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Notice of Appeal

Filed November 16, 1926

IN CHANCERY OF NEW JERSEY

10	Between MARY AGNES RYAN, et als, <div style="text-align: right;"><i>Complainants,</i></div> <div style="text-align: center;">AND</div> JOHN K. DALY, et als, <div style="text-align: right;"><i>Defendants,</i></div> <div style="text-align: center;">AND</div> MARGARET DALY, et als, <div style="text-align: right;"><i>Third Parties.</i></div>	On Bill, Etc. Notice of Appeal. Decree Appealed from Made by the Chancellor on the Advice of V. C. John Griffin.
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Margaret Daly, one of the third parties named in the counter-claim of defendant, John K. Daly, hereby appeals from the final decree made in the above entitled cause on August 23, 1926, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

30 Dated: October 30th, 1926.

G. FRANK SHANLEY,
Solicitor for Margaret Daly, Third Party.

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

JOHN J. MULVANEY,
Of Counsel.

A true copy.

40 THOMAS BARBER,
Clerk.

Bill of Complaint

Filed September 13, 1924

IN CHANCERY OF NEW JERSEY

To the Honorable Edwin Robert Walker,
Chancellor of the State of New Jersey. 10

The joint bill of complaint of Mary Agnes Ryan, residing at Poughkeepsie, in the State of New York, Irene V. Rochford, Thomas M. Boylan and Matthew J. Boylan, all residing at Jersey City, in the County of Hudson and State of New Jersey, respectfully shows:

1. That the complainants are the only children and heirs at law of Mary Elizabeth Boylan, deceased, who departed this life at Jersey City, February 1, 1919. 20

2. The said Mary Elizabeth Boylan and the defendant John K. Daly and Bridget Agnes Daly, now deceased, were the only surviving children of their mother Bridget Daly, who departed this life on or about May 1st, 1894, seized of a certain tract of real estate at Jersey City, in said County, described as follows:

“Beginning at a point on the north west-
erly corner of Henderson Street (formerly
Prospect Street) and Sixteenth Street 30
(formerly North Eighth Street), thence
running northerly along the westerly line
of Henderson Street 25 feet; thence west-
erly and parallel with said Sixteenth Street
100 feet; thence southerly and parallel with
Henderson Street 25 feet to Sixteenth
Street; thence easterly along the northerly
line of Sixteenth Street to the point of be-
ginning, being the same premises which 40

Bill of Complaint.

were conveyed to the said Bridget Daly by Edward O. Coles and wife by deed dated July 13, 1874, recorded in the office of the Register of Hudson County in Book 275 of Deeds, page 468.”

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3. By the last will and testament of the said Bridget Daly duly probated in the office of the Surrogate of Hudson County, she devised said real estate to the defendant, John K. Daly, and appointed Patrick Quillan and Dennis Gallagher as executors thereof. A copy of said last will and testament is annexed hereto. Dennis Gallagher was the only executor who qualified and acted.

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4. The said John K. Daly by his deed dated October 25, 1894, and recorded in liber 607 of Deeds, page 584, conveyed the said premises to the said Dennis Gallagher for the stated consideration of eighteen hundred dollars (\$1800); and the said Dennis Gallagher and Mary G. Gallagher, his wife, by their deed bearing the same date and recorded in the office of the said Register in liber 607 of Deeds, page 586, did declare that they held the said premises in trust for the following purposes, that is to say:

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A. To secure the payment of thirteen hundred dollars (\$1300) invested in said property by way of mortgage by the said Dennis Gallagher as executor aforesaid and guardian of said Bridget Agnes Daly.

B. To secure the payment of five hundred dollars (\$500) invested in said property by Dennis Gallagher by way of a second mortgage.

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C. To apply the rents, issues and profits of said property, including the interest on said investment of thirteen hundred dollars (\$1300) and

Bill of Complaint.

after the deduction of taxes, water rents and other necessary charges to the support and maintenance of the said Bridget Agnes Daly during her natural life.

D. To sell and convey the property in the discretion of the said trustee and out of the proceeds to retain the said thirteen hundred dollars (\$1300) for further use under the trust of the will of the said Bridget Daly and to retain to his own use the sum of five hundred dollars (\$500) and to hold the residue upon the trusts thereby declared as to the equity of redemption.

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E. Upon the death of the said Bridget Agnes Daly to convey the property, subject to the said two investments, or if the same shall have been sold, to pay the net proceeds thereof over and above the said two investments, or assign securities by which the same should then be represented to such child or children of Mary Elizabeth Boylan, the mother of the complainants, as the defendant John K. Daly should by appointment under his hand direct, or if he should make no such declaration and should die leaving a last will and testament then to such child or children of said Mary Elizabeth Boylan as he should in such will direct, and in case he should die without making such direction or without leaving such will, then to such child or children of the said Mary Elizabeth Boylan as he the said Dennis Gallagher should direct, and in case the said Dennis Gallagher should die without leaving such direction, then to all the children of the said Mary Elizabeth Boylan then surviving. A copy of said Declaration of Trust is annexed hereto.

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5. Following the creation of said trust of said Dennis Gallagher collected the rents and income

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Bill of Complaint.

of said property and applied the same to the maintenance of the said Bridget Agnes Daly until her death, which occurred about April 1st, 1904. Thereafter the premises in question were permitted to degenerate into ruin and eventually the structure erected thereon from which the said income had formerly been derived was demolished and the premises from thence hitherto have been unproductive of any income.

10
6. The said Dennis Gallagher departed this life October 14, 1918, not having sold the said property and leaving a last will and testament in and by which he devised and bequeathed his entire estate to his wife, Mary G. Gallagher, whom he also appointed as executrix of said will, which was duly probated before the Surrogate of Hudson County and is recorded in liber 108 of wills, page 481.

20
7. These complainants are uninformed as to whether prior to his death the said Dennis Gallagher was reimbursed for the sum of five hundred dollars (\$500) which in said Declaration of Trust he appears to have invested in said property; and they are likewise ignorant of whether at the time of his death he had in his hands any funds which were received by him in execution of said trust, and the defendant, Mary G. Gallagher, as executrix of the said Dennis Gallagher, deceased, has not rendered any accounting of funds which came into the hands of the said Dennis Gallagher as trustee aforesaid, and there has been no one duly appointed to administer the further trusts created by said deed.

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8. Since the death of the said Dennis Gallagher a controversy has arisen between the complainants and said John K. Daly as to the true mean-

Bill of Complaint.

ing and construction of the said Declaration of Trust, these complainants contending that the power of appointment given to the said John K. Daly was extinguished by the death of the said Dennis Gallagher and the said John K. Daly insisting that said power of appointment endures and is exerciseable by him during the balance of his lifetime. 10

9. The complainants are without remedy at law in the premises and therefore pray that the said John K. Daly and Mary G. Gallagher, the executrix of Dennis Gallagher, may without oath answer the allegations of this bill, that a new trustee may be appointed further to execute and discharge the trusts created by the said Declaration of Trust, that the true intent, meaning and construction of the same may be ascertained and declared in respect of whether the original power of appointment given to said John K. Daly is extinguished or still survives, that a writ of subpoena may issue to the said John K. Daly and Mary G. Gallagher requiring them and each of them to answer this bill of complaint and that the complainants may have such other and further relief as to the court may seem equitable and just. 20 30

RICHARD DOHERTY,

Solicitor of and of Counsel with Complainants.
(Will and Declaration of Trust are attached.)

A true copy.

THOMAS BARBER,
Clerk.

**Answer and Amended Counterclaim of
Defendant John K. Daly**

Filed March 12, 1925

IN CHANCERY OF NEW JERSEY

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Between

MARY AGNES RYAN, et al,
Complainants,

AND

JOHN K. DALY, et al,
Defendants.

} On Bill, Etc.

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The answer of the defendant, John K. Daly, and the counterclaim of John K. Daly against complainants and against defendant, Mary G. Gallagher, executrix of Dennis Gallagher, deceased, and also against said Mary G. Gallagher individually, Thomas Gallagher and Margaret Daly, Peter Ryan, Michael Rochford, Catharine Boylan and Alice Boylan, third parties.

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This defendant, John K. Daly, answering the bill of complaint, says that:

1. Paragraphs 1 and 2 are admitted.

2. Paragraph 3 is admitted except this defendant says that both executors named in said will qualified and acted.

3. Paragraph 4 is admitted.

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4. He admits that after the conveyance of said premises said Dennis Gallagher collected the rents and income of said property but denies that he applied the same or any part thereof to the maintenance of the said Bridget Agnes Daly.

*Answer and Amended Counterclaim of
Defendant John K. Daly*

5. Paragraph 6 is admitted.

6. Paragraph 8 is denied.

By way of counterclaim against complainants and defendant, Mary G. Gallagher, executrix of Dennis Gallagher, deceased, and also against said Mary S. Gallagher individually, Thomas Gal- 10
lagher, Margaret Daly, Peter Ryan, Michael Rochford, Catherine Boylan and Alice Boylan, third parties, the defendant, John K. Daly, says that:

1. On or about May 1, 1894, Bridget Daly de-
parted this life, seized of the premises described
in paragraph two of the bill of complaint, and
leaving a last will and testament which was duly 20
admitted to probate by the Surrogate of Hudson
County, New Jersey, whereby she did, among
other things, devise said lands and premises to
this defendant in fee simple.

2. Said Bridget Daly was, at the time of her
death, a widow.

3. In and by said last will and testament said
Bridget Daly further directed as follows:

“The money to which I have to my credit
in the Chambers Street Savings Bank, New 30
York City, amounting to about fourteen
hundred dollars, I give and bequeath to
my invalid daughter, Bridget Agnes Daly,
and I hereby appoint as guardian for the
said Bridget Agnes Daly, my friend Dennis
Gallagher.”

4. After the death of said Bridget Daly, said
Dennis Gallagher collected the moneys so on de- 40
posit with said savings bank, and on October 25,
1894, had in his hands the sum of thirteen hun-

*Answer and Amended Counterclaim of
Defendant John K. Daly*

dred dollars (\$1300) as the proceeds of said account, the moneys of and belonging to said Bridget Agnes Daly and held by him as guardian, under the terms of said will.

10 5. On October 25, 1894, this defendant, at the request of said Dennis Gallagher, conveyed to him, said Dennis Gallagher, said premises for the expressed consideration of eighteen hundred dollars (\$1800).

6. At the time of such conveyance the value of said premises was greatly in excess of eighteen hundred dollars (\$1800).

20 7. Said premises were so conveyed by this defendant to said Dennis Gallagher for the benefit of said Bridget Agnes Daly and for the purpose of providing and assuring her maintenance and support.

8. Said Dennis Gallagher purchased said premises with the said moneys of and belonging to said Bridget Agnes Daly, amounting to thirteen hundred dollars (\$1300) in his hands as such guardian and the sum of five hundred dollars (\$500) loaned and advanced by him for that purpose.

30 9. Said premises, although conveyed to said Dennis Gallagher, apparently in his own right, were actually intended to be and were conveyed to said Dennis Gallagher as trustee for said Bridget Agnes Daly and said Bridget Agnes Daly was the real owner of and entitled to said premises.

40 10. Said Bridget Agnes Daly was at the time of said conveyance mentally incompetent and insane and continued so to be until the time of her death.

11. After the conveyance of said premises by

*Answer and Amended Counterclaim of
Defendant John K. Daly*

this defendant to said Dennis Gallagher as hereinabove set forth, said Dennis Gallagher executed and caused to be recorded the pretended Declaration of Trust referred to in paragraph 4 of the Bill of Complaint.

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12. Such pretended Declaration of Trust was so executed and recorded without the knowledge or consent of this defendant and without the consent of said Bridget Agnes Daly.

13. Because of the matters and things hereinabove set forth, and because said premises were purchased by said Dennis Gallagher with moneys in his hands as guardian of said Bridget Agnes Daly, such incompetent, and for the benefit of said Bridget Agnes Daly, for the purpose of providing and assuring her maintenance and support, said Dennis Gallagher was without right or power to make or execute any such Declaration of Trust and said pretended Declaration of Trust is null and void.

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14. Said Bridget Agnes Daly did not at any time during her lifetime consent to the making of such Declaration of Trust and did not at any time make any election to claim any charge upon said premises for said moneys so in his hands as her guardian so used by him for the purchase of said premises.

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15. Prior to the death of said Dennis Gallagher, the said sum of Five Hundred (\$500) Dollars so advanced by him for the purchase of said premises and interest thereon, was repaid to said Dennis Gallagher.

16. Said Bridget Agnes Daly departed this life on July 31, 1904, intestate, unmarried and without issue and leaving no mother or father

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*Answer and Amended Counterclaim of
Defendant John K. Daly*

10 her surviving. Said Bridget Agnes Daly left her surviving, as her only heirs at law, this defendant, John K. Daly, her brother; Thomas J. Daly, a nephew, the only issue of James Daly, a deceased brother, the complainants, Mary A. Ryan, Irene Rochford, Thomas M. Boylan and Matthew J. Boylan, the only children of Elizabeth Boylan, a deceased sister, and upon the death of said Bridget Agnes Daly, title to said premises or the beneficial interest in and to said premises descended to and became vested in said above-named persons.

20 17. After the death of said Bridget Agnes Daly, this defendant and the other heirs and next of kin of said Bridget Agnes Daly, elected to claim said premises as owners thereof.

18. Said Thomas J. Daly departed this life on October 22, 1912, unmarried and without issue but leaving a last will and testament which was duly admitted to probate by the Surrogate of Hudson County on October 15, 1915, whereby he devised all of his estate of what kind so ever unto his mother, Margaret Daly.

30 19. Said Margaret Daly has since intermarried with and is now the wife of this defendant.

20. Said Dennis Gallagher departed this life on October 14, 1918, leaving a last will and testament which was proved before the Surrogate of Hudson County on October 25, 1918, whereby he first directed the payment of all his just debts and funeral expenses and secondly gave, devised and bequeathed all his estate to his wife, Mary G. Gallagher.

40 21. Said Dennis Gallagher died seized of the naked legal title to said premises in trust for this defendant, Margaret Daly, and complainants.

*Answer and Amended Counterclaim of
Defendant John K. Daly*

22. Said Mary G. Gallagher took no title or interest in or to said premises so held by said Dennis Gallagher in trust as aforesaid.

23. On the death of said Dennis Gallagher, the title to said premises so held by him as aforesaid, descended to and became vested in his son, Thomas Gallagher, the eldest son and heir at common law of said Dennis Gallagher, in trust for this defendant, Margaret Daly and complainants. 10

24. This defendant and defendant, Margaret Daly, are each entitled to a one-third part or share in and to said premises, and complainants are each entitled to a one-twelfth part or share in and to said premises.

25. Complainant, Mary Agnes Ryan, is married; her husband's name is Peter Ryan. 20

26. Complainant, Irene V. Rochford, is married; her husband's name is Michael Rochford.

27. Complainant, Thomas M. Boylan is married; his wife's name is Alice Boylan.

28. Complainant, Matthew J. Boylan, is married; his wife's name is Catherine Boylan.

29. This defendant and defendant, Margaret Daly, are husband and wife. 30

30. Defendant, Mary G. Gallagher, is a widow. This defendant therefore prays:

1. That complainants and defendant, Mary G. Gallagher, the executrix of the will of Dennis Gallagher, deceased, and said Mary G. Gallagher, individually, Margaret Daly, Peter Ryan, Michael Rochford, Catherine Boylan and Alice Boylan, third parties, may answer this amended counterclaim and each statement made herein.

2. That the Declaration of Trust made and 40

*Answer and Amended Counterclaim of
Defendant John K. Daly*

executed by Dennis Gallagher be decreed to be null and void.

10 3. That Mary G. Gallagher may be decreed to have no right, title, or interest in or to said premises.

4. That Thomas Gallagher, eldest son and heir at common law of Dennis Gallagher may be decreed to be seized in fee of said premises in trust for complainants, defendant, John K. Daly and Margaret Daly.

5. That the respective interests of complainants, defendant, John K. Daly and Margaret Daly, may be ascertained and determined.

20 6. That the said Thomas Gallagher be decreed to convey said premises to complainants, defendant, John K. Daly and Margaret Daly, according to their respective interests as so ascertained and determined.

30 7. That a fair partition and division of said lands may be made, if the same be practicable and consistent with the rights of all the persons interested therein; and in case such partition and division of said lands is impracticable, or cannot be made without prejudice to the owner of said lands, then that the said lands be sold and the proceeds divided between the complainants and the defendant, John K. Daly, according to their respective rights, shares and interests.

8. That a writ of subpoena may issue commanding third parties to answer this amended counterclaim and to abide by such decree as this Court may make in the premises.

40 WM. F. BURKE,
Solicitor of Defendant, John K. Daly.

Answer to Amended Counterclaim

Filed April 2, 1925

IN CHANCERY OF NEW JERSEY

Between

MARY AGNES RYAN, et als,

Complainants,

AND

JOHN K. DALY, et al,

Defendants.

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} On Bill, Etc.

The joint answer of Mary Agnes Ryan and Peter Ryan, her husband, Irene V. Rochford and Michael Rochford, her husband, Thomas M. Boylan and Alice Boylan, his wife, and Matthew J. Boylan and Catherine Boylan, his wife, to the amended counterclaim of the defendant, John K. Daly, sets forth:

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1. Paragraph 1 of the counterclaim is admitted.
2. Paragraph 2 of the counterclaim is admitted.
3. Paragraph 3 of the counterclaim is admitted.
4. Paragraph 4 of the counterclaim is admitted.
5. The allegation in paragraph 5 that Dennis Gallagher requested the conveyance is denied, and the remainder of the paragraph is admitted.
6. Paragraph 6 of the counterclaim is denied.
7. Paragraph 7 of the counterclaim is denied, except that it is admitted that the conveyance was made on the partial consideration that the same would afford a convenient, safe and profitable investment of the trust funds in the hands of Den-

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Answer to Amended Counterclaim

nis Gallagher to the extent that they were used in the purchase of the property.

8. Paragraph 8 of the counterclaim is admitted.

10 9. Paragraph 9 of the counterclaim is denied, except that it is admitted that it was the intent that the premises conveyed were to be held in trust for Bridget Agnes Daly to the extent that the trust funds were employed to acquire the same, and that the same were impressed with a trust in the favor of Bridget Agnes Daly to the amount of the trust funds so used.

10. Paragraph 10 of the counterclaim is admitted.

11. Paragraph 11 of the counterclaim is admitted.

20 12. The allegation of paragraph 12 that the Declaration of Trust was executed and recorded without the knowledge or consent of the defendant, John K. Daly, is denied; the allegation therein that it was executed and recorded without the consent of Bridget Agnes Daly is admitted, with the explanation that said Bridget Agnes Daly was then mentally incompetent and insane.

30 13. Paragraph 13 of the counterclaim, although wholly argumental, is denied.

14. Paragraph 14 of the counterclaim is admitted, with the explanation that at all times therein referred to Bridget Agnes Daly was insane and mentally incompetent.

15. Paragraph 15 of the counterclaim is admitted.

40 16. Paragraph 16 of the counterclaim is admitted, except as to the contention therein that title to the said premises, or the beneficial interest therein, descended to and became vested in the

Answer to Amended Counterclaim

persons named in said paragraph, which contention is denied.

17. Paragraph 17 of the counterclaim is denied.

18. Paragraph 18 of the counterclaim is neither admitted nor denied because of the lack of sufficient knowledge or information to form a belief as to the truth thereof. 10

19. Paragraph 19 of the counterclaim is admitted.

20. Paragraph 20 of the counterclaim is admitted.

21. So much of paragraph 21 as alleges that Dennis Gallagher died seized of the naked legal title to said premises in trust for the complainants is admitted; the allegation therein that the defendant, John K. Daly and Margaret Daly were also cestuis is denied. 20

22. Paragraph 22 of the counterclaim is admitted.

23. Paragraph 23 of the counterclaim is neither admitted nor denied because of the lack of sufficient knowledge or information upon which to form a belief as to the truth thereof, except that it is admitted that upon the death of Dennis Gallagher as trustee, the devolution of the title was according to law, and the premises thereafter were held for the purposes of a trust in favor of the complainants; it is denied that the defendant, John K. Daly and Margaret Daly were cestuis under said trust. 30

24. Paragraph 24 of the counterclaim is denied.

25. Paragraph 25 of the counterclaim is admitted.

26. Paragraph 26 of the counterclaim is admitted. 40

Answer to Amended Counterclaim

27. Paragraph 27 of the counterclaim is admitted.

28. Paragraph 28 of the counterclaim is admitted.

10 29. Paragraph 29 of the counterclaim is admitted.

RICHARD DOHERTY,

Solicitor of Complainants, and Peter Ryan, Michael Rochford, Alice Boylan, and Catherine Boylan, Defendants.

