

Court of Errors and Appeals.

BETWEEN

AMOS PALMATEER AND JOHN PALMATEER, ~~vs. ALLEN,~~

Appellants,

and

JOHN P. L. TILTON, ADMINISTRATOR DE BONIS NON, CUM TESTAMENTO ANNEXO OF WILLIAM A. HARVEY, DEC'D.

Respondent,

*Brigs
of
Appellants.*

This suit is for the specific performance of a contract for the sale of land.

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William A. Harvey, late of Monmouth county, died in 1875. In his will he made Abner Allen his executor, and Abner Allen entered upon the discharge of his duties as executor. Allen died May 6th, 1881, and the respondent became his administrator, de bonis non with the will annexed, *of Wm A Harvey dec'd Feb 27 1882*

William A. Harvey, deceased, left him surviving, his wife Catharine Harvey, who is still living.

It is claimed by the appellants that Abner Allen, in his lifetime, and while acting as executor of William A. Harvey, deceased, having full power and authority under the will of said deceased to sell the real estate left by him, either at private or public sale, at his discretion, to pay the debts of the deceased, did on the 5th day of March, A. D. 1881, sell and agree to convey to the appellants a tract of land described in the printed case as lying on the west side of the turnpike, for the sum of \$500.

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That at the said date one of the appellants paid said Allen on account of the purchase money thereof, the sum of \$25, and that Allen then and there signed a contract in

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writing, by which he agreed to convey to the appellants the said premises within one year, for the said sum, or the balance thereof.

The appellants also claim that after the death of Allen and the appointment of the respondent as administrator, &c., they applied to him to carry out the contract made with Allen, executor, having first performed their part of the contract or tendered a performance, and the respondent having refused to comply therewith, that they are entitled to the aid of the Court of Chancery and of this court, to compel a specific performance of the contract by the respondent.

The appellants further show that the contract in writing referred to, having been lost and due diligence having been made to find the same, but without success, they are entitled to a specific performance of the same, upon the secondary proof of the contents as appears by the testimony of the complainants' witnesses.

There is sufficient evidence in the case of the loss of the contract, and that due diligence has been used in searching for it to let in evidence of its contents.

In *Clark v. Hornbeck* 2 C. E. Green, 430, the Court says :

All that the law requires for a ground of admission of secondary evidence is the reasonable assurance that evidence of a higher nature is not suppressed by the party offering it.

Again : A party will not be presumed to have destroyed an instrument which he was interested in preserving.

As to proof of loss and amount of diligent search, see printed evidence :

Amos Palmateer, page 44, line 1, &c.,
 Amos Palmateer, " 51, " 10,
 John Palmateer, " 52, " 30,
 William C. Kelly, " 58, " 30.

The Chancellor in his opinion says, state of the case, page 3, line 13 : " If the agreement were established, the description, especially in connection with the evidence

“outside of the alleged contents of the receipt, would be
“sufficient to identify the property.”

The appellants claim that the terms of the agreement
or contract of sale is established by the testimony of

George C. Allen,	page 22, line 1, &c.,	
George C. Allen,	“ 23, “ 27, &c.,	
George C. Allen,	“ 24, “ 36,	
Ezekiel C. Allen,	“ 25,	
Archibald A. Applegate,	“ 28, “ 1—30,	
William C. Kelly,	“ 57, “ 25, &c.,	10
William C. Kelly,	“ 58, “ 1—12,	
William C. Kelly,	“ 59, “ 10 & 38,	
William C. Kelly,	“ 60, “ 20—39,	
Amos Palmateer,	“ 42, “ 4 & 25, &c.,	
Amos Palmateer,	“ 43,	
Amos Palmateer,	“ 44 “ 6,	
Amos Palmateer,	“ 46 “ 4,	
John Palmateer,	“ 49 “ 20,	
John Palmateer,	“ 51 “ 1 & 30.	

George C. Allen, page 21, testifies in substance that 20
Amos Palmateer came to his father's house a short time
prior to his (Abner Allen's) death, and that the subject of
the conversation between them was the sale of a portion
of the Harvey property, on the west side of the turnpike.

He says: It was the purchase of a lot on the *west* side
of the main road, (turnpike), page 23, line 27.

My father gave him something in shape of a writing,
page 22, line 20.

On page 24, line 36, he says: I have no doubt upon
that point. 30

Archibald Applegate says, in substance: 'That he farmed
the Harvey property on the west side of the road in 1881,
by agreement with Mrs. Harvey.

He says: “She (meaning Mrs. Harvey) told me I would
“have to go and see Mr. Abner Allen, because he had sold
“a piece of the land off,” page 27, line 31.

On same page, line 34, “She said he had sold it to Pal-
“mateer.”

“The land she spoke of as having been sold to Palma-
“teer was on the *west* side of the road.” 40

He further testifies that he went to see Abner Allen and Allen told him to be careful where he plowed, and described to him what was to be plowed and what to omit, and gives his reason for not wanting it plowed, on page 28, line 25.

“ He said he had sold the land which I was not to plow “ to Mr. Palmateer.”

William Devereaux, page 32, &c., describes by the map, Ex. 1 $\frac{1}{2}$, the land he did not plow by direction of Archibald Applegate, which corresponds with the premises described in complainants' bill.

“ He heard it had been sold to Palmateer.”

William C. Kelly, a witness for the complainants, (appellants), page 57, line 26, in answer to the following question, Did you see any receipt or know anything about what he (meaning Palmateer) ^{had done} in the way of purchasing this land, after he had returned? says :

“ Two or three days after that, on the very next time “ the land was brought up, I said, Let us see what you 20 “ have got there, and he walked to the safe and pulled “ out a receipt,” and describes it.

On page 58, line 12, he testifies that he read the receipt. “ It was to Amos and John Palmateer,” page 59, line 12. Exhibit 12 for complainant, being shown to the witness and being asked whether or not it stated substantially the contents of the lost receipt, says :

“ Well, I would not want to swear just how it read, but “ that was the contents of the receipt that I read over the “ counter.”

30 Page 60, line 30, he further testifies with reference to Exhibit 12, on same page :

“ If I had never known but what this was the receipt, “ and asked this morning to read the receipt, I would say “ that was the receipt I had seen.”

Mr. Kelly also refers to a conversation he had with Abner Allen, executor, upon the subject of this contract of sale, in which Mr. Allen said :

“ They (meaning Palmateers), had bought down to a “ cedar tree, and perhaps they had sold enough to pay the 40 “ debt.” Page 60, line 23.

Page 60 230

Catharine Harvey, a witness produced on the part of the defendants, (respondents) says on page 68 :

She remembers Mr. Allen coming to her house. He came to say that Mr. Palmateer wanted a piece of ground adjoining some land that Mr. Palmateer owned up by the toll house, on the *west* side of the pike ; that Mr. Palmateer had offered him \$500 for it, and he didn't say that he should take it or should not. And in answer to the question

Q. " At that time did he say anything to you about 10
" *any other lots ?* "

Answered, Yes, he spoke about two lots I understood him to say he had sold to Mr. Palmateer.

Amos Palmateer shows his object in buying that tract, page 40, lines 1 to 10.

And after relating the conversation between himself and Allen, pending the negotiations for the sale of the property, and describing it as the property referred to in the complainants' bill says, with reference to the contract in writing :

" I paid him, secondly, the \$25 for the lot to square us 20
" out to the pike. I took a receipt for this \$25. I was
" acting for my brother John as well as for myself on the
" lot, to square us out," page 42, line 30.

Again, " the boundary and description of the land were
" written in the receipt which I took on account of the
" purchase money of said land. Abner Allen wrote the
" receipt and the description and boundaries of the land
" in it, and signed it."

" He signed it as executor of William A. Harvey. I 30
" showed it to my brother John," page 43, line 15, &c.

This witness testifies more particularly to the contents of the agreement in question on page 44, line 7.

John Palmateer, one of the appellants, called as a witness for the complainants (appellants) says :

" I knew he went up to Abner Allen's to buy it." *
* * " He showed me a receipt for \$25 which he paid
" when he bought this land," page 49, line 20.

Other testimony of this witness as to contents of the 40

agreement will be found on page 50, line 25. Page 51, line 1 and 30.

The appellants insist that the testimony above referred to, fully establishes the fact that Abner Allen in his lifetime, did make a contract in writing with Amos Palmateer, for the sale of the premises in question, and which
 10 contract of sale was delivered to Amos Palmateer for the appellants, and also fully establishes the contents of that written agreement. But the Chancellor holds that the appellants are not competent witnesses, and cites *Colfax v. Colfax*, 5 *Stew. Eq.*, 206, to sustain his position.— This case, argued at the October term, 1879, and the decision rendered at the February term, 1880, (February 2, 1880), was based upon the provisions of the act of 1874, Rev. 378, Sec. 3, the supplement to that act was passed Feb. 25, 1880, P. L. 1880, page 52, and was not adjudi-
 20 cated upon in that case.

The supplement of 1880, is a remedial or enlarging statute, and should be construed liberally in correcting the mistakes and restrictions of the act of 1874.

The supplement of 1880 was evidently intended to enlarge the scope of evidence in that class of cases where the legal representatives of a deceased person sue or are sued.

The object was to remove the restrictions that encumbered the act of 1874, and had been found to work injustice.

30 All the restrictions upon evidence in such cases that the legislature intended to impose are expressed in the supplement in plain and unambiguous language.

The supplement excludes the evidence of transactions with or statements by any *testator* or *intestate*.

If the legislature had intended to exclude the evidence of other persons they would have so expressed it.

Statutes should be interpreted according to the most natural and obvious import of their language, without resorting to subtle or forced constructions, for the purpose
 40 either of limiting or extending their operations. Courts

cannot correct supposed errors, omissions or excesses of the legislature.

Waller v. Harris, 20 *Wendell*, 561, 562.

McCluskey v. Cromwell, 11 *N. Y.*, 601-2.

Dwarris on Statutes, page 144.

The spirit of a law may be referred to in order to interpret words of two meanings; but not to extend a law to a case not within its fair meaning.

Beebe v. Greffing, 14 *N. Y.*, 244, and cases there cited.

Rex v. Poor Law Commissioners, 6, *Adolphus & Ellis*, 7. 10

Newell v. The People, 7 *N. Y.*, (3 *Seldon*) 97.

Doughty v. S. & E. R. R. Co., 1 *Zab.*, 443, 455.

Lane v. Scomp, 5 *C. E. Gr.*, 82, 86.

Thompson v. Egbert, 2 *Har.*, 459, 462.

Freeholders Mercer v. Freeholders Warren, 3 *Zab.*, 416.

Sharp v. Teese, 4 *Hal.*, 352, 355.

Rudderow Col. v. The State, 2 *Vr.*, 515.

The State v. Parker, Receiver, 6 *Vr.*, 583.

Douglass v. Freeholders Essex, 9 *Vr.*, 214.

Water Commissioners v. Brewster, 13 *Vr.*, 129, 130. 20

Wellman v. Bergmann, 15 *Vr.*, 613, 615, 616.

If the views of the Chancellor be sustained in this case it would work an injustice which the supplement of 1880 was evidently intended to prevent.

The suit is based on a written contract. Such a writing is necessary, under the Statute of Frauds, to enable the appellants to maintain their action.

That contract has been lost. Beyond a doubt the respondent has our money, \$25.

The fact that there was a contract in writing, and the 30 contents of that writing have been very clearly shown.

It only remains to be proved that Allen, executor, signed it.

It is impossible to prove handwriting on a lost agreement.

If Amos Palmateer was the only person who saw it signed and under a forced construction of a remedial statute he is excluded; then the injustice and hardship that the supplement of 1880 intended to remove still remains. Not by the plain words of the statute, but by correcting 40 some supposed omission of the legislature.

But even assuming that the testimony of Amos and John Palmateer come within the spirit and meaning of the supplement of 1880, and for that reason they are incompetent to testify, it is urged and insisted that the disqualification has been waived or removed by the admission of the defendant, John P. L. Tilton, administrator, as a witness in his own behalf, in the same cause.

Walker v. Hills Executors, 7 C. E. Green, 513.

The appellants further submit, that if the testimony of
10 Amos and John Palmateer be excluded as incompetent, there remains sufficient evidence of competent witnesses to establish the agreement in writing or receipt, to enforce which the aid of the court is invoked.

The object of the purchase by the appellants was to square their land out to the turnpike.

See map Exhibit 1½.

Amos Palmateer's evidence: Wanted to straighten the
20 land we (appellants) owned behind it, out to the turnpike, p. 40, 41.

John Palmateer's evidence: It was to square our (appellants) triangle out with the turnpike, p. 50.

Catharine Harvey's evidence: The idea was, I suppose, they (appellants) wanted to square their land out to the pike. p. 73.

Boundaries named in receipt, Exhibit No. 11.

See evidence of William C. Kelly, pp. 58, 60, 61.

No objection has been made by demurrer or otherwise,
30 to the description as uncertain.

Reasonable certainty in the description is all that is required, and it is not material in what way the requisite certainty is attained.

Robeson v. Hornbaker, 2 Gr., Ch., 60.

Hoffman v. Hummer, 3 C. E. Gr., 83.

Lewis, Adm'r, v. Reichy, 12, C. E. Gr., 240.

Brown's Legal Maxims, 623, &c.

The attempt made to confuse the land in question with the lots on the east side of the turnpike is a failure.

George C. Allen testifies that the lot his father sold Palmateer in his presence, was on the *west* side of the turnpike, pp. 21, 22, 23.

Ezekiel C. Allen testifies to same effect, p. 25.

Amos Palmateer testifies on *west* side of turnpike and gives full description, p. 39.

John Palmateer testifies the land bought was on the *west* side; he didn't know of lots bought on *east* side of 10
turnpike, for a year after purchase; he was not interested in lots on *east* side, pp. 49, 50, 51.

Catharine Harvey testifies that Allen, the executor, told her in the month of March, as he died the May following, that \$500 was the price the appellants had offered him for land in question on the *west* side, and \$100 for lots on *east* side, pp. 68, 72, 73. She gave instructions not to plow land in question, as the flying reports were Mr. Palmateer had bought it. She was frequently told it, pp. 20
71, 72, 75, 76.

She told Tilton, the administrator, of the reported sale on the *west* side, p. 80.

Archibald A. Applegate testifies Mrs. Harvey told him about the sale of land in question by Allen to Palmateer, and he must go and see Allen about where to plow; he did, and Allen showed him the land and told him he had sold to Palmateer and not to plow it, pp. 27, 28.

The price agreed upon was adequate. 30

The consideration in the deed from Howlands to John and Amos Palmateer, dated April 22, 1879, (Ex. 13,) is \$1,450 for 7 25-100 acres adjoining land in question, and is better located, being 15 chains and 73 links or 1048 feet on the turnpike, and running back to the railroad, besides the triangular piece in rear of land in question, which is \$200 per acre; while \$500 for the land in question, containing 86-100 of an acre, including one-half of the turnpike and the avenue, being only 2 chains and 80 links (Ex. 1½) or 185 feet on turnpike, purchased less than 40

- one year thereafter, is at the rate of \$581.40 per acre. Tilton, the administrator, is the only person called to prove price inadequate, and it does not appear that he is an expert or judge of the value of property in that neighborhood. He speaks of it when cut up in lots, but much of the land in question lies back, and is ill-shaped. The executor also sold, same date, to Amos Palmateer, 5 lots (see receipt Ex. No. 3) on the *east* side of the turnpike, much nearer the ocean, for \$100, being only \$20 a lot.
- 10 Tilton swears selling \$500 on *east* and \$350 per lot on *west* side of turnpike, p. 84. See also account Ex. No. 7, as to prices received for lots on the *east* side much nearer the ocean.

No fraud is charged on the appellants or Allen, executor, nor could there be on either of them.

- Palmateer gave full price asked by the executor. The bargain was deliberately made. Mrs. Harvey was consulted. Appellants took from March 2 to March 5 to make up their mind. A year was allowed to make the deed.
- 20 Unless the inadequacy of price is such as shocks the conscience and amounts in itself to *conclusive and decisive evidence of fraud* in the transaction, it is not itself a sufficient ground for refusing a decree of specific performance.
- White v. Damon*, 7 Ves., 34.
Coles v. Trecothick, 9 Ves., 234, 236.
Ready v. Noables, 2 Stew., 497.

- Application to Tilton, Administrator, for deed.
- 30 Made within the year mentioned in the contract, p. 44, 45, so no laches. Also made to Mrs. Harvey, p. 45.
- Tender of balance of purchase money, \$475, made by appellants to Tilton, administrator, before suit commenced, p. 45. This done from great caution, there being no necessity for it, because of repeated refusals to make deed by the administrator and Mrs. Harvey, pp. 44, 45. Money in the bank and ready at any time; it was lying in the bank for more than a year for that purpose, pp. 45, 46. Administrator admits the tender, pp. 82, 88. His son
- 40 Charles present at the tender, pp. 92, 93.

Parke v Pettit
 14 Ves 516

Power of Administrator de bonis non, &c., to sell.

He has same rights as the executor had, Rev. 398, Sec.

11. Will gave executor power and authority to sell lands to pay debts and funeral expenses. p. 2, Exhibit No. 8.

The debts are not yet paid. This the administrator admits in his answer, p. 19. The Rogers bond and mortgage remains unpaid, and a debt of the estate, pp. 9, 10, 53, 54. It is for \$600, and dated Sept. 15, 1874, pp. 53, 54. Exhibits Nos. 5 and 6. Allen, the executor, said the object of the sale of the lots was to pay this mortgage. 10 pp. 45, 46.

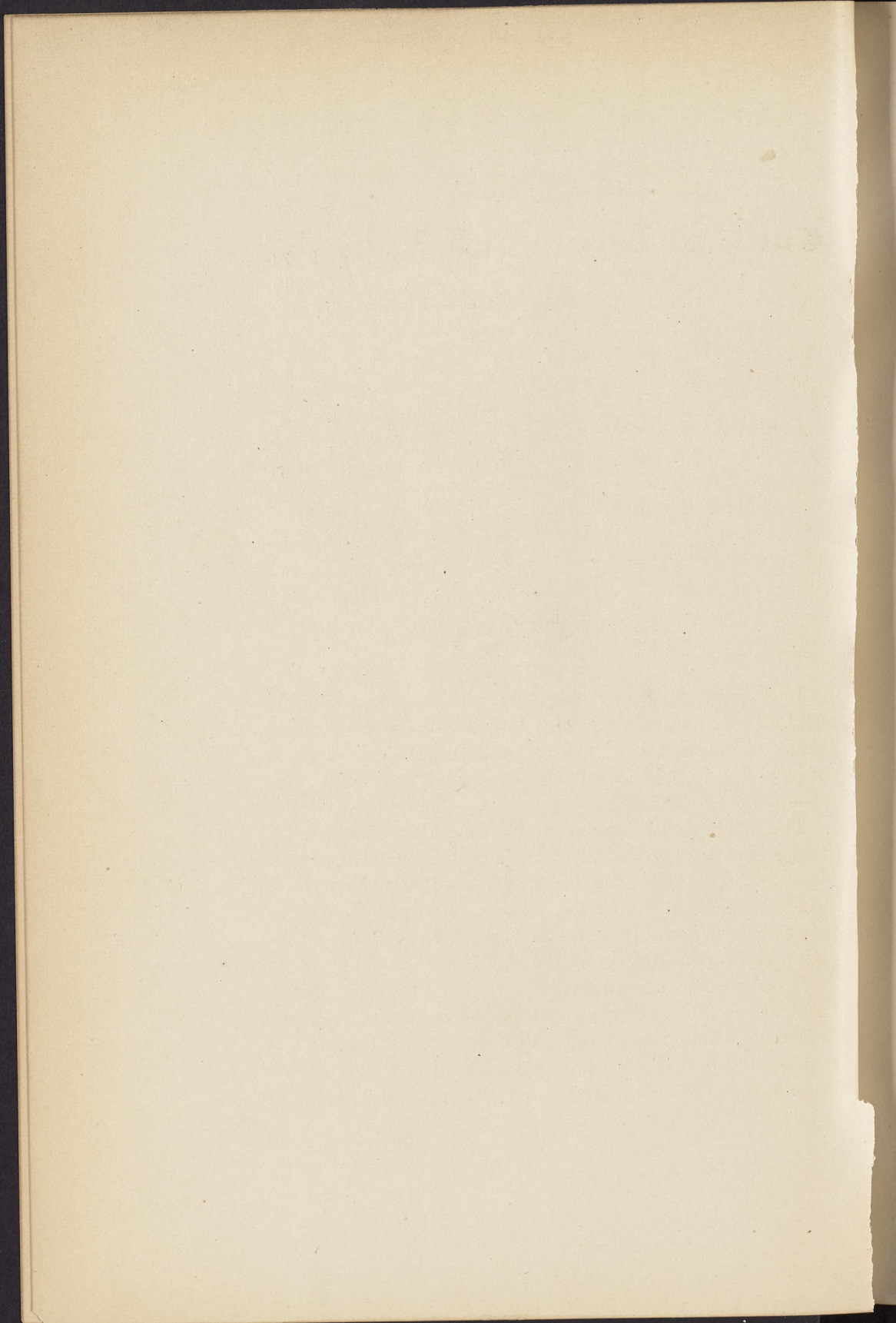
It will be seen that the \$500 for the land on the *west* and \$100 for the lots on the east side of the turnpike would just pay the mortgage. Allen, the executor, made other contracts of sale, which Tilton, the administrator, carried out by making conveyances, p. 89.

It is respectfully submitted that the decree of the Chancellor should be reversed with costs, and that the appellants are entitled to the relief asked for in their bill of complaint in the Court of Chancery. 20

ACTON C. HARTSHORNE,

HENRY G. CLAYTON,

Of Counsel with Appellants.



NEW JERSEY

Court of Errors and Appeals.

NOVEMBER TERM, 1885.

BETWEEN

HARVEY'S ADMR., CUM. TES. AN.,
Respondent,

and

AMOS PALMATEER, ET. AL.,
Appellants.

*On Bill for
Spec. Per.
of Contract
for Sale of
Land.*

RESPONDENT'S POINTS.

1. Neither Harvey's executor nor his administrator, *cum. tes. an.*, had authority to sell land without the express assent of the widow. This proposition raises a question of intention to be drawn from the whole will of Harvey. (See pages 2 and 3 of book.)

The pleader who framed the bill of complaint evidently recognized this in his bill. (See book, page 7, line 25). 10
In it he charges that the widow "consented and agreed," to the terms of the alleged purchase, and that the executor "acted in the said bargain," &c., "for the said Catharine Harvey, as her agent and attorney."

No consent or agreement on her part is proved; on the contrary she expressly swears that she opposed the proposition of a sale of any lands on the west of the turnpike, contending that the lots on the east of the turnpike were ample to pay all demands for her support. (See page 69 top, and page 68, bottom).

Under the first item of the will she had authority to sell so much or *all* of the real estate "as she might *desire*," and to make a bona fide deed of conveyance fully and effectually at law to the purchaser or purchasers of the same, to all intents and purposes forever, for the purpose of her maintenance and support, and no other. And although the next item of the will gives the executor authority to sell as much of the real estate as will be necessary to pay all just debts and funeral expenses, together
 10 with expenses, costs and charges of settling the estate, yet this power was to be exercised in conformity to and not in antagonism with the said first clause of the will. The authority to sell under the second item depends upon the *fact* of there being debts of deceased beyond the ability of his personal estate to satisfy, and that fact must first appear before the executor had power to act under this item, and before the "necessity" could arise to justify a sale of lands by the executor.

The order of the above items in the will, and the fair-
 20 meaning of the testator is, that his widow has the *first* choice of the lands for her support. This construction of the will is the practical one put upon it by the executor in consulting her, as her testimony and other proof shows.

Even if this is not the correct construction of the will, then

2. The burden of proof was upon the complainant, to
 30 show that in March, 1881, the time of the alleged contract, (nearly six years after the probate of the will), the personal estate was insufficient to pay debts. The presumption is, that in the usual course of such affairs all the debts had been paid.

Independent of any presumption, the burden of showing that such *necessity existed*, and the *determination* of such necessity by the executor expressly, was thrown upon the complainant, who seeks to enforce this contract. There was no proof of these requisite preliminaries.

3. If this authority to executor to sell lands was one subject to the "desire" of the widow therein, or to the joint selection of lands by both trustees, then that trust, after the death of the executor, was not transferred by the appointment of the administrator *cum. tes. an.*, and he is not empowered to make the deed, it was then *not* a mere naked authority to sell. See Rev. page 398, paragraph 11, and cases showing the construction of that statute by the courts.

