New Jersey Court of Errors & Appeals

IN THE LAST RESORT IN ALL CAUSES.

Between
AUGUST J. NICKLAS, Administrator of Ellen Cunningham, deceased,
Complainant,
Respondent,

and

BRIDGET PARKER, JOHN E. CLARK, CATHARINE B. KAVANAUGH, MARY E. RITGERT, and JAMES DONNELLY and ISABELLA DONNELLY, JOHN DONNELLY, THOMAS DONNELLY, and VINCENT DONNELLY, infants, by their guardian, PETER E. DONNELLY,
Defendants,
Respondents.

and

HONORA FINNERTY,
Defendant.
Appellant.

BRIEF FOR HONORA FINERTY, DEFENDANT, APPELLANT.

The question in issue, so far as it affects the appellant Honora Finerty, grows out of a deposit made by one Ellen Cunningham (otherwise known as Ellen Kelly) now deceased, opened June 29, 1898, Account No. 93249, with the Provident Institution for Savings in Jersey City, in the name of "Ellen Cunningham, Trustee for

Honora Finerty." The first deposit was $292.00, and thereafter additions were made to the fund by deposits and by accumulations of interest, the last deposit having been made January 8, 1903, $40.00. (*Case, Exhibit* 2, *Parker, et. als. p.* 42.) Ellen Cunningham died intestate, on or about January 13, 1904, having made one draft upon the account, January 10, 1903, when $200.00 was withdrawn. On July 1, 1904, the deposit, with accumulations, amounted to $1519.-90. Presumably the money with which the account was opened, and the money which was afterwards deposited to its credit, was the property of the intestate. There is no evidence that the existence of this deposit was ever made known to the beneficiary named. The question here arises between the administrator of Ellen Cunningham, claiming the fund as a portion of the intestate's estate, and Honora Finerty, claiming as the beneficiary under the trust declared when the account was opened.

The statement of the Finerty answer that the money deposited in the account in dispute was hers, was made by her solicitors under a misapprehension of the facts. The attention of the court was called to this mistake at the beginning of the hearing (*Case, page* 11, *line* 33). The law which would have been applicable to the defendant Honora Finerty's claim had the allegation of the answer been supported by the evidence, does not, of course, govern the situation as made by the proofs and as submitted to the court.

Although the deposition of the defendant Miss Finerty with the accompanying letters, marked Exhibits "A," "B," "C," "D", "E" and "F" (*Case, pages* 14 *to* 26), was taken on her own behalf, it was offered on the hearing by counsel for the next of kin, who claimed through the administrator, and without objection on the part of the complainant. It was hence properly received in evidence, and is important as showing the relationship of affectionate friendship existing between the two women until the intestate's

death, notwithstanding their separation since 1876. The continuance of this strong friendship makes natural a provision by the intestate for the benefit of Miss Finerty, though there was no legal consideration to support it, and warrants the inference that it was the intention of the intestate to create a trust for the claimant's use, rather than that this deposit should be classed with those in the names of relatives long dead, solely for the depositor's own convenience.

It is conceded that the present disposition of the fund on deposit in the Savings Bank cannot be supported as a *gift*. No attempt has been made to rest Miss Finerty's claim upon such ground. Upon the return of her deposition from Ireland, when it was learned that there had been no such dealing by the intestate with the earlier account (*Exhibit Parker* 1, *Case page* 43) as that the later account (*Exhibit, Parker* 2, *Case, page*) 42 in the savings bank could be fairly regarded as having been substituted for, and substantially a continuation of, the earlier account—which was the erroneous belief under which Miss Finerty's answer was prepared—it was recognized that her claim to the fund could be established only if the opening of the later account was a present, executed, declaration of trust. No claim was made by counsel in the Court of Chancery that the transaction amounted to a gift, although that view is discussed in the opinion of the learned Vice Chancellor.

The opening of the account, under the circumstances stated, created a present, executed trust for the benefit of Miss Finerty.

There was an express, voluntary trust, completed by the opening of the account on the books of the bank, and the acceptance of the pass book in the name of the intestate as trustee.

2 *Pom. Eq., Jur.*, 2*nd Ed., Secs.* 996, 997; 998; *Bispham's Eq. Jur.*, 6*th Ed., Sec.*, 67; *Hill Trustees*, 130; *Martin V. Funk*, 75 *N. Y.* 134.

Such a trust is complete and executed, although the trustee reserve the beneficial interest during her life.

Green v. Tulane, 7 *Dick. Ch.* 169 (*Pitney V. C.* 1893).

Such a disposition of personal property is not testamentary in character, and hence is not in derogation of the statute of wills (*Green v. Tulane supra.*)

In cases of Savings Bank Trusts, as they are often styled, it is conceded that the purpose for which the account was opened by the intestate is the proper subject of examination, where conflicting claims are made by the personal representative, and the beneficiary; but in none of the New Jersey cases is any consideration, or any principle, suggested which would defeat a claim of the beneficiary, whether a donee or a *cestui que trust*, where the gift or trust is executed, in the absence of evidence showing that the intestate made the alleged gift, or placed the money in the trust account, for motives of personal convenience, or for some other purpose necessarily in conflict with the intention to make a present gift, or create a present trust, for the use of the beneficiary. See New Jersey cases on this subject as follows:

Schick, v. Grote 15 *Stew.* 352 (*Prerog. Ct.*); *Skillman v. Wiegand*, 9 *Dick.* 198 (*Pitney V. C.* 1896);

Dennin v. Hilton, 50 *Atl. Rep.*, 600. (*Pitney V. C.* 1901);

Hoboken Bank for Savings v. Schwoon, 17 *Dick.* 503, (*Pitney, V. C.* 1901),

Dunn v. Houghton, 51 *Atl. Rep.* 71 (*Stevenson, V. C.* 1902).

What necessary to declare a trust.

In discussing the subject of Express Private Trusts, Professor Pommeroy thus states the language necessary to create or declare a trust:

"If the donor adopts the second" (creation of a third person as trustee) "or third" (declaration of trust) "mode, he need not use any technical words, or language in express terms creating or declaring a trust, but he must employ language which shows unequivocally an intention to declare a trust in himself. It is not essential, however, that the donor should part with the possession in the cases where he thus creates or declares a trust."

2 Pom. Eq. Jur. (2nd Ed.) Sec. 997.

In Martin v. Funk, 75 N. Y. 134 (1878), the donor deposited $500 of her own money in the Citizen's Savings Bank, receiving a pass book, according to her request, entitled "The Citizens Saving Bank in account with Susan Boone, in trust for Lillie Willard." The intestate retained the book until her death, and the beneficiary was ignorant of the transaction until the death of the donor.

> *Church, C. J.*, in his opinion sustaining the trust after reviewing the English cases, says (*p. 141, et seq.*) "If there is a valid declaration of trust, that is sufficient of itself, I apprehend, to transfer the title * * * * No particular form of words is necessary to constitute a trust, while the act or words relied upon must be unequivocal, implying that the person holds the property as trustee for another.
>
> "Let us now consider the case in hand. In form at least, the title to the money was changed from the intestate individually to her as trustee. She stated to the bank that she desired the money to be thus deposited. It was so done by

her direction, and she took a voucher to herself in trust for the plaintiff. Upon these facts what other intent can be imputed to the intestate than such as her acts and declarations imported, and did they not import a trust? There was no contingency or uncertainty fn the circumstances, and I am unable to see wherein it was incomplete. The money was deposited unqualifiedly and absolutely in trust, and the intestate was the trustee. It would scarcely have been stronger if she had written in the pass book: 'I hereby declare that I have deposited this money for the benefit of the plaintiff, and I hold the same as trustee for her.'

"This would have been a plain declaration of trust, and accompanied as it was with a formal transfer to herself in the capacity of trustee, would have been deemed sufficient under the most rigid rules to be found in any of the authorities. It seems to me that this was the necessary legal intendment of the transaction, and that it was sufficient to pass the title. The retention of the pass book was not necessarily inconsistent with this construction. She must be deemed to have retained it as trustee. The book was not the property, but only the voucher for the property, which after the deposit consisted of the debt against the bank.

"There are many cases where the instrument creating the trust has been retained by the author of it until his death, especially when he made himself the trustee, and yet the trust sustained. *Exton v Scott*, 6 *Sim.* 31; *Fletcher v Fletcher*, 4 *Hare*, 67; *Souverbye v. Arden*, 1 *Johns. Ch.* 240; *Bunn v. Winthrop*, *id*, 329. This circumstance, among others, has been considered upon the question of fntent, but is never deemed decisive against the validity of the trust. Id. See Hill Trustees, *supra*. Some confusion has

> been created by judicial expression, that the author of such a trust must do all in his power to carry out his intention, that the nature of the property will admit of. This general proposition requires some qualification. In this case, the intestate might have notified the objects of her bounty, but this is not regarded as indispensable by any of the authorities; and she might have made the deposits in their name, and delivered to them the books, or delivered to them the money. The rule does not require that the gift shall be made in any particular way, it only requires that enough shall be done to transfer the title to the property. And one of the modes of doing this is by an unequivocal declaration of trust. In *Richardson v. Richardson, supra* "(L. R. 3 Eq. Cas. 684)" the court, in noticing this point said, 'Reliance is often placed on the circumstance that the assignor has done all he can, and that there is nothing remaining for him to do, and it is contended that he must in that case only be taken to have made a complete and effectual assignment. But that is not the sound doctrine on which the case rests; for if there be an actual declaration of trust, although the assignor has not done all that he could do, for example, although he has not given notice to the assignee, yet the interest is held to have effectually passed as between the donor and donee. The difference must be rested simply on this; aye or no, has he constituted himself a trustee?'"

The case at bar differs materially from the instance supposed by the learned Vice-Chancellor of one making a written statement of trust respecting personal property which he retains in his own possession. In that instance there is no declaration of trust. The act is never completed. In our case, by declaration made to the depository of the fund, evidenced by the books of the Bank, as well as by the bank pass book, the trust is completely declared.

Stevenson v. Earl, Distinguished.

The case of *Stevenson v. Earl*, 20 *Dick.*, 721 (*E. & A.* 1903), reversing the Court of Chancery (*Grey, V. C.*) in *P. R. R. Co. v. Earl's Executor*, 18 *Dick.* 634, is not a precedent against upholding this trust for Honora Finerty. It is to be distinguished upon broad and substantial grounds.

In *Stevenson v. Earl*, there was nothing which could be construed as amounting to a declaration of trust. The avowed purpose of the arrangement entered into by the depositor with the depository was to retain in himself the entire beneficial interest in the fund during his life time, and to vest in the wife, who was named as the beneficiary in his application, only the funds which should remain on deposit at his death. There was no *present interest* in the wife. It was clearly a disposition testamentary in character. That it was not a declaration of trust is apparent, and was expressly held in the case. It was sought to sustain the claim of the wife upon the theory of an executed gift. This failed, because of the clear purpose of the husband not to make a present gift, but to vest in his wife only whatever should be to his credit in the fund at the time of his death, to take effect on that event, and thus accomplish a testamentary purpose which the law required to be effectuated in another way. It is settled that courts of equity will not turn an imperfect gift into a trust, to effectuate the intention of the donor. In our case, no gift is claimed. There is no question here of the use of the proper technical words, and an appropriate declaration, to create a present trust. That trust was created by the original deposit, June 29, 1898, $292.00, and the additions to the fund by later deposits made by the intestate in the same account were equivalent to fresh declarations of trust as to each sum deposited.