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**Answer and Counterclaim of Defendants
Mary G. Gallagher and Thomas Gallagher**

Filed May 4, 1925

IN CHANCERY OF NEW JERSEY

Between MARY AGNES RYAN, et al, <i>Complainants,</i> AND JOHN K. DALY, et al, <i>Defendants,</i>	}	10 On Bill, Etc.
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The answer of the defendants, MARY G. GALLAGHER and THOMAS GALLAGHER to the Bill of Complaint, and the Counterclaim of said MARY G. GALLAGHER and THOMAS GALLAGHER against the complainants and defendants.

These defendants, MARY G. GALLAGHER and THOMAS GALLAGHER, answering the Bill of Complaint, say that:

1. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraph 1.

2. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraph 2, except that it is admitted that Bridget Agnes Daly died on May 1, 1894, seized of the premises mentioned in the bill of complaint.

3. Paragraph 3 is admitted.

4. Paragraph 4 is admitted.

5. Defendants admit that following the crea-

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*Answer and Counterclaim of Defendants
Mary G. Gallagher and Thomas Gallagher*

10 tion of the trust, Dennis Gallagher turned over any rent or income from the premises received by him to the said Bridget Agnes Daly until her death. Defendants allege that the building erected on the premises described in the bill of complaint was old and dilapidated and did not yield any income after the death of the said Bridget Agnes Daly, and that the amount expended by the said Dennis Gallagher for the upkeep and carrying charges of said premises exceeded the income.

6. Paragraph 6 is admitted.

20 7. Neither Dennis Gallagher nor his sole legatee and devisee, the defendant, Mary G. Gallagher, were ever reimbursed for the sum of Five Hundred (\$500) Dollars, which, in accordance with the terms of the declaration of trust set forth in the bill of complaint, was to be secured as a mortgage, nor have the said Dennis Gallagher or Mary G. Gallagher received any interest on account of said loan, or any reimbursement for the amounts expended by the said Dennis Gallagher in the upkeep of the property. The defendant, Thomas Gallagher, as the eldest surviving son of Dennis Gallagher, is advised that he is the trustee of the property mentioned in the bill of complaint and the person authorized to administer the said trust, but said Thomas Gallagher has never acted as trustee, and is willing to renounce whatever claim or claims he may have as such Trustee.

30 8. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraph 8.

40 BY WAY OF COUNTERCLAIM against the complainants and the defendant, John K. Daly, defendants Thomas Gallagher and Mary G. Gallagher, individually and as executrix of Dennis Gallagher, deceased, say that:

*Answer and Counterclaim of Defendants
Mary G. Gallagher and Thomas Gallagher*

1. On or about the 25th day of October, 1894, Dennis Gallagher purchased from the defendant, John K. Daly, the premises mentioned in the bill of complaint for the consideration of Eighteen Hundred (\$1800) Dollars. Said premises were purchased by the said Dennis Gallagher as Trustee in accordance with a certain declaration of trust recorded in Liber 607 of Deeds, page 586, in the office of the Register of Hudson County, the objects of which trust are set forth in paragraph 4 of the bill of complaint. 10

2. Said Dennis Gallagher advanced on account of the purchase price of said premises the sum of Five Hundred (\$500) Dollars, which amount, as will appear by reference to the declaration of trust set forth in paragraph 4 of the bill, was a loan invested in said property by Dennis Gallagher by way of a second mortgage. 20

3. Said Dennis Gallagher was never repaid the said sum of Five Hundred (\$500) Dollars, nor any interest thereon.

4. Said Dennis Gallagher departed this life October 14th, 1918, not having conveyed the property mentioned in the bill of complaint, and leaving a last will and testament in and by which he devised and bequeathed his entire estate to the defendant, Mary G. Gallagher, who was also appointed executrix of his Will, which Will was duly admitted to probate before the Surrogate of Hudson County and recorded in Liber 108 of Wills, page 481. Said Mary G. Gallagher entered upon her duties as executrix of the estate of Dennis Gallagher, but has not received any moneys on account of the aforementioned advancement by Dennis Gallagher, either by way of interest or principal, and the full amount thereof, 30 40

*Answer and Counterclaim of Defendants
Mary G. Gallagher and Thomas Gallagher*

with interest from October 25th, 1894, is due and owing, together with other advancements made by the said Dennis Gallagher in his lifetime, amounting to the sum of One Thousand (\$1,000) Dollars, which have not been repaid, and which amount is a charge upon the land and premises mentioned in the bill of complaint.

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5. The title to the said premises mentioned in the bill of complaint stood in the name of the said Dennis Gallagher at the time of his death, subject to the trust agreement mentioned in the bill of complaint, and the title to said premises descended to and became vested in his son, Thomas Gallagher, one of the defendants herein and a party to this counter claim, as the eldest son and heir at common law of said Dennis Gallagher.

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These defendants, therefore, pray:

1. That the complainants, the defendants and Margaret Daly, Peter Ryan, Michael Rochford, Catherine Boylan and Alice Boylan, third parties, may answer this counterclaim, and each statement made herein.

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2. That the defendant, Mary G. Gallagher, may be decreed to have a lien on the premises mentioned in the bill of complaint for the sum of Five Hundred (\$500) Dollars, with interest from October 25th, 1894, in addition to the sum of One Thousand (\$1,000) Dollars, advanced by the said Dennis Gallagher during his lifetime for the upkeep of the premises mentioned in the bill of complaint.

3. That the said Thomas Gallagher may be relieved as trustee of said premises.

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CHARLES A. ROONEY,
*Solicitor for and of Counsel with
Defendants, Mary G. Gallagher
and Thomas Gallagher.*

**Answer of Defendants Mary G. Gallagher and
Thomas Gallagher to Amended Counterclaim
of Defendant John K. Daly**

Filed May 4, 1925

IN CHANCERY OF NEW JERSEY

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Between

MARY AGNES RYAN, et al,
Complainants,

AND

JOHN K. DALY, et al,
Defendants.

On Bill, Etc.

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The answer of defendants THOMAS GALLAGHER and MARY G. GALLAGHER, individually and as executrix of Dennis Gallagher, deceased.

These defendants, THOMAS GALLAGHER and MARY G. GALLAGHER, individually and as executrix of Dennis Gallagher, deceased, answering the amended counterclaim of the defendant, John K. Daly, say that:

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1. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraphs 1 to 4, both inclusive.

2. Defendants admit that on October 25, 1894, defendant, John K. Daly, conveyed to Dennis Gallagher the premises mentioned in the bill of complaint for the sum of eighteen hundred (\$1800) dollars, but deny that said conveyance was made at the request of said Dennis Gallagher.

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3. Paragraph 6 is denied.

*Answer of Defendants Mary G. Gallagher
and Thomas Gallagher to Amended Counter-
claim of Defendant John K. Daly*

10 4. Defendants admit that one of the objects of said conveyance to Dennis Gallagher was to provide for the support and maintenance of Bridget Agnes Daly, but state that the entire objects of said conveyance are more fully set forth in the declaration of trust mentioned in paragraph 4 of the bill of complaint.

5. Paragraph 8 is admitted.

6. Defendants deny the allegations of paragraph 9, except that they admit that the said Dennis Gallagher held the premises as trustee, pursuant to a declaration of trust, as mentioned in paragraph 4 of the bill of complaint.

20 7. Paragraph 10 is denied.

8. Defendants admit that Dennis Gallagher executed the declaration of trust referred to in paragraph 4 of the bill of complaint.

9. Paragraphs 12 to 15, both inclusive, are denied.

10. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraph 16.

30 11. Paragraph 17 is denied.

12. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraphs 18 and 19.

13. Paragraph 20 is admitted.

14. Paragraph 21 is denied, except that at the time of his death Dennis Gallagher was seized of the title to the premises mentioned in the bill of complaint, subject to the trust agreement referred to in paragraph 4 of the bill of complaint.

40 15. Paragraph 22 is denied, but defendants state that said Mary G. Gallagher as sole lega-

*Answer of Defendants Mary G. Gallagher
and Thomas Gallagher to Amended Counter-
claim of Defendant John K. Daly*

tee and devisee of Dennis Gallagher has acquired a lien on the aforementioned premises, in accordance with the declaration of trust set forth in paragraph 4 of the bill of complaint for the sum of five hundred (\$500) dollars, advanced by the said Dennis Gallagher, and also for other advancements made by the said Dennis Gallagher in his lifetime. 10

16. Defendants admit that the legal title to the premises mentioned in the bill of complaint became vested in the son of said Dennis Gallagher, to wit, Thomas Gallagher, one of the defendants herein, but state that said trust agreement is set forth in paragraph 4 of the bill of complaint and not as stated in this paragraph. 20

17. Paragraph 24 is denied.

18. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraphs 25 to 29, both inclusive.

19. Paragraph 30 is admitted.

CHARLES A. ROONEY,
*Solicitor for and of Counsel with
Defendants, Thomas Gallagher
and Mary G. Gallagher, Individu- 80
ally and as executrix of Dennis
Gallagher.*

**Answer of Margaret Daly to Amended
Counterclaim of Defendant John K. Daly**

Filed April 3, 1925

IN CHANCERY OF NEW JERSEY

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Between

MARY AGNES RYAN, et al,
Complainants,

AND

JOHN K. DALY, et al,
Defendants.

} On Bill, Etc.

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The answer of Margaret Daly, one of the third parties named in the Counterclaim filed in this cause by defendant, JOHN K. DALY, to the said counterclaim, says that:

This defendant, Margaret Daly answering the said Counterclaim, says that:

1. She admits all of the allegations of said counterclaim and joins in the prayer of said counterclaim.

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G. FRANK SHANLEY,
Solicitor of Margaret Daly.

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Replication

Filed May 7, 1925

IN CHANCERY OF NEW JERSEY

<p>Between</p> <p>MARY AGNES RYAN, IRENE V. ROCHFORD, THOMAS M. BOY- LAN, MATTHEW J. BOYLAN, et als,</p> <p style="text-align: center;"><i>Complainants,</i></p> <p style="text-align: center;">AND</p> <p>JOHN K. DALY, MARY G. GAL- LAGHER, Executrix, etc., et als,</p> <p style="text-align: center;"><i>Defendants.</i></p>	}	<p style="text-align: right;">10</p> <p style="text-align: right;">On Bill, Etc.</p> <p style="text-align: right;">20</p>
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The defendant, JOHN K. DALY, joins issue on the answers of the complainants and defendant, Mary G. Gallagher, and the third parties to the counterclaim of said defendant.

WM. F. BURKE,
Solicitor of Defendant, John K. Daly. 30

Minutes of Final Hearing
IN CHANCERY OF NEW JERSEY

	Between		
10	MARY AGNES RYAN, et als, <i>Complainants,</i>	}	On Bill, Etc.
	AND		
	JOHN K. DALY, et als, <i>Defendants.</i>		

Appearances:

20 *HON. RICHARD DOHERTY*, for Complainants.

WILLIAM F. BURKE, Esq. (Mr. Sheridan and Mr. Mulvaney of counsel) for John K. Daly and Margaret Daly.

CHAS. A. ROONEY, Esq., for Mary G. Gallagher, Executrix, and Thomas Gallagher.

30 Before *HON. JOHN GRIFFIN*, Vice Chancellor.
Chancery Chambers, Jersey City, N. J., October 22, 1915.

THE VICE CHANCELLOR: Now, what do you say the present situation of this case is?

40 **MR. DOHERTY:** In 1894 Bridget Daly owned three pieces of property. She had, at that time, three living children, and a further heir was the son of a deceased son. She made a will in which she disposed outright—oh, pardon me—of the four children, one of them was John K. Daly. She had three living children, John K. Daly,

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Mary Elizabeth Boylan, the wife of Matthew Boylan, and an infirm, mentally incompetent daughter, Bridget Agnes Daly (They called her "Bridget Agnes" to distinguish her from her mother). She had one other heir in the person of Thomas Daly, who was an infant son of a deceased son of her own. Now, in that situation, she made a will in which she disposed outright of two pieces of property in Union County with which we are not at all concerned. She devised to John K. Daly the property on the northwest corner of Henderson and Sixteenth Streets, which now lies at the mouth of the tunnel that is being erected and has attained some considerable value, although at that time it was not of much consequence. Besides that, she had, in a savings account in a New York bank, the sum of \$1300. She devised the Henderson Street property—

THE VICE CHANCELLOR: Well, she left the \$1300 to the incompetent daughter?

MR. DOHERTY: She directed her executor to hold the \$1300 for the maintenance of the unfortunate daughter.

MR. SHERIDAN: She bequeathed the \$1300 in the savings bank absolutely to Bridget Agnes, and appointed Dennis Gallagher, one of the executors, as guardian for her.

THE VICE CHANCELLOR: That is an absolute bequest?

MR. SHERIDAN: Yes, sir.

MR. DOHERTY: Yes, sir; but then

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10 Dennis Gallagher took possession of it, and held it as a trust fund, and then disposed of it afterwards in a manner that does relate to this case. You will observe that the devise to John K. Daly was accompanied by a desire that he should not sell the property for ten years, and that desire seems to have been respected by him, and he did nothing until 1904—

MR. SHERIDAN: Pardon me—he did convey it within the ten years; he conveyed it in October of the same year—October, 1894, was the conveyance to Gallagher.

20 MR. DOHERTY: 1894? Well, then, the expression of the testatrix was disregarded, and shortly after he conveyed the property to Dennis Gallagher, who was an executor. It may be inferred from the transaction that Dennis Gallagher preferred to have the \$1,300 invested securely in real estate than to continue it as a bank deposit. It may likewise be inferred that John K. Daly would rather have had the value of the property in money than the property itself. He valued it at \$1,800, and turned it over to Dennis Gallagher for the consideration of the \$1,300 trust fund which Dennis Gallagher had, and the balance of the purchase price, or the difference between the \$1,800 and the \$1,300 trust fund, was eked out by Dennis Gallagher himself supplying the \$500; and in that way the title was vested in Dennis Gallagher, and John K. Daly came into possession of the 30 \$1,300 trust fund and the \$500 that Dennis Gallagher advanced in order to give him the 40

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full purchase price. Now, actuated by the duties and requirements of the situation, Dennis Gallagher simultaneously executed a declaration of trust in which he set forth that he did not hold the property beneficially, but that he held it as security for the return of the \$1,300 trust fund, and for the return of his own \$500. I think, in the interest of accuracy, we had better read what are the objects of the trust as recited in the declaration. He says (reading from page 2 of the bill) that he holds them “for the following purposes, that is to say: (a) to secure the payment of \$1,300 invested in said property by way of mortgage by the said Dennis Gallagher, as executor aforesaid, and guardian of the said Bridget Agnes Daly; (b) to secure the payment of five hundred dollars invested in said property by Dennis Gallagher by way of second mortgage; (c) to apply the rents, issues and profits of said property, including the interest on said investment of \$1,300, and, after the deduction of interest, water rents and other necessary charges, to the support and maintenance of the said Bridget Agnes Daly during her lifetime; (d) to sell and convey the property, in the discretion of the said trustee, and out of the proceeds to retain the said \$1,300 for further use under the trust of the will of the said Bridget Daly, and to retain to his own use the sum of five hundred (\$500) dollars, and to hold the residue upon trusts hereby declared as to the equity of redemp-

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10 tion. (e) Upon the death of the said Bridget Agnes Daly to convey the property subject to the two investments, or if the same shall have been sold, to pay the net proceeds thereof over and above the said two investments, or assign the securities by which the same should be then represented, to such child or children of Mary Elizabeth Boylan, the sister, as the defendant, John K. Daly should by appointment under his hand, direct, or if he should make no such declaration and should die leaving a last will and testament, then to such child or children of said Mary Elizabeth Boylan, as he should in such will direct; and, in case he should die without making such direction or without leaving such will, then to such child or children of the said Mary Elizabeth Boylan, as the said Dennis Gallagher should direct, and in case the said Dennis Gallagher should die without leaving such direction, then, to all the children of the said Mary Elizabeth Boylan, then surviving." The beneficiary under the trust—that is, the insane daughter—died in 1904.

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THE VICE CHANCELLOR: The same year the mother died?

MR. SHERIDAN: No, ten years after.

MR. DOHERTY: I do not think any of us are provided with information as to just how that trust was discharged. This girl lived in the household of her sister, Mary Elizabeth Boylan. Anyhow, it seems that after her death in 1904, the whole transaction was abandoned by Dennis Gal-

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lagher, and John K. Daly forewent all interest in the property; it lapsed into dilapidation and then into ruin, and was finally vandalized, and removed piecemeal, and eventually there was no vestige at all of any improvement on the property. 10

THE VICE CHANCELLOR: When did Dennis Gallagher die?

MR. DOHERTY: Dennis Gallagher died in 1918. That was fourteen years after the death of his ward, and during that time the whole situation was in desuetude. John K. Daly, after the death of Bridget Agnes, the sick sister, refused to exercise this power of appointment. 20

THE VICE CHANCELLOR: The power of appointment was by will, wasn't it? 20

MR. DOHERTY: No, the power of appointment was in the declaration of trust of Dennis Gallagher—what is termed, "a naked power,"—whereas, Dennis Gallagher retained to himself a certain alternative collateral power.

THE VICE CHANCELLOR: Oh, yes (examining the declaration of trust). Of course, he didn't say that if he was living at the time of the death, then Dennis Gallagher would appoint. 30

MR. DOHERTY: No, by the terms of the donation, Dennis Gallagher couldn't make any appointment during the lifetime of Daly.

THE VICE CHANCELLOR: That is what I say. 40

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10 MR. DOHERTY: Yes, Daly, however, did not die, but Dennis Gallagher did die. In the filing of this bill we have due regard to the subsistence of this power and consider it as being an element in the case; and we pray that the court decree that that power was terminated or exhausted by the death of Dennis Gallagher, because, by its terms, obviously he was to be the last appointor; and John K. Daly having failed to exercise the power of appointment before the death of Mr. Gallagher his right to appoint then was ended.

20 THE VICE CHANCELLOR: I do not quite follow you on that. Here Mr. Daly is given a power of appointment; he could appoint either by deed or by will. Now, if he did not appoint by deed or by will, then Dennis Gallagher, if living, could appoint.

30 MR. DOHERTY: Yes; but Mr. Daly's power of appointment was to designate to whom Dennis Gallagher should deed the property, and, by fair implication, the power was to be exercised during the lifetime of Dennis Gallagher in order that Dennis Gallagher could accept the mandate and make the conveyance. Now, by the delay of twenty years, the abandonment of the right by Daly, and the death of Dennis Gallagher (who by the terms of the appointment was to reserve the right to make the appointment by his own will), we claim that that was exhausted. But, listen, please—
40 to our amazement, John K. Daly files an answer and counterclaim in which he sets up that the declaration of trust was fraudu-

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lent—that the donation of the power of appointment to him was fraudulent, and he repudiates all rights and responsibilities under that power. Now, I conceive that answer and that repudiation removes from our consideration now all thoughts of this power, because the answer plainly sets up that if he was required to exercise that power, the court will be compelling him to act as *particeps fraudis*, and it was a fraudulent power which he will not exercise. Now, that was the first suggestion I am glad to be able to make to the Court. 10

THE VICE CHANCELLOR: There may be something in that point, but not in the other point. 20

MR. DOHERTY: Be that as it may, John K. Daly repudiates the power of appointment.

MR. SHERIDAN: But that is not so. We do not admit that we repudiate it, or that the thing was fraudulent, either.

MR. DOHERTY: Let his Honor read the paper in which it was stated.

THE VICE CHANCELLOR: It says that the declaration was “so executed and recorded without the knowledge and consent of this defendant, or without the consent of Bridget Agnes Daly.” Well, of course, Bridget Agnes was insane; Bridget Agnes Daly was a daughter of the deceased testatrix? 30

MR. DOHERTY: Yes, sir. He asks in his prayer that the declaration of trust made and executed by Dennis Gallagher be decreed to be null and void. 40

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THE VICE CHANCELLOR: Then what?

10 MR. DOHERTY: Well, under that, he cannot contend that he now has any power of appointment that was created by that trust that he repudiates and denounces.

THE VICE CHANCELLOR: Even if that be true, and there is no declaration of trust, where does this property go?

20 MR. DOHERTY: The answer of John K. Daly is that the property was purchased with trust funds of Bridget Agnes Daly, and that, therefore, there was a trust as of the entire property, resulting in her favor; and that she, having died intestate, there should be a decree that the property now belongs to her heirs, being, first, himself—

THE VICE CHANCELLOR: That, of course, would be subject to the \$1,300 and the \$500?

MR. DOHERTY: Subject to the \$1,300 and the \$500.

MR. SHERIDAN: That \$1,300 goes to the estate, anyhow—it goes to the heirs.

30 THE VICE CHANCELLOR: Didn't she marry?

40 MR. DOHERTY: She was unmarried; and there would be an equal distribution under the statute of distribution. Now, I think we are focussing the issue in this case: The question is whether under that declaration of trust, if it is to be upheld, the property should not now, in equity, be decreed to belong to the children of Mary Elizabeth Boylan, because they were in the class to whom the equity was to

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eventually go under the declaration of trust.

