

New Jersey Court of Errors and Appeals.

MARY AGNES HEYER,
Complainant-Appellee,

against

MICHAEL A. SULLIVAN,
Defendant-Appellant.

*On appeal from
Decree of the
Court of Chan-
cery.*

*Defendant-Appell-
pellant's Brief.*

The bill is filed by a legatee of shares of stock against a person claiming to be the owner and prays that said shares may be decreed to be the property of the complainant, and for an account of dividends.

FACTS.

Mary Sullivan died July 9, 1912.

Her last Will and Testament is dated February 10, 1912, and by the third paragraph she gave ten shares of the stock of the Jersey City Horse Manure Transportation Company to Mary Agnes Heyer.

On January 12, 1910, she transferred 32 shares of the capital stock of the Jersey City Horse Manure Transportation Company to Michael Sullivan, the appellant here, by endorsement and delivery of the certificate.

Mary Sullivan signed this transfer of stock by her mark. Michael Sullivan, the appellant, testified that the certificate was handed to him by his mother just as it was; that at the time she turned over this certificate to him, he agreed, on his part, to turn over all the dividends to his mother during her lifetime, which was done. The stock was transferred on the books of the company, and a new certificate was issued to Michael Sullivan, and during his mother's lifetime he cashed the dividend checks and turned the money over to her. The only other witness was Mrs. Flynn, a sister of Michael Sullivan, who stated that the signature of the attesting witness was not her signature.

The appellant insists that the decree is erroneous for the following reasons:

First: The Court was without jurisdiction.

Second: That if the Court had jurisdiction to make the decree, it should have, under the evidence, been a decree in favor of the appellant.

I.

JURISDICTION.

It will be observed that there is no allegation of fraud, trust, accident and mistake, or any other allegation, which confers jurisdiction upon an equity court. The only charge, by indirection, is that the transfer was never made by Mary Sullivan. Such being the case, there was an adequate remedy at law, and the Court of Chancery is without jurisdiction.

Freeman v. Elmendorf, 7 Eq., 487;
Hoagland v. Township, 17 Eq., 116;
Agens v. Agens, 50 Eq., 566;
Hoboken Ferry v. Baldwin, 58 Eq., 36;
Town of Franklin v. Crane, 80 Eq., at 513.

In the latter case the bill was filed by the township for an accounting, and a demurrer was filed setting up, among the causes of demurrer, that the complainant had an adequate remedy at law. The demurrer was sustained. The Court held that the complainant had an action at law for money had and received and that equity does not assume jurisdiction because an accounting is demanded or needed, nor because the case involved arose from fraud * * * nor even to recover money held in trust, where an action for money had and received will lie.

Same *v. Jones*, *Ibid* 517—in which the Court characterized the action as a pure collection suit cognizable at law.

A mere assumption of fraud will not confer jurisdiction. It must be alleged and proved.

Dunn v. Ryan, 82 Eq., 357.

The fundamental right upon which the complainant prays equitable relief, is the legal title to the stock in question, and that right being in substantial dispute, until such right is settled at law, the aid of a court of equity cannot be properly invoked.

Ostrander v. U. N. J. Rd. Co., 83 Eq., 648;
Lamphear v. Subers, 84 Eq., 392.

In *Farrel v. Passaic Water Co.*, 82 Eq., at page 105, the Court, in a suit involving the ownership of a bond, the subject of a gift inter vivos, said:

“Considering, as I do, that the question as between the administrators of Miss Farrell and the executors of Mr. Atkinson is one of legal title—title of which the law courts take cognizance—it would seem to follow that if there was a real doubt as to who was the legal owner, that doubt would have to be, under our system, settled by the law courts.”

It will be borne in mind that, while the Executor is made a party defendant, there is no charge that the title of Sullivan, the appellant, came through him; and indeed the prayer of the bill is that the stock be decreed to be that of the complainant or of the executor.

A legatee must sue the executor *only* for his legacy, and cannot join other persons, except where there is collusion between the executor and such person having the property in his hands.

Dorsheimer v. Rorback, 8 C. E. Green, 46.

In *Matthews v. Hoagland*, 48 Eq., 455, jurisdiction was assumed because it was alleged that one of the defendants as administrator took securities of the estate and converted them to his own and his sister's use.

But the case at bar has none of the elements which will give jurisdiction to the Court of Chancery.

II.

The decree should have been for the appellant.

The proof was that the testatrix, long before her death, handed this certificate of stock to appellant, endorsed as it appeared; that he was to pay all the dividends to her during her lifetime,

that he surrendered the certificate to the company within a day or two, and had it cancelled and a new certificate issued; and that he has kept his agreement and during his mother's lifetime gave her all the dividends.

The only direct evidence introduced was to the effect that there was a gift, and actual manual delivery of the certificate, and transfer on the company's books. How there could be a more perfect gift we are at a loss to know, for it combines all the elements necessary, namely (1) a donative intention on the part of the donor; (2) an actual delivery of the subject matter; (3) the donor stripped herself of all ownership and dominion over the subject matter of the gift.

Taylor v. Coriel, 66 Eq., 262;
Matthews v. Hoagland, 48 Eq., 455;
Swayze v. Huntington, 87 At. Rep., 106.

A transfer of stock need not be in writing, but may be by manual tradition without writing.

Farrell v. Passaic Water Co., 82 Eq., 97.

And a condition, not constituting a condition of delivery or title, but consistent with it, will not invalidate the gift.

30 *Cyc.*, 1210.

If the decree is for the complainant because the court below conceived that there could be no valid gift inter vivos of a certificate of stock without actual transfer by the assignor, or a written assignment or power to transfer, under the authority of *Matthews v. Hoagland*, *supra*, I again

refer and call particular attention to the later case of *Farrell v. Water Co.*, *supra*, in which Vice Chancellor Stevens points out that confusion has resulted from the use of the term "equitable" in connection with the title of the assignee to a chose in action and that since the Legislature in 1797 enacted that "the assignment of bills, bonds and other writings for the payment of money shall be good and effectual in law, and an assignee of any such may thereupon maintain an action of debt in his own name;" that the only excuse for calling the assignee's title "equitable" vanished, and that the aid of a court of equity to perfect the title of an assignee is unnecessary, and as to the formalities required to vest title in an assignee he says:

"At first it was held that an instrument under seal could only be assigned by an instrument of equal dignity (*Wood v. Partridge*, 11 Mass., 488); but this view has been abandoned, and it is now held that instruments such as bonds, mortgages and policies of insurance may be assigned by writing without seal, or even by parol accompanied by delivery. *Vreeland v. Van Horn*, 17 N. J. Eq. (2 C. E. Gr.), 137; *Travelers Insurance Co. v. Grant*, 54 N. J. Eq. (9 Dick) 208; *Allen v. Pancoast*, 20 N. J. Law (Spenc.) 71. The effect of the assignment is precisely the same in any of these forms—it vests the legal title in the assignee. The proof of it may be more difficult in the case of an assignment by parol, but in any mode the debt theretofore owing to the obligee passes to the assignee; he is the creditor, and the only creditor. These several modes of assignment are as applicable to the case of gifts as to those of transfers for value. The gift is just as completely vested

by the one mode as by the other, and it is settled law that the fact that the bond is not payable to bearer or that the instrument is not negotiable does not prevent a valid gift of it by manual tradition without writing. Executors of *Egerton v. Egerton*, 17 N. J. Eq. (2 C. E. Gr.) 421; *Corle v. Monkhouse*, 50 N. J. Eq. (5 Dick) 537; *Travelers Insurance Co. v. Grant*, 54 N. J. Eq. (9 Dick) 208; *Thompson v. West*, 56 N. J. Eq. (11 Dick) 660. Proof of delivery, coupled with proof of intent to pass a present interest by way of gift, has precisely the same effect as a formal written transfer."

If *Berg v. Baldwin*, 84 Eq., 90, is authority for the rule that the naked and uncorroborated testimony of a donee will not be accepted as sufficient to sustain a gift as against the estate of a deceased donor, then the learned Vice Chancellor has disregarded as corroborative evidence of ownership, the possession of the certificate for three years prior to donor's death, the actual transfer on the books of the company, and the receipt by him of dividend checks during that time.

The objection for want of jurisdiction was raised by the answer and at the hearing, and on that ground and also on the ground that the evidence will not sustain the decree, there should be a reversal.

THEO. RURODE,
of Counsel with Defendant-Appellant,
Michael A. Sullivan.

INDEX.

Petition filed Aug. 9, 1917.....	1
Answer to Petition of Appeal filed Oct. 13, 1917	3
Notice of Appeal filed July 24, 1917.....	4
Bill of Complaint filed September 5, 1916..	5
Answer	17
Complainant's Exhibit I.	29
Complainant's Exhibit I.C.....	30
Conclusions	32
Final Decree filed July 17, 1917.....	36

TESTIMONY.

