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# New Jersey Court of Errors and Appeals

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BILL OF COMPLAINT AS AMENDED. 10

(Filed January 7, 1927.)

IN CHANCERY OF NEW JERSEY

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

The complainant, George S. Lings, of Summit,  
Union County, and State of New Jersey, respect- 20  
fully shows that:

1. Complainant's wife, Mary Louise Lings,  
died at Montclair, New Jersey, on June 19, 1926.  
From the time of their marriage until the date of  
her death, she and complainant lived together as  
husband and wife. At the time of the marriage  
between complainant and the said Louise Mary  
Lings, she was not possessed of any real estate  
or personal estate, except that which he had 30  
given her, and practically all of the estate of  
which she died seized and possessed, came to her  
from complainant.

2. In the month of December, 1903, complain-  
ant purchased certain lands consisting of prop-  
erty known as Beechwood, at Orangetown, Rock-  
land County, New York, and paid therefor out  
of his own funds the sum of \$3,000.00. After  
acquiring title to said lands, he placed improve- 40

*Bill of Complaint as Amended*

ments of great value thereon and said lands and improvements were sold by complainant and his wife in the year 1924, for the sum of \$43,500.00.

10 3. Complainant was twenty years older than his wife, the said Louise M. Lings, and it was believed by both complainant and his wife that he would predecease her and in contemplation of this event, his said wife repeatedly suggested to complainant that he convey said lands and premises to her and that if he would do so, she would make a will under which she would devise said lands to him, should she predecease him and later and on or about September 15th, 1920, complainant caused said lands to be conveyed to his wife, 20 the said Louise M. Lings, pursuant to an agreement with his wife that she would make and execute a will under which she would devise said lands to complainant, and on the date that complainant conveyed said lands to his wife, the said Louise M. Lings, she subscribed, acknowledged, published and declared her last will and testament, pursuant to said agreement, in which the second clause reads as follows:

30

“SECOND: I give, devise and bequeath my real estate consisting of the home property known as “Beechwood” at Orangetown, Rockland County, New York, given to me by my husband GEORGE S. LINGS, he surviving me.”

4. Subsequently, complainant and his said wife, the said Louise M. Lings, decided to change 40 the nature of the bequest and devise to complain-

*Bill of Complaint as Amended*

ant, to be made to him by his wife, in her last will and testament in case she should predecease him, and accordingly, on June 17, 1924, pursuant to such decision and agreement, the said Louise M. Lings, by and with the consent and knowledge of complainant, and pursuant to agreement with him, subscribed, acknowledged, published and declared her last will and testament in which the fourth clause thereof reads as follows: 10

“FOURTH: In case my husband, GEORGE S. LINGS, survives me, then and in that case I give, devise and bequeath all the rest, residue and remainder of my property, of every kind and nature whatsoever, both real and personal, of which I may die seized, possessed or entitled to, except such as is bequeathed in paragraph “THIRD” of this will, to my Trustee hereinafter named, with power to invest and reinvest the same as in their judgment may seem to the best interest of said trust, and pay over the income arising therefrom, one-half thereof to my husband, GEORGE S. LINGS, during his life time, and the other half thereof to my daughter, ETHEL L. URQUHART, she surviving.” 20 30

5. At no time subsequent to the making of said will in June, 1924, did complainant's wife ever suggest that any change should be made in her will nor did complainant ever consent to any modification or change in the bequest which was given to him in said will in consideration of the 40

*Bill of Complaint as Amended*

conveying by the complainant to his wife of the property aforesaid in the month of September, 1920, as aforesaid;

6. The complainant's wife, the said Louise M. Lings, was seriously ill for several months immediately prior to her death and during her last illness, she was under the control and influence of her daughter, the defendant herein, Ethel Louise Urquhart.

7. Complainant's wife, said Louise M. Lings, died in the City of Montclair, New Jersey, on June 19th, 1926, and on or about June 30th, 1926, the defendant herein, Ethel Louise Urquhart, produced before the Surrogate of Union County, a paper writing purporting to be the last will and testament of Louise M. Lings, dated February 9th, 1926, a copy of which is hereto annexed and marked Exhibit 1, which paper writing, the complainant has never seen.

8. Complainant avers that if said paper writing was made, executed and intended to be a last will and testament by his said wife, said Louise M. Lings, the same was procured by the defendant herein, the said Ethel Louise Urquhart, through undue influence and at a time when his said wife was under the sole control and domination of said defendant herein.

9. Complainant avers that the making and execution of the said paper writing purporting to be the will of the wife of the complainant, dated February 9, 1926, was a fraud upon this complainant; that it was in direct contradiction and

*Bill of Complaint as Amended*

violation of the agreement so made and carried out on the part of this complainant as hereinbefore set forth; that said first agreement was the inducement upon which this complainant acted and relied in conveying said lands to his said wife, the said Louise M. Lings, as hereinbefore set forth; that the attempt to deprive this complainant of his rights under the agreements so made by him with the said Louise M. Lings as aforesaid and the attempt by means of the said paper writing, dated February 9th, 1926, as aforesaid to prevent this complainant from obtaining the benefit and enjoyment of a life estate in one-half of the property of which the said Louise M. Lings died seized and possessed, is inequitable and unconscionable.

10  
20  
10. Complainant avers that under his agreements so made with his wife, the said Louise M. Lings as aforesaid, he is entitled to enforcement of the terms of the said agreement which is manifested by the fourth clause in her will so made on June 17th, 1924, as aforesaid.

11. Although the defendant herein was appointed executrix of the last will and testament of Louise M. Lings, deceased. On June 30th, 1926, no inventory of the estate of the said deceased has ever been filed by said executrix.

12. Complainant is without adequate relief at the common law and therefore prays that:

(1) That Ethel L. Urquhart, individually and as executrix of the estate of Louise M. Lings, deceased, who are the defendants to this suit, may

*Bill of Complaint as Amended*

answer this bill of complaint and each statement therein contained.

10 (2) A decree may be made by the Honorable Court adjudging and declaring that complainant is entitled to one-half of the income arising from the estate of Louise M. Lings, deceased, during his lifetime.

20 (3) That the defendant herein may set forth and discover the amount of the estate of the said Louise M. Lings; and specifically, the names and addresses of any and all banks in which the said Louise M. Lings had any monies on deposit at the time of her death or which were given by the said Louise M. Lings to the said defendant any time within four months next preceding the death of the said Louise M. Lings; or otherwise disposed of by the said Louise M. Lings, in so far as the said defendant has any knowledge thereof.

30 Also that the said defendant may set forth and discover the names of all bonds, stocks and other securities of whatsoever kind or nature, the denomination of the bonds, the number of shares of stock, the names of the corporations issuing such stock and bonds or either of them, the nature of such stock, whether common or preferred, and any and all of the same in the possession of the said Louise M. Lings at the time of her death or which may have been given by the said Louise M. Lings to the defendant within four months prior to the death of said decedent or otherwise disposed of by her, in so  
40

*Bill of Complaint as Amended*

far as the said defendant has any knowledge thereof.

Also that said defendant may set forth and make a complete discovery of all the assets of the estate of said Louise M. Lings, deceased, describing the same in detail, which were in the possession of the said Louise M. Lings, at the time of her death or owned by her or to which she was entitled at any time within four months prior to the death of said decedent or otherwise possessed by said decedent, in so far as said defendant has any knowledge thereof. 10

Also that said defendant may set forth and discover a complete inventory and account of all of the assets of the said Louise M. Lings which have come to her hands subsequent to her appointment as executrix of the estate of the said Louise M. Lings and also any and all other assets of said estate which may have come to her knowledge. 20

(4) A decree may be made by this Honorable Court appointing one or more trustees or other competent person or persons to take possession and control of the residuary estate of which the said Louise M. Lings died seized, possessed or entitled to, excepting her personal effects, wearing apparel, jewelry, pictures, bric-a-brac, furniture, etc., and hold the same pursuant to the terms of the last will and testament executed by the said Louise M. Lings on June 17th, 1924, as aforesaid, including any and all property of every kind or nature whatsoever, of which the said Louise M. Lings was seized, possessed or to which she 30 40

*Bill of Complaint as Amended—Exhibit 1*

was entitled at any time within four months prior to her death, and pay over the income arising therefrom as provided in said will.

10 (5) And that complainant may have such other relief as the nature of the case and the circumstances of the case may require.

(6) That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

MELOSH, MORTEN & MELOSH,  
Solicitors and of counsel with  
Complainant.

20

**EXHIBIT I.**

IN THE NAME OF GOD, AMEN:

I, LOUISE M. LINGS, being of sound and disposing mind and realizing the uncertainties of life, do hereby make, constitute, publish and declare  
30 this to be my last Will and Testament, hereby revoking all former Wills by me made.

FIRST: I direct that all my just debts and funeral expenses be paid as soon after my death as my Executrix hereinafter named may deem practicable.

SECOND: I give, devise and bequeath my real estate, consisting of the home property known as  
40 "Beechwood", at Orangetown, Rockland County,

*Bill of Complaint as Amended—Exhibit 1*

New York, given to me by my husband on or about the 15th day of September, 1920, to my husband, George S. Lings, he surviving me.

THIRD: All of the furniture on the said premises, except what are known as the Lings heirlooms, I give and bequeath to my daughter, Ethel Louise Howth, with the provision, however, that if my husband, George S. Lings, shall survive me, he shall have the use of the same during his life time. 10

FOURTH: All the rest, residue and remainder of my property, of every kind and nature whatsoever and wheresoever the same may be situated, I give, devise and bequeath to my daughter, Ethel Louise Howth. 20

FIFTH: I authorize and empower my Executrix hereinafter named to sell or mortgage any real estate of which I may die seized or possession and wherever the same may be situated, whenever in her opinion it may be to the best interest of my estate so to do, and to satisfy and release any mortgages upon any real estate which I may own at the time of my death or which she may subsequently acquire for my estate. 30

SIXTH: I hereby nominate and appoint my said daughter, Ethel Louise Howth, Executrix of this my last will and testament, and direct that no bond be required of her.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 15th day of September, Nineteen Hundred and Twenty. 40

LOUISE M. LINGS.

**ANSWER AS AMENDED.**

(Filed April 10, 1928)

The answer of the defendant, Ethel L. Urquhart, individually and as executrix of the last will and testament of Louise Mary Lings, deceased.

10 This defendant, answering the bill of complaint, says that:

1. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 1, except that she admits that said Louise Mary Lings, wife of complainant, died at Montclair, New Jersey, on June 19, 1926, and that  
20 his said wife, until the date of her death, they have lived together as husband and wife.

2. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 2 and paragraph 3.

3. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 4. She believes, however,  
30 that about the year 1924, said Louise Mary Lings made or attempted to make a will, and testament in which was contained a paragraph similar to the paragraph set forth in said paragraph 4 of said bill.

4. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 5, except that she denies the allegation that at no time subsequent to June, 1924, did  
40 said Louise M. Lings ever suggest that a change should be made in her will.

*Answer as Amended*

5. Defendant denies paragraph 6, except that she admits that said Louise M. Lings was seriously ill for several months immediately prior to her death.

6. She admits the allegations of paragraph 7, except that she has no knowledge or information sufficient to form a belief as to whether complainant had ever seen the last will and testament a copy of which he claims to have annexed to his said bill of complaint, and marked Exhibit 1. 10

7. Paragraph 8 is denied. Defendant alleges that said complainant, on or about September 22, 1926, filed in the Union County Orphans' Court a petition of appeal from the probate of the last will and testament of said Louise M. Lings, deceased, dated February 9, 1926; that the grounds for said appeal were that defendant unduly, illegally and fraudulently influenced said Louise M. Lings in respect to the making and execution of said will, and that said will was not duly executed and published as required by the laws of the State of New Jersey; and that after a hearing upon said petition, the said Union County Orphans' Court by a decree therein entered on January 12th, 1927, affirmed the order of probate and found said will was the last will and testament of said Louise M. Lings, deceased, and that at the time of the making thereof she was of sound and disposing mind, memory and understanding, and said will was not the product of undue influence. 20 30

8. Defendant has no knowledge or information sufficient to form a belief as to the statements, 40

*Answer as Amended*

arguments and conclusions contained in paragraphs 9 and 10.

9. Paragraph 11 is admitted.

10. Defendant denies that any agreement was entered into by said Louise M. Lings with complainant as alleged in paragraph 3 of the bill of complaint; and further denies that any agreement was made between the said two parties as alleged in paragraph 4 of the bill.

11. Defendant will rely upon the provisions of the Statute of Frauds in so far as the same may apply to any contract claimed by complainant to have been made with said Louise M. Lings as alleged in paragraphs 3 and 4 of said bill.”

## MOTIONS IN LIEU OF DEMURRER.

1. Take notice that the defendant will move to strike out the bill upon the ground that the bill discloses no cause of action.

2. The defendant will move to strike out the bill upon the ground that the complainant has an adequate remedy at law for the matters contained in his bill of complaint other than such matters as are res adjudicata by reason of the decree of the Union County Orphans' Court hereinabove referred to.

EDWIN G. ADAMS,  
Solicitor of defendant.

Formal replication filed Apr. 26, 1927.

The cause was referred to Honorable Vivian M. Lewis on May 17th, 1927.

## TESTIMONY.

## IN CHANCERY OF NEW JERSEY

Between GEORGE S. LINGS,  Complainant,  and ETHEL URQUHART, individually, etc., <i>et al.</i> ,  Defendants.	}	On Bill, etc. Testimony.	10
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Jersey City, N. J., April 18, 1926.

Before: HONORABLE VIVIAN M. LEWIS, 20  
 Vice Chancellor.

## Appearances:

Louis G. Morten, Esq., appearing for Messrs. Melosh, Morten & Melosh, Solicitors for Complainant.

Edwin G. Adams, Esq., Solicitor for Defendants.

Mr. Adams: I have an amendment here to the answer which I would like to file. 30

Mr. Morten: The replication shall apply to the amended answer.

The Court: All right.

Mr. Morten: The nature of the case is this: We expect to show that the complainant and the mother of Ethel Urquhart were married, and at the time of the marriage she had no financial responsibility at all. Things went on and then 40

*Testimony*

10 Mr. Lings bought a piece of property and conveyed it to his wife, with the distinct understanding that if she died first she would make a will, whereby she would leave the property to her husband. Later still, they agreed to a modification of the form of the will, whereby the property was left so that one-half of the income would go to him during his life, and the rest to be disposed of as she saw fit.

There was a subsequent will that caused all the trouble, and the last will that was made by agreement between the parties was made in 1924, and that carried out the mutuality of the wills.

By the Court: Were they both the same?

20 Mr. Morten: Yes, a will in trust, and one-half to the complainant during his life, and the rest as she saw fit. The Beachwood property was purchased by him and they made the wills at the time he transferred the property. Then, unknown to us, Mrs. Lings made a will.

The Court: How long before her decease?

Mr. Morten: That was made in February, and she died in June.

30 The Court: What year?

Mr. Morten: 1926. The will was made when she had been ailing, and she had been living in a house in Summit, and she was living at a residence to which the complainant says he was denied access, and he says they said they couldn't accommodate him there, and he says it was never her will, because they had lived together very happily.

40 The Court: Who is the beneficiary under that will?

*Testimony*

Mr. Morten: It was the daughter of the deceased by a former marriage.

Mr. Adams: If your Honor, please: I would like to straighten out the issue. There is no allegation in the bill of complaint about mutual wills, and this is the first mention I have heard of it. The bill, briefly, is this: It is exceedingly vague, as to dates, but it alleges that the complainant conveyed this property to his wife in 1920, and sets out no contract. It says that she suggested that he convey the property and she would make a will, devising the property to him, and that pursuant to agreement, they made a will. Now, in lieu of an amendment, or in lieu of a bill of particulars, Mr. Morten informs me that the agreement there is an oral agreement. Then he alleges next that the parties—husband and wife—later decided to change the nature of the bequest and devise to complainant, and pursuant to said decision and agreement, and no agreement set out, except what I have just stated, and with his consent, she made a new will in which she left him one-half of the income of the residuary estate, and the rest to her daughter, Mrs. Urquhart.

Now, the prayer is that he may be decreed to have one-half of the income, so, if you pause there for a moment, it seems to me he had an adequate remedy at law, and he is not asking for the establishing of a will, or the construction of a will, but he is asking damages for a breach under the contract, and he is asking for damages to the extent of one-half of the income. That he can do in a court of law.

*Testimony*

10 Now, the rest of his bill is directed to the making of the final will, and there he alleges that it was the product of undue influence. Our answer says that that question was rejected in the Orphans' Court of Union County, between the two parties, and this will was probated, and it was appealed from, among other things, on the ground of undue influence and lack of testamentary capacity. I have pleaded it in the answer and it merely joins issue.

The Court: I will take the proofs.

20 Mr. Adams: I find that in one or two cases this court has held, and particularly in the decision of Vice Chancellor Stevenson, that a claim of this nature, where a complainant was asking for a money judgment, that there was an adequate remedy at law, and if the question was raised the court would not take jurisdiction, but since the parties raised no objection, and he had taken all the proofs, he thought he would take jurisdiction on that case, and the Court of Errors and Appeals said they didn't uphold the jurisdiction, but it would affirm him in that case.

30 The Court: I will note your point, that you think there is adequate remedy at law.

Mr. Morten: I just want to correct Mr. Adams on the prayer. Our prayer is this: That a decree may be made by this Honorable Court to appoint one or more trustees to take care of the residuary estate, of which she died seized, except the personal property, which she disposed of according to the will, including all the property of every kind or nature, of which she died seized.

40 Mr. Adams: I did not mean to misstate his prayer—

The Court: Let me have the proofs.

*Ethel Urquhart—Direct*

ETHEL URQUHART, one of the defendants in the above entitled cause, being called and sworn by the complainant, testified as follows:

Direct-examination, by Mr. Morten:

By the Court:

10

Q. Where do you live? A. Little Neck, Long Island.

By Mr. Morten:

Q. Mrs. Urquhart, you are now in the possession of the estate left by your mother? A. I am.

Q. And that was vested securities? A. Yes.

Q. And some was stocks and some was bonds?  
A. Naturally.

20

Q. And all those stocks and bonds and all the estate of your mother is now in your individual possession, isn't it? A. Yes, sir.

Q. You have not filed an inventory, have you, of the estate?

Mr. Adams: I object to the question, on the ground that it is immaterial.

The Court: What materiality has it?

Mr. Morten: We can't find an inventory.

30

By the Court:

Q. Have you filed an inventory? A. No. The inheritance tax was paid.

Q. Do you know what the amount of the estate was? A. I think it is about fifty-three thousand, five hundred dollars.

By Mr. Morten:

Q. And the income varies, according to the dividends paid on the stocks, from time to time?  
A. Naturally.

40

*George S. Lings—Direct*

Q. If I understood you correctly, the stocks have been transferred to your name. Did I understand you to say that the stocks have been transferred to your name? A. Yes.

10 Q. And that has been done? A. Yes.

By the Court:

Q. Were they transferred to you individually, or as executrix? A. They were conveyed to me individually.

Mr. Morten: That is all.

(No cross-examination).

20 Mr. Adams: The last will left the entire estate to Mrs. Urquhart.

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GEORGE S. LINGS, the complainant in the above entitled cause, being first duly sworn according to law, testified as follows:

Direct-examination, by Mr. Morten:

30 Q. Mr. Lings, you were the husband of Mary Louise Lings? A. Louise Mary Lings; yes, sir.

Q. She died—

Mr. Morten: I ask to amend my bill; I see I have the names transposed.

The Court: The amendment will be allowed.

Q. And your wife died in Montclair, in June, 1926, on the 19th? A. She did.

40 Q. Now, you were married to your wife a number of years ago? A. Yes.

*George S. Lings—Direct*

Q. And at the time of your marriage, was your wife possessed of any estate? A. Not a cent.

Q. Now, do you remember purchasing any lands in December, 1903? A. Yes; I did purchase some land in Rockland County.

Q. And those lands—did they have any name; were they known by a name? A. I gave the place a name afterwards—known as Beechwood. 10

Q. By the way, Mr. Lings, how old are you now? A. I was eighty, my last birthday.

Q. And how old was your wife? A. Twenty years younger than I was.

Q. Now, after you purchased these lands, known as Beechwood, in Rockland County, New York, did you make any improvements on it? A. Yes; I improved the land and built a house. 20

Q. When you purchased the land, in whose name did you take the title, originally; when you first bought it, was it your name or your wife's name? A. I bought it, individually.

Q. Now, in—I show you a deed, dated December 12th, 1903, made by John H. Haring and wife, to George S. Lings, and recorded December 15, 1903, in Book No. 215 of Deeds for Rockland County, page 52, and ask you if that is the deed you received when you bought the property—that is the property in Orange Town? A. Yes; that is the deed. 30

Mr. Morton: I offer the deed in evidence.

(Deed marked Exhibit C-1, as of this date.)

*George S. Lings—Direct*

By the Court:

Q. Did you buy any other property? A. No; not at that time. It was about forty acres of land, with an old farmhouse on it.

10 By Mr. Morten:

Q. In 1924, did you know the value of that property?

Mr. Adams: I object to the question, on the ground that it is immaterial.

The Court: I will allow it.