THE VICE CHANCELLOR: Suppose the declaration of trust was not there, where would the property go?

MR. DOHERTY: Why, if Dennis Gallagher held this title in his own name, without any announcement of the trust, I suppose the best we could claim now is that we might have a partial trust declared so far as the \$1,300 is concerned. 10

THE VICE CHANCELLOR: Well, but unless this declaration of trust stands, has not Dennis Gallagher the estate, unless you can prove that he bought the property under some trust? 20

MR. DOHERTY: Yes, sir—well, I think the facts show the trust.

THE VICE CHANCELLOR: In other words, eliminating the trust agreement—the declaration of trust—would not the property go to Dennis Gallagher?

MR. DOHERTY: There was a deed to Dennis Gallagher, absolute on its face, but the declaration of trust signed by Dennis Gallagher and his wife was contemporaneous. So we are— 30

THE VICE CHANCELLOR: If there was no declaration of trust, then the record would show that Dennis Gallagher was the owner?

MR. DOHERTY: Yes.

THE VICE CHANCELLOR: Now, a declaration of trust appears, and that declaration of trust, John K. Daly says was void, as it was made without his con- 40

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sent or that of the cestui-que trust. Well, that being so, what is there on the face of the deeds to show that John K. Daly can make that assertion?

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MR. DOHERTY: I made a motion to strike out his answer on the ground of uncertainty in that respect, and Vice Chancellor Fielder did strike out the answer and no new answer was filed; it was still uncertain and I gave notice of another motion to strike it out, for the same uncertainty, but the Vice Chancellor thought that it would be better to let the matter rest until now; and I am now ready to contend that the answer is insufficient; that there are no facts set up to impugn this declaration of trust.

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THE VICE CHANCELLOR: This case, then, turns on two points—is the declaration of trust valid; and if it is not, then is the property of Dennis Gallagher, or his estate subject to some other trust by which he took title to the property? If, on the other hand, the declaration of trust is valid, why then, it is the declaration of trust that is being construed to determine where the property should go.

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MR. DOHERTY: Yes; and the Estate of Dennis Gallagher is ready to make a disclaimer that they have no interest at all in this matter, and are willing to place the matter at the complete disposition of the Court. So that leaves us to consider first whether the declaration of trust was valid; and, secondly, the point I have already suggested.

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THE VICE CHANCELLOR: Well, if it was invalid, there must be some evidence to show that he had no authority to make the declaration of trust.

MR. DOHERTY: The admissions in the answer are that the property owned by John K. Daly was sold by him for \$1800 and that he got the \$1800. They then came along with the contention that, of that \$1800 he did receive, \$1300 of it was part of the trust funds, and that—

THE VICE CHANCELLOR: Well, he declares he owns the property in trust for the \$1300 investment, and \$500 coming to him under second mortgage.

MR. DOHERTY: Yes; then the rest of the trust relates to the residue of the property, which is called the equity of redemption; and, as to that third part, provision is made as to John K. Daly appointing what children of Mary Boylan should get the property, and in the event of Dennis Gallagher dying without such appointment being made, then it would go to all of the children.

THE VICE CHANCELLOR: I do not read it that way. I think the purpose is that John K. Daly may appoint during his lifetime, and that if he does not appoint during his lifetime, he may appoint by his last will. Now, that is given him before the right to appoint by Gallagher can be exercised, but in the event of no appointment being made, at the death of Daly by his last will and testament, in his lifetime, then the right accrues to Dennis Gallagher,

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and Dennis Gallagher, having died without appointment, and John K. Daly being still living, the power, it seems to me, would continue in John K. Daly.

10 MR. DOHERTY: Yes, but who would take the mandate—who would give the deed? Dennis Gallagher, by his own declaration of trust was to give the deed himself.

THE VICE CHANCELLOR: Yes, I understand, but I do not understand that the power of appointment, unless expressly stated, can pass to the next of kin and heirs at law; it is a personal power.

20 MR. SHERIDAN: That power still exists to the death of John K. Daly. Dennis Gallagher having died, then whoever succeeded to the trust as the common law heir of Dennis Gallagher would have to comply with the power exercised by Daly.

THE VICE CHANCELLOR: Where do you get the idea that it is not personal to the donee of the power?

30 MR. SHERIDAN: I say that is right; it is personal to John K. Daly.

THE VICE CHANCELLOR: It is as to Dennis Gallagher, too. After he died, then it passed to the other person.

MR. SHERIDAN: I do not see that it can be exercised by anybody else but the donee, and the donee was Daly, who is still alive.

40 THE VICE CHANCELLOR: Yes; and Gallagher being dead, the power to be exercised on that part of the trust is at an end.

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MR. DOHERTY: Yes, sir, but it is a function of the highest trust and confidence, as your honor suggests, and, in this particular case it is a power more of exclusion than of designation, because Dennis Gallagher has provided the class in whose favor the power should be exercised, leaving it to John K. Daly to select whom should be left out, rather than whom should be included. Now, Daly coming along and saying that that donation was fraudulent, a situation is created that is so incongruous that it appears to me that it would be monstrous on the part of the Court to say to Daly, "You still have the right to exercise the power—that power which you say is of fraudulent origin—that power, the instrument creating which you say is null and void." Now, is the Court to say to him, "It is not null and void; and you go on and still exercise this sacred trust"? I think a situation is created in which the Court—

THE VICE CHANCELLOR: He may, in time, exercise the power.

MR. DOHERTY: If he does this property stagnates, because there is no mandatory power in any Court to compel him to do it.

THE VICE CHANCELLOR: Do you think if the Boylans take, under the *cy pres* doctrine, that they all take?

MR. DOHERTY: No; I think they take more by the maxim that "equality is equity," because the language of the trust

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is that in case of any failure or dereliction in the exercise of the power, when Dennis Gallagher was dead with the power being unexercised, then all of the children of Mary Elizabeth Boylan should take.

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THE VICE CHANCELLOR: Is not the only question involved, then, as to the validity of the power; and, in case Daly refused to exercise the power, all of the children of Mary Elizabeth Boylan should take?

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MR. DOHERTY: Well, as to that power, I say that is out of the case, because Daly has repudiated; and if it is out of the case, the only question involved is the validity of the trust—that is the only question.

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THE VICE CHANCELLOR: He might change his mind before he dies. I will hear someone else as to whether the issue to be tried here is not, first, on the validity of the power. If the power is invalid, then who takes? If the power is valid, and the donee of the power refuses to exercise it, if it does not go to the class that he is to select, is not that all there is to the case?

MR. DOHERTY: Yes, sir. We contend that the power is exhausted.

THE VICE CHANCELLOR: What have you to say, Mr. Sheridan?

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MR. SHERIDAN: I say this, if the Court please, that there is no question on the pleadings that Dennis Gallagher had, in October, 1894, \$1300 of and belonging to Bridget Agnes Daly, the incompetent, as her guardian; and I say that it is ad-

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mitted in the pleadings that he took that \$1300, added \$500 of his own, and bought this property for her benefit. I think that is really conceded. Now, then, I say this—that it is a matter of law that where a guardian or trustee converts personal property into real and takes title in his own name, the property immediately is impressed with a trust in favor of the ward—in this case Bridget Agnes Daly, and that she has an election to do one of two things—either to—

THE VICE CHANCELLOR: One moment: It is in the third paragraph where she gives and bequeaths to her daughter, Bridget Agnes Daly, a sum amounting to about \$1400, in the Chambers Street Savings Bank, New York City, and appoints as her guardian Dennis Gallagher. Now, as I take the drift of your remarks, it points to the idea that when he used the \$1300 to buy this property, the property became vested in him as trustee of Bridget Agnes Daly, subject to this \$500 claim.

MR. SHERIDAN: And that she had the right to have the moneys impressed on the property, or to elect to take the property subject to a charge in his favor for the money which he invested. I do not think there can be any question about that.

MR. DOHERTY: I think that is fallacious.

MR. SHERIDAN: The Court (citing *Bohle vs. Hasselbroch*, 64 Eq. 334) laid down that rule—that the cestui-que-trust

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10 has the right to elect. Now, I say that Bridget Agnes Daly, immediately upon the conveyance to him, had the right to elect whether she would take the whole property, subject to a charge for the money which he invested, or a right to elect to have her moneys impressed as a charge on the lands; and that, in taking the property in his own name, under these conditions, he took it in trust.

THE VICE CHANCELLOR: It is admitted that the whole purchase price of this property was the \$1300 trust fund?

20 MR. DOHERTY: No, sir; the whole purchase price was \$1800, made up of the \$1300 and the \$500 that Dennis Gallagher himself contributed; and the defect in this contention as to a resulting trust—

THE VICE CHANCELLOR: Well, I want to get it right—the \$1300 belonged to Mary Elizabeth Boylan?

MR. SHERIDAN: No; belonged to Bridget Agnes Daly, the incompetent.

30 THE VICE CHANCELLOR: Your idea is that Dennis Gallagher, for Bridget Agnes, used \$1300 of her money and \$500 of his own money, thus mingling the trust fund with his own moneys, and claimed a second mortgage of \$500 on the property and a first mortgage of \$1300 for the trust?

MR. SHERIDAN: I don't think it makes any difference whether he called it a "mortgage" or not. There was no mortgage in fact made.

40 THE VICE CHANCELLOR: Just a distribution of the purchase price?

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MR. SHERIDAN: It was just a distribution.

THE VICE CHANCELLOR: I think I have got the drift of it.

MR. DOHERTY: Except that he says that it was invested on mortgage, and he estops himself as to that. 10

THE VICE CHANCELLOR: The question is whether a trustee can do that.

MR. MULVANEY: That is our case—our contention is that a trust resulted to Bridget Agnes Daly, and the trust declaration is an admission that that is so; and we say that the attempted declaration in favor of others than Bridget Agnes Daly was an unwarranted attempt to divert the trust on the part of Mr. Gallagher. 20

THE VICE CHANCELLOR: In other words, she had an election either to take the money, or take the land?

MR. MULVANEY: Yes, sir; and that there was no legal power of nomination that would be conferred by Mr. Gallagher in that declaration of trust, even though John K. Daly consented to it, and that brings us under the case that Mr. Sheridan has pointed out to the effect that upon the death of Bridget Agnes Daly the title of that property was in her. She having died intestate, without having made an election, upon her death intestate, it went to her right heirs rather than to the persons who might or might not be designated by Mr. Daly or Mr. Gallagher. 30

THE VICE CHANCELLOR: She had no children? 40

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MR. MULVANEY: No.

THE VICE CHANCELLOR: No children, at any time, born alive?

MR. SHERIDAN: No, sir; she was not married.

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THE VICE CHANCELLOR: Then John K. Daly gets no interest whatever?

MR. SHERIDAN: Yes, sir; he is her brother.

THE VICE CHANCELLOR: Well, he only comes in as one of her heirs?

MR. SHERIDAN: Yes, sir; that is all that he claims.

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MR. DOHERTY: Our contention is that Dennis Gallagher was the guardian; he was allowed (and it was commendable on his part) to invest the \$1300 in the property. He did invest it. He states in his declaration that it is an investment by way of mortgage. He might have been more clear if he had taken back a mortgage, but he did not do it. He gave to his ward all the security that a mortgage would have afforded by stating that her estate had a lien upon the property.

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THE VICE CHANCELLOR: One moment: You say he was given the power to invest in this property—where is there anything as to that in the will? It is not in the third paragraph.

MR. DOHERTY: Yes, but this \$1300 could have been properly disposed of by him to produce an income. He was not to be commended for just using up the *corpus* of it.

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THE VICE CHANCELLOR: I know; but there is nothing in here which directly authorizes the investment of the money in this fashion. The statute fixes how it should be invested. Now, he appears to have done it this way by this declaration of trust. I have the drift of the case. You may proceed. 10

MR. MULVANEY: On that we make the additional point that the investment of this money in land was an unauthorized investment. He had no power to make such investment under the statute. It being unlawful, that fact is a further fact, supported by the cases, that even though it were unlawful the ward had the right to affirm it if to her benefit, and disallow it if to her harm; and if she did neither, the court would make the selection, or the election. 20

THE VICE CHANCELLOR: When did this incompetent die?

MR. SHERIDAN: In 1904.

THE VICE CHANCELLOR: Then nothing has been done in this matter up to the present time—for twenty-one years; how does the doctrine of laches apply? 30

MR. SHERIDAN: Well, the doctrine of laches has not been set up, if the Court please, and the executor, the devisee under his will, and his eldest son, the common-law heir, admit that the property was held in trust. Of course they admit it was held in trust under the terms of this trust agreement. But Mr. Rooney is here for 40

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them now to disclaim any interest except as trustee.

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MR. ROONEY: May I just explain my position in this matter, if the Court please: The Gallaghers are not in a position—in fact, I do not think anyone is in a position—to show now the amount of money received by Dennis Gallagher under this trust agreement—or whether or not the \$500 which he mentioned in his declaration of trust was ever paid to him; we don't know that; nobody seems to know it. Mr. Gallagher has been dead a number of years, and no one that was familiar with his business knows what happened to that trust agreement.

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THE VICE CHANCELLOR: It is admitted, though, that the property cost \$1800?

MR. ROONEY: Yes, sir.

THE VICE CHANCELLOR: And that the incompetent only had \$1300?

MR. ROONEY: That is so.

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THE VICE CHANCELLOR: So it must be assumed that his \$500 went into it.

MR. SHERIDAN: We say that it went into it, but we contend that it was paid back.

MR. ROONEY: Of course we don't know about that.

THE VICE CHANCELLOR: He may have to prove how much is due upon his claim.

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MR. ROONEY: We are perfectly willing to leave it to the Court, and I will take

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Mr. Sheridan's word if he thinks that the amount that some accounting might show would be equal to our \$500 was paid, I would be perfectly willing to withdraw our counterclaim, as far as that \$500 goes.

MR. SHERIDAN: I have the receipts from the real estate agents who collected the rents. Are you willing to have them offered in evidence, and waive all right, of course, to any accounting? The only effect of these bills would be to show that Dennis Gallagher received enough money in his lifetime to repay him the \$500 and interest. 10

THE VICE CHANCELLOR: What about the support? 20

MR. SHERIDAN: I think we can show that in another way.

THE VICE CHANCELLOR (To Mr. Rooney): Do you want to waive that?

MR. ROONEY: We are perfectly willing to waive that.

THE VICE CHANCELLOR: And you, Mr. Sheridan, waive any claim against the estate of Dennis Gallagher? 30

MR. SHERIDAN: Yes, sir; and I think Judge Doherty does, too.

MR. ROONEY: That is, against Mary Gallagher, defendant, and the executor, and also against Thomas Gallagher, the eldest son. Of course, under this trust agreement, Thomas Gallagher is really a defendant who should now come into this court and say he was willing to abide by this. Under the old rule of primogeniture he steps into his father's trusteeship. 40

Minutes of Final Hearing

THE VICE CHANCELLOR: The trusteeship is only valuable now as to determining the power of appointment.

10

MR. ROONEY: We are willing to abide by any decree the Court makes; and, in fact, your Honor, I do not see, in the way the thing shapes up now, any further interest the Gallaghers have in it, unless, possibly, by some understanding, or it looks as though both sides are trying to knock out this trust agreement, and if they do, then Gallagher is the owner of this estate of record. It looks to me as if that was the way it was drifting.

20

THE VICE CHANCELLOR: Go on with your testimony.

MR. DOHERTY: I don't know what testimony we can offer; the admissions are so elaborate here. We have served notice to produce the original documents—the deed from Daly to Gallagher—

THE VICE CHANCELLOR: There are no infants in the case?

30

MR. SHERIDAN: No, sir. There is only one thing I can see that we might take testimony on, and that is as to the knowledge of John K. Daly as to the declaration of trust. Everything else is admitted in the case.

THE VICE CHANCELLOR: Well, I don't know; I do not propose to instruct counsel as to what they should do.

40

MR. DOHERTY: I think your admissions and comment here supply us with a *prima facie* case. It is admitted that the complainants are the only children of Mary Elizabeth Boylan.

John K. Daly—Direct

MR. SHERIDAN: We admit that. And you set up the making of the deed from Daly to Gallagher?

MR. DOHERTY: Yes; and the simultaneous making of the declaration of trust; the failure of Daly to appoint, and the death of Gallagher without making an appointment. 10

THE VICE CHANCELLOR: Well, suppose you get this transcript from Mr. Black. He can write this up and send you gentlemen copies, and then you can make a stipulation, and state your respective claims based on the pleadings and the papers and declaration of trust and the will. 20

MR. SHERIDAN: As Mr. Daly is here, I think I should put him on the stand to testify that he did not know anything about the declaration of trust. 20

THE VICE CHANCELLOR: All right.

JOHN K. DALY, sworn.

Direct Examination by Mr. Sheridan:

Q. Mr. Daly, you are one of the defendants in this case? A. Yes, sir. 30

Q. And you reside where? A. Now?

Q. Yes. A. 76 Wade Street, Jersey City.

Q. And you are a son of Bridget Daly, who died in 1894, leaving this will in question? A. Yes, sir.

Q. Bridget Agnes Daly was a sister? A. A sister.

Q. Now, you were acquainted with Mr. Dennis Gallagher at that time? 9. I was. 40

John K. Daly—Direct

Q. How did you know him? 9. I was in his employ.

Q. In 1894? A. In '94.

10 Q. The bill in this cause, Mr. Daly, sets up a declaration of trust made by Dennis J. Gallagher to you, on October 26th, 1894, the same time that the deed from you to him was made; do you recall being in the attorneys, Collins & Corbin's office, at that time? A. Yes.

Q. And you executed this deed? A. A deed for the property, yes.

Q. To Mr. Gallagher? A. To Mr. Gallagher.

Q. And it was acknowledged there, was it? A. Yes.

20 Q. At that time was anything said about, or did you see any declaration of trust, or any other paper made by Dennis Gallagher to you?

MR. DOHERTY: We object to any incompetent testimony under the statute. This is an action in a representative capacity, and Mr. Gallagher's executrix is a party to this suit, and this gentleman is a party to the suit also; and we do not waive any right we have to object to the testimony as to transactions with the deceased testate.

30

THE VICE CHANCELLOR: Is that a *transaction*—to say that he never saw or heard of a declaration of trust?

MR. DOHERTY: He says he was in the office of Collins & Corbin, and is now asked to say what transpired there.

(The question was repeated at the direction of the court.)

40

MR. DOHERTY: We submit that that

John K. Daly—Direct

relates to a transaction by Dennis Gallagher.

MR. SHERIDAN: That is a denial of any transaction; that is perfectly proper.

THE VICE CHANCELLOR: Cannot he ask him if he ever saw a declaration of trust from Dennis Gallagher to him? 10

MR. DOHERTY: He cannot, if the question seeks to elicit information as to a transaction in which Dennis Gallagher participated.

THE VICE CHANCELLOR: Well, he can ask the question the Court suggested.

Q. Did you ever see or hear of a declaration of trust made by Dennis Gallagher to you affecting this property? 20

MR. DOHERTY: Same objection.

THE VICE CHANCELLOR: Objection overruled.

A. At what time?

Q. At the same time? A. Not for a year or two afterwards He told me about it.

Q. Who told you about it? A. Mr. Gallagher 30

MR. DOHERTY: I move to strike that out, under my main objection.

THE VICE CHANCELLOR: That does not hurt you. I will strike out the last question and answer; that is a transaction with the deceased, or conversation with the deceased.

Q. Was there anything said to you by anyone, prior to the making of the deed, respecting a trust or declaration of trust by Gallagher? A. No. 40

John K. Daly—Direct

Q. Did you ever have a declaration of trust?

A. Never saw it.

10 THE VICE CHANCELLOR (To Mr. Sheridan): You do not represent Dennis Gallagher?

MR. SHERIDAN: No, sir.

MR. DOHERTY: Mr. Rooney represents him.

THE VICE CHANCELLOR: (To Mr. Rooney): You did not object to the question, did you? You have no objection?

MR. ROONEY: No, I have no objection.

20 Q. Then, about a year or two afterwards, when you first heard about this declaration of trust, from whom did you learn that?

MR. DOHERTY: One moment; the Court struck out that testimony.

THE VICE CHANCELLOR: I will admit it for the present, for I don't know whether the question has been raised as to whether anyone of Dennis Gallagher's Estate can object to it.

30 MR. DOHERTY: They have not been dismissed as parties.

THE VICE CHANCELLOR: The question is whether *you* can take advantage of it, or whether the only one that can take advantage of it is Dennis Gallagher.

MR. ROONEY: For the purpose of keeping the record clear, I will make an objection to any transaction dealing with the decedent.

40 THE VICE CHANCELLOR: Then I will sustain the objection.

John K. Daly—Direct

MR. SHERIDAN: I just want to have the questions asked and have them objected to.

