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Complaint.

Filed May 2, 1929.

In Chancery of New Jersey.

To his Honor, EDWIN ROBERT WALKER, Chancellor
of the State of New Jersey: 10

The complainant, Madison Trust Company, a banking corporation of the State of New Jersey, says that:

1: The complainant is a banking corporation organized and existing under the laws of the State of New Jersey, having its banking house in the Borough of Madison, in the County of Morris and State of New Jersey. 20

2: Heretofore, and on the 27th day of April, 1928, and prior thereto, Maria E. Tunis had on deposit in the bank of the complainant the sum of eighty-two hundred ninety-one dollars and sixty cents (\$8291.60), as shown by a deposit book issued to her by the complainant in the special department thereof, the said deposit book being numbered 201. 30

3: Thereafter and heretofore and on the 28th day of April, 1928, the said Maria E. Tunis departed this life intestate, a resident of the County of Morris aforesaid.

4: Thereafter and heretofore J. Frank Allen was appointed administrator of the estate of the said Maria E. Tunis by the Surrogate of the County of Morris. 40

Complaint.

5: Heretofore the said J. Frank Allen individually and as administrator as aforesaid presented at the banking house of the complainant the said deposit book #201 and claimed that the said bank account standing in the name of the said Maria E. Tunis had been by her given to him, and demanded the same from the complainant.

10

6: The complainant has not paid the said sum on deposit, or any part thereof, to the said J. Frank Allen, and thereafter and heretofore the said J. Frank Allen has commenced an action at law in the Supreme Court of the State of New Jersey against the complainant herein to recover the said bank deposit with interest thereon, and said action is now pending in the said Court and has been noticed by the plaintiff therein, the said J. Frank Allen, for trial at the May term of the Morris Circuit Court.

20

7: The said J. Frank Allen presented to the complainant the deposit book aforesaid and made demand on the complainant for the said sum on deposit on the very same day on which the said Maria E. Tunis departed this life, claiming that the said deposit had been by the said Maria E. Tunis given to him, the said J. Frank Allen, the day before.

30

8: The said J. Frank Allen, as administrator of the estate of the said Maria E. Tunis, never included the said sum on deposit or any part thereof in the inventory filed by him of the estate of his said intestate.

9: After the appointment of the said J. Frank Allen as administrator of the estate of the said

40

Complaint.

Maria E. Tunis, and heretofore, certain of the next of kin of the said Maria E. Tunis presented a petition to the Morris County Orphans' Court, praying for his removal as such administrator and for the appointment of a substituted administrator of the estate of the said Maria E. Tunis, and such proceedings were had thereon that heretofore an order was made by the Morris County Orphans' Court removing the said J. Frank Allen as administrator as aforesaid and appointing Russell E. Young substituted administrator of the estate of Marie E. Tunis aforesaid. 10

10: Thereafter and heretofore and on the eighteenth day of April, 1929, the said Russell E. Young as such substituted administrator has presented a claim to the complainant, demanding, as such administrator, all of the said sum on deposit to the credit of Maria E. Tunis aforesaid at the date of her decease, together with all accumulations of interest thereon. 20

11: The amount now due to whomever is properly entitled to the said sum on deposit, together with interest thereon, amounts to the sum of \$8567 62/100. 30

12: The complainant has always been willing to pay the said sum on deposit, together with all accumulations of interest thereon, to such person as should be lawfully entitled to receive the same, and to whom it could pay with safety. The complainant hereby offers to pay into this Court the said sum of \$8567 62/100 constituting the said sum on deposit, together with all accumulated interest thereon. 40

Complaint.

13: The complainant does not collude with either the said J. Frank Allen or Russell E. Young as substituted administrator of the estate of Maria E. Tunis, deceased, and has not been indemnified by them or either of them, but brings this suit of
10 its own free will, to avoid being molested or sued by the defendants herein touching the matters contained in the said bill.

The complainant is without remedy at law, and therefore prays:

1: That J. Frank Allen and Russell E. Young, as substituted administrator of the estate of Maria E. Tunis, deceased, who are the defendants in this suit, answer this bill of complaint and each state-
20 ment therein contained.

2: That the said defendants may interplead and settle their rights to the said sum of money, and that the complainant may be at liberty to pay the same into this Court, and that the said J. Frank Allen may be enjoined and restrained from proceeding in his said action at law against the complainant and from instituting any other actions or
30 suit against it; and that the defendant Russell E. Young as substituted administrator of the estate of Maria E. Tunis may be enjoined and restrained from instituting any action at law against the complainant to recover the sum on deposit to the credit of Maria E. Tunis in her lifetime, and all accumulations of interest thereon, and that the complainant upon payment into Court of the aforesaid sum of \$8567 62/100. and procuring the defendants to interplead according to the course of practice of this Court, may be decreed to be discharged
40

Complaint.

from all liability to the said defendants in the premises, and may have all its costs therein.

3: That a writ of subpœna may issue, commanding the said defendants to answer this bill of complaint and abide by such decrees as this Court may make in the premises.

4: That the complainant may have such other and further relief as may be agreeable to equity and good conscience.

10

McCARTER & ENGLISH,
Solicitors of Complainant.

G. W. C. McCARTER,
Of Counsel.

20

STATE OF NEW JERSEY }
County of Morris } ss:

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

1: I am secretary and treasurer of Madison Trust Company, the complainant in the foregoing bill of complaint named. I have read the foregoing bill of complaint and the matters and things therein contained are true.

30

2: The complainant has exhibited its bill of interpleader against the defendants in this cause without any fraud or collusion between it and the said defendants, but merely of its own accord for relief in this Court. The said bill is not exhibited at the request of the said defendants or either of them, and the complainant has not been indemnified by the said defendants or either of them.

40

Complaint.

3: The complainant has exhibited the said bill with no other intent than to avoid being sued or molested by the said defendants touching the matters contained in the said bill.

10 4: Maria E. Tunis, named in the bill of complaint, resided in the Borough of Madison in the County of Morris and State of New Jersey, and had an account in the special department of the complainant, which department is in effect the savings department of the complainant. The complainant had issued to her a deposit book, #201. There was to her credit on the 27th day of April, 1928, the sum of eighty-two hundred ninety-one
20 interest accrued on the said account from the last mentioned date until today makes the total of the said bank account today amount to \$8567 62/100.

5: On the 28th day of April, 1928, the defendant J. Frank Allen called at the office of the complainant in the Borough of Madison and saw me. He had with him, in his possession, the complainant's deposit book #201, representing the account of the said Maria E. Tunis in the complainant's special department. He then stated to me that the
30 said Maria E. Tunis had on the day before given and made a present of the said sum on deposit to him, and he then and there demanded payment thereof.

6: The complainant's rules and regulations as set forth in the pass book aforesaid include, among others:

40 "In case any person other than the original depositor shall present a book, such person

Complaint.

shall present an order signed by the depositor, or such other evidence as the officers of the company demand."

The said rules also provide:

"In case of the death of a depositor the amount standing to his or her credit shall be paid to his or her duly accredited representative (executor or administrator) upon the presentation of the certificate of the Surrogate or other proper officer of their appointment as such representative. 10

"Provided, that in case the money due the deceased shall not exceed one hundred dollars, the Executive Committee may direct the same to be paid to the next of kin of the deceased upon a satisfactory bond of indemnity." 20

7: The said J. Frank Allen did not produce an order signed by the said Maria E. Tunis.

8: I afterwards learned that the said Maria E. Tunis died on the very day of the presentation of the bank book by the said J. Frank Allen to me.

9: On advice of counsel the complainant has refused to pay the said J. Frank Allen. 30

10: Subsequently, and on the 18th day of April, 1929, there was presented to me a claim by Russell E. Young, as substituted administrator of the estate of the said Maria E. Tunis, deceased, for the payment to him of the said bank account, together with all accumulated interest thereon. On advice of counsel the complainant has not paid the said substituted administrator. 40

Complaint.

11: The said J. Frank Allen has commenced an action in the New Jersey Supreme Court against the complainant to recover the said bank account, so demanded by him as hereinabove stated.

EDWARD B. MILLER

Sworn to and subscribed be- }
10 fore me, this 23rd day of }
April, 1929. }

WILLIAM L. THEBAULT

Notary Public, New Jersey.

My commission expires June 9, 1929.

(SEAL)

20

30

40

Interlocutory Decree.

Filed June 12, 1929.

IN CHANCERY OF NEW JERSEY.

*Between*MADISON TRUST COMPANY, a
corporation,

Complainant,

and

J. FRANK ALLEN, *et al.*,

Defendants.

72/630

10

On Bill, etc.

Interlocutory Decree
of Interpleader.

The complainant having filed its bill of interpleader in this matter, and having paid into Court²⁰ the sum of eight thousand five hundred sixty-seven dollars and sixty-two cents (\$8567.62), and none of the defendants having contested the complainant's right to relief within the time required by law for them to answer, and application now being made; it is, on this 12th day of June, 1929, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED as follows:

30

1: The said bill of interpleader is properly brought by the complainant in this cause, and the complainant is entitled to relief in this Court.

2: The complainant be dismissed from further prosecution of this suit, with its costs to be taxed, and a counsel fee of \$125.00 dollars (\$) to be included in the taxed costs; the said taxed costs, including counsel fee, to be paid by the Clerk⁴⁰

Interlocutory Decree.

of this Court out of the fund; and that the complainant be released, acquitted and discharged of all claims and liabilities by the defendants or either of them in this suit and upon or by reason of the said fund.

10 3. The said defendants do interplead, settle and adjust their several claims, demands and matters in controversy in this suit as between themselves.

E. R. WALKER,
C.

Respectfully advised

WM. J. BACKES, A. M.

A true copy.

20 FERD GARRETSON,
Clerk.

30

40

Statement of Claim of J. Frank Allen.

Filed June 3, 1929

IN CHANCERY OF NEW JERSEY.

Between

MADISON TRUST COMPANY, a
 banking corporation,
 Complainant,
 and
 J. FRANK ALLEN, *et al.*,
 Defendants.

10

On Bill &c.
 Statement of Claim
 of J. Frank Allen

Statement of claim of the defendant, J. FRANK ALLEN, of the Borough of Madison, in the County of Morris and State of New Jersey. 20

1. For many years prior to April 28, 1928, the date of her death, Maria E. Tunis lived with this defendant and his wife at their home in Madison where she enjoyed all the comforts of life, provided by this defendant.

2. On or about April 27, 1928, the said Maria E. Tunis had on deposit with the Madison Trust Company in a savings account the sum of \$8,567.62, represented by pass book Number 201. 30

3. On or about April 27, 1928, the said Maria E. Tunis gave to this defendant said pass book number 201 in Madison Trust Company and the deposit represented therein. Prior to the death of said Maria E. Tunis, this defendant presented said pass book and demanded payment of the amount 40

Statement of Claim of J. Frank Allen.

represented therein which demand was refused by said bank.

4. The rules of said Madison Trust Company provide:

10 IV. At the time of the making of the deposit it shall be entered on the books of the Company. A pass book shall be given to each depositor and possession of the book may be treated by the company as authority to pay the amount due thereon to the person presenting it. In case any person other than the original depositor shall present the book, such person shall present an order signed by the depositor, or such other evidence as the officers of the company demand.

20 X. Although the Company will endeavor to prevent fraud being perpetrated on the depositors yet all payments to persons producing the pass books issued by the Company shall be valid payments to discharge the company from further liability.

30 5. Complainant Madison Trust Company has not paid to this defendant the amount shown by said pass book or any part thereof. All of the monies represented by said pass book are the absolute property of said J. Frank Allen.

KING & VOGT,

Solicitors of Defendant,
J. Frank Allen.

**Statement of Claim of Russell E. Young,
Adm.**

Filed June 4, 1929.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i> MADISON TRUST COMPANY, a corporation, Complainant, and J. FRANK ALLEN, AND RUSSELL E. YOUNG, as Substituted Administrator, Defendants.</p>	}	<p>10</p> <p>Docket 72-630 On Bill, etc. Statement of Claim</p> <p>20</p>
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Statement of claim of defendant Russell E. Young, as Substituted Administrator of the estate of Maria E. Tunis, deceased:

1. On April 28, 1928 said Maria E. Tunis had on deposit with the Madison Trust Company the sum of \$8567.62, represented by Pass Book Number 201. 30

2. Said Maria E. Tunis died intestate on April 28, 1928, a resident of the Borough of Madison, County of Morris, State of New Jersey.

3. On April 5, 1929 the Morris County Orphans' Court ordered that letters of substitutionary administration upon the goods, chattels and credits of said Maria E. Tunis be granted to this defend- 40

Statement of Claim of Russell E. Young, Adm.

ant, Russell E. Young, of the Borough of Chatham,
County of Morris, State of New Jersey.

4. Said deposit of \$8567.62 belonged to said
Maria E. Tunis at all times during her lifetime, and
at the time of her death; and now belongs to this
defendant as Substituted Administrator of the
estate of said Maria E. Tunis, deceased.

10

5. On April 18, 1929 this defendant made due
demand upon said Madison Trust Company for the
payment of said sum with interest, which demand
was refused. Said Madison Trust Company has
not paid said sum or any part thereof to this de-
fendant.

20

Solicitor of Defendant Russell E.
Young, as Substituted Adminis-
trator of the estate of Maria E.
Tunis, deceased.

30

40

Supplemental Statement of J. Frank Allen.

Filed June 7, 1929.

IN CHANCERY OF NEW JERSEY

(76-630)

Between

MADISON TRUST COMPANY, a
corporation,
Complainant,

and

J. FRANK ALLEN, and RUSSELL
E. YOUNG, as Substituted Ad-
ministrator,
Defendants.

10

On Bill, &c.

Supplemental State-
ment of Claim.

20

Supplemental statement of the defendant J. Frank Allen, to the statement of claim of Russell E. Young, as substituted administrator of the Estate of Maria E. Tunis, deceased.

1. This defendant denies the allegation contained in paragraph two of said statement of claim.

2. This defendant admits Paragraph two.

3. This defendant admits Paragraph three.

30

4. This defendant denies Paragraph four.

5. As to the statements contained in Paragraph Five, this defendant has no knowledge or information thereof, sufficient to form a belief, and therefore denies the same.

.....
Solicitors of Defendant.

J. F. Allen

40

**Statement of Claim of Russell E. Young,
Adm.**

Filed June 4, 1929.

IN CHANCERY OF NEW JERSEY

10

Between

MADISON TRUST COMPANY, a
corporation,
Complainant,

and

J. FRANK ALLEN, and RUSSELL
E. YOUNG, as Substituted Ad-
ministrator,

20

Defendants.

Docket 72-630

On Bill, etc.

Supplemental State-
ment of Claim

The supplemental statement of the defendant Russell E. Young, as Substituted Administrator of the estate of Maria E. Tunis, deceased, to the statement of claim of defendant J. Frank Allen:

1. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the statement of claim of defendant J. Frank Allen, and therefore denies the same.

30

2. This defendant admits the allegations of paragraph 2 of said statement of claim.

3. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraphs 3 and 4 of said statement of claim, and therefore denies the same.

40

Statement of Claim of Russell E. Young, Adm.

4. The rules of said Madison Trust Company provide:—

“In case any person other than the original depositor shall present a book, such person shall present an order signed by the depositor, or such other evidence as the officers of the company demand.”

10

The said rules also provide:—

“In case of the death of a depositor the amount standing to his or her credit shall be paid to his or her duly accredited representative (executor or administrator) upon the presentation of the certificate of the Surrogate or other proper officer of their appointment as such representative.”

20

5. This defendant admits that said Madison Trust Company has not paid the aforesaid sum or any part thereof to defendant J. Frank Allen; but this defendant has no knowledge or information sufficient to form a belief as to the other allegations of paragraph 5 of said statement of claim and therefore denies the same.

Solicitor of Defendant Rus- 30
sell E. Young, as Substi-
tuted Administrator of the
estate of Maria E. Tunis,
deceased.

40

Case.

IN CHANCERY OF NEW JERSEY.

10	<p><i>Between</i> MADISON TRUST COMPANY, Complainant, and J. FRANK ALLEN and RUSSELL E. YOUNG, as substitute ad- ministrators. Defendant.</p>
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20 NEWARK, N. J., September 11, 1929.

Before:

HON. ALONZO CHURCH, Vice-Chancellor.

Appearances:

MESSRS. KING & VOGT, by
ELMER KING, Esq.
For J. Frank Allen.

30 ARTHUR T. VANDERBILT, Esq.,
For Russell E. Young.

Mr. Vanderbilt: If your Honor please, this suit arises on a bill of interpleader. The Madison Trust Company interpleaded a savings account standing in the name of Maria E. Tunis in the sum of \$8,291.60. The defendants interpleaded are
40 J. Frank Allen, who claims the bank account as a

 Frederick H. Seward—Direct.

gift *inter vivos*, and Russell E. Young, who is the substitute administrator of the estate of Miss Tunis, Mr. Allen having been the original administrator for the administration of the estate with the exception of this bank account, which is in contest, the substitute administrator making the claim that there was never a gift *inter vivos* and Mr. Allen states through his counsel, Mr. King, that there 10 was a gift *inter vivos* of the bank account to him.

Mr. King: We will prove that it was a gift *inter vivos*. The book is in our possession and has been so.

The Court: I suppose it is up to you to show that it was a gift.

Mr. King: I think so. Counsel on the other side has subpoenaed Dr. Seward in the matter that is before the Court, and I have asked counsel on the other side to introduce his testimony, so that he 20 might get back, and he has consented to it.

FREDERICK H. SEWARD, called as a witness on behalf of the substituted administrator, being first duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. VANDERBILT:

Q. Dr. Seward, you are a practicing physician in the State of New Jersey, residing in Madison?

A. I am. 30

Q. And how long have you been practicing, Doctor?

A. I have been there twenty-six years.

Q. On April 28, 1928, were you called in to attend Miss Maria E. Tunis?

A. I was.

Q. At what time, Doctor?

A. It was in the afternoon, I think.

Q. In the afternoon? 40

Jennie Allen—Direct.

A. I am not—

Q. And who called you?

A. Mr. Frank Allen.

Q. Mr. Frank Allen. And did you go down to his home?

A. Yes. Within five minutes I was there.

Q. And was Miss Tunis still alive?

A. She had just passed.

10 Q. She has just passed. Had you been her regular physician in her lifetime?

A. No.

Q. Do you know who was her regular physician?

A. I think it was Dr. Scarborough of Madison, who has passed away.

Q. He has passed away. Do you know what Miss Tunis died of?

20 A. Well, there was every indication of heart failure.

Q. What was her age, Doctor?

A. I don't remember.

Q. Well, was she a very old woman?

A. Rather elderly, yes, sir.

Q. Was there any indication of whether she had been sick previous to this fatal illness?

A. Not to my knowledge, no.

Mr. Vanderbilt: That is all.

30 Mr. King: That is all, Doctor.

Will the Court now excuse the Doctor?

The Court: Yes. Doctor, you may go.

JENNIE ALLEN, called as a witness on behalf of J. Frank Allen, being first duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. KING:

40 Q. Mrs. Allen, you are the wife of J. Frank Allen?

Jennie Allen—Direct.

- A. Yes.
- Q. And you live in Madison?
- A. Yes.
- Q. How long have you lived there?
- A. 28 years.
- Q. Did you know Maria Tunis in her lifetime?
- A. I have known her for 35 years.
- Q. And during the 35 years that you have known her, did she live with you any portion of that time? 10
- A. The last years of her life.
- Q. How long?
- A. The last years of her life.
- Q. As a boarder?
- A. As a boarder.
- Q. Have you in mind whether she had any near relatives?
- A. Only nieces and nephews.
- Q. And where were they located, generally? Did 20
any of them live in Madison?
- A. Yes.
- Q. Who lived there?
- A. The Tunis family—the Vincent Tunis family.
- Q. What board did she pay to you and your husband?
- A. \$5 a week.
- Q. How old was she at the time of her death?
- A. 84 years.
- Q. And prior to her death, how was she? 30
- A. Just the same as she had always been since I have known her.
- Q. Prior to her death, do you remember a conversation or statement made by her to your husband in reference to a savings account bank book in the Madison Trust Company?
- A. Yes, sir.
- Q. When was that in relation to the time of her death? 40

Jennie Allen—Direct.

A. The night before.

Q. What was the occasion? Were you having your dinner or what?

A. No. We were sitting at the table reading, and she looked up at the calendar, and she said to my husband, she said, "It is near the 1st of the month," and she said, "I have some coupons," she says, "that is due the first of the month, and I
10 would like, when you go down to the bank, if you will get my box, I will get the keys." She went up-stairs and got her keys, and my husband got her box for her.

Q. Just a moment. Where was the box?

A. In the safe.

Q. In whose safe?

A. In Mr. Allen's safe.

Q. And was this box of hers kept locked?

20 A. Always.

Q. And she retained the key?

A. She retained the keys. She went up to get the keys.

Q. So, your husband went and got the box and she went and got the keys?

A. Yes, sir.

Q. Then what took place?

A. And she opened the box. She took out one bank book. She looked at that. She took out another bank book and looked at that, and she took
30 out a little piece of paper and crumpled that up in her hand. She took out the last bank book, and then she picked up the first bank book and she handed that to my husband, and she says, "Here, Frank, you take this for what you have done for me. You have done more for me than any of my nieces and nephews, and I want you to have this." Then she took out her railroad bonds and she
40 looked at those.

Jennie Allen—Direct.

Q. When she said this to your husband, "Here, Frank, I want you to have this," what did she do with the book?

A. She handed it to Mr. Allen.

Q. And he took it?

A. And he took it, and thanked her.

Q. Then what happened?

A. Then she looked at her bonds. She put them 10
back in the box and she closed the box and locked it.

Q. And returned the box to him?

A. Returned the box to Mr. Allen, and she took
the keys.

Q. Was this bank book that she handed to your
husband replaced in the box or did he retain it?

A. What is that?

Q. This bank book that she gave your husband,
was that replaced in the box, or did your husband 20
retain it?

A. He kept it. She—he kept that bank book,
put it in his pocket.

Q. What was said, if anything, about drawing a
will?

A. Now, she says, "Frank," she says, "I want
to make a will. I don't want my money to go the
way my sister's did," and she says, "I want to make
a will, and I want it to go to those that need it."

Q. Was there any suggestion made by anybody as 30
to the lawyer that should be engaged to perform
that service?

A. She said, "Just how would you go about it,
Frank, to make a will?" And he said, "Why, if I
was going to make a will, I would have a lawyer.

Mr. Vanderbilt: What was that?

(The answer was read by the Reporter.)

Q. Proceed.

Jennie Allen—Direct.

A. And she said, "Well, will you see to that, Frank; will you get a lawyer?" And Frank said, "You can either go to the lawyer or have him come here," and she said, "Well, you see a lawyer and have him come here," which he did Saturday morning, when he went down to the bank.

Q. Did a lawyer subsequently—was the name of
10 the lawyer mentioned that night?

A. No, no lawyer mentioned.

Q. Did a lawyer subsequently come to your
house?

A. Yes, sir.

Q. What was the name of the lawyer?

A. Mr. Pilch.

Q. And he lives in Madison?

A. He lives in Madison.

Q. When did he come?

20 A. As near as I can remember, it was about a
quarter after three.

Q. Of what day?

A. Saturday.

Q. Now, this conversation in reference to the
bank book took place Friday?

A. Friday evening.

Q. And the lawyer came at quarter of three?

A. Yes, sir.

30 Q. What had been going on in your house on a
Saturday?

A. Well, we had a guest for dinner and that
was all.

Q. And then after dinner, what happened?

A. Why, we sat there talking and Mrs. Spargo
was with us for lunch, and she left about ten min-
utes to three. And Miss Tunis was in the kitchen
talking with her and then she went upstairs.

40 Q. Now, she went upstairs—whom do you mean?

Jennie Allen—Direct.

A. Miss Tunis.

Q. Miss Tunis went upstairs?

A. Mrs. Spargo left, and Miss Tunis went upstairs.

Q. While she was upstairs, did anyone come?

A. Mr. Pilch.

Q. He was the attorney?

A. Yes, sir.

10

Q. Then how long did he remain, and what did he do?

A. Well, my husband went to see her—he says, “She has just gone upstairs to dress,” and he said, “You will possibly have to wait a few moments.” So then he came in in probably five or ten minutes, and went upstairs. He found her—

Q. If you did not go with him, you can't tell that. Your husband went upstairs?

A. Yes.

20

Q. What did Mr. Pilch do?

A. Mr. Pilch stayed in the store. He was in the store.

Q. Did anyone come down to Mr. Pilch, or did he go upstairs?

A. Well, my husband went upstairs and found her—knocked at her door to see if she was dressed

—.