A. I don't know anything about it.

20 Q. What did you get when you sold the property? A. Three thousand, six hundred dollars.

Q. How much? A. When I bought it?

Q. No; when you sold it. This property was sold in 1924, wasn't it? A. Yes.

Q. What was it sold for? A. Forty-one thousand dollars; there was a house on it then.

Q. Was it forty-one thousand dollars, or forty-three thousand, five hundred dollars? A. I think the net amount was about forty-one thousand dollars.

30 Q. Now, did you have any other properties besides this real estate, and any personal property that you gave your wife?

Mr. Adams: I object to the question. I object to any transaction with his wife, because the defendant is here in a representative capacity, and secondly: I object because he hasn't testified that he gave any.

*George S. Lings—Direct*

The Court: Repeat the question.

(Question repeated by the stenographer).

The Court: Strike the latter part of the question out. 10

Mr. Adams: I still object to it.

The Court: I will allow it.

By the Court:

Q. Was there any other property, personal property or real estate? A. Yes; I had a little parcel of land near the house, about seventeen acres, with a little house on it, but that was bought with another deed, and I kept that. 20

Q. Have you got that now? A. No; I sold that.

Q. Did you have any personal property at the time? A. I had no money, except what I had in my firm in New York, where I was doing business.

By Mr. Morton:

Q. And how much money did you have invested in your firm in New York?

Mr. Adams: I object to the question, on the ground that it is immaterial. 30

The Court: I will allow it.

A. I had everything I had got.

By the Court:

Q. How much was it? A. About one hundred and fifty thousand dollars.

By Mr. Morten:

Q. Now, then, outside of this real estate—what did you do with this real estate that you bought 40

*George S. Lings—Direct*

in Orange County, in 1903; what did you do with it in 1920?

10 Mr. Adams: I object to it, if the object is to go in any transaction with the deceased.

The Court: I will allow it.

A. In 1920, I deeded it to my wife.

By the Court:

Q. Absolutely? A. Absolutely.

Q. You gave it to her? A. I gave it to her.

20 Mr. Morten: Mr. Adams, have you any objection to my putting in evidence, certified copies of deeds, instead of the originals?

Mr. Adams: I will make no objection to the copies of the deeds when they are certified by the County Clerk.

30 Mr. Morten: I offer in evidence a certified copy of a deed dated September 15th, 1920, made by George S. Lings to Wilhemina L. Lotz, recorded June 30th, 1922, in Liber 284 of Deeds, on page 289, in the Office of the Clerk of Rockland County, New York.

(Certified copy of deed marked Exhibit C-2, as of this date.)

40 Mr. Morten: I offer in evidence a certified copy of a deed dated September 15th, 1920, made by Wilhemina L. Lotz to Louise M. Lings, recorded June 30th, 1922, in Liber 284 of Deeds, on page 292, in the

*Exhibits Offered in Evidence*

Office of the Clerk of Rockland County,  
New York.

(Certified copy of deed marked Exhibit  
C-3, as of this date.)

Mr. Morten: I now move to discontinue  
as to Ethel Urquhart, as the Executrix of  
the estate of her mother. I have no action  
against her as executrix . 10

Mr. Adams: If he discontinues as to her  
as executrix, then that settles the case  
The claim is one that is necessarily one  
against the estate; the estate has been  
administered and the estate closed.

Mr. Morten: In view of her statement  
that all of the property is in her name, the  
estate is closed, and the statute says that  
a sole beneficiary need not file an account-  
ing or inventory, and I cannot see that the  
estate is any longer in existence. 20

Mr. Adams: The Orphans' Court Act  
requires an account by the executrix or an  
administrator, and a decree passing the  
account and discharging the executor or  
administrator, but it makes an exception  
where the executor or executrix is the resi-  
duary legatee and devisee. He can have  
a decree discharging him from the admin-  
istration of the estate, upon his filing  
releases from all of the specific devisees,  
and in order to close the estate she would  
have to file a decree. 30

The Court: I think you had better take  
it as a suit individually, now. 40

*George S. Lings—Direct*

10 Mr. Adams: I now find out that there is a mortgage of twenty-one thousand dollars that is still in her name as executrix, and in order that the record may be straight, I would like to recall her and bring out that point.

Mr. Morten: If Mr. Adams makes that statement, I will accept it, and not call upon him to produce her. I also withdraw my motion.

By Mr. Morten:

20 Q. Now, Mr. Lings, you and your wife—after this property was sold in 1926, this Orange Town property, you and your wife went to live where?

Mr. Adams: You have used the year 1926 before and now, and the bill alleges that it was 1924.

Q. 1924—after the property was sold—this Rockland County property—where did you and your wife go to live? A. We went to Summit.

Q. New Jersey? A. Yes, and lived at the Beechwood Hotel there.

30 Q. And still lived there when your wife was taken sick? A. She was taken sick before that, and the preceding year we had gone to Europe, and she was taken ill and was in a very bad state of health all the while she was in Europe, and we came back again and she was ill the six months the latter part of the year.

Q. The year before she died, you mean? A. Yes.

40 Q. Now, where was your wife living at the time of her death—what residence? A. She was living at Montclair, New Jersey.

*George S. Lings—Direct*

Q. What was the name, at the time of her death—what street, do you know, at the time of her death? A. I don't know the name of the street. I wasn't living there. The daughter—she was taken there after she had a stroke.

10

By the Court:

Q. How long were you separated from her before her decease? A. Before she was ill?

Q. No; before she died—for what period? A. Oh! I was continuously with her while she was at Beechwood and Summit.

Q. I want to know how long you were separated from her before she died? A. Two or three months, but I went nearly every day to see her. My step-daughter had taken the house without my consultation, and in her name, and there was no room for me.

20

Q. Your wife wanted to be there? A. She was taken there in an ambulance.

By Mr. Morten:

Q. Where was your daughter living previous to the time your wife went to live with them?

Mr. Adams: I object to the question, on the ground that it is immaterial.

30

The Court: I will allow it.

Q. Where was your daughter living, previous to the time that your wife went to live with her in Montclair? A. In New York.

Q. And do you know whether she kept the apartment in New York, even after your wife came to live with her in Montclair?

40

*George S. Lings—Direct*

Mr. Adams: I object to the question, on the ground that it is immaterial.

Mr. Morten: He paid the rent. He kept the apartment in New York, and they took the house for the purpose of having Mrs. Lings brought from the hotel to the house.

10

Q. Mr. Lings, do you know how your daughter came to take the house at Montclair—your step-daughter, I mean? A. I don't know—because, she was looking for a house, and she took this house without consulting me.

Q. Why did she take the house? A. Because, she wanted to take her mother to this environment, and not the environment of the hotel, where we were staying with her at the time. I don't know whether she rented it, but she said she was going to rent her apartment in New York, and come there with her husband. There was no room for me at the house, because they had two nurses, and I was to stay at my hotel, and I was to come down every day, which I could, very conveniently.

20

Q. Did you go to see your wife? A. Constantly, yes.

30

Q. Did you see her every time? A. No; not all the time.

Q. Why not? A. Sometimes the nurse wouldn't let me, and sometimes her daughter said she didn't want to see me.

Q. When you say "your daughter", you mean Mrs. Urquhart? A. I mean my step-daughter.

Q. Who paid the expenses for the last sickness? A. They simply sent me how much—what

40

*George S. Lings—Direct*

he wanted; my—the husband of my step-daughter sent me a statement of how much he wanted, and I sent him a check for it.

Q. Was there any feeling between you?

Mr. Adams: I object to the question. 10  
This is a suit to set aside a will, and it opens up a long line of testimony.

The Court: I will allow it.

By the Court:

Q. Did your wife have any other children; was that her only child? A. That was the only child.

Q. You had no children by her? A. I had no children by her, but I had children by a former marriage. 20

By Mr. Morten:

Q. Now, at the time you deeded this property in Rockland County to your wife, in 1920, was there any understanding between you and your wife?

Mr. Adams: I object to the question on the ground that it is leading.

The Court: Yes.

Q. What was done by your wife on the same 30  
day that you deeded the property to her, in Rockland County, in 1920?

Mr. Adams: I object to the question, on the ground that this relates to a transaction between the complainant and the deceased.

The Court: I will allow it.

Mr. Adams: And I object further upon 40  
the ground that it is an attempt to prove

*George S. Lings—Direct*

10 a contract by parole, and that it is an attempt to vary the statute of frauds and perjuries—the parole evidence rule; that the attempt is to explain or modify in any way the written contract which has been proven; that is, the conveyance.

The Court: I will allow it.

A. She made another will.

Q. And who made that will—who drew it?

Mr. Adams: I object to the evidence of the will, because it is a document, and the document should be proven.

20 Mr. Morten: I have the original will and intend to prove it by the man who drew it.

Mr. Adams: If you want to offer that, we will admit that that is the signature of Mrs. Lings, but we don't know anything about the other signatures.

The Court: What is the date of the will?

Mr. Morten: September 15th, 1920; the same date as the deed.

30 Mr. Morten: I offer in evidence a paper writing signed by Louise M. Lings, dated September 15th, 1920, and purporting to be signed in the presence of George W. Bristol and Wilhemina M. Lotz, and the last page thereof what purports to be an attestation clause, and witnessed by the same persons.

Mr. Adams: I object to the admission of the will.

40 Mr. Morten: I don't offer it as a will now, but merely to identify it as a part of the transaction.

*George S. Lings—Direct*

The Court: I will admit it.

(Paper writing marked Exhibit C-4, as of this date.)

Q. Do you know how it came about that your wife signed this paper, which has been marked Exhibit C-4, and which you have referred to as a will? 10

Mr. Adams: I object to it.

The Court: I will allow it. It will all be taken over your objection.

A. Well, I told my wife, when I deeded the property, that I was put in a peculiar position; I had nothing if anything happened to her, and she said she would make that all right, because she would will it back to me, and if anything happened to her—she died, I would have the property back again; that was the whole thing. 20

Q. Now, you have just testified that you made the deed to her, because she made the will to you, whereby you would get back all the property, in case she died?

Mr. Adams: I object to the question, on the ground that it is leading. 30

The Court: The objection is sustained.

Q. Was this arrangement that is exhibited by the deed and this will ever modified between you and your wife, respecting how much you were to get in case of your wife's death; was it changed?

A. It was never changed, to my knowledge.

Q. Was it changed after? A. You mean the will of 1924?

*George W. Bristol—Direct*

Q. No; the will of 1920? Was there another will drawn after this will of 1920? A. There was another will drawn in 1924.

Q. Now, how did that will come to be made—the will in 1924?

10

Mr. Adams: I object to that, because no will has been proven.

Mr. Morten: I have the will here, which will be proven.

Mr. Adams: I would like to have it proven before there is any testimony about it.

20 Mr. Morten: All right. Mr. Lings, will you step down for a moment, please.

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GEORGE W. BRISTOL, a witness produced on behalf of the complainant, being first duly sworn according to law, testified as follows:

Direct-examination by Mr. Morten:

30 Q. Mr. Bristol, where do you live? A. Atlantic Highlands.

Q. What is your profession? A. Lawyer.

Q. Of what state? A. New York.

Q. Did you know Louise Mary Lings in her lifetime? A. I did.

Q. Do you know George S. Lings? A. I do.

Q. Were you ever employed by them in any capacity, to act as an attorney or counsel? A. I was employed by Mr. Lings.

40 Q. How long have you been Mr. Lings' attorney? A. Over thirty years.

*George W. Bristol—Cross*

Q. And in 1924, were you consulted by Mr. and Mrs. Lings? A. Yes, sir.

Q. For what purpose? A. Making a change in their wills.

Q. Do you know whether or not a change was made? A. It was. 10

Q. What was done?

Mr. Adams: I object to the question.

The Court: The objection is sustained.

Q. Were new wills made in 1924? A. Yes.

Q. By each of them? A. Yes.

Q. After the two wills were made, what was done with them? A. One was given to Mr. Lings and one to Mrs. Lings. 20

Q. Have you copies of those wills? A. I have.

Q. I ask you to produce them.

Mr. Adams: I object; I would like to cross-examine him first.

The Court: You may.

## CROSS-EXAMINATION by Mr. Adams:

Q. You say you drafted a will for Mrs. Lings in 1924? A. Yes, I prepared two; one for Mr. Lings and one for Mrs. Lings. 30

Q. And at the time you prepared her will you were acting as her attorney? A. I don't know whether I was acting for her; I went to Beechwood, in Rockland County, and all three of us were there.

Q. And you are an attorney at law of how many years practice? A. Since 1891.

Q. And you don't know whose attorney you were in the preparation of Mrs. Lings' will? A. 40

*George W. Bristol—Cross*

Yes. Mr. Lings said they wanted to make some changes in the will and I went up there and changed them.

10 Q. So, in the changing of Mrs. Lings' will, you were the attorney of Mr. Lings, were you? I am asking you for whom you were acting as attorney? A. I presume I was acting for Mr. Lings; he paid the bill, anyway.

Q. So, when you prepared the will of Mrs. Lings, you were acting for Mr. Lings and not Mrs. Lings; is that right? A. I never considered that; I went there and I drew both wills, and, naturally, I was acting for Mr. Lings; he paid the bill.

20 Q. You think that is what constitutes the relationship? A. No, I don't.

Q. You think that decides the relationship of attorney and client—who pays the bills, and if you didn't send a bill, there would be no relationship? A. No; I don't.

Q. And you thought you didn't represent Mrs. Lings?

Mr. Morten: I object to the question.

30 The Court: I will allow it.

A. Mr. Lings told me what they had agreed upon. I was representing both, I suppose, to a certain extent.

By the Court:

Q. Mr. Lings has paid you? A. Yes; paid all the bills. She never paid anything at all.

By Mr. Adams:

40 Q. You wouldn't want us to think that you were representing Mr. Lings, when you went to

*George W. Bristol—Cross*

his wife as his attorney, and asked her to make a will, which you, as his attorney, drew to have her sign? A. I didn't ask her to sign any will. Mr. Lings told me they wanted to change their wills, and he asked me to come up.

Q. Will you tell us whose attorney you was when you prepared that will? 10

Mr. Morten: I object to the question. That calls for a conclusion.

The Court: He says he was attorney for Mr. Lings.

A. It was a mutual conversation.

By the Court:

Q. Mrs. Lings didn't send for you to come up— Mr. Lings did? A. Not on that occasion. 20

Q. Had she asked you to come up there and make her will? A. No; the will was made in my office.

By Mr. Adams:

Q. Then it wasn't drawn up at Rockland County? A. No, sir.

Q. You said you went to Rockland County? A. It was discussed there for weeks before this time. 30

Q. Who was present when the will was drawn? A. Mr. Lings and Mrs. Lings.

Q. And will you tell me whether you were acting as attorney of Mr. Lings or not? A. I went there at the request of Mr. Lings, and we had a three-cornered talk, and sometimes I went there over week-ends, at her invitation.

Mr. Adams: Now, I am going to object, because his testimony shows that he 40

*George W. Bristol—Cross*

10 was acting as attorney for Mrs. Lings at the time this will was drawn. He went to Rockland County and he talked to her about her will, and she must have requested him to draw the will, and when he undertook, and received from her any instructions for the will, he was acting for her. He was acting as her attorney, and anything she disclosed to him was confidential and any document she left in his possession was confidential and he cannot disclose it. I object to his producing any document, or testifying to it, on the ground that he stands in a relationship to Mrs. 20 Lings which not only makes it privileged, but makes it his duty to refuse to testify, as her attorney.

Mr. Morten: Mr. Adams has lost sight of the testimony that Mr. Lings was present, and that destroys the privileged part of it.

The Court: I will allow it.

By Mr. Morten:

30 Q. Mr. Bristol, who was present when Mrs. Lings gave you the information, or when the information was given to you, when the will of Mrs. Lings was drawn, in June, 1924? A. Mr. and Mrs. Lings were both present.

Q. Was Mr. Lings present at the time the instructions were given to you at your office in New York? A. I don't know as there were any instructions given in New York, because the wills were 40 drawn and ready to be executed when they called.

Q. Was anybody else present? A. Mrs. Lings' will was executed, but Mr. Lings' wasn't, because

*George W. Bristol—Cross*

Mrs. Lings objected to Mr. Johnson being named as trustee, and that will wasn't signed, and he came down two days later and executed his will.

Mr. Adams: I want to object to the part of the answer that was not responsive.

10

Q. Was any witness present besides Mr. and Mrs. Lings?

By the Court:

Q. Are they the original wills? A. No; they are copies.

Q. Where are the original wills? A. I don't know.

Mr. Morten: I might say that it is agreed between counsel that the defendant doesn't have, and does not know where these two wills are.

20

By Mr. Morten:

Q. I have asked you, Mr. Bristol, who was present at the time, besides Mr. and Mrs. Lings? A. Yes.

Q. Who was there? A. Virginia Gardner.

Q. And who else? A. Myself.

Q. Who was Virginia Gardner? A. She was a stenographer for lawyer Dodd, on the same floor, and I asked her in to act as a witness.

30

Q. Describe what was done at the execution of this will of Mrs. Lings', in June, 1924.

Mr. Adams: I object to the question.

Mr. Morten: If the other side will concede that these papers were executed according to the statute—

Mr. Adams: The only thing I will admit is that a paper purporting to be a will

40

*George S. Lings—Direct*

contains the proper testamentary clause, according to the law of New York.

Mr. Morten: Is it conceded that the wills were executed in the manner set forth in the attestation clause?

10

Mr. Adams: No. They cannot prove a will by parol evidence. Proof of a copy by parol evidence is an attempt to prove a will by parol evidence.

Mr. Morten: All right, Mr. Bristol; I will now recall Mr. Lings.

20 GEORGE S. LINGS, having already been called and sworn, is recalled, and testified as follows:

Direct-examination (continued) by Mr. Morten:

Q. Mr. Lings—

By the Court:

Q. You made a will on that date in June, 1924?

A. Yes, sir.

30 By Mr. Morten:

Q. What did you do with the will you signed in 1924; what did you do with that will that you made in 1924? A. I gave it to my daughter; I think my wife's daughter; we gave it to her.

By the Court:

Q. You must be certain about it. What did you do with your will? A. It was put in a safe deposit box.

40

Q. How do you know it was? A. I presume it was.

*George S. Lings—Direct*

By Mr. Morten:

Q. Who did you give it to; do you remember?

A. I gave it to my wife.

Q. In what safe deposit box was it to be put?

Mr. Adams: I object to the question.

The Court: The objection is sustained. 10

By the Court:

Q. You had a new will in 1924? A. Yes.

Q. What did you do with it? A. Well, I gave it—I can't remember exactly, whether I brought it home and gave it to my wife, or her daughter, or both of them, and told them to put it in a safe deposit box. I had none.

Q. How did you know she had one? A. She 20  
had it in her bank. She drew her checks there. She had a safe deposit box in her own name, and I had a key to it, but I was never in it.

Q. Are you sure you gave the will to your wife?

A. I am certain of it.

Mr. Morten: It is conceded that the defendants have been requested to produce these wills, but they never found them.

Mr. Adams: You are mistaken about 30  
the will of Mr. Lings, because I never heard of that before today. We waive any notice of production of the will of Mrs. Lings, of 1924. We haven't it.

By Mr. Morten:

Q. Have you your will of 1924, now? A. No.

Q. Have you ever seen it since you gave it to your wife or her daughter, to put in the safe deposit box? A. No, but I told my step-daughter 40  
to take the two wills out, in order to save any

*George S. Lings—Direct*

trouble, and she said she would, and she apparently went to do it, and I told her to give these wills to me to put in my office, and she said she went over to the bank, and she got these wills, and she got these wills and gave them to Mr. Williams.

10 Q. Mr. Corra N. Williams? A. Yes, and she had Mr. Williams come on the plea originally—he lived in the hotel, and she said Mrs. Lings wanted him to make out a power of attorney, so her daughter could sign her checks, and what made me suppose was that Mr. Williams made the will of 1926, but I didn't know anything about it until the time my wife died, and then it was  
20 sprung on me.

Q. Do you know what became of your wife's will that was made in 1924? A. I don't know what she did with it.

Q. Did she tell you what she did with it? A. She told me she put it in the safe deposit box in her own name.

Q. Did you ever see it after that time—her will? A. Never saw it again.

30 Q. Do you know where it is? A. I only infer it is there; that my step-daughter said she took it out of there and gave it to Mr. Williams. She knew the wills were there.

Mr. Morten: I think I have established that the wills have been lost.

The Court: I will receive it as part of the transactions between these defendants, only.

40 Mr. Morten: I didn't think it would be incumbent on me to prove—

*George S. Lings—Direct*

The Court: I will receive the copy as part of the transaction here between the parties, as alleged by the bill of complaint.

Mr. Morten: Is it to be understood that these two documents are to be received as to what they contained, or how they were drawn, or do I have to prove it? 10

Mr. Adams: In view of your Honor's view about it, I am willing that they be marked for identification.

Mr. Morten: I ask to have the paper writing, purporting to be a copy of the will of Louise Mary Lings, dated June 17th, 1924, marked for identification.

The Court: Let it be marked. 20

(Said paper writing is marked Exhibit C-5, for identification, as of this date.)

Mr. Morten: Now I ask to have the paper writing purporting to be a copy of the will of June 19th, 1924, of George Scott Lings, marked for identification.

