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BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

90-4

Between

JOHN B. DYER, executor
of estate of NANNIE T.

WHELEN, deceased,
Complainant,

and

ELIZABETH C. SMITH,
Defendant.

10

Bill of Complaint.

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

20

The complainant, John B. Dyer, of the City of New York City, in the County of New York and State of New York, respectfully shows that:

1. He was named as executor of the will of Nannie T. Whelen, deceased, who died in Atlantic City, N. J., on October 17, 1931.

30

2. The will of the said Nannie T. Whelen, deceased, was admitted to probate in the Surrogate's Court of Atlantic County, at Mays Landing, N. J., on March 18, 1932, and this complainant duly qualified as executor.

Bill of Complaint

3. The said Nannie T. Whelen, deceased, prior to her death, resided at the Hotel Flanders, St. James Place, Atlantic City, New Jersey, and died while a guest at that hotel.

4. The said Nannie T. Whelen had been very seriously ill for some months prior to her death, and had in her employ a trained nurse, during her last illness.

5. Among the guests at the same hotel was one Elizabeth C. Smith, who became friendly to the said Nannie T. Whelen, and assisted, without any arrangements for compensation therefor, in and about the sick room of the said Nannie T. Whelen. The said Elizabeth C. Smith became familiar with the affairs of the said Nannie T. Whelen, wrote letters in her behalf, became familiar with the finances of the said Nannie T. Whelen, and took into her charge the bank books, check books and other private papers of the said Nannie T. Whelen.

6. On or about September 22, 1931, the said Elizabeth C. Smith caused a document to be drawn, purporting to be a last will and testament, in which the said Elizabeth C. Smith caused herself to be made the chief beneficiary of decedent's estate. At the time this document was drawn, the said Elizabeth C. Smith knew the relatives and next of kin of the said Nannie T. Whelen; she knew the said Nannie T. Whelen was in an unusually weak condition, and knew that the said Nannie T. Whelen was likely to die any moment; said document was prepared and executed in the absence of any of the

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relatives and next of kin of the said Nannie T. Whelen, and in the absence of the nurse from the room.

7. The said Elizabeth C. Smith was an entire stranger to the deceased, Nannie T. Welen having met her only because of both being guests in the same hotel. The said Elizabeth C. Smith concealed the fact that the so-called will had been drawn, and when asked the question, denied it, and told those who did know about the drawing of the paper to refrain from telling any of the relatives. 10

8. Subsequent to the death of the said Nannie T. Whelen, deceased, the said Elizabeth C. Smith, through her attorney, offered the document purporting to be a will, for probate. 20

9. A caveat was filed on behalf of the said Florence S. Dyer, chief beneficiary under the former will, and there was a hearing on said caveat before the Orphans' Court of Atlantic County, at Mays Landing, New Jersey, March 9, 1932. The document purporting to be a will, in favor of Elizabeth C. Smith, was denied probate.

10. During the hearing of the caveat, which resulted in the denial of probate of the document purporting to be a will, the Court requested counsel for the said Elizabeth C. Smith, who was present, to state the amount of the estate, and counsel replied it was somewhere between six thousand (\$6,000) dollars and seven thousand (\$7,000) dollars. 30

Bill of Complaint

11. Promptly upon having probated the will in which this complainant was named executor, this complainant endeavored to ascertain the condition of the financial affairs of the said Nannie T. Whelen, deceased, and discovered that the said Elizabeth C. Smith had, while in possession of certain blank checks to pay the expenses of the said Nannie T. Whelen, filled in one of the said checks for five thousand (\$5,000) dollars, payable to herself, although at the time the check was signed, there was less than six thousand (\$6,000) dollars of a balance in the account of the said Nannie T. Whelen.

12. Prompt demand was made by this complainant upon the said Elizabeth C. Smith for said money, a copy of said demand is hereto attached and made a part hereof, and the said Elizabeth C. Smith refused to return said money to this complainant, as executor of the estate.

13. Complainant further says that on October 13, 1931, there was paid to the said Elizabeth C. Smith the sum of two hundred eighty dollars and forty cents (\$280.40), by check marked "in full payment of services as nurse to date."

14. The said Elizabeth C. Smith is a guest of the Hotel Flanders, St. James Place, Atlantic City, New Jersey, and has no real or personal property within the State of New Jersey, and has deposited the sum of five thousand (\$5,000) dollars, obtained from the bank account of Nannie T. Whelen, deceased, in a Pennsylvania banking institution, in Philadelphia, Pennsylvania.

Bill of Complaint

15. Your complainant alleges that the said Elizabeth C. Smith has wilfully, fraudulently, and with the purpose to cheat and defraud the estate of Nannie T. Whelen, deceased, taken this money into her own possession.

Complainant is without adequate remedy in the courts of law, and therefore prays: 10

1. That an order to show cause be issued out of this court, returnable at a short day, why the money now in the hands of Elizabeth C. Smith, to wit, five thousand (\$5,000) dollars, with interest thereon from October 6, 1931, should not be paid to this complainant as executor.

2. That an order issue from this court, restraining the said Elizabeth C. Smith, her attorney, agents or assigns, from using, transferring, assigning or disposing of said sum of five thousand (\$5,000) dollars in any manner whatsoever, until the further order of this Court. 20

3. That a trust be impressed upon these funds now in the hands of Elizabeth C. Smith, her attorney, agents or assigns, as being the property of the estate of the said Nannie T. Whelen, deceased, and, as such, be restored to John B. Dyer, executor of said estate. 30

4. That a writ of *ne exeat* issue, to insure defendant's presence to answer this complaint.

5. That a writ of subpoena may issue, command-

Bill of Complaint

ing said defendant to answer this bill of complaint and to abide such decree as this Court may make in the premises.

ROBERTSON & ROBERTSON,
*Solicitors for and of Counsel
with Complainant.*

10

TO ELIZABETH C. SMITH:

I herewith demand of you, the sum of FIVE THOUSAND (\$5,000) DOLLARS, and any interest obtained thereon by you, being the amount of a check signed in blank, by Nannie T. Whelen, and dated October 6, 1931, being check #114, on the Guarantee Trust Company, of Atlantic City, New Jersey, filled in by you, to yourself, and by you deposited, and paid by the said Guarantee Trust Company.

This Demand is made by me, as Executor of the Estate of Nannie T. Whelen, Deceased.
Dated March 18, 1932.

John B. Dyer
Executor of the Estate of
Nannie T. Whelen, De-
ceased.

30

AFFIDAVIT OF JOHN B. DYER.
IN CHANCERY OF NEW JERSEY.

Between 10
JOHN B. DYER, executor
of estate of NANNIE T.
WHELEN, deceased,
Complainant,
and
ELIZABETH C. SMITH,
Defendant. } Affidavit of John B.
Dyer.

20
State of New York, }
County of New York, } ss.

JOHN B. DYER, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the complainant in the foregoing bill of complaint mentioned. I have read the same and am familiar with the contents thereof, and the matters and things therein set forth are true. 30

2. I reside at 555 West 151 st, New York City, New York.

3. I was named as executor of the will of Nannie

Affidavit of John B. Dyer

T. Whelen, deceased, who died in Atlantic City, N. J., on October 17, 1931.

4. The will of the said Nannie T. Whelen, deceased, was admitted to probate in the Surrogate's Court of Atlantic County, at Mays Landing, N. J., on March 18, 1932, and I duly qualified as executor.

10 5. The said Nannie T. Whelen, deceased, prior to her death, resided at the Hotel Flanders, St. James Place, Atlantic City, New Jersey, and died while a guest at that hotel.

6. The said Nannie T. Whelen had been very seriously ill for some months prior to her death, and had in her employ a trained nurse, during her last illness.

20 7. Among the guests at the same hotel, was one Elizabeth C. Smith, who became friendly to the said Nannie T. Whelen, and assisted, without any arrangements for compensation therefor, in and about the sick room of the said Nannie T. Whelen. The said Elizabeth C. Smith became familiar with the affairs of the said Nannie T. Whelen, wrote letters in her behalf, became familiar with the finances of the said Nannie T. Whelen, and took into her charge
30 the bank books, check books and other private papers of the said Nannie T. Whelen.

8. On or about September 22, 1931, the said Elizabeth C. Smith caused a document to be drawn, purporting to be a last will and testament, in which the said Elizabeth C. Smith caused herself to be

Affidavit of John B. Dyer

made the chief beneficiary of decedent's estate. At the time this document was drawn, the said Elizabeth C. Smith knew the relatives and next of kin of the said Nannie T. Whelen; she knew the said Nannie T. Whelen was in an unusually weak condition, and knew that the said Nannie T. Whelen was likely to die any moment; said document was prepared and executed in the absence of any of the relatives or next of kin of the said Nannie T. Whelen, and in the absence of the nurse from the room. 10

9. The said Elizabeth C. Smith was an entire stranger to the deceased, Nannie T. Whelen having met her only because of both being guests in the same hotel. The said Elizabeth C. Smith concealed the fact that the so-called will had been drawn, and when asked the question, denied it, and told those who knew about the drawing of the paper, to refrain from telling any of the relatives. 20

10. Subsequent to the death of the said Nannie T. Whelen, deceased, the said Elizabeth C. Smith, through her attorney, offered the document purporting to be a will, for probate.

11. A caveat was filed on behalf of the said Florence S. Dyer, chief beneficiary under the former will, and there was a hearing on said caveat before the Orphan's Court of Atlantic County, at Mays Landing, New Jersey, March 9, 1932. The document purporting to be a will, in favor of Elizabeth C. Smith, was denied probate. 30

12. During the hearing of the caveat, which resulted in the denial of probate of the document purporting to be a will, the Court requested counsel for the said Elizabeth C. Smith, who was present, to state the amount of the estate, and counsel replied it was somewhere between six thousand (\$6,000) dollars and seven thousand (\$7,000) dollars.

10

13. Promptly upon having probated the will in which I was named executor, I endeavored to ascertain the condition of the financial affairs of the said Nannie T. Whelen, deceased, and discovered that the said Elizabeth C. Smith had, while in possession of certain blank checks to pay the expenses of the said Nannie T. Whelen, filled in one of the said checks for five thousand (\$5,000) dollars, payable to herself, although at the time the check was signed, there was less than six thousand (\$6,000) dollars of a balance in the account of the said Nannie T. Whelen.

20

14. Prompt demand was made by me upon the said Elizabeth C. Smith for said money, a copy of said demand is hereto attached and made a part hereof, and the said Elizabeth C. Smith refused to return said money to me, as executor of the estate.

30

15. That on October 13, 1931, there was paid to the said Elizabeth C. Smith the sum of two hundred eighty dollars and forty cents (\$280.40), by check marked "in full payment of services as nurse to date."

16. That the said Elizabeth C. Smith is a guest

Affidavit of John B. Dyer

of the Hotel Flanders, St. James Place, Atlantic City, New Jersey, and has no real or personal property within the State of New Jersey, and has deposited the sum of five thousand (\$5,000) dollars, obtained from the bank account of Nannie T. Whelen, deceased, in a Pennsylvania banking institution, in Philadelphia, Pennsylvania.

JOHN B. DYER. 10

Sworn to and subscribed before me this 24th day of March, 1932.

(Seal)

REG. C. BALLARD,
Notary Public,
New York.

TO ELIZABETH C. SMITH:

I herewith demand of you, the sum of FIVE THOUSAND (\$5,000) DOLLARS, and any interest obtained thereon by you, being the amount of a check signed in blank, by Nannie T. Whelen, and dated October 6, 1931, being check #114, on the Guarantee Trust Company, of Atlantic City, New Jersey, filled in by you, to yourself, and by you deposited, and paid by the said Guarantee Trust Company. 20

This Demand is made by me, as Executor of the Estate of Nannie T. Whelen, Deceased. 30
Dated March 18, 1932.

John B. Dyer
Executor of the Estate of
Nannie T. Whelen, De-
ceased.

AFFIDAVIT OF FLORENCE S. DYER.
 IN CHANCERY OF NEW JERSEY.

10 Between
 JOHN B. DYER, executor
 of estate of NANNIE T.
 WHELEN, deceased,
Complainant,
 and
 ELIZABETH C. SMITH,
Defendant. } Affidavit of Florence
 S. Dyer.

20 State of }
 County of } ss.

FLORENCE S. DYER, of lawful age, being first duly sworn, upon her oath deposes and says that she is the wife of John B. Dyer, executor of the estate of Nannie T. Whelen, deceased, and that she is also the chief beneficiary under the will which has been probated.

30 Deponent further says that she was in frequent communication with the deceased, and also with Elizabeth C. Smith.

Deponent further says that she visited the deceased, on the fourth day of October, 1931, and at a conversation with the said Elizabeth C. Smith,

Affidavit of Florence S. Dyer

which conversation was directed toward establishing a sum that was to be paid to the said Elizabeth C. Smith for her services rendered in connection with Mrs. Whelen's illness, and that at that time the said Elizabeth C. Smith stated that she was not looking for any salary or sum of money to be given to her for whatever services she was able to render, but was entirely willing to help Mrs. Whelen in any way she could. At that time, deponent saw that Mrs. Smith was taking charge of Mrs. Whelen's affairs, in that she had in her possession the private papers belonging to Mrs. Whelen, including her bank book, and papers of like character. 10

Deponent further says that she was unable to come to any definite agreement with Mrs. Smith as to an amount to be paid to her for her services.

Deponent further says that on August 19, 1931, she received a letter from Elizabeth C. Smith, in which the said Elizabeth C. Smith said as follows: 20

"Mrs. Whelen was stricken suddenly this A. M., with another serious heart attack. The doctor gives me no hopes whatever. He says she may pull through this time, if she is prudent."

Later on in the same letter, "The doctor says if she does survive this attack, she may have another and go off suddenly. I suggested a nurse. Mrs. Whelen tells me she cannot afford a nurse. I took it upon myself to get a nurse for a few days at least, surely Mrs. Whelen can afford to pay her. I wish Mrs. Dyer you would write me at once telling me just what to do. Mrs. Whelen has told me many times you and your husband will look after her affairs." 30

Deponent further says that she received a letter

Affidavit of Florence S. Dyer

from Elizabeth C. Smith, dated August 21, 1931, in which the said Elizabeth C. Smith said:

“Today Mrs. Whelen is suffering a lot, to be frank with you Mrs. Dyer I feel she will not live many days unless she is more prudent.”

Later on in the same letter, Mrs. Smith stated: “Today Mrs. Whelen had a notice from an attorney
10 in California informing her Mrs. Hulner’s Will would be probated August 27, 1931. I infer from this Mrs. Whelen has been made a Beneficiary.”

On September 22, 1931 (the day the document which was offered for probate, was drawn), Mrs. Smith wrote as follows:

“Mrs. Whelen has many complications to battle
against. Only her extraordinary stamina has enabled her to weather this long illness she is now
suffering from heart, embolism of back, arms and
20 legs. Also enlarged liver & spleen. So you see Mrs. Dyer why the doctor insists that she stay in bed, and keep perfectly quiet. The doctor does not want her to talk or exert herself in any way whatsoever.

She has a wonderful nurse who has her own troubles following the doctor’s orders.”

On September 28, 1931, Mrs. Smith wrote as follows: “Mrs. Whelen was more than pleased to receive your cheery letter. All day yesterday she
30 seemed very good, but today has gone back again. She has many such days, one day good, next bad.

Mrs. Whelen is looking forward to your coming down some day she says she knows how busy you are.”

On September 30, 1931, Mrs. Smith again wrote deponent, as follows:

Affidavit of Florence S. Dyer

“She wants every one to know she has a nurse (sometimes she makes me write she has two nurses) at \$7 per day. The doctor \$5 a visit, medicine, her board, nurses board etc. Today I told her who wants to know all that. Then she says write it anyhow. I know Mrs. Dyer she worries over the expense, but what is she going to do. She does not want to go, and will not go to the hospital. 10

As we have arranged now she is living much less here. As in a hospital she would have to have a special nurse just the same.”

Postscript to the same letter: “I jotted down what Mrs. Whelen told me to write, so will not let her see this letter, I will read the letter she dictated telling you again about the undertaker, her burial, her expenses, etc. With kindest regards.”

On October 4, 1931, when this deponent saw the said Elizabeth C. Smith, the said Elizabeth C. Smith told this deponent about Mrs. Whelen being very much worried about her expenses. 20

On October 13, 1931, the said Elizabeth C. Smith wrote to this deponent stating: “Mrs. Whelen has been improving slowly ever since Wednesday Oct. 7. She is taking just a little more nourishment, her respiration & heart are better, and the swelling of her left leg has gone down considerable, if these conditions continue I feel she will be out of bed in a short time.”

Later on in the same letter, she says: “She laid me out for fair, for not answering your letter of last week. Hereafter she will do her own letter writing. She wrote, or I should say attempted to write you a letter. I had to address it for her. 30

I made a pretense of mailing it (but will enclose

it) you will understand when you try to decipher it how weak she is. I fear this week we will have a scrap about the nurse's check & hotel bill, do you know she is getting real mercenary it is laughable to hear her talk about saving."

10 Deponent further says the said Nannie T. Whelen died on October 17, 1931; and the said Elizabeth C. Smith knew about the will in which this deponent was beneficiary, and she assured this deponent, after the death of Nannie T. Whelen, that "No new will has been made."

20 Deponent further says that the said Elizabeth C. Smith concealed from this deponent the fact that the said Elizabeth C. Smith had drawn from the account of Nannie T. Whelen the sum of five thousand (\$5,000) dollars, or any other amount; as a matter of fact, there was a conversation between the said Elizabeth C. Smith and this deponent, in which the said Elizabeth C. Smith stated that the deceased had given her a check on the saving account, as a present in consideration of her services, and that said check had been returned from the bank "unpaid," by reason of lack of notice to the bank. Said check was for the amount of about two hundred (\$200) dollars, which the said Nannie T. Whelen was giving to Elizabeth C. Smith in consideration of her services, and by reason of the fact that Elizabeth C. Smith had been unable to pay promptly her board bill, and was in imminent need of funds.

30 Deponent further says that the said Elizabeth C. Smith had been writing letters to the various relatives of Nannie T. Whelen, explaining the poor financial condition of Nannie T. Whelen, her great

Affidavit of Florence S. Dyer

anxiety and fear that her funds would be exhausted during her illness, etc. Having that in mind, this deponent endeavored to find the exact financial condition of Nannie T. Whelen. When deponent visited the said Nannie T. Whelen on October 4, 1931, deponent talked to Nannie T. Whelen, and the said Nannie T. Whelen requested the said Elizabeth C. Smith to get her books, which had been in possession of the said Elizabeth C. Smith, but the said Elizabeth C. Smith was unable to find the papers, and apparently was reluctant to permit this deponent to get the true facts. The said Elizabeth C. Smith knew that any financial help that was likely to be received for Nannie T. Whelen, was to be procured from this deponent, her husband, and Mrs. Pope.

FLORENCE S. DYER.

Sworn to and subscribed before me this 24th day of March, 1932.

(Seal)

REG. C. BALLARD,
Notary Public,
Westchester County.

Cert. filed in N. Y. Co. No. 651, Reg. No. 3-B-465.
Commission expires March 30, 1933.

AFFIDAVIT OF MADELINE POPE.
 IN CHANCERY OF NEW JERSEY.

10

Between

JOHN B. DYER, executor
 of the estate of NANNIE
 T. WHELEN, deceased,
Complainant,

and

ELIZABETH C. SMITH,
Defendant.