The creator of the trust here in question retained no "*dominion*" over the *subject matter*,—that is the

equitable estate in the beneficiary, which was thereupon created. This is clearly the meaning of the English equity cases, (*Warriner v. Rogers*, *L. R.* 16 Eq., Cas. 340, and *Richards v. Delbridge*, *L. R.* 18 *Eq. Cas.* 11) which are the basis of the decision of this Court in *Stevenson v. Earl.* In *Warriner v. Rogers*, after using the language quoted in *Stevenson v. Earl*, the Vice-Chancellor quoted from the judgment of Lord Justice Turner in *Milroy v. Lord*, 4 *D. F. & J.*, 264, as follows :

> "I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which according to nature of the property comprised in the settlement was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual ; *and it will be equally effectual if he* transfers the property to a trustee for the purpose of settlement, or *declares that he himself holds it in trust for those purposes ;* and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parole ; but in order to render the settlement binding, one or the other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift."

It will be observed that, under this statement of the law, a declaration that one holds in trust for certain purposes is as effectual as a transfer of property to a third person as trustee, or an actual transfer to the beneficiary himself. After quoting this language, Vice-Chancellor Bacon makes this significant comment, "Nothing can be more clear and distinct than

the exposition of the law contained in the sentences I have read, and to my judgment, nothing more satisfactory, if I were at liberty (which I am not) to pronounce a critical opinion upon it."

So in *Richards against Delbridge, supra,* after quoting with approval the language of Vice-Chancellor Bacon, which is quoted in *Stevenson v. Earl*, the *Master of the Rolls* proceeds as follows:

> "A man may transfer his property without valuable consideration in one or two ways: He may either do such acts as amount in law to a conveyance or assignment of the property and thus completely divest himself of the legal ownership, in which case, the person who by those acts acquires the property takes it beneficially, or on trust, as the case my be; or *the legal owner of the property may* by one or other of the modes recognized as amounting to a valid declaration of trust, *constitute himself a trustee without an actual transfer of the legal title*, and may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true that he need not use the words, 'I declare myself a trustee', but he must do something which is equivalent to it and use expressions which have that meaning, for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning."

It is hence apparent that in the language quoted in *Stevenson v. Earl* the "parting with the interest" referred to and the putting of the property out of one's power, is not meant to require the raising of a trust in *a third person,* or the parting by the settlor with the *physical* control and possession of the property.

In our case, while the intestate retained physical

possession of the book, and while it was within her power, in derogation of the trust, to withdraw funds from the bank, and in one instance she actually did so, this did not take away from the force of her complete declaration, any more than did the retention by the trustee of the subject matter of the trust in the case of *Collins v. Steuart*, 13 *Dick.* 392 (affirmed on appeal, for the reasons stated by the Vice-Chancellor, in *Collins v. Lewis*, 15 *Dick.* 488). In that case, a husband executed a written assignment to his wife of certain industrial stocks therein described, and had his signature witnessed by a third person, the transaction being, as stated to the witness, to save his wife from possible loss from forfeiture for non-payment of a loan, for which he was depositing bonds owned by his wife. Before his death he withdrew certain of the stocks, erasing them from the list, and substituted others in their place. The papers were found on the death of the husband in a tin box, in which were contained securities, some of which belonged to him and some to his wife. The statement of facts seems to negative any inference that the making of the declaration of trust, or its contents, had been made known to the wife during the life of her husband. How could the oral statement to the witness in that case, upon which the court relied to show an intention to raise a present trust, be more effectual for such purpose than the formal declaration of trust in the case at bar, with the use of apt, technical words, evidenced by the pass book and the Bank's books?

So in the case of *Janes v. Falk*, 5 *Dick.* 468, (*E. & A.*, 1892), where it appeared that Craig, executor of Henry Baird, had converted to his own use assets of the estate and then placed an endowment policy of life insurance, issued upon his life, among the papers of the estate in a tin box, and with it put a letter saying that the policy was collateral for the payment of his indebtedness to the estate of Baird, and thereafter, according to his own testimony, did not regard

the policy as his individual policy, but held it in trust for the Baird estate, and so informed those interested in that estate through their representatives and counsel, it was held by this court, *Dixon J.* upon proceedings had against Craig, on a judgment obtained against him, by a receiver appointed in supplemental proceedings, that "these facts form a perfect declara- of trust in favor of the beneficiaries of the Baird estate, making them the equitable owners of the policy for the purpose of reimbursement, and constituting Craig, at the time when his rights are conceded to have passed to the complainant, a mere trustee for those beneficiaries." It is further stated that the principle upon which this conclusion rests is thoroughly settled in equity, and quotation is made from 2 *Pom. Eq. Jur., Sec.* 997. The cases cited in the notes to that work are referred to, and additional English and American cases are cited.

While in *Janes v. Falk*, the fact of the deposit of the policy in trust was communicated to the representatives of the beneficiaries, the court says that many of these cases hold that it is not essential that the memorandum relied on should have been delivered to anyone, as a declaration of trust, or that the *cestui que trust* should have been informed of the trust, the presence or absence of these circumstances being material only in considering whether the trust has been actually declared. The cases cited are stated to demonstrate that upon a declaration of trust the *cestui que trust* acquires an absolute estate or title, not a mere right to ask for a title.

In the case at bar, there was an actual, notorious declaration of the trust, made to the Savings Bank, the depository of the money, and evidenced by the entry upon the Bank's books as well as by the issue of the pass book No. 93249.

These two cases of *Janes v. Falk* and *Collins v. Steuart*, both in this court, we think conclusively settle that the deposit in the case at bar raised *a present*

complete and executed trust, which was effectual both during the lifetime of the intestate, and after her death. How can it be said that the act of the depositor, in our case, was at all equivocal? The learned Vice-Chancellor says that in the *Collins* and *Janes* cases there were unequivocal declarations showing the *intention* of the grantor, or settlor or assignor to transfer his interest. In our case, the transfer was *actually made* by the use of apt and technical words, proper to declare the trust. We have no need to inquire as to the intention. The trust was executed when the account was opened.

It will be observed that in both of these cases in this court, the actual, physical, custody of the property impressed with the trust remained with the settlor, and no suggestion is made that this defeated the trust. To so hold would avoid all declarations of trust as to personalty where the trustee retains the custody of the money, stocks, bonds or other property —a very large class of transactions, in which the trust declared has been upheld without reference to the consideration of *physical possession*. The essential point is always regarded as the parting by the settlor with his *interest*, not his *possession*. *Stevenson v. Earl* is not a precedent against the validity of a trust established as was the trust here in question, nor was it intended so to be.

New York Rule Consistent with Accepted Principles Governing Trusts.

The recent decision of the New York Court of Appeals,

Matter of Totten, 179 *N. Y.*, 112,

is not at all inconsistent with *Stevenson v. Earl, supra*, although so regarded by the learned Vice-Chancellor, who appears to have adopted the view of Mr. Larremore, editor of "The Albany Law Journal," that the New York case is an example of judicial legislation.

He regards a trust revocable at the will of the creator as hardly a trust at all, as a serious anomaly. But the power of revocation as a proper incident to a a voluntary trust has been recognized in this state since

Garnsey v. Munday, 9 *C. E. Gr.* 243 (1873).

This case has been repeatedly followed in our state. The subject is examined more fully later in this brief, but is here referred to because the novelty seems to be in Mr. Larremore's criticism of the ground of the New York decision, rather than in the decision itself. The term "tentative" is there used in defining the status of a Savings Bank trust, prior to the communication of knowledge thereof to beneficiary or the death of the depositor. This means no more than that the trust is subject to the exercise by the donor of his power of revocation, and harmonizes with the English cases and our own decisions hereinafter referred to.

The New York rule was pronounced after elaborate argument by distinguished counsel, and on mature reflection, with the purpose of settling the conflicting decisions in the various appellate divisions of the Supreme Court of that State. The fact that the rule is one of vast public convenience, and will promote the interests of a large class of depositors, ought not, certainly, to be an argument against its acceptance by this court, if not inconsistent with recognized and established principles. We have endeavored to show that the case at bar is not governed by *Stevenson v. Earl*, and unless in conflict with that case, the law as pronounced by the New York Court of Appeals ought to be established by this court.

Knowledge of Trust by Beneficiary Unnecessary.

To the point that it is not necessary that the fact of the declaration should be communicated to the

cestui que trust, or to anyone for her, we cite the following cases, in addition to those above referred to :

Shepherd, Survivor, &c. v. McEvers, et al, 4 *Johns. Ch.*, 136, where *Kent, Ch.*, says, that "though a trust be created for the benefit of a third person without his knowledge at the time, he may afterwards affirm the trust and enforce its execution," citing 3 *Johns. Ch.* 261.

Berley v. *Taylor*, 5 *Hill*, 577–586, where the above stated doctrine as announced by Chancellor Kent is re-iterated.

Church v. Gilman, 15 *Wend.*, 656.
Belden v. Carter, 4 *Day* (*Conn.*) 66.
Wheelwright v. Wheelwright, 2 *Mass.*, 447.

Right of Revocation Not Inconsistent with Declared Trust:

It is also to be observed that the reservation of a right of revocation is not inconsistent with the declaration of trust.

Bispham's Eq. Jur., 6th Ed., Sec. 67, *p.* 111.

In fact, in case of voluntary trusts, the power of revocation ought properly to be reserved for the protection of the grantor.

Garnsey v. Mundy, 9 *C. E. Gr.*, 243, (1873).
Hall v. Otterson, 7 *Dick. Ch.* 522,531 (1894).
White v. White, 15 *Dick. Ch.* 104, 115, (1900).
James v. Aller, 21 *Dick. Ch.* 52, 63, 64, 65, (1904).
Warren v. Pim, 20 *Dick, Ch.* 36, 52, 53, (1903).
Collins, v. Toppin, 20 *Dick. Ch.* 439, 478. (1903).

In *Lines v. Lines*, 142 *Pa. St.* 149, a trust of personalty had been created by delivery of a trust deed and certain stocks, upon trust to collect the income and pay it to the settlor during his life, and on his death to make certain distribution, as provided in the instrument. Certain changes in the disposition of the property were provided for in the event of the death of relatives named, before the settlor. The *settlor reserved the right* to *alter, change, modify* or *revoke* all disposition and direction as to transfer and disposition, made and to be made after his decease. By a second trust deed, he declared trusts in certain other securities, *reserving* in the deed the *power of revocation*, in which case, the trustee was to deliver the property to the settlor *free from the trusts*. The court below, in an elaborate opinion which was affirmed, holds that the reserved right of revocation was not inconsistent with the creation of a valid trust; that if the right of revocation was not exercised during the lifetime of the donor, and according to the terms in which it was reserved, the validity of the trust remained unaffected, as though there had never been a reserved right of revocation. The court above (*Paxton, C. J.*) after quoting with approval the language of the court below, says:

> "There is nothing in this deed to indicate an intention to create a trust to take effect only after the death of the donor. On the contrary, the intention is clear to create a present trust, in favor of the beneficiaries named therein, and to take effect immediately on the execution of the deed. * * * * The transaction was complete, and the donor was absolutely denuded of his property. It is useless to pursue the subject further."

So in *Stone v. Hackett*, 78 *Mass.* (12 *Grey*) 227 (1858), where there had been a voluntary trust of certain shares of stock, upon which blank assignments

were endorsed, to pay the income to the settlor for life, and at his death to transfer to certain charitable objects, with a reservation of the right to modify the uses, or revoke the trust, *Bigelow, J. says*:

> "It was suggested by the learned counsel for the widow that the donor never parted with his power or dominion over the property, because he retained a right to annul or revoke the trust. But this seems to us to be quite immaterial. A power of revocation is perfectly consistent with the creation of a valid trust. It does not in any way affect the legal title to the property. That passes to the donee and remains vested for the purposes of the trust, notwithstanding the existence of the right to revoke it. * * * * Nor are we able to see any force in the suggestion that the trust which the donor created, in some of its features looked to a disposition of the property which was the subject of the gift, after his death. We know of no principle of law which renders such a transfer of property *inter vivos* invalid. The entire *jus disponendi* was in the donor."