Complainants:

Edward Kelly,

Direct

20

Cross

21

Hannah Flynn,

Direct

28

Defendant:

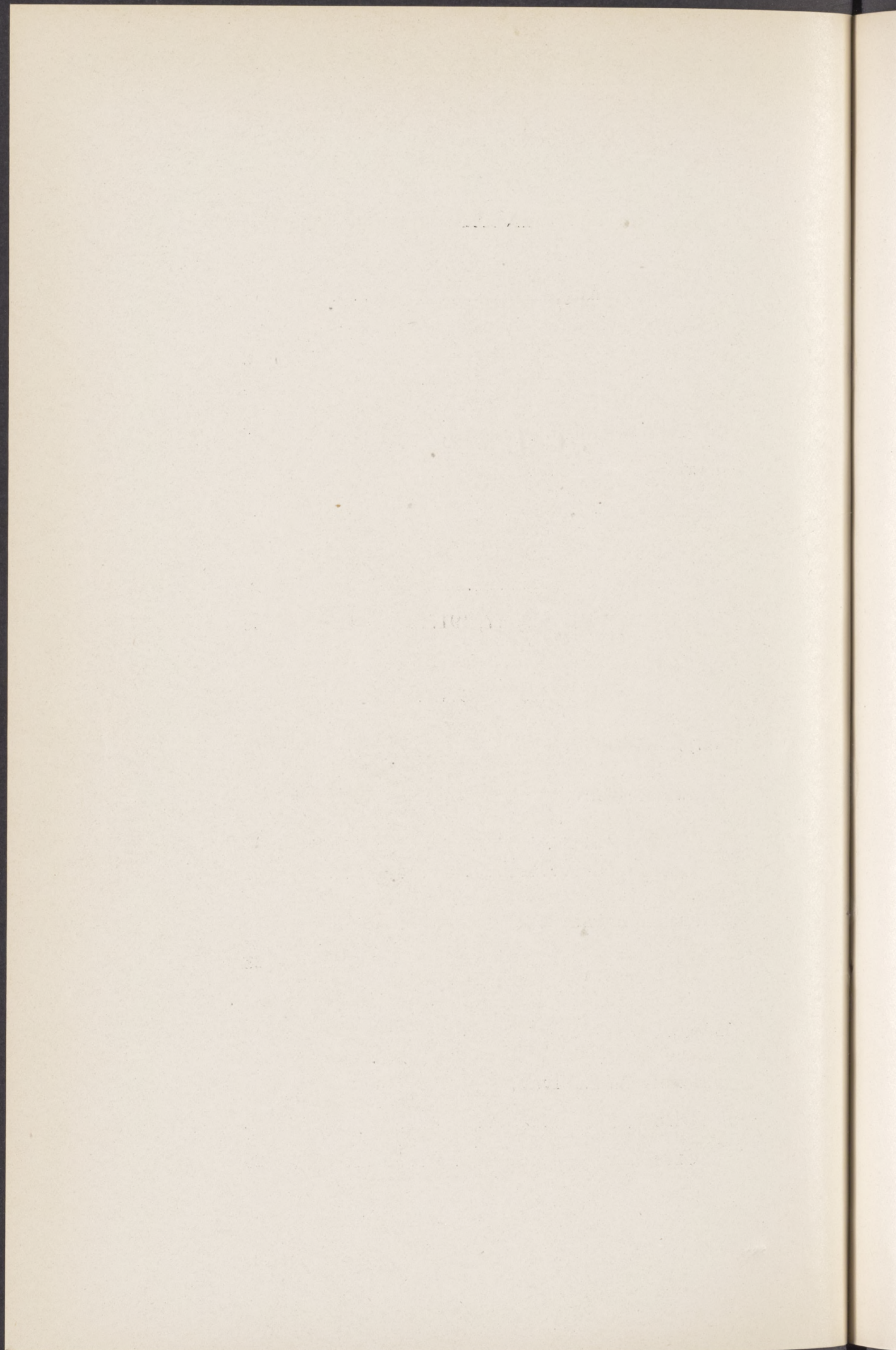
Michael A. Sullivan,

Direct

22

Cross

25



New Jersey Court of Errors and Appeals

Petition.

Filed August 9, 1917.

Between

MARY AGNES HEYER,
by her next friend,
Complainant-Appellee,

and

MICHAEL A. SULLIVAN, et als.,
Defendant-Appellant.

10

On Appeal
from decree
of the Court
of Chancery.

20

The petition of Michael A. Sullivan, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery, by his Honor Edwin Robert Walker, Chancellor of New Jersey, wherein the said Mary Agnes Heyer, by her next friend is complainant, and the said Michael A. Sullivan is defendant in this respect, to wit:

30

That the said decree erroneously adjudged that ten shares of the capital stock of the Jersey City Horse Manure Transportation Company were not owned by defendant Michael A. Sullivan, and that the same were owned by and are an asset of the estate of Mary Sullivan, for distribution to the complainant.

40

Petition—Filed August 9, 1917

That the said decree erroneously ordered the defendant Michael A. Sullivan to transfer, assign and set over to the complainant, said ten shares of stock and that he pay to the complainant accumulated dividends thereon, amounting to
 10 \$2131.84.

Said decree is erroneous, because it is not sustained by the evidence.

Because the evidence shows that at the time of the death of Mary Sullivan, said ten shares of stock were the property of the defendant-appellant, Michael A. Sullivan.

Because the suit is improperly brought in the name of the complainant.

Because the Court of Chancery is without jurisdiction in the premises, it appearing by the bill of complaint and by the answer that the matter in difference between the same parties concerning the ownership of said stock had already been adjudicated by the Orphans' Court of Hudson County, and that an appeal from said adjudication was still pending undetermined in the Prerogative Court of New Jersey; and because the complainant has a complete and adequate remedy
 20 at law.
 30

And your petitioner further shows that the said decree is erroneous, for that it should have been in favor of the defendant-appellant, Michael A. Sullivan.

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

THEO. RURODE,
 Solicitor of Appellant.
 THEO. RURODE,
 of Counsel with Appellant.

Answer to Petition of Appeal.
Filed October 13, 1917.

NEW JERSEY COURT OF ERRORS AND
 APPEALS.

MARY AGNES HEYER,
 by her next friend,
 Complainant-Appellee,

10

and

MICHAEL A. SULLIVAN, et als.,
 Defendant-Appellant.

On Appeal
 from decree
 of the Court
 of Chancery.
 Answer

20

The answer of the above named respondent to the petition of appeal of the above named appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a decree was, on the seventeenth of July last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said decree is agreeable to equity, and prays that the same may be affirmed, with costs to be adjudged to this respondent.

30

40

THOMAS J. BROGAN,
 Solicitor for and of
 Counsel with Respondent.

Notice of Appeal.
Filed July 24, 1917.

IN CHANCERY OF NEW JERSEY.

Between

10

MARY AGNES HEYER,
 by her next friend,
 Complainant-Appellee,

and

20

MICHAEL A. SULLIVAN, et als.,
 Defendant-Appellant.

On Bill, etc.
 Notice of
 Appeal

The defendant, Michael A. Sullivan, hereby
 appeals from the final decree made in this court
 in the above stated cause and from the whole and
 every part thereof to the Court of Errors and
 Appeals.

30 Dated, July 23, 1917.

THEO. RURODE,
 Solicitor of Defendant,
 Michael A. Sullivan.

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

40

THEO. RURODE,
 of Counsel with Defendant,
 Michael A. Sullivan.

Bill of Complaint.
Filed September 5, 1916.

IN CHANCERY OF NEW JERSEY.

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

The complaint of Mary Agnes Heyer, an infant under the age of 21 years, by Lawrence B. Heyer, her next friend, shows that: 10

1. Complainant is the grand-daughter of Mary Sullivan, deceased, who died on July 9th, 1912, at Jersey City, in the County of Hudson aforesaid. Said Lawrence B. Heyer was duly appointed guardian of Complainant and her property by the Surrogate of the County of Hudson on October 26th, 1915. 20

2. The Last Will and Testament of the said Mary Sullivan, deceased, was duly admitted to probate by the Surrogate of the County of Hudson on the 27th day of August, 1912. Copy of the said Will is hereto annexed, referred to and made a part hereof, marked "Will, Mary Sullivan."

3. The 3rd and 4th paragraphs of the said Will are as follows: 30

"Third: I give and bequeath unto my grand-daughter, Mary Agnes Heyer, ten shares of the capital stock of the Jersey City Horse Manure Transportation Company.

"Fourth: I give and bequeath unto my son, Michael A. Sullivan, all my remaining shares of the capital stock of the said Jersey City Horse Manure Transportation Com- 40

Bill of Complaint—Filed September 5, 1916

pany, after Mary Agnes Heyer shall have received the ten shares above bequeathed to her.”

10 4. Edward A. Kelly, the Executor named in the said Will of the said Mary Sullivan, duly qualified as such Executor, and is still acting as such.

5. At the time of the execution of the said Will of the said Mary Sullivan, and at the time of the death of the said Mary Sullivan, she owned 32 shares of the capital stock of the Jersey City Horse Manure Transportation Company, a corporation of the State of New Jersey.

20 6. The executor of the Will of the said Mary Sullivan, the said Edward A. Kelly, ascertained after the death of the said Mary Sullivan, that Michael A. Sullivan, son of the said Mary Sullivan, named in the said Will of the said Mary Sullivan, claimed to own the said shares of the capital stock of the said company mentioned in the said Will, being all the shares of the stock of the said Company owned by the said Mary Sullivan at the time of the execution of the said Will
30 and at the time of her death, by virtue of a pretended transfer of the same to him by the said Mary Sullivan, and the said Michael A. Sullivan refused to deliver the said 10 shares of stock mentioned in the third paragraph of the said Will, to the said executor as property of the estate of the said Mary Sullivan.

40 7. Complainant avers that she became entitled on the death of the said Mary Sullivan, by virtue of the Will of the said Mary Sullivan, to have and

Bill of Complaint—Filed September 5, 1916

to receive 10 shares of the capital stock of the said company, being the 10 shares of the capital stock of the said company mentioned in the third paragraph of the Will of the said Mary Sullivan.