Q. Now, did Dennis Gallagher tell you what was in the declaration of trust? 10

MR. ROONEY: Objected to—I make the same objection to all this line of testimony.

THE VICE CHANCELLOR: I will sustain the objection.

Q. And what did you tell Mr. Gallagher then?

MR. ROONEY: I am objecting to this whole line of testimony, for the purpose of having the record proper. 20

THE VICE CHANCELLOR: I will sustain the objection.

Q. Mr. Daly, when did Bridget Agnes Daly die?
A. In 1904.

Q. And at the time she died with whom was she living? A. Her sister, Mrs. Boylan, up until her (Mrs. Boylan's) death in 1899.

Q. And after 1899 she lived with whom?
A. Me. 30

MR. SHERIDAN (To Mr. Rooney): You have withdrawn your claim for the \$500?

MR. ROONEY: Oh, yes.

THE VICE CHANCELLOR: Note that the Estate of the defendant Gallagher withdraws its claim for \$500; and the other parties to this suit waive any accounting by him, and consent that he may be dismissed.

MR. ROONEY: And the same for Mary Gallagher, who, I believe is also a party, individually, and for Thomas Gallagher, the 40

John K. Daly—Cross

eldest son of Dennis Gallagher, who may be his representative as trustee.

MR. SHERIDAN: Yes; we waive any accounting as against them.

10 MR. ROONEY: And you, too, Mr. Doherty—any claim against any of the Gallaghers you waive; and any claim of the Gallaghers is waived.

MR. SHERIDAN: Except, of course, against Thomas Gallagher as succeeding trustee, to convey the property to whomsoever the Court may decree.

MR. ROONEY: Of course; we are in court for that purpose—to follow the direction of the Court.

20 Q. You had a brother James, didn't you?

A. Yes.

Q. And he died when? A. 1888, I believe.

Q. That was before Bridget died? A. Yes—1888.

Q. And the son, Thomas, died when? A. About twelve or sixteen years ago.

Q. And he did not have any brothers or sisters, did he? A. No, sir.

30 Q. And the mother was Margaret Daly, who is now your wife? A. Yes.

Q. And when Thomas died, he devised all his estate to his mother? A. To his mother, yes.

Q. And you only have one child, that is a son, James—is that right? A. James, yes.

Cross-Examination by Mr. Doherty:

40 Q. On the occasion when you were in the office of Collins & Corbin, you received the purchase price of the property? A. Yes, sir.

John K. Daly—Cross

Q. \$1,800? A. Yes.

Q. That was the full purchase price? A. The full purchase price.

THE VICE CHANCELLOR: Aren't you opening up this question of a transaction with the deceased? 10

MR. DOHERTY: I have not asked him from whom he received it.

THE VICE CHANCELLOR: There was only one person who could pay it, and that was Gallagher.

MR. DOHERTY: Perhaps, it is not a necessary line of examination because he admitted in his answer that he got the \$1,800. I withdraw that line of examination. 20

Q. You have never exercised the power of appointment that was given to you by this trust deed, did you? A. No, sir.

Q. Did you intend ever to do it?

MR. SHERIDAN: I object. I do not see how it is material whether he intends to, or not; that cannot bind him. Suppose he says, "No, I do not," he may change his intention tomorrow. 30

MR. DOHERTY: A court of equity may always inquire into the good faith of the donee of a power, and it certainly has the right to invalidate the power if there is any appearance of bad faith in its exercise. I want to go on and show that this gentleman regards this donation as being an unjust one, and that he has no intention ever to exercise it, and upon that, predicate a 40

John K. Daly—Cross

request that the power be decreed to be exhausted or terminated.

10

THE VICE CHANCELLOR: I will let you ask the question, but I do not see how the trustee has the right, at the present time, to say that he will never perform the trust, especially so when no trustee can now be appointed in his stead to exercise that power. You may ask him; but the time to exercise that power is any time between now and his death, either by appointment, by deed, or appointment, by will.

20

Q. Will you answer that question, Mr. Daly—do you ever intend to exercise that power? A. I probably will, but I am under the opinion that the deed of trust was disinheriting Thomas Daly.

Q. Mr. Daly, is it not your personal understanding, that you, yourself, have a substantial interest in this property, and that your wife has a substantial interest in the property? A. I have a financial interest because I bought it at a Martin Act sale.

30

Q. You were also a brother of Bridget Agnes? A. Yes.

Q. And you claim now that you are entitled to one-third of the property for yourself, as her heir, don't you? A. The way I think is that the property is all mine, through the Martin Act sale.

Q. And for that reason you are now resolved never to exercise that power? A. I don't say that.

40

Q. Well, can you inform the Court as to whether you have now any disposition to give to the children of Mary Elizabeth Boylan, or any of those children, property that you claim as your

John K. Daly—Cross

own property? A. I offered to make a settlement with them, and they wouldn't have it.

Q. Well, I want you to tell the Court—

THE VICE CHANCELLOR: Don't you see this point—if this power is held valid he may exercise it, but until it is held to be valid I do not imagine that he is going to exercise it. 10

MR. DOHERTY: Still, where the power of sale is repudiated, or where the situation of the party is such that he cannot exercise the power of sale, such as the status of the donee, who claims that he owns the property is—

THE VICE CHANCELLOR: Where do you claim any authority for that? 20

MR. DOHERTY: In a casual survey that I made of the law of powers, I found that the Court may decree the power to be terminated, may decree it to be exhausted, or may decree it to be impossible of performance. I would be glad to send you them.

THE VICE CHANCELLOR: You may go ahead and ask your question. I do not quite follow it, however. 30

MR. SHERIDAN: My objection is that the witness has already answered it, and shows that he has not repudiated the power.

MR. DOHERTY: The whole line of this examination shows that this gentleman repudiates the power. That is all.

THE VICE CHANCELLOR: You may go on. 40

John K. Daly—Cross

Q. When did you first learn, Mr. Daly, that you had this power vested in you? A. What power?

10 Q. The power to designate to what children of your sister, Mary Elizabeth, the property should go? A. When Gallagher told me about the deed of trust.

THE VICE CHANCELLOR (To Mr. Doherty): Well, now, you have opened the door, haven't you?

MR. DOHERTY: No; not opened the door by putting on a representative of my own. Of course, if the other side objects I will be content to have the latter part of the answer struck out.

20 THE VICE CHANCELLOR: You are asking him when he first learned that the exercise of this power was given to him; that opens up the thing, because if he states when he learned it, I think the other side would have the right to ask him what he told him. My impression now as to the law of the exclusion of testimony, is that where death seals the lips of the other party, to open up any part of a transaction with the deceased is to open up the whole of the transaction.

30 MR. DOHERTY: It says, where you put on the representative himself, testifying in his own behalf, and he testifies to a transaction—

40 THE VICE CHANCELLOR: You are not dealing with that; you are examining this witness, who is a party, as to a transaction with the deceased. Now if you open the door, for that testimony, I think, under

John K. Daly—Cross

the authorities, the other side have a right to go into it.

MR. DOHERTY: The trouble is by this man's answer; I asked him merely when he learned it.

(The last answer was repeated.)

10

MR. DOHERTY: I move to strike out that answer as unresponsive, as I only asked the date when he first learned that he was the recipient of that power.

A. The date?

Q. Yes, what was the date when you first heard it? A. It was about a year after the declaration was made.

Q. You mean in 1895—around that time? A. Well, around that time.

20

THE VICE CHANCELLOR: I will take into consideration the question of striking out that answer, as not being responsive to the question.

Q. You were aware of the fact when Bridget Agnes Daly died—you knew that she had died, didn't you? A. I knew that she died, yes.

Q. And since her death you haven't done anything in the way of exercising this power that was vested in you? A. We tried to settle it—

30

Q. Just say yes or no—you have done nothing at all to exercise the power since her death? A. Oh, yes.

Q. What have you done? A. Why, you have been in the business and Charlie Egan has tried to settle it, and a half a dozen other lawyers.

By the Vice Chancellor:

Q. But you never made any deed or paper

40

John K. Daly—Cross

designating to whom this property should go?

A. No.

By Mr. Doherty:

10 Q. Now, I would like to ask you why you didn't?

MR. SHERIDAN: I object to it. I do not see how that is material why he did not. I do not quite understand the theory of it. Counsel for complainant has predicated his right to this examination upon the theory that this man has repudiated the power, and he says he has not exercised it.

20 THE VICE CHANCELLOR: I am going to let the evidence in, and you can point out later what is irregular.

A. Because I thought the deed of trust was disinheriting a nephew of the deceased.

Q. Do you still think so? A. I still think so, yes.

Q. You mentioned something about buying this property in at a tax sale, yourself? A. Yes, I bought it from the City.

Q. How long ago was that? A. 1917 or 1918.

30 *By the Vice Chancellor:*

Q. What—since the death of Bridget? A. I think it was in 1917 or 1918.

Q. Seven or eight years ago? A. 1918. From 1918 to 1923, I paid the taxes.

MR. SHERIDAN: It has been redeemed.

THE VICE CHANCELLOR: You say it has been redeemed.

MR. SHERIDAN: Yes.

40 THE VICE CHANCELLOR: That is the end of it.

*John K. Daly—Cross**By Mr. Doherty:*

Q. After you bought the property, the property was redeemed, was it? A. I heard so.

Q. Well, do you still claim you are the owner of the property by virtue of that tax sale? A. Well, I thought so; I was under that impression. 10

Q. And you still think you are the owner yourself? A. Well, under the Martin Act sale, I think I am.

Q. Don't you know that the property was redeemed by Mrs. Ryan, one of the children of Mrs. Boylan? A. I got a note to that effect, but that is all.

By the Vice Chancellor:

Q. Well, didn't you get your money back from the City? A. No, sir. 20

Q. Never took it back? A. No, sir.

Q. But you got a notice that it was redeemed?
A. I got a letter that it was redeemed.

THE VICE CHANCELLOR: Well, there is nothing to this, is there, if the property has been redeemed? I do not want to have the record confused by that; excepting that you can examine him as to his motives and all of that, if you please. 30

MR. SHERIDAN: I think it was redeemed in 1924. That is admitted, is it not, Judge Doherty?

MR. DOHERTY: No, what we admitted was that the property was not actually sold. That is what I am informed by one of the complainants, although the certificate of sale would seem to indicate that there was an actual sale. 40

John K. Daly—Cross

MR. SHERIDAN: And you admit it was redeemed by Mrs. Ryan.

MR. DOHERTY: Yes, we admit that.

THE VICE CHANCELLOR: Well, go on.

10

Q. Now, when you bought that property in at the tax sale, it was for the purpose of making yourself the owner of it, was it? A. Certainly.

Q. And so far as you now understand, you were successful in buying it and you are today the owner of the property? A. I think so, yes.

Q. You think so? A. Yes, sir.

Q. Do you know Mr. Thomas Boylan? A. I do.

20

Q. He is one of the complainants and he is one of the children of Mary Elizabeth Boylan? A. He is one of the children.

Q. Did you ever talk to Mr. Thomas Boylan about this Henderson Street property? A. I talked to him about a settlement on the property, yes.

30

Q. And was the settlement that you proposed to Mr. Boylan one of any arrangement whereby the property could be turned over to you and Thomas Boylan to the exclusion of the other children of Mary Elizabeth Boylan? A. No, sir.

Q. The conversation that happened between you and Thomas occurred in Brooklyn, didn't it, at his house, about a year from last July? A. Somewhere about that time.

Q. And you say at that time that you did not propose that some course be taken in respect to this property so that you and Thomas would become the owners of it?

40

MR. SHERIDAN: I object to it. In the

John K. Daly—Cross

first place it is not cross-examination; I did not open the door for any of this.

THE VICE CHANCELLOR: I will sustain it on the ground that it is not cross-examination.

MR. DOHERTY: If it is not cross-examination, I would be bound by it, and I withdraw the question. 10

MR. SHERIDAN: I have no further witnesses.

MR. DOHERTY: There is still to be the main stipulation of facts.

THE VICE CHANCELLOR: Yes; you can go over what is on the record, after it is written up, and you can get copies of it, and if you want to change it any, or add new matter to it, counsel can agree and stipulate outside of court. You can submit your briefs on the law and facts. I do not want any long argument; it is purely a technical case and I want your points in three or four lines. Just put your cases in to support them. 20

MR. SHERIDAN (To Mr. Doherty): I think you and I can agree as to examined copies of these bills. I think we can do that. 30

MR. DOHERTY (To the Court): Would you want a statement of the facts written up for you with the papers annexed?

THE VICE CHANCELLOR: It must be written up, and counsel want to stipulate whether or not it contains all they want in it; and when you get your copies then you can modify it, and put it in the form of a fair written stipulation, carefully drawn; 40

Stipulation of Facts

and then you sign that, all of you, and send me in your briefs; as I say, just with a statement of your points, without an argument.

10

MR. DOHERTY: Will you fix any time that you want us to send it in?

THE VICE CHANCELLOR: Oh, well, you can give it to me within two weeks after Mr. Black makes up the statement.

CASE HELD.

Stipulation of Facts

20

Filed January 29, 1926

IN CHANCERY OF NEW JERSEY

30

Between

MARY AGNES RYAN, et als,
Complainants,

AND

JOHN K. DALY, et als,
Defendants.

On Bill, Etc.

The following facts are stipulated by and between the parties hereto, viz.:

1. Bridget Daly died seized of the premises described in the bill of complaint on May 1st, 1894, leaving a last will and testament which was admitted to probate by the Surrogate of Hudson County. A copy of the will is hereto annexed.

40

Stipulation of Facts

marked "A," and are the premises referred to in the second paragraph of said will.

2. By deed, absolute on its face with full covenants and warranty, dated October 25th, 1894, and recorded in the office of the Register of Deeds of the County of Hudson, in Book 607 of Deeds, on page 584, John K. Daly, in consideration of the sum of \$1,800 paid to him in the manner set forth in paragraph 8, conveyed said premises to Dennis Gallagher. 10

3. By written declaration of trust, dated October 25th, 1894, and recorded in the Register's office of the County of Hudson, in Book 607 of Deeds, at page 586, said Dennis Gallagher did declare that he held, and would continue to hold, the premises in trust, that the sum of \$1,300, constituting part of the purchase price, was guardianship funds invested by way of first mortgage, and that the balance of \$500 was his own money invested by way of second mortgage. A copy of the declaration of trust is annexed hereto, marked "B." 20

4. Said deed was acknowledged by said John K. Daly on November 13, 1894, before John J. Mulvaney, a Master in Chancery of New Jersey, and said declaration of trust was acknowledged on the same day by said Dennis Gallagher before said John J. Mulvaney and by Mary G. Gallagher on November 15, 1894, before said John J. Mulvaney. Both said deed and said declaration of trust were witnessed by said John J. Mulvaney. Said deed and declaration were recorded simultaneously by Collins and Corbin, and were returned, after being recorded, to said Collins and Corbin. Said John J. Mulvaney, at, and prior, to the time of the execution of said deed and declara- 30 40

Stipulation of Facts

tion and subsequently thereto, was employed by said Collins and Corbin.

10 5. Said John J. Mulvaney has no recollection, at this time, of the execution of said deed and declaration of trust or of the circumstances surrounding the same.

6. At the time of the death of Bridget Daly, her daughter, Bridget Agnes Daly, mentioned in the third paragraph of the will (marked "A") was mentally incompetent and insane and continued so to be to the time of her death.

20 7. At the time of the conveyance of said premises (as set forth in paragraph 2 hereof) Dennis Gallagher had in his hands the sum of \$1,300.00 belonging to Miss Bridget Agnes Daly, the moneys bequeathed to her in said third paragraph of said will.

8. The said premises were purchased by said Dennis Gallagher of said John K. Daly with the said sum of \$1,300.00 in the former's hands belonging to Bridget Agnes Daly, and the sum of \$500.00 advanced by himself.

9. No mortgages for these sums were actually executed.

30 10. John K. Daly, the donee of the power of appointment in the declaration of trust, disclaims knowledge of the execution of the declaration of trust, and of the accompanying power for a year or two afterwards, when he was informed of its existence by Dennis Gallagher. He did not at any time subsequent to the death of Bridget Agnes Daly, exercise the power of appointment, being influenced in his refusal by the belief that the declaration of trust had the unjust effect of "disinheriting a nephew of the deceased," that is to
40 say, Thomas J. Daly, referred to in paragraph 11. His course in the matter until the date of hearing

Stipulation of Facts

was dominated by the same belief, in addition to which he was controlled by the belief that he became the owner of the premises absolutely through purchase at a tax sale on March 18, 1920. In such belief he persevered notwithstanding the redemption of the property from the sale. 10

11. Bridget Agnes Daly died on July 31, 1904, intestate and unmarried and without issue. She left her surviving as her only heirs at law and next of kin, the following:

John K. Daly, her brother, one of the defendants,

Thomas J. Daly, a nephew, a son of James Daly, a deceased brother,

Mary A. Ryan, a niece,

Irene V. Rochford, a niece, 20

Thomas M. Boylan, a nephew,

Matthew J. Boylan, a nephew, the complainants, children of Elizabeth Boylan, a deceased sister.

12. Dennis Gallagher died October 14, 1918, leaving a last will and testament duly proven before the Surrogate of the County of Hudson, a copy of which is hereto annexed, marked "C."

13. Thomas Gallagher is the eldest son and heir at common law of said Dennis Gallagher, and he is one of the defendants named in the counterclaim of the defendant, John K. Daly. 30

14. Thomas J. Daly, nephew and one of the heirs at law and next of kin of Bridget Agnes Daly, died on October 22, 1912, leaving a last will and testament, duly proven before the Surrogate of the County of Hudson, a copy of which is hereto annexed, marked "D." He was unmarried at the time of his death.

15. Margaret Daly, the devisee named in the will of said Thomas J. Daly, is now the wife of 40

Stipulation of Facts

defendant, John K. Daly, and is one of the defendants in the latter's counterclaim.

16. Complainant, Mary Agnes Ryan, is married and her husband is Peter Ryan, who is one of the defendants named in the counterclaim of defendant, John K. Daly.

17. Complainant, Irene V. Rochford, is married, and her husband is Michael Rochford, who is one of the defendants named in the counterclaim of defendant, John K. Daly.

18. Thomas M. Boylan is married and his wife is Alice Boylan, who is one of the defendants named in the counterclaim of defendant, John K. Daly.

19. Matthew J. Boylan is married and his wife is Catherine Boylan, who is one of the defendants named in the counterclaim of defendant, John K. Daly.

20. On March 18, 1920, said premises were sold by James Radigan, City Collector of the City of Jersey City, for unpaid taxes and water rents, to John K. Daly, in fee for \$390.42 and thereafter and on June 9, 1924, complainants redeemed said premises from such sale.

Dated January 22, 1926.

30

RICHARD DOHERTY,

Solicitor of Complainants and Defendants, Peter Ryan, Michael Rochford, Alice Boylan, and Catherine Boylan.

WILLIAM F. BURKE,

Solicitor of Defendant, John K. Daly.

G. FRANK SHANLEY,

Solicitor of Defendant, Margaret Daly.

CHARLES A. ROONEY,

40 *Solicitor of Defendants, Mary G. Gallagher, and Thomas Gallagher.*

"A"

In the Name of God, Amen, I, Bridget Daly, widow of Thomas Daly, of Jersey City, in the County of Hudson and State of New Jersey, do make, publish and declare my last will and testament in manner following, that is to say:

10

First: I direct all my just debts and funeral expenses to be paid as soon as practicable after my decease; and it is my will that such debts and expenses be paid out of the fund of Five Hundred Dollars now due me from the Building and Loan Association in Elizabethport, of which I am a member.

Second: I do give and devise the house and lot on the north side of Sixteenth Street, west of Henderson Street in Jersey City, New Jersey, to my son, John K. Daly, to have and to hold to him, his heirs and assigns forever, but it is my desire that he refrain from selling or otherwise disposing of the same, for at least ten years after my decease.

20

Third: The money to which I have to my credit in the Chambers Street Savings Bank, New York City, amounting to about fourteen hundred dollars, I give and bequeath to my invalid daughter, Bridget Agnes Daly, and I hereby appoint as guardian for the said Bridget Agnes Daly, my friend, Dennis Gallagher.

30

Fourth: I do give and devise the two lots of land owned by me on Second Street, Elizabethport, New Jersey, near the Singer Sewing Machine Works, to my daughter, Elizabeth Boylan (widow of the late Michael Boylan) for and during the term of her natural life, and after her death, I do give and devise the same to her children,

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Exhibit A

share and share alike to have and to hold the same to them, their heirs and assigns forever.

10 Fifth: I do give and devise the house and lot owned by me, situated on Bond Street, in Elizabethport, to my grandson, Thomas Daly, son of my deceased son, James Daly; to have and to hold the same to him, his heirs and assigns forever.

