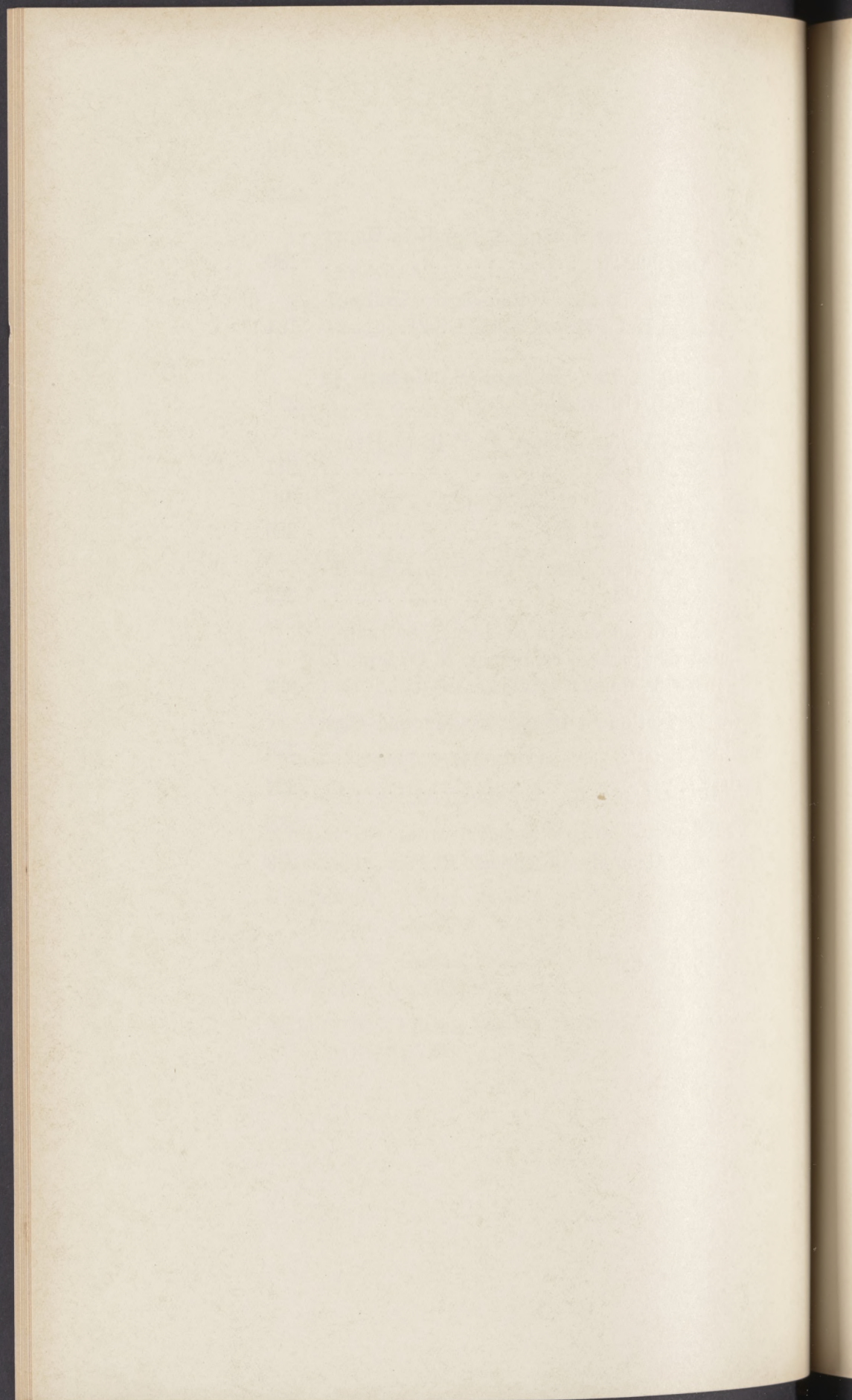


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SUMMONS.

(Filed July 31, 1931.)

*The State of New Jersey to Chemical Bank and
Trust Company, administrator cum testamento
annexo of the Estate of Mary A. Ott, Deceased:* 10

You are summoned to answer the annexed complaint of Walter A. Baude, in
(Seal) an action at law in the Supreme Court.
And take notice that unless you file your answer to the said complaint with the Clerk of the Supreme Court, at Trenton, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 20

Witness HONORABLE WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this thirty-first day of July, nineteen hundred and thirty-one.

FRED L. BLOODGOOD,
Clerk.

H. WALTER GILL,
Attorney.

COMPLAINT.

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

10

WALTER A. BAUDE,

Plaintiff,

v.

CHEMICAL BANK AND TRUST
COMPANY, Administrator*Cum Testamento An-*
nexo of the Estate of

MARY A. OTT, Deceased,

20

Defendant.

Action at Law.
Complaint.

Plaintiff, Walter A. Baude, a resident of the City
of Cincinnati, Ohio, says that:

1. On the 4th day of March, 1921, plaintiff was
and since that date down to the present time has
been the owner of the following bonds and certifi-
30 cates of stock, and has been entitled to the posses-
sion thereof:

Allied Packers, Inc., 6% Convertible Bonds
Nos. 10167, 10168, 10169, 10170, 10171, 10172,
10173, 10174, 10175 and 10176, each for the prin-

Complaint

cipal sum of \$1000.00, making a total of \$10,000.00 in principal of these bonds;

Toledo Traction, Light & Power Co., 7% Bonds Nos. M49, M50, M51, M52 and M53, each for the principal sum of \$1000.00, making a total of \$5000.00 in principal of these bonds;

Louisville Railway Co. 6% Bonds Nos. 11118 and 11119, each for the principal sum of \$1000.00, making a total of \$2000.00 in principal of these bonds; 10

100 shares of Preferred Stock of the Standard Sanitary Manufacturing Co., represented by Certificate No. C-2145 for 30 shares, Certificate No. C-2080 for 30 shares and Certificate No. C-2150 for 40 shares. This stock was subsequently exchanged for 100 shares of the Preferred Stock of the American Radiator and Standard Sanitary Corporation. 20

2. That being the owner and in possession of said bonds and stock on and prior to March 4, 1921, he did on said March 4, 1921, at Atlantic City, in the County of Atlantic and State of New Jersey, deposit and leave in the custody of one, Mary A. Ott, said bonds and the coupons thereunto belonging, and certificates of stock, for safe keeping, to be held in the custody of the said Mary A. Ott, and to be redelivered to the said Walter A. Baude upon demand 30 made by him. Said plaintiff at no time parted with, or transferred the title of said bonds, coupons and stock to the said Mary A. Baude, but title thereto at all times remained with, and is still vested in this plaintiff.

Complaint

3. That said Mary A. Ott, being in possession of said bonds and certificates of stock, so as aforesaid the property of this plaintiff, departed this life on or about the twenty-third day of June, 1930, leaving a last will and testament with several codicils thereto, wherein and whereby she appointed her son, Henry L. Ott, executor and trustee.

10

4. Said last will and testament and codicils were duly admitted to probate by the Orphans' Court of the County of Atlantic and State of New Jersey, on or about the 29th day of September, 1930.

5. Said Henry L. Ott renounced his appointment as executor and the Chemical Bank and Trust Company, a corporation of the State of New York, the defendant herein, was by an order of the Orphans' Court of the County of Atlantic and State of New Jersey, dated the 29th day of September, 1930, appointed administrator *cum testamento annexo* in the place and stead of the said Henry L. Ott, and was duly qualified and took upon itself the burden of administering said estate.

6. On or about the 6th day of November, 1930, plaintiff filed with the defendant, a proof of claim and demand for the return to him of said bonds and the interest coupons belonging thereto from March 4, 1921, to date of demand and the certificates of stock, which said claim and demand was duly verified, a copy whereof is hereunto annexed and made a part hereof, marked "Exhibit A." On or about the 25th of March, 1931, plaintiff filed a second

Complaint

proof of claim with defendant for said bonds, interest, coupons and certificates of stock, together with a demand for the value thereof if defendant could not for any reason deliver the bonds, coupons and certificates of stock, a copy of which proof of claim and demand is annexed hereto and made a part hereof, marked "Exhibit B."

10

7. Said defendant returned to this plaintiff said certificates of stock in compliance with his demand, but neglected and refused to return to this plaintiff said bonds and the interest coupons belonging thereto from March 4, 1921, to date.

8. Said bonds and coupons belonging thereto from March 4, 1921, are of the value of \$30,000.00.

9. Plaintiff has demanded of defendant, as heretofore stated that it deliver said bonds and coupons thereto belonging to this plaintiff, yet defendant well knowing that said bonds and coupons belonging thereto are the property of the plaintiff, and contriving and fraudulently intending to deprive plaintiff of said bonds and coupons belonging thereto, hath refused and doth still wholly refuse to deliver and has not yet delivered to plaintiff said bonds and coupons thereto belonging.

20
30

10. Said defendant on or about the 25th of March, 1931, at Atlantic City, County of Atlantic and State of New Jersey disposed of said bonds, and converted the same to its own use to the damage of the plaintiff in the sum of \$30,000.00.

Complaint

Wherefore, the plaintiff demands as damages from the said defendant the sum of \$30,000.00, together with interest from the day and date of conversion by said defendant and all costs and disbursements of this suit.

H. WALTER GILL,
Attorney of Plaintiff.

10

EXHIBIT A.

STATE OF OHIO }
HAMILTON COUNTY } ss.

WALTER BAUDE, being first duly sworn, deposes and says that on March 4th, 1921, he delivered to Mary A. Ott, Haddon Hall, Atlantic City, New Jersey, to be held for him the following property:

20 “Allied Packers Inc. Bonds Nos. 10167, 10168, 10169, 10170, 10171, 10172, 10173, 10174, 10175, 10176, each for One Thousand (\$1000) Dollars;
 “Bonds of Toledo Traction, Light and Power Company, Nos. M49, M50, M51, M52, M53, each for one thousand (\$1000) Dollars;
30 “Bonds of the Louisville Railway Company, Nos. 11118, 11119, each for One Thousand (\$1000.) Dollars;
 “Certificate of preferred stock of the Standard Sanitary Manufacturing Company, No. C-2145 for thirty (30) shares, C-2080 for thirty (30) shares and C-2150 for forty (40) shares;

Complaint

That said certificate of stock NY-242 for One Hundred (100) shares of the preferred stock of the Standard Sanitary Manufacturing Company was exchanged for One Hundred (100) Shares of the preferred stock of the American Radiator and Standard Sanitary Corporation;

That to the best of affiant's knowledge said certificate of stock and said bonds were in the possession of Mary A. Ott at the time of her death; 10

Affiant further says that said stock certificate is issued in his name and that the above described bonds and said stock certificate and the shares represented thereby are his property and accordingly he hereby files claim therefore and demands the delivery thereof to him.

(signed) Walter A. Baude.

Sworn to and subscribed before me this 6th day of November, 1930. 20

(signed) Alfred T. Geisler
Notary Public in and for
Hamilton County, Ohio.

EXHIBIT B.

30

STATE OF OHIO }
HAMILTON COUNTY } ss.

Walter A. Baude, being first duly sworn, deposes and says that he has heretofore filed with the Chemi-

cal Bank and Trust Company, Administrator C. T. A of the Estate of Mary A. Ott, Deceased, being administered in the Surrogate's Court of Atlantic County, New Jersey, said estate being estate No. 11411 of the Surrogate's docket of Atlantic County, New Jersey; said claim being in the words and figures as follows:

10 "STATE OF OHIO }
 HAMILTON COUNTY } ss.

"Walter Baude, being first duly sworn, deposes and says that on March 4th, 1921, he delivered to Mary A. Ott, Haddon Hall, Atlantic City, New Jersey, to be held for him the following property:

20 "Allied Packers Inc., Bonds Nos. 10167, 10168, 10169, 10170, 10171, 10172, 10173, 10174, 10175, 10176, each for One thousand (\$1000) Dollars;

"Bonds of Toledo Traction, Light and Power Company, Nos. M. 49, M50, M51, M52, M53, each for One Thousand (\$1000) Dollars;

"Bonds of the Louisville Railway Company, Nos. 11118, 11119, each for One Thousand (\$1000) Dollars;

30 "Certificate of preferred stock of the Standard Sanitary Manufacturing Company, No. C-2145 for thirty (30) shares, C-2080 for thirty (30) shares and C-2150 for forty (40) shares;

"That said Certificate of Stock NY-242 for One Hundred (100) shares of the preferred stock of the Standard Sanitary Manufacturing Company was exchanged for one hundred (100)

Complaint

shares of the preferred stock of the American Radiator and Standard Sanitary Corporation.

"That to the best of affiant's knowledge said certificate of stock and said bonds were in the possession of Mary A. Ott at the time of her death;

"Affiant further says that said stock certificate is issued in his name, and that the above 10 described bonds and said stock certificate and the shares represented thereby are his property and accordingly he hereby files claim therefore and demands the delivery thereof to him.

(signed) Walter A. Baude.

"Sworn to and subscribed before me this 6th day of November, 1930.

(signed) Alfred T. Geisler

Notary Public in and for
Hamilton County, Ohio." 20

Affiant further says that the bonds named in the said Claim as Allied Pack Bonds are the bonds of Alliel Packers, Inc.;

Affiant further says that he has collected no interest on any of the aforesaid bonds mentioned in his claim since March 4th, 1921, and he therefore in addition to the claim heretofore filed with the said Administrator, C. T. A., for the purpose of making plain the claim heretofore filed, makes the 30 additional statement that said claim includes a claim for interest upon said interest since and from the various dates said interest became due;

Affiant further says that in case said bonds have been disposed of, he claims in lieu of said bonds the

sum of Thirty Thousand (\$30,000.00) Dollars as damages;

Affiant further states that the above mentioned certificates of preferred stock of the Standard Sanitary Manufacturing Company, Numbers C-2145, for thirty (30) shares, C-2080 for thirty shares, and C-2150 for forty (40) shares were exchanged for
10 certificate No. NY-242 for One Hundred (100) shares of the preferred stock of the Standard Sanitary Manufacturing Company and that said certificate NY-242 was exchanged as aforesaid for One Hundred (100) shares of the preferred stock of the American Radiator and Standard Sanitary Manufacturing Company.

Affiant further says that if said stock has been disposed of, he claims in lieu thereof the sum of Seventeen Thousand Five Hundred (\$17,500.00)
20 Dollars as damages.

Walter A. Baude.

Sworn to before me by the said Walter A. Baude and by him subscribed in my presence this 25th day of March, 1931.

Alfred T. Geisler,
Notary Public in and for
Hamilton County, Ohio.

Answer

ANSWER.

(Filed Aug. 18, 1931.)

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

10

WALTER A. BAUDE,
 Plaintiff,
 v.
CHEMICAL BANK AND TRUST
COMPANY, Administrator
Cum Testamento An-
nexo of the Estate of
MARY A. OTT, Deceased,
 Defendant.

Action at Law.
Answer.

20

Defendant, Chemical Bank and Trust Company,
administrator *cum testamento annexo* of the Estate
of Mary A. Ott, deceased, answering the plaintiff's
complaint herein, says that:

30

1. It denies all the allegations in paragraph 1
excepting that it admits that plaintiff is the owner
of 100 shares of preferred stock of the American
Radiator and Standard Sanitary Corporation.

2. It denies the allegations of paragraph 2 excepting that it admits that plaintiff deposited and left in the custody of said Mary A. Ott, deceased, said 100 shares of the preferred stock of American Radiator and Standard Sanitary Corporation, for safe keeping.

10 3. It admits the allegations of paragraph 3 excepting that it denies that said Mary A. Ott was in possession of any bonds which were the property of said plaintiff at the time of her death.

4. It admits paragraph 4.

5. It admits paragraph 5.

6. It admits paragraph 6.

20

7. It admits paragraph 7.

8. It has not sufficient knowledge or information to either affirm or deny the allegations of paragraph 8 and therefore requires proof.

9. It denies the allegations of paragraph 9 excepting that it admits that it has refused and does still refuse to deliver said bonds and coupons there-
30 to to plaintiff.

10. It denies the allegations of paragraph 10.

WM. ELMER BROWN, JR.,
Attorney of Defendant.

Reply

13

REPLY.

(Filed Sep. 2, 1931.)

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

10

WALTER A. BAUDE,
 Plaintiff,
 v.
CHEMICAL BANK AND TRUST
COMPANY, Administrator
Cum Testamento An-
nexo of the Estate of
MARY A. OTT, Deceased,
 Defendant.

Action at Law.
Reply.

20

Plaintiff, Walter A. Baude, joins issue with the
defendant, Chemical Bank and Trust Company, ad-
ministrator *cum testamento annexo* of the Estate of
Mary A. Ott, deceased, in the answer filed herein.

H. WALTER GILL,
 Attorney of Plaintiff.

30

NOTICE OF MOTION.

(Filed April 1, 1932.)

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

10

WALTER A. BAUDE,
Plaintiff,

v.

CHEMICAL BANK AND TRUST
COMPANY, Administrator
c. t. a. of the Estate of20 MARY A. OTT, deceased,
*Defendant.*Action at Law.
Notice of Motion.

Sir:

Please take notice, that on Friday, the first day of April, 1932, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Court Room, seventh floor of the Guaranty Trust Building, in the City of Atlantic City, Atlantic County, N. J., I shall apply to his Honor, W. Frank Sooy, Judge of the Atlantic County Circuit Court, sitting as a Commissioner of the Supreme Court, for an order to amend the answer heretofore filed in this cause by adding thereto the following:

30

Notice of Motion

FIRST SEPARATE DEFENSE.

1. The securities referred to in paragraph 1 of the plaintiff's complaint, namely, the bonds of Allied Packers, Inc., Toledo Traction, Light and Power Co., and Louisville Railway Co., were delivered by the plaintiff to said Mary A. Ott, now deceased, on or about March 9th, 1921, the date alleged in said 10 complaint, in compliance with a demand which was made upon the plaintiff by a letter, dated January 5, 1921, which was sent to the plaintiff by one Helm Bruce, Esquire, an attorney at law, on behalf of and at the instance and request of said Mary A. Ott. Said letter reads as follows:

“Jan. 5, 1921.

Mr. Walter A. Baude,
913 Park Place,
Wilmington, Del.

20

Dear Sir:

Mrs. Mary A. Ott has asked me to write you and demand the return of certain securities which she has heretofore placed in your hands under certain conditions, and upon certain trusts. And I therefore write for the purpose named, and do hereby, as counsel for Mrs. Ott, make the demand upon you.

I am not able to specify the securities, but you know what they are, being all of those 30 which you have heretofore received from her. She has heretofore personally informed me that she placed these securities in your hands simply to hold until her death, at which time, but not before, they were to become yours, and that she

only turned them over to you at the time because she was not in Louisville where her safety box is and where she could put them away herself, and she did not care to turn them over to her son, Henry, who ordinarily acts as her agent, as she did not care to mix him up in the matter.

10 I have also conferred with Henry L. Ott, who tells me that he was present when the first of these securities were delivered to you and that the statement of his mother to me, as outlined above, is correct.

As you of course know conditions have changed since Mrs. Ott placed these securities in your hands, and while she still intends to carry out the ultimate trust for your benefit—in other words, intends them to be yours at her death—she desires to have possession of them and to preserve them, until her death.

20

If I am correctly informed—and I have no doubt that I am—you are greatly debtor to Mrs. Ott, who has in fact been a mother to you; and I venture to suggest that it is as little as you can do to comply with her wishes in this matter and not force her to carry into Court this situation.

30 Mrs. Ott has asked me to have you send the securities to me, but if you doubt my authority to receive them for her, you can send them direct to her, or I can have her send you a written order for the delivery of them to me.

Please let me hear from you promptly as this

Notice of Motion

matter has now been in an unsatisfactory condition for quite a while.

Yours truly,

(Sgd) Helm Bruce.

HB-G''

2. On or about December 24, 1921, the plaintiff made demand of said Mary A. Ott, that she return 10 and deliver to the plaintiff the aforesaid bonds.

3. On or about January 23, 1922, said Mary A. Ott duly notified the plaintiff that she refused to return or deliver the aforesaid bonds to the plaintiff, and, at the same time, said Mary A. Ott duly notified the plaintiff that she claimed to be the sole and unconditional owner of all the aforesaid bonds, and that she possessed and exercised full and complete control over all the aforesaid bonds, and collected and retained the income therefrom. 20

4. On or about February 16, 1922, the plaintiff again made demand of said Mary A. Ott that she return and deliver to the plaintiff the aforesaid bonds. No subsequent notice was given to said Mary A. Ott during her lifetime, of any claim of the plaintiff of title to, or any interest in, the aforesaid bonds. No subsequent demand was made on said Mary A. Ott, during her lifetime, for the return 30 or delivery of any of the aforesaid bonds to the plaintiff.

5. On or about February 20, 1922, said Mary A. Ott again duly notified the plaintiff that she refused

to comply with any of the said demands of the plaintiff, and at the same time said Mary A. Ott again duly notified the plaintiff that she claimed to be the sole and unconditional owner of the aforesaid bonds.

10 6. Said Mary A. Ott at all times thereafter during her lifetime, exercised full and complete ownership and control over all the aforesaid bonds, and collected the income therefrom, and disposed of the aforesaid bonds from time to time, and applied the proceeds thereof to her own use and benefit.

20 7. By reason of the facts herein alleged, the plaintiff's alleged cause of action accrued at a time more than six years next before the commencement of this action, by virtue whereof the statute of limitations constitutes an absolute bar and defense to the alleged cause of action of the plaintiff.

SECOND SEPARATE DEFENSE.

1. The defendant repeats and realleges the allegations, and each of them, contained in paragraphs numbered 1 to 7, inclusive, of the first separate defense, and alleges:

30 2. This action being barred by the statute of limitations by reason of the facts herein alleged, said alleged cause of action was not and is not revived by reason of the demand alleged in the complaint herein to have been made by the plaintiff, and the refusal of the defendant herein to comply therewith.

WM. ELMER BROWN, JR.,
Attorney for Defendant.

Order

[ENDORSED]

Due and legal service hereof is hereby acknowledged. Dated: March 22, 1932.

H. Walter Gill,
Attorney for Plaintiff.

10

ORDER.

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

WALTER A. BAUDE,

Plaintiff,

v.

CHEMICAL BANK AND TRUST
COMPANY, Administrator
c. t. a. of the Estate of
MARY A. OTT, deceased,
Defendant.

Action at Law.

On Motion to Amend

Answer.

Order.

20

30

This matter being opened to the court by Wm. Elmer Brown, Jr., attorney of the defendant, on motion to amend the answer heretofore filed in this cause by adding two certain separate defenses fully and specifically set forth in the written notice of

Order

said motion duly served upon plaintiff and filed herein on April 1, 1932, and the Court having examined the pleadings filed herein and having heard and considered the arguments of counsel for both of the parties hereto and the Court being of the opinion that said amendment or amendments should not be allowed for the reasons, first, that the allegations
10 contained in the said proposed amendments, except insofar as they particularly and specifically refer to the statute of limitations as a defense to this action, are no more than mere statements of evidence all of which may be offered at the time of trial in view of the issue as now joined herein, and secondly, said proposed amendments insofar as they refer to the statute of limitations as a defense hereto are statements of a strict defense and therefore should not at this time be allowed;

20 It is, on this 10th day of March, A. D., 1933, ordered that the application of the defendant to amend its answer filed herein made as aforesaid, be and the same is hereby denied.

W. F. Sooy,

*Judge of the Atlantic County
Circuit Court, sitting as a
Commissioner of the Su-
preme Court.*

30 Entered: March 13, 1933.

On motion of

WM. ELMER BROWN, JR.,
Attorney of Defendant.

TESTIMONY.

ATLANTIC COUNTY CIRCUIT COURT.
ATLANTIC COUNTY.

WALTER A. BAUDE,
Plaintiff,
v.
CHEMICAL BANK AND TRUST
COMPANY, Administrator
C. T. A., Estate of MARY
A. OTT, deceased,
Defendant.

10

20

Before HON. WILFRED H. JAYNE, J., and a Jury.

Atlantic City, N. J.,
Monday, January 22, 1934.

APPEARANCES:

H. WALTER GILL, Esq., HARRY COULOMB, Esq., and
ALFRED T. GEISLER, Esq., for the plaintiff. 30
WILLIAM ELMER BROWN, JR., Esq., for the defen-
dant.

(The jury was impaneled and sworn.)

*Opening Statement by Counsel for
Plaintiff*

Mr. Coulomb: May I present to the Court Mr. Alfred T. Geisler of the Cincinnati Bar, who is associated in this case?

Your Honor please, and ladies and gentlemen of the jury, this is a suit brought by Walter A. Baude
10 against the Chemical Bank and Trust Company of New York City, the administrator with the will annexed of Mary A. Ott, deceased, who died in Atlantic City, Haddon Hotel, in June of 1930. The action is to recover money damages for the conversion, as we claim, of certain bonds owned by Mr. Baude, and which he placed in Mrs. Ott's possession for safekeeping, as I will explain to you later. The action is an old style action called in common law an action of trover and conversion, or an action of
20 conversion, but under our Practice Act of 1912 it is now simply termed an action at law. But essentially and substantially it is an action of conversion.

In order that you may have the picture as fully as I am able to place it before you, I am going to take just a few minutes of your time in this opening, and perhaps a few minutes more than ordinarily would be done in an ordinary damage case. The plaintiff in this suit, Walter A. Baude, spent some of his early years—he is now about thirty-eight
30 years old—in Louisville, Kentucky, where he lived with his uncle, Rudolph Baude. A near neighbor of the Baudes in Louisville, Kentucky, was Mary A. Ott and her husband. Mr. Ott, her husband, who predeceased Mrs. Ott by some years, founded the Sanitary Supply Company, that made supplies of

*Opening Statement by Counsel for
Plaintiff*

that sort. They were quite wealthy and rich people, and they were quite good friends of Rudolph Baude, the uncle of the plaintiff in this suit, and as a result of that relationship Mrs. Ott became acquainted with Mr. Baude, that is, Mr. Rudolph Baude, and Mr. Walter A. Baude, the plaintiff in this suit, and always took a great and deep interest in Mr. Walter A. Baude. Sometime in 1919, the war being over, 10
Walter A. Baude, the plaintiff in this suit, began to visit, at Mrs. Ott's request, Mrs. Ott in Haddon Hall here in Atlantic City. She was then living here. She knew him quite well, of course, and had a great interest in him, and during the course of a year or perhaps a year and a half—it will be outlined to you more specifically by Mr. Baude when he is on the stand—Mary A. Ott gave to Mr. Baude, the plaintiff in this suit, \$17,000 in bonds. Those 20
bonds consisted, briefly, of \$10,000 of Allied Packers bonds, \$5,000 of the bonds of the Toledo Traction Company, and \$2,000 of the bonds of the Louisville Railroad Company. Mr. Baude will explain just exactly what these bonds were and their interest on it. She also gave him in part a hundred shares of the stock of this Sanitary Supply Company which was—afterwards became associated in some way, which Mr. Baude will explain to you, with the American Radiator Company. As I said before, Mrs. Ott 30
took a great deal of interest in young Mr. Baude. He was at that time about to enter upon a teaching profession in the University of Cincinnati, which he subsequently did. He had become married and has now, I think, two children. She was interested in

*Opening Statement by Counsel for
Plaintiff*

his career, interested in him because he lived near them in Louisville, and she was acquainted with his family, and she desired to help him all she could, and that was probably the reason of this gift. Mr. Ott, by virtue of that gift, became the actual owner of these bonds and of this stock. Just about the
10 time that Mr. Ott had announced his engagement to his present wife, Mrs. Ott, for some reason that we don't know, thought perhaps those bonds would be safer, so far as Mr. Baude was concerned, in her possession than in his. And finally, after some negotiation, Mr. Baude, on the 4th of March, 1921, sent these bonds back, and the stock as well—the bonds and the stock, to Mrs. Ott to be held by her for him until he should either demand them or until she should die. The bonds were held, and the stock
20 was held; so far as we know, the stock and the bonds were held by Mrs. Ott at the time of her death. At her death she left a will, and in that will she left the—appointed her son, Henry A. Ott, who is now deceased—Henry L. Ott, who is now deceased, her executor. He renounced his executorship and on sometime in December of the—September of the year following her death, she—in the month following her death—she died June, 1930, and sometime in September, 1930, the Chemical Bank and Trust
30 Company, the defendant in this suit, was appointed administrator with the will annexed, which is the title conferred upon the person who is appointed an executor in the place and stead of the one named in the will; and, of course, thereafter, the administration of this estate, the burden of it, fell upon

*Opening Statement by Counsel for
Plaintiff*

the Chemical Bank and Trust Company. Mr. Baude then demanded of the Chemical Bank and Trust Company the return of the \$17,000 bonds, and of the hundred shares of the stock of the Standard Supply Company—Standard Sanitary Supply Company. He made that demand on November 6th. On March 25th, he made an amended or supplemental demand for the return of the bonds and the stock, or, if they couldn't produce them, then their value. The Chemical National Bank and Trust Company returned to Mr. Baude the hundred shares of the capital stock of the Sanitary Supply Company, but did not return the bonds; refused; neglected to return them. Now, as I have said, these bonds were to be held by Mrs. Ott for Mr. Baude until he wanted them back. She died before he made any demand of her for the return of them. And he then made the demand upon the only existing person or institution that could comply with it. That was the administrator. The administrator, that is, the Chemical Bank and Trust Company, did not return those bonds. We don't know whether they have them or whether they don't have them. At any event, they did not return them, and in law when a person is lawfully in possession, as his Honor will charge you, of bonds—and Mrs. Ott was lawfully in possession of these bonds because Mr. Baude had sent them to her to keep for him—there is no conversion until demand is made for the return of those bonds, or whatever the property may be. And in this instance it was the bonds. The demand was made after Mrs. Ott's death upon her

*Opening Statement by Counsel for
Plaintiff*

administrator, who presumably had the bonds in his possession. They returned the stock, as I said before, but did not return the bonds.

- I think I should have told you, and perhaps I did, but if not I will repeat it: At the same time that Mr. Ott delivered these bonds, or sent them to—
- 10 Mr. Baude delivered these bonds or sent them—and stock, and sent them to Mrs. Ott at Atlantic City, he returned or delivered to her both the bonds and stock in the same envelope at the same time. They were his, as I have said before, owned by him and in his possession up until the time he sent them to Mrs. Ott, as I have said, for safe keeping. They gave back the stock; they did not give back the bonds. We claim, therefore, that under the law, that amounted to a conversion.
- 20 Now, a conversion is, as I said before—is an action for money damages; and in this suit we are seeking to recover from the Chemical Bank and Trust Company, the administrator of Mary Ott's estate, the value of these bonds as the damages for their detention after demand made upon the bank by Mr. Baude. And if we satisfy you that Mr. Baude was the owner of these bonds and of this stock on March 4, 1921—the time when he delivered them, the stock and the bonds, to Mrs. Ott, he did
- 30 not sell or transfer the title or make a gift of them to Mrs. Ott or to anybody else, but remained the owner—then we are entitled to recover from you, if you find that they were not returned to us—and we will show that they were not—the value of those bonds, such value as the Court may charge you

*Opening Statement by Counsel for
Defendant*

should find, under the law, from the evidence in the case.

I have spoken perhaps a little longer than I should, but I wanted you to have as clear a picture as I could place before in the circumstances under which this entire transaction from its beginning to its end occurred. If we prove the facts to you, we are entitled, as we will claim, and do claim, a verdict for the amount of these bonds, namely, \$17,000, with interest from the 4th day of March, 1921, upon the—and such interest as those bonds upon their face required to be paid, and if it should eventuate that any of the bonds were redeemed or sold in the meanwhile, that is, legal interest, and that is interest at the rate of six per cent, on the face value of those bonds from the day of their sale or redemption to the date of trial.

The case will be developed through the course of testimony by Mr. Baude and depositions which were taken by consent of Mr. Brown during the course of the time that this suit has been pending. And with that, I think that is all I need to say to you at this present time with respect to our claim and the amount of damages we claim, and the circumstances under which our claim for damages arose.

Mr. Brown: If it pleases the Court and you ladies and gentlemen of the jury: I am in a rather unusual position in that I represent the Chemical Bank and Trust Company, the administrator of the decedent estate. Mrs. Mary A. Ott died in 1930, and the bank since that time has been in charge of the assets and the administration of her estate.

*Opening Statement by Counsel for
Defendant*

It is true that Mr. Baude made a demand upon the bank to deliver to him the bonds in question. It is also true that the bank did not deliver those bonds. And I propose to tell you why.

It seems to me that we are not interested in whether or not Mrs. Ott was wealthy or poor, or
10 whether Mr. Baude is married and has two children or not. It seems to me that we are not interested in whether or not Mr. Baude lived with his uncle in Louisville, Kentucky, and next door to Mrs. Ott, and during the years prior to 1921. It does not seem to me we are interested in whether or not Mr. Baude was contemplating an education at the University of Cincinnati. It seems to me a lot more time has been taken to give you an atmosphere in this case, rather than facts. What I want you to do and what
20 I am asking you to do is to adhere strictly to the case that the plaintiff has made out, the case that has been made out by the plaintiff in their complaint and by the answer which has been filed by the defendant.

In the first paragraph of their complaint, they allege that they are the owners of certain preferred stock of the American Radiator and Sanitary Corporation. And that we admit, they were the owners—rather, on March 4th, 1921; that we have admitted.
30 They in their second paragraph allege that on that date they were the owners of these bonds; and that we deny, because we require them to prove that. We have no information or knowledge concerning that. I don't know whether they had any bonds or not or whether they were the owners of

*Opening Statement by Counsel for
Defendant*

the bonds or not. That is something you must decide. We are in the dark. Understand, we knew nothing about this transaction on March 4th, 1921, and the only person who could tell us the full facts concerning this transaction is now dead, the decedent whom we represent.

Now, on March 4th, he claims he deposited the bonds and the stock with Mrs. Ott, the decedent. We admit that he deposited the stock, because that stock was found in her possession and came into our possession as administrator of her estate, and we turned it back to Mr. Baude. That is the stock that he demanded and we turned it back. We deny that he delivered the bonds to Mrs. Ott because they were not found among her assets at the time of her death, and never came into the hands or possession of the bank or administrator.

The next paragraph of the complaint alleges her death; and that is admitted by us. Then that she died leaving a will probated on September 29, 1930; and that we admit. That the Chemical Bank and Trust Company was appointed administrator; and that we admit. And then that the plaintiff filed a claim, or two claims, demanding the return of the bonds and the stock, and in lieu—the second demand was a demand that if we could not return the bonds or the stock, that we return their value or give him their value. We returned the stock as they admit receiving. But, as I say, we did not, and denied that we had, as a matter of fact, the bonds that he demanded be returned. And, therefore, we admit the allegation of the next paragraph that the claim and demand was refused.

*Opening Statement by Counsel for
Defendant*

Now, the value of the bonds they allege to be thirty thousand dollars, and we have asked them to prove that. We don't know what the value of those bonds were. And, incidentally, they have asked that if they are entitled to anything, you find they are entitled to \$17,000 plus six per cent interest. It may be those bonds were not at that value. That was their par value, but, nevertheless, the value of those bonds must be proven to you.

Now, the very crux of this case is in the next allegation—the next two allegations of this complaint, and I want you to have those in mind when this testimony is being introduced. They are paragraphs nine and ten of the complaint, and I want to read them to you:

“Plaintiff has demanded of defendant, as heretofore stated, that it deliver said bonds and coupons thereto belonging to this plaintiff, yet defendant well knowing that said bonds and coupons belonging thereto are the property of the plaintiff, and contriving and fraudulently intending to deprive plaintiff of said bonds and coupons belonging thereto, hath refused and doth still wholly refuse to deliver and has not yet delivered to plaintiff said bonds and coupons thereto belonging.”

Tenth paragraph: “Said defendant on or about the 25th day of March, 1931, at Atlantic City, County of Atlantic and State of New Jersey, disposed of said bonds, and converted the same to its own use to the damage of the plaintiff in the sum of \$30,000.”

Now, the Court will undoubtedly charge you that before the plaintiff can recover any verdict in this

Discussion

case, they must prove what they allege. So that the plaintiff must prove that by contrivance and in fraud the Chemical Bank and Trust Company, as administrator of the estate of Mary A. Ott, deceased, converted—disposed of her bonds and converted them to the use of the bank administrator, on March 25, 1931. Now, we deny that that occurred. So that you first—the denial is that the bonds did not belong to Baude, and, secondly, the fact that the bonds did not come into the hands of Mrs. Ott for the purposes which he alleges, and we deny that they ever came into our hands at all, and we, therefore, deny that they were disposed of and converted fraudulently and by contrivance. And if we prove those facts, in the event that they have testimony which seems to indicate that they were, we will ask for your verdict.

20

Mr. Gill: May it please your Honor, there are certain allegations admitted in the pleadings. I would like to have them on the record at this time.

The first is the death of Mary A. Ott, June 23, 1930, leaving a last will and testament appointing her son, Henry L. Ott, her executor.

The second is the renouncement of Henry L. Ott as executor and the appointment of the Chemical Bank and Trust Company administrator cum testamento annexo, September 29, 1930.

The third is a demand by the plaintiff on November 6, 1930, for the return of the bonds and stock to him from the Chemical Bank and Trust Company.

The fourth is a demand by the plaintiff on March

25, 1931, for the return of the bonds and stock or the value thereof.

The fifth is that the hundred shares of the preferred stock of the American Radiator and Standard Sanitary Corporation were returned to the plaintiff by the defendant.

10 The next is that the plaintiff was the owner of said hundred shares of preferred stock of the American Radiator and Standard Sanitary Corporation.

And the next is that the plaintiff deposited and left in the custody of Mary A. Ott said hundred shares of preferred stock for safe keeping.

Mr. Brown: No.

Mr. Gill: That is admitted in the pleadings.

20 Mr. Brown: It is not. The only admission we make in that respect is that they were delivered to Mrs. Ott; not for safe keeping.

Mr. Gill: The pleadings will speak for themselves.

Mr. Brown: Then let us get the stipulation properly on the record from the pleadings themselves.

30 Mr. Coulomb: It is specifically admitted in one of your answers.

Mr. Brown: There is only one answer filed.

Mr. Coulomb: One of your paragraphs. Paragraph 2, if your Honor please.

The Court: Yes.

Mr. Brown: That is correct.

Mr. Gill: That is correct, is it?

Mr. Brown: All right. That applies only to the preferred stock. 10

Mr. Gill: All right. Let us see if you have got that exactly as I dictated it; the last, number seven, what was that?

(The record was read by the stenographer as follows: "And the next is that the plaintiff deposited and left in the custody of Mary A. Ott said hundred shares of preferred stock for safe keeping.")

The Court: Was it stipulated that the facts so stated by counsel for the plaintiff are to be assumed as facts for consideration of the jury in this case? 20

Mr. Brown: The pleadings, I think, so state. I naturally rely upon the pleadings.

WALTER A. BAUDE, the plaintiff, called as a witness in his own behalf, being sworn, testified as follows:

Direct examination.

10 By Mr. Coulomb:

Q. Mr. Baude, what is your full name?

A. Walter A. Baude.

Q. And where do you live?

A. Cincinnati, Ohio.

Q. What is your profession or business?

A. I am a teacher at the University of Cincinnati.

Q. And in what subject?

A. Economics and statistics.

20 Q. How long have you been practicing that profession?

A. Since 1926.

Q. Had you been a student in the University of Cincinnati prior to that time?

A. Yes.

Q. Are you married?

A. Yes.

Q. When were you married?

30 Mr. Brown: It seems to me all this is without the issue in the case and cannot serve only one purpose. I am in the position where I must confine counsel to proper proof of this case, because we are representing a decedent, and a lot of the information we have no knowledge of; and certainly this

Walter A. Baude—Direct

has no importance or relevancy to the issue in this case.

Mr. Coulomb: If your Honor please, I think in every law suit the jury has the right to know something about the parties, if it can be learned. I have never known it to be objected to before. If your Honor, however, feels it is going to prolong the testimony, I won't press it. But I believe it is relevant and important. 10

The Court: Well, it is preliminary. I will allow it so far.

Mr. Coulomb: Yes.

The Court: The question is, are you married?

The Witness: Yes. 20

(The last question was read by the stenographer as follows: "When were you married?")

A. April, 1921.

Q. Did you know Mrs. Mary A. Ott in her lifetime?

A. Yes.

Q. Where had you first met her? 30

A. In Louisville, Kentucky.

Q. And with whom were you living at that time?

A. My uncle.

Q. How old were you at that time, Mr. Baude?

A. I moved to Louisville when I was ten years old.

Q. Where did Mrs. Ott live with respect to your home in Louisville?

A. About eight houses from our house.

Q. Were your families acquainted with each other?

A. Yes.

Q. Did you visit each other?

10 A. The families.

Mr. Brown: If this witness is being qualified for the purpose of testifying as to transactions that he had with the decedent, I raise objection now to his testimony. The witness is not qualified to testify to any transactions with the decedent. He is the plaintiff to the suit. He has sued the representative of the decedent's estate, and as such, therefore, under Section 4 of the Evidence Act, he is not qualified to give this testimony.

20

The Court: I assume counsel for the plaintiff will have in mind, of course, the restriction of the appropriate provision of the Evidence Act.

Mr. Coulomb: Yes, I do have that in mind. I have it in mind.

Mr. Brown: The objection comes for this reason, if your Honor please. The allegation of the plaintiff is that these bonds were given by the decedent to Baude. The probabilities are, and I anticipate what they are intending to show, is a relationship between the plaintiff and the decedent such as would be a sufficient consideration for the gift of these

30

bonds. And therefore it seems to me that this testimony is objectionable. The cases, as I understand, hold that the test of what constitutes a transaction by which the surviving party cannot testify is determined entirely upon whether or not the same is such that it could be denied by the decedent.

Mr. Coulomb: I won't seriously press the question if your Honor please. 10

The Court: Well, all right. The question will be withdrawn.

Q. On or about—on or before March 4th, Mr. Baude, were you in possession of certain bonds and stock?

A. Yes.

Q. 1921?

A. Yes. 20

Q. I want to get that date right; March 4th, 1921. Can you enumerate the stocks and bonds of which you were in possession at that time?

A. Yes.

Q. What were they, or are they?

A. They were \$10,000 face value of Allied Packers, which paid six per cent; \$5,000 face value of Toledo Traction Light and Power bonds, paying seven per cent, and \$2,000 worth of bonds of the Louisville Railway Company, paying five per cent, and one hundred shares of preferred stock of the Sanitary Manufacturing Company, which yield seven per cent. 30

Q. How long had you had possession of those securities?

Mr. Brown: I object. It is immaterial and irrelevant.

The Court: Well, it may or may not be. I will permit it.

Mr. Brown: Allow me an exception.

10

The Court: You may have it.

A. I received the first gift of bonds —

Mr. Brown: I object to that; ask it be stricken.

Q. I asked you —

The Court: Strike it out.

20

Q. I asked you how long you had possession of them?

A. Since August, 1919.

Q. When did you come in possession of the \$10,000 of Allied Packer bonds?

A. In August, nineteen —

30

Mr. Brown: I object because that is—certainly involves a transaction with the decedent. In their very opening they said they received these bonds from the decedent.

The Court: That is no evidence.

Mr. Brown: I want to register that objection. Allow me an exception.

Walter A. Baude—Direct

The Court: The question is—the witness will heed the question: When did you come into possession, personally, I assume, of the bonds to which the question relates?

Q. \$10,000 of the Allied Packer?

A. In August, 1919.

Q. When did you come in possession of the \$5,000 10
bonds of the Toledo Power and Light Company?

A. March, 1920.

Q. When did you come in possession of the \$2,000
bonds of the Louisville Railroad?

A. March, 1920.

Q. When did you come in possession of the hundred shares of stock of the Sanitary—Standard Sanitary Supply Company?

A. December, 1919.

Q. What is the correct name of that company? 20

A. Standard Sanitary Manufacturing Company.

Q. What was your interest in those bonds?

Mr. Brown: I object, if your Honor please.

The Court: Why?

Mr. Brown: Well, because, if your Honor please, we are getting into the question of whether or not he became the owner, and that involves the trans- 30
action between him and the decedent, and he is allowed in this respect to draw a conclusion as to that. I am relying upon the opening of the plaintiff, who says these bonds were given to him by the decedent. Now, then, we get into the question of

what constitutes a gift inter vivos, and this question will permit him to draw the conclusion this was a gift inter vivos.

The Court: I don't think that to be so.

Mr. Brown: I have to raise these objections because it seems to me they are putting the cart before the horse.

Mr. Coulomb: Is the question allowed?

The Court: Yes. Objection overruled.

Mr. Brown: Exception.

A. I was the owner of the bonds and shares of stock.

Q. Did you at any time sell, transfer the title or make a gift of those bonds to any one?

A. No.

Q. Who collected the interest on the bonds from the time you came into possession of them until March 4th, 1921?

A. I did.

Q. Were they coupon bonds?

A. Yes.

Q. Did you keep the interest thus collected by you?

A. Yes.

Q. Who received the interest or dividend on the capital stock of the Sanitary Standard Manufacturing that you had?

Walter A. Baude—Direct

Mr. Brown: Over what period?

Q. Well, I will confine it now, from the date you received it until March 4, 1921?

A. I did.

Q. On March 24, 1921, were the bonds and stock that you mentioned in your possession?

A. Yes.

10

Q. What did you do with them, where were you at that time?

A. In Wilmington, Delaware.

Q. What were you doing in Wilmington at the time?

A. I was an employe at the DuPont Company.

Q. What did you do with the \$17,000 of bonds and the stocks, the hundred shares of stock?

Mr. Brown: I object, so far as the bonds are 20
concerned, because it involves a transaction with the
decedent. The plaintiff in this case alleges the de-
livery of them on that day to the decedent. The
opening of counsel for the plaintiff alleges delivery
on that date to the decedent. And that this question
calls apparently for no other than an answer to the
effect he delivered them on that day, which is de-
nied, and he is not qualified to testify to that fact.

