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Bill of Complaint.

Filed June 18, 1918.

In Chancery of New Jersey

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To the Honorable, Edwin Robert Walker, Chancellor of the State of New Jersey.

The complainant, Morristown Trust Company, a trust company, in the State of New Jersey, with its principal office in the Town of Morristown, in the County of Morris, and State of New Jersey, respectfully shows that

1. John H. Capstick, late of the County of Morris, deceased, departed this life testate on the seventeenth day of March, One Thousand Nine Hundred and Eighteen.

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2. That the last will and testament of said deceased was duly admitted to probate by the Surrogate of the County of Morris and letters testamentary thereon granted and issued to the said Morristown Trust Company and Ella F. Capstick, the executors therein named, who duly qualified thereunder, and have taken upon themselves the burthen of administering said estate according to the terms thereof.

3. That Ella F. Capstick is the widow of said John H. Capstick, deceased, and the life tenant mentioned and described in the last will and testament of said deceased, and to whom was given the use for life of the estate of said deceased: That upon the death of Ella F. Capstick, the remainder is bequeathed and devised to Elizabeth Safford, Harriet Stafford, May Florence Stafford, Clara Louise Stafford, nieces, and Wright Henry Stafford, nephew, of the deceased, all of whom reside in Lawrence, Mass., and all of whom were of full age and living at the time of the death of the testator.

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4. That at the time of the death of John H. Capstick there was on deposit in the said Morristown Trust Company, the sum of Eighteen Thousand One Hundred and Fifty-one Dollars and Thirty-four Cents, deposited in the name of "John H. Capstick or Ella F. Capstick."

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5. That at the time of the death of John H. Capstick there was also deposited in the Boonton National Bank, of Boonton, N. J., the sum of Ten Thousand Three Hundred and Thirty-three Dollars and Twenty-one Cents, likewise deposited in the name of "John H. Capstick or Ella F. Capstick."

10 6. That the said Ella F. Capstick, as survivor of the said John H. Capstick, claims the whole of said account and denies that the estate has any right or title therein or thereto.

7. That said persons in remainder claim that said moneys, as aforesaid, did not, on the death of said John H. Capstick, vest in the survivor, but the same belong to and are a part and portion of the estate of said John H. Capstick, deceased.

8. That complainant, is uncertain whether the moneys remaining on deposit in the names of "John H. Capstick or Ella
20 F. Capstick" are a part and portion of the estate of said John H. Capstick and should be used and distributed as mentioned in his will, or whether the same belongs to Ella F. Capstick, his widow and survivor.

Complainant is without adequate remedy in the Courts of Law, and, therefore, asks the aid and direction of this Honorable Court, and prays

1. That Ella F. Capstick, as an individual, The Boonton National Bank, Elizabeth Safford, Harriet Stafford, May Florence Stafford, Clara Louise Stafford and Wright Henry Stafford, who
30 are defendants in this suit, may answer this bill of complaint, without oath, and each statement therein made.

2. That this Court may by decree declare to whom, on the death of John H. Capstick, belong the moneys deposited in the name of "John H. Capstick or Ella F. Capstick," remaining on deposit in the said Morristown Trust Company and Boonton National Bank.

3. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and abide by such
40 decree as the Court may make in the premises.

4. That the complainant may have such further and other relief as may be just.

ALFRED ELMER MILLS,
Solicitor for and of Counsel with the Complainant.

Answer of Ella F. Capstick.

Filed July 6, 1918.

This defendant, Ella F. Capstick, answering the bill of complaint, says that:

1. She admits the first paragraph. 10

2. She admits the second paragraph.

3. She admits the third paragraph.

4. She admits the fourth paragraph.

5. She admits the fifth paragraph.

6. She admits the sixth paragraph.

7. As to the statements contained in paragraph seven of said bill, the defendant has no knowledge or information thereof sufficient to form a belief. 20

For General Answer to Said Bill Defendant Alleges,

That the sum of $18,151.34 on deposit in the Morristown Trust Company and the sum of $10,333.21 deposited in the Boonton National Bank deposited in the name of John H. Capstick or Ella F. Capstick belong solely to her and neither the estate of John H. Capstick nor the complainant as executor have any estate, right or interest therein.

That the said sums so on deposit in the respective banks were a gift to her *inter vivos.* 30

That said moneys became and were her sole property at the time the same were deposited.

The death of John H. Capstick does not change the status of defendant, and she now is entitled to withdraw all or any of said funds to the same extent as if said John H. Capstick were living.

KING & VOGT,
Solicitors of and of Counsel with
Ella F. Capstick, Defendant. 40

Answer of Elizabeth Safford, and Others.

Filed August 16, 1918.

These defendants, Elizabeth Safford, Harriet Stafford, May Florence Stafford, Clara Louise Stafford and Wright H. Stafford, severally answering say that:

1. They admit the allegations contained in the first and second and third paragraphs of the bill of complaint.

2. They severally have no knowledge of the allegations contained in the fourth and fifth paragraphs but believes the same to be true.

3. They severally deny the right of Ella F. Capstick to any part of the funds on deposit in the Morristown Trust Co. or Boonton National Bank but alleged funds are a part and parcel of the estate of said John A. Capstick, deceased.

4. These defendants severally answering the seventh paragraph of the complaint admit the allegations contained therein.

5. These defendants have no knowledge of the allegations contained in the eighth paragraph and put the complainant to its proof.

These defendants humbly pray to be hence dismissed with their reasonable costs and charges in this behalf more wrongfully sustained.

JOHN A. BERNHARD,
Solicitor and of Counsel with the Defendants.

Replication.

Filed August 28, 1918.

The complainant joins issue on the answer of the defendants.

ALFRED ELMER MILLS,
Solicitor and of Counsel with Complainant.

IN CHANCERY OF NEW JERSEY.

MORRISTOWN TRUST CO., *Complainant,* *and* ELLA F. CAPSTICK, *et als.,* *Defendants.*	

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TRANSCRIPT OF SHORTHAND NOTES of testimony taken in the above entitled cause at Morristown, New Jersey, on November 6, 1918, before the HONORABLE FREDERIC W. STEVENS, Vice-Chancellor.

APPEARANCES:

Edward K. Mills for complainant.

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Mr. John A. Bernhard for the Stafford defendant.

King & Vogt for Mrs. Capstick.

The Court. There will be a decree dismissing you, Mr. Pierce, with a payment of fifty dollars counsel fee out of the fund.

OSCAR G. MYERS, sworn.

Direct examination by Mr. King.

Q You are connected with the Boonton National Bank? A Yes, assistant cashier.

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Q And for how long have you been connected with it? A With the bank for about ten years, and assistant cashier for about three.

Q I have asked you to produce the signature card of John H. Capstick for the bank account in your bank; is this the account? A That is.

Q Is this the card? A Signature card, it is.

Q I notice on the top in typewriting "John H. or Ella F. Capstick, Montville, New Jersey." Does that so appear? A Yes.

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Q And then beneath that in the handwriting of some person "Ella F. Capstick?" A Yes.

Q Is that her signature? A It is.

Q And beneath that position on the card the signature of some person, who is that? A John H. Capstick.

Q Why is the signature of John H. Capstick pasted on the card? A For the reason that I was not at the bank the day that account was opened, I was away on my vacation; Mr. Capstick came in and took one of our account cards on July 6th I think it is or 7th, the account was opened for $1,000, and at that time Mr. Capstick left his signature on a paper, and from the present matter on that signature card I should say that Mrs. Capstick came to the bank on July 13th and left that signature, and at that time the other signature was attached.

Q (*By the Court.*) Then the first signature was the signature of John H. Capstick? A Yes, sir, left at the time he was at the bank.

Q (*By the Court.*) On the 13th of July? A No, on July 6 or 7, I don't recall just the date when the first deposit was made, July 7 when the account was opened.

Q (*By the Court.*) What do you call this paper that I have in my hand? A That is the ledger account.

Q Is this a sheet of the original entry? A That is the original entry.

Q Well, now, let me understand. On the first line of this ledger account are the words "1916, July 7, $1,000" under the head of "date" "desposit"? Was that the time when the deposit was made? A It was.

Q (*By the Court.*) And who made it do you say? A Mr. Capstick.

Q (*By the Court.*) Mr. Capstick himself made it? A I don't know whether it was made personally or by mail.

Q (*By the Court.*) But I understood you to say that you were a party to this transaction? A No, I was not, I was away at the time.

Q (*By the Court.*) The card on which occur the names "Ella F. Capstick and John H. Capstick," dated July 13, 1916, was a card made by you? A By our bank.

Q (*By the Court.*) You made this? A Not me personally, no, sir.

Q (*By the Court.*) Then you know nothing at all personally about this transaction? A No, not personally, just representing the bank I know the account was opened on that day for $1,000.

Q (*By the Court.*) Opened on July 7? A Yes, sir.

Q (*By the Court.*) You infer that from the fact you see it on this ledger account? A And that I was told so by the cashier.

The Court. Then the witness knows nothing personally; he merely identifies these two papers as papers coming from the bank; that is the way I understand it. 10

Q This signature card which you have here was prepared in the bank, wasn't it? A It was.

Q Have you personal knowledge that it was?

The Court. Not personal knowledge.

Q What did you see about the preparation of this card? A Nothing to my knowledge except it was in our files and I saw it upon my return.

Q Upon your return when? A From my vacation. 20

Q When did you get back? A I don't remember.

Q Was it after the 13th of July? A Yes.

Q Then, these papers that are produced are nothing more than the records or the files in your bank, is that so? A That is correct.

Q Who was it that made this deposit card? A Why, undoubtedly it was made out by the stenographer and Mr. Fischer, our cashier, handled it.

Q Is Mr. Fischer here? A He is not.