} Affidavit of Madeline
 Pope.

20

State of Connecticut, }
 County of New Haven, } ss.

MADLINE POPE, of full age, being first duly sworn according to law, upon her oath deposes and says:

1. I am a resident of New York City and reside at No. 480 Park Avenue. I am a relative of Mrs. Nannie T. Whelen, late of Atlantic City, N. J., who
 30 died on the 17th day of October, 1931, being a cousin to the decedent, and I have known her personally all of my life and have kept in touch with the said Nannie T. Whelen, prior to her taking up a residence in Atlantic City and during her residence in Atlantic City.

Affidavit of Madeline Pope

2. I know that she lived at the Hotel Flanders in Atlantic City, N. J., for a year or more prior to her decease; that during most of the said year prior to her decease, she was in ill health and confined to her room a large portion of the time; I know that she was seriously ill for a period of four months prior to her decease on October 17th, 1931, and was attended by a trained nurse, most of the time day and night. 10

3. I also am personally acquainted with one Elizabeth C. Smith, who resided at the same hotel, the Flanders, where the decedent, Nannie T. Whelen, resided; I know that during the residence of the said Nannie T. Whelen at said hotel she became acquainted with the said Elizabeth C. Smith and they became friends at the hotel and that the said Elizabeth C. Smith was accustomed to call frequently at the room of the said Nannie T. Whelen and on various occasions remained in the room with her for short periods when the trained nurse was off duty. 20

4. I know that for some months prior to the death of the said Nannie T. Whelen that her financial assets were somewhat limited and that she was under heavy expense on account of her prolonged illness, and having always been interested in her welfare and due to our close family ties, I felt interested in her welfare and anxious to know whether or not she might be in need of any financial assistance from her relatives, in order that she might have the necessary care and comforts to which she was accustomed. 30

Affidavit of Madeline Pope

5. I corresponded with her at various times, but being unable to ascertain definitely what the condition of her affairs might be, on October 3rd, 1931, I journeyed to Atlantic City to see Mrs. Whelen at her hotel so that I might ascertain if I could be of any assistance to her and to learn if she were in need of funds.

10

6. I called on her on the aforesaid date at her hotel and visited with her in her room; when I arrived at her room in the hotel she was confined to her bed and desperately ill and I found Mrs. Elizabeth C. Smith in the room with her; I endeavored to have a confidential chat with Mrs. Whelen in regard to her affairs and her finances and she told me that she still had sufficient funds to take care of her needs and that I should get her check book and bank book and go over her papers and tell her how her account in the bank stood and what moneys she had on hand. She asked Mrs. Smith to get me her bank book and check book and other papers and Mrs. Smith apparently made some effort to locate these books and papers, but could not seem to find them, although Mrs. Whelen stated that they were in Mrs. Smith's custody; Mrs. Smith said that she did not know just where they had been put and that things were in such confusion about the room that she could not locate the books and papers, and up to the time I left the hotel later in the afternoon, Mrs. Smith did not locate the bank book and check book or the other papers which Mrs. Whelen wanted me to see; during my stay in the sick room with Mrs. Whelen, Mrs. Smith never left the room for a moment, and I was unable to carry on any conver-

Affidavit of Madeline Pope

sation with Mrs. Whelen privately, except in the hearing of the said Mrs. Smith, although Mrs. Whelen indicated to me that she wished to talk with me alone.

7. Mrs. Whelen told me at this time that Mrs. Smith was assisting her in managing her business matters and frequently wrote checks for her and paid bills for her and attended to such other business matters as were necessary, as she, the said Mrs. Whelen, was frequently so ill that she was barely able to sign checks. 10

8. I am positive from the actions of Mrs. Smith on the occasion of my visit that she was purposely trying to keep me from having a private interview with Mrs. Whelen, and further that she purposely attempted to keep me from inspecting Mrs. Whelen's bank, check book and other business papers. 20

MADLINE PARKER POPE.

Sworn and subscribed to before me this 25th day of March, 1932.

(Seal)

WILLIAM S. HUEY,
Notary Public.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

10

Between

JOHN B. DYER, executor
of the estate of NANNIET. WHELEN, deceased,
Complainant,

and

ELIZABETH C. SMITH,
Defendant.

} Affidavit

20

State of New Jersey, }
County of Atlantic, } ss.

MYRTLE BECK, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am a resident of the City of Northfield, New Jersey, and am by profession a trained nurse, and, as such, was in attendance on one Nannie T. Whelen, deceased, during her last illness, and I was present at the Hotel Flanders in Atlantic City in such capacity, seven days a week, from September 8th, 1931, up until the time of the death of Nannie T. Whelen.

Affidavit of Myrtle Beck

2. I am personally acquainted with one Elizabeth C. Smith, of the Flanders Hotel, Atlantic City, N. J., and during the time I was present attending Nannie T. Whelen, I had many conversations with the said Elizabeth C. Smith; that the said Elizabeth C. Smith, who is not a graduate nurse, was accustomed to looking after the wants of the said Nannie T. Whelen, during the time that I was temporarily away from her room. I personally know that such attendance by the said Elizabeth C. Smith was purely a voluntary act on her part. 10

3. I talked with Elizabeth C. Smith about a certain will which had been made some years before in favor of Florence S. Dyer, and Elizabeth C. Smith said that the will left most of the estate of Nannie T. Whelen to Florence S. Dyer, and Mrs. Smith also said that it was a shame that the relatives would get everything, when they were so indifferent as to the welfare of the said Nannie T. Whelen. 20

4. I repeatedly heard Elizabeth C. Smith make remarks to Nannie T. Whelen which were prejudicial to her relatives, the Dyers, and I heard the said Nannie T. Whelen say many times that Elizabeth C. Smith did not understand Florence S. Dyer, and that the said Nannie T. Whelen always spoke in the highest terms of the said Florence S. Dyer; that also within the last ten days of the making of a certain other document, purporting to be a will, which was refused probate as a will, I heard Elizabeth C. Smith say that it was terrible that any one so disinterested in Nannie T. Whelen would get her estate. 30

Affidavit of Myrtle Beck

5. I also heard David E. Gardiner, a notary public, and Elizabeth C. Smith conversing about the making of the new will, but such conversation was not within the hearing of the said Nannie T. Whelen.

10 6. The said Nannie T. Whelen had very grave sinking spells, and sometimes talked in an incoherent manner, and sometimes she was entirely unable to understand what was going on about her, at times she did not even know the doctor or myself, and at times was raving, and clearly out of her mind; that at nights she had to be given narcotics as prescribed by the doctor in order to sleep.

20 7. That on the day the document purporting to be a will was drawn, the said Elizabeth C. Smith told me not to say anything about it to the relatives of Nannie T. Whelen, the words of Elizabeth C. Smith being, "I was not supposed to know anything."

8. That on the night of October 3rd, 1931, and the morning of October 4th, 1931, I saw Florence S. Dyer and Madeline Pope, relatives of Nannie T. Whelen, at the Hotel Flanders.

30 9. That it was the custom of the said deceased Nannie T. Whelen to sign a number of checks in blank, said checks being left in the custody of the said Elizabeth C. Smith, for the purpose of paying Nannie T. Whelen's expenses, such as her hotel bill, doctor bill, nurse, etc.

10. That on October 6th, 1931, a number of checks

Answer

were signed in blank by the said Nannie T. Whelen, for the expenses of the said Nannie T. Whelen; that one of the checks was filled out by the said Elizabeth C. Smith and given to me for my salary as nurse; that another check was also filled out at the same time and was given to Dr. William J. Carrington for payment of his services.

MYRTLE BECK. 10

Sworn and subscribed to before me this 26th day of March, 1932.

HARRISON C. BROWNE,
Notary Public of New Jersey.

ANSWER.

IN CHANCERY OF NEW JERSEY. 20
90-4.

Between

JOHN B. DYER, executor
of estate of NANNIE T.

WHELEN, deceased,
Complainant,

and

ELIZABETH C. SMITH,
Defendant.

On Bill.
Answer. 30

Elizabeth C. Smith, of the City of Atlantic City and County of Atlantic, and State of New Jersey,

the defendant herein, in answer to complainant's bill of complaint, says:

1. She neither admits nor denies paragraphs one or two, but leaves complainant to his proof.
2. She admits paragraphs three, four and five.
- 10 3. She denies paragraphs six and seven.
4. She admits paragraphs eight and nine.
5. She admits the allegations of paragraph ten, except that portion which refers to the answer made by defendant's attorney which defendant alleges was that in the estimation of counsel he believed the estate to be worth somewhere between six or
20 seven thousand dollars.
6. She denies paragraph
7. Defendant admits paragraphs twelve and thirteen.
8. Defendant neither admits nor denies paragraph fourteen, but leaves complainant to his proof.
- 30 9. Defendant denies paragraph fifteen.

DEFENSE.

1. On or about September 30th, 1931, Nannie T. Whelen requested the defendant, Elizabeth C. Smith, to draw a check to the order of Elizabeth C. Smith,

Answer

in the sum of five thousand dollars (\$5,000). Said five thousand dollars (\$5,000), as a gift from the said Nannie T. Whelen to defendant, Elizabeth C. Smith, which check defendant refused to draw and which gift she refused to accept.

On October 1st, 1931, said Nannie T. Whelen again instructed the defendant to draw a check for five thousand dollars (\$5,000) for the purpose aforesaid, which defendant refused to do. On October 6th, 1931, said Nannie T. Whelen demanded that the defendant draw the check above mentioned, and after considerable argument the check was drawn by defendant and signed by said Nannie T. Whelen and given by the said Nannie T. Whelen to the defendant, Elizabeth C. Smith. 10

Said check and the proceeds thereof constituted a gift from the said Nannie T. Whelen to defendant and same is not subject to any obligation or trust as alleged in complainant's complaint. 20

PATRICK H. HARDING,
Solicitor for Defendant.

REPLICATION.

IN CHANCERY OF NEW JERSEY.

10

Between

JOHN B. DYER, executor
of estate of NANNIE T.

WHELEN, deceased,

Complainant,

and

ELIZABETH C. SMITH,

*Defendant.*Docket 90, Page 4.
On Bill.
Replication.

20

John B. Dyer, executor of the estate of Nannie T. Whelen, deceased, of the City of New York City, County of New York and State of New York, the complainant, in reply to answer filed herein, says:

1. The complainant joins issue in the answer of the defendant.

30 2. The complainant denies, and joins issue with the defendant, in the matters set up in paragraphs Nos. 1, 2 and 3 of the separate defense in the answer.

ROBERTSON & ROBERTSON,

Solicitors for Complainant.

Testimony

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between		10
JOHN B. DYER, executor of the estate of NANNIE T. WHELEN, deceased, Complainant, and ELIZABETH C. SMITH, Defendant.	} } } } } }	On Bill, etc. Final Hearing.

Atlantic City, New Jersey, October 19, 1932.

TESTIMONY.

Before Hon. ROBERT H. INGERSOLL, Vice-Chancellor.

APPEARANCES:

For the complainant, MESSRS. ROBERTSON & ROBERTSON.

For the defendant, PATRICK H. HARDING, Esq.

30

JOHN B. DYER, SWORN.

Direct examination.

By Mr. Robertson:

- 10 Q. Mr. Dyer, where do you reside?
A. 555 West 151st Street, New York City.
Q. Are you the executor of the will of Nannie T. Whelen, deceased?
A. I am.
Q. When did she die?
A. October the 17th, 1931.
Q. When were you qualified as executor?
A. March the 28th, I think it was.
Q. Have you your letters with you?

- 20 Mr. Harding: I think that has been admitted in the answer.

The Court: It is admitted.

- A. You have those.
Q. Did you know Nannie T. Whelen, the person for whom you are executor?
A. Yes.
30 Q. Where did she reside prior to her death?
A. New York City.

Mr. Robertson: I guess that is admitted, too.

Mr. Harding: He evidently didn't understand the question.

The Court: He says New York City.

Mr. Harding: That is not correct, if your Honor please.

Mr. Robertson: I see by his answer that is admitted, paragraphs 3, 4 and 5.

A. I thought you meant previous to her coming down here. 10

The Court: I think you better correct it now. You have here that she resided in New York.

Q. Where did Mrs. Whelen reside prior to her death?

A. At the Flanders Hotel.

Q. Atlantic City?

A. Atlantic City. 20

Q. Were you present at Mays Landing when Mrs. Smith presented a will purporting to be the last will and testament of Mrs. Whelen?

A. Yes.

Q. What was the result of the ——

A. It was not admitted to probate.

Mr. Harding: If your Honor please, I object.

The Court: Haven't you the record, if you desire to prove that? 30

Mr. Harding: All admitted here.

Q. Now, after your admission to—after you

were appointed executor of the estate, did you make a demand—did you have the books of the decedent balanced at the Guarantee Trust Company?

A. Yes.

Q. Bank book?

A. Yes, I got the balance sheet and the cancelled checks.

10 Q. Will you tell me whether this is the record that the Guarantee Trust Company gave you of the account of Mrs. Whelen?

A. Yes.

Q. Are those the cancelled checks that the Guarantee Trust Company gave you that were in the bank?

A. Yes.

(Statement and cancelled checks offered, received
20 in evidence and marked Exhibit C1.)

Q. Among the cancelled checks that the Guarantee Trust Company gave you, did you find one for five thousand dollars?

A. I did.

Q. Is this the check in question?

A. Yes.

Q. What is the date of the check, please?

A. October the 6th, 1931.

30 Q. Where was it deposited?

A. Marine Trust Company of Philadelphia —

The Court: Why do we take time for that? It is in evidence.

Q. Did you make a demand upon Mrs. Smith, the

Mrs. Florence Dyer—Direct

defendant, for the return of this money to the estate?

A. I did.

Q. Did she comply with the demand?

A. No; absolutely refused.

Q. Then you authorized us to bring this suit to recover that sum, is that right?

A. Yes. 10

Q. Has Mrs. Smith since that time paid any money back to you as executor of the estate?

A. No.

(No cross-examination.)

MRS. FLORENCE DYER, SWORN.

Direct examination. 20

By Mr. Robertson:

Q. Mrs. Dyer, where do you reside?

A. 555 West 151st Street, New York City.

Q. Are you a relative of Mrs. Whelen, the deceased in this case?

A. I am.

Q. What relation are you? 30

A. Second cousin.

Q. What relation are you to Mr. Dyer, the executor?

A. I am his wife.

Q. Did you know Mrs. Smith?

A. I met her.

Q. Did she write you from time to time prior to the death of Mrs. Whelen?

A. She did.

Q. Did you come down to see Mrs. Whelen as the result of those letters?

A. I did.

Q. Did you talk with Mrs. Smith?

10 A. I did.

Q. Did you endeavor to obtain the financial status of Mrs. Whelen at those visits?

A. Yes, I did.

Q. What did Mrs. Smith say to you?

A. She avoided me. She wouldn't give me any satisfaction.

Q. Did you ask her whether she was being paid for her services to Mrs. Whelen?

A. I did.

20 Q. What did she say?

A. That she was receiving nothing, that she would make no charges, unprofessional, until after Mrs. Whelen's death.

Q. Did you talk with her again after the death of Mrs. Whelen?

A. I did.

Q. What did she say to you then?

30 A. She said that she had received a small check from Mrs. Whelen in compensation for her services but that the check had been returned and she had not had a penny from Mrs. Whelen.

Q. Did you know anything about this check for five thousand dollars that Mrs. Smith had received prior to that conversation?

A. No.

Mrs. Florence Dyer—Direct

Q. Did she admit or tell you in the conversation that she had received that check?

A. No.

Q. Did she tell you that she had not received a penny?

A. That she had not received a penny.

Q. What conversation did you have other than that with Mrs. Smith after the death of Mrs. Whelen?

A. After the death of Mrs. Whelen?

Q. Yes.

A. The day that I brought the deeds to the cemetery down to the Flanders Hotel, after Mrs. Whelen died, on the following day, the 18th of October.

Q. What did she say to you?

A. She then admitted there was another will, but she didn't know anything about it, Mrs. Whelen's attorney, Mr. Straw, had the papers, and if I wanted to know anything there was the will.

Q. Did you talk with Mrs. Smith at the cemetery?

A. I did.

Q. What did she say to you there?

A. She still maintained that she never had a check from Mrs. Whelen, that the check for services came back owing to an error in the figures.

Q. Did you subsequently find out what the amount of that check was approximately?

A. I believe it was two hundred and eighty some dollars, two hundred and eighty some dollars.

Q. Now, prior to Mrs. Whelen's death, you knew that she was seriously ill, didn't you?

A. Oh, yes, Mrs. Smith wrote from time to time and Mrs. Whelen had been writing.

Q. In those letters, have you those letters—I have those letters?

A. You have the letters.

Q. In those letters, did Mrs. Smith stress the financial condition of Mrs. Whelen?

A. She did.

Q. What did she say about it?

10

Mr. Harding: I object, the letters are here and certainly speak for themselves.

The Court: Yes.

Mr. Robertson: Would you object if I put the letters all in? There are some letters you have already seen.

20 Mr. Harding: No.

Mr. Robertson: I think that would save a good deal of time. There are a good many of them.

The Court: You may do so.

30 Mr. Robertson: If your Honor please, we thought we would save time by putting such letters as Mrs. Smith wrote and such letters as Mrs. Whelen wrote to this witness prior to the death.

The Court: You may do so.

Q. Mrs. Dyer, these letters that you are shown are the letters that Mrs. Whelen wrote to you, are they not?

A. Yes, those are Mrs. Whelen's letters.

Mrs. Florence Dyer—Direct

(Letters offered, received in evidence and marked Exhibit C2.)

Q. These letters are the letters Mrs. Smith, the defendant, wrote to you, right about the time of Mrs. Whelen's death?

A. Yes, these are Mrs. Smith's letters.

(Letters offered, received in evidence and marked Exhibit C3.)

Q. As the result of these letters, you came to Atlantic City and endeavored to find out the financial status of Mrs. Whelen?

A. I did, Mr. Robertson.

Q. Mrs. Smith refused to give you that information?

A. Yes, I couldn't get any definite information.

Q. Do you know who was attending to Mrs. Whelen during her last illness?

A. Mrs. Beck, a nurse.

Q. She was the nurse.

A. Yes, the nurse.

Q. You were at the hearing on the probate of the will at Mays Landing?

A. I was.

Q. Was Mrs. Smith present also?

A. Yes.

Q. Did the Court ask the amount of the estate?

A. It did.

Q. And did the attorney for Mrs. Smith reply?

A. Yes.

Q. What did he say?

A. Between six and seven thousand dollars.

Q. Did Mrs. Smith deny that?

A. No.

Cross-examination.

By Mr. Harding:

10

Q. Mrs. Dyer, when the Court in Mays Landing asked the amount of the estate, I replied that as far as I knew six to seven thousand dollars, that is correct?

A. Yes, Mr. Harding.

Q. Mrs. Smith was not asked whether that was a true statement or not?

A. No.

20 Q. In other words, she was not on the witness stand even to answer any questions regarding the value of the estate?

A. No.

Q. That is true?

A. That is true.

Q. Now, how long had Mrs. Whelen been at the Flanders Hotel, Atlantic City, before she died?

A. Well, I should say she had been there almost a year, at least.

Q. About a year?

30 A. I don't know the exact dates.

Q. Do you know about when she went there?

A. She went there in the spring time with my aunt and her companion, yes.

Q. Of 1931?

A. In June, it was.

Mrs. Florence Dyer—Cross

Q. 1931?

A. Mrs. Whelen was back and forth to New York, and I didn't know it was a permanent stay at that time or not, she came up to the Martha Washington Hotel.