Mr. Coulomb: As Mr. Brown just stated a few 30
minutes ago, the test as it applied to this very arbi-
trary rule of the fourth section of the Evidence
Act, which closes the mouth of a party to a cause
merely because the opposite party is dead—the test
is whether the decedent, if alive, could deny what

the witness testifies to. That was very recently expressed by Mr. Justice Heher in the case of Bankers Trust Company against the Bank of Rockville Center, in a very recent opinion, in the pamphlet of 1918. If I may say so—and if counsel should prefer, I will go before your Honor in your Honor's room, or out of the hearing of the jury, so as not to offend in any respect, and show you exactly what we propose to prove; and I think it comes squarely within the test. I will do either one. Won't take but a minute.

The Court: Suppose we retire and discuss it; if counsel is willing to tell what he proposes to offer, much time may be saved by such discussion.

(In chambers.)

20

Mr. Coulomb: We propose to show on the 4th day of March, 1921, Mr. Baude took these \$17,000 of bonds and the one hundred shares of stock, placed them in an envelope, addressed them to Mrs. Mary A. Ott, Haddon Hall, Atlantic City, New Jersey, and placed them in the post office at Wilmington, Delaware, and registered that parcel.

The Court: I rather suspected that.

30

Mr. Coulomb: Mrs. Ott could not possibly deny that. She could say, "I never got them," but she could not say he had not performed those acts, and that is the very test, Mr. Justice Heher's decision. I simply mention that case because it happens to be

a late case, as to what was done. As your Honor well knows, there are cases in this State which seem to go to a tremendous length in stopping the mouth of a plaintiff suing a representative. Wigmore says —

The Court: Out of a set of facts arises a presumption, doesn't it, whether or not—and the presumption, of course, the decedent would be able to rebut. 10

Mr. Coulomb: If your Honor please, this is not proof at all. If we stop with the proof of what we did, I think your Honor would say there would be no presumption arise from it, but we can prove what we did. Your Honor can charge the jury—I don't think it should go that far—but our mouths are not stopped from showing the actual physical fact which we prove out of Mrs. Ott's presence. If your Honor feels a presumption that she receives those bonds flows from that act, we are not deprived from proving the act merely because of presumption. If you feel we are — 20

The Court: I simply suggest that anticipating the possible challenge of your right to do so.

Mr. Coulomb: I think that the force and effect of the Evidence Act, of this section of the Evidence Act, has got to be limited to its precise terms. And our Courts, in defining what that section meant, for that very purpose said that it must be something that she could deny. Now, she could not deny that 30

he placed them in the post office. She could deny she received them. In other words, if your Honor please, let us suppose she were alive and we proved what I have offered to prove, and she would come on the stand and say, "I never received those bonds or that package."

10 The Court: Yes.

Mr. Coulomb: That is the furthest she could go.

Mr. Brown: It seems to me the only purpose this bit of testimony could have is to raise the very presumption your Honor has suggested, that, in the ordinary course of events, those bonds came into the possession of the person to whom they were addressed. That cannot be denied, because the decedent is dead. It does not seem to me it makes any difference whether it is in her presence or not. That is not the test. The test, as Mr. Justice Heher, in the Bankers Trust Company case against the Bank of Rockville Center, to which Mr. Coulomb has referred—the Justice stated as follows: "The test laid down for ascertaining what is a transaction with the decedent within the intendment of the statute is to inquire whether in case the witness testified falsely the deceased, if living, could contradict it of his own knowledge."

20

30

The Court: Apply that here; it could not contradict the fact to which this witness desires to testify.

Mr. Brown: But we could contradict the presumption that arises from those facts, which, I say, proves their case against the decedent.

(Discussion off the record.)

Mr. Brown: I urge the objection if the presumption is to follow the proof of those facts. 10

Mr. Coulomb: May I ask Mr. Geisler to read the Kansas case which I think disposes of this proposition?

Mr. Geisler: Here is the Kansas case. (Cites *Bryan v. Palmer*, 111 Pacific, 443; 83 Kansas 298; 21 Annotated Cases, 1214.)

The Court: How much further are you going? 20

Mr. Coulomb: We are going to introduce in evidence a letter which we have established by proof acknowledging the receipt of these securities.

Mr. Brown: That I object to, because it does not acknowledge the receipt of the securities. It acknowledges the receipt of securities, but not these securities. 30

Mr. Coulomb: That is, of course, a question we have not come to. But with all of the information that they have—and, if your Honor please, I think I am justified in saying, because it is a public record

in the files in this case, that they did receive it, by their own witness.

The Court: Are we concerned with this Evidence Act question as to this communication?

Mr. Geisler: No; the plaintiff is not the witness
10 in that case.

Mr. Coulomb: That was the testimony we took.

The Court: Is this the only question that is likely to arise under the provisions of the Evidence Act to which we have been referring with this witness? We might as well discuss them all.

Mr. Coulomb: There is another matter I will bring
20 before you now. We have the return receipt, registry receipt, which we propose to offer in evidence.

Mr. Brown: By whom do you propose to prove the signature of the decedent on that receipt?

Mr. Coulomb: I propose to prove it was the registry receipt received by Mr. Baude, without proving any signature. That was what he received from the Post Office.

30

Mr. Brown: It is objectionable, first, because it is not proven to be her signature. Therefore, it is not proof of the receipt. It is certainly a transaction with the decedent that they are not entitled to prove.

Walter A. Baude—Direct

Mr. Coulomb: Of course, there will probably be a number of these questions that will arise during the course of this trial.

(Discussion off the record.)

Mr. Coulomb: We want to offer the receipt. We may be able to prove it later by somebody else. If your Honor please, Mr. Baude cannot prove it. 10

The Court: That draws another line, as to whether or not the fact of this receipt from the Post Office Department may be shown. I would not regard it as any evidence.

Mr. Coulomb: Except as the regulation, as to what he had done himself.

20

The Court: Yes; I don't think from it I could say it was proof it was the signature of the decedent, or that—from the plaintiff's testimony, I mean.

(Discussion off the record.)

(In Open Court.)

(The question was read by the stenographer as follows: "What did you do with the \$17,000 of bonds and the stock, the hundred shares of stock?") 30

Q. On March 4, 1921?

Mr. Brown: That is objected to.

The Court: I have determined to permit the plaintiff to answer this question, restricting the witness, however, testifying as to what he did physically with the bonds. I permit the plaintiff to answer this question in recognition of what I conceive to be the test, namely, that what he did with the bonds was not done in the presence of the decedent, and
10 his testimony will relate to facts of which the decedent would not have had knowledge which would have enabled her, if living, to contradict his testimony. I may add that counsel for the parties in this action have in chambers stated to the Court the object of the question, the testimony of the plaintiff which it is sought to be elicited by this question.

You may answer.

20 Mr. Brown: Allow me an exception.

The Court: You may have an exception.

A. I went to my safety deposit box in the Equitable Trust Company at Wilmington, Delaware, removed the bonds.

Q. What bonds, enumerate them, please.

A. The ten thousand face value of Allied Packers,
30 five thousand face value of Toledo Traction Light and Power, and two thousand Louisville Railway bonds, and three certificates representing a hundred shares of preferred stock of the Standard Sanitary Manufacturing Company.

Q. What did you do with those securities?

A. I put them into an envelope, addressed to Mrs.

Mary A. Ott, Haddon Hall, Atlantic City, sealed the envelope, had it registered at the registry department of the Wilmington Post Office, put on the necessary postage and delivered that envelope to the registry clerk.

Mr. Brown: May it please your Honor, there was a question interjected there. I understand my objection went to this last question, too, because it was a part of the original. 10

Mr. Coulomb: Yes, I have no objection.

The Court: Yes.

Q. Did you say you registered the package?

A. I did.

Q. Did you ever get any registry receipt? 20

A. I did.

Mr. Brown: I object.

Mr. Coulomb: If your Honor please, I had supposed this was to be—I may have misunderstood, but I had understood this was to be admitted simply as a card without any proof—I mean without any proof from which the jury could take it this was Mrs. Ott's signature. 30

Mr. Brown: I am not stipulating that. I have my objection on the record.

Mr. Coulomb: I did not want to be understood

that we were stipulating, but I thought that was what your Honor said, as evidence of the completion, so far as the Post Office was concerned, of the registry transaction; that your Honor would not say this card of itself was any proof that the signature on it was Mrs. Ott's.

10 The Court: However, the receipt of a card simply as such would not be material or relevant to the issues in this case.

Mr. Coulomb: Well, it may only be, if your Honor please, corroborating the fact that there was a package registered addressed to Mrs. Ott in the post office.

20 The Court: I suspect, however, the card would not show that.

Mr. Coulomb: No, I guess it doesn't excepting it is in the regulation way. I don't know whether the Court would take judicial notice of it or not.

The Court: I think the objection, present objection, is well taken. It will be sustained.

30 Mr. Coulomb: Your Honor will allow me an exception?

The Court: You may have it.

Mr. Coulomb: I have offered this in evidence and it has been rejected, as I understand it.

Walter A. Baude—Direct

Mr. Brown: If you are offering it, I do object to it.

Mr. Coulomb: I am offering it, and I understand it is objected to and the objection is sustained. May I have it marked for identification?

The Court: For identification, it may be. 10

Mr. Coulomb: Mark that P1.

(The registry card referred to is marked Exhibit P1 for identification.)

Q. Now, from March 4, 1921, if you know, who received the income or the dividends on the one hundred shares of the capital stock of the Standard Sanitary Manufacturing Company? 20

Mr. Brown: I object, if your Honor please, because that is immaterial and irrelevant; and, secondly, because if the answer, is to charge the receipt—charge the decedent with the receipt of those dividends or interest or whatever the income might have been from them, then this witness is not qualified to testify to it.

The Court: I think if this question involves the receipt of this income through some transaction 30 with the deceased, it would be improper.

Mr. Coulomb: May I put the question this way? I withdraw that.

Q. Did you receive the interest and dividends on the one hundred shares of the capital stock of Standard Sanitary Manufacturing Company from March 4, 1921?

A. I did.

Q. Did you receive the income on the bonds from March 4, 1921?

10 A. No.

Q. Did you ever receive back into your possession any of the securities which you have described; that is, the \$17,000 of bonds and the hundred shares of the capital stock of the Standard Sanitary Supply Company—Manufacturing Company?

A. Yes, I received the shares of preferred stock of the Standard Sanitary Manufacturing Company.

Q. And from whom did you receive them?

A. The Chemical National Bank.

20 Q. That is the defendant in this suit?

A. The defendant in this suit.

Q. And when did you receive them?

A. I can't remember definitely.

Q. Was it before or after Mrs. Ott's death?

A. After Mrs. Ott's death.

Q. Now, Mr. Baude, was there any change in the form of the one hundred shares of capital stock of the Standard Sanitary Manufacturing Company?

30 A. Yes.

Q. Between March 4, 1921, and when you received some shares back from the Chemical Bank?

Mr. Brown: I object, if your Honor please, because that might involve, by inference at least, that

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the decedent had done something or that such change was brought about by the decedent.

The Court: Well, we are not concerned, are we

Mr. Brown: I think that is an additional objection, that it is immaterial and irrelevant as to what 10 happened with the preferred stock.

Mr. Coulomb: I think it is important, for this reason: It is our contention this transaction was a single transaction. •

The Court: I understand.

Mr. Coulomb: The bonds and the stock were a single transaction and that therefore in order to 20 escape confusion that he should be allowed to testify whether there was any change—whether by merger of corporations or issuing of some other character of stock in the place of the stock which he had. It don't seem that is a transaction with the decedent. I have not asked who accomplished it.

The Court: Does it do any more than confuse it? We have assumed from the opening that the 30 shares of stock were returned.

Mr. Coulomb: They were, but they were returned in a changed form, because during the time there was some change in it.

The Court: Well, the circumstance of the change does not appear to me to have any obvious relevancy. If it has ——

Mr. Coulomb: I just don't want to have it assumed that certain different stock was sent back than what we sent over, without showing why it
10 was different.

The Court: Well ——

Mr. Coulomb: I am just asking whether there was any change in the character of the stock or the form of it.

The Court: I will permit it.

20 Mr. Brown: Allow me an exception.

The Court: You may have it.

A. Yes.

Q. What was the change?

Mr. Brown: I object.

The Court: Well, I assume the answer is going
30 to be such as will not be in violation of the rule.

Mr. Coulomb: I don't see how it possibly can be.

The Court: Of course I cannot forecast these answers.

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Mr. Brown: In addition to that, it is irrelevant and immaterial as to what happened.

The Court: Mr. Brown, you have stated in your opening, and I think the answer admits—at least it does not deny—the return of the shares of preferred stock —

10

Mr. Brown: That is correct.

The Court: —in the complaint.

Mr. Brown: So that the change in that stock is irrelevant and immaterial to this issue.

The Court: How does it harm you in any wise?

Mr. Coulomb: We gave to Mrs. Ott certain shares 20 of stock. Now there was a change made in that, and when the stock was got back it was different.

The Court: Change in capital structure?

Mr. Coulomb: Yes.

The Court: I will permit it.

Mr. Brown: Exception.

30

The Court: You may have it.

A. The shares of preferred stock of the Standard Sanitary Manufacturing Company were exchanged

for temporary certificates of preferred stock of the American Radiator and Standard Sanitary Company. This was later exchanged for permanent shares of preferred stock of the same company.

Q. And what shares—what do you mean, of the same company?

A. Of the American Radiator and Standard Sanitary Company.

Q. And what shares did you receive back from the Chemical Bank?

A. Preferred stock of the American Radiator and Standard Sanitary Manufacturing Company.

Q. And how much?

A. One hundred shares.

Q. Did you ever—You may cross-examine.

Mr. Brown: No cross-examination. Is that all with this witness?

Mr. Geisler: That is all.

Mr. Gill: If your Honor please, pursuant to a stipulation, the testimony of one Rudolph Baude was taken. The stipulation is as follows.

30 The Court: Better read it to the jury.

Mr. Gill: After title of the cause: "It is stipulated by and between H. Walter Gill, Esq., attorney for plaintiff, and William Elmer Brown, Esq., attorney for defendant, that the testimony of Rudolph

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Baude, a material witness to this cause, who is a non-resident of this State, be taken stenographically before John Costello, a Notary Public of the State of Ohio, in the office of the said John Costello, 1308 Ingalls Building, Cincinnati, Ohio, at such time as the said notary may direct.

"It is further stipulated that the answers to said 10
interrogatories shall be taken down stenographically by such stenographer as the said John Costello may designate, and it is further stipulated that the answers to said interrogatories be sent directly to counsel for the respective parties to this cause, and that said answers to said interrogatories may be used at the trial of this cause, as if said interrogatories had been taken by virtue of a commission issued out of and under the seal of the New Jersey Supreme Court." 20

That is signed by myself as attorney for plaintiff, H. Walter Gill, and William Elmer Brown, Jr., attorney for the defendant.

Proceeding, the interrogatories, after reciting the title of the cause again, are as follows:

"Interrogatories to be administered by John Costello on behalf of the plaintiff to Rudolph Baude, a material witness and non-resident witness in this cause, pursuant to stipulation entered into between 30
counsel for the respective parties hereto:

"First interrogatory: What is your full name?"

Answer to the first interrogatory, he says: "My name is Rudolph H. Baude."

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"Second interrogatory: Where do you live?"

Answer to the second interrogatory: "I live 1207
Cherokee Road, Louisville, Kentucky."

"Third interrogatory: How old are you?"

To the third interrogatory, he says: "I am
10 seventy-seven years old."

"Fourth interrogatory: What is your business?"

To the fourth interrogatory he says: "My business is retail jeweler."

"Fifth interrogatory: How long have you been
in that business?"

To the fifth interrogatory he says: "I have been
20 in that business sixty-two years."

"Sixth interrogatory: Are you any relation to
Walter A. Baude, the plaintiff in this suit?"

To the sixth interrogatory he says: "Yes."

"Seventh interrogatory: If your answer to the
sixth interrogatory is yes, what is the relationship?"

To the seventh interrogatory he says: "I am his
uncle."

30 "Eighth interrogatory. Did you know Mrs. Mary
A. Ott in her lifetime?"

To the eighth interrogatory he says: "Yes."

"Ninth interrogatory: If your answer to the

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eighth interrogatory is yes, how long had you known her?"

To the ninth interrogatory he says: "About thirty-two years."

"Tenth interrogatory: If your answer to the eighth interrogatory is yes, what was the nature of your acquaintance with her?" 10

To the tenth interrogatory he says: "We lived in the same block in Louisville, Kentucky, for twenty-seven years. Her daughter, Ruby, and my daughter, Bessie, were classmates. We visited her and she visited us. She was also a good customer of mine and she often came to my store and I frequently went to her house with goods. Later, after she had gone to Atlantic City, she continued to deal with me. She would write me and order things by mail. She paid her accounts by check." 20

"Eleventh interrogatory: Where did you and she live during this acquaintanceship?"

To the eleventh interrogatory he says: "Most of the time we both lived in Louisville, Kentucky. Later Mrs. Ott moved to Atlantic City. I saw her once after she moved to Atlantic City. She came to my store and made a purchase." 30

"Twelfth interrogatory: How close did you live to Mrs. Mary A. Ott?"

To the twelfth interrogatory he says: "While she lived in Louisville, we lived on the same side of

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the street in the same block about eight houses apart."

"Thirteenth interrogatory: Are you familiar with the handwriting of Mrs. Mary A. Ott?"

To the thirteenth interrogatory he says: "Yes."

10

"Fourteenth interrogatory: During the course of your acquaintanceship with Mrs. Mary A. Ott, did you ever receive any letters from her?"

To the fourteenth interrogatory he says, "Yes."

"Fifteenth interrogatory: "If your answer to the fourteenth interrogatory is yes, please state as nearly as you can the number of letters you have received from her?"

20

To the fifteenth interrogatory he says: "I would say twelve or more letters were written to me personally. My wife received many letters and she corresponded pretty regularly with her. I used to see Mrs. Ott's letters to my wife and read them. They were really family letters."

"Sixteenth interrogatory: Up to what time did you continue to receive letters from Mrs. Mary A. Ott?"

30

To the sixteenth interrogatory he says: "Our correspondence stopped in 1921."

"Seventeenth interrogatory: Did you ever receive any checks in any business transaction with Mrs. Mary A. Ott, signed by Mrs. Mary A. Ott?"

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To the seventeenth interrogatory he says: "Yes. I received checks in payment of accounts for goods she purchased at my store."

"Eighteenth interrogatory: You are shown a letter dated March 4, 1921, purporting to be in the handwriting of Mrs. Mary A. Ott and signed 'Mrs. Ott', a photostatic copy of which letter is annexed to the interrogatories. Do you know in whose handwriting the letter is written?" 10

To the eighteenth interrogatory he says: "Yes."

"Nineteenth interrogatory: If your answer to the eighteenth interrogatory is yes, please state in whose handwriting the letter referred to in the eighteenth interrogatory is written?" 20

To the nineteenth interrogatory he says: "That letter is in the handwriting of Mrs. Mary A. Ott."

The Court: What was the date of that?

Mr. Coulomb: March 4, 1921.

Mr. Gill: That is right; March 4.

"Twentieth interrogatory: Your attention is directed to the signature of 'Mrs. Ott' to the letter referred to in the eighteenth interrogatory. Do you know by whom that signature was written?" 30

To the twentieth interrogatory he says: "Yes."

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“Twenty-first interrogatory: If your answer to the twentieth interrogatory is yes, in whose handwriting is the signature ‘Mrs. Ott’ to the letter referred to in the eighteenth interrogatory?”

10 To the twenty-first interrogatory he says: “The signature ‘Mrs. Ott’ to the letter referred to in the eighteenth interrogatory is in the handwriting of Mrs. Mary A. Ott.”

“Twenty-second interrogatory: ——”

“We now offer in evidence the letter referred to in the eighteenth interrogatory under date of March 4, 1921, a photostatic copy ——”

20 Mr. Brown: Now I object to that letter on the ground that it does not acknowledge the receipt of the securities in question.

Mr. Coulomb: I hand your Honor a letter and also a typewritten copy of it, which may be a little easier.

Mr. Brown: I am satisfied that is a copy. In other words, I don’t think—I don’t want the Court to have to compare them.

30 The Court: The letter will be admitted.

Mr. Brown: Allow me an exception.

The Court: Yes.

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(The original of letter referred to is received in evidence and marked Exhibit P2.)

Mr. Coulomb: We would like to read that letter to the jury now, if your Honor please.

The Court: All right.

10

Mr. Gill: The letter just admitted in evidence reads as follows:

"Haddon Hall, Atlantic City, New Jersey, March 4, 1921.

"Mr. W. A. Baude. Dear Walter: I received the securities all right. I will write and let Harry make arrangement to have them taken care of and notify you. I thank you, Walter, for your promptness, also 20 that you kept your word. I regret that all this unpleasantness happened between us, but it seemed it could not be avoided. Don't think, Walter, that I do not love you. I love you still the same and always will, but I will never worry you with it or dictate or advise. It will only be to quiet the longing of my heart while alone. I have been so happy since I received them. I always said it was not like you. I just could not believe it. It has shortened my days"—there is no punctuation here so I am 30 rhetorically going on as it is written—"I have turned very gray, am continually under the doctor's care. He was here today. Harry and Alfred regret that this unpleasantness happened between us and feel it because I am losing ground, but I will try

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not to worry and only think of the time when you asked me to let you be my son. I knew then you loved me as your mother but it was just for a short time. I regret I was so unfortunate in holding your mother love but God knows best.

10 "I have withdrawn from everything, writing, entertaining and doing for others. It is often quite trying. Before I know it I want to make some one happy when I am reminded and must withdraw. I was very homesick this week and it was strange while I was writing to Harry your first letter came. He said he is having the cottage cleaned and put in order and Mrs. Haines would stay with me, but I wrote I would try to hold out this year and see what develops. Every one is very kind to me and they never leave me alone. They do not want to think
20 of my leaving. I know, Walter, after you have had the responsibilities of life you will understand what I have gone through. I meant it well. My aim was set high for you, but it was not to be. You need have no fear, Walter, you will receive them at the proper time and can enjoy them knowing that nothing but a loving feeling existed. I will find out whether I can keep them until Harry comes the latter part of April. If not, he will advise me how to send them. It is strange I met Mrs. Harvey and
30 Mrs. Van Trump last year and they have been visiting here at present, they leave tomorrow for Wilmington. Mrs. Harvey inquired about you.

"very respectfully, Mrs. Ott."

(The photostatic copy is marked P1A for identification.)

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"Twenty-second interrogatory: The witness is shown an envelope bearing on one side the coat of arms and name of Haddon Hall, Atlantic City, N. J., and on the other side addressed to Mr. W. A. Baude, 913 Park Place, Wilmington, Delaware, with a two-cent United States postage stamp attached, bearing the cancellation mark of the United States Post Office, and bearing the United States Post Office postmark, Atlantic City, N. J., March 5, 4 A. M. 1921, a photostatic copy of which envelope is attached to and made a part of these interrogatories, and is asked, do you know in whose handwriting the address on the envelope, namely 'Mr. W. A. Baude, 913 Park Place, Wilmington, Delaware' is written?" 10

To the twenty-second interrogatory he says: "Yes."

20

"Twenty-third interrogatory: If your answer to the twenty-second interrogatory is yes, in whose handwriting is the name and address on the envelope referred to in the twenty-second interrogatory written?"

To the twenty-third interrogatory he says: "The name and address on the envelope are in the handwriting of Mrs. Mary A. Ott."

"Twenty-fourth interrogatory: If you know the Mrs. Mary A. Ott referred to in the eighth interrogatory, please state who she was, where she lived" 30

Mr. Coulomb: We offer the envelope.

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Mr. Brown: I object because it goes along with the letter.

The Court: Yes; objection will be overruled.

Mr. Brown: And exception allowed.

10

(The envelope offered is received in evidence and marked Exhibit P3.)

Mr. Gill: And the photostatic copy of this envelope is marked P2A for identification.

20 “Twenty-fourth interrogatory: If you know the Mrs. Mary A. Ott referred to in the eighth interrogatory, please state who she was, where she lived, her husband’s name and her husband’s business.”

To the twenty-fourth interrogatory he says “She lived on Cherokee Road, Louisville, Kentucky, and later moved to Atlantic City. She was the wife of Henry Ott who before his death was connected with Ahrens & Ott in the plumbing supply business of Louisville, Kentucky. This firm later became part of the Standard Sanitary Corporation.”

30 “Twenty-fifth interrogatory: Is the Mary A. Ott referred to in the eighth interrogatory and the twenty-fourth interrogatory alive or dead?”

To the twenty-fifth interrogatory he says: “She is dead.”

“Twenty-sixth interrogatory: If your answer to

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the twenty-fifth interrogatory is that Mrs. Mary A. Ott is dead, please state when and where she died."

To the twenty-sixth interrogatory he says: "I was informed she died in Atlantic City on June 23, 1930."

"Twenty-seventh interrogatory: Is the Mary A. Ott referred to by you in your answers to the eighth, 10 twenty-fourth, twenty-fifth and twenty-sixth interrogatories the same Mary A. Ott whose handwriting you identified in exhibits marked P1 and P2 for identification?"

To the twenty-seventh interrogatory he says: "Yes, she is the same Mary A. Ott."

The testimony is signed by Rudolph H. Baude.

"Examination taken, reduced to writing, and subscribed and sworn to before me this 6th day of January, 1934, John H. Costello, notary public in and 20 for Hamilton County, Ohio. My commission expires May 20, 1935."

The prothonotary certificate is attached.

Mr. Geisler: We call him the clerk of the court.

Mr. Gill: The clerk of the court, Peter J. McCarthy.

30

Mr. Coulomb: We offer this in evidence now.

Mr. Brown: Objected to because of the fact of the proof of the letter which I have objected to as irrelevant and immaterial, and because it does not

*Interrogatories and Answers of Henry
L. Ott*

specifically acknowledge the receipt of the securities involved in this suit.

Mr. Coulomb: I would like to recall Mr. Baude.

The Court: The objection will be overruled, and
10 interrogatories pursuant to the stipulation will be admitted.

Mr. Brown: Exception.

(The interrogatories offered are received in evidence and marked Exhibit P4.)

The Court: Now you desire to recall Mr. Baude?

20 Mr. Coulomb: I don't believe so.

Mr. Gill: May it please your Honor, a second stipulation entitled in the title of this cause reads as follows: "It appearing that Henry L. Ott had died before plaintiff could submit interrogatories to him and pending negotiations between counsel as to the form of the interrogatories, it is stipulated by and between the parties hereto that the following
30 interrogatories and answers, had they been submitted to said Henry L. Ott, would have been asked and answered as follows:

First: "What is your name, age, occupation and place of residence?"

Answer: "My name is Henry L. Ott. My age is

*Interrogatories and Answers of Henry
L. Ott*

fifty-four. My occupation is capitalist and my place of residence is Pass-a-grille, Florida."

Second: "Are you the son of Mary A. Ott, late of Atlantic City, New Jersey?"

Answer: "Yes."

10

Third: "Are you acquainted with Walter A. Baude, the plaintiff in an action entitled 'Walter A. Baude, plaintiff, versus Chemical Bank and Trust Company, administrator cum testamento annexo of the estate of Mary A. Ott, deceased, defendant,' and brought in the Supreme Court of New Jersey, Atlantic County?"

Answer: "Yes, I am."

Fourth: "State whether or not Walter A. Baude 20 returned the following bonds and stocks:

"Allied Packers, Inc., 6% Convertible Bonds Nos. 10167, 10168, 10169, 10170, 10171, 10172, 10173, 10174, 10175 and 10176, each for the principal sum of \$1000, making a total of \$10,000 in principal of these bonds;

"Toledo Traction, Light & Power Co., 7% Bonds Nos. M49, M50, M51, M52 and M53, each for the principal sum of \$1000, making a total of \$5000 in principal of these bonds;

30

"Louisville Railway Co. 6% Bonds Nos. 11118 and 11119, each for the principal sum of \$1000, making a total of \$2000 in principal of these bonds;

"100 shares of preferred stock of the Standard Sanitary Manufacturing Company, represented by

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certificate No. C-2145 for 30 shares, certificate No. C-2080 for 30 shares and certificate No. C-2150 for 40 shares.

“to Mary A. Ott, after demand made by said letter dated January 5, 1921?”

- 10 Mr. Brown: Now I object to the answer to that question unless the letter of January 5, 1921, is produced and introduced in evidence.

Mr. Coulomb: He can put the letter in if he wants to and let the jury draw such inferences as they will be permitted to draw from the letter, but that is simply fixing a time of their return after a demand made, and the answer is perfectly plain and perfectly clear.

20

The Court: Well, the interrogatory is whether it was done pursuant to—what is the language of the interrogatory?

Mr. Brown: It is interrogatory four.

Mr. Gill: Fourth interrogatory.

(Mr. Brown hands paper to Court.)

30

The Court: What is your objection?

Mr. Brown: The question contemplates a demand for the return of those securities to Mary A. Ott by letter from her January 5, 1921.

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L. Ott*

Mr. Coulomb: It is not a letter from her. It says a letter.

Mr. Brown: From whom?

Mr. Coulomb: From Bruce.

10

Mr. Brown: After demand ——

Mr. Coulomb: After demand of a letter of a man named Bruce.

Mr. Brown: Yes, her attorney. I think we are entitled to know the character of that demand, because it may help to lend some light on whether or not she was not entitled to receive these as owner of them.

20

The Court: That may be true. And evidential, I suppose, of the fact of whether or not Walter Baude returned the bonds, is it not?

Mr. Coulomb: That is it exactly.

The Court: Objection will be overruled.

Mr. Brown: Allow me an exception.

30

Mr. Gill: Answer: "Walter Baude returned the bonds and stocks enumerated above, but I do not know when. They were returned directly to my mother."

Fifth: "If your answer to interrogatory numbered fourth is in the affirmative, state whether or not the bonds and stock referred to in interrogatory numbered fourth were returned by Walter A. Baude personally or by mail, if you know."

Answer: "They were returned by mail as far as I know."

10

This stipulation is signed, H. Walter Gill, attorneys for plaintiff, and William Elmer Brown, attorney for defendant.

Mr. Coulomb: We offer this stipulation.

The Court: It may be marked.

(Stipulation offered is received in evidence and
20 marked Exhibit P5.)

Mr. Coulomb: May I recall Mr. Baude now, please?

The Court: All right.

WALTER A. BAUDE, recalled.

30

Direct examination.

By Mr. Coulomb:

Q. Mr. Baude, I show you a letter which has been offered in evidence and marked P1 for identification

Walter A. Baude—Direct

and P2 as admitted, and ask you whether you received that letter?

A. I did.

Q. And was the letter enclosed in the envelope which is marked Exhibit P2 for identification, and P3 for admission?

A. It was.

Q. Was Henry L. Ott, whose deposition or testimony has just been read, known by any other name? 10

A. He was.

Q. What was he sometimes called?

A. He was called Harry Ott.

Q. That is the same person?

A. Same person.

Q. Mr. Baude, I show you letter dated August 26, 1919, and ask you whether you know the signature to that letter, the person who signed?

A. I do. 20

Q. Whose signature is it?

A. Henry L. Ott.

Q. Is he the son of Mrs. Mary A. Ott?

A. He is.

Q. Is the letter in typewriting or written in longhand?

A. It is written in longhand.

Q. And is the body of the letter—and in whose handwriting is the body of the letter? 30

A. Henry L. Ott's.

Q. Did you receive that letter at or about the date of it?

A. I did.

Q. At the time that you received that letter what

bonds did you have in your—what bonds did you have in possession and were the owner of?

A. Ten thousand face value of Allied Packer.

Mr. Coulomb: I offer the letter in evidence.

Mr. Brown: If your Honor please, I object. It
10 cannot bind the decedent.

The Court: Well, I haven't read it.

Mr. Coulomb: I had a copy there.

Mr. Geisler: The Court has the copy.

Mr. Brown: There has been no proof of any au-
thority in Harry L. Ott to write that letter in behalf
20 of his mother.

The Court: Can the reason for it be stated with propriety here?

Mr. Geisler: I think better not before the jury.

Mr. Brown: I don't know the reason for it, if your Honor please.

30 The Court: Of course, ordinarily I would not recognize the materiality of a letter by one Henry L. Ott, who appears by stipulation to have been the son of the decedent.

Mr. Coulomb: Yes, that is true. I might add, however, that the letter is offered by us at this

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time perhaps in anticipation of the defense, and that is my only—my only point being, as I explained to your Honor in your Honor's room, as to the apparent part Mr. Ott did play in some parts of this transaction.

The Court: Well, it has not yet been made apparent. 10

Mr. Coulomb: I will ask to have it marked for identification, then.

The Court: Very well.

(Letter referred to is marked P6 for identification.)

Mr. Brown: I think I had an understanding with 20
you that I would not require you to prove the authenticity of these letters, subject to my objection to their materiality and relevancy, so that we might save time by submitting these letters to the Court with the understanding that we admit the genuineness of the letters—I don't mean to require that form of proof.

Mr. Gill: The second letter that was included 30
under that stipulation is dated November 29, 1919.

Mr. Brown: Signed by ——

Mr. Gill: Signed by Henry L. Ott.

Offer of Evidence

Mr. Brown: And I object to that for the same reason.

Mr. Gill: To Walter A. Baude. With the check attached, cancelled check.

Mr. Brown: I haven't seen the check. That was
10 not submitted to me.

Mr. Gill: It is referred to in the letter.

Mr. Geisler: It is not part of the letter. Better give me the check.

Mr. Gill: According to this letter for identification.

20 Mr. Brown: That is being offered for identification or as an exhibit?

Mr. Coulomb: We offer it as an exhibit.

Mr. Brown: I object.

Mr. Coulomb: If you object, we ask it be marked for identification.

30 The Court: I am not ruling finally because I am not aware specifically of the relevancy of these.

(The letter referred to is marked Exhibit P7 for identification.)

Mr. Brown: Is there another offer?

Mr. Coulomb: Yes.

Mr. Brown: I wish you would say so, so I can know.

Mr. Gill: The next is a letter of August 10, 1920.

Mr. Brown: Signed by Henry L. Ott? 10

Mr. Gill: Signed by Henry L. Ott.

Mr. Brown: I object to that, for the same reason.

(The letter referred to is marked Exhibit P8 for identification.)

The Court: It may be marked for identification 20 merely.

Mr. Gill: The next letter is dated September 10, 1920, signed by Henry L. Ott.

Mr. Brown: I object to that for the same reason.

(The letter referred to is marked Exhibit P9 for identification.)

The Court: It may be these letters may become 30 material later on, but it does not seem to me now they are material.

We will recess at this time until one-forty-five.

(Recess until 1:45 o'clock P. M.)

(After recess, 1:45 o'clock P. M.)

Mr. Gill: If your Honor please, we offer letter of September 17, 1920, written by Walter A. Baude to Mr. Henry L. Ott. Here is a copy.

- 10 Mr. Brown: I object to that because the letter is addressed not to the decedent, but to her son, and any statement made therein could not bind her.

The Court: I presume we ought to determine the relevancy of these letters, if any, in the plaintiff's affirmative case, so to speak.

- 20 Mr. Coulomb: We thought we would get the letters in because I thought they will show they were all part of a series of correspondence between these parties. And they show clearly I think that Mr. Ott was certainly speaking with authority for his mother throughout all of them.

The Court: How would a statement of the agent itself speak of authority on his part from the principal?

- 30 Mr. Coulomb: If your Honor please, the rule is that the agent may prove his own agency by his own testimony. There is no question about that. It cannot be proven by a third person who says the agent told him he was an agent. But the cases clearly hold that the agent himself can prove his agency. For instance, if Mr. Ott were alive and

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here in court I could ask him whether he was Mrs. Ott's agent for the handling of this transaction, and, of course, subject to cross-examination, as to what, how and when he was appointed, his answer would be competent and relevant. Not his answer of a third person to whom he said he was agent. I think from these letters—his letters in connection with the answers received clearly show he was Mrs. Ott's 10 authorized agent in dealing or in corresponding with Mr. Ott with respect to this very transaction we have now here under discussion.

The Court: Let me return to my first inquiry. Is the letter anything more than a statement made by the so-called agent?

Mr. Coulomb: If it is made over his handwriting, he being dead. It is not a letter written—we are 20 not trying to put in a letter written by someone else saying that we made—that Mr. Henry L. Ott is his mother's agent.

The Court: Nor are you having Mr. Henry L. Ott testify as to the agency.

Mr. Coulomb: No, but he is writing letters, if your Honor please, covering a general course of conduct, which seems to me is the most efficient way, 30 I would say, of disclosing whether he was agent or whether he was not. From a practical and logical point of view, if your Honor please, and logic has some—logic and reason have quite a considerable place in the practice of law—I don't think anybody

could escape the conclusion that he was authorized. Now, of course, your Honor's question is whether it presents legal proof; but I think the legal proof flows from the fact that here is not an isolated letter, but a series of transactions which seem to me are convincing that Mr. Ott, when he was writing to Mr. Baude, wrote with the authority of his mother.

10

The Court: Of course I had in mind only the letter—the only letter which I have read carefully is the letter P6 for identification.

Mr. Coulomb: Now, there is a letter of —

The Court: Which would seem to be an inquiry—in reply to an inquiry made by the plaintiff.

20 Mr. Coulomb: Yes.

Mr. Brown: It might help your Honor—it seems the law is directly against what Mr. Coulomb is endeavoring to prove. And I refer your Honor to the case of Ryle against Manchester B. & L. Association, reported in 74 Law. Justice Green. “It is settled law with us that the declarations of a person alleged to be the agent, although accompanying his acts, are not competent to establish either the
30 fact or the extent of the hiring.” Now, the agency might be proven by the agent himself in court, testifying, but it cannot be established by virtue of the documents which have been offered in evidence, because they are mere declarations of the agent accompanying the acts.

Offer of Evidence

Mr. Coulomb: If your Honor please, what Mr. Brown says is unquestionably the law. We have no dispute about that at all. But I direct your attention in addition to this—to these letters, I direct your attention to Mrs. Ott's letter which is in evidence, of March 4, in which she speaks that she is communicating or sending these things, or would send them to Harry to take care of them, and we 10 have proven Harry Ott is the same as Henry L. Ott.

Mr. Brown: That letter post-dates the letters that you are offering in evidence now. It was the letter—the letter of Mrs. Ott is dated March 4, 1921, and the letters of Henry Ott and Walter Baude to Henry Ott are in 1920.

Mr. Coulomb: That is true, but it is all part of 20 a single series of transactions.

Mr. Brown: Do you contend, Mr. Coulomb, this is not all of the correspondence that transpired between them, but just such as you have considered material?

Mr. Coulomb: This is the correspondence that we consider material to our case.

Mr. Brown: It does not represent all the cor- 30
respondence between Henry L. Ott and Walter Baude?

Mr. Coulomb: As far as we know, as far as Henry L. Ott is concerned, yes.

Offer of Evidence

The Court: You may mark them for identification.

(Letter offered is marked Exhibit P10 for identification.)

Mr. Gill: Letter of September 22, 1920, from
10 Walter A. Baude to Henry L. Ott.

(Letter offered is marked Exhibit P11 for identification.)

Mr. Brown: That is offered as an exhibit, or identification?

Mr. Coulomb: It is offered as an exhibit and,
as I understand your Honor's ruling, they can be
20 marked now for identification, and not being considered offered at this time.

The Court: Yes.

Mr. Brown: And I am objecting to the offer.

Mr. Coulomb: We have one more letter here, we find.

30 Mr. Gill: Letter of July 13, 1921, written by Henry L. Ott to Mr. W. A. Baude.

Mr. Brown: And I object to the offer for the reasons heretofore stated.

Offer of Evidence

(Letter offered is marked Exhibit P12 for identification.)

Mr. Brown: I understand that is marked for identification only.

Mr. Coulomb: That is marked for identification only. Plaintiff rests. 10

Mr. Brown: Then I have a motion for a non-suit, if your Honor please.

The Court: You desire to make it in chambers, under the circumstances, I suppose.

Mr. Brown: Might be better.

(In chambers:) 20

Mr. Brown: My motion —

The Court: The letters should be dealt with first, I think.

Mr. Coulomb: They were marked for identification and then we rested. It seems to me those letters clearly show that Mrs. Ott was talking to Mr. Baude through Henry L. Ott. As I said in the court room there, from the point of view of practical reasoning and logic, that certainly was the case. I don't think anybody who is just simply viewing the matter from the purely practical point of view would doubt it. The question is whether 30

there is anything in the law which prevents their use. I think there is a principle of law in the trial of a case, and particularly in the question of evidence, about a series of transactions, not one isolated letter, but a series, that would seem to indicate that where the letters themselves show a course of conduct between a man, I will say for the purpose
10 of argument, ostensibly at least talking for his mother—and he was; there is no doubt about that—whether he was her agent, he was pretending to be her agent, pretending to talk for her, telling what her attitude was and what she would like to have done. Now, when that continues and when we find at the very end of all this series of transactions—when the bonds finally reach—I take the practical situation in this case—finally reach the mother, she again refers—she refers to her son Harry. That
20 is the letter which is not there—yes, it is—letter of March 4, 1921, in which she says that, “I will give them to Harry if he comes this week, and if not will send them to him if he thinks that is correct,” or something of that sort. It shows, in connection with the rest of the transaction, that he did have authority to speak for her.

Now, I think I may with propriety state this, too, that if those letters are not evidential now for any reason, they are—may be evidential if this case gets
30 past Mr. Brown’s motion, and if Mr. Ott’s testimony is introduced, as tending I think to contradict it; but as the record now stands I think they are admissible, if your Honor please, as part of a continuing transaction, winding up with the assent spoken by Mrs. Ott in her letter that she had talked the matter over or would talk it over with Harry, she calls him.

Offer of Evidence

The Court: What do you intend they would prove, if admitted?

Mr. Coulomb: I beg pardon?

The Court: What do you intend these letters would prove, if admitted?

10

Mr. Coulomb: I think they are only corroborative, perhaps, if your Honor please, as showing from the course of conduct that—not only that Mr. Ott—Mr. Baude's statement and testimony on the stand that these bonds belonged to him is true —

The Court: Of course, the evidential —

Mr. Coulomb: The first letter there, I think, having in mind in connection with what he stated as to when he received the first batch of bonds, and the letter of October—of August 26, 1919, is clearly indicative of ownership. Cannot be anything else.

20

The Court: Of course, that ultimately brings us back to the question of whether or not he speaks for the deceased.

Mr. Coulomb: Oh, yes, I realize that, but you asked me what would be the evidential value if they were admitted, and of course, as I said before—well, I think—I don't know that it has any bearing on the case particularly, excepting to say that it is certainly not inconsistent that Mrs. Ott made her son her executor. I don't know the date of the will. It may have been made long after those letters.

30

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(Discussion off the record.)

The Court: The objection to the admission of these letters which have been marked P6 to P12, inclusive, for identification, will be sustained in the present posture of the testimony. I feel that there is absence of proof to disclose that Henry L. Ott
10 was authorized to speak for his mother, the deceased, in the matters to which these communications relate.

Mr. Coulomb: I ask for an exception to the refusal to admit exhibits offered for identification P6 to P12, inclusive.

Mr. Brown: Now, if your Honor please, I suppose we are at the point where I tender the motion
20 for a non-suit, and I make such a motion upon these grounds. If your Honor will analyze the pleadings in the case, as I referred to it in my opening this morning to the jury, you will observe that paragraphs 9 and 10 constitute what I call the crux of this case, and for the purpose of this motion I am anxious that your Honor should have them in mind. I have no doubt that you now have, but if I may be excused for again calling your attention to those allegations:

30 In paragraph 9 they say: "Plaintiff has demanded of defendant, as heretofore stated"—now the defendant in this case is Chemical Bank and Trust Company, administrator c. t. a. of the estate of Mary A. Ott, deceased—"that it deliver said bonds and coupons thereto belonging to this plain-

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tiff, yet defendant well knowing that said bonds and coupons belonging thereto are the property of the plaintiff, and contriving and fraudulently intending to deprive plaintiff of said bonds and coupons belonging thereto, hath refused and doth still wholly refuse to deliver and has not yet delivered to plaintiff said bonds and coupons thereto belonging."

Now, in paragraph 10 of their complaint, they 10 say: "Said defendant"—which is the bank administrator—"on or about the 25th of March, 1931, at Atlantic City, County of Atlantic and State of New Jersey, disposed of said bonds, and converted the same to its own use to the damage of the plaintiff in the sum of \$30,000."

Now then, that, if your Honor please, alleges what I conceive to be a fraudulent conversion on the part of the bank administrator, and the conversion is specifically alleged to have occurred on or about 20 March 25, 1931. The burden of proof in this case is on the plaintiff, and particularly is the burden on the plaintiff to prove first that these bonds came into the hands of the administrator defendant, and, secondly, that on March 25, 1931, they disposed of those bonds and converted them to its own use, and that it did so through contrivance and fraudulent intention.