Q Did you have subpoena served on you or on Fischer? A On the Boonton National Bank. 30

Mr. Joshua R. Salmon. I represent the bank, but not as an answering party. Mr. Fischer today had a very important appointment in New York City, and it did not appear that he was subpoenaed personally to come; the subpoena was addressed to the Boonton National Bank, and Mr. Meyers had this general knowledge of the bank's records. Mr. Fischer did not intimate to me, at any rate, that he had any personal knowledge of the immediate transactions or I should have stated to him the great necessity for his appearing here to-day; but the subpoena was addressed to the bank as an institution or corporation and Mr. Meyers came as the assistant cashier or officer to testify as to these papers mentioned in the subpoena. 40

The Court. The bank undoubtedly responded to the subpoena; they are not in fault. It now appears that the witness who came here on the part of the bank had no personal knowledge of what actually occurred when that card was signed, and it so happens that in this class of cases that information is vital. We will have to have his evidence at some other time.

Mr. King. I offer original of the ledger account standing in the name of John H. or Ella L. Capstick in the Boonton National Bank of Boonton, New Jersey, together with a card designated as "Authorized signature of John H. or Ella F. Capstick, Montville, N. J.," and will substitute, with the consent of the other side, will substitute copy of the ledger account, returning the original. The original authorization of signature perhaps may be recorded by the Court.

Marked Exhibit C. 1.

Q I show you two checks, one dated August 14, 1916, and one dated March 23, 1918, both with the signature of Ella F. Capstick and both drawn on the Boonton National Bank. The first one is for $100, and the second one for $5,000. Will you kindly testify as to whether those were paid from this account? A They were.

Marked Exhibits C. 2 and C. 3.

Q These are some vouchers returned from the bank and dated February 1, 1917, September 1, 1917, January 1, 1917, and April 1, 1918. Were those statements issued by your bank in relation to this bank account? A They were.

Q I call your attention to the fact that the one of April 1, 1918, is "John H. Capstick or Ella F.," and in parenthesis "and either or survivor," while the one prior to that on February 1, 1917, is "John H. or Ella Capstick"; the one of September 1, 1917, is "John H. and Ella Capstick"; the one of January 1, 1917, is "John and Ella Capstick." What have you to say about these as to whether the original account had been changed or whether these are just mere mis-descriptions? A They are mis-descriptions; the original account has never been changed.

Q And in the original account is it "John H. and" or "John H. or"? A "John H. or Ella F. Capstick."

Q (*By Mr. Bernhard.*) You produced two checks signed by Mr. Capstick. Did Mr. Capstick also draw on this account? A Yes.

CLYDE POTTS, sworn.

Direct examination by Mr. King.

Q Where do you live? A Morristown.

Q You are an engineer? A Yes.

Q With an office in New York? A Yes.

Q And have lived in Morristown some years, have you not? A Lived in Morristown twelve years, almost.

Q Were you acquainted with John H. Capstick, now deceased? A Very well.

Q Do you remember ever having a talk with him about any deposits, bank deposits, they made? If so, about what time and what did he say to you—if so, about what time? A Well, my wife and I used to go frequently to Montville to visit the Capsticks, and they used to come to our house in Morristown, and on more than one occasion when we were in Montville visiting them the question of bank accounts came up. Mr. Capstick was connected with the Morristown Trust Company as an officer and he would once in a while talk about banking matters, and I recall one occasion he asked me if I had a joint account with my wife, and I said, "No."

Mr. Bernhard. I just object technically so as to keep the record straight. Mr. King's question was what time these conversations took place. Mr. Potts has perhaps gotten a bit beyond that. I think we ought to know the time first.

Q (*By the Court.*) Can you fix the time approximately? I can only by years; I should say prior to 1912.

Q (*By Mr. Bernhard.*) Was it before or after this bank account? A I don't know when that bank account was. It was prior to 1912 or thereabouts. I will say here he never mentioned anything to me about joint account he had in the Boonton bank.

The Court. The conversation must, of course, relate to this particular account.

Mr. King. He has two, one in the trust company and one there.

A Well, it was somewhere around 1912; we were over there frequently during the Presidential campaign of 1912 and the time Mr. Capstick was running for Congress, and I associate it with

1912 visits more than any other time, so I think it was prior to that time; in fact, I know it was. He said to me, did I have a joint account with my wife, and I said, "No, I didn't," and he said it was a nice thing to have, that I should have an account from which my wife could draw, and he said if anything happened to him or to me that there would be money there which she could use to tide over until such time as the estate was settled up. He said it was a nice thing for a woman to have a joint account with her husband, that she always would have money to use. And there were other times when the same subject was reverted to again; and I recall one time he told her that he, Mr. Capstick, told Mrs. Capstick that there was a joint account that she could draw on for the full amount any time she wanted it, when he gave her the book.

Q When he gave her the book, what was that? A When he gave her the bank book in the Morristown Trust Company, and he told her there was a joint account that she could draw on as well as himself, that she could draw on it for the full amount, if she so desired.

Q Do you remember him speaking more than once about what she could do in case of his death? What did he say about that, if anything? A Well, only what I said before, that in case of any accident or his death that there would be a fund there to use until the estate was settled up.

Q Have you fully stated to the court your recollection of the conversation? A Yes, I have; my memory is a little hazy on that, but all I can say it was reverted to a number of times by him in conversation.

OSCAR G. MYERS, recalled.

Direct examination by Mr. King.

Q In this account in the Boonton National Bank, did it require the production of the bank book to withdraw the funds? A No, sir.

Q Had the possession of the bank book anything to do with the payment of the funds by the bank? A No.

Q All you required was the ordinary check passing through? A Yes.

JANE POTTS, sworn.

Direct examination by Mr. King.

Q You are the wife of Mr. Clyde Potts, who just testified? A I am.

Q And during the lifetime of Mr. Capstick you and he frequently went over to Montville? A Many, many times. 10

Q Have you ever heard him talk anything about having bank account? A Yes.

Q Please give me the date first, generally, if you can? A It must have been about 1910.

Q And were all the conversations in that one year or were they in sequence during various years? A Mr. Capstick often referred to money matters. Of course, he was a man of unlimited means and he was fatherly to Clyde, and we often talked about money up until three weeks of his death; he talked money 20 matters with us.

Q Did he ever speak of these two accounts that are in controversy before the court, the one in the Morristown Trust Company and Boonton National Bank? A I don't know of the Boonton account; the account that I know about was the Morristown Trust Company.

Q What did he say about that? A The first time he ever talked to us about it he said, "Clyde, have you a joint account with Jane"? And Mr. Potts said, "No," and he said, "Well, you ought to have; it is a good thing." Mr. Capstick was a little 30 inclined to profanity, and when he talked about his joint account he said that he came home to his wife one night and he said, "Dearie, I have opened a joint account in the Morristown Trust Company with you and you may draw on it to the full amount, but if you do I will give you hell." I remember that because of the remark.

Q Just tell the court generally what he said about these accounts and what he intended to do about them, if he expressed that ever? A He said to Clyde and I that he had opened this account because he might die any time, and a woman who was 40 left alone in the world with an estate to settle up was in a bad way; he opened this account with Mrs. Capstick that she might use it; if he died she could use this money to settle up things while waiting for the estate to be closed.

Thomas Beddow, direct.

Q Now, generally, was that conversation repeated down to the time you have mentioned? A Yes.

Q Mr. Capstick and I were musical and had many good times. He would say to me many times, "Has Clyde opened that joint account yet?" That would be perhaps all that would be said about it.

10 Q (*By Mr. Bernhard.*) When Mr. Capstick asked Mr. Potts if he had a joint account with you and Mr. Potts said "No," Mr. Capstick said it would be a good thing to have one; did you agree with Mr. Capstick? A Absolutely.

THOMAS BEDDOW, sworn.

Direct examination by Mr. King.

Q Did you know Mr. Capstick during his lifetime? A Yes.

Q And for how many years have you known him? A About 20 forty years.

Q Were you over at his office frequently? A Yes.

Q And did you ever hear him speak about these bank accounts or one bank account? A Yes.

Q What is the date, if you can give it? A Well, I don't remember the date; I couldn't say.

Q What year? A It was likely seven or eight years ago; I just don't remember the date.

Q Please tell the occasion and what he said to you? A I was there to dinner with him one night, and he fetched up the same 30 thing and wanted to know how I had my bank account, and he made me go change it into my wife's name and my name; I done it in the trust company and Foote Bank; changed it; I had it all in my own name; I changed it around; he said he had his account in the Morristown Trust Company for Mrs. Capstick, so if anything happened to him at any time she had plenty of money to use without being tied up for money; he didn't say she would have it to use while settling up the estate, but she would have plenty of money to use while things were tied up.

Q Did he mention the Boonton National Bank account? A 40 No, I don't remember him mentioning the Boonton at all; no, he was talking about the trust company.

Q Did he mention this more than once? A Oh, yes, several times; and he even made me go and change mine, or had me do it through him; I changed it.

Q What did he tell you would be the result if you changed yours? A He said if I didn't change it my wife would have trouble to get hold of cash if anything happened to me, and I ought to change it so as to have the cash to handle.

Q And did you do it? A I did it in both places.

ELLA F. CAPSTICK, sworn. 10

Direct examination by Mr. King.

Q You are the widow of Mr. John E. Capstick? A Yes.

Q I show you a card in the Boonton National Bank and ask you if that is your signature on the card? A Yes.

Q Now, was your husband present when you signed your name to that card? A He said he left his card.

Q Was your husband present when you signed your name to that card? A I can't remember, but what I can remember he told me I had to go— 20

Q No. A (Continuing.) —and put my name there.

Q But your husband did go and told you to leave your name there? A Yes, sir.

Q And following that request from him, did you do so? A Yes.

Q (*By the Court.*) When you left your name there and when you wrote that on the card was there anything else on it? A Yes, it was filled out, and he told me to put my name down on it.

Q (*By the Court.*) You see there the name of John H. Capstick; was that there when you signed your name? A Yes, sir. 30

Q After the deposit was made in the Boonton National Bank you drew two checks on it, which you produced to me and which I offered in evidence? A Yes.

Q What is your recollection as to whether you drew more than those two checks on that account? A On the Boonton National Bank?

Q Yes; there is one of $100 and one of $5,000? A I have been drawing ever since on the account.

Q Before your husband's death? A Oh, I don't remember; I had some checks. 40

Q Two that you gave me; are there other checks that you remember? A Checks on the Morristown Trust Company.