8. Edward A. Kelly, the said executor of the Will of the said Mary Sullivan, filed a petition in the Orphans' Court of the said County of Hudson, under the statute, and upon said petition an Order to Show Cause was made, under which a hearing was held in said court, whereupon on February 15, 1916, the said court concluded and decreed by Order dated on that day, that 10 shares of the stock of the said company in the possession of the said Michael A. Sullivan was an asset of the estate of said Mary Sullivan, and said Order directed the said Michael A. Sullivan to assign, transfer, set over, release and srurender to the said executor, Edward A. Kelly, 10 shares of the capital stock of the said company, and that said Michael A. Sullivan take steps to have the same duly assigned and transferred on the books of the said company in order that the said estate should be vested with the legal title to said shares of stock. The said Michael A. Sullivan has filed an appeal from the said Order of the Orphans' Court to the Prerogative Court of New Jersey, which appeal is now pending in that court.

9. The said Jersey City Horse Manure Transportation Company has, for some years, and from the time of the death of the said Mary Sullivan, and each year, been paying a yearly dividend of 50 per cent on its stock.

Bill of Complaint—Filed September 5, 1916

10 10. Complainant avers that the said 10 shares of the capital stock of the said Company mentioned in the third paragraph of the Will of the said Mary Sullivan should be transferred to the said executor, Edward A. Kelly, or to the Complainant, in order that the Will of the said Mary Sullivan shall be complied with; that the said shares of stock are not needed for the payment of debts of the said estate of said Mary Sullivan; that all debts of the said estate have been paid.

11. Complainant is informed and verily believes that the said Michael A. Sullivan is not a person of nancial stability.

20 12. Said Michael A. Sullivan refuses to transfer said 10 shares of stock to the said executor or to the Complainant, and also refuses to account to said executor or to the Complainant for the dividends on said stock that have been paid by the said company and received by him since the death of the said Mary Sullivan; that said Michael A. Sullivan threatens and intends to transfer the said shares of stock to third parties without regard to the rights of the executor or of the Complainant by virtue of the Will of the said Mary Sullivan; and that he will do so unless restrained by the Order of this Court.

30 13. That the stock of the said company is stock that cannot be purchased in the open market; that the said company is what is known as a close corporation, and its stock issue is held by some five persons; that large dividends are paid on said stock; that the value of the stock of the said company, because of the circumstances of the said
40

Bill of Complaint—Filed September 5, 1916

company, the manner in which the business of the said company is conducted, and the way in which its stock is held, cannot be stated or ascertained; that a money judgment against the said Michael A. Sullivan, if such judgment could be obtained, and if such judgment could be collected from the said Michael A. Sullivan, would not compensate Complainant for not receiving 10 shares of the stock of the said company in accordance with the Will of the said Mary Sullivan. 10

14. The said executor, Edward A. Kelly, has requested Michael A. Sullivan to transfer and deliver to him the 10 shares of the stock of the said company but the said Michael A. Sullivan refuses so to do. 20

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

1. That the said 10 shares of capital stock in the said Jersey City Manure Transportation Company, mentioned in the third paragraph of the Will of the said Mary Sullivan, be decreed to be the property of the Complainant or of the said Executor of the said Will, Edward A. Kelly, free from any claims of the said Michael A. Sullivan, or any person claiming under him. 30

2. That the said Michael A. Sullivan be decreed to transfer and assign to the said Executor, or to the Complainant, the said 10 shares of the capital stock of the said company, free from any claim of the said Michael A. Sullivan, or any person claiming under him. 40

Bill of Complaint—Filed September 5, 1916

10 3. That the said Jersey City Horse Manure Transportation Company may be restrained from transferring the said 10 shares of its capital stock on the books of the company, from the said Michael A. Sullivan, or for him, except to the Complainant, or to the said Executor, and from paying dividends on said stock, except to the said Executor, or to the Complainant.

20 4. That the said Edward A. Kelly, Executor as aforesaid, may be decreed to transfer and deliver the said 10 shares of the capital stock of the said company to the Complainant upon his receiving the same as Executor under the said Will of the said Mary Sullivan.

30 5. That an account may be taken of the dividends that have been paid, or that may be due, or may become due, on the said 10 shares of capital stock, from the time of the death of the said Mary Sullivan; and that the amount of the said dividends may be decreed to be paid to the Complainant, or to Edward A. Kelly, Executor as aforesaid.

40 6. That a writ of subpoena may issue, commanding said defendants, Michael A. Sullivan, Edward A. Kelly, and the Jersey City Horse Manure Transportation Company to answer this Bill of Complaint and to abide by such decree as this Court may make in the premises.

THOMAS J. BROGAN,
Solicitor and Counsel
with Complainant.

Bill of Complaint—Filed September 5, 1916

“WILL, MARY SULLIVAN.”

IN THE NAME OF GOD, AMEN.

I, Mary Sullivan, of No. 201 Fifteenth Street, Jersey City, Hudson County, New Jersey, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this as and for my last will and testament, hereby revoking all former wills and codicils by me made. 10

First: I order and direct that all my just debts and funeral expenses be paid as soon after my decease as may be convenient. 20

Second: I give and devise unto my son, Michael A. Sullivan, the house and lot situate at and known as No. 179 Eighteenth Street, Jersey City, New Jersey, to have and to hold the same to him, his heirs and assigns forever. 30

Third: I give and bequeath unto my granddaughter, Mary Agnes Heyer, ten shares of the capital stock of the Jersey City Horse Manure Transportation Company. 40

Fourth: I give and bequeath unto my son, Michael A. Sullivan, all my remaining shares of the capital stock of the said Jersey City Horse Manure Transportation Company, after Mary Agnes Heyer shall have received the ten shares above bequeather her. 40

Bill of Complaint—Filed September 5, 1916

10 *Fifth:* I give and devise unto my granddaughters, Florence, Lucilla and Frances Sullivan, children of my deceased son, Jeremiah Sullivan, the house and lot known as and by street number 630 Grove Street, Jersey City, New Jersey, to have and to hold the same to them, their heirs and assigns forever, in equal shares.

Sixth: I give and devise unto my daughter, Helen Heyer, the house and lot known as and by street number 643 Henderson Street, Jersey City, New Jersey, to have and to hold the same to her, her heirs and assigns forever.

20 *Seventh:* I give and devise unto my son, Michael A. Sullivan, the house and lot known as and by street number 179 Seventeenth Street, Jersey City, to have and to hold the same to him, his heirs and assigns forever.

30 *Eighth:* I give and devise unto my daughter, Hannah Flynn, the lot and house, front and rear, known as and by street number 641 Henderson Street, Jersey City, New Jersey, to have and to hold the same to her, her heirs and assigns forever.

40 *Ninth:* I give and devise unto my daughter, Hannah Flynn, the house and lot, known as and by street number 202 16th Street, Jersey City, New Jersey, to have and to hold the same to her, her heirs and assigns forever provided, nevertheless, that my said daughter, Hannah Flynn, shall pay the sum of two thousand dollars to the guardian of my said grand-children, Florence,

Bill of Complaint—Filed September 5, 1916

Lucilla and Frances Sullivan, for the support, maintainance and education of said grandchildren, and I hereby charge the payment of said two thousand dollars upon the said premises known as and by sreet number 202 16th Street, Jersey City, New Jersey.

10

Tenth: I give and bequeath unto my daughter, Helen Heyer, my piano and the brass bed and furniture in the pink room.

Eleventh: I give and bequeath unto my daughter, Hannah Flynn, my watch and chain and diamond earrings.

Twelfth: I give and bequeath the remainder of my household furniture, household effects, clothing, jewelry, trinkets and personal apparel unto my daughters, Hannah Flynn and Helen Heyer, share and share alike.

20

Thirteenth: I give and bequeath unto the pastor of St. Lucy's Roman Catholic Church of Jersey City the sum of two hundred and fifty dollars, and direct that the same be used in the celebration of one High Mass at such church every for the happy repose of my soul, until said fund is exhausted.

30

Fourteenth: I give and bequeath the sum of two hundred and fifty dollars for the celebration of masses for the happy repose of my soul, and direct that such masses be said when and where my son, Michael A. Sullivan, may, in his discretion determine.

Fifteenth: I give and bequeath the sum of five hundred dollars to St. Lucy's Roman Catholic

40

Bill of Complaint—Filed September 5, 1916

Church of Jersey City, at Fifteenth and Grove Streets, Jersey City, New Jersey.

Sixteenth: I give and bequeath unto my daughter, Helen Heyer, the sum of two thousand dollars.

10 *Seventeenth:* I give, devise and bequeath unto my son, Michael A. Sullivan, his heirs and assigns forever, my family plot in the Catholic Cemetery of Jersey City, and direct that no persons other than the immediate members of the family shall be hereafter buried in said plot.

20 *Eighteenth:* I do hereby declare that the money on deposit in the Pavonia Trust Company of Jersey City in my name, for the children of my deceased son, Jeremiah Sullivan, amounting to about fourteen hundred dollars, is the property of and intended for said children of my said deceased son, Jeremiah Sullivan.

30 *Nineteenth:* I hereby nominate, constitute and appoint my daughter, Hannah Flynn, as and for the guardian of Florence, Lucilla and Frances Sullivan, children of my deceased son, Jeremiah Sullivan.

40 *Twentieth:* All the rest, residue and remainder of my estate I give, devise and bequeath unto my children, Mary Sullivan (known as Sister Agnes Michaella) Michael A. Sullivan, Helen Heyer and Hannah Flynn, share and share alike, to have and to hold the same to them, their heirs and assigns forever, and if any of them be deceased at the

Bill of Complaint—Filed September 5, 1916

time of my death, then the share of such deceased child shall go, to his or her children, if he or she shall leave any surviving at the time of my decease, and, if not, then his or her share shall go to his or her heirs at law or next of kin, according to the nature of the property constituting such share. 10

Twenty-first: I hereby nominate, constitute and appoint the Reverend Edward A. Kelly, executor of this my last will and testament, and direct that he be not required to give bonds for the faithful performance of his duties, as such executor.

