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BILL OF COMPLAINT.

Filed June 10, 1921.

In Chancery of New Jersey

To his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainant, Lillian Leslie Donovan, of the City of East Orange, County of Essex, and State of New Jersey, a lunatic, by Ada Leonard, her sister and next friend, respectfully shows:

(1) On and before the twenty-fifth day of August, 1920, complainant was the owner in fee simple of certain premises in the City of East Orange, County of Essex and State of New Jersey, and bounded anl described as follows:

> "Beginning in the westerly line of North Seventeenth Street at a point therein distant northerly measured along said line of said street one hundred and thirty feet from the northwesterly corner of said street and Eaton Place; thence westerly at right angles to North Seventeenth Street one hundred feet; thence northerly parallel with said street thirty feet; thence easterly parallel with first course one hundred feet to said line of North Seventeenth Street; thence along said line of said street southerly thirty feet to point of Beginning."

(2) On said twenty-fifth day of August, 1920, the said Lillian Leslie Donovan was and ever since has been and is a lunatic and of unsound mind and is at the present time an inmate of the Essex County Hospital for the same at Overbrook, N. J.

(3) On the twenty-fifth day of August, 1920, the said complainant, being as above set forth a lunatic, and being also an invalid and residing in the same house as

William Nelson Donovan, who is the defendant in this case, and who was boarding with her and under his influence, did, on said date, make, execute and deliver to said William N. Donovan a deed of warranty for the said premises above described, which deed was recorded on August 26, 1920, in the office of the Register of Essex County in Book C 64 of Deeds, page 587.

(4) The execution and delivery of said deed was secured by the said William Nelson Donovan by reason of his undue influence over the complainant and without consideration, and while the defendant was fully aware of the complainant's insanity and feeble mental condition.

Complainant is without adequate remedy in the Court of Law and therefore prays:

(1) That William Nelson Donovan, who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

(2) That the conveyance of the premises herein described may be set aside and for nothing holden.

(3) That the defendant may be required to re-convey to the complainant the premises described in the deed herein mentioned and set forth.

(4) That writ of subpoena may issue, commanding said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

HOWE & DAVIS,
Solicitors and Counsel with Complainant.

ANSWER.

Filed September 15, 1921.

The defendant, William N. Donovan, residing at No. 9 North Seventeenth street, East Orange, answering the bill of complaint, says that:

1. Defendant admits paragraph one.

2. Defendant denies paragraph two and says that the said Lillian Leslie Donovan did not become insane until sometime in the month of March, 1921, at which time she was committed to the Overbrook Asylum.

3. Defendant denies paragraph three and states that while the said Lillian Leslie Donovan was an invalid on the twenty-eigth day of August, 1920, she was a person of sound mind, and fully capable of understanding and appreciating the purport and effect of the deed of conveyance which she executed and which is mentioned in said paragraph.

4. Defendant denies paragraph four and states that prior to the execution and delivery of said deed, this defendant had advanced all of the money out of his own personal funds necessary to purchase the said property and has maintained said premises and paid all of the charges that has from time to time accrued against the same.

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

JAMES R. STEWART, Jr.,
Solicitor of Defendant.

ORDER OF REVIVOR.

Filed February 8, 1922.

It appearing by petition and affidavit that Lillian Leslie Donovan, the complainant in this cause, departed this life on September 21, 1921, having first duly made and published her last will and testament, whereby among other things, she appointed Ada Leonard her executrix, who has not yet taken upon herself the burden of execution thereof, and that the said Ada Leonard is a sister of the said Lillian Leslie Donovan, and entitled to share in said estate, either as heir-at-law of the said Lillian Leslie Donovan, or as residuary legatee, and executrix under the last will and testament of Lillian Leslie Donovan,

It is on this seventh day of February, 1922, ORDERED, that the said Ada Leonard, be and she hereby is inserted as complainant in this suit; and that the said suit should be revived and conducted in the name of the said Ada Leonard, as heir-at-law and executrix named in the last will and testament of the said Lillian Leslie Donovan, deceased.

And it is further ordered that she be permitted to amend the bill of complaint herein as her interest may require.

E. R. WALKER,

C.

Respectfully advised,

BAYARD STOCKTON,

A. M.

IN CHANCERY OF NEW JERSEY.

January 4, 1923.

Between
ADA LEONARD,
Petitioner,
and
WILLIAM NELSON DONOVAN,
Defendant.

Transcript of shorthand notes of testimony taken in the above-entitled matter before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Edward L. Davis, Esq., for petitioner; James R. Stewart, Esq., for defendant.

LEONARD H. SMITH, sworn in behalf of the petitioner.

Direct examination by Mr. Davis.

Q You are a physician of the State of New Jersey? A I am.

Q How long have you been such physician? A Eighteen years.

Q Duly licensed, I suppose? A Yes.

Q Practicing most of the time in New Jersey? A All the time, practically.

Q And did you examine Lillian Leslie Donovan at any time in regard to her insanity? A I did.

Q When? A I cannot tell you how long ago that was.