The court further says that if the evidence showed an intent to evade the testamentary laws, it might be ground for impeaching the instrument; but no such intention was made manifest.

If such a reservation, expressed in the instrument declaring the trust, does not affect the validity of the settlement then made, how can a single act of the settlor, done after the last deposit had been made in trust, in withdrawing a portion of the fund, as it were, revoking the trust to that extent, operate to extinguish or impair rights created under a prior completed, executed trust?

The question is not raised here of the rights of the respective parties in the $200. withdrawn by the intestate January 10, 1903. We are concerned only

with the amount on deposit at the time of the intestate's death. As to that sum, a complete, executed, trust is established. It is contended that upon settled and universally recognized principles this trust should be upheld.

The decree of the Court of Chancery should be reversed, and a decree made directing payment of the fund to Honora Finerty.

CHARLES L. CARRICK,
Of Counsel with Appellant.

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IN CHANCERY OF NEW JERSEY.

To his Honor WILLIAM J. MAGIE, Chancellor of the State of New Jersey.

Humbly Complaining, showeth unto your Honor, your orator, AUGUST J. NICKLAS, of Jersey City, Hudson County, New Jersey, Administrator of the goods and chattels, rights and credits of ELLEN CUNNINGHAM, late of Jersey City aforesaid, deceased:

1. The said Ellen Cunningham departed this life, at Jersey City, on the Thirteenth day of January, Nineteen Hundred and Four, intestate, and your petitioner was appointed administrator of her estate, on the Twenty-Seventh day of January, Nineteen Hundred and Four, by the Surrogate of the County of Hudson aforesaid, and duly entered upon the duties of his office as such administrator, and is still acting as such.

2. The said Ellen Cunningham left no husband or children her surviving, and her next of kin,—as your orator is informed,—are the following named persons:—

Bridget Parker, of the City of Baltimore, State of Maryland, a sister; John Edward Clark, of the same place; a nephew; Michael Keough, William Keough, Margaret Keough, and Mary Ann Keough, claiming to be nephews and nieces of said intestate; Mrs. Catharine Donnelly Kavanaugh; Mrs. Mary Donnelly Ritgert; James Donnelly, Isabella Donnelly, John Donnelly, Thomas Donnelly, and Vincent Donnelly, all of Baltimore, aforesaid, alleging themselves to be grand-nieces and grand-nephews of said Ellen Cunningham; All of the persons above named are of full age, except Isabella Donnelly, John Donnelly, Thomas Donnelly and Vincent Donnelly, who are infants, and whose father, Peter E. Donnelly, of the City of Baltimore aforesaid, is their guardian, appointed for them by the Orphans' Court of Baltimore, on January Twenty-Third, Nineteen Hundred and Four.

3. The said Bridget Parker, John Edward Clark, Michael Keough, William Keough, Margaret Keough, and Mary Ann Keough, have,—as your orator is informed,—made an assignment, or transferred some interest, if any they have, in the estate of the said Ellen

Cunningham to one George A. Smythe, of the City, County and State of New York. The said Bridget Parker and John Edward Clark subsequently revoked the said assignment made by them to the said George A. Smythe, and gave notice thereof to your orator; but the said George A. Smythe, claims that the said revocation is null and void.

4. As part of the property of the said Ellen Cunningham coming to the hands of your orator, as such administrator, are three (3) pass-books, showing accounts in the Provident Institution for Savings in Jersey City; one, No. 93249, in the name "Ellen Cunningham, Trustee for Honora Finnerty," opened June 29th, 1898, and showing an apparent balance of Fourteen Hundred and Ninety-Two Dollars and Fifty-Two Cents ($1492.52); the second, No. 115348, in the name "Ellen Kelly, Trustee for Eliza Clark," opened January 10th, 1903, and showing an apparent balance of Five Hundred ($500.00) Dollars; the third one, No. 116443, in the name "Ellen Cunningham, Trustee for Mary Clark," opened March 28th, 1903, and showing an apparent balance of Three Hundred and Forty-One Dollars and Fifty-Seven Cents ($341.57).

Your orator is informed and believes, that the said Ellen Cunningham was also known as Ellen Kelly, and used both names. The said Honora Finnerty is in no way related to the said Ellen Cunningham, and resides in Ireland, in the United Kingdom of Great Britain and Ireland.

The Eliza Clark above mentioned was, as your orator is informed, one Elizabeth Clark, who departed this life February Seventh, Eighteen Hundred and Ninety-Six,—or upwards of six years before the said account was opened in the name "Ellen Kelly, Trustee for Eliza Clark,"—above mentioned.

The said Mary Clark was as your orator is informed, a sister of the said Ellen Cunningham, and it is alleged departed this life before the said account was opened in the name "Ellen Cunningham, Trustee for Mary Clark," above mentioned.

5. The persons above named, claiming to be the next of kin, contend that the above mentioned account: "Ellen Cunningham, Trustee for Honora Finnerty" is

in reality a part of the estate of the said Ellen Cunningham, deceased, and that no part thereof is the property of the said Honora Finnerty. Some of the above named persons claiming to be next of kin, contend that the above mentioned account, "Ellen Cunningham, Trustee for Mary Clark," is in reality a part of the estate of the said Ellen Cunningham, deceased, and does not belong to the next of kin of Mary Clark, deceased, and some contend that the said account "Ellen Kelly, Trustee for Eliza Clark," is in reality a part of the estate of said Ellen Cunningham, deceased, and not the property of the next of kin of the said Elizabeth Clark, deceased.

6. Your orator shows that he is utterly unable to determine to whom the said three accounts should be paid, and that it will be unsafe for him to render the pass-books in his possession, or to authorize the payment of the money evidenced by the same, and that the Orphans' Court of the County of Hudson has no authority to determine the questions involved.

Your orator therefore prays that the facts, matters and things therein alleged may be inquired into, the status of the various persons above named in relation to said accounts, and in and to the estate of the said Ellen Cunningham, deceased, determined, and that it may be ascertained by the order of this court who are really entitled at the present time to the said moneys on deposit in said Savings Institution, evidenced by the said three pass-books, and your orator directed to whom and in what manner to pay the same, and that your orator may have such further and other relief in the premises as may be equitable and just.

May it please your Honor, the premises considered, to grant unto your orator, the tSate's writ of subpoena directed to the said: Bridget Parker, John Edward Clark, Michael Keough, William Keough, Margaret Keough, Mary Ann Keough, Mrs. Catharine Donnelly Kavanaugh, Mrs. Catharine Donnelly Ritgert, James Donnelly, Isabella Donnelly, Johi Donnelly, Thomas Donnelly, Guardian of said Isabella Donnelly, John Donnelly, Thomas Donnelly and Vincent Donnelly: George A. Smythe, Honora Finnerty and The Provident Institution for Savings in Jersey City.—therein and there-

by commanding them on a certain day therein to be specified, to be and appear before this Court, and answer the premises (but without oath), and stand to, abide by, and perform the decree of the court.

And your orator will ever pray, &c.

COLLINS & CORBIN,

Solicitors for and of Counsel with Complainant.

JOINT ANSWER OF MICHAEL KEOUGH, WILLIAM KEOUGH, MARGARET KEOUGH AND MARY ANN KEOUGH.

The joint answer of Michael Keough, William Keough, Margaret Keough and Mary Ann Keough to the bill of complaint of the above named complainant, or to so much thereof as they are advised is necessary or material that they should make answer unto:

These defendants admit the death of the decedent Ellen Cunningham, otherwise known as Ellen Kelly, and the appointment and qualification of the complainant as her administrator, as set forth in the bill of complaint. They further admit that the decedent left no husband or children her surviving, but allege the fact to be that they, the said, Michael Keough, William Keough, Margaret Keough and Mary Ann Keough, who are nephews and nieces of the said decedent, are her sole next of kin.

These defendants admit that three pass-books, showing accounts in the Provident Institution for Savings in Jersey City, as set forth in the bill of complaint, came to the hands of the complainant as administrator of said decedent, and they are informed and believe, and admit the fact to be, that account No. 93249, in said Savings Institution in the name of Ellen Cunningham, Trustee for Honora Finnerty, is not part of the estate of said decedent, but rightfully belongs to the said Honora Finnerty, for whom the said decedent held the same in trust. They are informed and believe, however, that the other accounts in said Savings Institution, which are referred to in the bill of complaint, were opened by the decedent for her own convenience, in order that her separate accounts in various Savings

Banks should not exceed the limit for small accounts, on which the highest rate of interest is paid, and that no trust was ever declared, or intended, by said decedent in opening said accounts, nor were the account books ever delivered to the persons named as beneficiaries or either of them, nor was the fact that said accounts had been opened ever made known to them or either of them. These defendants are also informed and believe that both Eliza Clark and Mary Clark, who are named as the respective beneficiaries in said accounts, had died before the accounts were opened.

These defendants, therefore, believe and aver that two accounts referred to in the bill of complaint opened by the decedent, one as Trustee for Eliza Clark, and the other as Trustee for Mary Clark, are in reality part of the estate of the decedent, and should be paid to the complainant, as administrator, for distribution at the proper time, to the next of kin of the said decedent. These defendants join in the prayer of the complainant that the right of the respective parties to said funds may be inquired into and adjudicated by this court, and that the two accounts, above referred to, if the same shall be found of right to belong to the estate of said decedent, may be paid to the complainant as administrator, and be by him distributed to the next of kin of said decedent, in accordance with law.

FRANK W. HASTINGS, JR.,
Sol'r and counsel with defendants Michael Keough, William Keough, Margaret Keough and Mary Ann Keough.

ANSWER OF HONORA FINNERTY.

The answer of Honora Finnerty to the bill of complaint of the above named complainant, or to so much thereof as she is advised it is necessary or material that she should make answer unto:

She admits the death of Ellen Cunningham (otherwise known as Ellen Kelly) as set forth in the bill of complaint, and the appointment and qualification of the complainant as her administrator. She is informed and believes that the decedent left no husband or child-

ren her surviving, but she has no knowledge as to her next of kin.

This defendant admits that a pass-book number 93249, in account with the Provident Institution for Savings in Jersey City, in the name of Ellen Cunningham, Trustee for Honora Finnerty, as stated in the bill of complaint came to the hands of the complainant, and this defendant avers the fact to be that the money so on deposit with the Provident Institution for Savings in Jersey City is the property of this defendant, and the trust therein declared is for the use and benefit of this defendant.

This defendant further shows that she is upwards of fifty-eight years of age and resides at Carbone, New Inn Post-office, Woodlawn, County Galway, Ireland, and was in the City of New York in the United States of America from on or about the twentieth day of May, eighteen hundred and sixty-five until on or about the nineteenth day of September eighteen hundred and seventy-six, and during that time was well and intimately acquainted with the decedent Ellen Kelly, widow of John Kelly, deceased, whose maiden name was Ellen Cunningham. This defendant returned to Ireland in September 1876 and since that time has lived with her brother Patrick, at Carbone, aforesaid. While in America, this defendant was accustomed to give her savings accumulated in her work as domestic servant, to said decedent, who deposited them in a Jersey City savings bank, where she had accounts opened for herself, and the bank book evidencing such deposits was always left by this defendant in her possession. Before this defendant returned to Ireland in September, eighteen hundred and seventy-six, she went with the decedent to the Bank where the money was deposited, and assigned all her money over to the decedent, to manage it for this defendant, knowing her to be honest and faithful in the trust. Occasionally after this defendant's return to Ireland, the decedent sent small remittances to this defendant, as part of the interest which had accumulated on the fund. This defendant knew of the deposit by the decedent of the funds so left with her in September, eighteen hundred and seventy-six, and of their accumulation, and alleges the

fact to be that the fund so on deposit in the Provident Institution for Savings in trust for this defendant is the money so left with the decedent, with interest which has accumulated since that time, most of which has not been withdrawn.