Q Yes, but directing your attention to the Boonton Bank? A I don't remember; I haven't looked back to find out.

The Court. Have you looked for the checks drawn on the account; the checks drawn on the account that have been returned to the family?

Q You have looked for those as I have requested you to? A Yes.

10 Q And you only found those that you turned over to me? A Yes; that is all I found.

The Court. Where are the other checks that were drawn on the accounts?

Mr. King. Those were Mr. Capstick's; signed by him.

Q Now, in the Morristown Trust Company there was an account there; I show you now the signature card in the Morristown Trust Company and ask you where you signed your name to that? A Right there (indicating).

20 Q Yes, but where were you, in the bank or Boonton, or where? A I went over in the bank in Morristown.

Q Morristown Bank? A Yes.

Q And can you tell me when you put your name to it; how many years ago? A I cannot; it is a long time ago; I don't remember now; can't remember.

Q It is dated March 5, 1901. A Then it must have been at that time.

Q You think that is so? A Yes.

30 Q There was attached to this card a portion of a letter; is that your husband's signature?

Mr. King. I want to offer this letter together with the card. It is entitled, "John Capstick & Son, printer, dyers, bleachers and finishers, Montville, New Jersey, March 4, 1901. Morristown Trust Company. Gentlemen: I wish my account changed to John H. Capstick and Ella F. Capstick, so that either one may draw checks against it. Below please find signature of my wife. Yours respectfully, John H. Capstick" The mark on the letter indicates

40 that it was received by the trust company March 5, 1901, the same date that appears upon the signature card of Mrs. Capstick.

Marked Exhibit C. 4.

Q On this account in the Morristown Trust Company, did you ever draw any checks? A Yes.

Q I show you now checks dated October 7, 1912, June 10, 1912, June 13, 1912, August 16, 1912, August 16, 1912, August 16, 1912, and August 9, 1912. These checks are all signed by you and drawn on the Morristown Trust Company? A Yes. 10

Q I have asked you to look among your husband's papers to see if you found any other cancelled checks signed by you and drawn on this bank account. Are these the only ones you have found? A I looked through them carefully, gone back to 1905 in different boxes and just took these out, and those; there may be more.

Marked Exhibit C. 5.

Cross examination by Mr. Bernhard.

Q I notice that the checks that you drew on August 14, 1916, for $100 to the order of E. A. Fisher, is drawn on the check of John H. Capstick in print. A Yes. 20

Q And the other one, Exhibit C, is drawn on a counter check for $5,000. With reference to that, may I ask if you appeared at the Boonton National Bank and procured a counter check and drew it at that time? A I drew it then.

Q Personally there? A Personally.

Q So I assume that you had no bank book, check book of your own on the Boonton National Bank? A No, I think I did not.

Re-direct examination by Mr. King. 30

Q I show you now a book entitled, "Ledger," and "1898," and "J. H. C." on the back, and directing your attention to page 36, the date appears to be July, 1917, and marked, "Private book of property owned by John H. Capstick." Looking at the whole page, can you tell the Court whether that page is in the handwriting of your late husband or not? A Oh, yes.

Q All of it? A All of it.

Q I should like to read in evidence, if I may, the last paragraph. "I have made in this book a list of securities held by Mr. and Mrs. Have a box in safe deposit at Morristown Trust Company and will take one at the Boonton National Bank, owned jointly between my wife and self, both having access to them. My bank accounts are jointly held by my wife and self; either can draw upon the accounts." 40

JOHN H. B. CORIELL, sworn.

Direct examination by Mr. King.

Q You are the secretary and treasurer of the Morristown Trust Company? A Secretary and vice-president.

10 Q Can you tell me, please, when the account, when John H. Capstick first opened his account in your bank? A I cannot without looking at the records.

Q Had he an account in your bank prior to March 5, 1901? A He did.

Q On March 5, 1901, there appears a letter received by your trust company, dated March 4, and also signature card of Mrs. Capstick. Can you tell me whether any change was made in his account at that time? A It was at that time.

Q And how is the account now run? A John H. and Ella F.
20 Capstick.

Q (*By the Court.*) The papers you hold in your hand are the records from the bank? A From the file; yes, sir.

Q So that a check drawn by either would be good? A Yes.

Q (*By the Court.*) How about the bank book; was it necessary to have the bank book? A It was not necessary at the time; no, sir; the bank book is not like a savings bank book and usually change the book when it was brought in.

Q (*By the Court.*) But the book did not have to be produced at the time of each payment? A No, sir.

30 Q So far as the bank was concerned, the mere physical possession of the book was no indication that the owner has account? A No.

Q It is what we call commonly commercial account? A Yes.

Q This ledger which I produced, from which I read this small article, was found among his effects and you had it in your possession as one of the executors? A Yes.

Cross examination by Mr. Bernhard.

Q It does not yet appear just how this account stands on your
40 books; in whose name or under what authority does it stand, in the name of John H. or Ella F. Capstick, or how does it stand on your books? A John H Capstick or Ella F. Capstick.

Q It does not so appear? A It is so either can draw, it says there.

Q Where does it say that; I mean on your books? A Well, if it stood that way both could draw the money.

Q (*By the Court.*) You have a book? A We have a ledger.

The Court. There ought to be a copy of that ledger.

Q Will that show on that ledger? A Yes. 10

Mr. Bernhard. Whatever it is, it will show on that card you are going to ask for.

Mr. King. I have promised the Court to produce it.

The Court. Certified copy will do.

Copy of the last will and testament of John H. Capstick offered in evidence and marked Exhibit C. 6.

TESTIMONY CLOSED.

STATE OF NEW JERSEY, } *ss.* 20
COUNTY OF MORRIS. }

Edwin A. Fisher, of full age, being duly sworn, according to law, upon his oath says that he is cashier of The Boonton National Bank, and has been such cashier for the last past fifteen years; that the late John H. Capstick was previously a depositor, stockholder, director and president of said bank; that about the year 1903 said John H. Capstick severed his relation in all capacities with said bank, and for a period of years thereafter this deponent infrequently discussed the question with said John H. Capstick of renewing his relationship with said bank to the 30 extent of becoming a depositor thereof; that on or about the seventh day of July, nineteen hundred and sixteen, said John H. Capstick called personally at said bank and deponent and said Capstick conferred together concerning the subject of the latter opening a deposit account; said Capstick stated to dependent that he wished to open an account, and that he wanted to have the account so that he and his wife Ella F. Capstick could draw cheques against said account, if need be, to the full extent thereof; that the reason as stated by said Capstick, was that he wished his wife to be in funds in his absence at Washington, D. C., dur- 40 ing the session of Congress, of which he was a member, or under any other circumstances whatever; that the account was then opened in the names of "JOHN H. CAPSTICK or ELLA F. CAPSTICK," in the presence of said John H. Capstick, which was in accordance with his directions.

Affidavit of John H. B. Coriell.

The signature card was typewritten in those said names as indicated above and given to said John H. Capstick, who took the same from said bank for the purpose of securing the signature of his said wife. On or about the thirteenth day of July, 1916, the said signature card was returned by said Ella F. Capstick
10 duly signed by her and placed in the files of said bank.

The signature of John H. Capstick was familiar to the bank's tellers by reason of the fact of the said signature coming before them in his capacity as Treasurer of the Consolidated Realty Company, who continuously carried an account for the last past fifteen years, and also the fact that said "John H. Capstick" had previously carried a personal account in said bank.

The balance to the credit of the account of John H. Capstick or Ella F. Capstick as shown by our books at the close of business March 17th, 1918, was Ten Thousand Five Hundred Thirteen
20 Dollars and twenty-one cents ($10,513.21).

EDWIN A. FISHER.

Subscribed and sworn to before me this
fifteenth day of November, nineteen
hundred and eighteen.

Joshua R. Salmon,
Master in Chancery of New Jersey.

30 State of New Jersey, }
County of Morris. } *ss.*

Jno. H. B. Coriell, of full age, being duly sworn according to law, upon his oath deposes and says that he is vice-president and secretary of the Morristown Trust Company, conducting a banking business in Morristown, New Jersey.

That on and prior to April 1, 1900, John H. Capstick had an account in the Morristown Trust Company in his individual name.

That on March 5, 1901, upon the written order of the said John
40 H. Capstick, dated March 4, 1901, the said account was changed to read "John H. Capstick or Ella F. Capstick" and said account remained as changed until the date of the death of the said John H. Capstick (March 17, 1918).

That during the time from March 5, 1901, to the date of his death a large number of deposits and withdrawals were made in

the account. As all cancelled cheques have been returned, there is nothing on the records to show whether the cheques were signed by John H. Capstick or Ella F. Capstick.

A cheque drawn by either would be honored by the trust company and charged against the account as above stated up to the time of his death. 10

At the time of Mr. Capstick's death, the amount standing to the credit of this account was Eighteen Thousand One Hundred Sixty-six Dollars and Thirty-four cents ($18,166.34).

This account has been a very active one, covering thirty-nine sheets written on both sides, and is open to the inspection of the Court or to any of the counsel.

JNO. H. B. CORIELL.

Sworn and subscribed to before me this 20
7th day of November, 1918.

GEORGE F. MELICK,
Notary Public of New Jersey.

November 12.

I hereby consent that the above affidavits may be made a part of the evidence in *Morristown Trust Co.* v. *Capstick.*

JOHN A. BERNHARD, 30
Sol. of Stafford, Defendant.

40

Exhibits C. 1, C. 2 and C. 3.

EXHIBIT C. 1.

This exhibit consists of the ledger pages of the Boonton National Bank showing the debits and credits to account of "John H. or Ella F. Capstick"; and the following signature card:—

10 AUTHORIZED SIGNATURES OF

Account opened

.....

Signature

John H. or Ella F. Capstick.
Montville, New Jersey.
Ella F. Capstick
John H. Capstick

Address
Business
20 Introduced by

For The Boonton National Bank, Boonton, N. J.

July 13th, 1916.

EXHIBIT C. 2.

Boonton, N. J. Aug. 14th, 1916, No. 3

THE BOONTON NATIONAL BANK.

30 Pay to the order of E. A. Fisher $100 00/100
One Hundred 00/100 Dollars.

Ella F. Capstick.