The Court. What is the date of the deed?

Mr. Davis. August, 1920.

The Court. August 25, 1920?

Mr. Stewart. Yes, sir.

The Court. All right.

Leonard H. Smith, direct.

Q I show you a certified copy of the record of the—
A Commitment?

Q —of the record of the Essex County authorities committing patient to the insane asylum, and ask you if you can refresh your recollection from that? A I should say that is it, yes.

Q What is your recollection; is your recollection refreshed as to the time? A There is a date on there, that is all.

Q And that date is what? A April, 1921.

The Court. May 13, 1921?

Mr. Davis. March, isn't it?

A March.

The Court. This is May here (indicating).

The Witness. There are three of four things on here. I think these papers go way back here (indicating). There it is (indicating to Court).

The Court. March, 1921?

A March, 1921.

Q Had you previously examined this woman? A Not to my recollection.

Q Tell us her condition at that time? A At the time I examined her?

Q Yes. A She is insane, according to the commitment.

Q Well, what sort of insanity? A I do not think I made a diagnosis.

Q Were you able to tell from your examination what the inducing feature of the insanity was? A There is a statement there that she was paralyzed. The chances are that there was that a—I don't know, I am not going to guess about it, I would rather not.

Q You don't know whether from your—did you tell from your own examination that she was paralyzed? A Yes.

Q And would a paralyzed condition have an effect, produce such an effect on her brain? A Eventually does.

Q And are you able to tell us in that particular case what was the inducing feature? A I could not tell you.

Q Was she violently insane at the time? A Not violent, no.

Q Could you tell from your examination how long that condition had existed? A No, I could not.

Q Was her condition at that time apparently a gradual process or a sudden one? A I presume the history will show on there, but from recollection I could not tell you.

Q Assuming that she had a paralytic stroke in August or October, 1919, and that she was in the condition in which you found her in March, 1921, would you say that her insane condition was a gradual result of the paralytic condition which arose in 1919? A No two of those do the same thing. Some of them can start at the time of a stroke, some of them—it is not an essential feature of a stroke to have insanity go with it. It might or might not.

Q But if insanity results with paralysis present, aren't you safe in assuming that that is the cause of it? A I do not think so.

Mr. Stewart. I think your Honor—I do not want to be making objections, but it seems to me to be purely in the field of speculation.

The Witness. Yes.

Mr. Stewart. The doctor has answered these questions.

The Court. The doctor says she was insane when he examined her, and he is not sure how long she had been insane. That is about all he can testify to.

Cross examination by Mr. Stewart.

Q The only time you examined Mrs. Lillian Leonard, was in March, about March, 1921? A No, I would not

say that. I say that is the only time I remember examining her.

Q The only time you remember? A Yes.

CHARLES D. MOULTON, sworn for the petitioner.

Direct examination by Mr. Davis.

Q Are you a practicing physician of the State of New Jersey? A I am.

Q Duly licensed? A I am.

Q And how long have you been practicing? A Since 1902.

Q Did you have occasion to examine Mrs. Lillian Leslie Donovan in the early part of 1921? A I did.

Q When were you first called to examine her? A Sometime in September.

Q Of what year? A It was the year after she had had her stroke; I don't remember—the year before I committed her in March, I can place it from that.

The Court. That would be 1920?

The Witness. 1920.

Q And what was her condition then, her physical condition first? A Left sided hemiplegia, that is paralysis of the whole left side.

Q What was her mental condition at that time? A Her mental condition at that time was good; that is, any stroke of apoplexy they would not be quite as good, but the mental condition seemed to be so that she knew what she was doing.

Q Do I understand that any stroke of apoplexy—was it apoplexy? A Apoplexy.

Q —to some extent affects the mental powers? A It would; every stroke would more or less.

Q And you continued to attend her from September— A I did.

Charles D. Moulton, cross.

Q —to the time she was committed? A I did off and on. I was not in steady attendance; I would go when I was needed.

Q You assisted Doctor Smith in having her committed? A I did.

Q And at that time she was insane? A Insane.

Q In what way was her insanity demonstrating itself? A Why the use of abusive language, which I had never heard her use before; the woman was absolutely devoid of any reason, she could not answer questions intelligently at all.

Q In September when you were first called was she able to get up? A No, she had to be helped, she never was able to walk while I was there.

Q You never attended her previous to— A Never to my knowledge.

Q —previous to the stroke? A She had had the stroke before I attended her.

Q And was she in bed all the time, or was she able to sit up? A She was from bed to chair, with the nurse's help.

Q Would you say that her mental actions were those of a normal person? A I would say she knew what she was doing at that time; yes, sir.

Cross examination by Mr. Stewart.

Q Did you have occasion, doctor, to treat Mrs. Leonard in sometime about August, 1920? A I was away in August, so I know I did not treat her in August.

Q You treated her, though, from September twentieth —or September, 1920, on? A Yes, sir.

Q Until about when? A Until we committed her at the insane asylum.

Q That was in March, 1921? A Whatever the papers say.