30

The Court: You can't testify to that unless you were with him.

Q. Unless you were with him, Madam,—don't tell what you heard, only what you saw. You did not see him knock at her door, did you?

A. No.

Q. And did Mr. Pilch leave the place where they were, or did Mr. Pilch go with your husband? I am trying to find out what he did.

40

Jennie Allen—Cross.

A. I met Mr. Pilch on the stairs, as near as I can remember, that was all I saw of him, on the stairs, when my husband came to me and said, "I think Maria is gone."

Q. Was Mr. Pilch with your husband then?

A. Yes.

Q. And did you go up where Miss Tunis was?

10 A. Yes, sir.

Q. And what was her position and condition then?

A. Well, she was sitting in a chair with her head back and had her waist in her hand, ready to put it on; she was all dressed but her waist. She sat in the chair.

Q. And her condition was——

A. She was dead.

20

CROSS-EXAMINATION BY MR. VANDERBILT:

Q. Now, Mrs. Allen, you say that Miss Tunis' physical condition was the same up to the day she died as it had always been?

A. Always had been, yes, sir.

Q. When, so far as you know, had she last had a doctor attend her?

A. I think about ten years; she had some trouble
30 with her shoulder.

Q. She came to live with you after the death of her sister, Mrs. Vincent, did she not?

A. Yes, sir.

Q. And that was just a trifle over a year prior to her own death?

A. Yes, sir.

Q. Mrs. Vincent and Miss Tunis had been very close, had they not?

40 A. Yes.

Jennie Allen—Cross.

Q. And she was somewhat broken up after her sister's death?

A. Yes. She felt it.

Q. And her memory was not as good after her sister's death as it had been before that, was it?

A. Just the same.

Q. You mean to say that her mental condition was exactly the same after her sister's death as it was before? 10

A. Just the same.

Q. Did her various nieces and nephews come to visit her in your home?

A. Not very often—two or three times.

Q. Who among the nieces and nephews came to visit her during the year or so that she stayed at your home?

A. Mrs. Jamieson was there three times and Mrs. Clark was there, not over three times, and I think—Mrs. Winters, and I think that is all that came to visit her while she was with me. 20

Q. And you have told us the number of times that each of them came. Now, did any of the nephews come to visit her while she was with you?

A. No. I don't recall any of them.

Q. None of them came at all?

A. No.

Q. Are you sure of that? 30

Q. So far as I can remember. I don't remember any of them visiting her now.

Q. Now, what relation, if any, was Miss Tunis to either you or Mr. Allen?

A. Mr. Allen's mother and she were own cousins.

Q. Do you know what was approximately the size of her estate?

A. No. I do not. 40

Jennie Allen—Cross.

Q. Did she ever discuss her business affairs with you?

A. Never.

Q. Do you know whether or not she was of an extremely careful, saving disposition or whether she was inclined to be either generous or reckless with her money?

10 A. She always was saving.

Q. Extremely so?

A. Yes, sir.

Q. Almost to the point of penuriousness?

A. Yes.

Q. She was always in fear, was she not, that she would die in want?

A. No.

Q. And for that reason saved her money very
20 carefully?

A. (Witness shakes her head.)

The Court: Speak louder.

The Witness: I don't think so.

Q. What is that?

A. I don't think so.

Q. Well, did she ever express herself on that subject to you?

30 A. No.

Q. Well, you know that she was most economical even in the very smallest things, do you not?

A. Yes, she was always very saving.

Q. She was what the younger generation would call very tight, in money matters?

A. (Witness nods head.)

The Court: You must answer, and speak so that counsel can hear you.

40 The Witness: Yes, sir.

Jennie Allen—Cross.

Q. Had she ever, during the time that she lived with your husband and you previously made any gifts of money to either of you?

A. Yes, she made us a Christmas gift.

Q. She made you a Christmas gift, and what was that?

A. \$5 each.

Q. \$5 each. And during the time previous to 10 when she came to live with you, had she ever made gifts to either of you?

A. No.

Q. Now, on this Friday evening prior to her death the following day, she seemed to be in as good health that night as she ever had been?

A. Yes, just the same.

Q. Just the same. And this conversation that you tell us about took place after dinner?

A. In the evening, about half past seven. 20

Q. And how did the conversation start?

A. Well, she looked up at the calendar and she saw it was getting near the 1st of the month.

Q. Well, do you recall what day of the month it was?

A. That was the 27th of April.

Q. The 27th of April. And that led her to think of her coupons, and she spoke of her coupons?

A. Yes, sir. 30

Q. Do you know what coupons she had what railroad bonds they were?

A. No, I do not know.

Q. You had never had anything to do with that?

A. No.

Q. Had Mr. Allen been in the habit of attending to Miss Tunis' banking for her?

A. Well, these coupons, he had taken those down for her. 40

Jennie Allen—Cross.

- Q. He had taken those down for her?
A. She would ask him.
Q. And deposit them in the bank?
A. Yes, sir.
Q. Do you know which bank they were put in?
A. I do not know.
Q. And did he ever make any other deposits or
10 withdrawals for her?
A. He made deposits for her.
Q. Or did he ever withdraw any money for her
from the banks?
A. I don't remember that.
Q. Then you say that she went upstairs and got
her keys?
A. Yes.
Q. And your husband went into the store and got
20 her box out of his safe?
A. Out of the safe.
Q. What kind of store was that?
A. It was what we call the office, where we keep
the safe, that was in the store.
Q. Now, what kind of store is it? What was
done in that store? Is it a grocery store or what?
A. It is a bicycle and plumbing.
Q. Bicycle and plumbing; and that is your hus-
band's business?
30 A. The bicycles.
Q. The bicycles. He had been in the bicycle busi-
ness for a great many years?
A. Yes, sir.
Q. And he went to his safe and brought back
Miss Tunis' box.
A. The box.
Q. And she unlocked it. Was there any conver-
sation before she unlocked the box?
40 A. Nothing.

Jennie Allen—Cross.

Q. Then, you say that she took out first the bank book?

A. Yes, sir.

Q. Do you know what bank that book was for deposit in?

A. She took out the bank book and looked at it, and she put that back.

Q. Do you know which bank book that was? 10

A. The first one she looked at, she gave my husband.

Q. The first one she looked at she gave your husband.

A. But she looked at the three first, before she gave it to him.

Q. When you say that she looked at it, did she look at the cover?

A. Opened the book.

Q. Opened the book and looked at what was in them? 20

A. Yes, sir.

Q. So, the one she looked at first, judging from the subsequent event must have been the bank book of the Madison Trust Company?

A. Yes.

Q. Then you say she looked at a second bank book?

A. Yes. 30

Q. Do you know what bank that was in?

A. No, I do not.

Q. Where were you sitting, on the opposite side of the table?

A. On the opposite side of the table from her.

Q. And your husband was sitting in between the two of you?

A. He was sitting on the other side of her.

Q. On the other side of her. I see. Then she 40

Jennie Allen—Cross.

took a little piece of paper out of the box and crumpled that?

A. Yes, sir.

Q. Did she put that piece of paper back in the box?

A. She kept it in her hand.

Q. She kept it in her hand. Do you know what
10 that piece of paper was?

A. No, I do not.

Q. Then you say she looked at a third bank book?

A. Yes.

Q. Do you know what bank that was on?

A. No, I do not.

Q. Then she looked at the first bank book again?

A. Yes, sir.

Q. And up to that time there had been no con-
20 versation on her part?

A. No.

Q. With respect to these matters?

A. No.

Q. And after she finished that, she said what?

A. She says, "Here, Frank"—took the book up
and said, "Here, Frank, you take this for what you
have done for me. You have done more for me
than any of my nieces and nephews, and I want you
80 to have this".

Q. Now, is that all that she said?

A. No.

Q. With relation to the bank book?

A. Yes. I think that was all.

Q. What did your husband say?

A. He took it and thanked her.

Q. And what did you say?

A. Well, I was so overjoyed that I did not say
40 anything. I could not.

Jennie Allen—Cross.

Q. You were surprised, weren't you?

A. Yes, sir.

Q. Is there any way that you can account for this sudden reversal of the saving habit of a lifetime on her part?

A. No, I do not know.

Q. Do you know how large a proportion of her estate this bank book represented, or did you know 10 then, I mean?

A. No.

Q. Do you know now?

A. I know what was in the book.

Q. Do you know how large a proportion of her estate this bank book represented?

A. I do not know just what you mean.

Q. Well, what part of this estate—or I will put it this way: What size—how did this bank book compare in the size to all the rest of her estate 20 that she left?

A. I do not know.

Q. Do you know how much money and property she left?

Mr. King: Your Honor, I will permit counsel to read on the record, as if it were testified to, the value of the remainder of her estate.

Mr. Vanderbilt: Well, I want to get it for 30 another purpose now, if I may.

Mr. King: The percentage is so difficult.

Mr. Vanderbilt: I meant figuring roughly in a general way.

Q. Well, you knew this bank book represented a considerable part of the funds which Miss Tunis had, didn't you?

A. Yes, sir.

Q. Was anything said that night as to the 40

Jennie Allen—Cross.

amount which the bank book represented, while you all three sat together there?

A. No.

Q. Just what was it your husband said?

A. He took the book and thanked her.

Q. Did he kiss her?

A. No.

10 Q. Put his arms around her?

A. No.

Q. She had not said anything up to that time about expecting to die, had she?

A. No.

Q. She seemed to be in good health?

A. She seemed to be in perfect health.

Q. And you say her mind was just as good then as it was in any of the thirty-five years you had known her?

20 A. Yes.

Q. Although she was doing something which was quite unusual for her, wasn't it?

A. Yes, sir.

Q. You do not know of any other previous time on which she had made any large gifts to anyone, do you?

A. I never heard her say.

30 Q. Well, you do not know of any occasion when she had made any large gifts, even to her sister?

A. I do not know.

Q. You do not know of any?

A. No.

Q. And all your husband said was that he thanked her?

A. Yes, sir.

Q. Did he shake hands with her?

A. No.

40 Q. And after this very brief conversation, she

Jennie Allen—Cross.

put the other bank books back and put the railroad bonds back, locked up the box and gave it to your husband?

A. Yes.

Q. And he took the box back and put it in the safe?

A. Yes.

Q. Did he come back to the room? 10

A. He came back.

Q. Was anything more said then about the bank account?

A. She said, "I hope that you will live to enjoy it."

Q. And what did he say?

A. He said, "I hope so." She said, "I have spent the happiest year of my life here with you."

Q. What did he say?

A. Well, I don't just remember. 20

Q. Well, what was done next?

A. Well, she just sat there and talked. I don't just remember.

Q. And what did you say to her about this present that you have told us about?

A. I could not say anything.

Q. You never got over your shock?

A. No.

Q. How long did Miss Tunis stay in the room 30 before she retired, after she had, as you say, turned over the bank book to your husband?

A. I think it was about nine o'clock.

Q. About nine o'clock. Now, did this conversation with respect to drawing a will take place before or after your husband put away the box in the safe?

A. She spoke about the will before he put the box away. 40

Jennie Allen—Cross.

Q. Did she specify to you and your husband what she intended to do with her will respecting individuals to whom she was going to give her money?

A. No. The only thing she said—she did not want her money to go the way her sister's did, and she wanted it to go to those that needed it.

10 Q. Her sister died intestate without leaving any will?

A. Yes, sir.

Q. And did she specify who those were who needed it?

A. No.

Q. Do you know how the subject of drawing a will happened to come up at all? Who brought that up?

20 A. She did.

Q. She brought it up. Do you know what occasioned the mention of the drawing of the will?

A. No. She said she did not want her money to go the way her sister's did, and she wanted to make a will, after she got through looking at her bonds.

Q. Now, had she ever mentioned this subject of drawing a will before in the year or more that she had lived with you?

30 A. Yes. The first part of the year, she said that she wanted to make a will.

Q. That was right after she came with you?

A. Yes.

Q. And how soon after she came with you was that?

A. Oh, possibly about a month.

Q. About a month. And she said that to your husband and to you together?

40 A. I don't think my husband was in at that time.

Jennie Allen—Cross.

Q. I see. Did you tell your husband about it?

A. I do not know that I did.

Q. Well, from that time on to the Friday evening when these events took place, as you say, had there been any conversation with Miss Tunis—had she said anything about drawing a will again?

A. Only when she would read things in the paper about people leaving a will, like that, then she would say, "I must make a will." 10

Q. Well, on how many different occasions did she speak in any manner of drawing a will?

A. Possibly two or three times.

Q. Possibly two or three times. Now, the first one was about a month after she came to live with you?

A. Yes.

Q. When was the next one?

A. I don't remember. It was just as I say, when she would read things in the paper, that she would say that. 20

Q. On any one of these occasions—what was the nearest of these occasions to the night, Friday evening, that you had this conversation that you have told us about, that she spoke on this point?

A. I don't remember.

Q. Do you know that the drawing of a will, the project of drawing a will had been put in her mind by anything in particular? 30

A. She had been reading the paper, and I do not know—

Q. You do not know what she read in the paper?

A. No, I do not know.

Q. Well, at any rate, you say that she asked your husband to get a lawyer?

A. Yes.

Q. To attend to the drawing of the will, and to have him come to the house? 40

Jennie Allen—Cross.

- A. Yes.
- Q. Now, do you know when it was that your husband called Mr. Pilch up?
- A. He went to the bank Saturday morning.
- Q. Yes.
- A. And he asked Mr. Miller—
- 10 Q. Well, you were not there. You do not know that of your own knowledge, do you?
- A. No.
- Q. But you do know that he came about 3.15. Miss Tunis had been down to dinner?
- A. Yes.
- Q. With Mrs. Spargo, was it?
- A. Yes, sir.
- Q. What time did you all have dinner, about?
- A. About a quarter of one.
- 20 Q. And she was in good health then?
- A. Yes, sir.
- Q. Just the same as she had been the night before?
- A. Yes.
- Q. And just the same as she had been for the thirty-five years previous?
- A. Yes.
- A. And Mrs. Spargo left about 2.50?
- 30 A. Yes, sir.
- Q. Mr. Pilch had not come yet, had he?
- A. No.
- Q. And after Mrs. Spargo left, Miss Tunis went upstairs to dress?
- A. Yes.
- Q. For the afternoon. Now, when did you first see Mr. Pilch? You did not see him when he came into the store, did you?
- 40 A. No.

Jennie Allen—Cross.

Q. That store is out in the front of your house, isn't it?

A. Yes—at the side.

Q. And you do not know anything about his being told by Mr. Allen that he would have to wait a few minutes?

A. No.

Q. That testimony you gave us about his having to wait and his waiting for ten minutes, you do not know of your own knowledge, because you were not in the store at the time? ¹⁰

A. No.

Q. And the first you knew of Mr. Pilch being there was when you met Mr. Pilch and your husband in the hall, and your husband stated something about Miss Tunis being gone, is that right?

A. Yes.

Q. Now, who owns the house in which Mr. Allen and you and Miss Tunis live in? ²⁰

A. Who owns the house?

Q. Yes.

A. It belongs to the Allen Estate.

Q. And that is the estate of Mr. Allen's mother or father?

A. Father.

Q. Father. Mr. Allen, I suppose, owns the bicycle business? ³⁰

A. Yes.

Q. Has he ever been in any other business that you know of?

A. No.

Q. Do you know whether or not, Mrs. Allen, after Miss Tunis looked at those railroad bonds, whether she took any coupons off the bonds and gave them to your husband that night?

A. No. She put them back, and she said, "Well, ⁴⁰

Jennie Allen—Cross.

they are not due until the last of the month." So she did not cut them off.

Q. Well, I understood you to say that she looked at the calendar and was reminded by the calendar that it was getting near the 1st of the month, and that her coupons would be due on the 1st, and for that reason she wanted the box?

A. Yes, sir.

10 Q. And she asked your husband to get the box so that she could cut her coupons?

A. Yes.

Q. Then after she had handled the bank books and given the first bank book to your husband, with this conversation you tell us about, she put the railroad bonds back without cutting the coupons?

A. Yes.

20 Q. Did your husband say anything to her about that?

A. No, no.

Q. Well, wasn't that somewhat out of the ordinary for him not to remind her that she had forgotten to cut the coupons, which was really what she first got the box out to do?

A. No, I don't think so.

Q. Didn't that strike you as unusual?

30 A. No. She saw the date on the coupons and put them back.

Q. Well, she saw the date on the coupons was May 1st?

A. Yes, sir.

Q. And this was on the evening of April 27th, and she had gotten the box out for the purpose of clipping those May 1st coupons. Why was it that you did not say something to her about cutting the coupons which was the prime purpose for which
40 she stated that she wanted the box?

Jennie Allen—Cross.

A. Because I thought she knew her own business, and I would let her do what she wanted to.

Q. You did not say anything during this conversation that dealt with financial matters, did you?

A. No.

Q. And your husband did not say anything to her about cutting the coupons?

A. No.

Q. And, did he act shocked or surprised when this gift was made to him?

A. Yes, sir.

Q. What did he do that indicated his shock?

A. Well, he thanked her.

Q. What was it he said?

A. He thanked her for the gift, the book.

Q. What did he say? What did he say by way of thanking her?

A. "Thank you, Maria." She said, "Well, I hope you will live to enjoy it."

Q. And what is there in his statement, "I thank you, Maria," that would indicate shock on his part at receiving this gift?

A. I do not know.

Q. Was there anything about his expression or appearance that indicated shock?

A. Yes. He was surprised to think that she would give it to him, because we did not expect—

Q. How do you know he was surprised?

A. Because I looked at him.

Q. And what about his condition was there that indicated surprise to you?

A. Well, I could tell by the expression of his face that he was surprised.

Q. He did not topple off the chair, or anything like that, did he?

A. No.

10

20

30

40

J. Frank Allen—Direct.

Q. Well, what did he do? Tell us about it.

A. All that I can remember is that he thanked her for it.

Q. Did he raise his eyebrows?

A. He looked at me, and I looked at him. I was shocked the same as he was.

Q. How did he show his shock? That is what I
10 want to find out.

A. I don't remember now. Just as I say, I could tell by the expression on his face that he was shocked to see that she gave us what she did.

Q. Shocked or pleased?

A. Well, both.

Mr. Vanderbilt: That is all. May I just ask one or two questions?

Q. Do you know where she kept the keys to her
20 box ordinarily?

A. I do not know.

Q. Somewhere in her room?

A. Somewhere in her room.

Mr. Vanderbilt: That is all.

(Witness excused.)

J. FRANK ALLEN, called as a witness in his own
behalf, being first duly sworn, testified as follows:
30

DIRECT-EXAMINATION BY MR. KING:

Mr. King: The Court will pardon me. The law precludes you from giving any testimony, any statement by either you or she, the deceased bearing on the transaction with the testatrix, so when the questions are asked you—I will try to avoid that, but if I should ask you a question incorporating that, don't answer it.

40

J. Frank Allen—Direct.

Q. Do you have in your possession a bank book issued by the Madison Trust Company in favor of Maria E. Tunis? A. After she gave it to me.

Q. No.

Mr. King: Of course, I have tried to tell him——

Mr. Vanderbilt: I move to strike it out.

Mr. King: I move to strike it out, because I¹⁰ asked him the question,——

Q. You do have a bank book, have you that bank book in your possession now?

A. I have.

Q. Will you produce it?

A. I will.

Mr. King: I want to offer this bank book and cover in evidence. The bank book is No. 201²⁰ Madison Trust Company, Madison, New Jersey, Special Department, and is issued to Maria E. Tunis. The bank balance on April 13, 1928 was \$8,291.60. The cover is without any number, but is of the Madison Trust Company. I offer them as two exhibits.

(Received in evidence and marked C (Claimant) 1, cover marked C (Claimant) 2.)

Q. Has this bank book remained in your possession since April 27th?³⁰

A. It has.

Q. 1928. Now, after you received the bank book, what did you do? I am not asking you to discuss how she gave it to you, or anything of that sort, but after you had the bank book in your possession, what did you do with it?

A. I took it to the bank.

Q. When?

40

J. Frank Allen—Direct.

A. The next morning, about ten-thirty, somewhere around there.

Q. To the Madison Trust Company?

A. Yes.

Q. Whom did you see at the bank?

A. Mr. Miller.

Q. And what position does he occupy in the bank?

10 A. Secretary-Treasurer.

Q. And did you tell him what your call was for?

A. Yes.

Q. What did you tell him your call was for?

A. Well I came down with the book, to have it transferred at her request, and also to get the price on the railway bonds.

Q. Now, directing your attention to this book, because that is the thing we are interested in.

A. Yes.

20 Q. Did you show him this book?

A. I did.

Q. And what did he tell you?

A. He said—he gave me a couple of yellow slips to take up for her to sign.

Q. And these are the yellow slips to which you refer?

A. They are—in the Savings Department.

30 Mr. King: Counsel does not object. I offer these.

(Received in evidence and marked C-3 and C-4.)

Q. Now, after he gave you these, what did you, after he gave you these slips?

A. Took them home, put them in the book and took them home.

Q. Did he also return the book?

40 A. Yes.

J. Frank Allen—Direct.

Q. Then you went back home. What time did you get back home?

A. Well, somewhere around eleven or a little after, possibly.

Q. Now, he told you to have Miss Tunis sign this slip for the withdrawal of money?

A. Yes; fill out and sign one of these slips.

Q. Where did you find her when you got back to your home? 10

A. She was sitting in the kitchen.

Q. Did you have any guests on that day?

A. Yes.

Q. Who were the guests?

A. My brother, his daughter, and three other children were in the kitchen when I first went in.

Q. Where was Miss Tunis?

A. She was sitting there in the kitchen.

Q. At lunchtime did you see Miss Tunis? 20

Mr. Vanderbilt: If the Court please, I think that we are getting close to the transaction. I won't object to preliminary questions.

The Court: Nothing objectionable has been brought out yet, Mr. Vanderbilt, that I see.

Q. When did the guests leave the home?

A. Why, my brother and his daughter, and the other two children, or three, left possibly in half an hour after that. 30

Q. Now, I want to divert just a minute. Prior to the time that you had had your lunch, had you had no communication with an attorney in relation to drawing a will for Miss Tunis?

A. Mr. Miller called Mr. Pilch for me.

Q. Mr. Miller in the bank?

A. Yes, sir.

Q. And Mr. Pilch is also attorney of the bank, is he not? 40

J. Frank Allen—Direct.

A. Yes, I believe he is.

Q. Did you find out that Mr. Pilch could come to draw the will that day or not?

A. Well, he said he possibly could get around; if not, he would come the next day, or some other time. I told him not to come the next day, because it was Sunday. I told Mr. Miller to tell him. Of course, I was not talking to Mr. Pilch, Mr. Miller
10 was talking to him.

Q. Now, on this Saturday, did you see Mr. Pilch?

A. Yes, when he came in the store.

Q. What time did he come to the store?

A. Well, shortly after three.

Q. Did you have any talk with Mr. Pilch about drawing her will? Did either one of you mention the purpose of his visit at all?

A. He came to see Miss Tunis, and I told him
20 that she had just gone upstairs a few minutes before, and we would have to wait a few minutes.

Q. How long did you wait?

A. Why, I do not know; possibly 15 minutes, maybe a little longer, maybe not as much.

Q. And Mr. Pilch remained there during that time?

A. Mr. Pilch was with me in the store, yes.

Q. Then what did you do?

A. I went in and called to her from the hall, and
30 got no answer. Mr. Pilch came in the hall with me, and then we went on up. I went to the front room where she generally sat, in the afternoon, and she was not there. Then I went to her room and found her sitting in a chair.

Q. Did Mr. Pilch accompany you?

A. Mr. Pilch was in the hall upstairs.

Q. You entered her room alone?

A. Yes, I entered her room alone. I do not know
40 how close Mr. Pilch was to me when I went in.

J. Frank Allen—Direct.

Q. Did you find Miss Tunis in the room?

A. Yes, sitting in a rocking chair.

Q. What was her condition?

A. Why, she sat there, and had one hand down at the side of the chair, with her waist in her hand. She had washed, combed her hair, and changed her skirt, and had her waist in her hand, and one hand was in her lap.

10

Q. Was she dead at that time?

A. Yes.

Q. Now, after you discovered this condition, did Mr. Pilch come in the room with you?

A. Yes. I called Mr. Pilch right in the room, called Mrs. Allen and Mrs. Duryea downstairs.

Q. Did you show this bank book to Mr. Pilch?

A. I did.

Q. Did you show it to him before you had entered the room?

20

A. No.

Q. After?

A. After.

Q. You have not received the money on the bank book, have you?

A. I have not.

Q. And she did not sign any order for it?

A. No.

Q. Why did you delay asking her to sign this order?

30

Mr. Vanderbilt: I object to that.