This defendant denies that the money so deposited in the Provident Institution for Savings in the name of Ellen Cunningham, Trustee for this defendant, is, or that any portion thereof is, part of the estate of said decedent, and joins in the prayer of the complainant that the respective rights of the complainant and of this defendant to said fund may be inquired into and adjudicated and that the said fund may be ordered to be paid over to this defendant, in case her title thereto shall be established to the satisfaction of this court.

CARRICK & WORTENDYKE.

Sol'rs and of counsel with Honora Finnerty, defendant.

Answer of Bridget Parker and others - See page 40

Answer and Cross-bill of The Provident Institution for Savings in Jersey City.

The answer of the defendant, The Provident Institution for Savings in Jersey City, to the bill of complaint of the above named complainant.

This defendant answering says:

1. The defendant admits the statements contained in paragraph 1 of the said bill.

2. This defendant has no knowledge whatever respecting the facts stated in paragraph 2 of the said bill.

3. This defendant has no knowledge whatever respecting the facts stated in paragraph 3 of the said bill.

4. This defendant admits that three accounts were opened with this defendant, bearing the numbers and opened in the names and at the dates as stated in paragraph 4 of the said bill. Said accounts were as follows: the balances here stated being now due this thirtieth day of January, Nineteen hundred and five.

No. 93, 249 in the name of "Ellen Cunningham, Trustee for Honora Finnerty," opened June 29, 1898, showing a balance now due of $1,547.68.

No. 115,348 in the name of "Ellen Kelly, Trustee for

Eliza Clark'' opened January 10, 1903—showing a balance now due of $11.

No. 116,443 in the name of ''Ellen Cunningham, Trustee for Mary Clark'' opened March 28, 1903—showing a balance now due of $6.94.

This defendant admits that Ellen Cunningham and ''Ellen Kelly,'' mentioned in that paragraph of the said bill, as opening the said accounts, were one and the same person.

This defendant does not know the residence of Honora Finnerty, nor whether she was related to Ellen Cunningham.

This defendant has no knowledge of any of the facts stated in that paragraph respecting Eliza Clark or Mary Clark, except that the names of those two persons appear upon the said accounts in the manner above stated.

5. Defendant admits that Honora Finnerty claims title to the money appearing to be due upon the account No. 93,249, as mentioned in paragraph 5 of the said bill, and that the next of kin of Ellen Cunningham, or some of them, claim that all of the money due upon that account belongs to the complainant, as administrator of Ellen Cunningham.

Defendant has no knowledge respecting any of the other claims mentioned in that paragraph of the bill.

6. Defendant says that it paid to complainant, as such administrator, upon account No. 115,348, Ten hundred and forty dollars and thirty cents in two payments, on April 21st and July 1st, 1904, respectively; and on the first day of July, 1904, it paid to him, as such administrator, on account No. 116,443, the sum of Three hundred and forty-one dollars and fifty-seven cents, he then presenting to this defendant the pass books or deposit books for the said two accounts. The balances on said two accounts as stated above in paragraph 4, remain after making the said payments.

This defendant by way of cross-bill against the complainant and the defendant, Honora Finnerty, says that:

7. That it is a corporation, chartered by special law, approved February 27th, 1839, entitled ''An Act to Incorporate The Provident Institution for Savings in

Jersey City," for the purpose of conducting the business of a Savings Bank, which it has ever since conducted. All of said accounts were opened with it in the regular course of its said business.

Demand has been made upon it by the said complainant to pay to him, as administrator as aforesaid, the balance due upon account No. 93,249, an dthe defendant, Honora Finnerty, has notified this defendant not to make payment to complainant of the balance or any part thereof due upon that account, and has notified this defendant that she, the said Honora, is the owner of the moneys due upon that account, and has demanded payment thereof and has threatened to bring suit against this defendant to recover the amount due upon that account. This defendant does not know and has no means of ascertaining to which of the said foregoing claimants the money due upon that account belongs, and it cannot safely make payment to either of said claimants. This defendant has no interest in the said account or in the money due thereon, except as a depositary, and it is ready to pay the money due thereon to whomsoever may be entitled to it, and is ready to pay the said money into this court to be disposed of as this court may direct.

And this defendant says that it does not collude with any of the parties above mentioned, who make said claims, and that this defendant has not been indemnified by the said parties, or either of them, respecting the said matter.

8. In consideration whereof, this defendant having no remedy in the courts of law, respectfully prays:

(1). That the said complainant, August J. Nicklas, Administrator of Ellen Cunningham, deceased, and the defendant, Honora Finnerty, may answer the part of this answer exhibited as a cross bill.

(2) That they may interplead and settle their rights to the moneys due upon the said account No. 93,249 and that this defendant may be at liberty to pay the same into court.

(3) That upon paying the said money into court and procuring the said complainant and defendant to interplead, that this defendant may be decreed to be discharged from all liability in respect of the said ac-

count and the money due thereon, and may be allowed its costs in this suit.

HARTSHORNE, INSLEY & LEAKE,
Sol'rs. and Counsel of Def't., The Provident Institution for Savings in Jersey City.

REPLICATION TO ANSWER, AND ANSWER BY WAY OF CROSS-BILL, OF THE DEFENDANT, THE PROVIDENT INSTITUTION FOR SAVINGS IN JERSEY CITY.

The complainant joins issue on so much of the answer of the defendant, The Provident Institution for Savings in Jersey City, as is not in the nature of a cross-bill; and, as to the part of said answer which is in the nature of a cross-bill, he says:

He admits that it is a Corporation conducting the business of a Savings Bank, as therein alleged.

He admits that he has made demand, as Administrator, upon the said defendant, to pay to him the balance due upon account No. 93,249,—as in said cross-bill alleged,—but has no knowledge as to whether Honora Finnerty, therein mentioned, has given the notice to said defendant, or threatened to bring suit against it, as alleged.

He admits that said defendant has no interest in said account, or the money due thereon, except as a depositary.

COLLINS & CORBIN,
Solicitors of Complainant.

ANSWER OF HONORA FINERTY TO CROSS-BILL OF THE PROVIDENT INSTITUTION FOR SAVINGS IN JERSEY CITY.

Honora Finerty, one of the defendants in the above entitled cause answering the cross-bill exhibited by the Provident Institution for Savings in Jersey City against the complainant and this defendant says:

She admits the incorporation of the Provident Institution for Savings, as stated in defendant's cross-

bill, and that the accounts referred to therein were opened with it in the regular course of its business.

She admits that she has notified said defendant not to pay the balance due upon said account Number 93,-249 to the complainant, that she is the owner of the moneys due upon said account, and has demanded payment thereof to her and threatened to bring suit unless said amount were paid to her. She admits that said defendant has no interest in the said account except as a depositary, and that it has not been idemnified by the parties respecting said matter.

She concedes the right of the said defendant to pay the money represented by said account into court and to be discharged thereupon from all further liability in respect to said account and the money due thereon, and asserts against the complainant her right to the money represented by said accounts upon the ground set forth by her in her answer to the bill of complaint heretofore filed in said cause.

CARRICK & WORTENDYKE,
Sol'rs and of Counsel with Honora Finerty.

CHANCERY CHAMBERS, Jersey City, N. J.

May, 24, 1905.

Hon. Lindley M. Garrison, Vice-Chancellor.

The Vice Chancellor:—The paper title is in Honora Finnerty—the account apparently on its face is hers—and those who dispute that should assume the burden of disproving that which, without challenge, would stand. This results in the affirmative being taken by the defendants, represented by Mr. Stevenson.

Mr. Carrick states that the allegations of the answer of Honora Finnerty that the money deposited in the account in dispute was hers, was made by her solicitors under a misapprehension of the facts, and is not sustained by the defendant's deposition.

Mr. STEVENSON. I am about to offer in evidence copies of the records of the Provident Institution for Savings. Judge Carrick, I understand, is willing to stipulate as to these copies in such a manner as will

save the Bank the burden of bringing the books and the Clerks here.

By agreement of counsel, the papers now about to be offered in evidence are offered as if they were the original books of the Bank, and no objection is made as to their competency.

Mr. Stevenson produces and offers in evidence the following records:

Record of account No. 21647 in the Provident Institution for Savings in Jersey City, standing in the name of "Nora Finerty," which account purports to have been opened on July 8, 1869, and to have been closed on August 5, 1893. (Marked Exhibit 1 of Parker et als.)

Record of account No. 93249 in the Provident Institution for Savings in Jersey City, in the name of "Ellen Cunningham, Trustee for Honorah Finerty," being the account here in litigation, purporting to have been opened June 29, 1898, and to be still outstanding. (Marked Exhibit 2 of Parker et als.)

Record of Account No. 116,443 in the Provident Institution for Savings in Jersey City, in the name of "Ellen Cunningham, Trustee for Mary Clark," purporting to have been opened March 28, 1903, and to be still outstanding. (Marked Exhibit 3 of Parker, et als).

Record of Account No. 115,348 in the Provident Institution for Savings in Jersey City, in the name of "Ellen Kelly, Trustee for Eliza Clark," purporting to have been opened January 10, 1903, and to be still outstanding. (Marked Exhibit 4 of Parker, et als). It is stipulated on the record that Ellen Kelly, the depositor in this account, and Ellen Cunningham, the decedent, of whom the complainant is administrator, are identical.

Record of Account No. 14,902 in the Provident Institution for Savings in Jersey City, in the name of Ellen Cunningham, purporting to have been opened January 5, 1866, and to have been closed by payment to the administrator of Mrs. Kelly January 25, 1904. (Marked Exhibit 5 of Parker, et als).

Record of Account No. 115,349 in the Provident Institution for Savings in Jersey City, in the name of "Ellen Kelly, Trustee for Bridget Parker," purporting to have been opened January 10, 1903, and to have been closed January 30. Counsel stipulates that this ac-

count was closed by payment to George A. Smythe as attorney in fact for Bridget Parker. (Marked Exhibit 6 of Parker, et als).

Record of Account No. 115,347 in the Provident Institution for Savings in Jersey City, in the name of "Ellen Kelly, Trustee for John Clark," purporting to have been opened January 16, 1903, and to have been ~~Kelly, or Ellen Cunningham, in the name of Ellen Kelly~~ closed on January 30, 1904, by payment to George A. Smyth as attorney for John E. Clark, or John Clark. (Marked Exhibit 7 of Parker, et als).

It is stipulated by counsel actually apearing in the case, in behalf of their clients, that the papers already marked in evidence comprise a complete record of the Provident Institution for Savings of all accounts in the said bank outstanding at the date of the death of Ellen Kelly, or Ellen Cunningham, in the name of Ellen Kelly or Ellen Cunningham, or in the name of Ellen Kelly or Ellen Cunningham in trust for any party or parties; that these records also are a complete record of any accounts in the Provident Institution for Savings bearing the name of "Nora Finerty" or "Honora Finerty," or that were ever in the said bank standing in the name of "Nora Finerty" or "Honora Finerty," either individually, or coupled with the name of "Ellen Kelly" or "Ellen Cunningham."