Q. Just listen to my question, Mrs. Dyer. Would you tell me whether Mrs. Whelen went to the Flanders Hotel to live in July, 1931, or 1930?

10

A. I think it was 1930.

Q. 1930?

A. Yes.

Q. In other words, she was there considerably over a year before she died?

A. Not permanently; she was up a great deal to Staten Island during that time.

Q. I don't mean that, I don't mean these temporary tours she would make here and there, but she considered the Flanders her home?

20

A. Yes, she did.

Q. From about July, 1930?

A. That is correct.

Q. Now, from July, 1930, until the day Mrs. Whelen died, how many times did you visit her?

A. Not at the Flanders Hotel, I didn't, but she was in Staten Island.

Q. How many times did you visit her at Atlantic City?

A. Only the once, on October the 4th.

30

Q. How long was Mrs. Whelen seriously ill before she died?

A. From August 19th to October the 17th, the date of her death.

Q. When was the first visit you made after you knew that she was seriously ill?

A. October the 4th.

Q. October the 4th?

A. Yes.

Q. And she died on the 17th?

A. On the 17th.

Q. According to your testimony, you went there then to find out about her financial affairs?

10 A. Yes.

Q. You are not her nearest relative, are you?

A. No, she has a nephew.

Q. What is his name?

A. Carl Thorbeck.

Q. You say that you asked Mrs. Smith concerning Mrs. Whelen's financial affairs?

A. Yes.

Q. Did you believe at that time that you had any right to ask about Mrs. Whelen's financial affairs?

20 A. Absolutely.

Q. You were not her nearest relative?

A. No.

Q. You had not visited her at all except this day you were talking to Mrs. Smith?

A. No.

Q. Now, you wrote to Mrs. Whelen several times, didn't you?

A. All the time.

Q. All the time?

30 A. Two or three times a week.

Q. And you wrote her a letter which, according to the envelope, is dated August 20, 1931, and according to the letter is headed Thursday, but there is no other date on the letter, I presume that the letter and envelope correspond, do they?

A. I think so.

Q. Are they both in your handwriting?

A. They are.

Q. Now, in this letter you used this language, didn't you: "I do think it would be wise to try to go into a hospital for just a week or two. There must be some moderate-priced institution. What do the poor do?"

10

A. Yes.

Q. You wrote that letter to her, did you?

A. Yes.

Q. Now, that was in August, and did you know at that time whether Mrs. Whelen was confined to her room?

A. She wrote that she was.

Q. Why did you write the letter of "What do the poor do"? Had she asked you for any money or any assistance?

20

A. She was asking everybody for assistance. She was complaining of her finances, that they were so low, and asked my advice what she should do, and because she asked my advice I gave it.

Q. When did she first write to you asking you for any assistance?

A. Not financial assistance definitely, but she always complained of her finances, she couldn't make both ends meet, and to curtail her expenses, they were so terrible, and I made that reply, should she go into a hospital, she wrote me.

30

Q. Can you tell me about when you wrote the first letter in which she complained about her finances?

A. During August.

Q. During August?

A. Yes.

Q. So from the time in August when she wrote until the time in October when she died, you didn't render any financial assistance, did you?

A. No.

Q. The only thing you did was write her this letter: "What do the poor do"?

10 A. Yes.

Q. Now, you say that you met Mrs. Smith first at the hotel, didn't you?

A. Yes.

Q. You made some inquiries as to Mrs. Whelen's books and papers?

A. I did.

Q. And she told you that she couldn't find them?

A. Yes, she gave me no definite answers.

Q. Did you know why she made that statement to
20 you?

A. I surmised—why, she didn't want me to see them.

Q. Did you know whether Mrs. Smith knew that Carl Thorbeck was a closer relative than you?

A. I did.

Q. Did you know at that time whether there had been any other will drawn except the will you had in your possession?

A. I did not.

30 Q. You did not?

A. I did not.

Q. When did you first hear of that will?

A. At the Flanders Hotel when I brought the deeds of the cemetery to Mrs. Smith.

Q. That was the day of the funeral or the day after?

Mrs. Florence Dyer—Re-direct

A. No. that was the 18th; she died on the 17th.

Q. She died on the 17th, and that was the day after?

A. I brought the cemetery deeds which my husband had down to the Flanders Hotel.

(Letter and envelope referred to offered and received in evidence by consent and marked Exhibit 10 D1.)

By Mr. Robertson:

Q. Mrs. Dyer, you did see Mrs. Whelen other than that one time that you visited her here before her death?

A. At the Flanders Hotel, no, but during the time she was in Atlantic City she came up to my aunt's at Staten Island.

Q. How many times did you see her up there?

A. A great many times, she was up there three or four or five weeks.

Q. During the time she was up there you saw her frequently?

A. Oh, yes, I am sure every week.

Q. Was Mrs. Whelen on friendly terms with Mr. Thorbeck?

A. Friendly terms, yes. She didn't visit him except once, I think. He lived in Riverside.

Q. Was she on more friendly terms with you than with Thorbeck?

A. She was married from my mother's house. She was like any one of our family. We did everything for her. Mr. Dyer attended to all her affairs after my mother died, she was the same as a mother to me.

Q. There was no such relation existing of friendship between Mrs. Whelen and Thorbeck?

A. Absolutely none.

Q. As there was between you and Mrs. Whelen, was there?

A. Mrs. Whelen had not seen Mr. Thorbeck in years until the death of her daughter.

10

By Mr. Harding:

Q. At the time that Mrs. Whelen visited you in New York, she was in good health, wasn't she?

A. She was never in very good health.

Q. She was in sufficient health?

A. She went around, she would get these spells, you know, and she would get sick again, she would come up to New York a while, go down to my aunt's, she would be sick down there, she was very sick down there once.

20

Q. At the time the will which was admitted to probate in Mays Landing was drawn, Mrs. Whelen at that time was over at your house, wasn't she?

A. No, she was up—you mean the will that favors me?

Q. She was visiting you?

A. No, way up at Sunset Place, called Sunset, up in the Catskill Mountains.

30

Q. Were you there?

A. No, I have never seen the place.

Q. Was the will drawn up there?

A. It was drawn up there and signed up there.

Q. Who witnessed it?

A. Two witnesses up there, I don't even know them.

Mrs. Myrtle Beck—Direct

Q. Didn't your husband draw the will?

A. Certainly not. Mrs. Whelen wrote that will herself.

Q. But Mr. Thorbeck was not considered at that time?

A. No, she wasn't friendly with him at that time—he was mentioned in the will, yes.

10

MRS. MYRTLE BECK, SWORN.

Direct examination.

By Mr. Robertson:

Q. Mrs. Beck, where do you reside?

A. 101 East Vernon Avenue, Northfield.

20

Q. Married?

A. Yes, sir.

Q. How long have you lived in Atlantic County?

A. Seven years this last time. I have lived here previous to that and I came back again.

Q. Were you the nurse in attendance on Mrs. Whelen at the time of her death and shortly prior thereto?

A. Yes.

Q. What was Mrs. Whelen's physical condition some time prior to her death, the last two or three weeks prior to her death? 30

A. She was in poor condition, some days we didn't know whether she would live from day to day or not, some days she would be better.

Q. When did you go on the case?

A. September the 8th.

Q. 1931?

A. Right.

Q. And you remained there up until the time of Mrs. Whelen's death, is that right?

A. Yes, sir.

10 Q. Do you know the defendant, Mrs. Smith?

A. Yes.

Q. What did your duties consist of?

A. Taking absolute care of Mrs. Whelen.

Q. Did Mrs. Smith endeavor to assist you in taking care of Mrs. Whelen?

A. No, she didn't assist me. She was with Mrs. Whelen in my absence, but not in my presence.

Q. Do you know whether or not Mrs. Smith took charge of the personal affairs of Mrs. Whelen?

20 A. Yes.

Q. Did she assume that authority or did Mrs. Whelen tell her to do it?

A. I never heard Mrs. Whelen tell her.

Mr. Harding: I object, unless the witness knows.

The Court: She says she never heard.

30 Q. Do you know whether letters that came addressed to Mrs. Whelen were opened by Mrs. Smith?

A. Some were.

Q. Without Mrs. Whelen seeing them?

A. Yes.

Q. Did Mrs. Smith also answer letters on behalf of Mrs. Whelen?

Mrs. Myrtle Beck—Direct

A. Yes.

Q. Did she have charge of her bank book and check book and so forth?

A. Yes.

Q. Did she pay some bills that Mrs. Whelen owed?

A. Yes.

Q. Did Mrs. Whelen's physical condition fluctuate? 10

A. Yes, at times she didn't know us.

Q. And at times was she completely oblivious to what was going on about her?

A. Yes.

Q. Can you recite any instance that occurred on or about October 6th that would indicate that Mrs. Whelen was not conscious of what she was doing?

A. She didn't know the doctor one day when he was there, absolutely didn't know him, and several occasions — 20

Mr. Harding: I object to the answer, if your Honor please.

The Court: Question limited to a certain date.

Q. On or about October the 6th I asked you, Mrs. Beck.

A. Well, I couldn't tell you the exact date of her not knowing the doctor, but there were times when she would talk to me about myself and didn't know me, didn't know she was talking to me. 30

Mr. Harding: I object to the answer.

The Court: I will permit that.

A. And she didn't—the shutters in the room, she was absolutely convinced, were people, and we couldn't tell her otherwise, and things on the chairs she was convinced were people, and that they were to be taken out of the room, and there was no one else there at the time.

Q. Now, did you see Mrs. Dyer and Mrs. Pope
10 when they came down on October 4th?

A. Yes. Mrs. Pope came on the night before and Mrs. Dyer came on the 4th. I saw them when they both arrived.

Q. Did you hear them ask Mrs. Smith for the bank book or check book of Mrs. Whelen?

A. No. I heard them ask her about their financial status, about Mrs. Whelen's financial status, but I couldn't say that I heard them ask for the bank book or check book.

Q. What did Mrs. Smith say as to that?
20

A. She evaded the question.

Q. Did Mrs. *Whelen* and Mrs. Pope look after the—endeavor to find the check book and bank book of Mrs. Whelen?

A. Yes.

Q. Did Mrs. Smith say that she could not find it, or something to that effect?

A. Yes, she didn't know where it was.

Q. As a matter of fact, she had it in her posses-
30 sion at that time, did she?

A. Yes.

Q. On October 6th there were several checks drawn. One of those checks was made payable to you, was it not?

A. Yes.

Mrs. Myrtle Beck—Direct

Q. Was that check filled in at the time Mrs. Whelen signed her name to it?

A. No.

Q. Had Mrs. Whelen signed a number of checks in blank?

A. Yes.

Q. Which afterwards were filled in by Mrs. Smith? 10

A. Yes. Mrs. Whelen signed checks in blank most of the time I was there.

Q. Did you have any knowledge of Mrs. Whelen giving any check to Mrs. Smith?

A. No, except one that I was not supposed to know of, but Mrs. Smith told me she had been given the check and had been returned to her for services.

Q. Do you know the amount of that check?

A. Two hundred and eighty some dollars.

Q. Now that check was first returned for some irregularity, was it not? 20

A. Yes, it was drawn on a savings account instead of a check account, and was not accompanied by the check book when it was sent, or the bank book.

The Court: Madam, who told you that?

A. Mrs. Smith.

Q. Did Mrs. Smith instruct you not to tell the relatives anything about the affairs, the financial affairs of Mrs. Whelen? 30

A. Yes, she said I was to know nothing.

Q. Were you present there at the time of the preparation of the will that was denied probate?

A. Yes.

Q. Did Mrs. Smith tell you to keep quiet about that?

A. Yes.

Mr. Harding: I object. Do you know what the question was?

10 A. Did she tell me to keep quiet about the will?

Mr. Harding: The question wasn't finished. Will you kindly hold the answer?

A. I beg pardon?

Q. She told you, as I understand, to say nothing, to the relatives about the making of that will, is that right?

A. Yes.

20 Q. You were there for how long?

A. From September 8th to October 17th, the day she died.

Q. During the course of that time, did you have any conversation with the deceased about Mrs. Dyer?

A. Yes, any number of times.

Q. Did Mrs. Whelen refer to Mrs. Dyer in a friendly or unfriendly manner?

30 A. Always in a friendly manner, her attitude was always that we didn't understand Mrs. Dyer, if letters were read or anything said unkindly or anything said of Mrs. Dyer, she always said, "Oh, you don't understand Florence. She has her hands full." That was always Mrs. Whelen's answer.

Q. Did Mrs. Whelen say anything in your presence about her fear of financial difficulties?

Mrs. Myrtle Beck—Direct

A. She was always annoyed about her moneys, and not having enough.

Q. Did she fear that her money would be exhausted prior to her getting well from her illness?

A. Yes.

Q. What did she say about that at times?

A. Well, that she couldn't go on, that she didn't know what she would do, with her expenses being so awful, she didn't know how she was going to get by with them. 10

Q. Did you ever hear Mrs. Whelen say anything about giving five thousand dollars to Mrs. Smith or any such sum?

A. No.

Q. Was Mrs. Whelen of a frugal or generous disposition?

A. Generous, I should say.

Q. Were you present at Mays Landing at the hearing on the probate of the will that was offered for probate last March? 20

A. I was.

Q. Did you hear Mrs. Smith admit that she asked the scrivener to date back the will a month when he made it?

A. Yes.

Q. Was the general conduct of Mrs. Smith during the period that you were at the bedside of Mrs. Whelen such as to indicate to you that she had designs upon the securing of Mrs. Whelen's estate? 30

Mr. Harding: I object.

The Court: Sustain the objection.

Q. Did you see any act of Mrs. Smith indicating a wish to obtain Mrs. Whelen's estate?

A. You ask that question again, please, Mr. Robertson.

(Question repeated.)

10 Mr. Harding: I object to that.

The Court: Sustain the objection.

Cross-examination.

By Mr. Harding:

Q. Mrs. Beck, did you know Mrs. Whelen or Mrs. Smith before you went to act as a nurse for Mrs. Whelen?

20 A. Yes.

Q. How long had you known them?

A. Well, practically from the time they came to the Flanders to live.

Q. You knew both?

A. Yes, both.

Q. Are you friendly with Mrs. Smith?

A. Yes.

Q. Always have been?

30 A. Up to the time of Mrs. Whelen's death.

Q. What was the trouble then?

A. There hasn't been any trouble that I know of, except Mrs. Smith flatly refuses to speak to me when I go into the Flanders to attend to Mrs. Yard.

Q. Did you have any trouble between you before Mrs. Whelen died?

Mrs. Myrtle Beck—Cross

A. No.

Q. You were asked by Mr. Robertson the question as to whether you heard Mrs. Smith testify at Mays Landing on the occasion of the probate of the will, as to whether she did not say that she requested Mr. Gardiner, the scrivener, to predate the will a month. Now, can you give me exactly what you heard at that time?

10

A. I would hesitate to quote just exactly, Mr. Harding, but I remember her referring to that.

Q. Now, if I read the testimony on that occasion, will you tell me whether you believe it is correct or not?

A. Yes.

Q. The question: "You heard him say that you asked him to predate the will a month ahead, that is Mr. Gardiner, is that correct? A. He told Mrs. Whelen he couldn't do that.

20

"Q. I asked you if you asked him to do that? A. Yes, to date it the 24th of August, that is when she wanted to date it back, and he told her —"

"Q. You asked Mr. Gardiner to do that? A. No, I told him Mrs. Whelen wanted to know if he would do that, and he didn't say anything then."

Is that correct or isn't it?

A. Yes.

Q. So that Mrs. Smith herself did not ask the question at all, she quoted Mrs. Whelen as having 30 desired it, is that correct?

A. Yes.

Q. Now, Mrs. Beck, did you know the Dyers at the time you went to nurse Mrs. Whelen?

A. No.

Q. When did you first meet the Dyers?

A. On October the 4th.

Q. That was the day that they came to inquire about the financial affairs of Mrs. Whelen, is that right?

A. That was the day they came to the Flanders.

Q. Were they introduced to you by anybody?

10 A. Yes, Mr. —

Q. By whom?

A. Mrs. Pope arrived the night before and Mrs. Whelen introduced Mrs. Pope to me.

Q. Mrs. Pope you knew the day before?

A. She came the evening before Mrs. Dyer arrived.

Q. By introduction of Mrs. Whelen you met Mrs. Pope the day before?

A. The day before.

20 Q. The next day the Dyers arrived?

A. Yes.

Q. Who introduced the Dyers, Mrs. Pope?

A. No, Mrs. Whelen, in the room.

Q. Mrs. Whelen herself introduced them?

A. Yes.

Q. Where did the introduction take place, in the bedroom?

A. Yes, Mrs. Dyer came in the door of Mrs. Whelen's bedroom.

30 Q. Did she say who she was or what relation she was to Mrs. Whelen?

A. No.

Q. And you only met these people then that one time, that day?

A. Yes.

Mrs. Myrtle Beck—Cross

Q. And they inquired of you as to the financial affairs of Mrs. Whelen?

A. No, they didn't ask me.

Q. Didn't you testify that they asked about bank books, papers and so on?

A. No, I didn't.

Q. Then you didn't mean that?

A. I don't think I answered that. I beg pardon, 10
Mr. Harding.

Q. Didn't you speak about Mrs. Smith holding the bank books and papers and didn't want to let them have them?

A. Yes, but they didn't ask me for them.

Q. They didn't ask you for them?

A. No, they didn't.

Q. Did they ask you anything about Mrs. Whelen's financial affairs?

A. Yes. 20

Q. So that they did ask you about her financial affairs?

A. Mrs. Pope asked me Saturday night about them.

Q. Did you tell them that Mrs. Smith had her books and papers?

A. I can't answer that.

Q. Did you tell the Dyers that Mrs. Smith had her bank books and papers?

A. No. 30

Q. But according to your testimony you wanted to cooperate with the Dyers to get the bank books and the papers, didn't you?

A. No.

Mr. Robertson: I object to that, if your Honor please. There is no such testimony at all.

The Court: She answers "no."

Q. Well, the Dyers, you say, did come there to ask you about her financial affairs?

A. Not to ask me.

Mr. Robertson: I object.

10 The Court: I will sustain the objection to that.

Q. Who did they ask?

A. Mrs. Smith.

Q. Did they ask her in your presence?

A. Yes. I was back and forth when they were talking about it.

Q. Was it customary for you to be there if people came to discuss private affairs?

20 A. There was never any private affairs discussed previous to that.

Q. That was an extremely private affair, wasn't it, discussing financial affairs?

Mr. Robertson: I object, drawing a conclusion as to what is extreme.

The Court: Sustain the objection.

30 Q. Now, Mrs. Beck, you went to Mrs. Whelen to perform a nursing service about September the 8th?

A. Yes.

Q. And you continued there until the day she died?

A. Yes.

Q. Were you on duty twenty-four hours?

Mrs. Myrtle Beck—Cross

A. Twenty hours, we are off four hours out of a day.

Q. The four hours you were off, who took care of things?

A. Mrs. Smith was in and out, aside from that there was no one there.

Q. Did Mrs. Smith and Mrs. Whelen appear to be friendly? 10

A. Yes.

Q. Did Mrs. Whelen think a lot of Mrs. Smith?

A. Yes and no.

Q. Now, tell us the no part.

A. There were many times when Mrs. Whelen did not approve of Mrs. Smith and of the things Mrs. Smith did, and there were many times she complained to me of Mrs. Smith.