The Court: Let it be marked.

(Said paper writing is marked Exhibit C-6, for identification, as of this date.) 30

By the Court:

Q. Did you have any further transactions with your wife, relative to your property? A. No, sir; I don't think so. She was in very poor health.

Q. How old a woman was she? A. She was twenty years younger than I was. She would be about sixty now; I am eighty. 40

*George S. Lings—Direct*

Q. What year did she die? A. Twenty-six.

Q. When you deeded your property to your wife, did you have any property left? A. Only my business.

10 Q. What was your income from your business in 1920? A. Of my own?

Q. Yes. A. About 1920, we made a big loss.

Q. What was your income in 1921? A. For the years following, we didn't make any profit.

Q. How did you make a living? A. I drew out money I had in my business; I drew the capital.

20 Q. How much? You told me you had one hundred and fifty thousand dollars invested in business in 1920; how much did you draw out of the investment? A. I drew out five thousand dollars, about; I don't know exactly. It was an incorporated company, and I held it all. There was money there, and I took money as I needed it.

Q. And you lived on that? A. I lived on that.

Q. And you are doing that today? A. Yes, sir; except that I am going out of business and winding it up.

30 Q. As an actual fact, what you gave to your wife was this real estate, in the first place? A. And in addition to that I had given her the proceeds of some life insurance policies.

Q. How much? A. About fifteen thousand dollars, and she got a share of the profits from the business, and she received it.

Q. But the gift you are fighting for is the real estate?

40 Mr. Morten: It is the residuary estate, not the real estate.

The Court: All?

*George S. Lings—Direct*

Mr. Morten: Of the residuary estate; he gets one-half of the income.

By Mr. Morten:

Q. Now, Mr. Lings, in 1924, how did it come that you and your wife made wills at that time, and made changes in the wills of 1920? 10

Mr. Adams: I object to the question on the same grounds. There is no proof that there was any will executed in 1924. I object to any proof of any will of his in 1924, because there is no issue about that. We are not prepared to meet any plea of mutual wills. There is no such allegation in the pleadings. He has set out no agreement in the pleadings, and now he says the agreement was that this man was to make a will. 20

The Court: I will admit it.

Q. Do you understand the question? A. Yes.

Q. Will you answer it?

Mr. Adams: How can this be admitted when he is suing in a representative capacity? He is the complainant and he is asking about transactions with the deceased. 30

Mr. Morten: I will withdraw it. That is all.

Mr. Morten: I offer in evidence a certified copy of a deed made by Louise M. Lings and husband to Robert F. Tierney and wife, dated May 12th, 1924, and recorded in the Rockland County Clerk's 40

*George S. Lings—Cross*

Office on May 14th, 1924, in Liber 294, page 370. This deed being the deed by which Mr. and Mrs. Lings conveyed to Mr. Tierney, and the property having previously been conveyed through an intermediary, by Mr. Lings to Mrs. Lings.

(Certified copy of deed marked Exhibit C-7, as of this date.)

CROSS-EXAMINATION by Mr. Adams:

Q. You say 1920 was a bad year in your business? A. Yes, sir.

Q. And you had heavy losses that year? A. Yes, sir.

Q. And that was the year you conveyed your property to your wife? A. Yes, sir.

Q. And wasn't the property conveyed to your wife, because you were afraid of your creditors getting after you? A. I wasn't afraid of my creditors getting after me at all, because I had plenty then.

Q. Wasn't the reason you conveyed the property to your wife, was because you didn't want it lost, in case you lost your business? A. I think I did it because she asked me.

Q. Is that the reason? A. My wife thought so, but I didn't, and because she asked me, I did it.

Q. She thought you might lose the property, through loss in your business? A. Yes, she thought so.

Q. And you talked it over? A. Yes, sir.

Q. And she suggested that you convey it to her for that reason? A. Yes, sir.

*George S. Lings—Cross*

Q. And you said you would? A. I said I would on one condition: that I had some protection for myself.

Q. But the primary reason was that you didn't want that property at the risk of the loss in your business? A. I didn't think anything about it. I don't know what I thought at the time, but it was a suggestion to me and I let her have her own way. 10

Q. You have already told us what she suggested? A. Yes, sir.

Q. And you decided that you would convey it to her, so it wouldn't be lost through your business troubles and embarrassments, provided she made a will and left it to you? A. Are you speaking of 1920, or 1924? 20

Q. I haven't asked you about anything but 1920. A. Very well, then. In 1920, I had lost a lot of money, but at that time I wasn't a bit afraid of anything, but I transferred it to my wife for love and affection—nothing else.

Q. Was that all? A. That was all.

Q. Are you sure about that? A. Absolutely sure about that, but with the proviso that if she die that she must make a will, leaving that to me, because her daughter would get it, and that was the arrangement at that time. 30

Q. A moment ago you said she came to you, and because your wife thought you were going to lose your property through financial embarrassments you were going through in your business, and you said you would deed it to her, provided she would make a will in your favor; is that true? A. In 1920? 40

*George W. Bristol—Direct*

Q. That is what you said before? A. Yes.

Q. Is that true? A. It is true—what?

10 Q. Is it true, as you volunteered a moment ago, that in 1920, your wife suggested that she was afraid that the Beechwood property might be lost through your business troubles, and she suggested that you convey it to her, and you said you would, provided she would make a will, leaving it to you? A. She did make a will, and she volunteered to make a will to me in that case, which she did.

Mr. Adams: That is all.

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GEORGE W. BRISTOL, a witness having already been called and sworn on behalf of the complainant, is recalled and testified as follows:

Direct-examination by Mr. Morten:

30 Q. Mr. Bristol, you have testified that you prepared certain wills for Mr. and Mrs. Lings, of which Exhibits C-5 and C-6, for identification, are copies. Describe what took place at the time those wills were executed, of which these are copies.

Mr. Adams: Now, I again object.

The Court: I am going to receive it, noting his objection.

Mr. Morten: I now offer the papers in evidence.

Mr. Adams: I object to it.

40

The Court: I will accept them, noting the objection.

*George W. Bristol—Direct*

Mr. Adams: I want to make the further objection that there is no foundation.

(Exhibits C-5 and C-6 for identification, are marked Exhibit C-5 and Exhibit C-6, as of this date.)

10

Q. Are the papers, Exhibit C-5 and Exhibit C-6, exact copies of the wills executed by them?

A. They are exact copies of wills executed by them, on the date on them.

Q. Where have the copies been? A. In my possession all the time.

Q. Now, Mr. Bristol, you remember being present at a consultation with Mr. and Mrs. Lings, prior to the execution of the will of 1920, and the deed of 1920, at which the purpose of the deed—

20

Mr. Adams: I object.

The Court: Objection sustained.

By the Court:

Q. Prior to the execution of the will of 1920, how many times did you meet Mr. and Mrs. Lings? A. Many times. I used to go up to the place week-ends, and sometimes, during the week.

Q. Did you have any conversations with them? A. Yes, sir.

30

Q. Relative to their property affairs? A. Yes, sir; and drew a number of wills for Mr. Lings, and they were always discussed, and Mrs. Lings always took part in the discussion.

By Mr. Morten:

Q. Can you recall any of the transaction that took place between Mr. and Mrs. Lings, relative to the deed of 1920, and the will of 1920?

40

*George W. Bristol—Direct*

Mr. Adams: I object to the question on the rule of parol evidence.

The Court: The objection is overruled.

A. Yes, sir.

10 Q. What conversation can you recall took place, regarding these two papers? A. It was talked about on two or three occasions, and perhaps more. In the spring of 1920, the bottom dropped out of the textile market.

Q. Mr. Lings was in the textile market? A. Yes.

20 Q. As an individual or corporation? A. It was a privately owned corporation, and in the conversation that was talked about, Mrs. Lings was disturbed about—

Mr. Adams: I would like to have the time and place fixed.

Witness (continuing): This was in the summer of 1920, and she discussed the financial condition of the company.

Q. What position did you hold in the company? A. I was the secretary.

30 Q. And did she get the information? A. She would talk to Mr. Lings, and then she would ask me, and she said Mr. Lings was giving his notes for the company, and that was true, and she said: "The first thing you know we will be out in the street", and she said: "I want this property fixed so I won't lose it", and she asked Mr. Lings—first she said she wanted the property put in her name, so if anything happened to Mr. Lings,  
40 she would be safe.

*George W. Bristol—Direct*

Mr. Adams: She said this to you?

The Witness: Yes.

Mr. Adams: Are you trying to give us her exact language?

The Witness: Yes.

Q. I want you to tell what Mrs. Lings said about the transfer of this property. A. She said she had agreed to make a will and give it back to Mr. Lings, in case she predeceased him, and Mr. Lings said that was all right, and agreeable to him, and I called his attention to the fact that she might make a will and leave him out, and he said he had perfect confidence in her, and she wouldn't do anything like that, and I drew the deed and the will, pursuant to their instructions, and they came to the office and executed the deed and the will at the same time, and I asked Mrs. Lings not to record the deed, as I thought it might hurt the credit of the corporation, and she held it for about two weeks, and then I found that she had recorded it, and it then seemed that she was looking out for herself and the interest of her daughter, also.

Q. Now, Mr. Bristol, you said you prepared the wills of which Exhibit C-5 and Exhibit C-6 are copies? A. Yes.

Q. How did it come about that you prepared those two wills—at whose instructions? A. Mr. Lings told me first that he and his wife had agreed upon a change—

Mr. Adams: I object to that.

The Court: Strike it out—what the complainant said.

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*George W. Bristol—Direct*

Q. Will you just give us only conversation that took place, if any there were, when both Mr. and Mrs. Lings were present. A. One was a conversation had at Blauvelt, and Mr. and Mrs. Lings were present, and Mr. Lings told me what was agreed upon, and Mrs. Lings was present and said that was correct.

10 Q. And what was agreed upon? A. It was agreed upon to make new wills, and she was to make her will, and her will was to provide that her property, and she stated it was the entire property—money she had received from certain life insurance policies and a small house which Mr. Lings had purchased for her daughter, and had been sold, and her real estate, and her whole property shall be put in trust, and Mr. Lings was to receive one-half of the income, and her daughter was to receive the other one-half, and he was to make a will, whereby his three children got the income of the one-half, and she was to get the income of one-half as long as she lived, and then it was to go back to his children, and on those instructions I prepared those wills, and that was before the property was sold. They were discussing this even before they found a buyer, and Mrs. Lings told me Mr. Lings wasn't willing to let her have the money, and she didn't want Mr. Lings to have the money, because she said if it went in the business she thought it would be lost, and they finally agreed upon the arrangement set forth in the two wills.

Mr. Morten: That is all.

*George W. Bristol—Cross*

CROSS-EXAMINATION by Mr. Adams:

Q. Of course, you don't remember, out of the many visits that you made there, you don't remember definitely what was said to you by Mrs. Lings, relative to the making of the wills of 1924?

A. I know they were both present, and Mr. Lings outlined— 10

Q. Will you answer my question? A. I thought so.

By the Court:

Q. You don't remember definitely what passed between them there, do you? A. I just remember the substance.

By Mr. Adams: 20

Q. And you could get the substance by just reading the wills? A. No; I don't think so.

Q. You don't think you could tell by just reading the wills, what Mrs. Lings told you in the discussion? A. I don't think so.

Q. You drew the wills? A. Yes, sir.

Q. In the presence of whom? A. Mr. and Mrs. Lings.

Q. And you think they don't conform to what they told you they wanted in the wills? A. I think they do. 30

Q. And you were up there every week? A. No; I wasn't.

Q. Once in two weeks? A. No; I might be up there once in two weeks, three weeks or four weeks, or twice in one week.

Q. You was attorney for Mr. Lings? A. Yes, sir.

Q. You are still his attorney? A. Yes, sir. 40

*George W. Bristol—Cross*

Q. You are assisting with Mr. Morten in this suit? A. I put it in Mr. Morten's hands; yes, sir.

Q. And you and he have conferred together, and prepared the case before you? A. Yes, sir.

10 Q. And when I served a demand upon him recently for a copy of the alleged wills, you took the posture that they shouldn't be given up, unless there was some understanding about it? A. This is the first time I knew a demand had been made.

Q. You didn't know that a demand had been made? A. No, sir.

Q. Is there anybody else in New York who corresponded with me for you? A. No, sir.

20 Mr. Adams: Mr. Morten, to whom did you refer when you wrote him?

Mr. Morten: To Mr. Bristol's office.

Mr. Adams: Not Mr. Bristol, personally?

Mr. Morten: I don't recall now, and cannot state just now, who it was that told me. It wasn't a definite refusal.

30 Q. After Mrs. Lings died, you represented Mr. Lings with reference to any claims that he might have against the estate, did you not? A. Yes.

Q. And you say Mr. Corra N. Williams, of Summit, was counsel for Mrs. Urquhart, in the probate of the will? A. Yes, sir.

Q. And you saw him? A. I saw him.

40 Q. And corresponded with him? A. I don't remember any correspondence, but I remember going out there and talking with him.

*George W. Bristol—Cross*

Q. And you spoke of certain securities of Mr. Lings' that were in Mrs. Lings' possession? A. I think so.

Q. And he turned them over to you—Mrs. Urquhart turned them over to you, subsequently? A. No. 10

Q. No? A. I don't think I ever received anything from Mrs. Urquhart.

Q. You received them, didn't you? A. No; I didn't receive anything from there at all.

Q. Was there a bond and mortgage standing in the name of Mrs. Lings, that Mr. Lings claimed belonged to him? A. Yes; it was a bond and mortgage on the sixteen acre tract, next to the—

Q. Which stood in the name of Mrs. Lings? A. The assignment did; the mortgage was in Mr. Lings' name. 20

Q. The assignment was in her name? A. Yes.

Q. And you saw Mr. Williams with reference to that claim? A. Yes.

Q. And he procured the bond and mortgage and it was assigned by Mrs. Urquhart back to him? A. Yes, sir.

Q. And that was upon payment of four hundred and fifty dollars, that you were to forward to Mr. Williams? A. No; there was no such condition attached to it. 30

Q. And you delivered it without collecting the four hundred and fifty dollars? A. Yes, sir.

Q. And you never paid over the four hundred and fifty dollars? A. No, sir; I did not.

Q. So the bond and mortgage and re-assignment by the executrix were not forwarded to you upon the instructions you were to deliver them 40

*George W. Bristol—Cross*

to Mr. Lings, upon the payment of four hundred and fifty dollars to Mrs. Urquhart, as the executrix? A. I think there was such a letter.

Q. And you turned them over to Mr. Lings?

10 A. I think I sent them to the County Clerk for recording.

Q. I show you a carbon copy of a letter dated July 29th, 1926, addressed to George W. Bristol, Esq.; did you receive the original of that letter, with the signature of Corra N. Williams to it?

A. I received that letter; yes, sir.

20 Q. And you delivered the bond and mortgage to Mr. Lings without receiving the check? A. I don't think I did; I think I have the bond and mortgage in my possession yet. I sent the assignment to Rockland County to be recorded.

Q. And you didn't collect the four hundred and fifty dollars and send it to Mr. Williams? A. I did not. I told him he was not entitled to it.

Mr. Adams: I would like to have the letter marked for identification.

(Letter marked Exhibit D-1 for identification, as of this date.)

30 Q. Now, Mr. Bristol, I ask you, did you ever assert to Mr. Williams, as counsel for Mrs. Urquhart—claim that he was entitled to one-half of the income from this estate? A. I don't think so.

Q. Or the residuary estate? A. I don't think so.

40 Q. Did you ever file a claim for Mr. Lings to that effect? A. No.

*George W. Bristol—Re-direct*

Q. Did you ever tell Mr. Lings to notify Mrs. Urquhart or her attorney, of that claim? A. No. I turned it over to Mr. Morten.

Q. When? A. A short time after her death.

Q. When? A. I don't recall.

Q. How soon after the petition of appeal from the Probate Court? A. I don't know when it was. Mr. Morten filed whatever was filed. 10

Q. You were in that the same as you are in this? A. Yes.

Q. And you were there at the hearing? A. Yes.

Q. And ready to testify there, the same as you are here, if there was any occasion for you to testify? A. I suppose so; yes. 20

Q. And you have conferred with Mr. Morten right along in the preparation of this case? A. Yes; he was over to my office one day last week, and he conferred with me and Mr. Lings together.

Q. Isn't it a fact that he doesn't do anything without first conferring with you? A. I don't think so.

Q. Isn't it a fact that he wouldn't serve a notice or anything on me, without he conferred with you? A. I wouldn't say that; I didn't know you had served a notice on him to produce a copy of the will, until you just told me. 30

Mr. Adams: That is all.

RE-DIRECT EXAMINATION by Mr. Morten:

Q. Now, Mr. Bristol, will you tell me the condition under which you received the bond and mortgage from Mr. Williams? 40

*George W. Bristol—Re-cross*

Mr. Adams: I object to the question.

The Court: I will admit it.

Q. Just tell us what that was, and about the  
 four hundred and fifty? A. Mr. Lings bought in  
 10 at a foreclosure a piece of land adjacent to the  
 Blauvelt property—sixteen acres, and he bor-  
 rowed some money of his wife—I think it was  
 twenty-five hundred dollars—I am not sure; at  
 least he had a mortgage on the place, or sold the  
 mortgage to her for so much, and she was to pay  
 him the amount of the mortgage, and she had  
 paid him four hundred and fifty dollars on  
 account of it, but had not paid the balance, and  
 20 the mortgage was in the safe deposit box, stand-  
 ing assigned to her, and we considered that she  
 had only paid four hundred and fifty dollars on  
 a mortgage for twenty-five hundred dollars, and  
 Mr. Lings had furnished considerable money  
 which he considered should be paid by Urquhart,  
 and I told Mr. Williams that there was consid-  
 erable money coming to Mr. Lings from Urqu-  
 hart, and I said to send back the mortgage and  
 I would have it fixed up, and he sent back the  
 30 bond and mortgage, and I said it would be sub-  
 ject to adjustment.

Q. And that is still subject to adjustment? A.  
 It is. I have certain checks which are to be  
 adjusted down at Montclair, but I don't know  
 what they were about.

Mr. Morten: That is all.

RE-CROSS EXAMINATION by Mr. Adams:

40 Q. Now, I ask you if Mr. Williams didn't say  
 this to you, when he delivered these papers into

*Wilhelmina M. Durr—Direct*

your custody, by mail: "I enclose herewith an assignment of mortgage from Mrs. Urquhart to Mr. Lings, which has been executed by her before a notary in New York. You will please also find enclosed the bond and mortgage and insurance policy, and a certified copy of the will of Mrs. Lings, which you will probably have to use in the recording of the assignment of mortgage. 10

\* \* \* I am about to leave on my vacation for several weeks, and am asking you to take care of this matter in this way, and you are authorized to make delivery to Mr. Lings upon receipt of the four hundred and fifty dollars". A. That letter was sent to me and I received it, but I declined to pay the four hundred and fifty dollars. 20

Q. And you kept the documents and had them recorded? A. Yes, sir.

Q. And you didn't pay the four hundred and fifty dollars? A. No, sir.

Mr. Adams: That is all.

WILHEMINA M. DURR, a witness produced on behalf of the complainant, being first duly sworn according to law, testified as follows: 30

Direct-examination by Mr. Morten:

Mr. Adams: May I examine this witness as to her qualifications?

Mr. Morten: I have no objections.

By Mr. Adams:

Q. Mrs. Durr, you were employed by Mr. Bristol? A. Yes, sir. 40

*Wilhelmina M. Durr—Direct*

Q. In what capacity? A. Stenographer and office clerk.

Q. And you were in his employ since when? A. January, 1908.

Q. And you were present at some of the con-  
10 versations that Mrs. Lings had with him? A. Yes, sir.

Q. Several times? A. Yes, sir.

Mr. Adams: I will object to this witness  
testifying, upon the ground that the rule  
that an attorney cannot testify to commu-  
nications with his client, extends also to  
his clerk, stenographer, agent or employee  
of the attorney, and such person is not  
20 regarded as a third person, which relieves  
the rule with a third person present.

The Court: I will allow it.

By Mr. Morten:

Q. Mrs. Durr, when these instructions were  
given relative to the instruction of the prepara-  
tion of the will, Exhibit C-4, upon which your  
name appears as a witness, who was present when  
the instruction was given—who was present? A.  
30 Mr. Bristol, Mr. Lings and Mrs. Lings.

Q. Were they both there at the same time? A. Yes, sir.

Mr. Adams: She wasn't there.

Mr. Morten: She says she was.

The Witness: Yes, sir.

Q. Were you present when the instructions  
were being given? A. Yes, sir.

40 Q. And did you hear the conversation? A. I did.

*Wilhelmina M. Durr—Direct*

Q. Do you remember the wills of 1924—the wills that were drawn in June, 1924? A. Yes, I do.

Q. Previous to the wills being drawn, did you ever have any conversation with Mrs. Lings, relative to the drawing of the wills, and how they were to be drawn? A. Yes, sir. 10

Q. Will you state what these conversations were? A. That was 1924?

Q. Yes; that was when the two wills were made.

Mr. Adams: I want to object on the same grounds as before.

The Court: The objection is noted.