Q And as to her sanity, her condition in September, 1920, at the time you were treating her then, what was

her condition? A I would say she knew what she was doing.

Q And her actions were rational, that of a rational person? A Yes, sir.

Q And about when did you last treat her, or have occasion to? A At the time she was committed to the insane asylum.

Q That was in March, 1921? A The date is there, yes, sir.

Q Are you able to—can you tell the Court and tell us about when you noticed her condition became that of insanity? A It was along after the first of the year before we committed her in March, her mental condition seemed to be on a gradual change.

Q But as far as you know, prior to the first of the year, that is, 1921, her condition was—she was sane? A She was sane, to the best of my judgment.

Re-direct examination by Mr. Davis.

Q Doctor, would you say from your examination and knowledge of the case that the original attack of apoplexy was the inducing feature of the insanity? A I do not think you could say positively.

Q What is that? A I do not think you could make a positive statement with regard to that.

CHARLES RATHGEBER, sworn for the petitioner.

Direct examination by Mr. Davis.

Q Doctor Rathgeber, you are a practicing physician of the State of New Jersey? A I am.

Q Licensed? A I am.

Q How long have you been practicing? A About eleven years.

Q And did you know Mrs. Lillian Donovan? A I did.

Q And at the time you knew her was she Mrs. Donovan? A No.

Charles Rathgeber, direct.

Q When did you first—when were you first consulted in regards to your— A September 15, 1919.

Q Where? A At her home on North Seventeenth street.

Q Did you make an examination of her at that time? A I did.

Q What was her physical condition? A She was suffering from the results of an apoplexy which occurred four days prior to my examination.

Q That was what you have been told? A Yes.

Q And was she able to get about? A Not without help.

Q And did you continue to attend her? A I attended her until April the seventh, 1920.

Q And about how frequently? A I made about fifty visits to the home.

Q And did her physical condition improve as time went on? A No.

Q Did it do the reverse? A I think she got gradually worse.

Q And what was her mental condition when you first visited her? A When I first went there her mental condition was fairly good. All of these cases of apoplexy, however, the mental condition is not normal, and she was typical of that condition.

Q And was there any development of this condition during your period of attendance? A Any development of what condition?

Q Of mental condition that was out of the normal?

The Court. Did she get worse, in other words?

A Yes, sir; her mental condition got worse.

Q How did it show itself to you? A By being very dopey at times and then occasionally she would have acute spells at night in which she would be absolutely disoriented and would not know where she was or the time, or anything.

Charles Rathgeber, cross.

Q Was she excitable at all during any of the period of your attendance? A Yes; on a few occasions.

Q And how did this excitability show itself? A By getting in a sort of an hysterical state.

Examined by the Court.

Q Did you visit her in August, 1920? A No, sir; no, your Honor, I did not.

Q Well, when did your visits cease? A April 7, 1920.

Q Now, on April 7, 1920, do you think that she had enough intelligence to execute a deed? A That is very hard for me to answer, your Honor, because at times she seemed to be perfectly rational and then at times she did not. It is almost impossible for me to answer.

Q Well, during your last visits, do you think she could have executed a deed— A If she were—

Q —intelligently? A Yes; I think she could, if she were in her usual frame of mind. However, if she were in these attacks of sort of hysterical state, why, she could not.

Q It would depend upon whether it was executed in one of these spells or not? A Yes.

Q Well, it is a fact, isn't it, doctor, that a great many people are paralyzed and still maintain their mental equilibrium? A Oh, yes; indeed.

Cross examination by Mr. Stewart.

Q Doctor, you would not want to say at this time in April, that Mrs. Leonard was insane, would you? A I would not.

Q She might be sane and suffering but that would not necessarily mean that her mind was not clear, would it? A Not in April, 1920.

Q And after that? A I know nothing about the case.

Q You know nothing about her then? A (No answer.)

EDWARD WILLIAM BLAKELY, sworn for the petitioner.

Direct examination by Mr. Davis.

Q Are you a practicing physician of the State of New Jersey? A I am.

Q For how long? A About ten years, a little over ten years.

Q And did you have occasion to examine Mrs. Lillian Donovan at all? A I did.

Q During the past few years. When was that? A That was some time in December, 1919.

Q And where did you examine her? A I saw her at her home, with Dr. Rathgeber, but I do not recall the street address.

Q On how many occasions? A Only once.

Q Only once. And what was her physical condition at that time? A At that time she had a decided left-sided paralysis with very marked mental condition usually following a condition of that kind, that is, she was in a semi-conscious condition at the time I saw her.

Q And were you able to observe her mental condition? A Well, she did not answer questions rationally; she appeared at times to be all right and would answer and then she would lapse off into these unconscious or semi-conscious spells.

Q Would you say that she was in sufficient control of her mental faculties to appreciate the effect of making a deed? A Well, I would not say she was at the time that I saw her; I only saw her the once; at that time I do not think she would be—that is, from my questioning her, I do not think at that particular time that she would be.

Cross examination by Mr. Stewart.