Q. Now, then, Mrs. Whelen did sign a lot of checks in blank? 20

A. Yes.

Q. To whom did she give the checks?

A. Mrs. Smith held the check book always.

Q. Now, when Mrs. Whelen signed the checks in blank, to whom did she give the checks or the check book if the checks were attached to the book?

A. Mrs. Smith.

Q. So that she had enough confidence in Mrs. Smith to sign those checks in blank, is that right? 30

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

The Court: I think that is argument. Sustain the objection.

Q. You got your check, didn't you, for your nursing services?

- A. Yes, sir.
- Q. That was signed same as the other checks?
- A. Yes, sir.
- Q. Signed in blank?
- A. Yes, sir.
- Q. Mrs. Smith filled it in?
- A. Yes.
- 10 Q. The checks went for merchandise purchased, and so on, they were signed in blank, weren't they?
- A. Yes.
- Q. Mrs. Whelen herself was in such physical condition that she could not fill out the checks, could she?
- A. There were times when she did fill out the checks.
- Q. When was that, when you first went on the case?
- 20 A. Not 'only when I first went on the case, all the time, I say there were days when Mrs. Whelen filled out her own checks and signed them.
- Q. When you went there September 8th was Mrs. Whelen able to get out of her room at all?
- A. Yes, with assistance.
- Q. But she spent most of her time in bed or in a chair, didn't she?
- A. Yes.
- Q. You wouldn't say that she was a physically
- 30 strong woman at that time, would you?
- A. Not when I went there, no.
- Q. Mentally when did she first indicate to you that she was a little bit abnormal?
- A. Very first day I went there.
- Q. September 8th?

Mrs. Myrtle Beck—Cross

A. September 8th—July 1st ——

Q. Who was her attending physician at that time?

A. Dr. Carrington.

Q. Did he go there day in and day out?

A. Yes.

Q. Up to the time of death?

A. Yes.

Q. Did you ever tell the doctor that you thought 10
she had lapses of memory or there was trouble with
her mind?

A. Yes.

Q. When did you tell that to Dr. Carrington?

A. I told him the very next day after I was there,
and I told him different occasions when these things
arose.

Q. September 9th?

A. Yes.

Q. You told him then that the mind —— 20

A. Yes, I told him what had happened the day be-
fore.

Q. That the mind was bad?

A. Yes.

Q. Did you ever tell him after that that her mind
was bad?

A. Yes.

Q. When?

A. Well, when she had these affairs, when she
didn't know me, when we had the arguments about 30
window shades, and that sort of thing, they were all
related to Dr. Carrington professionally.

Q. Did you conclude that her mind was bad be-
cause she would argue with you about window
shades or something of that kind?

A. Beg pardon?

Q. Did you conclude that her mind was bad because she would argue with you about window shades or something of that kind?

A. No, not normal, but when she would insist that inside shades were people and that you could eliminate them from the room, there was something
10 surely wrong with her mind then.

Q. Did her mind remain bad up to the time she died?

A. There were days up until before she died, there were some days when her mind was bad, and other days when apparently it was clear.

Q. Was her mind bad when she used to sign these checks?

A. How can I tell which checks?

Q. How was her mind, for instance, if you recall,
20 about October 6th, was her mind bad then?

A. October the 6th? No, her mind was clear.

Q. She signed quite a few checks that day, didn't she?

A. Yes.

Q. And her hand seemed to be very clear, no nervous tremor in the signature, anything of the kind, is there? I show you the checks, you tell me whether in your judgment the mind was bad. There is October 6th check, there is October 6th—October
30 6th check to you, another check dated October 8th, another check dated October 7th, another 13th, another 14th, two 13th, several checks dated in September, and the signatures all practically all alike. Would you think any signs of any nervous tremor of any kind in them, is that correct?

Mrs. Myrtle Beck—Cross

A. I am not in a position to tell you anything about signatures, Mr. Harding. I know that is her signature, as to the dates when they were signed, to the dates that they were made out I couldn't vouch for, Mr. Harding.

Q. Did the signatures indicate to you that on these particular dates that these checks were signed that she had any mental trouble? 10

A. I couldn't say anything on that score, Mr. Harding, because I don't know a thing about the signatures and mental conditions, and I have no way of knowing when she signed these checks on the day that these checks were made out.

Q. In other words, you doubt as to whether the checks were made the date they bear, is that it?

A. I wouldn't say I doubt it, I say I know some were made out blank, others were signed the day they were made out, I couldn't say which were which. 20

Q. In other words, you wouldn't want to give Mrs. Smith the benefit of anything at all in this matter?

Mr. Robertson: I object to that.

The Court: Sustain the objection.

Q. Now, Mrs. Beck, you say that Mrs. Smith opened the letters that were sent to Mrs. Whelen? 30

A. Yes.

Q. Did she show Mrs. Whelen the letters and read them to her?

A. Some she did and some I don't know if she did or not because they were taken into Mrs. Smith's

room before Mrs. Smith was up in the morning and given to her, and whether they were showed to her or read to her I couldn't say.

Q. But you do know that some she read to her?

A. Yes.

Q. Did she carry on all correspondence of Mrs. Whelen?

10 A. No, Mrs. Whelen wrote some letters herself.

Q. What did you say?

A. No, Mrs. Whelen wrote some letters herself.

Q. Did Mrs. Whelen write letters towards the end of her life?

A. Yes.

Q. When? To whom was the last letter she wrote, if you can tell me?

20 A. I couldn't give you any particular date, but I know very well Mrs. Whelen got out of bed and sat up at a desk one day when we thought she was too ill to lift her head.

Q. To whom did she write a letter that day?

A. Mrs. Dyer.

Q. About when was that?

A. I can't give you any definite date, Mr. Harding. I didn't keep those dates, didn't mean anything.

Q. Can you tell me about when it was with respect to her death?

30 A. Well, I would say not more than a week before, about a week before her death.

Mr. Harding: Have you any letters a week before her death?

Mr. Robertson: Mr. Harding, all the letters we

Mrs. Myrtle Beck—Cross

have I have put in evidence, and the dates of them I don't recall.

Q. Of course you know Mrs. Whelen's handwriting, I presume?

A. Yes, sir.

Q. Can you tell me, by looking at any of these letters, about when they were written, they don't 10 seem to bear date, most of them?

(Recess taken until 1:30 o'clock P. M.)

AFTERNOON SESSION.

(Trial of the cause resumed at 1:30 P. M.)

20

MRS. MYRTLE BECK, resumed.

Cross-examination (resumed.)

By Mr. Harding:

Q. Mrs. Beck, did Mrs. Whelen during the time you were nursing her, make you any presents of any 30 kind?

A. Yes.

Q. What did she give you particularly?

A. She gave me an electric mixer.

Q. What else?

A. A purse, a pocketbook, that is all.

Q. About when did she give you those things, do you know?

A. Well, the purse she gave me within a few days after I went there, and the electric mixer was paid for in the last check that Mrs. Whelen made out for me.

10 Q. About how much was it, do you know?

A. The electric mixer?

Q. Yes.

A. Nineteen dollars and something, I think.

Q. That is all.

By Mr. Robertson:

Q. Mrs. Beck, Mr. Harding asked you some questions about the quarrels between Mrs. Smith and
20 Mrs. Whelen. What were the nature of those quarrels?

Mr. Harding: Quarrels between Mrs. Smith and Mrs. Whelen? I don't think there was any question of that kind. If I did I didn't intend to ask it because I don't know of any quarrels.

The Court: I don't recollect the word "quarrel" was used. You may proceed if you can understand
30 the question.

Q. Did you hear any quarrels between Mrs. Smith and Mrs. Whelen?

A. Arguments, yes. I would probably hear the end of them as I came back off duty, several times

Mrs. Myrtle Beck—Re-cross

I heard Mrs. Whelen say to Mrs. Smith, "Oh, all right, but don't quarrel with me."

Q. How often did you hear controversies between them?

A. Well, I couldn't say how often. I know at different times there was that when I came into the room, and I know different times Mrs. Whelen said to me, "Oh, all I hear is money, money, money, 10 from the time you are gone until you come back."

Q. From the time you are gone?

A. "From the time you are gone out of the room until you come back," she would say.

Q. All she would hear was money?

A. Money, money, money.

Q. Do you know anything about how this money, this five thousand dollars got into the bank prior to Mrs. Smith drawing it out?

A. Yes, Mrs. Whelen's bank account was terribly 20 low and it was transferred from her savings account in New York to her checking account here in the Guarantee Trust.

Q. Mrs. Whelen tell you about it at the time?

A. Yes, I took the bankbook upstairs after it had been transferred, Mrs. Whelen told me that.

By Mr. Harding:

Q. Mrs. Beck, so that the Court will understand, 30 what was the trouble with Mrs. Whelen, what was her ailment?

A. Heart.

Q. It was a heart case, was it?

A. Yes.

Q. That is all.

Mr. Robertson: I would like to prove one more thing by Mr. Dyer unless it is admitted by Mr. Harding. In the affidavit of Mrs. Smith she states that, in paragraph 6, "She had asked me not to deal with the Dyers or to talk with them concerning the condition of her finances." I want to ask Mr. Dyer if he made a demand upon Mrs. Smith for the bank books
10 and check books and other assets of the estate and papers pertaining to the estate, on Mrs. Smith, and was refused.

Mr. Harding: That testimony is in.

Mr. Robertson: I think all our testimony shows we asked for five thousand dollars, but I want to make it clear we asked also for all books and papers.

20 Mr. Harding: If there is any doubt about it, my recollection is you asked that question.

JOHN B. DYER, recalled.

Direct examination.

30 By Mr. Robertson:

Q. Did you make such a demand?

A. I did. Mrs. Smith said Mrs. Whelen's lawyer, Mr. Straw, had them, and she couldn't give them to me.

Discussion
Mr. Gardiner—Direct

Mr. Robertson: The only other testimony we have to offer at this time is the testimony of Mr. Gardiner, who was here and just stepped out, and it may be admitted, at Mays Landing, when Mr. Gardiner testified, according to the record, he was asked by Mrs. Smith to date this will back a month and he declined to do it. If it is admitted he will testify to the same thing here I will close, and you can go on. 10

Mr. Harding: I don't know, Mr. Gardiner's testimony as I take it was as I read into the record on cross-examination of Mrs. Beck. If you want to show that, of course, I would want to enter the testimony, but the record here speaks for itself.

Mr. Robertson: If you will admit that he will testify as he says there on page 20, when he said Mrs. Smith asked him to date the will back a month. 20

Mr. Harding: Page 20?

Mr. Robertson: Question by myself: "Mr. Gardiner, during your conversation with Mrs. Smith prior to the making of this document, did she say anything to you which led you to believe that she feared that Mrs. Whelen could not make a proper will? A. Yes. She wanted me to antedate the will a month." 30

If you will admit he would say that same thing now I will close.

Mr. Harding: I will admit he testified to that.

The Court: Is there any cross-examination on that point? I am sure I don't know where I obtained it, what he said was Mrs. Whelen asked her to have it done.

Mr. Harding: Yes, he has contradicted that, if your Honor please, here, the other place he tied it
10 up to Mrs. Whelen and Mrs. Smith told him Mrs. Whelen desired it, and here he says Mrs. Smith told him to do it.

Mr. Robertson: Shall I read the rest of it into the record?

“Re-cross examination.

“By Mr. Harding:

20

“Q. Why didn't you do that, Mr. Gardiner?

“A. I don't know why I should answer that question.

“Q. You did all these other things. You were very accommodating. Why didn't you do that?

“A. I did all the other things?

“Q. Yes, you put an attestation clause on that will that you say you now repudiate. You say it is not correct. You say you did not apprise the woman
30 that it was her will.

“A. I tried to and I was not able—I at least made an honest effort to do those things.

“Q. And you say relative to the statement that she didn't know the contents of the will, that you had her sign the paper notwithstanding that she did not know the contents?

Discussion

“A. Exactly.

“Q. Why did you say that you refused to ante-date the will?

“Mr. Robertson: I object to that, as to why he refused. He said he refused to do it.

“The Court: I sustained the objection.” 10

That seems to be the end of the re-cross.

The Court: And is this testimony admitted, that Mr. Gardiner would testify to that?

Mr. Harding: Yes, that is the record.

COMPLAINANT RESTS.

20

Mr. Harding: Your Honor please, I don't know whether you want us to go ahead with any defense. It seems to me there is a serious doubt here as to whether there is anything to answer.

The Court: How is that?

Mr. Harding: I say it seems to me there is a serious doubt as to whether there is anything to answer. 30

The Court: That is for you to determine. You either proceed or close your case. I am not going to rule upon that point until you close your case.

Mr. Harding: I guess we might as well go ahead, then.

The Court: Let me make one suggestion now, if you are going to get Mrs. Smith's testimony, isn't this a good time of the day to do it rather than to wait until later in the afternoon?

10

Mr. Harding: If your Honor would care to go over there.

The Court: Is there any objection to you taking the stenographer along? You don't need me.

Mr. Harding: None at all.

The Court: It is stipulated the testimony taken
20 before the stenographer is by the consent of both counsel.

Mr. Robertson: That is agreeable.

(Counsel for the respective parties and the official stenographer then adjourned to the Flanders Hotel, where the testimony of Mrs. Elizabeth C. Smith was taken, at 2 P. M.)

30 (Flanders Hotel, Atlantic City, N. J., 2 o'clock P. M.)

Mrs. Elizabeth C. Smith—Direct

MRS. ELIZABETH C. SMITH, affirmed.

Direct examination.

By Mr. Harding:

Q. Mrs. Smith, you reside here at the Flanders Hotel? 10

A. Yes.

Q. How long have you lived here?

A. Going on three years.

Q. You knew Nannie T. Whelen in her life time?

A. Yes.

Q. When did you first become acquainted with her?

A. When she came to this house to reside.

Q. When was that? 20

A. Well, I don't know the exact date, Mr. Harding, but it was some time in the summer, in June, I think.

Q. Of what year?

A. 1929—I judge—1930.

Q. 1930?

A. Yes.

Q. Was she in good health when she came here?

A. Apparently.

Q. After coming here did she subsequently become ill? 30

A. I wouldn't say ill, but she had heart attacks, Mr. Harding, she had the doctor while she was here.

Q. When did these heart attacks take such a serious turn that she had to employ a nurse?

A. The first time that nurse came in?

Q. Yes.

A. Or when she had the first attack, bad attack?

Q. First time the nurse came in.

A. You know she was very ill three weeks before the nurse came on, in August, she was going up on the roof and was stricken at the elevator, and that
10 was the day that they brought in a nurse. The maid and I had been looking after her three or four weeks previous to that attack.

Q. Who was the nurse that was brought in at that time?

A. The first nurse was Miss Norster.

Q. About when was that, do you know?

A. I think it was the 19th of August, if I am not mistaken. May I add something now, Mr. Harding?

Q. Yes.

A. You know I did keep a diary, not in relation
20 to Mrs. Whelen entirely, but my personal diary, and I have jotted down the dates and everything happened, and she was stricken, I am sure the 19th, but that diary has been taken out of my desk, and I can't give you the exact dates now.

Q. How long did Miss Norster remain in service?

A. Four days.

Q. Was she succeeded by another nurse?

A. Yes, Miss Rickstein came on the same day Miss
30 Norster left.

Q. How long did Miss Rickstein remain?

A. Two or three weeks.

Q. Approximately about two or three weeks?

A. About two or three weeks, yes.

Q. Who succeeded Miss Rickstein?

Mrs. Elizabeth C. Smith—Direct

A. A Miss Chamberlain.

Q. Did she remain long?

A. Only four days.

Q. Then who came next?

A. Mrs. Beck.

Q. Mrs. Beck remained with her up until the time

A. Until she passed away, yes.

10

Q. Now, what were the relations between you and Mrs. Whelen?

A. In what respect, Mr. Harding?

Q. Well, cordial or otherwise.

A. Yes, always very friendly.

Q. Did you ever have any quarrels with her at all?

A. None.

Q. Who handled her business affairs while she was sick?

20

A. Well, I did.

Q. I mean at the hotel here.

A. Oh, yes.

Q. What did those affairs consist of mostly?

A. Well, in writing her letters at times, sometimes she was able to write her own letters, when she wasn't, she would send for me to write her letters, and then this other nurse that she had, Miss Chamberlain, was leaving and Mrs. Whelen came out in the hall to make a check out and the nurse over- 30
charged her thirteen dollars, instead of twenty-eight dollars she had Mrs. Whelen draw up a check for forty-one and, of course, when Mrs. Whelen gave over her check book for me to try to balance it for her, it was in such a terrible condition, I found that

it was short the fourteen dollars, of course, we couldn't locate that, and then I sent to the bank for a statement and the bank checks, and they sent it back, and I found that the check instead of being twenty-eight dollars was forty-one dollars, then Mrs. Whelen decided that she would give me Power of Attorney to transact her business for her.

10 Q. Now, there was a Power of Attorney given, was there?

A. Yes, Mr. Harding.

Q. Who drew that up?

A. Mr. Gardiner—no, I won't say Mr. Gardiner, I don't know, but Mr. Gardiner, I think got it from the bank. I am not sure about that.

Mr. Harding: Have you that, Mr. Robertson in your papers?

20

Mr. Robertson: We have not.

Q. You gave it to the bank for what purpose?

A. No, I didn't give it to the bank.

Q. Who gave it to the bank?

A. Mr. Gardiner, he said he would have to take that back to the bank, and he brought two cards for me to sign, and he showed me how to sign them, Nannie T. Whelen by Elizabeth C. Smith, Atty.,
30 and the card was signed wrong, Mrs. Whelen didn't sign her checks before that, and I hadn't given out any checks for Mrs. Whelen, of course, I never saw her sign any, and he said that the checks or the cards were not signed as she signed her checks, she signed her checks "N. T. Whelen" or visa versa,

Mrs. Elizabeth C. Smith—Direct

I won't say which now, and he said, "you will have to sign other cards." You see he took those cards and came out to the desk, he took those cards, he showed me how to sign them, the next morning I had two cards sent me by the bank there that they had been signed wrong, hereafter I would have to sign them as Mrs. Whelen signed her checks on the Guarantee Trust, it seemed one of the banks she signed Nannie T. and the other N. T., so then Mr. Gardiner brought me two cards back that day. That was the day after she had given me a Power of Attorney and said I would have to make out the two cards and he would take them back to the bank. 10

Q. Well, did you ever act under that Power of Attorney?

A. What do you mean?

Q. Did you ever sign any checks that way?

A. No, Mrs. Whelen was always able to sign her own checks. 20

Q. So that Power of Attorney was never used?

A. No, Mr. Harding.

Q. Did you ever fill out checks for Mrs. Whelen?

A. Oh, yes, I filled them all out.

Q. Just tell us what method was pursued in filling out the checks that were necessary for the payment of bills by Mrs. Whelen?