Dominick v. Michael, 4 *Sanf.*, 374. 10

Conklin v. Egerton, 21 *Wend.*, 430.

Beekman v. Bonsor, 23 *N. Y.*, 298, 303.

Roome v. Philips, 27 *N. Y.*, 357, 363.

Bain v. Matteson, 54 *N. Y.*, 663.

Dunning v. Ocean National Bank, 61 *N. Y.*, 497.

Brush v. Young, 4 *Dutch.*, 242.

4. Conceding (for the sake of the argument only) that the appellants established the existence and contents of the alleged contract, it is a most *improvident* one for the estate and the widow, and has no claims to be enforced by a Court of Equity. 20

The undisputed proofs, supported by the answer, show that the land in question was worth *three times* as much as the alleged contract price, namely, fifteen hundred dollars, (\$1,500.) See answer page 20, from top to line 10, also the proofs, same book, page 84, line 23 to bottom.

There was no contradiction of this evidence and no cross examination of the witness on this point.

The effort in this suit is to force this administrator and trustee to convey the trust property for one-third of its worth. 30

A decree of specific performance is not a matter of right; it is a matter of discretion in the court governed by general rules and principles.

Smith v. McVeigh, 3 *Stock.*, 239.

3 *Parsons on Contracts*, page 350.

And such decree will never be made unless substantial justice is done thereby, but the parties will be left to their remedies at law.

Ely v. Perrine, 1 *Gr. Ch.*, 396. 40

Pinner v. Sharp, 8 C. E. Gr., 274-281.

Rodman v. Zilley & als., Saxton, 325.

Miller v. Chetwood, 1 Gr. Ch., 199.

Seymour v. Delancey, 6 Johns. Ch., 226.

Courts of Equity take the liberty to examine into the consideration to be given, its fairness and equality, and all the circumstances connected with it, and if anything manifestly inequitable appears in that part of the transaction, they will not lend their power to carry the contract
10 into execution.

Ready v. Nookes, 2 Stew., 498.

Rodman v. Zilley, Saxton, 320.

Even if the inadequacy of the consideration be not so great as to avoid the contract, still if it be sufficient to give to the contract the character of *hardship* or *oppression* equity will leave the plaintiff to his remedy at law.

3 *Parsons on Con.* (6th Ed.) 360 *Star.*, page 361.

Day v. Newman, 2 Cox, Eng. Ch., 77, where *one-half* value was considered inadequate enough to avoid the contract.

20 *Seymour v. Delancey*, (*supra*) where Ch. Kent held that a difference of *one-half* between value of the land and price agreed was sufficient ground to refuse decree.

Also *Powers v. Hale*, 5 Foster, 145.

Howard v. Edgell, 17 Vt., 9, 28.

Johnson v. Robinson, 4 Md. Ch., 182, 183.

Reeves Dom. Rel., 386. *Newman on Con.*, 223, 224.

The rule of the English courts is the same; mere *inadequacy* of price is a sufficient reason to refuse specific performance of a contract.

30 *Falcke v. Gray*, 4 Drewry & Smale, 651, (1859).

5 *Jurist*, New Series, (London) 645.

29 *Law Journal*, (New Series), Ch. 28.

Underwood v. Hithcox, Vesey, 12, 279.

City of London v. Nash., Vesey 12, 279.

Faine v. Brown, 2 Vesey 304.

Ramsden v. Hilton, 7 Vesey, 34; 9 Vesey, 234.

In *Seymour v. Delancey*, on Appeal, 3 Cow., 516, said Chief Justice Savage: "The question was one upon which very great men have differed, and have adminis-
40 tered the equity of the court upon diametrically opposite

principles; the one class maintain that the court will not lend its aid to enforce the performance of contracts unless they are fair, just and reasonable, and founded on adequate consideration. The other class maintain that unless the inadequacy of price is such as shocks the conscience and amounts in itself to decisive and conclusive evidence of fraud in the transaction, it is not of itself a sufficient ground for refusing a specific performance."

The former doctrine was declared and acted upon in England by Lords Somers, Macclesfield, Northington, 10 Guilford, Talbot, Harcourt, Hardwicke, Alvanly, Erskine, Rosslyn, Chief Baron Eyre, and in this country by Chancellor Kent and the courts of New York, South Carolina, Virginia, Connecticut.

If this court adopt the rule of the Court of Chancery in *Shaddle v. Disborough*, 3 *Stew.*, 370, that "unless the inadequacy is such as to shock the conscience of the court, and in itself to amount to conclusive and decisive evidence of fraud in the transaction, a defence to such an action based on that alone will not avail." It is submitted that 20 such a difference as is shown here between the alleged price and the value of the land is sufficient to bring the case even within the last named rule.

5. The appellants were not in a position to produce *secondary* evidence of the contents of the alleged contract.

No proof was offered of any *bona fide* and diligent search having been unsuccessfully made for the alleged lost instrument, the appellants were bound to prove clearly 30 *first* the former existence of the contract on which they based their suit, and *second* a sufficiently diligent search for it before offering evidence of its contents.

Poignand v. Smith, 8 *Pick.*, 272.

Jackson v. Frier, 16 *Johns.*, 192.

Jackson v. Root, 18 *Johns.*, 60.

Hatch v. Carpenter, 9 *Gray*, 271, 273.

The strictness of search required depends upon the nature of the paper and the circumstances of the case. In 40

Jackson v. Root, Ch. J. Spencer says: "I think there is a material distinction between papers and writings which cease to be of any use or value or any evidence of title, and such as are the muniments of one's title."

"In the first case the slightest proof of loss ought to entitle the party to give evidence of the contents, whilst in the other case the proof should be more strict."

See also 2 *Best on evidence*, par. 482, and cases there cited.

- 10 The excuses which the law allows for dispensing with primary evidence are, that the document has been destroyed or lost, that is to say, after sufficient search has been made. A party is not allowed to produce secondary evidence until a *bona fide* and diligent search has been unsuccessfully made for the lost instrument in the place where it was most likely to be found.

The complainant does not show a *bona fide* effort to produce it or find it, when he says on page 44, top, that he has his "ideas as to how it got out." He founds his
20 whole claim to relief upon this paper, and yet does not disclose his whole knowledge about it to the court.

He does not swear that it was taken out of the jurisdiction of the court. Nor does he say that it was taken by any party to this suit or who is privileged to withhold it. For aught it appears it may be in his brother's hands, the other complainant.

- 30 6. If complainants are in a position to offer secondary evidence of the alleged contract, it is insisted that they have proved nothing; first, because the proofs were not competent, and second, if competent, are not truthful or reliable.

Amos Palmateer, the only witness who swears to the making and signing of the alleged contract, was an incompetent witness upon that subject. The other party to the contract is dead; both the nominal and beneficial parties opposed to complainants' in that alleged contract are dead
40 and unable to speak about it. (That subject is fully dis-

cussed by the court below, and is sustained by both reason and authority). But if Amos Palmateer be adjudged by this court a witness qualified to speak upon a subject on which his opponents' mouths are closed by death, there is enough in the case to contradict him effectually and to discredit his whole testimony upon this subject.

On pages 5 and 6 of the bill of complaint he alleges that on an occasion, about the first of March, 1881, that complainants, by himself, "accepted" the offer of said Abner Allen to sell said land for \$500. On pages 40 and 42, in contradiction of his own bill, he swears that he "did not accept the offer at that time." [See page 42, line 23.] 10

This is a distinct admission that no contract for the purchase of the land in question was consummated on March 2d, 1881.

Catharine Harvey swears [page 68, line 32] "that it was an offer which was opposed by her and never accepted by the executor. Also (page 73, line 25. Page 77, line 9, and line 22.)

He testifies that on March 5th, 1881, at Allen's house, at Deal, the bargain was consummated, but he is discredited in this in various ways. 20

First. By his bill of complaint as above stated.

Second. By his failure to produce the paper which he says Allen then signed as evidence of the contract. He attempts to explain that this paper has been lost, but produces another receipt for other lots for the same amount, and fails to show why he lost one receipt and not the other, although he claims they were kept in the same place. 30

Third. His own witness, George C. Allen, contradicts him. He swears that he was present on the same occasion, on March 5th, 1881, and that there was but one payment and but one receipt. (Page 22, line 18, and page 23, line 31.) And his other witness, Ezekiel C. Allen, fails to confirm him in any of his statements of occurrences on March 5th, 1881, (page 26, line 10.)

Fourth. No books or papers of the deceased executor are produced or proved to confirm these statements. Allen's books as executor should show his receipts of money 40

and they do not show it, otherwise they would have been produced. On the contrary, the account filed by the administrators of Abner Allen, in December, 1881, fails to show such receipt, (see Exhibit C for defendant,) while the account of the same administrators, complainants' Exhibit No. 7, filed since the commencement of the suit, has no force in the light of the previous account.

10 *Fifth.* His own conduct in failing to tender the balance of \$475 within the year, which according to the contract claimed by him, was due before March 5th, 1882, con-
 10 contradicts him. If he had had such a contract he would have been anxious to tender to both the widow and the representative of that estate, the \$475 before the time expired, and yet, after more than eighteen months had expired, he had not yet made the tender. In fact, it was not until September 20th, or October 5th, 1882, that he made any offer of money to the representative of that estate. (See page 82, line 15), the administrator's evi-
 20 dence, and (page 92, bottom, evidence of Charles Tilton).

20 *Sixth.* His silence when he ought to have spoken con-
 20 tradicts him. On February 27, 1882, the administrator was appointed, and yet Amos Palmateer, who met the administrator at Asbury Park either on February 28, or March 1st, 1882, (see page 79), said nothing to him about the land in question, but did speak to him about the lots he had bought on the east side of the turnpike; and again in April, 1882, (page 80, line 15), he saw admin-
 30 istrator and was silent about the land in question, but did speak to him about the lots on the east. And again, as late as June 1st, 1882, when he saw Amos Tilton, who came to see him in behalf of the administrator about lands which he claimed to have purchased, and had a conversation with him about the receipt for the five lots, the complainant was still silent as to the land in question. (See page 92, top, and line 17 to 22). As late as the Fall of 1882, when he saw Mrs. Harvey, (see page 69, bottom, and page 70, top,) he for the *first* time to her claimed that he had the contract for the lands in question, having been silent about it to her up to that late period.

40 *Seventh.* He made contradictory statements as to the

alleged transaction with Allen. He told the widow in the Fall of 1882, that he had paid \$50 to Allen on the contract in question, (see page 70, top). Afterwards, in another interview with her, he said that was a mistake; that it was \$25 he paid on it. (See page 70, line 22).

Eighth. The receipt which he obtained from George C. Allen contradicts him, (see Exhibit 1 for complainant). He swears he obtained that after the appointment of the administrator, Tilton, and yet that is dated February 16, 1882, and Tilton's appointment was not made until February 27, 1882; and that receipt has been altered by some one by the insertion of the name of Amos, as the difference in the shade of ink would indicate. 10

Ninth. The alleged contract bears internal evidence in what it omits, that Amos Palmateer's statements are unreliable. The alleged contract says nothing about a mortgage of six hundred dollars held by Charles Rogers, or any other lien, or whether it is to be conveyed subject to a lien or otherwise, and yet complainant asks that it be conveyed to him free of the lien of this mortgage and all other liens, and testifies on (page 46, top,) that this property west of the turnpike was to have been conveyed to him free of encumbrance. That this was the agreement with Mr. Allen, and that he asked Mr. Allen if there was a mortgage on this property, and that Allen said there was a mortgage for six hundred dollars, held by Charles Rogers. And this court is asked to believe that this executor with the knowledge of this mortgage, made this contract without referring to it in any way. 20

Again, this complainant is contradicted by the witness, J. P. Tilton, as to other important statements. On (page 47, line 11) he says he is "sure" that he had a conversation with the witness at Asbury Park, between the first and middle of February, 1882, and that at that time he had heard that the witness had been appointed administrator of Harvey. In fact witness was not appointed until February 27th, 1882, and on page 44, bottom, he says it was after Tilton's appointment that he obtained this duplicate receipt. Its date, February 16, 1882, contradicts him. 30

Other improbabilities and contradictions in the testimony of Amos Palmateer are referred to in the opinion of the court below, and are not here intended to be repeated.

Another convincing circumstance that the alleged receipt was not drawn by Allen, the executor, who had knowledge of the land, but has been since conceived by some one else, is shown by the *inaccuracy* of the description. The last line fails to close and is wanting, and the complainants' witnesses upon that point are confused and
10 inexact.

It is respectfully submitted that the complainants have made no case, and that the decree below should be affirmed.

W. H. VREDENBURGH,
Of Counsel with the Respondent.

In Chancery of New Jersey.

MAY TERM, 1884.

Between
Amos Palmateer and John Palmateer,
Complainants,
and
John P. L. Tilton, Adm'r, & als,
Defendants.

OPINION.

Bill for specific performance. On final hearing on pleadings and proofs.

Mr. C. ROBBINS for complainants.

Mr. W. H. VREDENBURGH for defendant, Tilton, 10 Admr.

The Chancellor.

This suit is for the specific performance of an agreement for sale of land. It is brought against the administrator *de bonis non* with the will annexed of William A. Harvey, deceased, late of Monmouth county, the devisees under the will and the husbands of such of them as are married women, and the holder of a mortgage given by Mr. Harvey and his wife on the premises and other land. The property in question is a small piece of land in what 20 was called Central Park, a tract lying between Key East and Ocean Grove, near the sea shore, in Monmouth county. It is wholly unimproved and lies back from the shore. It contains 86-100 of an acre. Mr. Harvey owned it at the time of his death. By his will he gave his wife all the residue of his real estate after payment of his debts, and so much of his personal property as she might choose to take, and fully authorized and empowered her to sell and convey (but only for her support) the whole or any part of his estate, real or personal. And 30

he ordered his executor to sell all his personal property not taken by his wife, as soon as convenient after his death, and so much of his real estate as would be necessary to pay his debts and funeral expenses, and provided that such sale of his real property should be either public or private as the executor should think best, and on such terms and conditions, and in such quantities as he should think and adjudge to be for the interest of all persons interested in the estate. And he further provided that the

10 surplus of the proceeds, after payment of his debts and funeral expenses, and the cost and charges of selling and of settling up his estate, should be paid over to his wife. He appointed Abner Allen his executor, who proved the will May 24th, 1875. The complainants allege that on the 5th of March, 1881, Mr. Allen sold to them the land in question for the price of \$500, then agreed upon between him and them, of which they then paid to him \$25, and were to pay the balance within a year from that time, and that the deed was to be delivered on the payment of

20 that balance. Mr. Allen died May 6th, 1881, and the defendant, John P. L. Tilton, was appointed administrator *de bonis non cum testamento annexo*, February 27th, 1882. Amos Palmateer, one of the complainants, swears that he made the purchase of the property for himself and his brother John, and details the circumstances. He says that when he paid the \$25 he took a receipt from Mr. Allen, drawn by the latter, and signed by him as executor of Mr. Harvey; that the receipt (which he says is lost) was as follows: "Received, March 5th, 1881, from Amos

30 Palmateer and John Palmateer, twenty-five dollars, on account of land south of toll gate, of the estate of William Harvey, deceased, commencing at an iron plug on the east side of the railroad; thence running northeasterly until it strikes the centre of Evergreen avenue; thence running east along the center line of Evergreen avenue until it strikes the center of the turnpike; thence southerly as many feet as it is from the iron plug to the center of Evergreen avenue, north; and the balance, four hundred and seventy-five dollars, to be paid within the year,

40 and the deed to be given when paid." The Palmateers

owned a triangular piece of land on the corner of Evergreen avenue (on the north) and the New York and Long Branch railroad (on the west); between the latter and the turnpike (on the east), which is parallel to the railroad, or nearly so, and they were desirous of buying of the estate of Harvey enough land adjoining between it and the turnpike road to make, in connection with their plot, a plot extending along Evergreen avenue from the railroad to the turnpike of the same depth on the turnpike as that which the triangular plot had on the railroad. The description in the receipt is of such a piece, but it does not, in the language of the surveyors, close; the last line is wanting. If the agreement were established, the description, especially in connection with the evidence outside of the alleged contents of the receipt, would be sufficient to identify the property. But the proof of the contract is not sufficient. The receipt is not produced. Amos Palmateer says it is lost. The evidence of the loss itself is not altogether satisfactory. He says he does not know where it is nor how it got lost—not positively—but he has his ideas as to how it got out (of the safe). He does not, however, state what his theory is on that subject. But if it were conceded that the loss is sufficiently proved, the secondary evidence offered to establish the receipt is not sufficient for the purpose. The principal evidence on that head is the testimony of Amos Palmateer. He testifies to the giving of the receipt and to its contents, but he is not a competent witness. While the supplement of 1880 (*P. L.* 1880, *p.* 52,) to the act concerning evidence provides that “in all civil actions in any court of law or equity of this State any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity.” It also provides that the supplement shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator or intestate represented in such action. It is true the testimony under consideration is not strictly within the language of the act, for Mr. Allen was not the testator; but it is within its spirit and meaning. *In Colfax v.*

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Colfax, 5 Stew., Eq. 206, the prohibition was held to apply to a case where heirs at law were sued for specific performance, and it was there said that the proviso was intended to protect the estate of deceased persons against the substantiation of claims by the oaths of parties prosecuting or defending suits directly affecting the estate. Also that the object of the legislature in making the proviso was to guard against the injustice which would arise from a want of mutuality in the exercise of the right to testify on one's own behalf. While in this case Mr. Allen was not, as before remarked, the testator, he was his representative, clothed with power to dispose of his estate. Many of the evils to be apprehended from permitting one who presents a claim against the estate of a decedent to substantiate it by his own testimony as to the statements of or his transaction with the deceased, are to be apprehended from permitting one who makes a claim to that estate, based on the agreement of the deceased executor, to testify in his own behalf to the statements of or his transactions with the executor in the matter. It must be held the prohibition extends to such cases. The contrary construction would leave an estate which has been in the hands of a trustee who has died, subject to be charged by false allegations of contracts of sale or other disposition or incumbrance, to the disadvantage of those interested therein, upon the mere oath of the claimant, which there would be no means of controverting because of the death of the trustee. Striking out of the record the testimony of Amos Palmateer, on the subject of the agreement, there is no proof to sustain it. George C. Allen, son of the executor, indeed swears that his father sold a piece of land of the Harvey estate on the west side of the turnpike to Amos Palmateer; that the latter then paid to his father money, \$25, on account of the purchase, and that his father gave Palmateer something in the way of a writing, but he does not know what the paper was. He says his father wrote the paper and that it took him only about two or three minutes to do it. Ezekiel C. Allen, another son who was present, testifies to the fact that Amos Palmateer on that occasion came to see his father

to purchase land of the estate of Harvey, and he says he supposed and has no doubt it was land on the west side of the turnpike, but he knows nothing of the payment of any money or the giving of any receipt or paper by his father. It should be stated that Amos Palmateer testifies that on that occasion he bought from Mr. Allen five lots of the estate, on the east side of the turnpike, for \$100, and paid \$25 on account of the purchase money, and took a receipt therefor, drawn and signed by Mr. Allen, which he produces. George C. Allen speaks of only one sale and of the payment of only one sum of money, and of the giving of but one paper. The receipt for the five lots consists of but seven lines and may well have been the paper which George says his father wrote in two or three minutes. It is not at all probable that Mr. Allen could have written the receipt, which Amos Palmateer swears he gave him for the land on the west side of the turnpike, in two or three minutes or any such very short time. According to Amos Palmateer's testimony it contained a carefully worded description of the land, or at least of the lines constituting three sides of it, and it must have been twice as long as the receipt just spoken of. Here it may be remarked that the receipt for the land on the east side is for \$25, and provides for the payment of the balance of the purchase money in one year, and for the delivery of the deed on the payment thereof. A few words may be said in regard to the testimony of George C. Allen as to the land which was sold by his father, as executor to Amos Palmateer. He says it was on the west side of the turnpike, but he only knows of one sale and there was a sale of land on the east side made at that time, on which, as before stated, \$25 were paid and a receipt given. It is quite possible that that is the transaction of which he speaks, and that he is in error as to the location of the land. John Palmateer, one of the complainants, testifies that the same evening in which Amos went to Mr. Allen's to buy the lot (on the west side of the turnpike) Amos showed him a receipt for \$25, paid on account of the purchase money of that land. He says he cannot remember how the receipt read nor what it contained, but

he remembers that it was for \$25 and they were to have the deed inside of a year. He further says that he never saw the receipt after that night. He does not say, and it does not appear, that he knew the handwriting of Allen. Nor does he say in whose handwriting the receipt was nor that it purported to be signed by Allen. It may be added that he is incompetent as a witness, for the reason before stated in connection with Amos's testimony. William C. Kelly, the brother-in-law of the complainants, also testifies to the receipt. He says he saw it two or three days after the purchase was made; that it was on a piece of paper about three inches wide and seven or eight long; that Amos Palmateer handed it to him and he, Kelly, remarked: "It is the old Quaker's (meaning Mr. Allen's) writing," and Amos said that he, Amos, wrote it himself, and that Allen called up his sons and daughters to witness the transaction. This paper was not the one of which Amos speaks, for Amos swears that Allen wrote and signed that receipt, while the receipt which Kelly saw and read was written by Amos, as the latter himself told him. Kelly testifies that he does not know Allen's signature; that he never saw it except on that occasion. The proof of the contract is insufficient. There is, in fact, no competent evidence of it at all.

The bill will be dismissed with costs.

FINAL DECREE.

This cause coming on to be heard in the presence of Mr. Chilion Robbins, of counsel with the complainants, and of Mr. William H. Vredenburg, of counsel with the defendant, John P. L. Tilton, administrator, &c., and the pleadings and proofs having been read, and the arguments of the respective counsel having been heard and considered, and it appearing to the Chancellor that the complainants are not entitled to the relief sought and prayed for by them in their bill of complaint herein:

It is, on this seventeenth day of November, 1884, ordered and decreed that the complainants' bill of complaint be and the same is hereby dismissed with costs.

THEODORE RUNYON, C.

APPEAL.

The complainants hereby appeal from the final decree made and filed on the seventeenth day of November, A. D. eighteen hundred and eighty-four, in the above stated cause, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated December 26, 1884.

ROBBINS & HARTSHORNE, 10

Solicitors for and of Counsel with Complainants.

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

A. C. HARTSHORNE,

Of Counsel with Complainant.

NEW JERSEY COURT OF ERRORS & APPEALS.

Between

<p>Amos Palmateer and John Palmateer, Appellants.</p> <p style="text-align: center;">and</p> <p>John P. L. Tilton, Administrator, &c., of William A. Harvey, deceased, et al, Respondents.</p>	}	<p>Petition</p> <p style="text-align: center;">of</p> <p>Appeal.</p>
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To the Honorable the Court of Errors and Appeals in the last resort in all causes :

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The humble petition of Amos Palmateer and John Palmateer, the appellants in the above stated cause, respectfully show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by His Honor, Theodore Runyon, Chancellor of New Jersey, bearing date the seventeenth day of November, in the year of our Lord one thousand eight hundred and eighty-four, wherein the said Amos Palmateer and John Palmateer were complainants, and the said John P. L. Tilton, administrator, &c., of William A. Harvey, dec'd, 40

and others, were defendants, in this respect, to wit: That the said decree adjudges that the said complainants' bill of complaint be dismissed with costs.

And your petitioners humbly appeal from the said decree, and from the whole and every part thereof, upon the ground that the same is erroneous, for that your petitioners are entitled to relief in the Court of Chancery, according to the prayer of their said bill.

Your petitioners therefore pray that the said decree of
 10 the said chancellor may be reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this honorable court shall seem meet.

ROBBINS & HARTSHORNE,

Solicitors of Appellants.

A. C. HARTSHORNE,

Of Counsel with Appellants.

ANSWER.

20 The answer of the above named respondents to the petition of appeal of the above named appellants. This respondent not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that an order was, on the 17th day of November, A. D., 1884, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition as
 30 is therein stated; and as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said order is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

R. TENBROECK STOUT,

Sol'r of Respondent.

VREDENBURGH & PARKER,

Of Counsel.

In Chancery of New Jersey.