The Court: I will allow the question.

A. We had, as I say—there was company there, and I did not bother. I did not think there was any occasion of bothering her at that time, kept the book in my pocket, just as I brought it from the bank.

40

J. Frank Allen—Cross.

Q. Did Miss Tunis have a private box?

Y. Yes.

Q. In your safe?

A. Yes.

Q. A safety deposit box which was kept in your safe?

A. Yes.

Q. And was that kept locked?

10 A. The box was always locked, always the safe was locked.

Q. Who retained the keys?

A. She did.

Mr. King: Cross-examine.

CROSS-EXAMINATION BY MR. VANDERBILT:

Q. Mr. Allen, when you went to the bank on
20 Saturday morning about ten thirty and saw Mr.
Miller, the Secretary and Treasurer, what did you
say to him?

A. I asked him—I showed him the book and
told him that Miss Tunis had given me the book,
and I wanted to have it transferred.

Q. What did he tell you, what did he do?

A. Why, he said—he got me two of those
slips, and told me to have her fill out and sign one
of those slips, gave me one, and then gave me two
30 and said that she might blot it, or ruin it.

Q. Did he call Mr. Pilch up about it at that time,
do you know?

A. He called Mr. Pilch up for me while I was
there.

Q. About transferring this bank book?

A. He did not say anything to Mr. Pilch about
transferring any bank book, no.

Q. He did not say anything to Mr. Pilch about
40 transferring the bank book?

J. Frank Allen—Cross.

A. No.

Q. Didn't Mr. Miller tell you that he could not transfer the bank book without a written order signed by Miss Tunis?

A. He gave me those slips and told me to take them have her sign them and return them.

Q. And that he would not transfer the book without her signature? 10

A. He said that he could not do it without her signature.

Q. You wanted it transferred that morning, didn't you?

A. At her request, I took it down to have it transferred.

Mr. Vanderbilt: I move to strike that out.

"At her request."

The Court: Strike that out. 20

Q. You had taken the bank book down to the bank for her on previous occasions?

A. Yes. I had that bank book to the bank for her the first part of that month, I believe.

Q. And that was on the occasion when she withdrew her account from the National Newark & Essex Bank, and put it in this book—correct?

A. The Howard Savings Bank. She had a book in the Howard Savings Company. 30

Q. That was this entry of April 9, 1928, \$3,958.33?

A. Yes, I believe so. That was the first part of April, I know that she did that.

Q. You took it down for her when that was done?

A. Yes.

Q. And you knew the bank book—pardon me. I read the wrong figure on that. It should be 40

\$4,332.27. The amount I read was the previous balance before that deposit was made.

Q. Did you take the bank book down to the bank for her earlier than that?

A. Not that I recall. I took it down shortly after that.

Q. Had you ever had a savings account of your own or special account of your own in any bank
10 before?

A. Yes.

Q. You were familiar with the rules with respect to the withdrawal of accounts?

A. No, I do not know that I was. I went down and drew money myself. That is all.

Q. What?

A. I just simply went down and drew the money
20 myself.

Q. Did you sign a withdrawal slip each time?

A. Yes.

Q. Then you know that was the practice of the Madison Trust Company to have withdrawal slips signed each time?

A. Yes, I knew that.

Q. When an amount was withdrawn from the savings account?

A. Yes.

30 Q. And you knew their rules prescribed that.

A. Yes, I knew that was customary.

Q. Now, you say that you got back to the house about eleven o'clock, and your brother and his daughter—

A. And three children were there, yes.

Q. Of course, you are on close terms with all of them?

A. Yes.

40 Q. Why was it that you did not ask Miss Tunis

J. Frank Allen—Cross.

to sign? What made you delay at that time asking her to sign the withdrawal slip?

A. Well, I did not think there was any hurry about it.

Q. You knew the bank closed at twelve o'clock on Saturday?

A. Yes, I knew the bank closed at twelve o'clock. I did not think it made any difference whether I got it there on Saturday, Sunday, or some other 10 day.

Q. You did, as a matter of fact, go down there the next morning, shortly after the bank opened, went down Saturday morning, shortly after the bank opened, to get it transferred, didn't you.

A. Yes.

Q. You wanted it transferred as soon as they could, didn't you?

A. Well, she said to have it transferred.

20

Mr. Vanderbilt: I object.

The Court: No. You must not tell what Miss Tunis said, that is inadmissible.

Q. Why didn't you get her to sign that slip when you returned to the house about eleven o'clock on Saturday morning?

A. She was busy talking with my brother, his daughter, and the children, and I did not bother. That is all.

30

Q. And it would just take a second to sign the slip, wouldn't it?

A. Yes, I suppose it possibly would.

Q. There was no reason why you did not want your relatives to know about this, was there?

A. No, absolutely not.

Q. And you knew the lawyer was coming?

A. No, I did not. He said if he had time between his two appointments, he would be there. There was nothing definite.

40

J. Frank Allen—Cross.

Q. Did he tell you about when he would be there?

A. Yes. He said if he could come he would be there shortly after three or somewhere in the neighborhood.

Q. Now, you said that your brother and his folks went home about half an hour afterwards which would be eleven-thirty, and still you did not have
10 Miss Tunis sign up these slips. Why did you continue to delay then?

A. Well, Mrs. Spargo came in just as they went out.

Q. And whose friend was she?

A. A friend of all of us.

Q. Well, she was primarily Mrs. Allen's friend, wasn't she?

A. Not any more Mrs. Allen's than Miss Tunis'?

Q. Well, how old a woman is Mrs. Spargo?
20

A. Well, I do not know old she is.

Q. Well, approximately, as near as a man can guess about those things?

A. Well, I could not say. I do not know anything about that.

Q. Well, is she a woman of Miss Tunis' age?

A. No.

Q. A woman of about Mrs. Allen's age?

A. About. I do not know that she is as old as
30 Mrs. Allen.

Q. She had been a friend of Mrs. Allen's for a long time?

A. Yes.

Q. She came to see Mrs. Allen?

A. She came to take lunch with us.

Q. She came to take lunch with you. Why didn't you have it signed up then before lunch? You
40 didn't have lunch until a quarter of one.

J. Frank Allen—Cross.

A. Well, I did not think there was any hurry about it. If she had been sick, or anything like that, it would have been a different thing.

Q. Do you know where Miss Tunis kept the keys to her box?

A. No, I did not.

Q. Well, when you talked to Mr. Miller about getting Mr. Pilch to come down to draw the will, 10 you wanted him to come down right away Saturday morning, didn't you?

A. No.

Q. Didn't you have Mr. Miller urge Mr. Pilch to come right down?

A. No.

Q. Didn't Mr. Pilch say that he was outworking in the garden and was all hot and had to take a bath and could not do that until after dinner? 20

A. No, sir.

Q. Nothing like that?

A. No. I did not talk to Mr. Pilch at all.

Q. Didn't Mr. Miller communicate that to you?

A. Mr. Miller was talking to him.

Q. Do you know what he said?

A. No.

Q. What did Mr. Miller say to you about Mr. Pilch's coming down?

A. Mr. Miller said if he had time in the after- 30 noon he would be down, and if he did not, he would come the next day. I told him not to come the next day.

Q. It was left as indefinite as that whether he would be down Saturday afternoon or not?

A. He said he had two appointments Saturday afternoon. Mr. Miller told me that I was not talking to Mr. Pilch.

Q. You only know what Mr. Miller told you? 40

A. That is all.

Q. Why did you ask Mr. Miller about the price on the railroad bonds?

A. She wanted me to get the valuation, price, on the railway bonds.

Q. When Mr. Pilch came in and you were sitting there for ten or fifteen minutes with him waiting for Miss Tunis to dress, what did you and
10 he talk about?

A. Well, I don't just recall what we talked about at that time.

Q. Well, did you tell him anything about this bank account in the Madison Trust Company?

A. Not at that time.

Q. You knew he was coming down to draw Miss Tunis' will, that was the purpose of his visit?

A. That was the purpose of his visit.

20 Q. Did you talk to him any about her affairs?

A. No.

Q. Why didn't you mention this bank account to him?

A. Why, I didn't think it was necessary to mention that to him.

Q. Didn't you think it was necessary for the lawyer who drew the will to know the size of the estate?

30 A. That did not belong to estate. She had given that to me.

Mr. Vanderbilt: I move to strike that out.
The Court: Strike it out.

Mr. King: Strike out only that portion:
"She had given it to me?"

The Court: The other part of the answer, that it did not belong to the estate is assuming the judicial prerogative of deciding it. Strike
40 the whole answer out.

Henry G. Pilch—Direct.

Q. After you made this deposit of \$4,332.27 on April 11, 1928, what did you do with the book?

A. Took it back and gave it to her.

Q. And did you have the book in your possession again from that date to the date you testified to in answer to the question of your counsel on April 27, 1928?

A. A day or two possibly later—I do not know 10 whether it was one day or two days after—just when it was—Mr Miller said there had been a mistake made in the interest of one dollar. I told her about it, and she gave me the book and I took it down and had it put on it.

Mr. Vanderbilt: That is all.

Mr. King: That is all.

(Witness excused.)

20

HENRY G. PILCH, called as a witness on behalf of J. Frank Allen, being first duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. KING:

Q. You live in Madison?

A. I do.

Q. And are a practicing attorney of New Jersey?

A. I am.

30

Q. Did you have a telephone call from Mr. Miller of the Madison Trust Company in relation to some business, and was that telephone communication on April 29th, Saturday?

The Court: 28th, wasn't it?

Mr. Vanderbilt: 28th, it is, Mr. King. Friday was the 27th.

Q. I beg your pardon.

40

Henry G. Pilch—Direct.

A. I can't fix the date. I don't remember. But it was on Saturday morning.

Q. What did Mr. Miller ask you to do?

A. Mr. Miller said that Mr. George Allen was in the bank and wanted me to come down and draw a will for a Miss Tunis who lived with Mr. Allen.

Q. What did you tell him?

A. I said that I could not come down that morning because I had been working in the garden and was all heated up, and had to change clothes, but I would be down that afternoon about two o'clock.

Q. Did you go down about two o'clock?

A. Well, I think, a little later than two. It was around two o'clock—between two and three.

Q. After you arrived there, please tell the Court what you did and what you said?

A. I rang the bell and Mr. Allen came to the door. As I remember it was a bicycle store, and there was a bell on the side or a bell over the door. I know there was a bell. I rang the bell and Mr. Allen came to the door and I went in. He said, "Miss Tunis is expecting you; she has gone upstairs to change her dress and she will probably see you in about ten minutes." So he invited me inside to sit down. I sat down, and we had some general conversation about the weather and things like that; nothing pertaining to the will. Then he said, "Well, I will go upstairs and see if she is ready." So I remained downstairs and in a few minutes he came down and came in the room and said, "My God, she is dead." So he said, "What shall we do?" I said, "Well, I will go up and see." I went upstairs and Miss Tunis sat in the chair, apparently looking out of the window. He said, "What shall we do?" I said, "The first thing to do is to send for a doctor right away." So he went down stairs, and in about five minutes Dr. Seward came.

Henry G. Pilch—Cross.

Dr. Seward went over and examined her and listened to see if her heart was beating, put his head down over her chest, and he said, "She is dead, all right." So I left.

Mr. King: Cross-examine.

CROSS-EXAMINATION BY MR. VANDERBILT:

Q. You made a definite appointment to come 10
down around two o'clock?

A. Well, the appointment was made with Mr. Miller. He called me up and I told him——

Q. I mean, you told Mr. Miller definitely that you would be down around two o'clock?

A. Around two o'clock, yes.

The Court: Were you asked to go to the house immediately?

The Witness: Mr. Miller asked me if I could 20
come down right away. I said, "No," I had to change clothes and take a bath because I had been working in the garden.

Q. And when you got there, you had ten minutes of general conversation, and then Mr. Allen went upstairs. Now, when he went upstairs the first time, did you go up with him?

A. Not the first time, no.

Q. You only went up with him after he came 30
down and told you Miss Tunis was dead?

A. Yes. At the second time, too, there was some lady that went upstairs. I think that was Mrs. Allen. I do not remember just who that was.

Q. You mean, when he went up the second time?

A. We all went up together the second time, Mr. Allen, myself and the lady, whoever she was.

Q. The second time he went up, and your first time?

Henry G. Pilch—Cross.

A. Yes.

Q. After you came down, did Mr. Allen say anything to you about the bank account?

A. No, not at that time.

Q. When did you first learn of anything about the bank account 201?

A. Well, I do not know the number of the account, to identify it by that.

Q. Well, the bank account that is in controversy, Exhibit C-1?

A. The next morning, Sunday morning, about ten o'clock, Mr. Miller telephoned to me and said that Mr. Allen was there, and "we want to come up and see you." "Well," I said, "I do not want to see you this morning, because I am just going to church." "Well," he said, "we would like to see you this morning." I said, "All right. Come on up." So Mr. Miller and Mr. Allen came to the house, and Mr. Allen had the bank book, and Mr. Miller said, "Mr. Allen wants this account transferred to him," and he said, "Will that be all right?" I said, "Why, no, certainly not." He said, "Well,"— Mr. Allen said, "Well, Miss Tunis gave me the book, and I think it will be all right to have it transferred." I said, "I can't advise the bank to do that." And that was all that was said, and they left, and I went back in the house.

The Court: Was this the first time you had heard about the bank book?

The Witness: It was the first time I had heard about the bank book.

The Court: Mr. Allen said nothing to you about it when you were up at the house the day of Miss Tunis' death?

The Witness: No.

The Court: The answer is "no", then.

Henry G. Pilch—Cross.

The Witness: Because he told me she was dead, and we went in there, and everybody seemed to be very much excited, and as soon as the doctor came, I left.

Q. When next did you have anything to do with this transaction, so far as Mr. Allen is concerned, Mr. Pilch? Did you have any further conferences with him? 10

A. Shortly after that, I should say probably two weeks, it was at the next meeting of the Madison Building & Loan Association. I was down at the meeting and Mr. Allen came in. He asked to see me, so we went in the back room, and he said, "Can't you advise Mr. Miller to transfer that account to me?" He said, "Miss Tunis gave me the book. It is perfectly all right." I said, "No, I can't do that, because the account stands in the name of Miss Tunis," and he said, "Well, it is all right. There will be no trouble." I said, "Well, I do not know. There might be trouble, a lot of trouble, and I think that you should establish your right in some judicial proceeding or legal proceeding," or words to that effect. And he said, "Well, there will be no trouble, everybody is satisfied, I know." He said, "Everybody would be satisfied." He said, "I know there will be no trouble. 20

Q. And was that all that took place there, Mr. Pilch? 30

A. Yes, I think that was about it. I was busy. It was a building and loan meeting.

Q. What night of the month do they meet on, so we can fix that date?

A. Thursday.

Q. Every Thursday or some particular Thursday?

A. Every month. It is the last Thursday in the month. 40

Edward B. Miller—Direct.

Q. This would be the last Thursday of May, then —it must have been?

A. I don't remember. I know it was shortly after the time I was asked to make the will. I was at the building and loan meeting.

Q. Did you know Mr. Allen before meeting him down at his house? Had you ever had an acquaintance or business acquaintance?

A. Yes, I had known him for many years.

Q. You had both resided there a good many years?

A. Yes. Well, he lives right at the end of the street I live on, about ten minute's walk from my house.

Q. And did you ever have any business dealings with him?

A. No.

Mr. Vanderbilt: That is all.

Mr. King: That is all.

(Witness excused.)

EDWARD B. MILLER, called as a witness on behalf of J. Frank Allen, being first duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. KING:

Q. Mr. Miller, do you live in Madison?

A. I do, sir.

Q. What is your business?

A. Secretary-Treasurer of the Madison Trust Company.

Q. And do you remember a call made on you by Mr. Allen in reference to the account of Miss Tunis?

A. I do.

Q. When was that?

A. On a Saturday morning.

Edward B. Miller—Direct.

Q. Some time in April?

A. Was the date April 28th?

Q. Now, just tell what occurred between you and him on that occasion?

A. Well, Mr. Allen came to me with a book, this book No. 201, saying that Miss Tunis had given the book to him, and requested me to transfer it to his name. I told him I was not able to do it because we can't transfer only on written authority, 10 and with that I handed him—returned the book to him with one or two of the withdrawal slips.

Q. And with request that he do what?

A. I asked him—I said that it would be necessary for Miss Tunis to sign one of those slips, and then we could transfer it.

Q. Was there anything said about employing a lawyer or engaging a lawyer to draw her will?

A. As I recall it, he said Miss Tunis had been anxious to draw a will, and who would I suggest 20 as an attorney for that. I replied that Mr. Pilch was the bank's attorney, and I felt that he would be fully competent to take care of that, and suggested his name to Mr. Allen, whereupon he asked me if I would phone to Mr. Pilch, which I did. Mr. Pilch said that he would not be free to come in the morning, but would be there—I don't recall the hour he did state—in the afternoon, and I communicated that to Mr. Allen, and he left shortly 30 after that.

Q. Does this book that has been offered in evidence require the presentation of the book when there are any withdrawals?

A. Yes, sir.

Q. And those orders that are used for withdrawal are retained by the bank?

A. The cancelled order—is that your question, Mr. King? 40

Edward B. Miller—Cross.

Q. Yes.

A. The withdrawals, after they have been made, and paid, are retained by the bank.

Q. So that the bank retains the withdrawal order and the depositor has the book?

A. Yes.

Q. And the book each time shows the balance that is due except for the crediting of interest which
10 may be entered by the bank?

A. I don't get you.

Q. And the book shows all the time the amount of the balance in the book, with the exception of interest which is credited by the bank at periodical times?

A. That is true, yes.

Q. Then it would show that?

A. Yes.

20 Mr. King: Cross-examine.

The Witness: Should there be interest on the book after the presentation, it will be entered on the bank books whether or not the book is present.

Q. What I had in mind was the scheme of banking, which is to retain the cancelled order after payment on it——

A. Yes, sir.

30 Q. And the depositor has the bank books made to date all the time?

A. Made to date, yes.

Q. With the exception of the interest?

A. With the exception of the interest.

Mr. King: Cross-examine.

CROSS-EXAMINATION BY MR. VANDERBILT:

Q. On this occasion, Saturday morning, Mr.
40 Miller, when you called up Mr. Pilch, he said defin-

Edward B. Miller—Cross.

itely that he would come down to Mr. Allen's house in the afternoon and draw Miss Tunis' will, didn't he?

A. I don't recall just how definite the engagement was. In fact, I did it as a matter of courtesy for Mr. Allen, and dismissed it from my mind after it was over.

Q. Now, do you recall Mr. Allen coming to see 10 you the next day, Sunday morning?

A. I do.

Q. Where did he come to see you, at your home?

A. At my home.

Q. About what time?

A. Why, as near as I recall, it was about nine-thirty in the morning.

Q. And what did he say to you?

A. He asked me if I could not transfer that 20 money, as it had been given to him, or something of that sort, and he wanted to know if I would talk with Mr. Pilch about it.

Q. Well, did he give any reason as to why he came to see you Sunday morning instead of waiting until the next business day?

A. I don't recall that.

Q. Did you ask him why he did not wait until Monday?

A. Did I ask him? 30

Q. Yes.

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

Q. Well, after this conversation ensued, how did you come to go up to Mr. Pilch's house on Sunday?

A. Because Mr. Allen wanted to go there, I believe.

Q. That was his suggestion?

A. Yes, sir. 40

Edward B. Miller—Cross.

Q. And you acquiesced in it because it was a matter that concerned the bank?

A. Yes, as a matter that concerned the bank, and as a courtesy to Mr. Allen.

Q. In other words, it was a friendly bank and aimed to please; is that it? Well, when you got up to Mr. Pilch's house, the conversation ensued that
10 Mr. Pilch has testified to?

A. About that, yes, sir.

Q. Mr. Pilch advised you and Mr. Allen that the bank could not make the transfer?

A. That is correct.

Q. And you knew that before you went up there?

A. I did.

Q. You just wanted to please Mr. Allen?

A. Virtually that. I was certain of it myself,
20 and to show Mr. Allen that I was right, I agreed to go with him over to Mr. Pilch.

Q. Now, in the conversation you had on the Saturday morning at the bank with Mr. Allen, was anything said except with reference to this bank account and with reference to calling in Mr. Pilch to draw the will?

A. I don't recall any business that we talked about, except that it would be a nice day.

Q. Do you recall anything being said to you by
30 Mr. Allen with reference to railroad bonds?

A. On that instance?

Q. Yes, on Saturday morning.

A. I do not.

Q. Were there any withdrawals ever made from that account, Mr. Miller?

A. According to the book, there was one withdrawal made.

Q. When?

40 A. On April 23rd, 1918,

Edward B. Miller—Cross.

Q. And from that date on, all the money was coming in and none going out of the account?

A. Yes, sir.

Q. And it gradually accumulated to the sum of \$3,800 by relatively small amounts until this \$4,332.27 from the Howard Savings Bank was credited in April, 1928; is that right?

A. That is right.

10

Q. At the time that money was transferred into this account from the Howard Savings Bank account, Mr. Allen presented the Howard Savings Bank book together with a withdrawal slip on the Howard Savings Bank similar to the withdrawal slip that your bank used, did he not?

A. Yes, sir. I believe it was Mr. Allen who presented that.

Q. And the withdrawal slip was signed by Miss 20
Tunis, of course?

A. I believe so. It must have been.

Q. And that closed out the Howard Savings account, did it not? I mean you sent through the book on the withdrawal slip?

A. Sent through the book for the balance of the account, I believe.

Q. At the time that the Howard Savings account was closed and deposited in your bank, did Mr. 30
Allen come in and speak to you in advance about it, to see whether or not that could be accomplished without Miss Tunis going to Newark?

A. That is frequently the case, and it might have happened in this case. I don't specifically recall whether Mr. Allen came, although I think he did.

Mr. Vanderbilt: That is all.

Mr. King: That is all.

(Witness excused.)

40

Elizabeth Duryea—Direct.

ELIZABETH DURYEA, called as a witness on behalf of J. Frank Allen, being first duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. KING:

- Q. Do you live in Madison?
 A. Yes, sir.
- 10 Q. And how long have you known Miss Tunis?
 A. I have known her ever since I was a child.
 Q. And have you lived near her?
 A. Very near.
 Q. In the last years?
 A. Very near.
 Q. Now, when did you see her prior to the day
 of her death?
 A. Thursday.
- 20 Q. And what was her mental and physical condition then?
 A. Perfectly well.
 Q. Was she normal and all right?
 A. Yes, sir, normal.
 Q. Active?
 A. Yes, sir.
 Q. Did you see her on Saturday before her death?
 A. No, I just went in the house about ten minutes before she died.
- 30 Q. While you were there—ten minutes before she died?
 A. Yes, just about ten minutes.
 Q. While you were there, did you see a bank book?
 A. Oh, yes, the bank book was shown me that morning—not the book, but told to me in the morning.
 Q. By whom?
 40 A. By Mrs. Allen.

Elizabeth Duryea—Direct.

- Q. She told you about this bank book?
- A. Mrs. Allen told me about the present given to Mr. Allen by Miss Tunis.
- Q. Did you see the book?
- A. No, I did not see the book at that time.
- Q. I suppose she was very much pleased about the gift?
- A. What it that? 10
- Q. I suppose she was very much pleased with the gift?
- A. Very much pleased with the gift, and spoke to me about it.
- Q. Did Mr. Allen produce this book while Mr. Pilch was there?
- A. I think he did.
- Q. Where was Mr. Pilch and Mr. Allen at that time?
- A. In the front room, and I was there at the same time. 20
- Q. Was Miss Tunis dead at that time?
- A. Yes, Miss Tunis was dead at that time.
- Q. And did Mr. Allen show the book to Mr. Pilch?
- A. Mr. Allen took the book out of his pocket and asked what he should do with it at that time.
- Q. What did he tell Mr. Pilch about it?
- A. What was that? 30
- Q. Did he tell Mr. Pilch how he got the book?
- A. Sure, he showed it to him, and told him the book was given to him.
- Q. What did Mr. Pilch tell him?
- A. Told him to keep it under cover.
- Q. Not under cover?
- A. What is that?
- Q. He did not use those words, did he? He did not use the words "under cover". 40

Elizabeth Duryea—Direct.