A. Well, do you mean as far as paying the hotel bill? 30

Q. Anything, what was the method?

A. Well, when we got the bills I showed the bills, of course, Mrs. Beck would usually get her mail for her, then when I would go in her room, I very seldom went in her room until after ten o'clock, if

she had any mail she would say, "here is the doctor's bill, here is the other bill, here is this bill," whatever it might be. She said, "will you make up the checks for them and we will pay them." I said, "yes, I will," and I would go out to my desk, it was alongside of her door, I would make out the checks in her book and take them in and she would
 10 sign them, and she was always particular to have those bills on the side of the desk while she was signing this check.

Q. Did you fill in the checks showing what they were for always before she signed them?

A. Always, she wouldn't sign them.

Q. Did she ever sign for you any checks in blank?

A. Never.

Q. Now, this check for five thousand dollars was that made out by you?

20 A. Yes.

Q. In your hand writing?

A. Yes.

Q. And she signed it?

A. She signed it.

Q. Was it filled out and shown to her before she signed it?

A. Oh, yes.

Q. Now, how did you come to make that check for five thousand dollars?

30 A. She asked me to.

Q. Will you just tell us what she said, what the conversation was?

A. On the day she signed it?

Q. Yes.

A. She said, "Mrs. Smith, you make out that

Mrs. Elizabeth C. Smith—Direct

check now, I want you to have it today." She said, "you put me off long enough."

Q. In other words, you had a discussion about that check of that kind prior to that?

A. Oh, yes, I had prior to that.

Q. What was the prior discussion?

A. That she wanted me to have this five thousand dollars, in case Mrs. Dyer would contest the will, 10 which she knew she would, she said, "you don't know her like I know her." She said she would try to get Emma Jane's property from her and "she will try to get what I have, and I don't want her to have one penny, I am through with her." I said, "I wouldn't talk like that, let it be where that is, Mrs. Whelen." I said, "for the time being anyhow." Then these folks came down on Sunday, Mrs. Dyer, and then Emma Jane, Mrs. Pope came down the Saturday evening before, and Mrs. Pope told us 20 all about the circumstances, about the death of her daughter and so on and said that they always had trouble with Nannie &c. and so on, and the next day Mrs. Dyer and Emma Jane came down, but I had been cautioned not to give out any of the details of her affairs, if they should come. Mrs. Beck went down to Mrs. Pope's room on Sunday morning and told her everything, see, then, Mrs. Pope came upstairs on Sunday afternoon, and Dr. Carrington said no one was to stay in the room longer than ten minutes, 30 if they did they would contract small-pox, he put a little yellow card up, making believe it was quarantine, and Mrs. Pope demanded an explanation from Mrs. Whelen, and said, "now, Nannie, I want to know just how much money you drew from the

Corn Exchange," and she said, "I couldn't tell you, Madeline." She said, "that is funny, your nurse knows." See, and she said, "doesn't Mrs. Smith know?" She said, "yes, Mrs. Smith knows," so when she said Mrs. Smith I said, I went in, and I said, "what is it you want to know, Mrs. Pope?" She said, "I want to know just how much money Nannie has in bank." I said, "offhanded I couldn't tell you that." She said, "well, I want the statement." I said, "the Guarantee Trust doesn't issue monthly statements, and I haven't gotten a statement this month." She said—well—"Mrs. Smith, I would like you to get a statement and mail it to me, will you mail it to me tomorrow?" I said, "I couldn't do that, tomorrow is Monday. I will have to send to the bank for the statement and can let you have it by Tuesday very well." Then she began—she had been then looking around for the papers, she went in the bureau drawers, and then went in Mrs. Beck's hat boxes that were under the bed, and Mrs. Whelen said, "don't go in there, Madeline, that isn't my box." She said, "Mrs. Smith, you will send me the statement?" I said, "just as soon as I get it I will send it." The next day she said she didn't want her to know about her money and she didn't want Madeline to have anything to do with her affairs. This was Sunday, 30 Monday she said, "you have got to make out that check. I want you to have that money." I didn't take it Monday. So Monday night when Mrs. Beck went upstairs to Mrs. Young than we talked things over. I said, "now, on certain conditions I will take the check, and I will send it to my bank." She

said, "all right." And I made it out with Dr. Carrington's and Mrs. Beck's check, I made out the three checks at my desk and took them in and Mrs. Whelen got out of bed and sat at the desk and signed them, and Mrs. Beck said, "I thought you wouldn't make out a small check." I said, "I haven't." She said, "well, what is the other check?" and Mrs. Whelen nudged me like this, you know, she asked the second time what is the other check, was and Mrs. Whelen said, "that is none of your business." That afternoon Mrs. Whelen said to me, "I want you to lock your desk." I said, "Why?" She said, "someone was at it, I thought it was Rose, and I called and I called and I called, and when Rose answered after while Mrs. Beck came," I said, "she wouldn't go in my desk, Mrs. Whelen. My desk is open, only the roll top." Well, she said, "I think she was trying to find that check." I said, "she couldn't find that, you know I sent that to bank." "Well, she could see the stub," just like that. Of course, after that I locked the drawer of the desk, but I still kept my keys in the big drawer. That was Tuesday. On Wednesday Mrs. Whelen gave me her papers. That was the first I had Mrs. Whelen's papers.

Q. Before we get to far, the visit of Mr. Pope to you was about October 4th, was it?

A. Yes.

Q. And the subsequent visit you are speaking of, Monday, Tuesday and so on, followed immediately after the fourth?

A. The Tuesday she gave me the check was two days after —

Q. The sixth?

A. Two days after Mrs. Pope came down here looking for the papers.

Q. Now, Mrs. Smith, did Mrs. Whelen tell you specifically what that five thousand dollars was for?

A. Yes, she did.

Q. What did she tell you it was for?

10 A. She told me she wanted me to have it. I said, "why shall I take that, Mrs. Whelen? You have left me the balance of everything you have in your will." She said, "I want you to have that in case Florence Dyer contests this will, and she is going to do it, she is going to make trouble for you."

Q. Was that the will that Mr. Gardiner drew you had reference to or was it a will that was made up by Mrs. Weller?

A. I don't think Mrs. Weller made a will.

20 Q. The written will that we had, who made that up, or was it Mrs. Whelen's own hand writing?

A. The one Mrs. Rickstein and little Helen —

Q. Yes, who made that up?

A. Mrs. Whelen made that up.

Q. Was that in her hand writing?

A. I think that was Mrs. Weller's hand writing.

Q. Did she have reference to that will or did she have reference to the will that Mr. Gardiner drew up?

30 A. The will that Mr. Gardiner drew up, that is the supposition because I didn't consider a will—is that a will? That letter was disposing of her clothing and her personal belongings.

Q. Now, Mrs. Smith, what relation was Mrs. Pope, Madeline Pope to Mrs. Whelen?

Mrs. Elizabeth C. Smith—Direct

A. Either second or third cousin, I don't know which, Mr. Harding.

Q. What relation was Mrs. Florence Dyer?

A. She is a second or third cousin, one is one, once removed. I think Mrs. Pope is nearer than Mrs. Dyer, I think Mrs. Dyer is the third cousin but I won't be sure of that. I want to tell the truth about it, one is the second and the other third cousin. 10

Q. What relation was Carl Thorbeck to Mrs. Whelen?

A. Carl Thorbeck, Mrs. Whelen's nephew.

Q. Nephew?

A. Yes, her brother's son.

Q. Was he the nearest relative to Mrs. Whelen living?

A. That I know of. Yes.

Q. When Mrs. Dyer came here on October 5th

20

A. 4th.

Q. —did she have some conversation with you relative to Mrs. Whelen's financial affairs?

A. None.

Q. Did she demand or ask of you any books or papers belonging to Mrs. Whelen?

A. No, sir, none.

Q. Did she have any conversation with you relative to any compensation that you received from Mrs. Whelen for services rendered? 30

A. Yes, she did.

Q. Will you tell us just what that conversation was?

A. She asked me what Mrs. Whelen was paying me. I told her as yet she hadn't paid me anything,

that she had given me a check that she wanted me to have but that was a gift. That wasn't any payment for my services, but the check had not been honored, it was sent through to the Corn Exchange and about a week after that it was returned saying not honored, it was some—I think it was a thrift account, or saving fund account, and she had to have
 10 a pass book, and she said she had no pass book, she never had had one.

Q. Was that check for two hundred and ——

A. No, that was for two thousand dollars.

Q. It was for two thousand dollars?

A. Yes.

Q. You met Mrs. Dyer at the funeral I presume.

A. Yes, I did.

Q. Where was Mrs. Whelen buried?

A. In the Woodlawn Cemetery.

20 Q. Here?

A. No, in Philadelphia.

Q. Did you go to the cemetery?

A. Yes, sir.

Q. Did Mrs. Dyer at that time ask you whether you had received any compensation for your services?

A. Yes.

Q. Did you make any reply?

30 A. No, I don't think Mrs. Dyer. I think it was Mrs. Pope, but Mrs. Dyer was there, but I said, "yes," but unfortunately the letter was given to me just as I was leaving the hotel and marked "informal" but I didn't know what that meant, and Mrs. Pope said, "isn't that too bad? Nannie should have paid you," at least Mrs. Pope told her that

Mrs. Elizabeth C. Smith—Direct

Sunday that she should give me that check over again, that two thousand dollar check. I said, "I suppose that was my fault. I can't see why it was informal." I didn't see the mistake on it at the time. Of course, going off in a hurry I didn't read it over, you know. After the funeral I looked it over and I couldn't understand it, so I called up the Pennsylvania Company they said yes in one place 10 it was two hundred and eighty dollars and the other place two hundred and eighty-four dollars and that is what made it informal, then I asked them, they told me I had better call up the Chelsea Bank and see what they would do, they said no they couldn't accept it, I would have to send my bill in to the estate, when I came back Mr. Clayton Young went over with the bill, they thought I had signed it as Attorney after Mrs. Whelen had passed out, and Mrs. Whelen had given me that money before, and 20 she had signed it, and I had sent it through and it came back, and that was the check and Mrs. Pope said, Mrs. Dyer, not Mrs. Pope, that asked me that, and she asked me how much and I told her.

Q. What was the procedure here at the hotel so far as you and Mrs. Whelen were concerned in regard to Mrs. Whelen's mail?

A. I don't quite understand that.

Q. In other words, suppose a letter was addressed by Mrs. Dyer or anybody else to Mrs. Whelen, 30 Flanders Hotel, Atlantic City, when the letter reached the hotel, what happened to it?

A. It was given to Mrs. Whelen.

Q. Did she open the letters herself?

A. Always herself.

Q. Did you ever open them?

A. Never one.

Q. Did you ever open any of her mail and not show it to her?

A. Never. I never opened any of her mail.

Q. You never opened any of it?

A. Never.

10 Q. About her taking letters, did you write some of the letters for her?

A. Most of her letters.

Q. Do you know whether she wrote any letters herself within ten days or two weeks of her death?

A. Yes, she did.

Q. To whom, do you know?

A. Mr. Emile Shur.

Q. Where is he?

A. He has gone. He passed away since.

20 Q. Where was he, in Philadelphia or New York?

A. In—New York, the Warwick Hotel.

Q. You know how long before her death she wrote that letter?

A. I think it was that week, Mr. Harding. I won't say—yes, it was the week that she passed away. Now, I won't be sure about that. It may have been the week before that, but it was after Mrs. Dyer and Mrs. Pope had been here because Mrs. Weller had given her literature about the apartment

30 hotel down in the Greenwich village and he had been looking around for a cheaper apartment and she wanted that literature sent to him to go to see this apartment house, apartments that were cheaper than the Warwick, either the week or the week before she passed away.

Mrs. Elizabeth C. Smith—Direct

Q. She had a heart condition, did she?

A. Yes.

Q. That is what she died of?

A. Yes.

Q. Did she ever, while you observed her, show any evidences of any mental condition at all?

A. Oh, never.

Q. Did she ever act queer?

10

A. No, she was temperamental, but I wouldn't say she acted queer.

Q. Did she do anything out of the ordinary?

A. No, never that I know of.

Q. You never observed anything of that kind?

A. Never.

Q. Did she in your presence at any time, while Mrs. Beck was around, show any evidences of a bad mental condition?

A. No, I wouldn't say that, but at times she and Mrs. Beck had squabbles. Only the Tuesday before Mrs. Whelen passed away Mrs. Beck came to my room before I was out of it and said that they had had another battle, and she wouldn't stay. I said, "what was the battle?" "Well, she doesn't want her room cleaned when I want it cleaned." I said, "you can't force a sick woman to have it cleaned." Still she said, "she has been carrying on since two o'clock. I haven't had any sleep." I said, "now, consider it," that is when I sent for the other nurse, and went over to Mrs. Whelen and she told me, and she told the doctor the same day what a terrible time it was, she couldn't stand her insolence or cruelty, I think it was the water-bag, I don't think cruelty, Mrs. Whelen at times thought she would

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like heat on her abdomen, "get me the hot water bag," and Mrs. Beck would get it, she said, "is this the new hotel, this hotel we can't get hot water whenever you want it?" I said, "why not over in the new building"—she only could stand so much in the bag, and get cold right soon, of course, go to bed right early, by the time she had her sleep Mrs. Beck was ready to sleep. I wouldn't call that cruelty. Mrs. Whelen said she was cruel, she wouldn't get her the hot water bag.

Q. Do you recall when Mrs. Whelen received a letter from Mrs. Dyer, which I have offered in evidence this morning and is marked exhibit D1, in which Mrs. Dyer suggested that Mrs. Whelen could get a room at a more moderate price, and that she should go to some institution where she could be taken care of and concluded with the language "what do the poor do?" Do you remember that letter?

A. Yes, I recollect that letter.

Q. What was Mrs. Whelen's reaction to that letter, when she received it?

A. She was very angry.

Q. What did she say, and what did she do?

A. She said, "I am through with her. I am through with her, damn her, she wants to put me in the hospital with the niggers." She said in this letter, if I remember rightly, "surely there must be some place at a moderate price where you can afford to go, and what do the poor people do?" Far as I recollect that is what it was.

Q. Who was the nurse here at that time?

A. Miss Norster.

Q. You know whether she read that letter or part of it to Miss Norster?

Mrs. Elizabeth C. Smith—Direct

A. Yes, I believe she sent Miss Norster down stairs to Mr. Young to tell Mr. Young if the Dyers came in to not to let them upstairs and if they did get past the desk she wasn't to let them in the room.

Q. To your knowledge did Mrs. Whelen ever write or communicate in any way with Mrs. Dyer whereby she complained of her finances and ask for any financial assistance from Mrs. Dyer? 10

A. I did. I don't know whether Mrs. Whelen understood but Mrs. Whelen had me write to Mrs. Dyer and tell her what a terrible expense she was under and I asked Mrs. Dyer to advise me what I was to do and Mrs. Dyer wrote me a letter and said that she was very sorry she couldn't advise me what to do, that Mrs. Whelen knew her own financial affairs best, and she would write to her and tell her that, so that is when she wrote the letter you see in answer to the letter that I had written. 20

Q. Is that the letter that we have just talked about, marked D1?

A. Yes, she wrote and told me there must be some place where she could afford to go because the nurse was charging seven dollars a day and the doctor five dollars a day and she had the nurse's board to pay and her own board, and it was more than she could afford but Mrs. Whelen thought perhaps that Mrs. Dyer would take her home, but Mrs. Dyer said no Mr. Dyer wouldn't have her in the house. That was the day after Mrs. Whelen died when I said, "she thought she could take her home." She said, "I have too much to do. I have Mr. Dyer's mother and brother to look after and I couldn't take Nannie and if I wanted her, Jack wouldn't have her in the 30

house." That was the Sunday after Mrs. Whelen died.

Q. Did Mr. Dyer ever attend to any affairs of Mrs. Whelen, that you know of?

A. None that I know of. She never told me he did. She told me occasionally she would send her check book up, she would get that balled up, she
10 said she would give it to him to fix it, but she never knew whether she had six cents or six dollars, it wasn't kept when she got it, and that is when she asked me to go over it, that is how I came to find the thirteen dollars shortage.

Pardon me. You spoke to me about a letter coming or going out from Mrs. Whelen. Mrs. Whelen did write a letter the week before she died and Mrs. Beck brought it down to me and she said, "Mrs. Smith, here is a letter Mrs. Whelen gave me to
20 mail and I want you to look at it." I said, "Well, what about it?" She said, "well, I didn't want to mail it until I showed you this." I said, "what is it?" and she took the letter down like this, don't you know, and traced the envelope, she said, "read that." Now, Mrs. Straw sat next to me when she did this, I said, "what did you do that for, Mrs. Beck?" She said, "I just wanted to see. I asked her what she was writing and she told me it was none of my business and she wrote the letter and sealed it, and
30 look what she said." I said, "what is it?" She said "read it," so I took it and I looked at it and it said, "I have been looking all day for a cheaper apartment." Now, she thought that was what Mrs. Whelen had written. I said, "that is not Mrs. Whelen's writing." She said, "oh, yes, it is, I saw her write

the letter, she gave it to me to mail." I said, no, Mrs. Beck, she said, "don't bother, Mrs. Whelen has given you permission to open her mail, and just to go to Mrs. Dyer, and Mrs. Dyer told you to open her letters to see what was in them and if worthless to tear them up, so," and I said, "I wouldn't open Mrs. Whelen's mail, I took it up to Mrs. Whelen." I said, "you wrote to Florence Dyer?" She said, 10
 "Yes, I enclosed Emlie's letter." Evidently Mrs. Dyer at that time had told her to ask Mr. Dyer for some money and that is the reason Mrs. Dyer wrote that letter, Mrs. Whelen to Mrs. Dyer telling her she was in hard luck again same as the rest, but Mrs. Beck, she wouldn't have Mrs. Beck prying into her affairs, she said Mrs. Beck pried into her affairs, that is what she did that night, that is the last letter she wrote.

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Cross-examination.

By Mr. Robertson:

Q. Mrs. Smith, who was present when you say Mrs. Beck went down to Mrs. Pope's room and told her certain affairs about Mrs. Whelen?

A. Who was present when she went down?

Q. In the room with Mrs. Pope?

A. I wasn't down there, Mr. Robertson.

30

Q. Then, how do you know that Mrs. Pope and Mrs. Beck had any conversation in their room?

A. Mrs. Pope said so.

Q. You were not present?

A. No, but I was present when she told that to Mrs. Whelen.

Q. You say that Mrs. Whelen gave you a check for two thousand dollars?

A. Yes.

Q. As a gift?

A. As a gift.

Q. When was that?

A. That was sometime in September, it was before she made her will, before she made her will.

Q. What became of the check?

A. I sent it to the Pennsylvania Company and it was returned as not honored.

Q. Then, what became of it when it was returned?

A. I gave it to Mrs. Whelen.

Q. And it was never made good to you?

A. Not that check, no.

Q. Was that check signed by Mrs. Whelen?

A. Yes.

Q. Signed in blank by her?

A. No. I made it out and she signed it.

Q. You made it out and she signed it.?

A. And she signed it, as I had made all her checks.

Q. It was returned as informal?

A. Not honored it was marked.

Q. Subsequent to that time did you try to get that check honored?

A. Did I try to what?

Q. Get it honored later?

A. No.

Q. Did you get a new check for it?

A. No, not for that, no; not for two thousand.

Q. You promised Mrs. Dyer, when she was here, a statement showing the financial status of Mrs. Whelen, is that correct?

Mrs. Elizabeth C. Smith—Cross

A. The money that she had in the Guarantee Trust.

Q. Did you send her that statement?

A. No, Mrs. Whelen asked me not to.

Q. You said also that you had a conversation with Mrs. Dyer prior to the death of Mrs. Whelen on the fourth of October?

A. I had a conversation with her? 10

Q. Yes.

A. Yes.

Q. In that conversation she asked you if you had received any moneys from Mrs. Whelen and your reply was no; is that correct?