BETWEEN

AMOS PALMATEER AND JOHN
PALMATEER,

Complainants,

and

JOHN P. L. TILTON, ADMINIS-
TRATOR OF WILLIAM A. HAR-
VEY, DECEASED, ET ALS.,

Defendants.

} On Bill
for Relief,
&c.

Bill of Complaint.

[Filed November 11, 1882.]

IN CHANCERY OF NEW JERSEY.

To His Honor Theodore Runyon, Chancellor of the State of
New Jersey :

Humbly complaining shows unto your Honor, your orators, Amos Palmateer and John Palmateer, of the township of Neptune, in the county of Monmouth and State of New Jersey, that William A. Harvey, late of the said township of Neptune (then Ocean), deceased, de- 10 parted this life on the third day of May, A. D. eighteen hundred and seventy-five, seized and possessed of certain

lands and real estate in the township of Neptune aforesaid, amongst which was the tract or parcel hereinafter particularly described, having first made, published and declared, in due form of law, his last will and testament as follows: That is to say, " In the name of God, Amen, I, William A. Harvey, of the township of Ocean, county of Monmouth and State of New Jersey, being of sound and disposing mind, memory and understanding, (for which blessing I thank God) do make, publish and de-
10 clare this my last will and testament in manner following: That is to say—

First. It is my will, and I do order that all my just debts and funeral expenses be duly paid and satisfied as soon as conveniently can be after my death.

Item. I give and bequeath unto my beloved wife, Catharine Harvey, all the residue of my real estate after the payment of my debts, and so much of my personal property as she may choose to take at and after my decease, and do hereby fully empower and authorize her
20 to sell as much, or all of my estate, both real and personal, as she may desire, and to make a *bona fide* deed of conveyance fully and effectually at law to the purchaser or purchasers of the same, to all intents and purposes forever for the purpose of her maintenance and support and no other.

Item. I do order my executor to sell all my personal property (not chosen or taken by my wife as aforesaid) as soon as convenient after my decease, and as much of my real estate as will be necessary to pay all my just
30 debts and funeral expenses, together with expenses, cost and charges of settling of my estate, and to sell such real estate, either at private or public sale, as he may think best, and on such terms and conditions and in such quantities as he shall think and adjudge to be for the interest of all persons interested in my estate; and if such sale should exceed the payment of all my just debts, funeral expenses and cost, and charges of selling and settling up my estate, he shall pay the surplus over to my wife, Catharine Harvey, aforesaid, taking her receipt
40 therefor, which shall be his full discharge.

Item. It is my will, and I do order at and after the death of my wife aforesaid, that all the residue of my estate, both real and personal, and such now used by my beloved wife in her lifetime for her maintenance and support, be divided between the persons hereinafter named as follows: After paying the debts she may have incurred for the same and her funeral expenses, (all the residue of my estate) to Hannah Roberts, wife of William Roberts, of Brooklyn, N. Y., and daughter of Samuel and Catharine Jake, one-sixth part of said residue,¹⁰ and to Deborah Picher, daughter of Samuel L. and Lydia Vannote, of Ocean county, N. J., and wife of James Picher, N. Y., one-sixth part of said residue. And all the remainder of said residue I do will and bequeath to the following named persons, share and share alike, to be divided between them, viz.: Mary Larrence, wife of Richard Larrence, of Monmouth county; Ella M. Judge, daughter of Joseph and Emeline Smith, and wife of William Q. Judge, of Brooklyn, New York; Ella Schreiner, daughter of Osmornan and Sarah Schreiner, of²⁰ Brooklyn, New York; Delia Tunison, daughter of Jacob and Susan Schriver, and wife of Pierce Tunison, of Brooklyn, N. Y.; Francis E. Bowman, son of Charles and Mary A. Bowman, of Monmouth county; Alexander Miller, son of Robert Miller, Esq., J. P., of Monmouth; Deborah E. Patterson, wife of Dr. Austin H. Patterson, M. D., of Monmouth, and daughter of David Miller, deceased, of Ocean county; Jane Amanda Truex, daughter of said David Miller, deceased, and wife of George Truex, of Monmouth; Lydia Vannote, wife of³⁰ Samuel J. Vannote, of Ocean county. I also bequeath to Corinna S. Roberts, daughter of William and Hannah Roberts, of Brooklyn, New York, one metallic teapot, silver mounted, marked with the German letter H (H) over the spout.

Item. I do order, and it is my will, that my executor do and shall as soon as conveniently can be done after the decease of my wife, to sell and dispose of all my estate, both personal and real, then remaining, and divide the proceeds, after deducting all proper costs, and charges⁴⁰

and expenses as aforesaid, between the persons above named, or, in the event of their death, to their legal and lawful heirs.

Lastly, I do hereby appoint my faithful friend Abner Allen my sole executor of this my last will and testament, hereby revoking all former wills. Done this twenty-first day of April, in the year of our Lord one thousand eight hundred and seventy-six." Which said will was duly and legally signed and attested.

10 That after the decease of the said Harvey, to wit, on the twenty-fourth day of May, A. D. eighteen hundred and seventy-five, the said will was duly admitted to probate in the Surrogate's office of the said county of Monmouth, and recorded in Book L of wills, page 230, &c., as will more fully appear by the said record or a certified copy thereof, to which your orators hereby refer.

That the said Abner Allen, the executor named in said will, thereupon took upon himself the burthen of the administration of the estate of the said William A. Harvey, deceased, pursuant to the provisions of the said will, and continued such administration up to the time of his decease, which occurred on the sixth day of May, A. D. eighteen hundred and eighty-one.

That the said William A. Harvey in his lifetime owned and possessed, and died seized of amongst lands of a certain parcel of land in the said township of Neptune, near Ocean Grove, containing _____ acres, more or less, which parcel of land the said Harvey some time about the year eighteen hundred and seventy-three
30 caused to be plotted and mapped and laid out into building lots, streets and avenues, and called said premises so mapped, plotted and laid out "Central Park," and offered the said lots for sale for building purposes and the like.

That the map of the said premises showing said lots, streets and avenues, and their surroundings was duly filed in the clerk's office of the said county of Monmouth, on the nineteenth day of December, eighteen hundred and seventy, where the same still remains of record, to which map, or a certified copy of the same, your orators
40 beg leave to refer if it be necessary so to do.

That the said premises lie on both sides of the turnpike road leading from Deal to Squan Bridge, which runs in a northerly and southerly direction across the westerly part thereof, and the New York and Long Branch Railroad also runs across the most westerly point of the said premises in about the same direction as the said turnpike.

That the avenue bounding the said premises on the northerly side is known and designated as Evergreen avenue, and in its course runs across the said turnpike 10 and railroad.

That the said premises were divided into four plots, named and designated plots A, B, C and D respectively, the three plots first named lying on the easterly side of the said turnpike road, and the plot last named lying on the westerly side thereof and adjoining in part the said Evergreen avenue, the said railroad, the said turnpike road and lands of your orators, which lands of your orators were bounded northerly by said avenue, southerly by plot D, aforesaid, and extended westerly to and along 20 said railroad; the line of your orators' land along the line of the lands of the said railroad being two chains and eighty links, more or less.

That being desirous of purchasing sufficient of plot D, aforesaid, to extend your orators' said land in an easterly direction from where the same joined the northwesterly line of said plot D, and the same width; the same extended along the line of the said railroad's lands to the said turnpike road, so as to give your orators the same number of feet frontage on the said turnpike as they had 30 on the said railroad (that is to say two chains and eighty links). Your orator, Amos Palmateer, acting for the said John Palmateer and himself, on or about the first day of March, 1881, applied to the said Abner Allen, executor as aforesaid, for that purpose, and offered to purchase sufficient of the said plot for the purpose aforesaid, if proper terms could be agreed upon; that thereupon the said executor said that he would go and see Catharine Harvey, the widow of the said William A. Harvey, who resided within a short distance, and consult 40

her as to the sale of the said piece of land to your orators. And immediately the said executor, taking the said Amos Palmateer with him in his carriage to the house of the said Mrs. Harvey ; and the said executor went therein and consulted her, and returned to said carriage where the said Amos had remained, and informed him, the said Amos, that he would sell the said parcel of land to extend your orators' land, as aforesaid, for the price and consideration of five hundred dollars, which offer was
10 accepted by the said Amos Palmateer for your orators ; and it was then and there agreed that within a few days thereafter your orators should go to the house of the said Allen and conclude said purchase in all necessary details.

That on or about the fifth day of March, eighteen hundred and eighty-one, in pursuance of the foregoing arrangement, your orator, Amos Palmateer, acting for the said John Palmateer and himself in the premises, attended at the said place of the said executor and paid
20 him the sum of twenty-five dollars on the consideration money of five hundred dollars which your orators had agreed to pay for the said parcel of land as above stated, which money the said executor accepted as a part payment and part performance of the said purchase money and contract, and thereupon made, signed and delivered to the said Amos a receipt and agreement which is hereinafter particularly set forth.

That the said Amos took the said receipt and agreement, and on the same day showed it to the said John
30 Palmateer, who fully approved of and ratified all that had been done in the premises by the your orator, Amos Palmateer.

That the said receipt was placed in the safe of your orators at Asbury Park for safe keeping on the same day last mentioned ; that since that time your orators have missed said receipt from the place where it was so deposited, and though they have made diligent and careful search for the said receipt, they have been and are totally
40 unable to find or account for the same, and to the best of their belief the same is irrevocably lost or destroyed.

That the said receipt and agreement mentioned and acknowledged the payment and receipt of the said twenty-five dollars as part payment and performance as aforesaid; described the land purchased and to be conveyed; stated the balance of consideration to be paid, and the time when the deed for the said land was to be delivered; was dated the fifth day of March, eighteen hundred and eighty-one, and signed by the said Abner Allen, executor as aforesaid, and was, to the best of your orators' knowledge, recollection and belief, in words and figures 10 as follows, to wit:

"Received March 5th, 1881, from Amos Palmateer and John Palmateer twenty-five dollars on account of land south of toll-gate, of the estate of William A. Harvey, deceased, commencing at an iron plug on the east side of the railroad; thence running northeasterly until it strikes the center of Evergreen avenue; then running east along the center line of Evergreen avenue until it strikes the centre of turnpike; then southerly as many feet as it is from iron plug to centre of Evergreen ave-20 nue north; and the balance, four hundred and seventy-five dollars, to be paid within the year, and deed to be given when paid."

And your orators charge the truth to be that the said Catharine Harvey knew and understood fully the terms and conditions of the said purchase, and consented and agreed thereto, and that the said executor acted in the premises in the said bargain and in the acceptance of the money aforesaid, and in the making of the said receipt and agreement and the delivery of the same, not only 30 for himself as executor as aforesaid, but also for the said Catharine Harvey, as her agent and attorney, as to any possible right, title or interest which she might or could have in the said parcel of land, and that she is as fully bound and concluded in the premises as if she had acted personally therein.

That the said boundaries of the said tract or parcel so purchased, was fully and explicitly understood by the said Abner Allen, executor as aforesaid, the said Catharine Harvey and your orators, so that no error, mistake, 40

or misunderstanding could or ever has occurred in that respect.

That your orators have had the said parcel of land surveyed, and the following is an accurate description of the same by courses and distances, viz.: Beginning at an iron plug or monument in the easterly line of the lands of the New York and Long Branch Railroad Company, (formerly the New Egypt and Farmingdale Railroad Company), and running thence (1) north seventy
10 degrees and thirty minutes east three chains and sixty-seven links to a stake in the centre of Evergreen avenue; thence (2) south sixty degrees and twenty-four minutes east one chain and seventy-two links to a stake in the centre of the Deal and Squan Bridge turnpike; thence (3) south twenty-one degrees and fifty-five minutes west two chains and eighty links in the centre of said turnpike; thence (4) north sixty degrees and twenty-five minutes west four chains and fifty links to the place of beginning; containing eighty-six hundredths of an
20 acre more or less; being a part of plot D, as laid down on a map of Central Park, land of William A. Harvey, filed in the Monmouth county clerk's office December 19, 1873. The above bearings of the magnetic needle are as the same pointed April 1st, 1879.

That soon after the date of the said receipt and agreement, to wit, on the sixth day of May, eighteen hundred and eighty-one, the said Abner Allen, executor as aforesaid, died.

That afterwards, on or about the twenty-seventh day
30 of February, A. D. eighteen hundred and eighty-two, John P. L. Tilton was duly appointed administrator *de bonis non*, with the will annexed of the said William A. Harvey, deceased.

That your orators within the year mentioned in the said receipt, and soon after letters of administration were issued to the said John P. L. Tilton, as aforesaid, applied to him to carry out the terms of the said agreement and to make your orators a deed for the said parcel of land, and tendered themselves ready to pay the said balance
40 of purchase money as soon as the said deed was ready

for them ; that the said Tilton fully recognized and admitted that said purchase had been made, and informed your orator, Amos Palmateer, that if he would get a receipt showing the payment and purchase aforesaid of George C. Allen, one of the administrators of the said Abner Allen, he would make your orators a deed for the said parcel of land, which receipt your orators afterwards, on or about the sixteenth day of February, eighteen hundred and eighty-two, obtained from the said George C. Allen, administrator, as aforesaid, and thereupon presented the same to the said Tilton, and tendered themselves ready to pay the balance of the said purchase money upon his making a deed to them for the said premises, which they then demanded that he should do ; that the said Tilton then and there refused to convey the said premises to your orators, or in any way to carry out the said contract and agreement, and although your orators did all on their part to be done and performed, and have tendered the balance of the said purchase money to the said John P. L. Tilton, administrator, as aforesaid, in legal tender money of the United States, and demanded a conveyance in due form of the said premises, and a specific performance of his part of said agreement, which the said administrator refused to do, and declared that he should not make such conveyance, or perform said agreement, except upon the order or decree of some competent court.

That such last-named tender and demand were made out of great precaution, and notwithstanding your orators were advised that the same was not necessary, the said administrator having theretofore, at different times, absolutely refused to proceed and carry out his part of the said contract, and declared that he would not do so.

That your orators, or one of them, at other times than those above named, had made like applications to the said Tilton and always with the same result.

That your orators have also applied to the said Catharine Harvey for her assistance in the premises, who also has always and still does neglect and refuse the same.

That on or about the fifteenth day of September, 40

eighteen hundred and seventy-four, the said William A. Harvey and wife executed a mortgage on plot D aforesaid and other land of the said Harvey situated in the said township of Neptune, on the northerly side of Duck creek and westerly side of the turnpike leading from Shark river to Ocean Grove, containing five acres more or less, to Charles Rogers, to secure an indebtedness of six hundred dollars which he then owed the said Rogers, which mortgage bears date the day and year last aforesaid, and is recorded in the Monmouth county clerk's office, in Book L3 of Mortgages, page 510, &c., and to said record, or a certified copy thereof, your orators beg leave to refer if it be necessary so to do, and by virtue of which said mortgage the said Charles Rogers claims some interest in the aforesaid premises.

And your orators charge that the said John P. L. Tilton, administrator as aforesaid, should pay and satisfy said mortgage and cancel the same of record, or obtain a release of said premises so agreed to be conveyed to your orators from the incumbrance of said mortgage, and should, if necessary to effect that object, be compelled to pay the balance of the said purchase money of your orators to that purpose.

And your orators further show that at the time of their purchase of the said parcel of land of the said Abner Allen, executor as aforesaid, he had not paid all the just debts, funeral expenses, and costs and charges of selling and settling up the estate of the said William A. Harvey, deceased, a large amount of such indebtedness then and still being outstanding and unsatisfied, the exact amount being to your orators unknown; but they aver and charge the truth to be that such indebtedness then was and still is greater in amount than the said purchase money of your orators was or is sufficient to pay, either by itself or added to any money of the estate of the said Harvey then or now in the hands of or due to his then executor or now administrator; and that the said Abner Allen, as executor as aforesaid, at the time of said purchase, had full power and authority to sell and convey said premises, and that the said John P. L. Til-

ton, administrator as aforesaid, has also full power to convey the same to your orators and specifically carry out the said agreement.

And your orators further show that they have always been ready and willing, and are now willing, to perform their part of the said agreement, and on having a good and marketable title shown to said land, and a conveyance of the fee simple thereof, discharged of all incumbrances, made to them, to pay the residue of said purchase money or sum of four hundred and fifty dollars to 10 the said John P. L. Tilton, administrator as aforesaid.

And your orator further shows that the correct name of Hannah Roberts, mentioned in said will is Hannah Roberts, and of Deborah Picher, Deborah Pitcher, and of Mary Larrance, Mary Lawrence, and of Lydia Vanote, Lydia Vannote, and that by virtue of the last will and testament of the said William A. Harvey, deceased, as hereinbefore set forth, the said Catharine Harvey, Hannah Roberts and William Roberts, her husband, Deborah Pitcher and James Pitcher, her husband, Mary 20 Lawrence and Richard Lawrence, her husband, Ella M. Judge and William Q. Judge, her husband, Ella Schreiner, Delia Tunison and Piera Tunison, her husband, Francis E. Bowman, Alexander Miller, Deborah E. Patterson and Dr. Austin H. Patterson, her husband, Jane Amanda Truax and George Truax, her husband, and Lydia Vannote and Samuel F. Vannote, her husband, claim as devisees of the said William A. Harvey, deceased, some right or interest in the said land and premises.

30

And your orators well hoped that the said John P. L. Tilton, administrator, *de bonis non*, with the will annexed of the said William A. Harvey, deceased, would have specifically performed the said agreement entered into by the said Abner Allen, executor of the last will and testament of the said William A. Harvey, deceased, on his part, as in justice and equity he ought to have done.

But now so it is, may it please your honor, that the said John P. L. Tilton, administrator *de bonis non*, with the will annexed of the said William A. Harvey, de- 40

ceased, combining and confederating with the said Catharine Harvey and with divers other persons at present unknown to your orators, whose names, when discovered, your orators pray they may be at liberty to insert herein, with apt words, to charge them as parties defendant hereto, and continuing how to wrong and injure your orators in the premises, he, the said John P. L. Tilton, administrator as aforesaid, refuses to perform the said agreement between the said Abner Allen, executor, &c.,
10 of the said William A. Harvey, deceased, and your orators, on his part as administrator *de bonis non*, with the will annexed, of the said William A. Harvey, deceased, and to color such refusal he gives out and pretends that he is unable to make out a good and marketable title for the aforesaid land and premises, and that the said agreement is not valid or binding, either in law or equity. Whereas, your orators charge the contrary thereof to be the truth, and that the said John P. L. Tilton, administrator as aforesaid, is able to make out a
20 good and marketable title to the aforesaid land and premises, if he thinks proper so to do, but that the said John P. L. Tilton, administrator, as aforesaid, refuses and declines to make out a good and marketable title to the said premises, notwithstanding your orators have required him so to do, and offered to pay him the residue of the said purchase money upon having the title made out, and a proper conveyance of the said premises executed to your orators, their heirs and assigns, by the said John P. L. Tilton, administrator, *de bonis non*, with the
30 will annexed of the said William A. Harvey, deceased; and your orators did, within the time required by said agreement, tender to the said John P. L. Tilton, administrator, as aforesaid, in legal tender money of the United States, the residue of the said purchase money, viz., the said sum of four hundred and seventy-five dollars, and did then and there demand of him the deed aforesaid.

And your orators charge that the whole of the residue of their purchase money of the premises hath been ready and unproductive in their hands for completing the said
40 purchase from the time it ought to have been completed

by the terms of the said agreement. All which actings, doings, pretences and refusals are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orators in the premises. In tender consideration whereof, and for as much as your orators are remediless in the premises, at and by the strict rules of the common law, and are relievable only in a Court of Equity, where matters of this kind are properly cognizable and relievable. To the end therefore that the said John P. L. Tilton, administrator, *de bonis non*, with the will annexed of William A. Harvey, deceased, Catharine Harvey, Hannah Roberts, wife of William Roberts, and the said William Roberts, Deborah Pitcher, wife of James Pitcher, and the said James Pitcher, Mary Lawrence, wife of Richard Lawrence, and the said Richard Lawrence, Ella M. Judge, wife of William Q. Judge, and the said William Q. Judge, Ella Schreiner, Delia Tunison, wife of Piera Tunison, and the said Piera Tunison, Francis E. Bowman, Alexander Miller, Deborah E. Patterson, wife of Dr. Austin H. Patterson, and the said Dr. Austin H. Patterson, Jane Amanda Truax, wife of George Truax, and the said George Truax, Lydia Vannote, wife of Samuel F. Vannote, and the said Samuel F. Vannote, and Charles Rogers, and their confederates, when discovered, may upon their several and respective corporal oaths to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and they and every of them distinctly interrogated thereto; and your orators pray that the said John P. L. Tilton, administrator, *de bonis non*, with the will annexed of the said William A. Harvey, deceased, may be decreed to convey to your orators by a proper conveyance in the law the said land and premises hereinbefore set forth, and agreed to be sold and conveyed to your orators as aforesaid, in accordance with the terms of said agreement, and by the courses and distances of the new survey aforesaid, free and dis-

charged of all encumbrances, and especially the mortgage aforesaid, and that the said Catharine Harvey may be compelled to join in the execution of said conveyance, or to properly execute to your orators a conveyance for her right, title and interest in said land and premises, if any she has in the same; and that your orators may have such further and other relief in the premises as to your Honor shall seem meet, and the nature of the case may require.

10 May it please your Honor, the premises considered, to grant unto your orators a writ or writs of subpoena, issuing out of and under the seal of this honorable court, to be directed to John P. L. Tilton, administrator, with the will annexed of William A. Harvey, deceased; Catharine Harvey, Hannah Roberts, wife of William Roberts, and the said William Roberts, Deborah Pitcher, wife of James Pitcher, and the said James Pitcher, Mary Lawrence, wife of Richard Lawrence, and the said Richard Lawrence, Ella M. Judge, wife of William Q. Judge, and
 20 the said William Q. Judge, Ella Schreiner, Delia Tunison, wife of Piera Tunison, and the said Piera Tunison, Francis E. Bowman, Alexander Miller, Deborah E. Patterson, wife of Dr. Austin H. Patterson, and the said Dr. Austin H. Patterson, Jane Amanda Truax, wife of George Truax, and the said George Truax, Lydia Vannote, wife of Samuel F. Vannote, and the said Samuel F. Vannote, and Charles Rogers, therein and thereby commanding them and each of them, on a certain day
 30 your Honor in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand to, abide by and perform such decree therein as to your Honor shall seem meet and agreeable to equity and good conscience; and your orators will ever pray, &c.

ROBBINS & HARTSHORNE,

Solicitors for and of Counsel with Complainants.

Answer.

The answer of John P. L. Tilton, administrator *de bonis non*, with the will annexed of William A. Harvey, deceased, to the bill of complaint of Amos Palmateer and John Palmateer, complainants :

This defendant now and at all times hereafter, saving and reserving all and all manner of benefit and advantage of exception to the many errors, uncertainties and imperfections in said bill of complaint contained for answer thereunto, or unto so much thereof as this defendant is advised it is material or necessary for him to make answer unto, answering says :

That he believes it to be true that William A. Harvey departed this life on the third day of May, A. D. 1875, seized and possessed of certain lands and real estate in the township of Neptune, as stated in said bill of complaint, having first made, published and declared, in due form of law, his last will and testament as therein set forth ; but that said will was dated the twenty-first day of April, in the year of our Lord one thousand and eight hundred and seventy-five, and not eighteen hundred and seventy-six, as in said bill set forth.

That he admits it to be true that on the twenty-fourth day of May, A. D. 1875, the said will was duly admitted to probate in the surrogates office of the county of Monmouth, and recorded in Book L, of Wills, page 230, &c., as in said bill of complaint set forth.

That this defendant also admits it to be true that Abner Allen, the executor *name* in said will, took upon himself the burthen of the administration of the estate of the said William A. Harvey, deceased, and continued such administration up to the time of his decease, which occurred on the sixth day of May, A. D. 1881, as in said bill of complaint set forth.

That the defendant admits it to be true that said Wil-

liam A. Harvey in his lifetime owned and possessed and died seized, of amongst other lands, a certain parcel of land in said township of Neptune, near Ocean Grove, containing acres, more or less, and that he plotted and mapped and laid out in building lots, streets and avenues, and called the same "Central Park," certain lands; and this defendant in further answering denies that said William A. Harvey, in the year 1873, or at any other time in his lifetime, plotted out the parcel of
10 land referred to and described in said bill of complaint, lying west of the turnpike road therein mentioned; but on the contrary this defendant says part of the whole tract lying east of the said turnpike was mapped out into lots suitable for building and called it "Central Park."