Q. Was Mr. Bristol present when these conversations took place? A. Always? 20

Q. Yes. A. No; sometimes Mrs. Lings would chat with me when Mr. Bristol wasn't present.

Q. Can you tell me some of the conversation that took place when Mr. Bristol wasn't present? A. Yes. Mrs. Lings came in and said they were going to look for a buyer for the place; the place was too big; she said she had no idea how much work there was there, and she asked us for the names of some medical journals, because she thought they could use it as a sanatorium. 30

Q. Come down to the time of the wills—these proposed wills. A. Yes; and she said they were going to draw new wills when the place was sold, and they were going to distribute the money different, and that Mr. Lings was going to get one-half, and that she was willing to put in, in addition, all the money she had—all the personal property she had, which was some life insurance 40

*Wilhelmina M. Durr—Cross*

policies that she had and had become payable, and she said: "I am going to put everything in the pot, and G. S." as she referred to him as, "G. S. is going to get half and Ethel was to get half".

- 10 Q. Was this in general professional conversation—generally chatty? A. Yes, and they were all around at the time the property was sold, in May, and the subject was then discussed and the instructions given for both wills, and I drew, or wrote out, both of those wills home in June.

Mr. Morten: That is all.

- 20 CROSS-EXAMINATION by Mr. Adams:

Q. Now, this statement that you say Mrs. Lings made to you, did she make that on one occasion?

A. What was that?

- Q. What you just told us—you just told us what she told you about the property she had and she was going to sell, and the moneys she received from life insurance policies, and that she was going to make a will and put it all in, and leave a half of the income to her husband and a half  
30 to her daughter. Are you giving us one statement on one occasion, or were you summing up different statements she made on different occasions? A. No; she came down in April.

- Q. Won't you answer my question: Did she say all that that you told us in one statement to you—that is, made on one occasion to you, or were you gathering together what she said to you at different times and giving it all to us at once?  
40 A. I would say that was on several occasions, in

*Wilhelmina M. Durr—Cross*

that short interval from March to April, and the sale went through in the middle of May.

Q. What you have taken then is several conversations and given us what you adduced as to what her purpose was? A. About selling the place, I have heard her speak about that a number of times. 10

Q. What do you mean; about her wish to sell it? A. Yes, sir.

Q. And this statement about her making her will, and her reference to what money she had, and was going to have, and where it came from; that was one statement, made at one time? A. I couldn't say definitely; I couldn't say she made all this statement on just one occasion; I wouldn't say that. 20

Q. And you saw her how often? A. During that occasion?

Q. Yes. A. She came down several times.

Q. How many times? A. I would say Mrs. Lings was in there four or five times within a couple of months.

Q. During what months? A. It started at the latter part of March, and she received this buyer about fifteen days later, and then she came back again, later, and she left the instructions, and that was on April 30th—yes, sir; that she came in and said then that they had definitely decided on how they would dispose of it in two wills. 30

Q. She said what? A. I can't give you it verbatim. I didn't keep a record of Mrs. Lings' entire conversation.

Q. What did she say? A. She said the place was sold, and she was going to keep the money; 40

*Wilhelmina M. Durr—Cross*

that she wouldn't turn it over to G. S., but that she would be willing to put the whole thing in the pot.

Q. She said this on April 30th? A. No; I am not—

10 Q. You fixed April 30th, as the date when she came in the office? A. Yes.

Q. Now, we will stick to April 30th, until we have finished it. A. Yes, sir.

Q. April 30th, she came in about what? A. She came in and left instructions about two wills.

Q. What do you mean by leaving instructions—what did she say? A. This is a small office, and I am most always there. She spoke to Mr. Bristol and me, and I would hear it and take part in it.

Q. We are sticking to April 30th? A. Yes, sir.

Q. What did she say on that date? A. That is the date she came in and left instructions about the two wills.

Q. Did she come in and hand you a paper and say: "Here are the instructions for the two wills"? A. No; she didn't.

30 Q. What did she say? A. She said she had come in about the two wills, and she said G. S. had given her permission to receive the money from Mr. Tierney, and she was going to put all the money in the pot together, and Mr. Lings was to receive the income of one-half, so long as he lived—the balance of his life, and Mrs. Urquhart the other half.

Q. And she said that all on April 30th? A. Yes, sir.

*Robert S. Hudspeth—Direct*

Q. And where did you locate that date? A. In the register.

Q. Where is the register? A. In the office.

Q. You haven't it with you? A. No, sir; it is that big (indicating).

10

By the Court:

Q. What did she say about the will? A. She said Mr. Lings' will was to correspond with hers, in so much that she was to receive one-half of his property, and his children were to receive one-half, and that was just a few days before the transaction with Tierney took place, and that was the middle of May.

20

The Court: We will now take a recess until two o'clock.

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(After recess).

ROBERT S. HUDSPETH, a witness produced on behalf of the complainant, being first duly sworn according to law, testified as follows: 30

Direct-examination by Mr. Morten:

Q. Mr. Hudspeth, what is your profession? A. Lawyer.

Q. What state? A. New Jersey and New York.

Q. Did you know Mrs. Louise Mary Lings in her lifetime? A. Ever since she was a child, up until her death.

40

*Robert S. Hudspeth—Direct*

Q. Do you remember having a conversation with her about her property, shortly before her last illness? A. Yes; I had several conversations with her.

10 Q. Can you tell me the conversation you had with her last? A. I think she died two years ago this coming June; that would be 1926.

Mr. Adams: Were you attorney for Mrs. Lings at the time?

The Witness: I was neither attorney for her or her husband.

Mr. Adams: I object to the question, on the ground that it is an attempt by parol—

20

The Court: It is admitted.

(Witness continuing) I think about the year preceding that, she and her husband were living at the Blackburn Hotel, at Summit, and my country home is near Summit, at Millington, and I went there one night to play whist with her and her husband, and my wife had accompanied me, and after dinner she commenced talking about her husband's financial condition—he had lost  
 30 considerable money during or after the war, and they had sold their home at Pearl River, and were living at hotels, this time at the Blackburn, as I have referred to. She mentioned the fact that he was getting very old, and she wanted him to retire from business, and that he had a mill down in Philadelphia—I am speaking now generally as to what she said. She wanted him to get rid of that as soon as possible and turn it  
 40 into money. She said, finally: "You know, Bob",

*Robert S. Hudspeth—Direct*

she always called me "Bob", I was very intimate with her—"George will never want if he should outlive me", and she laughed and said: "I don't suppose that is possible", and she laughed and she said: "I have made a will, and he has made a will, and he will be taken care of, if he survives me", and I think she said that the will provided that one-half of the income of her property would go to her husband, during his lifetime, and that the other half of the estate went to her daughter, and when he died the other half would go to her daughter. That wasn't the first time that she had spoken to me about her will, or their mutual wills. 10

Q. You said that was the first time? A. That wasn't the first time; she had spoken to me about other wills. 20

Q. Can you give me some of the other conversations? A. They had a very pretty property at Pearl River—

Q. Is that the Rockland County property? A. Yes—I thought Mr. Lings had purchased that before he married Mrs. Lings, but I am not sure. I had a farm and his seeing my place, I think, led him to buy this place. He had been up there several times, and I think that was the inspiration that led him to buy this farm. He was speaking about the beauties of the country, and I was there several times. I was there when Mr. Lings and Mrs. Lings was there, and her daughter, and I think then they told me that Mr. Lings had conveyed that property to his wife—that is my recollection, and I recall on one occasion while out there that Louise, that is Mrs. Lings, 30 40

*Robert S. Hudspeth—Direct*

- talked about selling the property—having the property sold; it was too big, and trouble with servants, and it was far too big, and they talked about having it sold—had agreed to have it sold. I didn't want them to sell it. I had known Mr.
- 10 Lings a great many years, and he was getting old, and I advised him to stay there and keep the house and not sell it. However, I was impressed at that time that there was an intention on her part, at that time, to have the property sold, and I don't know whether the title was in her name or not, and she wanted to know from me what the value of it was, and, of course, I couldn't give her any idea on that property away out there in
- 20 Rockland County, and I told her she was foolish to sell a place like that; that she would never get the money out of it—a large place like that—the money they had put in it and developing it, and at that time she spoke also about their making mutual wills, and I think that came about because I was objecting to their selling the property, and that led her to speak about the wills, and she said they had made mutual wills; that if she should
- 30 die first, George would get, I think she said, everything, and if he died, she would get everything. I think it was a year before that—a year before her death—they were at the Blackburn Inn—I was at the Chelsea—I had rooms there, and I think they did, and this question of the property came up, and the conversation took most all evening, and Mrs. Lings was persisting about selling the property, and she had been running around, and she had an offer, and she wanted to know if
- 40 I thought that was a proper offer, and I said I

*Robert S. Hudspeth—Cross*

didn't know anything about the price, and I again suggested that it was a foolish thing to sell the property, and she again said she was urging George to have the property sold, and I dropped the conversation, and that ended the proposition, generally. 10

Mr. Morten: That is all.

CROSS-EXAMINATION by Mr. Adams:

Q. The first conversation you spoke of was at Summit? A. That was the last conversation, Judge. The last conversation was at Summit.

Q. You spoke of it first. It was the last of three conversations, but you spoke of it first? A. Yes. 20

Q. Then you spoke of one at Orange Town? A. Pearl River.

Q. Yes; they called that Beechwood, didn't they? A. Yes.

Q. When was that? A. That was several years before her death; several years.

Q. Can you fix it any clearer than that? A. Let me see—two years she is dead, and a year before that at the Blackburn, and a year before that at the Chelsea—it must be about twenty-two or twenty-three, or it might be twenty or twenty-one—somewhere between nineteen twenty and nineteen twenty-three. 30

Q. Somewhere between 1920 and 1923; you can't fix it any clearer than that? A. It is impossible.

Mr. Adams: That is all.

Mr. Morten: Now, is it understood, regarding the Exhibit C-4; that this will 40

*Discussion*

is received in evidence and that it is admitted that it was executed regularly, in the manner required for the execution of wills?

Mr. Adams: I am satisfied.

10 Mr. Morten: Now, if the Court please: I have here a number of letters and wills as well, and unless the Court feels it will be of no assistance and that I am encumbering the record, I am now ready to prove that Mr. Lings executed a number of wills—eleven or twelve, in all, and that each one was executed at the request of Mrs. Lings, and that she was the dominating influence throughout, but if the Court feels that it  
20 is not necessary, I will not take up the time, at this time.

The Court: I don't think so.

Mr. Morten: Now, I wish, with Mr. Adams' consent, to offer the testimony of Mrs. Munkittrick, taken at the proving of the will at Union County. I have had a constable at her home for four days to serve a subpoena upon her, and he telephoned me last night that she is away on a motor trip and won't be back until the fourth, and I will either offer this evidence, or I will have to ask your Honor for an opportunity to bring her in.  
30

The Court: I think you had better bring her in.

Mr. Adams: I will look it over and let you know.

40 Mr. Morten: With that reservation, complainant rests.

*Ethel Urquhart—Direct*

ETHEL URQUHART, one of the defendants, having already been called and sworn, is re-called and testified, for the defendants, as follows:

Direct-examination by Mr. Adams:

Q. Mrs. Urquhart, when did you first hear that Mr. Lings asserted a claim that Mrs. Lings, your mother, had agreed to make a will in his favor, or a will such as he claims in this bill; when did you first hear of it? A. The first I heard of it was when I was served in the Orphans' Court with the papers in this proceeding. 10

Q. You mean the process in this proceeding? A. Yes.

Q. You mean you were attending the Orphans' Court? A. Yes; and I was served the minute I got in the place. 20

Q. And had Mr. Lings, or anybody else, given you any notice of any claim, prior to that time?

A. I had never been told about any contract.

Mr. Adams: That is all.

(No cross-examination.)

Defendants rest. 30

It is stipulated and agreed, that counsel for the complainant shall furnish counsel for the defendants with a brief within fifteen days after the testimony is received; that counsel for the defendants is to have fifteen days to reply, and then counsel for complainant is to have fifteen days to answer defendants' brief. 40

*Jeanette Munkittrick—Direct*

By stipulation, the following testimony of Jeanette Munkittrick, taken in the Union County Orphans' Court, was admitted in evidence in this cause with the same force and effect as if it had been taken before the Vice Chancellor.

10

Direct-examination by Mr. Adams:

Q. Mrs. Munkittrick, where do you reside? A. Summit, New Jersey.

Q. How long have you lived there? A. The last five years, steadily; before that for 40 years.

Q. Did you know Louise Mary Lings in her lifetime? A. Intimately.

20 Q. How long had you known her intimately before her death? A. Over a year intimately.

Q. And how long had you been acquainted with her? A. Ever since she came to Summit. I can't just remember when I first—

Q. About how long? A. About two or three years, I think. Two or three years.

Q. Now, at any time during the year preceding her death, did she say anything to you about her intentions to make a will. A. She did.

30 Q. And when was it? A. Between the 1st and 15th of November, 1925.

Q. How many conversations did she have with you upon that subject? A. Positively two; possibly three.

Q. And how far apart were the two? A. Two, one afternoon, the other definite one on the train going to New York the following morning.

40 Q. Will you give us as nearly as you can the first conversation? A. She came to my house in the afternoon and found me rather blue and asked

*Jeanette Munkittrick—Direct*

the reason why. I said I had been at the safe deposit place in the Summit trust going over my will as I was going abroad to be gone at least six months, or five months. And she said, "Well, that is a thing that I have got to do myself. I have got to make a change in my will." Of course, there was a good deal of minor conversation. She said "When I was ill last Summer in England I was perfectly petrified to remember the will that I had left in America." She said that Will was really a courtesy will, "my 'old dear,' " as she called her husband, "is twenty years my senior, and of course, I have always expected to outlive him and as a matter of courtesy I made this will but when I was so ill last summer I was petrified to think that if anything happened to me that daughter,"—as she called her only child—"would be left absolutely unprovided for." I said, "But she has a husband." She said, "Yes, her husband is a darling but if anything happened to him where would daughter be." Those are her words as I remember it.

Mr. Morten: I didn't catch the words. I did not understand the witness, if your Honor please.

(The last part of the answer repeated by the stenographer.)

Q. Was that substantially all of the conversation on the first occasion? A. No; she spoke to me about—it was rather an intimate conversation because we were talking about the rights of a woman in her own affairs, and she asked me how much I considered a woman entitled to her own money; what claims anybody had. And being a

*Jeanette Munkittrick—Direct*

woman, I said: "Well, I feel that a woman should be protected. I have two grand-daughters and a grand-son, and I am taking mighty good care my grand-daughters are protected. And my dear little grand-son, I am going to let fend for himself." She said: "I agree with you, a man should take care of himself. My old dear will have plenty to last him."

Q. What? A. She spoke of Mr. Lings as "My old dear," will have plenty to last him.

Q. In that conversation, did Mrs. Lings indicate in any way what the will was then in existence provided? Did she say anything about it?

A. She said it was simply a courtesy will and Mr. Lings was—I inferred—she didn't say that; she said it was a courtesy affair.

The Court: You mean you inferred it was a courtesy will?

A. No. She said it was a courtesy will. But I inferred she had left Mr. Lings the money because he was so much older than she.

The Court: She did not say that?

A. She didn't say so. She told me he was so much older. The reason why she wanted to change her will, she said last summer when she was in England her horror that will would stand because she never intended that will to stand.

The Court: What will?

A. The first will that she made, in which she left the money to Mr. Lings.

The Court: How do you know she left the money to Mr. Lings?

A. Because she told me so.

*Jeanette Munkittrick—Direct*

The Court: She did not say that?

A. Yes; she said in that will—

The Court: You said you inferred.

A. No. I said I inferred it was a courtesy will and she had left everything; she didn't say so, 10 she had left him everything, but she said she left him money; and she wished her daughter to have what she had.

The Court: We do not want you to testify to inference.

A. No; but she said positively—

The Court: That is what I want to know, 20 what she said positively.

A. She said she had made a courtesy will in which Mr. Lings was the beneficiary. And she didn't wish that to stand.

Q. Next day you met her on the train, you say?

A. Yes.

Q. And what conversation did you have upon this subject then? A. I asked her if she had made her arrangement to change her will. And she said No, she wasn't going to do it until after 30 I left. And I said "Why don't you do it right away." And she said "Oh, I have got a heap of things to do before Christmas." And she said, "I am going to give you a lot of time, and I am going to be busy until after you go." And she said "I am going to do a lot of things after you go."

Q. The reference to after you left, and after you went, was to what? A. My trip around the 40 world.

*Jeanette Munkittrick—Cross*

Q. And left about when? A. 14th of January for a trip around the world on the Frankonia.

Q. And that date was known to both you and her? A. Yes.

10 Q. Some time in advance? A. A long time in advance. She arranged with me about my photograph for my passport, and she loaned me her wardrobe trunk to take with me, and we were extremely intimate.

Q. And that is practically the entire conversation of the second day? A. That was; yes.

Q. Do you recall any other conversation on this subject with Mrs. Lings? A. Not that I can swear to.

20 Q. That is not that you remember definitely? A. No; not sufficiently, with sufficient definiteness.

Q. When did you return from your trip around the world? A. The last of May.

Q. Did you see Mrs. Lings again? A. No.

Mr. Adams: Cross-examine.

CROSS-EXAMINATION by Mr. Morten:

30 Q. Mrs. Munkittrick, in testifying you said something about England. Did you in that answer say what year Mrs. Lings told you she was in England? A. Yes.

Q. Did you say that in your answer— A. I don't know whether in the answer.

Q. I didn't catch it. A. She said the summer before she had been in England, summer of 1925 she was very ill in England, August and September.  
40

Mr. Morten: I think that is all.

Mr. Adams: That is all.

## OPINION OF VICE CHANCELLOR LEWIS.

(Filed )

(Syllabus)

1. An Oral agreement to execute a will and not to change it will, at the instance of the party who shall have completely performed it on his part, so as to have irretrievably changed his position to his disadvantage by such performance, be specifically enforced by a court of equity, if it be sufficiently proven and established. 10

2. Such an agreement, however, because of its nature and the situation and relation of the parties to it, and the consequent opportunity for the perpetration of a fraud, is always regarded with suspicion and should be subjected to close scrutiny whenever its enforcement is sought. 20

3. In order to induce a court of equity to enforce such an agreement, it must appear that it is mutual, definite and certain in its terms and with reference to its subject matter, and the quality of the proof relied upon to establish it should be clear and convincing, while the things relied upon as part performance must be referable to and done in consequence of said agreement. 30

4. Where the evidence with reference to the existence of such an agreement, as well as its terms and provisions, is not clear and convincing but uncertain and unsatisfactory, a court of equity should decline to decree its specific performance.

*Opinion of Vice Chancellor Lewis*

Louis G. Morten, Esq., for the Complainant.

Edwin G. Adams, Esq., for the Defendants.

LEWIS, V. C.:

10 A bill was filed by complainant, George S.  
Lings, against his stepdaughter, Ethel L. Urqu-  
hart, individually and as executrix of the estate  
of Louise Mary Lings, deceased, his wife, wherein  
he alleges that in December, 1903, he purchased  
a tract of land known as Beechwood at Orange-  
town, Rockland County, New York, for \$3,000.00,  
and which, after having made improvements  
thereon, he and his wife, Louise Mary Lings, now  
2 : deceased, sold in the year 1924 for \$43,500.00;  
that his said wife, who was twenty years his  
junior, repeatedly suggested to him that he should  
convey the said property to her and that she in  
turn would make a will whereby she would devise  
said property to him; that pursuant to said un-  
derstanding, he, on or about September 15, 1920,  
conveyed said property to his said wife, who in  
turn executed her will on that date by the second  
clause of which she devised said property to him;  
30 that subsequently he and his said wife entered  
into an arrangement for the purpose of changing  
the character of her devise to him under her will  
of 1920, and pursuant to which she, on June 17,  
1924, executed a new will, the fourth clause of  
which purports to convey to a trustee therein  
named all of the residue of her property, both  
real and personally, with power in said trustee,  
to invest same and to pay one-half of the income  
40 therefrom to complainant and the other one-half

*Opinion of Vice Chancellor Lewis*

thereof to her daughter, the defendant herein; that his said wife died on June 19, 1926, and that, on or about June 30, 1926, defendant produced before the Surrogate of Union County a paper dated February 9, 1926, purporting to be, and which was admitted to probate as the last will and testament of complainant's deceased wife, Louise Mary Lings; that not only was the will of 1926 procured by undue influence exerted on the part of the defendant, but that it was a violation of the defendant's understanding with complainant and constituted a fraud upon his rights in the premises. 10

Such, in brief, were the substance of the allegations made in complainant's bill. Upon his case, as thus stated, he predicates his right to, and now seeks, a decree which will secure to him the specific performance on the part of his deceased wife's representative of the oral agreements and understanding claimed by him to have been thus had with her, and especially adjudging and declaring him to be entitled to one-half of the income arising from her residuary estate during his lifetime, as well as directing the appointment of a trustee or trustees to assume and retain the possession and control of said residuary estate pursuant to the terms and provisions of the decedent's will of June 17, 1924. 20 30

That equity, at the instance of a party who shall have completely performed it on his part, will specifically enforce a parol agreement of the character above referred to, if such be sufficiently proven and established, is a principle so well 40

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- established by the adjudicated cases in this State, as to render the citation of any authority in support thereof unnecessary. And rightly so, for, to hold otherwise, would be to enable the party to such agreement, declining to perform
- 10 on his part, to successfully perpetrate a fraud on him, who, relying upon and induced by said agreement, has in good faith so performed it as to have irretrievably changed his position to his disadvantage. Amongst the reported cases of our own State, wherein may be found a recognition and application of this salutary and beneficent equitable principle, are *Casler v. Thompson*, 3 Gr. Ch. 59; *France v. France*, 4 Halst. Ch. 650;
- 20 *Johnson v. Hubbel*, 2 Stock. 332; *Van Duyne v. Vreeland*, 3 Stock. 370; S. C. 1 Beas. 142; *Davison v. Davison*, 2 Beas. 246; *Cooper v. Carlisle*, 2 C. E. 529; *Brewer v. Wilson*, 2 C. E. Gr. 180; *Eyre v. Eyre*, 4 C. E. Gr. 102; *Brown v. Brown*, 6 Stew. Eq. 657; *Larison v. Polhemus*, 9 Stew. Eq. 506; *Shutt v. Missionary Society, Etc.*, 14 Stew. Eq. 115; *Pflugar v. Pultz*, 16 Stew. Eq. 440; *Young v. Young*, 18 Stew. Eq. 226; S. C. 6 Dick Ch. Rep. 491; *Nibert v. Baghurst*, 2 Dick
- 30 Ch. Rep. 207; *Drake v. Lanning*, 4 Dick Ch. Rep. 452; *Duvale v. Duvale*, 56 N. J. Eq. 375; *Egers v. Anderson*, 63 N. J. Eq. 26.