Sixth: All the rest, residue and remainder of my estate real and personal whatsoever and wheresoever of or to which I shall die seized, possessed or in any way entitled I do give, devise and bequeath to St. Lucy's Roman Catholic Church, Jersey City.

20 Seventh: I hereby nominate, constitute and appoint my friends, Patrick Quinlan and Dennis Gallagher, of Jersey City, New Jersey, and the survivor of them, executors and executor of this, my last will and testament.

In witness whereof, I have hereunto set my hand and seal at Jersey City, this twenty-first day of April, A. D., One thousand eight hundred and ninety-four.

BRIDGET DALY (I.S.)

30 The foregoing instrument was on this April 21, 1894, at Jersey City, N. J., by Bridget Daly, the testatrix therein named, signed, sealed, published and declared as and for her last will and testament in the presence of us, two witnesses, both present at the same time, and we do now at her request and in her presence, and in the presence of each other, subscribe our names hereto as such witnesses.

Charles P. Gillin, 615 Grove Street, Jersey City.

40 John J. Mulvaney, 375 Montgomery St., J. C.

"B"

DECLARATION OF TRUST
BY DENNIS GALLAGHER

Recites deed dated October 25, 1894, made by John K. Daly to Dennis Gallagher, and in consideration of \$1.00 and other valuable considerations, etc., declares that the party of the first part now holds and will continue to hold the lands, etc., in said deed described in trust only as follows: 10

(1) To secure the payment of the sum of one thousand three hundred dollars invested by way of mortgage on said property moneys belonging to Bridget Agnes Daly which I hold under the terms of the will of her mother, Bridget Daly, deceased, with interest on said sum from this date at six per cent. per annum, payable semi-annually, the principal to be paid immediately upon the death of the said Bridget Agnes Daly. 20

(2) To secure the payment of the sum of Five Hundred Dollars to myself which sum is invested by me by way of second mortgage on said property with interest on said sum from this date at six per cent. per annum, payable semi-annually, the principal to be paid immediately upon the death of the said Bridget Agnes Daly.

(3) To apply the rents, issues and profits of said property (including the interest on said investment of One Thousand three hundred dollars) after deducting thereout the interest on said investment of Five Hundred Dollars, and paying the taxes, assessments, water rents, insurance, repairs, and all other necessary and proper things to the support and maintenance of the said Bridget Agnes Daly during her natural life. 30

(4) To sell and convey the said property in my discretion and out of the proceeds retain the investment of One Thousand Three Hundred Dol- 40

Exhibit C

lars under the trusts of the will of said Bridget Daly, deceased, to retain for my own use my investment of Five Hundred Dollars and interest even though not then due, and to hold the residue of said proceeds upon the trusts hereby declared as to the equity of redemption in said property.

- 10 (5) Upon the death of the said Bridget Agnes Daly to convey said property subject to said two investments or (if the same shall have been sold) to pay the net proceeds thereof over and above said two investments or assign the securities by which the same shall then be represented to such child or children of Mary Elizabeth Boylan, sister of the said John K. Daly, as he shall by instrument under his hand direct or if he make no such declaration and shall die leaving a last will and testament, then to such child or children of the said Mary Elizabeth Boylan, as he shall in said last will and testament have directed, and in case he shall die without such direction or without leaving a last will and testament, then to such child or children of the said Mary Elizabeth Boylan as I, the said Dennis Gallagher shall direct, and in case I shall die without leaving such direction then to all the children of the said Mary Elizabeth Boylan, then surviving.

30 (Mary G. Gallagher declares she will not claim any right of dower in said premises.)

“C”

IN THE NAME OF GOD! AMEN

40 I, Dennis Gallagher, being of sound and disposing mind, memory and understanding, do make, publish and declare this to be my last will and testament in manner following:

Exhibit D

FIRST: I direct the payment of all my just debts and funeral expenses as soon as the same can conveniently be done after my decease.

SECOND: I give, devise and bequeath all my estate, real and personal and mixed of whatsoever kind and wheresoever situate, of which I may die seized or possessed, or to which I may be entitled at the time of death, unto my beloved wife, Mary G. Gallagher, absolutely.

10

THIRD: I nominate and appoint my said wife, Mary G. Gallagher, executrix of this, my last will and testament, and I order and direct that she be not required to give bonds anywhere for the due and faithful performance of her duties.

IN WITNESS WHEREOF, I hereunto set my hand and seal, this sixth day of November, in the year, Nineteen hundred and thirteen.

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DENNIS GALLAGHER (Seal)

Witnesses:

Charles M. Egan

Elizabeth McNamara.

Mary G. Gallagher qualified as executrix, and letters testamentary were issued to her on October 25th, 1918.

30

“D”

WILL

I, Thomas J. Daly, being of sound and disposing mind, memory and understanding, do make, publish and declare this to be my last will and testament in manner following:

FIRST: I direct the payment of my just debts and funeral expenses as soon as the same can conveniently be done after my decease.

40

Exhibit D

10 SECOND: I give, devise and bequeath all the rest, residue and remainder of my estate of what kindsoever, unto my beloved mother, Margaret Daly, to have and to hold the same unto her, her heirs, executors, administrators and assigns forever.

LASTLY: I nominate and appoint my mother, Margaret Daly, executrix of this, my last will and testament.

IN WITNESS WHEREOF, I hereunto set my hand and seal this 15th day of October, in the year nineteen hundred and twelve.

THOMAS J. DALY (Seal)
Margaret Daly qualified as executrix.

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Final Decree

Filed August 23, 1926

IN CHANCERY OF NEW JERSEY

Between

MARY AGNES RYAN, IRENE V.
ROCHFORD, THOMAS M. BOYLAN,
AN, MATTHEW J. BOYLAN,
Complainants,

AND

JOHN K. DALY, MARY G. GAL-
LAGHER, Individually and as
Executrix of DENNIS GAL-
LAGHER, deceased, THOMAS
GALLAGHER, MARGARET DALY,
PETER RYAN, MICHAEL ROCH-
FORD and CATHERINE BOYLAN,
Defendants.

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On Bill, Etc.

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This matter coming on to be heard on the joint bill of complaint of the above-named complainants praying for the appointment of a trustee further to execute the trusts created by the Declaration of Trust in the bill of complaint mentioned, and for a construction of such declaration in respect of whether the original power of appointment given by said Declaration of Trust to the defendant, John K. Daly, has expired or still survives; and as well upon the answer and counterclaim of the defendant, John K. Daly, praying

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Final Decree

that said Declaration of Trust be decreed to be null and void, that Thomas Gallagher, eldest son and common-law heir of Dennis Gallagher, be decreed to be seized of the fee of the premises described in said bill, in trust for the complainants, the defendant, John K. Daly, and the defendant, Margaret Daly, that the respective interests of complainants and the defendants, John K. Daly and Margaret Daly, be determined, and that said Thomas Gallagher be decreed to convey the premises to complainants and to the defendants, John K. Daly and Margaret Daly, according to their respective interests as so determined; and proof having been taken in support of the allegations of said bill of complaint and counterclaim in the presence of Richard Doherty, solicitor of the complainants and of the defendants, Peter Ryan, Michael Rochford, Catherine Boylan and Alice Boylan, of William F. Burke, solicitor of the defendant, John K. Daly, of G. Frank Shanley, solicitor of the defendant, Margaret Daly, and of Charles A. Rooney, solicitor of the defendants, Mary G. Gallagher and Thomas Gallagher; and said proof and the arguments thereon having been duly heard and considered, it is on this twenty-third day of August, 1926,

ORDERED, ADJUDGED and DECREED that the defendant, Thomas Gallagher, as the eldest son and common-law heir of Dennis Gallagher, deceased, stands seized of the fee of the premises described in the bill of complaint, to wit:

“All that certain lot, tract or parcel of land and premises situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, beginning at a point on the northwesterly corner

Final Decree

of Henderson Street (formerly Prospect Street), and Sixteenth Street (formerly North Eighth Street), thence running northerly along the westerly line of Henderson Street 25 feet; thence westerly and parallel with said Sixteenth Street 100 feet; 10
 thence southerly and parallel with Henderson Street 25 feet to Sixteenth Street; thence easterly along the northerly line of Sixteenth Street to the point of beginning, being the same premises which were conveyed to Bridget Daly by Edward O. Coles and wife by Deed dated July 13th, 1874, recorded in the office of the Register of Hudson County in Book 275 of Deeds, page 468.” 20

in trust for the complainants, Mary Agnes Ryan, Irene V. Rochford, Thomas M. Boylan and Matthew J. Boylan, the children and heirs at law of Mary Elizabeth Boylan, deceased.

It is further ADJUDGED and DECREED that the power of appointment given by said Declaration of Trust to the defendant, John K. Daly, has expired, and that the said John K. Daly and the defendant, Margaret Daly, have no estate, right, title or interest in the premises above described. 30

It is further ORDERED, ADJUDGED and DECREED that within 30 days after the service upon him of a certified copy of this decree, the defendant, Thomas Gallagher, as the eldest son and common-law heir of the original trustee, Dennis Gallagher, deceased, by his deed convey the above described premises in fee simple to the complainants, Mary Agnes Ryan, Irene V. Rochford, Thomas M. Boylan, and Matthew J. Boylan. 40

Final Decree

It is further ORDERED that the complainants have their costs to be taxed against the defendant, John K. Daly and Margaret Daly.

10 It is further ORDERED that Charles A. Rooney, solicitor of the defendants, Mary G. Gallagher and Thomas Gallagher, be allowed a counsel fee of \$500, which shall be paid by the complainants out of the corpus of the estate and be a lien on the premises above described until paid.

It is further ORDERED that a counsel fee of Twenty-five hundred (\$2,500) dollars be allowed to Richard Doherty, solicitor of the complainants, which shall likewise be paid out of the corpus of the estate and be a lien upon the said premises until paid.

20 Respectfully advised.

E. R. WALKER,
C.

JOHN GRIFFIN,
V. C.

Petition of Appeal

Filed November 29, 1926

NEW JERSEY COURT OF ERRORS AND APPEALS

Between

MARY AGNES RYAN, et als,
Complainants-Appellees,

AND

JOHN K. DALY,
Defendant-Appellant,

MARY G. GALLAGHER, and others,
Defendants-Appellees,

MARGARET DALY, and others,
Third Parties-Appellees.

On Appeal
from the
Court of
Chancery.

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TO THE HONORABLE the COURT OF ERRORS AND APPEALS, in the Last Resort in All Causes:

The petition of John K. Daly, 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 the State of New Jersey, bearing date August 23rd, 1926, in a certain cause in said Court of Chancery wherein the said Mary Agnes Ryan, Irene V. Rochford, Thomas M. Boylan and Matthew J. Boylan were complainants and said John K. Daly, Mary G. Gallagher as Executrix of Dennis Gallagher, deceased, were defendants and said Mary

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Petition of Appeal of John K. Daly

10 G. Gallagher, individually, Thomas Gallagher, Margaret Daly, Peter Ryan, Michael Rochford and Catherine Boylan, were third parties brought in by the counterclaim of defendant, John K. Daly, in this respect to wit: that the said decree ad-
 10 judges and decrees that the defendant, Thomas Gallagher, as the eldest son and common-law heir of Dennis Gallagher, deceased, stands seized of the fee of the premises described in the bill of complaint, to wit:

20 "All that certain lot, tract or parcel of land and premises situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, begin-
 20 ning at a point on the northwesterly corner of Henderson Street (formerly Prospect Street), and Sixteenth Street (formerly North Eighth Street), thence running northerly along the westerly line of Hen-
 30 derson Street 25 feet; thence westerly and parallel with said Sixteenth Street 100 feet; thence southerly and parallel with Hender-
 30 son Street 25 feet to Sixteenth Street; thence easterly along the northerly line of Sixteenth Street to the point of beginning, being the same premises which were con-
 40 veyed to Bridget Daly by Edward O. Coles and wife by Deed dated July 13th, 1874, recorded in the office of the Register of Hudson County in Book 275 of Deeds, page 468."

40 in trust for the complainants, Mary Agnes Ryan, Irene V. Rochford, Thomas M. Boylan and Mat-
 40 thew J. Boylan, the children and heirs at law of Mary Elizabeth Boylan, deceased; that the said

Petition of Appeal of John K. Daly

decree further adjudges and decrees that the power of appointment given by said Declaration of Trust to the defendant John K. Daly, has expired, and that the said John K. Daly and the defendant, Margaret Daly, have no estate, right, title or interest in the premises above described; 10

that the said decree further orders, adjudges and decrees that within thirty days after the service upon him of a certified copy of this decree, the defendant, Thomas Gallagher, as the eldest son and common-law heir of the original trustee, Dennis Gallagher, deceased, by his deed convey the above-described premises in fee simple to the complainants, Mary Agnes Ryan, Irene V. Rochford, Thomas M. Boylan and Matthew J. Boylan; that 20

the said decree further orders that the complainants have their costs to be taxed against the defendant, John K. Daly and Margaret Daly; that the said decree further orders that Charles A. Rooney, solicitor of the defendants, Mary G. Gallagher and Thomas Gallagher, be allowed a counsel fee of \$500, which shall be paid by the complainants out of the corpus of the estate and be a lien on the premises above-described until paid; 30

that the said decree further orders that a counsel fee of Twenty-five Hundred (\$2,500) Dollars be allowed to Richard Doherty, solicitor of the complainants, which shall likewise be paid out of the corpus of the estate and be a lien upon the said premises until paid.

And your petitioner appeals from the said decree aforesaid, upon the ground that the same is erroneous for that:

1. The proof established that the complainants were not entitled to the relief prayed for and de-

Petition of Appeal of John K. Daly

ce should have been for the appellant and Margaret Daly, third party.

10 2. The proofs established that the declaration of trust referred to in the bill of complaint and the answer and counterclaim of defendant, appellant, was null and void.

3. The proofs established that Thomas Gallagher, third party appellee, held title to said lands in trust for complainants, appellant, and Margaret Daly, third party, as tenants in common.

4. The power of appointment given to defendant, John K. Daly, by said Declaration of Trust had not expired.

20 5. The proof established that Thomas Gallagher should have been decreed to convey said lands to complainants, defendant, John K. Daly, and Margaret Daly, third party, in the shares or proportions of one-twelfth each to complainants and one-third each to John K. Daly and Margaret Daly.

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

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WM. F. BURKE,
Solicitor of Appellant.
JOHN J. MULVANEY,
Of Counsel.

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Petition of Appeal

Filed November 29, 1926

NEW JERSEY COURT OF ERRORS AND APPEALS

Between

MARY AGNES RYAN, et als,
Complainants-Appellees,

AND

JOHN K. DALY,
Defendant-Appellee,
MARY G. GALLAGHER, and others,
Defendants-Appellees,

MARGARET DALY,
Third Party-Appellant,

AND OTHERS,
Third Parties-Appellees.

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On Appeal
from the
Court of
Chancery.

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TO THE HONORABLE the COURT OF ERRORS AND APPEALS, in the Last Resort in All Causes :

The petition of Margaret Daly, the appellant in the above-stated cause, respectfully shows, that your petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date August 23rd, 1926, in a certain cause in said Court of Chancery wherein the said Mary Agnes Ryan, Irene Rochford, Thomas M. Boylan and Matthew J. Boylan were complainants and said John K. Daly, Mary

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Petition of Appeal of Margaret Daly

10 G. Gallagher as Executrix of Dennis Gallagher, deceased, were defendants and said Mary G. Gallagher, individually, Thomas Gallagher, Margaret Daly, Peter Ryan, Michael Rochford and Catherine Boylan, were third parties brought in by the counterclaim of defendant, John K. Daly, in this respect, to wit: that the said decree adjudges and decrees that the defendant, Thomas Gallagher, as the eldest son and common-law heir of Dennis Gallagher, deceased, stands seized of the fee of the premises described in the bill of complaint, to wit:

20 "All that certain lot, tract or parcel of land and premises situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, beginning at a point on the northwesterly corner of Henderson Street (formerly Prospect Street), and Sixteenth Street (formerly North Eighth Street), thence running northerly along the westerly line of Henderson Street 25 feet; thence westerly and parallel with said Sixteenth Street 100 feet; thence southerly and parallel with Henderson Street 25 feet to Sixteenth Street; 30 thence easterly along the northerly line of Sixteenth Street to the point of beginning, being the same premises which were conveyed to Bridget Daly by Edward O. Coles and wife by Deed dated July 13th, 1874, recorded in the office of the Register of Hudson County, in Book 275 of Deeds, page 468."

40 in trust for the complainants, Mary Agnes Ryan, Irene V. Rochford, Thomas M. Boylan and Mat-

Petition of Appeal of Margaret Daly

thew J. Boylan, the children and heirs at law of Mary Elizabeth Boylan, deceased; that the said decree further adjudges and decrees that the power of appointment given by said Declaration of Trust to the defendant, John K. Daly, has expired, and that the said John K. Daly and the defendant, Margaret Daly, have no estate, right, title or interest in the premises above described; that the said decree further orders, adjudges and decrees that within thirty days after the service upon him of a certified copy of this decree, the defendant, Thomas Gallagher, as the eldest son and common-law heir of the original trustee, Dennis Gallagher, deceased, by his deed convey the above-described premises in fee simple to the complainants, Mary Agnes Ryan, Irene V. Rochford, Thomas M. Boylan and Matthew J. Boylan; that the said decree further orders that the complainants have their costs to be taxed against the defendant, John K. Daly, and Margaret Daly; that the said decree further orders that Charles A. Rooney, solicitor of the defendants, Mary G. Gallagher and Thomas Gallagher, be allowed a counsel fee of \$500, which shall be paid by the complainants out of the corpus of the estate and be a lien on the premises above described until paid; that the said decree further orders that a counsel fee of Twenty-five Hundred (\$2,500.00) Dollars be allowed to Richard Doherty, solicitor of the complainants, which shall likewise be paid out of the corpus of the estate and be a lien upon the said premises until paid.

And your petitioner appeals from the said decree aforesaid, upon the ground that the same is erroneous for that:

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Petition of Appeal of Margaret Daly

1. The proof established that the complainants were not entitled to the relief prayed for and decree should have been for the appellant and John K. Daly, defendant.

10 2. The proofs established that the declaration of trust referred to in the bill of complaint and the answer and counterclaim of defendant, appellant, was null and void;

3. The proofs established that Thomas Gallagher, third party appellee, held title to said lands in trust for complainants, appellant, and John K. Daly, as tenants in common.

4. The power of appointment given defendant, John K. Daly, by said Declaration of Trust had not expired.

20 5. The proof established that Thomas Gallagher should have been decreed to convey said lands to complainants, defendant, John K. Daly, and Margaret Daly, third party, in the shares or proportions of one-twelfth each to complainants and one-third each to John K. Daly and Margaret Daly.

30 Your petitioner, therefore, prays that the said decree of the said Chancellor may be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

G. FRANK SHANLEY,
Solicitor of Appellant.
JOHN J. MULVANEY,
Of Counsel.

**Answer to Petition of Appeal of
John K. Daly**

Filed December 1, 1926

NEW JERSEY COURT OF ERRORS AND
APPEALS

10

Between

MARY AGNES RYAN, et als,
Complainants-Appellees,

AND

JOHN K. DALY,
Defendant-Appellant,

MARY G. GALLAGHER, and others,
Defendants-Appellees,

MARGARET DALY, and others,
Third Parties-Appellees.

On Appeal
from the
Court of
Chancery.

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The complainants in the above entitled suit, for answer to the petition of appeal of John K. Daly, the above named defendant, say:

1. They deny that the said final decree in the petition of appeal mentioned is erroneous upon the several grounds set forth in said petition or otherwise.

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RICHARD DOHERTY,
*Solicitor for and of Counsel
With Complainants.*

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**Answer to Petition of Appeal of
Margaret Daly**

Filed December 4, 1926

NEW JERSEY COURT OF ERRORS AND
APPEALS

10

Between

MARY AGNES RYAN, et als,
Complainants-Appellees,

AND

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JOHN K. DALY,
Defendant-Appellant,
MARY G. GALLAGHER, and others,
Defendants-Appellees,
MARGARET DALY, and others,
Third Parties-Appellees.

On Appeal
from the
Court of
Chancery.

The complainants in the above entitled suit, for answer to the petition of the above named defendant, Margaret Daly, say:

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1. They deny that the said final decree in the petition of appeal mentioned is erroneous upon the several grounds set forth in said petition or otherwise.

RICHARD DOHERTY,
*Solicitor for and of Counsel
with Complainants.*

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Answer to Petition of Appeal

Filed December 1, 1926

NEW JERSEY COURT OF ERRORS AND APPEALS

Between

MARY AGNES RYAN, et als,
Complainants-Appellees,

AND

JOHN K. DALY,
Defendant-Appellee,

MARY G. GALLAGHER, and others,
Defendants-Appellees,

MARGARET DALY,
Third Party-Appellant,

AND OTHERS,
Third Parties-Appellees,

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On Appeal
from the
Court of
Chancery.

