in and by the thirteenth paragraph of said will he provided that the legacies and provision made for his said wife, Sarah Jane Dewey Gilmore, should be in full satisfaction of and in lieu of, and for her dower, right of dower, thirds and any other interest which she might or could have by virtue of being his widow. 20

11. That very shortly after the death of the complainant's father, the said William E. Gilmore, complainant conferred with her brother, Edgar S. Gilmore, and her sister, Madeline Gilmore Kelly, and advised them of her intention to file a caveat against the probate of the will of her said father, William E. Gilmore, she the said complainant being informed and believing that she might succeed in having said will refused probate and declared invalid. 30

12. That during the course of said conference or conferences with her said brother and sister, the said brother, Edgar S. Gilmore, and said 40

Bill of Complaint.

10 sister, Madeline Gilmore Kelly, stated to complainant that if she would forbear the institution of a proceeding to deny probate of said last will and testament, they would agree to so distribute any and all moneys coming to them from the estate of their said father, William E. Gilmore, that she, the complainant, and they, the said Edgar S. Gilmore and Madeline Gilmore Kelly, would each receive an equal amount of the said estate, and they further agreed at that time that they would enter into, make and execute any agreements or assignments which might be necessary to fully effectuate and consummate said agreement.

20 13. The complainant thereupon agreed with her said brother, Edgar S. Gilmore, and her sister, Madeline Gilmore Kelly, that in consideration of their agreement to divide the income and any principal which they might or could receive from said estate, in such manner that she would share equally in the same with each of them, that she would not file the caveat and contest the probate of her father's will, as had been her contemplated plan.

30 14. The complainant further says that her said brother, Edgar S. Gilmore, and her sister, Madeline Gilmore Kelly, received approximately forty thousand dollars (\$40,000) as the proceeds of insurance upon the life of her said father, and that they, in pursuance of the agreement made between the complainant and her said brother and sister as aforesaid, agreed to distribute or divide said sum of forty thousand dollars (\$40,000) so that the complainant and her said brother and her said sister would each receive an equal amount of principal from the
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Bill of Complaint.

estate or proceeds of insurance on the life of her said father, William E. Gilmore, and that in order to consummate the said arrangement, her said brother, Edgar S. Gilmore, and her said sister, Madeline Gilmore Kelly, each paid and delivered to the complainant the sum of five thousand dollars (\$5,000) which total of ten thousand dollars (\$10,000) added to the specific bequest of five thousand dollars (\$5,000) in and by the fourth paragraph of the last will and testament of complainant's father, William E. Gilmore, made a total of fifteen thousand dollars (\$15,000) received by the complainant, which equalled in amount the sum retained by her said brother and her said sister, from the proceeds of the insurance moneys.

15. After the death of the complainant's father, William E. Gilmore, it developed that he had made no provision in and by his last will and testament for his chauffeur, who had been in his employ for some time, and that the complainant and her brother, Edgar S. Gilmore and her sister, Madeline Gilmore Kelly, decided that the said chauffeur should receive some sum of money from the estate in recognition of his faithful services to their said father. In pursuance of said agreement, the complainant and her said brother and her said sister each contributed a sum of approximately three hundred and thirty-three dollars and thirty-three cents (\$333.33) so that a total gift of one thousand dollars (\$1,000) might be made to the said chauffeur from the estate of their said father, and the complainant shows and alleges that this arrangement for the benefit of the chauffeur was an indication and an evidence of the arrangement made between her

Bill of Complaint.

and her said brother and sister as hereinabove set forth.

10 16. That relying upon the promise of her said brother, Edgar S. Gilmore and her said sister, Madeline Gilmore Kelly to share their interest in the estate of their father, William E. Gilmore, with complainant, the complainant did not file a caveat or start any proceedings to prevent the probate of the last will and testament of her said father, William E. Gilmore, and the said last will and testament was, as aforesaid, duly probated in Essex County on the thirtieth day of January, 1928.

20 17. That the complainant requested her said brother and her said sister to make, execute and deliver to her the necessary agreement, in writing, or the necessary assignment to effectuate and consummate the arrangement agreed upon between them for the participation of the complainant in the estate of her said father, but that her said brother and her said sister have failed, refused and neglected to make, execute and deliver such agreement or assignment, although requested by the complainant to do so.

30 18. The complainant has relied upon the promise of her said brother and sister to carry out and perform their agreement to permit her participation in the estate of their father, William E. Gilmore, upon an equal basis with them, and has assumed that they would surely and certainly carry out and perform said agreement made as aforesaid with the complainant.

40 19. The complainant, however, on or about the third and fourth days of May, 1928, conferred with her said brother and said sister, and requested that the agreements and assignments

Bill of Complaint.

necessary to effectuate and consummate the agreement between them to sign and deliver to her, and was then informed for the first time by her said brother and said sister that they and neither of them would make, execute and deliver to the complainant the agreements or assignments which they had heretofore agreed to make and deliver, and further indicated and told the complainant that they did not plan to make, execute and deliver the said agreements and assignments. 10

20. The complainant shows and alleges that she was not informed by her said brother and sister that they would not make, execute and deliver said agreements until the time in which she might appeal from the will, as provided by the statutes of the State of New Jersey, had fully expired, and that she had thereby lost her right to take an appeal from the probate of said last will and testament. 20

21. The complainant therefore shows and represents that her said brother and sister have fraudulently, falsely and iniquitously failed to carry out their agreement with her to permit her participation with them in the estate of their said father, William E. Gilmore, and that they, her said brother and sister, have wilfully, purposely and intentionally failed to notify or inform the complainant of their determination not to carry out their agreement, until the time for the filing of a caveat or an appeal from the probate of said will had expired. 30

The complainant therefore shows that she is without remedy in the courts of law and therefore prays:

1. That her said brother, Edgar S. Gilmore, may be decreed and ordered by this Honorable 40

Bill of Complaint.

Court to carry out and perform the agreement made with complainant providing for her participation in her father's estate on a basis equal with that of her said brother.

10 2. That her said sister, Madeline Gilmore Kelly, may be decreed and ordered by this Honorable Court to carry out and perform the agreement made with complainant providing for her participation in her father's estate on a basis equal with that of her said sister.

20 3. That her said brother, Edgar S. Gilmore, and her said sister, Madeline Gilmore Kelly, be further ordered to make, execute and deliver any and all agreements or assignments or other papers which might be necessary to fully effectuate and consummate the agreement made between them and the complainant, providing for complainant's participation in the estate equally with her said brother and her said sister.

30 4. That an accounting be ordered and made by her said brother and her said sister of the amounts and sums of money which they have thus far received from the estate of her said father, William E. Gilmore, to the end that complainant's share therein might be determined and ordered paid to her by her said brother and her said sister.

40 5. That in case her said brother and her said sister fail and refuse to make, execute and deliver the necessary agreements, assignments or other papers to effectuate and consummate the agreement as aforesaid, this Court order the executors and trustees of the last will and testament of William E. Gilmore, namely, Sarah Jane Dewey Gilmore and the Fidelity Union Trust

Bill of Complaint.

Company of Newark, N. J., to apportion, set aside and pay over to the complainant a proportionate amount of the money payable from time to time from either income or principal to her said brother and her said sister, so that the amount received by complainant will equal that received by her said brother and her said sister. 10

6. That this Court make an order or decree restraining and enjoining her said brother, Edgar S. Gilmore, and her sister, Madeline Gilmore Kelly, from disposing of or alienating their interest in said estate of their father, William E. Gilmore, in any manner which might or could defeat the full performance or consummation of the agreement heretofore made as above alleged, between this complainant and her said brother and her said sister. 20

7. That this Court make an order or decree that the executors and trustees under the last will and testament of William E. Gilmore, hold in trust for this complainant the income, principal or funds which are justly due to this complainant under said agreement, and that the said executors and trustees pay over and disburse the said income or principal of said trust to this complainant, pursuant to said agreement between complainant and her said brother and sister. 30

8. That a writ of subpoena may issue, commanding the said defendants Edgar S. Gilmore, Madeline Gilmore Kelly, Sarah Jane Dewey Gilmore and the Fidelity-Union Trust Company of Newark, N. J., to answer this bill of complaint and to abide by such decree as this court may make in the premises.

ANDREW J. WHINERY,
Solicitor for and of Counsel 40
with Complainant.

Bill of Complaint.

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

10 GLADYS G. DARLING, of full age, being duly
 sworn according to law, upon her oath deposes
 and says: That I am the complainant in the
 foregoing bill of complaint named, and that the
 matters and things therein contained are true.

Subscribed and sworn to before me,
 this day of May 1928.

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Answer of Madeline Gilmore Kelley.

3. Paragraphs 12 and 13 are denied.

10 4. This defendant admits that she and her brother, Edgar S. Gilmore, received approximately \$40,000, of the proceeds of insurance upon the life of their said father, William E. Gilmore, and that they each gave to the complainant
20 \$5,000 of said insurance moneys so received by them, respectively, which gifts, aggregating \$10,000, added to the specific bequest of \$5,000 received by the complainant under paragraph 4 of the said Will and Codicil of their father, William E. Gilmore, made a total of \$15,000 received by the complainant, which equalled in amount the sum retained by this defendant and her brother, Edgar S. Gilmore, from the proceeds of the insurance moneys. The remaining allegations of paragraph 14 are denied.

30 5. This defendant admits that after the death of her father, William E. Gilmore, it developed that her father had made no provision in and by his Last Will and Codicil for his chauffeur, who had been in his employ for some time, and that complainant, this defendant and their brother, Edgar S. Gilmore, decided that the said chauffeur should receive some sum of money in recognition of his faithful services to their said father and that subsequently the complainant, this defendant, and their brother, Edgar S. Gilmore, each contributed a sum of approximately \$333.33, making a total of \$1,000, which was given to the said chauffeur. The remaining allegations in paragraph 15 are denied.

40 6. It is admitted that complainant did not file a caveat or start any proceedings to prevent the probate of the Last Will and Codicil of her father, William E. Gilmore; that the said Last

Answer of Madeline Gilmore Kelley.

Will and Codicil of the said William E. Gilmore was duly probated in Essex County on the 30th day of January, 1928. The remaining allegations of paragraph 16 are denied.

7. This defendant admits that she had not made, executed and delivered any agreement pertaining to, or assignment of any interest in her father's estate, with or to the said complainant. Except as herein admitted, the allegations of paragraph 17 are denied. 10

8. Paragraphs 18, 19, 20 and 21 are denied.

LINDABURY, DEPUE & FAULKS,
Solicitors for and of Counsel with
Defendant, Madeline Gilmore Kelley.

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ANSWER OF EDGAR S. GILMORE.

Filed June 2, 1928.

IN CHANCERY OF NEW JERSEY.

10 *Between*

GLADYS G. DARLING,
Complainant,
and
 EDGAR S. GILMORE, et al.,
Defendants.

On Bill, &c.
Answer of
Edgar S.
Gilmore.

20 This defendant, Edgar S. Gilmore, answering
 the bill of complaint, says that:

1. Paragraphs 1 to 10, inclusive, are admitted,
 but this defendant begs leave to refer to the said
 Last Will and Codicil of his father, the said
 William E. Gilmore, deceased, or to certified
 copies thereof, for the exact terms and provisions
 of said Will and Codicil.

30 2. This defendant admits that shortly after
 the death of complainant's father, he had several
 conversations with complainant, but denies that
 at any of them she advised him of her intention
 to file a caveat against the probate of the Will
 of her father, William E. Gilmore; he has no
 knowledge or information sufficient to form a
 belief as to whether said complainant had been
 informed and believed that she might succeed in
 having said Will refused probate and declared
 invalid, but says that there was no ground for
 any such belief.

40 3. Paragraphs 12 and 13 are denied.

Answer of Edgar S. Gilmore.

4. This defendant admits that he and his sister, Madeline Gilmore Kelley, received approximately \$40,000, of the proceeds of insurance upon the life of their said father, William E. Gilmore, and that they each gave to the complainant \$5,000 of said insurance moneys so received by them respectively, which gifts, aggregating \$10,000, added to the specific bequests of \$5,000 received by the complainant under paragraph 4 of the said Last Will and Codicil of their father, William E. Gilmore, made a total of \$15,000 received by the complainant, which equalled in amount the sum retained by this defendant and his sister, Madeline Gilmore Kelley, from the proceeds of the insurance moneys. The remaining allegations of paragraph 14 are denied. 10

5. This defendant admits that after the death of his father, William E. Gilmore, it developed that his father had made no provision in and by his Last Will and Codicil for his chauffeur, who had been in his employ for some time, and that complainant, this defendant and their sister, Madeline Gilmore Kelley, decided that the said chauffeur should receive some sum of money in recognition of his faithful services to their said father and that subsequently the complainant, this defendant and their sister, Madeline Gilmore Kelley, each contributed a sum of approximately \$333.33, making a total of \$1,000, which was given to the said chauffeur. The remaining allegations in paragraph 15 are denied. 20 30

6. It is admitted that complainant did not file a caveat or start any proceedings to prevent the probate of the Last Will and Codicil of her said father, William E. Gilmore; that the said Last Will and Codicil of the said William E. Gil- 40

Answer of Edgar S. Gilmore.

more was duly probated in Essex County on the 30th day of January, 1928. The remaining allegations of paragraph 16 are denied.

10 7. Defendant says that on the day following the reading of the Last Will and Codicil of his father, William E. Gilmore, and on the several other occasions prior to the time when complainant could have appealed from the probate thereof, complainant requested him to execute an agreement in writing, assigning to her a portion of his interest in his father's estate and that at the time each of said requests was made, he refused and has ever since refused to make, execute and deliver any agreement pertaining to, or assignment of any interest in, his father's estate with or to the said complainant. Except as
20 herein admitted, the allegations of paragraph 17 are denied.

8. Paragraph 18 is denied.

9. It is admitted that on or about the 3rd or 4th day of May, 1928, complainant again requested this defendant to execute an agreement in writing assigning to her a portion of his interest in his father's estate, which this defendant refused to do. It is admitted that this defendant
30 has always refused to make, execute and deliver any agreement pertaining to, or assignment of any interest in, his father's estate with or to the said complainant. The remaining allegations of paragraph 19 are denied.

10. Paragraphs 20 and 21 are denied.

LINDABURY, DEPUE & FAULKS,
Solicitors for and of Counsel with
Defendant, Edgar S. Gilmore.

TO
REPLICATION ~~OF~~ ANSWER OF
MADELINE G. KELLY.

Filed January 10, 1929.

68-265

IN CHANCERY OF NEW JERSEY. 10

Between

GLADYS G. DARLING,
Complainant,
and
EDGAR S. GILMORE, *et als.,*
Defendants.

On Bill, etc.
Replication to
Answer of
Madeline G.
Kelly.

The complainant joins issue on the answer filed 20
by the defendant, Madeline G. Kelly.

ANDREW J. WHINERY,
Solicitor of Complainant.

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REPLICATION TO ANSWER OF
EDGAR S. GILMORE.

Filed January 10, 1929.

68-265

10 IN CHANCERY OF NEW JERSEY.

Between

GLADYS G. DARLING,
Complainant,
and
EDGAR S. GILMORE, *et al.,*
Defendants.

On Bill, etc.
Replication to
Answer of
Edgar
Gilmore.

20 The complainant joins issue on the answer filed
by the defendant, Edgar Gilmore.

ANDREW J. WHINERY,
Solicitor of Complainant.

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OPINION OF VICE-CHANCELLOR.

Filed June 4, 1929.

IN CHANCERY OF NEW JERSEY.

Between

GLADYS DARLING,

Complainant,

and

EDGAR S. GILMORE, *et als.*,

Defendants.

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On Bill, etc.

Opinion.

(Decided May 27, 1929.)

Syllabus:

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1. The uncorroborated testimony of complainant and her husband is not sufficient to establish an agreement to divide property contrary to the express provisions of a will.

2. Claims of this character should be substantiated by clear and convincing proof.

Andrew J. Whinery and Arthur T. Vanderbilt for complainant.

Lindabury, Depue and Faulks for defendants.

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CHURCH, V.-C.

This bill is filed by complainant to compel her brother and sister to permit her to share with them, property they received under the will of their father.

Complainant insists that she intended to file a caveat against the probate of her father's will, but refrained from so doing because her brother and sister agreed to assign to her one-third of

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Opinion of Vice-Chancellor.

their shares in the estate. They deny any such agreement. Complainant's counsel, in his brief says, "The only question in this case is whether the testimony presented on behalf of complainant is to be believed."

10 The father, William E. Gilmore, died in East Orange on January 17, 1928. He had been a prominent business man and left approximately \$900,000. By his first marriage he had three children, Mrs. Darling, the complainant, Edgar S. Gilmore and Madeline Gilmore Kelly, the defendants. The first wife died in 1922, leaving two pieces of real estate, one in East Orange, and one on Long Island. In order to facilitate the sale of these properties the children conveyed the title to their father. He claimed no right in them
20 save that of curtesy. He held these properties at the time of his second marriage in 1925. Mrs. Darling was much opposed to the second marriage. She instituted suit in New Jersey to have the East Orange conveyance set aside on the ground of fraud. The suit was never heard. It was terminated by the sale of the property and the division of the proceeds. The Long Island property was also sold and the proceeds divided. On October 29, 1926, Mr. Gilmore made his last
30 will. On May 16, 1927, he executed a codicil. Prior to his death, he took out two life insurance policies for \$20,000 each. In one, his daughter Madeline was named beneficiary; in the other, his son Edgar. From the time of the controversy over the first wife's property until his death, Mr. Gilmore and his daughter Mrs. Darling were estranged. By the terms of his will Mr. Gilmore gave his homestead in Montclair to his widow. He left \$5,000 to Mrs. Darling. The
40 residue was to be divided into three equal shares.

Opinion of Vice-Chancellor.

The income on the first share was to be paid to his widow until her death or re-marriage when it should be divided equally between his son Edgar and his daughter Madeline. The income on the second share was to be paid to his son Edgar for life and on his death, to his issue, or failing issue, to the issue of Madeline. The income on the third share was to be paid to Madeline and on her death, to her issue, or failing issue, to the issue of Edgar. At the time of Mr. Gilmore's death, none of his children knew the contents of his will. After the will had been read in the presence of the widow and Edgar the son, Edgar started for his sister Madeline's house to inform her of its contents. On his way he met Mrs. Darling and told her of its provisions.

Complainant's claim, in substance, is that she intended to file a caveat against the will but did not do so because her brother and sister agreed to divide their shares with her if she would not do so. When asked about the reasons for filing such a caveat, she said she thought her brother and sister had alienated her father from her in their refusal "always in any way to try to fix up anything between us." Explaining that she said her sister kept her away from her father. Further on in her testimony she says she went to see her father, was never refused admittance, and her sister did not keep her away from her father. She also says that her brother, in her opinion, did not influence her father. She also alleges that her father was a heavy drinker and "when he was in those spells" was not a clear thinker. She does not assert that he was mentally incapacitated at all times to make a will. Mrs. Darling asserts that her brother and sister agreed to surrender to her a large part of their

Opinion of Vice-Chancellor.

inheritance because they wanted to avoid a legal attack on the will, fearing if it were set aside the widow would get more than the will provided for her. The improbability of this is apparent from the terms of the will. Had it been set aside, Edgar and Madeline would have received their shares in the personalty outright instead of only the income, and their share in the homestead real estate instead of nothing. There could have been no fear on their part, therefore, about a contest for were it successful, they would benefit. It should be noted also that the will cut off any unsuccessful contestant. So that complainant might, had she failed to break it, have lost even the \$5,000 bequest. Her brother, Edgar, lived with her after the will was read for some time.

20 Mrs. Darling says that on the Monday after the will was read, the agreement for division was made. She is corroborated in this only by her husband. She also says that she repeatedly asked her brother, she does not say she ever asked her sister, to reduce the agreement to writing. This was never done. Edgar says he definitely refused to sign any paper on January 24th. There was still time, therefore, in which to bring proceedings to contest the will. It is admitted

30 that Edgar and Madeline each gave a portion of the insurance money to their sister. This insurance as I have stated above, was no part of the estate, and I do not think the transaction is any corroboration of the alleged agreement. Edgar and Madeline both say they gave the money as a gift, feeling sorry for their sister's small share in the estate, but that there was no consideration for it. This, I believe. The brother and sister also admit that they told Mrs. Darling they would give her something from the

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Opinion of Vice-Chancellor.

estate. No specific amount was mentioned and no written agreement was ever executed. Edgar says he refused to do so. Madeline was never asked to do so. Both deny emphatically that they ever made any agreement for any specific amount conditioned on Mrs. Darling's refraining from legal proceedings. Their testimony is clear and straightforward, and seems to me, to be entirely truthful. I think they were surprised at the disposition their father had made of his property, were sorry for their sister, and were willing to help her in a manner they themselves might determine on. They were not, however, willing to be forced into a legal agreement which would deprive them of a large part of their inheritance. On the other hand, Mrs. Darling's attitude on the stand convinces me that she is a highly excitable woman, and her testimony was contradictory and not convincing. The evidence shows that she had quarreled with her father and had started suit against him alleging fraud. This, she discontinued when an equal division was made of her mother's property. It is quite apparent that she was surprised and annoyed at having been left out of her father's will with so small a recognition. She, therefore I think, magnified the generous suggestions of her brother and sister into a legal agreement, which would put her upon a par with them.

A claim of this kind, involving a large amount of money, should have conclusive proof to substantiate it. The uncorroborated statements of complainant and her husband are not, in my opinion, sufficient in the absence of any written agreement, to establish the claim she is now making. As counsel for complainant has said that the conclusion depends entirely on the facts and the

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Opinion of Vice-Chancellor.

reliability of complainant's story, I shall find that she has exaggerated her facts. She endeavored to force her brother and sister into an agreement they never contemplated. They desired to assist her, but not to the extent she now insists upon. I see no necessity of citing cases in this matter. It is purely a matter of fact. I find that no agreement, such as is alleged by complainant, was ever entered into. To allow such a claim, upon the mere statement of those making it, would seriously affect property rights and results in prolonged litigation.

I will advise a decree dismissing the bill.

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FINAL DECREE.

Filed June 4, 1929.

IN CHANCERY OF NEW JERSEY.

*Between*GLADYS G. DARLING,
Complainant,
*and*EDGAR S. GILMORE, *et al.*,
Defendants.

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On Bill, &c.
Final Decree.

Complainant having filed her bill of complaint in the above-entitled cause and the defendants, Edgar S. Gilmore and Madeline Gilmore Kelly, and Sarah Jane Dewey Gilmore and Fidelity-Union Trust Company, executors of and trustees under the last will and testament of William E. Gilmore, deceased, having been duly served with subpoena *ad respondendum* and Messrs. Lindabury, Depue & Faulks, solicitors of this court, having appeared and filed an answer for the defendants, Edgar S. Gilmore and Madeline Gilmore Kelly, and the defendants Sarah Jane Dewey Gilmore and Fidelity-Union Trust Company, executors of and trustees under the last will and testament of William E. Gilmore, deceased, not having appeared or filed answers, and the pleadings and proofs having been read and the arguments of the respective counsel having been heard and considered, and the Court having duly considered the said pleadings, proofs and arguments, and it appearing to the Court that the complainant is not entitled to the relief sought and prayed for by her in the bill of complaint,

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Final Decree.

IT IS on this 4th day of June, one thousand nine hundred and twenty-nine ORDERED, ADJUDGED and DECREED that the complainant's bill be and the same is hereby dismissed against all defendants.

AND IT IS FURTHER ORDERED and DECREED that the complainant pay to the defendants the costs of this suit to be taxed, and that execution issue therefor according to the practice of this Court.

E. R. WALKER,

C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

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ORDER SUBSTITUTING SOLICITORS.

Filed May 27, 1930.

IN CHANCERY OF NEW JERSEY.

Between

GLADYS G. DARLING,
Complainant,
and
 EDGAR S. GILMORE, *et als.,*
Defendants.

On Bill, etc.
Order Sub-
stituting
Solicitors.

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It appearing that Andrew J. Whinery, solicitor
of record for the complainant, consents hereto:

It Is, on this 22nd day of May, 1930, on motion
of Gabrielson, Conover & Stasse, solicitors of the
complainant, ORDERED, that said Gabrielson, Con-
over & Stasse be, and they hereby are, substituted
as solicitors of record for the complainant in
place of Andrew J. Whinery.

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E. R. WALKER,

C.

I hereby consent to the making and entry of
the above order.

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ANDREW J. WHINERY,
Solicitor of Record for the Complainant.

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NOTICE OF APPEAL.

Filed June 4, 1930.

No. 68-265.

IN CHANCERY OF NEW JERSEY.

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Between

GLADYS G. DARLING,
Complainant,

and

EDGAR S. GILMORE, *et als.,*
Defendants.

On Bill, etc.
Notice
of Appeal.

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The complainant hereby appeals from the final decree made in the above-entitled cause on June 4, 1929, by the Chancellor on the advice of Vice-Chancellor Church, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

GABRIELSON, CONOVER & STASSE,
Solicitors for and of Counsel with Complainant.

Dated May 22, 1930.

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

J. HOWARD CONOVER,
Of Counsel with Complainant.

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Notice of Appeal.

Service of the within notice of appeal is hereby acknowledged this 23rd day of May, 1930.

LINDABURY, DEPUE & FAULKS,
Solicitors for Defendants,
Edgar S. Gilmore and Madeline G. Kelly.

HOOD, LAFFERTY & CAMPBELL, 10
Solicitors for Defendants, Sarah Jane Dewey
Gilmore and The Fidelity-Union Trust
Company, of Newark, New Jersey, Execu-
tors of and Trustees under the last Will
and Testament of William E. Gilmore,
deceased.

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PETITION OF APPEAL.

Filed June 24, 1930.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

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Between

GLADYS G. DARLING,
Complainant-Appellant,

and

EDGAR S. GILMORE, and others,
Defendants-Respondents.

On Bill, etc.

On Appeal.

*Petition
of Appeal.*

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

The petition of Gladys G. Darling, the appellant in the above stated cause, respectfully shows that:

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1. Your petitioner finds herself aggrieved by the whole and every part of a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date June 4, 1929, wherein the said Gladys G. Darling was complainant and the said Edgar S. Gilmore, Madeline Gilmore Kelly, and Sarah Jane Dewey Gilmore and The Fidelity-Union Trust Company of Newark, New Jersey, Executors of and Trustees under the last will and testament of William E. Gilmore, deceased, were defendants, in this respect, to wit, that the said decree adjudges that the complainant's bill be and the same is hereby dismissed against all defendants, and that said decree further adjudges that the complainant pay to the defend-

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Petition of Appeal.

ants the costs of this suit to be taxed, and that execution issue therefor according to the practice of this Court.

2. Your petitioner humbly appeals from the whole of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that: 10

(a) It should have been decreed that the defendant-respondent, Edgar S. Gilmore agreed with the complainant-appellant, Gladys G. Darling, that he would assign, transfer and set over unto her one-third of the income which was bequeathed to him in the last will and testament of William E. Gilmore, deceased, and one-third of the principal of the share of said estate which was bequeathed to him upon the death or re-marriage of Sarah Jane Dewey Gilmore, the widow of said William E. Gilmore. 20

(b) It should have been decreed that the said Edgar S. Gilmore should carry out and perform said agreement made with said Gladys G. Darling and that he should make, execute and deliver any and all agreements, assignments or other papers which might be necessary to fully effectuate and consummate said agreement made between said Gladys G. Darling and said Edgar S. Gilmore. 30

(c) It should have been decreed that an accounting be made by said Edgar S. Gilmore to said Gladys G. Darling of the amounts and sums of money which he had thus far received from the estate of said William E. Gilmore, deceased, and that the amount found to be due to said complainant should be paid to her by said Edgar S. Gilmore.

Petition of Appeal.

(d) It should have been decreed that if said Edgar S. Gilmore should fail or refuse to make, execute and deliver the necessary agreements, assignments or other papers to carry out and consummate said agreement, that said Court of Chancery should order Sarah Jane Dewey Gilmore and The Fidelity-Union Trust Company, of Newark, New Jersey, Executors of and Trustees under the last will and testament of William E. Gilmore, deceased, to apportion, set aside, hold in trust for and pay over to complainant one-third of the income and principal, payable from time to time under the terms of said will, to said defendant Edgar S. Gilmore.

(e) The Court of Chancery should have made an order or decree restraining or enjoining said defendant, Edgar S. Gilmore, from disposing of or alienating his interest in said estate of said William E. Gilmore, deceased, in any manner which might or could defeat the full performance or consummation of said agreement between complainant and said defendant, Edgar S. Gilmore.

(f) It should have been decreed that the defendant-respondent, Madeline Gilmore Kelly, agreed with the complainant-appellant, Gladys G. Darling, that she would assign, transfer and set over unto her one-third of the income which was bequeathed to said Madeline Gilmore Kelly in the last will and testament of William E. Gilmore, deceased, and one-third of the principal of the share of said estate which was bequeathed to her upon the death or remarriage of Sarah Jane Dewey Gilmore, the widow of said William E. Gilmore.

(g) It should have been decreed that the said Madeline Gilmore Kelly should carry out and

Petition of Appeal.

perform said agreement made with said Gladys G. Darling and that she should make, execute and deliver any and all agreements, assignments or other papers which might be necessary to fully effectuate and consummate said agreement made between said Gladys G. Darling and said Madeline Gilmore Kelly.

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(h) It should have been decreed that an accounting be made by said Madeline Gilmore Kelly to said Gladys G. Darling of the amounts and sums of money which she had thus far received from the estate of said William E. Gilmore, deceased, and that the amount found to be due to said complainant should be paid to her by said Madeline Gilmore Kelly.

(i) It should have been decreed that if said Madeline Gilmore Kelly should fail or refuse to make, execute and deliver the necessary agreements, assignments or other papers to carry out and consummate said agreement, that said Court of Chancery should order Sarah Jane Dewey Gilmore and The Fidelity-Union Trust Company, of Newark, New Jersey, Executors of and Trustees under the last will and testament of William E. Gilmore, deceased, to apportion, set aside, hold in trust for and pay over to complainant one-third of the income and principal, payable from time to time under the terms of said will, to said defendant Madeline Gilmore Kelly.

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(j) The Court of Chancery should have made an order or decree restraining or enjoining said defendant, Madeline Gilmore Kelly, from disposing of or alienating her interest in said estate of said William E. Gilmore, deceased, in any manner which might or could defeat the full performance or consummation of said

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Petition of Appeal.

agreement between complainant and said defendant, Madeline Gilmore Kelly.

(k) The Court of Chancery held that the claims of Gladys G. Darling against said defendants, Edgar S. Gilmore and Madeline Gilmore Kelly, involving a large amount of money, should have conclusive proof to substantiate them.

Your petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden and that your petitioner may have such relief in the premises as to this Court shall seem meet.

GABRIELSON, CONOVER & STASSE,
Solicitors for and of Counsel
with Complainant-Appellant.

Service of the within petition of appeal is hereby acknowledged on this 26th day of June, 1930.

LINDABURY, DEPUE & FAULKS,
Solicitors for Defendants-Respondents, Edgar S. Gilmore and Madeline G. Kelly.

HOOD, LAFFERTY & CAMPBELL,
Solicitors for Defendants-Respondents, Sarah Jane Dewey Gilmore and The Fidelity-Union Trust Company, Executors of and Trustees under the last Will and Testament of William E. Gilmore, deceased.

IN CHANCERY OF NEW JERSEY.

January 10, 1929.

*Between*GLADYS G. DARLING,
*Complainant,**and*EDGAR S. GILMORE, *et als.,*
Defendants.

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Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Andrew J. Whinery and Arthur T. Vanderbilt for complainants; Lindabury, De-
pue & Faulks (by Mr. Ashmead) for defendants.

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GLADYS G. DARLING, sworn for complainant.

Direct examination by Mr. Vanderbilt.

Q Mrs. Darling, where do you live? A In Llewellyn Park, West Orange.

Q And you are one of the three children of William E. Gilmore, who died on January 17, 1928, a resident of Essex County? A I am.

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Q And what are names of the other two children? A Madeline Gilmore Kelly and Edgar S. Gilmore.

Q Prior to your father's death, what was the relationship which existed between your father and yourself? A We were not friends.

Q And over how long a period of time, Mrs. Darling, had this relationship existed between

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Gladys G. Darling, direct.

your father and yourself? A A little over two years.

Q And what was the cause of this strained relationship between your father and yourself?

A My mother died intestate and her property —(interrupted).

10 Q When was that? A In 1922, and her property came to the children. Immediately after her death, my father and his lawyers told us that in order to facilitate the sale of the property it would be better if it were placed in his name.

Q Where was the real estate you are speaking about that had been in your mother's name?

A A piece of property in East Orange, on Prospect street, and one in East Hampton, New York.

20 Q And who were the lawyers concerned? A Mears & Mears of Brooklyn.

Q New York lawyers? A Yes.

Q And as a result of their advice and of your father's suggestion, did your sister and your brother and yourself transfer— A She did.

Q —the real estate to your father? A Yes.

Q By deed? A By deed.

30 Q And then how long after that time did your father remarry? A He married in August, 1925.

The Court: Well, was there any consideration for these deeds?

Witness: None.

Mr. Ashmead: They have no bearing on this case.

Mr. Vanderbilt: Simply as showing the relation.

Gladys G. Darling, direct.

The Court: I don't know whether it has any bearing or not, but I will admit it.

Mr. Vanderbilt: I am just trying to show the relationship that existed.

Q Now, the relationship between your father and yourself was perfectly at the time you transferred your interest in your mother's property to him? A Oh, yes. 10

Q And the difficulty arose at the time that you learned of his intended second marriage? A Yes.

Q Will you tell the Vice-Chancellor what developed at that time? A Well, my father told us he was going to be married again, in a little less than two weeks, and I told him that I thought he ought to deed the property back to us children, because the moment he married again his wife would have a dower right in that property, and he made the statement that she would not, that all she would get was a dower right in his curtesy, and I told him I told him I did not believe that because I knew his curtesy right could not be transferred and, besides, the property was in his name, and then he said, "Well, if you will see your lawyer and ask him, whatever he says I will abide by it." And then he left the room. I saw a lawyer the next day, and my father, when I told him of what his decision had been, was very angry, and said then I was going to fight and I got angry, too, and said, yes, if he wanted to take that standpoint, I would. 20 30

Q And, then, subsequent to that conversation that you mentioned with your father, proceedings were had in Chancery to partition the 40

Gladys G. Darling, direct.

property? A Yes, they brought a partition sale.

Q And the property— A Was sold.

Q At partition sale, and that, so far as you know, is the cause of the strained relationship between your father and yourself? A Absolutely.

Q And that continued up to the time— A Of his death.

Q —of his death. After your mother's death, with whom did your father live? A My sister.

Q In the family residence on Harrison street? A The first winter in New York and then on Prospect street.