However, it has also been firmly established, by the foregoing, as well as other authorities, that a parol agreement of such a character, because of its very nature, the relationship and situation of the parties to it, as well as the attendant and consequent opportunity for the perpetration of

40 fraud, is regarded with suspicion and subjected

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to close scrutiny whenever its enforcement is sought. It must be mutual, as well as being definite and certain in its terms and with reference to its subject matter. The quality of the proof, relied upon to establish it, should be both clear and convincing (*Cooper v. Carlisle and Brown v. Brown, supra; Clawson v. Brewer*, 67 N. J. Eq. 20) and should plainly demonstrate that those things which are alleged and relied upon as part performance, are referable to, were done in consequence of and for the purpose of carrying the said agreement into effect. *Eyre v. Eyre, supra; Pom. Sp. Pef.*, Sec. 108-109. 10

The claim that a legal obligation is assumed in favor of the party seeking its enforcement must be supported by evidence the effect of which is to establish something more than a mere consent on the part of the other party to make a will or an arrangement on his part, the fulfillment of which is accomplished by the mere making of a will; this, of necessity, must follow by reason of the ambulatory characteristics and those qualities of mutability which are inherent to wills. 20

Having in mind—if complainant's own version be true, that, although he had the benefit of legal advice, as well as ample opportunity to procure and exact, if necessary, from his wife a writing evidencing her alleged agreement, complainant failed or did not see fit to do so; and also bearing in mind the fact that death has now sealed the lips of her, who is charged with having made this alleged oral agreement, I cannot say, after a careful consideration of all of the evidence before me, 30 40

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aided by my observations of the conduct, demeanor and manner of testifying of each of the witnesses upon the stand, that I am satisfied that complainant has established this alleged oral agreement. However, I am fully convinced that  
10 the quality of the proof adduced by complainant fails to satisfy the standards required and defined by the authorities in point. At the very best, it is doubtful, uncertain and unsatisfactory, which circumstance alone is sufficient to stay the hand of this Court.

No useful purpose can be served by a review and discussion of the evidence at length. Suffice  
20 it to say that the complainant in one instance testified that he conveyed the property to his wife because she, after he had informed her that he would have nothing in case anything happened to her, had assured him that she would will it back again to him in case anything happened to her; while he, in another instance, in replying to my inquiry as to his reason for having done so, at first testified that he gave it to her "absolutely", then "because of his love and affection for her"  
30 and finally because of her solicitations, which were acuated by her desire to avoid losing the property in the event of his business failure. His own testimony showed that at the time of this conveyance, he was possessed of other property as well as of a business in which he had invested \$150,000.00.

George Bristol was the only other witness who  
40 testified with reference to the alleged agreement pursuant to which it is claimed the conveyance

*Opinion of Vice Chancellor Lewis*

was made by complainant. He admitted that for the last thirty years, of the thirty-seven that he had been practising, he was the legal adviser, friend and business associate of the complainant. His testimony also disclosed the fact that he had represented complainant in connection with the enforcement of certain claims which he had asserted against this very estate, and that he aided and counselled in the proceedings following the filing of a caveat by complainant against the probate of the decedent's will, and that he was also assisting complainant in this very litigation. That he was most vitally interested and concerned in the outcome of the present controversy cannot be questioned. From my observations of his conduct, demeanor and manner of testifying while on the stand, having in mind his relationship and interest in this case, and in view of the fact that his entire testimony with reference to the alleged oral agreement, made more than eight years before was based upon his mere recollection, and in a great many respects, was not in accord with that of the complainant, I am constrained to say that I am neither satisfied with nor convinced by it. He failed to make any mention of that part of the conversation wherein complainant claims to have informed his wife that he would have nothing if anything happened to her, and that she then assured him that she would make that alright by willing the property to him. He only states that complainant's wife told him that she had agreed to make a will giving the property back to her husband, in case she predeceased him,

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*Opinion of Vice Chancellor Lewis*

and that her husband then said it was alright. It is significant, indeed, that not even complainant corroborates him as to this alleged conversation with complainant's wife, although complainant is supposed to have been present at the time.

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If the design and intent of the parties were to effect an arrangement whereby, at all events, the property should revert to the complainant upon the decease of his wife, it seems improbable and incredible to me, that Mr. Bristol, as complainant's legal adviser, knowing as he did that the agreement, without being reduced to an irrevocable writing, was at best fraught with legal frailties and infirmities—since he claims to have called this fact to the attention of complainant—would nevertheless not take the common ordinary precaution to safeguard the interests of his client by reducing the agreement to a writing for execution by the parties to it. He at least could have made some memorandum of or reference to it in the deed or the will which he had drafted. His failure to do any of these things under the circumstances has not been satisfactorily accounted for.

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On the other hand, the evidence points strongly to the fact, and I feel quite satisfied from it, that the property was conveyed by complainant to his wife for the purpose of placing it beyond the reach of his creditors. He himself admitted that his company—for which he had given out his personal notes—had suffered considerable business losses and was experiencing business difficulties prior to, and at the time of, his conveying said

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property to his wife, and by reason of which his wife had suggested to him that he convey the property to her because of her fear that he would lose it through his business reverses, and that he acceded to her said request.

To like effect was the testimony of his star witness, George Bristol. He, too, testified that the bottom of the textile market, and complainant was then engaged in the textile business, had dropped out in the spring of 1920, and that complainant's wife had informed him that she was disturbed and quite apprehensive about her husband's financial condition and the fact that he was giving his personal notes for his company and that she, therefore, wanted the property in question so fixed that she wouldn't lose it. He also admitted that it was he who had asked her to withhold the deed from the record because of his fear that the company's credit would be hurt by its recording.

It seems that the salvaging of this piece of property from the impending financial difficulties of the complainant was foremost and uppermost in the minds of all parties, including that of Mr. Bristol. And that this was the very purpose and reason for which the conveyance was made, I have no doubt of. It certainly dispels, or at least overweighs, the reason advanced by complainant for the said conveyance, namely; because of the alleged oral agreement.

The evidence with reference to the alleged agreement between complainant and his wife in 1924,—the purpose of which was to modify that

*Final Decree*

of the year 1920, in addition to being far more meagre, frail and unsatisfactory, is also subject to the same criticism which I find to exist against that offered on behalf of the complainant with reference to the existence of the alleged agreement of 1920.

For the reasons indicated by me, I will advise a decree dismissing the bill.

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**FINAL DECREE.**

This cause coming on to be heard in the presence of Louis G. Morten, of counsel with the complainant, and Edwin G. Adams, of counsel with the defendant, and the pleadings having been read and briefs having been submitted and the arguments of the respective counsel having been heard and considered, and it appearing to the Court that complainant is not entitled to the relief sought and prayed for by him in his bill of complaint;

It is, on this second day of September One thousand nine hundred and thirty, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED that the complainant's bill be and the same is hereby dismissed, with costs.

FURTHER ORDERED AND DECREED that the complainant pay to the defendant the costs of this suit to be taxes, and that execution issue therefor according to the practice of this court;

*Notice of Appeal*

FURTHER ORDERED that the question of an allowance to Edwin G. Adams, of counsel with the defendant, be reserved.

Respectfully advised,

Vivian M. Lewis, V. C.

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**NOTICE OF APPEAL.**

(Filed Sept. 12, 1930.)

The complainant George S. Lings hereby appeals from the final decree made in the above entitled cause on September 2nd, 1930, by the Chancellor on the advice of Vice Chancellor Lewis, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes. 20

Dated September 11, 1930.

MELOSH, MORTEN & MELOSH,  
Solicitors for and of counsel  
with Complainant.

30

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

LOUIS G. MORTEN,  
Of Counsel with Complainant.

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**PETITION OF APPEAL.**

(Filed Sept. 20, 1930.)

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

10 The petition of George S. Lings, the Appellant, in the above entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Crancellor of the State of New Jersey, bearing date September 2nd, 1930, in a certain cause in said Court of Chancery wherein the said Ethel E. Urquhart was defendant and the said George E. Lings was  
20 complainant, in this respect, to wit, that the said decree adjudges that the bill of complaint herein be dismissed with costs and that the complainant pay to the defendant the costs of said suit to be taxed.

30 And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that it should have adjudged that the complainant was entitled to the relief prayed for in his bill of complaint, to wit, in accordance with the fourth paragraph of the Will, made by said Louise M. Lings on June 17th, 1924.

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this court shall seem proper.

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MELOSH, MORTEN & MELOSH,  
Solicitor for and of Counsel with  
Appellant.

**EXHIBITS.****EXHIBIT C-1.**

Deed dated December 12, 1903, from John H. Haring and wife to George S. Lings, recorded December 15, 1903, in book 215 of Deeds for Rockland County, on page 52, conveying to complainant lands known as Beechwood, in Rockland County, New York. 10

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**EXHIBIT C-2.**

Certified copy of deed dated September 15, 1920, made by George S. Lings to Wilhelmina M. Lotz, recorded June 30, 1922, in Liber 284 of Deeds, on page 289, in the office of the Clerk of Rockland County, New York, conveying to Lotz the lands described in Exhibit C-1. 20

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**EXHIBIT C-3.**

Certified copy of deed dated September 15, 1920, made by Wilhelmina M. Lotz to Louise M. Lings, recorded June 30, 1922, in Liber 284 of Deeds, on page 292, in the office of the Clerk of Rockland County, New York, conveying the lands described in Exhibit C-1. 30

**EXHIBIT C.4.**

Original paper writing purporting to be the will made by Louise M. Lings on September 15, 1920, copy of which was annexed to the bill of complaint by error and appears on pages 8 and 9 of the printed record; the attestation clause annexed thereto, reading as follows:

20           “The foregoing instrument was subscribed, acknowledged, published and declared by LOUISE M. LINGS as and for and to be her last Will and Testament in our presence and in the presence of each of us, and we, at the same time, at her request, in her presence and in the presence of each other do hereunto subscribe our names and residences as attesting witnesses this 15th day of September, in the year Nineteen Hundred and Twenty.

GEO. W. BRISTOL, residing at 46 2nd Ave., Atlantic Highlands, N. J.

30           WILHELMINA M. LOTZ, residing at 305 Harman Street, Brooklyn, N. Y.”

## EXHIBIT C-5.

IN THE NAME OF GOD, AMEN:

I, LOUISE M. LINGS, being of sound and disposing mind and realizing the uncertainties of life, do hereby make, constitute, publish and declare this to be my last Will and Testament, hereby revoking any and all other wills by me heretofore made. 10

FIRST—I direct that all of my just debts and funeral expenses be paid as soon after my decease as may be found practicable by my Executor hereinafter named.

SECOND—I give and bequeath all of my personal effect, such as wearing apparel, jewelry, pictures, bric-a-brac, furniture, etc., to my daughter, ETHEL L. URQUHART. 20

THIRD—In case my husband, GEORGE S. LINGS, shall predecease me, my daughter ETHEL L. URQUHART surviving, I give, devise and bequeath all the rest, residue and remainder of my property, of every kind and nature, to my said daughter, ETHEL L. URQUHART.

FOURTH—In case my husband, GEORGE S. LINGS, survive me, then and in that case, I give, devise and bequeath all the rest, residue and remainder of my property, of every kind and nature whatsoever, both real and personal, of which I may die seized, possessed or entitled to, except such as is bequeathed in paragraph "THIRD" of this will, to my Trustees hereinafter named, with power to invest and reinvest the same as in their judgment may seem to the best interest of said trust, and pay over the income arising 30 40

*Exhibit C-5*

therefrom, one-half thereof to my husband, GEORGE S. LINGS, during his life time, and the other half thereof to my daughter, ETHEL L. URQUHART, she surviving.

- 10 In case my said daughter, ETHEL L. URQUHART, should predecease my said husband, then and in that case the entire income of said trust fund shall be paid to my said husband, during his life time.

FIFTH—On the death of my said husband, GEORGE S. LINGS, the said trust shall cease and determine and the principal thereof be paid over to my daughter, ETHEL L. URQUHART, she surviving.  
20

On the death of my said husband, GEORGE S. LINGS, my said daughter, ETHEL L. URQUHART, having predeceased him, I give, devise and bequeath the principal of said trust fund as follows:

One-quarter to MARY PATRICIA LINGS, she surviving; should she predecease my said husband, then to her heirs;

- 30 One-quarter to HELEN FRANKLIN, she surviving; should she predecease my said husband, then to her heirs;

The other half to be paid over to the following persons, and in the following amounts, i. e.:

- To my sister, ELEANOR K. FREEMAN, Six  
40 Thousand Dollars, she surviving; should she predecease my said husband, then said Six Thousand Dollars shall remain in said trust fund and become a part of my residuary estate.

*Exhibit C-5*

To my mother, LOUISE R. KIMBALL, One Thousand Dollars, she surviving; should she predecease my said husband, then said One Thousand Dollars shall remain in said trust fund, and become a part of my residuary estate.

To my cousin, CORINTHA S. SCOTT, One Thousand Dollars, she surviving; should she predecease my said husband, then said One Thousand Dollars shall remain in said trust fund, and become a part of my residuary estate. 10

To CHRIST CHURCH, Sparkhill, New York, One Thousand Dollars;

To ST. STEPHENS' CHAPEL, Pearl River, New York, the sum of One Thousand Dollars. 20

The balance of said trust fund, if any, shall constitute my residuary estate and be used, first, in paying the debts, if any, of my said daughter, ETHEL L. URQUHART, and the rest, residue and remainder of said trust fund, after paying the above legacies and any debts which may have been left by my said daughter, ETHEL L. URQUHART, I give and bequeath to my son-in-law, C. POLLARD URQUHART. 30

SIXTH—I hereby nominate and appoint my husband, GEORGE S. LINGS, to be the Executor of this my last Will and Testament, he surviving me, and direct that no bond be required of him. In case my said husband shall predecease me, then and in that case, I nominate and appoint my daughter, ETHEL L. URQUHART, to be the Executor of this my last Will and Testament and direct that no bond be required of her. 40

*Exhibit C-5*

SEVENTH—In case my said husband, GEORGE S. LINGS, should survive me, then and in that case, I nominate and appoint my said husband, GEORGE S. LINGS, and C. POLLARD URQUHART to be the Trustees of the trust created herein, and it is my  
 10 will that no bond be required of either of them.

IN WITNESS WHEREOF, I have hereunto set my hand this 17th day of June, 1924.

LOUISE M. LINGS

In the Presence of:  
 VIRGINIA F. GARDNER  
 GEO. W. BRISTOL

21

The foregoing instrument was subscribed, acknowledged, published and declared by LOUISE M. LINGS, as and for and to be her last Will and Testament in our presence and in the presence of each of us, and we, at the same time, at her request, in her presence and in the presence of each other do hereunto subscribe our names and residences as attesting witnesses, this 17th day  
 30 of June, in the year One Thousand Nine Hundred and Twenty-four.

VIRGINIA F. GARDNER Residing at 1432—90th St.,  
 Woodside, S. I.

GEO. W. BRISTOL Residing at 58—3rd Ave., At-  
 lantic Highlands, N. J.

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## EXHIBIT C-6.

## IN THE NAME OF GOD, AMEN:

I, GEORGE SCOTT LINGS, being of sound and disposing mind and realizing the uncertainties of life, and being desirous of making disposition of my property after death, do hereby make, constitute, publish and declare this to be my last Will and Testament, hereby revoking any and all other Wills and Codicils by me heretofore made. 10

FIRST—I direct that my just debts and funeral expenses be paid as soon after my decease as may be found practicable by my Executor hereinafter named.

SECOND—All the rest, residue and remainder of my property, of every kind and nature whatsoever, I dispose of in the manner following: 20

One sixth of said property I give, devise and bequeath to my son, GEORGE HERBERT LINGS:

One-sixth of my said property I give, devise and bequeath to my daughter, HELEN MASSEY FRANKLIN:

One-sixth of my said property I give, devise and bequeath to my son, ERIC MASSEY LINGS. 30

THIRD—The remaining three-sixth of my property I give, devise and bequeath to my Trustees, hereinafter named, for the uses and purposes herein stated. My said Trustees shall hold the same in trust and invest and reinvest the same at their discretion and as in their judgment they may deem for the best interest of said trust fund, and pay over the income thereof annually or semi-annually to my wife, LOUISE MARY LINGS, 40

*Exhibit C-6*

during her life time, and on the death of my said wife, LOUISE MARY LINGS, I direct that said trust shall cease and determine and said three-sixth of my property, so held in trust shall be equally divided among my grandchildren then living, per  
10 capita and not per stirpes.

FOURTH—I hereby give my Executor and Trustees named herein power to sell, lease or mortgage any real estate I may have at the time of my death, and to satisfy or release any mortgage of or upon any such real estate.

FIFTH—I hereby nominate and appoint my wife, LOUISE MARY LINGS, to be the Executor of  
20 this my last Will and Testament, and it is my will that no bond be required of her.

I hereby nominate and appoint my said wife, LOUISE MARY LINGS and JOHN C. DOWDALL to be Trustees of the trust herein created, and it is my will that no bond be required of either of them.

IN WITNESS WHEREOF, I have hereunto set my hand this 19th day of June, in the year One Thousand  
30 sand Nine Hundred and Twenty-Four.

GEORGE SCOTT LINGS

In the Presence of:  
EDMOND A. KNOEPEL  
GEO. W. BRISTOL

The foregoing instrument was subscribed, acknowledged, published and declared by  
40 GEORGE SCOTT LINGS, as and for and to be his last will and testament in our pres-

*Exhibit C-7*

ence and in the presence of each of us, and we, at the same time, at his request, in his presence and in the presence of each other do hereunto subscribe our names and residences as attesting witnesses this 19th day of June, in the year One Thousand Nine Hundred and Twenty-four. 10

EDMOND A. KNOEPEL Residing at 1815 Morris Ave., N. Y. C.

GEO. W. BRISTOL Residing at 58—3rd Ave., Atlantic Highlands, N. J.

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**EXHIBIT C-7.**

20

Certified copy of deed dated May 12, 1924, made by Louise M. Lings and George S. Lings (her husband) to Robert F. Tierney and Sadie M. Tierney, his wife, recorded in the office of the Clerk of Rockland County May 14, 1924, in Liber 294, page 370, conveying the premises described in Exhibit C 1.

In the Bill of Complaint, paragraph 7 recites that a copy of the will of February 9th, 1926, is annexed to the bill and marked Exhibit 1. By inadvertence a copy of the will of September 15th, 1920, was annexed as Exhibit 1. However, the case was tried upon the understanding between counsel in Court that the will of February 9th, 1926, named the defendant ETHEL LOUISE URQUHART as the sole beneficiary, and with consent of counsel, for the information of the Appellate 30 40

*Exhibit C-7*

Court, a copy of the will of February 9th, 1926, is herewith given.

10 I, Louise Mary Lings, of the City of Summit, Union County, New Jersey, do make, publish and declare this to be my last will and testament, hereby revoking any and all former wills by me at any time made.

FIRST: I direct that my executor hereinafter named shall pay all my debts as soon as possible after my decease.

20 SECOND: I give, devise and bequeath all my property, both real and personal and wheresoever situate to my daughter Ethel Louise Urquhart, of New York City, her heirs and assigns forever.

LASTLY: I hereby appoint my said daughter, Ethel Louise Urquhart, sole executrix of this will, and direct that no bonds be required of her in this or in any other state.

IN WITNESS WHEREOF I have hereunto set my hand and seal this ninth day of February, nineteen hundred and twenty-six.