A. Well, I am very sorry to say he did, because I sat right there, and I was also told to remember all that was said.

Q. Who told you that?

A. Mr. Pilch.

Q. Didn't Mr. Pilch, instead of telling him to keep it under cover, just merely tell him to keep it?

10 Mr. Vanderbilt: I object to his leading the witness.

Mr. King: I know, but I don't like the statement. I am not criticizing the witness at all, but im am just wondering whether Mr. Pilch did use the words "under cover," which sometimes has a dark significance.

The Court: I don't believe he said it, and I don't hesitate to say that right now.

20 Mr. King: I am just trying to straighten this witness up merely to find out whether he said "keep it," which would have been perfectly all right.

The Witness: He said "keep it," yes, that was it.

Mr. King: Not that it might be wrong, but that it might have some significance.

The Court: Well, we all know Mr. Pilch.

30 Q. What is your best recollection; did he use the words "under cover"?

A. He did not mean that. He meant it was a gift to him and to keep it until the administrator was appointed and the estate came to trial, that is all.

Mr. Vanderbilt: I object to what he meant. She testified to what he said.

40 Mr. King: I consent that it be stricken out.

Elizabeth Duryea—Cross.

- Q. How soon was this after the death?
 A. I beg your pardon?
 Q. How soon was this after the death?
 A. This happened immediately after the death,
 after the doctor had come.

CROSS-EXAMINATION BY MR. VANDERBILT:

- Q. You are a friend of Mrs. Allen, aren't you?
 A. I am a friend of the whole family. 10
 Q. I mean, you are a more intimate friend of
 Mrs. Allen than you are of Miss Tunis?
 A. Well, naturally.
 Q. Mrs. Allen and you are more of an age than
 Miss Tunis and you?
 A. I beg your pardon?
 Q. Mrs. Allen and you are more of an age than
 Miss Tunis and you?
 A. Oh, no. Miss Tunis and Mrs. Allen are more 20
 of an age.
 Q. I don't think you understood my question.

The Court: I don't think she understood you.

- Q. I say, Mrs. Allen and you are more of the
 same age than Miss Tunis and you?
 A. Oh, no.
 Q. You are more nearly Mrs. Allen's age than
 Miss Tunis'?
 A. No. Mrs. Allen is more. 30
 Q. Not Mrs. Allen.

Mr. Vanderbilt: Will you repeat the question?

- Q. (The pending question was read by the Re-
 porter.)
 A. You mean Mrs. Allen's mother?
 Q. I mean the Mrs. Allen that testified a few
 minutes ago is more nearly your age than you are
 to Miss Tunis' age? 40

Elizabeth Duryea—Cross.

A. Yes, very near what Miss Tunis and I——

Q. And Mrs. Allen and you are very good friends?

A. Yes, sir.

Q. Now, did you observe anything different in Miss Tunis' memory and general condition of mind after the death of her sister, Mrs. Vincent?

10 A. No, I did not. I noticed that she would be a little forgetful, that is all, but as a general thing her mind was just the same.

Q. At times she was forgetful?

A. Once in a great while she might forget some things.

Q. She would forget such things as when you had last been to see her, for example?

A. Oh, no.

Q. What did she forget?

20 A. Little minor things that would come up, everyday occurrences that might slip her mind.

Q. The things that an average woman would remember?

A. Yes, same as an average person.

Q. And what was Miss Tunis' disposition and character so far as money matters were concerned; was she close?

30 A. I never had any dealings with her, so I could not answer that question.

Q. You do not know. Miss Tunis did not say anything to you about the gift of the bank book?

A. Oh, no. She mentioned several times that she was going to make it right with Mr. and Mrs. Allen.

Q. I did not ask you that. I asked you if Miss Tunis said anything to you about the bank account?

A. Not about the bank book, no.

40 Q. Now, on the occasion of Miss Tunis' death, where were you when you first knew about it?

Elizabeth Duryea—Cross.

- A. Down in the kitchen.
- Q. Down in the kitchen with Mrs. Allen?
- A. Yes, visiting there with her, yes.
- Q. And who told you about the death?
- A. Mr. Allen.
- Q. Mr. Allen came in, and did you then go upstairs with Mr. Allen and Mr. Pilch and Mrs. Allen?
- A. Yes. 10
- Q. Just the four of you?
- A. Just after she died.
- Q. Just after she died. Well, Mr. Allen must have come down first to tell you about it, didn't he?
- A. No, he did not. He called from upstairs.
- Q. He called from upstairs. You are sure he did not come down again and get Mr. Pilch and take him up?
- A. He called from upstairs. 20
- Q. Who went upstairs with you?
- A. Mrs. Allen.
- Q. That is all?
- A. That is all.
- Q. What room did you go in?
- A. Her bedroom.
- Q. Her bedroom. And who was there in the bedroom together?
- A. Mrs. Allen— Mr. Allen stood at one door, 30 and Mr. Pilch stood at the other, and we all stood there.
- Q. And what was said then?
- A. I beg your pardon?
- Q. What was said at that time, what was the conversation when you all four were together up in the bedroom?
- A. We were all greatly surprised to find her dead.
- Q. And what was said; what did you all say? 40

Elizabeth Duryea—Cross.

A. What did we all say?

Q. Yes.

A. I am sure I can't tell you that. I do not know.

Q. Tell us just as much as you can what the conversation was.

A. Why, all the conversation was that I know
10 of— it was a great shock to us all, because she
had been in her usual health, perfectly well, except
some little cold, and she was much better from that,
as I had been there every day for quite a while.

Q. Aside from that, what was said?

A. What was said was "Isn't this terrible that
we should find her in this condition?"

Q. And after that was said, what was said or
done?

A. What is that?

20 Q. What was next said or done after you had
expressed surprise?

A. We merely went into the next room and sat
down and talked about the matter of making the
will.

Q. All four of you went into the other room and
sat down?

A. Yes, sir.

30 Q. And talked over the matter of making the
will?

A. Yes, the matter—

Q. And what was said in this other room about
the matter of making the will?

A. Nothing. She was dead and gone. That was
all there was to it.

Q. You did not talk it over?

40 A. It was said that Mr. Pilch came to make a
will and found her dead. That is all that was men-
tioned on that subject.

Elizabeth Duryea—Cross.

Q. And what next was mentioned when you four were in this room?

A. Simply what I told you about, about the bank book.

Q. Who brought up the subject about the bank book?

A. Mr. Allen took it out of his pocket and asked what he should do with it. 10

Q. Asked Mr. Pilch. And what did Mr. Pilch say?

A. He said, "Keep it under cover until the administrator is appointed." I sat right there.

Q. Use his exact words, please.

A. Yes.

Q. Please give me his exact words, Mr. Pilch's exact words?

A. I can't say any more than that. 20

Q. Just tell what it was.

The Court: Say it over again. What did he say?

The Witness: What did he say?

The Court: Yes.

The Witness: Well, that is the way it come about, he spoke that.

The Court: What did he say?

The Witness: He simply said, "Frank, keep 30 that book until there is an administrator appointed."

The Court: And those are his exact words?

The Witness: That is the exact words. He said, "Keep it under cover, until the administrator was appointed." That is the words that was said that day.

Q. What was said or done next?

A. Nothing. 40

Elizabeth Duryea—Cross.

Q. I mean, did you continue to sit there and say nothing?

Q. No. After the thing was settled, Mr. Pilch went home.

10 Q. Was anything said at all about getting a doctor?

Q. What?

Q. Was anything said at all about getting a doctor?

A. The doctor was there, the doctor was sent there before she was gone.

Q. When did the doctor come in with respect to these conversations, before or after?

20 A. The doctor came in immediately when we found her, about ten minutes after we found her dead, the doctor came in.

Q. Who telephoned for the doctor?

A. Mr. Allen.

Q. And who suggested that he telephone for the doctor?

A. I suggested it.

Q. You suggested it?

A. I suggested sending for the doctor.

30 Q. And was that before or after this conversation took place?

A. It was before.

Q. Sending for the doctor at your suggestion took place before all the rest of this conversation?

A. Yes.

Q. Did Mr. Pilch say anything about sending for a doctor?

A. I don't recall that.

40 Q. Did you suggest what doctor to send for?

A. No.

Ethel Spargo—Direct.

Q. Just said a doctor?

A. A doctor.

The Court: If I may interrupt you, Mr. Vanderbilt—how long do you gentlemen think this case will take?

Mr. King: I have one other witness.

The Court: Do you think that it will take
the rest of the afternoon? 10

Mr. King: I have only one other witness to prove her mental condition.

Mr. Vanderbilt: We have several witnesses, but I think that they will all be quite short, your Honor. I don't believe we will take more than an hour and a half at the most, in the afternoon.

The Court: We will take a recess for about ten minutes. 20

(Recess).

The Court: Had you finished with the witness?

Mr. Vanderbilt: That is all.

(Witness excused.)

ETHEL SPARGO, called as a witness on behalf of Mr. J. Frank Allen, being first duly sworn, testified³⁰ as follows:

DIRECT-EXAMINATION BY MR. KING:

Q. Mrs. Spargo, you live in Wharton?

A. Yes.

Q. That is in Morris County just above Dover?

A. Yes, sir.

Q. Were you down at Mrs. Allen's home on this Saturday morning? 40

Ethel Spargo—Direct.

- A. Yes, I was.
- Q. You were friendly with whom?
- A. I am a relative of the family.
- Q. Of which family?
- A. Well, Mr. Allen's side.
- Q. What time did you get there?
- 10 A. Well, I should judge it was around about half past eleven.
- Q. And who was with you, if anyone?
- A. I came alone.
- Q. How long did you stay?
- A. I left about ten minutes of three.
- Q. Did you have lunch there with them?
- A. I did.
- Q. When had you seen Miss Tunis before that?
- A. Well, not very often before that.
- 20 Q. During the time you were there, was she one of the company?
- A. Oh, yes, sir.
- Q. What did you notice about her physical and mental condition?
- A. Why, she was perfectly natural, so far as I could judge. I did not notice a particle of difference. In fact, she seemed—— she seemed quite in good spirits, and her memory was wonderful, be-
- 30 cause she was relating to me things that had happened in her childhood.
- Q. Was there any indication of impending death?
- A. Not as I would judge.
- Q. Did she join in the conversation with the rest of them?
- A. Oh, my, yes.
- Q. Were you there when she left to go upstairs
- 40 to change her dress?

Ethel Spargo—Cross.

A. Yes. She said good bye to me at the foot of the stairs, and she went up the stairs, and I went out the front door.

Mr. King: Cross-examine.

CROSS-EXAMINATION BY MR. VANDERBILT:

Q. How are you related to Mr. Allen? 10

A. Mr. Allen's mother and my husband's mother were first cousins.

Mr. King: I wonder what relation that is.

Mr. Vanderbilt: I can't figure it out.

Q. Mr. Allen was around during the time you were there?

A. Just like he always is.

Q. And where were you most of the time, what room, from eleven-thirty to two-thirty, or were you 20 in various rooms?

A. We were preparing dinner.

Q. You were preparing dinner. You had dinner about a quarter of one?

A. I judge between half past twelve and a quarter of one.

Q. And there were just four of you there for dinner?

A. Yes, just four of us. 30

Q. Dinner was over, I suppose, sometime after one.

A. I can't tell. We sat there talking at the table for a time.

Q. Did Mr. Allen stay there, too?

A. Yes.

Mr. Vanderbilt: That is all.

(Witness excused.)

Emma Tithian—Direct.

EMMA TITHIAN, called as a witness on behalf of Mr. J. Frank Allen, being first duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. KING:

Q. Miss Tithian, you live in Madison?

A. No, I live in Morristown now. I did live in
10 Madison near to Mrs. Vincent and Miss Tunis a number of years with my cousin.

Q. What years?

A. Well, I left there the 26th of September, just exactly two years ago.

Q. Now, you had lived near Miss Tunis for how many years?

A. Well, I should seven or eight; not less than seven. I don't remember whether it was 1920 that
20 I came up there in May or '21.

Q. Then you moved to Morristown?

A. Yes. And I have been there since.

Q. And after you had been in Morristown, how frequently did you see Miss Tunis?

A. Well, I saw her quite often. I did not see her as often as I did when I lived there.

Q. Well, during the time you lived in Morristown, had you seen her on occasions?

A. Oh, yes.

30 Q. About how frequently?

A. Well, I have stayed there to dinner, and I have visited there from time to time. I often called there when I was in Madison, and sometimes came on purpose to call.

Q. You did see her on the day of her death?

A. No.

Q. How long had you seen her prior to that time—you have heard of her death, haven't you?

40 A. Yes, I knew all about it almost immediately.

Emma Tithian—Cross.

I think I was in Madison just a few days, a short time after that, and I was at the funeral.

Q. Before that, when did you see her last?

A. I can't just recall how recent before her death.

Q. Was it recent or very removed?

A. Yes, it was recent because I very often called.

Q. What did you find her condition of health to be?

A. Apparently as well as ever, whenever I met her.

Q. What about her mentality?

A. Very good. I thought she was wonderful.

Mr. King: Cross-examine.

CROSS-EXAMINATION BY MR. VANDERBILT:

Q. Was there any difference in her memory after the death—

A. No, not so far as I could see.

Q. What do you know about her from the standpoint of money matters, whether she was very close or generous?

A. She was not penurious so far as I know, but she was very careful of her money. She never gave it out lavishly, but I think she was saving for her old age. That is the way it seemed to me.

30

Mr. Vanderbilt: That is all.

Mr. King: With the exception of one point—when the Court ruled on the question and answer made by Mrs. Duryea—I think I asked her what she said about the will, and she meant to say something, and I think your Honor ordered the answer stricken out. I am not so sure about that.

The Court: I don't remember that.

40

Ethel Spargo—Direct.

Mr. King: The witness said she was going to make it right for the Allens, and I asked whether—

The Court: Then Mr. Vanderbilt said "That is not what I asked you. I asked you something else." That was the way—

Mr. Vanderbilt: I interrupted the witness.

Mr. King: Was that answer stricken out?

10 The Court: There was not any request. It stands just as it was, an unfinished answer.

Mr. King: Will your Honor permit me to ask which witness made that answer?

Mr. Vanderbilt: Mrs. Duryea.

Mr. King: With the permission of the Court—only if your Honor consents—are you the lady who said she was going to make it right with the Allens?

20 Mr. Vanderbilt: I object. I don't think she could—

Mr. King: Well, I will let the record stand as it is.

Mr. Vanderbilt: May I ask the indulgence of the Court to call Mrs. Spargo back for one question?

ETHEL SPARGO, recalled.

30 By Mr. Vanderbilt:

Q. Mrs. Spargo, during the time you were there Saturday, was anything said to you about the bank book?

A. Oh, my, no.

Q. You never knew anything about it?

A. No.

Mr. Vanderbilt: That is all.

Mr. King: That is all.

40 (Witness excused.)

Case.

Mr. Vandergilt: I desire to offer a certified copy of the inventory and accounting of the Morris County Orphans Court, on this estate. Then I will also present the order on the accounting and substituting the administrator.

(Received in evidence and marked Exhibit D-1 and Exhibit D-2 respectively.) 10

Mr. Vanderbilt: The estate, your Honor, is shown by the inventory, exclusive of this bank account, which was not inventoried, to amount to \$14,651. In the final accounting, the original administrator, Mr. Allen, charges himself with the inventory and certain profits he says were realized on the balance, bringing the total up \$16,689.56. I believe we can stipulate, Mr. King, that there was no real estate? 20

Mr. King: There was no real estate.

Mr. Vanderbilt: This is the certified copy of the order appointing the substitute administrator.

(Received and marked Exhibit D-3.)

Mr. Vanderbilt: Your Honor, we might also stipulate with Mr. King that subsequent to the appointment of Mr. Allen as administrator, he brought suit at law against the Madison Trust Company, individually, to recover the amount of the bank account, without offering that record. 30

Mr. King: Yes, and then they filed a bill of interpleader, which resulted in the case before your Honor.

(Defendant J. Frank Allen rests.)

William L. Thebault—Direct.

WILLIAM L. THEBAULT, called as a witness on behalf of the substitute administrator, being first duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. VANDERBILT:

10 Q. You are connected with the First National Bank of Madison?

A. I am.

Q. And in what capacity?

A. Cashier.

Q. Did Miss Tunis have any account or accounts in your bank?

A. Yes, she did. One in the savings department and one in the checking department.

Q. And what was the size of the savings account at the time of her death?

20 A. May I refer to the records?

Q. Yes, sure.

A. Your question was, at the time of her death?

Q. Yes.

A. May I ask the date of her death?

Q. April 28, 1928.

A. \$6,853.66.

Q. And how long had that account been in your bank?

30 A. This savings account was opened July 2, 1914.

Q. And does that account consist of deposits with the withdrawals?

A. There are two withdrawals.

Q. What are the dates of those, and the amounts?

A. The first withdrawal was August 29, 1917, for \$500. The second withdrawal was March 19, 1923, and the amount was \$200.

40 Q. And those are the only withdrawals?

Mrs. H. W. Tunis—Direct.

A. Those are the only withdrawals prior to Miss Tunis' death.

Q. Did she have a checking account, as you say?

A. Yes, she did.

Q. What was the size of that at the time of her death?

A. That was April 28, 1928?

Q. 1928.

A. \$505.50.

Q. And was that an active account?

A. The checking account was an active account. ¹⁰

Mr. Vanderbilt: That is all.

Mr. King: No questions.

MRS. H. W. TUNIS, called as a witness on behalf of the substitute administrator, being first duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. VANDERBILT:

Q. Mrs. Tunis, did you know Miss Maria E. Tunis? ²⁰

A. I did.

Q. And over how long a period?

A. Over 32 years.

Q. She was your sister-in-law?

A. Sister-in-law.

Q. Can you tell us what was her disposition and character with respect to money matters? Was she either generous or lavish in her expenditures on the one hand, or was she extremely careful, frugal ³⁰ and penurious, on the other?

A. Extremely penurious.

Q. Do you know whether or not at all times she had in mind saving money, during the period you knew her, for her old age?

Mr. King: I think that is objectionable, because it permits the witness to draw conclusions.

Mr. Vanderbilt: I admit that. ⁴⁰

Mrs. E. M. Clark—Direct.

Q. Did she every say anything to you—

A. No.

Q. As to whether or not she was saving her money for her old age?

A. No.

Mr. Vanderbilt: That is all.

Mr. King: No questions.

10

MRS. E. M. CLARK, called as a witness on behalf of the substitute administrator, being first duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. VANDERBILT:

Q. Mrs. Clark, where do you live?

A. 508 Norwood Street, East Orange.

Q. And what relation were you to Maria E. Tunis?

20

A. Niece.

Q. And did you ever visit her?

A. Frequently.

Q. How often did you visit her during the year or so after her sister died, while she was living with the Allens?

A. Well, I should say every three or four weeks.

Q. At the Allens' house?

30 A. Yes, sir. I had to go on a trolley or a bus or I would have done it oftener.

Q. When did you last see her?

A. The day before she died I was up there.

Q. On Friday?

A. Yes.

Q. And what was her state of health when you saw her, physical health?

A. Fine. She said she had not felt better, I guess, in years.

40 Q. She was not thinking of dying at that time?

Mrs. E. M. Clark—Direct.

A. No, sir.

Q. What was her mental condition in respect to her memory and her mental activity?

A. Well, she did not seem to remember things that happened, current things, at all. I could be there one day and she would tell me that none of her nieces and nephews had been to see her, and I knew for a fact that my cousin had just been up there a day or so before, but she did not remember that. A lot of things I would tell her, she would not remember at all.

Q. And what would you say, if anything, with respect to her affection or lack of affection in regard to her various nieces and nephews? Was she friendly to them or unfriendly?

A. Well, yes, she was friendly toward them, only, as I said, she did not remember they had been to see her and felt badly about it, and would tell me I was the only one that came near her.

Q. Now, when you heard of Miss Tunis' death, did you go up there?

A. Yes.

Q. When?

A. Saturday evening or night; father took me up.

Q. Your father took you up. Did you see Mr. and Mrs. Allen at that time? 30

A. Yes. We were not there long.

Q. And did you go up there later, again, at any time after that?

A. Yes, sir. The next day I went up there with my husband.

Q. On Sunday?

A. On Sunday.

Q. Did you see Mr. and Mrs. Allen then?

A. Yes.

Mrs. E. M. Clark—Cross.

Q. Did you go up again at any time later?

A. No, not before the funeral. I asked if there was anything I could do, and there did not seem to be anything.

Q. Did you go to the funeral?

A. Yes.

Q. Did you see Mr. and Mrs. Allen at the funeral?
10

A. Yes.

Q. On any of those occasions, Saturday night, Sunday or at the funeral, did either Mr. or Mrs. Allen say anything to you about the gift of this Madison Trust Company account to Mr. Allen?

A. No.

Q. When was the first you knew about it?

A. Why— oh, months later, perhaps nine or
20 ten months later, I guess.

Mr. Vanderbilt: That is all.

CROSS-EXAMINATION BY MR. KING:

Q. On this day prior to the death, while you were there, how long did you remain?

A. All afternoon.

Q. Did anybody else join in the conversation?

A. No.

30 Q. Between you and she?

A. No. Mrs. Allen was around. I heard her around through the other rooms.

Q. What did you both talk about?

A. Well, most everything in general.

Q. Certainly you did not do all the talking. She must have done some?

A. Sure she did.

Q. And you had an ordinary conversation with
40 an old lady; is that right?

Mrs. E. M. Clark—Redirect.

Henry M. Young—Direct.

A. Yes.

Q. And the criticism you have of her mental condition is that some of the suggestions made by you she did not remember, for instance, the relatives' calling?

A. Yes.

Q. That is the only criticism?

A. Yes, sir. Her memory seemed to be leaving her.

Q. You had a rather enjoyable occasion, did you? 10

A. Always, yes.

Q. You discussed things that appeared in the newspaper or friends and relatives?

A. Well, we spoke of our relatives.

Q. Somebody had a new baby and you knew about it and you spoke about that?

A. Yes.

Mr. King: That is all.

20

REDIRECT-EXAMINATION BY MR. VANDERBILT:

Q. What was her disposition with respect to money matters?

A. Well, she was very close and penurious, careful. I know, one suggestion, we wanted her to get a vacuum, but they did not seem to want it, she and her sister, when they were living together before she died. They did not want it because they felt that they did not want to put the money out 30 for it.

(Witness excused.)

HENRY M. YOUNG, called as a witness on behalf of the substitute administrator, being first duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. VANDERBILT:

Q. Mr. Young, you knew Miss Tunis?

A. I did.

40

Henry M. Young—Direct.

Q. A good many years?

A. Yes, sir.

Q. Did you see her during her lifetime, especially the last year of her life?

A. Yes, frequently.

Q. When did you last see her before she died?

A. I could not recall exactly. Sometimes I
10 would go up there once a week and sometimes I
would go—it would be two or three weeks before
I could get a chance.

Q. Where do you live?

A. 508 Norwood Street, East Orange.

Q. And when you saw her, what was her physical condition?

A. Very good.

Q. What about her memory and mental condition?

20 A. She was getting forgetful. She frequently
would say that "No one comes to see me any more.
You are the only one that comes." I knew for a
fact that others had been there.

Q. Mrs. Clark is your daughter?

A. Yes.

Q. You were up there with her Saturday night
after the death of Miss Tunis?

A. Yes.

30 Q. You did not go Sunday, did you?

A. No, I did not go up there.

Q. Did you see Mr. and Mrs. Allen on that
Saturday night?

A. Yes, sir.

Q. And did either of them say anything to you
about the bank account?

A. Not a word.

40 Q. You have known Mr. and Mrs. Allen for some
time?

Henry M. Young—Cross.
Grace B. Winters—Direct.

A. Yes, sir.

Q. How many years?

A. Oh, probably forty years.

Q. What about Miss Tunis' saving habits?

A. She was careful. I do not know that she was peculiarly so. She was just very careful how she spent money. I remember one instance when 10 she was living with her sister, Mrs. Vincent, Mrs. Vincent felt as though she did not have money enough to pay her rent, and she asked Miss Tunis to help her, and Miss Tunis rather objected, thought she was not well-enough-to-do to advance the money.

Mr. Vanderbilt: Cross-examine.

CROSS-EXAMINATION BY MR. KING:

20

Q. Outside the fact that Miss Tunis made the allegation that her relatives had not called on her with such frequency as she desired, all the rest of her conversation was normal, wasn't it?

A. Yes.

(Witness excused.)

GRACE B. WINTERS, called as a witness on behalf of the substitute administrator, being first 30 duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. VANDERBILT:

Q. Mrs. Winters, you are a niece of Miss Tunis?

A. I am.

Q. And when did you last see her during her lifetime?

A. I really don't remember. I think it was probably two or three months.

40

Grace B. Winters—Direct.