Q And then, after your father's remarriage, he lived with his second wife, I suppose. A Yes.

Q In the East Orange residence? A No; they moved to Montclair.

Q Oh, they moved to Montclair, I see. Prior to the death of your father, what had been the relationship between your sister, Mrs. Madeline Kelly and yourself? A We were not particularly friendly.

Q And how long had that situation existed? A Since my mother's death.

Q And what was the relationship between your brother, Edgar Gilmore, and yourself, prior to your father's death? A Not very friendly.

Q How soon after your father's death did you discuss or have any discussion with your brother and sister, or either of them, with reference to your father's will? A Shortly after my father's death, my brother said he thought I had been disinherited. I told him I did not think so, and he said, "Well, I do, because right after the property was sold Father said to me,

Gladys G. Darling, direct.

'I suppose, if I leave my money to you outright, you will split with your sister, Gladys.'” And he said, “Yes, sir, I will; and I feel sure Madeline will, too.”

Q Was your sister, Madeline, there at the time of this conversation? A No.

Q You are now telling us about? This was a few days after your father's death? A Yes.

Q Had his will been located up to that time? A No.

Q Well, now, was there anything further said at this conference between your brother, Edgar and yourself? A Not at that time.

Q Now, did you have any subsequent conferences with him, or with him and your sister, prior to the discovery of your father's will? A No— Yes.

Q Well, now, what were they? A We didn't know—they didn't know what the will was, and, in discussing it they thought maybe his second wife was going to get quite a lot of it, and they called my husband and I up and we went to my sister's house. They had a discussion, and then my husband and my brother's—my sister's husband and my brother went to consult a lawyer, Mr. Taylor, on what they should do in such a case.

Q This was before the discovery of your father's will? A Yes, but before we knew anything about it.

Q And what was the conversation between your sister and your brother and yourself and also your husband and her husband, if they were present, with respect to what you would do?

A They were going to fight, contest the will.

Q Before— A If she received more than her share.

Gladys G. Darling, direct.

Mr. Ashmead: Who was present?

10 Q Who was present at the time of this conversation at which they said they were going to contest the will if the widow got more than her share? A Mr. and Mrs. Kelly, my brother Edgar Gilmore, my husband, Mr. Darling, and myself.

Q And where was this conversation? A In my sister's home.

Q And can you tell us about how long this was after the death of your father? A No; it was in the week after he was buried.

Q I see. Now, who is this Mr. Taylor that you say was consulted? A Well, he lived on Harrison street, he is a lawyer.

20 Q What is his first name? A I think it is Charles, I am not sure.

Q Is he a New Jersey lawyer or a New York lawyer? A I think New York.

Q And who did you say it was consulted him? A The three men. My husband, my brother-in-law and my brother.

Q Now, how soon after this conference that you referred to, was your father's will found? A Found on the Saturday of that week.

30 Q Your father— A And read.

Q Your father died— A On the 17th.

Q —January 17th. That would make this about what date? A It was January 28th.

Q And who told you about the finding of the will? A Well, my brother just simply said it was going to be read; the will would be read on Saturday morning.

Q And where was it that he told you that? A Right— in my house.

40 Q In your house. Were you present at the reading of the will? A No.

Gladys G. Darling, direct.

Q Well, when did you first learn the contents of the last will of your father? A Immediately after the will was read. I left my apartment to go and get my car, and as I was walking down Harrison street my brother, in my father's car, passed me and he called and the car stopped and I walked across the street to speak to him. 10

Q And what did he say to you on this occasion? A He took my arm and he said, "Glad, dear, you have been disinherited with five thousand dollars." And I said, "Oh, have I?" He said, "Are you going to fight it?" And I said, "Yes." "Well," he said, "if you do, you will lose your five thousand." "Well," I said, "what is five thousand compared to probably two hundred thousand?" "Well," he said, "if you fight the case and win it, Sadie gets her third out-right." 20

Q Who is Sadie? A Sadie is the—

Q The second wife? A —the second wife. And he said, "That is that much less for us." Also he said, "I know that I need the money and if you fight the will, you tie the estate up maybe for two or three years, and we both know Madeline needs it." And I said, "Well, I will think it over." 20

Q Now, this, you say, was on a Saturday?
A Yes.

Q The conversation you and your brother had on the street? A Absolutely.

Q Who was driving your father's car at the time? A My father's chauffeur, Mr. Seabeck.

Q Well, now, what was the next conversation between your brother and your brother and sister and yourself, with reference to this matter, 40

Gladys G. Darling, direct.

after the conversation on Saturday? A It was that evening, at my sister's house.

Q And who was present, Mrs. Darling? A Mr. and Mrs. Kelly, my brother, my husband and myself.

10 Q And what was said by the various people there that Saturday evening, with respect to the will and matters relating thereto? A When I got there they asked me what I was going to do and I told them I was going to fight and my sister said, "If you do that, don't you see that Sadie will get a third outright; that will be taken away, and, if you do not, you will get a third of all that we have—which is a third. Of course, we cannot give you anything but part of our income, but Sadie's money can and will be divided," and I said, "That is just the point. As far as I can see, it is to my advantage not to do that, because I only have a share of your income as long as you live, and, after that, it stops, and I get only the share of Sadie's money, which is probably much smaller—it is undoubtedly much smaller than I would get should the will be broken."

20 Q And what else was said? A They put forth various arguments such that they needed the money and it would tie it all up and I said that I—still I would think it over. We got our copy of the will then that night.

30 Q Did your brother take part in the discussion? A Yes.

Q And do you recall whether or not he said anything on that occasion about his financial condition or what he was planning to do or had been doing? A No; he just simply said he needed the money, and I knew that. We loaned

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Gladys G. Darling, direct.

him money to send to his wife, when my father died, and money for himself.

Q Had he been working, prior to your father's death? A He said not for two years.

Q During that evening, Saturday evening, did you have any opportunity to look over the actual will as your father had left it? A Yes, 10
we read it that night.

Q And were its terms discussed by all of the party? A Well, the main thing that seemed to be worrying them was whether I would fight or not, not what the will read.

Q Well, now, will you tell us in detail what they said to you and what you said to them with respect to fighting the will, as you have expressed it? A Well, my sister, of course, 20
put forth the argument about the income, which did not seem so very strong to me. Then they both gave all kinds of reasons as to why we should not—why I should not fight the will: The same one that they needed the money, that Sadie would get her third outright.

Q Was there anything said on this occasion with respect to the insurance? A Yes. My brother said—the only cash they got out of the estate was forty thousand dollars in insurance, 30
which, with the five thousand I got, made forty-five thousand dollars, so that, if I decided not to contest the will, that would be divided equally between us all.

Q The five thousand you refer to as to your getting is the specific legacy, is it not? A The specific legacy, yes.

Q Was there any agreement reached on Saturday night with respect to the insurance? A No.

Q Or with respect to anything? A No. 40

Gladys G. Darling, direct.

Q The matter was just left open? A Yes.

Q And, now, was this a nice, quiet conference, the way you are telling it now, or was it a good old fashioned Irish fight? A Is was a good old fashioned row.

10 Q Considerable argument? A Yes.

Q Now, when was the argument adjourned to? A Well, then, we saw them on Sunday, but we did not discuss anything because my brother-in-law's parents came in and we were only there for a short time.

Q This was also down at your sister's house? A Yes.

Q And you say "we," you mean your husband and yourself? A Yes.

20 Q All right. When did you next see your brother? A On Monday night.

Q And what was said or done at that time, with reference to this matter? A Well, they—I told them that I had been to see—rather, that I had told my husband to go to see our lawyer regarding the discussion of possible proceedings.

Q Did you mention who your lawyer was? A I may have said Dave McBride—probably did.

30 Q And you told that to your brother and sister on Monday, you said? A Yes.

Q Now, what further discussion was there? A Well, we started the thing all over again and they brought the same reasons to bear of what it all meant and tying up the estate and how the whole thing would be very distressing and I agreed—

Q What is that? A I agreed not to fight the will, in consideration for the assignment which they promised to draw up.

Gladys G. Darling, direct.

Q Now, what assignments did you refer to?

A The assigning of one-third of their income for their life, the assigning to me of one-third of the shares of the money they received on the death or remarriage of my father's second wife.

Q And anything about the insurance? A 10
It was then decided I receive my—that they would give me the money from the insurance just as soon as they got their check.

Q You don't mean they would give you all the money? A No. My share, my five thousand dollars?

The Court: Your five thousand or fifteen thousand?

Witness: Five thousand; they each gave 20
me five thousand, and then the five thousand I got from father made the fifteen.

Q That equalized it. Now, did you also agree on this Monday evening—

Mr. Ashmead: Don't lead.

Mr. Vanderbilt: I didn't know that I was.

Q Was there anything said Monday night 30
with respect to the chauffeur? A Yes. That is when we discussed Victor. Edgar said that nothing had been done for Victor, he thought that we ought to give him something, he had been very loyal and at the time of my mother's death he was more than loyal and I said I thought so, too. We first discussed it and they eventually decided they could afford to give a third of a thousand dollars, so my brother said—

Gladys G. Darling, direct.

Q You mean, each of you? A That each of us would give a third to make a thousand dollars and my brother said, "When I give you my check for five thousand dollars I will deduct that portion which is to go to Victor and give him the money."

10 Q What did your sister say? A My sister said she agreed with that, too, but, of course, when the check was in full and she paid my brother the share that she owed.

Mr. Vanderbilt: In lieu of the original checks, I desire to offer—(to witness:) First off, are these photographs of the checks, one signed by your brother for five thousand dollars are to your order—pardon me—your
20 sister, for five thousand dollars to your order, dated February 1st, 1928, and the other signed by your brother to your order for \$4,667?

Witness: Yes. Those are the checks.

Mr. Vanderbilt: I desire to offer the photograph in lieu of the originals.

The Court: Any objection?

Mr. Ashmead: No.

30 The Court: Let them be marked.

(Photograph marked Exhibit C. 1.)

The Court: Then Mrs. Darling got her share.

Mr. Vanderbilt: Of the insurance money.

Q And did you contribute your share to the thousand dollars that was offered to Victor?

A Yes. My brother deducted it from the five thousand that he had given me and was my
40 share of the insurance money.

Gladys G. Darling, direct.

Q Now, this meeting on Monday night, I take it, was amicable? A Yes, very.

Q And who was there beside your brother and sister and yourself? A My husband and my sister's husband.

Q Now, subsequent to this meeting on Monday night, did you give any instructions to your attorney in the matter? A Yes. Mr. Darling went the next day and told him to file a caveat. We didn't know—(interrupted) 10

Q Did you say anything to your husband, in their presence, with reference to his seeing Mr. McBride, on the Monday night after the agreement was reached? A No, I think I just simply told them that we would stop all proceedings immediately.

Q Do you know whether or not your husband did see Mr. McBride? A Yes, he did. 20

Q And when was the next family meeting, subsequent to this meeting of Monday night? A There was no other.

Q Well, did you— A It was settled.

Q Well, you continued to see your brother and sister? A Yes, but we didn't discuss it.

Q Did you or your husband—did you or did your husband in your presence tell your brother and sister whether or not Mr. Darling had seen Mr. David McBride and given him any instructions? A Yes, he told him that before Monday. 30

Q What is that? A We told him that, that he had seen the—he had seen a lawyer that day.

Q That was about starting it. I want to know after this— A Oh, yes.

Q —meeting of Monday night. A Yes. We told my brother in my house that we had discontinued. 40

Gladys G. Darling, direct.

Q Oh, was your brother living with you at the time? A Yes, my brother came to live with me either that Saturday night after the finding of the will or the Sunday, I can't remember which.

10 Q And how long did he continue to live with you? A Until he went back to California.

Q And about how long after the—(interrupted) A Oh, I think it must have been around ten days.

Q I see. A A week or ten days.

Q Did he live in California at the time? A Yes.

Q Family out there? A Yes.

20 Q And did he subsequently return from California? A He did.

Q About how long after he left? A In April.

Q And how long did he—did he come back to live with you? A He did.

Q Alone? A No; with his wife and child.

30 Q And how long did he continue to live with you, or did they continue to live with you after their return from California? A Until the third of May. From the 27th of April, I think it was, until the third of May, a Friday to a Thursday.

Q I see. And when he returned from California, did you say anything to him with respect to—(interrupted) A I did not see him.

Q You didn't see him? A No.

Q I mean, while he was living at your house. A Just say "Hello" and Good bye."

40 Q Well, did you have any conference or any conversation with him at any time subsequent to his return from California with his wife and

Gladys G. Darling, direct.

child, with reference to the execution of the assignment. A Yes.

Q That you mentioned in connection with that meeting of Monday night? A I did.

Q What was the conversation and where was it? A I told my brother on Wednesday that I wanted to see him, but I had just moved into my house the day before they came to be with me, and I was very busy. On Thursday morning I told him again that I wanted to see him. 10

Mr. Ashmead: What time was this?

Q Can you fix the time?

Mr. Ashmead: It must—(interrupted)

A You mean the time in the day? 20

Q No; the time of the month. A It was the third of May.

Q The third of May. A And then I had—he was upstairs shaving, so I went out to do whatever shopping I had to do, or something, and, when I returned in the afternoon inadvertently with my mother-in-law, I saw my nephew in the house and asked him what he was doing there and he said, "Oh, we are home." I went upstairs and found my brother and sister-in-law talking and I said, "Are you going away?" And my sister-in-law said, "My brother has come on with his bride and we are going to New York for a few days to stay with him." She said, "I only have two bags and I don't know which to take and which to leave, so I am taking everything." I went downstairs. Then my brother called a taxi and came downstairs and said to me, "What did you want to see me about?" "Well," I said, "it doesn't 30 40

Gladys G. Darling, direct.

take much intelligence to guess. I want to know when you are going to give me those assignments." He said, "We have changed our minds; we are not going to give you anything." And I said, "But you can't change your minds." "Well," he said, "I have; and it is too late for you to do anything about it." I said, "What do you mean 'too late?'" He said, "You had until the first of May to fight the will." And I said, "Well, it was settled that I told you I would not fight the will, in return for these assignments."

10

Q And what did he say? A He said he couldn't help that. It wasn't—we hadn't made the will, he hadn't done this, he hadn't done that and he—(witness stops of her own accord).

20

Q Did he say whether or not the payments would be made to you? A Well, I said to him, "You changed your mind about the assignments, I suppose you have changed your mind about everything?" He said, "Yes, I have."

Q And where did he go to from there? A He went to the Hotel Suburban.

Q Who was there at the time of this conversation? A My mother-in-law and his wife.

Q And is your mother-in-law still living? A No; she died December thirtieth.

30

Q Well, after he left his wife, where did your brother and his family go? A The Hotel Suburban.

Q That is in East Orange? A Yes.

Q How do you know they went there? A Well, the following morning I went down to see my sister and I went in her house and I was sitting there and I said to her, "When are you going to East Hampton?" We had planned to go down together and she was fixing the

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Gladys G. Darling, direct.

house up, she had rented it, and I was to help her and she said, "I haven't made up my mind yet. It all depends upon Ed." And then the telephone rang and she answered it and I heard her say, "No, he isn't here. He is at the Hotel Suburban," and when she finished I said, "Who is at the Hotel Suburban?" She said, "Ed is." I said, "I thought he was going to New York." She said, "Yes, he was, but they thought it would be too expensive," and I—(interrupted) 10

Q Now, did you have any conversation with your sister at this time you are telling us about with respect to what your brother had said the day before? A No, because I got excited easily and I knew I was going to cry, so I went away, and when I had gotten a little control of myself I went back and the woman who does her washing was there and she said Mrs. Kelly had gone out—she had gone to the Hotel Suburban; she was going to have lunch with Mr. Gilmore's wife and after luncheon she was going to interview a maid to take away, as she was leaving for East Hampton the first thing in the morning. 20

Q Did you see your sister subsequently with reference to the situation? A No; I didn't see her again.

Q Did you see your brother subsequently with reference to the situation? A No, I did not. 30

Q And you then turned the matter over to Mr. Whinery to start suit, the time for filing the caveat having expired? A Yes.

Q Now, during this period, from the time you made the agreement on Monday evening, as you have told us—pardon me— What was the relationship which existed between your brother and your sister and yourself, up to the time of the conversation that you had with 40

Gladys G. Darling, direct.

him in which he told you that he would not execute these assignments? A Most amicable. I was with my sister a great deal and with her children.

Q How old are her children? A Tenny is about two and Tillie is about four.

10 Q And I understood you to say that prior to your father's death the relationship between your sister and yourself had not been so friendly? A No it had not.

Q What had been the cause of that? A They thought I was wrong in doing what I did in the suit with father and I just did not agree with them. They took umbrage because they had been mentioned.

20 Q That was a suit about the real estate—
A Yes.

Q —that you told us about? A It cost them money and they didn't like it.

Q What is that? A It cost them money and they didn't like it.

Q But that situation was cured and the relations were friendly after this agreement had been reached? A Very.

30 Q How often did you see your sister during that month or two? A Oh, three or four times a week or oftener.

Q And what was your relation with your brother, during this same period from—(interrupted) A Well, he was in California, but we were—his wife and I corresponded.

Q And while he was on he stayed with you? A Yes.

40 Q And when he came back, he brought his wife and child to your house? A Yes; I moved specially.

Gladys G. Darling, cross.

The Court: For what?

Witness: So they would have a place to come and stay. I had no room in the apartment.

Q Has your brother, Edgar, any children to take under this provision of the will that you referred to? A Yes, four. 10

Q Yes; four children. And you have no children, Mrs. Darling? A No.

Cross examination by Mr. Ashmead.

Q Mrs. Darling, this suit that you mentioned that you started against your father was disposed of by agreement of the parties, wasn't it? A No.

Q Wasn't the property sold under an agreement? A Yes. 20

Q Under the consent of all the parties, wasn't it? A No; it was a partition sale.

Q And you didn't object to the disposition of that property? A Well, I don't know. Does one?

Q Well, do you remember that you did or did not? A I only know that it was a partition suit that took priority over my claim, I think it was. 30

Q Now, you claimed, didn't you, in that suit—what was your claim in that suit, that the deed of your father had not been properly signed—it was a forgery? A Oh, no. I claimed that the deed I signed had been for no consideration and the deed that was filed was for thirty-nine thousand dollars—a sale.

Q So that you did not sign the deed that was filed? A I signed the deed that was filed, but they put in subsequently a phrase. 40

Gladys G. Darling, cross.

Q Then your claim was that the deed had been altered. A Yes.

Q Was your father offended at your attitude in that suit? A He was.

Q From the time of that suit did you have any friendly relations with him? A None.

10 Q You were very much opposed to him getting married the second time, weren't you? A No.

Q Were you very friendly with his second wife? A No. I was not against his being married. I was against the way it was done.

Q You did not oppose it? A No; I did not oppose the marriage.

Q What was the trouble with the way it was done? A My father was over sixty. We didn't know he knew this Mrs. Dewey, until he
20 announced that in less than two weeks he was going to be married. I thought it very undignified.

Q And did you express that indignation to him? A No; I don't think I did.

Q Did he know of your attitude with respect to it? A Probably.

Q You never had any conversation with him about the second marriage? A No.

30 Q You never had anything to do with him, however, after this suit that you started for this property? A No.

Q Now, had you, prior to his death, any thought that this second wife might influence him?

The Court: Any what?

Q Any thought about his second wife, that she might influence him to give her an undue
40 proportion of his estate? A No.

Gladys G. Darling, cross.

Q You never expressed it? A I never expressed or thought about it.

Q You never thought about it. Well, then when did you first think that possibly his will was subject to attack? A I did not.

Q You did not think it was subject to attack?
A No. 10

Q I see. A Oh, to attack!

Q Yes. A Oh, from my viewpoint?

Q Yes. A It was always subject to attack from my viewpoint.

Q I see. Now, what did you conceive to be the basis of attack that you could make on the will? A My sister and brother had both alienated my father from me by their refusal always in any way to try and fix up anything between us. Both my father and I were hasty and they refused innumerable times. 20

Q The situation then was that you and your father were two of a kind and hasty? A Yes.

Q And you thought that his will was subject to attack because your brother and sister had not tried to fix things up between you? A No. My sister kept my father away from me ever since my mother died.

Q I see. And you thought that might be a basis for attacking the will? A Certainly. 30

Q Now, is that all that you had in mind?
A No.

Q What else? A My father had been for many years a very heavy drinker, and when he was in those spells he was not a clear thinker.

Q Well, now, did you have any information as to his condition at the time the will was executed? A No. My sister told me, though, that for six months before his second marriage— 40

Gladys G. Darling, cross.

Q Your sister Madeline? A She is the only one I have—he had been sober practically not at all.

Q I see, so you thought that was the basis of attack of the will, did you? A I always thought so.

10 Q You knew the will was drawn—the codicil was drawn and executed before a Mr. Campbell and Mr. Lafferty here in Newark, didn't you? A I didn't know anything about it.

Q You didn't know anything about the circumstances surrounding the execution of the will? A No.

Q But because you thought that your father drank heavily you considered that that would give you a basis of attack on this particular will? A That, and the alienation of his affection.

20 Q And the alienation of the affection was that your sister had not done anything to bring you and your father together; is that it? A She had done everything to keep us apart.

Q What did she do? A They lived in New York the winter after my mother died. During the period in New York I had dinner with them once; I had luncheon with my sister twice. I lived in the house on Prospect street during that winter and they came to my house every Tuesday night and every Sunday for dinner. Immediately after dinner on every Tuesday night but one or two, they left the house to go other places, and on Sundays they always went to my brother's, and immediately after dinner I never saw my brother, they went to White Sulphur. I didn't know they were out of town until practically a stranger told me in the greengrocer's. I knew nothing about them at all.

40

Gladys G. Darling, cross.

Q Of your mother and father? A I didn't know anything about mother or father.

Q Did you ever go to see them? A Certainly. They always made me feel like a step child, but I went.

Q How frequently would you go around there? A Well, they lived in New York all winter. I couldn't go over very often. 10

Q Did you ever try to have a reconciliation with your father? A Yes.

Q And you were not successful, either, in your efforts? A Always, up to the time of his marriage, father and I were very amicable when we were alone.

Q Were you ever refused admittance to see your father, when you went to see him? A No. 20

Q Madeline had nothing to do with that, did she? A Why, no.

Q She never kept you away from your father? A No.

Q Then what do you mean when you say she prevented a reconciliation between you and your father? A I didn't say that. I said when Madeline, by her attitude toward me prevented me seeing my father as much as I should after my mother's death. 30

Q In what way? A She was not interested in seeing me herself. Therefore, she made other appointments and other engagements.

Q Oh, that was the reason? A And I also think she probably antagonized him to me. She used to do that very often.

Q You think that was so? A Well, one only can think.

Q Now, is that all that Madeline has ever done that led you to believe that she had unduly 40

Gladys G. Darling, cross.

influenced your father? A It seemed very big to me at the time.

Q But that is all that you had in mind?

A Yes.

10 Q And you were going around to see your father of your own accord, whenever you wanted to, as frequently as you wanted to? A When he was home.

Q Yes. You had no idea at all that Mrs. Gilmore, that is, the second wife, might influence your father? A She couldn't influence my father—what happened before she came into the family.

20 Q So that your sole basis of thinking you could contest this will was because of what you related in respect to Madeline? Your brother was out in California, wasn't he, and had been for several years? A No, no.

Q He went out in 1925, didn't he? A Yes; my father—no, he did not.

Q 1926? A He went in the fall of 1926.

Q Yes. Long before your father's will was made. A Oh, no.

30 Q Do you know the date of your father's will? A My brother did not go to California until long after the property was sold—on Prospect street.

Q Yes. I am not talking about that. I am talking about this will. A This will was drawn up right after that.

Q Now, when did your brother go out to California? A He went in the fall.

Q September, wasn't it? A Yes, the end of September.

Q Of 1926? A Did father die in 1928?

40 Q Yes. A Then he went in 1927.

Gladys G. Darling, cross.

Q No, he went in 1926. A Yes; the fall of 1926. It would make it a little over a year before father's death.

Q September, 1926, didn't he? A Yes; a little over a year.

Q This will that was made was not made until twenty-six, was it? A Why, was that the codicil? 10

Q October 29, 1926. A Was that the codicil or the will?

Q No. That was the will itself. A Well, that shows, then, evidently, that they were still at their work when they went away.

Q I see. That was your idea? A Why, certainly.

Q Now, the codicil was made in which he reaffirmed the will, on May 16, 1927. A Yes. 20

Q Now that was ten or eleven months after your brother went to California, wasn't it? A Uh huh. My brother told me the reason why the codicil was made was because of the row that they had with Mears & Mears in Mears & Mears' office, when my brother and father both were there.

Q You think that your brother had unduly influenced your father in the will? A No; he wouldn't do anything. 30

Q Your father was a very successful business man? A In the earlier years of his life.

Q And he continued business up until shortly before his death? A No, no, he did not.

Q Within two years before his death; isn't that so? A He was not particularly successful.

Q He amassed an estate of over eight hundred thousand dollars, didn't he? A Yes, but he lost a lot of it in the last year of his life. 40

Gladys G. Darling, cross.

Q So, then, during his life, he did create an estate of even a sum much larger than eight hundred thousand dollars? A Yes.

10 Q Now, you have related, have you, to the Court, all the reasons that you had for thinking that this will was subject to attack? A Yes. But the most important thing I have not told you. At the time that my brother and sister were begging me not to fight this will and bringing their arguments to bear, the one thing that they both said—not once, but several times, was that my father in the last years of his life had changed greatly and they felt perfectly sure that, if he had lived another year, his will would have been withdrawn and I would not have—
20 would have been remembered in the one that he would draw up.

Q Your sister did that, notwithstanding, you say, for several years prior to that time she was trying to keep you from being reconciled with your father? A Yes, but this time she was trying to keep me from keeping money away from her—a great deal of difference.

30 Q That is the motive you intend to that remark. Now, after this, your father had died, you appeared on the scene pretty frequently, didn't you? A Not at all.

Q You were at the funeral? A Certainly I was at the funeral. I was there when he died.

Q How soon after that was it suggested that you should attack this will—that you expected to attack this will? A When I heard the provisions.

Q Not before that time? A No.

40 Q What was the time that you went to Mr. Taylor? A I didn't go to Mr. Taylor.

Gladys G. Darling, cross.

Q What was the time that your husband went to Mr. Taylor? A When my brother and sister were afraid that they might be left out of the will.

Q Was that before or after the will was read? A Before.

Q Sure. So that somebody thought about attacking the will, before the will was read, didn't he? A Yes.

10

Q And your husband was representing you in that matter, wasn't he? A Yes.

Q Sure. A They wanted me there then.

Q And in these—in respect to this will, your husband has represented you in a number of occasions. A Yes.

Q Now, coming back to—(interrupted) A Mr. Kelly represented his wife, too.

20

Q Coming back to Mr. Gilmore, what is your conception that he did that influenced his father against you? A My brother?

Q Yes. A At the time we were having the partition sale, my brother and sister were just as angry as I was, but they could not afford to fight with my father, and, just before I went to see the lawyer, they met me in my husband's office, and I said to them, "I am going in to New York to see my lawyer. What are you going to do?" And my brother turned to me and said to me, "If you would only talk sensibly to father you would not have these rows all the time, and, if you would only let him explain it—he told it all to me." I said, "What did he say?" He said, "Go up and find out for yourself. I am not going to help you at all."

30

Q Didn't you think that was pretty good advice? A No.

40

Gladys G. Darling, cross.

Q I see. A It seems to me he could have helped me.

Q Did you go up to see your father, after he made that suggestion? A No, my father would not see me.

10 Q Instead of attempting to talk it over with your father you went to New York and hired a lawyer? A He told me to.

Q And that did not please your father. A No, it did not.

Q Now, this last answer of yours has been given in response to a question in which I asked you what you thought your brother had done to influence your father against you. Now, is that the only thing that he ever did that was the basis of your idea of contesting this will?

20 A Well, he never helped. He knew—they could have done a great deal to have kept the whole thing and they never tried. They acted as if they wanted me out of the way.

Q You really never got to the point of seeing a lawyer about contesting this will, did you?

A Yes.

Q You did? A Why certainly.

Q Did you give him these reasons for contesting the will? A My husband saw him.

30

The Court: Mr. Ashmead, it does not seem to me it is important as to whether or not she could have contested the will. As I understand this case, it is this: They made an agreement that if she did not contest the will she should have so and so. Now, whether she could have successfully contested the will or not, does not enter into this thing, in my opinion.

40

(Discussion.)

Gladys G. Darling, cross.

Q Well, now, Mrs. Darling, you have stated all the things that you had in mind in respect to basing a contest of this will? A Yes.

Q Now, these conversations that you allege to have had with your brother and sister, did you charge them with these things? A I told my sister many times that I thought she had acted outrageously to me, after my mother's death, and she called me a sentimental old fool and lots more. 10

Mr. Ashmead: I ask the question be repeated.

(Question read as follows: "Now, these conversations that you allege to have had with your brother and sister, did you charge them with these things?") 20

A What things?

Q The alienation of your father's affection from you. A Yes. I told my sister that I thought she had acted outrageously.

Q When was that? After your mother's death, wasn't it? A Not at all. It was after my mother's death and after my father's death, both.

Q I see. And did you charge Mr. Darling with the things that you have mentioned—Mr. Gilmore, with the things you have mentioned? A No; his was more an offense of "do nothing" than "do something." 30

Q Now, you have mentioned some insurance policies. They were not payable to your father's estate, were they? A I don't know anything about that. I only know that my brother was paid twenty thousand in insurance and my sister was paid twenty thousand in insurance. 40

Gladys G. Darling, cross.

Q And weren't they the beneficiaries under the policies? A Yes.

Q That is, they were named as beneficiaries in the policies, weren't they? A I think they were; I don't know it.

10 Q Now, I think you said—was there ever any suggestion by you at any time, about an assignment? I think you mentioned an assignment that you requested them to write this assignment. When was this suggestion first made by you? A I did not make the first suggestion; my brother did.

20 Q When was that made? A It was in a conversation that we had immediately after the reading of the will, just before he went back to the car he said to me, "And I will make this thing all legal and shipshape before I go back west."

Q Now, that was before he had seen his sister, wasn't it? A Yes.

Q That is that he had this conversation, I mean, at the car, as I understand. A Yes.

Q And he was speaking there—I suppose you understood, for himself. A Yes.

30 Q Whatever he said. He did not attempt to bind Madeline in any way? A No, not then; later.

Q Now, before he went back did you ever suggest that an assignment might be made? A Yes.

Q That was before he went back to California? A Yes.

Q And what happened? When was that? A It was in my apartment. My sister had agreed to this settlement—

40 Q Well, now, just a moment. I am asking you about the assignment. A Yes. I have to say that in order to explain it.

Gladys G. Darling, cross.

Q All right. A And I said to my brother, "I think it is—how are you going to make those assignments payable, direct from the Fidelity Union or will you and Madeline send me the money?" And he said, "Well, we will send you the money." And I said, "Well, I don't see why you can't have it made direct, because, if there is an income tax to pay, it is foolish for you to pay a tax and probably a sur-tax on money that belongs to me." "Well," he said, "that will all be deducted." And I said, "Another thing, I am not a charity patient and I don't see why I cannot have the same standing with you and Madeline." So then he said, "Well, I want to get home. It has been over a month since I have been away from the family and I am very anxious to get there and this takes time, but, when I return east in May, all these papers will be signed again legally and ship shape." 10 20

Q Did he refuse to make any assignment?

A No—at that time, yes.

Q No. I mean, at the time you are speaking of, in your apartment. A Did he ever refuse definitely?

Q Did he refuse to make any assignment?

A No; he merely stalled me off. 30

Q Well, so that, according to your story, the first time you claim that there was a refusal to make any assignment to you of any interest in your father's estate, was not until after May—or, was not until May? A May 3rd.

Q That is the first time, according to your story? A Absolutely the first time.

Q At this conversation that you claimed to have had with Mr. Gilmore on the sidewalk— 40

Gladys G. Darling, re-direct.

Mr. Ashmead: Never mind; that is all.

The Court: That is all, madam.

Re-direct examination by Mr. Vanderbilt.

10 Mr. Vanderbilt: May I just ask one or two more questions, your Honor?

Q You never were, in fact, paid any consideration for that deed that you made to your father? A No, never. Neither one of them.

20 Q You say you did not tell him of any objection on your part to this remarriage, but you thought he knew about it. Do you know who did tell him of your objection? A Why, my sister and brother were the only ones who could have.

Q With respect to the suit which was brought in Chancery for the partition of this property, did your brother and sister have anything to do originally with the idea of that suit? Were they in it originally? A They brought it.

30 Q Well, how many suits were there altogether? A Well, I started one to get the property back, have it deeded back to the three children, and then I got papers about the partition sale. I was served.

Q You were a complainant in the suit to get the property back from your father, and you were a defendant in the partition suit? A In the partition suit.

Q And they were complainants in the partition suit? A Yes. I don't know how they got the property.

40 Q When did you first talk to your sister with reference to these assignments? A Saturday night.

Gladys G. Darling, re-direct.

Q Following your conversation — (interrupted)? A Right after the day the will was read.

Q And again on Monday night I take it?
A Yes.

Mr. Vanderbilt: That is all. 10

Mr. Ashmead: That is all.

The Court: That is all, madam.

Now, I don't get quite clearly in my mind what this partition suit was. I don't understand that.

Mr. Vanderbilt: As I understand it— (interrupted).

The Court: I understood Mrs. Darling to say they conveyed the mother's property absolutely to the father. 20

Mr. Vanderbilt: Yes.

The Court: Then how could there be any partition?

Mr. Vanderbilt: Then she brought a suit—

The Court: To get the property back.

Mr. Vanderbilt: —to get the property back on the ground of no consideration.

The Court: Yes. 30

Mr. Vanderbilt: And did get that back.

The Court: Oh, she did get it back?

Mrs. Darling: No, no.

The Court: No, she did not get it back.

Mr. Vanderbilt: I don't know. I thought—

The Court: How could there be a partition if the property was already in one name? Can you explain that, Mr. Ashmead? 40

David A. McBride, direct.

Mr. Ashmead: It was worked out by agreement. When the property was sold, all of them joined in the deed.

Mr. Vanderbilt: Wasn't there any suit?

10 Mr. Ashmead: Their counsel. They had these suits pending and the property, as I understand it was sold and the deeds actually went from those who were interested in the property.

The Court: Did she get any money back from this property at all?

Mr. Ashmead: She did. She got her share.

The Court: How much is this estate worth?

20 Mr. Ashmead: This present estate?

The Court: Yes.

Mr. Ashmead: It is worth over a million dollars.

Mr. Vanderbilt: Mr. McBride.

DAVID A. McBRIDE, sworn for complainant.

Direct examination by Mr. Vanderbilt.

30

Q Mr. McBride, you are a counsellor-at-law of this State? A I am.