Paid 8-15-16

EXHIBIT C. 3.

Boonton, N. J. March 23, 1918 No.

40 THE BOONTON NATIONAL BANK.

Pay to the order of Ella F. Capstick $5000.00
Five Thousand and 00/100 Dollars
Paid 3/23/18

Ella F. Capstick.

Exhibits C. 4 and C. 5.

EXHIBIT C. 4.

John H. Capstick & Son
Printers, Dyers, Bleachers and Finishers.

Montville, N. J., March 4, 1901.

Morristown Trust Company. 10

Gentlemen:

I wish my account changed to John H. Capstick and Ella F. Capstick, so that either one may draw checks against it. Below please find signature of my wife.

Yours respectfully,

John H. Capstick.

20

EXHIBIT C. 5.

MORRISTOWN TRUST COMPANY.

No. 1 Morristown, N. J. June 10th, 1912.
Pay to the order of Marlborough Blenheim Hotel
Thirty Two .....50/100 Dollars
$32.50/100 Ella F. Capstick.
Paid 6/14/12

30

MORRISTOWN TRUST COMPANY.

No. 2 Morristown, N. J. June 13th, 1912.
Pay to the order of Marlborough Blenheim Hotel
Twenty three .....86/100 Dollars
$23.86 Ella F. Capstick.
Paid 6/19/12

MORRISTOWN TRUST COMPANY.

40

No. 3 Morristown, N. J. Aug. 9th, 1912.
Pay to the order of the New Monterey
82 .....05/100 Dollars.
$82.05 Ella F. Capstick.
Paid 8/14/12

Exhibit C. 5.

MORRISTOWN TRUST COMPANY.

No. 4 Morristown, N. J. Aug. 16th, 1912.
Pay to the order of Monmouth Garage
Thirty Five .....40/100 Dollars.
$35.40/100 Ella F. Capstick.
10 Paid 8/21/12

MORRISTOWN TRUST COMPANY.

No. 5 Morristown, N. J. Aug. 16th, 1912.
Pay to the order of The New Monterey
Eighty two .....75/100 Dollars
$82.75 Ella F. Capstick.
Paid 8/20/12

20

MORRISTOWN TRUST COMPANY.

No. 6 Morristown, N. J. Aug. 16th, 1912.
Pay to the order of Monmouth Garage
Three .....30/100 Dollars.
$3.30/100 Ella F. Capstick.
Paid 8/21/12

No.

30 MORRISTOWN TRUST COMPANY.

Morristown, N. J.
Oct. 7th, 1912.
Pay to the order of Hudson Bay Co. $
Fourty Dollars .....Dollars
Mrs. John H. Capstick.
Paid 11/12/12

40

Exhibit C. 6.

EXHIBIT C. 6.

STATE OF NEW JERSEY, }
COUNTY OF MORRIS. } SS:

I, WILLIAM H. THOMPSON, Surrogate of the County of Morris, do certify the annexed to be a true copy of the last will and testament of .....John H. Capstick,..... late of the County of Morris, deceased, and that .....The Morristown Trust Company and Ella F. Capstick—the Executors therein named, proved the same before me, and are duly authorized to take upon themselves the administration of the estate of said testator agreeably to said will. 10

WITNESS, my hand and seal of Office the First day of April, in the year of our Lord One thousand nine Hundred and Eighteen. (SEAL) 20

WILLIAM H. THOMPSON,
Surrogate.

By HARRY R. SHUPE,
Deputy Surrogate.

I, JOHN H. CAPSTICK, of Montville Township, Morris County, New Jersey, do make, publish and declare this to be my last Will and Testament, in manner following, hereby revoking any and all wills by me at any time heretofore made. 30

FIRST: I order and direct all my just debts and funeral expenses, to be duly paid as soon as conveniently can be after my decease.

SECOND: I give and bequeath to my wife, Ella Frances Capstick, all my household goods, furniture, fixtures, household supplies, my horses, carriages, harness, automobiles and stable and garage equipments, and all my jewelry.

THIRD: All the balance of my estate, real and personal, including any interest which I may own in any business, or in any real estate, I do give, devise and bequeath to *The Morristown Trust Company, and Ella F. Capstick,* in trust, however, for the following uses and purposes, viz: 40

Exhibit C. 6.

(*a*) To sell all my real estate whenever in their opinion it is advisable so to do. In the meantime, to collect the rents, issues and profits thereof, and to pay all necessary taxes, insurance and repairs.

(*b*) To invest and keep invested the proceeds of the sale of
10 such real estate, and my other personal property, in the best securities possible, having regard to the rate of interest to be secured thereon, not limiting the said Trustees to the investment of said funds in trust securities, and to collect the income therefrom. But I direct that no money shall be loaned to any person or persons on notes made or endorsed by my said wife, nor shall she make any investments or loans, without the consent of the other Trustee.

(*c*) To pay to my said wife, the income arising from my
20 estate, after the payment of all proper and legal costs and charges, but in case the amount so paid my said wife shall not amount to Ten thousand dollars ($10,000) a year, I direct that a sufficient sum to make up the difference between the income paid her and the sum of Ten thousand dollars, shall be taken from the principal. It being my intention hereby to provide her with the sum of Ten thousand dollars a year, even if a portion of the same shall come out of the principal.

(*d*) Upon the death of my said wife, *Ella Frances Capstick*, to divide my estate, then remaining between my nieces, *Elizabeth*
30 *Safford, Harriet Stafford, Mary Florence Stafford, Clara Louise Stafford*, and my nephew *Wright Henry Stafford*, share and share alike, and in case any of them shall be deceased, such share shall be paid to the heirs of the one so deceased.

Lastly: I do hereby make, constitute and appoint *The Morristown Trust Company, Executor*, and my wife *Ella F. Capstick, Executrix*, of this my last Will and Testament, and direct that neither of them shall be required to give security as such Executors, or as such Trustees, in this or in any other State, and I
40 provide and direct that the said *The Morristown Trust Company*, shall receive for compensation as such Executor and Trustee, the sum of five per cent., on the income and two and one-half per cent., on the principal: but my said wife shall receive no compensation for her services as Executrix, or as Trustee.

Exhibit C. 6.

In Witness Whereof, I have hereto set my hand and seal this Twenty Fourth (24) day of November, in the year of our Lord One thousand Nine hundred and twelve. Signed, Sealed, Published and Declared by the said Testator to be his last Will and Testament, in our presence, and we at his request and in his presence, and in the presence of each other, (all being present at the same time, and the Testator signing first) have subscribed our names as witnesses hereto. 10

JOHN H. CAPSTICK (seal)

F. B. STRONG, Morristown, N. J.
H. L. BAKER, Morristown, N. J.

STATE OF NEW JERSEY 20

MORRIS COUNTY SURROGATE'S OFFICE

Morris County, ss.

I, William H. Thompson, Surrogate of the said county and clerk of the Orphans' Court thereof, the same being a Court of Record, do hereby certify that I have compared the foregoing copy of the last Will and Testament of John H. Capstick, late of the County of Morris and State of New Jersey, deceased, together with Letters Testamentary granted thereon, with the original record thereof, now remaining in my office, and have found the same to be a true copy therefrom. 30

In Testament Whereof, I have hereunto set my hand and seal of office this Eleventh day of April, A. D. Nineteen hundred and Eighteen.
[seal]

WILLIAM H. THOMPSON,
Surrogate, Etc.

40

Opinion of Vice-Chancellor.

Filed February 28, 1919.

Mr. Alfred Elmer Mills for complainant.

Mr. Elmer King for Mrs. Capstick.

10 Mr. John A. Bernhard for Elizabeth Safford, *et al.*

STEVENS, *V. C.* This is an interpleader bill, filed by one of the executors of the will of the late John H. Capstick. Mr. Capstick died in March, 1918. He left him surviving his widow, Ella F. Capstick, one of the claimants and certain nieces and a nephew, his residuary legatees, who are the other claimants. At the time of his death there was on deposit in the complainant trust company the sum of $18,151.34. It stood in the name of "John H. Capstick or Ella F. Capstick." There was also on 20 deposit in the Boonton National Bank the sum of $10,333.21, which likewise stood in the name of "John H. Capstick or Ella F. Capstick." These deposits were such as are made in banks of discount and deposit and not in savings banks. In this respect the case differs from any that has heretofore engaged the attention of this Court.

The widow's contention is that she and her husband were joint tenants of the two funds and that she takes by survivorship. The other defendants contend that the form of the deposit read in the light of the evidence, shows an intention on Mr. Cap- 30 stick's part to make a provision for his wife that was in reality testamentary and that failed of accomplishment under the rule laid down by the Court of Appeals in *Stevenson* v. *Earl,* 20 Dick. 721.

Mr. Capstick was a member of Congress at the time of his death and a gentleman of considerable means. Prior to March 4, 1901, he had an account in complainant company's bank, which stood in his own name. On that day, upon his written order, it was changed to read, as already stated, "John H. Capstick or Ella F. Capstick" and remained thus changed, up to 40 the time of his death. The account was an active one, covering thirty-nine sheets of the bank ledger. Mrs. Capstick drew checks of her own upon this account, but not, as I infer from the evidence, very frequently. The Boonton account was opened in the same form on July 12, 1916. This, too, was an active account and Mrs. Capstick drew, in all, two checks upon it. The money deposited by Mr. Capstick was all his own money.

There cannot be the least doubt as to his purpose. In a private memorandum book containing a list of securities held by him and his wife he wrote "My bank accounts are jointly held by my wife and self. Either can draw upon the accounts." In conversation with a friend, Mr. Potts, about the year 1912, at his (Mr. Capstick's) home, he asked him whether he had a joint account with his wife and Mr. Potts answering no, he said, "it was a nice thing to have; that I should have an account from which my wife could draw and he said if anything happened to him or to me that there would be money there which she could use to tide over until such time as the estate was settled up * * * and I recall one time he told her * * * that there was a joint account (The Morristown Trust Co. account) that she could draw on for the full amount any time she wanted it, when he gave her the book." Exactly what the witness means by the words "when he gave her the book" is not clear, for the account had been opened in the two names eleven or twelve years before and the account being an ordinary one, delivery of the pass book was unnecessary, as her check would suffice. The witness is probably referring, inaccurately, to the changing of the account to the two names.