Twenty-second: If any of the legatees or devisees under this will shall resist or attack its probate or contest its validity, such legatee or legatees or devisee or devisees shall hereby forfeit the bequests and legacies hereby given them, and such bequests and legacies so forfeited shall be divided equally among my surviving children who shall not contest the validity hereof or resisted or attacked the probate hereof. 20

In witness whereof, I, the said testatrix, Mary Sullivan, have hereunto set my hand and seal, this tenth day of February in the year one thousand nine hundred and twelve. 30

her

MARY X SULLIVAN. (L.S.)

mark

the presence of us, both being present at the same time and we at her request in her sight and presence and in the sight and presence of each other have hereto subscribed our names as witnesses.

The words "except as herein changed" interlined on first page before execution. 40

Mark A. Sullivan, 65 Grand St., Jersey City.

Denis Callahan, 184 16th St., Jersey City.

Bill of Complaint—Filed September 5, 1916.

Signed, sealed, acknowledged, published and declared by the said testatrix, Mary Sullivan, as and for her last will and testament, in the presence of us (both being present at the same time), and we, at her request, in her sight and presence and in the sight and presence of each other, have
 10 hereto subscribed our names as witnesses.

Mark A. Sullivan, 65 Grand Street, Jersey City.
 Daniel G. Bergen, 140 Mercer Street, Jersey City.

This is a codicil to the last and testament of me Mary Sullivan which said last will and testament is dated the tenth day of February nineteen hundred and twelve

First: I do hereby republish and redeclare and
 20 reaffirm everything in my said last will and testament dated February tenth, nineteen hundred and twelve, contained, except as herein changed.

Second: I give and devise unto my son Michael A. Sullivan the house and lot situate at and known as and by street number 210 Fifteenth Street, Jersey City, N. J., to have and to hold the same to him, his heirs and assigns forever.

In witness whereof I, Mary Sullivan, have here-
 30 unto set my hand and seal this tenth day of April, nineteen hundred and twelve.

her
 MARY X SULLIVAN. (L.S.)
 mark

Signed, sealed, published, acknowledged and declared by the said testatrix, Mary Sullivan, to
 40 be a codicil to her last will and testament, dated February tenth, nineteen hundred and twelve, in

Answer.

IN CHANCERY OF NEW JERSEY.

Between

MARY AGNES HEYER,
by her next friend,
Complainant-Appellee,

and

MICHAEL A. SULLIVAN, et als.,
Defendant-Appellant.

10

On Bill, etc.
Answer of M.
A. Sullivan.

20

The defendant answering, says:

1. He denies that Mary Sullivan, at the time of making her last will, and at her death owned 32 shares of the capital stock of the Jersey City Horse Manure Transportation Company.

2. He denies that he claimed to own said shares of stock by virtue of a pretended transfer to him by Mary Sullivan, and says that his title and possession of said shares of stock was by virtue of a valid gift and transfer of the same to him by Mary Sullivan in her lifetime.

30

3. This defendant admits paragraph 8 of the bill of complaint, but for greater certainty begs leave to refer to the decree of said court, and to the proceedings thereon.

40

Answer

4. This defendant answering paragraph 9 of the bill, says that the Jersey City Horse Manure Transportation Company, has since the death of Mary Sullivan paid dividends of 50 per cent, excepting during two years when it paid 25 per cent, a full statement of all such dividends having been
10 furnished to the Complainant, and testified to before the Orphans' Court of Hudson County, in the proceedings there taken upon which a decree was made by said Court.

5. This defendant further answering says, that on January 12, 1910, Mary Sullivan transferred and delivered to this defendant Certificate No. 19 for 32 shares of the Jersey City Horse Manure
20 Transportation Company, and that said certificate has been delivered up to the said company,, and has been cancelled, and a new certificate issued therefor to this defendant, and that at no time was a certificate for 10 shares of said stock ever owned by Mary Sullivan, or delivered by her to this defendant.

6. The defendant further answering says, that
30 this suit is improperly brought in the name of the Complainant, and should be dismissed.

7. The defendant further answering says, that this Court is without jurisdiction to hear this cause, first because the matters in difference has been adjudicated and settled by the Orphans' Court of the County of Hudson, and is still pending on an appeal in the Prerogative Court and secondly because the Complainant has a complete
40 and adequate remedy at law.

Answer

8. This defendant further answering says, that said bill should be dismissed because it states no cause of action in favor of the Complainant as against this defendant.

He prays hence to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

10

THEO. RURODE,
Solicitor for and of Counsel with
Defendant Michael A. Sullivan.

20

30

40

Testimony.

IN CHANCERY OF NEW JERSEY.

Between

10

MARY AGNES HEYER,
Complainant-Appellee,

and

20

MICHAEL A. SULLIVAN, et als.,
Defendant-Appellant.

} Testimony.

Testimony taken in the above entitled cause at the Chancery Chambers, Jersey City, New Jersey, on Monday, the twenty-first day of May, 1917, at 11 o'clock A. M.,
Before Hon. JOHN H. BACKES, Vice Chancellor.
Appearances:

30

THOMAS J. BROGAN, Esq., for Complainant.
THEODORE RURODE, Esq., for Defendant.

EDWARD A. KELLY, a witness produced on behalf of the complaint, being duly sworn, testifies as follows:

Direct Examination by Mr. Brogan:

40

Q. Father Kelly, you are pastor of Saint Patrick's Church in New Jersey? A. Yes.

Edward E. Kelly—Complainant—Direct

Edward E. Kelly—Complainant—Cross

Q. You were named as the executor of Mary Sullivan, who died in July, 1916? A. Yes.

Q. Have you administered that estate with the exception of ten shares of stock left to Mary Agnes Heyer? A. I have. 10

Q. Did you endeavor to get that ten shares of stock in order to give it to this girl? A. I did.

Q. The estate has been wound up with this exception? A. Yes.

Q. From whom did you endeavor to get these ten shares of stock? A. Michael A. Sullivan.

Q. What did he say to you when you requested them from him? A. He said, "There are no shares; whatever shares I have I received as a gift from my mother." 20

Q. Did you see him more than once about it? A. Two or three times.

Q. Was his answer the same in each instance? A. Substantially the same.

Cross-Examination by Mr. Rurode:

Q. Father, has any one requested you to bring action against Mr. Sullivan for the recovery of these shares of stock? A. No. 30

Q. And, therefore, you have never refused to do so? A. No.

Q. Did you, on the contrary, bring an action in the Orphans' Court, through Mr. Brogan, for the recovery of these shares of stock? A. Yes.

Q. And, so far as you know, is that action pending on appeal? A. As far as I know. 40

*Michael A. Sullivan—Defendant—Direct**Re-cross Examination by Mr. Brogan:*

Q. Did Michael A. Sullivan, when you saw him, say he had the stock? A. Say he had the stock?

10 Q. Yes, which his mother formerly held? A. He said whatever shares he had were gifts from his mother. That is what I said.

Complainant Rests.

MICHAEL A. SULLIVAN, the above named defendant, being duly sworn in his own behalf, testifies as follows:

Direct Examination by Mr. Rurode:

20 Q. You are the Michael A. Sullivan mentioned as a defendant here? A. Yes, sir.

The Court: I understand the only question before me is one of title?

Mr. Rurode: Yes, sir; and, of course, the legal question I have raised as to jurisdiction, and which your Honor, I take it, has decided against me.

30 Q. You are the son of Mary Sullivan? A. Yes, sir.

Q. Mentioned also in the papers? A. Yes, sir.

Q. Are you the owner of ten shares of stock in the Jersey City Horse Manure Company? A. Yes, sir.

Q. How many shares do you own in that company? A. Fifty-five, I guess.

40 Q. Did you get any of those shares of stock from your mother? A. Yes, sir.

Michael A. Sullivan—Defendant—Direct

Q. How many? A. Thirty-two.

Q. Was that in the shape of one certificate?

A. Yes.

Q. Tell us when and under what circumstances you got that certificate from your mother? A.

Why, she called me in the room one day and said, "Here, I have promised you this stock from some time——"

10

Mr. Brogan: Objected to. The person is dead, and it is a self-serving declaration.

Mr. Rurode: I think I have a right to ask that.

Mr. Brogan: I will withdraw the objection.

Q. Go ahead? A. And she gave it to me.

20

Q. Did she hand you a paper? A. Yes, sir.

Q. What did she do? A. She handed me the certificate of stock and I took it, and two or three days after I had it transferred on the books of the company in my name.

Q. And that was for how many shares? A. Thirty-two.

Q. And that is the only certificate of stock you got from her? A. That's all.

30

Q. How long before her death was that? A. Pretty near three years, I think.

Q. Up to the time of her death, what did you do with the dividends of that stock? A. I would take the checks to her, and she would tell me to give her the cash, and I would give her her dividends.

Q. Why? A. She told me while she lived she wanted the dividends of that stock.

40

Michael A. Sullivan—Defendant—Direct.

Q. How did you get your dividends—in the shape of one check which included the dividends of this and other stock, or more than one check? I mean after this transfer. A. One check.

10 Q. And that check included dividends on the stock you had previously? A. Yes.

Q. Was any one ever present when you showed these dividend checks to your mother and turned over the dividends to her?

Mr. Brogan: That is objected to as leading, and it assumes something that is not in the testimony.

A. Yes, sir.

20 Q. Who was present? A. Mrs. Flynn.

Q. Who was she? A. She is my sister.

Q. After your mother died, was there anything said by Father Kelly, or any one else, about these shares of stock to you?

Mr. Brogan: Objected to as immaterial.
The Court: Objection overruled.

30 A. Father Kelly asked me for the stock when the will was read.

Q. What did you say to him? A. I told him there was no stock belonging to my mother—I had that stock for the last three years.