Q Well, now, doctor, when a person suffers a paralytic stroke, just at that time, or after that time, it is not unusual, is it, for a person to be in a semi-conscious condition, as you term it? A It is quite the usual thing.

Q It does not necessarily mean that the person is suffering from insanity, does it? A No; not at all.

Q (*By the Court.*) Often they come out of it, and come out of the coma? A And they are perfectly rational again.

Q And it is no indication, the fact that they are at that time semi-conscious is no indication that they are suffering from insanity? A No.

Q And the only time you treated Mrs. Leonard, is this period of December, 1919? A In 1919 I saw her, in consultation with Dr. Rathgeber; I did not treat her at any time; Dr. Rathgeber and I talked the case over and just made suggestions. There was nothing aside from the treatment that he was already carrying on.

Q You were called in, I presume, on account of this paralytic condition? A Yes.

Q (*By the Court.*) It was four days after the stroke? A Yes, sir.

ELIZABETH PALMER, sworn for the petitioner.

Direct examination by Mr. Davis.

Q What is your business, Mrs. Palmer? A Well, at present I am keeping house for my cousin where my aunt died.

Q Have you ever worked at any business? A No, sir.

Q Well, are you a nurse? A Not a nurse, no.

Q Do you know Mrs. Donovan, or did you know Mrs. Lillian Leslie Donovan? A I have known her.

Q Did you live in the same house with her for any length of time? A Well, I was called down there the 15th of October, and I took care of—

Q Of what year? A 1915. And I took care of her until April the 16th.

Q Where was that at? A At—in Seventeenth street.

Q In East Orange? A Yes, sir.

Q Who were the members of the household who lived there? A Mr. Donovan and Mr. Leonard.

Q Mr. Leonard? A Her uncle. And her—and Mr. Donovan's son.

Q And Miss Lillian Leslie Leonard, I suppose? A Yes.

Q And anybody else? A No, sir.

Q Who was the Mr. Leonard that you spoke of; you said there was a Mr. Leonard living there? A That was this Mr. Leonard's son, Howard Leonard; the other one was her husband, later on, this other Mr. Leonard.

Q I am not sure I have it clear. How many women were there in the house besides you and Mrs. Donovan? A Just us two.

Q How many men? A Three.

Q Who were the three? A Well—

Q Mr. Donovan and his son? A Yes.

Q And who else? A And her uncle, Mr. Leonard.

Q How old a man was he, about? A Her uncle?

Q Yes. A Oh, I don't know, he is past seventy, I should judge.

Q And was he a man who went out to work or did he stay home? A He stayed home.

Q Now, your duties were what? A Well, I helped—I assisted with the housework and I took care of Miss Leonard.

Q Now, was she able to do any work herself? A Oh, my, I guess she was not; she was not able to get out of bed herself; her whole side was paralyzed.

Q Was she able to sit up? A Well, not when I first went there; she sat up, I would get her out of bed in the chair, but she would sit just a few minutes and then I would get her back, and that is the only time.

Q Toward the end was she in the habit of sitting up? A Not very much.

Q Did you notice her mental condition at all? A Oh, yes; it was not right.

Q What were some of the things she used to do that made you think it was not right? A Well, she would be hysterical and at times she might call you for a few

minutes and then again she would not at all—and she would want—I—she would want to get out of bed all the time, and at times I could not leave the room at all and if I did leave the room I would have to go back and see if she was trying to get out of bed; she would try to get out of bed and sometimes she did not know where she was.

Q Did her sisters come to see her there? A Very often, yes, sir.

Q How many of them? A Well, Mrs. Bunn and Mrs. Viviet and Miss Leonard that sits beside of you, and a sister from Paterson, I cannot just recall her name.

Cross examination by Mr. Stewart.

Q In other words, Mrs. Palmer, Mrs. Leonard was a very sick woman at that time, wasn't she? A Yes; she was, very.

Q And persons that have a paralytic stroke are very sick persons, aren't they? You know that from your experience. A Well, of course, if any of you have ever seen any one paralytic you will know what that means.

Q Yes. And they are liable to be delirious at times; is that so? A Well, I don't know whether you could—

The Court. I think that is a medical question. (To witness.) How long were you there, from April?

A I came there in October the 15th.

Q (*By the Court.*) October 15, 1919? A Yes, sir.

Q (*By the Court.*) All right. A And I stayed there until April the 17th.

Q (*By the Court.*) 1920? A Yes, sir.

Q Mrs. Palmer, just one or two questions. Who employed you to come there? A Her sister, Miss Leonard, the one that sits beside of you.

Q Do you see Mr. Donovan here? Was he there at that time? A Sure he was there.

Re-direct examination by Mr. Davis.

Q Did any of the sisters live there? A No, sir.

IDA C. TAYLOR, sworn for the petitioner.

Direct examination by Mr. Davis.

Q Mrs. Taylor, did you know Lillian Leslie Donovan? A I did.

Q And did you see her at all during her illness? A I did.

Q More than once? A Only once.

Q When was that? A Well, I think it was about a week after her return from the West after the stroke.

Q And where did you see her? A In her home in East Orange.