Now, my motion is that—my suggestion is that there is nothing in this case to prove that these 30 bonds ever got into the hands of the administrator, unless perhaps plaintiff is endeavoring to have you draw in this instance, for the purpose of this motion, at least, the conclusion that the presumption follows that they came into the hands of the administrator

because they went into the hands of the decedent nine years previous to the appointment of the administrator. The proof in this case is that the bonds were delivered to the decedent in 1921, March 4th. The administrator c. t. a. was not appointed until 1930, September, 1930, more than nine years afterwards. Now, as I say, I submit the only testimony
10 from which it could even be inferred that those bonds ever got into the hands of the administrator c. t. a. is perhaps the suggestion on the part of plaintiff that there arises the presumption that they came into the hands of the administrator because they went into the hands of the decedent nine years previous to the administrator's appointment. I say that cannot follow as a matter of law; that there cannot be the presumption to that effect; that the—that it does not carry the burden that the plaintiff is called
20 upon to carry in this case. But, if your Honor please, assuming that there is such a presumption, there is no testimony in this case from which it can be proven that the bonds were converted on March 25, 1931, by this administrator to its use through any contrivance nor with any fraudulent intention. There is not a scintilla of evidence in this case which would warrant the conclusion or the jury's conclusion that there was fraudulent intention on the part of the bank. The mere refusal, we will say, to turn
30 over these bonds does not constitute fraud. I do not understand that conversion, in order to be conversion, must be founded in fraud. I think that the mere refusal to turn over the property may constitute a conversion, but they have chosen to describe a fraudulent conversion, which I think must

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be classified differently than mere conversion, and that there is no testimony, first, that the bonds ever came into the hands of the administrator or, secondly, that there was any conversion through fraud or contrivance on the part of this bank to the use of the bank. And they must prove the case they have made out. And that is the case, and there is nothing, I submit, in this case that would warrant 10 the defendant proceeding with its defense.

The Court: May I invite your attention to paragraph 7 of the complaint?

Mr. Brown: Yes.

The Court: In which it is alleged that the defendant returned to the plaintiff —

Mr. Brown: The certificates of stock. 20

The Court: Yes.

Mr. Brown: And refused and neglected to return the bonds with the coupons.

The Court: Yes, I thought that included the—the latter part of it I have in mind—but neglected and refused to return to this plaintiff said bonds 30 and coupons.

Mr. Brown: And the answer is that we did refuse to return them, that we returned the stock—no, I think the answer is —

The Court: Paragraph 2 alleges that the plaintiff was the owner and in possession of the bonds on and prior to March 4, 1921, and that on that date he deposited and left with the deceased the bonds and also, of course, the certificates of stock for safe keeping, and then follows paragraphs of the complaint in which demands are alleged to have been
10 made for the return of the bonds. And in paragraph 7 it is alleged that the defendant refused to return the bonds to the plaintiff.

Don't the paragraphs to which I have referred, together with others, allege a cause of action of conversion?

Mr. Brown: No, if your Honor please, because there is a denial in the answer of the defendant that the bonds ever came into our possession. Now,
20 if it were not for that denial that they came into our possession, then if we had just merely admitted we refused to turn them over, that might give rise to the assumption that we had them in our possession; but there is a denial that they ever came into our possession.

The Court: Well, you take it, then, that if the bonds had been owned by the plaintiff, had been entrusted to the deceased for safe keeping, the deceased died before any demand had been made upon
30 her, and with the additional circumstance that the deceased may have in her lifetime, unknown to the plaintiff, disposed of them, that the representative of her estate would not be liable for the conversion of the bonds?

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Mr. Brown: Well, if your Honor please, they would have been liable, perhaps, for the conversion of the bonds by her.

The Court: Yes.

Mr. Brown: But that is not the case that they have alleged.

10

The Court: It is her estate, is it not?

Mr. Brown: No, they allege the conversion by us. There cannot be a conversion without the possession of the property. I was surprised that in the filing of this complaint it had not alleged either a conversion by her or by the administrator, the refusal of the delivery of these bonds on demand.

20

The Court: Suppose there were no allegation as to—specifically as to who had exercised the dominion over the bonds, but that the case, as alleged, represented the situation to be that the bonds of plaintiff had been entrusted to the deceased for safe keeping and the deceased died, demand was made upon the representative of her estate for the return of the property, and the property was not returned, the demand to return was refused. Would such a complaint allege a good cause of action against the representative of the estate?

30

Mr. Brown: I think without doubt that would have presented a proper cause of action, and then

you may have gone further and said that conversion was either by the administrator or by the deceased.

The Court: Need they have said that at all?

Mr. Brown: But that is an entirely different case from what they have made out here.

10

The Court: Isn't that the case alleged here except it may be said that the pleader as he went along became a little more enthusiastic?

Mr. Brown: When we are called upon to try a case we look to the complaint to determine that with which we have been charged; and they say the bonds came into the hands of the administrator after the death of the decedent, and that after that, on March
20 25, 1931, they made a demand for the delivery to them and we refused it and that then and there, in that time, we through contrivance and fraud converted them to the use of the bank administrator. That is an entirely different case from what your Honor has suggested, and we naturally are trying this case upon that theory.

Now, I am going to tell you why it becomes important.

30 (Discussion off the record.)

The Court: Counsel now says you particularized your case by this complaint.

Mr. Coulomb: Let me point out this: that con-

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version in its common law style was a fraudulent act, it was an act of tort, it was a tortious taking of property away from another, and the use of the word "fraudulent" in that is simply the same kind of an allegation which you say in an ordinary contract, that at the special instance and request—where the contract is not by special instance and request, but is applied. It is a form of pleading, 10 and nothing more.

Let me say to you, you can examine this pleading that Mr. Brown speaks of, and his answer, and you will not find in it a single, solitary allegation that these bonds did not come into the possession of the bank. What they say is, "We received no bonds the property of Mr. Baude." Now, when we made our demand there is no proof in the case as yet that they ever told us, "We are giving you back the stock because we have it, but we are not giving you 20 back the bonds because we haven't it." When this complaint was drawn we had no more idea whether the bank had those bonds than your Honor had when you entered into the trial of this case. There was not a thing. All we knew was this, that we had placed bonds that belonged to us in Mrs. Ott's custody, and when she died we demanded those bonds back and the stock. We got back the stock and we did not get the bonds back.

Now, we mention particularly in our complaint 30 and in the demand the items that we declared that they had. They don't say in this answer, they don't set it up either by way of answer to our complaint or by an affirmative answer that these bonds were converted by Mrs. Ott in her lifetime. They don't

say that "these bonds never came into our possession." And how are we to know? They were the administrator. They knew whether the bonds had come into their possession or whether they had not. It was their duty to say, "All these bonds are not in our possession, these specific bonds; not to say that "no bonds the property of Mr. Baude" came
10 in. And as they deny, if your Honor please, in the second paragraph our ownership of those bonds, then they say "no bonds the property of Mr. Baude came into our possession," in their next paragraph. Now, what does that convey to a pleader? Supposing they had said in their answer to our pleading, by way of an affirmative defense, "These bonds never came into our possession, and if they were converted at all they were converted by Mrs. Ott in her lifetime." They had the facts, we did not, and,
20 therefore, we were forced to assume that they had them. How could we have proven—supposing we had alleged in this complaint that these bonds had been converted by Mrs. Ott in her life time; we could have come in here and Mr. Brown would have argued there is no conversion by Mrs. Ott in her lifetime, no proof of it. He said just a minute ago in an argument here that you cannot have two conversions, and we say, if your Honor please, that
30 from a legal point of view this conversion actually took place when we made our demand on them in March 25th—might have been November 6th when the first demand was made, but to make it absolutely sure, when we made our second demand for the return of the bonds or their value, if they did not have them. And do they say they don't have

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them, our bonds? It seems to me, and in our present state of pleading, we were entitled to know if they were going to make a defense in this suit that these bonds did not come into their possession.

Now, this suit was brought, I think, after we had made the demand for the bonds, July '31—that was ten months after they had been appointed administrator, and we were entitled to know in this answer, 10 when we filed this complaint to this—the answer to this complaint, that they did not have these bonds and never did have, and that they had been converted by Mrs. Ott in her lifetime. They knew, but we did not. We were obliged to take the case as we found it. Mrs. Ott was dead. The Chemical Bank and Trust Company was her administrator. We went to the administrator and demanded back the bonds and the stock. They give us the stock and do not give us the bonds. They do not say that 20 the bonds—either in answer to our demand, or in their complaint—in their answer to our complaint, that these bonds have been converted. It seems to me it would be absolutely an impossibility for us to know. For all we know, the bonds may have been in Mrs. Ott's possession all the time. They may still be hidden around somewheres, for aught we know.

The Court: You need not argue anything further. 30

Mr. Brown: They say we should have alleged that this conversion in fact occurred before we were appointed. Now, the fact is that the minute that that information came into our possession we en-

deavored to set it up in the answer, and they objected to it, and it resulted in the order which the Court entered. They say that we should have known it. The only way that we found this out was by mere chance, and there was an affidavit presented at the time, as I recall it, setting forth how the information came into the possession of the bank.

10 Understand, the bank had nothing to do with this estate until the decedent died.

Now, it seems to me that we should be called upon to defend only the case that they have made out and not something else that might be inferred from the pleadings. And, therefore, I think that the proof is lacking and that it does not substantiate the allegations in the complaint which are particular in themselves and all, I think, that we are called upon to defend.

20

The Court: I think the question here debated becomes somewhat simplified. After all, this is a motion for a non-suit, at which I am to consider only the testimony introduced in behalf of the plaintiff in its relation to the allegations of the complaint.

Testimony has been herein introduced from which the inference may be legitimately drawn that the plaintiff on March 4, 1921, was and since has been the owner of the bonds which are the subject-matter

30 of this litigation, and that on that date he parted with the possession of these bonds. There is a letter in evidence which I believe is marked P2, which it seems to me constitutes some evidence of the receipt of these bonds by the decedent, Mary A. Ott, the testator represented by the defendant in this

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action. It is admitted in the case that on November 6, 1930, and again on March 25, 1931, the plaintiff demanded of the defendant the return of these bonds, and that the defendant has failed, neglected and refused to return the bonds to the plaintiff. It is, accordingly, alleged that the bonds having been lawfully in the possession of the deceased, that the conversion of the bonds resulted in consequence of the demand for their possession on the part of the plaintiff, which occurred on March 25, 1931. 10

I think the evidence to which I have alluded, together with other evidence in the case, is sufficient to constitute a prima facie cause of action against the defendant within the allegations of the complaint. The motion for a non-suit must accordingly be denied.

Mr. Brown: You will allow me an exception? 20

The Court: You may have an exception. I suppose there is no proof of the value of these bonds?

Mr. Coulomb: I desire to direct your attention to the face value of the bonds as prima facie proof of their value.

Mr. Brown: I desire to call to your attention that they are demanding interest from March 4, 1921, rather than from the date of the conversion, and my point is that they are entitled to interest, if at all, only from the date of the conversion alleged and not from the date they turned the bonds over. 30

Mr. Coulomb: That is a question we were going to suggest your Honor might desire to have threshed out. We were entitled to interest on these bonds at their face interest down to the time they were shown to have been disposed, if they have been, by Mrs. Ott, and since that time at the legal interest.

10 (Discussion off the record.)

(In open court.)

B. LOUIS BLUMBERG, called as a witness on behalf of the defendant, being sworn, testified as follows:

Direct examination.

20

By Mr. Brown:

Q. You are a counsellor at law of this State, are you not?

A. Yes.

Q. Do you hold any official position in any department of the State?

A. I do.

Q. What is your official position?

30 A. Why, I am the Atlantic County District Supervisor for the Transfer Inheritance Tax Bureau of New Jersey.

Q. Were you such in June of 1930?

A. I was.

Q. And as such supervisor did you accompany me

B. Louis Blumberg—Direct

to the Chalfont Hotel and there open the safe deposit box that stood in the name of Mary A. Ott?

A. I did.

Q. What date was that?

A. On July 11, 1930.

Q. Do you know whether or not the box had been opened prior to that time?

A. I don't know. I don't have any record of any 10 opening except my own.

Q. When the box was opened did you find in the box any Allied Packers, Incorporated, 6 per cent convertible bonds?

A. No.

Q. Did you find any Toledo Traction, Light and Power Company 7 per cent bonds?

A. No.

Q. Did you find any Louisville Railroad Company 5 per cent bonds? 20

A. No.

Q. Did you examine the entire contents of the box?

A. I made an inventory of the box in the presence of William Elmer Brown, Mr. Harry H. Hallman

Q. Who was Mr. Hallman; associated with the hotel?

A. I think he is associated with the hotel, manager or something like that. And I think a Mr. Ott 30 was there or some relation of the deceased. Four or five were there.

Q. Did you find any preferred stock of the Standard Sanitary Manufacturing Company?

A. I have a record of 479 shares American Radia-

tor and Standard Sanitation Corporation, in the name of Alfred W. Ott, common stock.

Q. Did you find any preferred stock of that corporation in the name of Walter A. Baude?

A. Yes; I found a hundred shares of American Radiator and Standard Sanitation Corporation preferred in the name of Walter A. Baude.

10 Q. After examining the contents of the box for the Transfer Inheritance Tax purpose, did you release the contents of the box?

A. I delivered the State's release to Mr. Holman and sealed the box and put it back with instructions to—delivered the contents to the proper representative, whoever appeared with the short certificate.

Mr. Brown: Cross-examine.

20 Cross-examination.

By Mr. Coulomb:

Q. Was there any securities in that box that belonged to anybody else other than Mrs. Ott, Walter A. Baude and Alfred Baude—Alfred Ott?

A. I don't know. I have the entire list. I will read it if you want me to.

30 Mr. Brown: I don't think the entire contents exactly is an answer to the question.

Mr. Coulomb: If your Honor please, I think I have a right to know whether there was anything of Mrs. Ott's in there.

Frank S. Farley—Direct

Mr. Brown: What importance could that be? The purpose of producing this is to show bonds were not there. I intend to follow that up and show the bonds never came into the hands of the administrator.

The Court: I suppose proper cross-examination, however, to show what was there. 10

Q. Were there any securities in that box belonging to Mrs. Ott, Mrs. Mary A. Ott?

A. No, sir.

Q. That is all.

A. Except that I have a copy of a trust agreement to the Chemical National Bank of New York. I have not the names of the parties to that agreement.

20

Mr. Coulomb: That is all.

FRANK S. FARLEY, called as a witness on behalf of the defendant, being sworn, testified as follows:

Direct examination.

By Mr. Brown: 30

Q. Mr. Farley, you are an attorney at law of this State, are you not?

A. I am.

Q. In June of 1930 did you at my request go to

the Chalfont Hotel for the purpose of investigating the assets of Mary A. Ott, deceased?

A. I did.

Q. What day did you go?

A. June 24, 1930.

Q. What part of the hotel did you go, do you recall?

10 A. First went to the office and got in touch with Mr. Holman, who instructed a Mr. Hall, another man who was with me at the time, to her room. We went into a room that was two rooms, apparently two bedrooms with corresponding bath, and we searched through the entire day and part of the next day.

Q. Did you examine every article and make an inventory of the contents of those rooms?

A. I did.

20 Q. Did you find among any of the articles in the rooms any six per cent convertible bonds of Allied Packers, Incorporated?

A. I did not.

Q. Did you find any 7 per cent bonds of Toledo Traction, Light and Power Company?

A. I did not.

Q. Did you find any five per cent bonds of Louisville Railway Company?

A. I did not.

30 Q. Were you one of the appraisers of this estate?

A. I was.

Q. Do you recall whether or not in the appraisal which was submitted to you, you were called upon to appraise any six per cent convertible bonds of the Allied Packers, Incorporated?

Frank S. Farley—Cross
Hugh Weir—Direct

A. I was not.

Q. Were you called upon to appraise the value of any seven per cent bonds of Toledo Traction, Light and Power Company?

A. I was not.

Q. Were you called upon to appraise the value of any five per cent bonds of Louisville Railway Company? 10

A. I was not.

Mr. Brown: Cross-examine.

Cross-examination.

By Mr. Coulomb:

Q. Mr. Farley, when you examined Mrs. Ott's room did you find securities there? 20

A. I did not.

Mr. Coulomb: That is all.

HUGH WEIR, called as a witness on behalf of the defendant, being sworn, testified as follows:

Direct examination.

30

By Mr. Brown:

Q. Mr. Weir, where do you live?

A. Teaneck, New Jersey.

Q. Are you in the employ of the Chemical Bank & Trust Company of New York?

A. I am.

Q. In what capacity?

A. Assistant trust officer.

Q. And as such assistant trust officer do you have or have you had under your charge the administration of the affairs of the Estate of Mary A. Ott, deceased?

A. I have.

Q. Are you acquainted with the assets of that estate?

A. I am.

Q. Are there among the assets or has there come into the hands of the Chemical Bank and Trust Company as administrator c. t. a. of that estate any six per cent convertible bonds of Allied Packers, Incorporated?

A. No.

Q. Has the Chemical Bank and Trust Company, administrator c. t. a. of the Estate of Mary A. Ott, deceased, had in its hands as a part of the estate any seven per cent bonds of Toledo Traction, Light and Power Company?

A. No.

Q. Has the—has that bank as administrator of said estate had in its hands as assets of the estate any five per cent bonds of Louisville Railway Company?

A. No.

Q. Did the bank receive the contents of the safe deposit box at the Chalfont Hotel in Atlantic City?

A. It did.

Q. Among those assets did it receive a hundred shares of preferred stock of the Standard Sanitary Manufacturing Company, or some such company?

A. It did. American Radiator and Standard Sanitary Corporation.

Q. And they were in the name of whom?

A. Walter A. Baude.

Q. And were those shares of stock the shares 10 that were delivered to Mr. Baude, as has been testified to in this case?

A. Those are the shares.

Q. Did the bank come into possession of the contents of the rooms which Mrs. Ott occupied at the Chalfont Hotel prior to her death?

A. The title passed to her property going in storage.

Q. Among those assets did any of those bonds to which I have called your attention appear? 20

A. Appeared nowhere among the property or in the records up there.

Mr. Coulomb: I move the last be stricken out. How are records binding on us?

The Court: Yes; latter part may be stricken out.

Q. Since the appointment of the Chemical Bank and Trust Company as the administrator c. t. a. of 30 the Estate of Mary A. Ott, deceased, has it had the—has such administrator these bonds in its possession?

A. Not in our possession.

Q. Now, it is true, is it not, that Mr. Baude made

the demand upon the bank for the delivery of these bonds?

A. It is.

Q. And the bank has admitted that it refused to deliver the bonds. For what reason was that refusal?

10 Mr. Coulomb: I object to that.

The Court: Isn't it obvious?

Mr. Brown: Well, it seems so to me from the testimony that has heretofore been introduced.

Mr. Coulomb: Well, if your Honor please, I think the fact is that they refused.

The Court: Yes, but the reason, I take it, has
20 already been given, hasn't it?

Mr. Brown: I withdraw that question.

Q. Mr. Weir, at the time that you refused to deliver the bonds to Mr. Baude, did you have the bonds in your possession?

A. We did not.

Q. And did you prior to that time have them in your possession?

A. No.

30

Mr. Brown: Cross-examine.

Mr. Coulomb: I don't think we have any questions.

The Court: That is all, Mr. Weir.

Mr. Brown: Now, Mr. Clerk, those depositions, will you bring them in? Have you got the one from Florida, please?

If your Honor please, in accordance with the procedure as required by law, I had certain depositions taken in the State of Florida, in the State of Kentucky and in the State of Delaware, and I had them delivered to the clerk in accordance with the rule, and they are here still sealed. I don't know whether they should be opened by the Court or by the clerk or by me. I want to offer them in evidence at this time. 10

The Court: No objection to the clerk opening them, is there, by counsel?

Mr. Coulomb: I have no objection to counsel opening them. 20

Mr. Brown: Now, if your Honor please, I desire to offer in evidence the commission which issued out of this court to Velma Adams, of Saint Petersburg, Florida, to take the testimony of Henry L. Ott, to which is attached the interrogatories and the answers, and I desire to read them to the jury at this time.

30

Mr. Coulomb: We reserve the right to object to these individual questions.

The Court: Yes.

*Interrogatories and Answers of Henry
L. Ott*

Mr. Coulomb: As they are asked.

Mr. Brown: The interrogatories are interrogatories administered to Henry L. Ott, at Pass-a-grille, Florida, a non-resident witness, and they were submitted to him in pursuance of an order of this
10 court of April 1st, 1932. The answers thereto were sworn to on April 25, 1932.

Interrogatory Number 1: "What is your name, age, occupation and place of residence?"

Answer: "My name is Henry L. Ott. My age is fifty-four. My occupation is capitalist and my place of residence is Pass-a-grille, Florida."

Second Interrogatory: "Are you a son of Mary
20 A. Ott, deceased, late of Atlantic City, New Jersey?"

Answer: "Yes."

Third Interrogatory: "Are you acquainted with Walter A. Baude, the plaintiff in an action entitled 'Walter A. Baude, Plaintiff, v. Chemical Bank and Trust Company, Administrator cum testamento annexo of the Estate of Mary A. Ott, deceased, Defendant,' and brought in the Supreme Court of New Jersey, Atlantic County?"

30 And the answer is: "Yes, I am."

Fourth Interrogatory: "Annexed hereto and marked Exhibit 'A' is a copy of a carbon copy of a letter dated January 5, 1921, and addressed to 'Mr. Walter A. Baude, 913 Park Place, Wilmington,

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Delaware.' State whether or not you requested Mr. Helm Bruce to write the letter of which Exhibit 'A' is such a copy."

That is the end of the question.

Mr. Coulomb: I object to that, if your Honor please. There is no proof in this case that Mr. Henry L. Ott had any authority to direct Mr. Bruce or anybody else to write a letter to Mr. Baude on behalf of his mother. Letters which your Honor considered, which we offered in evidence, and which were excluded on the ground of lack of agency, and there has been no proof of agency or authority as to that in this. 10

Mr. Brown: My recollection is that the witness testifies further on in the interrogatories that he did so at the request of his mother. I think we are within the rule. 20

The Court: Shall we pass it for the present, and a note may be made of it, and return to it if such a situation arises.

Mr. Brown: The answer itself, if your Honor please, states that it was not done by him, but it was — 30

Mr. Coulomb: I object to that.

Mr. Brown: Perhaps these ought to be—here is a copy of these interrogatories and here is a copy

of his answers. It is the sixth—or, fourth—if you look at the fourth answer. Will you produce the original of that letter, please, January 5, 1921?

The Court: That is the fourth interrogatory; wasn't it?

10

Mr. Brown: Yes. It refers to letter of January 5, 1921, which was referred to in the stipulation and interrogatories of this witness, as the demand which was made after which these bonds were delivered.

The Court: Have you seen the answer?

Mr. Coulomb: Yes. If your Honor please, I think the answer is hearsay.

20

The Court: Doesn't appear so, does it?

Mr. Coulomb: I think so.

The Court: It is a positive statement, is it not?

30 Mr. Coulomb: Well, I wouldn't say so, if your Honor please. I think, in the first place, it is double-barrelled hearsay. It says the letter was written by a certain lawyer at the request of a certain person, and Mr. Ott is testifying to that.

The Court: In this question he is asked whether or not he requested.

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Mr. Coulomb: He says no. That might be all right. And it is not responsive, either.

The Court: True; it is not responsive.

Mr. Brown: Same letter they referred to in their stipulated deposition, January 5, 1921, the demand. 10

The Court: January 5?

Mr. Brown: 1921. Do you remember, there was a stipulated deposition of Henry L. Ott offered by the plaintiff. We argued it out. It was the letter I wanted them to produce, and your Honor did not comply with the demand I made this morning because you said the answer did not say in pursuance of it. It was merely after the demand. 20

The Court: Just what were the circumstances of that? I am not so clear about that. Reference is made to it in your case, is it not?

Mr. Coulomb: Yes. That only fixed the time. These were returned after the writing of a certain letter. The letter was written on January 5, 1921, and apparently Mr. Ott was fixing the time. They were returned after the demand made but at a time that he was not certain about. The only effect of the date of the letter was to show it was made after the date of the letter, which was January 5th. 30

Mr. Brown: The purpose of this deposition is to show the demand by producing the letter.

The Court: The letter was not produced, was it?

Mr. Brown: I have an understanding that they will produce any letters they may have in their possession. I am asking them to produce the letter now.

10

Mr. Coulomb: We have not the letter. We have copy of the letter.

Mr. Brown: Will you produce it, please?

Mr. Coulomb: Yes.

Mr. Brown: Here is the letter to which we are referring.

20

The Court: I will allow it.

Mr. Coulomb: Allow the question?

The Court: Yes.

Mr. Coulomb: I desire an exception.

Mr. Brown: The fourth interrogatory I will repeat, it is so long ago since I read it:

30

"Annexed hereto and marked Exhibit 'A' is a copy of a carbon copy of a letter dated January 5, 1921, and addressed to 'Mr. Walter A. Baude, 913 Park Place, Wilmington, Delaware.' State whether or not you requested Mr. Helm Bruce to write the letter of which Exhibit 'A' is such a copy."

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Answer: "I did not request the writing of the letter of which Exhibit 'A' is a copy, but my mother did request it."

Mr. Coulomb: I move to strike the last out, if your Honor please, on the ground it is not responsive.

10

The Court: It is not responsive, is it?

Mr. Brown: Well, if your Honor please, they acknowledge the demand made upon them by that letter in their stipulated —

Mr. Coulomb: We did not —

The Court: However, are you gentlemen not confronted with this rule? The question was propounded by the attorney for the defendant. You object because the answer is not responsive. If the irresponsible part of such an answer is materially adverse, counsel cannot move to strike out the portion so considered.

20

Mr. Coulomb: I rather fancy that is a correct rule in practice.

The Court: Objection will be overruled.

30

Mr. Coulomb: Allow me an exception.

Mr. Brown: Now then, if your Honor please, I think it is appropriate that I should offer that letter

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in evidence at this time, having been produced by the defendant—or the plaintiff.

10 Mr. Coulomb: I object to the letter. In the first place, it is not written by Mrs. Ott; it is written by a lawyer. In the second place, there is no proof in the case that Mrs. Ott knew the contents of the letter; and, in the third place, if she did the letter would be self-serving.

The Court: The objection will be overruled.

Mr. Coulomb: Your Honor will allow me an exception?

20 The Court: You may have it.

(The letter offered is received in evidence and marked Exhibit D1.)

30 Mr. Brown: With your Honor's permission, I will read the letter to the jury. On the letterhead of the Law Offices of Bruce & Bullitt, Louisville, Kentucky. Dated January 5, 1921. Addressed to Mr. Walter A. Baude, 913 Park Place, Wilmington, Delaware.

“Dear Sir: Mrs. Mary A. Ott has asked me to write you and demand the return of certain securities which she has heretofore placed in your hands under certain conditions, and upon certain trusts.

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And I therefore write for the purpose named, and do hereby, as counsel for Mrs. Ott, make the demand upon you.

"I am not able to specify the securities, but you know what they are, being all of those which you have heretofore received from her. She has heretofore personally informed me that she placed these securities in your hands simply to hold" — 10

Mr. Coulomb: Now, if your Honor please, it seems to me that is clearly hearsay, this part of the letter.

The Court: True. It may not be proof. It is not proof of the facts therein stated.

20

Mr. Coulomb: That is all right.

The Court: I shall doubtless be obliged to so instruct the jury.

Mr. Coulomb: That is what I want to make clear.

Mr. Brown: I think it will be followed up by testimony that will be corroborative.

30

"She has heretofore personally informed me that she placed these securities in your hands simply to hold until her death, at which time, but not before, they were to become yours, and that she only turned them over to you at the time because she was not

in Louisville where her safety box is and where she could put them away herself, and she did not care to turn them over to her son, Henry, who ordinarily acts as her agent, as she did not care to mix him up in the matter.

10 "I have also conferred with Henry L. Ott, who tells me that he was present when the first of these securities were delivered to you and that the statement of his mother to me, as outlined above, is correct.

20 "As you of course know, conditions have changed since Mrs. Ott placed these securities in your hands, and while she still intends to carry out the ultimate trust for your benefit—in other words, intends them to be yours at her death—she desires to have possession of them and to preserve them, until her death.

"If I am correctly informed—and I have no doubt that I am—you are greatly debtor to Mrs. Ott, who has in fact been a mother to you; and I venture to suggest that it is as little as you can do to comply with her wishes in this matter and not force her to carry into court this situation.

30 "Mrs. Ott has asked me to have you send the securities to me, but if you doubt my authority to receive them for her, you can send them direct to her, or I can have her send you a written order for the delivery of them to me.

"Please let me hear from you promptly, as this matter has now been in an unsatisfactory condition for quite a while.

"Yours truly, Helm Bruce."

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The next interrogatory is the fifth: "Annexed hereto and marked Exhibit 'B' is a copy of a carbon copy of a letter dated January 23, 1932, and addressed to 'Mr. Richard S. Rodney, 907 Market Street, Wilmington, Delaware.' State whether or not you wrote and signed the letter, of which Exhibit 'B' is such a copy. If so, state whether or not you enclosed said letter, so signed, in a securely closed postpaid envelope addressed to 'Mr. Richard S. Rodney, 907 Market Street, Wilmington, Delaware,' and deposited the same in a United States post office or United States letter box." 10

Answer: "I wrote and signed that letter, of which Exhibit 'B' is a copy. I enclosed this letter in an envelope, securely sealed, postage postpaid, addressed to Mr. Richard S. Rodney, 907 Market Street, Wilmington, Delaware, and deposited it in a United States mail box." 20

I perhaps ought not to offer that at this time, but have the copy marked for identification, if I may, because it will not become relevant, it seems to me, until after the deposition of Richard S. Rodney is read into the evidence. Have you a copy of that letter, Mr. Gill?

Mr. Gill: I thought I had.

30

Mr. Brown: Sixth Interrogatory: "State whether or not you received a letter from Mr. Richard S. Rodney, dated on or about the 24th day of December, 1921. If so, please produce and annex to your

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answer to these interrogatories that letter, and marked it Exhibit '1'; or if you do not have the original of that letter, please produce and annex a true copy thereof and mark it Exhibit '1'; and state why the original of that letter is not produced and annexed, and state where the original of that
10 letter is, if you know."

The answer to that is: "I received a letter from Richard S. Rodney dated about December 24, 1921. I do not know if I have the original or not. I do not have it here in any event. My files are in Crestwood, Kentucky. It might be there. I do not have a copy available here."

Now a stipulation with counsel.

Mr. Coulomb: I think we agreed with Mr. Brown
20 or he agreed with us that we would not require formal proof of these letters. Question of their relevancy only.

Mr. Brown: I would like to mark that for identification, if I may.

(Letter offered is marked Exhibit D2 for identification.)

30 Mr. Brown: Next interrogatory is the seventh: "Annexed hereto and marked Exhibit 'C' is a copy of a carbon copy of a letter dated February 20, 1922, and addressed to 'Mr. Albert F. Polk, attorney at law, care of Saulsbury & Curley, Wilmington, Delaware.' State whether or not you wrote

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and signed the letter of which Exhibit 'C' is such a copy. If so, state whether or not you enclosed said letter, so signed, in a securely closed postpaid envelope addressed to 'Mr. Albert F. Polk, attorney at law, c/o Saulsbury & Curley, Wilmington, Delaware,' and deposited the same in a United States post office or United States letter box." 10

The answer to that: "Yes, I wrote and signed the letter of which Exhibit 'C' is a copy. I did enclose the letter in a securely closed postpaid envelope addressed to Mr. Albert F. Polk, attorney at law, care of Saulsbury & Curley, Wilmington, Delaware, and deposited the same in a letter box."

That letter will be offered later.

Eighth: "State whether or not you received a letter from Mr. Albert F. Polk, dated on or about February 16, 1922. If so, please produce and annex 20 to your answer to these interrogatories that letter and mark it Exhibit '2'; or if you do not have the original of that letter, please produce and annex a true copy thereof, and mark it Exhibit '2,' and state why the original of that letter is not produced and annexed, and state where the original of that letter if, if you know."

The answer to that is: "I have received a letter from Mr. Albert F. Polk dated about February 16, 1922. I do not know whether I have the original 30 or not. I do not have it here in any event, as my files are in Crestwood, Kentucky. It might be there. I do not have a copy available here."

I have the original of that letter and will ask it be marked for identification.

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(Letter offered is marked Exhibit D3 for identification.)

Interrogatory Ninth: "Do you know whether Mary A. Ott at any time handed over to Walter A. Baude any securities consisting of bonds and
10 stocks?"

Answer: "Yes, I know all about it. I bought the stocks and bonds for her to hand over. I was acting as Mother's agent at that time."

Tenth: "If your answer to the foregoing interrogatory is in the affirmative, state whether or not Mary A. Ott at any time handed over to Walter A. Baude securities consisting of bonds and stocks."

20 Answer: "Yes, Mary A. Ott handed to Walter A. Baude securities consisting of stocks and bonds in my presence."

Eleventh: "If your answer to the foregoing interrogatory is in the affirmative, state whether or not you were present at the time Mary A. Ott handed over to Walter A. Baude securities consisting of bonds and stocks."

30 Answer: "Yes, I have answered I was present when some of the securities consisting of stocks and bonds were handed over."

Twelfth: "If your answer to the foregoing interrogatory is in the affirmative, state whether or not the securities so handed over by Mary A. Ott

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to Walter A. Baude consisted of the following bonds and stocks."

And they are those enumerated in the complaint.

And the answer to that is: "Mary A. Ott handed over to Walter A. Baude the securities named in the twelfth interrogatory."

10

Thirteenth Interrogatory: "If your answer to interrogatory numbered 'Eleventh' is in the affirmative, state what, if anything, was said by Mary A. Ott to Walter A. Baude at the time she handed over to him the bonds and stocks."

Mr. Coulomb: I object to this question. In the first place, it is a transaction with the decedent. Now, to be sure, this testimony is being offered by Henry L. Ott, who was, as your Honor will recall, 20 the original executor to the will—in the will—named in the will. He resigned as executor, and now he comes in and speaks as to a transaction with the decedent. Had he remained executor, the result of that evidence which is now being offered would be to open the mouth of Mr. Baude. Now, therefore, it seems to me that testimony should not be introduced or received in evidence unless upon the condition that Mr. Baude himself will be permitted to make such reply to the statement now being offered 30 by Mr. Ott as may be the truth, so far as Mr. Baude is concerned.

The Court: Is there any doubt, Mr. Brown, it would have that effect, if you now offer testimony?

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Mr. Brown: The resignation of Mr. Ott as the executor under the will did not disqualify him as a witness.

10 The Court: Would it not have the effect, however, inasmuch as this is a transaction apparently between the plaintiff and the deceased, to which this testimony now to be offered is to relate, and the testimony is being offered by the defendant, the representative of the estate?

Mr. Brown: Well, the objection is not open to them.

The Court: No, no.

20 Mr. Brown: Maybe I am not conceiving the objection at all. I don't understand it.

Mr. Coulomb: I want to direct both the Court's and counsel's attention, if I may, so that there will be no question, that I permitted this question to be asked without objection, if I afterwards attempt to establish by Baude what the conversation was at that time.

30 The Court: In other words, counsel and the Court are being apprized of the position which plaintiff's counsel intend to take if this testimony is offered.

Mr. Brown: We take notice of that and meet it when it comes.

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The Court: Very well.

Mr. Brown: I have found copies of the Exhibit "B" and "C" which were attached to the interrogatories, which I will ask to be marked for identification at this time. That is the letter from Henry L. Ott to Rodney, and the letter from Henry L. Ott 10 to Polk.

The Court: December 24, 1921, and February 20, 1922.

Mr. Brown: No; it is January 23, 1922, and February 20, 1922.

(The letters offered are marked Exhibit D4 for identification and Exhibit D5 for identification.) 20

Mr. Brown: The answer to that interrogatory is —

Mr. Coulomb: What number is this?

Mr. Brown: Thirteen. "Mother said to him at the time of turning over some of the securities: 'Walter, I want you to learn how to invest money and take care of it and when you make investments I want you to report to me. I wanted to adopt you as a son but my lawyer advises against it.' Mother said to him, 'These securities are to be yours at my death but not before. I am only turning them over to you because I am not in Louisville where my safety box is and where I could put them away 30

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myself. I do not want to mix Harry (meaning me) up in the matter by making him trustee.' And she warned him not to get a swelled head over it, and if he did the stocks and bonds were to be returned to her."

- 10 Fourteenth Interrogatory: "If your answer to interrogatory numbered 'Eleventh' is in the affirmative state what, if anything, was said by Walter A. Baude to Mary A. Ott at the time Mary A. Ott handed over to him the bonds and stocks."

20 Mr. Coulomb: I have the same question to raise now that I raised before. He is now offering in evidence an alleged statement made by Mr. Baude in the presence of Mrs. Ott. Whether that is a transaction with the decedent or not I am not prepared to say at this precise minute, but I want to have my position stated on the record, we are going to insist that with the admission of this testimony, that Mr. Baude's mouth is opened.

Mr. Brown: I will take notice of that.

Mr. Coulomb: All right.

- 30 Mr. Brown: The answer is: "At the time of handing over the first securities, Walter A. Baude agreed to what my mother said in my presence. He said: 'The terms are satisfactory to me. Whatever you want done, I will do it. I promise I will not get a swelled head over it.'"

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The Fifteenth Interrogatory is: "If your answers to interrogatories numbered 'Tenth,' 'Eleventh' and 'Twelfth' are in the affirmative, state whether or not Mary A. Ott subsequently requested you to demand, or cause to be demanded, of Walter A. Baude that he return to her the securities consisting of the bonds and stocks referred to in interrogatories 10 numbered 'Tenth,' 'Eleventh' and 'Twelfth.' "

Mr. Coulomb: Now, your Honor please, I object to that because that is a statement made out of the presence of Mr. Baude.

The Court: It inquires whether the deceased requested him, the witness, to make a demand upon the plaintiff.

20

Mr. Brown: As her agent.

The Court: Yes.

Mr. Brown: That is the effect of it.

Mr. Coulomb: If it is admitted he is the agent, all right.

Mr. Brown: That is the only way it could be construed.

30

The answer to the interrogatory is: "Yes, she did request me to demand the return of these securities."

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Sixteenth Interrogatory: "If your answer to the foregoing interrogatory is in the affirmative, state what Mary A. Ott said to you at the time or times she requested you to demand or cause to be demanded of Walter A. Baude that he return the securities consisting of the bonds and stocks referred
10 to in interrogatories numbered 'Tenth,' 'Eleventh' and 'Twelfth.' "

Mr. Coulomb: I object to that. That certainly is purely self-serving, statement made by Mrs. Ott—that is, they allege it was, by Mrs. Ott to Mr. Ott, her son, in the absence of Mr. Baude. Mrs. Ott is dead. Mr. Baude was not there, and I say that is purely hearsay. I object to it on the ground it is hearsay and a self-serving declaration as well.

20

Mr. Brown: It seems to me that if for no other purpose the jury is entitled to receive this as a bit of testimony from which they can determine the intention of the donor at the time of the alleged gift. Your Honor has probably read from the facts that has already been before you and the arguments had between counsel that the allegation of the defense is that this—if anything at all could be—this case could be sustained only upon the theory that the
30 gift of these bonds from Mrs. Ott to Mr. Baude was a gift inter vivos. Now then, in order to accomplish such a gift, it must be complete, and one of the very essentials of a gift inter vivos is the donative intent that she, the donor, should have deprived herself of every dominion over the stock and that it should

be complete ownership delivered to Baude; so that it seems to me that, if for no other reason, this testimony is some evidence from which the jury can determine what the intention of the donor was at the time of the gift, and for that reason it is admissible.

10

The Court: However, it is a statement subsequently made, is it not; not concurrently made by the deceased with the turning over of the securities, but evidently made by the deceased at a time when she sought to have a demand made for the return of them?

Mr. Brown: Yes, it is true that it is subsequent. I was trying to locate a case that I had on that. Turner on Evidence, Chapter 7, under Declarations, 20 says: (Reads.)

The Court: Do you press the objection? As I notice the answer I don't think it is very consequential either way. If you press the objection I am inclined to sustain it.

Mr. Coulomb: The thirteenth interrogatory?

The Court: Sixteenth.

30

Mr. Coulomb: If your Honor please, yes, I think we would like to press that objection. The cases are clear.

The Court: Yes.

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Mr. Brown: Allow me an exception.

The Court: The objection will be sustained and you may have an exception.

Mr. Brown: Seventeenth Interrogatory: "State
10 whether or not Walter A. Baude returned the bonds and stocks referred to in interrogatory numbered 'Twelfth' to Mary A. Ott after demand made by said letter dated January 5, 1921. If so, state whether or not the same were returned on or about March 4, 1921."

Answer: "Walter Baude returned the bonds and stocks referred to in interrogatory 'Twelfth' but I do not know when. They were returned directly to my mother."

20

Eighteenth Interrogatory: "If your answer to interrogatory numbered 'Seventeenth' is in the affirmative, state whether or not the bonds and stocks referred to in interrogatory numbered 'Seventeenth' were returned by Walter A. Baude personally or by mail, if you know."

Answer: "They were returned by mail as far as I know."

30 Nineteenth: "State whether or not you received possession of the following bonds and stocks from Mary A. Ott on or about March 4th, 1921."

And then the bonds are specifically referred to as in the complaint.

"Also state whether or not" —

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Mr. Geisler: Also the stock.

Mr. Brown: Did I say just the bonds? Bonds and stock are specifically referred to as in the complaint.

"Also state whether or not the foregoing bonds and stock were the same bonds and stock referred to in interrogatories numbered 'Tenth,' 'Eleventh' and 'Twelfth.' "

That is the nineteenth. "I did receive possession of the bonds named in the nineteenth interrogatory as Mother's agent. My mother kept the 100 shares of preferred stock of the Standard Sanitary Manufacturing Company herself. It was issued in the name of Walter A. Baude. Yes, these bonds and stocks were the same bonds and stocks mentioned in interrogatories numbered 'Tenth,' 'Eleventh' and 'Twelfth.' "

Twentieth Interrogatory: "If your answer to interrogatory numbered 'Nineteenth' is in the affirmative, state whether or not you held possession of said bonds and stocks as the agent of Mary A. Ott and subject to her orders."

Answer: "Yes, I did hold the bonds as her agent and subject to her orders. I did not hold the stock."

Twenty-first Interrogatory: "If your answer to interrogatory numbered 'Nineteenth' is in the affirmative, state whether or not you collected interest on the bonds referred to in interrogatory numbered 'Nineteenth' on and after March 4th, 1921.

"State whether or not you collected interest on

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the stocks referred to in interrogatory numbered 'Nineteenth' on and after March 4th, 1921."

Answer: "After March 4, 1921, or 1922, I do not know which year, I collected the interest on the bonds as payable and deposited the same to my mother's credit. I did not collect interest on the
10 stocks. Walter Baude collected the interest on the stocks and did not live up to his agreement and report to Mother about the investments made with the interest from these stocks. As far as Mother and I knew, he made no investments of the interest he received on the stocks."

Twenty-second Interrogatory: "If your answer to interrogatory numbered 'Twenty-first' is in the affirmative, state, so far as you know, whether or
20 not Walter A. Baude at any time, during the lifetime of Mary A. Ott, deceased, received or demanded of you the interest on the bonds referred to in interrogatory numbered 'Twenty-first.' If your answer is in the affirmative, state on or about what date or dates Walter A. Baude received interest on said bonds and stocks from you."

The answer is: "No, he never demanded the interest on the bonds. I have answered that he never demanded the interest on the bonds. I did not collect
30 the dividends from the stock."

Twenty-third Interrogatory: "If your answer to interrogatory numbered 'Nineteenth' is in the affirmative, state what disposition, if any, you made of the bonds referred to in interrogatory numbered 'Nineteenth.'"

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"State what instructions, if any, were given you by Mary A. Ott with respect to the disposition of said bonds.

"Also state at or about what time such disposition, if any, was made of said bonds.

"Also state whether or not you advised Walter A. Baude of such disposition, if any, of said bonds. 10
If so, state approximately the date or year when, and by what means, you so advised him as to such disposition."

The answer is: "I do not know, I do not have the books here. I do not know what instructions were given, my books are not here. I do not know about the disposition of the bonds and I did not advise Walter Baude about the disposition of the bonds."

Twenty-fourth Interrogatory: "If your answer to interrogatory numbered 'Nineteenth' is in the affirmative, state what disposition, if any, was made by you of the stocks referred to in interrogatory numbered 'Nineteenth.' 20

"State what instructions, if any, Mary A. Ott gave you with respect to the disposition of said stocks.

"Also state at or about what time such disposition, if any, was made of said stocks.

"State whether or not you advised Walter A. Baude of such disposition, if any, of said stocks. If so, state approximately the date or year when, and by what means, you so advised him as to such disposition." 30

The answer to that interrogatory is: "The stocks

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were put in mother's box in the Atlantic City hotel and they were there at the time of her death. Mary A. Ott did not give me any instructions about the stocks. She held them herself. No disposition was made of stocks by me. I did not advise Walter Baude about the stocks as I did not make any disposition of them. They were in mother's hotel box at the time of her death."

Signed Henry L. Ott, and sworn to on April 25, 1932, before Velma Adams, Notary Public and Commissioner.

The Court: Henry L. Ott was or was not an officer connected with the defendant company?

Mr. Brown: That I don't know. I don't think he was connected with it, as far as I know. I have no information in that respect.

I now open the deposition —

If your Honor please, I offer in evidence the commission issued out of this court on April 2, 1932, addressed to Emery S. Graham of Louisville, Kentucky, to take the testimony of one Katherine Garvin, to which is attached the interrogatories and the answers thereto addressed to that witness. And I desire at this time to offer—to read those interrogatories and answers in evidence.

First Interrogatory: "What is your name, age, occupation and place of residence?"

The answer is: "My name is Katherine A. Garvin; forty-three years old; occupation, stenographer; place of residence, 4402 Southern Parkway, Louisville, Kentucky."

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Second Interrogatory: "Were you acquainted with one Helm Bruce, Esquire, an attorney-at-law of the City of Louisville and State of Kentucky, during his lifetime?"

Answer: "I was."

Third Interrogatory: "Is said Helm Bruce, Esquire, now living, and if not, state date of his death?" 10

"He dies on August 10th, 1927," the witness answers.

Fourth Interrogatory: "Were you employed by said Helm Bruce, Esquire, during the month of January, 1921, and if so state in what capacity?"

Answer: "I was employed by Mr. Bruce in the month of January, 1921, as his secretary." 20

Fifth Interrogatory: "During the month of January, 1921, did said Helm Bruce, Esquire, render legal services to one Mary A. Ott?"

"If so, state, if you know, whether or not such legal services were in connection with procuring the return to Mary A. Ott of bonds and stocks said to have been handed over by Mary A. Ott to one Walter A. Baude."