30 LOUISE MARY LINGS (Seal)

Signed, sealed, published and declared by the said Louise Mary Lings as and for her last will and testament, in our presence, who, at her request and in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

40 CORRA N. WILLIAMS,  
Summit, N. J.  
ETHEL GROEPLER,  
Summit, N. J.

14 MAY.T.1931

## New Jersey Court of Errors and Appeals

Between

GEORGE S. LINGS,  
Complainant-Appellant,  
and

ETHEL L. URQUHART, indi-  
vidually and as executrix of  
the estate of Louise M.  
Lings, deceased,  
Defendant-Respondent.

### BRIEF FOR COMPLAINANT-APPELLANT.

#### FACTS.

The facts in this case, as alleged in bill and made out by uncontradicted proofs, are as follows:

Complainant's wife, Louise M. Lings, died at Montclair, on June 19th, 1926 (18). At the time of her marriage to complainant, she was not possessed of any estate. Defendant is a step-daughter of the complainant, being a daughter of said Louise M. Lings by a prior marriage (26).

By deed dated December 12th, 1903, complainant acquired title to real estate in Rockland County, New York, taking title in his own name, upon which property he later made improvements (19).

In 1920, complainant conveyed this property to his wife (22) by deed dated September 15th, 1920 (Ex. C-2, p. 85) upon condition that she should make a will leaving the property to him so that in case she died before him, he would get the property and that was the arrangement at that time (43 L. 30) and this will was made and executed by the complainant's wife at that time (28).

The original will itself was offered in evidence and is marked Exhibit C-4, a copy of this will appearing on pages 8 and 9 of printed book and the attestation clause appearing on page 86, and defendant admitted that the attestation clause was sufficient under the laws of the State of New York, where the will was executed (35 & 66).

Complainant testified that this arrangement was never changed (29), excepting that there was a later will drawn by his wife, with his full consent, in 1924, a copy thereof being produced (Ex. C-5, p. 87). However, the will itself was not produced.

It is alleged in the bill (4) and admitted in the answer (11) that after complainant's wife died on June 19th, 1926, the defendant proved a will before the Surrogate of Union County, made by complainant's wife, dated February 9th, 1926, a copy of which will appears on page 94 of printed book.

Under the will made by the complainant's wife on September 15th, 1920, the complainant's wife devised to him the real estate which he conveyed to her on that day (8), and which, as before stated, the complainant's proofs show, was part of an arrangement and one of the conditions under which he conveyed the property to her at that time (43).

Under the will made by the complainant's wife in February, 1926, she devises all her estate to the defendant herein, her daughter. The complainant charges that the making and execution of the will of February 9th, 1926, was a fraud upon him and in violation of the agreement made and carried out between himself and his wife in September, 1920, when the complainant conveyed the real estate in question to her upon condition that she would make a will whereby he would get this property at her death, if she predeceased him.

The testimony of the complainant upon this subject is fully corroborated by his witnesses, George W. Bristol (47), a lawyer, who represented the complainant and his wife in the transaction, and by Robert S. Hudspeth, now deceased, a former member of the Bar of New Jersey (64).

In addition to this, we have the very significant testimony of Jeanette Munkittrick, given by her before the Union County Orphans' Court, as a witness for the defendant on the probate of the will, and introduced into this cause by stipulation, in which, in response to questions of the Court, she testified that some time in November, 1925 (68), the complainant's wife had told her that she had made a "courtesy will" in favor of Mr. Lings, the complainant, but that she did not intend that will to stand (70-71). Nowhere is this testimony contradicted in any way.

**POINTS URGED BY COMPLAINANT.**

The complainant contends that:

1. The condition upon which he made the conveyance of the property at Beechwood, to his wife on September 15th, 1920, was that she then and there make a will by which the property would be devised to him in case she predeceased him.

2. This agreement was fully executed and carried out by the complainant making the deed in question, and the complainant's wife at the same time making and executing a will in accordance with the agreement.

3. This is not a case whereby the complainant is seeking to compel the performance of a parol contract. The parol contract was fully performed by complainant's wife when she made the will of September 15th, 1920. All that complainant seeks by his bill of complaint is to have declared fraudulent and inequitable the making of the subsequent will of February, 1926 (94), by which she repudiated the arrangement to which she had assented when she made the will of September 15th, 1920.

4. Thereafter the complainant's wife was powerless to change that will without his consent and that it was a fraud upon him for her to make any will thereafter which was contrary to the terms of the will of September 15th, 1920, unless he assented thereto.

5. That the making of the will of February, 1926, was absolutely void and could not affect the complainant's rights under his agreement, made and executed with his wife on September 15th, 1920, excepting insofar as it may be found by the Court to have been modified by his consent by the execution of the will of June, 1924.

**ARGUMENT.****POINT 1.**

It is conceded that by deed dated September 15th, 1920, the complainant conveyed to his wife lands at Beechwood, in Rockland County, New York (Exs. C-2 and C-3, p. 85).

It is likewise conceded that on this same day, complainant's wife made a will under which she devised to the complainant the property known as Beechwood, and which had been conveyed to her by the complainant on or about September 15th, 1920; this devise to be effective in case her husband survived her (9).

The complainant testifies that the deed by him to his wife and the will made by his wife on September 15th, 1920, were the result of an arrangement between them, by which he transferred the property to his wife for love and affection—nothing else, with the proviso that she must make a will leaving the property to him in case she should die before he did, so that if she should predecease her husband, the property would not go to her daughter, but would be re-vested in her husband, the complainant (43).

There is no dispute that the deeds were made because they have been offered in evidence, and they have been recorded in the Rockland County Clerk's Office.

There is no dispute that the will was made, because the original will itself, signed by the complainant's wife, has been produced. The will itself appears on page 8 and the attestation clause appears on page 86, and the defendant admitted

that this will was executed legally and in the manner required for execution of wills (66). There is no contradiction of this testimony. No other explanation for the making of the deeds and the making of this will appears in the case from direct testimony.

The Vice Chancellor, in his opinion, finds that the complainant testified that he conveyed the property to his wife "because she, after he had informed her that he would have nothing in case anything happened to her, had assured him that she would will it back again to him in case anything happened to her."

There is no evidence in the case that the complainant ever so informed his wife.

The Court refers to the facts that the complainant's testimony that he gave the property to her absolutely (22) and that he gave it to her because of his love and affection for her (43), and also because his wife was actuated by her desire to avoid losing the property in the event of his business failure (78), and later finds that the property was conveyed by the complainant to his wife for the purpose of placing it beyond the reach of his creditors (80).

We respectfully submit that there is no evidence that warrants any such finding.

The complainant testified that he deeded the property to his wife and when the Court asked him whether the deed was absolute and if he gave it to her, he answered in the affirmative, and this was perfectly true (22). The deed is an absolute conveyance and he gave it to his wife because he received no consideration therefor. That is what the complainant meant. The complainant had

not yet completed his testimony relating to the transaction.

His testimony that he gave it to his wife for love and affection (43) is perfectly true.

His testimony that his wife was urging him to do it because she thought that they might lose the property through loss in complainant's business is likewise true, but the mere fact that she had this thought is no proof that it was justified. There is no proof that the *complainant* ever made the conveyance because *he* had any such thought. Quite to the contrary, the complainant testified that he was not afraid of his creditors getting after him because he had plenty then (42), and there is no proof anywhere that the complainant ever had any financial obligations or creditors whose claims he could not and did not meet.

We therefore submit that this finding on the part of the Court of Chancery cannot be upheld and that the only reasonable finding that can be made on the proofs in this case before the Court, is that the conveyance was made by the complainant to his wife upon her request; that it was without consideration and for love and affection and upon condition that she would make a will leaving that property to him in case she predeceased him.

#### POINT 2.

The oral agreement made between the complainant and his wife on September 15th, 1920, and probably previous thereto, was fully executed and carried out when the complainant deeded the property in question to his wife and his wife made the will dated September 15th, 1920, devising that property to him in case she predeceased him.

**POINT 3.**

The Court of Chancery misconceived the remedy which the complainant seeks in his bill of complaint. The complainant is not seeking to compel the performance of a parol agreement made between him and his wife on September 15th, 1920.

If the complainant had executed and delivered his deed to his wife upon her parol promise to make a will in which she would devise the property to him and she had never made such a will and the complainant was now seeking by his bill in this case to enforce that agreement, it may very well be demanded that proof of a clear and convincing character as to what the terms of that will were to be, should be produced before a Court of Equity would grant relief. The principles laid down in all of the cases cited by the Vice Chancellor requiring such proof do not apply to the present case.

We do not need to produce proof as to what the terms of the will were to be. We have produced the very will itself which was actually made and executed by complainant's wife showing what those terms were to be.

The only question in this case is whether or not the making and executing of the will of September 15th, 1920, was a condition upon which the property was conveyed by complainant to his wife. There is ample proof to show that this was one of the conditions, as we have before pointed out in the record, and there is absolutely no proof to the contrary.

We therefore urge that the principles applied to the case under consideration were erroneously applied by the Court of Chancery because this is not a case where the complainant is seeking to enforce the performance of a parol contract.

On the other hand, it is a case where the complainant is asking a Court of Equity to intervene and prevent fraud by permitting the conduct of his wife to defeat the performance of a parol contract fully executed by having been reduced to writing, notwithstanding the fact that the will of complainant's wife made on September 15th, 1920, might have been partly defeated in its purpose by the death of the complainant prior to the death of his wife.

We submit that the fact that the purpose of the will of complainant's wife, dated September 15th, 1920, might have been defeated by the happening of this contingency, does not justify a Court of Equity in refusing to lend its aid to carry out the terms of that will when it became manifest that such contingency was no longer a possibility. In other words, upon the death of complainant's wife prior to the death of the complainant, the purpose of the will had been served, namely, the return of the property to complainant by the will, inasmuch as he had survived his wife.

**POINT 4.**

The complainant contends that when he agreed to convey the property at Beechwood to his wife upon condition that she make a will whereby that property was to be returned to him by her in case he survived her and she accepted the deed under such a condition and actually made such a will, she thereby estopped herself from repudiating that agreement and she was powerless in equity to change that will without his consent. That when she made the will of February, 1926, it was a fraud against this complainant and that such will will not be permitted to stand in equity and defeat the terms of the will of September 15th, 1920.

We respectfully urge that this contention requires no citation of authority to sustain it in a Court of Equity.

**POINT 5.**

It may be that a Court of Equity will find from the proofs of this case that there is sufficient to justify a decree that the will of September 15th, 1920, was superceded by a will made in June, 1924. The complainant says that such a will was made.

The defendant has objected (44) to the reception in evidence of Exhibit C-5 (p. 87). Whether or not the proofs have been sufficient to justify the reception in evidence of Exhibit C-5 is a matter with which the complainant is not concerned. If the defendant is not willing to accept the terms of Exhibit C-5, then we insist that she is bound by the terms of Exhibit C-4, which is the will, a

copy of which is annexed to the bill of complaint and marked Exhibit I (8), the attestation clause thereto appearing on page 86.

**AS TO PRIVILEGED COMMUNICATIONS.**

The defendant has argued that conversations between Mrs. Lings, the complainant's wife, and Mr. Bristol were privileged. The uncontradicted proof is that at these conversations, the stenographer of Mr. Bristol was present and that Mr. Lings, himself, was also present at some of these conversations. Therefore, communications between a client and counsel under such conditions, are not privileged.

**AS TO THE EFFECT OF THE WILL OF FEBRUARY 9th, 1926.**

We submit that the probate of this will can have no effect whatever upon the right of the complainant to enforce in equity, the agreement made between his wife and himself and upon which he deeded the property in question to his wife.

Let us assume that Mrs. Lings had signed a written contract whereby she promised to give Mr. Lings a specific sum of money as an inducement for the conveyance of the real estate in question to her, such money to be paid to complainant in case he survived her. She then made the will of 1926. It is idle to argue that Mr. Lings could not enforce such an agreement.

If the will were properly executed, he could not defeat its probate in a competent tribunal, but this could in no way effect or defeat his right to enforce his agreement in a court of equitable jurisdiction.

The execution of the will of 1926 under such circumstances was a fraud upon the complainant which equity will not permit to be perpetrated. This seems so elemental as not to require citation of authority.

#### **AS TO THE DEED.**

There is nothing in the point that the complainant is seeking to vary the terms of the deed by parol evidence. The deed was and is absolute on its face and we do not seek to change the terms of the deed. All the complainant seeks to do is to impress upon the proceeds of sale of the land conveyed to complainant's wife by that deed, an agreement under which the deed was executed and delivered, which agreement is established by parol evidence, carried out by writings in evidence in this case.

#### **AS TO MUNKITTRICK TESTIMONY.**

The Munkittrick testimony adduced by this defendant on her behalf in the probate proceedings has never been contradicted and if the complainant in this case is willing to accept it, it does not lie in the hands of the defendant to question it.

With this testimony before the Court, we have absolute proof that Mrs. Lings knew that she had made a will which did not protect her daughter as far as she wanted to and that the will of 1926 was made by her after she had made a previous will and she was going to destroy the efficacy of the previous will.

The will of September 15th, 1920, has been absolutely established and it was fraud on the part of complainant's wife for her to repudiate her

agreement and the terms of this will, by the execution of the will of February, 1926, the provisions of which violate such agreement, and nullify the terms of the will of September 15th, 1920.

Mrs. Munkittrick's testimony was that Mrs. Lings had it in mind when she made the previous will, whenever it was made, not to carry it out, as she called it a "courtesy will" and Mrs. Munkittrick says that Mrs. Lings told her that she never intended to carry it out.

Here is a case of absolute equity jurisdiction.

We therefore submit that the decree of the Court of Chancery should be reversed and that the complainant is entitled to relief under his bill of complaint.

Respectfully submitted,

MELOSH, MORTEN & MELOSH,  
*Of Counsel with Appellant.*

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New Jersey Court of Errors and Appeals

Between GEORGE S. LINGS, <i>Complainant-Appellant,</i> and ETHEL URQUHART, individually, etc., <i>Defendant-Respondent.</i>	}	10
		20

**BRIEF FOR DEFENDANT-RESPONDENT.**

**Facts.**

(A) *As to Pleadings.*

It is not easy to point out the errors contained under the title of "Facts" in the brief of complainant-appellant. The brief begins with the statement, "The facts in this case as alleged in the bill and made out by *uncontradicted* proofs, are as follows:" Then follows a statement of what complainant-appellant conceives to have been proved in the case. 30

The word "uncontradicted" as used here is likely to be misleading. Counsel evidently means that the testimony offered by his witnesses was not directly contradicted by testimony of the other 40

side. The defendant contended, and the Vice Chancellor found, that the circumstances in the case, the strong interest of the two principal witnesses, i. e., the complainant and his attorney, the nature of their testimony which consisted largely of conclusions of fact, the contradictory assertions made by each of them and their contradiction of each other, taken in connection with their conduct, demeanor and manner of testifying upon the stand, were such as to contradict the testimony as to a parol contract made with a person then deceased, or at least to stay the hand of the Court to grant relief upon the bill because of the incredible character of the testimony of the complainant and his principal witness (Opinion, Case, p. 77, line 30 to p. 80, line 18).

Defendant-appellee submits as a fair statement of the bill of the complainant the following quotation from the opinion of the Vice Chancellor (Case, p. 74, line 9 to p. 75, line 34):

“A bill was filed by complainant, George S. Lings, against his stepdaughter, Ethel L. Urquhart, individually and as executrix of the estate of Louise Mary Lings, deceased, his wife, wherein he alleges that in December, 1903, he purchased a tract of land known as Beechwood at Orangetown, Rockland County, New York, for \$3,000 00, and which, after having made improvements thereon, he and his wife, Louise Mary Lings, now deceased, sold in the year 1924 for \$43,500 00; that his said wife, who was twenty years his junior, repeatedly suggested to him that he should convey the said property to her and that she in turn would make a will whereby she would devise said property to

him; that pursuant to said understanding, he, on or about September 15, 1920, conveyed said property to his said wife, who in turn executed her will on that date by the second clause of which she devised said property to him; that subsequently he and his said wife entered into an arrangement for the purpose of changing the character of her devise to him under her will of 1930, and pursuant to which she, on June 17, 1924, executed a new will, the fourth clause of which purports to convey to a trustee therein named all of the residue of her property, both real and personal, with power in said trustee, to invest same and to pay one-half of the income therefrom to complainant and the other one-half thereof to her daughter, the defendant herein; that his said wife died on June 19, 1926, and that, on or about June 30, 1926, defendant produced before the Surrogate of Union County a paper dated February 9, 1926, purporting to be, and which was admitted to probate as the last will and testament of complainant's deceased wife, Louise Mary Lings; that not only was the will of 1926 procured by undue influence exerted on the part of the defendant, but that it was a violation of the defendant's understanding with complainant and constituted a fraud upon his rights in the premises.

"Such, in brief, were the substance of the allegations made in complainant's bill. Upon his case, as thus stated, he predicates his right to, and now seeks, a decree which will secure to him the specific performance on the part of his deceased wife's representative of the oral agreements and understanding claimed by him to have been thus had with her, and

10 especially adjudging and declaring him to be entitled to one-half of the income arising from her residuary estate during his lifetime, as well as directing the appointment of a trustee or trustees to assume and retain the possession and control of said residuary estate pursuant to the terms and provisions of the decedent's will of June 17, 1924."

20 The answer either denied or put complainant to his proof upon the allegations concerning the alleged agreement of 1920 and the alleged agreement of 1924. The will of February 9, 1926, and the probate of the same were admitted. As to the contention in the bill that this will of 1926 was procured by undue influence exerted on the part of the defendant and that it was a violation of defendant's understanding with complainant and constituted a fraud upon his rights in the premises, defendant pleaded that complainant, on September 22, 1926, filed in the Union County Orphans Court a petition of appeal from the probate of said will and that the grounds of the appeal were that this defendant "unduly, illegally and fraudulently influenced said Louis M. Lings in respect to the making and execution of said will," and that after a hearing the Orphans Court, by its decree entered on January 12, 1927, confirmed the order of probate and found that the said will was the last will and testament of the said Louise M. Lings, and that at the time of the making thereof she was of sound mind, memory and understanding and that said will was not the product of undue influence (Case, p. 11, lines 17 to 39).

40 This fact was admitted upon the pleadings because the same was not denied in the replication (Chancery, Rule 47).

Defendant also in her answer gave notice that she would rely upon the statute of frauds in so far as the same might apply to any contract claimed by complainant to have been made in 1920 and 1924 with said Louise M. Lings as alleged in the bill.

Defendant gave notice that she would move to strike out the bill on the ground that it disclosed no cause of action. 10

Defendant gave further notice that she would move to strike out the bill on the ground that the complainant had an adequate remedy at law for the matters contained in the bill of complaint other than such matters as were *res adjudicata* by reason of the decree of the Union County Orphans Court above referred to (Case, p. 12, lines 16 to 34). 20

The replication was in the general form.

The apparent theory upon which complainant has proceeded is that there was an agreement by parol in 1920 at the time that he made a deed of the premises in question to his wife and she made a will leaving the property to him; that this oral agreement was to the effect that if complainant would convey the property to his wife she would agree to make a will leaving the premises to him; that this agreement was carried out by the execution of proper deeds and of the will of 1920; that in 1924, with the consent of the complainant, Mrs. Lings altered the will so as to fail to give to complainant title to any part of said land, but to provide that he should have, during his lifetime, one-half of the income arising from the residue of the estate of Mrs. Lings, and the other one-half to go to her daughter, the defendant-appellee herein, and upon the death of the complainant the entire residuary estate was to go to the daughter; and 30 40

10 that the will of 1926 wherein the entire estate was left to the daughter and nothing left to the husband was a violation of complainant's understanding with his wife and constituted a fraud upon his rights. The decree he sought was that of specific performance on the part of his deceased wife's executrix of the oral agreements and understanding claimed by him to have been had with his wife, and determining him to be entitled to one-half of the income from his wife's residuary estate during his lifetime.

(B) *As to Proofs.*

20 The complainant produced a deed dated September 15, 1920, recorded June 30, 1922, George S. Lings (complainant) to Wilhemina L. Lotz (Ex. C-2, p. 85); certified copy of deed dated the same day and recorded the same day from Wilhemina L. Lotz to Louise M. Lings (Ex. C-3, p. 85); will of Louise M. Lings, dated December 15, 1920 (Ex. C-4, p. 86); certified copy of deed dated May 12, 1924, recorded May 14, 1924, made by Louise M. Lings and George S. Lings, her husband, to Robert F. Tierney and wife, covering premises in question (Ex. C-7, p. 93).

30 Complainant offered in evidence an alleged typewritten copy of alleged will of decedent dated June 27, 1924 (Ex. C-5, pp. 87-90); an alleged copy of the will of complainant dated June 19, 1924 (Ex. C-6, pp. 81-93).

40 Complainant testified regarding the alleged transaction in 1920 comprehending the alleged parol agreement on the part of the wife to make a will in which she would devise to complainant certain premises if he would convey them to her, as follows (Case, p. 22, lines 12-15):

“A. In 1920 I deeded it to my wife.