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The above named defendants-appellees, Mary G. Gallagher, as executrix of Dennis Gallagher, deceased, Mary G. Gallagher, individually, and Thomas Gallagher, in answer to the Petition of Appeal of the above named appellants, says:

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These defendants-appellees not acknowledging any or all of the matters which in the said Petition of Appeal are contained to be true, for answer thereto nevertheless say and admit that a decree was on the 23rd day of August last past made and entered in the Court of Chancery in the cause for that purpose mentioned in the petition as therein stated, but as to the substance and form thereof these defendants-appellees pray to refer thereto when the same shall be produced,

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Memorandum

and these defendants-appellees are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed with costs to be judged to these defendants-appellees.

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CHARLES A. ROONEY,
*Solicitor for and of Counsel with
Defendants-Appellees, Mary G.
Gallagher and Thomas Gallagher.*

Memorandum

Filed September 22, 1926

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IN CHANCERY OF NEW JERSEY

Between

MARY AGNES RYAN, et als,
Complainants,

AND

JOHN K. DALY, et als,
Defendants.

} Memorandum

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For the Complainants, *Mr. Doherty.*

For the Defendants, John K. Daly and others,
*Mr. Burke (Mr. Sheridan, Mr. Milton and Mr.
Mulvaney, of counsel).*

For the Defendants, Mary E. Gallagher, Execu-
trix, and Thomas Gallagher, *Mr. Rooney.*

Submitted March 30, 1926; decided June 14, 1926.
GRIFFIN, V. C.:

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The bill in this cause is filed for the appoint-
ment of a new trustee to execute and discharge

Memorandum

the trusts created by a declaration of trust hereinafter referred to, and to ascertain and determine the true intent, meaning and construction of the said declaration of trust, and to determine whether the original power of appointment given to John K. Daly is extinguished or still survives. 10

Bridget Agnes Daly died May 1st, 1894, leaving her surviving as her only heirs at law her children, Mary Elizabeth Boylan, John K. Daly and Bridget Agnes Daly, and Thomas J. Daly, a son of James Daly, a deceased son. Bridget, the mother, died seized of the tract of land in Jersey City which is the subject-matter of the declaration of trust, leaving a last will and testament, in and by which she devised and bequeathed said tract of land to John K. Daly; and bequeathed to her insane daughter, Bridget Agnes, \$1400, and appointed Dennis Gallagher her guardian. John K. Daly, by his deed, dated October 25, 1894, and recorded in Liber 607 of Deeds, page 584, conveyed the said premises to Dennis Gallagher for the consideration of \$1800; and Dennis Gallagher and his wife did, on the same day, by a declaration of trust, recorded in Liber 607 of Deeds, page 586, declare the trusts upon which the property was conveyed to him. The above consideration of \$1800 consisted of \$1300 which Dennis loaned as guardian of Bridget Agnes Daly, and \$500 of his own. 20 30

The declaration of trust, after reciting the deed from John K. Daly to Gallagher for the premises in question, in consideration of one dollar paid by the said John K., did admit and declare that the said premises were conveyed to 40

Memorandum

him, and that he now holds and will continue to hold the same in trust only as follows:

10 “1. To secure the payment of the sum of one thousand three hundred dollars invested by way of mortgage on said property moneys belonging to BRIDGET AGNES DALY which I hold under the terms of the will of her mother, Bridget Daly, deceased, with interest on said sum from this date, at six per cent. per annum, payable semi-annually, the principal to be paid immediately upon the death of the said BRIDGET AGNES DALY.

20 “2. To secure the payment of the sum of five hundred dollars to myself, which sum is invested by me, by way of second mortgage on said property, with interest on said sum from this date at six per cent. per annum, payable semi-annually, the principal to be paid immediately upon the death of said BRIDGET AGNES DALY.”

30 The third paragraph provides that the net rents, issues and profits of said property, after paying interest on said two sums of \$1300 and \$500, and the taxes, etc., should be applied to the support and maintenance of the said Bridget Agnes Daly during her natural life.

 Bridget Agnes, the daughter, died April 1st, 1904. The trust for her as to the net income thereupon fell in, and as she died intestate, the \$1300, with interest, should be paid to her administrator out of the proceeds of the sale of the lands.

40 The paragraph requiring construction is the

Memorandum

Fifth of said declaration of trust, which is as follows:

“5. Upon the death of the said BRIDGET AGNES DALY, to convey said property, subject to said two investments or (if the same shall have been sold) to pay the net proceeds thereof over and above said two investments, or assign the securities by which the same shall then be represented to such child or children of MARY ELIZABETH BOYLAN, sister of the said JOHN K. DALY, as he shall by instrument under his hand direct, or if he makes no such declaration and shall die leaving a last will and testament, then to such child or children of the said MARY ELIZABETH BOYLAN as he shall in said last will and testament have directed, and in case he shall die without such direction or without leaving a last will and testament, then to such child or children of the said MARY ELIZABETH BOYLAN as I, the said Dennis Gallagher, shall direct, and in case I shall die without leaving such direction, then to all the children of the said MARY ELIZABETH BOYLAN then surviving.”

Under this clause the children of Mrs. Boylan took a contingent remainder during the life of Bridget Agnes, or until the death of Mr. Gallagher, if he died after the death of John K. Daly in the lifetime of Bridget Agnes, with a vested remainder in those who were living at the date of her death, or at the date of the death of Mr.

Memorandum

Gallagher as aforesaid, subject to one or more of said children, being eliminated by the execution of the power.

10 *Coleman vs. Seymour*, 1 Ves., Sr. 209;
27 Full Eng. Repr. 987.

The power of appointment given to Gallagher might be exercised by an instrument in writing or by his will. *Cueman vs. Broadnax*, 37 N. J. L. 508. Therefore, what is said herein with reference to the power of appointment by John K. Daly applies with equal force to the right to appoint by Gallagher.

20 Dennis Gallagher died October 14th, 1918, leaving a last will and testament, in which he did not attempt to exercise the power, and the parties have agreed that, as his estate has given up any claim to the \$500 and interest, no accounting by his estate will be required. The parties interested are all of full age.

30 Under this fifth paragraph John K. Daly was given a power to appoint, either by an instrument under his hand, or by his last will and testament, to such child or children of Mary Elizabeth Boylan as he might select, and if he failed to make such appointment then the power of appointment is given to the said Dennis Gallagher; and in case Dennis died without making the appointment, then to all of the children of said Mary Elizabeth Boylan then surviving. It is urged on one side, that as Dennis Gallagher died without exercising the power to appoint, the power given to John K. Daly is at an end. I cannot agree with counsel in this construction. The primary power of appointment is given to John K.

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Memorandum

Daly, and the power is given to Dennis only in the event of John K. dying without appointing.

It is urged, however, by John K. Daly, that he did not know of the making of this declaration of trust until about a year after it was made, which was about the year 1895, more than thirty-one years ago, and about twenty-three years before the death of Dennis Gallagher. During all that time he took no action; and now, when death has sealed the lips of Gallagher, who was most interested in sustaining the legality of the declaration of trust, it is too late for him to assert this claim. He is guilty of gross *laches*. *Lutjen vs. Lutjen*, 64 N. J. Eq. 773; *Dunham vs. Adams*, 82 N. J. Eq., 265, and cases cited at page 270.

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In addition to this, the declaration of trust and the deed were both executed at the same time as part of the same transaction; and it is quite evident that the declaration of trust was drawn to carry out the desire of John K. Daly, for, otherwise, why should a deed be given instead of a mortgage? In the absence of the declaration of trust, upon the payment of the \$1800, the title to the property would revert in John K. Daly.

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As the trust was in Dennis Gallagher, since deceased, upon his death it devolved upon his eldest son as trustee.

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The question presented is, what is the true construction of the declaration of trust?

Chancellor Kent in 4 *Kent's Comm.*, 345, says, "The intention of the donor of the power is the great principle that governs in the construction of powers, and in furtherance of the object in view the courts will vary the form of executing the power, and, as the case may require, either enlarge a limited to a general power, or cut

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Memorandum

down a general power to a particular purpose." (To the same effect is *Wilson vs. Troup*, 2 Cow., 195 [200]). (See also *Bristow vs. Warde*, 2 Vos. Jr., 336; 21 *Eng. Rul. Cas.*, 356, note at p. 378. *Jackson vs. Veeder*, 11 *Johns*, 169).

- 10 A question arises whether the donee of the power should exercise the appointment within a reasonable time and put the appointees in possession, or thereafter the right to appoint would be at an end. My conclusion is that John K. Daly should have exercised the power of appointment within a reasonable time after the death of Bridget Agnes Daly. The declaration of trust indicates that the objects of the donor's bounty were Bridget Agnes Daly, her insane sister, and
- 20 after her death the children of Mary Elizabeth Boylan.

Upon the death of Bridget Agnes Daly the declaration of trust deals with two situations—one, where the property had not been sold, and the other where it had been; and reading this declaration, omitting some of its verbiage, it reads as follows: 1. Upon the death of Bridget Agnes Daly to convey the said property to such child or children of Mary Elizabeth Boylan, sister of the

30 said John K. Daly, as he shall by an instrument under his hand, or in his last will, direct, etc.

2. If the property be sold, to pay the net proceeds thereof to such children of Mary Elizabeth Boylan as he shall appoint, etc., and, 3. To assign the securities by which the same (meaning thereby the net proceeds) shall *then* be represented, to such child or children, etc. Here it is perfectly plain that it was the donor's intention that immediately upon the death of Bridget Agnes

40 Daly the children of Mary Elizabeth Boylan ap-

Memorandum

pointed should enter into the possession and enjoyment of the property. It was not the intention of the donor that the donee of the power should withhold his appointment for years and allow the title to remain in suspense by reason of the non-execution of the power. It would be rather absurd to say that the donor expected, as in this case, that the donee should omit to exercise his power of appointment for twenty-one years. He not only, by reasonably plain language, specifies the death of Bridget Agnes Daly as the time when the appointment should be made, but he directs the payment of the net proceeds, if sold (meaning before the death of Bridget Agnes Daly), and, if the net proceeds are invested, to assign the securities in which the sums shall *then be represented* (that is, the investments as they existed at the time of the death of Bridget Agnes Daly); all of which clearly indicates that his purpose was that the power of appointment should be exercised immediately after the death of Bridget Agnes Daly by an instrument under his hand, if he survived Bridget, or by will if he predeceased her, for under no other condition could his will operate within a reasonable time, as his will would not speak until the time of his death, which might happen a half century after the death of Bridget.

My present view is that, after this long lapse of time, coupled with the fact that John K. Daly has been endeavoring to make a settlement with the persons to whom he was to appoint, for his own benefit, and his buying the property in a tax sale in order to defeat the power, and his counterclaim denying the validity of the trusts for complainants, rather indicate a state of mind

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Memorandum

where he not only did not intend to exercise the power but to defeat it. In *Pomeroy's Equity Jurisprudence*, 3d Ed., sec. 411, p. 687, Prof. Pomeroy said:

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“Where a power in trust is given to appoint among the members of a designated class, as among ‘the children’ of the donee, and the like, the donee upon whom the power is conferred can appoint in favor of any one of the class, and a court of equity will not interfere with his discretion. Where the donee, however, fails to make any appointment, and of course makes no selection of a particular beneficiary out of the class, a court of equity will carry out the power, under the principle of equality, by dividing the fund subject to the power in equal shares among all the persons composing the designated class.”

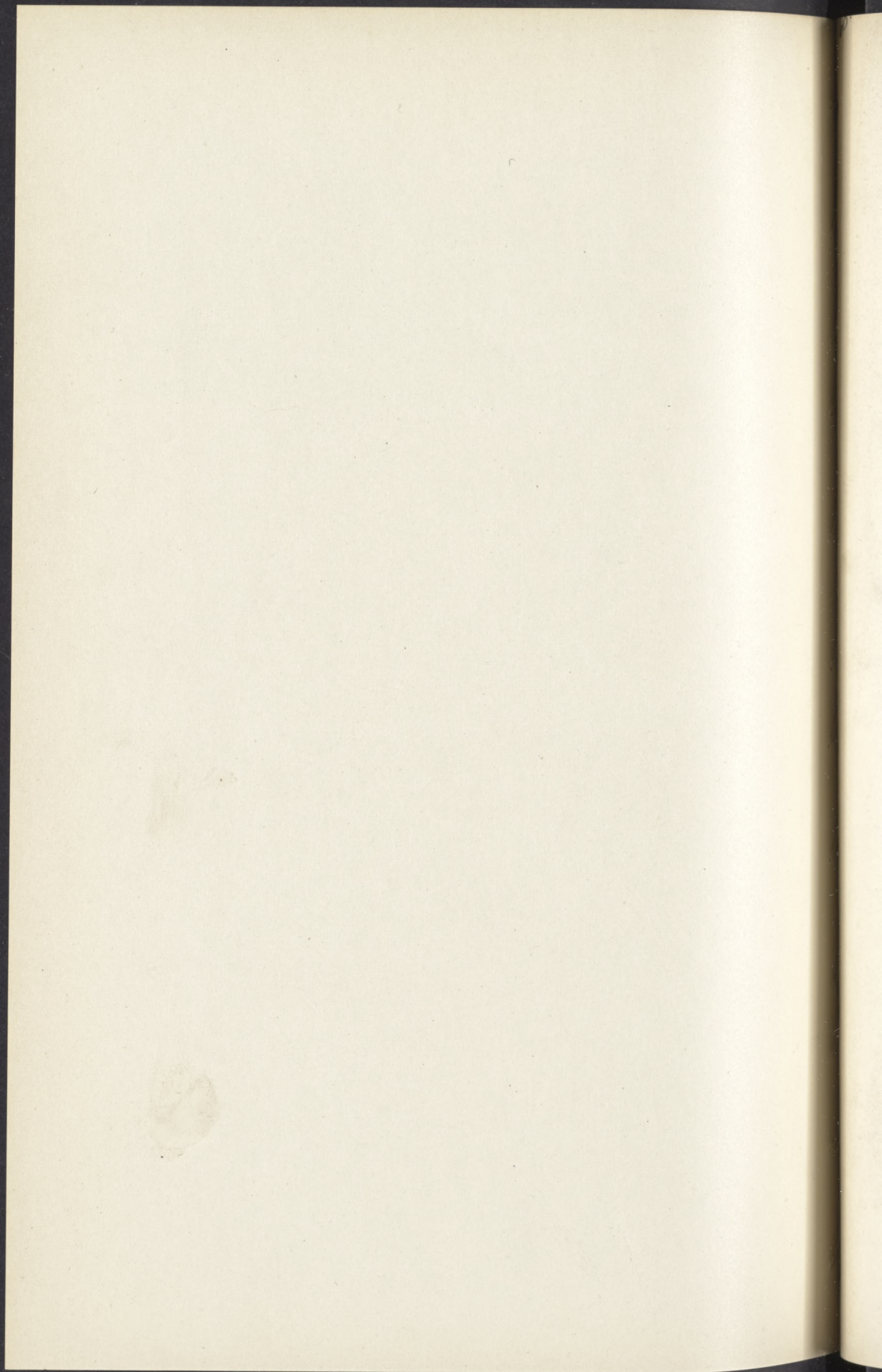
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I have therefore reached the conclusion that the eldest son of Dennis Gallagher should be decreed to convey to all the children of Mary Elizabeth Boylan. I have reached the conclusion more readily because all of the children of Mrs. Boylan have asked for a conveyance to them. *Biggs vs. Peacock*, 22 L. R. Ch. Div. 284. A decree will be advised in accordance with the foregoing views.

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New Jersey Court of Errors and Appeals

Between :

MARY AGNES RYAN, et als,
Complainants-Respondents,

AND

JOHN K. DALY, et als,
Defendants-Appellants,

MARY G. GALLAGHER, et als,
Defendants-Respondents.

On Appeal
from Court
of Chancery.

BRIEF FOR APPELLANT— JOHN K. DALY

These appeals bring to the consideration of the Court a decree of the Court of Chancery advised by Vice Chancellor Griffin adjudicating the title to real property in Jersey City.

The bill was filed by four of the respondents against appellant, John K. Daly, and by his counterclaim their respective husbands and wives were made parties, as was also the appellant, Margaret, wife of John K. Daly. The respondents, Gallagher, were parties defendant to the original bill.

The Facts

The pleadings and stipulation of fact (case, pp. 66 to 70), disclose the following state of facts :

Bridget Daly, owner of the premises, died testate at Jersey City, May 1, 1894, leaving her surviving the following:

- (1) John K. Daly, appellant, a son.
- (2) Bridget Agnes Daly, a daughter.
- (3) Elizageth Boylan, a daughter.
- (4) Thomas Daly, a grandson.

By her will she devised the premises in question to appellant, John K. Daly (p. 71). She also bequeathed to her daughter, Bridget Agnes Daly, a balance in a New York savings bank amounting to about \$1,300 and appointed Dennis Gallagher her guardian for the reason that she was mentally unsound, although not judicially so declared. There were other gifts in the will, but it is around the subsequent disposition of these two provisions that the litigation revolves.

October 25, 1894, Daly conveyed the premises in question to Dennis Gallagher, individually, for the expressed consideration of \$1,800 by full covenant warranty deed. On the same day Gallagher executed and recorded a declaration that he held the land upon the following trusts:

(1) To secure the payment of the sum of one thousand three hundred dollars invested by way of mortgage on said property moneys belonging to Bridget Agnes Daly which I hold under the terms of the will of her mother, Bridget Daly, deceased, with interest on said sum from this date at six per cent. per annum, payable semi-annually, the principal to be paid immediately upon the death of the said Bridget Agnes Daly.

(2) To secure the payment of the sum of Five Hundred Dollars to myself, which

sum is invested by me by way of second mortgage on said property with interest on said sum from this date at six per cent. per annum, payable semi-annually, the principal to be paid immediately upon the death of the said Bridget Agnes Daly.

(3) To apply the rents, issues and profits of said property (including the interest on said investment of one thousand three hundred dollars) after deducting thereout the interest on said investment of five hundred dollars, and paying the taxes, assessments, water rents, insurance, repairs, and all other necessary and proper things to the support and maintenance of the said Bridget Agnes Daly during her natural life.

(4) To sell and convey the said property in my discretion and out of the proceeds retain the investment of one thousand three hundred dollars under the trusts of the will of said Bridget Daly, deceased, to retain for my own use my investment of five hundred dollars and interest, even though not then due, and to hold the residue of said proceeds upon the trusts hereby declared as to the equity of redemption in said property.

(5) Upon the death of the said Bridget Agnes Daly to convey said property subject to said two investments or (if the same shall have been sold) to pay the net proceeds thereof over and above said two investments or assign the securities by which the same shall then be represented to such child or children of Mary Elizabeth Boylan, sister of the said John K. Daly, as he shall

by instrument under his hand direct or if he make no such declaration and shall die leaving a last will and testament, then to such child or children of the said Mary Elizabeth Boylan as he shall in said last will and testament have directed, and in case he shall die without such direction or without leaving a last will and testament, then to such child or children of the said Mary Elizabeth Boylan as I, the said Dennis Gallagher, shall direct, and in case I shall die without leaving such direction then to all the children of the said Mary Elizabeth Boylan, then surviving.

Bridget Agnes Daly died July 31st, 1904, intestate (of course) leaving her surviving the following heirs at law and next of kin:

- (1) Appellant John K. Daly, a brother.
- (2) Thomas J. Daly, a nephew, son of a deceased brother, James.
- (3) The four respondents, Ryan, Rocheford and Boylan, children of a deceased sister, Elizabeth Boylan.

Thomas J. Daly (2) above, died October 22nd, 1912, leaving a will (p. 69, 75) giving everything to his mother, Margaret, one of the appellants, who afterward inter-married with the appellant, John K. Daly (p. 69).

Dennis Gallagher, guardian and trustee, died October 14th, 1918, leaving a will giving his entire estate to his widow, the respondent, Mary G. Gallagher (p. 75) and leaving as his oldest son and heir as at common law the respondent, Thomas Gallagher.

Bridget Agnes Daly lived with her sister, Elizabeth Boylan (mother of the principal respondents) until the latter's death in 1899, when she went to live with the appellant, John K. Daly, and so continued to the time of her death in 1904 (p. 55).

John K. Daly had no knowledge of the execution of the declaration of trust until a year or two afterward (pp. 53, 60, 68). Dennis Gallagher died without making the designation provided for in the fifth clause of the declarations of trust nor has appellant made any such designation (p. 68).

The bill of complaint, after alleging the principal facts as above set forth, prays (p. 7):

(1) The appointment of a new trustee to succeed Gallagher.

(2) A construction of the declaration of trust and a determination whether the power of designation survived Gallagher.