The answer to that is: "He did render legal services to one Mary A. Ott. It was in connection with procuring the return of certain stocks and bonds turned over to one Walter A. Baude." 30

Sixth Interrogatory: "Annexed hereto and marked Exhibit 'A' is a copy of a carbon copy of a

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letter dated January 5, 1921, addressed to Walter A. Baude, 913 Park Place, Wilmington, Delaware.

"Do you have personal knowledge concerning said letter?

10 "If so, state whether or not said letter was dictated to you by said Helm Bruce, Esquire, and whether or not the original letter of which said Exhibit 'A' is a copy, was written by you as dictated by said Helm Bruce, Esquire?

"If said letter was dictated to and written by you, state whether or not said letter as written by you was signed by said Helm Bruce, Esquire?

20 "If said letter was signed by said Helm Bruce, Esquire, state, if you know, whether or not said letter so signed, was enclosed in a securely closed post paid envelope, addressed to 'Mr. Walter A. Baude, 913 Park Place, Wilmington, Delaware,' and deposited in a United States Post Office or United States letter box? If so enclosed and deposited, state by whom."

30 Answer: "I do have personal knowledge concerning the said letter of January 5th, 1921. Said letter was dictated by Mr. Helm Bruce to me and transcribed by me, and the original was signed by Mr. Helm Bruce. The Exhibit 'A' attached to the interrogatories has been compared by me with the carbon made at the time of writing the original letter and the same is a true and correct copy of the carbon of the original letter as dictated by said Helm Bruce and written by me and which was signed by Mr. Helm Bruce. The original so signed by Mr. Bruce was enclosed in a securely closed post

*Interrogatories and Answers of Emery S.
Graham*

paid envelope, addressed to 'Mr. Walter A. Baude, 913 Park Place, Wilmington, Delaware,' and was deposited in a United States Post Office mail chute. The said letter was so enclosed and deposited by me at Louisville, Kentucky."

If your Honor please, that is the letter offered in evidence and marked D1.

10

The Seventh Interrogatory: "If your answer to the foregoing interrogatory is in the affirmative, state, if you know, whether or not Mary A. Ott instructed Mr. Helm Bruce to write such a letter to Mr. Walter A. Baude."

Answer: "I did not hear Mrs. Mary A. Ott give these instructions to Mr. Helm Bruce to write said letter because she was not in the office at the time of the writing of the letter."

20

Eighth Interrogatory: "If your answer to interrogatory numbered 'Fifth' is in the affirmative, state, if you know, whether or not Henry L. Ott instructed said Helm Bruce, Esquire, to write such a letter to Mr. Walter A. Baude?"

Answer: "I do not personally know whether Henry L. Ott instructed said Helm Bruce to write such a letter to Mr. Walter A. Baude. Matters that Mr. Bruce attended to for Mrs. Ott were usually brought to Mr. Bruce's attention by Henry L. Ott. He was frequently in the office of Mr. Bruce and in consultation with Mr. Bruce."

30

Next interrogatory, the ninth: "If your answer to interrogatory number 'Fifth' is in the affirma-

tive, state, if you know, whether or not Walter A. Baude, after January 5, 1921, returned to Mary A. Ott the securities mentioned in said letter?"

The answer to that interrogatory is: "I do not know of the securities mentioned in the letter of January 5th, 1921, ever being sent to Mr. Bruce for Mary A. Ott."

10 Deposition is signed Katherine Garvin and is sworn to on April 8, 1932, before Emery S. Graham, Commissioner.

Should these depositions be marked in evidence, if your Honor please, to identify them?

The Court: I suppose they should.

Mr. Brown: Depositions of Henry L. Ott I offer in evidence.

20

Mr. Coulomb: We have no objection, except the one that was overruled. I think there was only one that was overruled; that is the thirteenth.

Mr. Brown: I am not sure as to the number, but I remember there was one.

Mr. Coulomb: And the rest are subject to our exceptions to several there that are on the record.

30

Mr. Geisler: We are not waiving any of the objections.

The Court: Those that were excluded I assume ought not to be.

*Interrogatories and Answers of Richard
S. Rodney*

Mr. Brown: Perhaps the proper procedure would be to file these with the Court.

The Court: Yes.

Mr. Brown: Of course, I have not had them in my possession. They went directly to the County Clerk in accordance with the required procedure; but I presume now they are opened and offered that they should be filed. Will your Honor mark them "filed" then? This prior one is the first, and the other is the second. (Hands papers to the Court.) There are two depositions from Delaware.

The Court: Are then lengthy?

Mr. Brown: Well, they have to do with the—they are not as lengthy as the first, by any means.

I now have the commission issued out of this court on April 2nd, 1932, and addressed to Catherine Fitzpatrick of Wilmington, Delaware, directing her to take the depositions of Richard S. Rodney and Albert F. Polk, residents of that city and State, and I have before me first the interrogatories of Richard S. Rodney.

First Interrogatory: "What is your name, age, occupation and place of residence?"

Answer: "In answer to the first interrogatory my name is Richard S. Rodney; age 49; occupation, Judge of the Supreme Court of the State of Delaware, residing at New Castle, Delaware, with busi-

*Interrogatories and Answers of Richard
S. Rodney*

ness address at the Court House, Wilmington, Delaware.”

Second Interrogatory: “Are you acquainted with Walter A. Baude, the plaintiff in the above-entitled action?”

10 Answer: “In answer to the second interrogatory I would say that I have reason to believe that I did know Mr. Baude slightly in 1921, but I have not seen or heard of him since that date.”

Third Interrogatory: “State whether or not you rendered legal services to Walter A. Baude during the month of December, 1921, and during the month of January, 1922. If so, state whether or not such legal services related to certain bonds and stocks
20 claimed by Walter A. Baude to have been delivered to or deposited with Mary A. Ott, deceased.”

Answer: “In answer to the third interrogatory would state that I have reason to believe that I rendered some slight legal service to Mr. Baude during the month of December, 1921, and that I believe from matters which have been brought to my attention that such services related to certain bonds and stocks claimed by Walter A. Baude to have been
30 delivered to or deposited with Mary A. Ott.”

Fourth Interrogatory: “State whether or not, on or about the 24th of December, 1921, you dictated, signed and mailed a letter to either Mary A. Ott or Henry L. Ott? If so, please produce and annex to

*Interrogatories and Answers of Richard
S. Rodney*

your answer to these interrogatories a copy of that letter, and mark it Exhibit '1.' "

Answer: "In answer to the fourth interrogatory as to my dictating, signing and mailing a letter to Mary A. Ott or Henry L. Ott, dated December 24, 1921, I would say that I have no independent recollection. I cannot produce or annex a copy of the letter and my only recollection at all is based upon the fact that a letter has been produced to me of that date on the letterhead that I then used, which bears my signature. I have no reason to doubt that it is genuine." 10

That, if your Honor please, refers to the letter written by Richard S. Rodney to Henry L. Ott, or Mary A. Ott, I am not sure which, which has been marked in evidence, for identification.

20

The Fifth Interrogatory: "If your answer to the foregoing interrogatory is in the affirmative, state whether or not such letter dated on or about December 24th, 1921, was written at the instance and request of Walter A. Baude?"

Answer: "In answer to the fifth interrogatory would state that I believe that letter was written at the instance and request of Mr. Baude."

Sixth Interrogatory: "Annexed hereto and marked Exhibit 'A' is a copy of a carbon copy of a letter dated January 23rd, 1922, addressed to 'Mr. Richard S. Rodney, 907 Market Street, Wilmington, Delaware.' State whether or not you received the letter of which Exhibit 'A' is such a copy? 30

*Interrogatories and Answers of Richard
S. Rodney*

If so, please produce and annex to your answer to these interrogatories that letter, and mark it Exhibit '2'; or if you do not have the original of that letter, please produce and annex a true copy thereof and mark it Exhibit '2' and state why the original of that letter is not produced and annexed and state
10 where the original of that letter is, if you know."

Answer: "In answer to the sixth interrogatory I would state that I know nothing of the letter addressed to me under date of January 23, 1922, a copy of which was filed with the interrogatory. It may have been received by me, but prior to its receipt I had been appointed to the bench and abandoned the practice of law and I evidently would have turned the letter over to some one else for consideration. I desire to state generally, in explanation
20 of the unsatisfactory character of my testimony, that I gathered from my letter that I only saw Mr. Baude for a few moments and only wrote one letter for him; that the transaction happened eleven years ago and that I have never seen or heard of him since that date, nor has the matter crossed my mind, and I therefore have no recollection whatever concerning it."

Signed Richard S. Rodney, and sworn to under date of January 15, 1932, before Catherine C. Fitzpatrick, Commissioner.
30

Next is the interrogatory of Albert F. Polk.

The Court: I think I will recess at this time.

Ladies and gentlemen of the jury, I have no occasion to say this to you either generally or particu-

*Interrogatories and Answers of Richard
S. Rodney*

larly because of the case on trial, but I say it to you as a word of caution which I trust you will observe throughout the term of your service as paid jurors here, that while a case is being considered by you and the case is in progress, do not permit anyone to discuss the case with you, do not permit anyone outside of the case or concerned in the case 10 to discuss the case with you, either in and around the court rooms or during recess when you are at lunch or at home at night. Very often, innocently enough, some one will approach you as jurors and endeavor to discuss with you something about a case which you are considering, and that circumstance, when made known to the Court, results in what we speak of as a mistrial, and we have to begin all over again. So that, in the absence of any corrupt or improper motive on the part of anyone, the very 20 circumstance sometimes results in what we speak of as a mistrial and we have wasted all the time that has been devoted to the trial of that particular case. So throughout the term of your service be very careful not to discuss the case that you are hearing with any other person, and do not permit any other person to discuss the case with you.

Tomorrow morning at ten o'clock.

(Recess taken to Tuesday, January 23, 1934, at 30
10 o'clock A. M.)

*Interrogatories and Answers of Albert
F. Polk*

Atlantic City, N. J.

Tuesday, January 23, 1934. 10 A. M.

10

(TRIAL CONTINUED.)

Mr. Brown: There is one other deposition, if your Honor please, which I want to read to the jury. Deposition of Albert F. Polk, Wilmington, Delaware, attached to the commission of Catherine Fitzpatrick.

First Interrogatory: "What is your name, age, occupation and place of residence?"

20 The answer to that interrogatory: "Albert F. Polk. Lawyer. Sixty-two. 822 Harrison Street, Wilmington, Delaware."

Second Interrogatory: "Are you acquainted with Walter A. Baude, the plaintiff in the above-entitled action?"

Answer: "In answer to the second interrogatory I would say that I have reason to believe that I did know Mr. Baude slightly in 1921, but I have
30 not seen or heard of him since that date."

Third Interrogatory: "State whether or not you rendered legal services to Walter A. Baude during the month of February, 1922? If so, state whether or not such legal services related to certain bonds

*Interrogatories and Answers of Albert
F. Polk*

and stocks claimed by Walter A. Baude to have been delivered to or deposited with Mary A. Ott, deceased?"

Answer: "In answer to the third interrogatory I believe that as an associate member of the firm of Saulsbury, Morris & Rodney, some legal service was rendered Mr. Baude in the latter part of 1921 10 and if my memory serves me right it was relative to certain bonds and stocks claimed by Mr. Baude in some controversy with either Mrs. Ott or her son."

Fourth Interrogatory: "State whether or not, on or about February 16th, 1922, you dictated, signed and mailed a letter to either Mary A. Ott or Henry L. Ott? If so, please produce and annex to your answer to these interrogatories a copy of that letter, 20 and mark it Exhibit '1.'"

Answer: "Yes, but I am unable to produce and annex a copy of my letter, as requested in said interrogatory, the same not being in my possession."

Fifth Interrogatory: "If your answer to the foregoing interrogatory is in the affirmative, state whether or not such letter dated on or about February 16, 1922, was written at the instance and request of Walter A. Baude?" 30

Answer: "Yes."

Sixth: "Annexed hereto and marked Exhibit 'A' is a copy of a carbon copy of a letter dated February 20, 1922, and addressed to 'Mr. Albert F. Polk,

*Interrogatories and Answers of Albert
F. Polk*

Attorney at law, care of Saulsbury and Curley, Wilmington, Delaware.' State whether or not you received the letter of which Exhibit 'A' is such a copy? If so, please produce and annex to your answer to these interrogatories that letter and mark it Exhibit '2'; or if you do not have the original of that
10 letter, please produce and annex a true copy thereof and mark it Exhibit '2,' and state why the original of that letter is not produced and annexed and state where the original of that letter is, if you know?"

Answer: "If the copy of a carbon copy of a letter dated February 20, 1922, and addressed to Mr. Albert F. Polk, attorney-at-law, care of Saulsbury & Curley, Wilmington, Delaware, is a full, true and correct copy of said letter, I am inclined to believe that I received such letter, although I cannot
20 state positively as such letter is not in my possession, nor have I had access to the files of Saulsbury & Curley since 1923, and for that reason cannot annex the letter to my answer to this interrogatory. I have no personal knowledge where the original of said letter is, but have been informed that the said files are in the possession of Honorable Hugh H. Morris, who was executor of the last will and testament of Honorable Willard Saulsbury."

30 "Albert F. Polk." That is the signature attached, and it is sworn to before Catherine C. Fitzpatrick on July 16, 1932.

Will your Honor mark these "filed"?

I think the exhibits that were marked for identification, I didn't get. They were the letter of January 5, 1921, and —

The Court: January 5, 1921. That says copy on that.

Mr. Brown: I think the original has been offered in evidence, hasn't it?

Mr. Geisler: That was offered in evidence. 10

Mr. Brown: Yes, that is in evidence. Now, I offer in evidence letter of December 24, 1921, written by Richard S. Rodney to Henry L. Ott and marked D2 for identification.

The Court: Any objection?

Mr. Geisler: No objection.

20

The Court: It will be admitted.

(Letter previously marked D2 for identification received and marked Exhibit D2 in evidence.)

Mr. Brown: You have the original of the letter Henry L. Ott to Richard S. Rodney dated January 23, 1922? I presume not.

Mr. Coulomb: No.

30

Mr. Brown: Then I offer in evidence the copy, which is the same as the copy attached to the depositions.

Mr. Coulomb: Object to Mr. Ott's letter; not on the form of the proof, because we agreed as to that, but on the ground it is a self-serving declaration. The proof now in the case is that Mr. Ott is the agent or was the agent of Mrs. Mary A. Ott. Insofar as this letter is self-serving, it should not be admitted.

10

The Court: If it appertained to the negotiations of the return of the bonds to Mrs. Ott, I should be inclined to permit it, but the letter was apparently written on a day subsequent to the actual return of the bonds.

Mr. Coulomb: Yes.

20 The Court: And, therefore, relates to negotiations, it seems to me, or subjects with which we are not concerned in this case.

Mr. Brown: If your Honor please —

The Court: Moreover, it is—I think there is nothing before me to indicate that Mr. Ott at that time, the bonds having been returned, had any authority to speak for the deceased.

30

Mr. Brown: I think the testimony of Mr. Ott was that the bonds were turned over to him for his supervision and that the stock, the preferred stock, was kept by his mother. That was in Henry L. Ott's deposition.

Offer of Evidence

Mr. Coulomb: I think, Mr. Brown, that letter clearly states that the bonds were in Mr. Ott's possession—I mean Mrs. Ott's possession.

Mr. Brown: The depositions also state, if your Honor please, that the letter was written at the request of his mother.

10

Mr. Coulomb: I don't think so.

Mr. Brown: Yes, I think they do.

The Court: I don't recall.

Mr. Brown: If you will look at the deposition of Henry L. Ott—you have my copy—I will look at the original. That is the recollection that I have.

20

The Court: I think not.

Mr. Brown: It is admissible, if your Honor please, I submit, for the further reason that it is in answer to the letter of Mr. Rodney written in behalf of Mr. Baude, that it is a part of a series of correspondence, the next letter following being that of Albert F. Polk to Henry L. Ott in reply to the one that he sent to Mr. Rodney, and subsequently the letter from Mr. Ott to Albert F. Polk in reply 30 to his.

Now, the purpose, of course, is apparent, in offering this testimony, is to show that there was a demand by Mr. Baude for the return of the stock through his attorneys in Wilmington in 1922, and

that it was not then returned in compliance with that demand.

Mr. Coulomb: If your Honor please, I object to that statement because the letters of Mr. Baude's attorneys say nothing about the return of stocks and bonds. They are negotiations, if anything, for the
10 care of these bonds and stock.

Mr. Brown: It is not my purpose to mis-state the contents of the letters. The construction I am putting upon the letters apparently is different from what my opponent is; but that is the purpose of the offer, to show there was, if any conversion at all, a prior conversion to the one claimed in the complaint.

20 The Court: Well —

Mr. Coulomb: If that is the purpose, I object. If your Honor reads those letters, you will find there is absolutely nothing that warrants the theory or the idea of any facts from which the jury could infer there was a demand for the return of these bonds by Mr. Baude's attorneys. The bonds had been returned and delivered back to Mrs. Ott, and that is the end of that transaction. Now, they are
30 trying to say that these letters show a demand of repossession by Mr. Baude. They are letters written by lawyers representing negotiations for the care of these bonds. And I cannot see anything in them, as I have read them myself half a dozen times —

Offer of Evidence

The Court: They relate more to the clearing up of the trust.

Mr. Coulomb: Yes, as to whether Mr. Ott should give a bond whether he should be the trustee or whether some independent person should be the trustee. There was no demand for the return of them at all.

10

Mr. Brown: And for the further reason that it seems to me that that correspondence corroborates the testimony already in the case, and is additional testimony from which it can be determined the circumstances under which these bonds came into the hands of Baude, the plaintiff, so as to show and refute his claim of ownership.

Mr. Coulomb: I object to that on that ground. This correspondence occurred after the gift to Mr. Baude and after the return or the redelivery of the bonds.

20

The Court: I think the letter of January 23, 1922, as I recall it, written by Mr. Ott to Mr. Rodney, is a reiteration, is it not, of the testimony he gave by deposition of the circumstances under which the plaintiff received the bonds originally.

30

Mr. Brown: Yes, but it is—it follows up the letter of Mr. Rodney and is a part of a series of correspondence which is referred to in these depositions.

The Court: It is rather the statement of knowledge on the part of Mr. Ott himself, rather than a communication intended to be forwarded in behalf of the deceased, is it not?

Mr. Brown: Well, I think the jury is entitled to have these to determine just what the effect of them
10 is as a series of correspondence.

The Court: I think that might be true with respect to the negotiations for the return of the bonds between Mr. Ott, who is said to have been the agent of the deceased, and the plaintiff. The bonds having been returned, some question having arisen, then, in the absence of any evidence in the case showing Mr. Ott had any authority to write the letter of January 23, 1922, for the deceased, and it
20 further appearing he purports to be making statements of fact which he claims to be of his own knowledge, it seems to me this letter would be to improperly fortify the evidence he has already given by deposition. The objection to admission will be sustained.

Mr. Brown: Allow me an exception.

The Court: Yes.
30

Mr. Brown: I offer in evidence the letter of Albert F. Polk to Henry L. Ott under date of February 16, 1922.

The Court: Any objection?

Offer of Evidence

Mr. Coulomb: If the letter is offered for the purpose of showing a demand, we do object. If it is simply offered for the purpose of showing a letter written by Mr. Baude's attorney, after the return, I don't believe we have any objection.

The Court: There is evidence, is there not, at least sufficiently indicative of the fact that Mr. Polk 10 was retained by the plaintiff?

Mr. Coulomb: Oh, yes; there is no doubt about that at all.

The Court: I will admit it.

Mr. Coulomb: Allow me an exception.

(The letter previously marked D3 for identifica- 20
tion, is received and marked Exhibit D3 in evi-
dence.)

Mr. Brown: Then I offer in evidence, if your Honor please, copy of the letter of Henry L. Ott to Albert F. Polk, under date of February 20, 1922, which is in reply to Mr. Polk's letter of the 16th.

Mr. Coulomb: We object to that letter, if your Honor please, on the same ground that we object 30
to the letter of January 23rd. It is of the same
character.

Mr. Brown: The difficulty with that is that the letter of Mr. Polk is addressed to Mr. Henry L.

Offer of Evidence

Ott, recognizing him in the position which he assumed in the letter of January 23, 1922, and they received the reply back from Mr. —

Mr. Coulomb: May we see the letter?

The Court: I wonder if in offering this letter you
10 will encounter absence of proof that this letter was received by Mr. Polk as the letter which Mr. Ott wrote to Mr. Polk.

Mr. Brown: I am not confronted with that, if your Honor please, because the testimony is positive that it was mailed in a sealed envelope with postage prepaid, with the address that appears on it, and which is the address of Albert F. Polk, according to his own letter; and then the presumption arises it
20 was received by Mr. Polk.

The Court: How is it material? You might let me see the letter, as you discussed the contents of it.

Mr. Brown: It is one of a series of correspondence which took place following the turning over of these bonds by Mr. Baude to Mrs. Ott, between Mr. Baude's attorneys and Mrs. Ott's representative, recognized in the correspondence to be such,
30 which definitely discusses between them the arrangement upon which these bonds were turned over, without any denial on the part of the plaintiff that that was the arrangement; and, furthermore, I say that those letters are in effect a demand upon Mrs. Ott to return the bonds unless Baude's arrangement

Offer of Evidence

was complied with, and that, the evidence is, was not done. And so that there was a conversion then.

The Court: Have you see this letter, gentlemen?

Mr. Coulomb: Yes, we have seen it. We think it has the same defect—the same objection that the other letter has.

10

The Court: Is there any evidence —

Mr. Coulomb: In the first place, it is written on some lawyer's letterheads, from Louisville. Of course, that might very well be, but it seems to cast a curious slant on it, that it may just be the lawyer's letter.

Mr. Brown: The testimony is Mr. Ott wrote it, 20 had him mail it. That is his deposition.

The Court: Is there any testimony to indicate that Mr. Ott had any right to bind or speak for his mother in these negotiations of February 20, 1922?

Mr. Brown: I think there is, if your Honor please, testimony from which the jury has a right to draw that conclusion, because of the testimony that has already been introduced on behalf of the plaintiff as well as the defendant, and the testimony of Ott himself that he was the agent—in effect he says that—of his mother in this transaction. He says he bought these bonds and that he turned them over to her so that she might turn them over to Baude. The

30

letter from Mrs. Ott which they produce in evidence indicates that Harry was to act for her. Harry is the man that wrote that letter. And, if you recall, that they introduced that in evidence with the depositions of Rudolph Baude, and in that letter there is evidence of the fact that he was to take care of the transaction.

10

Mr. Coulomb: Just one word about this, so as not to prolong the debate unduly. Yesterday morning serious objection was had to any proof of ours to show the return of these bonds, or Mr. Ott's agency. Now, the claim is that Mr. Ott was the agency, and we believe he was up to a certain period. That was our contention. Whether he was the agent after that period is another matter. And the mere fact that he was the custodian of these

20

bonds as agent for his mother it does not seem to me would permit him to enter into negotiations. The transaction, as far as Mr. Baude was concerned, was ended when he returned or redelivered those bonds to Mrs. Ott under the circumstances as —

The Court: This letter is quite harmless, however, isn't it?

30

Mr. Coulomb: Well, we don't think so. If your Honor please, I don't suppose we really care.

The Court: It does not seem to me it is very important. I think its admissibility is debatable. It does not seem to me it is harmful.

Hugh Weir—Direct

The Court: Is the objection withdrawn?

Mr. Coulomb: Yes, we withdraw the objection.

The Court: It may be admitted.

(Letter heretofore marked D5 for identification is received and marked Exhibit D5 in evidence.) 10

Mr. Brown: Mr. Geisler, will you produce letter written on the letterhead of Hughes, Schurmann & Dwight, under date of May 1st, 1931, addressed to you as attorney for Mr. Baude?

Mr. Geisler: I had no idea you were going to ask anything of me.

Mr. Brown: Neither did I until last night. I 20 didn't know where to find you. In the meantime, Mr. Weir, will you take the stand so that we won't lose time.

HUGH WEIR, recalled.

Direct examination.

By Mr. Brown:

30

Q. Mr. Weir, do you know Mr. Alfred T. Geisler, the Cincinnati attorney of Mr. Baude, who is present here at the trial?

A. I do.

Q. Did Mr. Geisler call upon you at the offices of the Chemical Bank and Trust Company in New York at any time subsequent to the assumption of the duties by that bank of the administration of the estate of Mrs. Ott?

A. He did.

10 Q. Did he discuss with you the matter of returning the bonds which are the subject of this suit to Mr. Baude?

A. He did.

Q. Did you have any conversation with him respecting the bonds and as to where they were or what you knew about them?

A. I did.

Q. What was that conversation and when did it take place?

20 A. He called at the bank on about —

Mr. Coulomb: Just a minute, please.

The Court: Go ahead.

30 A. Mr. Geisler called at the bank on or about January 22, 1931 and inquired as to the status of claim which he had filed for Mr. Baude. At that time I informed him that I was disposed to deliver the stock certificate which was in our possession, registered in the name of Mr. Baude, after first getting the approval of counsel. At that time I further informed him that we had not received the bonds set forth in the claim, nor had we found any record of them. I am quite sure I so informed him

because I recall discussing the status of the estate, the inventory and the various assets.

Q. Now, who is the counsel for the bank administrator of this estate?

A. Hughes, Schurman & Dwight, New York.

Q. And that is the counsellor to whom you referred in your conversation?

A. On that same day I called up the offices of Hughes, Schurman & Dwight, and arranged for Mr. Geisler to go over there and see Mr. Surbeck, of counsel. 10

Q. Subsequent to that was there a second proof of claim filed?

A. The original proof of claim did not mention any dollar value; simply set forth the bonds. Apparently subsequent to my conversation with Mr. Geisler — 20

Mr. Coulomb: I object to that.

The Court: Yes. You may state the fact.

A. Well, subsequent to that discussion with Mr. Geisler, we received a second proof of claim setting forth the bonds, and if not in our possession, the dollar value.

Q. Now, did you submit the matter of the proof, the second proof of claim to counsel?

A. Second proof of claim was referred to counsel. 30

Q. You refer to Hughes, Schurman & Dwight of New York?

A. That is the firm.

Mr. Brown: Cross-examine.

Cross-examination.

By Mr. Coulomb:

Q. You say it was in January, 1931, after Mrs. Ott's death, that Mr. Geisler called?

10 A. That is as I recall it.

Mr. Coulomb: That is all.

Re-direct examination.

By Mr. Brown:

Q. Mr. Weir, have you made some investigation concerning the market value of these bonds at or
20 about March 4, 1921?

A. I have.

Q. And what was the market value?

Mr. Coulomb: I object to that. It seems to me a very slight foundation for showing any proof of value—have you made any investigation, 1921.

Mr. Brown: Perhaps that is correct.

30 Q. How long have you been associated with the Chemical Bank and Trust Company of New York?

A. For the past seven years.

Q. And prior to that time what was your business?

A. In another bank for approximately ten years.

Q. What bank was that?

A. Bankers Trust Company of New York.

Q. And in what capacity?

A. As estate administrator and trust administrator.

Q. During that period of time have you had experience in the buying and selling of stocks and bonds on the market? 10

A. Some experience, although that has not been my work in the bank.

Q. I didn't hear.

A. I have had considerable experience with investments, although my position has not been buying or selling securities.

Q. Have you had experience of appraising the value of the securities that you have handled in the administration of the estates in your position as trust officer of the bank? 20

A. I have had such experience.

Q. And your source of information concerning the value of such securities is obtained from where?

A. From brokers, investments service, statistical services, all kept in our statistical department.

Q. Now, the statistical service that you refer to is in what form?

A. There are various services, such as Standard Statistics, and Moody Service, and Investment Quotation, and the brokers. 30

Q. Are they financial reports of the value of various securities on the market?

A. Yes.

Q. Have you made investigation from those

sources to determine the values of these particular bonds that are involved in the suit in question?

A. I requested our Statistical Department to ascertain the values.

Mr. Coulomb: What was that?

10 A. I requested our statistical Department to ascertain the values of the bonds set forth in Mr. Baude's claim during the year 1921.

Q. And have you those values now before you?

A. I have been informed that ——

Mr. Coulomb: I object.

The Court: Objection must be sustained, I think.

20 Mr. Brown: That is all, Mr. Weir. Now, have you the letter? Have you any objection to offering this letter in evidence?

Mr. Coulomb: Yes, we do. Letter from attorneys of the bank to Mr. Geisler, and contains matters which are not relevant to this cause at all.

Mr. Brown: Mr. Geisler, will you be sworn?

30 Mr. Coulomb: No objection to the fact the letter was sent, but do have objection to the matters contained in the letter, which are not relevant.

ALFRED T. GEISLER, called as a witness on behalf of the defendant, was sworn.

Mr. Brown: Do I understand that you do not deny that the letter was sent and received?

Mr. Coulomb: We do not deny that the letter was sent and received.

10

Mr. Brown: Then I presume the testimony of Mr. Geisler will be unnecessary, if your Honor will pass upon the relevancy of the letter. Mr. Geisler, you may be seated.

The Court: What is that you want?

20

Mr. Brown: They have offered in evidence proof of the fact that two claims were filed. That letter is the refusal of the claim and the reason why it is refused. It came prior to the institution of this suit, and Baude through his counsel was advised of the reason for the failure to turn these bonds over to him, but in spite of that he instituted the suit as he did. Now, my contention is that that is evidence of the fact, not only we did not have them, but the reason why we did not turn them over to him, and the fact there was no conversation on the part of the bank. Furthermore, it follows up the filing of the claim, in that it is the denial of the claim in accordance with the requirement of the statute.

30

Mr. Coulomb: As I have said before in the argument of matters touching this very point, is that it can make no difference whether these bonds were physically in the possession of this bank or not. We are not suing the bank as a bank, but as administrator of the estate of Mary A. Ott, who had property belonging to us, and whose administrator refused to
10 turn it over when we demanded it.

Mr. Brown: They used the argument yesterday in the matter of the motion for non-suit that they did not know of the fact that we did not have these bonds at the time that they filed their demand. Now the fact is that the demand which was filed—and before that time, the proof is that they did have—and that they did not have knowledge of the fact that we did not have these bonds in our possession at the
20 time they instituted suit, and this is evidence of the fact that they did have. I did not say that was the evidence; I said that was the argument they used at that time.

Mr. Coulomb: If your Honor please, in reply to that, Mr. Brown would try to make us believe that we were obliged to accept their statement.

Mr. Brown: Oh, no.
30

Mr. Coulomb: That they did not have these bonds when we demanded them, or they did not get them. When we filed the suit was the time for them to say they did not have these bonds, and that that was the reason they did not deliver them to us.

Mr. Brown: I do not say that ——

Mr. Coulomb: And they did not do that.

The Court: This letter—a statement that the bank as the administrator did not come into possession of these bonds.

10

Mr. Brown: It proves not only that we did not turn them over, but the reason why, and that we advised them why we did not turn them over. They are proceeding on the theory we have committed fraud. They have alleged it in the complaint. They have proceeded on the theory of contrivance and have alleged it in the complaint. And they have alleged a conversation by the bank as the administrator in disposing of those bonds from a certain date, to the use of the bank as administrator, that date being subsequent to the death; and I want to show they were advised why, and it was not fraud on our part, nor contrivance on our part. 20

The Court: The demands had been made prior to the date of this letter.

Mr. Brown: One demand was, I think.

Mr. Coulomb: No. Both demands.

30

Mr. Brown: Both demands had?

The Court: Both of them had.

Mr. Brown: Even so. Even so; I think it is important to show we had no fraud; that that is the letter that turned down their demand, and that states the reason. It is contradiction of any fraud or contrivance on our part.

10 The Court: I think we are not concerned in this case with the question of fraud.

Mr. Brown: Then the offer is denied?

The Court: Yes.

Mr. Brown: May I have it marked for identification and have an exception to your Honor's ruling?

20 Mr. Geisler: Will you let me substitute a copy for that?

Mr. Brown: Gladly. In fact, I have a copy of it; you need not bother giving it to me, if I have this marked. Suppose I have my copy marked.

Mr. Geisler: Have your copy marked.

30 Mr. Brown: Any doubt about this being the copy?

Mr. Geisler: Take your word for it, it is the copy.

(Copy of letter referred to is marked D6 for identification.)

Walter A. Baude—Direct—Discussion

Mr. Brown: Then the defendant rests.

Mr. Coulomb: If your Honor please, I would like to recall Mr. Baude.

WALTER A. BAUDE, the plaintiff, recalled. 10

Mr. Coulomb: If your Honor please, I don't know as I need Mr. Baude, really. We offered yesterday a series of letters beginning with Exhibit P6, which was a letter from Mr. Ott to Mr. Baude, under date of August 26, 1919, and that letter yesterday was rejected on the ground of agency. We think that has been fully established now by the testimony of the agent himself, and should be admitted. 20

The Court: I think the letter is not material, however.

Mr. Coulomb: I beg your pardon?

The Court: The letter would not appear to be material in the issue in the case, would it? It appears to be an answer by Mr. Ott to certain inquiries which the plaintiff himself appears to have made 30 of him personally with respect to —

Mr. Coulomb: That is right; but remember Mr. Ott said in his depositions, "I was present when the first bonds were given to Mr. Baude; I was pres-

ent with my mother when those bonds were given." Then he goes on to create some kind of a conversation such as this: they were not to be Mr. Baude's until Mrs. Ott's death; that they were only given to him because she had not access to her lock box in Louisville. This is Mr. Ott's testimony, now.

10 The Court: Yes.

Mr. Coulomb: And that Mr. Baude was not to get a swelled head over it. Now this letter clearly indicates an entirely different thing, made within a few days—that is P6.

The Court: You are offering it in relation to his testimony?

20 Mr. Coulomb: To his testimony, yes.

Mr. Brown: Now, if your Honor please, my contention is that not only is the letter immaterial and irrelevant, but that it cannot be offered through the testimony of this witness, which is in effect what they are doing.

The Court: Well, I don't so understand that.

30 Mr. Coulomb: This letter was admitted—I mean the authenticity of the letter was admitted, and the only thing that remained between us, Mr. Brown, as I understood it, was whether it was relevant. Now it is up to the Court—Mr. Brown has been

Discussion

Mr. Brown: He speaks of this letter. I don't know the letter he is referring to. But if it is the letter marked for identification yesterday, I insist it is irrelevant and immaterial.

The Court: This letter of August 26, 1919, I understand, is now offered as the suggestion that it may be considered in the light of Mr. Ott's testimony. 10

Mr. Coulomb: Yes.

The Court: Which he gave for the defendant. It is not here contended, I think, and in the offer of this particular letter, that it represents any statement made by the deceased.

Mr. Coulomb: I think it has the purpose not only of contradicting what Mr. Ott said in his depositions, but he says, "I was Mrs. Ott's agent," he says in his depositions, "I bought these bonds for the purpose of having my mother hand them to Mr."—that is the words he uses—"hand them to Mr. Baude." Now it is in connection with those bonds. They were the first bonds that were admitted, and here is a letter written by Mrs. Ott's agent, her son, who bought the bonds to give to Mr. Baude or, as he says it, "to hand to Mr. Baude", going into details as to the situation. And I think it is evidential not only for the purpose of contradicting—it is certainly evidential for that purpose—but evidential in fortifying or in corroborating, if I may use that language, Mr. Baude's statement that he was and is the owner of these bonds. 20 30

Mr. Brown: I do not so understand it. The letter of August 26th?

Mr. Coulomb: It is August 26th.

10 Mr. Brown: That letter merely describes the bonds, as I take it, and the character of them, the security of them, and the value of them, and how they should be handled, and so forth, apparently at the start of this young man on a course of study of investments. But I do not understand it in any way contradicts anything that he has said in his depositions.

20 Mr. Coulomb: Now, Mr. Brown has referred to something in this letter. He says that is all that is in the letter. If I have a right to say, there is something else that is in this letter that Mr. Brown did not refer to. He is talking of coupons that were attached to these bonds, and he says to Mr. Ott—to Mr. Baude in this letter, with respect to these coupons, don't cut your coupons and deposit them before January 2, or you may have to pay an income tax on them for the previous year if your income is over a certain amount. He also says in this letter, don't exchange these bonds for the preferred stock—that is a stipulation that was in the bond—until the
30 stock of the Allied Packers Company reaches at least 77. It is now only 53.

The Court: You need not go further. The objection will be overruled and the letter will be admitted.

Discussion

Mr. Coulomb: Mark it P6 in evidence.

(Letter heretofore marked P6 for identification is received in evidence and marked P6.)

Mr. Coulomb: The other letter is the letter P7, which is November 29, 1920—I mean 1919; that was P7, offered for identification. 10

Mr. Brown: And that is objected to as being irrelevant and immaterial.

The Court: Is there anything in that, Mr. Coulomb, that is helpful in this case? It seems to relate almost exclusively to the investment of some funds; not a thing said about the bonds or stocks.

Mr. Coulomb: We won't press that. Now the 20 next letter was P8 for identification, and it is dated August 10th, 1920.

The Court: Yes. Any objection?

Mr. Brown: No.

The Court: No objection; it will be admitted.

(The letter, heretofore marked P8 for identification, was received in evidence and marked Exhibit P8.) 30

Mr. Coulomb: I offer Exhibit P9, which is dated September 10, 1920.

The Court: Any objection?

Mr. Brown: I have no objection.

The Court: It may be admitted.

(The letter, heretofore marked P9 for identification, was received in evidence and marked Exhibit P9.)

Mr. Coulomb: P10, which is Mr. Baude's letter to Mr. Henry L. Ott.

Mr. Brown: No objection.

The Court: No objection; it will be admitted.

20 (The letter, heretofore marked P10 for identification, was received in evidence and marked Exhibit P10.)

Mr. Coulomb: This is P11 I want to introduce now, if your Honor please. It is dated September 22, 1920.

The Court: No objection; it will be admitted.

30 (The letter, heretofore marked P11 for identification, was received in evidence and marked Exhibit P11.)

Mr. Coulomb: May I have your letter of Mr. Bruce to Baude, dated January 5, 1921?

Walter A. Baude—Direct

Mr. Gill: Bruce to Baude, January 5, 1921?

Mr. Coulomb: Yes. Now, Mr. Baude, you take the stand.

The Court: That letter in evidence?

Mr. Coulomb: Yes; D1.

10

WALTER A. BAUDE, the plaintiff, recalled.

Direct examination.

By Mr. Coulomb:

Q. I show you a letter, Mr. Baude, written by a 20
lawyer named Helm Bruce, of Louisville, Kentucky,
dated January 5, 1921, and which is marked Exhibit
D1, and ask you whether you received that letter?

A. Yes, I received the letter.

Q. You know its contents, do you?

A. Yes, sir.

Q. Did you return the bonds and stock to Mrs.
Ott in consequence or in pursuance of that demand
—of any demand made in that letter?

A. No, I did not.

30

Q. Did you give any instructions to anyone to re-
fuse the request?

Mr. Brown: I object to that, if your Honor
please. It would make no difference whether he gave

instructions to refuse or not. The jury can determine from what actually happened whether or not the bonds were returned in answer to that letter. As a matter of fact, their own proof is that it was returned subsequent to the demand of January.

Mr. Coulomb: Subsequent.

10

Mr. Brown: Yes. And the jury has a right to determine whether or not it was in consequence of that demand. Certainly they cannot prove it was not by proving he gave instructions to some one else.

Mr. Coulomb: I ask you to produce a letter written by Mr. Edmund S. Hellings, an attorney of Wilmington, Delaware, dated January 8, 1921, to
20 Helm Bruce.

Mr. Brown: We have no such letter; never heard of it.

Mr. Coulomb: I will show it to you. Do you admit that letter?

Mr. Brown: I have no knowledge of this letter. I don't know anything about it. If you say that is
30 the letter.

Mr. Coulomb: Well, I will ask the witness.

Q. I show you a letter dated January 8, 1921, written by Mr. Hellings, a lawyer in Wilmington,

to Mr. Bruce. I ask you whether you directed that letter be sent?

A. I did.

Mr. Coulomb: Now, Mr. Brown ——

Mr. Brown: Are you offering it?

10

Mr. Coulomb: I am offering it.

Mr. Brown: I don't think I can object to it, under the circumstances.

The Court: No objection; it may be admitted.

Mr. Brown: Of course, there is no proof that letter was ever mailed. I am assuming that they have information which leads us to believe it was. 20

The Court: Well, you are more or less obliged to admit the mailing of some of this correspondence. Otherwise the case would be interminable to prove the despatch of letters.

Mr. Brown: I don't know anything about them. I merely wanted to determine.

(Letter offered is received in evidence and marked 30 Exhibit P13.)

Q. Was Henry L. Ott present with you and Mrs. Mary A. Ott at the time you received the \$10,000 of Allied Packers bonds?

Mr. Brown: I object, if your Honor please, because it has to do with the transaction with the decedent and the turning over, and contemplates the delivery of these bonds by her to him, and this witness is not qualified to testify to that or anything in connection with the transaction that occurred between him and the decedent.

10

The Court: I recognize the rule very well. The question is its application here, namely, whether or not the plaintiff may testify whether or not a person—a witness in the case was or was not present or in his presence at a given time.

Mr. Brown: And that given time being the occasion when the decedent turned over certain bonds to him.

20

The Court: Well, do you press it?

Mr. Coulomb: If your Honor please, I think that I am within the bounds of propriety in stating this. Yesterday when certain evidence was offered, I reserved the right to offer evidence in contradiction of it. Now, I did not want to be put in a position of having made an offer or tentative offer and then not follow it up by actually making the offer. I am bound to confess if your Honor please, that I think while it is an unjust rule of evidence which shuts the mouth of a witness as to where some living person comes in and testifies, nevertheless that is the rule, and I do not—I will not press this question or the other questions which might have followed.

30

Plaintiff's Exhibits—Letters

The Court: It has not appeared Henry Ott was in any wise connected with the administrator, something that I thought yesterday was going to be disclosed in some way that—perhaps that accounted for his nomination as the original executor in the will, but it appears he was not, and therefore I suppose we are in a position where the administrator has not given any testimony. 10

Mr. Coulomb: No, the administrator has not given any testimony as to transaction with the decedent, unless Mr. Weir—under the act as it is now amended, the testimony of the employe becomes in effect the—the corporation—becomes the testimony of the representative.

Mr. Brown: But there has been no testimony by the representative of any transactions with the decedent. 20

Mr. Coulomb: We withdraw it.

The Court: Very well; the question is withdrawn.

Mr. Coulomb: That is all, Mr. Baude.

Before we close, may we read these letters that have just been offered in evidence to the jury—6, 8, 9, 10, 11 and 12; with the exception of 7. 7 has not 30 been introduced.

Mr. Gill: May it please your Honor, letter written to Mr. Walter Baude on August 26—let me read the copy because I can do it more easily; you can follow the original.

Mr. Brown: I just want to get one or two of these exhibits and look them over while you are doing that.

Mr. Gill: Letter of August 26, 1919, on the stationery of Henry L. Ott, Crestwood, Kentucky, to Mr. Walter Baude, Pennsgrove, New Jersey.

- 10 "Dear Sir: The bonds are a 6% semi-annual dividend period namely Jan. 1 and July 1. The bonds are not secured by the Equitable Trust Co. But the Equitable Trust Co. is trustee only. The Trustee will receive from the Allied Packer Company beginning December 31, 1921, as a sinking fund 2% of the amount of the bonds issued and outstanding and will with this convert bonds. This is the duty of the Equitable Trust Company. The security lies in
- 20 the fact that the company is audited by Ernst and Ernst and must at all times have quick assets equal to at least 150% of current liabilities and net quick assets of at least 50% of the principal or par value of the bonds outstanding. In other words they must be able to have in cash and merchandise (cash, meats, cattle or what you might call inventory not including plants and real estate)—they must have at least fifty per cent. of the value of all the bonds outstanding. This is a debenture bond and not a
- 30 first mortgage bond. A debenture bond comes in with all creditors alike before the preferred and common stock holders get one cent. But with quick assets 150% above current liabilities and 50 per cent above net quick assets, I must say is a mighty fine thing. It is certain in my mind a mighty good

bond. Yes the common stock is only 53 now, but wait six months and see what it is. No it is not advisable to convert the bonds into common stock until it is above 77 and a regular dividend has been declared and established. Read the conversion period carefully. The bondholder has for a period of 20 year at the rate of \$77 a share. Any time before maturity you can convert these bonds for 10 common stock regardless of how high the common stock is listed on the market at the rate of 13 shares for each \$1000 bond. Now another word of advice. Don't clip your Jan. 1 coupons and put them in bank before January 2. If you do you must pay income tax on them this year. The company pays the 2% Federal income tax but if your earnings are above a certain amount you have to pay extra tax. I cannot say that a course in an institution will help very much as it takes experience to teach. Books 20 don't explain and bonds are issued differently by different companies, and different terms to meet the times. These terms are all new terms. The large issues of Liberty bonds and certificates of indebtedness by the Government causes terms to more liberal and attractive. Another question. The bonds I think are only temporary bonds and will be exchanged for engraved bonds. When I receive notice they are ready I will let you know.

"Well, I think I have answered all your questions 30 and tried to explain the main points in this bond. We are all well and in the midst of work. I have my silos to fill this week and next. That means a great deal of work. I will run six teams and have about twenty men to feed for almost a week. I

am getting ready for the work now. Farming is indeed interesting and a lot of work.

"I trust you are well and that you get your week end trips. Week ends with me mean a rest. Let me hear from you any time you want to know about the stock market and if I don't know I will find out and let you know.

10 "Yours very truly, Henry L. Ott."

Exhibit P8, on the stationery of Henry L. Ott, Crestwood, Kentucky, dated August 10, 1920.

"Mr. Walter Baude, Pennsgrove, New Jersey.

"Dear Sir: Your letter was forwarded to me as I had to hurry home. I regret that I did not get to see you in person.