Q. And what was her physical condition when you saw her?

A. Her physical condition was very good.

Q. And did she speak of her various relatives at all when you saw her?

A. Yes. That is probably about all we could
10 talk about.

Q. Did she seem friendly or unfriendly toward them?

A. Very friendly—nothing at all.

Q. Were you up there at the time of the funeral?

A. Yes, sir.

Q. Or any time between her death and—

A. The Saturday night she died in the afternoon.

Q. You were up there Saturday night?

A. Yes, sir.

20 Q. Did you talk to Mr. and Mrs. Allen then?

A. Yes.

Q. Did they tell you anything about the bank account?

A. Not a word.

Q. When did you see them next after that Saturday night?

A. At the funeral.

Q. Did they say anything to you about it then?

30 A. No.

Q. When did you first learn about the bank account, how soon after her death?

A. Somewhere between the 1st and 15th of February.

Q. The following?

A. The following.

Q. Was your aunt very saving with her money?

A. Very. I know that I used to get Christmas
40 cards with the flap tucked in so she could put one

Dorothy L. Jamerson—Direct.

cent on it instead of two cents. I thought that was pretty——

Mr. Vanderbilt: That is all.

Mr. King: No questions.

(Witness excused.)

DOROTHY L. JAMERSON, called as a witness on behalf of the substitute administrator, being first duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. VANDERBILT:

Q. Mrs. Jamerson, you live in Chatham? 10

A. I do.

Q. You are a niece of Miss Tunis?

A. I am.

Q. Did you visit her at all when she lived with Mrs. Allen?

A. Yes, occasionally.

Q. How often were you there?

A. I can't say how many times, but I did not visit her as frequently as when she was living²⁰ alone.

Q. About how many times would you say it was, as near as you can tell?

A. I would say four or five times, anyway, during that year.

Q. Were you up ther Sunday morning following her death?

A. I was.

Q. Did you talk to Mr. and Mrs. Allen? 30

A. Yes.

Q. Did they say anything to you——

A. Not a word.

Q. About the bank account.

Mr. Vanderbilt: Cross-examine.

Mr. King: No questions.

The Court: This testimony is merely cumulative, now. I do not think it is necessary to accumulate any more.

Russell E. Young—Direct.

Mr. King: Counsel is proving exactly what the case shows.

RUSSELL E. YOUNG, called as a witness on behalf of the substitute administrator, being first duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. VANDERBILT:

Q. Mr. Young, you are a nephew of Miss Tunis?

10 A. Yes.

Q. And you are the substitute administrator?

A. Yes.

Q. Do you know whether or not Miss Tunis was generally saving with her funds?

A. I do know it.

Q. Have you any special instances where that was shown?

20 A. Well, I know that one instance is that whenever we went up there to a meal, which was once in a while, they were very very frugal with what they set on the table. They worried themselves and they did not, of course, being in that vein ever set out a repast for anyone that visited them. They thought the rest of the people were just as careful as they were. And one thing, while they were both living, about six months, I believe, before Mrs. Vincent died, I thought they were pretty lonely, and I suggested to them that I should bring a radio
30 up to them, and set it up, and put the antenna all ready for them, I thought it would pass away some of their hours and give them a little enjoyment. Of course, at that time, there was only battery sets, and they were afraid the cost of the batteries would be a little more than they cared to give.

Q. They did not want to pay for the upkeep of the radio?

40 A. No. They were afraid of the upkeep, even though it would have given them pleasure. A lot of

Henry G. Pilch—Cross.

things we would tell them—why don't you get some one in here to help clean your house—why don't you go on a trip—Oh, they did not want to, it would cost too much.

Mr. Vanderbilt: That is all.

Mr. King: We have nothing in rebuttal.

The Court: That is the whole case?

Mr. King: Yes.

The Court: This is the end, then. Do you 10
desire to brief it?

Mr. Vanderbilt: We are prepared to argue it now, if the Court desires it, or brief it, whichever you prefer.

The Court: Well, I think I would prefer a brief. It is really merely a question of fact. You may send me a memoranda.

Mr. Vanderbilt: I find that I did neglect one thing. I would like to put in, if I may, the 20
family tree.

The Court: All right.

Mr. Vanderbilt: There is no objection, I think, on Mr. King's part. This is the memorandum we used from the Orphans Court.

The Court: I really expected that you would call Mr. Pilch to testify in regard to these dark statements that had been put in.

Mr. Vanderbilt: I understood your Honor to say that you did not believe them, but I will 30
call Mr. Pilch.

The Court: I don't, but I think it might be well to have it on the record.

HENRY G. PILCH, recalled.

The Court: I don't think Mr. King thinks so.

Mr. King: I do not want to disparage my own witness, but I know, if those words were used, they were made with no sinister intent. 40

Henry G. Pilch—Cross.

He is a man of high standing before the Court and good reputation in our county. I want to say that even though I asked her, there is no intent at all to say anything against Mr. Pilch's standing as a man, citizen, or anything else.

Mr. Vanderbilt: That does not leave me anything to say, Vice-Chancellor.

The Court: Let it go. Let us have it on the record.

10

By Mr. Vanderbilt:

Q. Mr. Pilch, did you say to Mr. Allen, in the presence of Mrs. Allen and Mrs. Duryea in that front room, I believe it was, of the Allen house, following Miss Tunis' death, when he was alleged to have told you about the bank account, "Keep it under cover"?

A. I did not.

20 Q. Did you say anything about keeping it until the administrator was appointed?

A. I did not.

The Court: And did you tell Mrs. Duryea to be sure and remember all that passed? As a matter of fact, I understood you to testify that there was no conversation.

80 The Witness: I don't remember about the bank book on that day. I don't remember any conversation about the bank book until the next morning. Of course, everybody was excited. I went in to draw a will, and when I got there they said she was dead. The doctor came in and there was excitement.

Q. You did suggest calling for the doctor?

A. I did, yes.

The Court: That is all. That is the end of the case then.

40

Opinion.

Filed Oct. 10, 1929.

IN CHANCERY OF NEW JERSEY.

*Between*MADISON TRUST COMPANY,
Complainant,

and

J. FRANK ALLEN and RUSSELL
E. YOUNG, as Substituted Ad-
ministrators,
Defendants.

Opinion.

10

ARTHUR T. VANDERBILT, Esq., Counsel for
RUSSELL E. YOUNG, Substituted Administrator.MESSRS. KING & VOGT, Counsel for J. Frank
Allen.

SYLLABUS

1. In cases of gifts *inter vivos* or *causa mortis*, both delivery and donative intent must clearly appear.
2. The burden of proof in establishing the alleged gift is of the donee.
3. In a case where the only witness to the alleged gift is the wife of the donee, it is proper for the Court to consider surrounding circumstances, personal interest and the actions of the claimant at or immediately subsequent to the alleged gift, especially as no objection thereto was raised at the hearing.
4. Evidence examined and found to be insufficient to establish a gift *inter vivos*.

30

40

Opinion.

CHURCH, V. C.

The following "facts" are set up in the brief of the defendant's counsel, who insists they have all been admitted or proved:

10 Maria E. Tunis, now deceased, had on deposit with the Madison Trust Company, on April 13, 1928, the sum of \$8,291.60 as shown by Bank Book No. 201. This sum was deposited in the Special Department of the Bank. Upon bill of interpleader by the bank, the sum of \$8,291.60 was directed paid to the Clerk of this Court.

The moneys are claimed by Russell E. Young, substituted administrator of Maria E. Tunis, and by J. Frank Allen, who claims a gift of the book *inter vivos* during the life of the deceased.

20 Miss Tunis was eighty-four years of age, unmarried and had boarded with J. Frank Allen in Madison for the last year of her life. She was a cousin to Mr. Allen's mother, and was known by Mrs. Allen for thirty-five years.

The Allen family consisted of the husband and wife. Miss Tunis paid them \$5.00 a week for her board. Her nearest relatives were nephews and nieces.

30 She appears to have enjoyed unusual good health for a woman of her age, both mental and physical. Her securities were kept in a lock box which she deposited in the safe in the store of Mr. Allen. This box was always kept locked. Miss Tunis retained the keys.

The store of Mr. Allen was a part of the house occupied as their home.

40 On the 27th day of April Mr. and Mrs. Allen and Miss Tunis were sitting at the table in the evening reading, when Miss Tunis looked up at the calendar and, addressing Mr. Allen, said, "It is

Opinion.

near the first of the month. I have some coupons that are due the first of the month and I would like when you go down to the bank; if you will get my box I will get the key." Miss Tunis then went upstairs, got her key and Mr. Allen got her box for her. This box was in the safe in Mr. Allen's store.

When Miss Tunis returned with the keys and Mr. Allen returned with the box, Miss Tunis unlocked the box and took out one bank book. She looked at that, then she took out another bank book and looked at that, then she took out a little piece of paper and crumpled that up in her hand. She then took out the last bank book and then picked up the first bank book and handing it to Mr. Allen said, "Here, Frank, you take this for what you have done for me. You have done more for me than any of my nephews and nieces, and I want you to have this." At the time she said this to Mr. Allen, she handed him the book and he took it and thanked her. She then looked at her bonds, put them back in the box, closed and locked it and returned the box to Mr. Allen. Miss Tunis retained the keys.

Mr. Allen put the bank book in his pocket.

At this time Miss Tunis told Mr. Allen she wanted to make a will. She did not want her money to go the way her sister's did and said, "I want to make a will and I want it to go to those who need it," and asked Mr. Allen how she would go about it to make a will, and he advised her that she ought to have a lawyer. Miss Tunis then requested Mr. Allen to get a lawyer and to have him come to the house.

The following morning Mr. Allen went over to the bank and presented the book to Mr. Miller for the purpose of having the funds transferred to his own name. Mr. Miller gave him a couple of yellow

Opinion.

slips to take up and have Miss Tunis sign. Mr. Miller returned the book to Mr. Allen and he returned home with the book and the slips which Mr. Miller told Mr. Allen to fill out and have Miss Tunis sign. When Mr. Allen returned about eleven o'clock, there were guests at the home and Miss Tunis was with them in the kitchen. While at the
10 bank, Mr. Miller, at the request of Mr. Allen, called up Mr. Pilch, an attorney residing in Madison, and who was likewise the attorney for the bank, and informed him of the desire of Miss Tunis to make a will.

Mr. Pilch came to the store before three o'clock Saturday afternoon.

Mrs. Spargo was at Mr. Allen's for lunch and after lunch Miss Tunis remained in the kitchen talking to her until Mrs. Spargo left about ten minutes of three. Then Miss Tunis went upstairs.
20 After Miss Tunis went upstairs Mr. Pilch came. Mr. Allen told Mr. Pilch that Miss Tunis had just gone upstairs to dress and that he would have to wait a few minutes. During this time Mr. Pilch remained in the store.

At the end of the fifteen minutes Mr. Allen went in the hall and called to Miss Tunis. Receiving no response, Mr. Allen went up the stairs to the front
30 room where Miss Tunis usually sat in the afternoon. She was not there, and then he went to her room. She was dead.

If these statements had been admitted or proved, there can be no doubt that the property in question, that is, the \$8,291.60, belongs to Mr. Allen. That there may be a gift *inter vivos* of a bank book, such as the one in question, is too well settled to make it necessary to cite authorities. The
40 substituted administrator of Miss Tunis' estate,

Opinion.

however, denies that there was in fact any such gift. He contends that the Court should take into consideration the surrounding circumstances and the conduct of the alleged beneficiary at the time and immediately thereafter. In matters of this kind the Court, I think, should be thoroughly satisfied that the gift was actually made before depriving the rightful next of kin of his patrimony. 10 Both Counsel agree that the case is purely one of fact. I think, however, that defendant's contention that I am limited to the sole question of whether or not the testimony of the one witness produced is on its face true, is too narrow. In order to determine her reliability, I must, as I see it, take into consideration surrounding circumstances, personal interest and the actions of the claimant at or immediately subsequent to the alleged gift. This I shall do, especially as there was 20 no objection to its reception at the hearing.

Miss Tunis was of an extremely penurious disposition. The only gift she ever made to the Allens was \$5.00 each on Christmas day. She hoarded her money, fearing that in her old age she might be in want. The alleged gift represents one third of her estate. She was in good health at the time she is alleged to have made it. She was not unfriendly to her nieces and nephews, the natural objects of her 30 bounty. Her only complaint was that they did not come to see her often enough. Even this is explained by the fact that she grew forgetful and often after their visits failed to recollect they had ever been made. The sole purpose of opening the strong box on April 27th, according to defendant's one witness, was to cut coupons from bonds. This was not done and no explanation is given as to why the coupons were not removed.

Opinion.

The next morning Mr. Allen went to the bank and endeavored to persuade the officials to transfer the account to him. They refused to do so because the account was in Miss Tunis' name. They, however, gave him withdrawal slips for her to sign, 10 which he took home. He was talking with Miss Tunis for over three hours before her death and she was in perfectly good health. In spite of his hurry to get to the bank, he says he was in no hurry to ask her to sign the slips. His reason is that there was company at the house. The company consisted of his brother and niece and two friends, to whom one would naturally suppose he would have confided the receipt of so substantial a gift. He did not tell them, and he *says* he did not ask Miss Tunis to sign. It is significant that 20 the slips were not signed. Any normal person who had been freely given such a gift would certainly, I think, have not hesitated to ask the donor to complete it. Although he was in no hurry to ask Miss Tunis to sign, again on Sunday, the day after her death, he persuaded a bank official to go to the home of Mr. Pilch, attorney for the bank, in an effort to persuade counsel to advise turning over the money without the signature. He again went to Mr. Pilch in another attempt along the same lines, 30 and went so far as to tell the bank's counsel, "Well, there will be no trouble, everybody is satisfied I know." While making this statement, he knew, as appears in the testimony, that the next of kin knew nothing about the bank book or the alleged gift. He was appointed administrator of the estate. He thereby made himself, as it were, a trustee for the next of kin, and though acting for them in a fiduciary capacity, did not disclose the alleged gift or 40 the bank book. Moreover, without notice to any

Opinion.

of the interested parties, he brought suit against the Madison Trust Company individually for the money. This resulted in his retirement as administrator of the estate.

To my mind, such a course of conduct is not that of a man who is sure he is the recipient of a voluntary gift. It is rather that of one, who, by silence, false statement to bank's counsel, and subterfuge, seeks to possess himself of something to which he is not entitled. ¹⁰

The only witnesses to the alleged act of giving were Mr. and Mrs. Allen. He, of course, was excluded from the witness stand under the Evidence Act. Mrs. Allen could and did testify, and though technically entitled to do so, her interest in the case is as deep and personal as that of her husband. Her story is not convincing. She does not say why ²⁰ Miss Tunis abandoned her purpose of cutting coupons in order to give away one third of her estate when she had announced her intention of making a will the following day and could have made the gift testamentary. Miss Tunis was in good health and no one anticipated her sudden demise.

The only other evidence on which I need comment is that of Miss Duryea, called for defendant. ³⁰ Her testimony was shifty and contradictory in itself. She contradicted Mr. Pilch, a lawyer of high standing, whose evidence I believe to be absolutely true. She even contradicted Mr. Allen, himself, in whose behalf she was called. In short, her eagerness to establish her case was so apparent that I do not believe any of her testimony. It tends to convince me that the alleged gift was never made. It is hardly necessary to add that the burden of ⁴⁰

Final Decree.

proof is upon the alleged donee to clearly prove both delivery and donative intent.

Under the circumstances I have above set forth, I cannot believe that a penurious old woman, in continual fear of poverty, would, while in good health, part with one third of her property. She intended to dispose of it by will the next day, which makes the gift *inter vivos* more improbable. Coupling this with the deep personal interest of the only witness to the alleged transaction and the conduct of the alleged donee, I shall find as a fact that there was no gift *inter vivos*, that is, neither voluntary delivery nor donative intent.

I will advise a decree accordingly.

Final Decree.

Filed October 31, 1929.

IN CHANCERY OF NEW JERSEY

Between

MADISON TRUST COMPANY,
Complainant,

and

J. FRANK ALLEN and RUSSELL
E. YOUNG, as Substituted
Administrator,
Defendants.

On Bill of
Interpleader

Final Decree

This cause being opened to the court by Arthur T. Vanderbilt, solicitor of defendant Russell E. Young, as substituted administrator of the Estate

Final Decree.

of Maria E. Tunis, deceased, and it appearing by an interlocutory decree made in the above entitled cause on the 12th day of June, 1929, it was ordered that the defendants J. Frank Allen and said Russell E. Young, as substituted administrator, interplead as to the fund deposited with the Clerk of this court in this cause by the complainant; and it appearing that said defendants J. Frank Allen and Russell E. Young, as substituted administrator, thereafter duly filed with the Clerk of this 10 court statements in writing of their several claims to the said fund; and this cause coming on to be heard in the presence of Arthur T. Vanderbilt, solicitor of the defendant Russell E. Young, as substituted administrator, and King & Vogt, solicitors of the defendant J. Frank Allen, and the court having examined the pleadings, and having taken 20 proofs orally and in open court, and heard and considered the arguments of counsel thereon; and it appearing to the satisfaction of the court that the defendant Russell E. Young, as substituted administrator, is entitled to receive the said fund so deposited in this court;

And it further appearing that the said fund, amounting to the sum of \$8,567.62, was, at the time of the filing of the bill of complaint in this cause paid by the complainant into this court, and that 30 the same, together with accumulated interest thereon since accrued, but less the costs of said complainant, still remains deposited in this court, and subject to the order and direction thereof.

It is thereupon, on this fifteenth day of October, 1929, ORDERED, ADJUDGED AND DECREED that the said defendant Russell E. Young, as substituted administrator, was and now is entitled to said sum of

Final Decree.

\$8,567.62 so paid into court, together with all accumulations of interest thereon; and that the balance, after deducting said costs, and the lawful commissions of the Clerk of this court, of said sum paid into this court as aforesaid, and now remaining deposited therein, together with all interest accumulated thereon, be paid to the said defendant Russell E. Young, as substituted administrator, or
10 to his solicitor.

It is further ORDERED, ADJUDGED AND DECREED that the costs of this cause of said defendant Russell E. Young, as substituted administrator, including a counsel fee of \$350, which is hereby allowed to said defendant Russell E. Young, as substituted administrator.

E. R. WALKER,

C.

20

Respectfully advised

ALONZO CHURCH

V. C.

30

40

Notice of Appeal.

Filed Nov. 9, 1929.

IN CHANCERY OF NEW JERSEY.

*Between*MADISON TRUST COMPANY,
Complainant,

AND

J. FRANK ALLEN and RUSSELL
E. YOUNG, as substituted ad-
ministrator,
Defendants.

10

} Notice of Appeal

20

The defendant, J. FRANK ALLEN, hereby appeals from the final decree made October 15, 1929 in the above entitled cause by the Chancellor on the advice of Vice-Chancellor Alonzo Church, and from the whole and every part thereof, to the Court of Errors & Appeals in the last resort in all causes.

Dated November 7th, 1929.

30

KING & VOGT

Solicitors for and of Counsel with
J. Frank Allen, a defendant.

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

ELMER KING

Of Counsel with Defendant J. Frank
Allen.

40

Petition of Appeal.

Filed Dec. 28, 1929.

NEW JERSEY COURT OF ERRORS
& APPEALS.

10

*Between*MADISON TRUST COMPANY,
Complainant,

and

J. FRANK ALLEN, and RUSSELL
E. YOUNG, as substituted ad-
ministrator,

Defendants.

On Appeal from the
Court of Chancery.

Petition of Appeal.

20

TO THE HONORABLE, THE COURT OF ERRORS AND
APPEALS IN THE LAST RESORT IN ALL CAUSES:The petition of J. Frank Allen, the appellant in
the above entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a final
decree made in the Court of Chancery by his Honor
30 Edwin Robert Walker, Chancellor of the State of
New Jersey, bearing date October 15th, 1929, in a
certain cause in said Court of Chancery wherein
the said Madison Trust Company was complainant
and the said J. Frank Allen and Russell E. Young
as substituted administrator, were defendants, in
this respect to wit: that said decree adjudged that
the defendant Russell E. Young as substituted ad-
40 \$8567.62 together with the accumulated interest

Petition of Appeal.

thereon paid into this Court, and the balance after deducting the costs and the lawful commissions of the Clerk of this Court, together with all interest accumulated thereon be paid to the said defendant, Russell E. Young, as substituted administrator, or to his solicitor.

And the petitioner appeals from the decree of the Chancellor, which decrees as aforesaid, upon the 10 ground that the same is erroneous in that:

1. The said decree should have awarded the said money in the hands of said Court to the defendant, J. Frank Allen and not to Russell E. Young, as substituted administrator.

Petitioner, therefore, prays that the said decree of the said Chancellor may be reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this 20 Court shall seem proper.

KING & VOGT

Solicitor for and of Counsel
with Appellant.

Answer to Petition of Appeal.

Filed February 5, 1930.

NEW JERSEY COURT OF ERRORS AND
APPEALS

10 20	<i>Between</i> MADISON TRUST COMPANY, Complainant, and J. FRANK ALLEN and RUSSELL E. YOUNG, as substituted ad- ministrator, Defendants.	} On Appeal from the Court of Chancery Answer to Petition of Appeal
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20 The answer of the above-named defendant, Rus-
sell E. Young, as substituted administrator, to the
petition of appeal of appellant, J. Frank Allen.

This defendant, not acknowledging all or any of
the matters which in the said petition of appeal
are contained to be true for answer thereto, never-
theless, says and admits that a decree was on the
15th day of October, 1929, made and entered in the
Court of Chancery, in the cause for that purpose
mentioned in the said petition, as is therein stated,
30 but as to the substance and form thereof, this de-
fendant prays to refer thereto when the same shall
be produced. And this defendant is advised and
believes, that the said decree is agreeable to equity,
and he prays that the same may be affirmed, with
costs to be adjudged to this defendant.

ARTHUR T. VANDERBILT,
Counsel for Defendant Rus-
sell E. Young, as Substi-
tuted Administrator.

Exhibit D-1.

MORRIS COUNTY ORPHANS' COURT.

In the matter of the Estate of MARIA E. TUNIS, Deceased.	}	On accounting. Petition.
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10

TO THE ORPHANS' COURT OF THE COUNTY OF MORRIS:

The petition of J. FRANK ALLEN, Administrator &c. respectfully shows as follows:

1. Your petitioner is the administrator of the estate of Maria E. Tunis, deceased, and herewith present this account of his administration of the aforesaid estate.

20

2. The names and addresses of all persons interested in said account are as follows:

Names	Addresses	Interest	
Jennie Douglass.....	70 Broad St. Newark, N. J.....	1/30	
Elmer Tunis.....	Florham Park, N. J.....	1/30	
Hattie Genung.....	".....	1/30	
Irving Tunis.....	".....	1/30	
Harley Tunis.....	".....	1/30	
Nellie Thompson.....	149 Halsted St. East Orange, N. J.....	1/30	
Myrtle Smith.....	".....	1/30	
Sadie Dey.....	".....	1/30	
Herbert E. Dey.....	57 Hillcrest Terrace ".....	1/30	30
Evelyn Clark.....	508 Norwood St. ".....	1/30	
Charles W. Dey.....	103-4th Ave. Newark, N. J.....	1/30	
Hilda Hartdegen.....	218 Highland Ave. Newark, N. J.....	1/15	
William Tunis.....	44 Fairview Ave. South Orange, N. J.....	1/30	
Grace Winters.....	24 Grenada Place, Montclair, N. J.....	1/30	
Clara B. Rutherford.....	30 William St. Smithbridge, Mass.....	1/20	
Fred E. Kitchell.....	Lenox Road, N. Y. Ave. Brooklyn, N. Y....	1/20	
Hudson Kitchell.....	40 Brownell St. Providence, R. I.....	1/20	
Dorothy Jameson.....	Chatham, N. J.....	1/15	
Russell E. Young.....	Chatham, N. J.....	1/10	
Henry R. Tunis.....	289 Woodside Ave. Newark, N. J.....	1/15	
Edward Kitchell.....	c/o Hudson Kitchell, 40 Brownell St. Providence, R. I.....	1/20	40

Exhibit D-1.

All of the aforesaid are of full age.