Q And your office is located in East Orange?

A Yes.

Q Did Mr. Richard Darling, late in the month of January, 1928, call to see you at your office with respect to the estate of William E. Gilmore, his wife's father? A I can only fix the time by saying that it was within a few days of Mr. Gilmore's death.

40

David A. McBride, direct.

The Court: A few days after?

The Witness: After.

Q And did he seek to retain you on that occasion? A He talked to me on that occasion about Mr. Gilmore's will.

The Court: Well, what did he say? 10

The Witness: He said that they wanted to—the gist of the conversation was that they wanted to break the will. That his wife wanted to break the will.

Q And did you advise him in the matter?

The Witness: I advised him only to the extent, at that time, of saying that, if they wanted to prevent the probate of the will, it would be well to file a caveat in the surrogate's office. 20

Q Now, did you have any subsequent conversation with Mr. or Mrs. Darling with respect to the matter? A Within a day or two.

The Witness: Within a day or two after the first conversation, on that subject, he called at my office again and we talked along for some time in just the same strain as we talked before, about the breaking of the will and what would be the course to pursue, and that was all, at that time. 30

Q Now, did he call to see you subsequent to this second visit, with reference to the matter? A Yes, some time after that—I can't tell exactly how long, he called and he told me that they had arrived at a settlement. 40

David A. McBride, direct.

The Witness: (Continuing.) That was why he had not seen me before.

Mr. Vanderbilt: What was the last answer?

10 (Answer read as follows: "Yes, some time after that—I can't tell exactly how long, he called and he told me that they had arrived at a settlement. That was why he had not seen me before.")

Mr. Vanderbilt: Oh. Did you have anything further to do with the matter, Mr. McBride, subsequent to this third visit you mentioned?

The Witness: Mr. Darling called at my office in regard to the matter later.

20 Q About what time, can you tell us? A I would say it was late in the spring or early in this past summer.

Q What was that about?

30 The Witness: That was about preparing a written agreement with Mr. Edgar Gilmore and Mrs. Kelly with regard to the settlement. I had to leave the office, shortly after Mr. Darling was there, and I didn't do anything about drawing that agreement that day.

Q Did you have any further conversation or any further dealings with Mr. Darling in reference to the matter? A Following that he left—I received word from him—I forget whether he spoke to me or telephoned me—(interrupted).

40 The Witness: —not to do anything about it, because they would not sign it.

David A. McBride, direct.

Q Did you have anything further?

The Court: Do you object to that?

The Witness: That is all.

The Court: Any cross examination?

Mr. Ashmead: That is all.

10

The Court: Now, you see, Mr. Vanderbilt, all this testimony amounts to is this, that Mr. Darling, we will say, as the agent of his wife, went to Mr. McBride to prepare a certain release. It does not appear that the other two had anything whatever to do with it, and his last answer is that he dropped it because he was informed that the other two would not sign.

Mr. Vanderbilt: That is so at the end, your Honor, but the first conference was with respect to filing a caveat.

20

The Court: Yes, I understand.

Mr. Vanderbilt: And subsequently he told him it had been settled and not to do anything about it.

The Court: Yes.

Mr. Vanderbilt: That was the main point I was driving at.

30

40

Richard F. Darling, direct.

RICHARD F. DARLING, sworn for complainant.

Direct examination by Mr. Vanderbilt.

10 Q Mr. Darling, you are the husband of Mrs. Darling, who is the complainant in this suit? A I am.

Q And you listened to your wife's testimony here this afternoon? A I have.

Q Were you present at the family conference held on Saturday night after the will had been read? A I was.

Q Down at the home of Mrs. Kelly, your sister-in-law? A I was.

20 Q Will you tell the Vice-Chancellor what was said and done on that occasion this Saturday night? A Gladys, my wife, and myself, called on Mr. and Mrs. Kelly and Mr. Edgar Gilmore that evening. I believe Edgar had asked Gladys to come up, when he met her in the morning, to talk over the settlement of the division. When we got there Gladys—the first thing they said—I believe it was Madeline asked Gladys if she was going to fight the will and Gladys said, “Yes, I am going to fight it,” and her conversation was that she had nothing to lose and where-
30 as Madeline and the children—she might have

Richard F. Darling, direct.

children some day and she didn't see why she should lose her inheritance and also Gladys said that she wanted one-third the same as they had, so then Madeline said that she would give Gladys one-third of the income and also one-third of all they got from Sadie. And she said, "Of course, I don't want you—you better not fight the will," she said, "if you do you won't get your part of it." 10

Q Who said that? A Madeline.

Q Did your brother-in-law, Edgar Gilmore, have anything to say on this occasion? A Yes. Ed also said that if Gladys fought the will, why, Sadie would get her part, and as he needed the money so badly he wished that she would not fight it.

Q Well, was any conclusion arrived at at this conference on Saturday night? A No. Gladys said that she was going to think it over. 20

Q Subsequent to this Saturday evening conference, did you consult Mr. McBride in Mrs. Darling's behalf? A Yes, I did.

Q When did you first consult him? A I believe it was the following Monday morning.

Q After this Saturday evening conference when was the next conference at which you were present? A I believe it was Monday night. 30

Q Now, will you tell the Vice-Chancellor what was said and done at the conference on Monday evening? A Gladys said she—(interrupted).

Q Where was it, first? A At Mrs. Kelly's house.

Q And who were present? A Mr. and Mrs. Kelly, Mr. Gilmore and my wife and myself. We arrived and Mrs. Darling said that she was—she was going, that it would be better to bring 40

Richard F. Darling, direct.

suit as she would get a greater part of the estate than by waiting for her share of the income.

- Q Yes? A So they begged her and talked to her and asked her not to bring suit, as, if she did, she might disturb the will and then Sadie would get her third. That seemed to worry them.
- 10 So at that time Gladys—they said, “Well, of course, if Sadie gets her third, it is going to make it much less for all of us,” and then they said, “Of course, we will get a forty thousand life insurance, which, if you do not fight the will, we will divide equally with you and give you your share, because that is the only amount of cash that is coming out of the will excepting ours, the income,” so they said, “Of course, if you don’t fight the will, why we will give you each
- 20 five thousand dollars.”

Mr. Ashmead: You have both of these people talking at the same time.

The Witness: No. Madeline was saying and Ed chiming in.

Mr. Ashmead: I wish you would separate them what they each said. You have got them both talking at the same time.

- Q How long did this conference continue on
- 30 Monday evening, how long did it last? A It didn’t last such an awfully long while. It was all agreed on—then they agreed that they would give Gladys one-third of all the income; also that they would give her one-third of any money derived from the widow’s estate; and they also agreed that they would give her five thousand dollars from their part, which, with the five thousand she got under the will, would make fifteen thousand; and it was also agreed at that

Richard F. Darling, direct.

time that they would give Victor one thousand dollars, and they should each give thirty-three and a third per cent. of that.

Q This agreement, you say, was reached on Monday evening? A Monday evening, yes, sir.

Q Was anything said on that occasion with reference to your having seen Mr. McBride that day? A Yes. I told them I had been to see Mr. McBride about the will and had left the will with Mr. McBride—copy of the will. 10

Q Anything said to them about proposed proceedings? A Yes, sir.

Q When the conference broke up on Monday evening, what was the relation between the parties? A It was very friendly.

Q And did that relationship continue for the next month or two? A It continued for about three months. My wife went up there quite frequently to see Mrs. Gilmore. Ed was staying at our house at the time. He was very friendly while he was there and then he went back to— (interrupted). 20

Q Do you know anything about your brother-in-law's financial condition at that time? A Well, when he arrived, when I first saw him he telephoned down to my office to send fifty dollars up to him, that he needed some money. 30

Q That was when he arrived from California? A From California, and, of course, I sent that to him; and shortly after that he said he had to send some money on to his wife and I loaned him three hundred at that time, which he paid me back as soon as he got the money.

Q And do you know anything about the financial condition of your sister-in-law at that time?

A Well, only that they lived very meagre, I would say, in a very small house. 40

Richard F. Darling, cross.

Q Was anything said Monday night when the agreement had been arrived at with respect to the matters you have just told us about your seeing Mr. McBride further? A Well, I said that I would have to go to see Mr. McBride and tell him not to go ahead.

10 Q Did you see him, subsequently? A Yes, I saw him subsequently and told him not to go ahead, that we were not going to do anything.

Q Now, did you see him later on with respect to drawing up an assignment? A Why, yes; at that time—(interrupted).

Q When was that, Mr. Darling, as near as you can tell? A That was around April—around the first of May, the first or second of May. You see, Edgar had agreed to have the assignments drawn up and every time Gladys
20 would try to ask him about it, he would stall—he would say something, put her off, so I thought—he had procrastinated generally on everything you asked him—so I said to Gladys, “I will have my lawyer draw that up and submit them to Ed.”

Q Did you ever talk to your brother-in-law Edgar, after he got back from California, with respect to drawing up these assignments? A No, no.

30 *Cross examination by Mr. Ashmead.*

Q Mr. Darling, did you go to see Mr. Kelly at his office a couple of days after Mr. Gilmore's death? A I don't remember going to Mr. Kelly's office. I remember he was at my office.

Q And don't remember any conversation with him where you requested that he have his wife draw an assignment? A No.

40 Q Within a couple of days—within a few days after Mr. Gilmore's death? A No.

Richard F. Darling, cross.

Q You have no recollection about that? A No.

Q Did you ever have any conversation with him at his office? A No.

Q Never talked to him about it?

Mr. Vanderbilt: You mean, about this matter or any time? 10

Mr. Ashmead: No. He answered before I finished.

Mr. Vanderbilt: Oh.

Mr. Ashmead: I am trying to find out what he means.

The Witness: I am taking it for granted you mean about this matter.

Mr. Ashmead: Yes.

The Witness: Yes. No, I have not. 20

Q Did you ever have any conversation anywhere with Mr. Kelly about this matter? A Only the nights about the assignments—in fact, we didn't have the conversations with Mr. Kelly.

Q Never have had? A No.

Q You have never talked with Mr. Kelly about this matter? A I did not. The only thing that was mentioned by Mr. Kelly he said it was a darn shame the way Mr. Gilmore left his money, that he ought to have given it outright to the children. 30

Q And that is the only remark that ever passed between you and Mr. Kelly? A That is the only thing I remember.

Victor Seabeck, direct—cross.

VICTOR SEABECK, sworn for complainant.

Direct examination by Mr. Vanderbilt.

Q Mr. Seabeck, you were chauffeur for Mr. William E. Gilmore? A Yes, sir.

10 Q For several years prior to his death? A For ten years.

Q For ten years. Do you recall an occasion after his death when you were driving the car and Mr. Edgar Gilmore, his son, was in it, going along the street, and passing Mrs. Darling and stopping? A I do.

20 Q Do you recall what the conversation between them—did you hear the conversation between them or any part of it? A Well, I don't heard much of the conversation. I just heard a few remarks that Mr. Gilmore say to Mrs. Darling that, "I will take care of you." That is about all the conversation I heard.

Q And where was this conversation had? A In Harrison street.

Q East Orange? A East Orange, yes.

Mr. Vanderbilt: That is all.

30 *Cross examination by Mr. Ashmead.*

Q Which way were you going on Harrison street? A We was going south.

Q Were you on the right-hand side of the street? A Yes, sir.

Q Where was Mrs Darling? A On the left side of the street. She was coming down, also on this same street side.

40 Q What? A She was going left—going down—going north.

Victor Seabeck, cross.

Q She was on the east side of the street? A She was going on the left side and I was going on the right. Also she was on the same side I was.

The Court: They were going different ways, only on the same street. He was coming down this way and she was coming up this way (indicating). 10

Mr. Ashmead: Yes. Do I understand she was across the street from where he was?

The Court; No.

Q Was she on the sidewalk across the street from where you were? A No, not across the street. On the same side.

Q And you listened to all this conversation? 20
A No, I don't heard much of it, because Mr. Gilmore went out of the car.

Q Went out of the car? A He was out of the car, that is, standing on the sidewalk.

Q You did not hear what conversation took place? A I just heard a few words.

Q And that was, "I will take care of you?"
A Yes; something in that line.

Q You do not remember that those were the exact words? A No. 30

Q Can't recall just what was said; is that right? A Yes, sir.

Mr. Ashmead: That is all.

Mr. Vanderbilt: I desire to offer a certified copy of the last will and codicil and we rest.

(Certified copy of last will and codicil marked Exhibit C. 2.)

Victor Seabeck, cross.

The Court: How many witnesses have you?

Mr. Ashmead: We have four.

The Court: It is useless to go on.

10 Mr. Ashmead: I have Mr. McDowell here from the Fidelity. I want to show the amount of the estate.

The Court: That can be admitted on the record. How much is it?

Mr. Ashmead: Mr. McDowell, how much was the estate at the time—I would like to show what it consisted of.

The Court: You can put that on record. I don't think Mr. Vanderbilt will object to that. It is a mere matter of fact.

20 Mr. Vanderbilt: I think we can stipulate the amount of the estate and date of the will.

SECOND DAY.

January 14, 1929.

30 Transcript of shorthand notes of testimony in the above-entitled cause before the Court and counsel as before.

Mr. Ashmead: Since the adjournment of this case on Friday it was suggested that we get from Mr. McDowell a letter of the amount of the estate. I have gotten that letter and showed it to Mr. Vanderbilt and the statement is satisfactory.

40 The Court: Put it in the record.
(Paper marked Exhibit D. 1.)

Edgar S. Gilmore, direct.

EDGAR S. GILMORE, sworn for defendants.

Direct examination by Mr. Ashmead.

Q Mr. Gilmore, where do you reside? A Long Beach, California.

Q How long have you resided there? A 10 Since October, 1926.

Q Are you the son of William E. Gilmore, the testator in this case? A I am.

Q You heard the testimony of Mrs. Darling on Friday? A I did.

Q Do you recall her speaking about, at the time of the death of your mother's mother, she left some real estate which was conveyed to your father? A I do.

20

The Court: I thought it was Thursday.

The Witness: Thursday.

Mr. Ashmead: Eh?

The Court: You said "Friday." It was Thursday.

Mr. Ashmead: Oh, Thursday, I beg your pardon.

Q You say you did? A I do recall it.

Q What were the circumstances surrounding that? A Of the real estate?

30

Q Yes, of your mother. A In order to sell the property, we conveyed to my father by means of a deed. This deed was signed by myself, my wife, Mrs. Darling and her husband, and my sister Madeleine, who was at that time unmarried.

Q And what did you say the purpose of that was, to facilitate the sale of the property? A That was the idea.

40

Edgar S. Gilmore, direct.

Q Did your father ever make any claim that he owned the property prior to that date? A No, he did not.

Q What was the difficulty that arose about it? A The difficulty?

10 Q With Mrs. Darling. A She had the feeling that, if the property was sold subsequent to his marriage or if his marriage took place, he having control of it, she would lose her third of the property, that is, there were two pieces in each instance per third.

Q He made no claim to her third? A He made no claim to it, no.

Q Or to her interest, rather? A No.

Q Now, were there any suits started? A Yes; there were suits started.

20 Q Do you know about those? A Yes, I was a defendant.

Q And what were those suits? A Mrs. Darling brought suit, first; that is to say, she filed *lis pendens* against the New Jersey property. On the New York property we brought a partition suit, as I recall it.

Q Were both properties subsequently sold? A Subsequently sold. The East Orange property was sold by agreement between all parties.

30 Q Yes. A Through a broker in East Orange.

Q Did all of them sign the deed? A Everybody signed the deed, including Mr. and Mrs. W. E. Gilmore.

Q And the money was divided? A The money was divided.

Q And the New York property was likewise sold and the money divided? A That was sold by order of the Court. A referee was appointed and it was sold at public auction.

40

Edgar S. Gilmore, direct.

Q And the money divided? A And the money was divided.

Q There was no difficulty about the division after the sale took place? A Oh, no.

Q Now, then, prior to the time you went to California, what was your business? A I was in the printing business. My father owned the business and I managed it—not right the moment prior to going to California, but that was my business before I left. 10

Q Yes. And what did you go to California for? A To make a new start and because of the fact that my health had not been—of late years, had not been too good.

Q And when was that that you went? You have already mentioned it? A Yes, I have mentioned it: September 30, was the exact date. 20

Q What year? A 1926.

Q Had you seen your father, subsequent to that time, up to his death? A I didn't see him until just prior to his death.

Q How old was your father when he died? A Sixty-five years of age.

Q Had he been a successful business man? A Oh, yes.

Q And was he in business up to practically the time before his death? A Yes, practically. Sold out his last interest, which was the Essex Press, but it was in the process of being disposed of then. He still had an advisory interest in it. 30

Q Was your father a drunkard? A No.

Q How was his mind? A Very keen.

Q A keen business man, was he? A Yes.

Q Now, when did you come on here? Did you come on here about the time of your father's death? A Yes, I did. I left California the first day of January, 1928. 40

Edgar S. Gilmore, direct.

Q Where was he then, at that time? A When I arrived here, he was in the hospital, but that was something I had not looked for—expected.

Q He died from the effect of an operation?
A That is a fact.

10 Q Now, I wish you would state—did you ever speak to your father or he speak to you about the provisions in his will? A What was that question?

Q Did you ever speak to your father or he speak to you about the provisions of his will? A No.

Q That he left? A No.

Q Never had any discussion with him? A No, I did not.

20 Q Had you any idea what the provisions of his will were? A At what time?

Q The will that he left— A I had no—

Q —prior to his death? A No. Prior to his death, no.

Q You knew nothing about it? A I knew nothing about the disposition of his property.

30 Q Now, after his death, will you tell the Court just what happened in respect to your relations with your sister, Mrs. Darling? Did you have any conversations with her, and what were they? A Yes, I had some conversations with her.

Q When was the first time that you knew of the contents of the will? A Monday, January 23rd.

Q How did you happen to find out then? A I heard the will read. I was present when the box was opened, the will taken out and I heard it read.

40 Q Who opened the box? A Mr. Pruden of the Fidelity Union Trust Company.

Edgar S. Gilmore, direct.

Q They were the executors? A The Fidelity Union was the executor.

Q And that was the first time you knew what was in the will? A That was the first time.

Q Now, did you have any conversations with your sister about this will subsequent to that time, that is, after you had—(interrupted) A Yes, I had some conversation that morning. 10

Q All right. Now, you just tell the Court all that you know about this alleged claim, or, this claim that she is now making in respect to this will. What was the first conversation you had? A Well, the first conversation I had was when I met her as I was going to my sister, Madeleine's to tell her of the contents of the will.

Q And what was that conversation? Where did it occur? A On Harrison street, East Orange. She was going north and I south. I crossed the street and spoke to her. 20

Q You crossed the street? A Yes.

Q Were you with Mr.—the chauffeur that testified? A Yes. I was in Mr. Gilmore's car, but I got out.

Q Now, she was on the opposite side of the street? A Yes, that is a fact.

Q Now, you state what that conversation was. A Well, I told her what the contents of the will were, which, of course, included among other things, that she had been left a legacy of five thousand dollars. 30

Q Yes. Go on. Detail that conversation. A Among other things I told her that I intended to give her one third of the income which I was to derive under a trust.

Q And what else? What did she say? A Well, her first remark was that inasmuch as 40

Edgar S. Gilmore, direct.

Sadie had—was only to receive what she was legally entitled to as a widow and that Madeleine and I got equally the remainder, after certain small bequests, she was perfectly satisfied.

Q She so stated to you? A She so stated to me.

Q What was—perhaps I am a little ahead of the story. Had she, after her father's death been around to see you in respect—or her husband, had he been around to see you in respect to contesting this will? A Yes. About a day after or the second day after my father's death I saw Mrs. Darling and Mr. Darling at my sister, Mrs. Kelly's.

Q Yes? A Mr. Darling told me at that time that—he said, "You children ought to get together on this thing and file a caveat."

Q Why? A The reason, he said that was because, he intimated in so many words, that unless a caveat immediately were filed, the widow would sequester the estate and it would be probated in secret and we would be left out completely. Now, my reply to that was that that was absolutely false, that he didn't know what he was talking about. I happened to know from a previous conversation I had with the lawyer who drew the will—although it is true I had not seen the will—Mr. Maiers, who drew the will. I saw him the night of my father's death and I asked him who the executors were. He told me, he and Mrs. Gilmore, he thought, unless my father had made other provisions. He also said, "You and Madeleine have nothing to worry about." He did not tell me any amounts.

Q Now—(interrupted) A I don't know whether I finished the first question you asked, however.

Edgar S. Gilmore, direct.

Q No, I don't think you did. You were telling about this conversation you had with Mr. and Mrs. Darling. A Yes, that is the point, Mr. Darling.

Q Who did they think was going to get the estate? A They intimated to me and Mr. Kelly —(interrupted)

10

The Court: Don't say what they intimated. Say what they said.

The Witness: All right.

They said in the presence of Mrs. Kelly, Mr. Kelly and myself that the widow could get the estate and we would know nothing about it, if we did not file an immediate caveat.

20

Q Did they feel she might have influenced your father? A They did; by their conversation; said so.

Q Did they make any claim at that time, that either you or Mrs. Kelly had influenced your father in any way? A They did not.

Q Did they ever make such a claim? A No.

Q When was the first time that you ever heard them make such claim? A I heard it last Thursday on the stand.

30

Q And you had been in California for something like fourteen months? A Fifteen months.

Q Before your father's death. Well, now, what was the result of this conversation? Did they say anything about when the caveat must be filed in respect to the reading of the will? A Mr. Darling told me immediately—you are speaking of Mr. Darling?

Q Yes. A I told him that he was wrong; he didn't know what he was talking about.

40

Edgar S. Gilmore, direct.

Q What did you do about that? A We decided to go over and talk to Mr. Charles I. Taylor. I decided to go along because I wanted to be present when he was apprised of his error.

Q I see. Now, did you go over to see Mr. Taylor? A Mr. Kelly and Mr. Darling and I
10 went to see Mr. Charles I. Taylor of East Orange.

Q What happened as a result of that conversation? A I particularly made it a point to ask him about this widow being able to sequester the estate and the will being probated without our knowing anything about it, and he said, no, absolutely not, it was foolishness.

Q And was that all that happened at Mr. Taylor's office? A That is all that happened.

Q I believe your sister, in her testimony,
20 mentioned about the three husbands going over to see Mr. Taylor. A That is a fact. I testified to that.

Q Is this the occasion that she referred to?
A That is the occasion and the only occasion.

Q Now, you were talking about your conversation on Harrison street. I do not think you completed that. Will you go back to that place? This was at the time when you were on your
30 way from the bank where you had heard the will, to tell Mrs. Kelly the contents of the will, and you happened to meet your sister. A Uh huh.

Q Mrs. Darling. A Yes, I did.

Q And you got out of the car to over and tell her; is that it? A Yes, I did. I told her—

Q Yes. You had partially completed that conversation, but not entirely. A I think I had arrived at about the point where I told her that
40 I intended to give her one third of the income

Edgar S. Gilmore, direct.

which I was to receive under the trust. She asked me what about Sadie's portion. I said "That is not in consideration. I do not intend to give you any of that."

Q And did she say anything at that time about contesting the will? A She said what I have previously testified to, the fact that as long as Madeleine and I had been remembered—I mean to say that we got the residue of the estate and Sadie only got her legal one-third, she was not going to contest. 10

Q Had no idea of contesting it? A Absolutely, that is what she said.

Q Now, what else can you remember about that conversation? Was there anything else you recall at the moment about that conversation? A I think that was the bulk of it. 20

Q Now, then, what did you do? A I got in the car then and continued on to Mrs. Kelly's.

Q Yes. A Where I apprised her of the contents of the will, which was natural, she being a beneficiary.

Q And what happened there? Your sister, Mrs. Darling, was not there? A Oh, no. I was there with Mrs. Kelly.

Q You apprised Mrs. Kelly of the contents of the will, did you? A That is a fact. 30

Q Now, when did you next see your sister, Mrs. Darling? A The next evening or the next afternoon, possibly.

Q And where was that? A At her apartment, that was January twenty-fourth.

Q You went over to her apartment, did you— A I did. And stayed there—

Q And stayed there? A I stayed there until I left.

Q Was there any claim made at that time that you—or intimation that you had in any way influenced your father? A Absolutely not. 40

Edgar S. Gilmore, direct.

Q Now, what happened at that time, at that occasion? Was there any discussion about your father's will or estate? A There was, and it brings me back to the previous conversation which I had the day before on Harrison street. I had told her at that time in order that she
 10 would feel that I was honest in what I said about giving her one-third of my income from the trust, if necessary, I would fix it up legally. Those were my words.

Q Yes. What happened? A The following night when I spoke to—rather, we had supper and there was nothing said about the will. After supper we sat down in the living room. Mr. Darling said to me, "You know, you and Madeleine ought to fix this matter up with a paper so
 20 Gladys will get her portion of the income." I said, "I won't sign any paper." He said, "Well. I said the same thing to Kelly yesterday and he got mad, too." "Well," I said, "I am not going to sign any paper."

Q What was your idea? A My idea in saying that was exactly this, that I was offering to give her—(interrupted).

Mr. Vanderbilt: I object to what the idea was.
 30

The Court: Yes.

The Witness: Well, all right. What do you want me to say?

The Court: Say what you said.

Mr. Vanderbilt: Say what you said, not what you thought.

The Witness: Well, I already said what I said.

Edgar S. Gilmore, direct.

Q Did you state the reason why you would not sign the paper? A Yes.

Q Now, what was that? A My reason for not signing it was—(interrupted).

Mr. Vanderbilt: No. Did you tell this to Mrs. Darling? 10

The Witness: I did, and Mr. Darling, too. My reason for not signing the paper, I said, was because I was freely giving them this gift; there was no urging on their part at all, and I was not going to sign a paper to bind myself to give them something that I was under no obligation whatsoever to give them.

Q And you were expressing what you expected to do as a voluntary act? A Exactly, and that was what it was. 20

Q Did you ever, at any time, agree with them to transfer any portion of your father's estate to them, to Mrs. Darling? A No.

Q Did they ever mention at any conversation with respect—(interrupted).

Mr. Vanderbilt: You are leading.

Q Now, continue the rest of that conversation. A That night? 30

Q Well, the occasion. A Yes. Well, that was— Oh, I—I said that I would not bind myself for that reason, and another reason I would not bind myself was that there might be a time in the future that they would not need any of this money, they might be so successful and I was not going to be bound to pay them at a time when they might not need it in the future. Those were my words. 40

Edgar S. Gilmore, direct.

Q Now, was there anything there said about a contest of the will? A No.

Q Now, is that about all the conversation that was had on that occasion? A That is virtually all bearing on it.

10 Q Later on did you have any further conversations with your sister or Mr. Darling? A I left one thing out of that conversation. I told them when I had refused to sign a paper as was suggested that they had until January the thirtieth to make up their minds to file a caveat as had been suggested in a meeting previously, or any other action they wished to take, the reason being that the will could not be probated until
20 January thirtieth, ten days following death and on account of Saturday and Sunday intervening it would bring it to Monday the thirtieth, so that—(interrupted).

Q You mentioned that? A Yes, I did mention that then.

Q Do you remember— A Now, you asked me in your last question if I had any further conversation. Along this line I had no further conversation, but the day or the day before leaving, about February 1st, I left on February 1st—(interrupted).

30 Q Before we get up to that, were you at the house of Mrs. Kelly at a time when Mrs. Darling says she and her husband were there, with you and your wife and Mrs. Kelly? A I was there one time—not after that date I wouldn't say.

Q I see. A I don't remember it was after that date.

Q Do you remember what it was that you talked about it last when you were with Mr. Darling? A The date I have testified to was
40 previous to this.

Edgar S. Gilmore, direct.

Q Yes. A Was before the will was read I am talking about at Mrs. Kelly's house.

Q You are confusing me. What date did you say? Was it the date before the will was read?

A You better ask the question again.

Q You have given a conversation that you had on the street with Mrs. Kelly. A Yes. 10

Q With Mrs.— A Darling, yes.

Q Darling. And that was the date the will was read. Do you remember what date that was? A The date?

Q Yes. A Monday, January twenty-third.

Q Yes. Now, then, you have detailed a later conversation that you had. A The next evening, January the twenty-fourth.

Q That was on January twenty-fourth. Now, you have referred to some other conversation, haven't you, that you had? A With Mrs. Darling? 20

Q Yes. A She was the one I had the conversation with. It was the day that I left, or the day before, which would be January thirty-first or February first, either one of those two days.

Q Now, let me straighten it out in my own mind at least. Was Mr. and Mrs. Darling at Mrs. Kelly's house one evening with you and your wife and Mr. and Mrs. Kelly? A We were, yes. 30

Q And what date was that? A Well, I have already fixed it as before January twenty-third. I would say January nineteenth or twentieth.

Q All right. Now, coming to that evening—(interrupted). A It could not have been—(interrupted).

Q Coming to that evening was there any conversation about any contest of the will? A No. 40

Edgar S. Gilmore, direct.

Q Was there any discussion or was there any claim made in respect to you and your sister having influenced your father in any way in the making—(interrupted). A No.

10 Q What, if anything, was said about the will that evening? A The main thing that was said as I got it on the part of the Darlings—I didn't say anything about the will, but Mr. Darling said, as I have previously testified, that there was danger of the will being probated and we not knowing about it.

Q Oh, that was then prior to the time you went to see Mr. Taylor, wasn't it? A Well, we saw him the same evening.

20 Q Oh, I see. I understand. So it was the evening that you were at Mrs. Kelly's house. A that is right.

Q And do you recall what evening that was, Saturday or—(interrupted).

The Court: The nineteenth or twentieth.

The Witness: The nineteenth or the twentieth. I would say the nineteenth because my father's funeral was the twentieth.

30 Q And the only thing that was mentioned about the will is what you testified to about—(interrupted). A That is all.

Q —his statement of the necessity of filing a caveat? A That is all I—(interrupted).

40 Q I see. All right. Now, coming back to your next conversation that you had with Mrs. Darling, did you have any other conversation with her in which the will was mentioned, subsequent to this evening that you were at the Darling's house which was on January 24th, and the time you left for California? A Only the conversation that I had on February—I fixed the

Edgar S. Gilmore, direct.

date as February first, which is the date I left. I left about five o'clock in the afternoon.

Q And did you have any conversation? A My express conversation with Mrs. Darling at that date was that, "The will has been probated, but you still have three months' period in which to appeal." She said, "I have no intention of appealing." Of course, I made no comment on that. That is what she said. 10

Q Now, was there any conversation with respect to signing any papers at that time? A No.

Q Now, is that all the conversation that you had with Mrs. Darling or Mr. Darling in respect to the will, before you went back to California on February 1st. A Any other conversations I may have had were on the —simply the will as it was. I mean by that, they had no bearing on any—Well, I don't know what to say—they were just, on one occasion I can recall, and I don't know what was said, Mrs. Darling having the will and going over it page by page, but I don't recall anything of particular value. 20

Q Now, how about this insurance? What was the situation in respect to that? A The situation in respect to that was that the second day following my father's death, I received a letter from an attorney, Mr. Garrabrant, who I know well, saying I was the beneficiary and Mrs. Kelly also, under two policies in the Connecticut General, which my father—(interrupted). 30

Q Are you both beneficiaries under those policies? A No. I was the recipient of the proceeds from one, and Mrs. Kelly was the recipient of the proceeds from the other. He wrote me, I guess not having Mrs. Kelly's address, and he also said, "If you will please get the policies and 40

Edgar S. Gilmore, direct.

send them to me, I will cash them or do whatever is necessary to cash them." I could not get the policies immediately because they were in my father's box. I did not get them until about the twenty-fourth—it quite likely was the twenty-fifth of January. In other words, the contents of
 10 the box had to be audited—(interrupted).

Q What conversation did you have with your sister? You did make a division of your policies, didn't you? A Yes.

Q What were the circumstances of that? A That goes back to a conversation I had—

Q Yes. A —with her on January twenty-third. I believe that was the day I told her I was going to give her five thousand dollars from the policies.

20 Q From that policy? A Yes.

Q That was the conversation on the sidewalk on Harrison street? A Yes.

Q And you did that afterward? A I did it, yes, somewhere—(interrupted).

Q And had the gift of that policy anything to do with any contents of the will? A Absolutely not. It was not contingent on anything—it was a free gift.

30 Q How soon was that made? A How soon was the gift made?

Q Yes. A I haven't my check book here, but I should say between the twenty-seventh and thirtieth of December, or January, rather.

Q That was completely settled before you went to California? A Yes. I gave her my check for it.

Q Now, did you pay her in check? A I gave her a check, forty-six sixty-seven.

40 Q And what was the difference between that and—(interrupted). A Three hundred thirty-

Edgar S. Gilmore, direct.

three dollars, which was her portion of the amount to give to the chauffeur.

Q You three children had decided to give the chauffeur something? A Madeleine and I had talked over to give him a thousand; we decided to each give five hundred. I learned later from Madeleine that Gladys had been ap- 10
prised of it and wanted to go in on it, too. I said, "As far as I am concerned, I don't care." So, when I gave her the check, I had deducted the three hundred thirty-three, and then when I left I gave Madeleine a check for seven hundred-odd dollars, which included some items which I purchased for myself, and which gave Seabeck—Victor, the thousand dollars.

Q Was that check returned to you through the bank? A It was. 20

Q Where is it? A In California.

Q Has it ever been east after it came—(interrupted). A It has not. It was mailed there as all my statements were.

Q Has it been out of your possession? A No.

Q I believe Mrs. Kelly said that you were financially embarrassed at that time? A Mrs. Darling, you mean?

Q Yes. A I was not. 30

Q You had just received twenty thousand dollars? A I was about to receive it.

Q Within two or three days? A Yes, I got it.

Q Of which you were giving her five? A That is right.

Q Now, how about your business out there? Did you have a good business? A It was not very flourishing. I had just started it.

Q How much were you making a year? A I was not making so much out of that, but I 40

Edgar S. Gilmore, direct.

suppose my total income that year from all sources was five thousand; that was including a gift of five hundred from my father.

Q Besides this twenty thousand that you received on the insurance? A Exactly.

Q Now, how long were you in California? A
10 How long was I in California?

Q Yes.

The Court: Fifteen months.

The Witness: Fifteen months before returning.

Q Yes. But you left for California— A
In January.

Q —on February 1st? A Yes.

Q 1928? A I testified as to what I said to
20 my sister. I also told her I was coming back just prior to May the first as there would be nothing done about the estate in the interim, except what could be done—

Q Yes? A —that being a period of appeal from probate, and that was the understanding I had from the lawyers. I said, “I am coming back here prior to May first”— I did not fix any exact date, and I got here the latter part
30 of April.

Q— Now, what happened after you came back? Had you received any letters from anybody? A No.

Q In the name of Mr. Darling or Mrs. Darling? A I don't recall any. Oh, there might have been one letter, or two, to my wife. I don't know as to that.