That that part on the west side of said turnpike, on which the mansion house or homestead is, was not plotted or mapped out into lots.

And this defendant, in further answering says, that he
20 is informed and states the fact to be that said parcel west of said turnpike, and on which the said mansion house or homestead stands, was intended by said Harvey, deceased, to be reserved and kept for the benefit of his widow, who has, since her husband's decease, occupied and tilled, farmed and cultivated the same for her own benefit.

And the defendant in further answering says, as to that part of the complainants' bill of complaint, which charges that on or about the first day of March, 1881,
30 Amos Palmateer called upon said Abner Allen for the purpose of purchasing certain lands, as in said bill of complaint set forth, he has no information except as is set forth in said bill.

As to that part of complainants' bill, wherein they say that the said executor consulted said Catharine Harvey, and returned to said Amos Palmateer and informed him, the said Amos Palmateer, that he would sell the said parcel of land for the consideration of five hundred dollars.

This defendant is informed by said Catharine Harvey, and believes the facts to be, that said executor did consult said Catharine Harvey as to the sale of a certain parcel of land, which will hereinafter more fully appear, but did not consult her as to the sale of land referred to in said bill of complaint, and as to the statement in said bill, that said executor would sell to said Amos Palmateer, the land therein described for said consideration of five hundred dollars, and that said Amos Palmateer accepted the same, defendant has no other information 10 except as contained in said bill of complaint.

And as to the statement in said bill, that said Amos Palmateer and said executor, would meet and conclude said purchase, defendant has no knowledge and no other information except as is contained in said bill of complaint.

And the defendant in further answering says, as to the statement in said bill of complaint, that on and about March fifth, 1881, said Amos Palmateer, paid said executor the sum of twenty five dollars, on the consider- 20 ation money of said parcel of land, defendant has no knowledge either as to the payment, or if paid upon what subject matter the payment was made, but in this connection the defendant says he is informed by a certain receipt which was in the possession of said Amos Palmateer, a copy of which this defendant now has in his possession, that the said executor received on the fifth day of March, 1881, from said Amos Palmateer, twenty-five dollars on account of sale of lots number three, four, five, six, and seven (3, 4, 5, 6, 7) on map of 30 said Central Park, but which lots are situate on the east side of said turnpike road and are not the parcel referred to in said bill of complaint.

As to the statement in said bill, referring to said complainants, being unable to find a receipt pretended to have been given by the said Allen, this defendant says, he has no information as to that receipt as is contained in said bill; but this defendant in further answering says, that shortly after his appointment as administrator *de bonis non*, with the will annexed of the estate of William 40

A. Harvey, deceased, the said Amos Palmateer came to him and made claim that he had bought certain lands on the east side of said turnpike of, and received from said Abner Allen, a receipt for certain payment made thereon, but made no claim to the parcel of land claimed in said bill.

That then this defendant caused to be procured the copy of the receipt above referred to for lots 3, 4, 5, 6, 7 from said Amos Palmateer, which receipt did not and does
10 not refer to the parcel of land claimed in said bill.

As to the receipt set forth in said bill, and charged to have been signed by said Allen, and given to said Amos Palmateer, this defendant says he has no knowledge except as is contained in said bill of complaint.

As to that part of said bill which charges that said Catharine Harvey knew of and consented and agreed to said purchase, this defendant says he has no information other than is contained in said bill, except as he has been informed by said Catharine Harvey; and this de-
20 fendant, in further answering, says that she did not know of any such agreement as is pretended to have been made between said complainants and said Allen embracing the land described in said will, but, on the contrary thereof, said defendant says that he has been explicitly informed by said Catharine Harvey that the land on the west side of the said turnpike was agreed between her and said Allen to be reserved until that on the east side was sold.

And defendant further says that said Catharine Har-
30 vey has resided since her husband's death, and does now reside, upon the parcel of land where the mansion house or homestead is, on the west side of the said turnpike, and that she has always claimed that under the terms of said will she was entitled to hold the same for the purpose of her residence until after the land on the east side of said turnpike was sold.

And this defendant says as to the said complainants having the said land in said bill of complaint described surveyed, and that the description in said bill is correct

as in said bill set forth, he has no knowledge except as in said bill set forth.

And this defendant, in further answering, admits it to be true that the said Abner Allen died on the sixth day of May, eighteen hundred and eighty-one, and that on or about the seventh day of February, A. D. eighteen hundred and eighty-two, John P. L. Tilton was duly appointed *admr. de bonis non*, with the will annexed of the said William A. Harvey, deceased.

And this defendant, in further answering, denies that 10 soon after his appointment as administrator aforesaid the said complainants applied to him to carry out the terms of said agreement and to make them a deed for said parcel of land in said bill claimed, and says that said complainants did call upon him and demand of him a deed of conveyance for the lots 3, 4, 5, 6, 7, and said nothing about the land in said bill claimed until a long time after.

And this defendant, in further answering, denies that a receipt of the purport charged in said bill was tendered 20 to him, but if such receipt was tendered him he paid no attention to it for the reason that George C. Allen had no authority to give such receipt.

And this defendant, in further answering, says that he admits that the complainants tendered him a sum of money, said by them to be the sum of four hundred and seventy-five dollars (475), and that he (the defendant) refused to make the conveyance requested and demanded by them of him, except upon the decree of some competent court. 30

And this defendant, in further answering, admits that the debts of said Harvey, deceased, are not all paid, but states that the land on the east side of said turnpike road is sufficient to pay all the debts of said estate, leaving the whole of the land on the west side of said turnpike, on which is the mansion house and where said Catharine Harvey lives, unsold.

And this defendant respectfully insists that if said will empowers him to make the conveyance sought by said complainants, and that he can lawfully perform the pre-40

tended agreement set out in said bill; that if, in fact, the said Abner Allen entered into the pretended agreement respecting the land west of the said turnpike, he must have been deceived as to its value. That the value of the same exceeded at the time of the making of the claimed agreement the sum of fifteen hundred dollars, said land being then worth, at least, three times as much as the said complainants bound themselves by said pretended agreement to pay for the
10 same.

And this defendant denies that it is true as stated in said bill, that he fully recognized or admitted that said purchase, as charged in said bill, had been made; and that, on the contrary, this defendant expressly states the fact to be that he has never seen any such pretended agreement, nor had any reason to believe that any existed other than the pretence set up in complainants' bill of complaint.

And this defendant, in further answering said bill of
20 complaint, says that he is credibly informed, and believes the fact to be upon such information and belief, that no agreement whatever respecting the lands, the conveyance of which is sought by said bills to be enforced, was ever made by or between the said complainants and said Abner Allen.

All and which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct, and he humbly prays to be hence dismissed with his reasonable costs and charges
30 in this behalf most unjustly sustained.

R. TENBROECK STOUT,
Solicitor of John P. L. Tilton.

Replication.

In usual form, filed July 12th, 1883.

Testimony.

Examination of witnesses in the above entitled cause, taken before me, Holmes W. Murphy, a master and examiner in the Court of Chancery of New Jersey, at my office, in Freehold, in Monmouth county in said State, on the 19th day of September, A. D. 1883, and on the several days to which the same was adjourned, in the presence of Chilion Robbins, of the firm of Robbins & Hartshorne, of counsel for complainants, and R. T. Stout, solicitor of defendant. 10

The signatures of the witnesses to the following depositions, wherever the same do not appear, were waived by agreement of counsel of the respective parties.

H. W. MURPHY,
M. C. C.

George C. Allen, a witness produced on the part of the complainants, being duly sworn according to law, on his oath says—

I reside at Deal Beach, in the county of Monmouth and State of New Jersey; my age is twenty-eight last 20 June; I am son of Abner Allen, deceased; he lived, prior to his death, at Deal Beach; I know the premises of William A. Harvey, known as Central Park, they were about three miles from my father's place, and are in what is now the township of Neptune; this Central Park place laid on both sides of the turnpike; he owned on both sides; my father died on the 6th or 7th of May, 1881; his administrators were E. H. Ward, Jr., and myself; we are still acting in that capacity; I remember a visit to my father's house, prior to his death, by either 30 Amos or John Palmateer; I think it was Amos; I recollect it was in the spring of the year, but I do not recollect whether it was the spring he died, or the year before; my father had two daughters and a son besides myself; I heard my father and Mr. Palmateer talking

on the occasion of this visit; the subject of their conversation was the sale of property by my father; Mr. Palmateer was up there to see about buying property of my father, as executor of Wm. A. Harvey's estate; the property mentioned was property on the west side of the Deal and Squan Bridge Turnpike Company's turnpike; this is the road running nearly north and south through the William A. Harvey property; I think my brother Ezekiel was present at the time of this conversation; I think my father agreed to sell this property at that time to Mr. Palmateer.

[Counsel for defendant objects to the last answer as incompetent.]

There was money paid at that time by Mr. Palmateer to my father on account of the purchase of the land.

[Counsel for defendant objects to this last answer as incompetent and illegal.]

Twenty-five dollars was the amount paid; I cannot tell whether my father gave Mr. Palmateer a receipt or not for the money at that time, but he gave him something in the shape of a writing; I did not read or hear read what he gave him in writing.

My father died with heart disease, but had been troubled with pneumonia; he had been sick about a month from the time he was taken; he rallied twice during that month and was about, driving out.

Cross-examined—

Q. This conversation you speak of between your father and one of the Palmateer's, at which time you say there was \$25 paid, what was the date?

A. I cannot tell; it was in the spring of the year—but whether it was in 1880 or 1881, I do not remember.

Q. How long was it before his death?

A. I do not remember; I had very little to do with his business; I just happened to be there that night.

Q. Was your father sick at the time?

A. No.

Q. Had he been sick shortly before that?

A. He had not; not in years before that.

Q. You speak of your father's giving Palmateer something at the time he paid the twenty-five dollars; what was it?

A. I don't know.

Q. Did you see it?

A. I saw a paper.

Q. How large a paper?

A. I don't remember.

Q. About how many inches long was it, according to the best of your recollection? 10

A. I do not know; I did not charge my mind with it; he gave him some kind of a paper after he paid the money.

Q. Who wrote the paper?

A. My father.

Q. Were you there during the time he wrote it?

A. I think I was.

Q. How long about did it take him to write it?

A. About a couple or three minutes—a short time.

Q. Could you recognize the paper if you saw it again? 20

A. I could recognize the signature, further I could not; I could not recognize the paper.

Q. You don't know what the twenty-five dollars was paid for?

A. I think I do; I know the way I understood it.

Q. What was it?

A. It was on the purchase of a lot on the west side of this main road, which I have mentioned before.

Q. Did you understand that at that time?

A. Yes, oh, yes. 30

Q. Was there any more than twenty-five dollars paid at that time on that or any other account?

A. Not to my knowledge; if he paid him anything else it was after I left the room.

Re-direct—

I could not tell how long Mr. Palmateer was there; my father wrote what he wrote at that time at a table in the sitting room; I think I was there when Mr. Palmateer first came, but am not positive; I could not swear

that I was; whatever sum of money was paid by Mr. Palmateer to my father was handed directly by him to my father; he was his own manager, and banker and bookkeeper, and attended to his own business; during the rallies of my father I have spoken about, he drove around the place; my father did not have a cold that I recollect of before it turned into pneumonia; I did not have any charge of the money; it was not turned over to me in the transaction of the business; it was not
 10 counted by me; I saw my father count it; I followed my father as he counted it; I think it was in three bills; I won't say it was in three bills, but that was my impression; I am positive it was twenty-five dollars; if I was not I would not have given him that other thing; I refer to that receipt which you hold in your hand.

[Witness shown the receipt he has just referred to]—

This is the paper I just spoke about; it is in my handwriting, except the printed parts, and is signed by me as one of the administrators of my father's estate.

20 [Paper offered in evidence by complainant's counsel, and marked by me *Exhibit No. 1* on part of complainant.]

[Counsel for defendant objects to this evidence and this paper as illegal, and incompetent and immaterial.]

I don't remember seeing Mr. Palmateer at my father's house during his lifetime except on the occasion I have referred to; I do not know of Mr. Harvey owning any other property except this Central Park place.

Q. Have you any doubt that the piece of property which your father at that time sold, or agreed to sell,
 30 Mr. Palmateer was a part of this Central Park property lying on both sides of the Deal and Squan bridge turnpike?

[Objected to by defendant's counsel as incompetent, because the receipt and agreement, if any, was in writing.]

A. I haven't any doubt upon that point.

GEO. C. ALLEN.

Sworn and subscribed before me this 19th day of September, A. D. 1883.

HOLMES W. MURPHY,
Master in Ch'y of N. J.

Ezekiel C. Allen, a witness produced on the part of the complainants', being duly sworn according to law, on his oath says :

I live at Deal Beach; my age is twenty-nine last January; I am a son of Abner Allen deceased; my father died on the 7th of May 1881; he was sick about a month 10 prior to his death; his last sickness was pneumonia; during the last month of his sickness he got better so that he drove about his place; I know the Central Park property of which William A. Harvey died seized; William A. Harvey did not leave any other real estate that I know of; I do not know how many acres the whole property contained; I recollect the visit of Mr. Palmateer to my father; I cannot tell whether it was Amos or John; I do not know them apart by their names; he visited my father on this occasion, at my father's house 20 at Deal.

Q. This is Mr. Amos Palmateer setting near me; please see whether you recognize him or not, as the gentleman who called on your father at the time mentioned?

A. I think he is the one; yes, sir.

I suppose the subject of conversation between my father and Mr. Palmateer was concerning the sale of land; I don't remember exactly, I did not charge my mind with it.

Q. What land was it which was the subject of their 30 conversation at that time?

A. I suppose it was land on the west side of the Deal and Squan bridge turnpike; I have no doubt on that point; the land which my father was selling belonged to the estate of William A. Harvey; my father was the executor of William A. Harvey; I do not remember how long Mr. Harvey had been dead at that time; I could not say how long Mr. Palmateer was there; I do not remember seeing Mr. Palmateer pay my father any

money on account of the purchase of this land ; I don't mean to say that he did not pay him some money, only that I have no recollection of it ; I did not see my father do any writing while Mr. Palmateer was there ; I don't remember whether or not I was there when Mr. Palmateer came ; I have no recollection of seeing Mr. Palmateer at my father's house on any other occasion than this one ; I cannot remember how long this visit was prior to my father's death ; I don't remember what season of the year it was ; I did not see my father give Mr. Palmateer any paper on that occasion ; I don't remember of his giving him any paper.

Cross-examined—

I remember very distinctly of Mr. Palmateer's being there ; I remember his coming ; I don't remember seeing him when he came, but I remember seeing him in the room ; I don't remember that I was in the room when he came ; I was in the room during his stay there.

Re-direct—

20 I am not prepared to say that I was there all the time that Mr. Palmateer was there.

Re-cross-examined—

Q. Was you there all of the time that Mr. Palmateer was there ?

A. That I cannot say.

EZEKIEL C. ALLEN.

Sworn and subscribed before me, this 19th day of September, 1883.

HOLMES W. MURPHY,
Master in Chy. of N. J.

30

Archibald A. Applegate, a witness produced on the part of the complainants', being duly sworn according to law, on his oath says :

I live in Neptune township, Monmouth county New Jersey ; my business is that of a house painter ; my age is

fifty-one, the 28th day of next October; I am acquainted with the widow of William A. Harvey; and I knew Abner Allen in his life time when I saw him; I know this Central Park property of which William A. Harvey died seized; I farmed a little over half of it; what I farmed was on the west side adjoining the toll gate; it was on the west side of the turnpike; I did not farm any on the east side of the turnpike; I farmed this land only one year; I remember when Abner Allen died; he was the father of George and Ezekiel Allen; it was the 10 same year that he died in which I farmed this land on the west side of the road; the road I refer to is the turnpike; the land I farmed was between the railroad and the turnpike; I plowed close up to the railroad and close up to the turnpike; this turnpike was called the Deal and Squan Bridge turnpike; Mrs. Harvey lived to the south of the land I farmed, right adjoining; this land I farmed was a part of Mr. Harvey's estate; I farmed this land on shares—one-half; I hired a man to plow the land for me; I was with him when he plowed it; the man was 20 William Devereau; I instructed Devereau where to plow and what lines to plow to; he plowed just as I told him, from the cedar tree to a large pine stump; I first saw Mrs. Harvey with reference to my farming this land—I mean this lady here, Mrs. William A. Harvey, the widow of William A. Harvey, who formerly owned that land; I saw her at her own house, if I remember, properly, on her premises; I asked her if she wanted to put out her land on shares; that I had a lot of manure and stock to farm it with, and that I thought I could raise a 30 good deal of stuff for her and myself; she then told me I would have to go and see Mr. Abner Allen, because he had sold a piece of land off, and I must see him before I did anything towards farming; she said he had sold it to Mr. Palmateer; I can't say whether she mentioned them both or not; this land she spoke of as having been sold to Mr. Palmateer was on the west side of the road and north of the land I farmed; after this conversation with Mrs. Harvey I went and saw Mr. Allen, as she had told me to; she said I must go and see him and see 40

where I must plow to, as he had sold some of the land; I went to see Mr. Allen about this, I think, the next day after the conversation with Mrs. Harvey; I went to see Mr. Allen at his place at Deal; it was a little over three miles from the Harvey place; I saw Mr. Abner Allen at his place at Deal; it was in April, 1881; Mr. Allen had been sick before I saw him; he was out in his wagon in the field; I went out and met him; this was but a short time before his death, about two or three weeks before
10 his death; Mr. Allen told me I must be careful where I plowed; to plow from the cedar tree on the turnpike, to the west, adjoining the railroad, to a pine stump close to an iron bolt; he told me that the iron wedge or bolt was near to the pine stump—that it was a large pine stump and the tree was laying there; he said if I went to the pine stump it would be near enough to the corner of the line between what he had sold and what still belonged to the Harvey estate.

Q. Did he or not say anything about your pacing to
20 get the width of land you were not to plow on, the end thereof adjoining the Deal and Squan Bridge turnpike—if so, what was it?

A. Yes, sir; he did; he told me to pace it on both ends, on the railroad end and the turnpike end, I did so; but can't recollect the number of paces; he said that he had sold this land, which I was not to plow, to Mr. Palmateer; I do not remember whether he mentioned more than one Palmateer to whom he had sold it; after I had
30 seen Mr. Allen I plowed from the Cedar tree which stood along the turnpike, west to the pine stump which stands along the line of the railroad; that was according to Mr. Allen's instructions; I plowed south from the line from the cedar tree to the pine stump, to Mrs. Harvey's cherry trees; the southerly line of my plowing was about thirty or forty feet from the house where Mrs. Harvey lived; I farmed it in corn and sweet and round potatoes, and tended it during the season; I delivered her her share of the crops; I saw her frequently, mostly every day, when I was doing the farming; I lived near her on Mr.
40 Arrowsmith's place, about one hundred and thirty yards

from her house; this piece of land which I did not plow on account of what she and Abner Allen said to me, remained idle that season; Mrs. Harvey never raised any question with me about that piece of land not being farmed; I think the land is farmed this year; I don't think this piece of land which I left has been farmed since the time when I left it unplowed till this year; Mr. Palmateer saw me afterwards about this land which I had left unplowed.

[Counsel for defendants objects to all the conversations 10 of witness with Mrs. Harvey, and also with Mr. Allen, and also as to what witness did on the land, as immaterial and incompetent; and counsel for complainants consents that objection may be taken at this time, and to have the same force and effect as if made at the end of each question and answer.]

It was several weeks after I had plowed the other when Mr. Palmateer saw me; Mr. Palmateer asked me if I wanted his piece of land to put in corn.

[Counsel for defendants objects to what Mr. Palmateer 20 said as illegal.]

He referred to the land which I left, north of what I plowed; I told him that I guessed not; I had not time to attend to it—it was getting so late in the season; there was a sharp corner of timber land north of where I plowed—it starts from a street which runs across the railroad east and west; I think the street is Evergreen avenue; this timber land lies between the turnpike and railroad, and right along the railroad, but does not reach the turnpike; a part of the land which I expected to 30 plow lies between the timber and the turnpike; the pine stump I speak of lay close to the sharp point of the timber; I think it was very near the corner tree; the timber runs to a point close by that pine stump; I aimed to make the strip of land which I left equally wide on the turnpike and on the railroad; I paced from the centre of Evergreen avenue south at both ends to the cedar tree at one end, and the pine stump at the other end; those were my orders from Mr. Allen.

Cross-examined—

The conversation I had with Mrs. Harvey about the property being sold by Mr. Allen was at her house; I think if I can remember—I can't say what time of day it was—it was in the month of April, about the 1st; I know it was in April from my business which I was doing at the time; this is the only positive way I know; I have no certain way of knowing about the time except that I have stated; I have no uncertain way of know-
 10 ing; I saw Mr. Allen at his place out in the field—it was in the forenoon—about half past ten; I think I told Mr. Palmateer what Mrs. Harvey said to me about this land; I have never talked this case over with him, or with either of the Palmateer's—it was none of my business; I am disinterested between the parties; I have not talked with any one interested in the case about what I was going to swear to; I said nothing about it till I got a subpoena, and only answer such questions as I am com-
 20 pelled to; I don't remember having any conversation with any one about what Mrs. Harvey said to me till I got the subpoena.

Q. Then this is the first time you have mentioned what Mrs. Harvey and Mr. Allen said to you in reference to the land in question?

A. Yes, sir; this is the first time that I mentioned it till I got my subpoena; no one of the Mr. Palmateers or Mr. Kelly has been to see me in reference to this case.

Re-direct—

Mr. Palmateer saw me about farming the land which
 30 I left unplowed a few weeks after I had plowed that which I did.

Q. Did he want you to farm the land which you left as you were instructed—did he or not?

[Objected to by defendants' counsel as illegal.]

A. He asked me if I wanted it and I told him no—it was getting so late I would not bother with it; he knew I had farmed the other part of the land; he asked me about it.

Q. So he knew from that time to this, without any

further information on your part, that you farmed that part of the land which you did, and drew that line or had it drawn from the cedar tree to the pine stump without any further information on your part?

[Objected to by defendants' counsel as illegal.]

A. That's right; he did know it.

Q. Now since you received your subpoena in this case, and to-day were you seen by me with reference to what you knew in this case, and did you inform me?

A. I stated to you about it in Mr. Kennedy's office—10 nothing about the case; I had not seen you till this morning; I was subpoenaed last Monday; it was a few minutes before we came in here to examine witnesses that I saw you in Mr. Kennedy's office about it.

Q. I used the word "this case" in my former question—did you or not inform me this morning with reference to your plowing that land?

A. I think I did.

Q. And where you plowed?

A. I think I did. 20

Q. And you also told me how you came to plow when and where you did—did you not?

A. I did.

Q. And that I understand you was since the subpoena was served, and the first time you have detailed all the facts and circumstances?

A. Yes.

Rr-cross-examined—

Q. Then you have talked this over since you were subpoenaed, have you not? 30

A. Mr. Robbins asked me a question or two and I answered them, and I have answered what you have asked me about it; I am disinterested between the parties; when Mr. Palmateer saw me about the plowing I told him what Mrs. Harvey and Mr. Allen had said to me about leaving the piece of ground unplowed.

Q. Then what do you mean when you say "this is the first time that I mentioned it till I got my subpoena"?

A. That is what I want to know what he means.

Question repeated.

A. That is the question that I want to know.

Question repeated.

A. I knew nothing about the men's business going to law till I was called here by subpoena to-day.

Q. But first you say you never mentioned what Mrs. Harvey and Mr. Allen said to you in reference to the land to any one till you got your subpoena, and then you say you did mention it to Mr. Palmateer when he saw
10 you about plowing the land shortly after you had the conversation and a long time before you were subpoenaed?

A. I did not know you were talking way back as that; in the first of my evidence I told you about his wanting me to farm his land; I also told him I was very careful not to get over his line; I have not talked it over with Mr. Palmateer outside of that; he has not been to my house, and I did not know I was to be fetched up on it; I mentioned a word or two to Judge Robbins to-day; I
20 answered a few questions.

Re-direct—

I did not see you, Mr. Robbins, over five minutes this morning; I don't think it was as much as five minutes, and I did not understand what Mr. Stout was cross-questioning me about as to conversing about the case.

ARCHIBALD A. ^{his}X APPLEGATE.
mark.

Sworn and subscribed before me this 19th day of September, 1883.