The counterclaim reiterates the principal facts and (p. 11) attacks the validity of the declaration of trust and prays (p. 12) its annulment, and that the interests of the heirs at law of Bridget Agnes Daly (complainants and defendants) may be ascertained and determined (p. 12).

In a memorandum opinion the learned Vice Chancellor (p. 95) found that under the fifth clause of the declaration of trust the complainants took a contingent remainder during the life of Bridget Agnes Daly and a vested remainder at her death (p. 95), subject to the designation by Gallagher or by Daly within a reasonable time after her death (p. 98), and that it was the intention of the "donor" that complainants should enter into possession immediately on her death (p. 99). He further found that the conduct of Daly warranted the conclusion that he not only did not intend to exercise the "power," but to defeat it.

The decree adjudges that Thomas Gallagher as common law heir of Dennis Gallagher, is seized in fee of the premises in question, in trust for the complainants, that the power of appointment in the declaration of trust had expired and that neither John K. Daly nor Margaret Daly have any estate in the premises. It then directs that Gallagher convey the premises to complainants, and allow costs and counsel fees.

The petitions appeal from the whole of the decree and assert that the declaration of trust was void and that the proofs established that the title was held in trust for the complainants, each one-twelfth (1/12) and for defendants, Daly, each one-third (1/3).

Discussion

At the outset we respectfully submit that the learned Vice Chancellor fell into error in holding that the declaration of trust contained a valid power of disposition and that thereby complainants became seized of an equitable estate in fee, in remainder after the death of Bridget Agnes Daly. This error taints the whole decision and the decree based thereon.

On behalf of defendants, it is respectfully submitted:

I.

THERE WAS NO VALID POWER OF DISPOSITION IN GALLAGHER:

(a) *The attempt to confer such power was ULTRA VIRES.*

(b) *It was an illegal attempt to limit the interest of the ward to a life estate.*

(c) *It was an illegal attempt to exclude the heirs at law of the ward from their inheritance.*

II.

THE RIGHT TO CONFER THE POWER WAS IN JOHN K. DALY.

(a) *He did not execute any instrument conferring such power.*

(b) *He did not authorize the execution of such an instrument.*

III.

JOHN K. DALY ALONE IS THE OWNER OF THE PREMISES:

(a) *The conveyance, in form a deed, was in fact a mortgage.*

(b) *Payment of \$1,300, or so much thereof as remains due, Daly is entitled to possession.*

IV.

LACHES IS NOT IMPUTABLE TO THE APPELLANTS.

I.

There was no valid power of disposition in Gallagher.

By the third clause of the will of Bridget Daly, the elder, Dennis Gallagher was appointed guardian of her daughter and by virtue thereof and the other provision of said clause he came into possession of a fund of \$1,300 in cash. As guardian, of course, he had no legal power to convert that

cash into real estate. Once having done so, however, his ward, if competent, might either ratify or reject the conversion as seemed best to her.

Durling vs. Hammar, 20 N. J. 220, 226.

Bohle vs. Hasselbroch, 64 N. J. Eq. 334.

Polkowitz vs. Nash, 87 N. J. Eq. 489.

We insist that at the time of this transaction the guardian either (1) acquired the fee, in which case (at her election), a trust resulted in favor of the ward, or (2) he became a mere mortgagee, in which case the equity of redemption was in John K. Daly, subject to the payment of the balance (if any), of the \$1,300.

In neither case was there any authority in the guardian to divest his ward or the mortgagor of their legal or equitable rights in the premises.

In the first instance, if the guardian acquired the fee, his ward at her election, could have either (1) a charge on the lands for the amount of her moneys used, or (2) the lands themselves subject to a charge for the moneys advanced by the guardian individually. Not being competent to make an election her heirs at law succeeded to that right.

Foth vs. Ellenberger, 47 Atl. Rep. 216.

Le Gendre vs. Goodridge, 46 N. J. Eq. 419.

Durling vs. Hammar, 20 N. J. Eq. 220.

Bohle vs. Hasselbroch, 64 N. J. Eq. 334.

Bidwell vs. Piercy, 71 N. J. Eq. 83.

Polkowitz vs. Nash, 87 N. J. Eq. 489.

James vs. Aller, 66 N. J. Eq. 69.

Fidelity Trust Co. vs. Federal Trust Co.,
87 N. J. Eq. 550, 552.

In the second instance, if the guardian were investing the fund by way of mortgage, then the

equity of redemption still remained in John K. Daly and upon the payment of the amount due the fee reverts to him.

(a) *The provisions of the declaration are ultra vires the guardian.*

As above set forth, the guardian took either one of two estates, a fee in trust for his ward, or an investment by way of mortgage. He was absolutely without authority in either case, to confer a power on himself or anyone else, in derogation of the interests of his ward or of her heirs (of whom Mr. and Mrs. Daly are two) or of John K. Daly's equity of redemption.

A power can only be created by a person competent to do the act which he attempts to authorize.

31 Cyc, 1039.

Earle vs. Earle, 20 N. J. L. 347.

Furthermore, a power to dispose of property must be created by an instrument which would itself be sufficient to dispose of such property.

31 Cyc, 1043.

It will not be pretended that the guardian, by reason of his investment in this property, had the power to convey it to any of those named in the fifth item of the declaration of trust except for value. Nor can it seriously be contended that this instrument itself was sufficient to dispose of the property.

Holding these lands as trustee on terms impressed by principles of equity, he could not by his individual act impose additional terms or create additional powers in himself the effect of which would alter or limit the devolution of the estate.

Adams vs. Carey, 53 N. J. Eq. 334.

Throughout the memorandum, the learned Vice Chancellor refers to the guardian as the "donor." This, we submit was error. He was guardian, whose duty was to conserve; he had nothing to "donate."

(b) *The declaration was an illegal attempt to limit the interest of the ward to a life tenancy.*

By the third paragraph of the will of Bridget Daly, her daughter, the ward, is given the fund absolutely (p. 71). This quantum of estate the guardian could not diminish. Should he, as he did, convert the cash into real estate, she would have as absolute an estate in the land as she had in the cash.

See the cases cited, supra.

True, in the fourth item of the declaration he seeks to provide for a reconversion of the trust estate into cash, but that very item nullifies itself by the provision which diverts the surplus above the \$1,300. This, of course, was beyond the power of the guardian. If he, as he did, converted the fund into land and should afterward sell the entire proceeds would belong to the ward.

The learned Vice Chancellor (p. 94) erroneously held that in the event of her death, "The trust for her as to the net income thereupon fell in, and as she died intestate, the \$1,300, with interest, should be paid to her administrator out of the proceeds of the sale of the lands." By a curious oversight the decree fails to subject the conveyance ordered to be made, to the payment of this sum, although the counsel fees allowed are declared to be a lien on the premises in dispute (p. 80).

(c) *The declaration was an illegal attempt to exclude the heirs of the ward from their inheritance.*

The fifth item of the declaration provides that on the death of the ward the property shall be conveyed, or the proceeds of its sale distributed, among such of the complainants as might be designated by John K. Daly, or in default, by the guardian, or on his default to the complainants equally.

As pointed out in the relation of facts above, the complainants are only one set of the heirs of the ward. They are seized in the right of their mother (a sister), who, had she lived, would have been entitled to one-third. Another one-third descended to appellant, John K. Daly (a brother), and the remainder to Thomas J. Daly (a nephew), who, by his will (p. 75), devised his estate to his mother, the appellant, Margaret Daly.

The effects of this fifth item were (1) to deprive the ward of the power to disposition should she be restored to competence; (2) to permit John K. Daly or the guardian to express a preference among complainants, and (3) to exclude Thomas J. Daly absolutely.

We respectfully submit that such action on the part of a guardian or mere naked trustee is utterly unwarranted in law. It is true that the ward was incompetent at the time, and never recovered, but that fact did not alter her legal rights, nor the rights of those who might succeed upon her death intestate. It cannot seriously be denied that had she recovered, she could have, at her election, brushed aside the so-called declaration of trust and made of it a mere scrap of paper. Neither the guardian's declaration nor the assumed consent of John K. Daly could have deprived her of that right. And what is true as to her is true also of those who came after, and stood in her shoes.

II.

The right to confer the assumed power was in John K. Daly.

The only person, up to the time of this transaction, competent to do the act attempted to be authorized by the guardian, was John K. Daly, the owner of the property at that time. Nowhere in the record does it appear that this attempt of the guardian received the approval or was with his consent.

At the time of the conveyance to the guardian, Daly, and he alone, could have impressed the land with such trusts permitted by law as he might choose. It was for him to say whether his sister should have a mere life estate, and to dictate the devolution of the remainder.

(a) *He did not execute or authorize any instrument conferring a power.*

Section 3 of the Statute of Frauds requires that all declarations and creations of trust shall be "manifested and proved by some writing, signed by the party who is or shall be by law enabled to declare such trust" (Comp. Stat. 2611).

Nowhere in the case is there the slightest evidence that appellant, John K. Daly, signed, or authorized the signing, of any writing impressing these lands with any trust. The most that appears is (pp. 53, 61) that a year or two after it was executed, the guardian told him of the declaration of trust. The learned Vice Chancellor (p. 97) assumes that "it is quite evident that the declaration of trust was drawn to carry out the desire of John K. Daly." But even that fact could not give it life in face of the provision of the statute that such declaration shall be null and void unless proven to be signed by the party.

Adams vs. Carey, supra, p. 338.

(b) *Such assent as Daly may have given was without consideration and revocable.*

Assuming that Mr. Daly assented to the declaration of trust, and did so in legal form, the power of designation was voluntary, without consideration moving from the complainants or any of them, was a mere naked power, and therefore revocable at any time.

31 Cyc, 1051.

While it is true that a duly created power cannot be revoked except in express terms or by necessary implication, we insist that the "necessary implication" is present here in the refusal of Daly to execute the power, and his expressed desire (pp. 58, 62) to protect the interest of his wife (appellant, Margaret) as devisee of her son, who otherwise would be excluded from his share in the inheritance.

III.

John K. Daly is sole owner of the premises.

Thus far, we have been discussing the case as if the conveyance to the guardian was absolute and divested Daly of any interest in the premises. This is the view most favorable to the complainants. But there is another view, more favorable to Daly, which is well supported by the circumstances.

(a) *The conveyance, in form a deed, was in fact a mortgage and Daly, therefore, has an equity of redemption.*

The first two paragraphs of the declaration of trust (p. 73) expressly declare that the investments of \$1,300 and \$500 are by way of first and

second mortgages respectively, and provide for the payment of interest semi-annually and of the principal immediately on the death of the ward. The \$500 invested by the guardian personally has been paid and that claim withdrawn (p. 55).

The learned Vice Chancellor (p. 94) necessarily found the investment to be a mortgage when he directed the payment of the \$1,300 to the administrator of the ward.

The declaration of trust is silent as to who should pay the principal. It is but natural to assume that such payment was to be made by the person who received the money: to wit, John K. Daly. In fact, the fourth item of the document (p. 74) expressly recognizes the existence of an equity of redemption. That estate could only exist in John K. Daly.

True, the fifth item provides for the conveyance of the equity of redemption, but as above pointed out, this is an unwarranted assumption of authority by the guardian mortgagee, not executed by John K. Daly in accordance with the statute, and not binding on him.

It follows, therefore, that Daly is entitled to the whole of the estate upon payment of the \$1,300 or as much thereof as may be found to be due on an accounting. This payment cannot be made at the present time because there has been no administrator of the ward, and no one has authority to receive the money.

IV.

Laches is not imputable to John K. Daly.

The question of laches was not pleaded and was first injected into the case by the learned Vice Chancellor at the final hearing (c. p. 47).

Ruckman vs. Decker, 23 N. J. Eq. 283.
21 C. J., 257.

It is difficult to see how Daly has been guilty of laches or how the complainants are entitled to relief because of inaction on his part.

Agnes Daly died in 1904 (pp. 55, 69). The guardian died in October, 1918. The bill was filed September 13th, 1924, six years after the death of the guardian and twenty years after the death of the ward, and the delay is unexplained.

Meantime, assuming that John K. Daly knew of the declaration of trust and the so-called "power." What was he required to do? His rights were not being invaded. In the absence of any designation by the guardian threatening the divestiture of his estate, he was justified in ignoring the document.

As a matter of fact, his failure to make the designation, and the guardian's acquiescence therein for fourteen years, is tantamount to a refusal and a repudiation of the document. He was not permitted to testify to conversations with the guardian (p. 55). His purchase at the tax sale in 1917 or 1918 and his payment of taxes thereafter (p. 62) coupled with his refusal to accept the redemption money (p. 63), far from militating against him (p. 99) indicate a consistent attitude of repudiation, or of revocation.

Instead it is the complainants who are in laches. If they had any rights under the document, it was their duty to assert them promptly after the death

of the ward. It was then that their rights, if they had any, accrued. Instead they remained quiescent for a period of twenty years, permitting the accumulation of taxes and their payment by Daly. They must have known of the document. They could have had their action to compel the exercise of the power or the removal of the donees. It is they, not the appellants, who are in gross laches, by their acquiescence in the refusal of both Gallagher and Daly to make the designation.

The decree of the Court of Chancery should be reversed.

WILLIAM F. BURKE,
Solicitor of Appellant.

JOHN MILTON.
Of Counsel.

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New Jersey Court of Errors and Appeals

Between:

MARY AGNES RYAN, *et als.*,
Complainants-Respondents,

and

JOHN K. DALY, *et als.*,
Defendants-Appellants,

MARY G. GALLAGHER, *et als.*,
Defendants-Respondents.

On Appeal
from Court
of Chancery.

BRIEF FOR DEFENDANTS-RESPONDENTS, MARY G. GALLAGHER, INDIVIDUALLY AND AS EXECUTRIX OF DENNIS GALLAGHER, DECEASED, AND THOMAS GALLAGHER.

The facts are fully set forth in the state of the case, pages 66 to 70, in a stipulation of facts consented to by the solicitors of the complainants and all of the defendants. For the purpose of brevity and the lack of active interest in the ultimate disposition of this case by the defendants, Thomas Gallagher, and Mary G. Gallagher, individually and as executrix of Dennis Gallagher, deceased, further restatement of the facts is refrained from.

The defendants, Mary G. Gallagher, individually and as executrix of Dennis Gallagher, deceased, and Thomas Gallagher, at the final hearing in this case before the Vice-Chancellor waived any claim to the premises in question, and the defendant,

Thomas Gallagher, as the eldest son of Dennis Gallagher, agreed to convey the legal title to said premises to such person or persons as the Chancellor might direct, and thereupon withdrew their counterclaim against the complainants and the other defendants. Complainants and defendants waived any claim or claims against the defendants, Mary G. Gallagher, individually and as executrix of the last will and testament of Dennis Gallagher, deceased, and the defendant, Thomas Gallagher. The final decree directed that the defendant, Thomas Gallagher, as the eldest son and common law heir of Dennis Gallagher convey the premises to the complainants, Mary Agnes Ryan, Irene V. Rochford, Thomas M. Boylan and Matthew J. Boylan. Said deed was delivered by the defendant, Thomas Gallagher, on the 27th day of September, 1926, in conformity with the terms of the decree. The defendant, Thomas Gallagher, stands ready to convey said premises to such person or persons as the Court may direct.

CHARLES A. ROONEY,

Solicitor for and of counsel with Defendants-Respondents, Mary G. Gallagher, individually and as executrix of Dennis Gallagher, deceased, and Thomas Gallagher.

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New Jersey Court of Errors and Appeals

Between:

MARY AGNES RYAN, et als,
Complainants-Respondents,

AND

JOHN K. DALY, et als,
Defendants-Appellants,

MARY G. GALLAGHER, et als,
Defendants-Respondents.

On Appeal
from Court
of Chancery.

BRIEF FOR APPELLANT— MARGARET DALY

The facts involved in this appeal are presented in the appeal of John K. Daly, and are fully set forth in the brief filed in that appeal.

Thomas J. Daly, son of this appellant, was a nephew and heir-at-law of Bridget Agnes Daly, entitled to one-third of her real and personal estate. He died October 22nd, 1912, eight years after her death (pp. 69, 75). He left a will giving his entire estate to his mother, this appellant.

On behalf of this appellant, it is respectfully submitted that Dennis Gallagher, guardian, was absolutely without power in the so-called declaration of trust to deprive Thomas J. Daly of his interest in the estate of Bridget Agnes Daly, or

to exclude him from the inheritance. We repeat here what we presented in the brief for appellant, John K. Daly, and in addition submit the following:

I.

THE DECLARATION OF TRUST WAS AN ILLEGAL ATTEMPT TO EXCLUDE THOMAS J. DALY FROM HIS INHERITANCE.

II.

LACHES IS NOT IMPUTABLE TO THOMAS J. DALY NOR TO THIS APPELLANT.

I.

The declaration of trust was an illegal attempt to exclude Thomas J. Daly from his inheritance.

The guardian of Bridget Agnes Daly had a fund of \$1,300 in cash. He invested this sum, together with \$500 of his own money, in the premises in question, taking from John K. Daly a deed therefor, absolute on its face. Simultaneously therewith, the guardian executed and recorded a declaration of trust, in which, after reciting that the investment is by way of mortgage, he retains to himself a power of sale, and then provides:

(5) Upon the death of the said Bridget Agnes Daly to convey said property subject to said two investments or (if the same shall have been sold) to pay the net proceeds thereof over and above said two investments or assign the securities by which the same shall then be represented to such

child or children of Mary Elizabeth Boylan sister of the said John K. Daly, as he shall by instrument under his hand direct or if he make no such declaration and shall die leaving a last will and testament, then to such child or children of the said Mary Elizabeth Boylan, as he shall in said last will and testament have directed, and in case he shall die without such direction or without leaving a last will and testament, then to such child or children of the said Mary Elizabeth Boylan as I, the said Dennis Gallagher shall direct, and in case I shall die without leaving such direction then to all the children of the said Mary Elizabeth Boylan, then surviving.

It does not appear in the case that this declaration of trust was delivered by the guardian to anybody, nor is it asserted or claimed that Thomas J. Daly or this appellant ever knew of its execution.

Complainants are but one set of heirs of the ward, claiming in the right of their mother as to one-third. Another one-third descended to appellant, John K. Daly, and the balance to Thomas J. Daly, who devised to his mother, this appellant (p. 75).

The effects of this fifth item were (1) to deprive the ward of the power of disposition should she be restored to competence; (2) to permit John K. Daly or the guardian to express a preference among complainants, and (3) to exclude Thomas J. Daly **absolutely**.

We respectfully submit that such action on the part of a guardian or mere naked trustee is utterly

unwarranted in law. It is true that the ward was incompetent at the time, and never recovered, but that fact did not alter her legal rights, nor the rights of those who might succeed upon her death intestate. It cannot seriously be denied that had she recovered, she could at her election have brushed aside the so-called declaration of trust and made of it a mere scrap of paper. Neither the guardian's declaration nor the assumed consent of John K. Daly could have deprived her of that right. And what is true as to her is true also of those who come after, and stand in her shoes.

II.

Laches is not imputable to Thomas J. Daly nor to this appellant.

The learned Vice Chancellor (p. 97) finds John K. Daly to have been guilty of laches and thereupon, ignoring the rights of Thomas J. Daly and of this appellant, advises a decree of conveyance to complainants, to the exclusion of everyone else. The question of laches on the part of John K. Daly we discuss in the brief filed on his behalf.

It is difficult to see, however, how laches on the part of John K. could have any influence or effect on the rights of Thomas J. If the transaction were an absolute conveyance to the guardian, then Thomas J. could ignore it, just as could Bridget, whose heir he was. If it were a mortgage, then Thomas J. had no interest except in the \$1,300 in case John K. elected to avail himself of his equity of redemption.

Furthermore, it is not shown in the case that Thomas J. or this appellant ever knew of the

declaration of trust. It is certain that down to the filing of the bill in this case (six years after the death of the guardian and twenty years after the death of the ward) complainants took no step toward enforcing the so-called trust. The rights of Thomas J. or of this appellant were not being invaded by any conduct of complainants or of the guardian. Hence no action was necessary.

The learned Vice Chancellor predicates the finding of laches upon the altered condition of the parties, consisting of the fact that "death has sealed the lips of Gallagher, who was most interested in sustaining the legality of the declaration of trust." To this comment there is a twofold answer.

(1) In view of the provisions of the Statute of Frauds requiring such declarations to be "manifested and proved by some writing, signed by the party" legally enabled to declare the trust, and the fact that no such writing was signed by John K. Daly, any testimony by Gallagher as to oral declaration by Daly would have been incompetent.

(2) Gallagher, the guardian, survived the ward for fourteen years and did nothing during all that time to "sustain the legality of the declaration of trust," notwithstanding he was the one "most interested" in doing so.

If, after the death of the ward, the guardian or the complainants had taken any action looking toward enforcement of the trust, then would have been the time for Thomas J. or this appellant to have defended their interests. Until that happened they were not chargeable with any neglect.