Mr. Stevenson offers in evidence a paper endorsed in this case, and having the File Mark "March 6th, 1905," and in red ink the figures 26-517. There being no objection, the paper is admitted (being the deposition of Honora Finerty) the Court stating that it need not be marked as an exhibit because it is already file-marked by the Clerk.

It is stipulated by counsel that the Account No. 21,647, in the name of "Nora Finerty," was originally opened in the name of "Nora Finerty;" that some time after the account had been opened it was so arranged between the bank and Nora Finerty and Mrs. Ellen Kelly that Mrs. Kelly might also draw from this account.

Pass-Book No. 93,249, in the name of "Ellen Cunningham, Trustee for Honora Finerty" is offered in evidence by Mr. Stevenson, admitted without objection, and marked Exhibit 8 of Parker et als.

It is stipulated that the Pass Book No. 93,249, heretofore offered in evidence and marked Exhibit 8 of Parker et als, was among the effects of the deceased, and ever since her death has been in the hands of her administrator, Mr. August J. Nicklas, and is produced out of his custody in court today.

The deposition of Honora Finerty is read by Mr. Stevenson.

DEPOSITION OF HONORA FINNERTY.

Taken de bene esse on Friday, February 14th, 1905, at eleven o'clock in the forenoon, at the office of John Burgess, Esquire, the Commissioner specially appointed by the Court of Chancery for that purpose, at his office at Athlone, in the County of Westmeath, Ireland, pursuant to notice, in the presence of M. Hayden, Esquire, Solicitor for said Honora Finnerty, and P. S. Golding, Esquire, Solicitor for Bridget Parker and John Edward Clarke, of Baltimore, U. S. A.

INTERROGATORY NO. 1.

Tell us your name, where you reside. When did you go to America and when and how you first met Ellen Cunningham.

A. I am Honora Finnerty. I live at Corbane in the County of Galway with my brother Pat Finnerty a farmer. I went to America in the month of May, 1865. I first met Ellen Cunningham, otherwise Ellen Kelly in the month of November or December, 1865. I met her in Jersey City. She was living at the time with (I think) a Mr. Williamson. I met her often and knew her intimately. I left Jersey City and went into New York to service before the Christmas of 1865. Some time afterwards, over two years, Ellen Cunningham also left Jersey City and came into New York to service. In the year 1868 she asked me to come and live with her. She sent a messenger for me. I went and lived with her, as a fellow servant in the same house. I lived with her as a fellow servant in several houses for seven or eight or nine years together. We were six years and

nine months together in the house of a Mrs. Gillespie at No. 157 West 53rd Street.

To. Mr. A. Hayden Solicitor.

No. 2.

Q. What used you do with your savings?

A. I handed them to Ellen Cunningham to invest. I believe she invested them in a bank in Washington Street Jersey City. I believe it was a savings bank. I think she got a separate Bank book for me.

No. 3.

Q. Do you remember a particular item of seventy-one dollars?

A. I remember giving her a sum which would be about that amount. It was five or six months wages.

No. 4.

Q. From time to time after that did you give her money to invest?

A. Yes.

No. 5.

Q. Did the dividends remain on in the bank?

A. Yes.

No. 6.

Q. Before you returned to Ireland did you go with Ellen Cunningham to the New Jersey Bank?

A. I did.

No. 7.

Tell us in your own words what happened and what was done?

A. I went to the bank in New Jersey with Ellen Cunningham. Mr. Kingsland was the manager. I told him I was coming to Ireland. I asked Mr. Kingsland to give me an acknowledgment so that if anything happened Ellen Cunningham there I could draw the money. He said no; that I should either take it or give her full control. I said I agreed to give her full control. I left the bank book with her. She always kept it. I had perfect confidence in her honesty. I knew her to be a woman who would make the best use of the money for me. I knew by my dealings with her that she used to get the most interest on the money that she possibly could.

No. 8.

When did you leave for Ireland?

A. I left on the 9th September 1876.

No. 9.

Did Ellen Cunningham remit you the dividends?

A. Part of them. She did not send me any for a year and a half or so after I came home. In the beginning she used to send me £6 half yearly in July and December.

No. 10.

Was the amount subsequently reduced?

A. Yes it was reduced to £4 half yearly.

No. 11.

Did you write and ask her the cause of the reduced amount?

A. No she told me first. She sent me £4 and said the interest was coming down. I asked her how much the interest was and she wrote to me saying it was up and down. I think it was after that I wrote to her asking her how we stood. Her reply was that I was not to be uneasy, there was more there than I left. I got several letters from her. Sometimes she might write four times and othertimes twice a year.

No. 12.

Up to what year did she keep up the correspondence with you?

A. I could not tell exactly, but I think up to nine or ten years ago. She wrote to me the Christmas after sending me the two sums of 600 dollars. She told me in that letter not to write to her again until I heard from her as she was changing her address and leaving New Jersey. I did not hear from her again until the month of April, 1902.

No. 13.

In any of her letters to you did she speak of coming home to Ireland?

A. Yes she mentioned in her letter of April 1902 that the reason she did not write before was that she wanted to surprise me that she was going to come home and she and I could live together and be happy in our old age.

No. 14.

Did you receive the two letters produced and marked "A" and "B" respectively and dated respectively 14th July 1889 and 8th December 1892?

A. Yes I received them in the ordinary course of post; they are letters from Ellen Cunningham they are in her handwriting with which I am familiar; there was a remittance of £4 with each letter.
No. 15.

Were you as a matter of fact expecting that she would come home?

A. Yes I was expecting her home every year. When I was in America she frequently spoke of her intention of returning to Ireland.
No. 16.

Will you explain why you did not press her for a statement of your account?

A. I was so confident in her I was as sure that what did not come was as safe as if it was in my pocket. I would not hurt her feelings to ask her. She was a very reserved sort of a person. In addition to that I was expecting her back to live with me.
No. 17.

Were you and your brother in fairly comfortable circumstances?

A. Yes we were and are. After my brother bought the farm he has now I wrote to her, this was about two years ago. In this letter I asked her over as I had a more comfortable home for her than I previously had.
No. 18.

Did you owe any money to Ellen Cunningham?

A. No. I got a letter from her—next April three years ago—telling me that she had put 1,000 dollars in my name in a bank in New York 22 years ago and that it now amounted to over 2,000 dollars and she asked for an acknowledgment to enable her to draw it. And she wrote that if the acknowledgment was not sufficient, I would have to make an affidavit and send a power of attorney.
No. 19.

Did you reply to that letter?

A. I wrote her a letter telling her to draw out the money. She acknowledged my letter and said she thought it would be all right.
No. 20.

Did you ever receive the 19 dollars 55 cents mentioned in the account produced and numbered 21647.

A. I received portions of the several sums in the columns headed "drafts" but not the entire of any of them. I received no portion of the $19.55 or of the 17 dollars 10 cents. When I left America I think I had about 1200 dollars in the bank. I think it was a little less than 1,200.

Cross-interrogatories delivered by Patrick S. Golding, Esquire, Solicitor.

No. 1.

When did you begin to deposit money with Ellen Cunningham?

A. In the year 1869.

No. 2.

Q. What were your wages at that time?

A. About an average of £3 per month.

No. 3.

Did you deposit all your wages?

A. No. I lodged about three-fourths.

No. 4.

When did you first begin to get interest?

A. Either in 1877 or 1878.

No. 5.

Did you get interest regularly from then until 1893?

A. Yes, regularly.

No. 6.

In 1893 did you write for your money?

A. No I never wrote for it.

No. 7.

Did you in May 1893 get a drafe for £121.18?

A. I think it was in July I got it, but I think it was only £121. I am not sure however.

No. 8.

Did you in August of the same year get £121?

A. No, I got £120.

No. 9.

Was that the principal you deposited in New Jersey.

A. Yes it was. I did not ask her for the money. She wrote when sending it saying there was a panic on

the banks, and that she couldn't sleep day or night until she drew the money. I don't know what money she sent me. Whether it was my own or hers.

No. 10.

After getting the £120 did you get any further sum?

A. Yes. I got from her before she died. The letter produced dated December 28th 1893 is in my hand writing to the best of my belief. It is marked "C."

No. 11.

Did you write in that letter as follows "Dear Ellen "you sed that you were sorry that your letter was an "empty one well dear I could not have my loaf and eat "it. I got it before and I expect no more but to hear "from you."

A. The words must be in my writing. As far as I can see it is my writing.

No. 12.

Did you believe then that you had drawn all the money that was coming to you?

A. I don't know whether I did or not.

No. 13.

Did you lodge any money with Ellen Cunningham after December 28th 1893?

A. No, I did not.

No. 14.

Did you lodge any money with Ellen Cunningham at any time after leaving America?

A. No I did not.

No. 15.

How then do you claim that the 1492 dollars in the Provident Institution for Savings in Jersey City is your property?

A. I don't claim that it is all my property, but that she mixed it up with mine, and I am under the impression that she left it there solely for my benefit.

No. 16.

Are you aware that that account was opened in the year 1898?

A. No.

No. 17.

Are you aware that Ellen Cunningham left an ac-

count in the Emigrant Industrial Savings Bank of New York in the name of Nora Finnerty or Ellen Cunningham?

A. She told me that she put in 1000 dollars 22 years before that time and that it had accumulated to 2,000 and odd dollars. She did not tell me the name of the bank beyond saying it was a New York bank. She said it was in my name and she wanted authority from me to draw it.

No. 18.

Is the letter and envelope produced and marked "D" in your hand writing.

A. Yes it is. The letter marked "C" is also in my writing. I am not sure if the letter marked E and dated June 9th 193 is in my writing. The letter marked "F" and dated July 9-193 is in my handwriting.

No. 19.

Am I right in saying that after your mother dying you neither wrote to nor heard from Ellen Cunningham for about 9 years.

A. Yes. When the correspondence opened again in 1902 it was opened by Ellen Cunningham. The two letters from Ellen Cunningham marked "A" and "B" are the only letters from her now in my possession.

NORA FINNERTY.
HONORA FINERTY.

EXHIBIT A.

Jersey City, July 17, 1889.

My Dear Nora I received your kind and wellcom letter and was happy to see by it that you were so well thank the lord for it that is more than I can say for I am far off being well You wanted to know wheather I was living out or not or who I was stoping with when you think that I am not comfortable or happy you think right for I am neather and if you were hear you would feel the same this country is not what it used to be you think you are very bad there but you would be worse hear I cannot tell you half what I would like

to tell you say your Mother wishes to see me she does not wish to see more than I wish to see her and I hope the lord will Spare the boath of us to meet I have an object in view and if I had that accomplished She would not belong without seeing me I may never accomplish it but if I do she wont be long without seeing me for I would give the world to be some place that I would see some one that I could talk to I am not living out nor was not in a long time they want nothing hear now but strong young people they want no delicate worn out ones at all there is too many strong young ones to take

ones I was to Kates the other day She Said She had a letter from you I told you in my letter that frank died Morristown thats what troubles her most but I hope his poor soul is all wright I got too papers to scend you the time of the ingouration and left them one side and never thought of them till they were too old but Kate told me she Scent Some and that day she was scending a bout the Johnstown disaster the wether is fearful hot hear this is a roasting night You said you would tell me about the marriages dont for get it I dont see any of the crop towners at all no more than you thats in Ireland so I can not tell you any thing abought them. Nora you would not know me seen me now I am gray toothless and as then as ever you were so now I think that is a purty good discription of me now.

in this you will find four pounds give my live to patt and your mother m

not forgetting nelly I hope

she is well

hem

I remain yours truly Ellen Cunng

Direct as be fore

318 first St.

Jersey City.

write by the return of post as I will be uneasy till hear from you.