HOLMES W. MURPHY,
30 *Master in Ch'y of N. J.*


William Devereaux, a witness produced on the part of the complainants, being duly sworn according to law, on his oath says:

I live in the borough of Neptune City; my business is postmaster, but I have no particular business; I know Mrs. Harvey, widow of William A. Harvey; I know

Archibald A. Applegate; I will be sixty-four years old the first day of January next; I knew William A. Harvey in his lifetime; I know where what is called his Central Park property is of which he died seized; it is located on the north side of Duck creek: the Deal and Squan bridge turnpike runs through it; I believe Mr. Harvey laid out the land on the east side of the turnpike in lots; I do not know that he mapped this land, and don't know where the lines of what he did map are; I plowed some of this land where Central Park property 10 lies for Archibald A. Applegate; I won't say whether it was two or three years ago this last spring; I plowed the part of this property which is on the west side of the turnpike—between the turnpike and railroad; I only plowed one year—just broke up the ground for him; I did not plow on the east side of the turnpike; I plowed clear through from the turnpike to the railroad; Archibald Applegate told me where to plow; I suppose he had instructions from Mrs. Harvey where to plow; I do not know whether it was Mrs. Harvey or Mr. Allen; I think 20 we went from a wild cherry tree next to the turnpike to a point of woods next to the railroad; it runs in my mind that there is a cedar tree near the cherry tree on the turnpike; I won't say whether the cedar is on the north or south side of the cherry; I have heard that the point of woods on the west to which I plowed was in the names of Kelly and Palmateer; I don't know which Palmateer; I suppose it was either John or Amos; I know them by sight, but do not know their names one from the other; there was a pine stump or pine tree at 30 the point of the woods where I came out; I don't know now which it was; I tried to draw a straight line with my plow from the turnpike to the railroad; I worked about south from the line I had broke up with my plow; I did not plow to the north of the line which I had made with my plow; I left that unbroken by order of Archibald Applegate; the reason he gave me for not plowing to the north of that line was that he said they were about selling that; he said they were about selling it to Mr. Palmateer; he did not mention any first name, 40

and did not mention whether there was more than one; Mrs. Harvey lived to the south of where I plowed, and about from seventy-five to one hundred yards from the line I drew with my plow; I plowed down to the line of the apple orchard; I plowed what apple trees there were and to within ten or twenty feet of the house where she lived; I was plowing there altogether about three-quarters of a day; Mrs. Harvey came out of the house and showed me how near to plow to the house where
10 she lived; I don't think she said anything to me about not plowing to the north of the line, and did not raise any question about it whatever; my post office and where I live is not over a quarter of a mile from Mrs. Harvey's house and was so then; I do not recollect of her saying anything to me about leaving the piece to the north of the line unplowed; the piece I did not plow is bounded on the east by the turnpike—I mean the Deal and Squan Bridge turnpike, on the south by the plowed land which I plowed, on the west it ran out
20 to a point at the railroad, and on the north by a piece of woods and Evergreen avenue; I mean the woods which I understood to belong to Palmateer and Kelly; this point of woods bounded on the railroad on the west, and the piece of land I did not plow on the south, and on Evergreen avenue on the north; I should suppose that the line which I drew from the point of woods to the turnpike would about square the piece of woods out to the turnpike—that is leave it about the same length on the turnpike that it was on the railroad; I did not
30 do any work on the land there afterwards; I remember hearing of the death of Abner Allen at the time he died; it was not the same spring that I heard of his death that I did the plowing; I think he died a year after the spring that I did the plowing; it is either two or three years ago last spring since I did the plowing—that is either 1880 or 1881—and I never plowed there but one year and that was for Archibald A. Applegate.

[Counsel for complainants shows witness a map which is entitled "Map of Central Park the property of W. A. Harvey's, at scale 75 feet to the inch," and calls his
40

attention to a plot marked on the map as plot D, lying to the west of the turnpike; witness says]—I recognize on this map the part which I left unplowed—that is the part of plot D as marked on this map; the line which I drew with my plow was from the point of the woods which is marked on this map “Beg.” and “” and straight across to the turnpike; the piece of woods is marked in pencil with the figure “1,” and the part I left unplowed is marked in pencil with the figure “2.”

[Counsel for defendants objects to all of the above 10 testimony and especially that part where witness speaks of the plowing of the land and of what others told him as immaterial, incompetent and illegal.]

Cross examined—

I cannot tell how wide a strip I plowed; it might have been seventy-five yards wide and might have been a little wider or not quite so wide; it might have been about fifty yards from the north line of where I plowed to Evergreen avenue.

WM. DEVEREAUX. 20

Sworn and subscribed this 23d day of October, 1883, before me.

HOLMES W. MURPHY,
Master in Chancery.

Peter Sours, a witness produced on the part of the complainants, being duly sworn according to law on his oath says—

My home is at Metuchin; my wife lives there, but I stay most of the time at Asbury Park; my business is civil engineering and surveying; I have followed that 30 business more or less since about 1831 or 1832; I follow my profession at and about Asbury Park; I have been doing so about two or three years; I think it will be three years next spring; I made a survey of the land in question in this case which the Palmetteers bought of Abner Allen, executor of William A. Harvey, deceased, as is said; I made this survey, I think, over a year ago,

at request of Mr. Palmateer; Mr. Amos Palmateer was on the ground with me when I made the survey; I cannot tell which one spoke to me about it; Mr. Amos Palmateer showed me the ground I was to survey and the points at the railroad from which I was to survey on the turnpike; I was required by Mr. Amos Palmateer to measure the same distance on the turnpike southerly from the centre of Evergreen avenue as I found the measurement to be from the centre of said Evergreen
10 avenue southerly along the easterly side of the railroad company's land to an iron bolt at the southwest corner of a triangular piece of the Palmateer woodland; I so measured the land; I made a map showing the result of my survey there.

[Counsel for complainants' shows witness a map which is signed "Peter Sours surveyor, Asbury Park, N. J.," which is offered in evidence, and marked *Exhibit 1½* for complainant]—That is the map which I made; and it shows truly the result of my labors as to monuments,
20 courses and distances, and street, turnpike and railroad; I think I saw a large pine stump near where, I have marked "Iron monument;" I found the distance along the east line of the railroad company's land from the centre of Evergreen avenue to the iron monument, at the point of the woods, to be two chains and eighty links; I then measured the same distance along the centre of the turnpike road, southerly from the centre of Evergreen avenue, namely, two chains and eighty links; I drove a stake on the westerly line of the turnpike, at
30 the same distance southerly from the centre of Evergreen avenue; I then ran from there back to the iron bolt on a course of north sixty degrees and twenty-five minutes, west four chains and fifty links, being the measurement from the centre of the turnpike to the iron bolt aforesaid; it is about fifty-three and a third yards from the south edge of Evergreen avenue, to the south line of the piece of ground surveyed by me for Mr. Palmateer; the area of the piece I surveyed for Mr. Palmateer, and as shown on this map, is eighty-six hundredths of an acre.

[Counsel for defendants objects to all the above testimony as immaterial and incompetent.]

[Counsel reads to witness the descriptions of the property in question, set forth in the bill of complaint, commencing with the words, "beginning at an iron plug or monument" and ending "containing eight-six hundredths of an acre more or less;" witness says that is an accurate description of the land as surveyed by me, and is in conformity with the map.]

[Counsel for defendants objects to above question and 10 answer for the reasons above stated.]

Cross-examined—

I made this survey in late summer or early fall of 1882, as near as I can recollect; I think I can say—I am sure I made it in 1882; I have no memoranda with me—the bearings are as the needle pointed in 1879; I made them conform to the bearings of that date; the distance along the turnpike surveyed by me for Mr. Palmateer is one hundred and eighty four and eight-tenths feet; the distance along the southerly line of the plot I surveyed is 20 two hundred and ninety-seven feet; the distance along Evergreen avenue is one hundred and thirteen feet and six inches.

Re-direct—


My line on Evergreen avenue, from the middle of the turnpike running west, did not go to the railroad; it went to the southeasterly line of Palmateer's triangular piece of woodland and the northeasterly corner thereof in the middle of the avenue.

PETER SOURS. 30

Sworn and subscribed before me, this 23d day of October, A. D. 1883.

HOLMES W. MURPHY,
Master in Ch'y of N. J.

William Devreaux, a witness produced on the part of the complainants, being recalled, says:

Q. Mr. Devreaux, in questioning you a while ago about the line you drew with your plow from the railroad to the turnpike, I pointed out as your point of beginning at the railroad and at the point of Mr. Palmateer's woods, the place which is marked "Beg. "—upon looking more carefully at the map which I showed you, I ascertained that the railroad crossed to the east of that point, and where I have now indicated by pencil marks; now, upon my showing you the map as corrected in the particular named, and assuming the railroad to cross where it is shown in pencil, from what point in the edge of the railroad land did you go with the line which you drew with your plow from the railroad to the turnpike?

A. I drew it from the turnpike to the point of woods at the railroad lands, and wherever the point of woods came, that was the point I went to.

[Question objected to by defendants' counsel as immaterial.]

20

WM. DEVEREAUX.

Subscribed and sworn to before me this twenty-third day of October, 1883.

HOLMES W. MURPHY,
Master in Ch'y of N. J.

Amos Palmateer, a witness produced on the part of the complainants, being duly sworn according to law, on his oath says—

I live opposite Ocean Grove, on the turnpike, in Neptune township, Monmouth county, New Jersey; I have no particular business now; I was formerly in the lumber business there; I am forty-two years of age; I have a brother John, who is older than I am; he lives in Asbury Park; I did not know William A. Harvey in his lifetime; I knew Abner Allen, his executor, in his lifetime; I know where the Central Park property of William A. Harvey is located; it is north of Duck creek, and on the east and west sides of Deal and Squan Bridge turnpike, the turnpike runs about north and south

through it; the New York and Long Branch Railroad also cuts across a point of it, the extreme west point of it; that was formerly called the New Egypt and Farmingdale Railroad; the railroad runs nearly parallel with the turnpike; the avenue which bounds along the north side of the Central Park property is called Evergreen avenue, and it runs across both the turnpike and railroad nearly at right angles; I and my brother John purchased part of this Central Park property of Mr. Allen, the executor of William A. Harvey. 10

[Counsel for defendant objects to this answer as incompetent.]

[Counsel for complainant shows witness the map which is entitled "Map of Central Park, the property of W. A. Harvey, at scale of seventy-five feet to the inch," which map is offered in evidence by complainants' counsel, and is marked by me *Exhibit No. 2*, on the part of complainant.]

[Counsel for defendant objects to that part of said map which has been added in lead pencil.] 20

I purchased the northeast corner of the parcel lying on the west side of the turnpike, and marked plot D, and which is marked in pencil "Palmateer."

[Objected to by counsel for defendant as incompetent.]

Q. How is that lot bounded?

A. It is bounded on the east by the Deal and Squan Bridge turnpike, on the south by the land owned by William A. Harvey's, deceased, estate, on the west by land owned by me and my brother John, and on the north by our land and Evergreen avenue; the land of 30 myself and my brother John lying west and north of the plot I have described is woodland; this woodland is marked on said map *Exhibit No. 2*; in pencil as "*No. 1*."

[Witness shown the map made by Mr. Sours, and identified by him this morning.]

This map correctly shows the land which I purchased and the woodland adjoining, and also the turnpike and avenue and railroad; I and my brother have owned that corner of woodland about four years.

Q. What was your purpose in purchasing this plot of 40

land west of the turnpike of Mr. Allen, the executor of Mr. Harvey?

[Defendants' counsel objects to this question as incompetent and immaterial.]

A. To straighten the land we owned behind it out to the turnpike, and to make it the same length on the turnpike that our other land was on the railroad, so that it would measure the same width at each end; Francis A. Gulich, who was in the ice business with Abner Allen, was seen by me at Asbury Park; I asked him if they had lots for sale on this Central Park property and he said they had, and I told him to send Abner Allen down; in about eight or ten days Abner Allen came down to the lumber office of myself and brother; this was on the 2d day of March, 1881.

[Counsel objects to any evidence by this witness, as he is one of the complainants in the suit, and Abner Allen, the executor, being deceased, and William A. Harvey being also deceased, of whose estate the land in question is a part; the objection was not made when the witness was sworn, because the counsel for defendants overlooked for the moment the fact that witness is one of the complainants.]

Q. State what occurred between you and Mr. Allen at that time?

[Objected to by defendants' counsel as incompetent and immaterial.]

A. Mr. Allen came in our office with this map and asked us if we wanted to buy lots; my brother and Kelly, I think, were present; I told him we did; he wanted to know if I wanted to go down and look at them; I told him I did; he said he had a wagon there and would take me down; so we went down there in the wagon; we drove in near Duck creek from the road a ways; I and Mr. Allen, the executor; he tied his horse and put the blanket on him; then he opened the map; it was a map plotted the same as *Exhibit No. 2*, only it was on thicker and yellower paper; he showed me on the map which lots were sold and which were not sold; I asked him then what he would take for lots 3, 4, 5, 6

and 7—all in plot C; he said he would take \$100 for the five lots; then I asked him what he would take to straighten us out in plot D, on map *Exhibit No. 2*; I showed him on the map where I owned, and I asked him what he would ask to straighten us out—that is, to give us as much on the turnpike as we owned on the railroad; I showed him the point of woodland, which is marked, in pencil, No. 1 on map *Exhibit No. 2*, and wanted him to square us out the same width on the turnpike as this woodland is on the railroad; there was 10 a monument at the point of the woods where our line was to begin to run across the turnpike; it was an iron plug driver in the ground about three inches across, or thereabouts; it was driven in solid and strong; I suppose it was put in by the railroad company, to show where their line crossed the line of land owners; the railroad line at that point crossed William A. Harvey's line, and also made the southwest corner of our woodland; we got this woodland of the heirs-at-law of Michael Howland; there was a pine stump near the 20 iron plug I speak of; about four feet northeast from the iron plug; there was a cedar tree near the end of the line where it reached the turnpike—that is, the end of the line which was to square our property out to the turnpike; this tree was twenty feet, if not more, from the edge of the turnpike, and about fifteen or sixteen feet north of the south line of the land we bought of Abner Allen; I also recollect a wild cherry tree near the cedar, and a little north of the cedar and nearer the turnpike than the cedar was; I and Mr. Allen talked 30 this matter over on the ground when we went there that day; Mr. Allen said he could not tell me then what he would take for this land.

[Defendants' counsel objects to any evidence of any conversation between witness and Mr. Allen as incompetent.]

He said he could not tell me till he saw the widow Harvey and heard what she said; he then unhitched the horse and drove up to the house where Mrs. Harvey lived; I rode with him in the wagon; he went in the 40

house and I held the horse; he went in to see Mrs. Harvey, to see what she would take for this land—that is, this part of plot D; he was in there from ten to fifteen minutes; when he came out he said he would take \$500; that is, he would sell it to me and my brother John for \$500; my brother knew about it and agreed to it then and afterwards; he then got in the wagon and went on the land on plot D, which is marked, in pencil, “2;” he tied his horse near this iron plug at the point of the
10 woods; he got out and went to the iron plug, and I showed him where we wanted the land, and he paced from the iron plug to Evergreen avenue; we did that to see how wide we wanted it on the turnpike; we came back to the iron plug and Allen said it would take just about to the cedar tree to give us the same width on the turnpike as we had on the railroad; I tried to get the land for less, and he got in the wagon and came to town; we hitched the horse at Isaac Kennedy’s office in the street; just as he was going up stairs
20 I asked Allen how long he would give me the refusal of it at that price; he said eight or ten days; he went up to Isaac Kennedy’s office and I went to our office; I did not accept the offer at that time; then on the 5th of March, 1881, I went up to Abner Allen’s, at Deal; I saw there Abner Allen; I told him I had come up to take that land; I mean both pieces—that which is marked on plot D on the map, and the five lots, 3, 4, 5, 6 and 7, on plot C; he said “all right, come in”; he lit the lamp; I paid him \$25 on the purchase
30 money of the land, which I bought to straighten out our land to the turnpike; he wrote first a receipt for the other land, the lots; I paid him \$25 also on the purchase of the five lots; I paid him first for the five lots and got the receipt for them first, and then I paid him secondly the \$25 for the lot to square us out to the pike; I took a receipt for this \$25; I was acting for my brother John as well as for myself on the lot to square us out; at the time the receipt was drawn there was some conversation about the lines; I was purchasing the five lots for my-

self; I have the receipt on account of the purchase of the five lots with me.

[Witness produces paper and says]—

This is the receipt for money paid on account of the lots 3, 4, 5, 6 and 7 bought by me of Mr. Allen, executor of William A. Harvey, deceased; I saw this written by Mr. Allen; it is all in his handwriting, body and signature; this purchase my brother John had nothing to do with; he and I owned the woodland back of what we bought to square us out to the pike jointly; that is the reason why we bought the land to square us out jointly. 10

[Complainants' counsel offers this receipt in evidence, which is marked by me *Exhibit No. 3* for complainant.]

At the time of giving the receipt for the land we bought to square us out to the turnpike, I and Mr. Allen talked over the lines of the purchase fully; the lines of the property purchased by me west of the turnpike were reduced to writing at that time by Mr. Allen; the boundary and description of the land were written in the receipt which I took on account of the purchase money of said land; Abner Allen wrote the receipt, and the description and boundaries of the land in it, and signed it; he signed it as executor of William A. Harvey; I took the receipt and brought it down to John Hathaway's store at Asbury Park; I showed it there to my brother John; he read it and said, "that is all right, it will hold the land"; I did not show him the receipt for lots 3, 4, 5, 6 and 7, marked *Exhibit No. 3*; he did not see that receipt for a year afterwards; after showing this receipt for the land west of the turnpike to my brother at Hathaway's store, I put the receipt in the safe; I have seen the receipt since I put it there; probably two or three weeks after putting it there I took it out and showed it to my brother and William C. Kelly; my brother read it; my brother-in-law, Kelly, stood alongside of him when he read it; what caused us to look at it at that time was that we were talking about the land and the receipt, and I went to the safe and brought it out; after I was done with it on that occasion I put it back in the safe; I have seen it since then as I 20 30 40

was looking over the papers ; I have not been able to see it since, or since this suit was commenced ; I do not know where it is, and do not know how it got lost—not positive, but I have my ideas as to how it got out.

Q. State to the best of your recollection, knowledge and belief the contents and terms of that lost receipt.

A. "Received March 5th, 1881, from Amos Palmateer and John Palmateer \$25 on account of land south of the toll-gate of the estate of William A. Harvey, deceased, 10 commencing at an iron plug on the east side of the railroad, thence running northeasterly until it strikes the centre of Evergreen avenue ; thence running easterly along the centre of Evergreen avenue until it strikes the centre of Deal and Squan bridge turnpike ; thence southerly as many feet as it is from the iron plug to the centre of Evergreen avenue north ; and the balance, \$475, to be paid within the year, and deed to be given when paid. (Signed) Abner Allen, executor." Mrs. Harvey knew about this sale to me and my brother John ; 20 she did not raise any objection to the sale to me or to my brother John so far as I know ; Abner Allen went in to consult her as to the sale before it was made ; there was no possibility of a mistake or misconstruction of the boundaries or lines of the tract he sold to us west of the turnpike ; after this receipt had been received by me Abner Allen died ; it was about two months after he gave it ; his son George C. Allen and Edward H. Ward were appointed his administrators ; after the death of Mr. Allen John P. L. Tilton was appointed administra- 30 tor of the estate of William A. Harvey, deceased ; within the year mentioned in the receipt I made application to Mr. Tilton to carry out the agreement which I had made with Mr. Allen for the purchase of the property west of the turnpike ; I saw Mr. Tilton once about this, I know, before the year was up, and I cannot say whether I saw him twice or not ; I was acting for myself and my brother John at that time ; as soon as Mr. Tilton got so that he did business for the estate of Mr. Harvey after his appointment as administrator, he met me in the street at 40 Asbury Park and said he understood I had bought a

piece of land of Abner Allen off the Harvey tract, and that I had lost the receipt; he said if I would go to George Allen and get another receipt he would give me a deed; I went and got a receipt, and never got the deed.

[Witness shown *Exhibit No. 1* for the complainant, being the receipt last mentioned, witness says]—

This is the receipt I got from Mr. Allen in pursuance of the instructions from Mr. Tilton; I told Mrs. Harvey about it as soon as I had lost the receipt, and asked her 10 if there would be any trouble about it, and she said she thought there would not; I saw her at her house, and went there on purpose to see her; I asked Mr. Tilton for my deed; I saw him about giving me the deed four or five times; I asked him about it every time I saw him; after I got this receipt from George C. Allen I showed it to Mr. Tilton; it must have been very soon after, for I was anxious to get my deed; Mr. Tilton at first made excuses; he said he did not know about it, and afterwards he said that he could not 20 give me a deed and if Mrs. Harvey wanted to she could; at the times I saw Mr. Tilton after getting the receipt of Mr. Allen I wanted to get the deed and was willing to pay the money; it was in the bank and ready at any time; previous to the commencement of this suit I tendered to Mr. Tilton \$475, and demanded of him a deed for the land west of the turnpike; it was made in legal tender money—greenbacks and gold; at that time I demanded that he make me a deed for the premises mentioned in the lost receipt lying west of the turnpike; he 30 refused to accept the money and said he could not make the deed, and he never gave the deed and I never had a deed made to me; when Mr. Tilton said he could not give me a deed, I asked Mrs. Harvey if she could not; she said Mr. Allen had fooled enough of her property away and she would not give a deed till she was obliged to; this was in the spring, perhaps in May of 1882; all of my demands for a deed, whether upon Mr. Tilton or Mrs. Harvey, have been met with either excuses or a refusal; there was a mortgage of \$600 on this property, 40

held by Charles Rogers when I bought it, and it remains on it yet as far as I know; this property west of the turnpike was to have been conveyed to me free of encumbrance; this was the agreement with Mr. Allen; I asked Mr. Allen if there was a mortgage on this property; he said there was a mortgage for \$600, held by Charles Rogers; he said his object in selling to me was to pay that mortgage, and that it would just about clean the mortgage up—that was his expression; when he
 10 spoke of this sale he referred to the sale of both pieces, making up the \$600; I and my brother have always been willing and desirous of paying this money and accepting the deed, and are so now; we had the money lying in the bank for more than a year for that purpose.

[Witness shown map made by Mr. Sours, and says]—
 This tract of land, marked on the map as containing eighty-six hundredths of an acre, is correctly described in the receipt given me by Mr. Allen, which is lost, and is the identical land described in that receipt.

20

FREEHOLD, N. J., November 24th, 1883.

Amos Palmateer, recalled for cross-examination—

[Defendant's counsel objects to all the testimony of this witness that relates to any transaction or conversation with, or statements made by the deceased.]

By Mr. Stout—

Q. Did you ever show this receipt, in question, to Mr. Tilton? A. No, sir.

Q. When did you first make a demand on Mr. Tilton for this land in question? A. He spoke to be about it
 30 first.

Q. When? A. It was in the fore part of February.

Q. In what year? A. 1882.

Q. What did Mr. Tilton say to you? A. He came to me, and says he, "I understand you bought a piece of property of Abner Allen, and you have lost the receipt;" I told him I had; he says, "Then you see George Allen, you go and get another receipt of George

Allen and I will give you a deed ;” I said, “ All right, I will do it,” and I went and got it.

Q. Was that February 1882, or 1883? A. That was 1882.

Q. Where was this? A. That was right down in front of Redway’s office.

Q. Who was with him? A. He was alone.

Q. Give me the exact date of that? A. I could not.

Q. Give it as near as you can? A. I could not tell the exact date. 10

Q. Was it before the 10th of February? A. It was between the first and the middle of February.

Q. You are sure about that, are you? A. Yes, sir, I am sure of it.

By Mr. Robbins—

Q. Did Mr. Tilton, when he spoke to you, as you have just stated, say whether or not he had been appointed administrator of William Harvey’s estate at that time?

A. He said he was going to settle up the estate ; he didn’t say that he was appointed. 20

Q. You don’t know whether he had actually been appointed at that time or not? A. I heard he had ; I didn’t know actually.