By the Court:

Q. Absolutely? A. Absolutely.

Q. You gave it to her? A. I gave it to her.”

His further testimony regarding this transaction was as follows: That he told his wife when he deeded the property to her that he was put in a peculiar position, he had nothing if anything happened to her and she said she would make that all right, she would will it back to him, and if anything happened to her—she died, he would have the property back again; “that was the whole thing” (Case, p. 29, lines 17 to 24). 10

Apparently the witness did not mean by this last statement that he had no other assets than this property, because he had already stated in answer to a question of the Court (Case, p. 21, lines 34-36), that he had \$150,000.00 invested in his business in New York (Case, p. 21, lines 14-19), and that he had seventeen acres of land with a house on it. 20

Upon cross examination he testified regarding this same alleged 1920 transaction that the reason he conveyed the property to his wife was because his wife thought that his creditors might get after him and he might lose this property through loss in his business, and that his wife suggested that he convey the property to her for that reason. He himself, was not afraid of the creditors getting after him because he had “plenty” then (Case, p. 42, lines 20 to 40). Next he said (Case, p. 43, lines 23-27): 30

“In 1920 I had lost a lot of money, but at that time I wasn’t a bit afraid of anything, 40

but I transferred it to my wife for love and affection—nothing else.”

Upon further questioning he stated that it was transferred

10 “with the proviso that if she die that she must make a will leaving that to him, because her daughter would get it, and that was the arrangement at that time” (Case, p. 43, lines 29-33).

The foregoing constitutes the entire testimony of the complainant as to the alleged parol agreement of 1920.

20 Complainant’s testimony as to the alleged parol contract of 1924 was as follows (Case, p. 36, lines 30 to 42):

Upon being questioned by his attorney as to what he did with the will he signed in 1924, he said:

“I gave it to my daughter; I think my wife’s daughter; we gave it to her.”

30 On admonition by the Court that he must be certain about it, and upon repetition of the question as to what he did with the will, his answer was—“It was put in a safe deposit box.” When asked how he knew this, his answer was, “I presume it was.”

Upon the question being repeated by his counsel as to whom he did give the will, he answered, “I gave it to my wife” (Case, p. 37, lines 1-2).

Another question by the Court regarding what the witness did with the will brought the answer:

40 “Well, I gave it—I can’t remember exactly, whether I brought it home and gave it

to my wife, or her daughter, or both of them, and told them to put it in a safe deposit box. I had none.”

The next question by the Court was “Are you sure you gave the will to your wife?” to which he answered, “I am sure of it” (Case, p. 37, lines 24-25).

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The foregoing constitutes the entire testimony of the complainant regarding the alleged parol agreement of 1924. It is readily observable that his testimony, even if it were legally admissible over the objections made to its introduction, fails to establish any agreement of either the year 1920, or the year 1924.

The principal witness called by the complainant was George W. Bristol, a New York lawyer, who had been practicing about thirty-seven years and who had acted as attorney for complainant for about thirty years (Case, p. 30, line 40). He testified regarding the alleged contracts and regarding conferences which he had with the complainant and his wife alone and together. He admitted that he was associated, at the time of his testifying, with the solicitor of the complainant in this very cause and helped to prepare the case for trial with the complainant’s solicitor, and that he had engaged the complainant’s solicitor (Case, p. 50, lines 1 to 10), and had also engaged him in the matter of the appeal taken by the complainant from the probate of the will in the Union County Orphans Court, and that he was there at the hearing in that court ready to testify as a witness (Case, p. 53, lines 13 to 24). As an attorney, he admitted, that he advised both the complainant and his wife with respect to the al-

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leged transaction of 1920 and the alleged transaction of 1924. He was in doubt as to who was his client, Mr. or Mrs. Lings, and after some questioning he finally determined that it was Mr. Lings, the complainant, because Mr. Lings had paid him (Case, p. 32, lines 1-12). His natural bias in the case arising from the fact that the transactions formulated by him were at stake, and the fact that he was a paid attorney for the complainant and had prepared the case for trial, and was therefore naturally much interested in the outcome of the case, is evidenced by a reading of his testimony, which is not long (Case, pp. 30, 31, 44, 49, 53-54) which is replete with voluntary statements that are either contradicted by the record or were so inherently improbable that no Court could safely rely upon them. This witness supplied all the testimony that the complainant was silent about regarding transactions between the complainant and his wife. He it was who painted the picture of the alleged parole agreement between complainant and decedent in 1920 and again in 1924. By this convenient method, the two witnesses, the complainant and his paid attorney, were left in a position where there would be the least possibility of either of them contradicting the other; since, instead of each of them testifying to the same transactions at which both were present, it was left to the attorney to testify to the transactions, and the principal confined himself almost entirely to other matters.

The Vice Chancellor, in his opinion, expresses dissatisfaction with the testimony of both these witnesses and regards their evidence as incredible. Naturally, he bases this not only upon the testimony which was given but upon his observations

of the conduct, demeanor and manner of the witnesses upon the witness stand and under examination.

There are two striking bits of testimony of Mr. Bristol which would seem to make questionable his credibility. The first is (Case, p. 47, lines 10 to 25) that when in 1920 Mr. and Mrs. Lings told him about the alleged oral agreement whereby "she had agreed to make a will and give it back to Mr. Lings in case she predeceased him." Mr. Bristol said:

"I called his attention to the fact that she might make a will and leave him out, and he said he had perfect confidence in her, and she wouldn't do anything like that, and I drew the deed and the will pursuant to their instructions."

This testimony is remarkable, because, if true, it indicates that Mr. Bristol recognized that such a parol agreement would be ineffectual and yet permitted his client to go through with such a transaction instead of preparing a contract or memorandum which would have been enforceable against the wife and against her estate. This leaves the witness in the position of giving advice to his client and having his client overrule the advice. The testimony is either true or untrue. It is not corroborated even by the complainant who was the only other person present except Mr. Lings, now deceased.

The other striking bit of Mr. Bristol's testimony is part of the same answer (Case, p. 47, lines 21 to 29) wherein he says, with reference to the deeds whereby Mr. Lings conveyed this property to his wife in December, 1920, and to the delivery of the deeds to Mrs. Lings:

“I asked Mrs. Lings not to record the deed(s), as I thought it might hurt the credit of the corporation, and she held them for about *two weeks* and then I found that she had recorded it, *and it then seemed that she was looking out for herself and the interest of her daughter also.*”

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This was a voluntary statement by Mr. Bristol, answering no question that had been put to him, and was obviously made for the purpose of impugning the intentions of the wife and hoping to bolster the case for the complainant. Mr. Bristol, however, *overlooked the fact* that there were in evidence certified copies of the two deeds that he referred to, the deed from George S. Lings to Wilhemina L. Lotz, and the deed from Wilhemina L. Lotz to Louise M. Lings. Each of these deeds is dated December 15, 1920, and each is stamped as recorded on June 30, 1922, a period of *one year and six months* after the date of the deeds. This false statement of Mr. Bristol, volunteered by him, again indicates the utter unreliability of his testimony.

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Again the only testimony regarding the alleged will of 1924 was given by the same Mr. Bristol. The bill made no reference to any will having been made by the complainant at the time his wife made a will in 1924. On the contrary, the bill claimed (Case, pp. 2-3, par. 4) substantially that the will of 1924 was made to modify the previous parol contract of 1920, and in paragraph 5 (Case, pp. 3-4), that the consideration of the will of 1924 was the conveyance in 1920 by complainant of the property in question to his wife. On final hearing, however, complainant's counsel claimed

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that the alleged parol transaction of 1924 was a new contract having nothing to do with the one of 1920, and consisted of *an agreement between the parties to make mutual wills* in which wills each favored the other in comparatively the same manner.

This new situation was supported almost entirely by the testimony of Mr. Bristol and he was unable to give any particulars regarding any discussion or interview had between him and the husband and wife; but by indulging in generalities he testified to conclusions of fact, that is, to conclusions that he had formed from oral statements made to him, and was able to state what the terms of the parol contract were, although one party was dead and could not be heard and the other party *failed to give any testimony regarding it*. He produced copies of these alleged wills, and testified (Case, p. 48, lines 12, etc.) to his conclusions from conversations had with Mr. and Mrs. Lings, conclusions which were preceded by the words "it was agreed upon."

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## ARGUMENT.

### POINT I.

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As to what grounds of appeal are before this Court.

Rule 21 of the rules of this Court provides that in the petition of appeal shall be briefly stated "the order or decree complained of *and the grounds of appeal*."

Rule 35b provides that the brief of the appellant shall contain (2)

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“*a specification* of the errors in criminal cases, and *of the grounds of appeal* in civil cases relied upon; and in equity the specifications shall state, as *particularly* as may be, in what the decree is alleged to be erroneous.”

10 The only ground of appeal asserted in the petition of appeal (Case, p. 84) is that the decree of the Chancellor is erroneous

“in that it should have adjudged that the complainant was entitled to the relief prayed for in his bill of complaint, to wit, in accordance with the fourth paragraph of the will made by said Louise M. Lings on June 17th, 1924.”

20 It is submitted that no ground of appeal is herein set out as required by the rules and that this respondent has not been apprised of the questions which the complainant apparently intended to raise by his appeal.

30 The viciousness of this method is illustrated by the fact that in his brief (p. 4) complainant-appellant sets out five separate points which he proceeds to argue in his brief and which really constitute specifications that should have been set out in his petition of appeal. Upon this ground alone the appeal should be dismissed.

## POINT II.

**Complainant-appellant had an adequate remedy at law and, therefore, this is not a case for equity jurisdiction.**

This point was contended in the argument below, but the Vice Chancellor does not refer to it in his opinion wherein he determines the case on other questions. The right to move to strike out the bill upon this ground had been reserved in the answer (Case, p. 12, lines 28-34), and such motion was made at the beginning of the hearing and the Vice Chancellor ruled that he would take the proofs and note the objection. 10

The fundamental rule applied by Courts of equity is that a Court of equity will not entertain jurisdiction of a proceeding where complainant has an adequate remedy in a suit at law; and particularly where timely objection to such assumption of jurisdiction is made by defendant. 20

In *Brown vs. Brown*, 33 N. J. E., 650, the Court of Errors and Appeals through Mr. Justice Knapp, expressed the rule as follows (pp. 654-655):

“There are certain general rules governing 30  
 “the court in the specific execution of con-  
 “tracts between parties that are established.  
 “It is a mode of redress, grounded upon the  
 “impracticability or inadequacy of legal rem-  
 “edies to compensate for the damages which  
 “the party seeking it will suffer, by the de-  
 “fault of the other in keeping his bargain.  
 “Where the law gives an action for the non-  
 “performance of the contract, and damages 40

10 “can be admeasured to fully match the wrong  
 “inflicted, courts of equity will not, unless  
 “other grounds of equitable relief be in-  
 “volved, accord this remedy. It is only when  
 “the remedy at law will not put the party in  
 “a situation as beneficial to him as if the  
 “agreement were specifically performed.  
 “Pom. on Sp. Perf., Sec. 9, and notes;  
 “Cutting vs. Dana, 10 C. E. Gr., 271.

“Where jurisdiction exists, the remedy is  
 “not of right; the court holds it in judicial  
 “discretion, controlled by principles of equity  
 “and justice. ‘The question is not what the  
 “court must do, but what it may do under the  
 “circumstances.’ Radcliff vs. Warrington,  
 “12 Ves., 332.”

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Assuming for the purpose of argument that any  
 contract has been “established” in this case, the  
 remedy sought, although designated by complain-  
 ant in his brief as specific performance, is really  
 damages for breach of contract, and is as easily  
 admeasured by a jury as by a master.

In *Thompson vs. West*, 56 N. J. E., 660, Vice  
 Chancellor Stevens, recognized the fundamental  
 rule, in these words (p. 664):

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“The agreement in question could not be  
 “more than an undertaking to make a will in  
 “Caroline’s favor. No will was made, and  
 “consequently we have here not the case of  
 “an agreement fulfilled, but of one broken,  
 “*the breach giving rise merely to an action*  
 “*of damages.*”

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In *Van Horn vs. Demarest*, 76 N. J. E., 386  
 (affd. 77 N. J. E., 264), the bill was described

by Stevenson, V. C. (p. 387), as one for compensation or damages on account of a breach of a contract alleged to have been made by the testator with complainant, by which testator legally bound himself to provide by will or otherwise, for the accession by the complainant, upon the death of testator, to a parcel of real estate and a large share of the remaining estate of the testator. The reporter summarizes the rulings of the Vice Chancellor upon certain questions in the following language (p. 387):

“(The vice-chancellor then proceeded to  
 “show that the rights, legal or equitable, as-  
 “serted by the complainant must be based  
 “upon a contract made by the complainant  
 “with his deceased uncle Garret C. Van  
 “Horn—that the will of Garret C. Van Horn  
 “was not in litigation in this case, the same  
 “having been admitted to probate after the  
 “complainant had had abundant opportunity  
 “to contest its validity; that the complain-  
 “ant might be conceded to be *suffering a*  
 “*hardship on account of the change in his*  
 “*uncle’s testamentary purposes, but that no*  
 “*such hardship could be recognized in this*  
 “*case or be made the basis of any equitable*  
 “*relief; that perhaps courts, as well as juries,*  
 “*in cases like this, where testators have*  
 “*changed their minds sometimes are too*  
 “*ready to give support to a feeble case of*  
 “*broken contract because of a very strong*  
 “*case of disappointed testamentary expecta-*  
 “*tions.*”)”

In Vice Chancellor Stevenson’s opinion (on pp. 40  
 391, etc.), he points out that an action at law

was the proper action and not a bill in equity; but he held jurisdiction, because *the parties had submitted to the jurisdiction* of the Court,

“the defendants by their counsel raised no such point either in the answers or at any time during the progress of the trial,”

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and all the testimony had been taken in the trial of what was practically the suit at law that should have been brought.

The Court of Errors and Appeals, in affirming the judgment of Vice-Chancellor Stevenson, filed a *per curiam* opinion as follows:

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“The decree in this case should be affirmed, “for the reasons given by Vice-Chancellor Stevenson. We are not to be understood, “however, as holding that the case was one “of equitable jurisdiction. No objection was “made on this ground, and it would be wrong “to dismiss the bill for that reason at this “stage of the proceedings.” 77 N. J. Eq., 264.

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In the instant case the objection to the jurisdiction was made in the answer, and by motion before the hearing.

### POINT III.

No special ground of equitable jurisdiction appearing in the case, the prayers for discovery and for a trustee will not of themselves confer jurisdiction.

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Discovery alone will not sustain a bill for an accounting.

*Township vs. Crane*, 80 N. J. E., 509 (E. & Ap.);  
*Daab vs. N. Y. C. Ry.*, 70 N. J. Eq., 489  
 (Stevenson, V. C.).

In the instant case, complainant did not pray for an answer under oath. Under the rules of court this is tantamount to praying for an answer without oath. 10

*Chancery Rule 66.*

In *Streeter vs. Braman*, 76 N. J. Eq., 371, at 377, Stevenson, V. C., held that a bill cannot be sustained as a bill for discovery where it prays for an answer without oath.

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**POINT IV.**

**The so-called contracts of 1920 and 1924 are both unenforceable.**

A. *As to alleged contract of 1920.*

1. *The 1920 alleged contract is unenforceable under Section 5 of the Statute of Frauds because it was a parol contract to devise lands.* 30

The bill fails (Case, p. 2, par. 3) to show whether the alleged agreement to make a will devising certain lands to complainant was in writing or by parol. The words there used to describe the agreement are (Case, p. 2, par. 3):

“Complainant caused said lands to be conveyed to his wife, the said Louise M. Lings, 40

“pursuant to an agreement with his wife that  
 “she would make and execute a will under  
 “which she would devise said lands to com-  
 “plainant,” etc.

10 On page 2 of the case, lines 19 to 21 will be found the statement of defendant’s counsel that complainant’s counsel had stated, in lieu of an amendment, or of requiring a bill of particulars that the agreement referred to was an *oral* agreement.

The Statute of Frauds was pleaded in paragraph 11 of the Amendment to Answer.

20 Complainant therefore bases his claim first upon an alleged *parol* agreement (1920), whereby defendant’s testatrix allegedly promised that if he conveyed the premises in question to her, she “would make and execute a will under which she would devise said lands to complainant” (Case, p. 2, lines 23-24), claiming further that he so conveyed, and she made and executed such a will on the same day (Complaint, par. 3; Case, p. 2).

30 If these facts were established by proper proofs, still such an agreement would be unenforceable, because of the provision of Section 5 of the New Jersey Statute of Frauds, which provides as follows (N. J. Comp. Stat., 1910, p. 2612):

40 “That no action shall be brought \* \* \*  
 “(4) upon any contract or sale of lands, tenements or hereditaments, or any interest in  
 “or concerning them; \* \* \* unless the agreement, upon which such action shall be  
 “brought, or some memorandum or note  
 “thereof, shall be in writing, and signed by  
 “the party to be charged therewith, or some  
 “other person thereunto by him or her law-  
 “fully authorized.”

In this case the bill is based upon an agreement by parol. Two documents are produced: (1) the deed (or deeds) transferring lands by complainant to defendant's testatrix, and (2) a will whereby testatrix devised such real estate to complainant.

These two documents do not constitute a contract, in and of themselves. No memorandum, as required by the Statute, has been proven. The contract alleged is based solely on attempted evidence of a *parol* agreement. Not only does this appear from the proofs, but it was admitted by complainant's counsel on the record (Case, p. 15, lines 19-21). 10

Section 5 of our Statute of Frauds is a complete defense to the whole claim of the complainant, assuming that the parties intended to make, so far as possible by mere words, the alleged contract claimed to have been made in 1920. 20

*Lozier vs. Hill*, 68 N. J. Eq., 300 (Stevenson, V. C.);

*Cooper vs. Carlson*, 66 N. J. E., 328 (E. and Ap.);

*Van Horn vs. Demarest*, 76 N. J. E., 386; aff'd 77 N. J. E., 264. 30

2. (a) *The alleged 1920 contract, assuming that the parties intended to make the parol contract contended for, is unprovable and unenforceable under the "parol evidence rule."*

The "parol evidence" rule, which has come to be a fundamental practice rule of our Courts, both of law and equity, is to the effect that where parties to a contract have put their contract in writing (i. e., a lease, a deed, a mortgage, or any 40

other written contract), the written contract shall be the only evidence of the contract as finally concluded, and that parol testimony of what was said or done during the negotiations will not be admitted either to contradict the written contract or to supply terms with respect to which the writing is silent.

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*Naumberg vs. Young*, 44 N. J. L., 331 (Depue, J.);

*Franklin Fire Ins. Co. vs. Martin*, 40 N. J. L., 568 (E. & Ap., Depue, J.);

*Van Syckel vs. Dalrymple*, 32 N. J. E., 233 (Van Fleet, V. C.);

*Russell vs. Russell*, 60 N. J. Eq., 282 (Grey, V. C.); aff'd 63 N. J. E., 282;

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and cases there cited.

This rule likewise operates *to prevent the proof by parol of a verbal contract to devise lands or bequeath other property.*

*Lozier vs. Hill*, 68 N. J. Eq., 300, at 310 (Stevenson, V. C.);

*Russell vs. Russell*, *ante*.

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In *Lozier vs. Hill* (68 N. J. Eq., at 310), Stevenson, V. C., said, with reference to "*the well settled rules which protect written contracts from impeachment by parol testimony*":

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"The effect of giving force to this alleged  
"oral contract would be to alter radically a  
"most solemn contract in writing—a convey-  
"ance of land under seal—and to convert  
"what on its face is an absolute conveyance  
"of the whole legal and equitable estate into

“a conveyance of a life estate only, leaving  
 “an equitable estate in reversion vested in  
 “the grantor.”

In *Franklin Fire Ins. Co. vs. Martin* (40 N. J. L., 568), Mr. Justice Depue said:

“The written contract shall be regarded 10  
 “as the sole repository of the intentions of  
 “the parties.”

There the contract was a policy of insurance; here it is a deed of conveyance, the terms of which are sought to be altered by parol evidence of an alleged parol understanding between the parties thereto.