Q. Was there any one present with Father Kelly at that time? A. Yes, my three sisters were there.

40 Q. Which sisters? A. Mrs. Heyer, Mrs. Flynn and Sister Agnes Michaelia.

Michael A. Sullivan—Defendant—Cross

Q. Mrs. Heyer is now deceased, is she not? A. Yes, sir.

Q. And it is her daughter who is here now as complainant in this suit? A. Yes, sir.

Q. You say those three sisters were present on an occasion when Father Kelly spoke to you about this stock? A. Yes, sir.

10

Cross-Examination by Mr. Brogan:

Q. Demand was made from you two or three times? A. Yes, sir.

Q. Demand was made upon you by Father Kelly for this stock? A. Yes, sir.

Q. Who lived at home with your mother? A. My brother.

Q. Is he dead? A. Yes.

20

Q. Died before her? A. Yes, sir.

Q. Your mother had a safe, didn't she? A. Yes, sir.

Q. And you were the only one who knew the combination of that safe, weren't you? A. No; I gave her the combination of the same.

Q. Of her own safe? A. Yes.

Q. Will you explain what you mean, just what you mean? A. Why, I left a piece of paper in there.

30

Q. Do you remember what the date of that transfer was, Mr. Sullivan; do you know about when your mother gave you that certificate of stock? A. About three years before she died.

Q. When did she die? A. In July, 1912, I think it is.

Q. And when did she give you this stock certificate? A. About three years before she died.

40

Q. July, 1909- A. I think so.

Michael A. Sullivan—Defendant—Cross

Q. I show you a certificate dated January 12, 1910, which certificate was issued to Mary Sullivan, entitling her to thirty-two shares of stock of the Jersey City Horse Manure Transportation Company, and the transfer is signed "Mary Sullivan, her mark," and signed and acknowledged
 10 in the presence of Hannah Flynn, and I ask you if that is the certificate she gave to you? A. That's the certificate.

Q. Were you present when that was executed?
 A. When it was signed?

Q. Yes. A. No.

Q. How long after the tenth of January did you get the certificate, if you remember—the tenth of January, 1910? A. When it was transferred
 20 there, do you mean?

Q. How long after the date of this transfer did you receive this certificate from your mother?
 A. About three days before the transfer.

Q. Three days before what transfer? A. Before I had it transferred.

Q. Before you had it transferred on the books of the corporation? A. Yes, sir.

Q. How long after January -, 1910, was it that you received this certificate from your mother?
 30 A. How long after?

Q. Yes. A. I don't know. I don't quite understand the question.

Q. This transfer appears to be dated January 12, 1910. Now, how long after that time did you get that paper? A. I got this paper three days before the transfer—this date here.

Q. You got it three days before that date? A. Before I had it transferred, yes.

Q. Here is the cancelled certificate which your
 40 mother owned? A. Yes, sir.

Michael A. Sullivan—Defendant—Cross

Q. Now, this certificate is dated January 12, 1910. On what date did she give it to you? A. She gave me this on January 9th, I think.

By the Court:

Q. Not before she executed it? A. I mean I had it transferred on the books of the company three days after she gave it to me.

10

Q. When did she give it to you? A. On that date, January 12.

Q. Do you remember that? A. Yes, sir.

Q. Now, this conversation you had with your mother; she told you she had to have those dividends as long as she lived? A. Yes.

Q. And you got these dividends all in one check. Did you ever bring the check home to show it to her? A. Yes.

20

Q. Then you cashed it, didn't you? A. Yes.

Q. And gave her her share of the dividends; is that what you mean? A. Yes.

Q. Mr. Sullivan, do you know where your mother kept the stock certificates that she owned? A. She kept them up in her room.

Q. In the safe? A. No, sir; she safe was on the other floor.

Q. In her dresser? A. Yes.

Q. This is a close corporation, isn't it, Mr. Sullivan, and you are a director? A. Yes.

30

Q. And Mr. Fitzpatrick is a director? A. Yes, sir.

Q. There are three directors? A. Yes.

Q. You own it? A. Yes.

Defendants Rest.

40

Hannah Flynn—Complainant—Direct

HANNAH FLYNN, a witness produced on behalf of the complainant, being duly sworn, testifies, in rebuttal, as follows:

Direct Examination by Mr. Brogan:

1 0 Q. Where do you live? A. 1128 Bloomfield Street, Hoboken.

Q. And you are the daughter of Mary Sullivan, deceased? A. Yes.

Q. And the sister of Michael Sullivan, who just testified? A. Yes, sir.

Q. And the aunt of Mary Agnes Heyer, who is the complainant here? A. Yes, sir.

2 0 Q. I show you, Mrs. Flynn, what purports to be a cancelled certificate of thirty-two shares of stock. A. Yes, sir.

Mr. Brogan: I will first offer it in evidence.
(Said certificate is marked Exhibit C-1.)

3 0 Q. I show you Exhibit C-1, and point out to you the name "Hannah Flynn" as attesting witness to that transfer, and I ask you if that is your signature? A. No.

Q. Did you write that? A. No.

Q. Were you present at any such transfer of stock? A. No.

Q. And you have no knowledge at all about it? A. No.

Q. You know nothing at all about it? A. No, sir; absolutely nothing.

Mr. Rurode: No cross-examination.

Both Sides Rest.

Complainant's Exhibit 2.

Adjourned to Monday, May 28, 1917, at
10:30 A. M., at the Chancery Chambers, Jer-
sey City.

EXHIBIT.

(Complainant's 1.)

10

JERSEY CITY HORSE MANURE TRANSPORTATION COM-
PANY STOCK CERTIFICATE.

No. 19.

32 Shares.

This is to certify that Mary Sullivan is entitled
to thirty-two shares of one hundred dollars each
of the capital stock of the Jersey City Horse Ma-
nure Transportation Company, transferable only
on the books of the company, in person or by at-
torney, on the surrender of this certificate.

20

In Witness Wherefore, the said company has
caused this certificate to be signed by its Presi-
dent and Treasurer and sealed with its corporate
seal in the City of Jersey City, N. J., this first
day of May, 1906.

DANIEL L. FITZPATRICK,
Treasurer.

JOHN F. SHANLEY,
Acting President.

30

Cancelled January 12, 1910."
(The following appears on the reverse side of

40

IN CHANCERY OF NEW JERSEY.

Between

MARY AGNES HEYER,
by her next friend,
Complainant-Appellee,

and

MICHAEL A. SULLIVAN, et als.,
Defendant-Appellant.

On Bill, etc.,
Testimony.

10

20

Proceedings had in the above entitled cause at the Chancery Chambers, Jersey City, New Jersey, on Monday, the twenty-eighth day of May, nineteen hundred and seventeen, at 10:30 A. M., Before Hon. JOHN H. BACKES, Vice Chancellor. Appearances, as heretofore noted.

Mr. Rurode: I move to dismiss the bill on the ground that the court is without jurisdiction, and that the complainant has no standing in this court.

30

The Court: The motion is denied.

Heard and decided May 28, 1917.

40

Conclusions.

Between

MARY AGNES HEYER,
by her next friend,
Complainant-Appellee,

and

MICHAEL A. SULLIVAN, et als.,
Defendant-Appellant.

20 For the Complaint: Mr. THOMAS J. BROGAN.
For the Defendant: Mr. THEODORE RURODE.
BACKES, V. C.

30 This bill is to recover a specific legacy of ten shares of the capital stock of the Jersey City Horse Manure Company. Mary Sullivan, deceased, owned thirty-two shares of the stock of this company, and by her will, dated February 10, 1912, bequeathed ten shares to the complainant and the remaining shares to her son, the defendant, Michael A. Sullivan. Sullivan claims the thirty-two shares by gift from his mother under date of January 12, 1910, at which time the stock was transferred to him upon the books of the company. The prayer is that Sullivan transfer to the complainant the ten shares, and also pay over to her the dividends thereon, received by him since the death of his mother, amounting to upwards
40 of \$2,000.

Conclusions

Two preliminary questions are presented. The first is that the right of action is in the executor and not in the complainant; and second, that the Orphans' Court of Hudson County has adjudged the controversy.

1. The estate of the testatrix has been fully administered in the Orphans' Court, except as to the shares here involved. The complainant's title is by virtue of the will. The qualified estate of the executor therein is at an end. His duty to surrender the legacy to the complainant will be presumed to have been performed. "Equity regards that as done which ought to be done." The executor is a party to the suit and does not object. See *Hayes v. Hayes*, 45 N. J. Eq., 461. 10

2. Upon the petition of the executor, the Orphans' Court ordered Sullivan to show cause why he should not surrender the ten shares of stock, and after a hearing adjudged the stock to be assets of the estate, and ordered them to be transferred upon the books of the company and delivered to the executor. From this order an appeal is pending in the Prerogative Court. Ch. 190 of the Laws of 1909, P. L. 284, authorizes a discovery in the Orphans' Court of the estate of decedent and empowers the Court to "take such proceedings for the recovery of any assets of the said estate so discovered by order or decree as may be taken in like cases in the Court of Chancery." The Orphans' Court had not the power to summarily try the title and determine the question of gift or no gift. There is nothing in the act to warrant the decree. The Court of Chancery on discovery, on bill for that purpose, simply restrains third parties from disposing of disputed property and determines the issue of fraudulent 20 30 40

Conclusions

trust on final hearing upon pleadings and proofs. A receiver appointed under the act must proceed against third parties to recover other than trust property according to the course of the common law. C. S., 435. The subject matter of this
10 litigation not being within the jurisdiction of the Orphans' Court, its decree must be disregarded.