Names	Addresses	Age	Interest
-------	-----------	-----	----------

10 3. The following is a summary of the aforesaid account:

ACCOUNTANT CHARGES HIMSELF AS FOLLOWS:

To the amount of Inventory.....	\$14,651.04
<hr/>	
Amount collected in addition to In- ventory	\$2,038.52
<hr/>	
TOTAL CHARGES	\$16,689.56

20 ACCOUNTANT PRAYS ALLOWANCE AS FOLLOWS:

Amount of expenditures.....	\$1,167.44
<hr/>	
Balance in the hands of account- ant	\$15,522.12

Your petitioner therefore prays that said account may be allowed and also for the allowance of commissions and counsel fees.

30 J. FRANK ALLEN
Administrator &c.

Dated Morristown, N. J.,

February 15
~~January 3rd~~, 1929.

40

Exhibit D-1.

STATE OF NEW JERSEY, }
 County of Morris, } ss.

J. FRANK ALLEN, being duly sworn according to law upon his oath, deposes and says that he is the petitioner in the foregoing petition named, and that the matters and things therein contained are true to the best of his knowledge and belief.

J. FRANK ALLEN 10

Subscribed and sworn to this }
 15th February }
~~3rd~~ day of ~~January~~, 1929, }
 before me }

MARY L. JAMIESON
 Notary Public of N. J.

20

30

40

Exhibit D-1.

MARIA E. TUNIS

THE FINAL ACCOUNT OF J. FRANK ALLEN, administrator of MARIE E. TUNIS, late of the County of Morris, deceased, as well of and for such and so much of the estate of said deceased as has come to his hands to be administered as for his payments and disbursements therefrom:—

10	THIS ACCOUNTANT CHARGES HIMSELF			
	with amount of Inventory.....			\$14,651 04
	With excess received as follows:—			
	40 shares N. J. Adamant Mfg.			
	Co. sold at \$165.....	\$6600 00		
	Inventoried at.....	5000 00		1,600 00
				<hr/>
	Interest accrued on account in			
	First National Bank of Madison, N. J.....	209 90		
	Int. charged in inventory.....	31 98		177 92
20				<hr/>
	Coupons received on the \$1000			
	bonds of Jersey City-Hoboken-			
	Paterson	40 00		
	St. Railway Co.			
	Charged in inventory.....	39 60	Excess	40
				<hr/>
	Coupons received on the \$1000			
	bond North Jersey Street Rail-			
	way Co.....	80 00		
	Charged in inventory.....	19 80	Excess	60 20
				<hr/>
	Int. on Adamant shares.....			200 00
30				<hr/>
				\$16,689 56
	THIS ACCOUNTANT CLAIMS ALLOWANCE			
	For loss on sale of following			
	bonds Inventoried value of			
	\$1000 bond of Jersey City-			
	Hoboken, Paterson St. Rail-			
	way Co. 1st Mtg. 4s of 49....			
		\$1,170 00		
	Received	1,036 44		
				<hr/>
	Loss			133 56
40				<hr/>
	Forward			\$133 56

Exhibit D-1.

MARIE E. TUNIS

Forward		\$133 56	
Inventoried value of \$1000 bond of North Jersey Street Rail- way Co. 1st Mtg. 4% Gold Bond	\$1,020 00		
Received	983 22		
			10
Loss		36 78	
Morristown Jerseyman, notice to creditors	1	11 10	
Surrogate, letters &c.	2	24 50	
“ inventory &c.	3	4 50	
“ certificate	4	75	
“ “	4a	75	
E. P. Burroughs & Son, Under- taker	5	734 50	
Jennie Allen, Services	6	10 00	
George Brown & Son, Markers & Inscription	7	198 00	
Dr. Seward, Physician	8	3 00	
Expenses of Administrator	9	10 00	20
		\$1,167 44	

The balance due the respective
heirs will be subject to col-
lateral inheritance tax.

SCHEDULE OF ASSETS

Cash on deposit First National Bank of Madison	\$14,900 87	
Paid Collateral Inheritance Tax	621 25	30
	\$15,522 12	

Exhibit D-1.

STATE OF NEW JERSEY }
 County of Morris } ss.

J. FRANK ALLEN, the accountant above named,
 being duly sworn on his oath, deposes and says that
 the account as above stated is in all things just and
 true both as to the charge and discharge thereof,
 according to the best of the knowledge, memory and
 10 belief of the deponent.

J. FRANK ALLEN

SWORN AND SUBSCRIBED before me }
 February 1st }
 this 3rd day of ~~January~~ A. D. }
 1929.

ELMER KING

Master in Chancery of New Jersey

20 TO THE JUDGE OF THE ORPHANS COURT OF THE
 COUNTY OF MORRIS:

The foregoing account has been by me audited
 and stated and placed upon the files of my office
 twenty days previous to this time and is now re-
 ported for examination and allowance.

Dated April 5th, 1929.

WILLIAM H. THOMPSON,
 Surrogate.

30

By HARRY R. SHUPE,
 Deputy Surrogate.

40

Exhibit D-2.

A TRUE AND PERFECT INVENTORY

Of the GOODS AND CHATTELS, RIGHTS AND CREDITS of MARIA E. TUNIS, late of the County of Morris, in the State of New Jersey, made by J. FRANK ALLEN Administrator and PRESTON A. BURROUGHS and ISAAC D. REED disinterested persons. Made this 13th day of Nov. 1928 A. D. 1928.

Cash in 1st Natl Bank, Madison, N. J.		10
Savings A/C	6853.66	
Interest Apr. 1/28 to Apr. 28/28.....	31.98	
Cash in Checking A/C.....	505.50	
" on Hand	10.50	
Two \$1000. Bonds #2831—2 Jersey City, Hoboken, Paterson Street Ry Co. 1st Mortgage 4's of 49.....	1170.00	
Int. Nov. 1-1927 to Apr. 28/28.....	39.60	
One \$1000. Bond No. Jersey Street Ry Co 1st Mortgage 4% Gold Bond of '48 #913	1020.00	20
Interest Nov. 1/27 to Apr. 28/28.....	19.80	
40 shares N. J. Adamant Mfg Co. Certificate #153065	5000.00	
	<hr/>	
	14651.04	

(Above value quoted from letter written by Herbert E. Dey, Secretary of the Company on Oct. 12, 1928.)

PRESTON A. BURROUGHS

STATE OF NEW JERSEY }
 Morris County } ss.

PRESTON A. BURROUGHS, one of the Appraisers of the annexed Inventory, being duly sworn, according to law, deposeth and saith that the Goods, 40

Exhibit D-2.

Chattels and Credits in the said Inventory set down and specified, were by him appraised according to their just and true respective rates and values, after the best of his judgment and understanding, and that ISAAC D. REED, the other Appraiser, whose name is hereunto subscribed, was present at the same time and consented in all
 10 things to the doing thereof, and that they appraised all things that were brought to their view for appraisalment.

PRESTON A. BURROUGHS
 ISAAC D. REED

Sworn and subscribed before me this }
 thirteenth day of Nov. 1928 A. D. }

LILLIAN A. GEMMEL [SEAL]
 Notary Public

20

STATE OF NEW JERSEY }
 Morris County } ss.

J. FRANK ALLEN of the estate of Maria E. Tunis deceased, being duly sworn according to law does depose and say that the annexed writing contains a true and perfect inventory of all and singular the Goods, Chattels and Credits of the said Maria
 30 E. Tunis Deceased as far as have come to his knowledge or possession or to the possession of any other person or persons for his use.

J. FRANK ALLEN, Admr.

Sworn and subscribed before me this }
 thirteenth day of Nov. 1928 A. D. }

LILLIAN A. GEMMEL [SEAL]
 Notary Public

40

Exhibit D-3.**MORRIS COUNTY ORPHANS' COURT.**

IN THE MATTER OF THE ESTATE	} Order Appointing Substituted Administrator.
OF	
MARIA E. TUNIS, deceased.	

10

It appearing that by the decree of the above entitled Court, bearing date April 5th, 1929, J. Frank Allen, Administrator of the above Estate was discharged as such administrator and relieved of any further duties in relation thereto, except the distribution of the funds remaining in his hands as therein found and determined; and it further appearing that by said decree it was further ordered that the next of kin of the above decedent were 20 permitted to appoint a new administrator:

It is thereupon on this Fifth day of April, 1929, upon motion of Smith & Slingerland, Proctors for all of the said next of kin of said decedent, ORDERED that letters of substitutionary administration upon the goods, chattels and credits of said intestate be granted to Russell Young, of the Borough of Chatham, in the County of Morris and State of New Jersey, upon his entering into bond 30 to the Ordinary, in the sum of One Thousand Dollars, with sureties to be approved by the Surrogate.

ALBERT H. HOLLAND,
Judge &c.

A True Copy,

By HARRY R. SHUPE

Deputy Surrogate.

40

Exhibit C-1.

BOOK NO. 201

MADISON TRUST COMPANY

Madison, N. J.

10

SPECIAL DEPARTMENT.

NAME

MARIA E. TUNIS.

NOTE.—PRESENT THIS BOOK WHEN DRAWING AND
DEPOSITING MONEY.

20

.....
NOTIFY COMPANY AT ONCE IF BOOK IS LOST

SPECIAL DEPARTMENT

MADISON TRUST COMPANY

The following shall be the Rules and Regula-
tions of the Special Department:

30

BUSINESS HOURS

I. The Special Department shall be open every
business day, from 9 A. M. to 3 P. M. Saturdays
9 A. M. to 12 noon.

DRAFT REGULATIONS

II. No original deposit of a sum less than Five
Dollars (\$5.00) shall be received from any depos-
itor. No draft shall be made for less than Five 40

Exhibit C-1.

Dollars, nor for fractional parts of a dollar, unless it be for the whole amount on deposit, or for interest only.

REGARDING SIGNATURE

10 III. On making the first deposit, the depositor shall be required to be present and subscribe to the signature book and signify his or her assent to be bound by the rules and regulations of the Company.

PASS-BOOK NECESSARY FOR WITHDRAWAL

20 IV. At the time of the making of the deposit it shall be entered on the books of the Company. A pass-book shall be given to each depositor and possession of the book shall be treated by the Company as authority to pay the amount due thereon to the person presenting it. In case any person other than the original depositor shall present a book, such person shall present an order signed by the depositor, or such other evidence as the officers of the Company demand.

LOST PASS-BOOK

30 In case a pass-book is lost, immediate notice must be given to the Company in writing of that fact, and the Company shall require satisfactory evidence and security before issuing a duplicate pass-book.

OPTIONAL RETURN OF DEPOSIT.

40 V. The Board of Directors or Executive Committee shall be at liberty to return the amount of any deposit to the depositor on giving thirty days' notice, which notice may be given by mail, direct to the address upon the signature book of the Com-

Exhibit C-1.

pany, and from and after the expiration of the thirty days in said notice, the deposit shall cease to draw interest.

NOTICE OF WITHDRAWAL.

IV. Deposits shall be paid only to the holders of books at the office of the Company, by its Treasurer on demand. The Directors reserve the right to require thirty days' written notice of such demand. 10

INSTRUCTIONS FOR WITHDRAWAL

VII. No money shall be withdrawn or deposited except on presentation of the pass-book and the person drawing must sign a receipt. If drawn by order, the bearer of the order must sign the name of the depositor and also his own name to the receipt, and leave with the Company the order or power. 20

UPON DEPOSITOR'S DEATH

VIII. In case of the death of a depositor the amount standing to his or her credit shall be paid to his or her duly accredited representative (administrator or executor) upon the presentation of the certificate of the Surrogate or other proper officer, of their appointment as such representative. Provided that in case the money due the deceased does not exceed one hundred dollars, the Executive Committee may direct the same to be paid the next of kin of the deceased, upon a satisfactory bond of indemnity. 30

MARRIED WOMEN AND MINORS

IX. Deposits made by married women in their own names cannot be drawn out by their husbands; deposits made by minors can be drawn only by them or on their order. 40

Exhibit C-1.

<i>Dr.</i>	MADISON TRUST CO.		<i>Cr.</i>
IN ACC'T WITH MARIA E. TUNIS			
Special Department.			
		Payment	Deposit Balance
	1911		
10	June 30 M	470—	470—
	Dec. 23 M	300—	770—
	" M	80—	850—
	1912		
	July 2 M	100—	950—
	Dec. 26 C	100—	1050—
	July 7 E	100—	1150—
	Dec. 29 E	200—	1350—
	Apr. 23 V	500	850—
20	July 1 V	200—	1050—
	Oct. 17 V	12.76	1062.76
	Mar. 17/21	10.	1072.76
	Int. Jan/12—Jan. 21	507.52	1580.28
	Sept. 23/21	11.26	1591.54
	Int. July/21	31.50	1623.04
	Nov. 15	10.	1633.04
	Int. Jan. 1922	32.37	1665.41
	May 17	12.	1677.41
30	Nov. 13	1096.27	2773.68
	Int. July 1/22	33.34	2807.02
	Nov. 16	40.	2847.02
	Interest Jul 1	338.21	3185.23
	July 3	400.	3585.23
	Interest to Jan 1 1927.....	219.42	3804.65
	Apr. 9	153.68	3958.33
	Apr. 11	4332.27	8290.60
	1928		
40	Apr. 13	1.	8291.60

Exhibit C-1.

PAYMENTS VALID TO THOSE HOLDING PASS BOOKS

X. Although the Company will endeavor to prevent fraud being perpetrated on the depositors, yet all payments to persons producing the pass-books issued by the Company shall be valid payments to discharge the Company from further liability.

RATE OF INTEREST

10

XI. Interest will be allowed at the rate of $3\frac{1}{2}$ per cent. per annum, or at such higher rate, as in the judgment of the Board of Directors, the business of the Company for the preceding six months will justify.

METHOD OF CALCULATING INTEREST

XII. On the first day of July and the first day of January on each year, interest will be credited on amounts which have remained undisturbed during the three or more calendar months previous to these dates. Such interest may be drawn by the depositors or entered in the pass-book to his or her credit, on or after the 20th day of July and January, respectively. Any interest not drawn will be credited to the depositor as of the date of the declaration thereof, and will be added to the principal and draw interest from such date. Subject to the above conditions, deposits made on or before the third day of any month will draw interest from the first day of such month.

NO INTEREST ALLOWED ON SUMS WITHDRAWN
BETWEEN INTEREST PERIODS,

40

Exhibit C-1.

MADISON TRUST COMPANY

FACILITIES

BANKING DEPARTMENT. In the Banking Department 3% interest is paid on accounts subject to check, providing a balance of \$100.00 is maintained.
10 The collection of coupons, checks, drafts, notes, etc., is effected without charge, checks are certified payable in New York when desired; in short, every modern facility is at the disposal of depositors.

TRUST DEPARTMENT. This Company acts as executor, guardian, trustee and in all capacities of trust. The charges are the same as those allowed an individual.

SAFE DEPOSIT DEPARTMENT. Safe Deposit Boxes
20 are for rent at \$5.00 and upwards per year. A Storage vault is maintained wherein valuable in bulk are cared for at the rate of 50 cents per month, and upwards, according to value and space occupied.

A BANKING BY MAIL DEPARTMENT enables people living at a distance from Madison to conduct business with us by mail as conveniently as in person.
30

Booklets descriptive of these departments will be furnished upon request.

Exhibit C-2.

MADISON TRUST COMPANY

Madison, New Jersey

Book No.....192....

COMPOUND INTEREST ACCOUNT

Pay to the Order of\$..... Dollars

Entered in Pass Book

THE DEPOSIT BOOK MUST BE PRESENTED AT TIME OF WITHDRAWAL 20

Exhibit C-2.

MADISON TRUST COMPANY

MADISON, N. J.

SPECIAL DEPARTMENT 30

OPEN EVERY BUSINESS DAY

FROM 9 A. M. TO 3 P. M.

SATURDAY, 9 A. M. TO 12 M.

Keep this book clean, Do not fold it or roll it up. Be very careful not to lose it.

40

Exhibit C-3.

MADISON TRUST COMPANY

MADISON, NEW JERSEY

Book No..... 192....

COMPOUND INTEREST ACCOUNT

Pay to the
10 order of..... \$.....
..... Dollars

Entered in Passbook.....

THE DEPOSIT BOOK MUST BE PRESENTED AT TIME OF
WITHDRAWAL

20

Exhibit C-4.

MADISON TRUST COMPANY

MADISON, NEW JERSEY

Book No..... 192....

COMPOUND INTEREST ACCOUNT

30 Pay to the
order of..... \$.....
..... Dollars

Entered in Passbook.....

THE DEPOSIT BOOK MUST BE PRESENTED AT TIME OF
WITHDRAWAL

40

26
1

New Jersey Court of Errors and Appeals.

MADISON TRUST COMPANY, Complainant,	}	On Bill of Interpleader
AND		
J. FRANK ALLEN and RUSSELL E. YOUNG, Substituted Administrator, Defendants.		

**BRIEF ON BEHALF OF J. FRANK
ALLEN.**

General Statement.

This matter comes up on bill of interpleader. J. Frank Allen, one of the defendants, claims by gift *inter vivos* the sum of \$8,291.60 represented by a bank book in the Madison Trust Co. issued to Maria E. Tunis.

Miss Tunis was a cousin of the mother of Mr. Allen, the donee, and had been living with Mr. and Mrs. Allen, and paying \$5.00 a week for board, bed room and sitting room. She was 84 years of age. She had no nearer relatives than nephews and nieces of which there were 21.

She had a lock box which she kept in a safe in the bicycle and repair shop of Mr. Allen. This store was a part of the building in which the Allens lived. The keys to the box were retained by Miss Tunis in her room.

On April 28, 1928, after supper Miss Tunis requested Mr. Allen to get her box from the safe as

she thought she had some coupons due May 1st. Mr. Allen went to the safe returning with the box and Miss Tunis to her bed room to get the keys. When she returned, she opened the box and after looking over the securities told Mr. Allen he had done more for her than her relatives, that she had never been so happy as when living with him and gave him the book in question.

The next morning he went to the bank to have the account transferred to his name; was told she should sign an order for the amount and with a blank order given him by the Treasurer of the Trust Co. he returned. Arriving at home he found Miss Tunis and Mrs. Allen entertaining five guests, who left about quarter of twelve. Before these left another guest came in and stayed for dinner. Miss Tunis assisted in getting dinner and went upstairs to change her dress at a quarter of three after the guest had left.

When she failed to return, Mr. Allen went up stairs with Mr. Pilch and found her sitting in her chair dead.

Both the Administrator and Mr. Allen claim the money. On bill of interpleader by the bank the Vice-Chancellor held there was no gift *inter vivos* and awarded the money to the Administrator. Mr. Allen appeals.

Argument.

Maria E. Tunis at the time of the gift was 84 years old (21). She and Jennie Allen, wife of the defendant, J. Frank Allen had known each other for 35 years, and the last years of her life lived with Mr. and Mrs. Allen, for which she paid \$5.00 each week for board (21).

For a woman of this age, Miss Tunis had rare mental and physical faculties; Jennie Allen testifies Miss Tunis did not have a doctor for 10 years

(26). Mr. Allen, that she always had good health; Mrs. Duryea who saw her Thursday prior to her death on Saturday, says she was perfectly well (66, 72). Ethel Spargo who had lunch with Miss Tunis the day of her death declares she was perfectly natural. Emma Fithian who saw her from time to time says her condition of health was apparently as well as ever (79).

On the day of her death, Ethel Spargo testifies Miss Tunis helped get the dinner for four (76), her memory was good, she was in perfect health (34). Emma Fithian declares she was as well as ever and her mentality was very good (79).

All the witnesses for the Administrator including the Administrator testify as to this condition.

Mrs. Clark was up to see Miss Tunis Friday before her death, testifies that her state of health was fine, "she had not felt better, I guess in years" (85). Henry M. Young, another witness, swears her physical condition was very good, but she was sometimes forgetful, and outside the complaint that her relatives didn't come to see her, her conversation was normal (89). Grace B. Winters says her physical condition was very good (90).

On Friday evening, April 27th, the night before her death, Miss Tunis and Mr. and Mrs. Allen were sitting at the table reading when Miss Tunis looked up at the calendar and said, "It is near the first of the month. I have some coupons due the first of the month, if you will get my box I will get the keys" (22); this box was always locked and kept by Mr. Allen in the safe in his store and she retained the keys. Mr. Allen went to his safe in the store and returned with the box and Miss Tunis went upstairs and got the keys; the testimony of Mrs. Allen is that Miss Tunis opened the box and took out one book and looked at that and then took out another bank book and looked at that, then she took a little piece of paper and crumpled it up in

her hands. She took out the last bank book and then picked up the first bank book, handed that to my husband and says, "Here, Frank, you take this for what you have done for me. You have done more for me than any of my nieces and nephews, and I want you to have this", and handed the book to Mr. Allen, she then put her bonds back in the box, closed and locked it and returned the box to Mr. Allen; she kept the keys and Mr. Allen put the bank book in his pocket (22-23).

Then she said, "Frank, I want to make a will, I don't want my money to go the way my sister's did" "I want to make a will and I want it to go to those who need it" (23). "Just how would you go about it, Frank, to make a will?" "Why," he says, "If I was going to make a will I would get a lawyer." "Well, will you see to that—will you get a lawyer?" Frank said, "You can either go to the lawyer or have him come here."

The next morning about 10:30, Mr. Allen took the book over to the bank, saw Mr. Miller, the Secretary-Treasurer, told him he wanted the book transferred to his name; he also told Mr. Miller Miss Tunis wanted a will drawn and asked him whom he would suggest. Mr. Miller said Mr. Pilch was the bank attorney and Mr. Allen asked him to telephone Mr. Pilch to come up to his house and draw a will for Miss Tunis. The Treasurer telephoned Mr. Pilch and gave Mr. Allen a couple of yellow slips for Miss Tunis (44) (C-3, C-4), which she was to fill in and sign for the withdrawal of the money (45). He then put the slips in the book and took them home, arriving there a little after eleven. Miss Tunis was sitting in the kitchen; a brother of Mr. Allen, his daughter, and three other children were there in the kitchen. They remained until half past eleven (45). As they left Ethel Spargo of Wharton, came in and stayed for lunch, and until ten minutes of three (76). Miss Spargo

bade Miss Tunis good-bye in the hall, when Miss Tunis went upstairs (77) to change her dress (75). Because of the company there during this time, Mr. Allen had not requested her to sign the order as he did not want to bother her at that time (47). In the meantime, Mr. Pilch, the Attorney had arrived. He was told by Mr. Allen that Miss Tunis had gone upstairs and he would have to wait a few minutes; after about fifteen minutes, Mr. Allen went into the hall and called upstairs, but without answer. Then Mr. Pilch and he went upstairs, Mr. Allen went to the front room where she generally sat and not finding her there went to her bed room, and found Miss Tunis sitting in a rocking chair, with her waist in her hand. She had washed, combed her hair and changed her skirt; one hand was in her lap. She was dead.

On cross-examination, Allen repeats the reason he did not rush back from the bank and get the withdrawal slip signed was that he did not think there was any hurry about it, she was not sick, and he did not want to bother her.

Mr. Pilch testifies to the telephone conversation with Mr. Miller; the appointment to go to Mr. Allen's home, his arrival between two and three o'clock, his entrance by the way of the store. Mr. Allen going upstairs to see if Miss Tunis were ready to receive Mr. Pilch; his quick return and cry "My God she is dead," the telephoned for, and arrival of Dr. Seward and his succinct statement "She is dead all right" (56-57).

It will be noticed that in the evidence of Mr. Allen he testifies that Mr. Pilch went upstairs with him, remaining in the hall, while he looked for Miss Tunis; Mr. Pilch testifies he remained down stairs when Mr. Allen went up the stairs the first time, but returned with Allen, when Allen came down and declared she was dead. In no event is it material to the issue.

On Sunday, the day after her death, Mr. Allen went to see Mr. Miller and he telephoned to Pilch they would like to talk with him. Allen had the bank book and Mr. Miller the Treasurer of the Bank told Mr. Pilch that "Mr. Allen wanted the account transferred to him, will that be all right," to which Mr. Pilch responded "I can't advise the bank to do that" (58).

Allen testifies that he did not mention to Mr. Pilch the gift of the bank book, when he first came to draw the will (54) and Pilch declares that the first he heard of the book was on Sunday morning (58). Mrs. Duryea testifies Mr. Allen produced the book while Mr. Pilch was there after the death of Mrs. Tunis and told him the book was given to him, and Mr. Pilch told him to keep it under cover (67). Mr. Pilch recalled denies he made this statement (94).

It must be borne in mind that this is a contradiction of testimony between Mrs. Duryea and Mr. Pilch. Their recollection of events *after* the gift should not defeat the intention of the donor when the gift was made.

It could only be received as evidence on the ground that the actions of the donee after the gift might throw some light on whether the gift had been made.