Objection was duly made on the trial of the instant case to the admission of evidence designed to show a parol contract modifying the deed of conveyance (Case, pp. 27-28, 29). 20

(b) *Parol evidence cannot be admitted to connect two writings so as to establish thereby a contract.*

This is sometimes cited as an application of the “parol evidence rule”; and sometimes applied under the authority of Section 5 of the Statute of Frauds. 30

*Johnson vs. Buck*, 35 N. J. L., 338 (Sup., Depue, J.);

*Nibert vs. Baghurst*, 47 N. J. E., 201, 208 (Green, V. C.);

*Shinn vs. Smiley*, 122 Atl., 531, 533; 1 Misc., 459. 40

In *Shinn vs. Smiley* (at p. 208) Vice Chancellor Green quotes from the opinion of Mr. Justice Depue in *Johnson vs. Buck* (p. 344) as follows:

10        “The connection between the signed and  
           “unsigned papers cannot be made by parol  
           “evidence that they were actually intended  
           “by the parties to be read together, or of  
           “*facts and circumstances from which such*  
           “*intention may be inferred.* The connection  
           “between them *must appear by internal evi-*  
           “*dence derived from the signed memoran-*  
           “*dum.*”

B. *As to alleged contract of 1924.*

20        1. *The alleged contract of 1924 is void because*  
           *it is claimed to be a modification of the alleged*  
           *contract of 1920, which was void and unenforce-*  
           *able; and because the consideration for it, if any,*  
           *was a past one.*

30        The bill of complaint (Par. 4) sets out this  
           alleged parol agreement of 1920 (see admission,  
           Case, p. 15, lines 15-30), as a decision between  
           Mr. and Mrs. Lings “to change the nature of  
           the bequest and devise to complainant,” to be  
           made in her will by testatrix. The change  
           claimed was a new will by Mrs. Lings whereby  
           she left the residue of her estate “*both real and*  
           *personal*” to a trustee, the income to go in equal  
           shares to complainant and to her daughter, the  
           individual defendant, during their joint lives, etc.  
           This will was executed *June 17, 1924* (Bill, Par.  
           4). From the proofs it appears that the real  
           estate conveyed in 1920 by complainant to his  
           40        wife, had been conveyed away by her, complain-  
           ant joining in the deed, on *May 12 or 14, 1920*

(Case, pp. 41-42; Ex. C-7, p. 93). *This is skillfully omitted from the allegations in the bill.*

The agreement alleged as of 1920, being unenforceable for the several reasons stated under Point IV, the amendment would likewise be void and unenforceable, since it was subject to the same frailties. Moreover, *the action of the complainant in joining in and thereby assenting to the conveyance by his wife of the property which he claims was under contract to him, released her from any such 1920 contract as he claims.* So that when she made the will of 1924, if she did, the consideration, if any, was a past consideration, which would not support a contract of the nature claimed. 10

2. (a) *The alleged 1924 agreement as claimed in the bill of complaint is unprovable and unenforceable under the parol evidence rule.* 20

In this instance it is sought to vary the terms of the alleged 1924 will of Mrs. Lings by engrafting upon it a parol agreement by parol evidence.

The authorities cited under this point at A 2 (a) apply equally to this situation.

Objection was made on the trial to the admission of evidence to this effect. 30

(b) *Parol evidence cannot be admitted to connect the two alleged mutual wills so as to establish thereby a contract.*

There is in the pleadings no claim of mutual wills, nor any allegation that complainant also made a will in 1924, at same time his wife is claimed to have made one. However, it is well established both under the cases referred to in last point above and in those cited under this 40

Point at A 2 (b) that parol evidence cannot be resorted to spell a contract out of two independent writings, neither of which refers to the other.

3. *If there were properly proven a parol agreement to make mutual wills, it would be unenforceable.*

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As shown above, the will of Mrs. Lings provides for both real and personal property. So does the will of Mr. Lings.

Such a claim of reciprocal wills is void under the statute of frauds, because making a will is not evidence of an agreement, and complainant has not changed his position, his property being still in his control.

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*Gould vs. Mansfield*, 103 Mass., 408.

It should be noted that the two wills were not made on the same day. Mrs. Lings' will, it is claimed was executed on June 17, 1924 (Case, p. 90), and that of Mr. Lings on June 19, 1924 (Case, p. 92), two days later. The theory of mutual wills is based upon a memorandum in writing, whereby each agrees to make a will of a certain nature. The memorandum constitutes the contract. Here there is no memorandum of other written contract. So if there were anything in the theory of mutual wills in this case, the will of Mrs. Lings was not supported by a consideration on the day when she made it and hence was *nudum pactum*, and lacked mutuality.

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4. *The alleged contract of 1924, in so far as it relates to lands is unenforceable under Sec. 5 of the New Jersey Statute of Frauds.*

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See authorities under this Point at A 1.

5. *The alleged contract of 1924, in so far as it relates to personalty, is unenforceable under Section 4 of the New Jersey Sale of Goods Act, because it was a parol contract to bequeath goods or choses in action.*

Section 6 of the New Jersey Statute of Frauds (N. J. Comp. St., p. 2615), which provided that every contract for the sale of "goods, wares and merchandise for the price of thirty dollars or upwards shall be *void*," unless a memorandum be signed, etc., etc., has been superseded by section 4 of the Sale of Goods Act (N. J. Comp. St., p. 4648), *Eigen vs. Rosolin*, 85 N. J. L., 515. 10

This latter statute provides:

"A contract to sell or a sale of any *goods* 20  
 "or *choses in action* of the value of five hundred dollars or upwards, shall not be enforceable by action, unless the buyer shall accept part of the goods or choses in action \* \* \* or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf." 30

There are two essential points of difference between these two statutes (aside from the minimum value involved): (1) The old statute provided that the contract should be *void*; the later statute provides that it "shall not be enforceable by action," thus bringing it into correlation with section 5 of the Statute of Frauds relating to Sales of land, etc. (2) The old statute related to "goods, wares and merchandise," the later to "goods or choses in action." 40

Before the enactment of the Sales of Goods Act, it had been held that the words "goods, wares and merchandise" as used in section 6 of the Statute of Frauds were equivalent to the term "personal property," and were intended to include *whatever* is not embraced by the phrase, "lands, tenements and hereditaments" in the preceding section (section 5) of the Statute of Frauds.

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*Greenwood vs. Law*, 55 N. J. L., 168 (E. & Ap.);

*French vs. Schoonmaker*, 69 N. J. L., 6 (Sup., Gummere, J.);

*Thompson vs. West*, 56 N. J. E., 660, at 666 (Stevens, V. C.).

20

The conclusion that must be arrived at from this statutory and juristic situation is that a parol agreement to bequeath personalty or choses in action of a value of \$500 or above is unenforceable by action, just as a parol agreement to devise lands is unenforceable under section 5 of the Statute of Frauds; and the authorities above cited under the latter statute, apply equally to this statute.

30

As to the value of the personalty involved; Mrs. Urquhart testified the estate possessed securities in excess of \$50,000; and both complainant and his attorney, Mr. Bristol, testified to the sale price of over \$40,000 from proceeds of real estate being part of the estate when this alleged will of 1924 was made. They testified also to some \$15,000 and other moneys held by her at about the time of said will.

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## POINT V.

If all the facts alleged by complainant were properly proven and undisputed, yet no enforceable contract was shown.

As to the 1920 transaction, the bill alleges (par. 3) that testatrix agreed that "she would make and execute a will under which she would devise said lands to complainant." As to the 1924 transaction it alleged (par. 4) that pursuant to a decision and agreement between them, testatrix subscribed, "acknowledged, published and declared her last will and testament in which the fourth clause reads as follows," setting out one clause of alleged will. 10

The alleged proofs do not rise above the level of an agreement to make a will. If read, as the Court will read them, understandingly and without prejudice, it is submitted that they fall short even of that. For instance when complainant was asked (Case, p. 22) what did he do with the real estate in 1920, the transcript shows: 20

"A. In 1920, I deeded it to my wife.

"By the Court:

"Q. Absolutely? A. Absolutely. 30

"Q. You gave it to her? A. I gave it to her."

Mr. Bristol, attorney of complainant, testified (Case, p. 47):

"Q. I want you to tell what Mrs. Lings said "about the transfer of this property. A. She "said she had agreed to make a will and give 40

10 "it back to Mr. Lings, in case she predeceased  
 "him, and Mr. Lings said that was all right,  
 "and agreeable to him, and I called his atten-  
 "tion to the fact that she might make a will  
 "and leave him out, and he said he had per-  
 "fect confidence in her, and she wouldn't do  
 "anything like that, and I drew the deed and  
 "the will, pursuant to their instructions, and  
 "they came to the office and executed the deed  
 "and the will at the same time, and I asked  
 "Mrs. Lings not to record the deed, as I  
 "thought it might hurt the credit of the cor-  
 "poration, and she held it for about two  
 "weeks, and then I found that she had re-  
 "corded it, and it then seemed that she was  
 20 "looking out for herself and the interest of  
 "her daughter, also."

This testimony shows that *the agreement was to make a will*. Incidentally it also illuminates the reliability of this attorney of Mr. Lings in his testimony. His volunteered statement, designed to be a reflection upon Mrs. Lings and her daughter, as to the recording of the deed within two weeks is contradicted by the record (Case, p. 85, Exs. C-2 and C-3) wherein both deeds dated  
 30 September 15, 1920, are shown to have been recorded June 30, 1922, a year and nine months after their delivery!

In *Lozier vs. Hill*, 68 N. J. E., 300, where Vice Chancellor Stevenson dealt with a contract to devise lands, he said (p. 306):

40 "No facts are proved which exempt the  
 "alleged oral contract from the operation of  
 "the statute of frauds.  
 "There was no fraud in the transaction.  
 "No fraud will be effectuated in case the

*“promise to devise was made and the complainant fails to get the land by devise or by the decree of this court. In such case the complainant will not be defrauded, but will merely suffer from the non-performance of a promise which is not legally enforceable.”*

And on page 308, he further said:

10

*“Assuming that the oral contract was made, the situation presented, in my opinion, is the ordinary one where a party competent to contract has voluntarily, with full knowledge of all the facts, and with the aid of independent advice, made a contract which is not enforceable on account of the provisions of the statute of frauds.”*

20

Vice Chancellor Stevenson might well have been speaking of this case now under discussion, which he referred to as “the ordinary one,” for there are present here all the elements referred to by him, even “the aid of independent advice,” i. e., the testimony of Mr. Bristol, volunteered by him (Case, p. 47, lines 15-17), where he said:

*“and I called his (complainant’s) attention to the fact that she (testatrix) might make a will and leave him out \* \* \*.”*

30

In *Eggers vs. Anderson* (E. & Ap.), 63 N. J. E., 264, the situation was presented of an elderly woman making a will in favor of some charitable young women who had helped support her, and who were then supporting her and expected to continue to do so. Later she revoked the will. Upon her death, the young women filed a bill for

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a decree establishing the arrangement as a contract and for the enforcement of it, etc., etc.

Mr. Justice Dixon, in delivering the opinion of the Court, which reversed the ruling of Pitney, V. C., below (61 N. J. E., 85) observed (p. 267):

10           “Doubtless a person *may* enter into a *legal*  
 “*obligation* to make a certain disposition of  
 “his property by will. Johnson vs. Hubbell,  
 “2 Stock., 332. Such an obligation does not  
 “seem to differ *in essence* from one concern-  
 “ing the disposition of property by other  
 “means. But a *will* is in its very nature  
 “*ambulatory, subject to revocation* during  
 “the life of him who signs it. 1 Jarm. Wills,  
 “ch. 2; Reid vs. Shergold, 10 Ves., 370, 379.  
 20           “*Irrevocability would destroy its essence as*  
 “*a will*. Hobson vs. Blackburn, 1 Ad. Ecl.,  
 “278. Said Lord Penzance in Goods of Rob-  
 “inson, L. R., 1 P. & D., 383: ‘An invariable  
 “test when a question is raised as to the tes-  
 “tamentary character of a paper, is whether  
 “the paper is revocable.’ This inherent qual-  
 “ity is declared by our statute of wills, and  
 “cannot be impaired by private contract.  
 30           “*Pacta privata jure publico derogare non*  
 “*possunt* is one of the maxims of the law, as  
 “an instance of which Broom cites the revoca-  
 “bility of wills. Lex Max., 309 (note a);  
 “Vynior’s Case, 8 Rep., 162. *If one should,*  
 “*under contract, execute a will and covenant*  
 “*not to change it,* and afterwards should re-  
 “voke it, substituting another, *the latter only*  
 “*could be admitted to probate as a will;* the  
 “other party would obtain redress only by  
 40           “securing, at law or in equity, such remedy

“for breach of the covenant as the rules of  
“those jurisdictions provide.”

“*From this mutability of wills it follows*  
“that if *the whole scope* of any arrangement  
“is fulfilled by the mere *making of a will*,  
“then nothing legally binding upon him who  
“signs the instrument is contemplated, *the*  
“*obligatory force of a contract is not in-* 10  
“*tended, and he remains at liberty to change*  
“*his mind. The claim that a legal obligation*  
“*is assumed must be supported by something*  
“*beyond the consent to make a will.*”

Here again we have language that readily ap-  
plies itself to the present situation. Complain-  
ant's proofs here clearly show that all that was  
contemplated by complainant was that testatrix 20  
should make a will; that when his attorney ex-  
plained to him that she might make a later will  
revoking the one she was about to make, he under-  
stood that and was satisfied (Case, p. 47, lines  
15-20).

Further, on page 268, Mr. Justice Dixon, ex-  
presses himself:

“If the design had been to present to the  
“mind of Mrs. Stager a proposal that *at all* 30  
“*events* her property should come to the com-  
“plainants at her death, would not the lawyer  
“have produced a writing *not in its nature*  
“*alterable as she should choose*, and if Mrs.  
“Stager had so understood the proposition,  
“knowing that the mere interest upon her  
“funds in bank exceeded the contributions of  
“charity, and cunning as she evidently was,  
“would she not have refused or at least with- 40  
“held consent?”

10 “I think that under the circumstances the  
 “consent to make this will *should not* be  
 “deemed a contract. *At the best*, it is not  
 “*certain* that the parties meant what they  
 “*did to amount to a legal obligation*, and, as  
 “was held by Lord Loughborough in Walpole  
 “vs. Orford, 3 Ves., 403, 419, which also was  
 “a case to enforce an alleged agreement to  
 “make a will, such uncertainty is sufficient to  
 “stay the hand of a court of equity.”

20 Mr. Bristol, it must be remembered, did not  
 overlook this important matter, but realized that  
 Mrs. Lings could legally change her will, and so  
 he advised his client of the effect of the will, and  
 the right of revocation, but since his client was  
 satisfied, he drafted no written contract. Both  
 were satisfied with the situation, the client for his  
 own reason, and Mr. Bristol because he had dis-  
 charged his duty in advising his client of the non-  
 binding arrangement, and had received instruc-  
 tions not to bother to have anything legally en-  
 forceable. It would have been thoughtful of Mr.  
 Bristol to have embodied his advice as to the situ-  
 ation in a contemporaneous letter to his client.  
 30 But he was satisfied to leave it to his own recol-  
 lection, and then without any question to prompt  
 him, to toss it into the middle of an answer—the  
 same answer into which he tossed the statement  
 that he saw the records of deeds within two weeks  
 of their execution, although they were not re-  
 corded for a year and six months thereafter.

40 A curious and most interesting situation this,  
 where the client declined to follow the attorney's  
 advice and have a binding agreement, but accepted  
 what the attorney advised was revocable by the  
 other party; and afterwards brings suit on the

very claim which he had been advised he did not possess, and his principal witness is the attorney who gave that advice, and who now strains at a gnat and swallows a camel to endeavor to help his client to establish the claim that he knew was of no effect.

**POINT VI.**

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**There were no legal proofs in the case to sustain complainant's claim.**

A. *All the testimony of complainant relating to any transaction with testatrix was inadmissible under section 4 of the Evidence Act.*

Section 4 of An Act concerning evidence (Revision of 1900, 2 N. J. Comp. St., p. 2218) provides:

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“In all civil actions any party thereto may  
 “be sworn and examined as a witness, not-  
 “withstanding *any party* thereto may sue or  
 “be sued *in a representative capacity; pro-*  
 “*vided*, this section shall not extend to permit  
 “*testimony to be given by any party to the*  
 “*action as to any transaction with or state-*  
 “*ment by any testator or intestate repre-*  
 “*sented in said action, unless the representa-*  
 “*tive offers himself as a witness on his own*  
 “*behalf, and testifies to any transaction with*  
 “*or statement by his testator or intestate, in*  
 “*which event the other party may be a wit-*  
 “*ness on his own behalf as to all transactions*  
 “*with or statements by such testator or intes-*  
 “*tate, which are pertinent to the issue.*”

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The rule of evidence embodied in this statute has been so uniformly followed in this state, and

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so continuously applied to cases like the present case, that it would seem to require the citation of few cases. A long line of them is published in the *Compiled Statutes*, following this section.

10 *Thompson vs. West*, 56 N. J. E., 660, previously cited on other points, contains a clear statement of the effect of the statute as it read prior to the revision of 1900.

20 *Lodge vs. Hulings*, 64 N. J. E., 761 (E. & Ap.), opinion by Gummere, C. J., contains an analysis of the effect of the changes made in 1900, and states that a party opposed to another who appears in a representative capacity, may be examined as a witness, but "shall not be permitted to testify concerning any transaction with, or statement by, the decedent of his adversary, unless his adversary first offers himself as a witness and testifies to a transaction of, or statement by, such decedent."

30 In this case, the complainant sued the executrix of Mrs. Lings to establish a parol contract or contracts. The executrix appeared in a representative capacity. She did not offer herself as a witness to any transaction of or statement by the decedent. Although *objection was made* to the complainant testifying to any such transaction, etc., with decedent, he was allowed to testify over the objection (Case, pp. 20, 21, 22, 27, 29) of the defendant. No further objections on this line were made because the Vice Chancellor stated (Case, p. 29)—"It will be all taken over your objection."

40 In view of the statute, all the testimony of complainant was inadmissible that related to transactions or conversations with the decedent. This left his testimony bare of any facts to support the claim sued upon.

B. *The testimony of all the witnesses of complainant relating to the transactions with, or statements by decedent, are inadmissible under the parol evidence rule.*

Substantially all the testimony of each of the four witnesses called by complainant (and including complainant himself) related to statements by decedent, whereby it was attempted to thus show that a parol contract or contracts existed in contradiction of written instruments. The attempt thus was to vary the terms (as to 1920) of a deed absolute on its face. 10

As to the 1924 alleged transaction, here the attempt also is to vary the terms of two writings by parol evidence. The writings were alleged wills made by husband and wife, each revocable in its nature. Parol evidence was admitted for the purpose of attempting to show an alleged irrevocable agreement, contradictory of the writings themselves. 20

That such parol evidence is inadmissible is established by the authorities cited under Point IV, A 2 (a) and (b) of this brief. While the authorities there cited refer in part to Section 5 of the Statute of Frauds, the same rule applies to alleged parol contracts under the New Jersey Sales of Goods Act (this brief, Point IV, B 5), and the principles of such authorities are now equally applicable to a sale of goods as well as land. So that, if the alleged 1920 will related to personalty only, it still could not be varied by parol evidence, and any such evidence would be inadmissible. 30

Thus complainant's cause is left denuded of any proofs of the alleged agreement of 1920, and of 40

the alleged modification thereof (or of mutual wills) of 1924.

Objections by defendant were made on the trial to the admission of such parol evidence (Case, pp. 27-28, 46, 62).

#### POINT VII.

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**No fraud on part of decedent appeared in the case.**

It is difficult from a reading of the bill of complaint, and still more so from a reading of complainant's brief to realize what he conceives the theory of his action to be. He refers to the action of decedent in the making of her last will as being a "fraud" upon him, and as being "fraudulent and inequitable."

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In a similar case, *Lozier vs. Hill*, 68 N. J. E., 300 (at p. 306), Stevenson, V. C., said:

"There was no fraud in the transaction. "No fraud will be effectuated in case the "promise to devise was made and the complainant fails to get the land by devise or "by the decree of this court. In such case "the complainant will not be defrauded, but "will merely suffer from *the non-performance of a promise which is not legally enforceable.*"

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#### POINT VIII.

**The Vice Chancellor's determination was a proper disposition of the cause.**

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The opinion of Vice Chancellor Lewis (Case, pp. 74 to 82) is, it is submitted, an able and fair

determination of the questions that were at issue. Counsel for complainant-appellant, in his brief, regards as proven everything to which any of his witnesses testified. He further disputes the Vice Chancellor's opinion regarding the testimony given, thus:

On page 6 of his brief, after quoting from the Vice Chancellor's opinion that the complainant testified that he conveyed the property to his wife "because she, after he had informed her that he would have nothing in case anything happened to her, had assured him that she would will it back again to him in case anything happened to her," asserts: 10

*"There is no evidence in the case that the complainant ever so informed his wife."* 20

The answer to this statement that the Vice Chancellor falsely quoted the testimony is found on page 29 of the case wherein complainant testified as follows:

"Well, I told my wife, when I deeded the property, that I was put in a peculiar position; I had nothing if anything happened to her, and she said she would make that all right, because she would will it back to me, and if anything happened to her—she died, I would have the property back again; that was the whole thing." 30

Counsel for complainant-appellant next (his brief, p. 6) says there is no evidence in the case that warrants the finding by the Vice Chancellor that the property was conveyed by the complainant to his wife for the purpose of placing it beyond 40

the reach of his creditors. Counsel, then discusses portions of the testimony but ignores large parts of the testimony directly referred to by the Vice Chancellor in his opinion, particularly the testimony of the star witness, George Bristol, that the bottom had dropped out of the textile market in the Spring of 1920 (Case, p. 46, lines 13-29); that Mr. Lings was in the textile market and his business was a privately owned corporation, and that Mrs. Lings discussed with Mr. Bristol the financial condition of the company, of which Bristol was secretary; *that Lings was giving his notes for the company* and that Mrs. Lings said to Mr. Bristol "*the first thing you know we will be out in the street; I want this property fixed so I wont lose it*" (Case, p. 46, lines 30-37). Bristol was not only the legal adviser of the complainant for a period of thirty years, but was also secretary of complainant's corporation (Case, p. 46, lines 28-29).

It is respectfully submitted that the decree below should be affirmed upon the grounds set forth in the opinion of Vice Chancellor Lewis, and that the cause should be remitted to the Court of Chancery.

EDWIN G. ADAMS,  
Solicitor for and of counsel with  
Defendant-Respondent.