20 "The securities given you by Mother were given to you during her life time as not to cause trouble or dispute after her death. Mother's wish is that you return them and she will arrange the management of them as she deems best. I will kindly ask that you follow Mother's suggestion and let me hear from you.

"Yours very truly," signed "Henry L. Ott."

P9, dated September 10, 1920, the letter on the letterhead of Henry L. Ott, Crestwood, Kentucky, and addressed to Mr. Walter A. Baude, Pennsgrove,
30 New Jersey.

"Dear Sir: Your letter was a sad disappointment to me and far more sadder to Mother. Now, Walter, I want to explain to you the position Mother takes and at the same time give you a chance to reconsider. Mother in the first place hurt herself

Plaintiff's Exhibits—Letters

returning from Pennsgrove and is under a physician at the present time. Mother wants the securities put in trust and you to get the interest on them. This will be done, I can assure you, whether you consent willingly or if by order of court, through court proceedings. Remember I was present when I told you that the lawyer did not think it advisable that Mother adopt you as a son by court order. 10

"Second. The investments were given to you during Mother's life time so that nothing could cause you any trouble later and were given to you to put in a trust box to hold. But you agreed Mother was to advise you on them and you to report on them. This is not being done now. Also it was to teach you how to invest and the dealings in stocks and bonds. But you held them in trust and they were yours and will be yours after Mother's death. 20

"Now I hope you will advise me promptly that you will fulfill the wishes of Mother and your agreement at the time the investments were given to you for your box. The trustee will be some one agreeable or a trust company. This can be decided on.

"I wish to relieve Mother of the worry over this and thus hasten her recovery.

"Yours very truly, Henry L. Ott."

P10, addressed to Mr. Henry L. Ott, Crestwood, Kentucky, under date of September 17, 1920, from 30
Wilmington, Delaware. Letter of Walter A. Baude.

"Dear Sir: Your letter of the tenth instant just received today. I am answering at once in order to obtain an agreement which will be satisfactory to all concerned, as soon as possible.

“Your letter put an entirely different aspect upon the matter under question than I had obtained from your other letters. I have no objections, if it is your mother’s wish, that the securities should be placed in trust for me providing that I receive the interest from such securities. You certainly can have no objections to my desire to have the securities deposited with the Equitable Trust Company of Wilmington, Delaware.

“We can arrange this matter upon your next visit to the East and above all I wish to state that I shall do everything to hasten an agreeable settlement.

“I read with regret that your mother had hurt herself upon her return to Atlantic City. The communication I had stated that she had arrived safely.

“I have moved to Wilmington since my last letter to you, as living conditions at the Riverside Club became unbearable. I am now living at 913 Park Place, Wilmington, Delaware.

“Trusting to hear from you concerning your plans, I am, Very truly yours, Walter A. Baude.”

P11 is another letter written by Walter A. Baude to Henry L. Ott, from Wilmington, Delaware, September 22, 1920, and reads:

“Dear Sir: Since I last wrote you, I have reconsidered the matter of a trusteeship, and I have come to the conclusion that there is no logical reason for such an agreement as the bonds are intact and I do not purpose to sell or exchange the securities because I realize that a permanent income in addition to my salary is necessary. The expense of a trusteeship, as you suggest, would be not only great but

Plaintiff's Exhibits—Letters

useless and cause a considerable reduction in the income derived from the securities.

“Hoping that I have made my viewpoint clear, I am,

“Very truly yours, Walter A. Baude.”

P13. On the stationery of Edmund S. Hellings, attorney at law, Wilmington, Delaware, under date 10 of January 8, 1921, addressed to Helm Bruce, Esq., Lincoln Bank Building, Louisville, Kentucky.

“Your favor of the fifth instant, addressed to Walter A. Baude, concerning the securities given to him by Mrs. Mary A. Ott, has been turned over to me.

“The securities were given to Mr. Baude absolutely. He sees no reason why they should be returned to Mrs. Ott nor any reason why they should be placed in the hands of any trustee for his benefit. 20

“You are at liberty to take any proceedings that you deem necessary.

“Yours very truly, E. S. Hellings.”

Mr. Coulomb: We rest.

The Court: Anything further?

Mr. Brown: I have a motion for direction.

(In Chambers.)

10 Mr. Brown: Now, if your Honor please, I would like to put on the record the motion or application which I made prior to the opening of court this morning to amend the answer by adding thereto the averment that the bonds which are the subject of this suit did not get into the hands of the bank administrator c. t. a. of the Estate of Mary A. Ott, deceased. There seems to have been some argument based upon the fact that that was not alleged in the answer. My theory was that it was in that we had denied the allegation of the complaint; but, not to leave any doubt about that, I am presenting the application. And I understand that your Honor—perhaps I better let you state your position.

20

The Court: I see no occasion for the present allowance of the amendment in question. All of the evidence apparently which counsel desires to introduce has been offered and the proof has thus not been restricted by the present pleadings. To aver or to prove that the administrator did not come into physical possession of these bonds, it does not seem to me would constitute a defense to this action. 30 Moreover, this action appears to have been instituted in July, 1931. The defendant administrator was certainly apprised of the claim of the plaintiff as early as November 6, 1930, and I think in the circumstances the proposed amendment ought not to be allowed.

Defendant's Motion for Direction of Verdict

Mr. Brown: Your Honor will allow me an exception.

The Court: Allow an exception.

Mr. Brown: Now, if your Honor please, I make a motion for the direction of verdict, on the ground, 10 first, that the proof does not substantiate the case that has been made out by the pleadings, my point being that the complaint alleges a conversion of the bonds in question by the bank administrator on March 25, 1931—or May 25, 1931, I am not sure which—at any rate, subsequent to the date of the death of the decedent, and that said conversion was in contrivance and with fraudulent intention; that the bonds were disposed of by the bank administrator on that date at Atlantic City, in this State, and 20 that the bonds were then converted to the use of the bank administrator.

The fact is that the testimony does not offer any proof that the bonds in question ever came into the hands of the administrator or that they were, in fact, in existence at the time of the death of the decedent; but the proof is to the contrary, that they were not in existence at the time of the death of the decedent, and it is—the proof is definite that they did not come into the hands of the administra- 30 tor. And to permit the case to proceed upon any different theory than that which is alleged in the complaint itself is to ask the defendant in this suit to defend an entirely different set of facts than has been alleged in the pleadings.

Secondly, the proof in the case is to the effect that back in 1922 it became known to Mr. Baude that the decedent herself denied his ownership of those bonds and claimed to exercise a right or dominion over them until the point of her death, or the time of her death. That was notice to him at that time that there was a conversion of these bonds
10 by her then, and there could not be a repetition of the conversion by the mere making of a demand upon the administrator and the refusal which was necessarily following such a demand by reason of the fact that the bonds did not come into its possession. I do not understand that conversion necessarily means that there must be a demand and refusal in order to complete the conversion. If there is any evidence of intention, either by act or word or whatnot, which would evidence the fact that
20 the person in custody of the bonds denies the right of the claim to receive them, as in this case Baude, that then the conversion occurs. The conversion having then occurred, they could not revive it by their demand of 1931, so that the—again there is no proven case that they made out. And, as I pointed out to your Honor yesterday, during the course of the argument, that had they alleged the claim that they were asking to recover the value of these bonds for the conversion either at the hands of the admin-
30 istrator or the decedent, that then we would have been apprised of the facts which would have enabled us to set up the defense that they were denied the right to relief because the statute had run against the claim—the conversion having occurred in 1922, if my contention is correct. At least, we would have had the opportunity to have presented that claim.

Defendant's Motion for Direction of Verdict

Now, the fact is that from the evidence apparently Baude recognized the right of Mrs. Ott in these bonds, because there is no proof that subsequent to 1922 he ever made demand upon her for either the principal or the interest of the bonds.

So that on those two grounds, it seems to me, we would be entitled to a direction of a verdict in favor of the defendant.

10

There is still in the case, of course, a question as to whether or not he had the complete ownership. Perhaps there is a controversial question on that that is a jury question. However, the testimony seems to indicate by his acquiescence apparently in her insistence.

Furthermore, if your Honor please, there could not be a conversion of these bonds for this reason. It is perfectly apparent that it was understood and agreed that those bonds were to be put in trust. Now, it is true that there is no proof that that trust arrangement was ever completed, but certainly the form of the action under those circumstances is different from what is made out here. Certainly there is no proof in this case from which it can be said that there was a fraudulent conversion—that there was a conversion by this bank on the date alleged in the complaint through the—through its contrivance and fraud.

20
30

Mr. Coulomb: I think we have discussed the latter part of Mr. Brown's argument on the motion for non-suit, and I don't suppose there is any necessity for discussing that further. The proof in this case is that there was an absolute gift—that is, there

is at least sufficient to go to the jury there was an absolute gift of these bonds to Mr. Baude.

The Court: Where is that proof, Mr. Coulomb?

Mr. Coulomb: The proof is, first, in his possession of the bonds; second, in the fact that he took
10 the income from the bonds; third, in the fact of his own declaration that he was the owner of those bonds; fourth, in the fact that the statements made by Mr. Henry L. Ott that his mother had given these bonds—he was present when they were given. Secondly, the statement that they were an entire transaction, that the stock was given back, as evidenced by the fact that it was returned; and, in fact, if your Honor please, there is no evidence that he was not the owner.

20

The Court: Well, the statements contained in the letters of Mr. Ott concerning his, the plaintiff's, ownership of the bonds, would not be evidential of that fact, would they?

Mr. Coulomb: I think they would. He was her agent. He was Mrs. Ott's agent. Remember in the letter of September—of August 26th—here is exactly what he said in that letter—not in the letter,
30 but in his testimony—he says, "I bought these bonds, the first of the bonds," which was the ten thousand of Allied Packers, "to be handed—for my mother to hand to Mr. Baude, Walter Baude." I think the testimony shows those bonds came into Mr. Baude's possession in the early part of August,

Defendant's Motion for Direction of Verdict

1919. He apparently writes a letter to Mr. Baude—to Mr. Ott with respect to these bonds, and he gets back the letter of January 26th—of August 26th. That letter says, in the first place, with respect to the coupons, “Don’t put these coupons in your income—in the bank until after January first—your coupons.” “Don’t change these bonds for the—take advantage of the substitution provision in the bonds by accepting stock until the stock reaches at least 77.” He says he was his mother’s agent, that he bought the bonds for the purpose that we are presenting the bonds were given. In the subsequent letter he says, “Mother gave you these bonds so that there would be no trouble—during her lifetime so that there would be no trouble after her death.” Now, he was present, if your Honor please. Mr. Ott was present when those bonds were given. He says he was, and he says that “my mother gave you those bonds in her lifetime so that there would be no trouble after her death.” Now, in the next place, if your Honor please—that appears not only once, but many times in these various letters. But let me put to you a stronger thing. The fact that Mr. Baude cut the coupons and took the interest is evidence of ownership. His declaration that he was the owner is sufficient until it is overturned by proof that he was not the owner.

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The Court: Should he in the circumstances of this case, as they subsequently developed, have been permitted to state that, or testify he was the owner? That admits of some doubt.

Mr. Coulomb: If your Honor please, how can it

admit of doubt, if a person who is in possession of the thing —

The Court: He may have testified to that.

Mr. Coulomb: Remember, he was in possession of it as a gift, and in the case of *Corall versus Monk-*
10 *house, 50 Equity*, there the Court held, citing from the opinion in the United States Supreme Court, that a valid gift can be made by delivery and an acceptance with the intention, of course, to make the gift; and here is the intention from the very person who was present. We cannot prove it by Mrs. Ott because she is not here. We can not prove it by Mr. Baude, just what took place in that room, because he is not here. But we can prove it and have proven it.

20

The Court: By whom?

Mr. Coulomb: By Mr. Ott.

The Court: Well, you prove it, so to speak, as a fact and you contend because he speaks for the deceased, do you not?

Mr. Coulomb: He speaks as her agent. Here is
30 what he says, if your Honor please: "I bought these bonds for my mother to hand to Mr. Baude." That is the first thing; that is the first step. There is the transition of possession. There is the delivery. That is the first thing he says. "My mother gave you these bonds in order that there might be

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no trouble after her death, that you may have possession of them now in order that there will be no trouble after her death. She was advised against adopting you as her son on the advice of her lawyer, and she gives you these bonds." How can there be any more evidence of proof? Mr. Ott is dead, to be sure; yes, Henry L. Ott is dead; but he speaks as plainly as words can speak through that letter which 10 was written when Mrs. Ott was living, at a time when he says he was her agent, at a time when he was present in the room where the delivery was made, and at a time also, if your Honor please, when he knew what this transaction was. Now, there is no letter—take Mrs. Ott's letter when she received these bonds back. She says, "They are your bonds and will be yours at the proper time." The controversy was apparently raised at the time of this young man's marriage. Of course, there is no proof, 20 we were unable to prove, our mouths were stopped; but in a case of this character, where it involves a person who had possession of bonds and possession of stock given to him, using that word "given" in the presence of tradition of the possession by Mrs. Ott, there can be no doubt that there is sufficient evidence to show a gift of those bonds to him. The possession is one in this case, as we will show from these letters, which seemed to me clear—"My mother was advised against adopting you as a son, 30 and she gave you these bonds." If your Honor's idea is —

The Court: No, I say this, perhaps, that were it not for the existence of the—of a relationship of

principal and agent between Mrs. Ott and her son, Henry L. Ott, comprehending these negotiations of which these letters are a part, the statements made by Mr. Henry L. Ott, while they might be considered by the jury in contradiction or modification of his testimony in that deposition, they would not constitute evidence, would they, of the facts therein
10 stated, because the author of the letters, Henry L. Ott, is simply making the statements by the way of the letter, and not as a witness in the case. Therefore, if and unless he was speaking for the deceased, statements contained in the letters would not be evidential of the facts therein stated, would they?

Mr. Coulomb: I think I can agree with that. They were excluded yesterday because we were unable to prove agency, but now we have, if your Honor
20 please, his own testimony that he was his mother's agent, and we have in addition to that his statement in his own testimony—not by way of letter, but his statement in his own testimony that he bought these bonds for his mother to hand to Mr. Baude, and that he was present and his testimony afterwards—I don't know where you are going, how you are going to exclude the idea of ownership when what they want to do is to have his mother hold them in trust.
30 She didn't keep them when she got these bonds back, and it seems to me it comes within the very decided line of cases. That letter, if your Honor please—a series of letters were written in connection with the negotiations concerning the return of these bonds or the redelivery of these bonds, and he was acting as his mother's agent. Supposing his mother had

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written that letter in these various negotiations; supposing she had written the letter of August 26th; supposing she had written the next letter of the 20th, when he said, "My mother gave you these bonds, put them in your box, they are to be yours, you are to have the income from them," and he takes the income from them. I say, if your Honor pleases, from every letter, every scrap of evidence 10 in this case, when Mr. Ott says, "I was in possession of the bonds and I owned them" —

The Court: Baude.

Mr. Coulomb: Mr. Baude—"I was in possession of those bonds and I owned them," the testimony, if it can come at all, must come from the other side that those bonds were not his.

20

The Court: Well, I felt so yesterday. There was some testimony in the case, namely, the dominion of the plaintiff over the bonds, his actual possession of them, and his receipt of the coupons from them, from which the jury might have inferred ownership, cited entirely from his testimony that he was owner, which in the then existing state of the proof would be said to be connected with a transaction to which Henry L. Ott later testified.

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(Discussion off record.)

Mr. Brown: If your Honor please, I did not intend to say that there was—I admit there was a factual question for the jury here. What I intended

to assume, that perhaps your Honor would draw that conclusion, but, after all, this plaintiff opened his case with the statement that these bonds had been given to him by Mrs. Ott, and, if your Honor will recall the matter, the question was objected to as to whether or not he owned, and pointed out that fact, and that that—pointed to a transaction with
10 the decedent, and whether or not he was the owner of the bonds was a conclusion that the jury might have to draw, and that the witness himself was not qualified to draw that conclusion.

In order to make a complete gift three things must be present, at the time of the gift—not later, but at the time. One is the intention to give and, secondly, a delivery and, thirdly, the release of all dominion over the article given. Now, the proof
20 in this case, and the only proof, concerning the gift and the intention of the donor, Mrs. Ott, was given through the deposition of her son, Henry L. Ott, who said he was present at the time, and he said that while the bonds and stock were delivered to Baude by his mother, that they were delivered for the purpose of teaching him how to invest his money and to handle investments, and that he was at all times to account to her; while he was to collect the dividends, while he was to collect the interest, he
30 was nevertheless to account to her at all times for what he did with those stocks, and that they were to become his at her death.

The Court: You didn't mean account to her for the proceeds of his collections of interest —

Mr. Brown: Yes.

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The Court: —but to account to her, so to speak, of the manner in which he himself, in his own interest, handled the securities.

Mr. Brown: Whichever construction you put upon it, if the Court please, it was the retention of some dominion over those bonds, even in the possession of Baude, and that there was not a complete gift 10
inter vivos. Now, as you said, the only testimony to controvert that is the letters of Ott, but if you take all his letters together, there is no controversion of it, but rather the confirmation of his testimony. If you pick out a single letter and say that “Mother gave you these bonds in her lifetime so as not to cause you any trouble at the time of her death,” perhaps that letter alone might be read to mean something else, but the entire correspondence is to have a different effect. 20

So it would seem to me we would be entitled to the direction upon any one of the three grounds advanced.

Mr. Coulomb: Let me add one point that occurred to me in the course of this argument of Mr. Brown. It came to me while he was talking there, and it has to do with his notion of the controversial part of this transaction as evidenced by Mr. Ott—after these bonds had been redelivered back to Mrs. Ott. Up 30
to that time, with the exception of the Helm Bruce letter, and I will refer to that now in a minute—all are consistent with the ownership, not only consistent with but proof of a gift and an ownership in Mr. Baude. While here comes the Bruce letter,

while Mr. Ott in his depositions says his mother caused that letter to be written, Mr. Bruce's stenographer says she never saw Mrs. Ott and that Henry L. Ott transacted all her business in that office as far as she knew, and that was right down to the time of January 5th, and the bonds were not given Baude, and even after that, if you take these letters, 10 they were to be a trust, and they were given to him by his mother so there would be no mistake about it. Now, if your Honor please, your Honor is aware of that line of cases which hold that where—of course, this is equity I am reading now from, but even where the donor keeps dominion over the property, but absolutely declares they were a trust, that trust will be enforced—not as a gift *donatio causa mortis* or a gift *inter vivos*, but as a trust, so that is not inconsistent with Mr. Baude's ownership. He was 20 the owner of these bonds. He had a right to them. If they wanted to show he was not the owner, then put in proof in attempt to do that. They have introduced these letters which they claim show there was not an ownership. That is for the jury to say.

I have never seen a case involving a transaction of this character, where apparently the only witnesses were two dead people and one live person whose mouth is stopped to tell what the transaction is, that is more forceful and convincing than the testimony 30 in this case. I cannot imagine it would be possible to get a more—evidence convincing almost to the point of demonstration that he was, in fact, the owner of these bonds, and you can read your letters—and you have read them, I know—to see how the thing went along from the beginning to the end, and

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I say when Mr. Ott declares—and that is their own proof, not our proof—that he was his mother's agent and that he bought these bonds for his mother to hand to him, and that he was present when they were handed, and then he goes on and writes this letter of August 26th telling Mr. Ott what to do with these bonds, not to transfer, not to do this, that or the other; and take the idea as evinced by 10 these letters that—according to Mr. Ott's testimony taken nine years later—ten years later down in Florida, that Mrs. Ott did not put these—gave these bonds to Mr. Ott—to Mr. Baude, not to teach him to be a financial expert, but because she could not get access to her box in Louisville, and she already had a box in Haddon Hall where the stock was subsequently placed, and, furthermore, along that line, Mr. Ott testified that his mother gave these bonds to Mr. Baude, who was living in Wilmington, 20 mind you, because she did not have access to her box, when he says in another part of his testimony, not in a letter, but in the testimony, his interrogatories—where he says, “I bought those bonds for my mother to give to Mr. Ott—or, rather, to hand to Mr. Ott—to Mr. Baude.”

Now how can that be consistent with anything else than a complete gift, and it certainly is in my estimation a clear and convincing case for the jury.

30

The Court: I conclude that the motion for the direction of verdict in favor of the defendant in this case must be denied. The testimony and evidence in the case is such as to present for the determination of the jury a question of whether the plaintiff

at the time of the demand was the owner of the bonds, entitled to the immediate possession of them. And, of course, the subsequent question of whether or not there was a wrongful conversion is likewise present in the case.

I may add that I do not think that the defendant is in a position to claim by way of surprise that the
10 defendant is obliged to meet different facts and circumstances than those alleged in the complaint, because such so-called different facts and circumstances are of the defendant's own making. Plaintiff in his complaint alleges ownership and right to possession of the bonds, made demand upon the defendant for their possession and the refusal of the defendant to return them.

Motion for a direction must be denied, and such
20 shall be the ruling.

Mr. Brown: Allow me an exception.

The Court: You may have it.

(Recess taken to 1:30 o'clock P. M.)

Court's Charge to Jury

AFTER RECESS.

 1:30 o'clock P. M.

10

(Mr. Coulomb opens the case to the jury on behalf of the plaintiff.)

(Mr. Brown sums the case up to the jury on behalf of the defendant.)

(Short recess.)

(Mr. Coulomb sums the case up to the jury on behalf of the plaintiff.)

20

 COURT'S CHARGE TO THE JURY.

JAYNE, J.:

Ladies and gentlemen of the jury: This is an action in which the plaintiff, Walter A. Baude, seeks the recovery of damages from the defendant, Chemical Bank and Trust Company, administrator with the will annexed of the Estate of Mary A. Ott, deceased, for an alleged wrongful conversion of certain bonds of the aggregate face value of \$17,000

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and for the wrongful conversion of the interest coupons attached to those bonds.

Now, I am aware that the usual orderly presentation of evidence has been frequently interrupted throughout this trial by objections to the legal admissibility of much of the evidence. I may say to you that most of these objections have arisen from
10 the circumstance first that Mary A. Ott is deceased and perhaps, secondly, from the circumstances that her son, Henry L. Ott, is likewise deceased, and thus the legal rules and statutory restrictions which are designed for the protection of the estates of deceased persons have been invoked requiring determination and the previous argument of these questions of law. Perhaps in passing I should say to you that it is entirely proper that counsel representing their respective clients in the trial of a
20 case should advance in the interest of their respective clients those arguments and objections which to them seem to be proper.

I have said that the trial has been interrupted by the argument of these legal objections perhaps, first, because of the death of Mary A. Ott. I think in the circumstances you are entitled to know that the statutory law of our State provides that in all civil actions any party thereto may be sworn and examined as a witness, but this statutory provision
30 insofar as you are interested in it in this case likewise provides that this section of the statute to which I am alluding shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator represented in said action unless the representative

Court's Charge to Jury

offers himself as a witness on his own behalf and testifies to any transaction with or statement by his testator, in which event the other party may be a witness on his own behalf as to all transactions with or statements by such testator which are pertinent to the issue. When the representative is a national bank, trust company, or other corporation, testimony of any officer or employe thereof shall be deemed testimony of the representative within the meaning of this section. I have quoted, I may say, from the statute only the pertinent parts of it to indicate to you that in the circumstances of this case the plaintiff was not permitted to testify to any transaction with or statement by the testatrix represented by the defendant bank as administrator of her estate. 10

Now, I shall endeavor to simplify for you without undertaking to review the testimony the conflicting contentions of the respective parties to this action, and point out if I can to you the issue or issues of fact which you are called upon to determine. The solution of all questions of fact in this case becomes a duty peculiarly and exclusively yours. The decision of all questions of law is the duty of the Court, but it is your exclusive duty to determine all questions of fact in this case, because you are the sole judges of all questions of fact, and in the determination of such questions of fact and in your consideration of the testimony and evidence relating to those disputed questions of fact, you become the sole judges of the weight and of the credibility of the evidence and of the testimony. 20 30

Now, it is contended in behalf of the plaintiff in

this case that on March 4th, 1921, he was the owner in his own right of the following bonds: ten \$1000 six per cent convertible bonds of Allied Packers, Incorporated; five \$1000 seven per cent bonds of the Toledo Traction Light & Power Company; and two \$1000 six per cent bonds of the Louisville Railway Company, and that on that date he delivered
10 by mail and entrusted these bonds to Mary A. Ott who was then alive and living, to be returned by her as is contended in behalf of the plaintiff in safe keeping for him, the plaintiff; that he has never since disposed of these bonds, divested himself of his ownership of them, and has never since obtained possession of the bonds or any of them. It is likewise contended in behalf of the plaintiff that on June 23, 1930, Mary A. Ott died and that subsequently the defendant was appointed administrator
20 of her estate and that on November 6th, 1930, and again on March 25th, 1931, with which latter date I think you are to be most concerned, the plaintiff demanded from the defendant administrator the return of these bonds, with the interest coupons, and that the defendant has failed and refused to return to the plaintiff the bonds and coupons so demanded.

Now, to successfully maintain this action it is incumbent upon the plaintiff to prove by a fair preponderance of the evidence his ownership of the
30 bonds at the time of the alleged conversion; that is to say, that he had such a general, or special title to the bonds as would entitle him to immediate possession of these bonds at the time of their conversion, and it is incumbent upon the plaintiff to likewise prove by a fair preponderance of the evi-

Court's Charge to Jury

dence a conversion by the defendant of these bonds, that is to say, such act or acts on the part of the defendant as would amount to a repudiation of the plaintiff's title to the bonds. Therefore, it is necessary in a case such as this for the plaintiff to establish by a fair preponderance of the evidence the two elements, namely, his title to the property and right to its possession at the time of the conversion, and, 10 secondly, the conversion of the property by the defendant. These are essential elements of the cause of action of the plaintiff which he must prove by the greater weight of the legal and credible and believable evidence in the case.

Now, I have said that you are to decide all questions of fact in this case. The first important question of fact that you encounter in your consideration of this case involves the title and ownership, if any, of the plaintiff in these bonds. Now, of course, if 20 the plaintiff never owned the bonds, did not have any right to their possession at the time he made a demand upon the defendant for them, then that is the end of the case, ladies and gentlemen. Your verdict must be, in such event, for the defendant. So that the first question, and of essential importance in the decision of this case, is whether or not the plaintiff owned these bonds. Now, evidence has been introduced on behalf of the plaintiff tending to show that on March 4th, 1921, and indeed for 30 some time indicated by the testimony prior to that date, he, the plaintiff, owned and possessed these bonds as the owner of them, that he was in physical possession of them and collected and received in his own right the interest accruing on the bonds, and

- that he never sold or transferred, gave them away or otherwise disposed of them in such manner as to divest himself of title to them. Now, moreover, counsel for the plaintiff invites your attention to certain letters which have been offered and permitted in evidence in this case—one written by the deceased, Mrs. Ott, under date of March 4, 1921;
- 10 others written by Henry L. Ott, who appears to have been the son of the deceased. It would be quite idle, I think, for me to make any specific reference to the contents of these letters, and, indeed, you are not entirely dependent upon your recollection of the contents of them as read to you by counsel in the case, because the letters themselves have been offered and admitted in evidence and will be available for your examination and perusal during your consideration of this case in the jury room.
- 20 Perhaps I should say to you, however, that if you conclude from the evidence in this case that Henry Ott was authorized by his mother, Mary A. Ott, to represent her in the affairs—and I speak of the negotiations for the return of these bonds, or with respect to their management and handling affairs to which the letters relate, and they were written by Henry Ott as agent of Mrs. Ott, pursuant to her authority and within its scope, so to speak, then in legal effect Mrs. Ott was speaking—Mr. Ott,
- 30 rather, I should say, was speaking for his mother, the deceased, in these letters, acting, of course, as her agent. Now, if you conclude from the evidence that Henry L. Ott was the agent of his mother, Mary A. Ott, and in pursuit of such agency and the authority by which it is created and within its limits

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and bounds he wrote these letters they have here, or some of them—the rule would apply only to those in which he wrote them as her agent—then the statements contained in the letters written by Henry L. Ott to the plaintiff were binding upon Mrs. Mary A. Ott in her lifetime and are binding upon her representative, the defendant in this suit, after her death, as admissions against interest. I should add, I 10 think, with respect to the letters written by Henry L. Ott that if you conclude that these letters or some of them were not written pursuant to any authority with which Henry L. Ott was clothed from his mother to act as her agent in the affairs to which these letters relate and for which they were mailed, then you may, however, consider these letters with special regard to the testimony given by Henry L. Ott as a witness in this case. And if in these letters you find statements made by him which are in con- 20 tradiction, in conflict with the testimony which he has given by way of answer to interrogatories in this case, then, of course, you will consider the contradictory statements so said to have been made by him in these letters, in determining the weight and credibility to be accorded to his testimony in the case. In this same connection I may say that statements contained in the letters of Henry L. Ott and of the attorney Helm Bruce, who I think was the attorney of Mrs. Ott, insofar as such statements 30 are self-serving, they are not to be attributed to, and in that sense binding upon, Walter A. Baude, the plaintiff in this action.

Now, on the other hand, speaking of the same question to which I first alluded, namely, whether

the plaintiff was or was not the owner of these bonds, you have the deposition, answer to interrogatories of Henry L. Ott, the son of the deceased, Mary A. Ott, who testifies that the plaintiff, Walter Baude, obtained possession of these bonds from his, Henry Ott's, mother, and that he, Henry Ott, was present when his mother delivered the bonds to the plaintiff. Henry Ott testifies that Mrs. Ott expressly stated at the time of the delivery of the bonds to the plaintiff that the bonds were to become the property of the plaintiff at her death and not before, and that the plaintiff accepted the bonds upon these terms and with that understanding. Now, of course, if these were the circumstances under which the plaintiff acquired possession of these bonds, then he cannot successfully claim title to the bonds as a gift from Mrs. Ott. To constitute a valid gift of the bonds by Mrs. Ott to the plaintiff, there must be proof of a donative intent on the part of Mrs. Ott; that is to say, an intent on her part to give them. There must be proof of a delivery of the bonds to the plaintiff and a relinquishment by Mrs. Ott of all further dominion or ownership of the bonds, that is to say, a relinquishment on her part of all claim and ownership to those bonds. Now, a mere agreement or understanding that the bonds should become the property of the plaintiff upon the death of Mrs. Ott does not constitute a gift of the bonds to the plaintiff at the time of such agreement or understanding, and if Mrs. Ott did not divest herself of ownership of the bonds upon delivering them to the plaintiff, then there was no valid gift of the bonds to the plaintiff. And, more-

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over, if Mrs. Ott in delivering the bonds to the plaintiff had no intention of making at that time a gift of the bonds to the plaintiff, that is to say, had no donative intent, then there was no valid gift of the bonds to the plaintiff. Of course, if a valid gift, however, was made, that is to say, if Mrs. Ott intended to divest herself of all ownership of these bonds and give them to the plaintiff, that they should become his, the gift is not destroyed merely because the donee might thereafter entrust the property so given to the donor for safe keeping. 10

And so these questions arise: Did Mrs. Ott, prior to March 4, 1931, make a gift of these bonds to the plaintiff? Was the gift effectuated by the delivery of the bonds to the plaintiff with intent that they should be his property? Did Mrs. Ott divest herself at the time of all ownership of them, with the intent that the bonds should then and there become the property of plaintiff? Or, on the other hand, did she merely entrust to the plaintiff the care and management of these bonds, so to speak, she herself, Mrs. Ott, retaining the title to and ownership of the bonds? That is the fundamental question in this case. By that I mean the question of whether or not the plaintiff at the time of the demand for the possession of these bonds was owner of them and entitled to the possession of them? If you conclude that the plaintiff never owned the bonds and was not entitled to the possession of them at the time he demanded them, then, as I have said before, the plaintiff cannot recover in this case. But if the plaintiff has satisfied you by a fair preponderance of the evidence that he was the owner of the bonds 20 30

and was entitled to the possession of the bonds at the time he made demand for them, then you pass on to the consideration of the next element of the alleged cause of action, namely, the alleged conversion of the bonds by the defendant.

Now, the alleged fact that the plaintiff delivered these bonds to Mrs. Ott does not now, at the end
10 of the case, appear to be in dispute. That she received these bonds is apparently not in dispute. It is admitted that the plaintiff demanded of the defendant, as administrator, the return of the bonds and that the defendant as administrator has failed to return or surrender the bonds to the plaintiff. In an action of trover, as counsel has said, such as this, conversion of the property is the real gist of the action, and as I have already said, the plaintiff must prove not only property in himself, but a
20 wrongful conversion of property by the defendant as alleged in his complaint. And so, if the plaintiff then owned these bonds and entrusted them to Mrs. Ott for safe keeping, proof of the demand upon the administrator for the possession of the bonds, and proof of the refusal of the administrator to comply with the demand constitute at least in a prima facie degree proof of the conversion of the bonds. I think in the trial of this case, as framed by the pleadings—and by pleadings I mean the complaint and
30 answers filed by the respective parties—you may, so to speak, view this case as if the administrator stands in the place and stead of the testatrix.

Now, we have not been informed by any evidence in this case, certainly, with any degree of definiteness at all, if at all, what has become of the bonds

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or where they may be now. The defendant has said that the bonds never came into its possession as administrator; but what became of them, where they are now, are matters about which no illumination has been shed by any of the testimony in this case. There is testimony now in the case that the bonds came into the possession of Mrs. Ott, and there is some testimony from which you might infer that her son, Henry L. Ott, became physically possessed of them perhaps, but as her agent. Now, if the plaintiff owned the bonds and you so conclude from your consideration of the testimony in this case, and deposited these bonds with Mrs. Ott for safe keeping, that she might retain them until he demanded them, why then, of course, you see, it became in such circumstances the duty of Mrs. Ott, upon the demand made upon her in her lifetime, to return them, and it became the duty of the administrator after the death of Mrs. Ott to return them upon demand unless the failure of the defendant to do so is rested upon some legal justification.

And so in this case I think that in view of the situation and proof, namely, that the making of the demand by the plaintiff for the possession of the bonds is admitted, and the failure of the defendant to return the bonds to the plaintiff is likewise admitted, you are faced here with *prima facie* proof of the conversion of the bonds, as alleged in the complaint in this case. The pivotal question, the fundamental question in the case, as I see it, relates to the title, the ownership and right to the possession of these bonds by the plaintiff.

Alluding now in the progress of my charge to

some of the requests submitted in behalf of the plaintiff, I charge you that it is claimed in this case that the plaintiff delivered certain bonds to Mary A. Ott to be held by her for the plaintiff until her death or until he should demand possession of them. The law under such circumstances is that the conversion does not take place until a demand is made for the
10 return of the property. The demand in this case was made upon Mrs. Ott's administrator, the defendant bank in this case, and I charge you that if there was a conversion, as claimed by the plaintiff, it took place at the time of the demand for the return of the bonds and the failure or refusal of the defendant to return them. And if you believe from the fair preponderance of the credible evidence in this case that Walter A. Baude was the owner of the bonds in question on and before March 4, 1921,
20 and neither sold, transferred the title nor made any gift of them to Mary A. Ott, and was the owner and entitled to the possession of them at the time the demand was made upon the defendant, and that the defendant has failed and refused to return them upon such demand, then your verdict must be in favor of the plaintiff. The fact, if you find it to be a fact, that the defendant never had possession physically of the bonds mentioned in this suit would not relieve the defendant of liability as administra-
30 tor of the estate of the deceased, if you find and conclude from the adequate amount of proof to which I have referred that the bonds belonged to and were owned by Walter A. Baude, the plaintiff, that he entrusted them, deposited them with Mary A. Ott, that he owned them and was entitled to the

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possession of them at the time he demanded them, and that the defendant failed and neglected to return them to the plaintiff.

If, then, you conclude that the plaintiff in this case has adequately established the essential elements of his cause of action as I have stated them, then, of course, you will be concerned in this case with the amount of damages to be awarded to the plaintiff. The general rule by which the allowance of damages is governed in actions of trover and conversion, is that the damages shall represent the value of the property at the time and place of the conversion. The general rule is altered somewhat, I may say, in cases relating to the conversion of commercial and marketable securities such as stocks and bonds. With respect to the conversion of stocks and bonds I understand the measure of damages to be the highest intermediate, market value, between the time of conversion and a reasonable time after notice of the conversion within which to replace the securities. I think, however, that you need not be confused by this rule in this case because there is no evidence showing any fluctuation in the market value of these bonds. Indeed, there is no evidence of the market value of these bonds except the evidence relating to the face value of the respective bonds. The face value of the respective bonds, in the absence of other proof of value, may be regarded by you as *prima facie* proof of the value of the respective bonds. Now, of course, ladies and gentlemen, you are not concerned with the estimation and calculation of the amount of damages to be awarded to the plaintiff in this case unless and

until you conclude that the plaintiff is entitled to recover against the defendant under the evidence introduced in this case and within the rules of law that I have expressed.

If you conclude that the plaintiff is entitled to recover, then you will award to the plaintiff in this case an amount which would be equal to the face value of these bonds, the principal of these bonds, and of the value of the coupons representing the interest accruing upon these bonds from March 4, 1921, to March 25, 1931, and upon that aggregate sum the plaintiff will be entitled to lawful interest from March 25, 1931. You see, what the plaintiff is entitled to, as the plaintiff claims, and if you conclude that he was entitled to it, are the bonds with the coupons attached, so that you are concerned with the value of the bonds, about which you are informed only as to their face value, and the coupons representing the interest during the period which I have mentioned. And to that—the plaintiff will be entitled to interest—the coupons—I should say, speaking of the coupons, you will have in mind these coupons were at the rates to which I have previously referred in my charge. Then to that sum plaintiff will be entitled to lawful interest from March 25, 1931.

Is there anything further, gentlemen?

Ladies and gentlemen of the jury, in my charge in making reference to a letter written by the deceased, Mrs. Ott, I said, I am told, that this letter was under date of March 4, 1931. I meant 1921.

Mr. Coulomb: I have only one thing: Where

Court's Charge to Jury

you said, speaking of conversion, "and if he was the owner of the bonds, they would be entitled to return them unless there was some justification for not doing it."

What legal justification could there be if they were the owner?

The Court: Ladies and gentlemen of the jury, I am prompted to add just this to my charge, in view of the matter to which my attention is called by counsel. 10

In my charge I said to you that if you concluded that the plaintiff was the owner of these bonds and had entrusted them and deposited them with Mrs. Ott for safe keeping, that they were to be returned upon his demand, then I think I said during the lifetime of Mrs. Ott it was her duty to return the bonds to him upon demand. I am speaking generally of the duty of a person with whom property of another is deposited. Then I proceeded to say to you that if no demand had been made upon Mrs. Ott during her lifetime, then it became the duty of her personal representative, that is to say, administrator of her estate, to return them upon demand, and I added to that, unless there was legal justification for the failure to do so, and in this case I meant by legal justification, namely, unless plaintiff did not own them; and, therefore, if you conclude that the plaintiff did not own these bonds, as I have repeatedly said to you throughout the charge, then plaintiff cannot recover in the case, and the defendant, even though it possessed the bonds, under such circumstances would not be required to surrender them, if the plaintiff did not own them. 20 30

Mr. Brown: Now, if your Honor please, I desire to take exception to that portion of your charge wherein you state that the plaintiff must prove that he had a general or special ownership in these bonds as would entitle him to the possession thereof at the time the demand was made. And my point is that under the case as made out in the pleadings,
10 nothing but an absolute ownership could entitle him to that right.

Also in that line, and for the same reason, I desire to take exception to that portion of your charge wherein you said that the plaintiff must show a right to the possession of the bonds at the time of making the demand.

The Court: I joined that with his ownership. I mean I speak of them both together.
20

Mr. Brown: I desire also to take exception to that portion of your charge wherein you say in effect that for the purpose of this case, from the pleadings, you may view this case as though the administrator stands in the place of the decedent, my point being that that cannot be so in view of the pleadings and the case as made out therein.

I also desire to take exception to that portion of the Court's charge wherein it was said that on the
30 demand and refusal the jury was faced with the prima facie proof of conversion of these bonds as alleged therein.

I desire further to take exception to that portion of the Court's charge wherein he said in effect that conversion does not take place until demand made,

Defendant's Exceptions

if there was a conversion it took place at the time of the demand and refusal, it being my point that there may be a conversion without a demand being made, as has been contended by me in this case made in 1922, and that notice of it was conveyed to the plaintiff Baude.

Furthermore, I desire to take exception to the Court's charge wherein it was said that the fact of lack of possession of the bonds by the administrator does not relieve it from liability, it being my contention that that presents this case to the jury upon an entirely different issue than that that was raised by the pleadings. 10

The Court: The jury may retire. Counsel better examine the exhibits and see that all the exhibits go, as well as to see that nothing which has not been offered in evidence goes. 20

(The jury retires.)

Mr. Brown: I desire to take exception to that portion of the charge of the Court wherein it, in effect, charged the first request of the plaintiff, which was in substance that the demand made in this case constituted a conversion as charged in the complaint.

I desire to except to that portion of the Court's charge wherein in effect it was said that if the jury believed that the plaintiff was the owner of the bonds in question on or before March 4, 1921, and neither sold, transferred the title or made a gift of them to Mary A. Ott, their verdict must be in favor of the plaintiff. 30

I would like to take exception to that portion of the Court's charge wherein it was said that if the jury believed from the evidence that Henry L. Ott was the agent of Mary A. Ott, then statements contained in the letters written by him to the plaintiff were binding upon her.

10 And also to that portion of the Court's charge wherein it was said that statements contained in the letters of Henry L. Ott and Helm Bruce, Mrs. Ott's attorney, insofar as such statements are self-serving are not binding upon Walter A. Baude, the plaintiff herein.

I think that covers it.

EXHIBIT D2.

20

Jan. 23/34.

V. E. M.

Law Offices of
SAULSBURY, MORRIS & RODNEY

907 Market Street

Wilmington, Delaware

Willard Saulsbury Long Distance Telephone 933

Richard S. Rodney Cable Address

"Saulsbury Wilmington"

30

December 24, 1921.

Henry L. Ott, Esq.,
Chestwood, Kentucky.

Dear Sir:

Mr. Walter Baudy of 1312 Van Buren Street, this
City has called to see me relative to a very unfor-

Defendant's Exhibits

fortunate difference which seems needlessly to have arisen between your Mother and himself by which a friendship extending over a number of years seems possibly to be impaired. I have only seen Mr. Baudy for a few moments and so may not have gotten all of the facts entirely correct, but it is my understanding from the information given to me that your Mother very generously gave to Mr. Baudy some bonds of approximately a par value of Seventeen Thousand Dollars and certificates for One hundred shares of the Standard Sanitary Manufacturing Company; that subsequently your Mother having written to Mr. Baudy that it was not her intention that he should have all of the benefit of the bonds until the death of your Mother these bonds were returned to your Mother and the stock certificate of the Standard Company and that your Mother suggested your appointment as Trustee and that to you should be transferred and delivered the bonds and stock. Mr. Baudy has every desire to do everything that can reasonably be expected of him in the matter but a few things have happened under the expectation that the bonds and stocks were to be his entirely at the present time which would not have happened if he had not been led to this conclusion. It is extremely doubtful to me that he would have been justified or have felt himself justified in being married on his existing salary except as that salary was supplemented by the income from these investments and he has expressly told me that after leaving the army the question of continuing the Government life insurance proposition having arisen that he would have been unable to do this

except from this added income. I think that you and your Mother will both agree that it would be most unfortunate and impossible for him to cancel this insurance now and it requires approximately Three Hundred Dollars from the income from the securities to continue this insurance in force.

10 If therefore, you will send to me a draft of the proposed trust agreement under which you propose to hold the securities and if this trust agreement could include the payment from the income of a sufficient sum to Mr. Baudy to continue this insurance I feel reasonably certain without having definitely discussed the matter with Mr. Baudy that I can persuade him to bring the matter to a settlement which will be mutually satisfactory to all of the parties. If I can be of any assistance to you in drawing this agreement I shall be very glad to do
20 so, if you will indicate to me the terms that you think should be expressed therein and the name of the Trustee. Of course, if any reputable Trust Company is named as Trustee any suggestion of a Trustee's bond would be unnecessary.

I should be very glad to take this matter up with you upon hearing from you.

Yours very truly,

Richard S. Rodney.

Defendant's Exhibits

EXHIBIT D3.

Jan. 23/34.

V. E. M.

Law Offices of
SAULSBURY & CURLEY

10

907 Market Street
Wilmington, Delaware

Willard Saulsbury Long Distance Telephone 933

Charles F. Curley Cable Address

“Saulsbury Wilmington”

Albert F. Polk

February 16, 1922.

Mr. Henry L. Ott,
Crestwood, Kentucky.

Dear Mr. Ott:

Your letter addressed to Richard S. Rodney dated 20
January 3d last, relative to the matter between your
Mother and Mr. Walter Baude, has been handed to
me by Judge Rodney for attention, he having been
appointed one of the Associate Justices of the Su-
preme Court of Delaware since he wrote you on
December 24th last.

This matter has been hanging fire for a long while
and it would seem to me that there must be some
common ground upon which an agreement may be
reached in the matter. Mr. Baude, with the idea 30
that the securities turned over to him by your
Mother were to be his, continued his War Risk
Insurance at an annual expense of around \$300.
which in all human probability he would not have
done had he for a moment thought that these securi-

ties had not been turned over to him in absolute good faith.