A. She didn't ask me that, she asked me if Mrs. Whelen paid me for my services.

Q. And you said you have received no money?

A. No money, I said she had given me a check not for my services, that she had given me a check 20 as —

Q. As a gift.

A. As a gift and it was returned. She asked me how much but I didn't tell her.

Q. Later on you had another conversation with Mrs. Dyer at the funeral, did you not?

A. At the cemetery.

Q. At the cemetery?

A. Yes.

Q. Did Mrs. Dyer at that time ask you if you had 30 received any money?

A. Mrs. Pope asked me that.

Q. What was your reply?

A. I told her I had received a check that week that she passed away and had sent it through but

the morning that I came up to the funeral it was handed me from my mail box and it was marked informal, Mrs. Pope said, "that is too bad." I said "I suppose that is my mistake."

Q. Did you tell Mrs. Pope at that time anything about having received this five thousand dollar check?

10 A. No.

Q. So you left her under the impression that you had not received any money?

A. No, I didn't. I told her I had that check.

Q. Yes, the check that had come back unpaid.

A. Yes.

Q. Other than that you didn't tell her about anything?

A. No, I was told not to say anything about it.

Q. You filled out quite a few checks for Mrs.

20 Whelen, did you not?

A. Many, yes.

Q. You filled them out prior to the signature or subsequent to signature?

A. I don't understand that, Mr. Robertson.

Q. Did you have Mrs. Whelen sign a number of checks in blank and then fill them up?

A. Never.

Q. Or did you fill them out and then had Mrs. Whelen sign.

30 A. Always filled them out and she always looked at them before she signed them.

Q. This particular check of five thousand dollars do you say now that that was signed prior to being filled in or subsequent to being filled in?

A. I filled it in, I filled three checks in that day

Mrs. Elizabeth C. Smith—Cross

and Mrs. Whelen signed them at the same time they were filled in, positively, one hundred and forty dollars to Dr. Carrington, sixty-three dollars and seventy-five cents to Mrs. Beck, and five thousand made out to my order and Mrs. Whelen sat at the desk and signed them, and Mrs. Beck was there when she signed them, of course, she didn't know what the checks were, the only check she knew because there was a controversy about the one check sixty-three dollars and seventy-five cents, Mrs. Beck didn't want the fourteen dollars and seventy-five cents put on that check. 10

Q. Now, prior to the death of Mrs. Whelen you were corresponding frequently with Mrs. Dyer, were you not?

A. For Mrs. Whelen, yes.

Q. You regarded—how did you regard the Dyers at that time in their relationship with Mrs. Whelen, did you think that they were the ones to whom you should report the condition and affairs of Mrs. Whelen? 20

A. They were the only ones I knew of, Mr. Robertson.

Q. Now, did Mrs. Whelen tell you that, if anything happened to her of a serious nature you should communicate with the Dyers?

A. No.

Q. Will you look at a letter that seems to be dated—that is dated August 19th, 1931, and tell me whether or not this letter is in your handwriting? 30

A. I don't have my glasses.

Q. You identified this letter once before at Mays Landing?

A. I didn't go over it.

Q. But you said it was in your handwriting?

A. Yes.

Q. The letter that bears your signature and which you identified concludes in this manner: "I wish Mrs. Dyer you would write me at once telling me just what to do. Mrs. Whelen has told me many
10 times you and your husband will look after her affairs. If she should go suddenly will wire you. Trusting to hear from you at your earliest, I am,
Yours sincerely, Elizabeth C. Smith."

A. Yes.

Q. You wrote that.

A. Yes, I wrote that.

Q. At the time you wrote that letter ——

A. Mrs. Whelen was very ill.

Q. You believed that Mr. and Mrs. Dyer were the
20 proper persons to look after the affairs of Mrs. Whelen?

A. Mrs. Whelen had told me that she had made a will in 1925, and made Florence Dyer her executrix and, of course, I took from that that they were the ones, if she was the executrix, that she was the one I should notify. Mrs. Whelen on that day was very, very ill, that was the day she collapsed. Will you look and see if that is not August 19th?

Q. That is August the 19th, yes.

30 A. Yes, and I think, if I am not mistaken, I sent it special delivery. I am not sure about that.

Q. That is correct. Subsequent to giving you check which is dated October 6th, you wrote another letter to Mrs. Dyer dated October 13th, which is signed "Yours sincerely, Elizabeth C. Smith," in

which you say that “just a line”—“My dear Mrs. Dyer: Just a line to let you know Mrs. Whelen has been improving slightly ever since Wednesday October 7th.” I show you that letter and ask you now what was the physical condition of Mrs. Whelen on October 6th at the time these checks were dated?

A. Her physical condition was better than it was on August 19th, if that is what you want to know. 10

Q. Was she in a like physical condition on October 6th at the time she signed these —

A. Pardon me?

Q. Was she in an unusually weak physical condition on October 6th, at the time she signed, at the time these checks were filled out?

A. No, she got out of bed herself and sat at the desk.

Q. Did she continue to improve after October 6th?

A. Was up on the porch, up on the roof a number 20 of times.

Q. How about the 7th?

A. I don't know about the dates but I think the 7th of October she was over in the 7th of October that was the day that she gave me her papers, so far as I know, I won't say the date, I don't know about that, Mr. Robertson. I said here, and that is October 13th that she would be out of bed in a short time.

Q. Just a minute. Did you tell anyone that you had received from Mrs. Whelen the sum of five 30 thousand dollars?

A. Yes.

Q. Whom did you tell that?

A. Mr. Straw, Mrs. Whelen's attorney.

Q. When did you tell him that?

A. I couldn't tell you the date, but it was immediately after I received it, but the date I couldn't tell you, Mr. Robertson, because I tell you I haven't my book, I don't know dates now, can't remember the date.

Q. Did you tell your counsel that?

A. Tell my who?

10 Q. Counsel.

A. Mr. Straw was the counsel, Mr. Straw was engaged to take care of Mrs. Whelen's estate.

Q. Did you tell your lawyer that?

A. He wasn't my lawyer, he was Mrs. Whelen's lawyer. He was engaged to take care.

Q. Did you tell Mr. Harding that?

A. No, I didn't tell Mr. Harding that.

Q. Where did you deposit this five thousand dollars?

20 A. In the Pennsylvania Company.

Q. When did you first withdraw it from there?

A. That date I don't know either.

Q. Was it a month after you put it in there, or more?

A. No, it was more than a month afterwards.

Q. Where is the money now?

A. I have it.

Q. Is it in Atlantic City?

A. No, sir, it is not.

30 Q. Where is it?

A. Do I have to tell where it is?

Mr. Harding: Well, I suppose you can decline to tell, I can object and then he will have a right to get the answer and the Vice-Chancellor will have to rule on it.

Mrs. Elizabeth C. Smith—Cross

A. Well, I did as Mrs. Whelen told me, I deposited it in the Pennsylvania Company, the receipt came back that it had been deposited to my account, I showed that to Mrs. Whelen. I guess you have it with the papers because you have all her papers, you have the bag and everything that the papers were in.

10

Mr. Harding: Maybe they have got it because I don't think we have.

A. Her papers were all kept in that yellow bag, and in the yellow bag I gave you the bag with the papers in Mr. Greening, and after that there were some more banks went up, and she said, "Mrs. Smith, are you sure that money is safe?" I said, "I think so, the Pennsylvania Company is a good Company, I wish all my money had been there." She said, "if you see any danger of that going up," she said, "I want you to go over to the Guarantee Trust and rent a box and put that money in there so it will be safe for you." I said, "what is the use of spending that money?" she said, "find out how much it is," so I asked Mrs. Mardello, she said she didn't know what they were over there, she didn't have a box, she had her box down in the boardwalk bank, she said they had them from five dollars up. She said, "no use spending five dollars, you put it away in a safe place," so I drew it out and put it in a safe place.

20

30

Q. When did you draw it out?

A. I can't tell you the date.

Q. Was it during 1932?

A. January, 1932.

Q. Did you put it in a safe deposit box?

A. I did, yes.

Q. Will you tell me now, where that safe deposit box is located?

A. No.

Q. You decline to tell?

10 A. Pardon me?

Q. You decline to tell?

A. Yes.

Q. Have you the five thousand dollars intact?

A. Yes, sir.

Q. What other gifts have you received from Mrs. Whelen?

A. Quite a few. I couldn't name them all, quite a few gifts, badges, needle bags, embroidery material.

20 Q. What other gifts?

A. I had jewelry.

Q. What jewelry?

A. Some of her personal belongings.

Q. Can you enumerate them?

A. Yes.

Q. Will you do so?

A. I have some things to give Mrs. Dyer, at least she told me that, but she contradicted that, but I want Mrs. Dyer should have them, I don't want
30 them.

Q. I am talking about ——

A. She gave me ——

Q. She gave you.

A. I have everything Mrs. Whelen had intact, I can't enumerate them, she gave me her jewelry outright, what she had.

Mrs. Elizabeth C. Smith—Cross

Q. What did the jewelry consist of?

A. There was a bracelet and one or two pins, I don't know much, and a ring and watch, a wrist watch, and, I don't know offhand, I can show it to you if you would like to see it, I think that is all.

Q. Any diamonds?

A. Not that I know of, no diamonds, the bracelet was supposed to be diamonds, I believe, but it is not near diamonds. 10

Q. What other money did she give you other than this check for five thousand dollars?

A. Not a thing. The two hundred and eighty dollars you know that.

Q. Well, that check I believe was for services.

A. That was from October before she died, one year's services, she marked that out herself, I took care of her all the fall and the winter.

Q. And she paid you what you say a satisfactory sum for your services. 20

A. For my services, yes.

Q. Did you know what balance Mrs. Whelen had at the time you drew that check for five thousand dollars to your order?

A. No, I didn't, Mr. Robertson. I couldn't tell you offhanded what her balance in bank was.

Q. You had the records at that time, didn't you?

A. No, I didn't have, I had the check book but I hadn't balanced that book. 30

Q. In your direct examination you said that Mrs. Whelen gave you this money on certain conditions. Will you tell to us at this time what those conditions were?

A. I don't know what you mean on certain conditions?

Q. In answer to a question by your counsel you said on certain conditions I will take the check.

A. Yes.

Q. Will you tell what those conditions were?

A. That if she ever needed it I would give it to her as she needed it, if she wanted fifty dollars I would give her fifty dollars, if she wanted a hundred
10 dollars I would give her a hundred dollars when her bank account ran short I would take it that way. She said, "Well, then, if I die, what then?" I said, "Well, what then?" just like that. She said, "Mrs. Smith, I want you to have that." I said, "I hope
20 you live to spend every penny of it. I will take it on those conditions, Mrs. Whelen. I hope you will live to spend every penny of it. If I precede you in death, if I am taken ill I will write my daughter and tell her what you have given me and advise any
amount of money left that I precede you in death my daughter will return that money to you." She said, "That is perfectly all right." Now she said, "Will you have it?" I said, "Yes." That was the conditions under which I took that money and she had tried to force it on me two or three times before I wrote out the check for her to sign.

By Mr. Harding:

30 Q. Mrs. Smith, I show you a memorandum which was evidently intended as a will, which, for the purpose of identification is marked in evidence D2, and ask you if you know in whose handwriting the envelope is, you know whose handwriting, paper purports to be a will is?

Mrs. Elizabeth C. Smith—Re-direct

A. Well, the envelope is Mrs. Whelen's.

Q. How about the ——

A. Well so far as I know that is—I wouldn't swear to it, that is Mrs. Weller's.

Q. Who is Mrs. Weller?

A. Mrs. Weller was a friend of Mrs. Whelen's.

Q. Was she ever at the Flanders Hotel?

A. Yes.

10

Q. While Mrs. Whelen was sick?

A. Yes, indeed.

Q. It is signed by apparently two witnesses, Marjorie Rickstein.

A. That is her second nurse.

Q. Who was the other one?

A. Helen Evans was the maid on the floor.

Q. You knew both of them?

A. Yes.

Q. Of course you know the signature attached to 20 it, whose signature is that?

A. Mrs. Whelen.

(Paper marked D2 for identification.)

Testimony resumed in open court at 3:15 P. M.

ELLEN NORSTER, SWORN.

10 Direct examination.

By Mr. Harding:

Q. Miss Norster, where do you live?

A. 20 South Newport Avenue, Ventnor.

Q. What is your business?

A. Nurse.

Q. You a trained nurse?

A. Yes, sir.

20 Q. Do you remember Nannie T. Whelen?

A. Yes, sir.

Q. Did you nurse her at the Flanders Hotel, Atlantic City?

A. Yes.

Q. Can you tell us about when?

A. I believe it was somewhere between the 18th and 23rd of August

Q. Of August?

A. Of August.

30 Q. What year?

A. 1931.

Q. Do you know what she was suffering from at the time?

A. Heart condition.

Q. Were you with her at the time that she re-

ceived a letter from Mrs. Dyer which has been offered in evidence here and marked Exhibit D1, in which a reference was made to Mrs. Whelen's circumstances, and in which the expression was used, "What do the poor do?"

A. Yes, sir.

Q. You remember that letter?

A. Yes, sir.

Q. Will you tell us just what reaction that had on Mrs. Whelen, what she said to you and how she acted when she received that letter?

A. Mrs. Whelen read the letter through —

Mr. Robertson: If your Honor please, I object to this testimony on the ground that this is an action to recover the five thousand dollars that was not transferred until some time in October, and this lady is attempting to give testimony in August previous when she was either four or five days a nurse in the place, and knows nothing of the transaction involving the five thousand dollars, couldn't have, because it is previous.

The Court: I will overrule the objection.

A. Mrs. Whelen read the letter, she handed it to me and said, "Miss Norster, read that letter through, and how would you feel if you received a letter like that from people who were supposed to be your friends?" I read the letter through and Mrs. Whelen was getting very excited about it. I said, "Now, don't worry about this, Mrs. Whelen. You are here and Dr. Carrington will see that you are

taken care of." She said, "Those people want me put into a public ward, and they will do it. Miss Norster, go down to the office at once and tell them that if Mrs. Dyer or Mr. Dyer comes to the Flanders Hotel, I don't wish to see them."

(No cross-examination.)

10

MISS MYRTLE RIXSTINE, SWORN.

Direct examination.

Q. Miss Rixstine, where do you live?

A. At present? I am in Spring City, Pennsylvania, right now.

20 Q. Where is your home?

A. That is my home. I was sick and I had to go home, but naturally where I have been residing is in Atlantic City up until July of this year.

Q. Now, do you know—did you know Nannie T. Whelen in her life time?

A. Yes.

Q. Do you know Elizabeth Smith?

A. Yes.

Q. Did you nurse Mrs. Whelen in her life time?

30 A. Yes.

Q. For about how long?

A. It was around—I don't know whether the 21st or 22nd of August, until September, I don't recall whether the 5th or 6th of September, right before Labor Day.

Miss Myrtle Rixstine—Direct

Q. You had to leave the case to go on another case, didn't you?

A. I left it to go to the Pocono Mountains because I had arranged for my plans.

Q. Now, could you tell us what the conduct of Mrs. Whelen was towards Mrs. Smith?

A. She told me she was the best friend she ever had.

10

Q. Did she say anything at all about her worldly possessions so far as Mrs. Smith was concerned?

A. She told in my presence that she wanted different people to have different things, and after everything was paid she wanted Mrs. Smith to have the remainder, and Mrs. Smith spoke up and said, "I don't think there will be anything left," and laughed and went out of the room.

Q. Who was present when she said that, do you know?

20

A. Mrs. Whelen, Mrs. Smith and I.

Q. And yourself?

A. Yes.

Q. Did Mrs. Whelen ever act queerly at all while you were nursing her?

A. The only time when she had two hypodermics at night, she would talk, and she would fool with the shutters, she took her cane and she would open them and she would close them shut, and at times she didn't know what she was doing, I don't think she was herself at those times, but in the day she knew everything she was doing.

30

Q. Only when she was under the influence of the hypodermics?

A. Yes, I had to give her two hypodermics.

Q. Now, Miss Rixstine, I show you a paper which has been offered subject to objection, as D2 for identification, and ask you if that is your signature?

A. Yes, that is my signature.

Q. Did you know at the time that that paper was signed what it was about?

A. She told me she wanted different friends to
10 have different things.

Q. Who told you that?

A. Mrs. Whelen.

Q. Is that Mrs. Whelen's signature?

A. Yes.

Q. Did you see her sign it?

A. I saw her sign it.

Q. Miss Rixstine, did Mrs. Smith, the defendant, help you at all in the nursing and giving attention to Mrs. Whelen?

20 A. Every afternoon when I was out for four hours she relieved me and took care of Mrs. Whelen, and different times when I went down for my meals she would stay with Mrs. Whelen until I came up when she was very bad.

Q. Did you ever observe any evidence of hostility of Mrs. Whelen towards Mrs. Smith at all at any time?

A. Well—just what do you mean?

30 Q. Did you ever notice any evidence of hostility on the part of Mrs. Whelen towards Mrs. Smith; in other words, were they friendly?

A. Very; they were the best of friends. She told me several times that Mrs. Smith was the best friend she ever had.

Miss Myrtle Rixstine—Cross

Cross-examination.

By Mr. Robertson:

Q. Did you hear them arguing one with the other?

A. No, they never argued when I was there.

Q. Who wrote this paper that you have just identified?

10

A. I don't know who wrote it. She told me one day —

Q. Who told you one day?

A. Mrs. Whelen told me she wanted to jot down different things, but I didn't see her write the paper.

Q. Did you look at this paper at the time it was written?

A. I didn't read it over.

Q. Did you have any hand in the preparation of it?

20

A. No.

Q. Did you know that it stated in it, "I direct my executors, Mrs. Florence Dyer," and so forth, to do certain things; did you know that was in there?

A. No, I didn't read the paper over. She asked me to witness the paper.

Q. Who asked you to witness the paper?

A. Mrs. Whelen.

Q. The paper seems to have from its appearance two ink preparations in one handwriting, and signature in another; do you know whether Mrs. Whelen prepared the paper at all?

30

A. Well, she at different times wanted to jot down different things, who she wanted this to go to and that to go to, but I really don't know who wrote

the paper. I mean I didn't read the paper over before I signed it.

Q. Were you there when the lady that was on the stand prior to you was there?

A. No, she was there and I relieved her.

Q. She said that she was there from the 18th to 23rd of August. What day did you come?

10 A. That very day she left, I arrived at noon and she left in the morning.

Q. So you came on the 23rd of August?

A. Yes, if that was a Sunday afternoon, I forget the date exactly, but it was a Sunday afternoon that I got there.

Q. You left what day?

A. I left, I don't know whether the 5th or 6th of September, I think it was a Friday, I had the dates at home.

20 Q. During the time you were there was Mrs. Whelen very ill?

A. Yes, she was very ill.

Q. Was she in fear of death?

A. Well, I don't know whether she feared death, I couldn't say that.

Q. Did she indicate to you that she thought she was going to die?

A. She knew she was very sick.

30 Q. You think this particular paper that you have just identified was written by some one with the belief in mind that Mrs. Whelen was about to die?