Q Did you talk to her? A I tried to.

Q Of course, her physical condition was that she was sick in bed? A Well, she was able to sit up at the time with a good deal of help.

Q Were you able to notice her mental condition? A Yes; I certainly did.

Q What was it when you noticed it? A Well, at first she did not recognize me and she had known me all her life.

Q Had she known you before that? A All her life, and she had very little to say to me, and one marked thing was that she did not ask me to come and see her again.

Q Have you had any medical experience yourself? A I sure have.

Q What have you been? A Well, I have had a sanatorium at my home.

Q Are you a nurse? A I am.

Cross examination by Mr. Stewart.

Q Are you related to Mrs. Leonard? A I am.

Q And what is your relationship? A Her mother and my mother were sisters.

Q Then how did you come to be there, when was it, in 1919? A 1919.

Q Yes. A Well, I went from a friendly point of view to see her; I heard she was ill and went to see her and offered my assistance, if necessary.

Q And how long did you stay there? A A couple of hours, I think.

Q You stayed there only a couple of hours? A Only a couple of hours.

Q And made but one visit? A But one visit, but I heard from her right along up to the time of her death.

Q How did you hear from her? A Well, I heard—

The Court. No; that is inadmissible. What she saw is what we want.

Q This is the only visit since 1919, you made upon Mrs. Leonard? A That is the only one. I was very busy and could not visit her.

EMMA HARVEY, sworn for the petitioner.

Direct examination by Mr. Davis.

Q Where do you live? A In South Orange.

Q And do you know Lillian Leslie Donovan, or did you know her? A Yes.

Q How long have you known her? A Well, I would say about twelve years, I am not sure, twelve to fourteen.

Q And did you visit her at all during her illness? A While she was at her sister's home.

Q At her sister's home where? A In South Orange, next door.

Q And do you know when that was? A Yes; it was in July, and the first part of August in '19 and '20, I believe, 1920.

Q July and August before her death, before she was sent to the asylum? A No; just before she was married, about four weeks before she was married is when she was at her sister's.

Emma Harvey, cross.

Q (*By the Court.*) Is that 1920? A In 1920, I believe.

The Court. Is it admitted it was 1920?

Mr. Stewart. No; it is not.

Mr. Davis. She was married in December, 1920.

The Court. We are fixing the time. This is a couple of months before.

Mr. Davis. Four weeks.

The Witness. Four weeks; she was there from the 4th of July until the 1st week in August; six weeks from the 4th of July.

Q (*By the Court.*) And it was during that period? A It was during that period I saw her nearly every day during the day sometime.

Q And her physical condition, I suppose, was the same as has been testified to? A Yes, sir.

Q Not able to get about unassisted? A No.

Q Did you have a chance to notice her mental condition? A Yes; I noticed she did not act as she had before she had been taken sick. I had saw her and she would get hysterical.

Q (*By the Court.*) Well, were there times when she was normal, did you think? A Not when I saw her I did not think there was.

Q When she was not hysterical what was her condition? A Why, she would act very quiet, if you were in the room she would rest her hand like that (indicating) and would not look at you for quite a while.

Cross examination by Mr. Stewart.

Q Your visits, Mrs. Harvey, extended over what period?

The Court. About a month, Mrs. Harvey said.

A Yes.

Emma Harvey, re-direct—re-cross.

The Court. Four weeks, she said, that would be July and August, 1920.

Q And the last time you saw her was in August—July, 1920, is that right? A August.

Q August of 1920, yes. And how did you come to visit the house? A Well, I went in to visit her to see her on account of her being ill and I had stayed with her occasionally, when her sister would go downstairs I would stay upstairs with her.

Q And did you talk with her? A Yes; when she would talk.

Q And how did she talk? A Well, I am not very—not very much, did not say very much; she would cry.

Q Did she talk as if she was very sick?

Q (*By the Court.*) Was what she said rational? A Yes, very.

Re-direct examination by Mr. Davis.

Q Do you know what he means by "rational"? A Well, very hysterical, I should say.

The Court. That means irrational.

A Yes, that is so.

Re-cross examination by Mr. Stewart.

Q In what way was she irrational? A Well, she would cry and then she would laugh, different ways like that.

Q Are you related to Mrs. Leonard here? A No; I am not.

Q How long would she cry, for how long a period? A I don't know.

Q What? A I don't know how long, I couldn't tell you.

Q Well, would it be very long? A Well, sometimes it would be and sometimes it would not.

Jennie Probeck, direct.

Q Well, could you carry on a conversation with her? A No.

Q Eh? A No; I could not.

Q When you made visits, how long would you stay? A Well, sometimes I would stay half hour and sometimes I would stay an hour.

Re-direct examination by Mr. Davis.

Q How old a woman was she, about?

The Court. Fifty-five.

A I don't know her age; I heard them say, but I could not say.

The Court. I think the papers show.

Mr. Stewart. She was fifty-five at the time she was committed, if that is admitted.

JENNIE PROBECK, sworn for the petitioner.