It is noticeable, too, that in the filing of this very bill this appellant, although a necessary party by reason of kinship of her son and the provisions

of his will, was completely ignored, and had to be brought into the case by the counterclaim.

The decree of the Court of Chancery should be reversed, and this appellant decreed to be entitled to an undivided one-third interest in the premises in question.

G. FRANK SHANLEY,

Solicitor of Appellant, Margaret Daly.

JOHN MILTON,

Of Counsel.

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New Jersey Court of Errors and Appeals

BETWEEN

MARY AGNES RYAN, *et als.*,
Complainants-Respondents,

and

JOHN K. DALY, *et als.*,
Defendants-Appellants,
MARY G. GALLAGHER, *et als.*,
Defendants-Respondents.

On Appeal From
Court of
Chancery.

**BRIEF FOR APPELLEES, MARY AGNES
RYAN, *ET UX*, IRENE V. ROCHFORD,
ET UX, THOMAS M. BOYLAN, *ET UX*,
AND MATTHEW J. BOYLAN, *ET UX*.**

The appellants attack a decree determining that they had no estate or interest in certain lands held in trust by Dennis Gallagher in his lifetime, and adjudging that the eldest son of such trustee was seized of the same in trust for the complainants, and directing him to make conveyance to them. The matter was opened by the filing of a bill asking for a construction of a declaration of trust under which the trustee stood seized, and particularly praying that a power of appointment given to the defendant, John K. Daly, to designate the ultimate feoffees of the land be decreed to have expired. In the opinion of the Vice Chancellor the same had expired by force of the donee's repudiation and a great lapse of time after its execution should have been made.

Facts.

The facts have been stipulated and are sufficiently outlined in the appellants' brief.

I.

The guardian did not employ the funds of ward to purchase real estate.

The inhibition against the use of trust personal funds, without direction, in the purchase of real estate, is based upon the conception that it is violative of the will of the settlor to change the character of the estate. It is not the transaction itself that is denounced, but the conversion.

When realty is converted into personalty, or *vice versa*, the consequences of such disposition, when unauthorized, are:

(a) The guardian, irrespective of his faith or the degree of his prudence, is liable if loss ensues. *Quick vs. Fisher*, 9 N. J. Eq. 802.

(b) The ward, when competent, may ratify or reject the conversion, while the property remains in the hands of the guardian or one with notice.

See citations of appellant.

These reflections, however, are purely academic in the present case wherein it appears that there was no purchase by the guardian, no conversion and no parting with the control of the trust funds as personalty.

He was charged with the difficult, and perhaps thankless, duty of maintaining an invalid female, and supplied with a paltry \$1,300 for the purpose.

This was capable of a normal produce of \$78 per year, so small as in all likelihood to require an application for leave to use principal for her maintenance, which evidently he was loath to do. Accordingly, by securing the control of the Daly property, keeping it in the family of the testatrix, and investing the guardianship money therein, he sought and was able to obtain for the ward, not only a yield of 6% on the fund, but the surplus of the income above the carrying charged. With the benefit of legal advice, at once scrupulous and ingenious, he was able to devise the plan, of which appellants complain, whereby not only were the salutary objects mentioned attained, and it made possible to keep the fund invested at interest during the life of the ward, but also to secure for her the additional advantage of his own complete domination of the security. In this difficult endeavor, it was incumbent on him clearly to maintain his control of the fund as a segregate investment, and avoid the fact, appearance or argument of its absorption into a real estate purchase. This he did through the terms of the Declaration of Trust.

The first provision of the Declaration, (p. 73, l. 12) following the disavowal of himself and his wife of their beneficial interest, is an assertion that the property is charged with "the payment of the sum of \$1,300 *invested by way of mortgage* on said property, moneys belonging to Bridget Agnes Daly, which *I hold under the terms of the will of her mother, Bridget Daly.*" Further on, in dealing with the disposal of the proceeds in the event of sale, he provided, "Out of the proceeds to retain the investment of \$1,300 *under the trusts of the will of said Bridget Daly.*" By these proceedings he retained a control of the guardianship fund to an extent more efficacious than would

be provided by a bond and mortgage with the expense and delay incident to foreclosure; he observed his duty to invest the funds entrusted to him, with real estate pledged as security, with a ready expedient for repayment through the exercise of the reserved power of sale, and he bound himself to hold and handle the funds both during the period of their investment and after their repayment, according to his obligations "*under the trusts of the will of said Bridget Daly.*" To contend in the face of this delineation of the transaction, that he misfeasantly converted the funds, exposed them to loss or abandoned his fiduciary obligations, is simply to ignore the truth of the case.

The appellants herein do not make the suggestion that loss was suffered, but on the contrary claim the right to elect to take the entire property not as against the guardian or his representatives, nor yet as against subsequent grantees with notice, but as against unknowing and unparticipating third parties; getting thereby the benefit of the greatly increased value of the property, the attainment of which depends exclusively upon the success with which they can claim that this trustee *purchased*, and did not *invest*.

II.

The covenants in the declaration of trust constituted a sufficient investment of the guardianship funds by way of mortgage.

A deed of trust of real estate executed for the purpose of securing a debt, and by its terms, or implications, conditioned to be void on the payment of the debt, and carrying a power of sale on default, is essentially a mortgage, and does

not differ in its legal operation and effect from an ordinary mortgage with power of sale.

DeWolff vs. A. & W. Sprague Mfg. Co.,
49 Conn. 282.

Brantley vs. Wood, 97 Ga. 755, 25 S. E.
499.

Union Mutual Ins. Co. vs. White, 106
Ill. 67.

Smith vs. Sheldon, 65 Ill. 219.

Harriman vs. Woburn Electric L. Co.,
163 Mass. 85, 39 N. E. 1004.

Shillaver vs. Robinson, 97 U. S. 68, 24
L. Ed. 967.

White Water Valley Co. vs. Vallette, 21
How. (U. S.) 414, 6 L. Ed. 154.

In the latter case it was held that the bonds of a corporation which pledged real and personal property of a corporation, for the payment of the debt and interest would be treated and enforced by a court of equity as a mortgage.

The respective views of the common law and equity as to the nature of a mortgage are widely divergent. The former, while not insistent on any precise formula of words, requires an instrument that evinces a present purpose on the part of the grantor, or mortgagor, to convey the title to specify real estate, sufficiently described, to a designated person as mortgagee to be held by the latter as security for the payment of a certain sum of money, or the performance of some other act.

4 Kent. Com. 133.

Montgomery vs. Bruere, 4 N. J. L. 310.

In equity, however, almost any instrument in writing intended by the parties to pledge land as security for a debt, will be considered and treated

as a mortgage, although it may lack the formal requisites of a mortgage and be insufficient to constitute a mortgage at common law or under a statute. The forms in which those liens are presented, and out of which has developed the learning of equitable mortgages, are manifold.

Jones Mortgages, Par. 162.

Cummings vs. Jackson, 55 N. J. Eq. 805.

In the present matter, irrespective of the antecedent duty of the guardian and of the specific and pignorative language of the declaration, the mere fact that the latter instrument charged the property with the support and maintenance of Bridget Agnes Daly "during her natural life" (p. 73, l. 38) would be sufficient to convert it into an equitable mortgage in favor of the incompetent.

Commercial Bank vs. Pridchert, 126 Cal. 600.

Hatch vs. Hatch, 45 Ill. 178.

Sibley vs. Ross, 88 Mich. 315.

Brockway vs. Wells, 1 Paige (N. Y.) 615.

In the latter case, a contract to purchase land which was assigned as security for a debt due to the assignee upon the condition that if the debt was paid at the time stipulated, the assignee should reassign the contract, was held in equity to be a mortgage and that a right of redemption resided in the assignor.

III.

The terms of the declared trust prevailed, and the guardian did not take the legal title subject to another that was implied.

- It is difficult to discern from the appellants' brief whether it is argued that there was a trust resulting in favor of Daly as the grantor, or a trust resulting in favor of the ward to which the expressed trust was compelled to yield. In respect to the former view it is severally argued that at the time of the declaration by Gallagher, Daly was the owner of the property * * * that he alone could have impressed the land with such trusts permitted by law as he might chose * * * it was for him to say whether his sister should have a mere life estate and to dictate the devolution of the remainder * * * did not execute or authorize any instrument conferring a power * * * nowhere is there evidence that he signed or authorized the signing of an instrument impressing these lands with a trust * * * such assent as Daly may have given was without consideration and revocable * * * the necessary implication is present in his expressed desire to protect the interest of his wife as devisee of her son.

These suggestions are unintelligible in the light of the evidence that Daly for full value, and seemingly without knowledge of the source from which Gallagher derived the funds, conveyed to Gallagher by a deed of full covenants and learned nothing of the existence of a trust until a year or two later.

Evidence would be inadmissible to show by parol that his absolute conveyance created a trust in his own favor.

Lovett vs. Taylor, 54 N. J. Eq. 311.

Neither is there any basis for the contention that the real estate was charged with a resulting trust in favor of the ward beyond the terms of the declaration. Gallagher's fiduciary obligations were defined by the will of Bridget Daly, bequeathing the legacy to her daughter and appointing him guardian. Primarily his duty was to keep the fund invested, support her out of the income and turn the principal over to the ward at the age of twenty-one, should she be competent to receive it, or to her legally constituted custodian. Neither the ward nor her representatives had the right to magnify his obligations beyond this; and no matter what may have been the fiscal course taken by the guardian, no rights inured to these appellants if he discharged his trust in conformity with the direction of the will and the requirements of law. By the rights established through the declaration of trust, he fulfilled this duty, and as to any avails coming under his control through the advancement of his own \$500 and the exercise of his business sagacity, the ward and her representatives have no rights. It is as to this surplus that the declaration of trust principally deals, and it was wholly within the power of the declarer to say to whose benefit it should inure after the death of the ward, the restoration of her original estate to her administrator, and the repayment of his own \$500.

A trust will not be implied where an express trust endures sufficient for the purpose of the justice of the case. Trusts are never implied except in case of absolute necessity.

Story's Eq. Jur. 10th Ed. Par. 1196.

The leading case on the subject is *Cook vs. Fountain*, 3 Swanst. 585, containing Lord Nottingham's famous judgment expounding the classification of trusts. Part of his language is as follows:

“There is one good, general and infallible rule, that goes to both of these (i. e. implied) kinds of trusts. It is such a general rule as never deceives; a general rule to which there is no exception; and that is this: The law never implies, the court never presumes, a trust, but in case of absolute necessity. The reason for this rule is sacred; and if Chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate. And so, at last, every case in court will become *casus pro amico*.”

See also

Lewin Trusts, 12th Ed. Par. 124, Note.
1 Perry Trusts, 6th Ed. Par. 112.

Ordinarily if a trustee transfers to another, without getting an equivalent, property that he holds in trust, the other will hold on the same trusts.

Deutsche P. Kirche vs. Trustees, 89 N. J. Eq. 242.

By force of this doctrine Gallagher, had he employed the guardianship funds to purchase the real estate for his own benefit, would have taken the title subject to trust to carry out the terms of the will of Bridget Daly, but by his declaration of trust made simultaneously, he indicated his recognition of this obligation and designed to prevent its obscuration by the express declaration that the

funds were not incorporated into the realty but were invested by way of loan only under the monitorship of the will. This preservation of the ward's rights rendered the presumption of a further trust wholly unnecessary.

With the real estate thus on his hands, and disclaiming any beneficial right thereto, some declaration was imperative as to the present and ultimate settlement of interests. These, according to the declaration, were threefold; the extent of the ward's interest was expressed as the right to claim a lien by way of first mortgage; his own interest was limited to a lien by way of second mortgage. Over the aggregate of these two amounts, there might (or might not) be a further value in the property, which the declaration conveniently calls the "equity of redemption." His direction as to this surplus interest was that it should inure to such of the complainants as John K. Daly should appoint. It is argued that this being a consideration wholly removed from his fiduciary obligation, he was free to make what provision he willed.

IV.

The right of *cestui* to elect to ratify an investment exists only to prevent an undue advantage to the trustee.

Good conscience does not approve anyone getting something for nothing. Out of this moral principle grows the doctrine of resulting trusts.

"All resulting uses or trusts will be found to be some variation of this principle, viz.: That one is presumed not to be a donor of property conveyed or caused to be conveyed by him. The idea that one who gives value

expects to get value in return is at the root of resulting trusts." H. F. Stone, *Resulting Trusts and the Statute of Frauds*, 6 Col. Law Review 326.

The doctrine that a *cestui* might elect to take the whole estate in which a trust fund was invested, and through his own choice become possessed of more than his original estate and normal increment, would have never obtained in equity unless justified by some moral exigency. An inspection of the authorities disclose that such right is accorded, not with the object of enriching the *cestui*, but to prevent the enjoyment of an unjust advantage by the trustee. The unearned increment must be awarded either to a misfeasant fiduciary or to an unentitled *cestui*, and the demand that wrongdoing be discountenanced is so urgent that the *cestui* becomes the repository of what the wrongdoer is deprived.

The logic of the rule is thus expounded by Mr. Justice Dixon in *Bohle vs. Hasselbroch*, cited by appellants:

"It is a fundamental principle in regard to trust estates that the trustee shall derive to himself no gain, benefit or advantage by the use of the trust funds; whatever of profit may be made shall belong to and become parcel of the trust estate. McKnight's Executor v. Walsh, 9 C. E. Gr. 498. An outgrowth of this principle is that, as between *cestui que trust* and trustee and all persons claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to the trust, however much it may be changed or altered in its nature or character, continues to be subject to or affected by the trust. Pennell v. Deffell, 4 De G. M. & G. 372, 388. As a concomitant of the rule just stated, and to effectuate fully the fundamental principle, another rule exists, that, when the trustee has improperly

changed the form of the estate, the *cestuis que trust* may elect whether they will accept the estate in its new form or will hold the trustee responsible for it in its original condition. *Ferris v. Van Vechten*, 73 N. Y. 113. If the improper conversion turns out to be advantageous, they may adopt it and take the profit; if it results in loss, they may insist on having an equivalent for the estate as it was before the change; and when the *cestuis que trust* are infants, the court will deal with the matter as it shall consider best for their interest. *Halcomb v. Executor of Halcomb*, 3 Stock. 281. This right of election by the *cestuis que trust* is upheld by courts of equity in many cases where there has been misconduct on the part of the trustee, as may be seen by reference to *Fox v. Mackreth*, 1 Lead. Cas. Eq. *115, and has been fully approved by this court. *Nulford v. Bowen*, 1 Stock. 797; *Stewart v. Lehigh Valley Railroad Co.*, 9 Vr. 505. It is enforced in cases like the present, for if a trustee purchases property with trust funds in his hands, and takes title in his own name and for his own benefit, he will, at the option of the *cestuis que trust*, be declared to hold it in trust for them. *Durling v. Hammar*, 5 C. E. Gr. 220; *Story Eq. Jur. Pars.* 1260, 1262. And if, in such a purchase, he has mixed up moneys of his own with the trust funds, a trust will still result to the *cestuis que trust* at their option; and the burden will be on the trustee to show the amount of his own funds used in the purchase, and so far as he fails to make that distinction the court holds the property bound by the trust. *Russell v. Jackson*, 10 Hare 204, 213; *In re Pumfrey*, L. R. 22 Ch. Div. 255; *Perry Trusts Par.* 128, 2 Pom. Eq. Jur. Par. 1076 (2)."

In the present instance the right to elect does not exist because, having reference to the foregoing, (a) the trustee did not seek to derive gain from the use of the trust funds, (b) the trust funds were not altered in nature or character,

(c) there was no misconduct on the part of the trustee, (d) the trustee did not take title in his own name *and for his own benefit*, (e) the trustee did not mix up moneys of his own with those of the trust fund.

V.

The claim of the appellant, Margaret Daly, is successive to that of the appellant, John K. Daly, and his demand is outrageously inequitable.

Daly, flouting the expressed wish of his mother that he keep the property for ten years, sold it to Gallagher in the open market for its full value which he received in cash (pp. 57, 58). After a lapse of thirty years, and in the face of his own deed, and without even an offer to restore the purchase price, made actually or in his pleading, he seeks to have a court decree that he is still an owner of the property. To sustain this position he must contend that his deed was not a deed; that the investment of the trust funds was not an investment, and that the declaration of trust was a nullity. No claim is set up by him of fraud or mistake in the making of his absolute deed, which would be the only method whereby he could avoid it; his brief concedes that the property today is charged with a mortgage lien in favor of the ward's administrator; and he escapes from the trust declaration by ignoring it.

Notwithstanding the foregoing, points are made in the appellants' brief that subsequent to the deed, he had a surviving control of the property that reserved to him the right to declare the terms of a trust, and that the declaration in question was not executed, authorized or assented to by himself (Appellants' brief, Point 2).

The prayer of his counterclaim was that he be decreed to be a *one-third owner* as heir of Bridget Agnes Daly; yet he contends before this court for the first time, that he is the *sole owner* of the premises because his absolute deed was in fact a mortgage for \$1,300. He seeks to prove it by the argument that the declaration of trust is silent as to who should pay the principal, and that it is but natural to assume that he is the debtor, and therefore the mortgagor, and ultimately the holder of the fee. His diatribe concludes with a lamentation that he cannot find anybody to whom he might safely pay back the \$1,300.

It is difficult to answer a contention so weird. As an appellant in this court, he is not at liberty to set up a claim of right different from that urged below and cannot through mere criticism of the opinion of the mourned Vice Chancellor, evade the effect of his absolute deed. It is significant that the opinion of Vice Chancellor Griffin wholly ignored the claims that the trustees acted *ex maleficio*, and also that the appellants had any right of inheritance.

VI.

Appellants were guilty of laches.

Bridget Agnes Daly died in 1904. By the terms of the declaration, upon her death the mortgages standing in favor of her estate and in favor of Gallagher were payable. If paid, it then became the duty of Daly, as donee of the power, to appoint what children of Mary Elizabeth Boylan should take the entire estate; or if unpaid, what

children should take subject to the liens of two said investments; the declaration of trust, in its general aspect, contemplated the composure of the entire matter and the exoneration of the guardian from further responsibility upon the death of the ward. No reason can be conceived why the guardian should care to prolong his obligations beyond that event.

Daly, from the outset, was covetous of the property and refused to make the appointment that would burn his bridges behind him. He sought to acquire the property for himself through the efforts of buying it in at a tax sale (p. 58), through offers of a settlement with the Boylan children (p. 59), and through special negotiations with one of the latter (p. 64). According to his testimony, during this lapse of thirty-three years, if his counterclaim, testimony or contentions on this appeal are to be believed, he regarded himself as having an interest in the property which could be settled only by resort to a court of equity, but nevertheless assented to and acquiesced in the equitable situation created by the declaration of trust.

He was guilty of laches which was properly invocable against him by the court, even though not pleaded, because his long delay indicated a purpose not to act upon the power of appointment, and his inactivity in respect thereto was evincive of his own conception that the power did not survive beyond a reasonable time after the death of Bridget Agnes Daly.

Norfolk & Hosiery Co. vs. Arnold, 49
N. J. Eq. 390.

VII.

The court below properly held that the right to exercise the power expired a reasonable time after the death of the ward.

The Vice Chancellor proceeded upon the elementary principle that the intention of the donor of a power is controlling. In the present instance the intention can be gathered from the terms of the declaration of trust. It recites the fact that the donor is a guardian with funds for investment in his hands, and that such investment is to terminate upon the death of the ward. It further declares his own investment of \$500 is likewise to terminate on the death of the ward.

Paragraph 5, which is the object of dispute, undertakes a direction of what shall be done, in general, "upon the death of the said Bridget Agnes Daly"; on that happening the property was to be conveyed to such of the complainants as Daly should direct. This is the plain language of the paragraph, which proceeds to deal with the contingencies of Daly dying and making such appointment by will; dying and failing to make such testamentary appointment; the donor's right to appoint in his lifetime, and the donor's death without leaving such direction.

All these latter provisions are subordinate to the general design that the conveyance, as directed through appointment, should be made upon the death of the ward; the several provisions of the paragraph can be brought into harmony only through construing them as referring to the possibility that the ward would outlive either Daly or the trustee, or both. The language respecting the possibility that Daly "shall die leaving a last

will," must be read "shall have died" in order to consound with the remaining language of the same phrase, "he shall, in said last will and testament, have directed." This is demanded by the clear evidence of the instrument that the death of the ward should mark the end of the guardian's responsibility.

No incentive existed for the protraction of the trust beyond the time when the guardian's responsibility terminated; thereafter he would be an interloper in the affairs of another family. The provision for reclaiming his own money invested when the ward should die, is significant of a design to wholly terminate the transaction on that occurrence.

Vice Chancellor Griffin discerned an additional reason in the provision that there should be an assignment of the "securities by which the property should *then* be represented."

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

RICHARD DOHERTY,
Solicitor of and of Counsel with Appellees, Ryan,
Rochford and Boylan.