A. No, she told me she wanted to give those gifts, and I thought that she had written that paper, but I didn't even look who wrote it. She asked me to witness her signature.

Miss Myrtle Rixstine—Re-direct

Q. Is that all she said to you, just "You witness my signature"?

A. I was the only one, you see there was no one there but the maid and I, and she asked if we wouldn't witness her signature on this.

Q. Is that all she said to you, "Will you witness my signature?"

A. I don't recall any other words. 10

By Mr. Harding:

Q. The maid you referred to, is that the other girl who signed this?

A. Helen.

Q. Helen Evans?

A. Yes, sir.

Q. Were you both in the room at the same time?

A. No, Mrs. Whelen came out in the hall, and she was sitting out in the hall and she wanted to sit out there at the desk to sign it, she couldn't write on her elbow, and she was sitting there in a big chair, and she signed it and then I signed it and then the maid signed it. 20

Q. In other words, you didn't see the maid sign it?

A. Oh, yes.

Q. Did you see the maid sign it?

A. Yes. 30

Q. Did the maid see you sign it?

A. Yes.

Q. Did you both see Mrs. Whelen sign it?

A. Yes.

(Paper offered, received in evidence and marked Exhibit D2.)

Mr. Robertson: Your Honor please, objection to that. I didn't know what the purpose of offering this paper in evidence except to show the condition of Mrs. Whelen's mind on that date, and for that reason I have no objection.

Mr. Harding: It is to show intent; in other words,
10 here is evidence of intent.

Q. Miss Rixstine, at the time that this paper was signed, did Mrs. Whelen tell you what it was, without telling you specifically what was in it, did she tell you what it was, did she tell you what this paper was that she was asking you to sign?

A. She was talking about a will and she wanted to be sure the different ones received the different articles.

20 Q. Did she say that this paper here was a will and that she wanted to be sure about people getting these particular articles?

A. I think she did.

Q. Is your mind pretty clear about it as to whether she said whether it was a will or not?

A. I am sure she said it was a will.

By Mr. Robertson:

30 Q. Mrs. Smith there all the time?

A. No, she only relieved me in the afternoon.

Q. No, I mean at the time that you signed this paper?

A. She was out in the hall until we went by there.

Q. How do you mean by "by there"?

Helen Evans—Direct

A. Mrs. Whelen signed the paper and then I signed the paper and then Helen signed it, and Mrs. Smith was there, too.

Q. Anybody else?

A. No.

Q. Didn't she ask Mrs. Smith to sign it, too?

A. No.

Q. Did Mrs. Whelen say anything to Mrs. Smith 10 at the time in your presence?

A. She said that she wanted, as I said, she wanted the different ones to receive these gifts, she wanted to be sure her different friends received the different articles?

Q. She said that to whom?

A. She said that to me, she said it right in front of Mrs. Smith and I several days before.

Q. I am talking about the day this was signed; did she have any conversation with Mrs. Smith at 20 that time?

A. Not that I remember.

HELEN EVANS, SWORN.

Direct examination.

30

By Mr. Harding:

Q. Miss Evans, where do you live?

A. I live 1000 Baltic Avenue.

Q. Atlantic City?

A. Atlantic City.

Q. Did you know Nannie T. Whelen in her lifetime?

A. I did.

Q. Did you perform services for her?

A. I did before the nurses started.

10 Q. Were you the maid around there?

A. I was.

Q. I show you a paper and ask you to look at it and see if your name is on there and see if that is your signature?

A. That is my signature.

Q. Is that your address, 1218 Baltic Avenue?

A. That is where I was living.

Q. Will you tell the Court just under what circumstances that paper was signed by you?

20 A. I was working in the room, in another room, and Mrs. Whelen called me and I came to her, and Mrs. Whelen was sitting in the chair, Mrs. Smith was sitting in another chair in front of the desk, Mrs. Whelen was at the desk, too, and Miss Rixstine was standing up behind, and I stood there, and she says, "Helen," she says, "I want you to witness my signing my name to this will," and I wrote my name down. Mrs. Smith in the meantime says, "Put your address there, Helen, in case anything comes up we
30 will know where to locate you."

Q. Was Miss Rixstine there when Mrs. Whelen said that?

A. Miss Rixstine was there, Mrs. Smith was there, Mrs. Whelen, and myself; no one else.

Q. Did you see Mrs. Whelen sign her name?

Ellen Norster—Direct—Cross

A. I saw her sign her name.

Q. Did you see Miss Rixstine sign her name?

A. Yes, Mrs. Whelen signed her name first, and Miss Rixstine signed hers, and I signed mine.

(No cross-examination.)

10

ELLEN NORSTER, recalled.

Direct examination.

By Mr. Harding:

Q. Miss Norster, I forgot to ask you one question, did Mrs. Whelen in her lifetime, while you were there as nurse, say anything to you or in your presence concerning her possessions and Mrs. Smith? 20

A. Yes, she did. She said that excepting for one or two pieces of clothing, she would like Mrs. Smith to have everything that she had, because she had been a good friend to her, and she felt that she deserved it.

Cross-examination.

By Mr. Robertson:

30

Q. Who was present when Mrs. Whelen said that?

A. No one excepting Mrs. Whelen and myself.

Q. When was it she said it?

A. I couldn't tell you the day, I was only there three days.

Q. You were there three days?

A. Yes.

Q. Was it morning or afternoon?

A. I couldn't tell you.

Q. Can you remember the exact words of Mrs. Whelen?

A. No, I have told you as near as I could tell you.

Q. What prompted Mrs. Whelen to say that to you?

A. The letter that she received from New York.

GEORGE B. HEATH, SWORN.

20 Direct examination.

By Mr. Harding:

Q. Mr. Heath, where do you live?

A. At the present time?

Q. Yes, sir.

A. At the Hotel Flanders.

Q. What is your business?

A. I am an instructor in English in the Senior High School, Atlantic City.

Q. Did you know Mrs. Whelen in her lifetime?

A. I did.

Q. Do you know Mrs. Smith?

A. I do.

Q. Do you know what the relationship, or did you

George B. Heath—Direct

know what the relationship was between the two women?

A. All I know is what Mrs. Whelen told me.

Q. That is what we want. Will you tell the Court?

A. She told me that Mrs. Whelen—that Mrs. Smith was the best friend she ever had in the world. She wrote my sister the same thing.

Q. Your sister and she were very friendly? 10

A. Very friendly.

Q. Did she ever say anything to you about her possessions as regards distribution of them?

A. No, sir.

Q. But she simply told you that Mrs. Smith was the best friend she had in the world?

A. Yes, many times.

Q. About when did she tell you that?

A. She told us that in the fall, well, in September when we came back, of the year that she died, we came directly to the Flanders that year, we had an apartment and we stayed a short time at the Flanders. 20

Q. How long had you known Mrs. Smith?

A. Who?

Q. Mrs. Whelen?

A. We had known Mrs. Whelen ever since she came to the Flanders, in June, I think it was, 1929. I have the impression it was 1929, and my sister first became acquainted with her. Do you wish me to tell? 30

Q. Yes, go ahead.

A. My sister first became acquainted with Mrs. Whelen, we went by her door together, she was indisposed, she had bad heart trouble, it was said, and the doctor was in attendance, and she had no one to

call upon but the maid. We were going by her door, going down to dinner, and my sister is deaf, I said to my sister, "I think that is the woman who has recently come here, and she seems to be in distress; why don't you go in and see if you can render any aid, at least ask her if we can do anything for her." My sister did go in and Mrs. Whelen was very fine
10 to her. She seemed to forget her own troubles and said she was delighted to meet her, so glad she came, and I think she asked my sister at that time to mail a letter for her, there was nothing special then, but I have known many times after that, that she has asked my sister to tell Mrs. Smith to come to her, that she has wished her for some services or other many times.

Q. Can you tell us about when was the last time you spoke to Mrs. Whelen?

20 A. Yes, my sister and I both saw Mrs. Whelen and talked with her, I think it was three or four days before she died.

Q. Did she discuss Mrs. Smith at that time?

A. I don't remember that as being a definite time at which she discussed her then, I wouldn't remember it.

Q. But you had seen her from time to time?

A. My sister was probably the most intimate friend that she had there, in fact, my sister got Mrs.
30 Smith to help Mrs. Whelen, she asked her if she wouldn't go to her, the woman was there alone in her room, that was the beginning of her indisposition.

Cross-examination.

By Mr. Robertson:

Q. You don't know anything about the financial relations between Mrs. Smith and Mrs. Whelen, do you?

A. I know nothing about them, no, sir.

Q. You don't know whether for the services that Mrs. Smith rendered to Mrs. Whelen, whether or not she was paid?

A. I do not.

Q. You don't know how much money that Mrs.

A. I do not, no, sir.

Q. Just a minute, please. —You don't know how much money Mrs. Smith was paid out of the estate of Mrs. Whelen for those services, do you?

A. I know nothing about it.

Q. Did you see Mrs. Smith and Mrs Whelen quarrelling one with the other?

A. Never.

Q. How often did you see them together?

A. Every day and every evening.

Q. For how long a period?

A. All the evening for night in and night out, they played cards together in the lobby from seven o'clock until ten, sometimes eleven.

Q. For how long a period?

A. For all the time we were at the Flanders.

DEFENDANT RESTS.

Mr. Harding: I am going to ask Mr. Robertson at this time if he will agree that the will which was offered for probate in Mays Landing be offered in evidence and considered part of the record. Have you the original?

10 Mr. Robertson: The original will is filed.

Mr. Harding: I mean have you a certified copy?

Mr. Robertson: I have no copy.

Mr. Harding: I have a copy here if you will agree on it.

20 Mr. Robertson: Placing in evidence the testimony and copy of the will, if you want to do that.

Mr. Harding: I have a plain copy here if you admit it is a copy.

Mr. Robertson: Let that go in evidence, with a copy of the testimony of the Surrogate.

Mr. Harding: Yes.

30 Mr. Robertson: Then I have no objection.

(Copy of will admitted and marked Exhibit D3.)

(Copy of testimony admitted and marked Exhibit D4.)

TESTIMONY CLOSED.

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

—————	10
Between	
JOHN B. DYER, executor	} On Bill, &c. Conclusions.
of estate of NANNIE T.	
WHELEN, deceased,	
<i>Complainant,</i>	
and	
ELIZABETH C. SMITH,	
<i>Defendant.</i>	
—————	20

1. A gift by an aged and seriously ill person, who shortly thereafter died, to one not a relative, but who had ingratiated herself to the decedent, one who had secured, by reason thereof, the bank books, check books and other private papers of the decedent, and who had caused a will to be drawn making herself the chief beneficiary, which gift practically impoverished the decedent, will not be sustained, unless it is clearly shown by the beneficiary that the decedent well understood the legal as well as the practical effect and consequence of her act and had the benefit of competent and independent advice relative to her proposed action. 30

2. The burden of proof is thrown upon the person in whom confidence is reposed, and who had ac-

quired an advantage, to show affirmatively, not only that no deception was practiced therein, no undue influence used, and that all was fair, open and voluntary, but that it was well understood.

- 10 MESSRS. ROBERTSON & ROBERTSON, for complainant.
MR. PATRICK H. HARDING, for defendant.
-

INGERSOLL, V. C.:

- 20 The complainant files his bill of complaint, alleging that he has qualified as executor under the will of Nannie T. Whelen, who died in Atlantic City on October 17, 1931, which will was duly probated in the Surrogate's Court of Atlantic County on March 18, 1932; that the decedent resided at the Flanders Hotel in Atlantic City, New Jersey, and died while still a guest at that hotel; that she had been ill for some months prior to her death; that shortly before her death she was attended by a trained nurse; that the defendant, Elizabeth C. Smith, was also a guest at the said hotel, became friendly with the decedent, and without compensation, assisted in and about the sick room of the said decedent, and by reason thereof, became familiar with her affairs, wrote letters
30 in her behalf and took into her charge the bank book, check book and other private papers of said Nannie T. Whelen; that on or about September 22, 1931, she caused a will to be drawn, making herself the chief beneficiary of decedent's estate; that she withheld knowledge from relatives of the said decedent of

Conclusions

said will, and, subsequent to the death of Nannie T. Whelen, offered the will for probate.

A caveat having been filed, a hearing was had on March 9, 1932, and said document was denied probate; that shortly after his qualification, the executor discovered that a check for \$5,000 had been signed by the said decedent to the order of said defendant, and that the same had been cashed and the proceeds thereof paid to the said Elizabeth C. Smith, and the prayer is that the said money should be declared a part of the estate of said Nannie T. Whelen, and as such be restored to complainant as executor. 10

This case is astonishingly similar to *Kelly v. Kelly*, 107 N. J. Eq. 483, except that therein the transfer was made to one not a relative but an acquaintance, who, by kindly acts, had ingratiated herself into the confidence of the deceased, one who, by reason of that confidence, had caused to be drawn a will making her the chief beneficiary, and who, in the preparation of that will, requested that the scrivener ante-date the same, which request was refused. There is no testimony why this request was made, but the conclusion is evident that she probably knew that in some jurisdictions, and perhaps in the commonwealth in which she placed the proceeds of the check in question, will executed within thirty days of death are, in some instances, invalid. 20

The giving of the \$5,000 check so depleted the bank account of the decedent that there remained less than \$1,000 for expenses, and after the payment thereof, said account was practically exhausted. That the decedent was aged and infirm and seriously ill is not disputed. The defendant admitted upon cross- 30

examination that under certain conditions she was to return this \$5,000.

I cannot do better than to paraphrase the language of Vice-Chancellor Lewis in *Kelly v. Kelly*, *supra*:

The gift, made and given under the circumstances and conditions hereinabove stated, contained no provision for the donor's support, nor any power of revocation. Although the law does not prohibit such action on the part of the aged and infirm, it nevertheless circumscribes same with certain safeguards in order to protect the rights and interests of the donor, especially where the relation existing between her and the donee is one of trust and confidence. Before it will sanction or approve of such a gift, that law will demand that it be shown that the donor had the preliminary benefit of competent and independent advice and fully comprehended the legal, as well as the practical, result of her action. It is the settled policy of this State that a court of equity, moved by the apparent improvidence of such a gift, will cast upon the donee the burden of showing that all was fair, open and voluntary, and well understood by the donor, after she had received the benefit of competent and independent advice. *Haydock v. Haydock's Ex'rs.*, 34 N. J. Eq. 570, 38 Am. Rep. 385; *Mott v. Mott*, 49 N. J. Eq. 192, A. 997; *Hall v. Otterson*, 52 N. J. Eq. 522, 28 A. 907; *Otterson v. Hall*, 53 N. J. Eq. 695, 35 A. 1130; *Slack v. Rees*, 66 N. J. Eq. 447, 59 A. 466, 69 L. R. A. 393; *Post v. Hagan*, 71 N. J. Eq. 234, 65 A. 1026, 124 Am. St. Rep. 997; *Soper v. Cisco*, 85 N. J. Eq. 165, 95 A. 1016, Ann. Cas. 1918B, 452; *Jacobus v. Waits*, 86

Conclusions

N. J. Eq. 148, 97 A. 958; *Clark v. Clark*, 87 N. J. Eq. 504, 101 A. 300.

This rule as laid down by all of the authorities is an inexorable one. Nor does this burden, which the law places upon the donee, shift merely because of the donee's verbal promise to support the donor for life, although it was not proven to my satisfaction that any such promise had been made by the donee 10 in this case.

The authorities are in accord, and now well settled, that a transfer which would be deemed improvident, if there were no consideration, is not saved from being so by the existence of a mere verbal promise by the donee to support the donor for life. *Mott v. Mott*, *supra*; *Walsh v. Harkey* (N. J. Ch.) 69 A. 726; *Siebold v. Zieboldt*, 93 N. J. Eq. 327, 115 A. 577, affirmed 93 N. J. Eq. 500, 116 A. 926.

The defendant has, in my judgment, utterly failed 20 to meet and satisfy the high requirements prescribed by the rule laid down by the authorities, governing gifts or transfers, such as those here involved. As was stated by Chief Justice Gummere, in *Slack v. Rees*, *supra*: "Its (the rule) purpose is not so much to afford protection to the donor against the consequences of undue influence exercised over her by the donee, as it is to afford her protection against the consequences of voluntary action on her part, induced by the existence of the relationship between 30 them, the effect of which upon her own interests she may only partially understand or appreciate.

In my judgment, the case at bar strikingly demonstrates the wisdom of the rule, laid down in *Hall v. Otterson*, *supra*, and cases following, that "the bur-

den of proof is thrown upon the person in whom confidence is reposed, and who had acquired an advantage, to show affirmatively, not only that no deception was practiced therein, no undue influence used, and that all was fair, open and voluntary, but that it was well understood." Considering the donor's testimony, in the light of the surrounding circumstances, as well as the other evidence in the case, I am constrained to the conclusion, to say the least, that the transactions in question were not "well understood" by her.

It is apparent that this gift was meant to accomplish the purpose of the will should the same fail of probate, as was the result after the hearing.

The rule relative to competent and independent advice is that the burden is upon the donee, where such proof is necessary, to show that such advice was actually given to the donor. *Pearce v. Stines*, 79 N. J. Eq. 51, 80 A. 941; *Kelso v. Kelso*, 96 N. J. Eq. 354, 124 A. 763, 33 A. L. R. 587; *Graziano v. Lanuto*, 97 N. J. Eq. 182, 127 A. 109.

There is no testimony nor any apparent attempt to prove that there was any independent advice given in this matter.

I will advise a decree in favor of the complainant.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

90-4.

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Between

JOHN B. DYER, executor
of the estate of NANNIE

T. WHELEN, deceased,
Complainant,

and

ELIZABETH C. SMITH,

Defendant.

}
On Bill, etc.
Final Decree.

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This cause coming on to be heard in the presence of Richard H. Robertson of Robertson & Robertson, solicitors of the complainant, and Patrick H. Harding, solicitor of the defendant, and the Court having examined the pleadings, and taken proofs orally and in open court, and having heard and considered the arguments of counsel thereon;

It is, on this 14th day of February, nineteen hundred and thirty-three, ordered, adjudged and decreed that the said defendant, Elizabeth C. Smith, pay to the said complainant, John B. Dyer, executor of the estate of Nannie T. Whelen, deceased, or to his attorneys, the sum of five thousand dollars, to-

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gether with interest thereon from the 6th day of October, 1931, at the rate of six per cent per annum; and that the defendant pay to the complainant the costs of this suit to be taxed, including a counsel fee of two hundred fifty dollars, which is hereby allowed to said complainant.

And it is further ordered that unless the said defendant, Elizabeth C. Smith, shall, within thirty days after the service upon her of a true but uncertified copy of this decree and of said taxed bill of costs, pay to the complainant, or his attorneys, the amount due to him upon said decree, together with interest thereon and the said taxed costs, execution issue against the goods and chattels, lands, tenements and hereditaments and real estate of the said defendant, Elizabeth C. Smith, to make said sum of five thousand dollars, together with interest and costs, according to the practice of this Court.

LUTHER A. CAMPBELL,
C.

Respectfully advised:

R. H. INGERSOLL,
V. C.

We certify this to be a true copy of decree and bill of costs.

ROBERTSON & ROBERTSON,
Attorneys.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

90-4.