Q. As to the exact date of his seeing you, do you speak with absolute certainty about that? A. No, sir.

Q. It might have been later, you say? A. Yes, sir.

Q. Or it might have been earlier? A. Yes, sir ; it might have been.

Q. You only speak from your best recollection on that point? A. Yes, sir. 30

John Palmateer, called on behalf of the complainant, being duly sworn, testified as follows—

By Mr. Robbins—

Q. Where do you reside? A. Asbury Park, N. J.

Q. What is your age? A. Forty-four years.

Q. How, if at all, are you related to Amos Palmateer, one of the complainants in this action? A. Brother.

Q. Are you connected with him in business? A. Yes, sir.

Q. Where? A. Asbury Park.

Q. What kind of business? A. We have been in the lumber business, but nothing much now; we are out of the business—out of the lumber trade.

Q. Do you remember hearing of the death of Abner Allen? A. I do.

Q. Heard of it at about the time he did die? A. 10 About the time, yes, sir.

Q. Do you know of his owning any land on the Deal and Squan Bridge Turnpike, known as Central Park property? A. Abner Allen?

Q. Do you know of William Harvey's estate owning any land there? A. Yes, sir.

Q. Do you know how Abner Allen was connected with the estate of William Harvey, deceased? A. I understood he was administrator of it.

Q. Or executor, which? A. Executor, whatever you 20 call it.

Q. How near to Ocean Grove is that Central Park property located? A. About one-eighth or one-quarter of a mile.

Q. Did you and your brother own any property adjoining that Central Park property of Mr. Harvey's? [Objected to as immaterial.]

A. We did.

Q. What was it that you owned there, you and your brother? A. We owned a gore piece, as you might call 30 it, right in behind, between the railroad and the turnpike.

Q. What was it, woodland? A. Timberland.

Q. What shape was it?

[Objected to as immaterial.]

A. In a triangle—three-cornered shape.

Q. How was it bounded, your triangular piece of land? A. Bounded on the west by the railroad and on the north by a street; I don't know what the name of it is.

40 Q. Evergreen avenue? A. I believe that is what

they call it, and then on the east I call it by this estate of Mrs. Harvey's—on the east and south or southeast.

Q. I show you a map marked *Exhibit No. 1*, on the part of the complainants; look at this map and say whether or not you recognize the gore or triangular piece of land? A. Yes, sir; this is ours, right here.

Q. Where you point with your finger? A. Yes, sir.

Q. And which is marked "Palmateer's land" on the map? A. Yes, sir.

Q. Do you know anything of the piece of land in 10 question in this suit having been purchased by your brother for yourself and him?

[Objected to as immaterial.]

A. I do.

Q. What do you know upon that point?

[Objected to as immaterial and incompetent.]

A. I know he went up to Abner Allen towards evening to buy it, and I told him that I would meet him at Hathaway's store when he came back, and I was there when he came in and he showed me a receipt for \$25, 20 which he paid when he bought this piece of land—a receipt for this piece of land and he paid \$25 on the purchase of it.

Q. That was in Mr. Hathaway's store on the return from Abner Allen's; A. Yes, sir; that evening.

Q. The piece of land which he bought of Abner Allen at that time, lying on the east or the west of the turnpike? A. On the west of the turnpike.

Q. Did he show you any receipt of purchase, so far as you knew at that time, any land lying on the east of 30 the turnpike? A. No.

Q. What was the first you ever knew of his having bought any land on the east of the turnpike of Abner Allen?

[Objected to as immaterial.]

A. I never knew that, it must have been a year or upwards after that; the first I found out I was up to our folks and they asked me about it, and that is all I knew about it; I didn't know about it until they spoke to me about it.

Q. Did he buy any on the east of the turnpike for you or for you in connection with him? A. No.

Q. How much was the price to be paid for the land which he bought for yourself and him on the west of the turnpike?

[Objected to as immaterial and incompetent.]

A. \$500.

Q. And he showed you a receipt for how much?

[Objected to.]

10 A. \$25.

Q. And that left a balance of how much?

[Objected to.]

A. \$475.

Q. Do you remember how long this was that he went to Abner Allen's and showed you the receipt as you have stated, before the death of Abner Allen? A. I could not say, probably a couple of months, or two or three months.

Q. I was a short time at any rate? A. Yes; a short
20 time.

Q. When did you ever see this receipt which you have mentioned afterwards, if at all?

[Objected to as incompetent.]

A. I don't recollect of ever seeing it at all, after that night.

Q. You don't recall it? A. I don't remember it.

Q. Did you read the receipt that night? A. I did.

Q. What was the purpose of yourself and your brother, in buying this piece of land on the west side of the turn-
30 pike?

[Objected to as immaterial.]

A. It was to square our triangle out with the turnpike, to make it square from that to the railroad.

Q. What do you mean by that? A. I don't know how to explain that; it was to make the front square with the back, making it all in one square piece.

Q. That is to give you as many feet on the turnpike, as you had on the railroad, after the lot was squared; was that the point? A. Yes, sir; that was the point.

40 Q. Can you remember anything about how the receipt

read; can you carry it in your mind now? A. I cannot; I know what I do remember; that we were to have the deed inside of a year, and it was for \$25., but more than that, I cannot tell.

[Defendants' counsel objects to the above answer as incompetent.]

Q. That is, the receipt was \$25? A. Yes, sir.

Q. Do you know whether or not the receipt has been lost? A. It has been lost.

Q. Do you know whether any search has been made 10 for it? A. Yes, sir; we have looked for it and can't find it.

Q. Have you made any search for it? A. Yes, sir; we have looked through the safe, and in all the papers my brother has, where he kept things, and he can't find it.

Q. You have been unable to find it? A. We can't find it.

Q. Have you had any talk with Mr. Tilton about the property? A. I never spoke to him about it. 20

Q. When you saw the receipt at the store of Mr. Hathaway and after you had read it, what was done with it? A. My brother took it.

Q. Your brother Amos? A. Yes, sir.

Q. I show you a paper and ask you this question—look at this paper and say whether or not that states correctly, or substantially, the contents of the receipt which you saw at Mr. Hathaway's store?

[Objected to.]

A. I would not say; I could not tell what the receipt 30 did say, only I know it was for \$25, and I remember that we were to have the deed within a year, but I would not say what the contents was; I just read it and handed it back to him; that is all I remember about it.

Q. Do you remember what the balance of the money was remaining after the payment of the \$25? A. \$475.

Q. You remember that distinctly? A. I can't say; I know the receipt was for \$25 paid on the land.

Q. As to the balance? A. I can't say what the balance did reach; I paid no attention much to it; I read it and 40

handed it back to him and he took it, and that is the last I remember of seeing the receipt.

Q. Do you remember what was to be paid for the tract on the west of the pike? A. \$500.

Q. But you don't remember the exact terms of the receipt? A. No, I do not.

Cross-examination by Mr. Stout—

Q. You are one of the complainants in this suit? A. I am.

10 Q. You have not made any search for this receipt? A. We have looked; I saw my brother looking for it.

Q. Have you looked for it? A. I think I have helped to look in my papers, but I would not be positive about it.

Q. You won't say that you ever made any search for this receipt? A. I don't remember about that exactly; of course the papers—he has kept all the papers himself; he has handled all the papers since we have been in the business; I have had nothing to do with them.

20 Q. You are not in the habit of losing papers from your safe? A. I don't know that we have.

Q. You do not lose papers do you, as a rule? A. No; I don't know as we do lose papers, only this one I know we have lost.

Q. And the only one you know of having lost? A. The only one I remember of losing around the office.

Q. But you don't know of any other paper being lost, and you don't know anything about this paper at all—you didn't have the handling of it? A. I know I saw it.

30 Q. Your brother took it? A. I saw it at the store.

Q. You don't know of your own knowledge whether it is lost or not, you have only what he says? A. We have searched for it through all the papers; he brought all the papers out on the desk and he could not find it; I was right there and saw him look for it.

Q. You heard what he said to you that he was looking for that paper? A. I know he said so, and he opened the safe and went to looking again; I would say "it must be in there," and he would unlock the safe and

bring out the papers and overhaul them again, and he said he could not find it.

Charles Rogers, called on behalf of the complainants, being duly sworn, testified as follows—

By Mr. Robbins—

Q. Where do you reside? A. Summerville, about three and one-half miles west of Asbury Park.

Q. Did you know William A. Harvey when he was living? A. Yes, sir; I was well acquainted with him.

Q. Did you know the property which belonged to him 10 and which was called the Central Park property? A. Yes, sir; I knew about its condition and where it laid.

Q. How did it lie in reference to the Deal and Squan bridge turnpike? A. It laid both sides of it.

Q. Did you hold any mortgage on that property? A. Yes, sir.

Q. Have you got it with you? A. Yes, sir.

Q. There was a bond accompanying it, too? A. Yes, sir.

Q. Will you produce it? 20

[Witness produces bond and mortgage.]

Q. I call your attention to the mortgage, which is from William A. Harvey and Catharine, his wife, to Charles Rogers, for \$600.00, and bears date the 15th of September, 1874, and recorded October 5th, 1875, in the Monmouth county clerk's office, in Book L3 of Mortgages, page 510, etc. Is this the mortgage which you held against Mr. Harvey in his lifetime? A. Yes, sir.

Q. Do you know the land which is covered by the mortgage? A. Yes, sir, pretty nearly. 30

Q. State whether or not this mortgage covers the Central Park property? A. It covers the portion west of the turnpike.

Q. It covers all west of the turnpike? A. That was the calculation.

Q. As you understand? A. Yes, sir, as I understood it.

Q. I show you the bond which you produce, and which bears even date with the mortgage just referred to, and

is from William A. Harvey to Charles Rogers. Is this the bond which you held against Mr. Harvey in his lifetime? A. Yes, sir.

Q. Do you know his signature? A. Yes, sir.

Q. Is that his signature? A. Yes, sir.

Q. Has any part of the principal of this bond and this mortgage been paid? A. No, sir.

Q. How much principal is due on it? A. \$600.

Q. And up to what time has the interest on it been paid? A. It was all paid up to last date, September 15th, 1881.

Q. Then I understand you to say that the whole of the principal and the interest from that date remains due upon this bond and this mortgage? A. Yes, sir.

Q. Are you still the holder and owner of them? A. Yes, sir.

Q. And this money is due from the estate of William A. Harvey, deceased, to you? A. Yes, sir.

[Bond and mortgage offered in evidence.]

20 [Mortgage marked complainants' *Exhibit No. 5.*
[Bond marked *Exhibit No. 6.*]

Cross-examination waived.

[Counsel agree that copies of the bond and mortgage may be used in this case the same as if they were the originals, unless either side should require the originals to be produced.]

William C. Kelly, called on behalf of the complainants, being duly sworn, testifies as follows:

By Mr. Robbins—

30 Q. Where do you reside? A. Raritan township, Middlesex county, N. J.

Q. What is your age? A. Forty-six years old last August, the seventeenth day.

Q. How, if at all, are you related to Amos and John Palmateer? A. I married their sister; I am their brother-in-law.

Q. Did you ever reside at Asbury Park? A. I did.

Q. Were you at any time connected in business with Amos and John Palmateer? A. I have been for six or seven years—ten years.

Q. When did your business connection with those gentlemen cease? A. It has not ceased; I have it every day.

Q. Were you ever a partner with them? A. Yes, sir.

Q. When did your partnership relations cease? A. It has not; only just sold out our lumber yard. 10

Q. Did you know Abner Allen in his life time? A. I knew him, after I heard who he was.

Q. You had no acquaintance with him? A. I never spoke to him but once in my life.

Q. When was that, as near as you can recollect—that is, how long before his death? A. A month or six weeks, or possibly two months.

Q. Were you living at Asbury Park at that time? A. I was.

Q. Did you know of his owning any property on the Deal and Squan Bridge Turnpike, which was called the Central Park property? A. I don't know that he owned it; I know that he had some selling of it.

Q. Do you know of the estate of William A. Harvey, having any property there? A. I saw old Mrs. Harvey a dozen times before that, and asked her if she had any to sell—

[Defendants' counsel objects to the conversation.]

—I used to stop there occasionally when I would be going up and down the road, and talk to her about the 30 land; I went to the barn one time, when they had a dead horse there and—

Q. You know of the land there belonging to the estate of Mr. Harvey? A. Yes, sir; she told me who was selling it.

Q. Who did she say? A. I understood her to say Mr. Tilton and Mr. Allen had the selling of the land.

Q. Was it Abner Allen? A. Yes, sir; Abner Allen, she told, who lived up towards Deal Beach.

Q. Did you know at any time, of Amos Palmateer 40

purchasing any part of the Central Park property for himself and his brother John.

[Objected to as immaterial.]

A. I do; I recollect the day well.

Q. How long was that before Abner Allen's death, as you recollect it? A. Abner Allen died in the spring, and this was in the spring; it was a warm day early in the spring; it might have been February or March; I never paid much attention to it, but it was in the spring
10 of the year.

Q. Tell me what you know about the purchase by Amos Palmateer, for himself and brother, of any part of the land belonging to the estate of William A. Harvey, deceased?

[Objected to as incompetent.]

A. Some of the dealings of "Palmateer Bros.," as they used to call themselves in Michigan, "& Kelly," we knew all about it, and other dealings, when they sometimes bought a piece of ground that they didn't want
20 me to know about, and I would accidently find it out, and I would do the same with them, but when we bought in partnership, we knew all about it.

Q. In reference to this piece, how was it? A. We were loading a lot of siding in front of the office, this day, and Amos came back and said—

[Objected to by defendant's counsel.]

—that he could buy that land for \$500; I didn't know that he was going to purchase the land until he came back and said he could buy it for \$500.

30 Q. Did he say what land it was? A. Yes, sir.

Q. What did he say upon that point?

[Objected to.]

A. He told me that it was the land to make their land square—their smoothing-iron by the railrod; they had a piece of land of seven acres; there is seven acres in that tract, and there is a piece of land across the avenue that you have spoken of; I don't know the name of the avenue; it runs across the railroad.

Q. Seven acres of land, one part of it lies— A. One
40 part of it lies to the north of this avenue, and the other

point runs down—it is a little gore, a smoothing-iron of woods.

Q How is that little smoothing-iron of woods bounded? A. By this avenue and the railroad and Mr. Harvey's land.

Q. Now, what was it he said about squaring it up?

[Objected to.]

A. He said he was going to buy up to a certain cedar tree, on the turnpike, for \$500.

Q. Did he say for what purpose? A. To make his 10 land square.

Q. To where? A. Out to the turnpike; he had got just as many feet on the turnpike as there was in the rear—

[Objected to.]

—I asked him how far that would go, and he said to within two feet of the railroad.

Q. What further do you know about it?

[Objected to.]

A. I says, "Shall I hitch up a horse?" and we were 20 using all the horses, and he said, "No, I have got a ticket to come back;" and he started out, and I saw him as far as Mr. Buchanan's lumber yard, and he went on up to Abner Allen's, and I did not see him that night after that.

Q. Did you see any receipt, or know anything about what he had done in the way of purchasing this land, after he had returned, at any time? A. Two or three days after that, or the very next time the land was brought up, I said, "Let us see what you have got up 30 there," and he walked to the safe and pulled out a receipt, about three inches in width and seven or eight inches in length, of white paper, foolscap, I should think it might be, but it may not have been, or it may have been, a little longer than foolscap paper, and he handed the receipt over to me; I said, "It is the old Quaker's writing;" and he said, "I wrote it myself, and—

[Objected to by defendant's counsel.]

—he brought his sons and daughters to witness this

transaction, and I paid him \$25," and the receipt read \$25.00, and he was to pay \$475.00 within a year.

Q. You remember that? A. Yes, sir.

Q. What was said about the boundaries?

[Objected to.]

A. It spoke of running to—there was a stake or stone or iron pin, driven in the ground; the iron pin is what it spoke of to a certain place to make their land square to the turnpike, the same depth of feet in front as there
10 was in the rear, and it came to within a few feet of a cedar tree.

Q. Did you read the receipt? A. I did.

Q. What was done with the receipt after you read it?

A. Put it back, as I supposed, in the safe; I don't recollect what he done with it, but he was the man that always handled all the papers except one drawer in the safe, that was mine.

Q. Who handled all the papers? A. Amos, ever since we have been in business.

20 Q. Do you know anything about the receipt being lost? A. I know within six months or a year after that, I came there one rainy morning and he said—

[Objected to.]

—he said: "I want you to look and see if you haven't got that receipt from Abner Allen among your papers," and I said: "Have you lost your receipt," and he said: "You may have it in your papers that you have taken over to Bradley's office," and he said: "I can't find it;" I took every paper out of the safe that was mine; he
30 had not looked through my papers and I took my papers out and him and me looked over every paper we had, and he opened the desk and put a stick up in front of the desk and took every envelope and every piece of paper and put them on the floor, and sat down and took every piece of paper up and crammed them into the stove and set fire to them, and to find this paper every envelope was torn in two that was in the desk and out of the desk in the office and hunted that paper, and we were to three or four o'clock in the afternoon trying to
40 find that and then we gave up the chase.

Q. Did you find it? A. No, sir; we did not find it.

Q. Did you have any idea of purchasing any of the property lying on the west of the turnpike of the estate of William A. Harvey?

[Objected to.]

A. I had spoken of it to her, to Mrs. Harvey.

Q. I mean with Abner Allen? A. I never spoke to Abner Allen up to that time, up to the time that he had bought.

Q. Amos had bought? A. Amos had bought. 10

Q. Who was this receipt to? A. It was to Amos.

Q. Or John? A. It was to Amos and John Palmateer.

Q. After Amos made this purchase, did you ever have any talk with Abner Allen?

A. Yes, sir, I did; I came down from the street collecting some money.

Q. Was that before or after you had seen the receipt?

A. I had seen the receipt and knew he had bought the land and knew he was the man to buy of.

Q. What did you do? A. I saw the old gentleman 20 one day, with a team of gray horses, in Mr. Buchanan's lumber yard, holding his horses until somebody came to wait on him; I walked in and talked about his horses and told him they looked like Normandy horses and in pretty nearly word for word what he said; I introduced myself and by and by I said: "Have you got any more land—

[Objected to by defendants' counsel.]

—any more land to sell down on the turnpike," and he said, "I don't know," he said, "where do you mean?" 30 I said down on this piece of land by Duck creek;" he said, "which side do you want to buy;" I said, "which side do you want to sell;" I said, "would you take off a piece of the point from the house, down towards the creek," and he said to me, word for word, "which do you want to buy;" he appeared to be a little deaf; I told him who I was before I got to this, that I was Kelly of Kelly and Palmateer; and he asked if I wanted to buy next to where my partners had bought, or next to the house. 40

Q. Who were your partners? A. Amos and John Palmateer; he said, "I don't know whether we will sell or not;" I said, "will you sell the whole," that was what I was trying to buy, and I was trying to buy it then for their father and mother, but I never spoke to them until after Abner Allen died; they were living in the west, and I was trying to buy the whole of what she owned on that side of the road, that strip of land; he said to me then, that he would see and let me know; I
 10 was over on Park Hall corner, two months or six weeks after that, and I met Rush Wright and he turned around to a gentleman, another Quaker gentleman, a Mr. Bay Wright, and he said—

[Objected to by defendants' counsel.]

—he said Abner Allen is dead; and I walked up to the office, and then I told the boys that Abner Allen was dead, and told them what I had been trying to do to buy the land, but I had never spoke to them about it before.

Q. Did he say during this conversation which you
 20 had with him, when you spoke of buying of him, what part they had bought?

[Objected to.]

A. He said they had bought to come down to a cedar tree, and perhaps they had sold enough to pay the debt, but what debt it was I don't know; I didn't ask him.

Q. He said he had sold enough to pay the debt? A. Sold enough to pay the debt, and he would see and let me know, and before he let me know he was dead; he never let me know.

30 Q. I show the witness a paper and ask you to look at it and say whether or not it states substantially the contents of the lost receipt, according to the best of your recollection? A. Well, I could not swear to this; I would not want to swear just how it read, but that was the contents of the receipt that I read over the counter.

Q. How does that correspond with your recollection of the receipt that you read over the counter?

[Objected to.]

A. If I had never known but what this was the re-

ceipt, and asked this morning to read that receipt, I would say that was the receipt I had seen.

Q. Were you acquainted with the lay of the land there on the west of the road at Central Park? A. Yes, sir.

Q. West of the turnpike? A. Yes, sir; helped them buy the land when they were buying it.

Q. What do you mean, the seven acres? A. Yes, sir.

Q. I show you the map, *Exhibit No. 1*—Just look at that and see if you can distinguish the gore of land, the smoothing iron as you call it? A. Here is the seven 10 acres and here is that street that runs up in the woods; here is the turnpike and here is the gore of land.

Q. How is that gore of land marked on the map? A. "Palmateer."

Q. What land was it, as shown on that map, that you understood that Mr. Allen sold to Amos and John Palmateer?

[Objected to.]

A. This is the piece of land; I never saw this map until this morning. 20

Q. How was that marked? A. There is the iron pin in the road and here is the cedar tree over on the turnpike; that makes it as wide on the north as it is on the turnpike.

Cross-examination by Mr. Stout—

Q. You say that receipt you saw was larger than a piece of foolscap? A. Longer, I mean, this way.

Q. In width, how much? A. I said about *this* width.

Q. How much? A. About four inches in width.

Q. And longer than a sheet of foolscap? A. As long, 30 I said; I could not tell whether it was foolscap or not.

Q. You thought it was a page of foolscap, didn't you? A. I thought it was a piece of foolscap, perhaps; it was about four inches in width, and a little longer than foolscap paper.

Q. Are you acquainted with Abner Allen's signature?

A. No, sir.

Q. Did you ever see it? A. Yes, sir; only on that occasion.

Q. You would recognize it if you saw it? A. I don't know; may be I would and may be I would not.

Q. You say you would think that this receipt was the same as that? A. Yes, sir.

Q. Does it look like it? A. No, the writing don't; I meant the reading.

Q. This is bill paper? A. Yes, sir.

Q. You would not think that was the same paper? A. I meant the reading of that receipt.

10 Q. You would not think that was the same receipt, then? A. How, the same receipt?

Q. If you had not seen any receipt? A. I know it is not the same receipt, but if I had not known it and had been shown this this morning, I would say that was the receipt, from the reading.

Q. You are interested in the business of Kelly & Palmateer? A. I am not, in that piece of land, any more than you are.

Q. Are you not interested in that at all? A. Not one 20 dollar.

Q. Don't you expect to be? A. Never, in the world.

Q. Don't you own land with them, adjoining this piece in question? A. No, sir.

Q. Haven't any interest in it? A. No, sir.

Q. Haven't you a contract with the Howlands' for a piece of land adjoining this? A. Amos has, not with John.

Q. Are you not interested in it? A. I am interested in a piece across the road, for I bought it.

30 Q. Are you not interested in the land of the Howlands' adjoining that which they have agreed to deed to Kelly & Palmateer? A. No, sir; it is Amos Palmateer and James A. Bradley and myself.

Q. That owns the land next to this? A. Across the road from that.

Q. Adjoining that? A. The railroad divides it, the same piece of land.

Q. That is what I am getting at, the same piece of land? A. Yes, sir; the same land.

Q. You would recognize it if you saw it? A. I don't know; may be I would and may be I would not.

Q. You say you would think that this receipt was the same as that? A. Yes, sir.

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Q. Adjoining that? A. The railroad divides it, the same piece of land.

Q. That is what I am getting at, the same piece of land? A. Yes, sir; the same land.

Palmateer, in the piece which you have called the smoothing-iron piece.

[Objected to as leading.]

A. Not a dollar.

Q. Or in the piece lying to the north of it, or to the north of Evergreen avenue?

[Objected to as leading.]

A. Not a dollar.

Q. Or have you any interest, or have you ever had, 10 in the piece which they bought of William A. Harvey's executor Abner Allen, to square out the smoothing-iron piece to the turnpike? A. Not a dollar or a cent.

Q. And never had? A. Never had.

Q. Did you own the piece opposite there, opposite the smoothing-iron piece; that is to the west of the railroad, at the time Amos and John bought of Abner Allen?

A. No, sir; they bought of Abner Allen before we bought the Howland tract; I bought one piece of Howland, right away after they bought the seven acres.

20 Q. I mean now, did you own at that time or have any interest in the land lying to the west of the railroad, immediately opposite the smoothing-iron piece; A. Not a dollar.

Q. When did you first acquire any interest in that land which lies immediately opposite the smoothing-iron piece and across to the west of the railroad? A. It was about a year afterwards; it may have been longer or not so long.