I have read the letter of Mr. Helm Bruce of Louisville, Ky. dated January 5th together with many letters written by your Mother to Mr. Baude and letters written by him to your Mother, as well as letters from you and from his Uncle, so I have a
10 pretty clear understanding of the difficulties surrounding this matter. I cannot understand your attitude that you should hold these securities as Trustee without bond or without the supervision of some Court of competent jurisdiction. My suggestion would be that some responsible Trust Company, for instance the Equitable Trust Company of Wilmington, Delaware, which is one of the strongest companies in the east, be made the trustee to hold these securities by your Mother executing a Declara-
20 tion of Trust to said Trust Company setting forth the terms and conditions of the trust. The expense of such a trust management would be small and certainly would be more satisfactory to Mr. Baude than to have them held by a person as trustee without a Declaration of Trust and without any assurance except such as contained in your letters that they would be turned over to him at your Mother's death. You must certainly realize that the mere holding of these securities by you as nominal trustee without
30 any actual declaration of trust by your Mother, would be no security to Mr. Baude or would give him no assurance of the carrying out of the agreement. I think, under all the circumstances, that at least \$300. of the annual income arising from the securities should be paid to Mr. Baude in order that

Defendant's Exhibits

he may keep up his War Risk Life Insurance, he having been led to assume such insurance by the belief that the delivery of the securities by your Mother to him was an absolute gift and that he would be entitled to income accruing therefrom.

\$1000. worth of the stock Mr. Baude informs me was purchased with his own personal funds and certainly if there is to be any agreement or arrangement about this stock new certificates should be issued to the extent of One Thousand Dollars. I trust that you will consider this matter from a purely business standpoint because as a business man you must realize that your proposition to hold these securities as trustee without any formal declaration of trust executed by your Mother and without any bond on your part for the faithful performance of that trust, would be a very unbusinesslike proposition for Mr. Baude to consent to and I cannot believe that you would wish him to put himself in any such position or would want to be put in that position yourself. 10 20

Will you please let me hear from you at as early a date as possible with your views upon the suggestions made by me in this letter as Mr. Baude desires that there be some final agreement made in the matter as early as possible and I feel sure that you and your Mother are equally desirous that a satisfactory arrangement be arrived at. 30

Yours very truly,
Albert F. Polk.

AFP—W.

EXHIBIT D4.

EXHIBIT "B."

Jan. 22/34.

V. E. M.

10

(Copy)

January 23, 1922.

Mr. Richard S. Rodney,
907 Market Street,
Wilmington, Delaware.

Dear Sir:

I received yours of the 24th ulto., and since receiving it I have conferred with my mother. The
20 necessity for this conference has caused me delay in answering you.

Mother insists that the agreement between her and Walter Baude be carried out as it was made, without alterations, except that she has consented that the securities be held by me as trustee, instead of being held by my mother herself, so that Walter can have this additional assurance that the original contract will be carried out.

If Walter Baude will show you a letter of Janu-
30 ary 5, 1921, written to him by my mother's lawyer, Mr. Helm Bruce of Louisville, Kentucky, you will see exactly the circumstances and conditions under which all of these securities were delivered to Walter. I may, however, briefly state to you the substance of it—and I may say that I was myself

Defendant's Exhibits

personally present when the first securities were delivered to him—was as follows: She said to him that these securities were to be his *at her death*, but not before; and that she only turned them over to him because she was not in Louisville where her safety box was and where she could put them away herself, and she did not at that time think it advisable to mix me up in the matter by making me a 10 trustee.

Of course the effect of that agreement was that the securities remain my mother's until her death, and she was entitled to receive the income upon them; because the gift was only to take effect at her death.

As said before, she has now consented to modify this to the extent that she will place these securities in my hands, as trustee, to hold according to the original agreement, to wit, to become Walter's only 20 upon my mother's death; belonging to her in the meantime and with the right in her to collect the income.

I may throw out their further suggestion that at present all of these securities are actually in my mother's possession, having some months ago been sent to her by Walter. She has the bonds, which are payable to bearer, and she has the stock, though the stock certificates are in Walter's name; and for this reason my mother has requested that he execute 30 a power of attorney to someone to endorse these certificates in his name so they may properly be held and controlled by the trustee. The bonds alone amount to \$17,000, par value, and if my mother should die with these bonds in her possession Wal-

Defendant's Exhibits

ter would probably have difficulty in getting them because it would doubtless be insisted that he had refused to abide by the terms of the agreement and had thereby nullified it.

It seems to me therefore that it is best for all parties that Walter endorse these certificates, that is to say, give a power of attorney to someone to
 10 endorse them in his name, so that they, as well as the bonds, can be delivered to me by my mother to be held by me as trustee for the purpose of carrying out the agreement stated above.

Yours truly,

EXHIBIT D5.

20

EXHIBIT "C."

Jan. 23/34.

V. E. M.

BRUCE & BULLITT

Louisville, Ky.

Louisville, Ky., Feb. 20, 1922.

Mr. Albert F. Polk,

Attorney at Law,

C/o Saulsbury & Curley,

30

Wilmington, Del.

Dear Sir:

I have yours of the 16th inst., answering a letter I wrote on the 23d ult. to Mr. Richard S. Rodney.

My mother insists on maintaining the position taken in my letter of the 23d. So far as the declara-

Defendant's Exhibits

tion of trust is concerned, there is no trouble about that. She would be perfectly willing to make a declaration of trust. And if that is all that stands in the way of final settlement, this can be quickly done.

If this is satisfactory, I will be glad to arrange for having the declaration of trust made by my mother and submit the form of same to you. 10

Yours truly,

EXHIBIT D6 FOR IDENTIFICATION.

Jan. 23/34.

V. E. M.

(COPY)

HUGHES, SCHURMAN & DWIGHT 20
100 Broadway, New York
May 1, 1931.

Alfred T. Geisler, Esq.,
18 East Fourth Street,
Cincinnati, Ohio.

Re: Baude v. Estate of Mary A. Ott,
Deceased.

Dear Sir:

In response to your letter of the 25th instant we beg to advise you that upon our advise the Chemical Bank & Trust Company as Administrator c. t. a. of the estate of Mary A. Ott, deceased, has decided to allow the claim of your client Walter A. Baude in so far as it relates to 100 shares of preferred stock of the American Radiator and Standard Sanitary Corporation and to dispute the balance of the claim. 30

We have prepared a formal notice of the allowance of the portion of the claim relating to the preferred stock and of the rejection or dispute of the balance of the claim and this will be sent to you at an early date. We enclose herewith a receipt for certificate TP316 for 100 shares of preferred stock of the American Radiator and Standard Sanitary Corporation and release from liability in connection therewith. Please have Mr. Baude execute this and acknowledge it before a notary public and have a county clerk's certificate affixed as to the authority of the notary. We enclose herewith two forms of county clerk's certificate which are acceptable in this state. Form No. 29 should be used if impressions of seals of notaries public are required by law to be filed in the country clerk's offices in your state. Form No. 43 should be used if there is no such requirement. When the receipt has been properly executed please return it to us. The Chemical Bank & Trust Company has advised us that as soon as they receive it they will forward by registered mail the stock certificate in question.

Neither the bonds mentioned in your client's affidavits nor the proceeds of the possible sale or redemption thereof nor the interest thereon have ever come into the possession of the Chemical Bank & Trust Company as Administrator c. t. a. The estate of Mary A. Ott is hopelessly insolvent

Alfred T. Geisler, Esq.

—2—

and has no assets available for the payment of Mr. Baude's claim with respect to bonds or the value thereof and interest thereon.

Defendant's Exhibits

We are considering instituting an action in the courts of this state for the purpose of determining whether certain debts, administration expenses and taxes should be paid from the corpus of a trust fund created by the late Mrs. Ott in February, 1929. It may be that your client would like to become a party to this action and voluntarily to appear therein. If so, please let us know and we will communicate with you further in regard to this proposed proceeding. 10

We feel, however, that we should call your attention to section 71 of the New Jersey Orphans' Court Act:

*"71. Claim, if disputed, must be sued for in three months or be barred. * * * If any executor or administrator to whom any such claim is presented dispute the same, or any part thereof, and shall give notice in writing to the creditor, claimant, his attorney or agent, that said claim, or any part thereof, is disputed, such creditor shall bring suit therefor in three months from the time of giving such notice; and in any suit not commenced within said time, said decree shall bar any recovery of the account or part so disputed, as if said debt or claim had not been presented within the time so limited by said court."* 20

The statute is found at page 3835 of Volume 3 of the Compiled Statutes of New Jersey, 1709 — 1910. 30

Very truly yours,

Encls.

*Notice of Motion to Mould Verdict and
Sign Postea*

NOTICE OF MOTION TO MOULD VERDICT
AND SIGN POSTEA.

(Filed Feb. 13, 1934.)

10

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

WALTER A. BAUDE,
Plaintiff,

v.

20 CHEMICAL BANK AND TRUST
COMPANY, Administrator
Cum Testamento An-
nexo of the Estate of
MARY A. OTT, Deceased,
Defendant.

Action at Law.
Notice of Motion to
Mould Verdict and
Sign Postea.

To Wm. Elmer Brown, Esq., Attorney for Defen-
dant:

30

Sir:

Take notice, that on Friday, the 26th day of January, 1934, at the hour of 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Circuit Court Chambers, in the Guarantee Trust

*Notice of Motion to Mould Verdict and
Sign Postea*

Building, Atlantic City, New Jersey, we will apply to His Honor, Wilfred H. Jayne, Judge of Atlantic County Circuit Court, to assess the damages and mould the verdict rendered in the above cause, in accordance with the charge of the Court, and to sign the postea, a copy of which proposed postea is hereunto attached.

10

Take further notice, that we will move the Court to mould the verdict in accordance with the computation, a copy of which is hereunto annexed.

H. WALTER GILL,
Attorney for Plaintiff.

20

30

POSTEA.

(Filed Feb. 13, 1934.)

10 NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

WALTER A. BAUDE,
Plaintiff,

v.

CHEMICAL BANK AND TRUST
COMPANY, Administrator
Cum Testamento An-
20 *nexo* of the Estate of
MARY A. OTT, Deceased,
Defendant.

Action at Law.
Postea.

30 This action came regularly on for trial before His Honor, Wilfred H. Jayne, Circuit Court Judge, and a jury, on the 22nd day of January, A. D. 1934, in the presence of counsel for the respective parties thereto.

The parties to said cause having submitted their evidence, and the jury having considered the same, the said jury returned a verdict in favor of the plaintiff and against the defendant, as follows: "We agree on the verdict in favor of the plaintiff, for

Postea

the face value of the bonds and the legal interest thereon.”

And whereas, it appears from the evidence that said bonds consisted of the following, to wit:

\$10,000 Allied Packers, bearing interest at the rate of 6%.

\$5,000 Toledo Traction Light & Power, bearing interest at the rate of 7%. 10

\$2,000 Louisville Railway Co., bearing interest at the rate of 5%.

And whereas, it appears that the interest on said bonds, as set forth in said coupons, from March 4, 1921, to March 25, 1931, was as follows, to wit: on the \$10,000 Allied Packers 6% bonds, the sum of \$6035; on the \$5,000 Toledo Traction Light & Power 7% bonds, the sum of \$3520.42, and on the \$2,000 Louisville Railway Co. 5% bonds, the sum of \$1005.83, making a total for interest on said bonds from March 4, 1921, to March 25, 1931, of \$10561.25, making a total for the face value of said bonds plus the value of the coupons, of \$27,561.25; 20

And whereas, the interest on said sum of \$27561.25 from March 25, 1931, to January 23, 1934, at the legal rate of interest, to wit: 6% is \$4680.82, making a total value of said bonds and the interest thereon as aforesaid of \$32,242.07; 30

And whereas notice has been given of an application to assess the damages and mould the verdict;

Now, therefore, I, Honorable Wilfred H. Jayne, Circuit Court Judge, do hereby mould the verdict as follows: Said jury returned a general verdict,

in favor of the plaintiff and against the defendant,
in the sum of \$32,242.07.

WILFRED H. JAYNE,
Circuit Court Judge.

10 COMPUTATION OF INTEREST, ETC.

in

Walter A. Baude v. Chemical Bank & Trust Co.,
Administrator C. T. A.

* * * * *

(1) \$10,000 Par Val. Allied Packers 6%
Bonds

	Principal or face value	\$10,000.00
20	Value of Coupons from March 4, 1921 to March 25, 1931 (date of demand)	
	Period — 10 years and 21 days	
	Interest = .6035 on \$1.00 and on \$10,000 it = 10000 x .6035 = \$6,035	6,035.00

(2) Toledo Traction Light & Power Co.
7% Bonds

	Principal or face value	5,000.00
30	Value of Coupons from 3/4/21 to 3/25/31 @ 7%	
	Period = 10 yrs. and 21 days	
	Int. for period on \$1 at 6% = .6035	
	Int. for period on \$1 at 7% = .7040 5/6	
	Int. for period on \$5000	3,520.42

Postea

- (3) Louisville Railway Co. 5% Bonds
- | | |
|---------------------------------|-------------|
| Principal or face value | 2,000.00 |
| Period = 10 years and 21 days | |
| Int. for period on \$1 at 6% = | |
| .6035 | |
| Int. for period on \$1 at 5% = | |
| .5020 1/6 | |
| Int. for period on \$2000 at 5% | 1,005.83 10 |
-

Total of Principal and Interest Coupons 3/4/31 to 3/25/31 \$27,561.25

- (4) Interest @ 6% on \$27,561 from 3/25/31 to Jan. 23, 1934 (date of trial)
- | | |
|--|----------|
| Period 2 years, 9 months 29 days = .169 5/6 on \$1 | 4,680.82 |
|--|----------|
-

Total amount due January 23, 1934 \$32,242.07 20

A true copy.

FRED L. BLOODGOOD,
Clerk.

JUDGMENT.

NEW JERSEY SUPREME COURT.

10

WALTER A. BAUDE,
Plaintiff,

v.

CHEMICAL BANK AND TRUST
 COMPANY, Administrator
Cum Testamento An-
nexo of the Estate of
 MARY A. OTT, Deceased,
Defendant.

Action at Law.

20

Whereupon it is adjudged that the plaintiff, Wal-
 ter A. Baude, do recover of the said defendant,
 Chemical Bank and Trust Company, administrator
cum testamento annexo of the Estate of Mary A.
 Ott, deceased the sum of thirty-two thousand two
 \$32,242.07 hundred forty-two dollars and seven
 cents damages together with his costs
 which have been taxed at the sum
 of

30

\$ making in the whole the sum of .
 Judgment entered and signed February 13, 1934.

THOMAS J. BROGAN,
Chief Justice.

NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.
ATLANTIC COUNTY.

WALTER A. BAUDE,
Plaintiff,
v.
CHEMICAL BANK AND TRUST
COMPANY, Administrator
c u m testamento an-
nexo of the Estate of
MARY A. OTT, deceased,
Defendant.

Action at Law.
Notice and Grounds
of Appeal.

10

20

To H. Walter Gill, Esq., Attorney of Plaintiff, or
to whom it may concern:

Please take notice that the Chemical Bank and
Trust Company, administrator c. t. a. of the Estate
of Mary A. Ott, deceased, the defendant in the
above-entitled cause, appeals to the New Jersey
Court of Errors and Appeals, the court of last re-
sort in all causes, from the judgment entered in this
cause on the following grounds:

1. Because the Court denied defendant's applica-
tion to amend the answer filed in this cause, by add-

ing thereto two certain separate defenses which are fully and specifically set forth in the written notice of said motion duly served upon plaintiff, and filed herein on April 1, 1932.

2. Because at the trial, the Court, over the objection of the defendant, permitted the witness, Walter A. Baude, to answer the following questions:

“How long had you had possession of those securities?” and

“I asked you how long you had possession of them?”

3. Because at the trial, the Court, over the objection of the defendant, permitted the witness, Walter A. Baude, to answer the following question:

“When did you come in possession of the \$10,000 of Allied Packer bonds?”

4. Because the Court, over the objection of the defendant, permitted the witness, Walter A. Baude, to answer the following question:

“What was your interest in those bonds?”

5. Because the Court, over the objection of the defendant, permitted the witness, Walter A. Baude, to answer the following question:

“What did you do with the \$17,000 of bonds and the stocks, the hundred shares of stock?”

6. Because the Court, over the objection of the defendant, permitted the witness, Walter A. Baude, to answer the following question:

“What did you do with those securities?”

Notice and Grounds of Appeal

7. Because at the trial, the Court, over the objection of the defendant, permitted the witness, Walter A. Baude, to answer the following questions:

“Now, Mr. Baude, was there any change in the form of the one hundred shares of capital stock of the Standard Sanitary Manufacturing Company?” and

“Between March 4, 1921, and when you received some shares back from the Chemical Bank?” 10

8. Because at the trial, the Court, over the objection of the defendant, permitted the witness, Walter A. Baude, to answer the following question:

“What was the change?”

9. Because at the trial, the Court, over the objection of the defendant, admitted in evidence the letter of March 4, 1921, purporting to have been written by Mary A. Ott, to plaintiff, Walter A. Baude, and marked “Exhibit P2.” 20

10. Because at the trial, the Court, over the objection of the defendant, admitted in evidence envelope bearing postmark “Atlantic City, N. J., March 5, 1921, 4 A. M.,” purporting to have contained the letter admitted in evidence and marked “Exhibit P2.” 30

11. Because at the trial, the Court, over the objection of the defendant, admitted in evidence the depositions or interrogatories of Rudolph Baude, marked “Exhibit P4.”

12. Because at the trial, the Court, over the objection of the defendant, permitted the plaintiff to read into the evidence and before the jury answer to the Fourth Interrogatory submitted to Henry L. Ott, which question or interrogatory was as follows:

“State whether or not Walter A. Baude returned the following bonds and stocks:

10 “ ‘Allied Packers, Inc., 6% Convertible Bonds Nos. 10167, 10168, 10169, 10170, 10171, 10172, 10173, 10174, 10175 and 10176, each for the principal sum of \$1000, making a total of \$10,000 in principal of these bonds;

“ ‘Toledo Traction, Light & Power Co., 7% Bonds Nos. M49, M50, M51, M52 and M53, each for the principal sum of \$1000, making a total of \$5000 in principal of these bonds;

20 “ ‘Louisville Railway Co. 6% Bonds Nos. 11118 and 11119, each for the principal sum of \$1000, making a total of \$2000 in principal of these bonds;

“ ‘100 shares of Preferred Stock of the Standard Sanitary Manufacturing Company, represented by Certificate No. G-2145 for 30 shares, Certificate No. C-2080 for 30 shares and Certificate No. C-2150 for 40 shares’;

“to Mary A. Ott, after demand made by said letter dated January 5, 1921?”

30 13. Because at the trial, the Court, over the objection of the defendant, admitted in evidence interrogatories of Henry L. Ott, containing the Fourth Interrogatory which was objected to by said defendant, which interrogatories were marked “Exhibit P5.”

Notice and Grounds of Appeal

14. Because the Court refused to grant the motion of defendant for a non-suit.

15. Because at the trial, the Court refused to permit the defendant to read into the evidence and before the jury answer to the Sixteenth Interrogatory submitted by said defendant to witness Henry L. Ott.

10

16. Because at the trial, the Court refused to admit in evidence letter dated January 23, 1922, written by one Henry L. Ott to one Richard S. Rodney.

17. Because at the trial, the Court refused to admit in evidence letter dated May 1, 1931, written by Messrs. Hughes, Schurman and Dwight to Alfred T. Geisler.

20

18. Because at the trial, the Court, over the objection of the defendant, admitted in evidence letter dated August 26, 1919, purporting to have been written by one Henry L. Ott to plaintiff, Walter A. Baude, and which said letter was marked "Exhibit P6."

19. Because at the trial, the Court, over the objection of the defendant, admitted in evidence letter dated August 10, 1920, purporting to have been written by Henry L. Ott to plaintiff, Walter A. Baude, which said letter was marked "Exhibit P8."

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20. Because at the trial, the Court, over the objec-

tion of the defendant, admitted in evidence letter dated September 10, 1920, purporting to have been written by Henry L. Ott to plaintiff, Walter A. Baude, which said letter was marked "Exhibit P9."

10 21. Because at the trial, the Court, over the objection of the defendant, admitted in evidence letter dated September 17, 1920, purporting to have been written by plaintiff, Walter A. Baude, to Henry L. Ott, which said letter was marked "Exhibit P10."

22. Because at the trial, the Court, over the objection of the defendant, admitted in evidence letter dated September 22, 1920, purporting to have been written by plaintiff, Walter A. Baude, to Henry L. Ott, which said letter was marked "Exhibit P11."

20 23. Because the Court refused to permit the defendant herein to amend its answer by adding thereto the averment that the bonds which are the subject of this suit did not get into the hands of said defendant, Chemical Bank and Trust Company, administrator c. t. a. of the Estate of Mary A. Ott, deceased.

30 24. Because the Court refused to grant defendant's motion for direction of a verdict against the plaintiff.

25. Because the trial Court charged the jury as follows:

"Now, to successfully maintain this action it is incumbent upon the plaintiff to prove by a

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fair preponderance of the evidence his ownership of the bonds at the time of the alleged conversion; that is to say, that he had such a general or special title to the bonds as would entitle him to immediate possession of these bonds at the time of their conversion, and it is incumbent upon the plaintiff to likewise prove by a fair preponderance of the evidence a conversion by the defendant of these bonds, that is to say, such act or acts on the part of the defendant as would amount to a repudiation of the plaintiff's title to the bonds. Therefore, it is necessary in a case such as this for the plaintiff to establish by a fair preponderance of the evidence the two elements, namely, his title to the property and right to its possession at the time of the conversion, and, secondly, the conversion of the property by the defendant. These are essential elements of the cause of action by the plaintiff which he must prove by the greater weight of the legal and credible and believable evidence in the case."

26. Because the trial Court charged the jury as follows:

"I think in the trial of this case, as framed by the pleadings—and by pleadings I mean the complaint and answers filed by the respective parties—you may, so to speak, view this case as if the administrator stands in the place and stead of the testatrix."

27. Because the trial Court charged the jury as follows:

“And so, if the plaintiff then owned these bonds and entrusted them to Mrs. Ott for safe keeping, proof of the demand upon the administrator for the possession of the bonds, and proof of the refusal of the administrator to comply with the demand constitute at least in a prima facie degree proof of the conversion of the bonds.”

28. Because the trial Court charged the jury as follows:

“Alluding now in the progress of my charge to some of the requests submitted in behalf of the plaintiff, I charge you that it is claimed in this case that the plaintiff delivered certain bonds to Mary A. Ott to be held by her for the plaintiff until her death or until he should demand possession of them. The law under such circumstances is that the conversion does not take place until a demand is made for the return of the property. The demand in this case was made upon Mrs. Ott’s administrator, the defendant bank in this case, and I charge you that if there was a conversion, as claimed by the plaintiff, it took place at the time of the demand for the return of the bonds and the failure or refusal of the defendant to return them. And if you believe from the fair preponderance of the credible evidence of this case that Walter A. Baude was the owner of the bonds in question on and before March 4, 1921, and neither sold, transferred the title nor made any gift of them to Mary A. Ott and was the owner and

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entitled to the possession of them at the time the demand was made upon the defendant, and that the defendant has failed and refused to return them upon such demand, then your verdict must be in favor of the plaintiff."

29. Because the trial Court charged the jury as follows: 10

"The fact, if you find it to be a fact, that the defendant never had possession physically of the bonds mentioned in this suit, would not relieve the defendant of liability as administrator of the estate of the deceased, if you find and conclude from the adequate amount of proof to which I have referred that the bonds belonged to and were owned by Walter A. Baude, the plaintiff, that he entrusted them, deposited them with Mary A. Ott, that he owned them and was 20
entitled to the possession of them at the time he demanded them, and that the defendant failed and neglected to return them to the plaintiff."

30. Because the trial Court charged the jury as follows:

"Perhaps I should say to you, however, that if you conclude from the evidence in this case that Henry Ott was authorized by his mother, 30
Mary A. Ott, to represent her in the affairs—and I speak of the negotiations for the return of these bonds, or with respect to their management and handling affairs to which the letters relate, and they were written by Henry Ott as

10 agent of Mrs. Ott, pursuant to her authority and within its scope, so to speak, then in legal effect Mrs. Ott was speaking—Mr. Ott, rather, I should say, was speaking for his mother, the deceased, in these letters, acting, of course, as her agent. Now, if you conclude from the evidence that Henry L. Ott was the agent of his mother, Mary A. Ott, and in pursuit of such agency and the authority by which it was created and within its limits and bounds he wrote these letters they have here, or some of them—the rule would apply only to those in which he wrote them as her agent—then the statements contained in the letters written by Henry L. Ott to the plaintiff were binding upon Mrs. Mary A. Ott in her lifetime and are binding upon her representative, the defendant in this
20 suit, after her death, as admissions against interest.”

31. Because the trial Court charged the jury as follows:

30 “In this same connection, I may say that statements contained in the letters of Henry L. Ott and of the attorney, Helm Bruce, who I think was the attorney of Mrs. Ott, insofar as such statements are self-serving, they are not to be attributed to, and in that sense binding upon, Walter A. Baude, the plaintiff in this action.”

32. Because the trial Court charged the jury as follows:

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“And so in this case I think that in view of the situation and proof, namely, that the making of the demand by the plaintiff for the possession of the bonds is admitted, and the failure of the defendant to return the bonds to the plaintiff is likewise admitted, you are faced here with prima facie proof of the conversion of the bonds, as alleged in the complaint in this case. 10
The pivotal question, or fundamental question in the case, as I see it, relates to the title, the ownership and right to the possession of these bonds by the plaintiff.”

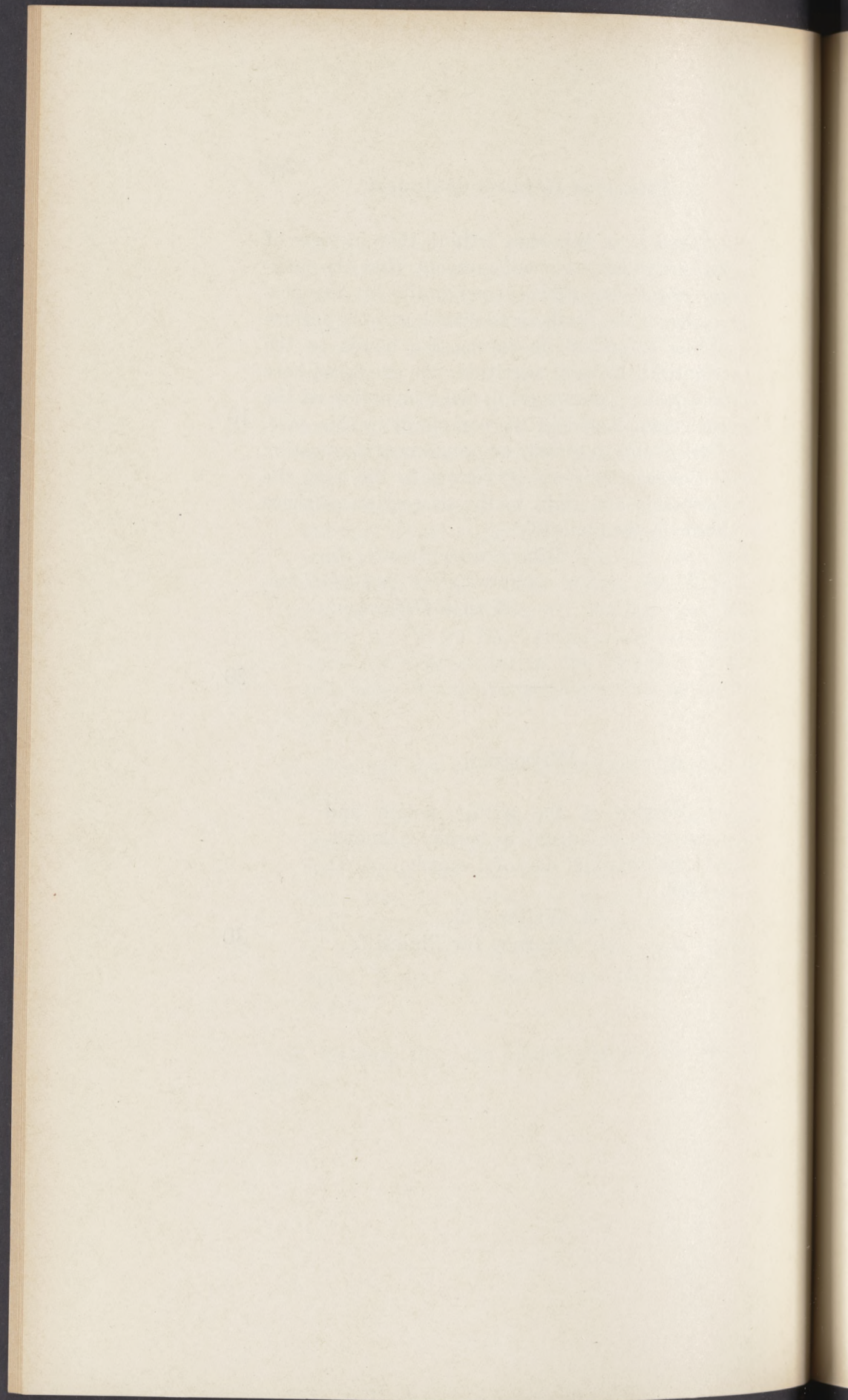
WM. ELMER BROWN, JR.,
Attorney for and of Counsel with Defendant.

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[ENDORSED]

Service of the within notice and grounds of appeal is hereby acknowledged this 21st day of December, A. D. 1934.

H. Walter Gill,
Attorney for Plaintiff. 30



NEW JERSEY COURT OF ERRORS
AND APPEALS.

WALTER A. BAUDE,
Plaintiff-Respondent,
v.

CHEMICAL BANK & TRUST COMPANY, administrator
c. t. a. of the Estate of MARY A. OTT, deceased,
Defendant-Appellant.

ACTION AT LAW.

ON APPEAL FROM THE SUPREME COURT.

APPELLANT'S BRIEF.

This is an appeal from a judgment entered in the Supreme Court in favor of the above-named respondent and against the above-named appellant in the sum of \$32,242.07 plus costs. The case was tried at the Atlantic Circuit (S. of C., pp. 228 and 232).

The complaint filed (S. of C., p. 2), alleged as plaintiff's cause of action the following: On March 4, 1921, and ever since then, plaintiff was the owner

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of certain bonds and entitled to the possession thereof; that on said date plaintiff did "deposit and leave in the custody" of one Mary A. Ott said bonds "for safe keeping, to be held in" her custody "and to be redelivered" to plaintiff "upon demand made by him"; that plaintiff at no time parted with title thereto; that said Mary A. Ott "being in possession of said bonds" departed this life testate; that said decedent's will was duly probated and defendant (appellant here) was appointed administrator c. t. a. of her estate on September 29, 1930; that plaintiff filed proof of claim with defendant demanding return of said bonds on November 6, 1930, and again on March 25, 1931; that said defendant refused to return said bonds to plaintiff on demand; that said "defendant well knowing that said bonds and coupons belonging thereto are the property of the plaintiff, and *contriving and fraudulently intending to deprive plaintiff of said bonds and coupons belonging thereto, hath refused and doth still wholly refuse to deliver* and has not yet delivered to plaintiff said bonds and coupons thereto belonging"; and that "said defendant on or about the 25th of March, 1931, at Atlantic City, County of Atlantic and State of New Jersey, disposed of said bonds, and converted the same to its own use to the damage of the plaintiff", &c.

Defendant by its answer (S. of C., p. 11), denied that plaintiff was the owner of said bonds; denied that said bonds were delivered to said Mary A. Ott for safe keeping in the manner and upon the conditions alleged; denied "that said Mary A. Ott was

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in possession of any bonds which were the property of said plaintiff at the time of her death"; denied that it refused to deliver said bonds to plaintiff "contriving and fraudulently intending to deprive plaintiff of said bonds"; denied that "on or about the 25th of March, 1931, at Atlantic City" it "disposed of said bonds and converted the same to its own use"; and admitted all allegations of said complainant not specifically denied.

Subsequently defendant made application to amend its answer (S. of C., p. 14), to set up two separate defenses, one to allege that the conversion, if it took place at all, was committed by said Mary A. Ott during her lifetime and on or about January or February, 1922, when she refused to return said bonds to plaintiff on his demand, and the other to set up the statute of limitations as a bar to this action because of the facts as above outlined. Said application to amend was denied first, because "the allegations contained in said proposed amendments, except insofar as they particularly and specifically refer to the statute of limitations as a defense to this action, are no more than mere statements of evidence all of which may be offered at the time of trial in view of the issue as now joined herein," and secondly, because "said proposed amendments insofar as they refer to the statute of limitations as a defense hereto are statements of a strict defense and therefore should not at this time be allowed." (S. of C., p. 19.)

With the pleadings in the state as outlined above the case came on to be tried. Over the objection of

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this appellant, Baude the respondent was permitted to testify that he was the owner of said bonds, it being known that he claimed said ownership by virtue of gift from said Mary A. Ott who was deceased at the time of the trial (S. of C., pp. 39 and 40). Also over objection said Baude was permitted to testify that on March 24, 1921, he put said bonds, together with certain corporation stocks, "in an envelope addressed to Mrs. Mary A. Ott, Haddon Hall, Atlantic City, sealed the envelope, had it registered at the registry department of the Wilmington Post Office, put on the necessary postage and delivered that envelope to the registry clerk." (S. of C., p. 41, line 17 and p. 48, line 35). Further Baude testified that thereafter he received the dividends on the stock but did not receive the income on the bonds (S. of C., p. 52, lines 1 to 10); and that subsequent to Mrs. Ott's death he received the return of the corporation stock from defendant (S. of C., p. 52, lines 10 to 25). For the purpose of proving that said bonds came into the hands of said Mary A. Ott, plaintiff-respondent produced a letter dated March 4, 1921, identified as in Mrs. Ott's handwriting, and admitted in evidence over appellant's objection, wherein she said "I received the securities all right." (S. of C., p. 63—Exhibit P2). Also it was proved in support of plaintiff's case that said bonds and corporation stock were returned by said Baude to Mrs. Ott "after demand made by said letter dated January 5, 1921." (S. of C., p. 69, line 20, to page 71, line 35.)

With plaintiff's case substantially as stated above

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he rested and appellant moved for non-suit for the reasons, first, that plaintiff had failed to prove a case of conversion and second, that plaintiff's proof was at variance with the allegations of his complaint as filed (S. of C., p. 86, line 18, to p. 96, line 20). The motion for non-suit was denied (S. of C., p. 96, line 20, to p. 97, line 20).

Appellant (defendant below) proved by way of defense that said bonds never came into its possession. Also in support of the defense it was proven that at the time Mrs. Ott turned the bonds over to Baude she said to him, "Walter, I want you to learn how to invest money and take care of it and when you make investments I want you to report to me. I wanted to adopt you as a son but my lawyer advises against it. These securities are to be yours at my death, but not before. I am only turning them over to you because I am not in Louisville where my safety box is and where I could put them away myself. I do not want to mix Harry up in the matter by making him trustee." And she warned him not to get a swelled head over it, and if he did the stocks and bonds were to be returned to her (S. of C., p. 123, line 26, to p. 124, line 10). To this Baude replied "The terms are satisfactory to me. Whatever you want done, I will do it. I promise I will not get a swelled head over it." It was further shown that subsequently Mrs. Ott requested her son, Henry, to demand the return of said securities (S. of C., p. 125, line 33). Also Mrs. Ott requested her attorney, Helm Bruce, to write Baude demanding the return of said securities (S. of C., p. 113,

line 1), and in compliance therewith said Bruce wrote Baude on January 5, 1921 (see Exhibit D1, S. of C., p. 114, line 25). It was in compliance with the demand of this letter that Baude delivered said bonds to Mrs. Ott on March 4, 1921. Subsequently on December 24, 1921, Baude's attorney wrote to Mrs. Ott's son Henry (see Exhibit D2, S. of C., p. 214), in which among other things Baude suggested that said bonds be set up in trust for his benefit. Henry L. Ott replied to this refusing to adopt the suggestion of said attorney (see Exhibit D4, S. of C., p. 220). Mrs. Ott continued to maintain her position in the matter (see Exhibit D3, S. of C., p. 217 and Exhibit D5, S. of C., p. 222). Thereafter said bonds were held by Henry as the agent of his mother, Mrs. Ott, and subject to her orders (S. of C., p. 129, line 28), and he collected the interest thereon and deposited same to Mrs. Ott's credit (S. of C., p. 130, line 3).

With the testimony substantially in this state defendant moved for direction of a verdict in its favor (S. of C., p. 183) which was denied (S. of C., p. 195, line 30).

The various grounds or reasons which have been advanced for the reversal of the judgment in this case will be hereafter argued under appropriate headings according to the legal principles involved.

I.

What Constitutes Conversion?

Conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights. The legal wrong denominated "conversion" is any unauthorized act of dominion or ownership exercised by one person over personal property belonging to another in denial of, or inconsistent with, his right. 65 *Corpus Juris* 11.

To constitute conversion, non-consent to the possession and disposition of the property by defendant is indispensable. If the owner expressly or impliedly assents to or ratifies the taking, use, or disposition of his property, he cannot recover as for a conversion thereof; and this is so although defendant exceeded the power given him. 65 *Corpus Juris* 14.

In *Frome v. Dennis*, 45 N. J. L. 515, 516, Mr. Justice Dixon speaking for the court said:

"What will constitute a conversion is, I think, well summed up by Mr. Justice Depue in *Woodside v. Adams*, 11 Vroom 417, in these words: 'To constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattel.'"

II.

In order to succeed in an action of conversion it is necessary for the plaintiff to prove, among other things, ownership of the goods and chattels.

In the instant case proof of ownership was received in violation of the provisions of Section 4 of the Evidence Act and also such proof was in the form of a conclusion.

Also plaintiff was permitted to testify concerning delivery of bonds to defendant's testatrix as well as to other transactions with said decedent, all of which was in violation of said section of the Evidence Act.

In *Corona Kid Co. v. Lichtman*, 84 N. J. L. 363, 366, the Court said:

"The nature of the action made it incumbent upon the plaintiff to prove its ownership of the goods and such act or acts of the defendant respecting the same as amounted to a repudiation of the plaintiff's title or to an exercise of dominion, *i. e.*, ownership over them. *Woodside v. Adams*, 11 Vroom 417; *Frome v. Dennis*, 16 *Id.* 515."

This rule was recognized as law in the case of *Manna v. Industrial Credit Corp.*, 10 N. J. Misc. Rep. 1098, where it was said:

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“He who seeks to recover in trover must prove that he was in actual possession of the chattel converted at the time of conversion, or that he had the right of immediate possession thereof, and *if such right of immediate possession depends on a property in the chattel, either general or special, he must also prove such property in himself as a fact.*”

In compliance with this requirement it therefore became necessary for Baude to prove his ownership or property in the bonds which are the subject of this suit on which he based his right to possession. Baude's attorney in opening the trial of this cause told the jury that “Mary A. Ott gave to Mr. Baude, the plaintiff in this suit, \$17,000 in bonds.” (S. of C., p. 23, line 19.) The jury was further told that Baude proposed to prove that a close friendship between him and Mrs. Ott as well as her desire to help him “was probably the reason of this gift.” (S. of C., p. 23, line 30, to p. 24, line 7.) Further counsel said it was contended that “Mr. Ott” (meaning Mr. Baude), “by virtue of that gift, became the actual owner of these bonds,” &c (S. of C., p. 24, line 7).

It will be seen that proof of plaintiff's ownership of the bonds required proof of a transaction between plaintiff and Mrs. Ott, who, at the time of the trial was deceased. Thus plaintiff was confronted with the restrictions of Sec. 4 of the Evidence Act (2 Comp. Statutes 2218) which reads as follows:

“In all civil actions any party thereto may be sworn and examined as a witness, notwith-

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standing any party thereto may sue or be sued in a representative capacity; provided, this section shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator or intestate represented in said action, unless the representative offers himself as a witness on his own behalf, and testifies to any transaction with or statement by his testator or intestate, in which event the other party may be a witness on his own behalf as to all transactions with or statements by such testator or intestate, which are pertinent to the issue."

The plaintiff, Baude, was himself offered as a witness and without the defendant (appellant here), representative of the estate of said testatrix, Mary A. Ott, being first offered as a witness on its own behalf for the purpose of testifying to a transaction or transactions between said decedent and Baude, he, Baude, was permitted to testify as follows:

"Q. What was your interest in those bonds?"
(S. of C., p. 39, line 22.)

"A. I was the owner of the bonds and shares of stock." (S. of C., p. 40, line 19.)

The question was objected to before being answered for the reason that it called for a conclusion which the jury should be called upon to determine from the evidence and also because to permit the witness to answer would be in violation of the prohibition of the Evidence Act (S. of C., p. 39, line 25, to p. 40, line 3). As has been pointed out plaintiff had given notice that he claimed his right to the pos-

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session of said bonds by virtue of a gift from Mrs. Ott during her lifetime. It, therefore, became necessary for plaintiff to prove such facts as would constitute a gift *inter vivos*. As to this more will be hereafter said.

The learned trial Court recognized the doubtful legality of his ruling on this point. During the discussion of plaintiff's motion for direction of a verdict the Court said:

"Should he in the circumstances of this case, as they subsequently developed, have been permitted to state that, or testify he was the owner? That admits of some doubt." (S. of C., p. 187, line 31.)

The fact that the plaintiff was permitted to testify as above has been assigned as Ground No. 4 for reversal.

Also appellant contends that, in violation of the provisions of said Sec. 4, of the Evidence Act, plaintiff was permitted, over the objection of appellant, to answer the following questions:

"Q. When did you come into possession of the \$1000 of Allied Packer bonds?" (S. of C., p. 38, line 24. Assigned as Ground No. 3 for Reversal.)

"Q. Now, Mr. Baude, was there any change in the form of the one hundred shares of capital stock of the Standard Sanitary Manufacturing Company?" and "Between March 4, 1921, and when you received some shares back from the Chemical Bank?" (S. of C., p. 52, lines 26 to 32. Assigned as Ground No. 7 for Reversal.)

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"Q. What was the change?" (S. of C., p. 54, line 25. Assigned as Ground No. 8 for Reversal.)

Mr. Justice Heher speaking for the Court of Errors and Appeals, in *Bankers Trust Co. v. Bank of Rockville, &c.*, 114 N. J. Eq. 391, at 403, said:

"The bar of the statute extends to all transactions with, or statements by, the testator or intestate represented in the action, unless the representative offers himself as a witness on his own behalf, and testifies to a transaction with or statement by his testator or intestate. The design of the rule of evidence prescribed by this statute is to produce equality between the parties, by silencing the one who may, by his own mouth, be able to testify to transactions and conversions with the decedent, possibly to the disadvantage of his estate, unless the representative of the estate should, by his own conduct, remove the interdict. *Hoffman v. Malovatsky*, 112 N. J. Eq. 333; 164 Atl. Rep. 260. The test laid down for ascertaining what is a 'transaction with' the deceased, within the intendment of the statute, is 'to inquire whether, in case the witness testified falsely, the deceased, if living, could contradict it of his own knowledge.' *Van Wagenen v. Bonnot*, 74 N. J. Eq. 843; 70 Atl. Rep. 143; *Campbell v. Akarman*, 83 N. J. Law 567; 83 Atl. Rep. 881."

Applying the test to the various questions referred to above and particularly to the answers

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elicited from Baude thereby it will be noted that that testimony had to do with transactions with the deceased Mrs. Ott which she alone, if living, could contradict. Particularly is this true with respect to the query — “What was your interest in those bonds?”

Also appellant contends that the trial Court erred in permitting plaintiff, Baude, to answer the questions:

“Q. What did you do with the \$17,000 of bonds and the stocks, the hundred shares of stock?” (S. of C., p. 41, line 17, and p. 47, line 30. Assigned as Ground No. 5 for Reversal) and

“Q. What did you do with those securities?” (S. of C., p. 48, line 34. Assigned as Ground No. 6 for Reversal.)

These questions brought forth the replies—“I went to my safety deposit box in the Equitable Trust Company at Wilmington, Delaware, removed the bonds” and “I put them in an envelope, addressed to Mrs. Mary A. Ott, Haddon Hall, Atlantic City, sealed the envelope, had it registered at the registry department of the Wilmington Post Office, put on the necessary postage and delivered that envelope to the registry clerk.” This testimony was offered in proof of a very vital essential of plaintiff’s case, viz: the delivery of said bonds to deceased. The answer was intended to raise the inference that the bonds, having been so mailed, were delivered to Mrs. Ott. Measured by the test stated in *Banker’s Trust Co. v. Bank of Rockville*,

dec., supra, that evidence was inadmissible. Mrs. Ott alone could contradict it.

It is true that plaintiff followed this questioned testimony by the offer of letter (Exhibit P2) dated March 4, 1921, written by Mrs. Ott to Baude in which she said "I received the securities all right." (S. of C., p. 63.) This was objected to for the reason that it had not been shown that the securities referred to therein were the bonds which were the subject of this suit. Proof of the delivery of said bonds to Mrs. Ott for safe keeping was vital to plaintiff's case. To have permitted the witness to testify as last stated above was error and the admission of letter, Exhibit P2, was likewise error (Ground No. 9 for Reversal. S. of C., p. 235, line 19.) Also the same objection is applicable to the admission in evidence of the envelope (Exhibit P3) in which letter Exhibit P2 was enclosed (S. of C., p. 65, line 35). The admission of said envelope over objection of appellant is assigned as Ground No. 10 for Reversal (S. of C., p. 235, line 25). Likewise the deposition of Rudolph H. Baude, in proof of said letter, Exhibit P2, and said envelope, Exhibit P3, was admitted in evidence as Exhibit P4 over objection. This has been assigned as Ground No. 11 for Reversal (S. of C., p. 235, line 32).

III.

**Defendant's Motion for Non-Suit Should Have Been
Granted.**

Appellant (defendant below) moved for non-suit at the close of plaintiff's case (S. of C., p. 86, line 18) for the following reasons:

- (a) the proof was at variance with the pleadings;
- (b) there was no proof that the bonds in question ever came into the hands of defendant; and
- (c) there was no proof of conversion.