Q Now, what happened when you came back? Did you have a conversation with Mr. and Mrs. Darling? That is, when you came back in April
40

Edgar S. Gilmore, direct.

I am talking about now. A I had conversations, but nothing particular—no bearing on this matter at all.

Q Did they ever state they were going to contest the will? A They did not.

Q When they came— A They never told me they were going to contest the will. 10

Q When was the first you knew—(interrupted). A When I was served with a paper.

Q How soon? A Following May first. That was not a contest, however, of the will.

Q Subsequent to the time you returned to California, you were here in April? A Yes, the latter part.

Q The twenty-seventh of April? A Somewhere in that neighborhood. 20

Q They never made any claim—did they ask you to sign any papers? A Mrs. Darling asked me to sign a paper about May the third.

Q May the third. What did she say? A She didn't ask me to sign a paper—she intimated to my wife she wanted to see me, so, before leaving I said, "What do you want to see me about?" She said, "Oh, never mind now." I said, "We can go upstairs or in the other room and talk about it." So we did go in the hall. She said, "I want you to give me a paper so I will have some standing there down at the Fidelity-Union." My answer to that was, "You have no standing down at the Fidelity-Union." We probably had a few words, but that is practically all along that line. We had quite a talk. 30

Q Did you have any conversation with Mr. Darling about that? A He was not present. No, I never had any conversation with him. 40

Edgar S. Gilmore, cross.

Q What were the relations between your father and Mr. Darling? A Unfriendly.

Q Why? A Father did not like him.

Q Do you know why he did not? A Do I know why he did not? Did not approve of his methods.

10

Mr. Ashmead: That is all.

Cross examination by Mr. Vanderbilt.

Q Mr. Gilmore, prior to the time you went to California in October, 1926, you lived around here? A Lived in West Orange, 52 Northfield Road.

20

Q Yes. And prior to your going west, what was your business, immediately prior to going west? A No immediate business.

30

Q Well, for what period prior to your going west had you not had any particular business? A I hadn't any particular business, that is to say, I had not been connected with the Essex Press, which had been my business up to about fifteen years previous to the—the spring I was taken ill with scarlet fever and was convalescing about four months. Following that this suit was brought and I worked at one or two things, for instance I worked in the Beaver Oil Company of West Orange, salesman, but I had no—made no lasting affiliations.

Q In other words, from the spring of 1926 until the time you went west, in the fall of 1926, you had no particular business? A That is exactly the truth.

40

Q Now, from the time you went west, what business have you been in? A Well, I am in—in the spring of 1927—this is 1926, in the fall, I got there.

Edgar S. Gilmore, cross.

Q Yes, in the fall. A I didn't do anything in the fall except occasionally parts in the moving picture business, although in November I ordered a shipment of jewelry from New York which I had and I attempted to start a business, jewelry business. I made some sales during the fall, but it was not very successful—I mean, it was not very lucrative, so I turned to other means. 10

Q That was not a success, so you turned to something else then? A It was not very lucrative—I did not have sufficient stock on hand. Then, the season being over, in the early spring, I took a position with the Chevrolet dealers in Long Beach, and then, following that, I went with the Lincoln.

Q You were an automobile salesman there? A Yes, as a salesman. And then I went with the Lincoln dealers and sold Lincolns. 20

Q When did you go with the Lincoln Company? A I stayed with them just a month.

Q With the Chevrolet just a month? A Yes, with the Chevrolet just a month and with the Lincoln just a month.

Q And then, after that, what did you do? A Following that, I didn't do anything that summer. My wife was starting to go to school, she had some credits to make up to give her her teacher's certificate, so I remained with the children most of the summer and looked after their welfare, that is, saw they got to school; they were attending summer school. 30

Q That was the summer of 1927? A That was the summer of 1927.

Q And then— A And then, in September, I started in with my jewelry again. I made occasional excursions, during the summer, about twice a week I was able to get away, but it was not 40

Edgar S. Gilmore, cross.

very active in the summer, and in the fall I made—I was able to sell a little, things were picking up a little and I made one trip to San Francisco. It was not very productive, so then I decided what I had had in mind all the time—(interrupted).

10 Q Did you have a jewelry store? A No; I sold from my house. I was a dealer.

Q I see. A I had been talking with my wife about the necessity of going to New York to purchase stock, but I did not go in the summer because she was busy, so I went—I finally decided to go the first of January and that is what I did and that is how I happened to be here when my father died. It was a coincidental happening.

20 Q Did you continue in the jewelry business up to the time you came east, or in January, 1928? A Yes, I did. My express purpose for coming here then was to get stock. However, when I came here and found my father ill at the hospital, all thoughts such as that were temporarily driven from my mind.

30 Q That jewelry business, I take it, was not very lucrative, either? A It has not been extremely lucrative, no, but it has been some means of income and that, with other, has brought the total up to what I mentioned.

Q When you spoke of having an income of about five thousand, you said five hundred was from your father? A Five hundred from father, eighteen hundred from a piece of property and a thousand dollars from the jewelry, and from all sources of the jewelry—(witness pauses). I don't recall just at present what other.

40 Q How much did you receive from your mother's estate? A Oh, I received somewhere

Edgar S. Gilmore, cross.

close to forty thousand dollars, including what— if I recall those figures were made up at the time—I received some of it when the estate was settled and when the property was finally sold I received some, as I recall it, ten thousand dollars.

Q Well, you had in all about forty thousand from your mother's estate and you had the income from that, didn't you? A I had an income from that, yes. That is what I—(interrupted). 10

Q And that is what made up the balance of this five thousand of income you say you had, isn't it? That is what made up the balance, that and the five-hundred-dollar gift from your father made up the balance of what you say, the five thousand? A A portion of that, yes; not all of it. 20

Q Yes. And you have how many children?
A Four.

Q Now, when you came east in January, 1928, did you borrow any money from Darling? A Yes, I was going up to the bank to make a loan, with the idea of sending my wife—she had sent me a letter and I wanted to send her some money.

The Court: You answered, "Yes." That is enough. 30

Q And how much did you borrow from Mr. Darling? A I recall three hundred. He said three hundred and fifty. I am not sure as to the amount.

Q This was prior to your father's death? A No.

Q Afterwards? A No; after his death. I never borrowed from him until I knew I was 40

Edgar S. Gilmore, cross.

going to get some money. In fact, it was coincidental that I borrowed from him at all. I didn't have to get it from him.

Q Now, prior to your father's death—

Mr. Vanderbilt: Strike it out.

10

Q I understood you to say, on direct examination, that you did not need any money at that time, but the fact remains you did borrow this money from Mr. Darling. What do you mean by "did not need it, did not need money," but you did borrow this money from Mr. Darling?

A Well, I wanted this money immediately, if that is what you mean.

Q You did not have any ready money of your own, did you? A Yes, I did.

20

Q You did? A Yes.

Q Then why did you borrow from Mr. Darling? A Because I wanted to keep my bank balance up.

Q You borrowed from him because you wanted to keep your bank balance up? A I borrowed from him simply because he suggested he would loan me this money. I had a couple of hundred dollars, if I recall the amount—I didn't make any particular—

30

Q I see. A —in the bank here, and I had some out west.

Q But you borrowed from him to avoid depleting your bank balance? A That was the reason for it, yes.

Q When you came on here to buy jewelry in January, 1928, did you stay with your sister, Mrs. Darling? A As I have testified, I went to stay with her on January the— I did not testify exactly, but that was the date—January
40 twenty-fourth.

Edgar S. Gilmore, cross.

Q How long had you been on here before that and prior to January? A Oh, I arrived here somewhere about the fifth of January. I left there on the first, so it would bring it about the fourth or fifth.

Q And you did not go to live with—(interrupted) A I went to live with my father.

10

Q What is that? A I went to live with my father. I had a letter from him. I had written him in November or December that I contemplated coming east and he immediately sent me a wire saying, if I came on, to stay with him, to be sure to stay with him, so when I got ready to go and knew what my date was, I sent him a wire saying I would arrive at such and such a time. When I arrived here his car did not meet me as I expected, but my sister met me. I said, "Where is father?" She said, "In the hospital." And that was news to me.

20

Q So you went— A I stayed at my father's house until after the funeral.

Q I see. A Several days.

Q Now, coming back to the situation with respect to your mother's estate, you say all of you joined in a deed of both the New York and the New Jersey property? A No, I did not. If I recall—the New York property was sold at auction, sold at public auction in New York.

30

Q You only joined in the deed of the New Jersey property? A Yes, that is what I said.

Q And with respect to the New Jersey property do you know whether or not there was any disagreement between your father and your sister, Mrs. Darling, with respect to the interest which—(interrupted). A You mean, the interest she would receive or expected to receive?

Q With respect to the interest which his prospective bride would have in that property

40

Edgar S. Gilmore, cross.

if the deed stood in his name. A Only what—only that my father told me that she had gone away in a temper.

Q And did your father tell you that he had said that his wife would not have any interest in that property? A He did not tell me that
10 at all.

Q What did he tell you on that? A I don't recollect that he told me anything.

Q I see. But he did state that there had been a disagreement between Mrs. Darling and himself because of this possible interest— A Which Mrs.—

Q —of the second Mrs. Gilmore in the Harrison street property? A (Witness nods yes.)

Q And that that was the reason that Mrs.
20 Darling had filed a *lis pendens* and started suit in the Court of Chancery? A You mean, my father told me that?

Q Yes. A No; he did not tell me that.

Q Did your sister tell you that? A She told me she was going to do it. I came up from my father's wedding, I came up a few days—it was a week prior, she called me by phone and said, "Come down to Dick's office; I have something important to tell you." And my sister,
30 Mrs. Kelly, was also there I suppose—I don't know how she was there and Gladys told me she had a half hour to catch the train; she was going in to bring suit against father and wanted to know if I was going to join her and I said, "No."

Q I understood you to say that you did bring a partition action in New York, is that correct? A My recollection is that it was a partition action. I haven't the exact—(interrupted).

Edgar S. Gilmore, cross.

The Court: I can't get it through my head how this partition action—(interrupted).

Mr. Ashmead: There was a partition action.

The Witness: There was some sort of a conversation of the lawyers and we went to River Head, I know, the day of the trial, and there was a conversation of some sort between Mrs. Darling's lawyer and our lawyer and my father was present and the Court signed some paper.

10

The Court: Well, if you are as indefinite as that, I guess—(interrupted).

The Witness: I am not able to be more specific from the legal standpoint.

20

Q Who brought the proceedings? A We brought the action in New York.

Q When you say "we," who is "we"? A Mrs. Kelly and myself.

Q And Mrs. Darling was a defendant in that action? A She was a defendant. My father, I think, brought some other sort of action, but I am not—(interrupted).

Q Now, why did Mrs. Kelly and you bring the action in New York and why was Mrs. Darling a defendant? What was the reason for that, do you know? A I don't know, but I would assume, if I am allowed to assume it—(interrupted).

30

Q I mean, did you ask her to join as a complainant with you? A No, we did not.

Q Were you on unfriendly terms with her at that time? A We were on unfriendly terms.

Q What is that? A From the standpoint of that we were, yes.

40

Edgar S. Gilmore, cross.

Q And that suit you had in New York went through to a public sale, did it? A It did.

Q And the property was sold and the proceeds divided? A Exactly.

10 Q But is it clear in your mind that the property in New Jersey did not go through to a public sale? A It is clear to my mind that it was sold—you mean, by order of the Court, you mean?

Q Public sale by order of the Court. A Yes—No, not in New Jersey.

Q That was a private sale by agreement of all of the parties? A That is a fact.

Q Where was this property in New Jersey located? A 119 Prospect street, but it continued through to Woodland avenue.

20 Q Don't you recall, Mr. Gilmore, that the East Orange property was sold in the proceedings brought by Mrs. Darling, in the course of the proceedings in the Court of Chancery, by George W. Anderson, a special master of the Court of Chancery? A I recall that he was the referee, or whatever is the designated term, yes.

Q And one piece of it was sold to Mr. Schotland? A And one piece to a builder.

Q And one piece to a Mr. Olsan. A That is a fact.

30 Q And that pursuant to the order of the Court on this, there was a private sale, all the parties joined in it, and these being private sales made by the special master. A Yes.

Q All the parties did join in it? A That is a fact, but there was never any Court decision, as I recall it. I mean to say, there was no appearance in Court of either parties.

Q No, it was an uncontested proceeding. A It was uncontested?

40 Q Yes. A No; we contested it.

Edgar S. Gilmore, cross.

Q Oh, you did contest it? A They never went by default, if that is what you are attempting to put on the record here.

Q I am only attempting to put facts on the record. A Well, that is a fact. That don't mean by default—by our default.

Q And you never appeared before any vice chancellor in this proceeding in New Jersey, did you? A We did not. 10

Q And you know that the deeds were made by George W. Anderson, special master of the Court of Chancery, don't you? A Well, I wouldn't say that, but somebody made them that was in authority. I presume that gave the buyers a clear title.

Q And are you sure that you signed the deed? A I am. My wife, too. 20

Q Now, did this same unfriendly feeling which you say existed between yourself and Mrs. Darling, also exist between Mrs. Kelly and Mrs. Darling at the time of these suits. A I would like to know just what you mean by that question.

(Short recess.)

(Last question and answer read as follows: "Now, did this same unfriendly feeling which you say existed between yourself and Mrs. Darling, also exist between Mrs. Kelly and Mrs. Darling, at the time of these suits?" Answer: "I would like to know just what you mean by that question.") 30

The Witness: "Unfriendly feeling."

Q Well, you have just told us, Mr. Gilmore that, at the time that the suits were brought, one by Mrs. Darling in New Jersey and one by Mrs. 40

Edgar S. Gilmore, cross.

Kelly and yourself in New York, with respect to the property of your mother's estate, the feeling between Mrs. Darling and yourself was not friendly. A With respect to that I disapproved of her actions.

10 Q I see. And did your sister share that same sentiment so far as Mrs. Darling was concerned? A Well, I really can't testify as to her feelings.

Q Well, do you know? A No.

Q You don't know. Your sister never discussed that with you? A No.

20 Q Now, did that unfriendly feeling continue up to the time of your father's death? A No, it did not exactly. By that I mean that when I left California, my sister and Mrs. Darling came up and said, "Good bye" to all of us. I suppose I saw her once or twice in the interim between the suit and my departure. She did not come to my house, though.

Q Had you ever visited them in the interim? A Following the suit?

Q Yes. A I never went to their house.

30 Q And the first you went to Mrs. Darling's house, then, from the time of the suits, was when you went there after your father's funeral? A Yes.

Q Now, I understood you to say on direct examination that you had not seen the will, and the first you knew about it was when the will was read? A The first actual knowledge I had of it, yes.

40 Q Yes. But you had talked it over with the New York lawyer who had drawn the will, immediately after your father's death? A I asked him if he knew who the executors of his will was, that is what I asked the lawyer.

Edgar S. Gilmore, cross.

Q What did he tell you? A He said he thought he was, with Mrs. Gilmore.

Q And did he tell you anything with respect to the contents of the will? A Absolutely nothing. Only in this way: He said, "You and Madeleine are taken care of."

Q Now, can you fix, with respect to the date of your father's death which occurred on the 17th of January, when it was you had this conversation with the New York lawyer, Maiers? A That evening.

Q On the evening of— A My father's death.

Q —of your father's death? A He called—

Q Where did you see him? A —at Mrs. Gilmore's house.

Q At Mrs. Gilmore's house? A Somehow or other he learned of the death.

Q And came out there? A Yes; came out and I met him in the office when I spoke to him.

Q Now, when was it you had your first conversation with your sister with respect to the estate? Was that on Monday, January twenty-third? A With respect to the will.

Q With respect to the will, I mean. A Yes; Monday, January twenty-third.

Q In other words, you had been staying at her house for several days— A I had not.

Q Well, hadn't you—(interrupted). A I had not left Mrs. Gilmore's yet.

Q On the twenty-third? A No.

The Court: He was at his father's house, he testified.

The Witness: I did not go to her house until January twenty-fourth.

10

20

30

40

Edgar S. Gilmore, cross.

Q Oh, I beg your pardon. You went to her house on January twenty-fourth. Well, had you seen her in the interim? A I had seen her.

Q Did you tell her anything about what you had learned from Mr. Maiers? A I did not.

10 Q Why not? A Because I don't tell things until I know them positively.

Q Well, it was a matter in which you were very much interested, wasn't it? A I was interested, of course.

Q Did you tell your sister, Mrs. Kelly? A I did not.

Q Didn't tell her anything about it? A I did not. I told her I didn't think we were cut off. I meant Madeleine and myself. There was no occasion for it that I could see.

20 Q You told that to Mrs. Kelly? A I told that to Mrs. Kelly.

Q Yes. And you told her that you thought the second Mrs. Gilmore and the lawyer were the executors? A I did not.

Q You did not tell her that? A I did not; I did not. I didn't know it myself.

Q Well, did you tell Mrs. Darling as much as you told Mrs. Kelly? A I did not.

Q Why not? A I wouldn't tell her what I knew.

30 Q Was that because you were unfriendly? A No.

Q With her. A Because I have always—ever since she had brought suit against father, Madeleine and myself, I have been doubtful as to just what her reaction might be under any circumstances.

Q In other words, you have viewed her with suspicion? A I did.

40 Q And that continued during the time even after you came to stay with them, after leaving

Edgar S. Gilmore, cross.

your father's home on the twenty-fourth? A That depends just how you mean that question.

Q Well, take it in its ordinary meaning. Do not attempt to make my questions deeper than they really are. A Well, if you mean that I thought there was still a possibility of their bringing suit, I did think they might. They still had until May the first, and I didn't know what action they might take in three months. That is quite a long time to reconsider. One cannot— (interrupted). 10

Q But outwardly you maintained a friendly attitude with Mr. and Mrs. Darling? A And outwardly they maintained a friendly one with me.

Q Yes. A It was reciprocal. In other words, we tried to be—(interrupted). 20

Q Well, did you suspect that their attitude toward you was not sincere? A I had no suspicion of it. I was rather surprised to find out by the testimony that it was insincere, that they were contemplating action all this time.

Q But, as far as you were concerned, although you were still suspicious of the Darlings, you maintained an outwardly friendly attitude while you were staying at their house? A I was suspicious that—on that score, that they might bring an action, yes. 30

Q You maintained, nevertheless a friendly— (interrupted). A I could not do otherwise, staying at their house, and, incidentally, my feeling toward my sister was not what one might call hostile, it was simply one of not just knowing which way she would jump. I have no hostility towards her now at the present moment—did not have then.

Q Just one of watchful waiting on your part? A Exactly. That just about describes it. 40

Edgar S. Gilmore, cross.

Q Coupled with expectancy? A Well, I don't know.

Q Well, as a matter of fact, your father was a hard drinker, wasn't he? A There were times when he drank.

Q To excess? A Too much, yes.

10 Q Yes. A He was not a drunkard.

Q Oh, no, I don't mean—(interrupted). A I testified he was not a drunkard, yes.

Q I am asking you now, on the other hand, if he was not a hard drinker at times? A At times, up until his second marriage, and, during his life with my mother there were times he did not touch anything for a year or more; following my mother's death, about a year after, he sometimes drank to excess. When he married
20 again, he gave it up.

Q How do you know? You were not here during the greater part of that period. You were in California. A No; that is hearsay.

Q Yes. A But—well, it is hearsay.

Q Now, you say that your father was still in business during these last years? A He was in business in an advisory capacity at the Essex Press, which he had sold, and it is still paying to the estate.

30 Q Yes, but the active business had been carried on for a considerable time down there by Mr. Friend, hadn't it? A Following my illness, my father took it over, and then, when the sale was consummated, Mr. Friend took it over, because that is his particular line; he built the Press up some years before.

Q Now, after the death of your father you say you first learned of the contents of the will directly by hearing it read on Monday, January
40 twenty-third? A That is the date.

Edgar S. Gilmore, cross.

Q And that was read, I suppose, down at the office of the Fidelity-Union Trust Company? A It was read at the Second National Bank in Orange.

Q Second National Bank in Orange? A The president, Mr. Munn, Mr. Pruden, Mrs. Gilmore, the widow, and her daughter.

10

The Court: Who was the first one?

The Witness: Mr. Munn, of the Second National Bank of Orange.

Mr. Vanderbilt: Mr. Munn, of the Second National Bank of Orange, Wilbur Munn.

The Witness: I believe he—

The Court: All right.

The Witness: And myself. Five people.

20

Q And you say it was later the same day that you had the talk on the street— A On the street, with Mrs. Darling.

Q —with Mrs. Darling, and will you tell us exactly what it was you said to her? A I told her of the provisions of the will. I also told her it was my intention to give her one-third of the income that I was to receive from the trust.

Q Did you say anything at that time, about giving her one-third of the insurance? A No.

30

Q That did not come up on that occasion? A Oh, yes. I told her I was going to give her five thousand dollars, but that was not one-third of the insurance.

Q Did you tell her on that occasion you were going to give her—(interrupted.) A I recall that was the occasion I told her that. I told her that on that day and that is the occasion I fixed it.

40

Edgar S. Gilmore, cross.

Q How could you, in your financial circumstances at the time and the unfriendly attitude which you say was then existing and which had existed for a couple of years between your sister and yourself, come to make any such offer as that? A Because I thought it was a fair thing
10 to do. She was my full blood sister. I never had any antipathy towards her, but I cannot approve of her actions. She had been practically disinherited. It was a perfectly natural thing to do under the circumstances.

Q Did you ask her at that time if she was going to fight the will on this occasion? A I didn't ask her—

Q On Harrison street? A —whether she was going to fight it, no.

Q Did she say anything about fighting it? A
20 She did not, except to say insomuch as Madeleine and I were—I may have said to her at that—no, I never asked her directly if she was going to fight the will.

Q Did she say anything on this occasion on Harrison street? A She said it in this way, “As long as you and Madeleine are getting the balance of the estate—” that is, after Sadie's portion and a few minor bequests—“I am satisfied.”
30

Q Was that before or after you had told her what you planned to do for her? A Well, it was—I should say, just after.

Q Yes. In other words, you said, “I am going to give you one-third of the income, and—”
A No. It was before.

Q Eh? A It was after I had apprised her of the contents of the will.

Q I see. And she said she was satisfied and was not going to fight even before you offered
40 her anything? A Sure.

Edgar S. Gilmore, cross.

Q And what did she say after you made this offer to her of one-third of the income? A She said nothing.

Q What is that? A She said nothing. She didn't say, "That is very nice," or anything.

Q She didn't say anything? A No, she did not.

10

Q Previous to this meeting on Harrison street, I understand there had been a family conference at which the possibility of the widow getting an undue proportion of the estate had been discussed, is that right? A There may have been a lot of talk on the part of the Darlings. I did not enter into it.

Q Didn't you go down to Taylor's house one night? A Surely.

Q Where did he live? A But I had a pretty good knowledge from Mr. Maiers telling me before that Madeleine and I were not left out of the will.

20

Q Yes. Now, what was the night you went down to Mr. Taylor's, a New York lawyer, to his home? A I should say it was the night of the day after my father died; that is to say, January eighteenth.

Q January eighteenth? A It might have been the nineteenth.

30

Q At that time you knew that you and your sister, Madeleine, Mrs. Kelly, had been taken care of— A Yes.

Q —in the will, although you did not know the express terms, nevertheless you went down to Mr. Taylor's home in East Orange with Mr. Kelly and Mr. Darling; is that right? A That is a fact.

Q As a matter of fact, you were the one that suggested going to Mr. Taylor? A I abso-

40

Edgar S. Gilmore, cross.

lutely did not suggest it. The suggestion came to me from Mr. Kelly through Mr. Darling.

Q Who was it suggested going to Taylor?

A Mr. Darling.

Q Mr. Darling. You didn't know Taylor? A I did not. I did meet him once, yes; I met him once at my brother-in-law's, Mr. Kelly's, that was about three years prior.

Q You say it was Darling or Kelly that suggested it? A Mr. Darling suggested it. He also picked out our lawyer for us; I mean, Mr. Taylor.

Q He picked out Taylor. You are sure it was not Mr. Kelly that picked out Taylor? A It might have been at that. The suggestion came through Kelly as coming from Darling. I can't say that Darling did pick out Taylor.

Q And at the time you went down to Mr. Taylor's house, the three men did discuss with Mr. Taylor about a caveat, you knew all that time that you were well taken care of— A By hearsay I did, yes.

Q Well, pretty reliable hearsay, from the man that drew the will? A Well, there was a codicil added to the will afterward and that might have happened and the whole thing be changed.

Q Did he tell you about the codicil? A He didn't know of it.

Q And you didn't, either? A That is why I wouldn't tell them anything.

Q In other words, you feared there might be a codicil? A I did not.

Q Then why didn't you tell them? A I wouldn't tell them that.

Q Why not? A I don't tell things until I am positive and know.

Q You never tell a thing until you know? A I try not to. I occasionally make that error.

Edgar S. Gilmore, cross.

Q When you had this talk with Mrs. Darling on the street, did I understand that you crossed the street to talk to her or she came across the street to where your car was? A My recollection of it is that I crossed the street.

Q That you crossed the street? A Her testimony was that she crossed the street, so I suppose—(interrupted). 10

Q Your present recollection is now that you crossed the street? A That is the way I have always remembered it, yes.

Q Yes. Do you recall what you said on direct examination? A Yes, I recall it, the purport of it.

Q Did you say then that you crossed or she crossed the street? A I said, on direct examination, that I crossed the street. 20

Q Did she seem at all broken up or affected by what you told her about the will? A No.

Q Did she seem at all inclined to consult a lawyer about it? A She didn't say so, didn't say anything about it to me.

Q Did you ever hear Mr. and Mrs. Darling, at any of these conferences, mention about going to see Mr. David McBride? A The following evening my sister mentioned about the—that Mr. Darling had gone to see Mr. McBride the day before, but that was subsequent to my conversation. I didn't know anything about it at the time. 30

Q That was subsequent? A To my conversation with Mrs. Darling, telling her of the contents of the will.

Q In other words, subsequent to your conversation on Harrison street with Mrs. Darling? A Yes. 40

Edgar S. Gilmore, cross.

Q You did learn from her the next day— A Do you want to know what she said?

Q —that she had consulted Mr. McBride? A She said, “When you told me yesterday you were going to fix that matter up, Dick went around to see Mr. McBride. He said it would
10 be a difficult thing, but it could be arranged by the drawing up of certain papers,” that was the reference to Mr. McBride.

Q That is what she told you? A Yes.

Q Now, at any subsequent time, did she say anything or did Darling— A No.

Q —say anything to you about having consulted McBride? A No; never after that.

Q Never heard of that again? And you say that Mrs. Darling told you the next day that
20 McBride said this would be a difficult thing to fix up? Is that right? A That is right.

Q Was there any discussion as to what the difficulty would be? A The discussion was about the difficulty, about my binding myself to pay them one-third of my income, in other words to sign a paper; that was the inference.

Q That was the inference. Now, will you tell us exactly what was said, because this is very important. A Just what I have said; just
30 what was said in my previous question.

Q Was there any discussion as to what the difficulties would be? Was there any conversation about it? A No; they didn't say what the difficulties would be; it would be a difficult thing, but could be accomplished. They said that was what Mr. McBride had said.

Q And you did not ask what the difficulties were? A I did not.

Q And were not interested, were you? A I was not.
40

Edgar S. Gilmore, cross.

Q Why not? A It was none of my affair.

Q Well, wasn't it very much of your affair, if you were going to give your sister one-third of the income? A That certainly interested me, but how it was to be done was my affair and not theirs.

Q You could not conceive of any difficulty about making an assignment of one-third of your income, could you? A Well, I did not—I had not made any inquiry as to whether there would be any difficulty. 10

Q Now, at the time you—(interrupted). A The only difficulty that I might have foreseen was the direct provision of the will that if there were any action brought against the will, that any party bringing an action would be disinherited.

Q This was not an action against the will, of course. A I didn't know what it might be considered, so I went slow. 20

Q Now, the occasion that you talked to your sister on Monday, January twenty-third on Harrison street, had you previously consulted with your other sister, Mrs. Kelly, about the matter?

A Well, what do you mean?

Q I mean by that, did Mrs. Kelly know that you were going to offer your sister, Mrs. Darling, one-third of the income and five thousand dollars of insurance? A I had discussed it with her, yes. 30

Q You had discussed what? A That I was going to do that.

Q Eh? A That I was going to do that, intended to.

Q And had she said anything about what she was going to do? A No. She said she didn't know exactly what she was going to do, but she did not feel hostile towards Gladys. 40

Edgar S. Gilmore, cross.

Q So you didn't say anything to your sister, when you saw her on Harrison street, about what Mrs. Kelly was going to do on her part? A I said, "I think Madeleine feels favorably toward you the same as I do."

10 Q Now, when you saw Mr. Taylor, the New York lawyer, what did he tell you? A I asked him whether it would be necessary to immediately file a caveat, in order to prevent the widow from sequestering the estate, the assets, or in order to prevent her probating it secretly so that the children would not know anything about it. He said that was all foolishness, unnecessary.

20 Q Well, did he tell you that, if the widow were an executrix, she could probate the will without talking to anybody about it? A He didn't tell me anything about it; I didn't ask him about that; but it was my understanding—I gathered from his conversation that the probate would be public, not secret, as Darling had inferred to me.

Q And that was the last he was consulted in the matter? A Yes.

30 Q At the time of your conversation with Mr. Taylor, in the presence of Mr. Kelly and Mr. Darling, did you tell him what you had already learned from Mr. Maiers about this will? A I did not.

Q Did you tell him that the will had been located? A I did not.

Q Did you know that it had been located at that time? A I did not.

Q Did you know where your father had a safe deposit box? A I did.

Q Had that been opened? A No.

40 Q Did Mr. Maiers tell you where the will was? A He didn't know.

Edgar S. Gilmore, cross.

Q What time of the day was this conference on Tuesday, January twenty-fourth, the day after the conference on the street? A In the evening after supper.

Q In the evening. Down at Mrs. Kelly's house? A No, at Mrs. Darling's house, in her apartment. 10

Q At Mrs. Darling's house, and who was present? A Mrs. Darling, her husband and myself.

Q Mrs. Kelly was not there at all? A She was not there. After that we went to the movies, the three of us.

Q And exactly what was said on this occasion, Tuesday evening? A Mrs. Darling said that Dick had ascertained how a paper could be drawn to give her the one-third of the income which I said I intended to give her. I said, "I am not going to sign any paper." 20

Q That was on the twenty-fourth? A That was on the twenty-fourth.

Q And any resentment at any time? A I think I got a little bit mad when he asked me to sign the paper.

Q Did Mrs. Darling get at all excited? A Mrs. Darling got excited. However, my anger happened to be at Darling, because he was the one that spoke to me afterward. 30

Q Did he get excited, too? A No; he seemed to keep somewhat cool.

Q And so it all ended by the three of you going out to the movies together? A It did.

Q And you continued to stay at Darling's house for a week more? A I did. Well, I would say it was February the first, if it happens to be a week it is; it is exactly a week.

Q And in the week that intervened between the twenty-fourth and the first of February, noth- 40

Edgar S. Gilmore, cross.

ing more was said about these papers? A Nothing more was said.

Q Or about the will or any contest of it? A Or about the will or any contest.

10 Q Now, was there any family conference at which Mrs. Kelly and her husband and you and Mr. and Mrs. Darling were present after— A The reading of the will.

Q —January twenty-fourth? A No.

Q This conference on the twenty-fourth when you say you had this disagreement then went to the movies, you told them that the reasons you were not signing were because in the future they might not need it? A That was one of the reasons.

20 Q What other reason did you tell them? A The gift was free on my part. I thought it was absolutely unnecessary. I didn't—I couldn't see any basis for their asking me to sign the paper to give them a free will gift, to bind myself to give them a free will gift.

Q Well, you intended to give it to them, didn't you? A I had that intention, yes.

30 Q Well, what was your objection, then, to putting the gift in writing so anyone could see it? A My objection?

Q Yes. A I had told them I was going to give it to them. Why should I sign a paper that I was going to give them something of my own free will? I didn't put it in writing when I gave the subsequent five thousand; I didn't put it in writing that I was going to give the five thousand insurance as a gift. They didn't ask for a—(interrupted).

40 Q Have you ever gotten any part of the income? A No opportunity was ever presented.

Edgar S. Gilmore, cross.

Suit was instituted before any opportunity arrived.

Q Had you consulted any attorney about this matter? A No.

Q In the period from January twenty-third—
A No.

Q —on? A No.

10

Q Let me make very sure. A I first consulted an attorney when I was served with papers in this suit.

Q Let me make very sure if you are telling what reasons you gave them for not signing the papers, on January twenty-fourth. A I simply refused.

Q What reason did you give? A I didn't have to sign the paper.

Q Not what you had to do, but what you told them, as a matter of fact. A That is what I testified, that it was not called for at all. The gift was a free will offer. I didn't have to give any of it.

20

Q Now, did you give any reason besides that, that it was a free will offer and therefore, you did not want to put it in writing? A I do not recall any other reason. That was the main reason. I simply refused to sign something that I was giving of my own free will, I was not bound by anything except my own desire to do it.

30

Q Did you say anything to them about their still having time to file a caveat? A Not then, no—yes, I did. I said "If you are not satisfied with this, you take any action that suits you. I am not going to advise you what to do. There is still time to file a caveat." In other words, the will would not be probated until January thirtieth—that was the twenty-fourth—and I was not going to sign any paper.

40

Edgar S. Gilmore, cross.

Q Now, when was it that the insurance money was divided up, Mr. Gilmore? A Well, I gave Gladys my check, I should say, around the twenty-seventh of January. I haven't the date. I haven't the check here. I suppose it will show in that photograph you have got.

10 Q And when was it that you and she had agreed on the deduction of three hundred thirty-three dollars and thirty-three cents? A I didn't agree with her at all.

Q Oh, you didn't agree with her on that? A No. When I handed her the check I said, "This is less three hundred thirty-three dollars, which is the portion that you told Madeleine you wanted to give to Victor."

20 Q I see. You and Mrs. Darling had never had any conversation at all about the thousand dollars for Victor? A I don't recall any.

Q You simply got that indirectly through your other sister, Mrs. Kelly? A I got it directly from Madeleine. She said, "Gladys wants to join us in that." I said, "All right. I am satisfied. It doesn't make any difference to me." The point was, Madeleine and I decided we want to give a gift.

30 Q Mrs. Darling didn't have any part in suggesting that gift of a thousand dollars to Victor? A She did not, no.

Q Now, what was the date of your return here in April? A Somewhere about the twenty-sixth or seventh.

Q Was there any conversation on your return about executing a paper? A No.

Q Never heard of that at all? A Not until after May first, then at that time I testified as to what the conversation was.

40

Edgar S. Gilmore, cross.