Q. Who are interested with you in that piece? A. 30 James A. Bradley, myself and Amos Palmateer.

Q. You three? A. We three.

Q. And the railroad divides that from the smoothing iron piece? A. Yes, sir.

By Mr. Stout—

Q. What part of Kelly & Palmateer's land is it that the smoothing iron is a part of? A. It is not any part.

Q. Do they just own that little piece in there? A. You know how that seven acres is.

Q Don't they own north of Evergreen avenue also?

A. Yes, sir.

Q. Isn't that the piece that you said you were interested in? A. I don't own a dollar of it.

Q. It is the piece you had your sign up on? A. I suppose our sign is on it, for it is on the Howland piece on the other side of the way—the same sign.

Q. The Howland tract runs around here to the west of the railroad? A. Yes, sir.

Q. And that is all from the same Howland property, 10 isn't it? A. Yes, sir; it is.

Complainants' counsel offers in evidence a certified copy of the account of George C. Allen and Edward H. Ward, administrators of Abner Allen, deceased, the late executor of William A. Harvey, deceased.

[Objected to as immaterial and incompetent.]

Marked complainants' *Exhibit No. 7.*

Also offers in evidence a certified copy of the will of William A. Harvey, deceased.

Marked complainants' *Exhibit No. 8.*

20

Also, offers in evidence, a certified copy of the letters testamentary issued to Abner Allen, as executor of William A. Harvey, deceased.

Marked complainants' *Exhibit No. 9.*

Also, offers in evidence, a certified copy of the letters of administration, with will annexed of William A. Harvey's estate, to John B. L. Tilton.

Marked complainants' *Exhibit No. 10.*

Also, offers in evidence, the paper which has been shown to the witnesses, Amos Palmateer, John Palma-30 teer and William C. Kelly, dated March 5th, 1881, and which purports to contain the substance of the lost receipt.

[Objected to as incompetent.]

Marked complainants' *Exhibit No. 12.*

Plaintiff rests.

ASBURY PARK, N. J., December 29th, 1883.

Complainants' counsel offers in evidence a certified copy of a deed from Michael A. Howland and wife to William A. Harvey, dated _____, recorded in Book 238 of Deeds, in the Monmouth County Clerk's Office, page _____, containing twenty-five acres.

It is admitted that this deed conveys to William A. Harvey the Central Park property in question in this case.

10 Marked Complainants' *Exhibit No. 12.*

Also, offers a deed from Merebath Howland, Emma J. Howland, James W. Howland, Emma Lucy Howland, Charles H. Howland and Elihue Howland, to John Palmateer and Amos Palmateer, dated April 22d, 1879, recorded May 3d, 1879, in the Monmouth County Clerk's Office at Freehold, in Book 315 of Deeds, page 44, etc., containing seven twenty-five-one-hundredths acres.

Marked Complainants' *Exhibit No. 13.*

It is admitted that this conveys the same land which 20 has been mentioned in the testimony as lying on both sides of Evergreen avenue, a part of which constitutes the pointed piece of land lying between the railroad and the land in question in this case, and which is marked on the map *Exhibit 1 1-2*, "Palmateers land."

Plaintiff rests.

Catharine Harvey, called on behalf of the defendant, being duly sworn testified as follows—

By Mr. Stout—

30 Q. Where do you reside? A. I reside on the property which belonged to my husband.

Q. In the homestead? A. Yes, sir.

Q. Have you resided there since his death? A. I have with the exception of six months that I was away.

Q. How old are you? A. I was eighty years old in October last.

Q. Do you know Amos Palmateer? A. I know a Mr.

Palmateer; I don't know what his first name is; it is the gentleman that sits *there*.

Q. You recognize that gentleman sitting there as the Palmateer that you know? A. I think so; yes, sir.

Q. And that is the man they have sworn as Amos Palmateer in this case? A. Yes, sir.

Q. Which side of the turnpike road is the homestead? A. On the west side.

Q. Is that the part that your husband did not have laid out in lots? A. Yes, sir; that is the part that he 10 did not have laid out in lots.

Q. What was his reason for not having that laid out? [Objected to as illegal and incompetent.]

A. It was on account that the east side was laid out in lots, and he wished them to be disposed of before any of the west side was.

Q. Was that the understanding between you and your husband?

[Same objection.]

A. It was. 20

Q. And he did not have the lots on the west side laid out? A. No, sir; not laid out.

Q. How was that left? A. It was left to be laid out when those on the east side was all disposed of, when any occasion required it.

Q. What was done with that on the west side? A. It was farmed.

Q. During his lifetime? A. Yes, sir; during his lifetime.

Q. And since his death, have you farmed it? A. It 30 has been farmed several times, not yearly; it has not been, not all of it.

Q. Was it farmed this past season? A. Yes, sir.

Q. The whole of it on the west side? A. Well, no; not the whole of it on the west side, it was more than half-way up; I could hardly give you the right description of it, but nearly half of it.

Q. Was it farmed from the house to the toll-gate? A. Yes, sir, it was farmed that far.

Q. Or from the house to Evergreen avenue? A. Yes, 40

sir, it was farmed from the house up as far as the line runs.

Q. And the part that is claimed by Mr. Palmateer was also farmed this year? A. Yes, sir.

[Objected to as leading and improper.]

Q. By you? A. Yes, sir; it was farmed at my request, by my orders

Q. Who received the crops from the part between the house and Evergreen avenue, including that which is
10 claimed by Mr. Palmateer? A. I received one-half of it and the farmer took the other half.

Q. For how many seasons has that been farmed, if you remember? A. It has been farmed three that I know.

Q. In succession? A. Not in succession one year right after the other, but it has been farmed three times.

Q. On this land west of the turnpike, is it, where you raise the most of your living?

[Objected to as leading and incompetent.]

20 A. I raised a part of my living there.

Q. Do you remember an occasion when Mr. Palmateer and Abner Allen came to your house—the occasion spoken of by Amos Palmateer? A. I remember of Mr. Allen's coming there; Mr. Palmateer I didn't see there.

Q. You don't know whether he was in the wagon or not? A. I don't know anything about it, whether he was or was not.

Q. What did Mr. Allen come to see you about, at that time? A. He came to say that Mr. Palmateer wanted a
30 piece of ground adjoining some land that Mr. Palmateer owned, up by the toll-house.

Q. On the west side of the turnpike? A. On the west side of the pike; he said that Mr. Palmateer had offered him \$500 for it, and he didn't say that he should take it, or should not; I spoke to him of the arrangement, or the understanding, that the east side should be sold before anything else was sold.

Q. Was it the understanding between you and Mr. Allen that the east side should be first sold?

40 [Objected to as leading and incompetent.]

A. Yes, sir.

Q. What was the understanding in relation to the property on the east and west side of the turnpike, between you and Allen?

[Same objection.]

A. The east side was to be sold to answer all the demands and for my support, as far as it would go, and when that was used up, to sell the rest.

Q. At the time Mr. Allen came to your house, that you have spoken of, was the east side all sold? A. No, sir; 10
nor it is not all sold yet.

Q. What did you instruct Mr. Allen, if anything, in regard to the selling of that on the west side? A. I opposed it, because it was not according as to how it was understood to be done; business was not expected to be done in that way.

Q. Did you ever consent to that being sold? A. No, sir, I never did.

Q. Did Mr. Allen ever come to see you again about that? A. No, sir; I never saw Mr. Allen afterwards— 20
not after that day; he did not live but a short time.

Q. At that time, did he say anything about any other land? A. Yes, sir, he spoke about two lots, I understood him to say, that he had sold to Mr. Palmateer.

Q. On which side of the turnpike? A. On the east side, and a certain lot, also, on the east side.

Q. Did you ever see Mr. Palmateer, after that time at your house? A. I have seen him there since; he had not been there then, and I didn't know Mr. Palmateer at that time when I saw him. 30

Q. Did he afterwards come to your place? A. He afterwards came there.

Q. About what time? A. I could not tell what month; it was in the fall after Mr. Allen's death.

Q. What year? A. 1882, I think.

Q. In the fall of 1882 he came to see you? A. Yes, sir.

Q. State what he said when he came? A. He came to talk about the land; he said that Mr. Allen had agreed to sell it to him. 40

Q. Sell what to him? A. Had agreed for him to have the piece on the west side, and that he had paid him \$50 on it.

Q. Did he say anything about that on the east side? A. Yes, sir; the two lots and the other piece were on the east side; he told me of being down to Mr. Allen's when he got his writings.

Q. What did he say about that? A. He said that he had paid it and got a receipt for it, and when Mr. Allen
10 got through he called up his two sons and daughters as to what the bargain was and how the business was to be conducted, so that if anything happened to Mr. Allen nothing should be uncertain about it.

Q. He said he called up his two sons and daughters to witness it? A. Yes, sir; he told me that more than once.

Q. What reply did you make to that? A. I don't know that I made any.

Q. Did you agree that it was all right?
20 [Objected to as leading and incompetent.]

A. No, sir, I did not; and then in talking about it at another time afterwards, he asked me if he told me that he paid Mr. Allen \$50, and I said that was the way I understood it, and he said it was a mistake—it was \$25 that he paid on it.

Q. When was this conversation? A. It was along through the winter; I could not tell; he was at my place several times.

Q. The winter of 1882? A. Yes, sir, 1882, and through
30 the fall and winter and towards spring, pretty much; he wanted to convince me that I should sign a deed for it.

Q. What did you tell him? A. I told him it was not my place to do so, and he wanted to know whether I would or would not, and I told him I should not do any such thing.

Q. Did he show you any receipt or agreement of any kind, signed by Mr. Allen? A. He showed me a receipt; he said he had one.

Q. What was that receipt? A. It was for—I don't
40 know that I read it through—it was four or five lots.

Q. On which side of the turnpike? A. On the east side; and I said to Mr. Palmateer, "I understood you to say two lots, and Mr. Allen told me two; how comes a receipt in this shape?" and he said it was on account of the lots being smaller, but I thought a small lot was a lot, as well as a larger one.

Q. Did he say anything at that time about the land on the west side? A. I could not say, but I suppose he did, for that was generally the talk.

Q. But he never mentioned anything about the land ¹⁰ on the west side of the turnpike until the fall of 1882?

[Objected to as leading and suggestive.]

A. No; I had heard that he had; flying reports said that he had got it, but I did not at that time know Mr. Palmateer until he came in the fall to talk about it; I had often heard him spoken of—that he had been anxious about the whole piece of the ground there, him and his brother-in-law—I can't call his name now; they wanted the whole lot on the west side, and they had spoken to Mr. Allen about it several times; Mr. Allen ²⁰ told me about it, that they had.

Q. You mean Mr. Kelly? A. Yes, Mr. Kelley and Mr. Palmateer.

Q. Do you know Archibald Applegate? A. I believe I do.

Q. He has stated in his evidence that he farmed this land on the west side of the turnpike for you. A. He did, one season.

Q. And says that he did not farm that part which is claimed by the Palmateers. A. I don't think he did ³⁰ all of it; he did a part of it.

Q. As I remember his testimony, he says that you instructed him not to farm that; state what you told him, if anything, about farming that. A. I don't know that I did or did not; the report was that Mr. Palmateer had bought it; Mr. Allen was gone, and I had not seen him, and I had not inquired of Mr. Allen's family about it, and I thought it might be so, and as I did not want to get in any trouble with any one I think likely I told

him not to farm all the way up; I am not positive about it, but I suppose I did.

Q. You had never at that time learned from Mr. Allen that that had been sold?

[Objected to as leading.]

A. No, sir.

Q. Nor from the Palmateers?

[Same objection.]

A. No, sir; it was only a flying report.

10 Q. Do you know about how much there remains unsold east of the turnpike? A. I do not; I heard Mr. Tilton not long ago say, but I don't remember what he said about it, but, I think, as much as a dozen lots or more, but I am not positive how many it was.

Cross-examination by Mr. Robbins—

Q. Did you state the date when Mr. Allen and Mr. Palmateer came to your house first to see about the land? A. I did not.

20 Q. How long do you think it was before Abner's death? A. It was in the month of March, but I could not say what day it was.

Q. Did he die the April following? A. The May following.

Q. Soon after, at any rate? A. Yes; his death occurred the 6th of May.

Q. Didn't you see Mr. Palmateer in the carriage with him? A. I did not.

Q. Or at the door? A. No, sir.

Q. Didn't look, I suppose? A. I did not look.

30 Q. Where was the toll-house situated, with reference to Evergreen avenue? A. It is right on Evergreen avenue.

Q. Is it on the corner of the turnpike and Evergreen avenue? A. Yes, sir; right on the corner, on the west side.

Q. And the piece of land which Mr. Allen told you about laid up next to Evergreen avenue, didn't it? A. Yes, sir.

Q. And in front of the point of land which Mr. Pal-

mateer and his brother owned, down next to the railroad? A. It ran from the railroad to the turnpike.

Q. The piece that Mr. Allen said they wanted to buy?
A. Yes, sir; that Mr. Allen said they wanted.

Q. They wanted to square out their land to the pike, wasn't that the idea? A. That was the idea, I suppose.

Q. Do you remember about a pine tree standing down at the point by their land—a large pine? A. I do not.

Q. You don't remember about that? A. I don't remember anything about a large pine there. 10

Q. The piece of land which Mr. Palmateer owned laid on both sides of Evergreen avenue, didn't it—the point down next to your husband's land—didn't the street cut right through their land? A. At the turnpike it was not through their land.

Q. I mean the street which ran down to the railroad and across it, that went through their land? A. Yes; that went through their land and on the edge of my husband's land.

Q. That is between their land and the turnpike—it was along the edge of your husband's land? A. Yes, sir. 20

Q. Mr. Allen said that \$500 was the price which the Palmateers were to pay? A. He said he offered him that amount.

Q. Offered him \$500? A. Yes, sir; he didn't say whether he would take it or not; he didn't say whether he thought it was enough; I don't think he had any idea of selling it.

Q. He came in and talked about it and mentioned the price? A. Yes, sir; and about the other two lots. 30

Q. That is, the lots on the east side of the road? A. Yes, sir.

Q. Both talked about at the same time? A. Yes, sir.

Q. Did he talk in that conversation about what Mr. Palmateer was to pay for the two lots on the east of the turnpike? A. He said he was to pay him \$100, but Mr. Palmateer told me that he had lost the receipt.

Q. That was after Abner Allen's death? A. Yes, sir.

Q. Was it after Mr. Tilton was appointed adminis-40

trator? A. I can't say about that; I am not certain; Mr. Palmateer was at our house several times before Mr. Tilton was authorized to act, but I thought it was to be put in his hands, but he was not authorized to act then.

Q. Then there was an understanding, after Mr. Allen's death, that Mr. Tilton should go on and settle up the business? A. Yes, sir.

Q. And he was afterwards appointed by the Surrogate?

A. Yes, sir.

10 Q. Did he have some little oversight of the matters, before he was actually appointed? A. I can't say that he had.

Q. Did Mr. Tilton know that he was to be appointed, or that that was the intention? A. I went and requested Mr. Tilton to take the business.

Q. That was after Abner's death? A. Yes.

Q. And did not Mr. Tilton take some little charge of affairs, even before he was appointed—do you know about that? A. I don't know. I saw him several times, but

20 I don't know whether he took any charge or not.

Q. How long was Mr. Allen at your house that day when he came there with Mr. Palmateer? A. He was in the house but a short time. I don't think he even took a seat and sat down. It was a cold, unpleasant afternoon in March.

Q. How many times do you think Mr. Palmateer was at your house to see you about this? A. He was there several times; I could not say how many times.

30 Q. When was it that he told you that he had lost the receipt? A. At different times; he said he never had anything to worry him as that did; it caused him to lose his sleep on account of it.

Q. That is, his receipt for what he had paid for the land on the west side? A. Yes, sir.

Q. He showed you that? A. Yes, sir, he showed me that; I understood him to say two lots, but when I saw the receipt it was for four or five, I believe.

Q. The receipt which he actually showed you was for the lots lying on the east of the turnpike? A. Yes, sir.

40 Q. And he told you that he had lost his receipt for the

land which he had bought on the west side of the turnpike? A. Yes, sir.

Q. He told you that at different times? A. At different times; yes, sir; he wanted to make a bargain to buy that; he wanted me to set a price on what I would take for it.

Q. Did Mr. Kelly tell you, when he talked about the purchase of your homestead, what he wanted it for? A. Mr. Kelly?

Q. I thought you said Mr. Kelly saw you about it? 10
A. No, I don't know that I did say so; I said it was for Mr. Palmateer and Kelly; he came in at one time afterwards—I understood it was Mr. Kelly—and talked about buying the homestead; in fact, they had made Mr. Allen an offer; it was a standing offer, that they would give \$1500, and I told Mr. Allen that I was not willing that he should take that for it.

Q. Did Mr. Kelly say what purpose he had in view in purchasing the homestead, if he did purchase it—did he say what he wanted it for? A. No, I don't think he did. 20

Q. The seasons when this land on the west of the turnpike was farmed were three, you say? A. Yes, sir.

Q. And they were not farmed successively. A. No, sir, not one year right after the other.

Q. And on one occasion, when Archibald Applegate farmed it, he did not come up to the toll house. A. No, sir.

Q. Because you understood that the Palmateers had bought a piece of land up there? A. Yes, sir.

Q. And you did not want the land to be farmed up 30
where you had heard they had purchased? A. No, I did not want any trouble about it; I supposed, from what I heard, there would be trouble about it, and I did not want to get in trouble.

Q. Did you tell Mr. Applegate what you understood about it? A. I think likely I did.

Q. You saw him when he was plowing? A. Yes, sir, I saw him frequently.

Q. You knew what he did farm and what he did not?
A. Yes, sir.

Q. And what he did was done with your approval and consent, I suppose? A. Yes, it was.

Q. Do you remember from whom you heard these flying rumors that you speak about? A. No; I guess everybody in the neighborhood; I was frequently told of it.

Q. Mr. Allen, did you see him many times after the time he was there with Mr. Palmateer? A. I never saw him at all; I never saw him after.

10 Q. He was taken sick soon afterwards? A. That was in March, and he was taken sick soon after.

Q. Had he been sick at that time? A. No, sir; but he was taken sick soon, and he had one or two relapses.

Q. You don't think he ever got off of his place after that? A. I don't think he was; he sent me word by his son, the week before his death, that he would be up that week; it was the 3d of May I think.

Q. Then from the time he was there with Mr. Palmateer, when they spoke about the sale of the land on the
20 west of the turnpike, you never saw or had any conversation with him whatever? A. Never at all.

Q. And no communication with him except as his son came to you and told you as you have stated? A. Yes, sir; only as his son told me that his father was coming up that week; he had got smarter so he went out, and he would be up in a few days.

Q. But he did not come there? A. No; if I recollect right, it was the 3d of May, and he did not live but three days afterwards.

30 Q. That was the reason he did not come to see you? A. Yes; I suppose it was the reason.

Recess.

By Mr. Stout—

Q. What do you mean by this land west of the turnpike being tilled three years? A. I mean that it had been tilled that many times since my husband's death, but it had been tilled for nineteen years next spring;

through his life time, it was tilled every year more or less of it.

Q. How many years has he been dead? A. He has been gone nine years, the third of next May.

Q. And this is what you have had done since? A. Yes, sir; what I have had done since.

Q. Did you in any way consent to the sale of this land west of the turnpike, either to Mr. Allen or Mr. Palmateer? A. No, sir; I did not.

[Objected to as illegal and incompetent.] 10

Q. Do you know of any contract having been made by Mr. Allen, of this land in question, other than you have received from Mr. Palmateer, and these rumors you have spoken of?

[Same objection.]

A. No, sir.

By Mr. Robbins—

Q. Do you recollect saying this to Mr. Amos Palmateer on one of his visits to your house after Abner Allen's death, that whatever Abner Allen had done you were 20 entirely satisfied with, or words to that effect? A. No, sir; I did not say that to Mr. Palmateer or any one else, for I should have said decidedly wrong from what I felt and know.

Q. I simply want to know whether you said it or not? A. No, sir.

Q. The land on the east side of the turnpike was also tilled in your husband's lifetime? A. Part of it.

Q. And a part on the west side? A. Yes, sir; it had all been tilled in his time. 30

Q. And the east side had all been tilled, which is tillable? A. No, sir; it was tilled pretty much opposite where the house stands, if you know where that is.

Q. A part of the east side was tilled? A. Yes, sir; from opposite the house up to Evergreen avenue it had been tilled several times.

Q. Then from opposite your homestead house up to Evergreen avenue, on the east side of the turnpike, was tilled in the lifetime of your husband? A. It had not

been tilled for some time before ; it was never tilled after it was sold out in lots, but it had been tilled before that was thought of.

Q. It was tillable land? A. Yes, sir.

By Mr. Stout—

Q. After this property was plotted out on the east side I understand you to say it was never tilled? A. No, sir ; not by my husband it was never tilled.

Q. Or by you since? A. No, sir.

10 Q. It has not been tilled since? A. No, sir ; he sold an acre, I suppose that was tilled, but it was not by him.

Q. That was after it was sold? A. Yes, sir ; that was after it went out of the estate.

By Mr. Robbins—

Q. Did you have anything to do with the making of the map of the Central Park property? A. No, sir.

Q. He did that in his own way and after his own fashion? A. Yes, sir.

Q. And so he made his will in the same way? A. 20 Yes, sir ; he made his will and he—

Q. I mean in his own way? A. Yes, sir ; in his own way.

By Mr. Stout—

Q. What else were you going to say? A. I was going to say this: He had not his health and the disease was softening of the brain, and he was hardly capable of making a will when he done it, but still I let it go as it was ; I could very handily have broken it, but I didn't see fit to do so.

30 *John P. L. Tilton*, called on behalf of the defendant, being duly sworn, testified as follows—

By Mr. Stout—

Q. You are the defendant in this suit? A. I suppose so.

Q. And the administrator of William A. Harvey, deceased, to the will annexed? A. Yes, sir.

Q. When were you appointed? A. February 27th, 1882.

Q. Just state what you know of this Palmateer matter from the time you first saw Mr. Palmateer to the present time? A. The first time after I was appointed I saw him here on the sidewalk by Cook's building.

Q. Had you had any information then that he wanted to see you? A. Yes, sir; Mrs. Harvey told me. 10

Q. When did she tell you, before or after you were appointed? A. After I was appointed; she said that Mr. Palmateer wanted to see me, and I came down here and met him on the sidewalk; he said he wanted to see me about selling lots that laid east of the avenue, along that creek; when I told him that she had told me so, he said "yes"; he said, "when will you be to the Harvey property?" I told him I would be there Wednesday or next week; that was about all the conversation we had at that time. 20

Q. Were you there at that time? A. Yes, sir.

Q. Was he there? A. He was not when I was there, but I understood he was there afterwards; but I didn't see him that day.

Q. When did you next see him? A. I don't know; some little time before I was down there again; I don't know exactly what time I was there again that month; it might have been during the latter part of it.

Q. Of what month? A. Of the same month; I came in February; that was in March. 30

Q. The first time you saw him? A. That was the next day, or the day after I was appointed.

Q. That would have been the 28th or 29th of February, 1882? A. The 27th I was appointed, and I either came here the 28th, or the 1st of March.

Q. And that was the day you saw him? A. Yes, sir.

Q. Did he say anything to you about the land on the west side of the turnpike at that time? A. No, sir, he did not; I never heard until after that—some time after—that he had ever bought it. 40

Q. How long after that do you think it was you saw him the second time? A. I don't know; it must have been pretty well towards the latter part of the month, if I did; I didn't see him the first time; I don't think I came before the latter part of the month again; I don't know whether I saw him or not the latter part of the month when I was there.

Q. What was your conversation the next time? A. I don't know whether it was the time that I sold Gibbs
10 that lot; I think it was the next day I sold Gibbs that lot; I could not say positively, but I don't recollect of any other time.

Q. When was that? A. That was some time in April; it was between the 8th and the 20th of April when I sold that lot.

Q. What did he say at that time? A. Then he came down to see me about these lots.

Q. Which lots? A. I was there when he came there, and what made me remember that more particularly, he
20 said the lot I sold to Gibbs, that that lot was his; I asked him if that lot was in the receipt that he was telling me about, and he said no, it was not in the receipt, but he was to have that lot; I told him I didn't know anything about it; I supposed it belonged to the estate, and I had just sold it to him.

Q. Which land was this that he was talking about then? A. This on the east side of the road.

Q. He had not, then, up to that time, said anything about the lot on the west side? A. I didn't know any-
30 thing about it.