Mrs. Potts' version of the conversation is, as follows: Mr. Capstick said "Clyde (Mr. Potts) have you a joint account with Jane (Mrs. Potts) and Mr. Potts said 'no': and he said well you ought to have; it is a good thing. Mr. Capstick was a little inclined to profanity and when he talked about his joint account, he said that he came home to his wife one night and he said 'Dearie, I have opened a joint account in the Morristown Trust Company with you and you may draw on it to the full amount, but if you do, I will give you hell.' I remember that because of the remark." The witness testified further that he told her husband, that he had opened the account because he might die any time "and a woman who was left alone in the world with an estate to settle up was in a bad way; he opened this account with Mrs. Capstick that she might use it; if he died she could use this money to settle up things while waiting for the estate to be closed."

From this evidence a twofold purpose is evident. First, he wanted to give his wife the power, occasionally, to draw upon moneys which he was depositing; and secondly, and this was

his main object—he wanted to make provision for her pending the settlement of his estate.

In *Stevenson* v. *Earl,* 20 Dick. 721, one Earl made application to become a depositor in the Savings Fund of the Pennsylvania Railroad. One of the rules of the company required a statement of the name and residence of the person to whom, in the event of death, his deposits should be paid. He stated to the company that in that event, all deposits standing to his credit should be paid to his wife and the account was opened accordingly. He gave his wife the pass book stating to her that here was the money and that if he died, it should go to her; and that she could get it in ten days by giving notice. Under the company's rules, he was at liberty, while living, to draw the whole or any part of the money thus deposited. It was held that the disposition of the money remaining to his credit at his death was testamentary and invalid because not made in the manner prescribed by the statute of wills.

The case in hand differs from *Stevenson* v. *Earl* in the circumstance that, by the form of the deposit, the wife was able to draw on it during her lifetime. The question is, does this differentiate it, in principle, from the case cited. Had the account been opened in the names "John H. and Ella F. Capstick," without more, I should have had no difficulty in finding that they were joint tenants and that Mrs. Capstick took by survivorship. The legal presumption would have been, in the absence of proof to the contrary, that Mr. Capstick intended a present gift and not a resulting trust.

But the account, in the case of both banks, was opened in the names of John or Ella. Now the word "or" and the evidence both negative the idea of a joint tenancy. In the case of such a tenancy neither tenant can destroy the estate of the other. The effect of a transfer by one alone, of his interest, is only to create a severance. Says Blackstone (Book 2x185) "if one joint tenant aliens and conveys his estate to a third person, the joint tenancy is severed and turned into a tenancy in common." In the case in hand either party had the legal right to draw out all the money and thus completely to appropriate and destroy the common fund. It seems, therefore, to be the reasonable inference from the facts that what Mr. Capstick intended, when he deposited his money, was to use it at his pleasure and yet, at the

same time, to give his wife power to draw, if in any contingency she needed money. This is plainly apparent from his picturesque but unconventional remark, "You may draw to the full amount, but if you do, I will give you hell." In other words he meant to give her the equivalent of a power of attorney to be exercised by her in a reasonable way. 10

In *Schick* v. *Grote,* 15 Stew. 352, a savings bank account was opened with "A. G. and wife or either" and Chancellor Runyon held that the form of the entry was not evidence of gift to the wife; that the money deposited remained the husband's at his death. The reason is evident. The depositor deposits his own money in such fashion that from the moment of deposit, he is at liberty to draw it out when and as he pleases. This he could not do, if the gift were complete. Says Gummere, *C. J.,* in *Stevenson* v. *Earl,* "in order to legalize a gift, there must be not only a donative intention but also, in conjunction with it, a complete stripping of the donor of all dominion or control over the thing given." Such being the rule, it follows inevitably that in a case of this kind only after the wife draws the money does she get any title. 20

Marshall v. *Crutwell,* Law Rep. 12 Eq. 328, is a case in point. There plaintiff's husband, being in failing health, transferred his banking account from his own name into the name of himself and his wife and directed his banker to honor checks drawn either by himself or his wife. The husband did not explain to his wife what his intention was in making the transfer but was said by the bank manager to have remarked at the time of the transfer that the balance of the account would belong to the survivor of himself and wife. The wife claimed this balance at his death. Sir G. Jessel, from the way in which the money was drawn out and the use to which it was put, inferred a resulting trust in the husband and he did this notwithstanding that the form of entry on the books of the bank (The conjunction "and" was used) appeared, by itself, to warrant the inference of a joint tenancy. The direction to honor checks of either the one or the other coupled with proof of the application of the money, showed, he thought, that the transaction was "simply a mode of conveniently managing the testator's affairs." 30 40

In view of the way in which the money deposited through a long series of years, was dealt with by Mr. Capstick, I find it

quite impossible to infer an intention to make an immediate gift. As I have said before the purpose appears to have been to let Mrs. Capstick, while he was living, draw a part of his money thus deposited, if she needed it, and then to give her what remained at his death. This brings the case directly within the rule laid down in *Stevenson* v. *Earl* and *Cook* v. *Lum,* 26 Vr. 375.

I regret the result, for it no doubt runs counter to Mr. Capstick's intentions. But finding his gift to be essentially testamentary I must hold that he has not made it in the way prescribed by statute.

Final Decree.

Filed April 5, 1919.

This cause coming on to be heard before the Chancellor in the presence of Edward K. Mills, Esq., solicitor and of counsel for complainant, Elmer King, Esq., of Messrs. King & Vogt, solicitors and of counsel for Ella F. Capstick and John A. Bernhard, Esq., solicitor and of counsel for Elizabeth Safford, *et als,* and the pleadings and proofs having been read and the arguments of the respective counsel having been heard and considered, and the Court having duly considered the said pleadings, proofs and arguments.

And it appearing that at the time of the death of John H. Capstick, late of the County of Morris, deceased, there was deposited in the Boonton National Bank, in Boonton, N. J., the sum of $10,333.21 in the name of "John H. Capstick or Ella F. Capstick"; and that there was deposited in the complainant trust company, the sum of $18,151.34 in the name of "John H. Capstick or Ella F. Capstick."

And it further appearing that Ella F. Capstick was the wife of said John H. Capstick, and upon the death of said John H. Capstick claimed to be entitled to the whole of both deposits so made, as aforesaid, and that the persons in remainder under the will of said John H. Capstick denied such claim of said Ella F. Capstick, and insisted said deposits were part and parcel of the estate of John H. Capstick, deceased, and should be administered according to the terms and conditions of said will.

Final Decree.

And the Court being satisfied that said deposits, as aforesaid, at the time of the death of John H. Capstick became and were a part and parcel of his estate, and that the said Ella F. Capstick by virtue of the deposits aforesaid, was not entitled to said deposits, as claimed by her.

It is, on this third day of April, 1919, by Edwin Robert Walker, Chancellor of the State of New Jersey, Ordered, Adjudged and Decreed, and the said Chancellor doth by virtue of the power and authority of this Court hereby Order, Adjudge and Decree that the sum of $10,333.21 deposited in the Boonton National Bank in the name of "John H. Capstick or Ella F. Capstick," and the said sum of $18,151.34, deposited in the Morristown Trust Company, in the name of "John H. Capstick or Ella F. Capstick" remaining at the time of the death of said John H. Capstick, belong to the estate of said John H. Capstick, deceased, and should be administered as directed by his last will and testament.

It is further Ordered that the complainant be allowed its taxed costs and a counsel fee of $50 and that the defendant, Elizabeth Safford, *et al.*, represented by John A. Bernhard be allowed their taxed costs of these proceedings, together with a counsel fee of three hundred and fifty dollars.

E. R. WALKER,
C.

Respectfully advised,

Frederic W. Stevens,
V. C.

A true copy.

Robert H. McAdams,
Clerk.

Notice of Appeal.

Filed April 16, 1919.

To Alfred Elmer Mills, solicitor of the complainant, and John A. Bernhard, solicitor of the defendants, Elizabeth Safford, Harriet Stafford, May S. Stafford, Clara Louise Stafford, and Wright Henry Stafford.

TAKE NOTICE, that the defendant, Ella F. Capstick, appeals to the New Jersey Court of Errors and Appeals from the decree entered in the Court of Chancery, on the third day of April, 1919, and from each and every part thereof.

KING & VOGT,
Solicitors for Defendant, Ella F. Capstick.

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

ELMER KING,
Of Counsel with Defendant, Ella F. Capstick.

Due and legal service of the within notice of appeal is hereby acknowledged this 12th day of April, 1919.

JOHN A. BERNHARD,
Solicitor of Stafford, Defendants.

Filed April 16, 1919.

Due and legal service of the within notice of appeal is hereby acknowledged this 14th day of April, 1919.

EDWARD K. MILLS,
Solicitor of Complainant.

Petition of Appeal.

Filed April 16, 1919.

New Jersey Court of Errors and Appeals

10

Between MORRISTOWN TRUST COMPANY, *Complainant,* *and* ELLA F. CAPSTICK, *et als.,* *Defendants.*	*On Bill, etc.* *On Appeal from the Court of Chancery.* *Petition of Appeal.*

To the Honorable: The New Jersey Court of Errors and Appeals, the last resort in all causes: 20

The petition of Ella F. Capstick, one of the defendants in the above stated cause and the appellant herein, respectfully shows:

That your petitioner finds herself aggrieved by a certain decree or order made in the Court of Chancery by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, on the third day of April, 1919, in a cause wherein the Morristown Trust Company was complainant and the said Ella F. Capstick, Elizabeth Safford, Harriet Stafford, May Florence Stafford, Clara Louise Stafford and Wright Henry Stafford were defendants, in and by which decree it was ordered and decreed that the sum of $10,333.21, deposited in the Boonton National Bank in the name of "John H. Capstick or Ella Capstick" and the sum of $18,151.34, deposited in the Morristown Trust Company in the name of "John H. Capstick or Ella F. Capstick," remaining at the time of the death of the said John H. Capstick, belonged to the estate of John H. Capstick, deceased, and should be administered as directed by his last will and testament, your petitioner being aggrieved in the following respects, to wit: 30 40

1. That said decree or order erroneously adjudged and decreed that said deposits, as aforesaid, at the time of the death of John H. Capstick, became and was part and parcel of his estate, and that said Ella F. Capstick by virtue of the deposits aforesaid, was not entitled to said deposits as claimed by her.