Q Well, when was the conversation? How soon after May first? A I should say, about the third of May.

Q About the third of May. And at that time you and your wife and one of your children had been staying there at the Darlings' house for four or five days? A We had, at their express invitation. 10

Q Yes? A I sent a telegram to my sister, Mrs. Kelly, asking her to get me rooms at the hotel, but it seems she told Gladys I was coming and Gladys expressed a desire that she wished to have me there.

Q And you went and stayed there and everything seemed to be friendly? A When I told Mrs. Kelly I didn't care to go she said, "Gladys will be terribly disappointed; she has been looking forward and wants to have you." And I said, "All right. I will go." The first night I spent at Mrs. Kelly's house. 20

Q At the time of your conversation there early in May with Mrs. Darling, was Mrs. Darling, Sr., present? A She was. I made my apologies to her afterwards for the rather excited time we had.

Q What did you mean, Mr. Gilmore, when you told your sister there on Harrison street that afternoon that you met her, when you said you would give her one-third of the income, and five thousand of the insurance that you would "fix it up legally"? A I didn't know exactly then. I knew Darling would not believe anything I said. He is not in the habit of believing things unless he has them signed. I wanted to convey to him that—and also to her—that I was not trying to pull the wool over their eyes, or, when I refused 30 40

Edgar S. Gilmore, cross.

the next night, I particularly pointed out to them that the time for filing a caveat had not expired.

Q Had not expired? A Had not expired and they could take any action that suited them, not on my advice, but on their own advice.

10 Q Then there had been some talk about filing a caveat, on their part, hadn't there? A Certainly, Mr. Darling said, as I testified once, at Mrs. Kelly's when we were all present, that if we wanted to prevent the widow making away with this estate, a caveat would have to be filed immediately. I disagreed with him.

Q Still, what did you mean when you said that you would "fix it all up legally"? A Just what I testified to here.

20 Q You said to your sister, "I am going to give you a third of my income in this estate, and five thousand dollars of my insurance money and I am going to fix it all up legally." What did you mean by that? A I meant by that, saying that if I put it in writing it would show them that I was not trying to pull the wool over their eyes.

Q You did intend, then, to put it in writing? A I had some thought. I said, "If necessary." I qualified that statement by an "if necessary."

30 Q You just think of the "if necessary" now for the first time, don't you? A Absolutely not.

Q Well, you did not testify to it that way on direct examination, did you? A Well, that is exactly—I don't know that I did, but that is exactly what happened.

Q You said, "if necessary I will put it in writing"? A Yes.

40 Q Still, what did you mean by telling them you would "fix it up legally"? What did you mean by that? A I meant by that, that if it

Edgar S. Gilmore, cross.

were necessary I would consult with a lawyer, which I had not done, and find out what would be necessary to bind myself.

Q You intended to "bind myself"? A No, I did not, at that writing. I thought that I would—(interrupted).

Q At that writing! The trouble is it didn't get to writing. A At that talking. 10

Q At that talking. A I thought I would show them that I had no—I mean to—this, that—(witness pauses).

Q Yes? A —I didn't want Darling or Mrs. Darling to feel that I was trying to pull the wool over their eyes.

Q Now, then, what did you mean by saying that "I will fix it up legally"? A That I didn't want them to feel that I was trying to pull the wool over their eyes. 20

Q Now, I don't—(interrupted). A That is what I meant.

Q What does the word "legally" mean to you? What did you mean when you used that word, "I will fix it up legally"? A When I said that—that meant that if I put it in writing and gave them a signed statement, that they would know then that I would—was not trying to pull the wool over their eyes. 30

Q And that is what you told them you would do on this division? A I said just those words, "If necessary, I will fix it up legally."

Q You did not use the words "if necessary" on direct examination, did you? A Well, it seems that I did not.

Q No. That just comes to your mind as an important thing now, doesn't it? A No, it does not. My statement of six or seven months ago has that in it. 40

Edgar S. Gilmore, cross.

Q You are sure of that? A Yes.

The Court: What do you mean by a statement of six or seven months ago?

The Witness: I wrote down the facts at the time that action was brought.

10

Q Now, you told your sister when you left around February first, that you would return about May first? A Yes.

Q Because nothing could be done until then, because of the time for appeal. What did you mean by that? A I meant that—I had been informed by the lawyers—I mean, the Fidelity-Union Trust Company that they were not going to make any dispositions under the estate until after May the first.

20

Q Yes? A I also pointed out to Gladys that if she was not satisfied with the fact that I had refused to sign any paper binding myself to make this free will gift from my income, that she had until May the first to reconsider and bring any action that she might feel that she could legally bring or might feel she wanted to bring.

30

Q So that by the following day, when you had this conference on January twenty-fourth, you had changed your mind completely about signing a paper? A About signing a paper, yes.

Q And you had not consulted any attorney in the meantime? A I had not; I never consulted any attorney until I was served with papers in this action.

40

Q Now, on May third, when you say you talked to Mrs. Darling, I understood you to say that she asked you for a paper which would give her standing at the Fidelity-Union Trust Company? A Yes, that is what she said.

Edgar S. Gilmore, cross.

Q You understood what she meant by that, didn't you? You understood what she meant by that? A Why I understood she meant by that, that I was to give her an assignment.

Q Yes? A Some sort of assignment, directing—or a paper directing the Fidelity-Union Trust Company to pay her directly money from the income which would primarily come to me, that is what I understood by her statement.

10

Q And that is the kind of paper that she had wanted from the beginning, wasn't it? A She never asked me for any paper.

Q Oh, she never asked you for any paper? A Except as I have testified.

Q What did you say to her, when she asked you for this paper about May third? A I said she had no standing at the Fidelity-Union.

20

Q Did you say anything about it being too late? A No, I did not.

Q In the first conference which all of you had prior to the reading of the will, was there anything said about Mrs. Darling—pardon me—Mrs. Gilmore, the second wife, and her share of the estate, and that Mrs. Darling would benefit by any will being upset? A I don't recall that it was at that meeting, no.

30

Q Do you recall it being said at any of these conferences? A I think the first time I talked to her I said that if the will were upset, Sadie would receive her portion outright, that is, it would be a little bit different division than it was under the will; she wouldn't get all the property which she did under the terms of the will.

Q You suggested that to Mrs. Darling? A I told her that that was in the will. She had a copy of the will.

40

Madeleine Kelly, direct.

Mr. Vanderbilt: That is all.

The Court: That is all.

Mr. Ashmead: Mrs. Kelly.

10 MADELEINE KELLY, sworn for defendant.

Direct examination by Mr. Ashmead.

Q Mrs. Kelly, where do you reside? A West Orange.

Q Are you the daughter of William Edgar Gilmore, the testator mentioned in this suit? A (Witness nods yes.)

Q Answer, he does not— A Yes, I am.

20 Q You are shaking your head. Are you a sister to Mrs. Darling? A I am.

Q And Mr. Gilmore? A Yes.

Q Now, prior to his death had your father ever talked with you about the provisions of the will? A No.

Q Did you have any knowledge whatever of what was to be in his will? A No.

Q Never mentioned it to you? A No.

30 Q When was he married the second time? A August twenty-five, I think.

Q 1925? A I think so.

Q Was he a man of business—a business man? A Yes.

Q And well to the time of his death? A Yes.

Q Was he a director in any bank, that you know? A Yes; the Second National Bank of Orange.

40 Q And was he a director of that bank to the time of his death? A Yes.

Madeleine Kelly, direct.

Q Now, I wish you would—had you ever suggested to your father anything with respect to the provisions of his will? A No.

Q What were the relations between your father and Mrs. Darling prior to his death? A Well, from the time of the suit, of course, he never saw her.

10

Q He never saw her at all? A I don't think he ever saw her after that.

Q Did you ever do anything to try to keep them apart? A No.

Q Now, coming down to this will, when did you first hear the contents of this will of your father's that he left? A When Edgar returned and told me.

Q What did he tell you? A He just told me about the will. The reading of the will.

20

Q Now, what conversations have you ever had with Mrs. Darling about your father's will, if any? A I never had any conversations with her about father's will.

Q Well, now, after the death did you see her? A I saw her many times. She came to my house on many occasions.

Q Now, she has been asked about a time that she came there, when there was a discussion about going to see Mr. Taylor. Do you recall that situation? A Yes.

30

Q Now, what was that and when was that, as far as you can tell? A That was long before the will was opened.

Q Before the will was opened. And what is your recollection of what happened that evening?

A Well, Mr. Darling came—Mr. and Mrs. Darling came in. Mr. Darling had a very definite idea in his mind that it would be necessary to file, or do something previous to the probating

40

Madeleine Kelly, direct.

of this will, because we might not know anything about the will being read; it could be done in secret.

Q Now, was there any claim at that time that you or Edgar had influenced your father in respect to the will? A No.

10 Q What was the result of that—what other conversations were had, anything more about this caveat come up? A On that occasion?

Q Yes. A I don't think so.

Q Do you recall anything else? A No.

Q Now, what was the result of that? A Well, they went to see Mr. Taylor.

Q Who went? A My husband and Mr. Darling and my brother.

20 Q And how long were they gone? A I don't know, half an hour, hour.

Q And do you remember what they reported, when they came back? A Just what Edgar said, sort of—nothing at all, foolishness.

Q Now, have you ever had any conversations with Mr. Darling with respect to the provisions of your father's will or his estate? A No.

Q At any time? A Never.

30 Q Did he ever mention it to you on any occasion? A No.

Q Now, what conversations, if any, have you had with your sister in respect to your father's will or his estate? A Only at—one time I asked her what she was going to do, if she had any intentions of breaking the will.

Q Yes? A She said, "No; as long as you and Edgar are remembered equally, or remembered—you—that amount, and Sadie only has her legal amount, I am not—I am perfectly satisfied."

40

Madeleine Kelly, direct.

Q Did she show any unfriendly disposition toward you or Edgar? A Absolutely none.

Q What was her antipathy, if anything, and who was it toward? A She didn't have any.

Q How about her feelings toward Mrs. Gilmore? A Well—her feeling toward Mrs. Gilmore?

10

Q Yes. A Why, she never saw her.

Q She never saw Mrs. Gilmore? Did she ever express to you that she had a fear that Mrs. Gilmore might get away with part of your father's estate? A Oh, yes.

Q More than she was entitled to? A Well, before the reading of the will she did not know what it might be.

Q That was the occasion of the discussion of the filing of a caveat? A Yes.

20

Q Now, is that all the conversations that you ever had with your sister about your father's will? A Yes.

Q Or his estate? A Yes.

Q Have you ever promised to give her any portion of the interest that you received under that will? A I told her that I would give her something, yes.

Q Something. When was that? A Shortly after the reading of the will. I told her that I would give her something.

30

Q And why were you going to give her something? A Well, because I wanted to.

Q Well, was it by way of agreement that you made that statement to her? A No.

Q What was the statement, that it was a gift?

Mr. Vanderbilt: I object, leading.

A Yes; I was just going to give her something.

40

Madeleine Kelly, direct.

The Court: Yes; strike it out. That is entirely too leading.

Mr. Ashmead: All right.

Q Just state that as fully as you can, will you? A On this conversation when she knew
10 she had been cut off I said that I was going to give her something.

Q Now, was there any statement as to your receiving a consideration— A No.

Q —for that gift? A Nothing.

Q What was the arrangement? I believe Mrs. Darling or Mr. Gilmore testified about a gift to the chauffeur. What was the circumstance in respect to that? A Well, Edgar and I talked about it, and we both decided we would
20 give Victor something and we were going to each give him five hundred.

Q Yes. A And I think Gladys came to my house and I told her we were going to give Victor something and she said, of course, that she would like to join in with it.

Q Now, what was the situation with respect to this insurance? You got insurance, about twenty thousand dollars? A Yes.

Q And what was done with that? A I gave
30 her five thousand dollars.

Q What were the circumstances under which you gave that? A I just gave it to her.

Q Was that part of carrying out any agreement that you had? A No.

Q Now, did you make her a check in respect to that five thousand dollars? A I did.

Q I show you a check bearing date February first. Is that the check that you gave her? A It is.

40 Q That went through the bank? A Yes.

Madeleine Kelly, cross.

Q And came back to you? A Yes.

Q Has it ever been out of your possession?

A No.

Mr. Ashmead: I introduce that.

(Check marked Exhibit C. 2.)

Mr. Ashmead: That is all.

10

Cross examination by Mr. Vanderbilt.

Q Mrs. Kelly, what has been the—(interrupted).

Mr. Ashmead: Oh, I might ask you this: Has your sister ever said anything to you about signing any papers?

The Witness: Never.

20

Mr. Ashmead: Never made any request to you along that line?

The Witness: Never.

Mr. Ashmead: All right.

Examined by Mr. Vanderbilt.

Q What has been the relationship between Mrs. Darling and yourself from the time of these suits over your mother's estate, up to the time of your father's death? A What has been what—the relations? We have been perfectly friendly, whenever she came to see me.

30

Q Perfectly friendly? A Except in regard to the action she had taken. I disapproved of them and told her so.

Q Well, how often did you see her in that period of a couple of years? A Well, I saw her when she came to see me.

40

Madeleine Kelly, cross.

Q Did you ever go to see her? A It was not possible at the time.

Q What is that? A It was not possible for me to go.

Q And how many times did she come to see you in that period of two years? A I don't remember when she started. I guess it was before
10 father died, she started to come quite often.

Q Well, how many times in the whole period of two years would you say that your sister had come to your house? A I have no idea.

Q Well, five, ten, a hundred? A I don't think a hundred.

Q And you never went to her house during this period of two years? A I may have, once or twice.

20 Q You have not any definite recollection of that? A No.

Q But, during the period immediately following your father's death and from then on through February, March, April, she was at your house very often? A Yes.

Q Played with the children? A Yes.

Q Helped take care of them for you? A Yes.

Q And you were very friendly and intimate during that period? A Yes.

30 Q That was entirely different from the relationship which had existed prior to your father's death? A No, I just had not seen her during that previous period. It would have been just the same had she come.

Q And, during this period after your father's death, did you go over to her house at all? A I may have, once or twice, when I could.

Q Now, when did you first learn from your
40 brother that you had been remembered in the

Madeleine Kelly, cross.

will? A When he came down on Monday after the reading of the will.

Q Didn't you know before that that he had seen a lawyer, Maiers and had been assured—

A I did not.

Q —that you and he had been taken care of?

A No.

10

Q He had not intimated that to you? A No.

Q The first you knew was when he came down on Monday, January twenty-third and told you the will had been read and what the contents of it were? A Yes.

Q Well, you recall this discussion of the three men and your sister and yourself which led to the men going to this Mr. Taylor? Do you remember that? A Yes.

Q At that time, you did not know that you had been remembered in the will? A No.

20

Q Who was it suggested that they go to see Mr. Taylor? A I don't remember.

Q Do you know Mr. Taylor? A Yes.

Q He is a friend of your husband's? A Yes.

Q Visits you and you folks visit him back and forth? A On several occasions.

Q Yes. And the men went over and saw him about an hour that night. Now, did Mrs. Darling or Mr. Darling say anything on that occasion about contesting the will, filing a caveat or anything like that? A They said they would contest the will if Edgar and I were not remembered or if Mrs. Gilmore got more than her legal right.

30

Q Well, now, after that did they say anything about going to see Mr. David McBride, the lawyer in East Orange? A I didn't hear them.

Q You never heard of that? A No.

40

Madeleine Kelly, cross.

Q After you learned the contents of the will, did Mr. and Mrs. Darling come over to your house the next night, Tuesday, January twenty-fourth? A Probably. I don't remember just what night. They were there very often.

Q They came over quite often that night?

10 A Yes.

Q Was your brother, Edgar, there? A I don't remember just what occasions he was there.

Q Well, was he there on any occasion? A I don't—(interrupted).

Q (Continuing) After the contents of the will were made known to you, on which Mr. and Mrs. Darling were there? A Maybe. I don't really know.

20 Q Well, can't you recall whether or not he and Mr. and Mrs. Darling came over together to your house? A No.

Q He was— A I really don't know whether they came together. They were there a great deal.

Q And he would come with them on occasions? A Yes, he might be there.

Q You say you never talked at all to Mr. Darling about the will of your father? A No.

30 Q And when do you say it was that you talked to Mrs. Darling? I understood you to say you talked to her once. A I don't remember when that was. I think it was one afternoon.

Q Well, how long after your brother told you about the contents of the will? A I think it was after he had gone off; I think it was one afternoon when she was there.

Q You mean, after he had gone off to California? A Yes.

40 Q That would be after February first? A I think it was, some time.

Madeleine Kelly, cross.

Q And what was it you told her you would do? A Eh?

Q What was it you said to her you would do? A I just told her I was going to give her something.

Q And what were you going to give her? A I didn't say anything; I didn't know. 10

Q You were going to give her a present of a new fur coat or an interest in the estate, or what? A I just said I was going to give her something, when they discussed the will.

Q Had you talked that matter over at all with your husband? A With whom?

Q With your husband? A Yes.

Q Had you and he agreed on what you were going to give her? A No. 20

Q Did you and he ever agree on what you were going to give her? A No.

Q Well, what did you have in mind to give her? A Well, I was going to give her something. I didn't even—(interrupted).

Q Well, what, a five dollar gold piece, or what? A Well, I didn't know what I was going to give her. I was going to give her something of my income.

Q Well, how much? A Well, I had never made any idea. I hadn't thought it out, nor had I expressed it. 30

Q Well, have you thought it out even yet? A No.

Q Do you know what Edgar was going to give her? A No.

Q Did you ever discuss with Edgar what he was going to give your sister, Mrs. Darling, and what you were going to give your sister, Mrs. Darling? A We talked about it. 40

Madeleine Kelly, cross.

Q But he did not tell you what he was going to give her? A No, because our discussion named various ways and means.

Q I see. A You might say each discussion was different.

10 Q Now, tell us what those discussions were and when they took place, please. A Well, I presume after the reading of the will we talked about it.

Q And he told you he was going to do what? A He was going to give her something of his income.

Q Well, what, specifically? A On one occasion he said he would give her one-third and on another occasion he thought he might give her one-fourth.

20 Q And was it to apply to the whole thing or just— A His income.

Q Just the income. And were there any other figures suggested besides a third and a fourth? A I don't think so.

Q On his part? A No.

Q Then what did you tell him you were going to give on your part? A I don't think I ever said anything very definite. I didn't know enough about it at the time.

30 Q Well, did he ever ask you to suggest a figure? A No.

Q Or fix a figure? A No.

Q And you never did come to the point where you made up your mind, even for yourself, as to what portion of the income you intended to give Mrs. Darling? A No.

40 Q Well, how did you come to make up your mind to give her a third—five thousand dollars of the insurance money? A Well, I just made up my mind I would give it to her. I wanted to give her something.

Madeleine Kelly, cross.

Q When did you make up your mind to do that? A As soon as I knew I was going to get it and that she had none.

Q How did you arrive at the figure of five thousand dollars? A Because, if I gave her five thousand dollars, and Edgar, too—Ed agreed he was going to give her five thousand, and, under father's will she was to get five thousand, which I thought would come immediately; that would give her fifteen thousand dollars cash on hand, and it would leave me fifteen thousand. 10

Q And it would leave Edgar fifteen. A And I was not giving her any more than I would have.

Q That would equalize it all around. Now, when was this conversation had about Victor? When did you talk to her about giving some money to Victor? A I don't know. Some day after she had come over and when Victor and I had discussed it. 20

Q Was it before or after you had made up your mind to give her five thousand dollars of the insurance money? A It was probably at the same time that Edgar and I had made up our minds about giving her that money and about giving Victor the money, and, when she came in I told her about it. She wanted to go thirds on it. 30

Q I see. At that time you didn't say anything to her about any interest in the income?

A I don't think so.

Q On this day you merely mentioned the thousand dollars for Victor? A Yes.

Q Now, as a matter of fact, Mrs. Kelly, didn't the suggestion of the thousand dollars for Victor come, in the first place, from Mrs. Darling? A No. 40

Madeleine Kelly, cross.

Q Well, who did first suggest it? A Well, Edgar and I had discussed it.

Q Well, which of the two of you? Which one of the two first suggested it, you or Edgar? A Well, I couldn't say that. It was in both our minds.

10 Q I know, but who first spoke about it? A Why, I don't know who first spoke of it.

Q Well, you spoke to your sister, Mrs. Darling, about it, didn't you and told her— A Yes.

Q —what you were going to do. A After Edgar and I decided to give him a thousand dollars, between us.

Q And then she said what? A She thought it was a good idea and she would like to give some, too.

20 Q And, up to that time had you told her that you were going to give her any part of your income? A I think I said I was going to give her something.

Q Give her something? A Yes.

Q But you did not say how much? A No.

30 Q You cannot recall at all this conference of Tuesday, January thirty-first—pardon me, Monday, January thirty-first—Monday, January thirtieth, I think it is, when Mr. and Mrs. Darling were at your house and Mr. Gilmore and your husband was there and this conversation was had that Mrs. Darling told about filing a caveat? A No.

Q And you agreed to, with your—(interrupted). A No; I never heard about filing a caveat after my father's will was known.

Q Did you ever hear of them going to Mr. McBride? A No.

Q Never heard of that at all? A No.

40 Q Well, on any of these conferences after your father's death, was anything said about the

Madeleine Kelly, cross.

second Mrs. Gilmore's interest in the estate? A After the reading of the will?

Q Yes. A No.

Q Or before the reading of the will? A Well, only on the occasions they went to see Mr. Taylor. That was before the reading of the will. After the reading of the will, nothing. 10

Q Was anything said that, if Mrs. Darling contested the will—(interrupted). A She always said she did not want to contest the will.

Q She never spoke of contesting it? A No; she always said she would not contest the will.

Q During these many visits that Mrs. Darling and you had, from the time of your father's death to May first, weren't these things discussed a lot? A Never.

Q Never discussed? A Never. On one occasion. 20

Q Only on the one occasion that you spoke of? A No; on one other occasion.

Q What was that other occasion? A My sister said something about "When I get my money" and I said, "What money?" And she said, "The five thousand from father's estate." And I said, "I don't think you are going to get that until the estate is settled and it takes a year for the estate to be settled, as I understand it, so I would not count on it." That is the only conversation. 30

Q That is the only conversation you had at all about it. After your mother's death you and your father lived together? A Yes.

Q And that continued up until the time of his remarriage? A Yes.

Q You lived for a while in New York in the hotel with him? A Yes.

Q And then for a time up here in East Orange? A Yes, and then in Long Island. 40

Madeleine Kelly, cross.

Q And in Long Island. And your relations with your father were very close? A They were.

Q Did you ever do anything to restore friendly relations between Mrs. Darling and your father? A Yes.

10 Q What did you do? A Well, I— On various occasions I—we went out to see him, when we were in New York.

Q After your mother's death? A Yes.

Q Your father came up to see Mrs. Darling after— A Yes.

Q —your mother's death. But, still continued this unfriendly feeling by reason of the suit? Was that it? A No; that suit—no suit had started then.

20 Q No, no. I mean, after your mother's death, between the date of your—put it this way: Between the time of the starting of these suits over your mother's estate, and your father's death, did your father come out to see Mrs. Darling? A No.

30 Q No. Well, during that period, a couple of years from the time of your mother's death, until the time of your father's death, or rather, I mean to say, from the time of the starting of the suit over your mother's estate, to the time of your father's death, did you do anything to restore friendly relations between Mrs. Darling and your father? A Yes.

Q What did you do? A I spoke to him on various occasions. We did not live together then.

40 Q Oh, you did not live with your father then? A No; I was married. Father—when my sister brought these suits about the property I was not living with my father.

Madeleine Kelly, re-direct—re-cross.

Q I see. Now, you saw your father quite often? A Not very often.

Q Well, did you ever do anything to restore friendly relations between your father and sister?

A I used to talk to him different occasions.

Q What did you say to him about that, I mean? A Well, I cannot just remember how the conversations came up. If it was possible I brought Gladys' name in the conversation.

10

Q What would he say? A Didn't want to see her again, ever.

Mr. Vanderbilt: That is all.

The Court: That is all.

Re-direct examination by Mr. Ashmead.

20

Q Mrs. Kelly, you said it was impossible for you to see your children—you did not state the reason why, or, sister? A Well, because I didn't have anybody to leave my children with. I had to stay home with them.

Q How many children have you? A Two.

Q And they were babies at the time? A Yes.

Q You had to stay at home to attend to them? A Yes.

30

Re-cross examination by Mr. Vanderbilt.

Q Now, wait a minute. We are getting in a little sphere I know something about now. You can take babies out in a baby carriage, can't you? It doesn't mean you stayed home all the time and never went out, does it? A I didn't go out very much. I went out to buy a loaf of bread or something like that, and then I had

40

Frank R. Kelly, direct.

to rush home again, but I didn't take them both out at night.

Q Oh, no. I don't mean at night. I mean in the daytime. Did you take the babies out? A I took them out for a short—(interrupted).

10 Q Yes. And how far from your house to your sister's house? A Not very far.

Q About how many blocks? A Oh, two or three blocks.

Mr. Vanderbilt: That is all.

Mr. Ashmead: That is all. Mr. Kelly.

FRANK R. KELLY, sworn for defendants.

20

Direct examination by Mr. Ashmead.

Q Mr. Kelly, you are the husband of Madeleine Kelly? A I am.

Q Who was just on the stand. The son-in-law of Mr. William E. Gilmore? A That is right.

Q You knew Mr. Gilmore, did you, during his life? A Very well.

30 Q Was he a business man? A He was.

Q And did he continue in business or have business relations up to the time of his death? A As far as I know, he was a director of the Second National Bank right up to the very date of his death; also interested in other projects.

Q Was he a drunkard? A I would not call him so, no.

40 Q Did he drink during the last years of his life, after his second marriage? A Occasionally, yes.

Frank R. Kelly, direct.

Q How frequently? A At times he drank frequently; at other times he would stop for a while.

Q I see. Now, do you know about this real estate transaction that was mentioned here two or three times? You are in the real estate business, aren't you? A Yes, that is right.

10

Q All right. Now, will you try to clear up that situation as to just what occurred at that transaction? A Why, as I understand it—of course, I was not a member of the family at the time that the deeds were transferred, but I understand it had happened, and, when Mr. Gilmore decided he was to get married again, Mrs. Darling was very much concerned that the property—(interrupted).

20

The Court: What we want to know is, what were the legal steps taken in regard to this property, if you can tell us. Otherwise, we don't want to hear it—I don't.

The Witness: Well, there were only two steps taken, that, on the New Jersey property, the suit was pending on it, but before any—(interrupted).

The Court: What kind of a suit and who brought it?

30

The Witness: Mrs. Darling brought a suit putting, I understand, a *lis pendens* on it, which was forcing it into the court. It came up before a Master of Chancery and before a decision came into the Court it was sold by private sale to Mr. Schotland by a real estate broker in East Orange, with the consent of every party, a deed or paper was signed, giving releases, the husbands and wives and all the children, and the father

40

Frank R. Kelly, direct.

and his wife. This took it out of the hands of the Court, and that was all that was done about it.

Q What was the New York suit? A The New York suit was put on by Mr. Gilmore and his son, and my wife in order to facilitate matters, he wanted to clean it up quickly, he was getting married or was just married and he didn't want a long suit pending on it and tie it all up and he decided to get rid of it so they would get their share of the estate on it and they put—they filed an action against him, forcing it into the hands of the Court.

Q A court reference to a Referee, Judge Nohowell of Babylon, Long Island, who declared the property should go into public auction? A The property was duly advertised and sold in public auction, where, incidentally, I bought it myself.

Q And the proceeds of both those properties were divided— A After deducting the expenses of the court and Mrs. Gilmore's curtesy right, the balance was divided into three equal parts and given to the children in each case.

Q Did Mr. Gilmore ever discuss with you the provisions of his will? A I never discussed it with Mr. Gilmore in my life.

Q Had you any idea of what disposition he was going to make? A Not the slightest.

Q What was the first occasion that you knew about his will? A The day the will was read by—in the presence of my brother-in-law, Edgar, I heard about it, that day, somewhere that afternoon, I believe, or that evening. I have forgotten which.

Q Now, was that the evening that the Darlings were at your house? A Whether they were

Frank R. Kelly, direct.

at my house that evening or not, I can't say. They were there several times during that week. They might have been there that particular evening.

Q Well, now, what was the occasion of going to see Taylor? A Why, Mr. Darling during the day—I was at his office and he said something about he was afraid that the widow would get more than her natural share; there was an inference that she might have prejudiced Mr. Gilmore against the children, and, in order to forestall any such proposition as that, he wanted to see a lawyer and see what could be done about filing a caveat, or whatever they call it, in order that the will could not be probated in secret by the attorneys of—and Mrs. Gilmore, if she was the executrix. 10

Q Where did that occur, at your house? A That occurred at his office. 20

Q At his office? A That is right.

Q Did you go from his office to Taylor? A No. That evening—it must have been the evening of that day when they came up there—they again brought the subject up and decided—Mr. Darling's idea was that we go and call up Mr. Taylor, who is quite a good personal friend of mine and he thought he would be a good man to talk to about it, merely to speak—seek in a friendly way advice, what to do. My brother-in-law, Edgar, said at that time, "You are crazy. They can't do anything about it at all, but I will go with you just to keep you company." And that evening the three of us, Mr. Darling, Mr. Gilmore and myself, went around to see Mr. Taylor and we told him what we had on our minds, and asked him if such a thing could happen, that a will could be probated without 30 40

Frank R. Kelly, direct.

anybody in the family knowing anything about it and he said, no, he didn't see how it could be possible and the best thing was to wait and see until the will was read, and then you would know what you are doing.

10 Q That is all? A That is all the discussion we had about it. We sat there part of the evening and came back again.

Q You say that Mr. and Mrs. Darling were at your house several times. Did you ever hear any discussion as to any agreement about contesting this will? A No.

20 Q Did they ever suggest in your presence that they intended to contest it? A Except on that one occasion. After the will was read the only—of course, I got most of these things second hand. I was not around during the day—

The Court: Don't tell us any second-handed information.

The Witness: Well—

30 Q Only tell about what happened in your presence. Did you ever hear any discussion? About breaking the will? About your wife or Mr. Gilmore giving Mrs. Darling any property in consideration for her not contesting the will? A No. There was never any thought of breaking the will.

The Court: No. Now—(interrupted).

Q Now, have you had any discussions with Mrs. Darling about this matter? A With Mrs. Darling?

40 Q Yes. A No.

Frank R. Kelly, direct.

Q Now, have you had any discussions with Mr. Darling about this matter? A Yes.

Q All right. Now, when was that discussion and what took place there? A Why, a day or two after the reading of the will Mr. Darling came in my office at noontime and he sat down and he said, "Now, about that money that Madeleine and Edgar are going to give Gladys," he said, "What they ought to do is to go down to the Fidelity-Trust Company and sign a paper down there so she will have some standing," and I was a little peeved and I said, "Gladys has no standing at the Fidelity-Trust Company," and I said, "Furthermore, whatever my wife intends to give your wife she is doing of her own free will and Madeleine is not going to sign a gosh darn thing." I got a little hot under the collar, I admit, and I said, "In any event, there should be no signing of any papers, because it might show"—I didn't know enough about the law and my theory of it also was that any papers that were signed, why, it might be construed as an effort to break the will and they would all be disinherited.

Q That is, there is a provision in the will about that? A Yes, sir.

Q Now, did you ever have any conversations with Mr. Darling beyond that? A No.

Q Or Mrs. Darling? A No.

Mr. Ashmead: That is all.

Q I might ask you this: "Were there any conversations had by either Mr. and Mrs. Darling with your wife, in your presence, referring to the will, beyond what you have testified—or with Mr. Gilmore? A No. I didn't see them with Mr. Gilmore—very infrequently.

Frank R. Kelly, cross.

Cross examination by Mr. Vanderbilt.

Q You know, don't you, with respect to this New Jersey Chancery suit that the deed was actually given by George W. Anderson, a Special Master in Chancery? A That is right.

10 Q And by order of the Court of Chancery? A (Witness nods yes.) I was in the—(interrupted).

The Court: Now, if it becomes important, we can have the files of these cases produced.

Mr. Vanderbilt: Yes, sir.

The Court: These witnesses are not expert lawyers as you gentlemen are, and they cannot explain the proceedings apparently.

20 Q As I understand, Lawyer Taylor is a close friend of yours? A Very good friend.

Q And you were the one that suggested going there? A No.

Q Who did? A Mr. Darling.

Q Is he a close friend of the Darlings, too? A No.

Q Did Darling know him at all? A I imagine so; both members of the same club.

30 Q Did you know, at the time you went there, that your brother-in-law, Edgar, knew more or less about the contents of the will? A No.

Q When did you first learn that your wife was giving Mrs. Darling five thousand of the insurance money? A I imagine, a day or two after they received notice that they were going to get it.

Q I see. Did you talk it over? A I couldn't give you the specific date.

40

Frank R. Kelly, cross.

Q I say, did you talk that over with them? A I don't remember having much discussion about it, no, not with me.

Q Did you have anything to say to your wife, any discussion with your wife as to what proportion of the income she was going to give her sister, Mrs. Darling? A The only proportion I proposed giving her was zero. 10

Q And did you stick at zero or did you rise a little bit above that as it got a little towards the middle of the day and the temperature went up? A I don't think my sympathy arose at all? I have always maintained the same line.

Q And that expresses your sentiment towards Mrs. Darling? A Yes.

Q Then and now? A Beg pardon?

Q Then and now? A Always. 20

Q You are aware of the fact that, during February, March and April, Mrs. Darling came over very often and visited your wife? A My wife, yes.

Q You raised no objection to that, I take it? A She is her sister.

Q What has been your relation with Mrs. Darling? A We have never been particularly close friends.

Q In view of this attitude toward giving her zero, what was your attitude on the subject of your wife giving five thousand dollars? A I thought that was her own business. She knew it better than I. 30

Q On the matter of income you thought that was some of your business? A I did, yes. I felt that it was—if you want my reason for it I will give it to you.

Q Yes, I would like to have it. A My idea is, and always has been— I think everybody 40

Frank R. Kelly, cross.

else's—Mr. Gilmore made a will and he made certain provisions in it. If he wanted his money to go differently, he would have made those provisions.

Q That does not apply to insurance? A It does not apply to anything my wife has.

10 Q And she, of course, had this income given to her under the will? A The insurance?

Q No. I am speaking of the income, now. I am trying to find out how your mind goes one way on the subject of insurance money and a different way on the subject of income. A I didn't say it runs differently on the insurance money.

Q I misunderstood you then. A I said she gave it of her own free will.

20 Q Yes. And you raised no objection to that. A I do not recall raising any.

Q But you did object to your wife giving Mrs. Darling any part of the income. Now, why was that? A I did not think she deserved it.

Q You did not think she deserved it. Did you ever tell your wife that you had had a conversation with Mr. Darling down at the office, that you related on direct examination? A I think I have.