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Between

JOHN B. DYER, executor
of the estate of NANNIE
T. WHELEN, deceased,
Complainant,
and
ELIZABETH C. SMITH,
Defendant.

On Bill, &c.
Notice of Appeal.

20

To John B. Dyer, Executor of the Estate of Nannie
T. Whelen, Deceased, and Robertson and Rob-
ertson, Esquires, Solicitors of Complainant:

Sirs:

Please take notice that the defendant, Elizabeth
C. Smith, hereby appeals from the final decree made
in the above-entitled cause on the 14th day of Feb- 30
ruary, 1933, and from the whole and every part
thereof, to the Court of Errors and Appeals in the
Last Resort in All Causes.

Dated—April 4th, 1933.

PATRICK H. HARDING,
Solicitor for and of Counsel
with Defendant.

Petition of Appeal

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

PATRICK H. HARDING,
*Solicitor for and of Counsel
with Defendant.*

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PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

20	JOHN B. DYER, executor of the estate of NANNIE T. WHELEN, deceased, <i>Complainant-Appellee,</i> v. ELIZABETH C. SMITH, <i>Defendant-Appellant.</i>	}	On Appeal from the Court of Chancery. Petition of Appeal.
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*To the Honorable the Court of Errors and Appeals
in the Last Resort in All Causes:*

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The petition of Elizabeth C. Smith, the defendant-appellant, in the above-entitled cause, respectfully shows that:

Petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor

Petition of Appeal

Luther A. Campbell, Chancellor of the State of New Jersey, bearing date the 14th day of February, 1933, in a certain cause in said Court of Chancery wherein John B. Dyer, executor of the estate of Nannie T. Whelen, deceased, was complainant, and the said Elizabeth C. Smith was defendant, in this respect, to wit, that the said decree adjudges that the sum of five thousand dollars (\$5,000) given by complainant-appellee's testator, Nannie T. Whelen, to defendant-appellant, Elizabeth C. Smith, prior to testator's death, was not a valid gift and said decree orders that said defendant-appellant, Elizabeth C. Smith, pay to the complainant-appellee herein, said sum of five thousand dollars (\$5,000) with interest and costs. 10

And the petitioner appeals from the decree of the Chancellor, which decrees as aforesaid upon the ground that the same is erroneous in that said sum of five thousand dollars (\$5,000), given to defendant-appellant by the said Nannie T. Whelen constituted a valid gift from the said Nannie T. Whelen to defendant-appellant, and same is not subject to any obligation or trust. 20

Petitioner therefore prays that the said decree of the Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper. 30

PATRICK H. HARDING,
*Solicitor for and of Counsel
 with Defendant-Appellant.*

The first part of the paper is devoted to a general
 consideration of the problem. It is shown that the
 problem is equivalent to the problem of finding
 the minimum of a certain function. This function
 is defined by the following expression:

$$F(x) = \int_0^x f(t) dt + \frac{1}{2} x^2$$
 where $f(x)$ is a given function. The minimum of
 this function is found by setting the derivative
 equal to zero. This gives the following equation:

$$f(x) + x = 0$$
 The solution of this equation is the minimum of
 the function $F(x)$. It is shown that this
 minimum is unique. The second part of the paper
 is devoted to a detailed study of the properties
 of the minimum. It is shown that the minimum
 is a function of the initial conditions. The
 properties of this function are studied in detail.
 It is shown that the minimum is a continuous
 function of the initial conditions. The third
 part of the paper is devoted to a study of the
 stability of the minimum. It is shown that the
 minimum is stable under small perturbations of
 the initial conditions. The fourth part of the
 paper is devoted to a study of the asymptotic
 behavior of the minimum. It is shown that the
 minimum approaches a certain value as the initial
 conditions approach infinity. The fifth part of
 the paper is devoted to a study of the
 properties of the minimum in the case of a
 discontinuous function. It is shown that the
 minimum is still a function of the initial
 conditions. The properties of this function are
 studied in detail. It is shown that the
 minimum is a continuous function of the initial
 conditions. The sixth part of the paper is
 devoted to a study of the properties of the
 minimum in the case of a function with a
 jump discontinuity. It is shown that the
 minimum is still a function of the initial
 conditions. The properties of this function are
 studied in detail. It is shown that the
 minimum is a continuous function of the initial
 conditions. The seventh part of the paper is
 devoted to a study of the properties of the
 minimum in the case of a function with a
 removable discontinuity. It is shown that the
 minimum is still a function of the initial
 conditions. The properties of this function are
 studied in detail. It is shown that the
 minimum is a continuous function of the initial
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 devoted to a study of the properties of the
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 point discontinuity. It is shown that the
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 studied in detail. It is shown that the
 minimum is a continuous function of the initial
 conditions. The ninth part of the paper is
 devoted to a study of the properties of the
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 jump discontinuity. It is shown that the
 minimum is still a function of the initial
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 minimum is a continuous function of the initial
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 removable discontinuity. It is shown that the
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 studied in detail. It is shown that the
 minimum is a continuous function of the initial
 conditions.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

Between

JOHN B. DYER, Executor of the Estate of
NANNIE T. WHELEN, deceased,
Complainant-Appellee,

and

ELIZABETH C. SMITH,
Defendant-Appellant.

ACTION AT LAW.

ON APPEAL.

BRIEF FOR DEFENDANT-APPELLANT.

This appeal brings up a decree of the Court of Chancery entered February 14, 1933, on the advice of Vice-Chancellor Ingersoll.

THE FACTS.

In June, 1930, Elizabeth C. Smith, who had been a guest at the Flanders Hotel in Atlantic City, New Jersey, for over three years, was requested by Miss Heath, another guest, to aid Mrs. Whelen, who was ill and who had just arrived at the hotel. Mrs. Smith immediately went to Mrs. Whelen and rendered assistance. A warm friendship sprang up between the two women and their affection for one another increased as the time passed. In appreciation of Mrs. Smith's kindness, Mrs. Whelen, on October 6, 1931, made her a gift of \$5000.00.

On October 17th, 1931, Mrs. Whelen died while still a guest at the hotel.

John B. Dyer, the executor of her estate, demanded that Mrs. Smith return the gift of \$5000.00. She refused and he brought suit to recover the \$5000.00 alleging that she had obtained the money by fraud. After hearing all the testimony the Honorable Vice-Chancellor advised that Mrs. Smith should return the \$5000.00 to the estate of Nannie T. Whelen, not because of any fraud on the part of the defendant as alleged by the complainant, but on the ground that there existed a relationship between Mrs. Whelen and Mrs. Smith of trust and confidence, and that consequently it was incumbent upon the donee to show that Mrs. Whelen well understood the transactions and had acted after she had received the benefit of competent and independent advice.

ARGUMENT.

POINT 1.

THE COMPLAINANT FAILED TO ESTABLISH THAT A RELATIONSHIP OF TRUST AND CONFIDENCE EXISTED BETWEEN THE DEFENDANT AND MRS. WHELEN.

The necessity of proving such a relationship was clearly set forth in the case of *Farley v. First Camden National Bank and Trust Company*, 107 N. J. E. 272. In that case the bill was filed to set aside a certain irrevocable deed of trust executed by complainant to the defendant in favor of certain relatives of the donor. Vice-Chancellor Leaming there held: The only grounds upon which the validity of the deed of trust is challenged by the bill are averments that its execution was an act of improvidence on the part of the donor, and that it was executed by donor without independent advice.

“The averments of the bill are clearly inadequate to afford the relief sought. Improvidence in the gift and want of independent advice touching its execution *are not alone sufficient* to set aside a gift or donative trust of this nature. Except as against creditors a man of adequate mentality is privileged to give *all* of his property, if he wishes to do so, and such a man *needs no independent advice* to sustain that apparently improvident act if the gift be made voluntarily and with full understanding of the

Brief for Defendant-Appellant

transaction and its force and effect. *It is the relationship of trust and confidence between the parties* which may inspire a dominating influence over the donor which renders the apparent improvidence of the act and the want of independent advice material, in the absence of other equitable grounds for relief," 107 N. J. E. 272, 152 A. 245.

To the same effect was the case of *James v. Aller*, 66 N. J. E. 52. In that case the complainant gave *all his property*, valued at \$3000, to his children as a gift. It was made *without the aid of any independent advice* and it contained no power of revocation and no provision for his future support. Later the complainant brought an action to recover his property and Vice-Chancellor Emory, in advising a decree for the complainant held:

"* * * and, if the power (of revocation) be omitted when the settlement would be unreasonable or improvident in the donor unless so guarded, then the settlement will not stand, *unless the donor had independent advice* as to the insertion of the power, and the effect of its omission and the settlement was the free determined act of the settlor after such advice. *Holl v. Otterson*, 52 N. J. E. 522, 28 A. 907 * * *

But in relation to gifts made by a parent to a child and made solely under the influence of the *confidence and trust* arising from that relation, the further question always arises whether the character and circumstances of the gift are such as to impose a duty toward the donor on the conscience of the donee who claims that the gift is irrevocable. If it is claimed to be irrevocable, then the Court must be satisfied that the settle-

Brief for Defendant-Appellant

ment was not unreasonable or improvident.”
66 N. J. E. 52, 57 A. 476.

It will be observed from a reading of the above case that the Vice-Chancellor based his opinion on the very ground that Vice-Chancellor Ingersoll did in the case at bar, namely, that a relationship of trust and confidence existed between the donor and the donee. The defendant appealed the decree of the Court of Chancery to the Court of Errors and Appeals, contending that the decree was erroneous because *there did not exist a relationship of trust and confidence between the parties.*

The Court of Errors and Appeals in 68 N. J. E. 666, 62 A. 427, reversed the decree of the Court of Chancery. Chief Justice Gummere, after reviewing the facts held the law applicable in all these cases to be:

“The law permits any one to dispose of his property gratuitously, if he pleases, provided the rights of creditors are not injuriously affected thereby. He may, if he sees fit, reserve to himself the right to revoke his gift, or, if he desires, he may make the gift absolute and irrevocable, and his power in this regard does not depend upon the providence or improvidence of his act. It has, indeed, frequently been declared that *where a relation of trust and confidence exists between the donor and the donee, and the donee occupies the dominant position*, the fact that the gift is improvident is of great importance in determining whether it was the voluntary, well-understood act of the donor, and that the failure of the donor to reserve to himself a power of revocation will vitiate the transaction.

Brief for Defendant-Appellant

..* *Where no relation of trust and confidence exists between the donor and the donee, or where, when such a relation does exist, the donor, not the donee, occupies the dominant position the rule laid down in these cases has no application, and a gift absolute in its terms, made voluntarily and with a full understanding of its effect, cannot be revoked by the donor, either by his own act alone, or with the aid of a judicial tribunal. Such is the case now before us.*"

In the case of *Connors v. Murphy* the complainant had given a friend \$5356.90. At the hearing he testified that he was seventy years old and had been a boarder in the home of the donee for many years. He contended as did the complainant in the instant case—that there was fraud and undue influence because the relation of the parties raised a presumption of fraud or undue influence. Justice Trenchard, speaking for the Court of Errors and Appeals said:

"We think not. The fact that the donor was one of a number of boarders living in the boarding house kept by the donee is not sufficient to raise a suspicion of fraud or undue influence, in the absence of circumstances showing a relation of trust and confidence.

But the complainant insists that the gift was invalid for want of competent and independent advice. To this it is a sufficient answer to say that *there was no relation of trust and confidence existing between the donor and the donee*. We therefore think that proof of competent and independent advice was not essential to the validity of the gift. *Morrison v. Morrison*, 94 N. J. E. 646, 121 A. 133, 100 N. J. E. 280, 134 A. 681."

Brief for Defendant-Appellant

In view of the above decisions by the highest Courts of our State the all-important question is: Did a relation of trust and confidence exist between Mrs. Whelen and Mrs. Smith, and if it did, did the latter dominate the former? The burden of establishing this relationship and the necessary domination over the deceased by the defendant was upon the party alleging their existence, namely, the complainant. Has he accomplished this?

First, does the evidence produced at the hearing warrant a finding that a relation of trust and confidence existed between the deceased and Mrs. Smith? Let us examine closely such testimony of the witnesses that might aid us in answering this question.

(a) John B. Dyer gave absolutely no testimony which mentioned or suggested that such a relation existed.

(b) Mrs. Dyer also failed to mention or suggest such a relationship. All that she admitted was that Mrs. Smith wrote her, Mrs. Dyer, several letters and that Mrs. Smith did not answer her questions to her satisfaction.

The testimony of complainant's other witnesses shed no light on this matter.

In view of Mrs. Beck's testimony one is compelled to admit that Mrs. Whelen was at all times physically and mentally able to write letters and make out complete checks, even up to the time of her death. Therefore, one must, of necessity, come to the con-

clusion that Mrs. Whelen never really needed the aid of Mrs. Smith—that she never had to depend on her for anything, and that the latter was nothing more nor less than a very dear friend, who was able, out of the goodness of her heart, to do, at times, very trifling things for the deceased.

Assuming, but not admitting, that the complainant has established the existence of a confidential relationship between the deceased and the defendant, has he proven that Mrs. Smith occupied a *dominant* position towards Mrs. Whelen? The testimony of all the witnesses loudly proclaims that the deceased was a woman who was not and could not be dominated by Mrs. Smith.

POINT 2.

THE BILL OF COMPLAINT WAS FATALLY DEFECTIVE IN THAT IT FAILED TO ALLEGE THAT THERE EXISTED A RELATION OF TRUST AND CONFIDENCE BETWEEN MRS. WHELEN AND MRS. SMITH.

The case of *Farley v. First Camden National Bank and Trust Company*, is right on point with the case sub judice and governs. Vice-Chancellor Leaming, among other things, held: The only grounds upon which the validity of the deed of trust is challenged by the bill are averments that its execution was an act of improvidence on the part of the donor, and that it was executed by the donor without independent advice.

Brief for Defendant-Appellant

The averments of the bill are clearly inadequate to afford the relief sought. Improvidence in the gift and want of independent advice touching its execution are not alone sufficient to set aside a gift or donative trust of this nature.

“No suggestion is to be found in the bill * * * that he was not mentally competent to give away his property, or that he did not intend to do so, or that the transaction was not thoroughly understood by him at the time of its execution. Clearly no decree adverse to the trust properly can be based upon the bill in its present form.”

The entire action by the complainant was brought upon paragraph 15 of the bill of complaint, which is as follows:

“Your complainant alleges that the said Elizabeth C. Smith has wilfully, fraudulently, and with the purpose to cheat and defraud the estate of Nannie T. Whelen, deceased, taken this money into her own possession.”

In her answer the defendant denied the allegation. The entire case of the complainant was based upon this allegation of fraud. So very obvious was this that after the complainant had closed his case, counsel for defendant remarked:

“Your Honor please, I don't know whether you want us to go ahead with any defense. It seems to me there is a serious doubt here as to whether there is anything to answer.”

When compelled to answer, defendant brought forth such evidence as tended to show that the actions and

Brief for Defendant-Appellant

purposes of the defendant were not fraudulent. The appellant feels certain that the grounds used by the Vice-Chancellor in arriving at his opinion never entered the mind of the complainant when his action was brought.

Therefore, since the bill of complaint alleged fraud, and not that there existed a relationship of trust and confidence between the defendant and deceased, it was absolutely fatal and no decree could properly be based upon it.

The appellant, therefore, respectfully submits that the complainant's bill should have been dismissed for reasons stated in the second ground of appeal, and that the decree of the lower Court should be reversed for the reasons and grounds of appeal argued herein.

Respectfully submitted,

PATRICK H. HARDING,
*Attorney for Defendant-
Appellant.*

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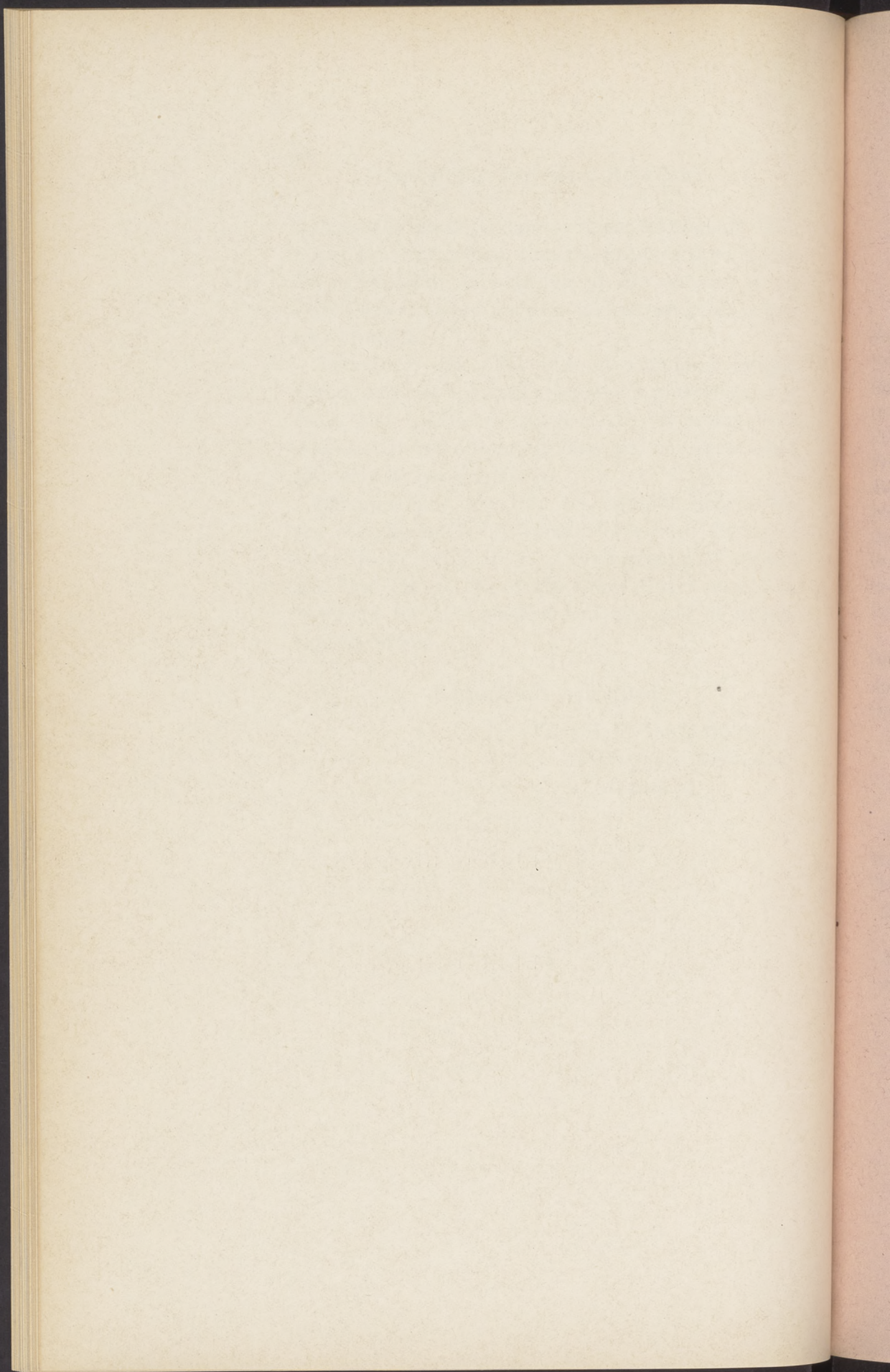
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