2. That said decree or order erroneously adjudged and decreed that the sum of $10,333.21, deposited in the Boonton National Bank in the name of "John H. Capstick or Ella Capstick" and the sum of $18,151.34, deposited in the Morristown Trust Company in the name of "John H. Capstick or Ella F. Capstick," remaining at the time of the death of the said John H. Capstick, belonged to the estate of John H. Capstick, deceased, and should be administered as directed by his last will and testament.

And your petitioner hereby appeals form said decree or order and from each and every part thereof, upon the ground:

1. That the same is erroneous in that the Court should have adjudged that said deposits, as aforesaid, at the time of the death of said John H. Capstick, were not, and did not become a part and parcel of his estate, and that the said Ella F. Capstick, by virtue of the deposits aforesaid, was entitled to said deposits as claimed by her.

2. That the Court should have adjudged and determined that the sum of $10,333.21, deposited in the Boonton National Bank in the name of "John H. Capstick or Ella Capstick" and the sum of $18,151.34, deposited in the Morristown Trust Company in the name of "John H. Capstick or Ella F. Capstick," remaining at the time of the death of the said John H. Capstick, belonged to Ella F. Capstick and not to the estate of John H. Capstick, deceased, and should not be administered as directed by his last will and testament.

And your petitioner humbly appeals from said decree and order and from each and every part thereof, and finds herself aggrieved thereby because said decree or order was for divers other reasons illegal, erroneous and unlawful.

Your petitioner humbly appeals from said order and decree on the ground that the same is erroneous and that the Court of Chancery should have made a decree in favor of your petitioner and against the other defendants.

Your petitioner therefore prays that the said decree or order of the said Court of Chancery, made in the premises aforesaid, be reversed, set aside, and for nothing holden, and that the Court of Chancery may be directed to make a proper decree in

accordance with the directions of this Honorable Court, and that your petitioner may have such further relief in these premises as to your Honorable Court may seem meet.

KING & VOGT,
Solicitors for Appellant.

10

ELMER KING,
Of Counsel.

Answer to Petition of Appeal.

Filed.

The answer of the above named respondents, Elizabeth Safford, Harriet Stafford, May Florence Stafford, Clara Louise Stafford and Wright H. Stafford, to the petition of appeal of the above named appellant.

20

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was, on the third day of April last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And these respondents are advised and believe, that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

30

JOHN A. BERNHARD,
Solicitor and Counsel for above named Respondents.

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New Jersey Court of Errors and Appeals

MORRISTOWN TRUST COMPANY, *Complainant and Appellee,* and ELLA F. CAPSTICK, *et als.,* *Defendants,* and ELLA F. CAPSTICK, *Appellant.*	*On Bill.* *On Appeal from Court of Chancery.*

BRIEF FOR STAFFORD DEFENDANTS.

Facts.

One, John H. Capstick, husband of Ella F. Capstick, departed this life March 17th, 1918, leaving a last will whereby he gave a life interest in his property to his widow, remainder over to the so-called Stafford defendants.

The decedent, for many years prior to March, 1901, had a commercial open account in the Morristown Trust Company. On March 4th, 1901, he caused that Trust Company to so alter its records that the account was thereafter recorded as "John H. Capstick or Ella F. Capstick" (p. 16, l. 43). This was apparently Mr. Capstick's principal bank account and he continued to draw upon it. Ella G. Capstick occasionally drew upon it (p. 15, l. 3). It continued to remain purely a commercial account (p. 10, l. 10). At Mr. Capstick's decease the account balance was $18,151.34.

The decedent, on July 7th, 1918, opened an account in The Boonton National Bank in the name of "John H. or Ella F. Capstick" (p. 6, l. 10) and signed the signature card depositing $1,000.00. On July 13th, 1916, Ella Capstick signed the card (p. 5, l. 38). This also was a commercial account (p. 10, l. 10) against which both parties might draw checks. As a matter of fact Ella F. drew two checks (p. 13, l. 30). At Mr. Capstick's decease, the account balance was $10,333.21.

The present bill is an interpleader by the banks and the sole question involved is whether any part or all bank balances belong to Ella F. Capstick, or to the estate of John H. Capstick.

In view of the evidence adduced at the hearing, we deem it expedient to distinguish between these two accounts and to refer to them severally as the Boonton and Morristown accounts, since although the principles of law governing the accounts are identical, the evidence is quite different.

We respectfully call attention to a ruling made at the hearing by the Vice-Chancellor on the admissibility of certain evidence (p. 9, l. 38). He there said "The conversation must, of course, relate to this particular account." That ruling is of importance in its application to all the evidence offered in this case, in view of the fact that there is no evidence of any conversation throwing light upon the testator's intent in so far as the Boonton account is concerned. Because of the positive law governing this case we doubt if the testator's intent is of any vital importance, however, we deem it wise to analyze the evidence and obtain the testator's intent. Such an anylysis discloses the following facts regarding the Boonton account.

(1) Myers, the assistant cashier testified that the account was opened July 7th, 1916, by Mr. Capstick in the name "John H. or Ella F. Capstick." On April 13th Mrs. Capstick signed the signature card (p. 5, l. 39). They both drew against it (p. 8, l. 47), Ella F. drawing only two checks (p. 13, l. 32).

(2) Clyde Potts' conversations with decedent were prior to the year 1912 (p. 9, l. 44) and therefore long prior to the opening of the Boonton account. The witness further says: *"I will say that he never mentioned anything to me about joint account he had in the Boonton Bank"* (p. 9, l. 25). Hence none of witness' testimony concerns the Boonton account.

(3) Jane Potts says conversations first began in 1910 (p. 1, l. 26) long before Boonton account was opened. *She also said "I don't know of the Boonton account;* the account I know about was the Morristown Trust Company" (p. 11, l. 25). The witness was then asked the question "What did he (the testator) say about that?" referring to the Morristown account. In answer to that question there follows the conversations all relating solely to the question *i. e.* the Morristown account. Hence none of this witness' testimony relates to the Boonton account.

(4) Thomas Beddow. He fixes his conversation at seven or eight years ago. He says "It was likely seven or eight years

ago" (p. 12, l. 26), *i. e.* long prior to the opening of the Boonton account. Witness also testified "he (testator) said he had his account in the Morristown Trust Co." (p. 12, l. 40). "No, I don't remember him mentioning the Boonton at all" (p. 12, l. 40). There is no evidence here relating to the Boonton account.

(5) Ella F. Capstick. Her testimony as to the Boonton account relates solely to the facts that she signed the signature card (p. 13, l. 15); she drew two checks (p. 13, l. 23), one on Mr. Capstick's printed check (p. 15, l. 20) and the other on a counter check (p. 15, l. 23). She had no Boonton Bank account (p. 15, l. 27). There is no further reference to the Boonton account in her testimony unless it be inferred from the entry in the "Private book of property owner by John H. Capstick," (p. 15, l. 33) in which was written "My bank accounts are jointly held by my wife and self. *Either can draw upon the accounts*" (p. 15, l. 45). More concerning this later.

(6) Mr. Coriell's testimony relates solely to the Morristown account, he being that company's secretary and vice-president (p. 16, l. 8). Hence, as to the Boonton account, the only facts before the Court are (a) John H. Capstick opened the account July 7th, 1916, in the name of "John H. Capstick or Ella F. Capstick," and signed the signature card. (b) On July 13th, 1916, Ella F. Capstick signed the signature card, (c) it was a commercial account and (d) both drew against it occasionally. Ella F. drawing only two checks. (e) The testator's note book contained the memorandum "My bank accounts are jointly held by my wife and self. *Either can draw upon the account,*" and it may be a fair presumption that the notation refers to the Boonton account, and if so, it does nothing more than state the fact.

There is no evidence of any kind as to the testator's intent in opening the Boonton account except that it is apparent that the fact that both could draw against it was a governing factor. The bare fact that the account was so opened and the testator's own statement that the account is jointly held so that "either can draw upon the account," is the only evidence regarding intent, and in so far as it goes, it only shows that the testator enabled the wife to draw at pleasure on this account.

So much for the Boonton account. The testimony relating to the Morristown account is as follows:

(1) Mr. Coriell, the treasurer says: "Mr. Capstick had an account prior to March 5, 1901 (p. 16, l. 13). On that date,

pursuant to a letter from Mr. Capstick, the bank changed the account to "John H. Capstick or Ella F. Capstick" (p. 16, l. 43). It continued to be a commercial account (p. 16, l. 34). Both could and did draw against it (p. 16, l. 44).

The letter is instructive. It directs the change in these words. "I wish my account changed to John H. Capstick and Ella F. Capstick, *so that either one may draw checks against it.*"

So far as any intent is expressed, it is a mere authorization to the bank to allow the wife to draw against the account at will. It is but a substitute for a power of attorney to sign checks.

(2) Clyde Potts, witness' testimony, so far as it concerns the testator's intent, is also instructive. He (testator) said "I should have an account *from which my wife could draw*" (p. 10, l. 8). He (testator) said "If anything happened to him that there would be money there which she (wife) could use to tide her over until such time as the estate was settled up."—"*That she always would have money to use.*" He (testator) told Mrs. Capstick that there was a joint account that she could draw on for the full amount at any time she wanted it when he gave her the book, (p. 10, l. 22) and again, "*that she would draw on as well as himself*" (p. 10, l. 22), and yet again "that in case of *any accident or his death, there would be a fund to use* until the estate was settled up" (p. 10, l. 26).

The intention, in so far as it is here expressed is, at most, an authorization to draw on the testator's account, a power of attorney in fact, together with a notion of a gift in case of accident or death.