EXHIBIT B.

1892

Jersey City, Dec 8

My dear Nora I received your letter and was sorry to hear that It lay so long in the office or they geting too rich or too Poor that they donot attend to business. it was funney about that letter any how first it took a month to write then when I went to Chamber St the place was closed it was a saturday and they close at 12 so that kepted it till the next saturday but I hope this wont have such a hard time of it nora I belive you make the people there belive that I am A million heir or that it would take a donkey to draw my money but you know you wor always very big feeling no mater how poor you wore but that is wright keep to that and they will think a great deal about me when I get there for there is nothing thought of you hear nor there if you are poor and sure I dont care but between hopping and trotting I intend to get there if the lord leaves me health and strenth no mather how long it will be you you might see me when you would least expect for I will never tell you I want to see you just as you are for if you knew I was comeing you would be makeing a great fus and bothering the folks and putting them to a great deal of trouble done think by this that you are going to see me in a minute for I must get a set of teeth and a silk dress yet and more I intend to work for them if the lord leaves me health and if not you wont see me at all so dont be alarmed every time the door opens that it is me the wether is a kind of nice hear yet we had too falls of snow one on the 9 and one on the 29 in regard to myself I am feeling a kind of well but nothing extra but I am thankful for that a self I hope ye are all well and in good health in Clooding the baby you never said in your letter that you got the money or the papers but I suppose if you dident I would hear from you in this you will find the same I hope it will get there all wright hoping it will find ye all in good health wishing ye all amerry Christemas and a happy new year I remain as usual your true friend untill death Ellen Cunningham.

EXHIBIT C.

Corbane, Dec. 28, 1893

My Dear Ellen I received your letter Christmas day. I was very glad to hear from you. I was to write to you before this only all the trouble & grief I had. I had a black sad christmas. Dear Ellen Ellen poor Mother is no more. She died 11 inst. Just two weeks before Christmas day. You can think how I feel at present. She died of a few days ilneys I never thought she had death untill the last day. O Ellen how I feel after her the poor creature we are verry lonesome after her. My heart is black and sore after her. She was the best Mother ever a daughter had but the will of God cannot be helped. I now she lived to an old age but if she was as old more we are verry sorry for her. Dear E I am very sorry to hear that your mony is held in the bank. I hope you will son have it all rite again. You say you are going to baltimore as soon as you get this letter you will let me now is your sister living there or did you hear from her or any of the friends or are you going to live there or will you come back to Jersey again. I hope when you get to baltimore you will write to me I hope Ellen you will write often for I am so lonesome I cannot write any more to you untill I hear from again I hope when you have your money in a safe investment that you will come and see me. I do not think I will live long and I would like to see you before I die so I hope you wont disappoint me as long as you wont come to Ireland to live I hope you will come and pay us a visit next summer. We will all be so glad to see you and I will make you as comfortable as we can. Dear Dear Ellen I wish you were here now for you would take the heavy load of my hart I fear you will not be able to read this letter for the tears are blinding me and my hart is sore. Dear Ellen I am very thankfull to you for writing to me for no one knows whether I have the money at home or abroad I never told anyone out of doors about it. I see by your letter that you were put out for saying that you ware married & that you did not want me to go to New York. Well Ellen you ought to now me better than that that was all a joke I did not mean one word of it for I did

it all for fun. You say I wrote to you last Chms & accused you of seeing peaple from my place & that you denied it Now Ellen you must make a mistake in reading my letter for my sight is verry bad lately and the letters are not correct & you or me must have maid a great mistake for I could for I could near sware I never wrote the like for the people from my place game me dam little trouble to tell you the truth. Now pleas write to me and explain to me what I sed or who is the people I ment. Dear Ellen you say that my friends used all kinds of language to you about my money. I suppose my money gave them more trouble than my body for the never asked after it & it maid very little difference to them what you done with it and it ought to make lys to you what the sed to you abot it. My oppinion of you was what you proved it to be that is a true cincere friend so do not mind what the say Dear Ellen you sed I could not have my loaf and eat it. It got it before and I expect no more but to hear from you & I hope wherever you are you wont forget always to write to me. Patt & Catherine is will & joins with me in wishing you a happy New Year. My own health is very poor at present I fear you wont be able to read this scribbling for the tears are blinding me good dear Ellen from your affectionate broken harted friend

NORA FINERTY.

EXHIBIT D.

do not forget)
writing as soon)
as you can.)

Cosbane, April 9, '93.

Dear Ellen. I write you these few lines hoping they will find you in good health as this leaves me in at present thank god Dear Elen Mother is very delicate at present & delicate she will be while she lives she is very old now & we cannot expect she will live much longer by nature & if she was as old more I I would not like to part with her I dont know I will live here after her I will be so lonesome

Dear Ellen my visit to you is postboned for a future day that if it ever comes now for we are all getten old to travel If it goes much further we are doomed never to see each other for indeed I do believe you never will come to Ireland & I wont to be able to go to America dear knows Ellen your lot in this world and mine was a poor one in in one sense of the word but it cannot be helped now Dear Ellen when you get this letter you will send me some money for I like to have things for my mother in her last days she has a good son willing to get her every thing she wants but Even so I like to spend some on her for I always dit spend my own on her cince I came hom & will while lives she to my great grief Ellen that wont be long but I cannot expect she will live allways welcome be to the will of god but I will be very lonesome after her I will be all alone in the world then like yourself for every one of them has their own while I can sit & talk to the wall If you ware near to me to condole with I think it would do me great good we have not eaven that much comfort. We have a young heiress since the 2nd. of February called Mary Michael is a very good child running about verry buisy. I will conclude by sending my love to you No one knows I am writing to you I sed nothg about it to any one in the house good by from your sinsere friend

Nora Finerty) send me 5 pounds as soon as you can.

Dear Ellen be sure of sending me some money in your next letter and dont delay it for I am verry much in need of it at present and Don't think I will see the last of it spent as little as it is good bye.

EXHIBIT E.

Corbane, June 9, 193

Dear Ellen I received your letter & money last night I was getting verry uneasy because you sed it would be on its way when I got the other letter. I was going to write after a few days onely I got it. My mother is a little better thanks we thought for two weeks every day would be her last. Deal Ellen we have a verry fine spring & summer. The crops would be better if

we had some rain. I will say no more untill I get the other letter then I will send you a long one good by for the present the all join with me in sending our love to you.

EXHIBIT F.

Corbane July 9, 1903.

Dear Ellen I have been waiting verry impatiently in the last three weeks for the letter & money you sed I would have shortly after the first draft you told me to watch the post. I have gone or sent there every day cince and got no letter It is now 4 weeks & three days cince I got your first letter and money and never got one cince. I feel very uneasey about it When you get this letter for god sak answer it rite away and let me now why you did not rite I hope you are in good health above all

Dear Ellen I hope I will have yourself with the money I wont say much untill I hear what you are going to do I hope you will tell me wheather you will come to Ireland or not If you do not come I will go see you when get the money I will leave it here in the bank where it will earn one pound to the hundred so you see how well I can live on the interest that is all I can make of it. I will say no more at present. I remain your true friend untill death do us part

Nora Finerty

To Ellen Cunningham

The Rev Father Head is no more he died the 5th instant & was berried the 8 Yesterday in the chapel we had three nights wake we had high mas yesterday There was 25 prieses an the Bishop the doctor sed he died of hart disease he was onely one day sick.

I hear Marget Corleys is given up for death in New York. Good by rite by the return of post.

CONCLUSIONS OF VICE CHANCELLOR.

Heard on bill, answers, cross-bill, replications and proofs in open court.

Collins & Corbin, for complainant.

Elmer H. Geran (with whom was Henry M. Stevenson of the New York bar). for Bridget Parker, et al.

Carrick & Wortendyke for Honora Finerty.

Hartshorne, Insley & Leake for The Provident Institution for Savings in Jersey City.

Garrison, V. C.

Ellen Cunningham, who married a man named Kelly, and thereafter seems to have used indifferently either her maiden or her married name, died on the 13th of January, 1904.

Her administrator, the complainant in this suit, found among her effects three passbooks evidencing deposits in the Provident Institution for Savings in Jersey City. One of these passbooks was numbered 115,-348, and was in the name of "Ellen Kelly, Trustees for Eliza Clark." Another passbook was numbered 116,-443, in the name of "Ellen Cunningham, Trustee for Mary Clark." The third passbook was numbered 93,-249, in the name of "Ellen Cunningham, Trustee for Honora Finerty."

The administrator filed this bill for the purpose of having the controversy over the ownership of the choses in action evidenced by the books determined.

The Provident Institution for Savings filed an answer and cross-bill, and in the latter tendered the money into Court for distribution under the order of the Court.

Issue was joined thereon, and the case is now before the court practically as one of interpleader between the various claimants.

The next of kin of Ellen Cunningham, or Kelly, are Bridget Parker, her sister; John Edward Clark, her nephew, Michael, William, Margaret and Mary Ann Keough, claiming to be her nephews and nieces; and Mrs. Catharine Donnelly, James, Isabella, John, Thomas, and Vincent Donnelly, and Mary Donnelly Ritgert, claiming to be her grand nieces and grand nephews.

Since it appeared at the trial that Eliza Clark, who was named as cestui que trust of the account No. 115,-348, was a relative of Ellen Kelly, and had died some six and a half years prior to the opening of the account, no contest was made with respect to her rights

therein, and a decree will therefore be made that this account is collectible by the administrator of Ellen Kelly, otherwise Cunningham.

A similar finding, for similar reasons, is made with respect to the account No. 116,443. The Mary Clark named as cestui que trust in this account was also a relative of Ellen Kelly, and had died many years prior to the opening of this account.

This leaves as the sole chose in action in controversy in this suit that evidenced by Pass book No. 93,-249, in the name of "Ellen Cunningham, Trustee for Honora Finerty."

This account was opened on the 29th, of June 1898, by the deposit of $292. Small deposits were thereafter made, and semi-annual calculations of interest were added, so that on the 8th of January, 1903, the deposits and interest amounted to $1,638.98. Ellen Cunningham, upon that date, withdrew $200, leaving a balance of $1,438.98, to which semi-annual additions of interest were added, so that at the date of the filing of the bill there was in this account a balance of $1,492.52.

Ellen Cunningham and Honora Finerty were Irish women and were each domestic servants. They were friends and intimately acquainted with each other. In 1869 Honora Finerty, through the procurement of Ellen Cunningham, started a bank account with the Provident Institution for Savings, and deposited money in it until she went back to Ireland in 1876. This account stood in her own name, and after her return to Ireland in 1876 she made no further deposits, nor were any other deposits made in this account. At that time there was some $1,200 to her credit, and she empowered Ellen Cunningham to draw from this account. At her request Ellen Cunningham drew the semi-annual interest paid by the Bank on this account and forwarded the same to her in Ireland.

Subsequently Ellen Cunningham, at the request of Honora Finerty, or with her consent, withdrew the entire balance remaining due Honora Finerty in this account, and transmitted the same to her in Ireland.

The account in controversy is not shown to have any connection whatever with the account of Honora Finerty just mentioned. Honora Finerty had no knowl-

edge whatever of this account until after the death of Ellen Cunningham, and the latter never made any declaration to anyone concerning the same, and the case is bare of any testimony or evidence respecting it save that evidenced by the passbook itself. Ellen Cunningham kept this passbook in her own possession, and it was found among her effects at her death, and upon one occasion she made a draft upon this account for her own purposes.

Since there was no contractual relation between these women, the account in controversy has no consideration to support it, and must be viewed as a pure gratuity.