The gift is not established. It is supported by the testimony of the donee only, who says that his mother called him into her room one day and said, "Here, I have promised you this stock for some time," and that she then handed to him the certificates, reserving the right to the dividends thereafter to accrue, which he says he paid to her down to the time of her death. The usual form
20 of assignment and power of attorney to transfer, printed on the back of the certificate, is not filled out. It bears date January 12, 1910, and purports to have been signed by Mary Sullivan by her mark, and witnessed by Hannah Flynn. In this form the stock was transferred to Sullivan upon the books of the company, which he owned and controlled. No attempt was made by Sullivan to prove the mark to be his mother's, nor to prove
30 the signature of the subscribing witness. Hannah Flynn, the supposed subscribing witness, daughter of Mary Sullivan, denied the signature as hers. It may also be observed that it is deducible from the testimony that Sullivan had access to his mother's papers. The circumstances arouse grave suspicion as to the genuineness of the mark; but it is not necessary to dwell upon this serious aspect of the case in reaching the conclusion that
40 the defendant has not made out a gift.

Conclusions

A delivery of a certificate of stock without actual transfer or a written assignment or power to transfer, although accompanied with words of gift, docs not constitute a valid gift *inter vivos*. Matthews v. Hoagland, 48 N. J. Eq., 455. There is no proof of a written assignment or transfer. 36 Cyc., 455.

10

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; Aff. 193.

To this may be added that the imputation of forgery of the name of the subscribing witness, the blank form of the assignment, and the evident belief of the testatrix that she owned the stock at the time she made her will, and other circumstances in the case, so utterly discredit the testimony of the defendant Sullivan regarding the alleged gift by his mother as to render it unworthy of belief.

20

The complainant is entitled to a decree for the stock and the dividends, with costs.

30

40

Final Decree.
Filed July 17, 1917.

IN CHANCERY OF NEW JERSEY.
Between

10 MARY AGNES HEYER,
 by her next friend,
 Complainant-Appellee,

and

20 MICHAEL A. SULLIVAN, et als.,
 Defendant-Appellant.

} On Bill, etc.,
} Final Decree.

30 This cause being heard at the Chancery Cham-
 bers, Jersey City, New Jersey, in the presence of
 Thomas J. Brogan, of counsel with the complain-
 ant, and Theodore Rurode, of counsel with the de-
 fendants, Michael A. Sullivan, and the Jersey
 City Horse Manure Company, sued herein under
 the name of the Jersey City Horse Manure Trans-
 portation Company and Daniel P. Byrnes, of coun-
 sel with the defendant, Edward A. Kelly and the
 pleadings and proofs having been read and argu-
 ments of counsel considered, and it appearing to
 the Court that Mary Sullivan, deceased, who died
 on July 9, 1912, bequeathed to the complainant,
 her granddaughter, ten shares of the capital stock
 of the Jersey City Horse Manure Transportation
40 Company; that the will of said testatrix, dated
 February 10, 1912, was admitted to probate on
 August 27, 1912; that the defendant, Edward A.
 Kelly, was the executor, and that the estate of the
 said testatrix has been fully administered with the

Final Decree—Filed July 17, 1917.

exception of the bequest or legacy of the said ten shares of stock; that the said stock is claimed by Michael A. Sullivan, a son of the said testatrix, by virtue of an alleged gift said to have been made on January 12, 1910; that stock of said company cannot be purchased in the open market; that Lawrence B. Heyer, father of the complainant, was, on October 26, 1915, appointed guardian of the person and property of the complainant by the Orphans' Court of Hudson County, and has duly qualified; that the ten shares of the capital stock of the Jersey City Horse Manure Transportation Company mentioned were not given to the defendant, Michael A. Sullivan, and that the same were owned by and are an asset of the estate of the said Mary Sullivan, deceased, for distribution to the said complainant; that the Jersey City Horse Manure Transportation Company is now the Jersey City Horse Manure Company, the name of the said corporation having been changed; and it further appearing to the court that the complainant is entitled to the said shares of stock and to the relief sought and prayed for by her in her Bill of Complaint: It is, on this 17th day of July, one thousand nine hundred and seventeen, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor by virtue of the power and authority of this court, doth hereby order, adjudge and decree that the defendant, Michael A. Sullivan, transfer, assign and set over to the complainant the said ten shares of the capital stock of the Jersey City Horse Manure Company before the 27th day of July, 1917, free from any claim of the said Michael A. Sullivan or any per-

10

20

30

40

Final Decree—Filed July 17, 1917.

10 son claiming under him, and that he deliver the certificate of the said shares of stock within the time mentioned to the said Lawrence B. Heyer, guardian, and that he pay to the said complainant the dividends that have been declared and paid on the said shares of stock from the time of the death of the said testatrix, Mary Sullivan, July 9, 1912, to date, with interest upon the said dividends, amounting to the sum of Two Thousand One Hundred Thirty-one Dollars and Eighty-four Cents (\$2,131.84), together with interest from the date hereof by delivering the same unto the hands of the said guardian; and,

20 IT IS FURTHER ORDERED AND DECREED, that the defendant, Jersey City Horse Manure Company, pay to the said complainant the dividend that has been declared on the said ten shares of stock for the year 1916, amounting to the sum of Five Hundred Dollars (\$500) by delivering the same into the hands of the said guardian; and,

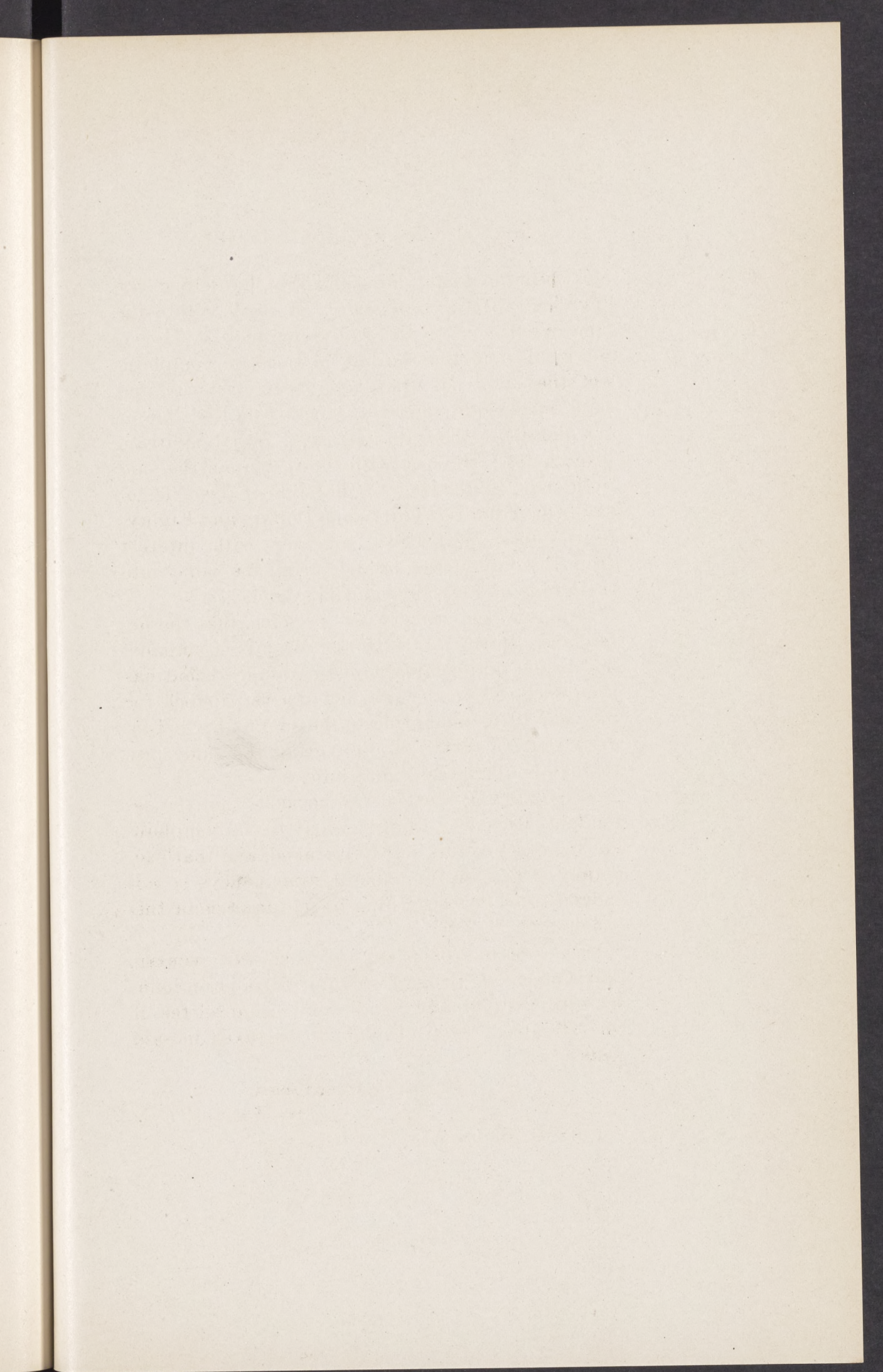
30 IT IS FURTHER ORDERED AND DECREED, that the defendant, Michael A. Sullivan, pay to the complainant the costs of this suit to be taxed, and that execution issue therefor and for said moneys so adjudged to be due according to the practice of this court; and,