30 Q You told her? A In fact, I probably came home disturbed about it.

Q (Continuing.) That Mr. Darling wanted to get an assignment. A Yes, probably.

Q Well, you are sure of it, aren't you? A Yes, quite sure.

Q Then you did know about Mrs. Darling wanting an assignment of a one-third interest of it and income—of her share of the estate? A There was no mention made of one-third.

40 Q What was this to be an assignment of? A Simply so Gladys would have some standing

Frank R. Kelly, cross.

down at the Fidelity to get the money that my wife might tell them to give her.

Q I see. But the percentage being indetermined? A Yes.

Q But, at any rate, you did tell your wife that Darling had been around to see you and wanted an assignment? A I probably did. I suppose I did. 10

Q Well, you are sure of it, aren't you? A I am not positive, no. I do not recall.

Q You were hot under the collar, when he came in and talked to you about it? A Certainly.

Q You mean to say you didn't come home to your wife and blow off about it? A That was noon time. I didn't come home until night.

Q You are Irish. Didn't you carry it from noon to evening? A I don't carry a grouch. 20

Q You mean you didn't tell your wife anything about it? A I didn't say I did. I said I might have told her and probably did.

Q Aren't you sure you told her? A No.

The Court: You misconstrue the Irish temper. It is up and then down. If he were a Scotchman he might have gone home and taken it out on his wife. 30

Mr. Vanderbilt: Up and down, but his memory is good.

Q You are sure you went home and said what Dick Darling tried to put over on you? A I am sure that I probably said it, but I am not sure that I said it in so many words. I say it would be a natural thing for me to say.

Q Sure. Did you ever discuss it with her, if you did discuss it with her that day? A Certainly. 40

Frank R. Kelly, re-direct—re-cross.

Q Was Edgar at your house, while you were there at all, during the week after the will was read? A Probably. I don't remember any specific occasion.

10 Q Did he ever come to your house with the Darlings that week? A He might have.

Re-direct examination by Mr. Ashmead.

Q When was this conversation you had with Mr. Darling? Did you give that date? A The first one or the second one?

Q About the assignment. A That was either the day of or the day after the reading of the will.

20 Q Now, there has been some statement here that you and Mrs. Kelly were in meagre circumstances. She had the property she received from her mother, hasn't she? A And more.

Q What? A That and more.

Q And how about your circumstances? Have you been able to support her? A I have never been poor.

30 Q You make a good return from your business? A My income in 1927 was about seven thousand dollars, with my wife's—my wife has always had a private income. My income last year was about sixteen thousand dollars.

Re-cross examination by Mr. Vanderbilt.

Q Well, then, she was able to get out of the house if she had wanted to.

The Court: That calls for a conclusion.
Mr. Vanderbilt: Mrs. Darling.

Gladys Darling, direct.

GLADYS DARLING, recalled in rebuttal.

Direct examination by Mr. Vanderbilt.

Q Mrs. Darling, the day you had the conversation with your brother, Edgar, on Harrison street, did he in his conversation with you on that occasion limit what he proposed to turn over to you to one-third of the income or was it more than that? A No; it was one-third of whatever he got in my father's will. 10

Q At any time up until May, did he ever change or vary that? A No.

Q In the conversations which you had with your sister, what did she say that she intended to turn over to you? A The only—the time when she said, “Of course, Gladdy, you know, we can only give you a share of our income; we have nothing to do with the principal, but Sadie's money can and will be divided.” 20

Q And when was that, Mrs. Darling? A That was in her house, when my husband and my brother and her husband were present, also my two aunts, both now living in Philadelphia and Abbingdon, Pennsylvania, who did not wait to testify. 30

Mr. Vanderbilt: That is all.

Mr. Ashmead: No cross.

Mr. Vanderbilt: That is our case, your Honor.

The Court: Is this the case? Now, what disposition do you want me to make of it? Do you want the testimony written out and a chance to file memoranda?

Mr. Ashmead: I should, yes. 40

Gladys Darling, direct.

The Court: All right. How long do you want after you get the testimony?

10 Mr. Vanderbilt: I wondered if I might, if necessary, put in a certified copy of these deeds that have been referred to on the Chancery record, if it is needed, about these other suits?

The Court: Certainly. How long do you want?

Mr. Vanderbilt: A week.

The Court: After you get the testimony.

Mr. Vanderbilt: Yes.

The Court: Very well. You can exchange briefs within a week after you get the testimony.

20 Mr. Ashmead: I would like to have their brief so I can reply to it.

The Court: What is that?

Mr. Ashmead: I should like to have their brief so I can reply to it.

The Court: You can do it that way or you can exchange briefs and have ten days, either one, for reply briefs.

30 Mr. Vanderbilt: I am willing to give Mr. Ashmead my brief and answer it, if it is necessary for file a short reply.

Exhibit C. 1.

EXHIBIT C. 1.

ORANGE, N. J. Feb. 1 1928 No. 900

SECOND NATIONAL BANK 55-171

Pay to the Order of Gladys G. Darling \$5,000 00/
Five Thousand and no/100 DOLLARS
Collectible at Par Through the Federal Reserve
Bank of New York

10

Madeleine J. Kelly

SAFE DEPOSIT
MEMBER FEDERAL

2

RESERVE BANK
VAULTS

20

No. A-14 WEST ORANGE, N. J. Jan. 31, 1928

THE FIRST NATIONAL BANK 55-450
of WEST ORANGE, N. J.

Pay to the Order of Gladys G. Darling \$4667.00
Four thousand six hundred sixty-seven
and no/100 DOLLARS

Edgar S. Gilmore

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Exhibit C. 2.

EXHIBIT C. 2.

10 IN THE NAME OF GOD, AMEN. I, WILLIAM E. GILMORE, residing at No. 152 South Mountain Avenue, in the Town of Montclair, Essex County, State of New Jersey, do hereby make, publish and declare this to be my Last Will and Testament, in writing, hereby expressly revoking all other and former Wills and Codicils at any time heretofore made by me, that is to say:

20 *FIRST:* I order and direct that all of my just debts, funeral and testamentary expenses be fully paid out of my Estate by my Executors hereinafter named and appointed as soon as conveniently may be done after my decease, and I leave the charges of my funeral and testamentary expenses and of a stone monument or tombstone, if any, to the discretion of my Executors.

30 *SECOND:* I give, devise and bequeath unto my wife, SARAH JANE DEWEY GILMORE, absolutely, to be to her and her heirs and assigns forever, my Plot of land, with the dwelling house, building and improvements thereon erected at the time of my decease, known as Number 152 South Mountain Avenue, situated in the Town of Montclair, in the County of Essex, and State of New Jersey, and located on the Westerly side of South Mountain Avenue, distant 184.08 feet Northerly from the Northwesterly corner of Gates and South Mountain Avenues, being 92.04 feet front and rear and 175 feet deep on each side.

40 *THIRD:* I give and bequeath unto my said wife, SARAH JANE DEWEY GILMORE, absolutely, to be to her and her heirs and assigns forever, all of the personal property, household

Exhibit C. 2.

goods, furniture, paintings, rugs, fixtures, automobiles, and all effects and personal property of every kind and nature in and upon my said Plot of land and dwelling house and buildings aforesaid at the time of my decease.

FOURTH: I give and bequeath unto my daughter, GLADYS G. DARLING, the sum of Five thousand Dollars (\$5,000), in cash, absolutely, to be to her and her heirs and assigns forever. 10

FIFTH: I give and bequeath unto my sister, IRENE G. LESLIE, the sum of Five thousand Dollars (\$5,000), in cash, absolutely, to be to her and her heirs and assigns forever.

SIXTH: I order and direct that the sum of Two thousand Dollars (\$2,000) be paid out of my Estate to "THE PROPRIETORS OF THE ROSEDALE CEMETERY", situate in the County of Essex, in the State of New Jersey, by my Executors hereinafter named and appointed, on condition that the same be invested in legal securities, and the principal or income thereof be used and applied by "THE PROPRIETORS OF THE ROSEDALE CEMETERY", or their successors, for the express and only purpose of at all times caring for, preserving, embellishing, and keeping any enclosure, monument, tomb, or other structure on my burial lots of land in said ROSEDALE CEMETERY in good order and condition, and clipping, preserving, cultivating, and keeping in order any grass, plants, trees, or shrubbery upon or pertaining to said lots, which said lots are delineated and laid down on the Register Map or Plan of the said Cemetery by the numbers 107 and 108 in Plot 41. 20 30

Exhibit C. 2.

SEVENTH: I order and direct that the sum of One thousand Dollars (\$1,000) be paid out of my Estate to THE GREEN-WOOD CEMETERY, situate in the Borough of Brooklyn, County of Kings, City and State of New York, by my Executors hereinafter named and appointed, on condition that the same be invested in legal securities, and the principal or income thereof be used and applied by THE GREEN-WOOD CEMETERY, or its successors, for the express and only purpose of at all times caring for, preserving, embellishing, and keeping any enclosure, monument, tomb, or other structure on my burial lots of land in said THE GREEN-WOOD CEMETERY in good order and condition, and clipping, preserving, cultivating and keeping in order any grass, plants, trees, or shrubbery upon or pertaining to said lots, which said lots are delineated and laid down on the Register Map or Plan of the said Cemetery by the Lot numbers 8018 and 29782.

EIGHTH: I give, devise and bequeath all of the rest, residue, and remainder of my Estate, real, personal or mixed, wheresoever and whatsoever it may be, of which I am now seized and possessed, or of which I shall die seized and possessed, or to which I shall be in any manner entitled, or over which I shall possess any power of appointment by any Will, or which shall be subject to my disposal by Will, at the time of my decease, after the payment of my just debts, devises, legacies, funeral and testamentary expenses, including the cost and charges of any stone monument or tombstone to be erected over my grave, and also after the payment of all inheritance or transfer taxes or other taxes due and payable to the State of New Jersey, or to

Exhibit C. 2.

any other State or Territory, or to the United States of America, or to any foreign Country, unto my Executors and Trustees hereinafter named and appointed, or the survivor or successor of them, IN TRUST, NEVERTHELESS, to and for and upon the several uses and trusts and for the purposes and with and subject to the provisions, clauses, conditions, powers and limitations hereinafter mentioned, limited and declared of and concerning the same, that is to say:— 10

(a) To take possession thereof and to keep, hold, manage and invest, and from time to time, as need be, reinvest and at all times keep invested, the said rest, residue, and remainder of my Estate in real or personal property, or both, or in such investments and securities as to my Executors and Trustees, or the survivor or successor of them, shall seem best, and so as to yield the largest income to my Estate, and to collect the interest, income, profits, dividends, and proceeds thereof. 20

(b) To take possession thereof, and to rent and let the real property of the said rest, residue and remainder of my Estate, and to collect and use the rents, issues, profits and income arising from the said real property of my Estate in the payment of any and all real estate taxes, water rates, assessments, interest on mortgages, insurance, premiums, repairs, and any and all other charges and expenses of every kind and nature incident to and incurred in the care, protection, maintenance and preservation of my said real property. 30

(c) To continue and retain any of my real or personal property, or any of my stocks, bonds, securities, or other investments that may come into the hands of my Executors and Trustees, 40

Exhibit C. 2.

or the survivor or successor of them, any law to the contrary notwithstanding, in the same form as the same shall come to them at the time of my decease; and to hold the same (if in their discretion they shall deem it wise so to do) until the final distribution of any or all of the principal

10 of the said rest, residue, and remainder of my Estate.

NINTH: I order, empower and direct my said Executors, or the survivor or successor of them, to divide the said rest, residue, and remainder of my Estate hereinbefore mentioned, into three (3) equal parts or shares, to be known as and referred to hereinafter by the following numbers, to wit: one equal one-third (1/3) part or share to be known as "*SHARE NO. 1*"; another equal

20 one-third (1/3) part or share to be known as "*SHARE NO. 2*"; and the remaining equal one-third (1/3) part or share to be known as "*SHARE NO. 3*."

AS TO SHARE NO. 1.

TENTH: I order and direct my Executors and Trustees, or the survivor or successor of them, to pay over the net rents, issues, profits,

30 and income accruing and arising from *SHARE NO. 1* and of the investments and re-investments of the same, (after the payment of the proportionate share of all charges and expenses of every kind and nature incurred in the care, protection, maintenance and preservation of *SHARE NO. 1*), to my said wife, SARAH JANE DEWEY GILMORE, during her natural life, or until she remarries; and, upon the death of my said wife, SARAH JANE DEWEY GILMORE,

40 or if she remarries, then I order and direct my

Exhibit C. 2.

said Executors and Trustees, or the survivor or successor of them, to pay over to and distribute the principal of *SHARE NO. 1* and all increment thereof, as follows:

(a) a one-half ($\frac{1}{2}$) part or share of *SHARE No. 1* to my son EDGAR S. GILMORE, absolutely, to be to him and his heirs and assigns forever; and

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(b) the remaining one-half ($\frac{1}{2}$) part or share of *SHARE NO. 1* unto my daughter, MADELINE GILMORE KELLY, absolutely, to be to her and her heirs and assigns forever.

AS TO SHARE NO. 2.

ELEVENTH: I order and direct my Executors and Trustees, or the survivor or successor of them, to pay over the net rents, issues, profits, and income accruing and arising from *SHARE NO. 2*, and of the investments and reinvestments of the same, (after the payment of the proportionate share of all charges and expenses of every kind and nature incurred in the care, protection, maintenance, and preservation of *SHARE NO. 2*), to my said son, EDGAR S. GILMORE, during his natural life; and, upon the death of my said son, EDGAR S. GILMORE, leaving lawful issue him surviving, then I order and direct my said Executors and Trustees, or the survivor or successor of them, to pay over to and distribute among such lawful issue of my said son so dying, the principal of *SHARE NO. 2*, and all increment thereof, absolutely, *per stirpes*; but if my said son, EDGAR S. GILMORE, shall die leaving no lawful issue him surviving, then I order and direct my said Executors and Trustees, or the survivor or successor of them, to pay over and distribute the

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Exhibit C. 2.

said principal of *SHARE NO. 2*, and all increment thereof unto the lawful issue of my said daughter, MADELEINE GILMORE KELLY, absolutely, *per stirpes*.

AS TO SHARE NO. 3.

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TWELFTH: I order and direct my Executors and Trustees, or the survivor or successor of them, to pay over the net rents, issues, profits, and income accruing and arising from *SHARE NO. 3*, and of the investments and reinvestments of the same, (after the payment of the proportionate share of all charges and expenses of every kind and nature incurred in the care, protection, maintenance and preservation of *SHARE NO. 3*),

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to my said daughter, MADELEINE GILMORE KELLY, during her natural life; and, upon the death of my said daughter MADELEINE GILMORE KELLY, leaving lawful issue her surviving, then I order and direct my said Executors and Trustees, or the survivor or successor of them, to pay over and distribute among such lawful issue of my said daughter so dying, the principal of *SHARE NO. 3*, and all increment thereof, absolutely, *per stirpes*; but if my said daughter, MADELEINE GILMORE KELLY, shall die

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leaving no lawful issue her surviving, then I order and direct my said Executors and Trustees, or the survivor or successor of them, to pay over and distribute the said principal of *SHARE NO. 3*, and all increment thereof, unto the lawful issue of my said son, EDGAR S. GILMORE, absolutely, *per stirpes*.

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THIRTEENTH: The provisions herein made by me to, or for the benefit of, my said wife, SARAH JANE DEWEY GILMORE, as afore-

Exhibit C. 2.

said, I hereby declare are intended to be and are given and made by me to my said wife in full satisfaction and for and in lieu of and for her dower, right of dower, thirds, or any or all other interest which she may have or can in any manner claim or demand, or which the Statutes of the State of New Jersey, or of any other State of which I may die a resident, may give or allow to her, out of my Estate, real, personal and mixed. 10

FOURTEENTH: If, for the purpose of carrying out the provisions of this Will, or if in the opinion of my Executors and Trustees, or the survivor or successor of them, it shall seem necessary or proper, either for the purpose of dividing my Estate more conveniently and satisfactorily, or for any purpose whatsoever, (including the payment of any money legacies), to sell any or all of my real or personal Estate, or both, I hereby authorize and empower my Executors and Trustees, or the survivor or successor of them, without application to any Court, to mortgage, lease, contract for sale, sell, convey and dispose of any or all of my real or personal Estate, or both, which I may own or have any interest in at the time of my decease, at private or public sale, at such time and upon such terms as to credit or otherwise, and for such prices, as to my said Executors or Trustees, or the survivor or successor of them, shall seem best and proper, whenever in their judgment the same shall sell to the best advantage, and by proper deed or deeds, conveyances, instruments of transfer, or assurances in law, to grant, convey, transfer, assign, and assure the same to the purchaser or purchasers of any or all of my said real or personal Estate, or both, and to his, her, 20 30 40

Exhibit C. 2.

its, or their heirs, successors and assigns, forever, free and clear from any and all trust or limitation whatsoever; and such purchaser or purchasers thereof shall not be bound to see to the application or non application of any of the purchase money or consideration paid therefor.

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FIFTEENTH: I hereby authorize and direct my Executors or Trustees hereinafter named and appointed, or the survivor or successor of them, to pay any and all transfer and inheritance taxes, or other taxes, due and payable to the State of New Jersey, or to any other State or Territory, or to the United States of America, or in any foreign Country, that may be imposed and charged upon and against any and all devises, bequests, legacies, annuities, and life estates under this my Will, out of the rest, residue, and remainder of my real and personal Estate mentioned and set forth in the paragraph numbered "EIGHTH" of this my Will.

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SIXTEENTH: I hereby nominate, constitute, and appoint my said wife, SARAH JANE DEWEY GILMORE, and my esteemed friend, THOMAS W. MAIRES, to be the Executors of and Trustees under this my Last Will and Testament; and I hereby expressly order and direct that my said Executors and Trustees, or the survivor or successor of them, shall not be required to furnish or give any Bond or other security to qualify, act and discharge their duties, either as such Executors or as such Trustees as aforesaid, any law to the contrary notwithstanding; and that my said Executors and Trustees shall not be liable for any depreciation in the value of any part of my real or personal Estate, unless the same is caused by their wilful act or

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Exhibit C. 2.

misconduct. And it is my intent and purpose that the duties, functions, and offices of my said Executors and Trustees shall be separate and distinct, and that I contemplate that there shall be a time when the duties, functions, and offices of my Executors shall cease, and those of my Trustees shall commence and continue.

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SEVENTEENTH: To the end that there may be no wasting of my Estate by litigation pertaining thereto, or otherwise, it is my will, and I do expressly order and direct, that in the event any of the legatees, devisees, beneficiaries, life-tenants, or persons named in this my Last Will and Testament shall be in any manner dissatisfied with this my said Will, or with any of the provisions thereof, or shall attempt in any manner, directly or indirectly, to contest, oppose, or interfere with, or aid in contesting, opposing or interfering with the probate of this my Last Will and Testament, or shall in any manner question or object to, at any time prior to or after probate, directly or indirectly, any of the provisions or trusts contained in this my said Last Will and Testament, or the distribution of my said Estate thereunder, then and in any of those events, he, she, or they so dissatisfied and contesting or opposing or interfering with, or aiding in contesting, opposing or interfering with the probate of this my Last Will and Testament, directly or indirectly, or attempting in any manner to contest or oppose or interfere with, or aid in contesting, opposing, or interfering with the probate of, or objecting to, this my Last Will and Testament, or questioning at any time prior to or after probate, directly or indirectly, any of the provisions or trusts contained in this my Will, or the distribution of my Estate thereunder, shall be abso-

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Exhibit C. 2.

lutely barred and entirely cut off from any and all portion or share of or interest in my Estate, real, personal, and mixed; and his, her, or their share or shares of my Estate shall be and belong to, and shall revert to and be equally divided among my child or children surviving me at the

10 time of my death not taking part in the said contest of, opposition to, interference with, or objection to this my Will, and not questioning any of the provisions or trusts contained in this my Will or the distribution of my Estate thereunder, as aforesaid, to be to her, him or them, their and each of their heirs and assigns forever, the said share or shares of my Estate to be at once paid and delivered to such of my children not taking part in said contest of,

20 opposition to, interference with, or objection to this my Will, and not questioning any of the provisions or trusts contained in this my Will or the distribution of my Estate thereunder, as aforesaid.

IN WITNESS WHEREOF, I, WILLIAM E. GILMORE, the Testator, have to this my Last Will and Testament, in writing, hereunto set my hand and affixed my seal this 29th day of October in the year One thousand Nine hundred and

30 Twenty-six.

WILLIAM E. GILMORE (LS)

WITNESSES:

WILBUR MUNN
 GEORGE H. WERNER
 EDWIN H. VOLCKMANN

Exhibit C. 2.

The foregoing instrument was on the date thereof signed, sealed, published and declared by the said WILLIAM E. GILMORE, the above and within named Testator, as and for his Last Will and Testament, in writing, in the presence of each of us, who, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as Witnesses thereto. 10

WILBUR MUNN residing at 383 Fairview Ave., Orange, N. J.

GEORGE H. WERNER residing at 312 Park Ave., Orange, N. J.

EDWIN H. VOLCKMANN residing at 179 High St., W. Orange, N. J.

I, WILLIAM E. GILMORE, of the Town of Montclair in the County of Essex and State of New Jersey, still being of sound and disposing mind, memory and understanding, do make, publish and declare this as and for a codicil to my last will and testament which bears date October 29th, 1926. 20

FIRST: My sister, Irene G. Leslie, having died, I do hereby revoke, cancel and annul paragraph "Fifth" of my said will, in which I give her a legacy of Five Thousand Dollars. 30

SECOND: I revoke, cancel and annul the nomination and appointment of my friend, Thomas W. Maires, as one of the executors of and trustees under my said last will and testament and I do hereby nominate, constitute and appoint my said wife, Sarah Jane Dewey Gilmore, and Fidelity Union Trust Company, a New Jersey corporation, located in the City of Newark, New Jersey, executors of and trustees under 40

Exhibit C. 2.

my said last will and testament with all the powers, duties, obligations and exemptions in said will given to my executors and trustees.

THIRD: I ratify and affirm my said last will and testament in all other particulars.

10 IN WITNESS WHEREOF I have hereunto set my hand and seal this 16th day of May, Nineteen Hundred and Twenty-seven (1927).

WILLIAM E. GILMORE (LS)

Signed, sealed, published and declared as and for a codicil to the last will and testament of William E. Gilmore, which bears date October 29th, 1926, in the presence of us who were present at the same time and who at his request and
 20 in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

FRED P. GIBBS	TRENTON, N. J.
FRANCIS LAFFERTY	NEWARK, N. J.
DANIEL L. CAMPBELL	NEWARK, N. J.

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Exhibit C. 2.

STATE OF NEW JERSEY.

ESSEX COUNTY SURROGATE'S COURT.

I, E. GARFIELD GIFFORD, Surrogate of the County of Essex, and Clerk of the Surrogate's Court of said County, do hereby certify the foregoing to be a true copy of the record of the last will and testament and Codicil thereto of William E. Gilmore, deceased, as the same appears of record in this office. 10

WITNESS MY HAND AND SEAL OF OFFICE, this 10th day of January, in (SEAL) the year of our Lord, one thousand nine hundred and twenty-nine.

E. GARFIELD GIFFORD,
Surrogate and Clerk. 20

ESSEX COUNTY SURROGATE'S COURT.

In the Matter
of
the Estate of
William E. Gilmore,
Deceased. 30

CERTIFIED COPY OF LAST WILL
AND TESTAMENT

Exhibit D. 1.

EXHIBIT D. 1.

Trust Department,
January 11, 1929.

Re: Estate of William E. Gilmore.

10 Lindabury, Depue & Faulks,
763 Broad Street,
Newark, New Jersey.

Attention of Mr. J. Edward Ashmead.

Gentlemen:

The Will of William E. Gilmore was admitted to probate in Essex County on January 30, 1928. The Executors of the estate filed their New Jersey Inheritance Tax Return with the State on September 19, 1928. This report disclosed the following:

	Amount of personal estate.	\$866,329.32
	Amount of real estate—	
	\$53,075., subject to a	
	mortgage of \$20,000.,	
	making the net amount of	
	the real estate.....	33,075.00
		<hr/>
	Total real and personal	
30	estate	\$899,404.32
	Debts, expenses and so	
	forth, amounted to.....	87,677.37
		<hr/>
	Net estate for distribution	\$811,726.95

The legacy provided in Paragraphs Second and Third have been satisfied. We are about to pay cash legacies amounting to \$8,000.00. All debts and expenses except counsel fees, executors fees and court costs have been paid.

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Exhibit D. 1.

After giving effect and consideration to these items, and estimating assets at present market value, there will remain for distribution to the three trust funds approximately \$990,000.00.

Very truly yours,

(Sgd.) L. G. McDOUALL, 10

L. G. McDouall,

LGM:EF ASSISTANT TRUST OFFICER.

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New Jersey Court of Errors and Appeals

Between

GLADYS G. DARLING,
Complainant-Appellant,

and

EDGAR S. GILMORE, and
OTHERS,
Defendants-Respondents.

On Bill, etc.

On Appeal.

BRIEF FOR GLADYS G. DARLING, Complainant-Appellant.

Statement of the Case

The appellant has appealed from the final decree in this cause made by the Chancellor on June 4, 1929, dismissing the complainant's bill to compel the respondents, Edgar S. Gilmore, the appellant's brother, and Madeline G. Kelly, the appellant's sister, to perform their agreement to assign to appellant one-third of their respective shares in the estate of their father, William E. Gilmore, so that said three children would receive equal shares therein.

The appellant claimed that she intended and threatened to file a caveat against the probate of her father's Will, in good faith, believing she had a good ground, and that in consideration of her agreeing not to file said caveat, her brother and sister agreed to assign to her one-third of their respective shares in their father's estate.

The respondent, Edgar S. Gilmore, admitted that he had told the appellant that he intended to give her one-third of the income which he

received from his father's estate; that he intended to bind himself, and that he would fix it up legally. He claimed that it was only a gift and not a binding agreement.

The respondent, Madeline G. Kelly, admitted that she told the appellant that she would give her some part of her income, but denied that there was any agreement to give her any part or that she named any definite percentage of her income. The testimony of the respondents, Edgar S. Gilmore and Madeline G. Kelly, was contradictory and not convincing. The great preponderance of the testimony did not sustain their defense.

The father, William E. Gilmore, died a resident of East Orange, New Jersey, on January 17, 1928 (Case, p. 40). He had been a prominent business man and left approximately \$900,000 (Case, p. 177). He had been for many years a very heavy drinker and when he was in those spells, he was not a clear thinker (Case, p. 55, l. 35). For six months before his second marriage, he had hardly ever been sober (Case, p. 55, l. 40 to p. 56, l. 4). The respondent, Edgar S. Gilmore, admitted that his father was a hard drinker and that he drank to excess (Case, p. 114, ll. 4 to 19). The husband of the respondent, Madeline G. Kelly, admitted that William E. Gilmore drank frequently (Case, p. 148, l. 34 to p. 149, l. 5). He lost a large part of his fortune in the last year of his life (Case, p. 59, l. 40).

William E. Gilmore had three children, by his first marriage, who survived him, namely the appellant, Mrs. Darling, and the respondents, Edgar Gilmore and Madeline Kelly. His first wife died in 1922 leaving two pieces of real

estate, one on Prospect street, East Orange, and one in East Hampton, Long Island (Case, p. 36). Said three children conveyed their interest in these properties to their father on his suggestion that it would facilitate the sale of the properties. The appellant was on friendly terms with her father up to the time when she learned that he was to be remarried in about two weeks, and requested him to deed the property back to the children so that his second wife would not have any dower right in the property. He claimed that his second wife would not have any dower in the property but told the appellant to consult her lawyer, and that he would abide by what he said. When appellant told her father that her lawyer advised that he deed the property back to the children, he became very angry (Case, p. 37). If the father claimed no interest in these properties, he should have deeded these properties back to the children, reserving his estate by the curtesy, and thus avoided the litigation which ensued and the question which would have arisen concerning his second wife's dower if the title remained in him at the time of his marriage to her (Case, p. 38, p. 106).

The respondent, Edgar S. Gilmore, testified that his father told him that there had been a disagreement between the appellant and him because of the possible interest of the second Mrs. Gilmore in the Prospect street property (Case, p. 106, which is therein incorrectly referred to as the Harrison street property).

On October 29, 1926, Mr. Gilmore made his last Will. On May 16, 1927, he executed a codicil (Case, pp. 162-174).

Prior to his death, the testator took out two life insurance policies for \$20,000 each (Case,

p. 95, p. 43, ll. 27-32; p. 136, l. 28; p. 143, ll. 5-17). One was payable to his daughter, Madeline G. Kelly, and the other to his son, Edgar S. Gilmore (Case, pp. 63, 64 and 95).

Mr. Gilmore gave his homestead and furnishings at Montclair, New Jersey, to his second wife, Sarah Jane Dewey Gilmore. He gave his daughter, the appellant, Mrs. Darling, \$5,000 in cash. After providing for his burial lot, he gave the residue of his estate to the Executors and Trustees to be divided into three equal shares. The income on the first share was to be paid to his second wife until her death or remarriage, when it was to be divided equally between his son, Edgar, and his daughter, Madeline, two of the respondents. He provided that the gifts to his wife were in lieu of dower.

The income on the second share was to be paid to his son, Edgar, for his life and on his death to his issue, or failing issue, to the issue of Madeline.

The income on the third share was to be paid to Madeline for her life and on her death to her issue, or failing issue, to the issue of Edgar.

The respondents, Edgar Gilmore and Madeline Kelly knew the substance of the Will before it was read. Mr. Maiers, who drew the original Will, told Edgar Gilmore, "You and Madeline have nothing to worry about" (Case, p. 86, l. 35). "You and Madeline are taken care of" (Case, p. 111, l. 9, p. 118, l. 23). Edgar Gilmore testified that he "had a pretty good knowledge from Mr. Maiers telling me before that Madeline and I were not left out of the Will" (Case, p. 117, ll. 20-33). Madeline Kelly testified that she first learned from her brother that she had been remembered in the

Will when he came down on Monday after the reading of the Will (Case, p. 138, l. 38, to p. 39, l. 15, p. 133, l. 17), but she is contradicted in this by her brother, the respondent, Edgar S. Gilmore, who testified, "I told her that I didn't think we were cut off. I meant Madeline and myself" (Case, p. 112, l. 17).

Edgar Gilmore did not tell Mrs. Darling as much as he told Mrs. Kelly. He concealed this information from her. He said, "I didn't tell her what I knew." In one breath Edgar Gilmore says that he did not tell Mrs. Darling, "Because I have always—ever since she had brought suit against father, Madeline and myself, I have been doubtful as to just what her reaction might be under any circumstances;" that he viewed her with suspicion (Case, p. 112, ll. 25-40); that he "thought there was still a possibility of their bringing suit, I did think they might. They still had until May 1st and I didn't know what action they might take in three months" (Case, p. 113, ll. 8-12, ll. 28-30). In the next breath, he says, "I was rather surprised to find out by the testimony that it was insincere; that they were contemplating action all this time" (Case, p. 113, ll. 22-25). He was surprised by what he expected. Edgar Gilmore's knowledge of the provisions of his father's Will is also shown by his statement to Mrs. Darling before the Will was located that he thought she had been disinherited (Case, p. 38, l. 38). This contradiction and inconsistency runs throughout his entire testimony.

The appellant, in good faith, threatened to file a caveat against the probate of her father's Will, believing that she had good grounds. It was subject to attack from her view point (Case, p. 41, l. 15; p. 42, l. 12; p. 55, ll. 13-40; p. 72,

l. 29; p. 60, l. 34). She evidenced her belief that she had good grounds for contesting her father's Will by consulting and retaining a lawyer to file a caveat (Case, p. 44, l. 22; p. 47, ll. 9-21; p. 62, ll. 24-40; p. 73, l. 23; p. 75, l. 11; p. 76, l. 7).

David A. McBride, the lawyer whom the appellant consulted, corroborated the fact that the appellant had retained him to file a caveat (Case, pp. 69 and 70; p. 73, l. 23; p. 75, l. 9).

The respondent, Edgar S. Gilmore, admitted that on January 24, 1928, before the Will was probated, he thought there was a possibility that Mrs. Darling might bring suit against the probate of her father's Will (Case, p. 113, ll. 10-30) and that she had threatened to file a caveat (Case, p. 92, l. 11). Edgar Gilmore's statement that "There is still time to file a caveat" (Case, p. 125, l. 36) clearly shows that she had previously threatened to contest the Will. Frank R. Kelly, husband of the respondent, Madeline G. Kelly, admitted that Mr. and Mrs. Darling had stated that they intended to contest the Will (Case, p. 152, l. 16). The Court below found that Mrs. Darling had threatened to contest the Will in good faith, believing that she had a good ground. It said:

"The Court: Mr. Ashmead, it does not seem to me it is important as to whether or not she could have contested the Will. As I understand this case, it is this: They made an agreement that if she did not contest the Will she should have so and so. Now, whether she could have successfully contested the Will or not, does not enter into this thing, in my opinion" Case, p. 62, l. 30).

Mrs. Darling honestly believed that the Will was subject to attack; that her sister and

brother had both alienated her father from her by their refusal always in any way to try and fix up anything between us; that her sister kept her father away from her ever since her mother died; that her father was a very heavy drinker and when he was in those spells he was not a clear thinker; that for six months before his second marriage he had been sober practically not at all; that her sister had done everything to keep her father and her apart; that her sister prevented her from seeing her father by making other appointments and engagements; that she antagonized him against appellant (Case, pp. 55-57; p. 63, l. 22); that her brother refused to help her reconcile with her father (Case, p. 61, l. 38; p. 62, l. 20; p. 63, l. 33); that her brother and sister had told her father about her objection to his second marriage (Case, p. 66, ll. 14-20).

After the Will was read, the respondent, Edgar S. Gilmore, was motoring to the home of the respondent, Madeline Kelly, when he met the appellant on Harrison street, East Orange. He told her in the presence of the chauffeur that she had been disinherited with only \$5,000, and immediately showed his anxiety as to whether she was going to contest the Will by asking her, "Are you going to fight it?" And I said, "Yes." "Well," he said, "if you do, you will lose your five thousand." "Well," I said, "what is five thousand compared to probably two hundred thousand?" "Well," he said, "if you fight the case and win it, Sadie gets her third outright." Q Who is Sadie? A Sadie is the— Q The second wife? A —the second wife. And he said, "That is that much less for us." Also he said, "I know that I need the money and if you fight the Will, you

tie the estate up maybe for two or three years, and we both know Madeline needs it.”