(3) Jane Potts. This witness' testimony of testator's intent is also illuminating. She testifies that the testator said to his wife, "*You may draw on it to the full amount, but if you do I will give you hell*" (p. 11, l. 34). Again he (testator) opened this account with Mrs. Capstick that she might use it, and if he died she could use this money to settle up things waiting for the estate to be closed (p. 11, l. 43). Here again there is a clear intent of an authorization to draw against the account and the notion *of a gift in case he died.* Nothing more.

(4) Thomas Beddow. Here again evidence of intent is of like tenor. The testator said, "I changed it (the bank account) so *that if anything happened to him (the testator) at any time she had plenty of money to use without being tied up for money,*" and again "She would have plenty of money to use while things were tied up" (p. 12, l. 38), and yet again, "If I did not change

it my wife would have trouble to get hold of cash *if anything happened to me.''*

Hence, again we find no evidence of a gift *inter vivos,* but only an authorization to draw during life of testator, with a notion of a gift at death.

(5) Ella F. Capstick. Her evidence, to her credit, is absolutely truthful and colorless as to testator's intent. She does, however, identify the letter to the Morristown Bank, authorizing the change, heretofore adverted to and in which the testator said ''I wish my account changed—*so that either may draw checks against it''* (p. 15, l. 44), and she produces also the memo. book (p. 15, l. 32). This book is marked *''Private book of property owned by John H. Capstick.''* In the book, page 36, he says: ''I have made in this book a list of securities held by Mr. & Mrs. Have a box in safe deposit at Morristown Trust Company and will take one at the Boonton National Bank, owned jointly between my wife and self, both having access to them.'' This notation so far obviously does not refer to the bank accounts. It refers in specific terms to ''Securities'' and to ''safe deposit boxes'' in which, presumably the jointly held securities were placed. He then says, ''My bank accounts are jointly held by my wife and self; *either can draw upon the accounts''* (p. 15, l. 45).

Here again is the testator's primary intention expressed, that is, that *either may draw upon the accounts.* There is absolutely no further shread of evidence bearing upon the testator's intention anywhere throughout the testimony.

Finally in the recital of this evidence at length it should be noted, that insofar as we know these two accounts were the testator's only bank accounts. In the note book, he says ''My bank accounts, etc.'' They were both commercial accounts. They were not in the conjunctive but in the disjunctive. Both were John H. or Ella F. The wife never made a single deposit in either account and apparently she never drew more than two checks against the Boonton account and seven against the Morristown account, although the latter was a joint account for fifteen years.

Law.

Two principles of law are involved in solving this case, both of which, we take it, are too firmly established to admit of dispute, *i. e.,* the law governing gifts *inter vivos* and the law governing gifts to take effect upon the death of the donor. The following discussion bears upon both questions alike.

Chancellor Runyon, Ordinary, in *Schich* v. *Grote,* 15 Stew. 352 at 355, said:

> "To constitute a perfect gift, the donor must part with the possession of and the dominion over the property. In this case, Mr. Grote, as before stated, retained his control over the property to the time of his death."

The Grote case was that of a joint deposit as in the case at bar, and the Court held there was no gift.

Chief Justice Beasley, in speaking of the donor stripping himself of dominion, in *Cook* v. *Lum,* 26 Vroom 373, said:

> "It is this absolute abnegation of power (by the donor) that, from a legal point of view, makes the transaction enforceable." (The gift was held invalid.)

Chief Justice Gummere, in *Stephenson* v. *Earl,* 20 Dick Ch. at p. 725, said:

> "But in order to legalize such a gift, there must be not only a donative intention, but also, in conjunction with it, a complete stripping of the donor of all dominion or control over the thing given. (Citing Cook *v.* Lum.) As was said in that case, this is the crucial test, and if it be applied to the present case, the gift is not to be sustained; for, neither by force of his contract with the company, nor by the delivery of the pass book, did he intend to, nor did he in fact, part with his complete dominion over any part of the moneys deposited by him."

The Earl case was very much like the case at bar and this wife's claim was disallowed.

The case of *Taylor* v. *Coriell,* 21 Dick. Ch. at page 271, *V. C.* Bergen quotes the Chief Justice in the case last cited and proceeds:

> "It is perfectly clear from the evidence in this case that the father intended to and did retain his control over the thing given, and that the most liberal construction in favor of the complainant that can be given to this evidence is that it was his wish that she should have whatever remained after his death. Even if we assume a donative purpose proven, the other element, the stripping of the donor of all dominion or control over the gift,

is wanting. There is no pretence that the father lost all dominion at any time. The account stood in her name as well as of his daughter; he retained the effective means of control, the pass book, in his possession until his death, and during his whole life exercised exclusive the right of ownership over the whole, *drawing, using* and *depositing according* to his will and pleasure."

The above case was a joint account of father and daughter and is slightly differentiated from that at bar, in that apparently the daughter never drew against the account. However, in our case the principle is the same, as the testator did exercise, at all times, complete dominion, allowing the wife to draw.

The crucial effect of continued dominion by the alleged donor over his alleged gift, is well illustrated in *Parker* v. *Copland,* 4 Robbins at page 690. That was a case of the gift of a savings bank book. After the gift had been made the pass book was returned to the tin box of the donor, where it remained until her death. The Court of Errors evidently felt that it was a hard case. The Court said:

> "The failure of an intended benefaction, whether by gift or legacy, is one of the unavoidable inconveniences of having laws that must be observed" * * * "The intended benefaction according to the proofs, was a gift that continued to be under the benefactor's dominion after it had been made." It was therefore held that no gift resulted.

Again in *Crane* v. *Brewer,* 3 Buch. 558, a joint account in the name of husband and wife was at issue. The bank book was mutilated and the husband's name stricken out with ink. The husband's trustee in bankruptcy sought to obtain the moneys. Wholly aside from the question of fraud involved the Court, *V. C.* Howell, held:

> "But suppose that the entry in the books of the Morton Trust Co. had been proven as alleged, *then the result would have been that there was on deposit with the trust company a sum of money which originally belonging to the husband, but which could be drawn by either party.* This alone would not be evidence of a gift to the wife. (Citing cases.) The act of authorizing the wife to draw upon the fund is entirely consistent with the husband's continued ownership of it."

While this excerpt is dicta in that case, it is abundantly supported by authority and is strictly in point for the case at bar.

In *Swayze* v. *Huntington,* 12 Buch. 127 at 133, *V. C.* Howell again reverts to this question. He says:

> "The general subject of gifts has been dealt with by the courts of this State, including the court of last resort, so many times and under so many circumstances, that there can be no question about the rule which prevails in this jurisdiction. I adopt in its entirety the conclusion reached by Vice-Chancellor Bergen in his opinion in Taylor *v.* Coriell, 77 N. J. E. 262, which holds that in order to establish a gift *inter vivos,* the following facts 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 action, like a certificate of stock or evidence of indebtedness, in which case the delivery must be of that variety of which it is most capable (citing cases); 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."

Our Court of Errors and Appeals finally passed squarely upon the question at issue in *Shippers* v. *Kempkes,* a case strangely enough not reported in the State's reports, but reported in 67 Atl. 74.

The facts were, Elizabeth Kempkes opened an account in the Paterson Bank in her own name in 1891. She made further deposits and drew against the same. In 1903 the following entry was made both in the bank ledger and the bank book: "The name of R. Herman Kempkes added by request of Eliza Kempkes." The old book finally being filled, a new book was taken out in the name "In account with R. Herman or Eliza Kempkes." Mrs. Kempkes died November, 1903. Herman Kempkes drew $500.00 after the death of Elizabeth Kempkes, leaving a balance on deposit. The balance was in dispute. Herman Kempkes "claims both as a present gift to him and by virtue of his survivorship of Mrs. Kempkes," which by a curious coincidence is almost the exact language of the defendant's wife's claim in her brief in this case. She claims (her brief, p. 7) "by reason of a gift *inter vivos* and her survivorship." The Court, however, denied both claims, holding:

> "She in no sense gave over the possession of the pass book to Herman, *or ceased either her actual dominion over it or right to reduce the fund represented by it to her own possession at any time.* Under such circumstances, a present gift of the fund will not be established. (Citing Cook *v.* Lum)—Where the subject of an alleged gift remains, or is immediately replaced, under the dominion of

the donor, the gift is not complete." (Citing Parker *v.* Copland).

"But it is contended that, even if the fund did not pass in this case by the indorsement on the pass book during the life of Mrs. Kempkes, it did pass at her death to Herman as survivor, as a valid gift" * * * "Such attempted gifts, *donatio causa mortis,* are not valid, but are clearly void under our decision, not of course, because of a lack of a donative purpose, but because the intent or direction is testamentary in character, and not made in the manner prescribed by the statute of wills. (Citing Stevenson *v.* Earle.) So that in whatever light this alleged gift may be viewed, it is void and unenforceable."

The case is clearly universal law. The attempted gift is bad, either as a gift *inter vivos* or *donatio causa mortis.* The right of the co-depositor, Mrs. Capstick, is simply a right of agency, in effect she is the holder of a power of attorney. Courts, other than ours, have more explicitly so stated the law. A Maryland Court, *Murry* v. *Connon,* 41 Md. 466, in a like case said:

"The depositor retained control by the very terms of the contract with the bank, and could have withdrawn it at any time, or revoked the power of the co-depositor to obtain it on her own order, and if she had drawn out any portion of the money, she would have drawn it out as the money of James Connon, acting in the matter as his agent, and by virtue of an existing authority derived from him."

A New York case, *Re Bolin,* 136 N. Y. 177, said:

"There were no words of gift and the receipt and holding of the pass book were consistent with a mere custody or agency. The law never presumes a gift" * * * "The evidence must show that the donor intended to direct herself of the possession of her property; and it should be inconsistent with any other intention or purpose."

Finally, as above noted, Mrs. Capstick's counsel recognizes his difficulty in his brief (p. 4). He says:

"It must be admitted, not only for the manner in which the accounts were carried, but also from his declaration, both verbal and written, that he intended Mrs. Capstick to have these funds."

And again

"A will is a testamentary disposition, taking effect after death. In such cases the statute intervenes and the legal requirement as to the manner of execution must be followed."

"Under a will no present interest passes at its execution; it speaks only at death and after probate."