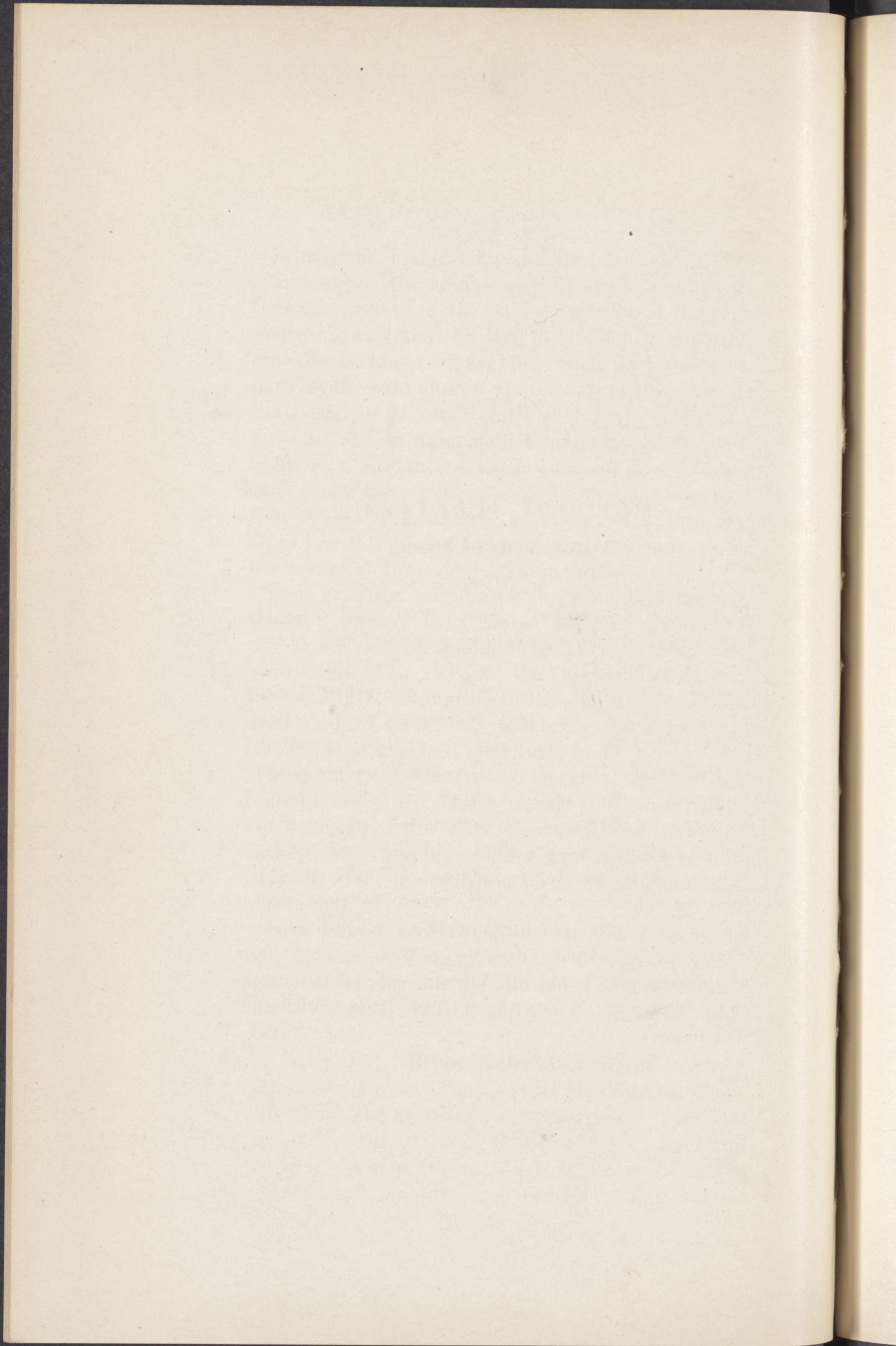
IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Thomas J. Brogan, solicitor for and of counsel with complainant, be allowed a counsel fee of One Hundred (\$100) Dollars to be taxed in said costs.

Respectfully advised,

E. R. WALKER, C.

40 JOHN H. BACKES, V. C.





New Jersey Court of Errors and Appeals.

Between

MARY AGNES HEYER,

Complainant-Appellee,

and

MICHAEL A. SULLIVAN, *et als.,*

Defendant-Appellant.

On Appeal
from Decree
of the Court
of Chancery.

10

BRIEF OF APPELLEE

Statement of Fact.

The complainant, Mary Agnes Heyer, is an infant, who brings suit by her next friend for a legacy under the will of her grandmother, Mary Sullivan, who died July 9, 1912. The third and fourth paragraphs of the will (see State of Case, p. 11, ll. 28-40) set forth the legacy to the complainant, which is ten shares of the capital stock of the Jersey City Horse Manure Transportation Company. The executor under the will of Mary Sullivan has distributed under the directions of the will except this one legacy of the complainant herein. The executor found that Michael A. Sullivan, a son of the decedent, Mary Sullivan, and an uncle of the complainant herein claimed to own the ten shares of stock above referred to, alleging a gift made on January 12, 1910, more than *two years before* the will of Mary Sullivan was made.

20

30

Attention is also called to the fact that on April 10, 1912, or three months before the testatrix died, she executed a codicil to her said will in which (p. 16, State of Case, ll. 18-22) she republished, re-declared and re-affirmed her will as to this legacy. Michael A. Sullivan, the defend-

40

ant, relies upon a transfer or assignment which is called "Exhibit C-1" (see State of Case, p. 30), which is dated January 12, 1910, and which purports to be signed by Mary Sullivan, the testatrix, by the making of her mark and which also purports to have been signed and acknowledged in the presence of Hannah Flynn and signed as attesting witness by her. Hannah Flynn is a daughter of the said Mary Sullivan, the decedent, and a sister of Michael A. Sullivan. Hannah Flynn testified that the signature on the back of this stock certificate which purports to be her signature was not written by her; that she was never present at any such alleged transfer of stock and that she had no knowledge whatever of this alleged transfer (see State of Case, p. 28, ll. 27-40). It is noteworthy that this witness was not asked a single question upon cross-examination.

20 The other reasons for reversal mentioned in the appellant's petition of appeal are not referred to in the brief for the appellant, so the respondent may properly consider them as abandoned. Counsel for the appellant through inadvertance omitted to print in his State of Case an amendment to the Tenth Paragraph of the Bill of Complaint, as follows: "That the said executor has settled his account of said estate, and the same has been allowed and confirmed by the Orphans' Court of Hudson County, and that the whole of said estate has been distributed with the exception of the ten (10) shares of the capital stock aforementioned, belonging to the complainant; and that the efforts made by the said executor to obtain the said stock from the said Michael A. Sullivan, hereinbefore and hereinafter set out, were for the purpose of transferring and delivering the same to the complainant." This was overlooked as a matter of fact by counsel for both sides and counsel for the appellant now agrees that same may be printed herein in this brief.

THE LAW.

Equity has jurisdiction over the subject matter of this suit.

This is a suit for a specific legacy and the appellant raises the question as to lack of jurisdiction in the Court of Chancery and says that there is a full, complete and adequate remedy at law. It seems to be apparent that there is no remedy at law whatever. As is set up in the complainant's bill (see State of Case, p. 8, ll. 33-40 and p. 9, ll. 1-13, Par. 13), this is a close corporation, whose stock is held by five persons only; it pays large dividends, usually 50 per cent. per annum (State of Case, p. 7, ll. 35-40, Par. 9), and the stock cannot be bought in the open market. No judgment in a court of law can compel the defendant, Michael A. Sullivan, to surrender these ten shares of this stock to the complainant and pay over to her as well the dividends that have been collected by him since the death of the testatrix. If the complainant prevailed at law and had a judgment for money damages, a jury would have to place a value upon this stock, but where could the complainant procure an investment of this kind with a return of 50 per cent. annually? It is not an action that can be settled by a suit in replevin, for what is there that the complainant may replevy? She certainly would have no interest whatever in replevying the old stock certificate which was offered in evidence and which we contend was the property of the testatrix, nor can a court of law bring about a cancellation of this certificate on the books of the corporation itself and compel the corporation to issue a new certificate for ten shares of this stock to the complainant, which is the extent of her legacy. It seems therefore to be fundamental that a judgment of any kind in a court of law

10

20

30

40

would not be an adequate remedy for the wrong herein complained of.

Assume, for the sake of argument, that this complainant sued the defendant, Michael A. Sullivan, in a court of law. Neither the executor of the will nor the Jersey City Horse Manure Transportation Company, the other defendants in this suit, might properly be made defendants in such suit at law. It is apparent that at law
 10 neither the executor nor the corporation could, by any reasoning, be properly made defendants, for neither of them is retaining, or in possession of, anything belonging to this complainant. Judgment being obtained against the defendant, Michael A. Sullivan, it is not clear how this complainant could compel the Jersey City Horse Manure Transportation Company to issue to her a certificate for ten shares of its capital stock. It is not a party to the suit. If the corporation
 20 refused to help the complainant out in this situation it might be possible to sue out a writ of mandamus against the corporation. Here the complainant would be put to the trouble and expense of another law suit and it is to prevent this multiplicity of actions that the complainant herein has come into the court of equity where the defendants Michael A. Sullivan and the executor and the corporation itself are properly made defendants. This is an elementary principle of
 30 equity jurisdiction. See *Black vs. Shreeve*, 7 N. J. L. Eq., 440; *Ackerman vs. Hartley*, 8 Eq., 476; *Shimer vs. Morris Canal*, 27 Eq., 364; *Symes vs. Strong*, 28 Eq., 131, and a long list of cases which establish this principle.