Direct examination by Mr. Davis.

Q Mrs. Probeck, did you know Lillian Leslie Donovan? A Yes; I did.

Q And did you visit her at all during her illness? A Yes; once.

Q Where? A Seventeenth street, East Orange.

Q And when? A Why, I think it was about June, in 1920.

Q And did you talk to her? A Yes.

Q What seemed to be her mental condition? A Well, the day I saw her, why, she did not act very good, don't you know, she would be all right one minute and the next she would be off.

Examined by the Court.

Q Do you think she was normal mentally? A No; I don't think she was normal.

Q Do you think she understood what you said? A At times, sometimes, and then again she would not. You

see, I only saw her once in that condition.

Q How long did you stay, how long did you visit? A Well, I think about four hours.

Q And all of that time she was not normal? A At times she would, you know, she would sit and then right off she would go on something else.

Q Was she paralyzed? A Oh, yes.

The Court. When was this stroke; in December, 1919, wasn't it?

Mr. Davis. September, 1919.

The Court. September?

Mr. Stewart. Yes, sir.

Cross examination by Mr. Stewart.

Q Mrs. Probeck, did I understand you to say you made only one visit? A That is all I saw her, and that was in June, I think.

Q What? A In June, 1920.

Q And what was the occasion of your visit there? A Why, I just went to see her.

Q How did you know to go to see her? A I was at Newark, I was in Newark doing some shopping and I went over to see her.

Q And you had been informed that she was sick? A Yes.

Q Are you related to any of the Leonards? A I am to Mrs. Viviet.

Q Mrs. who? A Mrs. Viviet, a sister to Mrs. Leonard.

Q I see. So you are a sister-in-law? A Sister-in-law.

Q And prior to June, 1920, did you have occasion to visit Mrs.— A When?

Q Prior to June, 1920, did you have occasion to visit Mrs. Leonard? A Well, I don't know what date it was in June, but it was in June, but I have not been there before or after.

Q Only one visit? A Only one visit, that is all.

Q While she was living there? A Yes, sir.

Elizabeth Nickl, direct.

ELIZABETH NICKL, sworn for the petitioner.

Direct examination by Mr. Davis.

Q Did you know Mrs. Donovan, Mrs. Nickl? A Yes; I did.

Q For a long time? A Oh, I knew her for about twenty-five years.

Q And did you visit her during her illness? A Three times.

Q Where? A Twice at her own home and once at her sister's.

Examined by the Court.

Q What was the last time? A When she was down at her sister's in South Orange.

Q And what was the date? A I really could not tell you.

Q About the year, can't you tell? A No; she was staying at her sister's, I know, for several weeks.

Examined by Mr. Davis.

Q Which sister was that? A Mrs. Bunn.

Q Are you able to tell us whether it was the same time she was staying at her sister's when Mrs. Harvey visited her, or don't you know? A I was not there at the same time Mrs. Harvey was there, but it was at that time.

Q But it was— A When she was staying at her sister's at that time.

Q She was unable to help herself, I suppose? A Yes; somebody had to help her.

Mr. Stewart. I object.

Mr. Davis. It is so generally admitted—

The Court.—It is admitted she was paralyzed, her physical condition, there is no dispute about that.

Mr. Davis. I was just trying to get over that quickly.

Elizabeth Nickl, cross.

Q What was her mental condition, as you noticed it? A She seemed odd to me, not like she used to be, because I knew her many years before that. She did not act right.

Q What way did it show itself? A Oh, she talked a great deal and said things over and over, not the way she used to.

Q (*By the Court.*) Do you think she could understand what she was doing when she made a deed? A I don't think so.

Cross examination by Mr. Stewart.

Q You cannot give us the exact date when you visited Mrs. Leonard? A No; I cannot. I know it was when she was staying with her sister.

Q And that was in South Orange, wasn't it? A That was in South Orange.

Q You say you made about three visits? A Well, only one to Mrs. Bunn's, but I went to her own home twice before that.

Q That was in East Orange? A Yes.

Q Do you recall when that was? A No, I do not. It was right after she was paralyzed.

Mr. Davis. I served notice on Mr. Stewart to produce the deed. I think it is admitted.

The Court. He is the subscribing witness.

Mr. Davis. Mr. Stewart, as its execution is admitted by the papers, I suppose I only need to offer it in evidence.

Mr. Stewart. I was going to prove the date, if your Honor desired it.

The Court. Well, it will be admitted and marked; no question about it. It is admitted in the pleadings, and such a deed was given.

Mr. Stewart. Yes.

The Court. What is the consideration.

Mr. Davis. It is mentioned as one dollar and other valuable consideration.

Paper marked Exhibit P. 1.

WILLIAM NELSON DONOVAN, sworn for the defendant.

Direct examination by Mr. Stewart.

Q Mr. Donovan, you are the defendant in this suit, are you not? A Yes, sir.

Q And you are the grantee mentioned in this deed (handing witness paper)? A Yes, sir.

Q You are the party to whom those premises were conveyed? A Yes, sir.