The trial Court denied the motion for non-suit and determined to submit the case to the jury with the following comment (S. of C., p. 96, line 21):

"Testimony has been herein introduced from which the inference may be legitimately drawn that the plaintiff on March 4, 1921, was and since has been the owner of the bonds which are the subject matter of this litigation, and that on that date he parted with the possession of these bonds. There is a letter in evidence which I believe is marked P2, which it seems to me constitutes some evidence of the receipt of these bonds by the decedent, Mary A. Ott, the testator represented by the defendant in this action. It is admitted in the case that on No-

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vember 6, 1930, and again on March 25, 1931, the plaintiff demanded of the defendant the return of these bonds, and that the defendant has failed, neglected and refused to return the bonds to the plaintiff. It is, accordingly, alleged that the bonds having been lawfully in the possession of the deceased, that the conversion of the bonds resulted in consequence of the demand for their possession on the part of the plaintiff, which occurred on March 25, 1931.

"I think the evidence to which I have alluded, together with other evidence in the case, is sufficient to constitute a *prima facie* cause of action against the defendant within the allegations of the complaint. The motion for a non-suit must accordingly be denied."

This ruling of the trial Court has been assigned as Ground No. 14 for Reversal (S. of C., p. 237, line 3). Confining the argument first to the reasoning of the trial Court it is first urged that there is no proof in plaintiff's case respecting the ownership of said bonds except that which he was permitted to give, viz: "I was the owner of the bonds" &c. As has already been pointed out, plaintiff's testimony in respect to this was illegally admitted. Nowhere else in the testimony is there any evidence of his ownership, either positive or by inference. It has also been heretofore argued in this brief that there was no legal proof that plaintiff "parted with the possession of these bonds" and delivered them to defendant's testatrix. It is true that "on November 6, 1930, and again on March 25, 1931, the plain-

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tiff demanded of the defendant the return of these bonds" and that defendant failed to deliver them. Said demands were made of defendant, administrator c. t. a. of said Mary A. Ott, after her decease without any proof first being offered that they came into the possession of said administrator.

The complaint filed in this case alleged: (a) on March 4, 1921, plaintiff Baude was owner of said bonds; (b) on said date plaintiff deposited and left said bonds in custody of Mary A. Ott "for safe keeping" to be redelivered to him upon demand; (c) that said Mary A. Ott died June 23, 1930; (d) that defendant (appellant here) was appointed administrator c. t. a. of her estate on September 29, 1930; (e) that on November 6, 1930, and on March 25, 1931, plaintiff demanded that defendant return said bonds; (f) that defendant "*contriving and fraudulently intending to deprive plaintiff of said bonds and coupons belonging thereto, hath refused and doth still wholly refuse to deliver*" said bonds; and (g) that said defendant, the administrator c. t. a., on or about March 25, 1931, at Atlantic City, *disposed of said bonds and converted the same to its own use.*

The proof on which this case was submitted to the jury on denial of defendant's motion for nonsuit was not that it had been established that defendant administrator had come into possession of said bonds and had refused to deliver same to plaintiff on his demand because of its contrivance and fraudulent intention to deprive plaintiff thereof. Nor was there any proof that said defendant ad-

ministrator c. t. a. had "disposed of said bonds and converted the same to its own use." The Court in fact submitted the case on an entirely different theory. It was that the allegations of the complaint respecting the contrivance and fraudulent intention of said defendant and that it had disposed of said bonds and converted them to its own use were surplusage and that proof of the delivery of the bonds to defendant's testatrix and demand made of the defendant for the return thereof was sufficient despite a total lack of proof concerning the conditions upon which delivery to Mrs. Ott was made.

In *Jordan v. Reed*, 77 N. J. L. 584, this Court held that

"It is sound law and sound reason that there must be no variance to the prejudice of the adverse party between the case declared upon and the case proven."

Defendant's answer denied "that said Mary A. Ott was in possession of any bonds which were the property of said plaintiff at the time of her death" as alleged in plaintiff's complaint. Furthermore defendant's answer admitted the allegation that it "neglected and refused to return to this plaintiff said bonds," &c. Defendant's answer thus averred, in effect, that it had neglected and refused to return said bonds on demand because they had never come into its possession and it could not, therefore, return them.

In 65 *Corpus Juris* 92 it is said:

"But where the circumstances of themselves

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do not amount to an actual conversion, plaintiff must show a demand and refusal prior to the commencement of the action, and *that at the time of demand and refusal it was within defendant's power to give up the property.*"

And in the same volume at page 115 it is said:

"Nevertheless a demand made after the property was out of defendant's possession and in consequence when he could not give it up is not evidence of a conversion."

It is, therefore, respectfully submitted that the case submitted to the jury on denial of motion for non-suit was in error because it was based on illegal proof, in some essential respects lacked proof and was based upon a wholly different theory than that alleged in the complaint.

IV.

Defendant's motion for direction of a verdict should have been granted because (a) there was variance between the case proven and the case declared upon; (b) there was no proper proof of plaintiff's ownership which would entitle him to the return of the property; (c) there was no proof that said property was ever in the hands of defendant thus enabling it to return said property on demand; and (d) the testimony disclosed that plaintiff had no ownership or title in said property which would entitle him to the return of said property.

The trial Court refused to grant defendant's (appellant here) motion for direction of a verdict against the plaintiff. (Ground No. 24 for Reversal. S. of C., p. 238.)

This was error because the proofs of plaintiff's case were at variance with the allegations of the complaint. This said point has been hereinbefore argued in relation to the Court's refusal to non-suit. The same argument will apply here.

Also the refusal to direct a verdict was in error because there was no proof that the bonds in question were ever in the hands of the defendant. This was a necessary part of the proof as has hereinbefore been pointed out. In fact the positive and uncontradicted proof of the defendant was that it never had the possession of them. Not having possession of the bonds, the defendant was unable to

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comply with plaintiff's demand. In such a situation defendant could not be guilty of conversion. See 65 *Corpus Juris* 92 and at 115 hereinbefore cited.

Furthermore the Court should have directed a verdict against the plaintiff because there was no proof of plaintiff's ownership of said bonds which would entitle him to their return on demand. It has been heretofore pointed out that plaintiff claimed ownership in said bonds by virtue of gift from Mrs. Ott. In fact, during the argument on this motion plaintiff's counsel urged "Remember, he was in possession of it as a gift," (S. of C., p. 188, line 8) and "there can be no doubt that there is sufficient evidence to show a gift of these bonds to him." (S. of C., p. 189, line 26.)

In *Matthews v. Hoagland*, 48 N. J. Eq. 484, the Court said:

"To constitute a valid gift *inter vivos*, there must be such a transfer of the subject-matter as will pass the donor's title at once to the donee, absolutely and irrevocably, divesting the former of, and investing the latter with, all of the donor's right or title therein, and control and dominion thereof."

In *Swayze v. Huntington*, 82 N. J. Eq. 127, at page 133, it was said:

"In order to establish a gift *inter vivos* the following factors must appear—first, a donative intention on the part of the donor; second, an actual delivery of the subject-matter of the gift except in cases where it is a chose in ac-

tion, like a certificate of shares of stock or evidence of indebtedness, in which case the delivery must be of that variety of which it is most capable; third, the donor must strip himself of all ownership and dominion over the subject-matter of the gift. These requisites appear in all our cases."

That donative intent, actual delivery and a surrender of dominion and control are essential to establish a gift *inter vivos* has been held in the following cases:

Kirkpatrick v. Kirkpatrick, 106 N. J. Eq. 391;

The First Natl. Bank v. The Rutherford Trust Co., 109 N. J. Eq. 265;

Parker v. Colonial B. & L. Assn., 111 N. J. Eq. 49;

The Guardian Life Ins. Co. v. Mareczko, 114 N. J. Eq. 369;

Bankers Trust Co. v. Bank of Rockville, &c., 114 N. J. Eq. 391.

The proof of the gift must be clear, cogent and convincing and the burden of such proof is upon the one who asserts and seeks to establish such a gift.

The First Natl. Bank v. The Rutherford Trust Co., *supra*;

Parker v. Colonial B. & L. Assn., *supra*.

In *The First National Bank of Lyndhurst v. The Rutherford Trust Co.*, *supra*, the Court said:

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"While the law recognizes and will sustain a gift *inter vivos*, whenever one is satisfactorily established, nevertheless, public policy requires that the evidence adduced in support thereof should be considered in the light of and tested by those sound safeguards against the perpetration of frauds and perjury which the law has so wisely laid down and prescribed in such cases."

* * * * *

"And, with all the more force and reason is this wholesome rule applicable in a case, such as is the one *sub judice*, where the alleged gift is asserted for the first time only after death has sealed the lips of the alleged donor."

Having in mind that ownership in plaintiff was essential to his case and that he claimed said ownership by virtue of a gift *inter vivos* from Mrs. Ott, it will be interesting to examine the proofs to determine the extent to which the plaintiff carried this burden.

Plaintiff, Baude, said he was in possession of the bonds in question; that he had been in possession of them from August, 1919, to March, 1921; that he "was the owner of the bonds"; that he collected the interest on the bonds during the time he was in possession of them; that he delivered said bonds to Mrs. Ott on March 4, 1921; that he received no interest thereon thereafter; that said bonds were returned by plaintiff to Mrs. Ott "after demand made by letter dated January 5, 1921." This in substance was the entire proof offered by the plain-

tiff. Particularly was this lacking in proof of donative intent. Plaintiff really proceeded upon the theory that when he said "I was in possession of those bonds and I owned them" the burden was then cast on defendant to prove that the bonds were not plaintiff's (S. of C., p. 191, lines 9 to 20). The trial Court seemed to agree with this view for he replied—"Well, I felt so yesterday. There was some testimony in the case, namely, the dominion of the plaintiff over the bonds, his actual possession of them, and his receipt of the coupons from them, from which the jury might have inferred ownership, cited entirely from his testimony that he was owner," &c. (S. of C., p. 191, lines 20 to 26.) Also along this same line plaintiff's counsel said in the argument for motion on direction, "His declaration that he was the owner is sufficient until it is overturned by proof that he was not the owner." (S. of C., p. 187, line 27.) To this, the Court took occasion to reply, "Should he in the circumstances of this case, as they subsequently developed, have been permitted to state that, or testify he was the owner? That admits of some doubt."

It was upon such a theory that the defendant (appellant here) was required to go on with its defense. In addition to proving that, as administrator c. t. a. of the estate of said Mary A. Ott, it had not come into possession of said bonds and knew nothing about them, the testimony disclosed that when Mrs. Ott turned the bonds over to plaintiff in the first instance she said to him—

"Walter, I want you to learn how to in-

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vest money and take care of it and when you make investments I want you to report to me. I wanted to adopt you as a son but my lawyer advises against it. These securities are to be yours at my death but not before. I am only turning them over to you because I am not in Louisville where my safety box is and where I could put them away myself. I do not want to mix Harry up in the matter by making him trustee.' And she warned him not to get a swelled head over it, and if he did the stocks and bonds were to be returned to her.'" (S. of C., p. 123, line 26.)

The testimony offered by defendant further disclosed that Mrs. Ott instructed her attorney, Helm Bruce, Esq., to demand the return of said bonds by plaintiff to her. Accordingly on January 5, 1921, Mr. Bruce wrote Baude as follows (Exhibit D1, S. of C., p. 114):

"Mrs. Mary A. Ott has asked me to write you and demand the return of certain securities which she has heretofore placed in your hands under certain conditions, and upon certain trusts. And I therefore write for the purpose named, and do hereby, as counsel for Mrs. Ott, make the demand upon you.

"I am not able to specify the securities, but you know what they are, being all of those which you have heretofore received from her. She has heretofore personally informed me that she placed these securities in your hands simply to hold until her death, at which time, but not

before, they were to become yours, and that she only turned them over to you at the time because she was not in Louisville where her safety box is and where she could put them away herself, and she did not care to turn them over to her son, Henry, who ordinarily acts as her agent, as she did not care to mix him up in the matter.”

Without comment or accompanying letter the plaintiff returned said bonds to Mrs. Ott by mail on or about March 4, 1921. When so returned Baude did not dispute the assertion of the terms and conditions upon which they were delivered to him. It was in answer to said Bruce's letter of January 5, 1921, from which the last quotation above is made that said bonds were returned (S. of C., p. 69, line 20, to p. 70, line 8, and p. 128, line 9 to line 20).

In Chapter VII of Turner's New Jersey Evidence, under the general heading “Declarations” and sub-heading “Gifts” it is said:

“Declarations of the alleged donor, written or otherwise, tending to show the existence of a state of mind and purpose in him, wholly inconsistent with the making of a gift, may, together with all other evidence bearing thereon, properly be considered by the Court, in arriving upon its determination, as to what the alleged donor's intention or state of mind was at the time of his having made the alleged gift.”

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This rule of evidence was recognized and applied in *The First National Bank of Lyndhurst v. The Rutherford Trust Co.*, 109 N. J. Eq. 265.

It was held in *Heyer v. Sullivan*, 88 N. J. Eq. 165, at page 167, that

“The naked and absolutely uncorroborated testimony of a donee will not be accepted as sufficient to sustain a gift as against the estate of a deceased donor. *Berg v. Baldwin*, 84 N. J. Eq. 90; affirmed, 84 N. J. Eq. 193.”

In *Meyers v. Meyers*, 99 N. J. Eq. 560, at page 562, Vice-Chancellor Backes said, “the donor’s mental attitude must be determined by his acts,” and in *Wright v. Sanger*, 101 N. J. Eq. 203, at page 210, Vice-Chancellor Fallon said:

“The evidence to substantiate the defendant’s claim should be so cogent as to leave no doubt in the mind of an unbiased person. * * * *A gift first asserted after the death of a donor, as in this case, must be regarded with suspicion.*”

Upwards of nine months after Baude had caused said bonds to be delivered to Mrs. Ott, to wit, on December 24, 1921, Baude caused his attorney, Richard S. Rodney, Esq., to write to Henry L. Ott, Mrs. Ott’s son and agent (see Exhibit D2, S. of C., p. 214). In that letter Baude did not assert a claim of ownership of said bonds nor did he demand a return thereof to him but, on the contrary, the attorney said:

“It is my understanding from the information given to me that your mother very gen-

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erously gave to Mr. Baudy some bonds * * * ; that *subsequently your mother having written to Mr. Baudy that it was not her intention that he should have all the benefit of the bonds until the death of your mother these bonds were returned to your mother* * * * and that your mother suggested your appointment as trustee and that to you should be transferred and delivered the bonds and stock."

With such an understanding the attorney asked that a trust agreement be prepared and sent to him for approval.

In reply Henry L. Ott, as agent for his mother, wrote under date of January 23, 1922 (see Exhibit D4, S. of C., p. 220) in which he said:

"Mother insists that the agreement between her and Walter Baude be carried out as it was made, without alterations, except that she has consented that the securities be held by me as trustee, instead of being held by my mother herself; so that Walter can have this additional assurance that the original contract will be carried out.

"If Walter Baude will show you a letter of January 5, 1921," (see Exhibit D1, S. of C., p. 114) "written to him by my mother's lawyer, Mr. Helm Bruce of Louisville, Kentucky, you will see exactly the circumstances and conditions under which all of these securities were delivered to Walter." &c.

Plaintiff later employed one Albert F. Polk, as his attorney and on February 16, 1922, said Polk

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wrote Henry L. Ott in answer to his letter written to said Rodney (Exhibit D3, S. of C., p. 217) and said:

"I have read the letter of Mr. Helm Bruce of Louisville, Ky., dated January 5th together with many letters written by your mother to Mr. Baude and letters written by him to your mother, as well as letters from you and from his uncle, so I have a pretty clear understanding of the difficulties surrounding this matter." &c.

With such an understanding said Polk proceeded to outline a form of trusteeship for the holding of said securities, which plan he urged for approval of Mrs. Ott.

Henry L. Ott, still acting for his mother, replied to said Polk on February 20, 1922 (see Exhibit D5, S. of C., p. 222) and said:

"My mother insists on maintaining the position taken in my letter of the 23rd. So far as the declaration of trust is concerned, there is no trouble about that. She would be perfectly willing to make a declaration of trust. And if that is all that stands in the way of final settlement, this can be quickly done.

"If this is satisfactory, I will be glad to arrange for having the declaration of trust made by my mother and submit the form of same to you."

The above series of correspondence is emphatic and conclusive corroboration of the fact that there

was no gift of said bonds by Mrs. Ott to plaintiff. Defendant's proof was in positive contradiction of any donative intent on the part of Mrs. Ott and of the claim of a complete surrender by her of the control and dominion over said bonds. The return of said bonds to Mrs. Ott by plaintiff after her demand of January 5, 1921, without comment or denial of her assertion of right thereto, is further contradiction of the claim of a gift *inter vivos*. Furthermore, according to the proof, Baude remained silent respecting said bonds from the date of the last letter above mentioned, to wit, February 20, 1922, until November 6, 1930, which was after Mrs. Ott's death. During that interim of eight years he made no claim of ownership of said bonds; he collected no interest therefrom and at no time made any demand for the return of said bonds to him. Neither is there any proof that when Baude returned said bonds to Mrs. Ott he did so for safe keeping. The proof against plaintiff's contention is overwhelming. Plaintiff attempted to overcome the effect of such proof by referring to certain letters:

Exhibit P6—letter of Henry L. Ott to Walter Baude (S. of C., p. 176);

Exhibit P8—letter of Henry L. Ott to Walter Baude (S. of C., p. 178);

Exhibit P9—letter of Henry L. Ott to Walter Baude (S. of Co., p. 178);

Exhibit P10—letter of Walter A. Baude to Henry L. Ott (S. of C., p. 179);

Exhibit P13—letter of one Edmund S. Helings to Helm Bruce (S. of C., p. 181).

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All of said letters were apparently introduced to offset the proof of defendant. It will be noted, however, that none of said letters are written by Mrs. Ott; all of them were either written by or to her son, Henry L. Ott, prior to the return of said bonds excepting Exhibit P13 and that there is no proof that Henry L. Ott was authorized to represent his mother at the time of said correspondence. With full consideration of the contents of said correspondence and in view of that which followed the return of said securities to Mrs. Ott by plaintiff, it is submitted that said correspondence is no reply nor any proof of a gift *inter vivos* to Baude.

Notwithstanding the proof as outlined the Court concluded that the motion for direction must be denied and said,

"The testimony and evidence in the case is such as to present for the determination of the jury a question of whether the plaintiff at the time of the demand was the owner of the bonds, entitled to the immediate possession of them. And, of course, the subsequent question of whether or not there was a wrongful conversion is likewise present in the case." (S. of C., p. 195, line 30.)

The appellant respectfully submits that such ruling was in error and that the Court should have decided as a matter of law that plaintiff was not the owner of said bonds, entitled to the immediate possession thereof. Also in view of the state of the proofs the Court should not have permitted the jury to deter-

mine "whether or not a wrongful conversion" was present.

Also the appellant respectfully submits that the Court's refusal to direct a verdict was in error, for the reason that the testimony warrants only the conclusion that the time Mrs. Ott delivered said bonds to the plaintiff back in the year 1919, she not only did not have the intention to make an outright gift, but she then and thereafter evidenced an intention to retain control and dominion over them. This is substantiated by the proof of what was said to Baude at the time said bonds were handed over to him, and to which arrangement he assented and agreed, and also it is substantiated by the subsequent transactions, namely, the correspondence as a result of which said bonds were returned by Baude to Mrs. Ott, and the correspondence which thereafter followed respecting the manner in which said bonds were to be handled.

Having in mind that Baude was claiming ownership as the result of this gift, and that he had offered no proof of gift but merely his conclusion that he was the owner, the testimony which the defendant offered definitely and positively established that no gift was ever intended or in fact made.

The proof in this case, considered as a whole, points to the definite conclusion that Mrs. Ott never intended at any time to relinquish her dominion and control over the bonds during her lifetime. This being so, there was no gift, and consequently Baude did not become the owner of said bonds so as to entitle him to demand their return to him upon the

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theory that Mrs. Ott merely held them in her custody for safe keeping. While there is some testimony in the case to the effect that Baude was to have said bonds at the time of the death of Mrs. Ott, this case was not presented nor tried upon the theory that Baude was entitled to said bonds in consequence of the promise of the gift and delivery thereof to him after Mrs. Ott's death.

V.

The trial Court's charge to the jury was erroneous because

- (a) it was charged, in effect, that special ownership in plaintiff was sufficient to entitle him to recover;
- (b) the Court told the jury to consider this case as though the appellant here stood in the place and stead of its testatrix;
- (c) it was charged that refusal of defendant (appellant here) to return the bonds in question constituted a case of conversion without regard to said defendant's ability to return them;
- (d) it was charged that the fact that said bonds never came into the possession of defendant was no defense to this action;
- (e) the Court charged that there was "adequate amount of proof" that plaintiff owned said bonds and was entitled to possession thereof; and
- (f) the Court erroneously limited the jury's consideration to two questions, viz., ownership and right to possession, without regard to plaintiff's allegations of fraud and conversion as set up in his complaint and also without regard to the defendant's inability to return said bonds when demanded.

Grounds 25 to 32 inclusive for reversal have particular reference to certain portions of the Court's charge to the jury.

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Quite early in the charge the Court said: "Now to successfully maintain this action it is incumbent upon the plaintiff to prove by a fair preponderance of the evidence his ownership of the bonds at the time of the alleged conversion; that is to say, *that he had such a general, or special title to the bonds as would entitle him to immediate possession,*" &c. (S. of C., p. 200, lines 27 to 33). Plaintiff's complaint filed in this case alleged an unqualified ownership of said bonds in him. No special title was averred. In spite of this the jury was in effect told that "general or special title" was sufficient. The jury was thereby led to believe that plaintiff's right to possession of said bonds at the time of making demand for the return thereof to him could be based on any theory by which either a general or special ownership might have been then vested in him. The case was not presented or tried on any such theory. Plaintiff claimed ownership only by virtue of absolute gift of Mrs. Ott made in the year 1919. If such be the fact plaintiff's right to possession could not be based on any "special title." It is true that there was some proof in the case that Mrs. Ott said the bonds were to be Baude's at her death and also that there was talk of holding them in trust for him during her lifetime. The jury may have determined that such a situation created a "special title" in Baude that entitled him to possession of said bonds on demand from defendant even though the case was neither presented nor tried on any such theory. The Court was in error in leaving it to the jury to find that plaintiff's right to recover was based on any other than an absolute ownership.

At another point in the Court's charge to the jury, it was said—"I think in the trial of this case, as framed by the pleadings—and by the pleadings I mean the complaint and answers filed by the respective parties—you may, so to speak, view this case as if the administrator stands in the place and stead of the testatrix." (S. of C., p. 206, lines 27 to 32.) It is respectfully submitted that this left it to the jury to determine the case upon a theory quite different from that made out by the pleadings. The complaint charged that the defendant, Chemical Bank and Trust Co., administrator c. t. a. &c. had contrived with fraudulent intent to deprive plaintiff of said bonds and that it did, on March 25, 1931, at Atlantic City, N. J., dispose of and convert said bonds "to its own use." There was no proof of any such contrivance, fraudulent intention or wrongful conversion. The date of the conversion alleged was on March 25, 1931, which was long after Mrs. Ott's death. The Court was apparently of the opinion that the plaintiff was entitled to win in this case even though the jury should conclude that Mrs. Ott had converted said bonds despite the fact that plaintiff's case was not so made up by the pleadings.

In the case of *Hellier v. Achorn*, 45 A. L. R. 789 (Mass.) it is said, at page 795:

"The auditor found that the plaintiff relied on a conversion of the stock by Mr. Morse about June, 1919, and the plaintiff so states in his brief. Mr. Morse came rightfully into possession of the stock. He never disposed of it and never, so far as it appears, was asked to deliver

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it to the plaintiff. He could not be held to have converted the stock until a demand was made for its return even if the plaintiff was entitled to have it returned upon demand. The declaration, however, does not allege a conversion by Mr. Morse, but by the *defendants who are executors of his will* and there could be no liability in tort on their part for the acts done by them as executors in any event, *unless a demand was made for the return of the stock while they held it* and unless they wrongfully refused to give it up. *Baker v. Lothrop*, 155 Mass. 376, 23 N. E. 643; *DeYoung v. Frank A. Andrews Co.*, 214 Mass. 47; 100 N. E. 1080."

It is important to note that in this case the Court seems to hold that the plaintiff could not recover when "the declaration however, does not allege a conversion by Mr. Morse, but by the defendants who are executors of his will." In that case a conversion by the defendant-executors was alleged, and the proof showed a conversion by said defendants-testator. Statement of the law in this Massachusetts case does not, therefore, seem to coincide with the view expressed by the learned trial Court in the case at bar. If the complaint had charged a conversion by Mrs. Ott or by the defendant, her administrator *c. t. a.*, then a demand upon the administrator might have been some evidence of the case so alleged. But here the plaintiff chose to charge a case of wrongful and fraudulent conversion by the administrator alone on a day certain following the death of the

testatrix. In view of positive and uncontradicted proof of the fact that said bonds never came into the hands of the administrator there could have been no conversion by it. So, therefore, to say that the administrator stood "in the place and stead of the testatrix" was harmful error.

For the same reasons as last argued above it was likewise error for the Court to charge, "And so, if the plaintiff then owned these bonds and entrusted them to Mrs. Ott for safe keeping, proof of the demand upon the administrator for the possession of the bonds, and proof of the refusal of the administrator, to comply with the demand constitute at least in a *prima facie* degree proof of the conversion of the bonds." (S. of C., p. 206, lines 21 to 27.)

It seemed to be the theory of the trial Court that a refusal of the defendant, administrator c. t. a. (appellant here) to return said bonds to plaintiff constituted a case of conversion as set forth in the pleadings and so entitled plaintiff to succeed. This withdrew from the jury any question about whether or not defendant could comply with said demand at the time of its refusal to do so (S. of C., p. 207, line 35 to p. 208, line 26). It is appellant's contention here that it (the defendant below) could not be called upon to answer for its failure to deliver bonds upon demand when in truth said bonds were not in its possession or under its control. Certainly under such circumstances it could not be charged with contrivance or fraudulent intention to deprive plaintiff of said bonds nor with the conversion thereof to its own use.

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The trial Court also said: "The fact, if you find it to be a fact, that the defendant never had possession physically of the bonds mentioned in this suit would not relieve the defendant of liability as administrator of the estate of the deceased, if you find and conclude from the adequate amount of proof to which I have referred that the bonds belonged to and were owned by Walter A. Baude, the plaintiff, that he entrusted them, deposited them with Mary A. Ott, that he owned them and was entitled to the possession of them at the time he demanded them and that the defendant failed and neglected to return them to the plaintiff." (S of C., p. 208, line 26, to p. 209, line 5.) Appellant submits that it was error for the Court to say that the fact "that the defendant never had possession physically of the bonds" would not relieve it from liability. Such a statement does not seem to coincide with the law as expressed in *Frome v. Dennis*, 45 N. J. L. 515. In that case the Court held:

"His subsequent failure to deliver the plow to the plaintiff on demand, was not evidence of a conversion, for the reason that delivery was then impossible to him. He did not refuse to deliver, but could not. *Ross v. Johnson*, 5 Burr. 2825; *Salt Springs Bank v. Wheeler*, 48 N. Y. 492; *Maguire v. Dinsmore*, 70 N. Y. 410."

Also in 65 *Corpus Juris* at page 31, it is said:

"A person cannot be charged with a conversion of goods unless he had an actual or constructive possession of them at the time of the conversion alleged."

Then again in the same volume at page 92 it was said that in order to prove conversion it was necessary to show

“that at the time of demand and refusal it was within defendant’s power to give up the property.”

And at page 115 of said volume it is said:

“Nevertheless, a demand made after the property was out of defendant’s possession and in consequence when he could not give it up is not evidence of a conversion. Evidence of conversion arising from demand and refusal is rebutted by proof that compliance with the demand was impossible.”

In 60 A. L. R. 630, the law is stated as follows:

“One may not rely on a demand and refusal to constitute a conversion where the defendant lacked the power to surrender the goods. If there has been a mere non-delivery of goods due to an inability to deliver, and no denial of the plaintiff’s right to possession, there has been no conversion and trover does not lie. *Boobier v. Boobier*, 39 Me. 406; *Johnson v. Couillard*, 4 Allen (Mass.) 446.”

At page 631:

“In *Dearbourn v. Winon Nat. Bank*, 58 Me. 273, it appeared that the plaintiff had deposited bonds with the defendant bank for security or as a deposit. The plaintiff later demanded of the

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defendant, but it was unable to deliver them as they had been either lost or stolen, whereupon the plaintiff brought an action of trover. The court non-suited the plaintiff, holding that, where there is a mere inability to deliver chattels, there is no conversion."

In view of these authorities, it would seem that appellant's inability to deliver said bonds on demand by reason of its lack of physical possession or control thereof was a complete defense to plaintiff's charge of conversion. To charge the jury otherwise, as was done in this case, was harmful error.

It was also harmful error for the Court to say to the jury that there was an "*adequate amount of proof*" that the bonds were owned by Baude and that he was entitled to possession thereof. This was in effect a direction that the jury should so find.

Grounds 30 and 31 for reversal refer to those portions of the charge to the jury wherein the Court pointed to statements in certain letters as being binding on defendant and others as self-serving and therefore not binding on plaintiff (S. of C., p. 202, line 20 to p. 203, line 10. Also S. of C., p. 203, lines 27 to 33). It is contended that said letters constituted a series of correspondence about the one subject. Letters written to Baude or to his agent or attorney containing statements which, if not true, should have been refuted but were not, are certainly binding upon him. Had such statements been uttered in his presence during the conversation he would have been chargeable with their effect un-

less he denied them. For instance the statements in said letters concerning the conditions upon which Mrs. Ott originally delivered said bonds to Baude were binding upon him in view of the fact that Baude did not deny those statements in his replying letters. Baude's replying letters or those written by his attorneys were in effect an affirmance of those statements which the Court refers to in his charge as "self-serving." To limit the effect of said letters, as was done by the Court in his charge, was harmful error.

The Court also said—"And so in this case I think that in view of the situation and proof, namely, that the making of the demand by the plaintiff for the possession of the bonds is admitted, and the failure of the defendant to return the bonds to the plaintiff is likewise admitted, you are faced here with *prima facie* proof of the conversion of the bonds as alleged in the complaint in this case. The pivotal question, the fundamental question in the case, as I see it, relates to the title, the ownership and right to the possession of these bonds by the plaintiff." (S. of C., p. 207, lines 24 to 35.) By this statement the Court limited the jury questions to ownership and right to possession. Appellant submits that there were other questions which the jury should have determined such as—(a) did the defendant contrive with fraudulent intention to deprive plaintiff of said bonds; (b) did defendant dispose of said bonds on March 25, 1931, and convert same to its own use; (c) was it within defendant's power to return said bonds when demanded. By submitting this case to

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the jury in such limited scope as referred error harmful to defendant's case was committed.

VI.

The Court refused to grant two applications made by defendant for leave to amend its answer filed in this cause (Grounds No. 1 and 23 for reversal).

The first of said motions was made in advance of the trial. It was made for the purpose of adding to the answer two separate defenses (S. of C., p. 14, 15, 16, 17 and 18). The first of said proposed defenses sets up facts which made it appear that if any conversion of said bonds occurred it was during the lifetime of Mrs. Ott and during January or February, 1921, more than six years prior to the beginning of this suit and so was therefore barred. The second of said defenses was a repetition of the first with the added averment that, the right of action having been barred, it could not be revived by a subsequent demand made thereafter. The Court denied this motion to amend by order entered March 10, 1933, in which it is stated that the Court was of the opinion that said amendment "should not be allowed for the reasons, first, that the allegations contained in said proposed amendments, except insofar as they particularly and specifically refer to the statute of limitations as a defense to this action, are no more than mere statements of evidence all of which may be offered at the time of trial in view

of the issue as now joined herein, and secondly, said proposed amendments insofar as they refer to the statute of limitations as a defense hereto are statements of a strict defense and therefore should not at this time be allowed." The allowance of this motion was within the discretion of the court and in sound use of such discretion should have been allowed. It is conceded that the general tendency of the courts is to deny amendments setting up the statute of limitations as a bar, when said amendments are proposed after time for answer has expired, but there are exceptions to that rule. The defendant in this case is the legal representative of a decedent's estate and as such it did not have personal knowledge of the transaction out of which this litigation grew. When served with complaint herein the defendant, therefore, could not, in all fairness, be charged with the knowledge which would have prompted the inclusion of the defense of said statute in the answer as originally filed. Having come into that knowledge after filing said answer it applied for leave to amend. The denial of said application under the circumstances was harmful error. It was not enough to say that the allegations of said defenses were no more than evidence which might be offered at the time of trial. As a matter of fact when said evidence was received at the trial the Court said it could be of no avail because the conversion could not occur until a demand was made for the return of the bonds. Such is not the law. In *Eade v. First National Bank* (Oregon) 43 A. L. R. 374, it was said, "Where a conversion has actu-

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ally occurred, there is no necessity of alleging and proving a demand and refusal." See also *Corona Kid Co. v. Lichtman*, 84 N. J. L. 363 and *Woodside v. Adams*, 40 N. J. L. 417.

The second application to amend the answer occurred during the trial. It was for permission to aver that the bonds which are the subject of this suit did not come into the hands of defendant so that it could not comply with plaintiff's demand and therefore could not be guilty of conversion (S. of C., p. 182). The answer did deny that "Mary A. Ott was in possession of any bonds which were the property of said plaintiff at the time of her death." Also said answer admitted that it did not deliver said bonds to plaintiff on demand. Defendant contended that the answer did, therefore, in effect aver that its failure to deliver said bonds to plaintiff was due, among other things, to an inability to do so. Plaintiff contended the answer did no more than to deny that Mrs. Ott died possessed of any bonds "which were the property of" plaintiff. This seemed to be a haggling of words as it is apparent that defendant intended to aver that it had not come into possession of said bonds. The motion to amend was made to avoid any misunderstanding. The testimony was all in. As the Court remarked—"the proof has thus far not been restricted by the present pleadings." No surprise could have been claimed. The Court refused the motion because it did not constitute a defense to this action. To so rule was error as has been pointed out by the authorities hereinbefore cited.

Brief of Defendant-Appellant

For the reasons hereinbefore argued, it is respectfully submitted that the judgment entered in this cause should be reversed and set aside.

WM. ELMER BROWN, JR.,
*Attorney for and of Counsel
with Appellant.*





NEW JERSEY COURT OF ERRORS
AND APPEALS.

WALTER A. BAUDE,
Plaintiff-Respondent,

v.

CHEMICAL BANK AND TRUST COMPANY, Administrator
c. t. a. of the Estate of MARY A. OTT, Deceased,
Defendant-Appellant.

ACTION AT LAW.

ON APPEAL FROM SUPREME COURT.

**BRIEF OF H. WALTER GILL AND BOURGEOIS
& COULOMB, ATTORNEYS AND COUNSEL
FOR PLAINTIFF-RESPONDENT.**

This is an appeal from a judgment entered upon a verdict of a jury at the Atlantic County Circuit of the New Jersey Supreme Court in favor of the plaintiff-respondent in the sum of \$32,242.07.

The action sounded in trover and conversion, and was brought against the Chemical Bank and Trust Company, Administrator c. t. a. of the Estate of Mary A. Ott, deceased, to recover damages for the conversion of certain bonds owned by the plaintiff-respondent, Walter A. Baude.

FACTS.

For brevity, we shall refer to plaintiff-respondent as "Baude" and to defendant-appellant as "defendant" herein.

The facts are not complicated, but the proof of them comes from several sources, and we believe it will be of greater convenience to the Court to narrate them without reference to pages, giving a reference to the pages later in the discussion of the several points raised by the defendant. Proof, which was uncontradicted and unobjected to, shows that Mary A. Ott and her family lived in Louisville, Ky., and that when Baude was about ten years of age, he took up his home there, his mother and father being dead, with his uncle, who was a near neighbor and a close friend of the Otts, and there became acquainted with Mary A. Ott.

That shortly after the war closed, and in 1919 and 1920, Baude was employed by the du Pont Co. in Wilmington, Delaware. Mary A. Ott at that time was living at Haddon Hall, in Atlantic City, N. J., and the earlier close acquaintance and friendship between the two was renewed and continued to such an extent that Mary A. Ott at one time desired to adopt Baude as her son, but was advised by her lawyer not to do so.

During the year 1919-1920, Mary A. Ott gave to Baude the following securities:

Allied Packers, Inc. 6% Convertible Bonds
Nos. 10167, 10168, 10169, 10170, 10171, 10172,

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10173, 10174, 10175 and 10176, each for the principal sum of \$1000.00, making a total of \$10,000.00 in principal of these bonds;

Toledo Traction, Light & Power Co., 7% Bonds Nos. M49, M50, M51, M52 and M53, each for the principal sum of \$1000.00, making a total of \$5000.00 in principal of these bonds;

Louisville Railway Co. 6% Bonds Nos. 11118 and 11119, each for the principal sum of \$1000.00, making a total of \$2000.00 in principal of these bonds;

100 shares of Preferred Stock of the Standard Sanitary Manufacturing Co., represented by Certificate No. C-2145 for 30 shares, Certificate No. C-2080 for 30 shares and Certificate No. C-2150 for 40 shares. This stock was subsequently exchanged for 100 shares of the Preferred Stock of the American Radiator and Standard Sanitary Corporation.

Henry L. Ott, a son of Mary A. Ott, appointed by her executor of her will, testified on behalf of the defendant that he knew all about the transactions and that he was his mother's agent at the time the securities were purchased and handed over to Baude, and had purchased the securities for his mother to hand over to Baude. Henry L. Ott's letters written about the time of the transaction clearly show a completed gift of all the securities.

Baude testified, over objection, that he was the owner of the bonds and stock above set forth and collected and kept the income therefrom until March

Brief for Plaintiff-Respondent

4, 1921, and likewise testified *without objection* that he never sold, transferred the title, or made a gift of the bonds or stock to anyone.

Later, on March 4th, 1921, Baude returned the bonds and the stock to Mary A. Ott to hold for him in safe-keeping. The stock was kept by Mary A. Ott and was found upon her death in her safe deposit box in Haddon Hall. The bonds she turned over to her son, Henry L. Ott, as her agent, and Henry L. Ott testified, both for Baude and for the defendant, that he thereafter held the bonds as agent for his mother; that he collected the interest thereon; after March 4th, 1921, and when asked what final disposition he had made of them, if any, stated he did not know what, if any disposition was made of the bonds.

Mary A. Ott died on the 23rd day of June, 1930, leaving a last will and testament, wherein she appointed her son, Henry L. Ott, executor. On September 29th, 1930, or three months later, Henry L. Ott renounced as executor and the Chemical Bank and Trust Company was appointed administrator with the will annexed by the Surrogate of the County of Atlantic.

On November 6, 1930, Baude filed a written demand with the defendant, demanding the return to him of the bonds and stock above set forth; and, again, on March 25, 1931, he filed a second demand with the defendant, demanding the return of the bonds and stock, and if they could not be returned for any reason, demanding the face value of the bonds and stock, together with interest thereon from March 4, 1921.

Brief for Plaintiff-Respondent

Subsequently, the defendant returned the stock, but refused to return the bonds.

The present suit was instituted on July 31, 1931, and within the requisite time an answer was filed by the defendant.

PLEADINGS.

The following facts, alleged in the complaint and admitted by the answer, were stipulated by counsel (p. 31, l. 20, *et seq.*):

1. Mary A. Ott died June 23, 1930, leaving a last will and testament, appointing her son, Henry L. Ott, her executor.

2. Henry L. Ott renounced as executor, and the Chemical Bank and Trust Company was appointed administrator *cum testamento annexo* on September 29, 1930.

3. On November 6, 1930, Baude demanded from the defendant the return of the bonds and stock.

4. On March 25, 1931, Baude filed a second demand with the defendant for the return of the bonds and stock, or for the value thereof.

5. The 100 shares of Preferred Stock of the American Radiator and Standard Sanitary Corporation were returned to Baude by the defendant.

6. Baude was the owner of said 100 shares of Preferred Stock of American Radiator and Standard Sanitary Corporation.

Brief for Plaintiff-Respondent

7. Baude deposited and left in the custody of Mary A. Ott, for safe-keeping, said 100 shares of preferred stock.

We desire to emphasize at this point that while the bonds and stock were given by Mary A. Ott to Baude at several different times, the circumstances and conditions under which both the bonds and stock were given were the same, and at all times the transaction as to both bonds and stock were considered as one transaction.

As a result of these several transactions, and flowing from them, Baude claimed to be the owner of the bonds and the stock, and that he deposited all the bonds and stock with Mary A. Ott for safe-keeping; that he demanded the return of the bonds and stock; that the stock was returned but not the bonds.

We deem it important and highly persuasive of Baude's ownership of the bonds, that in its answer the defendant admitted that Baude was the owner of the stock and that he had deposited the same with Mary A. Ott for safe-keeping and returned the stock to him on demand.

It will be further observed that the defendant, in its answer, does not deny that it was in possession of the bonds enumerated in the complaint and Baude's demand, but merely denies that it was in possession of any bonds "*which were the property of said plaintiff at the time of her death.*" (p. 12, l. 10-14.)

ARGUMENT.

I.

EFFECT OF 4TH SECTION OF EVIDENCE
ACT ON ADMISSION OF TESTIMONY.

Baude was permitted, without objection, to testify that he was in possession of the bonds and stock set forth in the complaint (p. 37, ll. 14-36), and that he came into possession of them on the following dates:

\$10,000.00 Allied Packer Bonds in August 1919; \$5,000.00 of the Toledo Power and Light Company Bonds in March, 1920; \$2,000.00 of the Louisville Railroad Bonds in March, 1920; 100 shares of stock of the Standard Sanitary Manufacturing Company in December, 1919 (p. 39, ll. 5-22).

The above testimony was not objected to. A previous question as follows:

“How long had you had possession of those securities?”

was objected to only *on the ground that it was immaterial and irrelevant*, but the Court admitted it (p. 37, l. 35, and p. 38, ll. 1-9). He was further permitted to testify, without objection, that he never sold, transferred the title, or made a gift to anyone of the bonds and stock (p. 40, ll. 20-35). He also

testified that he collected and kept the interest and dividends on the bonds and stock (*idem*). He was also asked (p. 39, l. 22), what his interest in said bonds and stock was; and he answered over objection that he was the owner thereof (p. 39, ll. 22-35 and p. 40, ll. 1-20).

Defendant contends that this was testimony as to a transaction with the deceased, and was, therefore, barred by the 4th section of the Evidence Act, the administrator (defendant) not having offered itself or any of its officials to testify as to any transaction with the deceased.

The theory apparently is that if the decedent were alive, she might have testified that Baude was not the owner. That Mrs. Ott, if alive, might have denied Baude's ownership of the securities, we contend does not render his testimony inadmissible under the 4th section of the Evidence Act.

Baude was in possession of the bonds and stock and testified that he was the owner. Defendant claims that this became a transaction with the deceased, because Baude's attorney, in his opening, said that the bonds and stock had been given to Baude by the decedent, and to permit Baude to testify that he was the owner was to permit him to testify to a transaction with the deceased.

It is necessary for counsel in his opening to the jury to state the facts he proposes to prove in order to establish his right of recovery. The truth of the allegations thus stated, may be established by one or more witnesses or by documentary evidence or both. In the present case, counsel in his opening

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did state that he proposed to prove that Mary A. Ott, in her lifetime, made a gift of bonds and stock to Baude. It was not necessary that this allegation should be established by Baude's testimony. It was established by the evidence of Henry L. Ott, both in his testimony and in various letters which he wrote to Baude and by a letter of Mary A. Ott, herself.

It will be observed that Baude did not testify that Mary A. Ott had given him the bonds. He testified to the fact that he was in possession of the bonds, and that he possessed them as owner. His testimony that he was owner was in support or furtherance of the presumption of ownership which flows from the fact of possession.

It is not a question of whether Mary A. Ott, if she were alive, could have denied the ownership of Baude of the bonds and stock in dispute. The question is whether his *statement of ownership* is a transaction with the deceased, and we contend that it is not. His title to the bonds in question, as owner, may flow from a transaction with the deceased, but his declaration that he is the owner of the bonds is an assertion of title, independent of the method whereby he became the owner; and he did not testify as to how he became the owner of the bonds, but simply that being in possession of the bonds he was in possession as owner.

The 4th Section of the Evidence Act is a rule of adjective and not substantive law. If Mary A. Ott had given Baude a bond and mortgage as a gift, *inter vivos*, and had evidenced that gift by an as-

signment duly executed and acknowledged, Baude could not, of course, testify to the circumstances under which the gift had been made, if they consisted of transactions with the deceased; but being in possession of indicia of ownership, the fact that he testified that he was the owner of the bond and mortgage could not be construed as a transaction with the deceased.

We contend that he amply established the fact that the bonds and stock were given to him by testimony in the case, *other than his own*.

Again, suppose, for example, that Baude had paid cash to Mary A. Ott for the bonds and stock, and, being in possession of them by virtue of such purchase, testified that he was in possession as owner. Such declaration would certainly not be deemed a transaction with the deceased. If, in such a case, we suppose that the defendant brought suit to recover the bonds and stock from Baude, upon the theory that no consideration was paid for them, under such circumstances, while Baude might be denied the privilege under the 4th section of the Evidence Act from showing that he had actually paid Mary A. Ott cash for the securities and become owner, he would certainly not be deprived, being in possession of the securities, of declaring that he was in possession as owner. In short, his possession and his statement of ownership by virtue of such possession, or as a presumption to be drawn from such possession, are not transactions with the deceased, but simple statements of fact.

Furthermore, the testimony that he was the owner

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of the bonds and stock is no more a transaction with the deceased than is testimony that he was in possession of the bonds and stock. If, as is the situation in the present case, the bonds and stock afterwards came into the custody of Mary A. Ott, she might, if she were so inclined, in a suit in which she was directly interested, declare that Baude had never been in possession of the bonds and stock, and she being living, of course, he could testify that he had been in possession.