The complainant in this action, brought in the Court of Chancery, sought relief that a law court cannot give. First, she seeks that the ten shares of the capital stock of the corporation in question might be decreed to be her property; sec-
 40 ondly, that the Jersey City Horse Manure Trans-

portation Company, ten shares of whose capital is in issue, may be restrained from transferring the said ten shares of stock on its books to any one except to the complainant or to the executor; third, that it may be restrained from paying dividends upon the said stock to any one except to the complainant or the executor; fourth, that an account may be taken of the dividends that have been paid. Such relief cannot be obtained in a court of law, and yet the complainant is entitled to relief to the extent prayed for. 10

The Court of Chancery has jurisdiction to entertain a bill for a specific legacy and that this is a specific legacy is clear from the cases in this State which have defined specific legacies; *Moore v. Moore* 5 N. J. Eq., 554; *Van Wagenen v. Baldwin*, 7 Eq., 211; *Unitarian Soc. v. Tufts*, 151 Mass., 56. It will I think be evident to the court that this legacy of ten shares of stock of the Jersey City Horse Manure Transportation Company has a very peculiar value in view of the large return it pays each year, generally a dividend of 50 per cent. Equity always has jurisdiction of legacies concurrent with the law courts (*King v. Berry*, 32 N. J. Eq., 44; *Smith v. Moore*, 4 N. J. Eq., 485) and in this case, where the claim of the defendant Sullivan is founded on fraud, and in order to prevent a multiplicity of suits, it is the only court that can give complete and adequate relief. 20 30

The complainant in the bill filed in the Court of Chancery did set up fraud (See State of Case p. 6 Par. 6, ll. 24-35) wherein it is charged that the defendant Michael A. Sullivan holds this stock by virtue of a pretended transfer and it was proved at the hearing (see State of Case p. 28 ll. 10-40) when the subscribing witness was called as a witness for the complainant that the subscribing witness had never signed this pretended transfer and the facts and the testimony 40

seem to make it very plain that forgery was committed when the name "Hannah Flynn" was written in as an attesting witness to this fraudulent transfer, and this was the fraud of the defendant Sullivan.

10 That the Court of Equity has jurisdiction in a case of fraud even where there might be an adequate remedy at law is laid down in the cases of *Mazzolla v. Wilkie* 72 N. J. Eq., 722, and *Ring v. New Auditorium Pier Co.*, 77 Eq., 422.

The various cases cited by counsel for the appellant on page 3 of his brief all establish propositions of law that are fundamental but that have no bearing whatever upon the facts and issues involved in this case. In one case that is cited, *Farrel v. The Passaic Water Company* 82 Eq. p. 105, which is relied upon by
 20 counsel, it is patent that the facts involved are entirely different from the question under consideration here. The *Farrel* case is one where suit is for a bond of the Passaic Water Company, paying a certain rate of interest, which might have been purchased by any one in the open market. Obviously this controversy was a question for the law court, for a money judgment would answer the damage that the party sustained because it had a determined value, and no more, and carried a certain rate of interest and no more. Between that case and the case under
 30 consideration there is a vast difference.

No gift has been made out by this defendant.

Counsel for the defendant Michael A. Sullivan attempts to establish a gift of this stock to the defendant from the testatrix. The gift fails on the elements necessary to constitute a gift as set up in the appellant's own brief. Assume,
 40 for the sake of argument, that there was a donative intention on the part of the testatrix

and a delivery of the subject matter, still the gift fails because the donor had not stripped herself of dominion over the subject matter of the gift (See State of Case page 23, ll. 33-38).

“Q. Up to the time of her death what did she do with the dividends of that stock?

A. I would take the checks to her and she would tell me to give her the cash, and I would give her *her* dividends.”

Nothing can be plainer than that this testatrix did not divest herself of all ownership and dominion over the subject matter of the gift. Counsel, in relying upon the *Farrel vs. Passaic Water Company* case in 82 Eq., 97, forgets that in this case the transfer was not made by written assignment. In the case under consideration the appellant, in order to make out his gift, must rely upon the instrument of assignment purporting to have been executed by the donor in the presence of the attesting witness. Therefore, the gift must be proved according to the tenor of the instrument relied upon. In other words, it must be proved as a deed or bond is proved, i. e. by an attesting witness. But in this case the attesting witness comes into court and virtually says that her name was forged to this instrument. The attempt to prove the gift is supported by the testimony of the donee only and, under authority of *Baldwin v. Berg*, 84 N. J. Eq., 90, aff. 193, 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. It is not a gift *inter vivos*, according to the principle laid down in the case of *Matthews v. Hoagland*, 48 N. J. Eq., 455; there is no proof of a written assignment or transfer (36 Cyc. 455). In his conclusions the learned Vice-Chancellor, having in mind the fraud of the appellant remarked “It may also be observed that it is de-

10

20

30

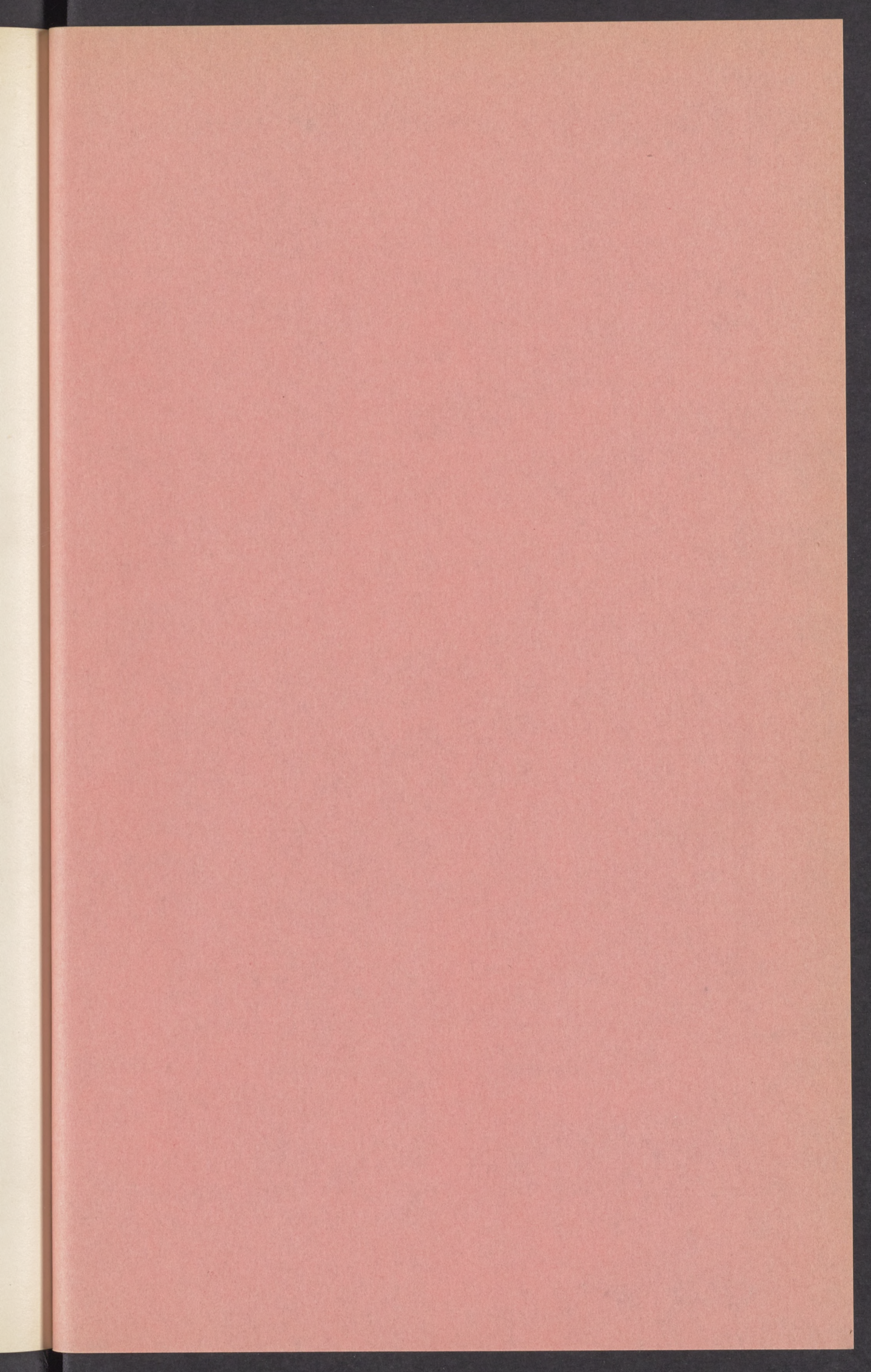
40

ducible from the testimony that Sullivan had access to his mother's papers. The circumstance aroused grave suspicions as to the genuineness of the mark, but it is not necessary to dwell upon this serious aspect of the case in reaching the conclusion that the defendant has not made out a gift." He also said "To this can be added that the imputation of forgery of the name of the subscribing witness, the blank form of the assignment, and the evident belief of the testatrix that she owned the stock at the time that she made her will, and other circumstances in the case, so utterly discredit the testimony of the defendant Sullivan regarding the alleged gift of his mother as to render it unworthy of belief."

It will be remembered that the testatrix bequeathed this legacy to the complainant herein by her will which was executed February 10, 1912, and re-affirmed her bequest of this legacy in the codicil executed on April 10, 1912. Both these instruments are eloquent upon the proposition that this testatrix never surrendered her 32 shares of stock to the defendant Michael A. Sullivan and never signed or attempted to sign any instrument that she believed divested her of her ownership of this stock. This negatives any donative intention on her part.

It is respectfully submitted that the decree made by the Court of Chancery be affirmed.

THOMAS J. BROGAN,
Solicitor for and of counsel
with Complainant-Appellee.



Faint, illegible text, likely bleed-through from the reverse side of the page.

Faint, illegible text, likely bleed-through from the reverse side of the page.

Faint, illegible text, likely bleed-through from the reverse side of the page.

Faint, illegible text, likely bleed-through from the reverse side of the page.

Faint, illegible text, likely bleed-through from the reverse side of the page.