The contention is then made that

> "All the money was hers; its use was dependent on her check, and taking effect at once, does not contravene the statute of wills."

But such a contention must fail because of the principle laid down in *Cook* v. *Lum,* 26 Vr. 375, and because Mr. Capstick also expressly retained dominion over both accounts at all times.

Moreover, this phase of the matter comes well within the principle set out in *Marshall* v. *Crutwell,* Law Rep. 12, Eq. 328, which is cited fully in the opinion of Vice-Chancellor Stevens.

It seems to me that it cannot be denied that the testator during his lifetime could have (a) drawn the whole or any part of his account; (b) revoked the wife's power to draw; (c) or that his judgment creditor could have levied against both accounts; or (d) that his trustee in bankruptcy, had he been so unfortunate as to have one, could have legally seized the accounts.

Mr. Capstick, we urge, retained dominion and as this Court said of a similar situation in *Parker* v. *Copland, supra:*

> "The failure of an intended benefaction, whether by gift or legacy, is one of the unavoidable inconveniences of having laws that must be obeyed."

It is respectfully urged that the law and facts warrant an affirmance.

Dated June 16, 1919.

JOHN A. BERNHARD,
Of Counsel for Stafford Defendants.

New Jersey Court of Errors and Appeals.

MORRISTOWN TRUST COMPANY, *Complainant and Appellee,* and ELLA F. CAPSTICK, *et als, Defendants,* and ELLA F. CAPSTICK, *Appellant.*	On Bill On Appeal.

Brief on Part of Ella F. Capstick.

John H. Capstick, the husband of Ella F. Capstick, departed this life March 17th, 1918, leaving a last will and testament in which he gave the net income to his wife, for life, with remainder over to nephew and nieces.

On July 7th, 1916, he opened an account in the Boonton National Bank in the name of "John H. or Ella F. Capstick, Montville, New Jersey," by depositing $1,000. This account remained active until the time of his death and was drawn against by both John H. Capstick and Ella F. Capstick, his wife. At the death of Mr. Capstick the balance in this account was $10,333.21.

For many years Mr. Capstick also had an account in the Morristown Trust Company. On

March 4th, 1901, he wrote a letter to the Trust Company reading as follows:

> "I wish my account changed to John H. Capstick *and* Ella F. Capstick so that either one may draw checks against it. Below please find signature of my wife."

and the account was changed to "John H. *or* Ella F. Capstick." On this last account both Mr. and Mrs. Capstick drew checks, and at the death of Mr. Capstick there remained a balance in the bank of $18,151.34. Under date of July, 1917, in a book marked "Private book of property owned by John H. Capstick," he wrote as follows:

> "I have made in this book a list of securities held by Mr. and Mrs. Have a box in safe deposit in Morristown Trust Company and will take one at the Boonton National Bank, owned jointly between my wife and myself, both having access to them. My bank accounts are jointly held by my wife and myself, either can draw upon the accounts." (15)

Clyde Potts, of Morristown, testified that in 1912, Mr. Capstick, after inquiring whether witness had a joint account, advised him to have a joint bank account upon which he or his wife could draw, and in urging the matter said,

> "If anything happened to me there would be money there which she could use to tide over until such time as the estate was settled up. It was a nice thing for a woman to have a joint account with her husband, that she always would have money to use." (10)

Jane Potts, testified that in 1910, speaking of the account in the Trust Company, he said,

> "Clyde have you a joint account with Jane?" Mr. Potts said, no. "Well he answered, it is a good thing, you ought to have," Mr. Capstick said he opened this account, because he might die any time and a woman who was left alone in the world with an estate to settle up was in a bad way." He opened this account with Mrs. Capstick "so that she might use it." "If he died she could use this money to settle up things while waiting for the estate to be closed." (11)

Thomas Beddow testifies that seven or eight years ago, while at dinner, Mr. Capstick inquired about his bank account and had witness change it into their joint names, witness testifies Mr. Capstick said he

> "had his account in the Morristown Trust Company for Mrs. Capstick, so if anything happened to him at any time, she had plenty of money to use without being tied up for money." (12)

Both were commercial accounts and it did not require the possession of the book of deposit to withdraw money from the bank.

At the time of the death of Mr. Capstick, did the balance of these accounts belong to the estate or to the defendant, Mrs. Capstick? The learned Vice-Chancellor decided that upon the death of Mr. Capstick the funds in question were subject to the provisions of his will and Mrs. Capstick had no interest therein, hence the appeal.

It must be admitted, not only from the manner in which the accounts were carried, but also from his declaration both verbal and written, that he intended Mrs. Capstick to have these funds.

There are a number of decisions in this state concerning joint accounts, but in all these cases it was necessary to *present the book to the bank at the time of withdrawal of any of the funds.*

Law.

Skillman *v.* Wiegan, 53 Eq. 198, Schick *v.* Grote, 42 Eq. 352, Gordon *v.* Toler, 13 Buch. 25. and many others in this state all deal with accounts in savings banks, and the cases turned on the possession of the deposit book at the time of death. In these cases it was held that where the possession of the deposit book was retained by the depositor at the time of his death, the joint account did not vest in the survivor because it would take effect after death and in contravention of the statute of wills.

A will is a testamentary disposition, taking effect after death. In such cases the statute intervenes and the legal requirement as to the manner of execution must be followed.

Under a will no present interest passes at its execution; it speaks only at death and after probate.

In the present case, Mrs. Capstick *received a present* interest in the money, *when her name was added to that of her husband on the deposit books* and each deposit by Mr. Capstick after that time re-affirmed this right in Mrs. Capstick.

All the money was hers; its *use* was dependent on her check, and taking effect *at once,* does not contravene the statute of wills.

It is admitted that to complete a *gift,* the transfer must be such, that, in conjunction with the donative intention, it shall completely strip the donor of his dominion over the thing given, Cook *v.* Lum, 26 Vr. 375.

The deposit, therefore, was not a gift to Mrs. Capstick. Mr. Capstick did, however, give his wife the unrestricted right of withdrawal for her benefit, of any or all of the money, then, or which might thereafter be deposited.

The learned Vice-Chancellor held it was not a joint tenancy, because neither joint tenant can destroy the estate of the other and quotes Blackstone, "if one joint tenant aliens and conveys his estate to a third person, the joint tenancy is severed and turned into a tenancy in common," but the very quotation is proof of a condition existing in a joint tenancy, where the act of one may sever the tenancy and create another legal estate.

But there is a clear distinction between a deposit for the benefit of two, where the joint depositors are husband and wife, because of their unity.

3 Ruling Case Law (page 714, 346) expresses a distinction between the ordinary joint account and a joint account of husband and wife this way.

> "The courts are, it seems, more favorable to the claim that a deposit by a husband in the joint names of himself and wife constitutes a completed gift to the wife, in case she survives her husband, on account of the unity idea of the relation of husband and wife, making the possession of one the possession of the other."

In Metropolitan Savings Bank of Baltimore *vs.* Murphy, 33 A. R. 640, the Court styled a saving

account in the name of husband and wife a "joint account" and confirmed payment to the wife.

The unity idea of the relation of husband and wife, making the possession of one the possession of the other was given effect in McElroy *v.* Albany Savings Bank, 8 App. Div. 46, 40 N. Y. Supp. 422 in which the court held that an entry in a Savings Bank pass-book representing money deposited by a husband reading "Albany Savings Bank in account with Mrs. Alida P. Bell, her husband, or the survivor of them" constituted the parties joint owners of the deposit and gave the wife the right, if she survived her husband to take the balance of the deposit. The court said it was not necessary to the validity of the gift, under the circumstances, that the wife should have possession of the pass book during the life time of the husband. A similar decision was rendered in McElroy *v.* National Savings Bank, 8 App. Div. 192, 40 N. Y. Supp. 340.

The facts in the case of Stevenson *v.* Earl, 65 Eq. 21 are quite different from the case before the Court.

In that case, the Pennsylvania R. R. Company established a depository for its employees. Among other provisions, the person depositing must state,

> "the name and residence of the person to whom, in the event of death, his deposits and the accrued interest thereon shall be paid."

and upon satisfactory proof of death of the depositor,

> "the money belonging to him shall be paid

> over to the person designated in his application to receive the same."

The depositor made a last will and testament in which he gave all his estate, except a small legacy, to his executor, upon certain trusts. The Vice-Chancellor had held that the deposit was impressed with a trust, defined by the printed regulations filed with the Company. The court of Errors and Appeals, however, declared,

> "he intended to retain the absolute control and ownership of all the moneys which were deposited by him and to deal with them on that basis during his life; and that his donative purpose to his wife was confined solely to such balance, if any, as should remain to his credit at the time of his death."

On the theory that a *trust* was created, the Court said,

> "If the right of the wife to the fund in dispute is to be sustained at all, it must be, because the donative purpose of the deceased, toward her, with relation to such balance of his deposit, as should remain to his credit at his death, was rendered effective by the agreement entered into between himself and the company, coupled with the delivery by him to her of the pass book which he had received from the company as a voucher; in other words, because that agreement, and the delivery of the pass book constituted a valid gift *inter vivos.*"
>
> "The expressed intention of the deceased was *only to bestow upon his wife so much of his deposit as should remain undrawn by*

> *him at his death,* such a gift is purely testamentary in character," and the Court held that, "such moneys did not become the property of the wife, because such agreement constituted a testamentary disposition of his property, which was invalid because not made in the manner prescribed by the statute of wills."

When Mr. Capstick placed the name of Mrs. Capstick on the account, he *then* gave her all *the money.* He also *retained* all the money. Either one could draw all the funds any time. The right existed and was not limited.

The moneys were not given *at the time of his death,* it was perfected when the change was made by him in the deposit.

It is not a question of his intent but the legal result from his own act.

There was nothing in the deposit denoting any change in case of his death, nor did Mr. Capstick limit this right during his life time; his death could not and did not curtail this right given her years before. If he had intended this limitation he would have expressed it.

We respectfully submit the decree should be set aside and the balance of the deposits decreed to belong to Mrs. Capstick.

KING & VOGT,
Solicitor and of Counsel with
Ella F. Capstick.