There can be no doubt that Miss Tunis had in mind disposition of her estate, and the sequence of events are normal and natural.

The night of the gift, Miss Tunnis said it was near the first of the month when she had some coupons due, and she wanted to deposit them in the bank (22). This was true; she had two Jersey City, Hoboken, Paterson St. Ry. first mortgage 4's of 49. Int. due November 1 and May 1st. (Inventory 115.)

After she had looked over her securities she said taking up the book in question, "Here, Frank you

take this for what you have done for me. You have done more for me than any of my nephews and nieces and I want you to have this" (22).

The nephews and nieces (Ex. D-4, p. 109) all lived near her. 4 lived in Newark, 4 in Florham Park, 5 in East Orange, 1 in South Orange, 1 in Montclair, 2 in Chatham, all within a few miles of Madison; of these seventeen living so near how many called to this old aunt. Four are produced as witnesses and their testimony is as follows:

Mrs. Clark called every three or four weeks (84), and declares that Miss Tunis complained to her that she did not remember that any of her nephews and nieces had been to see her and felt badly about it, and told me, "I was the only one who came to see her" (85). Henry M. Young says he went up sometimes every week and sometimes it would be two or three weeks before he got a chance (88). Grace B. Winters was up probably two or three months before she died (88). Dorothy L. Jamison visited her aunt occasionally, may be four or five times a year (91); is it a wonder that with 21 nephews and nieces, the large majority within a few minutes of her home she complained when she received this scant attention; Mrs. Allen, on the contrary, swears that during the whole year Mrs. Jamison called three times and Mrs. Winters not over three times. No other niece, nor did any of the nephews call (27); abandoned by her relatives the declaration came from the depth of her heart when she said at time of the gift, "I have spent the happiest year of my life here with you" (35).

The case discloses that the appellant was appointed Administrator of the Estate, and it will be claimed here, as below, that his position as Administrator was not compatible with his claim as donee.

The adverse opinion of the court below stresses

this point; its opportunity to disparage the testimony of the appellant is apparent. If the finger once be pointed, allegations unjustified and unwarranted can follow without opportunity to stop the turgid flow. We think he acted unwisely in having accepted this dual position. He did not consult an attorney before he accepted the appointment; at the time he knew the bank would not pay without a suit, and the possession of the book of deposit without the judgment or decree of a court would not avail him.

The highest ethics after the death of Miss Tunis would not have made a gift, if, as a fact, the gift had not been made; nor should conduct after the death defeat the gift, if, as a fact, it had been made.

There are so many facts that cannot be denied. It cannot be denied that a deposit book had been issued by the bank to Miss Tunis. That the day following the gift, Allen presented it to the bank and requested the funds be transferred to him. That slips were given him by the Treasurer, one of which was to be signed by the depositor. His return to the house with the book and slips. The company there present, one remaining for lunch, and leaving at 10 minutes of three. The retirement of the donor to change her dress, and her sudden death a few minutes later. The failure of Mr. Allen to secure her signature to the slip or order during the time the guests were there, and the apparently robust health of the donor.

There is no denial of the testimony that Miss Tunis kept her securities in a locked box in the safe of Mr. Allen, and that she retained the keys in her bed room.

It is disputed however that Miss Tunis made a gift *inter vivos* of the book in question and this denial rests in large measure on the proof that she was extremely saving and possibly miserly.

The vital question is did she make the gift? It was her property and she had a legal right to make the gift if she desired; nor is it unusual; the daily papers, statement of our friends, the large number of litigated cases, speak of this most common practice. The only answer to the testimony that there was a gift, is that the deceased, because of her penuriousness would not be likely to make it. This might be so if she had given away such a substantial part of her estate, that her remaining years might bring her to want; her age was 84 and she had \$15,000 left; ample amount to protect her against that justly dreaded specter.

But there was a reason for her gift. She had been living with a cousin of her mother; they were poor, but gentle folk. She was not a boarder, she was a member of the family, provided not only with a bed room, but a sitting room. Since the death of her sister, she had lived with them, and they had made her happy, as she declared "It had been the happiest year of her life."

Even if she were penurious, that need not smother gratitude.

None of us have the means of knowing what the donor knew, because we are not occupying her standpoint, living her life, nor sharing her secret affections and hates.

It has been urged that the fact the donor intended to make a will, is in a measure, proof that she would not have made a gift *inter vivos*.

To our view, this is measurable proof that a gift *inter vivos* had been made. It was the transaction of disposing of her property and this was a part of that intended transaction, part by gift *inter vivos* and part by will.

The evidence of Mrs. Allen cannot be cast aside because she is the wife of the Appellant. We are unwilling to assume that because she is a wife her evidence is untrue and that marriage creates a con-

dition from which subornation of perjury naturally arises.

The evidence discloses no such condition, and it is upon the evidence we must rely.

As we repeated why was the gift unusual, unless gratitude or love, accompanied by a gift, is unusual?

Argue as we may we get back to the right of the donor to make the gift. Not whether we would have made it, but whether she made it.

We submit the evidence discloses she did make the gift and the Court is asked to enforce it.

Law.

That there may be a gift *inter vivos* of the book in question is well settled:

Schick vs. Grote, 15 Stew. 353, at 355;
Cook vs. Lum, 26 Vr. 373;
Stephenson vs. Earl, 20 Dick. 575;
Taylor vs. Corriell, 21 Dick. 71;
Swayze vs. Huntington, 12 Buch. 127 at 133.

The gift is complete without the delivery of a written order by donor to the donee.

If necessary the donee, may use the name of the administrator for the recovery of the deposit in a legal action.

In the case of *Van Wagener vs. Bonnot, et als.*, 72 Eq. 143, the Court said:

“The point was suggested, and rather insisted upon by counsel, that these saving bank books on their face required an *assignment in writing by the depositor in order to transfer the money to another*. This assignment relates to an absolute present assignment as between the *bank* and the *depositor*, and is only intended to regulate the legal rights of the *bank*

with the Depositor. It would operate, in the present case, no farther than to require the *use* of the name of the administrator for the recovery of the deposit in a legal action. That saving bank books are proper subject of donation *causa mortis* by delivery is settled by the weight of authority in the American Courts, and the decisions in our own courts in relation to choses in action and are based on reasons which include such books."

Corle vs. Monkhouse, 50 Eq. 537, at 543;
Travelers Ins. Co. vs. Grant, 54 Eq. 208,
 at 212-213.

An illuminating and instructive case is that of Estate of Mary Curran, 3 N. J. Miscellaneous Reports, (page 717), where the Advisory Master wrote this clear cut opinion:

"Bridget Connor, the Administratrix of the Estate of Mary Curran, deceased, filed her account as such executrix, to which account exceptions were filed by three of the grandchildren and next of kin of intestate.

Among the exceptions is one wherein it is objected that accountant is not entitled to an allowance for the amount paid Bridget Connor, individually, under claim of gift of a certain bank account in the Howard Savings Institution to the amount of \$3,584.33.

Upon the cover of the bank book the following sections from the by-laws of the Howard Savings Institution are printed:

'Article 10. All deposits shall be entered in the books of the institution, and a deposit book shall be given to each depositor, in which the deposits shall be entered, and which shall be the voucher for the depositor, and possession of such deposit book may be treated by the institution as authority to pay the amount due thereby to the person producing the same, and all payments so made shall be deemed good and valid payments to the depositors, respectively.'

'Article 11. All drafts must be made personally, or by order in writing of a depositor, if

the institution has the depositor's authorized signature, or by letter of attorney duly authenticated, but no person shall have the right to demand any part of the principal or interest without producing the deposit book that such payments may be entered therein.'

At the hearing it was suggested that before proceeding to take testimony as to whether there was an actual gift of the bank book, that the question of law as to whether there could be a gift of such bank book without a draft or order in writing by the depositor, no such draft or order having been given with the bank book, should be considered.

It appears to be settled in this state that the delivery of a savings bank pass-book, with the intent to make a gift of the deposit, carries with it the fund. *Van Wagenen v. Bonnot*, 72 N. J. Eq. 143; concurred in by the Court of Errors & Appeals, 74 N. J. Eq. 843; *Laing v. Durand*, 84 N. J. Eq. 404. In the *Van Wagenen Case*, *supra*, however, no mention of any draft, or the requirements of one, is made, and, in the *Laing case*, *supra*, this significant language was used: 'There seems to be no requirement for a draft in making withdrawals. Deposits and withdrawals are entered in the pass-book as they are made.'

'It appears from the decisions of our Courts that they take a liberal view in relation to gifts of choses in action. Thus in *Travelers Insurance Co. v. Grant*, 54 N. J. Eq. 208, it was said that bonds and other non-negotiable obligations for payments of money may be subject of a valid gift, and that a delivery of the obligation to the donee, without written assignment, but with a closely manifested intention to make a gift, is sufficient to satisfy the rule requiring delivery of the things given. The sensible rule is that the delivery must be a tradition as the nature of the subject admits of. And, surely, the delivery of the formal writing, which evidences the debt and form a foundation of the right of action, is the best and only delivery of which the subject is capable.' And in that case it was held that a policy of life insurance payable to the 'legal representative of the insured' may be made the subject of a gift in the same manner as a

bond or other moneyed obligation, with the same results and without a formal assignment, even though the policy contained a provision that no assignment hereof will be noticed by this company unless made in writing, and unless a copy of such assignment shall be given to this company within thirty days after its execution.

In the case of *Corde vs. Monkhouse*, 50 N. J. Eq. 537, it was held that the doctrine now generally recognized as the true one is that a valid gift of a promissory note, held by the donor against another person, may be made by simple delivery and without writing of any kind.

Perhaps the most accurate statement of this doctrine to be found in any of the cases is that which was made by Chief Justice Shaw in *Parish vs. Stone*, 14 Pick. 198, (205) where he says: 'But whatever doubts may have existed, it has been decided that, as an assignment of a chose in action is now recognized as a good transfer of the equitable interest, and as such equitable assignment is manifested by a delivery over of the bond or other security for money by a gift of such bond, accompanied by an actual delivery of the bond, an equitable interest vests in the donee, and the executors of the donor, in whom the legal interest remains, are mere trustees for the donee, and bound to permit them to use their names to enforce the payment of the bond at law.'

No case decided by the Courts of New Jersey directly in point has been pointed out, nor have I been able to discover any such case, but it would appear from an application of the principles enunciated in the cases above cited that it should be held that the delivery of a savings bank book with the intent to make a gift of the deposit carries with it the fund. This point has been variously decided in other states, the great weight of opinion favoring the rule above stated. The case of *Ridden v. Thrall*, 125 N. Y. 572, decided by the Court of Appeals is, however, directly in point, and the by-laws printed upon the savings bank book were, to all intents and purposes, the same as those in the case under consideration, and the court, in deciding that the gift of the bank book without any order or power of attorney by the donor, used the following lan-

guage: 'Suppose the plaintiff had purchased the book, and had thus become the absolute owner thereof, he could have drawn the money as owner on presentation of the book, and the bank could not have required as a condition of payment that he should procure a power of attorney, or an order from one having no interest, legal or equitable, in the deposit. The owner in such a case should produce satisfactory evidence of his ownership of the book, and if the bank refused to pay he would be obliged to establish such ownership by any competent evidence, and nothing more, and his right as purchaser would be no greater than his right as donee. He has the same right to enforce a payment that he would have had if he had been the donee of any non-negotiable chose in action, or a certificate of deposit, or unendorsed note. He could establish his right to payment in such a case by any proof showing that he was the absolute legal or equitable owner.

From the reasoning of the various New Jersey decisions above quoted and that contained in *Ridden v. Thrall*, *supra*, I am of the opinion that a savings bank book may be the subject matter of a gift, even though conditions concerning the withdrawal of the fund are those which appear in this case, without any order or power of attorney by the owner of the savings bank book."

We, therefore, respectfully submit the Court should declare the gift of the book complete and the funds therein to belong to Mr. Allen.

KING & VOGT,

Solicitors and of Counsel for
Appellant, J. Frank Allen.

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In *Haydock vs. Haydock*, 34 Eq. 570, the court said, "the evidence in the case has impressed me with the conviction that at the time when these transfers were made, the mind of the donor approached so closely to the line which defines the limit of legal mental capacity, that upon the ground of a want of such capacity, I should be inclined to hold these gifts were void: The numerous instances of forgetfulness proven by the officers of the bank of which he was a director, and by artisans and business men with whom he had dealt, displays a mind upon which the business occurrences with which he was concerned *left but a feeble impression.*"

"I take the rule to be settled that when a person enfeebled in mind by disease or old age, is so placed as likely to be subjected to the influence of another, and makes a voluntary disposition of property in favor of that person, the court requires proof of the fact that the donor understood the nature of the act, and that it was not done through the influence of the donor."

It will also be noticed that the court, because of this enfeebled condition held the gifts were not *inter vivos*, but *causa mortis*.

There is nothing in this case to show dominance of Mr. Allen. Miss Tunis, as all the witnesses testified, was alert and active in both mind and body. The day of the gift she knew she had some coupons due three days after; the day following the gift she assisted in getting dinner and joined in the usual table conversation.

Here was no feeble mind, but one, despite her

age, that had a firm grasp of the details of her affairs.

Nor does the question here involve independent advice as in *Guidetta vs. Bonacci*, 95 Eq. 147; in that case the donor was divesting himself of *all* his property. In this case, while the gift was a substantial one, the donor retained about \$16,000 which would care for all her future needs.

The only defense is that the donor was penurious: as we have pointed out in our brief, she could be both penurious and just.

The motivation for the gift was the happiness which followed her home with the Allens and the fear her property would go to the same nephews and nieces who had inherited the property of her sister.

While the law defines the natural beneficiaries of Miss Tunis, it with equal force declares her right to dispose of her own property as she may choose. She had been neglected by these next of kin and the care and attention she had the right to expect from them had been entirely lacking. If any fair portion of the effort now made to set aside this gift had been given in ministration to her while living, there is no doubt that the latter part of her life would have been happier, and there would have been no reason for the exclamation "you have done more for me than any of my nieces or nephews, and I want you to have this."

We respectfully submit the wish of the deceased should be carried out, and the gift upheld.

KING & VOGT,
Attorneys, J. Frank Allen.

New Jersey Court of Errors and Appeals.

MADISON TRUST COMPANY, Complainant, and J. FRANK ALLEN and RUSSELL E. YOUNG, substituted administrator, Defendants.	}	On Bill of Interpleader No. 26
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**REPLY BRIEF OF DEFENDANT J. FRANK
ALLEN.**

This reply is filed by consent of the court given at the time of oral argument.

This was a deposit in the saving department of the bank and required the possession and presentation of the deposit book before any money could be withdrawn. The delivery of "this saving bank book, without more, with intent to make a gift of the deposit, carries with it the fund."

Laing vs. Durand, 84 Eq. 404.

Van Wagenen vs. Bonnot, 72 Eq. 143;
aff. 74 Eq. 843.

This was a gift *inter vivos* and not *causa mortis*.

*Provident Institution for Savings vs.
Sisters of St. Francis*, 87 Eq. at 427;

and it is this difference which strengthens our case.

On the morning following the gift, Allen went over to the bank, told Mr. Miller, Miss Tunis had given the book to him and requested the transfer to his name.

He had just come from his home where Miss Tunis resided. Her health was perfect. Her mind rational and clear. The brief of the Administrator charges Allen with secrecy. If he had held the book until *after* her death and then sought to obtain the money, the charge would have some weight. In this case, Allen left a broad trail of his claim of ownership, and if it were not a gift, sure detection. If the book were wrongfully obtained, Miss Tunis would quickly know it. The withdrawal of the money required the surrender of the book to the bank. When her book was not returned, investigation would be started, and the bank records disclose that he had the money. If Miss Tunis had been ill, it might be argued he would have taken this risk, but with her in good health, the immediate request for transfer is but proof of the gift.

The Administrator also complains that the gift should have been announced by Mr. Allen to his visitors when he returned from the bank with the slip to be signed by her, and in the same brief argues that his efforts to secure the money after her death, were *both* evidences of an unlawful claim. We wonder what course of conduct would have satisfied the yardstick by which they measure the conduct of another.

There was no secrecy; if the stroke of death had not come without warning, there would be no litigation, and the claimant would not be striving so hard to obtain that which is apparently his.

Miss Tunis kept her securities in a locked box and she retained the keys. On the day the gift was made she went to her bedroom, got the keys and unlocked the box when it was brought to her. Before the box was returned, she again locked it retaining the keys.

As to the charge of domination; in the brief of the Administrator, they allege Mr. Allen occupied a position of trust and confidence and refer to

pages 21, 27, 30, 49, of the state of the case to support this contention. No support is found in the references. The evidence discloses she was a boarder at the Allen home. That Mr. Allen's mother and she were cousins, and that Mr. Allen made deposits for her in the bank.

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KING & VOGT,
Attorneys, J. Frank Allen.

New Jersey Court of Errors and Appeals

Between

MADISON TRUST COMPANY,
Complainant,

and

J. FRANK ALLEN and RUSSELL E.
YOUNG, as Substituted Admin-
istrator,
Defendants.

On Appeal from
Chancery

BRIEF ON BEHALF OF RESPONDENT RUSSELL E. YOUNG, SUBSTITUTED ADMINISTRATOR.

Preliminary Statement.

This matter was instituted by complainant's bill, interpleading the adverse claimants to the savings account in the sum of \$8,291.60 of Maria E. Tunis, deceased. Defendant-appellant, J. Frank Allen, claimed said sum as a gift *inter vivos* from Miss Tunis, alleged to have been made the evening before her death, and defendant-respondent, Russell E. Young, claimed said sum as substituted administrator of the estate of Miss Tunis.

The only evidence presented on behalf of defendant-appellant, J. Frank Allen, as to the making of the alleged gift was the uncorroborated and unconvincing testimony of his wife, whereas the surrounding circumstances, the conduct of the alleged donee and donor and other evidence were

all inconsistent with a gift. The Vice-Chancellor found, as a fact, that there never was a gift to defendant-appellant. He thereupon brings this appeal from the decree rendered upon the finding of the Vice-Chancellor.

ARGUMENT.

The Law of the Case.

For the purposes of this case we may concede that there may be a gift *inter vivos* or *causa mortis* of a savings bank book (see *Van Wageningen v. Bonnot*, 72 N. J. Eq. 143 (Ch., 1906), affirmed in 74 N. J. Eq. 843 (E. & A., 1908); *Laing v. Durand*, 84 N. J. Eq. 404 (Ch., 1915), even though it is not accompanied by a written assignment as required by the rules of the bank (see *Estate of Mary Curran*, 3 N. J. Misc. 717, 129 Atl. 820 (Orphan's Ct., 1925)).

Where, as in our case, the gift is alleged to have been made shortly before the death of the alleged donor and is asserted after her death the possibilities of fraud are evident. The alleged donee is tempted to falsify, for there is no one to deny. In an attempt to protect the estates of decedents from fraudulent claims, our courts have laid down wholesome evidential safeguards.

(1) The alleged donee must sustain the burden of proof imposed upon him by clear and convincing evidence.

Schroeder v. Stoky, 2 N. J. Misc. 760 (Ch., 1924);

Reeves v. Reeves, 6 N. J. A. R. 706, 141 Atl. 175 (Ch., 1928);

Darling v. Gilmore, 7 N. J. A. R. 960, 146 Atl. 364 (Ch., 1929);

Wright v. Sauger, 101 N. J. Eq. 203,
137 Atl. 657, 659 (Ch., 1927).

“A gift first asserted after the death of a donor, as in this case, must be regarded with suspicion, and the rule of law requiring gifts to be established by clear and convincing evidence, applicable in such cases, is particularly applicable in this case, where a confidential relation existed between the decedent and the defendant. 28 C. J. 681, S. 86 (5). See, also, *In Re O'Connell*, 33 App. Div. 483, 53 N. Y. S. 748.”

(2) Under section 4 of the Evidence Act (2 C. S. 2218) the alleged donee when he brings suit is precluded from testifying. And even where the alleged donee's testimony is admitted it probably is insufficient in the absence of corroboration.

“The naked and absolutely uncorroborated testimony of a donee will not be accepted as sufficient to sustain a gift as against the estate of a deceased donor. *Berg v. Baldwin*, 84 N. J. Eq. 90, affirmed 84 N. J. Eq. 193”. *Heyer v. Sullivan*, 88 N. J. Eq. 165 (Ch., 1917) affirmed in 88 N. J. Eq. 595 (E. & A., 1918).

Although the testimony of the wife of the alleged donee is admissible, the same policy which excludes the donee's testimony requires that her testimony be carefully scrutinized. In *Berg v. Baldwin*, 84 N. J. Eq. 90, 93 (Ch., 1914), affirmed in 84 N. J. Eq. 193 (E. & A., 1915) Vice Chancellor Backes said:

“Other circumstances which influenced my judgment were left unspoken at the conclusion of the hearing. The foremost of these concerns the credit and weight to be given to the testimony of the complainant's sole witness, her husband. The mystery about the letters; their contents; how they came into

his possession; their usefulness to Mr. Carroll, and the use the witness could have made, or perhaps threatened to make of them, smattered very strongly of oppression at the time of the alleged promise. This, and the utter lack of candor in the conduct of the trial; the disinclination to exploit all of the facts, brought into the case such an atmosphere of subtlety that I could not regard the witness other than with suspicion. To all intents and purposes he was the complaining party and deeply interested in the outcome of the suit. *He was striving for a stake, for which he had no living opponent. He feared no contradiction, because the tongue of his real adversary was silenced by death. While his testimony was legally competent, I did not feel, under the circumstances, that I should accept it as true. It was absolutely devoid of corroboration by person or in circumstance, and I regarded myself as not justified in advising a decree depriving a decedent's estate of its property upon the naked and meagre words of this very much interested person.* I have since examined the books and find this view is supported by authority, Taylor, in his work on Evidence, section 965, says:

‘It has sometimes been supposed that it is an absolute rule of law that a court cannot act on the unsupported testimony of any person in his own favour. But there is no actual rule of law to the effect suggested; though a court ought to regard a claim against a dead man's estate which is only supported by the evidence of the claimant with jealous suspicion, and neither itself act upon it nor allow a jury to do so without corroboration, and this irrespective of persons.’

“The doctrine is applicable, regarding, as I do, the witness as the substantially interested party in the cause.”

To the same effect is the exhaustive opinion of Stevenson, V. C. in *Provident Institution v. Sis-*

ters of the Poor of St. Francis, 87 N. J. Eq. 424 (Ch., 1916), culminating at 437 in the following language:

“Entertaining the views which I do as to the danger of fraud through the easy establishment in the courts of gifts causa mortis and gifts inter vivos, which are not subjected to scrutiny until after the death of the alleged donor. * * * ”

The same thought is expressed by Vice Chancellor Foster in *Schroeder v. Stoky*, 2 N. J. Misc. 760, 761 (Ch., 1924) in the following language:

“Aside from her husband’s testimony, defendant is without corroboration on any feature of her case. And it is significant that Mrs. Schroeder did not tell her husband or anyone else of this alleged gift, and that defendant never mentioned it to complainant when she met him at the sanatorium on January 6th, 1917, nor at the funeral, nor even later, when she turned over to him in his capacity of administrator and guardian of all the effects and property of her sister’s which was in her care, and he only learned that defendant had the proceeds of the notes, after discovering their loss, by investigation, and through the assistance of the officers of the trust company and of the treasury department.

The proof is neither sufficiently clear nor convincing to establish a gift of the notes, or of their proceeds, of their redemption to the defendant, and I will advise a decree for complainant.”

(3) An additional safeguard enunciated in *Varrick v. Hitt*, 55 Atl. 139 (N. J. Ch., 1903) affirmed in 66 N. J. Eq. 442 (E. & A., 1904) by Vice Chancellor Stevenson commends itself. After discussing the rule recognizing the validity of

gifts of choses in action, the learned Vice Chancellor said (p. 154):

“I do not think it is too late to suggest as a proper rule that the absence of a written assignment where there was knowledge of its importance and opportunity to make it should raise a strong presumption against the gift—a presumption which cannot be removed in a case like this by a single witness whose relation to the donee or alleged donee is such as evidently justifies the presumption that she testifies under his control, under restraint from him, or at his dictation. It seems to me that in such a case the witness to sustain the gift should be an absolutely impartial witness, one about whose ability to tell the truth and disposition to tell the truth there can be no question whatever.”

(4) Lastly, the same policy which requires the foregoing safeguards demands that surrounding circumstances and the conduct of the alleged donee be carefully examined to determine whether a gift was, in fact, made. If his conduct is inconsistent with his claim of gift that should bear more weight than the uncorroborated testimony of an interested witness.