Q Will you please tell the Court when this property was first purchased by Mrs. Leonard? A This first deed?

Q Yes. A November 1, 1916.

Q And who paid the money as the consideration? A I did.

Mr. Davis. Just a minute. Don't answer that. I object to it on the ground that you are testifying to a transaction with a deceased person and it must be shown upon testimony—

The Court. Is this woman dead?

Mr. Davis. Yes.

Mr. Stewart. Yes.

The Court. I will admit it.

Mr. Davis. I ask an exception to your Honor's ruling.

Q Who advanced the money to purchase it? A I did.

Q And where did you get the money? A Borrowed it all alone on an endowment policy from the Prudential Life Insurance Company.

Q How much money did you borrow? A I borrowed $670.

Mr. Davis. It is understood that my objection applies to all this line of testimony?

The Court. Yes.

Q And then this—I will show you this paper and ask you what it is (handing witness paper)? A That is the first indenture.

Q That is the deed? A To Miss Lillian Leslie Leonard.

Q Which you have been testifying about? A Yes, sir.

Q And this is the same property that this deed was made to you, which is in evidence? A Yes, sir.

Q And it is money that you obtained from the Prudential that went to buy that property; is that so? A Yes, sir.

Mr. Stewart. I will offer this in evidence, your Honor.

Mr. Davis. No objection.

Indenture marked Exhibit D. 1.

Q Now, in August, 1920, when the premises were conveyed to you by Lillian Leslie Leonard, did you make any agreement with her? A I did.

Q Was the agreement in writing? A It was.

Mr. Stewart. Oh, I want to, before I get to this, I want to ask other questions.

Q This property covered premises on North 17th street, East Orange; is that so? A Yes, sir.

Q And when title was first taken in 1916, did you move there? A Yes, sir.

Q Who moved there with you? A Oh, Miss Leonard, myself, my mother and their uncle.

Q And was there a mortgage on this property?

The Court. Wait a minute. Who else?

A Their uncle, and that was all when we went there.

Q Was there a mortgage on this property? A Yes, sir.

Q How much was the property— A $3,000—$4,000.

Q $4,000? A Yes; three first and one for the second.

Q And who paid the interest on that mortgage? A I did.

Mr. Davis. I am making the same objection.

The Court. It is not necessary, you know, to register objections in Chancery.

Q Who paid the taxes? A I did.

Q And have you since paid the interest and taxes? A I have.

Q And all this time Mrs. Leonard lived there? A She did.

Q I ask you did you make an agreement when this conveyance dated August 25th was made? A I did.

Q And that agreement, you say, was in writing? A It was.

The Court. Do you object to that?

Mr. Davis. No, I am surprised by it because there is nothing in the pleadings to indicate it.

The Court. Then it will be admitted.

Q Is this the agreement, Mr. Donovan?

Mr. Davis. I think Mr. Stewart is the subscribing witness.

Mr. Stewart. I will take the stand later. May I have this marked for identification.

Paper marked Exhibit D. 2 for identification.

Q Now, Mr. Donovan, after this deed of August 25, 1920, was made, Mrs. Leonard was then single, was she not? A She was.

Q She was living with you and had been? A She was.

Q What occurred between you and her subsequently? A What is that?

Q What occurred between you and her subsequently, after, at a later date, did anything happen? A Well, on the 15th of September we were married, that is all that occurred.

Q And who married you? A Rev. Dr. Ray E. Hunt.

Cross examination by Mr. Davis.

Q Who was the lawyer that drew this deed? A Mr. James R. Stewart, Jr.

Q Who was the person that consulted him about having that deed drawn? A About having the deed drawn?

Q Yes. A There was not anyone consulted him.

Q How did he happen to—did he draw the deed at your house? A Yes, sir.

Q He drew it there? A Yes.

Q Did he have a typewriter with him? A He did not have no typewriter I saw.

Q I show you the deed. I am asking you if he drew it, if he did the typewriting work on that deed at your house? A That is the deed he gave me at the house.

Q Did he have a typewriter there? A I don't—

Mr. Stewart. This is the deed.

Q Did you see him do any typewriting at your house? A Well, I was busy with my wife most all the time when I was home.

Q She was not your wife at that time, was she? A No, but—

Q How did Mr. Stewart happen to come to your house? A Why, at my request.

Q At your request? A Yes, sir.

Q Did you go to his office to ask him to come? A Yes.

Q On how many occasions did he come to the house? A Two, I believe.

Q How close, do you know when the first occasion was? A No; I really could not say.

Q Was it at the time that the deed was signed or before? A When the deed was signed he came. Now, I really could not tell you whether it was before or after.

Q Now, at the time he came with the deed, was that the first time? A No, sir; he was at my house previous to that.

Q How long before? A That I could not say; maybe two weeks.

Q But in relation to this transaction, or in relation to something else? A No; we had another transaction.

Q He was only in your house the one occasion in relation to this transaction? A To this deed?

Q Yes. A I believe so.

Q At the time he came he had the deed with him; is that right? A I just forget whether he gave me that deed when he came that time or whether he gave it to me afterwards; I believe it was afterwards.