The allegations in the answer of Honora Finerty which would lead to a conclusion that there was consideration to support this account are not supported by any evidence whatever and must have been made by counsel under a misapprehension of fact.

This case presents the bald, bare question of the right to a chose in action arising from a deposit of the money of a depositor in a savings bank in the depositor's own name in trust for another.

So far as my own research has resulted, and so far as that of counsel has furnished me with data, this is the first case presenting this unqualified question in this State.

The right of the person named as **cestui que trust** to have the fund on deposit must rest upon one of two theories, i. e., that it was a gift **inter vivos** by the depositor to her, or that it was a valid trust now enforcealbe by her. In either event the intention must be clearly proven, and such intention must be shown to have been carried into effect by the donor or settlor.

The nature and amount of proof required, and the essentials to be proven, are similar with respect to each of the two necessary contentions. The form of the transfer and the time of enjoyment by the beneficiary may be different with respect to a trust, but there must be the same definiteness and clearness of proof of the completed execution of intention in the one case as in the other.

It is clear that the depositor in this case did not intend to make a gift **inter vivos** to Honora Finerty of

the money deposited. If she had intended to do this she would either have deposited the money in the name of Honora Finerty so that the latter could have drawn it at will; or, if she preferred to put it in the form of a trust, she would have vested Honora Finerty with power to draw immediately, or under conditions which she might specify, from the trust funds.

Since, by the retention of the passbook, and the failure to disclose to Honora Finerty the existence of this account, and the failure to vest Honora Finerty with the power to draw upon it, the depositor retained in her own power complete dominion over the chose in action, it must be held that there is not sufficient evidence of a gift **inter vivos.**

"In order to legalize such a gift there must be not only a donative intention, but also in conjunction with it a 'complete stripping of the donor of all dominion or control' over the thing given."

STEVENSON v. Earl, 65 N. J. Eq. 721, at p. 725 (Ct. of Errors, 1903).

The depositor therefore must be held to have intended some other thing than a gift **inter vivos.**

It is, in my judgment, equally clear that she did not intend to create a trust operative **inter vivos.**

The Court of Errors, in the case last cited, quotes the following language with approval:

"The one thing necessary to give validity to a dec-
"laration of trust—the indispensable thing—I take to
"be that the donor or grantor, or whatever he may be
"called, should have absolutely parted with that in-
"terest which had been his up to the time of the dec-
"laration; should have effectually changed his right
"in that respect, and put the property out of his power,
"at least in the way of interest."

The depositor, in the case in hand, did not so circumstance herself. By retaining the passbook, and refraining from disclosing to any one her intention with respect to the money deposited, she retained complete dominion and complete interest.

While the courts, in the many cases which have dealt with the intention with respect to gifts and trusts,

have refused to lay down any arbitrary, inflexible rule, they substantially agree that something more is necessary with respect to deposits in banks than the mere opening of the account in the name of the depositor in trust for another. This may have been done for any one of a number of reasons, each without donative purpose. There must be some unequivocal act or declaration clearly showing that an absolute gift or trust was intended.

I do not enter upon an extended review of the cases in other jurisdictions, because I think the principles to be applied have been settled in this jurisdiction; and if there is conflict elsewhere, no benefit results from citing the conflicting decisions. The cases will be found in those cited and in the notes referred to.

It may be, in this case, that the depositor merely used Honora Finerty's name as she did the names of certain of her dead relatives, because it was a convenient designation of an account. For all that appears, she may, for any one of numerous reasons, have desired to have separate accounts, and knew of no other way to designate them, or preferred this way of designating them. Unless she made some unequivocal expression of intention she failed to effectually declare the trust, and hence failed to show that a trust was intended. By retaining complete dominion over the chose herself and drawing from the account, by refraining from making any declaration respecting it or giving any notice concerning it, she certainly showed that she did not intend that the trust (if she intended a trust at all) should be operative during her lifetime.

The case is almost if not quite indistinguishable from the familiar one of a person making a written statement of trust with respect to personal property which he retains in his own possession. In every such case the written statement is held ineffectual to establish an enforceable trust, and some other and further act or declaration is required.

The most rational inference to be drawn from the circumstances, and that which I conclude to have been the fact, is that Ellen Cunningham desired to deposit her own moneys in this account in such a way that she would always be able to use them at her will during

her life, but that at her death, if anything remained in the account, it should go to her friend, Honora Finerty.

The Court of Appeals of New York reached the conclusion that this was the proper inference to be drawn under similar circumstances.

"When a deposit is made in trust and the depositor dies intestate, leaving it undisturbed, in the absence of other evidence, the presumption seems to arise that a trust was intended in order to avoid the trouble of making a will."

Matter of Totten, 179, N. Y. 112, at p. 124.

In this case the Court of Appeals of New York reached the conclusion that the trust which it found to exist was valid, and that the beneficiary thereof could recover the balance of the money on deposit at the death of the depositor. Our Court of Appeals, however, has reached an opposite conclusion upon this subject, and has held that a disposition of property not to take effect until the death of the owner is testamentary in character, and that the Statute of Wills requires it to be made in a particular way, and that it will not be effectual if not made in that way.

STEVENSON v. EARL, 65 N. J. Eq., 721 (Ct. of Er., 1903).

The New York Court of Appeals, in the Totten Case, formulated its doctrine in the following language (at page 125);

"A deposit by one person of his own money, in his "own name as trustee for another, standing alone, does "not establish an irrevocale trust during the lifetime of "the depositor. It is a tentative trust merely, revok- "able at will, until the depositor dies or completes the "gift in his lifetime by some unequivocal act or dec- "laration, such as delivery of the passbook, or notice "to the beneficiary. In case the depositor dies before "the beneficiary without revocation, or some decisive act "or declaration of disaffirmance, the presumption "arises that an absolute trust was created as to the "balance on hand at the death of the depositor."

This decision has been much commented upon by legal writers, and is well described by Wilbur Larremore in an article on "Judicial Legislation in New York" in the Yale Law Journal, Vol. 14, No. 6. p. 315. He there says, speaking with respect to this case, as follows:

"This decision has been widely commented upon "by legal journals, and so far as the writer is aware, "has been unanimously disapproved. It is inconsis- "tent with earlier authorities in the State of New "York. It introduces a serious anomaly into the law "of trusts; indeed a trust that is revocable at the will "of the creator can hardly be said to be a trust at all. "It impugns the policy of the statute of wills, by per- "mitting a disposition of property to take effect only "after death, without following the testamentary re- "quirements. On the other hand, as a piece of con- "structive legislation the decision could hardly be too "highly praised. It effectuates a custom which has "grown up among the humbler classes of people who, "in placing their money on deposit in trust for other "persons, often intend to retain the right to use it, "principle as well as interest, during life, but that what- "ever remains at the time of death shall go to the "**cestuis que trust.** . Under the law as it stood the es- "tates of depositors, who as trustees had drawn money "from accounts, would be liable to refund the same "to the **cestuis que trust.** The validation of the busi- "ness custom in question seems so unobjectionable, in- "deed so desirable, that the writer has on various oc- "casions advocated the enactment of a statute on just "the lines laid down in the Matter of Totten. He did "not believe that a court would venture upon such a "radical innovation and it is difficult to justify it as an "exercise of judicial power."

In our own state there is no direct authority with respect to savings bank deposits of the nature of the one dealt with in the one in hand; but the general principles to be applied are, I think, clear, and will be found stated in Cook v. Lum, 55 N. J. Law, 375, 376 (Sup. Ct. 1895), and in Stevenson v. Earl, **supra.**

In Dunn, v. Houghton, 51 Atl. Rep., 71 (Stevenson, V. C. 1902), the previous cases are cited and com-

mented upon. While that part of the decision in Dunn v. Houghton which holds that the statute of Wills does not prevent a trust operative only at the death of the settlor may be in conflict with the principle subsequently laid down in the case of Stevenson v. Earl (and I do not stop to consider or determine this) much that is said, and the review of the New Jersey cases therein contained, sustains the principles which I deem applicable in the case in hand.

Counsel for Honora Finerty placed great, if not entire reliance, upon the cases of Janes v. Falk, 50 N. J. Eq., 468 (Ct. of Er. 1892), and Collins v. Stewart, 58 N. J. Eq., 392 (Ct. of Chan. 1899; affirmed on the opinion below, sub. Nom. Collins v. Lewis, 60 N. J. Eq., 488). From these cases counsel deduced the principle that a declaration of trust such as that evidenced by this bank book was all sufficient. I do not think that this is a warrantable deduction from the reasoning of the learned judges writing the opinions in those two cases. In each of them the court found, as a matter of fact, that there were unequivocal declarations of intention by the grantor, or settlor, or assignor, sufficient to show a purpose to transfer his interest in the subject-matter.

In the Collins Case the oral testimony is cited on page 395 which led the Court to find that it was intended that the declaration of trust was to become operative from the time of its execution; and in the Janes Case, in addition to the letter stating his purpose, there was positive evidence that he had informed the beneficiaries of what he had done, and the court held "these purposes, acts and declarations are not "equivocal."

I therefore conclude, in the case in hand, that there is no sufficient evidence of the intention of Ellen Cunningham that the money which she deposited in the bank in her own name in trust for Honora Finerty should be operative as an immediate gift **inter vivos**, or as a trust **inter vivos**; and I further hold that if her intention was to retain complete dominion and control over the chose during her lifetime, and that it should pass to Honora Finerty at her death, such purpose was not effectuated in the only way in which it can be done

under the laws of this State, because it was not done in accordance with the provision of the statute of Wills.

I will advise a decree that the sum of money in controversy belongs to the administrator of Ellen Cunningham, deceased.

FINAL DECREE.

This cause coming on regularly to be heard in the presence of Charles L. Carrick, Esq., of counsel with the defendant, Honora Finnerty, and of Elmer H. Geran, Esq., counsel for the defendants, Bridget Parker, John E. Clark, Catharine B. Kavanaugh, Mary E. Ritgert, James Donnelly, and the defendants Isabella Donnelly, John Donnelly, Thomas Donnelly and Vincent Donnelly, infants under the age of 21 years, by their guardian Peter E. Donnelly, and the pleadings and proofs having been read, and the arguments of the respective counsel having been heard and considered, and the Court having duly considered the said pleadings, proofs and arguments, and it appearing that Ellen Cunningham, who married a man named Kelly, and was thereafter known both as Ellen Cunningham and Ellen Kelly, died on January 13th, 1904, and that thereafter the complainant, August J. Nicklas, was appointed administrator of her estate by the Surrogate of the County of Hudson, and that the said deceased left, among her effects, three pass books, evidencing deposits in the Provident Institution for Savings of New Jersey, one numbered 115,348, in the name of "Ellen Kelly, Trustee for Eliza Clark," another numbered 116,443, in the name of "Ellen Cunningham, Trustee for Mary Clark," another numbered 93,249, in the name of "Ellen Cunningham, Trustee for Honora Finnerty," and the Provident Institution for Savings having filed an answer in the nature of a cross bill, by which the rights of the various parties interested were submitted to the determination of this Court, and it appearing that the said Mary Clark and Eliza Clark above mentioned, died prior to the opening of the said respective accounts in their names, and the said Honora Finnerty claiming the said account evidenced by the pass book numbered 93,249, in the name of "Ellen Kelly, Trustee for Hon-

ora Finnerty,'' which, at the date of filing the bill herein, contained a balance of $1,492.52, or thereabouts, her claim to the said account being contested by the said defendants above named, represented by the said Elmer H. Geran, on the ground that the same belonged to the estate of the said Ellen Cunningham, or Ellen Kelley, and it appearing that the said accounts and the moneys deposited therein, and each of them, belong to the estate of the said Ellen Cunningham, otherwise known as Ellen Kelly:

IT IS on this Eighth day of July, One Thousand Nine Hundred and Five, by the Honorable William J. Magie, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, that the accounts in the Provident Institution for Savings in New Jersey, evidenced by the pass book numbered 115,348, in the name of ''Ellen Kelly, Trustee for Eliza Clark,'' and number 116,443, in name of ''Ellen Cunningham, Trustee for Mary Clark,'' and number 93,249 in name of ''Ellen Cunningham, Trustee for Honora Finnerty,'' and each of them, belong to the estate of the said Ellen Cunningham, otherwise known as Ellen Kelly, and the Provident Institution for Savings is hereby directed and ordered to pay the said accounts, and each of them. to the administrator of the said estate.