Both the respondents asked the appellant if she was going to fight the Will. Both asked her not to fight the Will since they needed the money and a contest would tie up the estate for two or three years and after the Will was upset, Mr. Gilmore's second wife would get her one-third outright, and if she got her one-third outright, it was going to make it much less for all of them (Case, pp. 41, 42, 43, 44, 72, 73, 74; 131, l. 32).

The respondent, Edgar Gilmore, from the spring of 1926 and until the time he went west, in the fall of 1926, had had no particular business. In the fall of 1926, he didn't do anything except occasional parts in the moving picture business, although in November he attempted to start a jewelry business which was not very lucrative. In the spring of 1927, he sold Chevrolet cars for one month; Lincoln cars for one month; and did nothing during the summer except to nurse his children while his wife went to school. In September, 1927, he conducted a jewelry business from his home, which was not productive, and continued therein until he came east in January, 1928, just before his father died (Case, pp. 100-102). He claimed that he had an income of \$5,000 in 1927 which was made up of the following items:

Earnings from his business.....	\$1,000
Gift from his father.....	500
Proceeds of sale of land.....	1,800
Income from his mother's estate.	1,700

He had had a serious illness in the spring of 1926 and did practically no work during the balance of the year. He had a wife and four

children with practically no income upon which he could depend, except \$2,700. The balance of the \$5,000 was made up of a gift from his father, who is now dead, and the proceeds of the sale of a lot (Case, pp. 100 to 103). When he came east in January, 1928, about two weeks before his father's death, he only had \$200 in the bank to support himself in the east and his wife and four children in California. He borrowed \$350 from the appellant's husband (Case, pp. 103-104). The respondent, Madeline Kelly, lived very meagerly in a very small house (Case, p. 75, ll. 39-40).

In consideration of the appellant giving up her right to file a caveat against the probate of her father's Will, the respondents, Edgar Gilmore and Madeline Kelly, agreed to assign to her one-third of the income which each received under their father's Will, one-third of the principal of the share from which Sadie, Mr. Gilmore's second wife, received the income during her life, and the principal of which was directed to be paid to the respondents, Edgar Gilmore and Madeline Kelly, upon the widow's death, and also agreed to pay over to the appellant \$5,000 from each of the \$20,000 insurance policies which were payable respectively to the respondent, Edgar S. Gilmore, and to the respondent, Madeline G. Kelly, so that the appellant would receive one-third of the fund made up of the two insurance policies and the \$5,000 bequest which the appellant received under her father's Will. This would make the three children share equally in their father's estate (Case, p. 42, ll. 10-20; p. 44, l. 37; pp. 45-46; p. 64, l. 37; p. 74; p. 76, ll. 13-30; p. 96, ll. 16-19; p. 115, l. 33).

The respondent, Edgar Gilmore, said that he would make this thing all legal and shipshape before he went back west (Case, p. 64, l. 18); that when he returned east in May, all these papers will be signed legally and shipshape (Case, p. 65, ll. 21-23). Edgar Gilmore agreed to have the assignments drawn up (Case, p. 76, l. 18).

The respondent, Edgar Gilmore, corroborates the appellant's testimony that he intended to assign one-third of his income to her (Case, p. 85, l. 35; p. 90, l. 4; p. 115, ll. 26-29). "I had told her at that time in order that she would feel that I was honest in what I said about giving her one-third of my income from the trust, if necessary, I would fix it up legally. Those were my words" (Case, p. 90, ll. 9-13; p. 127, ll. 30-40; p. 128, ll. 17-40).

To fix it up legally could have only one meaning: to make it enforceable in a court of law. It would not be enforceable in a court of law unless it was an agreement based upon a consideration. A gift is not complete until after delivery. After delivery of money there is no need for any agreement to make it legal or enforceable. The respondents clearly intended to bind themselves by an agreement, although they avoided that word in their testimony with too much care.

The respondent, Edgar S. Gilmore, himself admitted that he intended to bind himself (Case, p. 129). The respondent, Edgar S. Gilmore, never repudiated his agreement to transfer one-third of the income to appellant, but merely refused to sign a paper to that effect (Case, p. 130, l. 30).

Vice-Chancellor Church said in his opinion:

"The brother and sister also admit that they told Mrs. Darling they would give her something

from the estate. No specific amount was mentioned * * * ” (Case, p. 22, l. 38 to p. 23, l. 2). The finding that “no specific amount was mentioned” is not founded upon any testimony in the case and has no testimony to sustain it as to the respondent, Edgar Gilmore. He testified many times that he told Mrs. Darling that he “intended to give her one-third of the income which I was to derive under a trust” (Case, p. 85, l. 361). “I told her that I intended to give her one-third of the income which I was to receive under the trust” (Case, p. 88, l. 40; p. 115, l. 26; p. 121, l. 28; p. 123, l. 17; p. 127, l. 30; p. 128, l. 19). “I had told her at that time in order that she would feel that I was honest in what I said about giving her one-third of my income from the trust, if necessary, I would fix it up legally. Those were my words” (Case, p. 90, l. 9). He never at any time denied that he had told Mrs. Darling that he would give her one-third of the income he received from his father’s estate even after he changed his mind about binding himself by a written agreement. My reason for not signing the paper, I said, was because I was freely giving them this gift; there was no urging on their part at all, and I was not going to sign a paper to bind myself to give them something that I was under no obligation whatsoever to give them (Case, p. 91, l. 12; p. 124, ll. 20, 32; p. 130, l. 20). “* * * and another reason I would not bind myself was that there might be a time in the future that they would not need any of this money, they might be so successful and I was not going to be bound to pay them at a time when they might not need it in the future” (Case, p. 91, ll. 32-40, p. 124, ll. 13-38, p. 125, ll. 18-32).

Vice-Chancellor Church's finding that Madeline did not mention the specific amount of income she would give Mrs. Darling and that Madeline was never asked to execute an agreement is against the preponderance of the evidence. Gladys G. Darling and Richard F. Darling testified that Madeline agreed to assign to her one-third of the income which she received from her father's Will, and one-third of the principal, which she received on the death of Sadie, her father's second wife (Case, p. 42, ll. 16-20; p. 45, ll. 1-9; p. 64, l. 36; p. 73, ll. 3-9; p. 74, ll. 30-40); that Edgar and Madeline promised to have the assignment of the one-third of their income and one-third of Sadie's principal drawn up (Case, p. 44, l. 37 to p. 45, l. 9; p. 64, l. 36); that she talked with Madeline about assignments Saturday and Monday after the Will was read (Case, p. 66, l. 37; p. 67, l. 6).

Frank R. Kelly, husband of respondent, Madeline Kelly, testified that Mr. Darling requested him to have Madeline sign a paper at the Fidelity-Trust Company so that Mrs. Darling would have some standing (Case, p. 153, ll. 2-27). He told Madeline about said request for the assignment (Case, p. 156, ll. 25-30, 35-38; p. 157, ll. 8-10, 33-36).

GROUND OF APPEAL.

The grounds of appeal which the appellant asserts and intends to urge are as follows:

(a) The Chancellor should have decreed that the defendant-respondent, Edgar S. Gilmore agreed with the complainant-appellant, Gladys G. Darling, that he would assign, transfer and set over unto her one-third of the income which was bequeathed to him in the last Will and Testa-

ment of William E. Gilmore, deceased, and one-third of the principal of the share of said estate which was bequeathed to him upon the death or remarriage of Sarah Jane Dewey Gilmore, the widow of said William E. Gilmore.

(b) The Chancellor should have decreed that the said Edgar S. Gilmore should carry out and perform said agreement made with said Gladys G. Darling and that he should make, execute and deliver any and all agreements, assignments or other papers which might be necessary to fully effectuate and consummate said agreement made between said Gladys G. Darling and said Edgar S. Gilmore.

(c) The Chancellor should have decreed that an accounting be made by said Edgar S. Gilmore to said Gladys G. Darling of the amounts and sums of money which he had thus far received from the estate of said William E. Gilmore, deceased, and that the amount found to be due to said complainant should be paid to her by said Edgar S. Gilmore.

(d) The Chancellor should have decreed that if said Edgar S. Gilmore should fail or refuse to make, execute and deliver the necessary agreements, assignments or other papers to carry out and consummate said agreement, that said Court of Chancery should order Sarah Jane Dewey Gilmore and The Fidelity-Union Trust Company, of Newark, New Jersey, Executors of and Trustees under the last Will and Testament of William E. Gilmore, deceased, to apportion, set aside, hold in trust for and pay over to complainant one-third of the income and principal, payable from time to time under the terms of said will, to said defendant, Edgar S. Gilmore.

(e) The Court of Chancery should have made an order or decree restraining or enjoining said defendant, Edgar S. Gilmore, from disposing of or alienating his interest in said estate of said William E. Gilmore, deceased, in any manner which might or could defeat the full performance or consummation of said agreement between complainant and said defendant, Edgar S. Gilmore.

(f) The Chancellor should have decreed that the defendant-respondent, Madeline Gilmore Kelly, agreed with the complainant-appellant, Gladys G. Darling, that she would assign, transfer and set over unto her one-third of the income which was bequeathed to said Madeline Gilmore Kelly in the last will and testament of William E. Gilmore, deceased, and one-third of the principal of the share of said estate which was bequeathed to her upon the death or remarriage of Sarah Jane Dewey Gilmore, the widow of said William E. Gilmore.

(g) The Chancellor should have decreed that the said Madeline Gilmore Kelly should carry out and perform said agreement made with said Gladys G. Darling and that she should make, execute and deliver any and all agreements, assignments or other papers which might be necessary to fully effectuate and consummate said agreement made between said Gladys G. Darling and said Madeline Gilmore Kelly.

(h) The Chancellor should have decreed that an accounting be made by said Madeline Gilmore Kelly to said Gladys G. Darling of the amounts and sums of money which she had thus far received from the estate of said William E. Gilmore, deceased, and that the amount found to be due to said complainant should be paid to her by said Madeline Gilmore Kelly.

(i) The Chancellor should have decreed that if said Madeline Gilmore Kelly should fail or refuse to make, execute and deliver the necessary agreements, assignments or other papers to carry out and consummate said agreement, that said Court of Chancery should order Sarah Jane Dewey Gilmore and The Fidelity-Union Trust Company, of Newark, New Jersey, Executors of and Trustees under the last will and testament of William E. Gilmore, deceased, to apportion, set aside, hold in trust for and pay over to complainant one-third of the income and principal, payable from time to time under the terms of said will, to said defendant Madeline Gilmore Kelly.

(j) The Court of Chancery should have made an order or decree restraining or enjoining said defendant, Madeline Gilmore Kelly, from disposing of or alienating her interest in said estate of said William E. Gilmore, deceased, in any manner which might or could defeat the full performance or consummation of said agreement between complainant and said defendant, Madeline Gilmore Kelly.

(k) The Court of Chancery held that the claims of Gladys G. Darling against said defendants, Edgar S. Gilmore and Madeline Gilmore Kelly, involving a large amount of money, should have conclusive proof to substantiate them.

BRIEF OF ARGUMENT.

I.

The Appellate Court will ascertain by a full investigation and analysis of the evidence what the facts are and whether the finding of the Vice-Chancellor is consistent therewith.

On an appeal from a decree of the Court of Chancery, great weight is given to a finding upon a question of fact, because the Vice-Chancellor, who hears the case in the court below and sees the witnesses and hears them testify, has better opportunity to judge their credibility than the reviewing court. However, the rule giving great weight in the appellate court to the Vice-Chancellor's finding on a question of fact imposes no restraint on the power of the appellate court to ascertain by full investigation and analysis of the evidence what the facts are, and whether the general finding is consistent therewith. *Cartan v. Phelps*, 91 N. J. E. 312, 314 (Errors and Appeals); *Riddle v. Clabby*, 59 N. J. E. 573; affirmed 46 Atl. Rep. 782; *Cavanna v. Brooks*, (Errors and Appeals) 97 N. J. E. 329, 333; *Mackie v. Cain*, 92 N. J. E. 631, 634.

In *Cartan v. Phelps* (Errors and Appeals) 91 N. J. E., 312, at pages 314 and 315, Justice Trenchard said:

“We are of the opinion, after full examination and reflection, that the appeal is well taken. * * * So, the question presented is whether we are justified in rejecting that uncontradicted testimony, as was done in the court below.

We are constrained to think that we are not. * * *

Of course, the rule is different on appeal from an inferior law tribunal by way of writ of error, for in such case only errors of law

are reviewed, and the determination of disputed questions of fact depending on the credibility of the witnesses is the exclusive function of the jury. * * *

We do not feel at liberty to disregard that testimony of Bagley. His character for truth and veracity was unimpeached. He was expressly acquitted by the vice-chancellor, at the end of the hearing, of any fraud in the transaction. His testimony as to the amount of the debt is not inherently improbable. * * *

We think that his testimony was reasonably consistent throughout, and is in harmony with the other circumstances in evidence."

II.

This Court is not now concerned with the question whether or not the appellant could have successfully contested the probate of her father's will.

The compromise of a disputed claim, made bona fide is a good consideration for a promise, whether the claim be in suit, or litigation has not been actually commenced, even though it should ultimately appear that the claim was wholly unfounded—the detriment to the party consenting to a compromise, arising from the alteration in his position, forms the real consideration which gives validity to the promise. The only elements necessary to a valid agreement of compromise are the reality of the claim made, and the bona fides of the compromise. And what I understand is meant by the phrase, "the reality of the claim made," is that the claimant shall assert his claim in good faith, believing that it is real, or in the language of Lord Justice Cotton, in *Miles v. New Zealand Alford Estate Company*, L. R. (32 Ch. Div.) 266, a claim is

honest if the claimant does not know that his claim is unsubstantial, or if he does not know the facts which show that his claim is a bad one.

The same doctrine was subsequently declared in *Callisher v. Bishoffsheim*, L. R. (5Q.B.) 449. The Court speaking by Cockburn, *C. J.*, there said: "The authorities clearly establish, that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. * * * Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it (in enforcing his claim or right by suit), and if he bona fide believes he has a fair chance of success, he has reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue, he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexation incident to it." Apply these principals to the contract on trial, its validity in point of consideration is beyond dispute. In cases of this kind, if the contract has been fairly made, no inquiry will be made as to the adequacy of the consideration.

Rue v. Meyers, (Ct. of Ch.) 43 N. J. E., 377, 380, 382;

Grandin v. Grandin, (Sup. Ct.) 49 N. J. L. 508, 514;

Clawson v. Brewer, 67 N. J. E., 201, 207; affirmed (Errors and Appeals) 70 N. J. E., 803;

Worcester Loom Co. v. Heald, 78 N. J. L. 172, 175;

Bowers Hydraulic Dredging Co. v. Hess,
(Errors and Appeals) 71 N. J. L. 327, 330.

Holcombe v. Griggs, 78 N. J. L. 186, 189.

In *Worcester Loom Co. v. Heald*, 78 N. J. L.,
at page 175, Justice Trenchard said:

“We are not now concerned with the question whether or not the objections of the defendants to the plaintiff’s claim were unfounded. The rule is that a compromise of a disputed claim made in good faith furnishes a good consideration to support a contract, even though it should appear that such claim was in fact wholly unfounded. The court will not inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made.”

In *Bowers Hydraulic Dredging Co. v. Hess*,
(Errors and Appeals) 71 N. J. L. 327, 330, the
Court said:

“An agreement to so settle without litigation a disputed claim of infringement made in good faith furnishes a good consideration to support a contract even though it should appear that such claim was in fact wholly unfounded. The court will not inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made.”

The Vice-Chancellor applied this well settled rule at the hearing of the case. Vice-Chancellor Church said:

“The Court: Mr. Ashmead, it does not seem to me it is important as to whether or not she could have contested the will. As I understand this case, it is this: They made an agreement that if she did not contest the will she should have so and so. Now, whether she could have successfully contested the will or not, does not enter into this thing, in my opinion.” (Case, p. 62, l. 30.)

The appellant in good faith, threatened to file a caveat against the probate of her father's will, believing that she had good grounds. It was subject to attack from her viewpoint. (Case p. 41, l. 15; p. 42, l. 12; p. 55, ll. 13-40; p. 72, ll. 29; p. 60, l. 34). She evidenced her belief that she had good grounds for contesting her father's will by consulting and retaining a lawyer to file a caveat. (Case p. 44, l. 22; p. 47, ll. 9-21; p. 62; ll. 24-40; p. 73, l. 23; p. 75, l. 11; p. 76, l. 7).

David A. McBride, the lawyer whom the appellant consulted, corroborated the fact that the appellant had retained him to file a caveat. (Case pp. 69-70; p. 73, l. 23; p. 75, l. 9).

The respondent, Edgar S. Gilmore, admitted that on January 24, 1928, before the will was probated, he thought there was a possibility that Mrs. Darling might bring suit against the probate of her father's will, (Case p. 113, ll. 10-30) and that she had threatened to file a caveat (Case p. 92, l. 11). Edgar Gilmore's statement that "There is still time to file a caveat" (Case p. 125, line 36) clearly shows that she had previously threatened to contest the will. Frank R. Kelly, husband of the respondent, Madeline G. Kelly, admitted that Mr. and Mrs. Darling had stated that they intended to contest the will (p. 152, l. 16). The Court below found that Mrs. Darling had threatened to contest the will in good faith, believing that she had a good ground. It said:

"The Court: Mr. Ashmead, it does not seem to me it is important as to whether or not she could have contested the will. As I understand this case, it is this: They made an agreement that if she did not contest the will she should have so and so. Now, whether she could have successfully contested the will or not, does not enter into this thing, in my opinion" (Case p. 62, l. 30).

Mrs. Darling honestly believed that the will was subject to attack; that her sister and brother had both alienated her father from her by their refusal always in any way to try and fix up anything between them; that her sister kept her father away from her ever since her mother died; that her father was a very heavy drinker and when he was in those spells he was not a clear thinker; that for six months before his second marriage he had been sober practically not at all; that her sister had done everything to keep her father and her apart; that her sister prevented her from seeing her father by making other appointments and engagements; that she antagonized him against appellant (Case pp. 55-7; p. 63, l. 22); that her brother refused to help her reconcile with her father (Case p. 61, l. 38; p. 62, l. 20; p. 63, l. 33); that her brother and sister had told her father about her objection to his second marriage (Case p. 66, ll. 14-20).

This testimony clearly shows that the appellant, in good faith, threatened to file a caveat against the probate of her father's will, believing that she had good grounds. Vice-Chancellor Church was satisfied that the appellant had threatened to contest the will in good faith, believing that she had good grounds, as is shown in his action in cutting short the inquiry of the respondents' solicitor into the grounds on which she intended to contest the will. He said:

"The Court: Mr. Ashmead, it does not seem to me it is important as to whether or not she could have contested the will. As I understand this case, it is this: They made an agreement that if she did not contest the will she should have so and so. Now, whether she could have successfully contested the will or not, does not enter into this thing in my opinion" (Case p. 62, l. 30).

The great preponderance of the evidence is against the finding of Vice-Chancellor Church that the respondents, Edgar S. Gilmore and Madeline G. Kelly, did not enter into an agreement to assign to appellant one-third of the income which each received under their father's will, one-third of the principal which was devised to them after the death or remarriage of testator's second wife and one-third of the fund of \$45,000 composed of the appellant's bequest of \$5,000 and the two insurance policies of \$20,000 each.

The appellant and Richard F. Darling testified that the respondents, Edgar S. Gilmore and Madeline G. Kelly, were anxious to know and were worrying about whether she was going to fight her father's will; that they put forth various arguments why she should not fight the will; that they stated that if appellant did so the testator's second wife would get her third outright, and that would be taken away and make it much less for all of us; that they stated that they needed the money; that the contest would tie it all up (Case pp. 41, 42, 43, 72, 73, 75, 100-104; p 131, l. 32; p. 134, l. 33,); that if appellant did not fight the will, the respondents, Edgar S. Gilmore and Madeline G. Kelly, would assign to her one-third of the income which they received for life, one-third of the principal of the money which they received on the death or remarriage of the testator's second wife, and that each respondent would transfer to her \$5,000 of the \$20,000 insurance money which each received so that with appellant's \$5,000 bequest she would get \$15,000, an amount equal to the balance of each appellant's insurance money (Case pp. 42, 43; p. 73, l. 5; p. 74).

The appellant and Richard F. Darling, testified that she agreed not to fight the will in considera-

tion of the respondents, Edgar S. Gilmore and Madeline G. Kelly, agreeing to assign to her one-third of said income, one-third of said principal, and \$5,000 out of each \$20,000 insurance policy, thus making a one-third division of the \$40,000 insurance money and appellant's bequest of \$5,000; that she and said respondents, Edgar S. Gilmore and Madeline G. Kelly, each agreed to give one-third toward a gift of \$1,000 for their father's chauffeur who had not received anything under their father's will (Case pp. 44-47; p. 64, ll. 10-20, 36, 37; p. 65, ll. 1-23; p. 74, ll. 31-40; p. 76, ll. 13-30; p. 96, ll. 16-19; p. 115, l. 33).

The respondent, Edgar Gilmore, corroborates the appellant's testimony that he intended to assign one-third of his income from the estate to her (Case p. 85, l. 35; p. 90, l. 4; p. 115, ll. 26-29).

The appellant's testimony is not only corroborated by Mr. Darling and the respondent, Gilmore, but also by David A. McBride, an attorney, who testified that Mr. Darling had retained him to file a caveat against the probate of her father's will; that Mr. Darling had later called and told him that they had arrived at a settlement; that Mr. Darling had later called to have him prepare a written agreement with Mr. Edgar Gilmore and Mrs. Kelly with regard to the settlement; that Mr. Darling later told him not to do anything about it because they would not sign it (Case pp. 66-71). Mr. McBride is a disinterested witness; an attorney of unquestionable character and veracity. His character and reputation for truth and veracity was unimpeached. His testimony is uncontradicted, is not contrary to circumstances in evidence, and contains no inherent improbabilities or contradictions which alone or in connection with other circumstances in evi-

dence excite suspicion as to the truth of his testimony.

Victor Seabeck, who had been the testator's chauffeur, testified that he heard the respondent, Edgar Gilmore, say to Mrs. Darling, "I will take care of you" (Case pp. 78-79), thus corroborating part of the conversation on Harrison street where Mr. Gilmore admits he told Mrs. Darling he intended to give her one-third of his income (Case p. 85, line 37).

The only conflict in the testimony as to Gilmore's income is as to whether he voluntarily offered to give the appellant one-third of it or whether he bound himself by agreement to assign one-third of it to her in consideration of her agreeing not to contest his father's will, and this is only an apparent conflict. He carefully avoids and evades the use of the word agreement under the repeated leading of his solicitor. He testifies to mere conclusions of law but the following testimony clearly shows that he intended to bind himself. He said that he would make this thing all *legal and shipshape* before he went back west (Case p. 64, line 18); that when he returned east in May, *all those papers will be signed again legally and shipshape* (Case p. 65, line 21). He agreed to have said assignments drawn up (Case p. 76, line 18).

He admitted many times that he had agreed to reduce the agreement to writing and fix it up legally. "I had told her at that time in order that she would feel that I was honest in what I said about giving her one-third of my income from the trust, if necessary, I would fix it up legally (Case p. 90, line 9).

"Q What did you mean, Mr. Gilmore, when you told your sister there on Harrison

Street that afternoon that you met her, when you said you would give her one-third of the income, and five thousand of the insurance that you would 'fix it up legally'? A I didn't know exactly then. I knew Darling would not believe anything I said. He is not in the habit of believing things unless he has them signed. I wanted to convey to him that—and also to her—that I was not trying to pull the wool over their eyes, or when I refused the next night, I particularly pointed out to them that the time for filing a caveat had not expired,

Q Had not expired? A Had not expired and they could take any action that suited them, not on my advice, but on their own advice" (Case p. 127, l. 30 to p. 128, l. 8).

"Q You said to your sister, 'I am going to give you a third of my income in this estate, and five thousand dollars of my insurance money and I am going to fix it all up legally.' What did you mean by that? A I meant by that saying that if I put it in writing it would show them that I was not trying to pull the wool over their eyes.

Q You did intend, then, to put it in writing? A I had some thought. I said, 'if necessary.' I qualified that statement by an 'if necessary'.

Q You just think of the 'if necessary' now for the first time, don't you? A Absolutely not.

Q Well, you did not testify to it that way on direct examination, did you? A Well, that is exactly—I don't know that I did, but that is exactly what happened." (Case p. 128, ll. 19-35).

"Q Still, what did you mean by telling them you would 'fix it up legally'? What did you mean by that? A I meant by that, that if it were necessary I would consult with a lawyer, which I had not done, and find out what would be necessary to bind myself.

Q You intended to 'bind myself'? A No, I did not, at that writing. I thought that I would—(interrupted).

Q At that writing! The trouble is it didn't get to writing. A At that talking.

Q At that talking. A I thought I would show them that I had no—I mean to—this, that—(witness pauses).

Q Yes? A —I didn't want Darling or Mrs. Darling to feel that I was trying to pull the wool over their eyes.

Q Now, then what did you mean by saying that 'I will fix it up legally'? A That I didn't want them to feel that I was trying to pull the wool over their eyes.

Q Now I don't—(interrupted). A That is what I meant.

Q What does the word 'legally' mean to you? What did you mean when you used that word, 'I will fix it up legally'? A When I said that—that meant that if I put it in writing and gave them a signed statement, that they would know then that I would—was not trying to pull the wool over their eyes (Case p. 128, l. 38 to p. 129, l. 30).

Q And that is what you told them you would do on this division? A I said just those words, 'if necessary, I will fix it up legally.'

Q You did not use the words 'if necessary' on direct examination, did you? A Well, it seems that I did not. (Case p. 129, line 31).

Later, according to his testimony, he forgets about his desire to convince her he was honest about his agreement to give her one-third of his income, adopts the attitude of many honorable, but unreasonable men, that "his word is as good as his bond," gets mad because he is asked to sign the paper which he says he offered to sign. His alleged later action is not consistent with his original agreement and high motives, and does

not bear the badge of truthfulness (Case p. 90, l. 18).

“My reason for not signing the paper— was because I was freely giving them this gift; there was no urging on their part at all, and I was not going to sign a paper to bind myself to give them something that I was under no obligation whatsoever to give them” (Case p. 91, l. 12; p. 124, l. 20; p. 125, l. 18).

If there had been no urging on Mrs. Darling’s part and if she had expressed no anxiety about having a writing or made no demand for a one-third interest in the estate, why was he so anxious to convince her that he was honest in what he said about giving her one-third. No principle of honesty would be involved unless she had given up some right to contest the will and then he had failed to carry out his oral agreement. Why should he object to signing a paper when he had agreed to fix it up legally (Case p. 90, l. 12). His objection is not consistent with his admission that he agreed to fix it up legally. If he had fixed it up legally, the agreement would have been enforced, would have been given effect to by this court. He would have been bound. After the time for filing the caveat had expired, he changed his mind about convincing her he was honest and refused to reduce his agreement to writing although he did not repudiate his agreement (Case p. 99, line 30).

To fix it up legally clearly meant to fix it so that it would be enforced, protected, and given effect in a court of law. The respondent Gilmore’s statement that he intended to bind himself clearly meant that he intended to bring himself under a definite legal obligation to the appellant. (Webster’s New International Dictionary).

The respondent, Edgar Gilmore, admitted that he wanted to convey to Mr. Darling, and also to Mrs. Darling, that he was not trying to pull the wool over their eyes; that he knew Darling was not in the habit of believing things unless he had them signed. The only logical conclusion, therefore, is that the only way that he could convince them that he was not trying to pull the wool over their eyes was to bind himself by an agreement in writing (Case p. 127, l. 30 to p. 128, l. 8). He, himself, confirms this conclusion when he defined what he meant by "fixing it all up legally" in the following testimony: "I meant by that saying that if I put it in writing it would show them that I was not trying to pull the wool over their eyes" (Case p. 128, ll. 19, 26).

And again, where he said: "When I said that—that meant that if I put it in writing and gave them a signed statement, that they would know then that I would—was not trying to pull the wool over their eyes" (Case p. 129, ll. 24-30). Note that the witness was undoubtedly about to say after the word "would" "carry out my agreement" but then hesitates and evades using that word and finally ends up by saying "was not trying to pull the wool over their eyes." Why did his conscience trouble him about their feeling that he was pulling the wool over their eyes? There is only one reason for his anxiety. He knew that the appellant had refrained from contesting her father's will on the strength of the agreement of the respondents, Edgar Gilmore and Madeline Kelly, that in consideration thereof, they would assign to her one-third of their income; one-third of the principal which they received on the death of the testator's second wife, and one-third of the fund made up of the two \$20,000 insurance

policies and the appellant's \$5,000 bequest under the testator's will.

His testimony, that when he refused to sign the agreement the next night he particularly pointed out to the appellant that the time for filing a caveat had not expired (Case p. 127, l. 38 to p. 128, l. 8), conclusively shows that he knew that she had refrained from the contest in consideration of said agreement, and his testimony that he pointed out to the appellant that if she was not satisfied with the fact that he refused to sign any paper binding himself to make this free will gift from his income, that she had until May 1st to reconsider and bring any action which she might feel that she could legally bring or might feel she wanted to bring (Case p. 130, l. 20), conclusively shows that he knew that she had refrained from the contest in consideration of said agreement.

The general denials of the respondents, Gilmore and Kelly, that they made no binding agreements to transfer said one-third of the income, principal and insurance money to the appellant, and that no consideration was given them or mentioned for what they claim they offered to do as a free will gift, are mere testimony as to a conclusion of law (Case p. 91, p. 136, ll. 13-35). The testimony which we have quoted, and the respondent Gilmore's own admission, conclusively prove that he knew that the appellant was giving up her right to contest her father's will in consideration of his agreement to transfer said income, principal and insurance to appellant. The respondent, Gilmore, admits that he intended to bind himself and to reduce the agreement to writing in order to convince her that he was honest and did not intend to pull the wool over her eyes.

His evasiveness in so carefully avoiding the use of the word "agreement," while admitting facts, which show conclusively that he did make an agreement, corroborates the appellant's claim.

The respondent, Madeline Kelly, testified that the appellant never said anything to her about signing any papers and never made any request to her along that line (Case p. 137, ll. 17-24), but her husband, Frank R. Kelly, admitted that a day or two after the reading of the will, Mr. Darling came into his office and said that Madeline ought to go down to The Fidelity Trust Company and sign a paper down there so that the appellant would have some standing (Case p. 153, ll. 4-15) and that he told his wife that Mrs. Darling wanted an assignment (Case p. 156, l. 25 to p. 157, l. 38).

Vice-Chancellor Church's argument, in his opinion that it is apparent from the terms of the will that it was improbable that the respondents would have made such an agreement ignores the fact that the respondent Gilmore expressly admitted that he agreed to give the appellant one-third of his income and that he said that it was only the fair and honest thing to do as she was his full blood sister (Case p. 116, ll. 11-14). It also ignores the fact that many people consider that it is more important to be assured of a fixed income during their life, and of the safety of their principal, than to consume their principal in luxurious living or to risk it in business ventures, and would, therefore, consider that it was more beneficial for them to have the income for life on \$30,000, together with the right to receive \$100,000 after the death of the testator's wife, than to merely receive \$300,000 in principal at once without any right to receive the \$100,000 on the death of the testator's widow. If invested, the principal of the \$300,000, which

the respondents would have received at once if the will was upset, would produce no more income than they would have received from that fund if the will was not contested, and the respondents in that case would not receive \$100,000 out of the share from which the testator's widow received the entire income during her life. We contend that the respondents would benefit more if the will was not upset and that, therefore, it cannot be said that it is improbable that they would have made such an agreement. The Vice Chancellor's argument also ignores the fact that a contest of the will would have tied the estate up so that the respondents would not have received any income and that, therefore, they felt that they were benefiting by making an agreement which would avoid this delay and also avoid the annoyance and expense of a law suit.

We submit that a full investigation and analysis of the evidence will disclose that there is no actual contradiction in the testimony concerning the fact that the respondent, Edgar Gilmore, agreed to assign to appellant one-third of the income which he received from his father's estate in consideration of the appellant's agreement to refrain from contesting the Will; that this analysis will show that he in reality admits facts from which this court will conclude that he made that agreement and that even though he did not admit that he intended to give her one-third of the principal of the share from which the testator's widow received the income until her death or remarriage, and which Gilmore was to receive at that time, a great preponderance of the evidence shows that he also agreed to assign one-third of this principal to the appellant.

The testimony of the appellant is corroborated by the testimony of her husband, of David A. McBride, and of Mr. Seabeck, and by all of the evidence which showed that the appellant and the two respondents felt that proper provision had not been made for the appellant and that all of the money received from their father, whether under the Will or from the insurance policies, should be divided equally between them. Both the respondents admitted that they had agreed to and would divide the fund made up of the two insurance policies of \$20,000 each and of the appellant's \$5,000 bequest, in equal parts of \$15,000. They also joined equally in contributing to a fund of \$1,000 for the chauffeur. It is improbable that the appellant would have contributed to this fund if the two respondents were to have received the entire two-thirds of her father's estate and she had only received the bequest of \$5,000.

As all the facts essential to the determination of the controversy are established, the Court should enter the same decree for the appellant, which the Vice-Chancellor ought to have rendered. *Sullivan v. Visconti*, 68 N. J. L. 543, 551, aff'd 69 N. J. L. 452; *Reischmann v. Masker*, 69 N. J. L. 353, 357; *National Bank of N. J. v. Berrall*, 70 N. J. L. 757, 761; *Meecker v. East Orange*, 77 N. J. L. 623, 639; *Eatontown v. Mon. Co. El. Co.*, 78 N. J. L. 493, 498; *Frank v. Daily*, 106 A. 24, or

For these reasons, the decree entered in favor of the respondents, dismissing the bill of complaint, should be reversed.

GABRIELSON, CONOVER & STASSE,
Solicitors of Complainant-Appellant.

J. HOWARD CONOVER,
of Counsel.

New Jersey Court of Errors and Appeals

Between

GLADYS G. DARLING,
Complainant-Appellant,

and

EDGAR S. GILMORE, *et als.*,
Defendants-Appellees.

On Appeal
from
Court of
Chancery.

BRIEF FOR APPELLEES EDGAR S. GILMORE AND MADELINE G. KELLY.

This is an appeal from a final decree advised by Vice-Chancellor Church on June 4, 1929, dismissing the bill of complaint filed by the appellant herein.

The suit was instituted by the appellant, Gladys G. Darling, to compel her brother, Edgar S. Gilmore, and her sister, Madeline Gilmore Kelly, the appellees herein, to share with her the interest which they received under the last will and testament of their father, William E. Gilmore, deceased.

In her bill of complaint appellant alleged that she intended to file a caveat to the probate of her father's will and that in consideration of her refraining from doing so the appellees agreed orally to assign to her one-third of their respective shares in their father's estate. The appellees in their answer denied that any such agreement was ever made.