Now, if under those circumstances the question arose between Mary A. Ott's representative and Baude, could it be said that Baude would be denied the right to testify that he was in possession of the securities merely because Mary A. Ott, if she were living, might testify that he was never in possession of them? Under such circumstances, we insist that Baude would have been legally entitled to testify that he was in possession of the bonds and stock, notwithstanding Mrs. Ott might, had she been alive, denied such possession.

In the present case, the gift of the bonds and stock was one transaction. An examination of the letters, admitted in the case, as well as the evidence of Mr. Ott, clearly shows that both his mother and he, himself, looked upon the bonds and stock as a single gift. No distinction was made between the bonds and the stock, either by Mrs. Ott or her son, so far as Baude's right to the bonds and stock was concerned. In other words, if Mrs. Ott made a gift of the stock to Baude and Baude thereby became the owner of the stock, as was admitted by the defen-

dant, the presumption is that she likewise made a gift of the bonds to Baude. The gift of the stock was evidenced not only by Baude's possession thereof and his declaration of ownership, but also by the fact that his name was upon the stock certificates (p. 129, l. 17). The bonds, of course, were coupon bonds and were payable to bearer. When Baude returned the securities, he returned both the bonds and the stock in the same envelope (p. 48, ll. 22-35; p. 49, ll. 1-8). It is our contention that the situation, thus presented, is analogous to the illustrations above set forth.

The question of Baude's ownership of the securities and the testimony relating thereto will be more fully considered in the discussion of the Court's refusal to non-suit or direct a verdict in favor of the defendant.

Baude collected and kept the interest and dividends on the bonds and stock until March 4, 1921, when he turned them over to Mary A. Ott for safe keeping, and continued to collect and keep the dividends on the stock from that time until the present.

It is conceivable that Mary A. Ott, were she alive, might deny that Baude had received and kept the interest and dividends on the securities. Evidence that he did so was nevertheless admissible, and, in fact, in the present case was admitted, without objection, because it was not a transaction with the decedent, notwithstanding that his right to receive the dividends and interest arose by reason of the gift of the bonds and stock to him, as alleged in the complaint, and as established, as we contend, by the proof.

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We have argued that the mere fact that the decedent if alive might deny that Baude possessed the securities or was the owner of the securities or received the income thereof, does not prevent Baude from testifying that he was possessed of the bonds, was the owner of the bonds, or received the income, for the reason that none of those statements are transactions with the deceased, but are independent statements of possession, title and ownership, which would be admissible, whether or not she was present to deny it.

The presumption of ownership arises from the fact of possession. Wigmore cites the rule as follows:

“Where title to land becomes material, the fact of present possession alone may serve to create a presumption of ownership; the emphasis being on the occupation, or appearance of ownership, and not on the documentary sources of claim; and the rule serving merely to shift to the opponent the second burden, the duty of producing some evidence to the contrary. *The same rule serves in the evidencing of ownership of personalty.*” (Italics ours.)

Wigmore on Evidence, Vol. 4, Sec. 2515, p. 3564.

“Subject to some discriminations, the same presumption may be applied to the possession of a negotiable instrument, especially one endorsed in blank or to bearer.”

Wigmore on Evidence, Vol. 4, Sec. 2516.

It will be noted in the present case that Baude testified, without objection, that he was in possession of the securities mentioned in the complaint. These securities consist of coupon bonds, payable to bearer, and stock, the certificates of which were in the name of Walter A. Baude.

It further appears from the testimony that Baude had collected and kept the interest and dividends on the bonds and stock (p. 40, ll. 24-35 and p. 41, ll. 1-10).

It is a well-established principle of law that one in possession of personal property may declare and state the character of that possession, i. e., whether his possession was that of owner, or otherwise. Wigmore cites the rule as follows:

“One in possession of property is presumed to be the owner of it. As making more definite and significant the nature of the person’s custody or occupation, and as giving it the significance of an exclusive control and of a possession in the fullest sense, the acts and declarations of claim of title by the person may be decisive, and should therefore be considered for that purpose.”

Wigmore on Evidence, Vol. 3, Sec. 1779, p. 2295.

In the notes under the last quoted section, beginning on p. 2295, are cited several cases, among which are the following:

“In *Avery v. Clemons* (18 Conn., 306), admitting declarations of S in an action of trover

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between S's creditor and A, claiming as bailor of S, Judge Storrs says:

'The possession of personal property is, un^der explained, *prima facie* evidence of ownership in the possessor.'

In *Roebke v. Andrews* (26 Wis., 311), Judge Paine said:

'The law gives to the possession of either real or personal property under a claim of title, the effect of being *prima facie* evidence of title. It is sometimes briefly stated that possession is *prima facie* evidence of title.'

But, when so stated, it is always implied that the possession is under a claim of title. It is that fact which gives to it its character and legal effect. It is thus seen that wherever title is sought to be proved by possession, the claim of title accompanying that possession is not only proper but material and necessary to be known, inasmuch as every person whose title is in issue is permitted to make out a *prima facie* case by proving what title he claimed in connection with it. The immediate point of inquiry is, what title was claimed and not what really existed; and, that being so, inasmuch as what a man claims consists of what he asserts and declares in respect to his rights, his declarations are original evidence of the fact. * * *

It may be that, on proof of possession merely, the law, in the absence of any further proof, would presume that the party claimed a perfect title. But if there is any such legal presump-

tion, it would seem to furnish a sufficient answer to any apprehended danger from allowing a party to prove that he claimed title; for such proof would show nothing more than the law would presume without it.

The defendant was thus not entitled to the instruction that the plaintiff's assertions of ownership were not 'evidence of title.' It is true they were not direct evidence. His statements that he had bought the cattle were not evidence of that fact. But it was in its nature explanatory of his possession and of the title which he claimed. It was equivalent to a direct assertion of ownership; and such assertion the law allows to be given in evidence accompanied with evidence of possession, and to both together it gives the effect of *prima facie* evidence of title."

Wigmore on Evidence (Sec. 2515), above referred to was cited with approval in the Supreme Court in the case of *Nelson v. Bock* (84 N. J. L., pp. 123-125). This was an action for replevin and the question of title was in issue. The plaintiff claimed title by will of sale and the Court held that possession in the assignor was *prima facie* evidence of ownership in the assignor.

In the case of *Benvenute v. Voorhees* (146 Atl. 677; 7 Misc. 580), our Supreme Court held that testimony by plaintiff against an executor, whom he had sued when a debt owed by the decedent to the plaintiff had not been paid, did not violate the 4th

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section of the Evidence Act. Obviously, the testimony was admissible because it was as to fact and not as to a transaction with a decedent, notwithstanding, such decedent might have testified that the debt had been paid, had he been living.

Another case in point is *Wadsworth, Admr. v. Heermans* (22 Hun. 455; affd. 85 N. Y. 639). In this case, the surviving party was allowed to testify that bonds did not have the name of the decedent written in the assignment form and the bonds were endorsed in blank when the plaintiff put the bonds in his safe deposit box, to which the decedent had access. In allowing the plaintiff to testify, the Court said:

“We do not think the inquiry involved any personal transaction between Hill and Fellows. It raised merely the then condition of the bonds. It neither affirmed or negated any personal transaction between the two.”

In the foregoing case, it will be at once seen that the decedent, if alive, might have denied the plaintiff's testimony that the decedent's name was not in the assignment form.

In the case of *Hunnicut v. Higgenbottom* (138 Ala. 472; 45 Sou. 469; 100 A. S. R. 45) the Court held as follows:

“Ownership is a fact to which a witness may always testify.”

This was a case in which a husband sued his wife's estate in conversion. In the course of its decision, the Court speaks as follows:

"Furthermore, the objection went to the exclusion of what plaintiff had said about his ownership of the money and no further. Ownership of property is a fact to which a witness may always testify."

Assuming, but not conceding that Baude's testimony of ownership would have been inadmissible had he, Baude, testified as to the method whereby he became owner, it must be borne in mind that Baude was not cross-examined nor did he anywhere testify how he came into possession of the securities. If, as we contend, we established by testimony other than Baude, that the securities had been given to him, such testimony would not render inadmissible Baude's testimony that he was the owner, as such testimony, as we have herein pointed out, was a statement of a fact, i. e., a condition and not a statement of a transaction with the decedent.

B.

The defendant contends that the Court erred in permitting Baude to testify as to what he did with the bonds and securities on March 4, 1921. Mr. Baude testified, over objection (p. 48, l. 22 &c.), that he went to his safe deposit box in Wilmington, Delaware, removed all of the securities mentioned in the complaint therefrom, placed them in an envelope addressed to Mrs. Mary A. Ott, Haddon Hall, Atlantic City, N. J., had the parcel registered in the post office at Wilmington, Delaware, had the contents

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insured in his own name, paid for the necessary postage, placed it on the envelope, and handed the envelope, thus prepared, to the registry clerk in the post office.

We submit that the testimony does not fall within the prohibition of Sec. 4 of the Evidence Act, for the reason that the test laid down by the cases in interpreting that Act is that the thing testified to must be a transaction with the decedent, and such a transaction as she could deny if she were living. This test has recently been stated by Mr. Justice Heher in this Court in the case of *Bankers Trust Co. v. Bank of Rockville Center* (114 N. J. Eq. 390), at p. 403, as follows:

“The test laid down for ascertaining what is a ‘transaction with’ the deceased, within the intendment of the statute, is ‘to inquire whether, in case the witness testified falsely, the deceased if living could contradict it of his own knowledge.’ ”

and cites the cases of *Van Wagenen v. Bonnot* (74 Eq., 843), and *Campbell v. Ackerman* (83 L. 567).

Baude's testimony as to what he did with the bonds on March 4, 1921, took place out of the presence of Mary A. Ott, and in Wilmington, Delaware, and she could not possibly have denied the fact that Baude had done what he testified he did do.

Furthermore, Henry L. Ott, who testified both for the plaintiff and the defendant, testified at p. 69, l. 20 and p. 71, l. 31, for the plaintiff that Baude returned all of the securities mentioned in the com-

plaint directly to Mary A. Ott, and at p. 72, l. 8, that they were returned by mail. In the defendant's case, he gave the same testimony on p. 128, ll. 10-30.

In addition to Henry L. Ott's testimony, Mary A. Ott, in a letter written by her to Baude under date of March 4, 1921, said:

"I received the securities all right. I will write to Henry to make arrangements to have them taken care of, and notify you." (p. 63, ll. 13-20).

The defendant argues that because an inference might be drawn that Mary A. Ott received the bonds from the mere fact that they were deposited in the post office, this amounts to a transaction with the deceased. It can scarcely be said, however, that the mere fact that such inference might be drawn from the testimony renders it testimony as to a transaction with the decedent.

We deny that the testimony was illegal, but even if it were, no harm was done because the defendant's own proof, out of the mouth of Henry L. Ott, establishes the fact beyond peradventure that the identical securities were received by Mary A. Ott and handed over to Henry L. Ott.

On the question of the testimony relating to the mailing of the registered letter, the case of *Bryan v. Palmer, et al.* (83 Kan. 298; 111 Pac. 443; 21 Amn. Cases 1214) is in point. In this case, it appears that Bryan was King's administrator. King had loaned Palmer \$500. Bryan, administrator, brought

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suit against Palmer to recover the loan with interest. Palmer was permitted to testify that during King's lifetime he, Palmer, had enclosed currency in the sum of \$515 in an envelope, and enclosed with it also a form of receipt for King to sign; that he, Palmer, undertook to have this letter registered by the postmaster in New Mexico, but for some unexplained reason the postmaster omitted the registration. There was proof (apparently by someone other than Palmer) that a letter of this kind was received by King in Kansas, and that he signed the receipt. A receipt, signed by King and received by Palmer, was introduced in evidence. The Court held as follows:

"The steps taken by Palmer at the post office in New Mexico, * * * the statements made by him at the post office, and his attempt to register the letter, were not personal transactions or communications with King (the deceased) within the meaning of the Code * * * and if he were living, he could have given no testimony in contradiction of them, etc."

We contend that there was no error in admitting the testimony of Baude that he was the owner of the bonds, or admitting testimony of his mailing the bonds in the same package with the stock. If, however, it be assumed that such testimony was illegally admitted, there was nevertheless abundant testimony of Baude's ownership by other witnesses, as will hereafter be discussed. It will be particularly noted, furthermore, that Mr. Hellings wrote a letter, Exhibit P13 (p. 181), at Baude's direction (p. 173,

ll. 1 to 3), asserting Baude's absolute ownership of the bonds and stock. This letter was in answer to a letter written by Bruce, Exhibit , p. 115, l. 30, a lawyer representing Mary A. Ott. In Bruce's letter it was stated that Baude was not to have the securities until after Mary A. Ott's death, and Hellings' letter was in direct and complete repudiation of that statement.

It is held in our State that testimony admitted in violation of the 4th section of the Evidence Act, will not vitiate a judgment or decree if there is other evidence justifying the judgment or decree. *Gehrach v. Rupp* (112 N. J. Eq. 296, at p. 302).

II.

THE COURT DID NOT ERR IN REFUSING TO
NON-SUIT OR DIRECT A VERDICT IN
FAVOR OF THE DEFENDANT.

(a)

We contend that the Court did not err in any respect in refusing defendant's motion for a non-suit. It is, however, the settled law of this State that if, after the denial of a motion for a non-suit, the defendant proceeds, and at the close of the entire case whatever defect there may have been, if any, in plaintiff's case is cured, the Court will not reverse, because at the close of the plaintiff's case the defendant might have been entitled to a non-suit.

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Perth Amboy Mfg. Co. v. Condit & Boles,
(21 N. J. L. 659);

Sefler v. Vanderbeek (88 N. J. L. 636);

Benoliel v. Homac (87 N. J. L. 375).

In view of this situation, we think it proper to discuss the motion for a non-suit and the motion for a direction, together. Defendant contends that its motion for a non-suit should have prevailed, because there was failure of proof of ownership, claiming that the only proof of ownership was Baude's statement that he was the owner and that such statement was not legally in evidence. We have discussed, under Point 1, the legality of Baude's statement of ownership, and contend that it was legally admitted. We further contend that there was ample additional proof in the case when the motion for a non-suit was made, to require the Court to submit the question on this point to the jury. Baude testified, without objection, that he was in possession of the bonds and stock; that he came into possession of them at certain dates, and that he received the interest and dividends therefrom. Such possession, standing by itself, is sufficient evidence of ownership, as we have above argued. This evidence of ownership is strengthened by the fact that Baude received the income from the securities in question. Under the authorities cited in Wigmore's Evidence, and above referred to, this was sufficient evidence to take the case to the jury on the question of ownership.

In addition to the possession, the receipt of the income and the presumption of ownership which flowed therefrom, we have the significant admission

in the pleadings that Baude was the owner of the stock, and had deposited the same with Mary A. Ott for safe-keeping. (See par. 2 of defendant's answer, p. 12, ll. 1 to 10; also p. 32, ll. 9 to 14; p. 33, ll. 16 to 25.)

In view of the fact that Mrs. Ott and her son, who was her agent, made no distinction in their letters and in the testimony of Henry L. Ott, between Baude's right to the bonds and his right to the stock, we contend that the admission in the pleadings is sufficient to permit the jury to draw the inference that if Baude was admittedly the owner of the stock, he was the owner of the bonds also.

In addition to the above, Baude was permitted to testify, without objection, that being in possession of the bonds, he never sold, transferred the title to, nor made a gift of those bonds to anyone (p. 40, ll. 18 to 25).

In addition to the above testimony, we have Mrs. Ott's letter acknowledging the receipt of the securities, dated March 4, 1921 (p. 63, l. 13). Under Point 1, we discussed at length the fact that Mrs. Ott received the bonds and stock referred to in the complaint and in the demands made upon the defendant, and that they were sent to her from Wilmington by Walter Baude. Mr. Ott testified that his mother, Mary A. Ott, received the bonds and stock from Baude, and that they had been sent by mail. The letter of Mrs. Ott, above referred to, acknowledged the receipt of the securities and then proceeded, as follows (p. 64, l. 23):

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"You need have no fear, Walter, you will receive them at the proper time and can enjoy them, knowing that nothing but a loving feeling existed."

It will be observed that Mrs. Ott did not deny Baude's ownership of the bonds and stock, and we insist that her declaration that he, Baude, need have no fear, but would have "them," i. e., the securities, in proper time and could enjoy them, is such evidence from the mouth of the decedent herself, that in connection with the testimony above referred to and independent of Baude's declaration of ownership, was sufficient to justify the jury in finding that Baude was in fact the owner of the bonds as well as the stock, the ownership of which was admitted.

Therefore, at the close of the plaintiff's case, from the evidence, independent of Baude's statement that he was the owner, there was ample evidence not only to justify, but to require the trial Court to submit the case to the jury upon the question of ownership of the bonds.

We have hereinbefore cited the authorities and cases on the question of presumption of ownership, rising out of possession and acts of ownership, such as the receipt of income, etc., and will not here repeat them.

Wigmore on Evidence (Vol. 3, Sec. 1779, p. 2295);

Wigmore on Evidence (Vol. 4, Sec. 2515, p. 3564);

Nelson v. Bock (84 N. J. L. 123).

The Court, having denied defendant's motion for a non-suit, the defendant proceeded with its case, and we will now discuss the propriety of the Court's action in refusing to direct a verdict in favor of the defendant.

The defendant read into the evidence as part of its case, answers to certain interrogatories propounded to Henry L. Ott, the son of Mary A. Ott. We think the following answers are important in a consideration of the question of Baude's ownership of the bonds and stock.

The 9th interrogatory and answer were as follows (p. 120, ll. 1 to 10):

“Q. Do you know whether Mary A. Ott at any time handed over to Walter A. Baude any securities consisting of bonds and stocks?

A. Yes, I knew all about it. I bought the stocks and bonds for her to hand over. I was acting as mother's agent at the time.”

In the answer to the 10th interrogatory, p. 120, he testified that in his presence, Mary A. Ott handed over to Baude the securities referred to in the 9th interrogatory, and in his answer to the 12th interrogatory, p. 121, he testified that the securities referred to in the 9th and 10th interrogatories, were the securities enumerated in the complaint.

In his answer to the 13th interrogatory (p. 123, l. 24), Henry L. Ott testified to a statement or declaration purporting to have been made by Mary A. Ott when she handed the bonds and stock to Baude, to the effect that “the securities are to be yours at my

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death, but not before." This alleged statement of Mrs. Ott is directly and emphatically contradicted by his own letters to Baude, written 12 years before his testimony was given. These letters had been offered in evidence at the close of the plaintiff's case, and marked for identification as Exhibits P6 to 12 inclusive (p. 74, l. 5 to p. 86, l. 15). The letters were proven, or their authenticity admitted by stipulation, but objected to on the ground that Henry L. Ott had no authority to write for his mother, and the letters were rejected on that ground at the close of the plaintiff's case.

After Henry L. Ott had testified for the defendant in his answer to the 9th interrogatory, that he knew all about the transaction, was his mother's agent at the time, and bought the securities for his mother to hand to Baude, we again offered the letters in evidence, and they were admitted (p. 165, l. 10 to p. 173, l. 30).

The first of these letters, Exhibit P6 (p. 176, l. 10), was written by Henry L. Ott to Walter Baude on August 26, 1919. The letter clearly shows that Baude was the owner of the bonds and stock. Henry L. Ott advises him about the conversion of the bonds, describes their character as debenture bonds and not first mortgage bonds, directs Baude not to deposit his coupons from the bonds before January 2nd, or otherwise he would have to pay an income tax on them. He likewise writes that the bonds are only temporary bonds, and when he, Henry L. Ott, receives notice of their change, he will let Baude know; that he can convert the bonds into common

stock, but advised him not to do so until the market for the stock was above 77.

Exhibit P8 (p. 178, l. 11), was written by Henry L. Ott to Baude under date of August 10, 1920, and contains the following significant language:

“The securities given you by mother were given to you during her lifetime, as not to cause trouble or dispute after her death. Mother’s wish is that you return them and she will arrange the management of them as she deems best.” etc.

Exhibit P9 (p. 178, l. 27) was written by Henry L. Ott to Baude under date of September 10, 1920, and contained the following significant language (p. 179, l. 2):

“Mother wants the securities put in trust and you to get the interest on them. This will be done, I can assure you, whether you consent willingly or by order of Court or Court proceedings. Remember, I was present when I told you that the lawyer did not think it advisable that mother adopt you as a son by Court order. Second, the investments were given to you during mother’s lifetime so that nothing could cause you any trouble later, and were given to you to put in a trust box to hold. But you agreed mother was to advise you on them and you to report on them. This is not being done now. Also, it was to teach you how to invest in the dealings in stocks and bonds. But you held them in trust and they were yours and will be yours after mother’s death.”

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Exhibit P10 (p. 179, l. 29), is a letter written by Baude to Henry L. Ott under date of September 17, 1920, in answer to Henry L. Ott's letter, Exhibit P9, expressing a willingness that the bonds and stock should be put in trust with the Equitable Trust Company of Wilmington, Delaware, under an agreement that he, Baude, should have the income.

Exhibit P11 (p. 180, l. 25), was a letter by Baude to Henry L. Ott, dated September 22, 1920, 5 days after Exhibit P10 was written, and in that letter Baude reconsiders the idea of a trusteeship and says that he saw no necessity for the trusteeship, inasmuch as the expense would be great and useless.

P13 (p. 181, l. 9), was a letter from Edmund S. Hellings, Esq., to Helm Bruce, Esq., under date of January 8, 1921, and is in reply to a letter written by Helm Bruce on January 5, 1921, admitted in the defendant's case (p. 115, l. 30). Hellings' letter to Bruce was written at Baude's direction (p. 173, ll. 1 to 3). In it Hellings says at Baude's direction "the securities were given to Baude absolutely." He sees no reason why they should be returned to Mary A. Ott, nor any reason why they should be placed in the hands of any trustee for his benefit. "You are at liberty to take any proceedings that you deem necessary."

A consideration of the above testimony as set forth in the letters, as well as Henry L. Ott's testimony as to the fact that he was his mother's agent, that he bought the stock and bonds for her to hand to Baude, and that the securities were handed to Baude; that they were given by Mary A. Ott to

Baude during her lifetime, in order that there would be no trouble at her death; that Mary A. Ott had desired to adopt Baude as her son, but had been advised not to do so; that Henry L. Ott's directions and advice to Baude concerning the investments, their exchange, the depositing of coupons; his statement that the securities were Baude's, and if put in trust would be Baude's; Baude's declaration that he could see no reason for any trust, and his further declaration, through his attorney, Hellings, that he was the absolute owner of the *stock and bonds*, amounted to conclusive evidence that Mary A. Ott had given the bonds and stock to Baude as a gift in her lifetime, to avoid trouble at her death, and that he, Baude, was the absolute and unqualified owner of all of the securities. This, in connection with the admission that the *stock* was Baude's, and had been deposited with Mary A. Ott for safe-keeping, it seems to us presents a case so strong in its proof of Baude's ownership, that not only was the Court justified in refusing to direct a verdict in favor of the defendant, but was required to submit the case to the jury, and we further contend that a verdict by a jury, had it been adverse to the plaintiff upon this point, could have been set aside as being against the weight of the evidence. Bruce's letter to Baude (p. 115, l. 30), is made use of by counsel for the defendant, in support of the proposition that the securities were returned to Mary A. Ott by reason of that letter. Counsel for the defendant asserts in his Brief, that the statements made in the Bruce letter were never repudiated by Baude, and that the securi-

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ties were returned pursuant to the demand in Bruce's letter. This is not the fact. Upon receipt of the Bruce letter, Baude directed his attorney, Hellings, to write the letter, Exhibit P13, above referred to, on January 8, 1921. The Hellings letter, as we have above pointed out, is a direct denial of the statements contained in the Bruce letter, and the suggestion that the Bruce letter was unanswered, is contrary to the facts. Moreover, Baude testified as follows (p. 171, l. 27):

"Q. Did you return the bonds and stock to Mrs. Ott in consequence or in pursuance of that demand—of any demand made in that letter? (Bruce's letter).

A. No, I did not.

Q. Did you give any instructions to anyone to refuse that request?"

and this was followed by the question, on the bottom of page 172, which reads:

"Q. I show you a letter dated January 8, 1921, written by Hellings, a lawyer in Wilmington, to Bruce, I ask you whether you directed that letter to be sent?

A. I did." (Top p. 173.)

However, even the Bruce letter is not entirely inconsistent with Baude's assertion of ownership. Bruce states that Mary A. Ott told him that she placed the securities in Baude's hands to hold, on certain trusts and conditions, until her death, at which time the securities were to become Baude's.

The statement in Bruce's letter that the reason the bonds and securities were given to Baude, was because Mary A. Ott was not in Louisville, where she could put them in a safe deposit box, is without substance in fact. Henry L. Ott testified, as above set forth, that he bought the securities for his mother to hand to Baude; that he was present when they were handed to Baude, and in his Exhibits P8 and P9, directly states that the securities were given to Baude in Mary A. Ott's lifetime, so as to avoid any trouble after her death.

It is scarcely credible that Mary A. Ott would have given the securities to Baude to keep for her, because she did not have access to her safe deposit box in Louisville, when she did have a safe deposit box at Haddon Hall in Atlantic City (defendant's testimony, p. 104, ll. 34 to 36; p. 105, ll. 1 to 10), in which box the defendant subsequently found the 100 shares of stock of the American Radiator Company.

Furthermore, it is odd that Mary A. Ott would have given the stock and bonds to Baude, because she did not have access to her safe deposit box in Louisville, when her son, Henry L. Ott, testified that he purchased the bonds and stock for her to hand to Baude. Henry L. Ott was a capitalist, and the most natural person with whom Mrs. Ott would have deposited the securities, had she not intended Baude to have them as his own property. It is likewise significant that the defendant made no effort, so far as the testimony shows, to locate any of the securities in any supposed safe deposit box belonging to Mrs. Ott in Louisville, but contented itself

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with an examination of her rooms in Haddon Hall, and of the safe deposit box which she had in that hotel.

Henry L. Ott, at or about that time, was living at Crestwood, Kentucky, a town near Louisville, as will appear from his letters, Exhibits P6, 8 and 9. There is not a suggestion in any of Henry L. Ott's letters to Baude, that the bonds were handed to him for safe-keeping, because Mrs. Ott did not have access to her safe deposit box in Louisville. This statement by him first appears in his testimony, made 12 years later, after Baude had instituted the present suit.

2b.

THERE WAS NO VARIANCE BETWEEN THE
PLEADINGS AND PROOF IN THE PRE-
SENT CASE.

Defendant's contention is based apparently upon the notion, first, that there was no proof of fraud, etc. as alleged in the complaint, and second, that there was no proof that the defendant ever had the bonds in its possession. The present action was, of course, prosecuted under the Practice Act of 1912. Nevertheless, the complaint sounded in trover and conversion. The action of trover and conversion has been said to be one of the most highly fictional at the common law. Fraud, in the wrongdoer, was inferred from the fact that he converted to his own use the goods which belonged to another. The al-

legation of fraudulent conduct in the wrongdoer was the usual allegation in the common law declaration (2 Chitty Pledg. 12th Am. Ed., p. 835-837; Sheen's N. J. Practice Form 204, par. 3, p. 551).

Sheen states, in his Practice Act, that the form therein contained was adapted from the declaration in the case of *Corona Kid Company v. Lichtman* (84 N. J. L., p. 363).

Mr. Justice Kalisch, in writing the opinion for the Court of Errors and Appeals said, at p. 366:

"Of the many fictions which existed at common law the action of trover and conversion serves as a conspicuous example. If the plaintiff was confined in such an action to proof of the facts as set out in the declaration he would almost invariably fail.

Declarations in this form have been held sufficient to support the introduction of proof that the articles for which damages are sought were stolen, obtained by fraud in various ways, or in a lawful manner and then unlawfully withheld. The character of the proof introduced by the plaintiff to establish its cause of action against the defendant did not change the nature of the action nor the issue that was being tried and imposed no greater burden of proof upon the plaintiff than what is required in an ordinary case of trover and conversion. The nature of the action made it incumbent upon the plaintiff to prove its ownership of the goods and such act or acts of the defendant respecting the same as amounted to a repudiation of the plaintiff's

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title or to an exercise of dominion, i. e., ownership, over them. *Woodside v. Adams*, (11 Vroom 417); *Frome v. Dennis* (16 Vroom 515). It was not necessary to prove this by any particular kind of evidence."

In the above case, the criticism was that testimony of conspiracy, fraud and collusion was permitted to be introduced when there was no such allegation alleged in the complaint and the Court held this contention was without force.

In the present case, it is claimed there was no proof of fraud, although fraud was alleged. The answer is plain. Fraud could be inferred from the refusal to deliver the bonds and in the second place, it was not necessary to establish fraud specifically in view of the opinion of the Court of Errors and Appeals in the Corona Kid Co. case.

It was further contended that there was variance between the pleadings and the proof based upon the proposition that the complaint alleged a conversion by the defendant (administrator), whereas the defendant never was in possession of the bonds. It was also contended that independent of the question of variance, the defendant (administrator) could not be guilty of conversion, if in fact, it never was in possession of the bonds.

It will be noted that in paragraph 1 of the complaint, page 2, plaintiff alleges his ownership of the bonds and the stock in question. Paragraph 1 of defendant's answer admits the ownership of the stock, but denies the ownership of the bonds. Para-

graph 2, of the complaint, page 3, alleges that the plaintiff deposited the bonds and the stock with Mary A. Ott for safe-keeping. Paragraph 2 of the defendant's answer, page 12, admits that the stock was deposited with Mary A. Ott for safe-keeping, but denies that the bonds were so deposited. Paragraph 3 of the complaint, page 4, alleges that Mary A. Ott, being in possession of said bonds and stock died June 23, 1930. Paragraph 3 of the answer, page 12, admits the allegations of paragraph 3 of the complaint, excepting "that it denies that said Mary A. Ott was in possession of any bonds *which were the property of said plaintiff at the time of her death.*" Paragraph 9 of the answer, page 12, admits that the defendant has refused and still does refuse to deliver said bonds and coupons to the plaintiff.

From the state of the pleadings, it will be at once seen that the defendant was apprized of the specific bonds and stock which the plaintiff claimed to be his property. It did not specifically deny that it was in possession of the bonds therein specifically described, but contented itself with the allegation that Mary A. Ott did not die possessed of any bonds *which were the property of the plaintiff* and admitted that it, the defendant, refused and does still refuse to deliver said bonds. Nowhere within the four corners of the answer is there any allegation that the defendant was not in possession of the specific bonds mentioned in the complaint.

The importance of this omission is made manifest when we review the testimony of Henry L. Ott, who testified for the defendant in his answers to the 20th

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interrogatory (p. 129), 21st interrogatory (p. 130) and 23rd interrogatory (p. 131) that he received the bonds from Mary A. Ott as her agent, continued to collect the interest thereon after March 4th, 1921, and was unable to state, what, if any, disposition was made of said bonds.

The only testimony in the case with respect to the custody of the bonds was that they were in Henry L. Ott's possession, as agent of his mother after March 4, 1921, and the presumption is, in the absence of proof to the contrary, that they continued to remain in his possession and were in his possession at the time of her death and that at the time of her death, he continued in possession of them as the executor of Mary A. Ott, a position which he did not renounce until three months after his mother's death, at which time he was succeeded by the defendant.

A person named as executor in a will is chargeable with certain duties and obligations, even before he received letters testamentary from the Surrogate, such as the receipt and custody of the property of the decedent, *Thifes, Admr. v. Mason, Executor* (55 N. J. Eq. 456-460), and in a recent case, a corporation, which had been named executor, was actually charged as such because it received certain assets of the decedent, notwithstanding it never took out letters testamentary, and in fact, became disabled by law from doing so.

Donnelly v. Slaughter, Receiver of Atlantic City National Bank (Eq. 114, p. 302. Affirmed 174 at 507).

The defendant attempted to show that Mary A. Ott did not die in possession of the bonds by producing evidence that they made a search of her room in Haddon Hall, where she died, and of her safe deposit box there. Notwithstanding Henry L. Ott was the executor of his mother's will, and testified that he had the bonds in his custody, it is significant that no inquiry was made by the defendant of Henry L. Ott, at any time for the bonds or for information concerning them, although two demands were served upon it, one on November 6, 1930, another on March 25, 1931. This suit was filed July, 1931, and his (Henry L. Ott's), testimony was taken in April, 1932, wherein he stated that the bonds were in his custody.

Henry L. Ott was not ignorant of financial matters and in his answer to the 1st interrogatory (p. 108) testified that he was a capitalist; he was 54 years of age; he professed to have a good memory for transactions which had taken place twelve years prior to his testimony. It is not conceivable that if the bonds in question had been sold, exchanged, redeemed or otherwise disposed of by him, that he would not have remembered what disposition had been made thereof.

Therefore, so far as the testimony in this case shows, these bonds were in the possession of Mary A. Ott, i. e., in the possession of her agent, Henry L. Ott, her named executor, at the time of her death. The only person of whom the demand could have been made for their return was her personal representative, the defendant in this case. Admittedly,

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the demand was made and refused not because Mary A. Ott did not die possessed of the specific bonds named in the complaint, but on the ground that she died possessed of no "bonds which were the property of the plaintiff." This constitutes within the case of *Corona Kid Co. v. Lichtman* (84 N. J. L., p. 363), ample proof of conversion by the defendant.

It is suggested that the bonds, not having come into the possession of the defendant (administrator) that the bonds had actually been converted by Mary A. Ott at some time prior to her death, that the complaint failed to allege a conversion by Mary A. Ott at a time prior to her death and therefore, there was a fatal variance. Had the plaintiff alleged a conversion by Mary A. Ott in her lifetime, he would have been unable to prove such a conversion. The plaintiff would have been obliged to rely upon the testimony or statements of Henry L. Ott, who was in possession of the bonds. The only inference that could be drawn from Henry L. Ott's testimony, above referred to, is that the bonds were never disposed of by him and, therefore, were in the legal possession of Mary A. Ott at the time of her death and in the actual possession of her agent, before her death and her executor, Henry L. Ott, after her death, and, therefore, legally, under the dominion and control of the defendant, administrator c. t. a.

Mary A. Ott lawfully came into possession of the bonds and stock on March 4th, 1921, as depository for Baude, the plaintiff herein.

The depositing of these securities with Mary A.

Ott was not inconsistent with her previous gift to Baude.

Corle v. Monkhouse (50 Eq., 537 at 546);
28 C. J., p. 642, Sec. 36.

It is manifest that the return of the securities by Baude to Mary A. Ott was not inconsistent with the gift already made, as will appear from the various letters admitted in evidence and hereinabove referred to and commented on.

The lawful custody of Mary A. Ott of the bonds and stock could not become unlawful as against the plaintiff Baude until demand had been made by him for the return of the bonds and stock.

“Where bonds or other property are to be returned to the owner upon his demand, the conversion does not take place until such demand is made and not complied with.”

Andrews v. Carl (59 Atl., 167 — Vt.);
65 C. J., p. 42, Sec. 56, and p. 51, Sec. 80.

Mary A. Ott having died before any demand was made upon her by Baude for the return of the securities, there was only one person upon whom such demand could be made, namely, the administrator, the defendant in this suit. If the administrator, the defendant in the present suit, could not be sued for the conversion of the securities, we respectfully ask: “Who could be sued; and where could the plaintiff receive satisfaction for the wrong done him?”

“An action of trover lies against executors (or administrators) for a bond and mortgage on a conversion thereof by their testator.”

Terhune v. Executors of Bray (16 L., 53).

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An action of replevin will lie against an executor who comes into possession of jewelry belonging to the plaintiff, which jewelry had been loaned by the plaintiff to the administrator's decedent in her lifetime.

Boyle v. Knauss, Administrator (81 L., 330).

An action in replevin sounds in tort, and there would seem to be no reasonable distinction between bringing an action in conversion and an action in replevin against an administrator.

It will be observed that in the case of *Terhune v. Executors of Bray* (*supra*) the question was whether suit could be brought against an executor for conversion made by the testator; and the Court held that such a suit could be maintained. Judgment, however, was given for the defendant, because in the same action the plaintiff had joined a count against the executors, declaring upon a conversion by the testator, and the Court held that this was a misjoinder.

If, as we contend, there was proof in this case that Baude owned the bonds; that he deposited them with Mary A. Ott for safe-keeping; that when he demanded the bonds of her administrator, it refused to return them, and denied Baude's ownership thereof, then under the above cases a suit could be brought against the administrator in conversion for damages for its refusal to return the bonds, such refusal to return being in law a conversion. In the case of *Frome v. Dennis* (45 N. J. L. 515) Justice

Dixon, writing the opinion of the Supreme Court said on page 516:

“What will constitute a conversion is, I think, well summed up by Mr. Justice Depue in *Woodside v. Adams* (11 Vr. 417) in these words: ‘To constitute a conversion of goods, there must be some repudiation by the defendant of the owner’s right, or some exercise of dominion over them by him inconsistent with such right, or some act which has the effect of destroying or changing the quality of the chattel.’ ”

In the present case, the defendant denied Baude’s ownership of the bonds, refused to return them to him and refused to pay him their value on demand.

Defendant’s counsel takes the position that because the defendant did not have actual possession or custody of the bonds, that it could not be guilty of conversion. In making this statement, he overlooks the fact that the suit is in effect a suit against Mary A. Ott. The Chemical Bank and Trust Co., the defendant in this suit, is not being sued individually for the conversion of the bonds, but is being sued as administrator of Mary A. Ott for the conversion of the bonds. The conversion taking place when the demand was made upon the defendant, and it refused to return the bonds or their value, and denied Baude’s ownership thereof. As we have pointed out, so far as the proof in this case goes, at the time Mary A. Ott died, the bonds were in the custody of Henry L. Ott, as her agent, and from thence on until he renounced, remained in his cus-

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tody as executor. There was no proof in the case that the bonds had been actually disposed of by Mary A. Ott, or by her agent, Henry L. Ott, prior to her death. Under these circumstances, the plaintiff could not have supported an allegation that the bonds had been actually disposed of, i. e., converted by Mary A. Ott in her lifetime.

The defendant cites the case of *Frome v. Dennis* (45 N. J. L. 515) in support of the proposition that there could be no conversion where the defendant was not in possession of the chattels at the time demand was made upon him. An examination of that case will show that the owner of a plow loaned it to a certain person, who in turn loaned it to the defendant, the defendant believing that the plow belonged to the person from whom he received it. Subsequently, and before demand made, the defendant returned the plow to the person from whom he had borrowed it, believing such person to be the owner. Thereupon, the plaintiff demanded the plow of the defendant; and the Court held the defendant not guilty of conversion.

We submit that this is not a parallel case, for the reason that there was no privity by way of bailment between the plaintiff and the defendant.

In the case at bar, the suit is against the personal representative of Mary A. Ott, with whom Baude had deposited his bonds for safe-keeping, and is in legal effect, a suit against Mary A. Ott, herself. The judgment would be paid out of the estate of Mary A. Ott, which is in possession of the bonds, so far

as the testimony shows, and not out of the individual assets of the Chemical Bank.

In discussing an alleged error in the Court's charge, on the point here being considered, counsel for the defendant cites the case of *Hellier v. Achorn* (45 ALR 789 — Mass.). In this case, the executor was in possession of certain stock, specifically devised, and before any demand made upon him by the plaintiff, claiming to own the same, the executor distributed the stock under the terms of the will. It will be seen that in the *Hellier v. Achorn* (*supra*) case, the executor was lawfully in possession of the stock and lawfully distributed it to the appointees in the will before any demand was made upon him by the alleged owner, and without knowledge of any such claim of ownership.

Counsel for the appellant cites, in his brief, several excerpts from *Corpus Juris*, apparently to the effect that there can be no conversion unless the person upon whom the demand was made, had the property in his possession, and therefore be in a position to comply with such demand. We have examined many of the cases cited in *Corpus Juris* in support of this proposition, and can find no case parallel with the case at Bar. The case of *Frome v. Dennis*, *vide supra* is cited. We have already commented upon this case, and believe it to be typical of the other cases cited in *Corpus Juris*. The principle stated would appear to be applicable only to cases wherein the defendant, being in lawful possession of the goods and chattels, disposed of them without any knowledge of title or claim of ownership

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in the plaintiff. An apt illustration of this distinction is found in the case of *Frome v. Dennis*, and is illustrated by other cases in the opinion of Justice Dixon in that case. It certainly cannot be successfully contended that if A is in possession of goods belonging to B, and sells, gives them away, or otherwise disposes of them, that he can escape an action of conversion, i. e., an action for damages, because he is unable to return to the owner, on demand, property which he has thus unlawfully disposed of.

In addition to the authorities above cited we direct the Court's attention to the 5th section of the Executors and Administrators Act, 2 Comp. Stat., p. 2260, which provides that whenever any testator or intestate shall take away, carry away or convert to his or her use the goods of any person or persons, such person or persons shall have and maintain the same action against the executors and administrators of such testator or intestate as he, she or they might have had or maintained against such testator or intestate. We submit that the provisions of this section are a complete answer to appellant's contention that this suit could not be maintained against the defendant in the present case.

III.

THERE WAS NO ERROR IN THE COURT'S
CHARGE.

A.

Complaint is made that the Court charged the jury that the plaintiff might recover if "He had such a general or special title to the bonds as would entitle him to immediate possession of these bonds at the time of their conversion."

Counsel for the defendant has quoted only a portion of the Court's charge, so far as it relates to the necessity of the plaintiff proving ownership.

The Court charged the jury as follows:

"Now, to successfully maintain this action it is incumbent upon the plaintiff to prove by a fair preponderance of the evidence his ownership of the bonds at the time of the alleged conversion; that is to say, that he had such a general, or special title to the bonds as would entitle him to immediate possession of these bonds at the time of their conversion, and it is incumbent upon the plaintiff to likewise prove by a fair preponderance of the evidence a conversion by the defendant of these bonds, that is to say, such act or acts on the part of the defendant *as would amount to a repudiation of the plaintiff's title to the bonds*. Therefore, it is necessary in a case such as this for the plaintiff to establish by a fair preponderance of the

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evidence the two elements, namely, *his title to the property and right to its possession at the time of the conversion, and, secondly the conversion of the property by the defendant.* (Italics ours.) These are essential elements of the cause of action of the plaintiff which he must prove by the greater weight of the legal and credible and believable evidence in the case.”

The effect of the Court’s charge was to require the plaintiff to prove that he was the owner of the bonds and entitled to possession thereof at the time he demanded possession, and that the bonds were converted.

It will be seen at once that in isolating the portion of the charge complained of, the defendant ignored the specific declarations of the Court as to the proof required to be furnished by the plaintiff, i. e., proof of ownership and proof of right of possession at the time demand was made; and appellant will not be permitted, as we understand the law, to single out a single portion of the Court’s charge, and by removing it from its context, give it a color or meaning that the Court did not intend, and that is clearly shown by the context not to have been intended.

The only proof in this case was that the plaintiff was the absolute owner of the bonds, and this the Court required the plaintiff to establish by a fair preponderance of the evidence.

We submit that there was no error in the Court’s charge in this respect.

B.

Complaint is likewise made of the Court's charge in the following particulars:

"(a) the Court told the jury to consider this case as though the appellant here stood in the place and stead of its testatrix;

(b) It was charged that refusal of defendant (appellant here) to return the bonds in question constituted a case of conversion without regard to said defendant's ability to return them;

(c) It was charged that the fact that said bonds never came into the possession of defendant was no defense to this action."

The legal questions involved in a discussion of all of these points have been fully argued in the discussion on the motion for non-suit and direction, and on the question of variance, and need not be here repeated.

C.

Defendant contends that the Court erred in charging that there was adequate amount of proof that plaintiff owned said bonds and was entitled to possession thereof. The Court made no such charge. What the Court actually said was as follows (p. 208, l. 26):

"The fact, if you find it to be a fact, that the defendant never had possession physically

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of the bonds mentioned in this suit would not relieve the defendant of liability as administrator of the estate of the deceased, if you find and conclude from the adequate amount of proof to which I have referred that the bonds belonged to and were owned by Walter A. Baude, the plaintiff, that he entrusted them, deposited them with Mary A. Ott, that he owned them and was entitled to the possession of them at the time he demanded them, and that the defendant failed and neglected to return them to the plaintiff."

The adequate amount of proof to which the Court was there referring was charged by the Court as follows (p. 208, l. 18):

"And if you believe from the fair preponderance of the credible evidence in this case that Walter A. Baude was the owner of the bonds in question on and before March 4, 1921, and neither sold, transferred the title nor made any gift of them to Mary A. Ott, and was the owner and entitled to the possession of them at the time the demand was made upon the defendant, and that the defendant has failed and refused to return them upon such demand, then your verdict must be in favor of the plaintiff."

This appears immediately above the portion of the charge objected to by the defendant.

D.

The defendant further complains that the Court erroneously limited the jury's consideration to two questions, namely, ownership and right to possession, without regard to plaintiff's allegations of fraud and conversion, and also without regard to defendant's inability to return said bonds, when demanded.

We have fully discussed heretofore the question of actual fraud as an essential element of proof in a conversion case, and likewise have fully discussed the question of the necessity of the defendant, as administrator of Mary A. Ott, deceased, of having in its actual physical possession the bonds in question, and submit that no further discussion on this point is necessary.

IV.

THERE WAS NO ERROR IN REFUSING DEFENDANT'S PROPOSED AMENDMENTS.

The legal effect of the amendments was to permit the defendant to set up the statute of limitations by alleging that the conversion had taken place at some time previous to the death of Mary A. Ott.

The plea of the Statute of Limitations is a strict defense, and will not be permitted after time to answer has expired.

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Respecting the merits of defendant's application to amend, it sufficeth to say that there was never any repudiation of Baude's title to the bonds as owner; there was never any disposition made of the bonds by Mary A. Ott, in her lifetime; and Baude never made any demand for the bonds until November, 1930, and March, 1931, when he made his demand of the administrator.

We submit that there was no error in refusing to permit the amendments.

We respectfully submit that for the reasons above discussed, the appeal should be dismissed, and the judgment affirmed.

H. WALTER GILL,
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Respondent.*

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