And that the defendant, the Provident Institution for Savings, be allowed a counsel fee of FORTY DOLLARS, and its costs to be taxed and paid out of said funds, upon its cross bill (in its nature an interpleader.)

Respectfully Adused,

LINDLEY M. GARRISON, V. C.

W. J. MAGIE, C.

We consent to the form of the foregoing decree.

HARTSHORNE, INSLEY & LEAKE,

Sol'rs of Provident Institution of Savings of Jersey City.

Correct as to form under conclusions filed.

CARRICK & WORTENDYKE,

Sol'rs of Def't Finnerty.

NOTICE OF APPEAL.

The defendant Honora Finnerty hereby appeals from so much of the final decree made by this court in the above entitled matter, as finds that Account Number 93,249 in the Provident Institution for Savings in Jersey City, in the name of "Ellen Cunningham Trustee for Honora Finnerty" belongs to the Estate of the said Ellen Cunningham, otherwise known as Ellen Kelly and as directs and orders the Provident Institution for Savings to pay said account to the Administrator of the estate, to the Court of Errors and Appeals in the last resort in all causes.

CARRICK & WORTENDYKE,

Solicitors and of counsel with Defendant Honora Finnerty.

DATED August 12, 1905.

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

CHARLES L. CARRICK,

Of counsel with Defendant Honora Finnerty.

NEW JERSEY COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES.

Between—

August J. Nicklas, Administrator of Ellen Cunningham, deceased,

Complainant,
Respondent,

and

Bridget Parker, John E. Clark, Catharine B. Kavanaugh, Mary E. Ritgert, and James Donnelly and Isabella Donnelly, John Donnelly, Thomas Donnelly and Vincent Donnelly, infants, by their Guardian Peter E. Donnelly,

Defendants,
Respondents.

and

Honora Finnerty,

Defendant,
Appellant.

ON APPEAL. PETITION OF APPEAL OF HONORA FINNERTY.

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

The petition of Honora Finnerty, the appellant in the above stated cause, respectfully shows that your petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor, William J. Magie, Chancellor of New Jersey, bearing date of the eighth day of July, in the year of our Lord one thousand nine hundred and five, wherein the said August J. Nicklas, Administrator of Ellen Cunningham, deceased, was complainant, and the said Bridget Parker, John E. Clark, Catharine B. Kavanaugh, Mary E. Ritgert, and James Donnelly, and Isabella Donnelly, John Donnelly, Thomas Donnelly and Vincent Donnelly, infants, by their guardian Peter E. Donnelly, and your petitioner Honora Finnerty were defendants, in this respect, to wit, that the decree adjudges that the account in the Provident Institution for Savings in New Jersey evidenced by Pass Book No. 93,249, in the name of "Ellen Cunningham, Trustee for Honora Finnerty" belongs to the estate of the said Ellen Cunningham, otherwise known as Ellen Kelly, and directs and orders the Provident Institution for Savings to pay the said account to the administrator of said estate. And your petitioner humbly appeals from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, in that the said decree should have adjudged that said account belonged to your petitioner, and should have directed and ordered the said Provident Institution for Savings to pay the said account to your petitioner.

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

CARRICK & WORTENDYKE,

Sol'rs and of counsel with Appellant.

ANSWER TO PETITION OF APPEAL.

The Answer of the Above Named Respondents to the Petition of Appeal of the Above Named Appellant:

These Respondents, not acknowledging all or any of the matters which in the said Petition of Appeals are contained to be true, for answer hereto, nevertheless, say and admit that a Decree was, on the Eighth day of January in the year Nineteen Hundred and Five, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said Petition, as is therein stated; but as to the substance and form thereof these Respondents pray to refer thereto, when the same shall be produced. And these Respondents are advised, and believe, that the said Decree is agreeable to equity, and they **pray** that the same may be affirmed, with costs to be adjudged to these respondents.

CROUSE & PERKINS,

Solicitors for and of Counsel with Respondents.

Answer of Bridget Parker and others.

The joint and several answer of the defendants Bridget Parker, John E. Clark, Catherine D. Kavanaugh, Mary D. Ritgert and James Donnelly and the defendants Isabella Donnelly, John Donnelly, Thomas Donnelly and Vincent Donnelly, infants under the age of twenty-one years, by their guardian Peter E. Donnelly to the Bill of Complaint herein of August J. Nicklas, administrator of Ellen Cunningham, complainant.

These defendants severally answering, say:

1. They admit each allegation in the paragraph of said bill of complaint numbered "1."

2. They deny that Michael Keough, William Keough, Margaret Keough and Mary Ann Keough, or any of them, are the next of kin of said Ellen Cunningham or Ellen Kelly, and these defendants admit each and every other allegation in the paragraph of said bill of complaint numbered "2."

3. They admit that said Bridget Parker and John E. Clark executed certain papers purporting to transfer some interest in the estate of Ellen Cunningham to George A. Smythe, which they have since revoked, and that they gave notice of said revocation to said Smythe and they deny that said George A. Smythe claims that the said revocation is null and void; they have no knowledge or information sufficient to form a belief as to any other of the allegations in the paragraph of said bill of complaint numbered "3" and therefore deny the same.

4. They admit each and every allegation in the paragraph of said bill of complaint numbered "4" except that Honora Finnerty resides in Ireland, in the United Kingdom of Great Britain and Ireland, and these defendants have no knowledge or information sufficient to form a belief as to the said allegation last above referred to and therefore deny the same.

5. They admit each and every allegation in the

paragraphs of said bill of complaint numbered "5" and "6."

These defendants therefore join with the complainant in the prayer for relief contained in his said bill of complaint.

ELMER H. GERAN,
Solicitor for above named
Defendants.

EXHIBIT 2.—PARKER ET ALS.

No. 93249.

Ellen Cunningham Trustee for Honora Finnerty.

Date.	Deposits.	Balance.	Drafts.
1898.			
June 29	$292.		
1899.			
Jan. 1	(Int.) 5.84		
" 7	83.		
July 1	(Int.) 7.60		
Sept. 26	65.		
1900.			
Jan. 1	(Int.) 8.41		
June 15	100.		
July 1	(Int.) 9.22		
Oct. 3	50.		
1901.			
Jan. 1	(Int.) 11.92		
June 22	230.		
July 1	(Int.) 12.64		
Sept. 23	125.		
1902			
Jan. 1	(Int.) 18.75		
March 27	182.		
July 1	(Int.) 21.64		
Oct. 1	350.		
1903			
Jan. 1	(Int.) 25.96		
" 8	40.	1,638.98	
" 10		1,438.98	200
July 1	(Int.) 26.57		
1904			
Jan. 1	(Int.) 26.97		
July 1	(Int.) 27.38	1,519.90	

EXHIBIT 2.—PARKER ET ALS.

No. 21647.

Nora Finerty.

Date.	Deposits.	Balance.	Drafts.
1869.			
July 8	$71.		
1870.			
Jan. 1	(Int.) 2.13		
July 1	(Int.) 2.19		
" 12	25.		
1871.			
Jan. 1	(Int.) 2.62		
July 1	(Int.) 3.06		
" 27	95.		
1872.			
Jan. 1	(Int.) 4.60		
" 19	150.		
July 1	(Int.) 10.65		
" 9	50.		
Sept. 6	40.		
1873.			
Jan. 1	(Int.) 13.08		
" 8	50.		
Mch. 28	23.		
July 1	(Int.) 15.91		
" 18	53.		
Aug. 30	50.		
1874.			
Jan. 1	(Int.) 19.08		
" 1	(Int.) 8.28		
" 21	65.		
July 1	(Int.) 22.59		
" 16	60.		
Sept. 2	40.		
1875.			
Jan. 1	(Int.) 25.68		
" 14	60.		
July 1	(Int.) 28.83		
1876.			
Jan. 1	(Int.) 29.70		
July 1	(Int.) 30.60		
Aug. 26	100.		

Date.	Deposits.	Balance.	Drafts.
1877.			
Jan. 1	(Int.) 33.03		
July 1	(Int.) 35.52	1,219.55	
Aug. 27		1,200.	19.55
1878.			
Jan. 1	(Int.) 36.	1,236.	
Feb. 26		1,200.	36.
July 1	(Int.) 30.	1,230.	
1879.			
Jan. 1	(Int.) 30.75	1,260.75	
July 1	(Int.) 31.50	1,292.25	
" 23		1,282.	10.25
Aug. 7		1,260.	22.
Sept. 5		1,249.	11.
1880.			
Jan. 1	(Int.) 31.22	1,280.22	
" 27		1,249.	31.22
July 1	(Int.) 29.98	1,278.98	
" 26		1,250.	28.98
1881.			
Jan. 1	(Int.) 30.	1,280.	
" 7		1,265.	15.
July 1	(Int.) 30.30	1,295.30	
" 27		1,250.	45.30
1882.			
Jan. 1	(Int.) 25.	1,275.	
" 4		1,260.	15.
Apr. 4		1,235.	25.
July 1	(Int.) 24.70	1,259.70	
" 20		1,235.	24.70
1883.			
Jan. 1	(Int.) 24.70	1,259.70	
" 4		1,234.70	25.
July 1	(Int.) 24.68	1,259.38	
" 18		1,235.	24.38
1884.			
Jan. 21	(Int.) 24.70	1,259.70	
" 22		1,235.	24.70
July 1	(Int.) 24.70	1,259.70	
Oct. 6		1,235.	24.70
1885.			
Jan. 1	(Int.) 24.70	1,259.70	
" 22		1,235.	24.70
July 1	(Int.) 24.70		
Sep. 24			24.70

Date.	Deposits.	Balance.	Drafts.
1886.			
Jan. 1	(Int.) 24.70		
" 23			24.70
July 1	(Int.) 24.70		
" 29			24.70
1887.			
Jan. 1	(Int.) 24.70		
" 22			24.70
July 1	(Int.) 24.70		
" 29			24.70
1888.			
Jan. 1	(Int.) 24.70		
Mch. 2			24.70
July 1	(Int.) 24.70		
Aug. 3			24.70
1889.			
Jan. 1	(Int.) 24.70		
Mch. 28			24.70
July 1	(Int.) 24.70		
" 20			24.70
1890.			
Jan. 1	(Int.) 23.52		
Feb. 13			23.52
July 1	(Int.) 23.52		
" 24			23.52
1891.			
Jan. 1	(Int.) 23.52		
Mch. 24			23.52
July 1	(Int.) 23.52		
Aug. 5			23.52
1892.			
Jan. 1	(Int.) 23.52		
Feb. 17			23.52
July 1	(Int.) 23.52		
Aug. 30			23.52
1893.			
Jan. 1	(Int.) 23.52		
Mch. 25		1,235.	23.52
May 4		1,205.	30.
" 20		605.	600.
July 1	(Int.) 12.10	617.10	
" 1		17.10	600.
Aug. 5			17.10