The learned Vice-Chancellor found as a fact that the agreement alleged by the appellant to have been made, was never entered into. The issue before him was purely one of fact. He had the advantage of observing the witnesses and their demeanor in drawing his conclusion as to the truthfulness of their testimony. In reference to this he says in his opinion :

“Both (appellees) deny emphatically that they ever made any agreement for any specific amount conditioned on Mrs. Darling’s refraining from legal proceedings. Their testimony is clear and straightforward, and seems to me, to be entirely truthful. * * * On the other hand, Mrs. Darling’s attitude on the stand convinces me that she is a highly excitable woman, and her testimony was contradictory and not convincing. * * *

“A claim of this kind, involving a large amount of money, should have conclusive proof to substantiate it. The uncorroborated statements of complainant and her husband are not, in my opinion, sufficient in the absence of any written agreement, to establish the claim she is now making. As counsel for complainant has said that the conclusion depends entirely on the facts and the reliability of complainant’s story, I shall find that she has exaggerated her facts. She endeavored to force her brother and sister into an agreement they never contemplated. They desired to assist her, but not to the extent she now insists upon. I see no necessity of citing cases in this matter. It is purely a matter of fact. I find that no agreement, such as is alleged by complainant, was ever entered into. To allow such a claim, upon the mere statement of those making it, would seriously affect property rights and result in prolonged litigation” (Opinion, Case, pp. 23, 24).

The learned Vice-Chancellor advised that the bill of complaint be dismissed and accordingly the

final decree from which this appeal was taken, was entered on June 4, 1929.

Statement of Facts.

Appellant's father, William E. Gilmore, died a resident of Essex County, New Jersey, on January 17, 1928, at the age of sixty-five years (Case, p. 84). He was a man who had been very active in business affairs both in Newark and the Oranges, and at the time of his death had accumulated an estate of a net value of approximately \$900,000 (Exhibit D-1, Case, p. 176). He had been a director and large stockholder in a number of corporations and banks. For many years he was a director of the Second National Bank, of Orange, and continued in that capacity until the date of his death (Case, p. 132).

By his first marriage he had three children who survived him, namely, the appellant, Mrs. Darling, and the appellees, Mr. Gilmore and Mrs. Kelly.

His first wife died in 1922, leaving as a part of her estate two properties—one located on Prospect Street, East Orange, New Jersey, and another at East Hampton, Long Island, New York (Case, p. 36). In order to facilitate the sale of these properties the three children conveyed the legal title to their father, which he still held at the time of his second marriage in 1925 (Case, p. 36). His daughter, the appellant, Mrs. Darling, was very much opposed to her father marrying the second time, or at least to the circumstances under which such marriage was contracted (Case, p. 54). As a result of his second marriage she became involved in a controversy with him concerning the two properties left by her mother and which had been conveyed to him by herself and her brother and sister in order to facilitate the

disposition thereof. He claimed no right in these properties other than his curtesy right (Case, p. 82).

Notwithstanding this fact, Mrs. Darling instituted suit in New Jersey for the purpose of having the deed conveying the East Orange property to him, which she had signed, declared void on the ground that it had been altered. This suit never came to final hearing but was terminated by a sale of the property, in which he and the three children joined, and the proceeds of sale divided according to their respective interests (Case, pp. 53, 81).

In order to facilitate a disposition of the Long Island property the appellees, Mr. Gilmore and Mrs. Kelly, instituted a partition suit, as a result of which the property was sold and the proceeds of sale thereof likewise divided (Case, pp. 82, 83).

From the time of this controversy the father, William E. Gilmore, and the appellant, Mrs. Darling, were never on very friendly terms. This estranged relation continued up to the time of his death (Case, p. 84).

On October 29, 1926, he made his last will and testament, and appointed his second wife, Sarah Jane Dewey Gilmore, and his esteemed friend, Thomas W. Maires, Executors thereof and Trustees thereunder. On May 16, 1927, he executed a codicil revoking a bequest to a sister who had died since the execution of his will, and naming his wife, Sarah Jane Dewey Gilmore and the Fidelity Union Trust Company, of Newark, New Jersey, as Executors. By the third paragraph of the codicil he ratified and confirmed his said last will and testament in all other particulars. The codicil was executed before three witnesses, Fred P. Gibbs, Francis Lafferty and Daniel L. Campbell (see Exhibit C-2, Case, pp. 173, 174).

Prior to his death Mr. Gilmore took out two insurance policies in the Connecticut General Insurance Company for \$20,000.00 each (Case, p. 95). In one his daughter, Madeline Gilmore Kelly, and in the other his son, Edgar S. Gilmore, was named as beneficiary (Case, pp. 63, 95).

By his will and codicil Mr. Gilmore gave his homestead and furnishings at Montclair, New Jersey, to his wife, Sarah Jane Dewey Gilmore. He gave his daughter, the appellant, Mrs. Darling, \$5,000.00 in cash. After making provision for the maintenance of his burial lots in Rosedale Cemetery, Orange, New Jersey, and The Greenwood Cemetery, Brooklyn, New York, he gave the rest, residue and remainder of his estate to his executors and trustees to be divided into three equal shares.

The income from the first share to be paid to his wife, Sarah Jane Dewey Gilmore, during her life or until she should remarry, and upon her death, or remarriage, the principal thereof to be divided one-half to his son, Edgar S. Gilmore, and one-half to his daughter, Madeline Gilmore Kelly, absolutely. He provided that the gifts made to his wife, Sarah Jane Dewey Gilmore, should be made in lieu of dower.

The income from the second share to be paid to his son, Edgar S. Gilmore, during his natural life, and upon his death, leaving lawful issue, the principal thereof to them *per stirpes*; and in case of his death without lawful issue, to the lawful issue of his daughter, Madeline Gilmore Kelly, *per stirpes*.

The income from the third share to be paid to his daughter, Madeline Gilmore Kelly, during her natural life, and upon her death, leaving lawful issue, the principal thereof to them *per stirpes*; and in case of her death without lawful issue, to

the lawful issue of his son, Edgar S. Gilmore, *per stirpes*.

And to the end that there should be no wasting of his estate by litigation pertaining thereto, or otherwise, he directed that any beneficiary attempting in any way, directly or indirectly, to contest, oppose or interfere with, or aid in contesting, opposing or interfering with the probate of, or should in any manner question or object to, at any time prior to or after probate, directly or indirectly, any of the provisions or trusts contained in said will or the distribution of his estate thereunder, should be absolutely barred and entirely cut off from any and all portion or share of or interest in his estate, real, personal and mixed; and that his, her or their share should belong and revert to and be equally divided among his children surviving him not taking part in the said contest, opposition to, interference with or objection to his will, and not questioning any of the provisions or trusts contained therein or the distribution of his estate thereunder, and the same to be at once paid and delivered to such of said children (Exhibit C-2, par. 17, Case, p. 171).

At the time of Mr. Gilmore's death none of his children knew the contents of the will (Case, pp. 56, 84, 132).

After the funeral, the safe deposit box of Mr. Gilmore was opened and the will was found and read in the presence of Mr. Pruden, of the Fidelity Union Trust Company; Mr. Munn, of the Second National Bank of Orange; the widow, Mrs. Gilmore, and the appellee, Mr. Edgar S. Gilmore.

After the will was read, the appellee, Edgar S. Gilmore, immediately started to go to Mrs. Kelly's house to tell her the contents thereof. On his way he met his sister, the appellant, Mrs. Darling, on Harrison Street, East Orange, and stopped to tell her the contents thereof (Case,

p. 85). He then proceeded to Mrs. Kelly's and told her the contents thereof (Case, p. 89).

From this point on what transpired is in irreconcilable conflict and it would serve no useful purpose to set forth the conflicting testimony as part of the statement of facts. The veracity of the appellees' story and the falsity of the appellant's story can best be dealt with in the argument.

ARGUMENT.

Appellant's own testimony disproves the truth of her claim.

As previously stated, the appellant's claim is that she intended to file a *caveat* to the probate of her father's will and that in consideration of her refraining from doing this, her brother, Edgar S. Gilmore, and her sister, Madeline Gilmore Kelly, agreed to assign to her one-third of their respective shares in their father's estate.

An examination of the appellant's testimony demonstrates (1) that she could not *bona fide* have made any such claim and in fact no such claim was made, and (2) that no agreement of compromise of any such claim was made.

(1) As to the reality and *bona fides* of the appellant's claim.

The law applicable to this case is not in dispute. The appellant cites the cases of *Grandin v. Grandin* (Sup. Ct., 1887), 49 N. J. L. 508; *Rue v. Meirs* (Ct. of Ch., 1887), 43 N. J. Eq. 377; *Clawson v. Brewer* (Ct. of Ch., 1904), 67 N. J. Eq. 201; *aff'd* (Ct. of E. & A., 1905), 70 N. J. Eq. 803; *Bowers Hydraulic Dredging Co. v. Hess* (Ct. of E. & A., 1904), 71 N. J. L. 327, 330; *Worcester*

Loom Co. v. Heald (Sup. Ct., 1909), 78 N. J. L. 172; *Holcombe v. Griggs* (Sup. Ct., 1909), 78 N. J. L. 186, the authority of which we concede.

All of these cases are based upon the very able opinion of Mr. Chief Justice Depue in the case of *Grandin v. Grandin*, first above mentioned (Sup. Ct. 1887), 49 N. J. L. 508. At page 514 he states:

“The compromise of a disputed claim made *bona fide* is a good consideration for a promise, whether the claim be in suit, or litigation has not been actually commenced, even though it should ultimately appear that the claim was wholly unfounded—the detriment to the party consenting to a compromise, arising from the alteration in his position, forms the real consideration which gives validity to the promise. The only elements necessary to a valid agreement of compromise are the reality of the claim made and the *bona fide* of the compromise. *Cook v. Wright*, 1 B. & S. 559-570; *Callisher v. Bischoffsheim*, L. R. (5 Q. B.) 449; *Ockford v. Banelli*, 25 L. J. 504; *Miles v. N. Z. &c. Est. Co.*, 32 Ch. Dic. 267, 283, 291, 298.

“The court will not inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made. *Naylor v. Winch*, 1 Sim. & Stu. 555; *Lucy's Case*, 4 DeG., M. & O. 356; 1 Story's Eq. 131, 2 Pom. Eq. Jur. 855.”

From these cases and the English authorities cited therein and in appellant's brief, it appears that while the court will not pass upon the validity of complainant's claim, upon which an alleged compromise is based, it will make inquiry as to the reality and *bona fides* of such claim. In all of the cases these elements are declared to be essential to make the forbearance of any such claim a valid and legal consideration to support a compromise.

That appellant's claim, under the circumstances of this case, could have had the essential elements of reality and *bona fide* is, we submit, beyond reasonable belief.

In answer to a question whether she had any thought about Mr. Gilmore's second wife unduly influencing him in the disposition of his estate, the appellant answered:

"No. * * * I never expressed or thought about it" (Case, pp. 54, 55).

She admits that neither she nor her brother nor her sister knew what provisions the will contained up to the time it was read. She said:

"A. We didn't know—they didn't know what the will was. * * *

Q. This was before the discovery of your father's will? A. Yes, but before we knew anything about it" (Case, p. 39).

When asked on what basis she had attacked the will, she said:

"My sister and brother had both alienated my father from me by their refusal always in any way to try and fix up anything between us" (Case, p. 55). * * *

"Q. And you thought that this will was subject to attack because your brother and sister had not tried to fix up things between you? A. No. My sister kept my father away from me ever since my mother died. * * *

Q. Now, is that all you had in mind? A. No.

Q. What else? A. My father had been for many years a very heavy drinker and when he was in those spells he was not a clear thinker.

Q. Well, now, did you have any information as to his condition at the time the will was executed? A. No" (Case, p. 55). * * *

"Q. You knew the will was drawn—the codicil was drawn and executed before Mr.

Campbell and Mr. Lafferty here in Newark?

A. I didn't know anything about it.

Q. You didn't know anything about the circumstances surrounding the execution of the will? A. No'' (Case, p. 56).

* * * "I didn't know anything about mother or father.

Q. Did you ever go to see them? A. Certainly. * * *

Q. Were you ever refused admittance to see your father when you went to see him?

A. No.

Q. Madeline had nothing to do with that, did she? A. Why, no.

Q. She never kept you away from your father? A. No'' (Case, p. 57). * * *

"Q. And you were going around to see your father of your own accord, whenever you wanted to, as frequently as you wanted to? A. When he was home'' (Case, p. 58).

"Q. Now, when did your brother go to California? A. He went in the fall * * *.

A. Yes, the fall of 1926. It would make it over a year before father's death'' (Case, p. 59). * * *

"Q. You think that your brother had unduly influenced your father in the will? A. No. He wouldn't do anything'' (Case, p. 59). * * *

"Q. Now, you have related, have you, to the Court all the reasons you had that you thought this will was subject to attack? A. Yes. But the most important thing I have not told you. At the time that my brother and sister were begging me not to fight this will and bringing their arguments to bear, the one thing that they both said—not once, but several times, was that my father in the last years of his life had changed greatly and they felt perfectly sure that if he had lived another year his will would have been withdrawn and I would not—would have been remembered in the one that he would draw up'' (Case, p. 60).

The absolute unreality of the claim, in fact, is indisputably demonstrated by the testimony of Mrs. Darling when she and her husband say that during all the time she was making these charges of undue influence that she and her husband were entertaining her brother at their house and her husband was loaning him money. Mrs. Darling testified: "Q. Oh, was your brother living with you at the time? A. Yes, my brother came to live with me either that Saturday night after the finding of the will or the Sunday. I can't remember which" (Case, p. 48). It was the following Monday night that she claims the agreement was made (Case, pp. 44, 45). It is undisputed fact that they were entertaining her brother at their house and that Mr. Darling had loaned him some money, but it is not conceivable that either of such actions could take place concurrently with the insistence that her brother had influenced her father against her. When she instituted the suit against her father in respect to her mother's property she says she had a conference with her brother and when she told him she was going to New York to see her lawyer, he turned to her and said "If you would only talk sensibly to father you would not have these rows all the time" (Case, p. 61). The reason for the attitude of her father toward her appears from her own testimony and arose out of the attitude she took toward him in instituting the suit against him in respect to her mother's property.

We submit that nobody can possibly read her testimony and arrive at a conclusion that a claim made that she intended to contest her father's will could have been made *bona fide* or had any "reality", the two essential elements necessary to a valid agreement of compromise. *Grandin v. Grandin* (Sup. Ct. 1887), 49 N. J. L. 508, 514.

(2) As to the falsity of the claim that there was an agreement of compromise.

The foregoing testimony also is equally important on the question of whether any such agreement was made. Mr. Gilmore's estate amounted to approximately \$900,000.00, and the value of the interest Mrs. Darling alleges her brother and sister agreed to convey to her would amount to the income for their lives on approximately \$200,000.00 and \$100,000.00 cash upon the death of Mrs. Gilmore; and we submit it is not within the comprehension of any sane human being to agree to convey such interest to avoid a contest based on such ridiculous grounds. It is equally incomprehensible that the complainant would be willing to incur a forfeiture of \$5,000.00 by attempting to contest the will on any such ridiculous grounds (See Will, Exhibit C-2, para. 17, Case p. 171).

Realizing the absurdity of her claim, she endeavored to build up a motive on the part of her brother and sister that would move them to make such a contract. She first said that they were very much in need of money and, therefore, wanted the matter disposed of at once. The palpable untruth of this is demonstrated by the undisputed fact that within a few days they were each to receive \$20,000.00 from the Insurance Company on the policies which their father took out for their benefit, which obviously a contest of the will would not affect. The tale of immediate need on the part of her brother and sister as presented to her, in view of this undisputed circumstance, is preposterous.

The appellant also attempted to say that the appellees were very much concerned lest if she contested the will the widow, Mrs. Gilmore, might get more than they did under the will (Case, p. 42). That this would be any incentive on the part

of her brother and sister to avoid a contest of the will is as absurd as her claim that they were in need of money and anxious to avoid delay and, in fact, in conflict therewith, for the reason that it would have been to their advantage, likewise, to have the will set aside. Under its terms all the appellees get is the income from one-third of the personal estate during their lives, respectively. They get no interest in the real estate and will receive nothing from the interest given to them in the widow's third until after her death; speaking concretely, the will gave to each, Mr. Gilmore and Mrs. Kelly, only the income on approximately \$300,000.00 and a vested remainder in \$150,000.00 capable of enjoyment only after Mrs. Gilmore's death. Obviously, if the will were ~~not~~ set aside they would have received a one-third interest in the real estate, subject to Mrs. Gilmore's dower, and would have received immediately \$200,000.00 in cash. As a matter of personal interest, therefore, it would have been to their great advantage to have the will set aside. It is entirely incredible that they would have agreed to cut down the relatively small amount of the income which they were to receive under the will in order to prevent a contest thereof which, if successful, would have resulted in their receiving \$200,000.00 in cash, payable to them immediately.

If appellant had such distrust of her brother and sister as she testified, can any court conceive that in making the agreement she alleges to have been made, which would give to her the income for their lives on approximately \$200,000.00 and \$100,000.00 cash upon the death of Mrs. Gilmore, that she would not have insisted that it be immediately and definitely set forth in writing or an assignment of such interest made? If any such agreement had been made, there was no reason why it should not have been consummated, and

yet the appellant seeks to persuade this Court that with all of her distrust of her brother and sister, she benignly rested upon an oral promise and permitted the time to go by within which to file a *caveat* or to take an appeal from the probate of the will. She does not claim that she insisted upon an assignment being made until after this date (Case, p. 65).

She does not claim that she ever made any request of her sister to make any such assignment, not even to the day of the institution of this suit (Case, p. 51).

She claims it was all settled at the meeting on Monday night (Case, p. 47). "Q. Well, you continued to see your brother and sister? A. Yes, but we didn't discuss it" (Case, p. 47). If any such agreement had been made, it is incomprehensible that any of the parties thereto would have objected to reducing it to writing. There is not one circumstance alleged that in the slightest degree excuses such action. If the appellees had the anxiety which she claims they had concerning her alleged threat to contest the will, certainly they would have been most desirous to bind her by writing. The very fact that it was not done, under the circumstances of this case, is of itself, we submit, conclusive evidence that no such agreement was ever made.

The real facts of the case.

The father, William E. Gilmore, was a man of large affairs. He had been successful in business, acted as a director of corporations and for many years was a director of the Second National Bank of Orange, which position was still held by him at the time of his death (Case, pp. 59, 83, 132, 148).

During his life he was not a teetotaler and at certain periods may have occasionally drunk to

excess. He was not a drunkard in any sense of the word and subsequent to his second marriage in August, 1925, only an occasional drinker (Case, pp. 83, 148). His will was executed on October 29, 1926, and the codicil on May 16, 1927 (Case, pp. 172, 174). He had a very keen mind (Case, p. 83). There is not the slightest evidence to support any honest belief that his drinking at any time affected his testamentary capacity. The willingness of the appellant to refer to him as a drunkard only demonstrates her own character and the extent to which she is willing to go in a hopeless effort to sustain her claim.

Her claim that either her brother, Edgar S. Gilmore, or her sister, Madeline Gilmore Kelly, influenced their father against her is equally dishonest. They did not agree with the attitude she assumed toward her father in respect to their mother's property. Mr. Gilmore testified, "I never had any antipathy towards her, but I cannot approve of her actions" (Case, p. 116).

Mr. Gilmore had been in California and had not seen his father for at least two months prior to the execution of his father's will, and ten months prior to the time it was reaffirmed in the codicil (Case, pp. 59, 83). The testator had never spoken to either his son, Mr. Gilmore, or his daughter, Mrs. Kelly, as to the provisions of his will. The first either of the appellees heard of the provisions thereof was after his death (Case, pp. 84, 132). The appellant testified that neither she nor her brother or sister knew its contents. She said: "A. We didn't know—they didn't know what the will was * * *. Q. This was before the discovery of your father's will? A. Yes, but before we knew anything about it" (Case, p. 39).

It is perfectly apparent that the amount of the legacy left to the appellant by her father was the result of her own actions alone in respect to her

mother's property. The reasonableness of his will is demonstrated by its provisions. In this connection, it should be noted that the provision voiding the bequest of any of those who might oppose it or any of its provisions, applied alike to all beneficiaries including his widow, Mrs. Gilmore, his son Edgar S. Gilmore, his daughter, Mrs. Madeline Kelly, as well as Mrs. Darling, and that in case of the voidance of any bequest, the bequest voided should be equally divided among his children surviving him not opposing the will (Exhibit C-2, para. 17; Case, p. 171).

When the contents of the will become known, the appellee, Edgar S. Gilmore, regretting that the legacy of his sister, Mrs. Darling, was not larger, in his very first interview told her that he intended to give her one-third of the income that he was to receive under the trust, but that he did not, however, intend to give her any of his interest in the widow's portion (Case, pp. 88, 89), to-wit, his interest in the portion that was given to him, or in case of his death to his children, upon the death of the widow, Mrs. Gilmore. He told her also that he intended to give her \$5,000.00 of his share of the insurance (Case, p. 115). He further told her in order that she might feel that he was honest in what he said about giving her one-third of his income from the trust if necessary, "I would fix it up legally" (Case, pp. 90, 127).

When asked on cross-examination why he came "to make such an offer", he said, "Because I thought it was a fair thing to do. She was my blood sister. I had never any antipathy toward her, but I cannot approve of her actions. She had been practically disinherited. It was a perfectly natural thing to do under the circumstances. Q. Did you ask her at that time if she was going to fight the will because of this action? A. I didn't

ask her" (Case, p. 116). * * * "Q. Did she say anything about fighting it"? He replied that she did not except to say "As long as you and Madeline are getting the balance of the estate—that is after Sadie's portion and a few minor bequests—I am satisfied" (Case, pp. 116, 86, 89).

Concerning the meetings at Mrs. Kelly's house, Mr. Gilmore testified that the Darlings made no claim that either he or Mrs. Kelly had influenced her father in any way. He was later asked: "Q. Did they ever make such a claim? A. No. Q. When was the first time that you ever heard them make such a claim? A. I heard it last Thursday on the stand" (Case, pp. 87, 94).

Mrs. Kelly testified that at no time was there any claim that either she or Edgar had influenced her father in respect to the will (Case, p. 134).

She denies the conversations testified to by Mr. and Mrs. Darling.

"Q. What conversation, if any, have you ever had with your sister with respect to your father's will or his estate? A. Only at—one time I asked her what she was going to do, if she had any intention of breaking the will.

Q. Yes. A. She said, 'No, as long as you and Edgar are remembered equally, or remembered * * * and Sadie only has her legal amount, I am not—I am perfectly satisfied'.

Q. Did she show any unfriendly disposition toward you or Edgar? A. Absolutely none" (Case, pp. 134, 135).

"Q. * * * Now, is that all the conversation that you ever had with your sister about your father's will? A. Yes.

Q. Or his estate? A. Yes.

Q. Have you ever promised to give her any portion of the interest you received under the will? A. I told her I would give her something, yes.

* Q. Something. When was that? A. Shortly after the reading of the will. I told her I would give her something.

Q. And why were you going to give her something? A. Because I wanted to.

Q. Was it by way of agreement that you made that statement to her? A. No. * * *

Q. Just state as fully as you can, will you? A. In this conversation when she knew she had been cut off, I said I was going to give her something.

Q. Was there any statement as to your receiving a consideration? A. No.

Q. For that gift? A. Nothing" (Case, pp. 135, 136). * * *

"Q. Oh, I might ask you this; has your sister ever said anything to you about signing any papers? A. Never.

Q. Never made any request to you along that line? A. Never" (Case, p. 137).

On cross-examination she testified:

"Q. And what were you going to give her? A. I didn't say anything; I didn't know. * * *

Q. Well, how much? A. Well, I had never made any idea. I hadn't thought it out or had I expressed it.

Q. Well, have you thought it out even yet? A. No" (Case, p. 141).

"Q. Now, what was the situation with respect to this insurance? You got insurance, about \$20,000? A. Yes.

Q. And what was done with that? A. I gave her five thousand dollars.

Q. What were the circumstances under which you gave that? A. I just gave it to her.

Q. Was that part of carrying out any agreement that you had? A. No" (Case, p. 136).

Mr. Kelly testified concerning these visits of Mr. and Mrs. Darling at the house of Mrs. Kelly, as follows:

"Q. You say that Mr. and Mrs. Darling were at your house several times. Did you ever hear any discussion as to any agreement about contesting this will? A. No. * * *

Q. Only tell about what happened in your presence. Did you ever hear any discussion?

A. About breaking the will?

Q. About your wife or Mr. Gilmore giving Mrs. Darling any property in consideration of her not contesting the will? A. No, there was never any thought of breaking the will'' (Case, p. 152).

The truth of appellees' testimony, we submit, is completely established by the frankness and detail in which it is given. If they had been disposed not to tell the truth and support their own case, they would have denied and not admitted that they each had any intention of making any gift to Mrs. Darling. It has always been their intention to give their sister something out of their share of the property. As stated by them, however, this intention was never by way of any agreement of compromise but by way of a voluntary gift. While they have not approved of the attitude taken by Mrs. Darling towards her father, they had no antipathy against her. As stated by Mr. Gilmore, she was their full blood sister and while he could not approve of her actions, she had been practically disinherited and he thought it was a fair thing to do, a perfectly natural thing under the circumstances (Case, p. 116). This, we submit, is the rational view of the matter and the only conclusion which the Court, in view of all the evidence, can fairly adopt.

The truth of appellees' story is supported by all the pertinent collateral facts and circumstances.

The testimony of appellees, Edgar S. Gilmore and Mrs. Kelly and also that of Mr. Kelly, is indisputably supported by those facts in respect to which the appellant's witnesses also testified and

in which testimony they agreed in essence with the appellees and the other facts about which there can be no dispute.

First, as to the gift of a portion of the insurance money to Mrs. Darling: It is admitted by all that the appellee, Edgar S. Gilmore, was named beneficiary in one of these policies and Mrs. Kelly beneficiary in the other (Case, pp. 63, 64, 95). They constituted no part of the estate of their father. It is not at all probable that had Mrs. Darling made any claim that she intended to contest the will and a settlement had been made, that such settlement would have included any portion of these insurance moneys which constituted no part of the testator's estate nor of any interest the defendants were to receive under the will. Especially is this true in a case such as this where, if the will should be set aside, the beneficiaries seeking to avoid a contest would receive immediately \$200,000.00 in cash, rather than a life estate in \$300,000.00 and a remainder in \$150,000.00 cash. The payment to Mrs. Darling of \$5,000.00 from the insurance money received by each of the defendants is, we submit, consistent only with their story that it was a gift and cannot be considered in the slightest degree as evidentiary of any agreement of compromise in respect to a contest of the will.

Second, as to the fact that no agreement in writing nor any assignment was made: As already stated, appellant claims it was all settled at the meeting on Monday night (Case, pp. 44, 45). "Q. Well, you continued to see your brother and sister? A. Yes, but we didn't discuss it" (Case, p. 47). If any such agreement had been made, it is incomprehensible that any of the parties thereto would have objected to reducing it to writing. There is not one circumstance alleged that in the

slightest degree excuses such action. If the appellees had the anxiety which she claims they had concerning her alleged threat to contest the will, certainly they would have been most desirous to bind her by writing. The very fact that it was not done, under the circumstances of this case, is of itself, we submit, conclusive evidence that no such agreement was ever made.

From January 24, 1928, until the time he returned to California, about February 1, 1928, the appellee, Edgar Gilmore, was staying at the appellant's house. Mrs. Darling admitted that on one occasion she suggested that he make an assignment to her of what he intended to give her and that her brother refused to make an assignment. She says he "stalled" her off (Case, p. 65). Her brother in his testimony fixed the date of one conversation he had in respect to her suggestion of an assignment as of January 24th, 1928 (Case, pp. 89, 90). He testified:

"After supper we sat down in the living room. Mr. Darling said to me, 'You know, you and Madeline ought to fix this matter with a paper so Gladys will get her portion of the income.' I said, 'I won't sign any paper.' He said, 'Well, I said the same thing to Kelly yesterday and he got mad, too.' 'Well', I said, 'I am not going to sign any paper'" (Case, p. 90. * * *

"Q. Did you state the reason why you would not sign a paper? A. Yes.

Q. Now, what was that? * * * A. My reason for not signing the paper was because I was freely giving them this gift. There was no urging on their part at all, and I was not going to sign a paper to bind myself to give them something that I was under no obligation whatever to give them.

Q. And you were expressing what you expected to do as a voluntary act? A. Exactly, and that was what it was.

Q. Did you ever at any time agree with them to transfer any portion of your father's estate to them, to Mrs. Darling?
A. No." * * *

"Q. Now, continue the rest of that conversation * * *. A. Oh, I said that I would not bind myself for that reason and another reason I would not bind myself was that there might be a time in the future that they would not need any of this money. They might be so successful, and I was not going to be bound to pay them at a time when they might not need it in the future. Those were my words" (Case, p. 91).

Mr. Kelly testified:

"A. Why, a day or two after the reading of the will Mr. Darling came to my office at noontime and he sat down and he said: 'Now, about that money that Madeline and Edgar are going to give Gladys', he said, 'what they ought to do is to go down to the Fidelity Trust Company and sign a paper down there so that she will have some standing', and I was a little peeved, and I said, 'Gladys has no standing at the Fidelity Trust Company', and I said furthermore, 'Whatever my wife intends to give your wife she is doing of her own free will and Madeline is not going to sign a gosh-darned thing'" (Case, p. 153).

From this testimony, it appears that the suggestion of an assignment was made to Mr. Gilmore and Mr. Kelly and it is admitted by the appellant that no such assignment was given. With the feeling of suspicion which Mrs. Darling claims she had toward her brother and her sister, it is inconceivable that if the appellant had any honest intention of contesting her father's will or any agreement to give an assignment had been made, she would have treated the testimony of both Mr. Gilmore and Mr. Kelly as a repudiation and filed a caveat. These conversions took place before the

actual probate of the will and three months before the time to appeal from the probate had expired. Her own testimony that she had a feeling of suspicion against her brother and sister, and her failure to take any action against the probate of the will is absolutely inconsistent with her claim of the making of any agreement of compromise and consistent only with the fact, as stated by both Mr. Gilmore and Mr. Kelly, that what she was to receive from her brother and sister was to be given to her by way of voluntary gift and nothing more.

Mrs. Darling further admits that her brother and his wife returned to her house as a guest on April 27th, 1928, six or seven days before the time to appeal from the probate of the will by the Surrogate had expired (Case, p. 48). She admits that she never mentioned the matter of assignment to him until after the time had expired on May 3rd (Case, p. 49).

Is such action on her part in any degree consistent with her claim that he was "stalling me off"; with the proposition that there was any reality or *bona fides* in her claim that she intended to contest the will of her father; or with her claim that brother and sister had made an agreement of compromise in consideration of her forbearance of any such claim?

She admits that she saw her sister, Mrs. Kelly, very frequently from the date of the alleged agreement (Case, p. 52). In no part of her testimony did she claim that she ever once suggested to Mrs. Kelly that an assignment be drawn. Mrs. Kelly expressly testified that her sister had never made any request to sign any papers.

"Q. Oh, I might ask you this: Has your sister ever said anything to you about signing any paper? A. Never.

Q. Never made any request to you along that line? A. Never" (Case, p. 137).

Can any conceivable reason be given why such request should not have been made and the execution of the papers demanded from Mrs. Kelly if any agreement, as Mrs. Darling alleges, had been made?

Actions speak louder than words. The appellant says that she never insisted upon an assignment from her brother until two days after her time to appeal from the probate of her father's will had expired. She does not claim she ever made any demand of her sister. Her inaction for more than three months subsequent to the making of the alleged agreement during all of which time she could have definitely insisted upon assignments, or upon failure to secure them could have taken proceedings to contest the will, belies her whole story.

Third, that the appellant's whole case is conceived in fraud is not only demonstrated by her own testimony in respect to her failure to insist upon the consummation of the alleged compromise, but as well by the endeavor of herself and husband by their own self-serving conduct and conversations with their lawyer, Mr. McBride, to strengthen her case. The testimony of Mr. McBride was clearly inadmissible and incompetent to prove any fact relevant to the issues here involved. It, at most, shows an endeavor on the part of complainant to build her case by self-serving acts and declarations. In reference to this testimony the learned Vice-Chancellor said:

"Now, you see, Mr. Vanderbilt, all this testimony amounts to is this, that Mr. Darling, we will say, as the agent of his wife, went to Mr. McBride to prepare a certain release. It does not appear that the other two had anything whatever to do with it, and his last answer is that he dropped it because he was informed that the other two would not sign" (Opinion, Case, p. 71).

In this, as in many cases of fraud, the fraudulent scheming upon the part of the complainant may be demonstrated by what otherwise might be inconsequential matters. We have such evidence in this case. The checks of Mr. Gilmore and Mrs. Kelly to her for the portion of the insurance money bear date January 31 and February 1, 1928. These checks were deposited by her on February 2, 1928, in the Savings Investment and Trust Company and have never been in her possession since. At the trial she produced a photostatic copy of them which must have been taken prior to the time of their deposit (Ex. C-1, Case, p. 161). The securing of this photostat before the checks were deposited when considered in connection with the conduct and lack of action of the complainant clearly shows that even as early as February 2, 1928, she was beginning to build the fraudulent claim which she now presents.

In claims of this character the proof must be clear and conclusive.

All of the cases hold that to support such an agreement, appellant's claim must be corroborated by disinterested witnesses or unequivocal evidence. Not a case can be found where any such claim has been maintained upon the uncorroborated testimony of the complainant.

In *Clawson v. Brewer* (Ct. of Ch., 1904), 67 N. J. Eq. 201; affirmed on opinion below (Ct. of E. & A., 1904), 70 N. J. Eq. 803, the Court said:

“In claims of this character the proof should be conclusive.”

The testimony in this case does not in the slightest degree meet the character of conclusiveness required by any of the authorities. If a claim such as is made here can be sustained by

the mere testimony of the persons making the claim, without the slightest essential corroboration, the property of every individual, which it is the function of the courts to protect, would be put in most hazardous jeopardy.

The appellant would have this Court divest the appellees of an income for their lives on approximately \$200,000 and an interest of \$100,000 cash upon the death of the widow, Mrs. Gilmore, upon her mere oral statement that they agreed to do so in consideration of appellant foregoing a claim which is so obviously baseless that it is impossible to believe that any sane person could honestly or *bona fide* make such a claim, much less that any sane person would transfer to the appellant an interest of such magnitude, in consideration of the forbearance thereof.

For the reasons stated, we submit that the learned Vice-Chancellor was entirely correct in finding that the alleged contract had never been entered into by the appellees, and the final decree should be affirmed.

LINDABURY, DEPUE & FAULKS,
Solicitors for Defendants-
Appellees Edgar S. Gilmore
and Madeline G. Kelly.

J. EDWARD ASHMEAD,
Of Counsel.