Q. When did you see him again? A. The first I knew anything about it Mrs. Harvey told me that she had understood so; I told her I guessed it was flying reports, for I never heard Mr. Palmateer say anything about it.

[Objected to as hearsay and incompetent.]

Q. When was the next time you saw Mr. Palmateer? A. I could not tell to a certainty when the next time was; I guess it must have been in April; I think this
40 was in April when I saw him there; I saw him several

times in May, but I don't remember of anything about it until the 1st of June of saying anything to me about it.

Q. What did he say? A. He wanted me to make him a deed for it.

Q. For what? A. For these lots.

Q. On the west side of the turnpike? A. Yes, sir; he said he had lost the receipt, and he had been hunting for it and could not find it; after talking about it, he said; "when I paid this money, Mr. Allen called the girls and boys together, and made it known to them 10 and told him how much he paid for it, and the boundary lines and all about it;" I told him, "Mr. Palmateer, if that is the case—I suppose I will have to make you a deed," but I wanted him to get something to show from them, to indemnify me, so I would not get in trouble about it; I told him I wanted him to get a receipt from George, to show, so that I could call that money back of George, provided they knew all about it; I could not make him a deed unless he could give me something to show for it, and he said he could not find the receipt—20 that he had lost it; and that was all that I ever did demand of him was that.

Q. The first time that he ever spoke to you about this land on the west side of the turnpike, was it before or after your son Amos had been to him and got a copy of a receipt? A. I could not say, positively, about it, but I always thought it was afterwards; I know it was some time after I was appointed before I knew anything about it; I certainly didn't know it that day, and I didn't know it the week I went to George's, and George never 30 told me anything about it; I see by the receipt—the date of it—that he must have got it before I saw him, but I knew nothing about it; he didn't tell me that he had given one then.

Q. Did you tell Mr. Palmateer that if he would go to Mr. Allen and get a receipt signed by George Allen, that you would give him a deed? A. No, sir.

Q. What did you tell him? A. I told him if he would go to Mr. Allen's and get the boys and girls to sign a

paper to indemnify me, and sign a receipt, that I could call that \$25 back, I would give him a deed.

Q. Has Mr. Allen, as executor of William A. Harvey, ever given the estate credit for this \$25 for the land west of the turnpike?

[Objected to as incompetent.]

A. It is not in the statement he gave me.

Q. Have you examined the statement? A. I have; I have not seen it on it.

10 Q. Filed in the Surrogate's office? A. I got it in the Surrogate's office, a copy from what they filed.

Q. And you don't find it there? A. No, sir.

[All this is objected to as illegal and incompetent.]

Q. Did Mr. Palmateer, or any one for him, ever come to you and ask you to make a deed for that property, or say anything about it—I mean the property on the west side of the turnpike—before the 5th of March, 1882?

A. No, sir, they did not; I didn't know anything about it then.

20 Q. When did he tender you the money that he has spoken of? A. It was between the 20th of September and the 5th of October, 1882.

Q. How do you fix that date? A. I will tell you how I fix it; I was slacking lime at the time he came there; drawing it home and slacking it; the lime came to Farmingdale on the 20th of September, and they moved it to Shark River Station on the 21st or 22d, and we were carting lime; I could not tell exactly, but on the 5th I went up and paid the money, and I have got a

30 check to show when I paid it.

Q. Was that the first time that he had offered you any money for the land on the west side of the turnpike?

A. Yes, sir,

Q. Or anybody for you? A. Yes, sir, he came there to my place when I was slacking lime; I think it was about the latter part of September.

Q. This land in question claimed by the Palmateers, is that or not mapped out into lots?

[Objected to as incompetent and not the best evidence.]

40 A. No, it is not mapped out.

Q. I show you map marked *Exhibit No. 2* for complainants. This plat "D," as shown on this map, is that where the homestead of William A. Harvey is? A. Yes, sir, I suppose so; it is not plotted out; all the rest is but that.

Q. Is the homestead on this plat? A. Yes, sir.

Q. On the west side of the turnpike? A. Yes, sir, where Mrs. Harvey now lives.

Q. What is that ground used for generally, by Mrs. Harvey? A. Ever since I knew it, in her husband's 10 time, they tilled it occasionally; I don't know that they tilled it every year, but I have seen grain growing on it several times.

Q. Since his death, have you seen anything growing on it? A. Yes, sir.

Q. Has it been tilled this past season?

[Objected to as incompetent and irrelevant.]

A. Yes, sir.

Q. Did you ever send any one to Amos Palmateer, to get a copy of a receipt? A. I sent my son. 20

Q. Which one? A. Amos.

Q. Did he get that copy? A. Yes, sir.

Q. What was that receipt for, the lots on the east side of the turnpike?

[Objected to as incompetent and not the best evidence.]

A. On the east.

Q. Are there any lots on the east side of the turnpike yet unsold.

[Objected to as incompetent and irrelevant.]

A. Yes, sir, there is. 30

Q. About how many? A. About fourteen; I don't know exactly, but somewhere near that.

Q. Is there or not any understanding between you and Mrs. Harvey, as to which shall be sold first, that on the east side or the west side of the turnpike?

[Objected to as illegal and incompetent.]

A. On the east side, she wants sold off first.

Q. Do you know the reason for that?

[Objected to. Question withdrawn.]

Q. Did Mr. Palmateer, or any one for him, ever show 40

you any receipt, before the commencement of this suit, for the land on the west side of the turnpike, or for the land on the east side either? A. I don't know that I ever had any receipt; there was never none shown me for the west side.

Q. Was that on the east side ever shown you before?

A. I don't know whether it was or not, but I never knew how it was until I sent and got it; I have no recollection of seeing it; I may have seen it, but I have no re-
10 collection of it; that was the reason why I sent for it.

Q. Since you have been administrator of this estate, have you sold some of the lots as plotted out? A. Yes, sir.

Q. Have you known the value and do you know the value of land in that neighborhood.

[Objected to as illegal and incompetent.]

A. By the lot?

Q. Yes, in any way? A. They are selling on the other side there for \$500, and you can get \$350 on this
20 side.

Q. What size lots? A. 50x150.

[All this is objected to as incompetent.]

Q. What, in your judgment, is the land that is claimed in this suit worth.

[Same objection.]

A. I think it was worth \$1500 to plot it out and sell it.

Q. What was it worth at the time of this pretended purchase?

[Same objection.]

30 A. Do you mean now or then?

Q. When it was pretended to have been bought March 5th, 1881? A. To have plotted it out there would not have been much difference.

Q. It was worth then \$1500? A. It would fetch very near as much now; there has been more call for that corner than any piece around there.

Q. There has been more call for that corner? A. Yes, sir; it was in dispute and of course I could not sell it.

[All since the last objection is objected to for the same
40 reason.]

Q. After Mr. Palmateer told you that Mr. Allen's two sons and daughters were called in to witness this transaction spoken of by him, did you go to Mr. Allen to see about it? A. I did.

Q. Did they inform you that that was the fact?

[Objected to as incompetent and illegal.]

A. They informed me it was not; the boys were in when he done some business that night, but the girls were not, and they did not know anything about it.

Q. Mr. Palmateer says in his testimony in answer to 10 this question, "What did Mr. Tilton say to you?" "He came to me and says he, 'I understand you bought a piece of property of Abner Allen and you have lost the receipt;' I told him I had; he says, 'then you see George Allen, you go and get another receipt of George Allen, and I will give you a deed;' I said all right, I will do it." Did you say that? A. I said what I have said here, but that was after I was elected.

Q. You said what you have already stated in your testimony? A. Yes, sir. 20

Q. But you never agreed to give him a deed for a receipt signed by George Allen? A. Oh, no; what good would that do to me, without the girls and boys; I wanted something from them to show the agreement; I wanted it from the girls and boys; George Allen could not give me a receipt that would be of any use to me.

Cross examination by Mr. Robbins—

Q. Did Amos Palmateer show you any receipt or paper which he got from George Allen? A. Not that I know of. 30

Q. You don't remember about that, or do you say he did not show it to you. A. I don't remember of his showing me any; I saw one later, up there, a receipt; I suppose it was from George Allen.

Q. Do you know whether in point of fact he did get a receipt? A. He said so; I don't know any more.

Q. When did he tell you that, soon after the talk you had with him about it? A. That was some time after I was elected.

Q. Appointed administrator you mean; A. Yes; it must have been along in May or June.

Q. Then he did, as you understood from him, go to George Allen and get a receipt from him? A. Of course he got it there.

Q. And he told you about it? A. Yes, sir, he told me he had got one, but he did not get one from the girls or boys; I didn't want such a receipt as that; I wanted a receipt from all of them, to show that the money was
10 paid and the bargain was made there, to guarantee me, so as to give him a deed, and I wanted George Allen to send a receipt to me, so I could call the \$25 back again out of Abner Allen's estate; they told me they would not receive any receipt without Abner Allen's name was to it.

Q. You had two propositions in view, one was to justify you in making the deed, and the other was to compel the accounting by Abner Allen's estate to the estate of William A. Harvey, for the amount of \$25, which
20 had been paid? A. I wanted them to pay it back to me.

Q. As the administrator of Mr. Harvey? A. Yes, sir.

Q. You thought they ought to pay it to the Harvey estate? A. When he told me that the girls and boys were by, and knew all about it, and were there when the money was paid, and they knew the price and knew the boundaries,—I told him then I guessed I should have to make him a deed, but I wanted something to show from them, so I could get it on record to indemnify me for
30 making the deed.

Q. And you also wanted to compel the Allen estate to pay the Harvey estate the \$25? A. Yes, sir; wouldn't that be right?

Q. Yes, undoubtedly—I show you a receipt, *Exhibit No. 1*—are you clear now, that Mr. Palmateer did not show you that receipt? A. When do you mean?

Q. After he got it? A. I have no recollection of it; I know he told me about it, but as to saying that I saw it, I don't remember it.

Q. You know that he had lost the receipt? A. He told me he had lost it.

Q. Did Mrs. Harvey also tell you that he said he had lost it? A. I don't know whether she did or not, not until after he told me.

Q. Did she, at any time, tell you that Mr. Palmateer said that the receipt for the land on the west side of the road was lost—did she tell you that at any time? A. She might have, after he told me; I might have said something to her about it. 10

Q. Did you have any talk with her about your taking charge of the business before you were actually appointed? A. No, sir.

Q. She says that she saw you before? A. She came up there and wanted me to take charge of it, and I didn't want to have anything to do with it, and I told Mrs. Harvey I would rather she would get somebody else.

Q. She did talk with you before you were appointed? A. She talked with me, but I didn't agree to serve 20 though, and I didn't know anything about the business when I took hold of it; I didn't know that Mr. Palmateer had any lots when I took hold of it.

Q. The first you saw Mr. Amos Palmateer about this was on the street, at Asbury Park? A. Yes, sir; right down here, the next day, or the day after I was appointed.

Q. And on the street of Asbury Park? A. Yes; right down here; I was coming across the street and met him on the corner. 30

Q. About how many times did Mr. Palmateer ask you to convey him the land on the west side of the road, or to convey to him and his brother? A. I could not tell.

Q. More than once, I suppose? A. Yes, sir.

Q. Before the papers were served on you in this suit? A. Yes, sir; I can't tell how many times; along in June I saw him a good many times.

Q. And he asked you a number of times to convey to him and his brother, the property in dispute in this case? A. No, sir; he did not say anything about his 40

brother; I didn't know anything about his brother until this suit commenced.

Q. Didn't he ever ask you to convey to him the property on the west side of the road, or to him and his brother? A. I suppose he had it altogether; I never heard about his brother.

Q. Didn't he ask you to convey that property before this suit was commenced? A. Of course he did.

Q. And he tendered you the money before the suit
10 was commenced? A. Yes, sir.

Q. You did not, in point of fact, make him the deed? A. Of course not; I could not.

Q. I just want the fact? A. I could not make the deed; if he had done as I wanted him to I calculated to have made a deed.

Q. He has never received any title for the land from you in any way, shape or fashion? A. No, sir; I told him from the first I could not do it.

Q. Have you ever made a deed for the lots on the east
20 side of the turnpike to Mr. Palmateer?

[Objected to.]

A. No, sir; I have not made a deed.

Q. Have you got the copy of the receipt which Mr. Amos Tilton brought back to you? A. Yes, sir.

Q. Look at the receipt, *Exhibit No. 3*, was that ever shown to you by Mr. Amos Palmateer? A. He might have showed it to me.

Q. Before you got the copy which you speak about? A. I think so.

30 Q. You sent and got a copy of the receipt? A. Yes, sir.

Q. And that is the receipt of which you did get a copy? A. Yes, sir.

Q. How many lots have you sold since the appointment of yourself as administrator?

[Objected to.]

A. I don't know as I could tell without I had the books.

Q. Can you come somewhere near it? A. I don't
40 know that I could.

Q. Tell me as near as you can? A. It would not be a fair question for me to answer; part of the lots were paid for in Allen's time; that would show more money in my hands than I would have if I gave you the account of the whole of them.

Q. I want to know what lots you have actually sold since your appointment as administrator, not what you have received on account of Abner Allen's sale, but your own sales? A. I don't know.

Q. As many as a dozen? A. No, not as many as that; 10 it might be with the others.

Q. I mean outside of the Abner Allen's sales? A. I don't know that I could answer that question any ways correct.

Q. You have sold as many as six yourself? A. Yes, sir.

Q. Do you think you have sold as many as a dozen yourself? A. I don't know.

Q. Have you made deeds for them? A. Yes, sir.

Q. In your own name as administrator? A. Yes, sir; 20 some of them that have been sold have not yet been made.

Q. And some you have sold and made deeds for as administrator? A. Yes, sir; I don't think there are over three or four that has paid in full and got the deeds.

Q. You think you have made deeds for as many as four, of your own sales? A. I think so, besides the Abner Allen sales.

Q. Have you made deeds for some which Abner Allen 30 sold? A. Yes, sir.

Q. That is, you perfected his sales? A. Yes, sir; they had written contracts.

Q. Have you perfected any of his sales which were not reduced to writing? A. No, sir.

Q. How long did you and Mr. Palmateer talk here on the street at Asbury Park? A. About a minute or two minutes; he appeared to be in a hurry and I was too.

Q. Whereabouts on plot D does the house occupied by

Mrs. Harvey stand? A. It is about where the letter "H" is marked in pencil.

Q. And the toll-house stands in the corner of Evergreen avenue and the turnpike? A. Yes, sir.

Q. At about the point where the letter "T" is marked in pencil? A. Yes.

Q. Do you remember how much money it was that Palmateer tendered you? A. I never counted it any more than what he said.

10 Q. What did he say? A. \$475, he said.

By Mr. Stout—

Q. Did you act in any way for Mrs. Harvey or the estate before you were appointed? A. No, sir.

Q. Did you know anything at all about the business of the estate before you were appointed? A. I didn't know nothing at all about it; I didn't know nothing about the ground, or what was sold or was not sold, or anything about it.

Q. I see this receipt, marked *Exhibit No. 1* on the part
20 of the complainant, and signed by George C. Allen, administrator, is dated February 16th, 1882. Was it after that date that you had the conversation with Mr. Palmateer on the street? A. The first conversation we had was after I was appointed.

Q. And that was after the date of this receipt? A. It was February 27th I was appointed, and it was after that.

Q. And this receipt is dated February 16th? A. Yes, sir.

Q. So it must have been long after the date of this re-
30 ceipt?

[Objected to as leading and argumentative.]

A. Yes, sir.

Q. Have you given any deeds for any lots of the Harvey estate, as the fulfillment of any contracts made by Abner Allen, other than those which have been in writing and signed by Mr. Allen? A. No, sir.

By Mr. Robbins—

Q. Do you know the handwriting of George C. Allen?
A. I am not much acquainted with it.

Q. Look at this receipt, *Exhibit No. 1*, and if you have any acquaintance with it, say whether or not that is his genuine handwriting, the written part of that receipt, including the date? A. I could not tell you with any certainty; I don't know that I ever saw it more than once.

Q. Have you any knowledge of his writing from which you can judge? A. No, sir. 10

Amos Tilton, called on behalf of the defendant, being duly sworn, testified as follows—

By Mr. Stout—

Q. You are a son of John P. L. Tilton, the last witness? A. Yes, sir.

Q. Do you know Amos Palmateer? A. Yes, sir.

Q. Did you, at your father's request, ever go to see him? A. He wanted me to go and get a copy of a receipt that he had for lots.

Q. A copy of a receipt from whom? A. Amos Pal-20
mateer.

Q. Did you go? A. Yes, sir.

Q. About what time was it? A. June 1, 1882.

Q. Was that the exact date? A. Yes, sir.

Q. Look at that paper and see if that is a copy of the receipt that he showed you? A. That is the copy that I got at the time.

Q. At that time did you have any conversation with Mr. Palmateer? A. After I made this copy and compared it myself, I asked him to read the original, and I 30 went over this, and after he did so he said that was correct; he asked me when my father was going to make him a title for those lots down by Duck creek, that is, on the east side of the turnpike; I told him that he had not seen any receipt yet, or hadn't any authority; that was what I was after, to see what authority he had to make the title.

Q. That was for the lots on the east side? A. Yes, sir.

Q. Did he mention anything about the lots on the west side? A. No, sir, he didn't say anything about it.

Q. Did he say anything about losing a receipt at that time? A. No, sir.

Q. When you went in there, what did you ask him for? A. I asked him for a receipt for lots in Central Park, of the Harvey estate.

Q. And then he produced receipt marked *Exhibit No. 3* on the part of the complainants? A. Yes, sir, he produced that receipt.

Q. And you did not ask him for any particular receipt? A. No, sir.

Q. At that time he brought out this receipt? A. I didn't understand what receipt or receipts; father told me that he had not seen any receipts, and he wanted a copy.

Q. And he mentioned nothing about any other receipt? A. No, sir.

Q. Or about the purchase of any other land? A. No, not a word; I had no knowledge of it until about four weeks afterwards.

Q. How did you obtain your knowledge after that? A. Father said about four weeks after, that Mr. Palmateer claimed a piece of land on the west side of the turnpike.

Q. Did you see Mr. Palmateer frequently? A. Yes, sir.

[Defendants' counsel offers copy of receipt in evidence, marked Defendants' *Exhibit A.*]

Cross-examination waived.

30 *Charles Tilton*, called on behalf of the defendants, being duly sworn, testified as follows—

My Mr. Stout—

Q. You are a son of John P. L. Tilton? A. Yes, sir.

Q. Do you remember the time that Amos Palmateer came to your father's and tendered him some money? A. Yes, sir; he came there in September, between the 20th and the 5th of October, in 1882; he asked for Mr.

Tilton; I told him he was in the orchard, where they were slacking lime; I went out and told father and he met him at the corn-crib, and when I came back he was talking to him about these lots, and he had some money in his hand, which he wanted father to take, and he refused to take it; said that he could not do any such thing; I stood there a few minutes and went on, and when I came back they were talking yet, and the money was for lots on the west side of the turnpike, as I understood.

10

By Mr. Robbins—

Q. Do you know whether that tender of money was made by Mr. Palmateer by direction of his counsel. A. I don't know that.

Adjourned to Jan. 5, 1884.

FREEHOLD, January 12, 1884.

John P. L. Tilton, recalled for defendants—

[Counsel shows witness a paper which purports to be a copy of his appointment as administrator *de bonis non* of William A. Harvey, deceased, dated February 27, 20 1882, and asks him if that is the evidence of his appointment?]

Witness says it is.

[Counsel for defendants offers this paper, being copy of letters of administration above referred to, in evidence, which is marked by me *Exhibit B* on part of defendants.]

[Counsel for defendants next shows witness copy of an account referred to in his previous testimony of the administrator of Abner Allen, as stated by the surrogate, sworn to December 13, 1881, which is marked by me 30 *Exhibit C* on part of the defendants.]

Witness says—I think I got this account on the day I was appointed administrator, February 27th, 1882, and the map was sent down to me a few days after; there is not in this account any mention of a lot sold to com-

plainant by Abner Allen or any one; Amos Tilton who was sworn is my oldest son—over fifty years old; he is one of the town committee of Neptune township and treasurer of the committee; the lands in controversy are about a quarter of a mile from Key East—probably not that; the places are divided by a pond; this property is between Key East and Ocean Grove.

Cross-examined—

In this account shown to me I do not find any item of
 10 a payment of twenty-five dollars for the purchase of land on either side of the turnpike, either the east or the west.

Re-direct—

Witness says that there are some twenty lots unsold instead of the number previously stated, on the east side of the turnpike which has been mentioned, after deducting the five mentioned in *Exhibit No. 3* for complainant.

[Counsel for complainants objects to this re-direct evidence as irrelevant.]

20

JOHN P. L. TILTON.

Sworn and subscribed before me this 12th January, 1884.

HOLMES W. MURPHY,
Master in Chy. of N. J.

Counsel for defendants rests.

Amos Palmateer, recalled on behalf of complainants, says—

I remember the occasion when Amos Tilton came to me to get a receipt for the lots sold on the east side of
 30 the road; Amos Tilton wrote the copy of the receipt which was produced the other day; when he came to me that day he said he wanted to get a copy of the receipt I had of Abner Allen; I had not so far as I know any other receipt except that which I showed him and of which he made a copy.

[Counsel for defendants object to the last answer on a repetition.]

Q. Where was the receipt for the money you paid for the land you purchased on the west side of the road?

[Counsel for defendants objects to the question for the reason that the evidence was part of the complainants' case, was fully gone into and is not a proper subject of rebuttal.]

A. I do not know where it was—it was lost.

Mr. Tilton did not say anything about the lost receipt 10 on the land on the west side of the turnpike road; Amos Tilton came in the office and asked for a copy of the receipt that I had of Abner Allen's; I went and got the receipt; he took it and copied it; he then wanted me to read it over after he had copied it, to see if it was right; I think I asked him then when his father was going to give me a deed for it, but am not positive; that is all I remember was said; he was not in the office hardly ten minutes.

Q. Had you or not before that time told John P. L. 20 Tilton of the loss of the other receipt?

[Counsel for defendants objects to this question for the reason above stated, and also that it is leading.]

A. Yes, three or four times.

[Counsel for complainants shows the witness *Exhibit No. 1* for complainants.]

Q. At whose suggestion and request did you obtain this paper?

[Counsel for defendants objects to this question as leading and a repetition.] 30

A. John P. L. Tilton's.

This receipt was given to me at Abner Allen's house; it was written by George Allen, who has already been sworn in this case; I had not seen George Allen or got any paper from him, this or any other until after the suggestion was made to me by John P. L. Tilton.

[Counsel for defendants objects to this evidence for the reasons above stated.]

Q. The date of this receipt, *Exhibit No. 1*, is February 16th, 1882, and the date of Mr. Tilton's letters of admin- 40

istration is February 27th, 1882; have you any knowledge of why the receipt is dated before the letters of administration?

A. I don't know; I should not have known to have got the receipt if he, John P. L. Tilton, had not told me.

Q. Did you observe the date of the receipt, or see whether it bore date, the day you were there or not? A. I do not know; I did not observe the date of the receipt.

10 Q. Where were you and Mr. John P. L. Tilton when he told you to get this receipt *Exhibit 1*?

[Objected to as a repetition for reasons above stated.]

A. He met me right between the Central Express office and baggage room at Asbury Park, at the end of Cookman avenue, the street that runs up to our lumber yard.

Q. You wrote no part of the receipt *Exhibit No. 1*, did you? A. No, sir.

Cross-examined—

20 Q. Had you or not at the time that Amos Tilton called upon you in your possession the receipt dated February 16, 1882, *Exhibit No. 1*? A. Yes, sir, I had it.

Q. Did you show to Mr. Tilton, or offer to show him, this receipt? A. No, sir.

Q. Did you suggest to George C. Allen, after this receipt was written, to insert your name Amos there? A. I did not; both the names of Amos and John were written at the same time.

30 Q. Can you account for the difference in the shade of the ink between the two names? A. I cannot.

Q. Did you see the receipt written? A. I did; I sat right beside him; I did not notice the date; it was written at the same time and in my presence.

Q. Do you say that that date was a mistake? A. I do not know whether it was a mistake or not; I have no theory about it; I do not know whether it was a mistake or not; I got the receipt for \$25; that was all I was after.

AMOS PALMATEER.

Sworn and subscribed before me this 12th day of January, A. D. 1884.

HOLMES W. MURPHY,
Master in Ch'y of N, J.

Counsel for complainants rests.

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