Vice Chancellor Emery stated this doctrine in forceful language in *Van Wagenen v. Bonnot*, *supra*, at 150:

“In *Cosnahan v. Grice*, 15 Moo. P. C. C. 215; 2 Ch. Eq. Dig. 2012, it was said that in this class of cases the whole conduct of the parties at the time must be minutely examined, for, on a question of doubtful right, it is impossible not to take into account the conduct of a party at the time when the right becomes first capable of assertion and not to allow its due influence in raising a presumption in favor of or against the claim. The conduct of the donee in taking other property of the deceased after her death was

given weight in this case in determining adversely the question of a donation *causa mortis*.”

The Court below after seeing the witnesses on the stand and hearing them testify found, as a fact, that no gift had been made and its finding is entitled to great weight in this Court.

“This Court will give great weight to the findings of a vice Chancellor who had an opportunity to see the witnesses. *Cartan v. Phelps*, 91 N. J. Eq. 312, 109 A. 291.” *Cavanna v. Brooks*, 97 N. J. Eq. 329, 127 Atl. 247 (E. & A., 1925).

It is respectfully submitted that an analysis of the testimony will show that the character of the alleged donor, the circumstances of the alleged gift, the importunities of the alleged donee in dealing with representatives of the bank, his conduct after the gift is alleged to have been made, all negative his assertion of gift; and the force of all of these circumstances is not overcome by the unconvincing and uncorroborated testimony of Mrs. Allen, whose interest in the alleged gift is as great as that of the alleged donee.

The Facts of the Case.

Up to the time of her death, the deceased, Miss Tunis was in the best of health (S. C., p. 26, ll. 21-25; p. 34, l. 15; p. 79, l. 11). She had not been attended by a doctor for ten years before her death (S. C., p. 26, l. 29). Mrs. Allen, wife of appellant testified that Miss Tunis was in “perfect health” on the evening of the alleged gift (S. C., p. 34, l. 16).

Mrs. Allen testified that Miss Tunis was “extremely saving” almost to the point of “penuri-

ousness" (S. C., p. 28, ll. 10-14) and that she was "tight" in money matters (S. C., p. 28, ll. 35-41). Deceased's sister-in-law characterized her as "extremely penurious" (S. C., p. 83, l. 34). Henry M. Young related how she had objected to lending her sister enough to pay her rent (S. C., p. 89, ll. 8-18). Her niece, Mrs. Grace B. Winters, told how Miss Tunis would send out "Christmas cards with the flap tucked in so she could put one cent on it instead of two cents" (S. C., p. 90, l. 38 to p. 91, l. 2). Her nephew, Russell E. Young, testified that he offered to give Miss Tunis a radio set and equipment, but she refused because she was "afraid the cost of the batteries would be a little bit more than they cared to give" (S. C., p. 92, ll. 18-37). Indeed, the deposit book in question is mute evidence of her thrift. It contains no withdrawals after April 23, 1917 (S. C., p. 122).

Two weeks before the alleged gift, appellant, at Miss Tunis' request, withdrew all her funds from a saving account in the Howards Savings Institution of Newark and deposited it in the Madison Trust Company account in question. Obviously, at that time there was no thought or intention of making a gift. Appellant, however, asserts that shortly thereafter without any immediate cause, while in the best of health, and without expectation of death, this thrifty woman, without any statements or discussions before or after the alleged gift, disposed of the largest single item of her estate. ("The magnitude of the alleged gift also in my opinion makes against Mr. Hitt's contention," said Vice-Chancellor Stevenson in *Varrick v. Hitt*, *supra*, at page 155, referring to an alleged gift of \$10,000 constituting one-third of the alleged donor's estate.)

Surely a story to the effect that this "almost penurious" woman, vitally concerned with protecting herself against want (S. C., p. 79, ll. 25-

30) gave away one-third of her entire estate (S. C., pp. 112, 173) to one not the natural object of her bounty, without any immediate cause, without any previous or subsequent mention of gift and without telling his brother and daughter who visited her the next morning in the company of her friends, Mrs. Duryea and Mrs. Spargo, requires the most complete and convincing explanation.

Appellant bases his claim exclusively upon the testimony of his wife. Her story is unconvincing and entirely uncorroborated on items where corroboration was easily possible if her story were true. The Vice-Chancellor saw her on the witness stand and disbelieved her. An analysis of her testimony displays the soundness of the Vice-Chancellor's conclusion.

It must be borne in mind that the Allens were not wealthy and the receipt of an eight thousand dollar gift must have been a great moment in Mrs. Allen's life. Until his alleged gift they had been accustomed to receiving annually as evidence of Miss Tunis' generosity, \$5.00 as a Christmas gift (S. C., p. 29, ll. 1-13). Aside from these Christmas gifts no gratuities were ever received from Miss Tunis.

With that background, what is Mrs. Allen's story? Simply that after dinner on Friday, April 27th, while they were sitting at the table reading, Miss Tunis looked up at the calendar and said to Mr. Allen, "It is near the last of the month" and "I have some coupons that are due the first of the month and I would like, when you go down to the bank, if you would get my box, I will get the keys". She then went to her room and got her keys, and Mr. Allen got her box from the safe in the bicycle store (S. C., p. 22). She then opened the box, took out one bank book and looked at it; and then took out another bank book and looked at that; and then took out a little piece of paper

and crumpled it in her hand; and then took out a third bank book; and then picked up the first bank book and handed it to Mr. Allen saying, "Here, Frank, you take this for what you have done for me. You have done more for me than any of my nieces and nephews, and I want you to have this". She then took out her railroad bonds and looked at them (S. C., p. 22, ll. 28-40).

Is it likely that after making a "gift", which compared with her \$5.00 Christmas present to the Allens of the season preceding (S. C., p. 29, ll. 1-15) must have looked to her like the establishment of a Rockefeller Foundation she would have continued looking at her railroad bonds, without saying anything more? Is it likely that Mrs. Allen, as she testified, said nothing (S. C., p. 35, l. 25) and that her husband "just took the book and thanked her"? (S. C., p. 34, l. 5.)

Mrs. Allen testified that the box was taken out expressly for the sole purpose of clipping the coupons from the railroad bonds. Yet that was not done and no explanation for her failure to cut the bonds was offered.

Mrs. Allen's testimony with reference to the coupons strains credulity to the breaking point. On direct examination she testified that on the evening of the alleged gift (April 27th) Miss Tunis said:

"I have some coupons that are due the first of the month, and I would like, when you go down to the bank, if you will get my box, I will get the keys" (S. C., p. 22, ll. 8-12).

She then testified that when Miss Tunis looked at the bonds and saw the coupons were due on May 1st, she placed the bond back into the box, remarked:

"Well they are not due until the last of the month",

and did not cut the coupons off (S. C., p. 39, l. 40, to p. 40, l. 2).

Need we do more than merely place the above testimony side by side?

On cross-examination Mrs. Allen's testimony was obviously studied; she repeated the alleged donation speech in *haec verba* (S. C., p. 32, ll. 25-30). Although when Miss Tunis opened the box she did so expressly for the sole purpose of cutting the coupon, Mrs. Allen is now able to describe her actions to the minutest details. On direct examination she testified:

“She opened the box. She took out one bank book. She looked at that. She took out another bank book and looked at that, and she took out a little piece of paper and crumpled that up in her hand. She took out the last bank book and then she picked up the first bank book * * *” (S. C., p. 22, ll. 28-35).

And on cross-examination she repeated every detail (S. C., p. 31). Why if Miss Tunis merely asked for the box to do the customary act of cutting bond coupons did Mrs. Allen so carefully watch her actions?

On cross-examination Mrs. Allen added that when Mr. Allen returned to the room after replacing Miss Tunis' box in the safe Miss Tunis said, “I hope you will live to enjoy it”, to which he replied, “I hope so” (S. C., p. 35, ll. 10-20). Just how his act of putting her box back in the safe could have called forth the words, “I hope that you will live to enjoy it” is difficult to conceive.

The entire lack of preliminaries, the entire absence of an immediate cause, the irrelevancy of conversation, the utter lack of expression by Mrs. Allen, the colorless “thank you” of Mr. Allen, the failure to carry out the object for which the

box was originally produced, and the lack of any subsequent conversation all create an impression of unreality.

Is it conceivable that if a gift was made on Friday evening Mr. or Mrs. Allen or Miss Tunis would not have told Mr. Allen's brother and niece and their three children of the glad tidings when they visited on Saturday morning? Mrs. Spargo had lunch with Mr. and Mrs. Allen and Miss Tunis on Saturday, but no mention of the "gift" was made to her (S. C., p. 80, ll. 30-40). The silence of the alleged donor and donee and his wife can be explained only upon the theory that no gift was ever made. To quote from Vice-Chancellor Stevenson's opinion in *Varrick v. Hitt, supra*, if a gift had been made:

"Would not a person in Mr. Hitt's situation whether he was an honest man or a rogue plainly see that the concealment of this gift was most dangerous?"

Mrs. Allen, in her testimony, was quite unable to distinguish between what she actually heard and saw and what was told her by her husband. For example, she testified (S. C., p. 25) as if she were present in the bicycle shop when Mr. Pilch arrived:

"Q. While she was upstairs, did anyone come? A. Mr. Pilch.

Q. He was the attorney? A. Yes, sir.

Q. Then how long did he remain, and what did he do? A. Well, my husband went to see her—he says, 'She has just gone upstairs to dress', and he said, 'You will possibly have to wait a few minutes.' So then he came in in probably five or ten minutes, and went upstairs. He found her—

Q. If you did not go with him, you can't tell that. Your husband went upstairs? A. Yes.

Q. What did Mr. Pilch do? A. Mr. Pilch stayed in the store. He was in the store."

On cross-examination she testified, however (S. C., pp. 38, 39) that she did not see Mr. Pilch when he came into the bicycle store, nor did she know anything about his being told by Mr. Allen that he would have to wait a few minutes, and that the first she really saw Mr. Pilch was when she met her husband and Mr. Pilch in the hall and Mr. Allen stated something about Miss Tunis being gone.

Before passing to a consideration of Mr. Allen's conduct, it is significant as showing the "thinness" of her story and at the same time to indicate the peculiarities of the situation that are nowhere explained, to recall that Mrs. Allen said that the reason Miss Tunis wanted her box produced was to cut coupons from the railroad bonds she had in the box.

According to her story, she returned the bonds to the box without cutting them and nothing was said about the bonds or coupons (S. C., pp. 40, 41). We then find Mr. Allen testifying that he went down to the bank on Saturday morning and talked to Mr. Miller, Secretary-Treasurer of the Madison Trust Company, with reference to having the book transferred "and also to get the price on railway bonds" (S. C., p. 34, ll. 13-16). The only explanation he could make for this reference to the bonds is the following (S. C., p. 5, ll. 2-6):

"Q. Why did you ask Mr. Miller about the price on the railroad bonds? A. She wanted me to get the valuation, price, on the railway bonds."

Mr. Miller cannot recall any reference by Mr. Allen on Saturday morning to railroad bonds (S. C., p. 64, ll. 29-34). The entire situation with respect to the railroad bonds in the story of Mr.

and Mrs. Allen was quite inexplicable, and appellant made no effort to clear it up.

We wish to now consider the conduct of Mr. Allen "at the time when the right became first capable of assertion" (Vice Chancellor Emery in *Van Wagenen v. Bonnet, supra*) which is most significant.

Of primary importance is the fact that although the alleged donor and donee knew that a signed order was necessary to effect the gift (S. C., p. 49, ll. 22-38; p. 50, ll. 20-31; p. 65, ll. 10-40) none was executed and Mr. Allen testified that he said nothing about a signed order after the occasion of the alleged gift (S. C., p. 51, l. 3). The absence of a signed order where, as here, one could have been obtained is of the strongest character of evidence against the making of a "gift". As stated by Vice Chancellor Stevenson in *Varrick v. Hitt, supra*, the absence of the signed order in our case should raise "a strong presumption against the gift" which cannot be rebutted except "by an absolutely impartial witness, one about whose ability to tell the truth and disposition to tell the truth there can be no question whatever." (See also *Matthews v. Hoagland, 48 N. J. Eq. 455, 491 (Ch., 1891)* where Vice Chancellor Green said:

"If the decisions in this state did not seem to require an assignment in writing I would be satisfied that the failure of Henry Matthews to execute the transfer and power of attorney on the back of the certificate was conclusive evidence that he did not intend to make a present gift of the stock * * *.")

Under the rule of the *Varrick* case appellant's claim would necessarily fail even if his sole witness, his wife, had rendered a likely story.

Not only did Mr. Allen fail to obtain the order at the time of the alleged gift but even after Mr. Miller the treasurer of Madison Trust Company

had declined to transfer the account without an order he failed to obtain it or even request it from Miss Tunis whom he saw at his home in the company of his brother and family. Later at lunch with Mrs. Spargo and Miss Tunis he still refrained from mentioning the order. Indeed, he and the alleged donor failed to even mention the "gift" to his close relatives. His only excuse for not asking Miss Tunis for the order was "there was company there and I did not bother" (S. C., p. 47, ll. 35-40). The "company" was his own brother and family whom he would naturally tell about the "gift". His haste in rushing to the trust company on Saturday morning (the morning after the alleged gift) is strangely inconsistent with his subsequent nonchalance in obtaining her signature, which, he admitted, he knew to be necessary (S. C., p. 50, l. 31).

At 9:30 o'clock of the morning following Miss Tunis' death, a Sunday morning, appellant rushed to the home of Mr. Miller, treasurer of Madison Trust Company, in an attempt to secure the transfer of the account on that morning. His importuning Mr. Miller and his insistence that they take the matter up at once with Mr. Pilch, counsel for the bank (despite Mr. Pilch's express reluctance to receive them on Sunday morning) and his visit to Mr. Pilch's home that morning for the purpose of persuading him that the account should be forthwith transferred to him are entirely incompatible with an innocent frame of mind (S. C., pp. 63, 64). These facts combined with the fact, uncontradicted by himself and wife, that he concealed the alleged gift from the various members of the family who came to the house on Saturday evening and Sunday morning following Miss Tunis' demise (S. C., pp. 86, 90, 91) certainly negative the thought that a gift was made.

Subsequently Mr. Allen had himself appointed administrator of Miss Tunis' estate. Despite this fiduciary obligation undertaken by him, he and his wife continued to conceal the alleged gift from the next of kin and without notice to any interested party instituted suit individually against the Madison Trust Company to recover the alleged gift (S. C., p. 81, ll. 28-35). Most certainly this course of conduct was inconsistent with honesty.

Within two weeks after the death of Miss Tunis, appellant again attempted to persuade Mr. Pilch to transfer the account. This time, in his anxiety to reduce the fund to his possession before the next of kin were aware of the alleged gift appellant went so far as to *knowingly misrepresent*. Mr. Pilch testified (S. C., p. 59, ll. 10-30):

“Shortly after that, I should say probably two weeks, it was at the next meeting of the Madison Building & Loan Association, I was down at the meeting and Mr. Allen came in. He asked to see me, so we went in the back room, and he said, ‘Can’t you advise Mr. Miller to transfer that account to me?’ He said, ‘Miss Tunis gave me the book. It is perfectly all right.’ I said, ‘No, I can’t do that, because the account stands in the name of Miss Tunis’, and he said, ‘Well, it is all right. There will be no trouble.’ I said, ‘Well, I do not know. There might be trouble, a lot of trouble, and I think that you should establish your right in some judicial proceeding or legal proceeding,’ or words to that effect. And he said, ‘Well, *there will be no trouble, everybody is satisfied*, I know.’ He said everybody would be satisfied. He said, ‘I know there will be no trouble.’”

Can the statement “Everybody is satisfied” when appellant knew that he had concealed the facts from “everybody” be reconciled with hon-

esty of purpose? Indeed, appellant continued to conceal the alleged making of the gift for months thereafter, the next of kin not learning of his claim until nine or ten months after Miss Tunis' death (S. C., pp. 86, 88).

The remaining testimony we wish to consider is that of Mrs. Duryea, a witness on behalf of appellant. Mrs. Duryea in her testimony not only failed in her obvious purpose to assist appellant at all costs, but went a long way in discrediting the testimony of the claimants. As the Vice Chancellor said (S. C., p. 101):

“Her testimony was shifty and contradictory in itself. She contradicted Mr. Pilch, a lawyer of high standing, whose evidence I believe to be absolutely true. She even contradicted Mr. Allen himself, in whose behalf she was called. In short, her eagerness to establish her case was so apparent that I do not believe any of her testimony.”

An analysis of Mrs. Duryea's testimony lends weight to the belief that there never was a “gift”.

She first testified that she saw the bank book Saturday morning, but quickly changed her testimony (S. C., p. 66, ll. 32-35).

“Q. While you were there did you see a bank book? A. Oh, yes, the bank book was shown me that morning—not the book, but told to me in the morning.”

She then said that Mrs. Allen told her about the “gift”, but did not show her the book (S. C., p. 67, ll. 1-3). Then she testified that she *thought* Mr. Allen produced the book while Mr. Pilch was there, but in answer to a question almost immediately thereafter, she said Mr. Allen took the book out of his pocket and asked Mr. Pilch what he should do with it (S. C., p. 67, ll. 13-30). The ensuing testimony by Mrs. Duryea is significant:

“Q. What did Mr. Pilch tell him? A. Told him to keep it under cover” (S. C., p. 67, ll. 33-35).

When questioned as to whether he used the words “under cover” she replied:

“Q. He did not use those words, did he? He did not use the words ‘under cover’? A. Well, I am very sorry to say he did, because I sat there, and I was told to remember all that was said” (S. C., p. 67, l. 39, to p. 68, l. 3).

When a colloquy ensued between the Court and counsel, in which the Court said, “I don’t believe he said it, and I don’t hesitate to say that right now”, the witness craftily changed her testimony (S. C., p. 68, ll. 30-35):

“Q. What is your best recollection; did he use the words ‘under cover’? A. *He did not mean that.* He meant it was a gift to him and to keep it until the administrator was appointed and the estate came to trial, that is all.”

On cross-examination, however, she reaffirmed her original story (S. C., p. 73, ll. 12-13):

“A. He said, ‘Keep it under cover until the administrator is appointed’. I sat right there”,

and then under the Court’s questioning, again changed her story (S. C., p. 73, ll. 21-38):

“The Court: What did he say?

The Witness: He simply said, ‘Frank, keep that book until there is an administrator appointed.’

The Court: And those are his exact words?

The Witness: That is the exact words. He said, ‘*Keep it under cover* until the administrator was appointed.’ That is the words that was said that day.”

Mr. Pilch denied that he ever said "keep it under cover" or anything about keeping it until an administrator was appointed (S. C., p. 94, ll. 10-22). He denied that he knew anything about the bank book on that day (S. C., p. 94, ll. 26-30).

Not only did Miss Duryea contradict the testimony of another witness called on behalf of appellant but in her eagerness she contradicted the testimony of appellant himself. Appellant testified that after waiting with Mr. Pilch for Miss Tunis about ten or fifteen minutes (S. C., p. 46, ll. 29-39).

"A. I went in and called to her from the hall, and got no answer. Mr. Pilch came up in the hall with me, and then we went on up. I went to the front room where she generally sat, in the afternoon, and she was not there. Then I went to her room and found her sitting in a chair.

Q. Did Mr. Pilch accompany you? A. Mr. Pilch was in the hall upstairs.

Q. You entered her room alone? A. Yes, I entered her room alone."

He further testified:

"Q. Now after you discovered this condition did Mr. Pilch come in the room with you. A. Yes. I called Mr. Pilch right in the room. Called Mrs. Allen and Mrs. Duryea downstairs." (S. C., p. 47, ll. 12-18.)

Mr. Pilch testified as follows (S. C., p. 56, ll. 18-40):

"I rang the bell and Mr. Allen came to the door and I went in. He said, 'Miss Tunis is expecting you; she has gone upstairs to change her dress and she will probably see you in about ten minutes.' So he invited me inside to sit down. I sat down, and we had some general conversation about the weather and things like that; nothing pertaining to

the will. Then he said, 'Well, I will go upstairs and see if she is ready.' So I remained downstairs and in a few minutes he came down and came in the room and said, 'My God, she is dead.' So he said, 'What shall we do?' I said, 'Well, I will go up and see.' I went upstairs and Miss Tunis sat in the chair, apparently looking out of the window. He said, 'What shall we do?' I said, 'The first thing to do is to send for a doctor right away.' So he went downstairs, and in about five minutes Dr. Seward came."

Mrs. Duryea's testimony is directly contradictory in important details to appellant's and that of Mr. Pilch. She testified that she went upstairs with Mr. Allen, Mr. Pilch and Mrs. Allen (S. C., p. 71, ll. 8-10). She states that appellant did not come downstairs to tell them of Miss Tunis' death but called from upstairs (S. C., p. 71, ll. 15-21). She claims that all four went into the next room, sat down and talked about the matter of Miss Tunis making a will (S. C., p. 72, ll. 25-32). She claims that she suggested calling for the doctor (S. C., p. 74, ll. 24-26) and not Mr. Pilch. She also testified that the "doctor was sent there before she was gone" (S. C., p. 74, ll. 12-14) although what she meant by that is not quite clear. In short Miss Duryea's testimony instead of fulfilling its purpose of corroborating appellant's story cannot help but add doubt to its truth.

At page 9 of appellant's brief it is suggested that since admittedly Miss Tunis intended to make a will that is "measurable proof that a gift *inter vivos* had been made". Considering that the alleged donee was a penurious woman in fear of poverty and in good health, how much more improbable it is that she should give away one-third of her estate when she intended to dispose of it by will the next day. Her life long habit and character demanded of her that she retain her money

until death; her intention to dispose by will was but natural; it negatives any thought of disposition by gift.

In view of the finding that no gift had been made, the Court below, of course, had no occasion to consider the questions of undue influence or the understanding of the alleged donor. Admittedly, the deceased, although in good health, was very old (84 years of age) and with failing memory (S. C., pp. 85, 88). The alleged donee occupied a position of trust and confidence (S. C., pp. 21, 27, 30, 49). Although the foregoing facts gave rise to presumptions of undue influence and lack of understanding by the donor (*Haydock v. Haydock*, 34 N. J. Eq. 570) (*E. & A.*, 1881), no evidence to rebut said presumptions was offered on behalf of appellant. Nor did appellant offer any proof to meet the consequent requirement of independent advice (*Giuditta v. Bonacci*, 95 N. J. Eq. 147) (*Ch.*, 1923). Accordingly, even if the transaction testified to by appellant's wife had taken place, appellant's proof would not entitle him to recover in this action.

Conclusion.

Applying the rules of law hereinbefore stated that (1) the alleged gift must be proved by clear and convincing evidence, (2) that the testimony of the sole witness to the alleged gift, appellant's wife, must be carefully scrutinized, (3) that the conduct of the interested parties must be carefully examined to determine whether it is consistent with their testimony, and (4) giving its due weight to the finding of the Vice Chancellor who saw and heard the witnesses, can there be any doubt that appellant's claim must fail?

The testimony of the sole witness to the alleged gift (appellant's wife) is entirely uncorroborated and the actuality of the gift is negatived by (1) the character and circumstances of the alleged donor (her apparent good health leading her to expect to continue to live on; her habits of economy if not penuriousness, urging her to cling to her small estate to protect her in the event of sickness or want), (2) by the stereotyped and improbable character of Mrs. Allen's story (uncorroborated on points where corroboration was easily possible and disbelieved by the Vice Chancellor), (3) by appellant's entire conduct (a) in failing to obtain the order which he knew to be necessary, (b) in failing to speak to Miss Tunis on Friday evening or Saturday morning about the withdrawal slip, (c) in pursuing Mr. Miller and Mr. Pilch on Sunday morning to have the account transferred, (d) in concealing the alleged gift from interested parties, especially when he was under a fiduciary obligation to them as administrator, and (e) in misrepresenting to Mr. Pilch that the rest of kin were satisfied, when he knew they knew nothing of the alleged gift.

It would indeed be a dangerous precedent to sustain the claim of an alleged donee of a bank book, asserted after the death of the alleged donor, supported only by his wife's testimony, and contradicted by every material circumstance and the alleged donee's conduct. If sustained, section 4 of the Evidence Act might as well be removed.

Lastly, even if the transaction testified to by appellant's wife had taken place, appellant's proof would be insufficient since it fails to rebut the presumptions of undue influence and lack of under-

standing by the donor, and fails to establish any independent advice.

It is respectfully submitted that the finding of the Vice Chancellor and the decree rendered thereon should be affirmed.

Respectfully submitted,

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trator.