Q Well, your wife signed it there at that time, didn't she? A She signed the deed.

Q Did you sign the other paper at the same time that your wife signed? A No; that paper came later.

Q How much later? A I couldn't say just exactly.

Q What did you pay your wife for this deed, anything? A Yes, sir; I gave her one dollar and that agreement.

Q One dollar and the agreement. You actually handed over the dollar, did you? A Yes, sir.

Q Who else was present besides yourself and Mr. Stewart? A Mrs. Alma Merrit.

Q Is she here? A No; I believe she cannot come; I think she is sick.

Q Now, this insurance that you got the money on. Who paid the premiums on that insurance? A I did.

Q You have been doing it since the beginning of the insurance policy? A Yes, sir; my money paid it.

Q Previous to living in East Orange had you lived in some house with Miss Leonard? A Yes; different times.

Q Where? A Summit.

Q In Summit? A Yes, sir.

Q She practically brought up your boy, didn't she? A Yes, sir.

Q And she is a relative? A Yes, second cousin.

Q And when did your boy first start to live with her? A When he was eighteen months old.

Q How long ago is that? A Twenty—he lived with—about eighteen years, seventeen or eighteen years, along there somewhere.

Q He lived with her? A Yes, sir.

Q And until you moved into East Orange in 1916, it was at Summit? A Yes, sir.

Q Did she keep boarders, Miss Leonard, I mean? A In Summit?

Q Yes. A Yes; I think so.

Q And when she moved to East Orange she also kept boarders? A No, sir; not when we moved there.

Q Then there were no other boarders beside yourself, your son and the uncle? A Later on; yes, sir.

Q After she came to East Orange there were boarders? A Yes, sir.

Q And you borrowed $670 on the insurance policy? A First loan.

Q And how much of it did you give to her? A The whole business.

Q Were you present with her when the real estate transaction went through? A Was what?

Q Were you present with her when she got the deed at the lawyer's office? A The first deed?

Q Yes. A No.

Q The deed to her? A No.

Q Did you have anything to do with the purchase of the property, I mean to say, in the negotiations for buying the property? A Yes, sir.

Q Personally? A Yes, sir.

Q What were they? A She made a deposit on the house in, I forget the name, 105 Greenwood avenue, I think it was—the paper Mr. Stewart has—made a deposit of $400 on that place, and then she consulted me about the taking the—the buying the place and I told her that I did not approve of it, and then some of the other relatives came along and saw this house where we lived at Seventeenth street, and they suggested that house so I—so she asked me if I would go around and look the house over with her and I told her I would, and we went over and looked the house over; both of us alone and we looked the house over; she asked me what I thought of it, and I said the house looked all right to me and if she was satisfied I was perfectly satisfied. Then we went over to Muchmore's and purchased the house.

Q Did she always consult your advice in matters of importance? A Always, always while I lived with her.

Q She seemed to think considerably of your opinion on various things? A Yes, always.

Q (*By the Court.*) Did your first wife die when your boy was small? A Yes, when he was seventeen months old she died.

Q Outside of the one dollar and the agreement, then, you did not pay her anything else at the time she got the deed—at the time you got the deed? A No; I had plenty to pay.

Q How did the marriage happen to take place? A Well, the sisters complained about me handling her, I believe, and the—and that I not married to her and when I came home she used to look for me to handle her, to do for her, and said she was always glad to see me come, and she knowed that I would do for her willingly. The sisters claim that I had no business to go in the

room and handle her the way I did, but my wife was well pleased for me to do it; then I have an older cousin, which is not here today, and she came down to the house and explained matters to me, her name is Mrs. A. V. Oakes, she is a good Christian lady, around seventy years of age, I believe, and Mrs. Oakes came and explained the situation to me and I told her, "Well, here," I said, "There is only one thing left for me to do," I said, "I will marry her," and I said, "That will cover it all," I said, "I will—I will keep her anyway, and I support her anyway," so I married her and everything went along fine and good all the way through until after they found out that we were married, and then a great deal of jealousy arose and they said that I—

Q Well, now, we are getting a little bit off the subject there.

The Court. Not what they said.

Q Were the sisters informed of the fact when the deed was made to you?

Mr. Stewart. I object, your Honor.

The Court. I will admit it. (To witness.) Did you tell her sisters when the deed was made to you?

A Did I tell them?

Q (*By the Court.*) Yes. A No; I did not.

Q Were they told about it before your getting married? A Yes; they knew that I was going to do it.

Q They knew you were going to get married? A They knew that I was going to have the place deeded over.

Q How did they know that? A Because Mrs. Bunn's daughter overheard the conversation with my wife and myself—she was not my wife at that time—at Mrs. Bunn's house in East Orange.

Q And did they know that you were going to get married to her before it happened? A No, no; they did not.

Q Did you call anybody else in besides yourself and the lawyer to explain to her the nature of what she was going to do in giving the property to you? A Mrs. Merrit.

Q Mrs. Merrit? A Yes, sir.

Q And Mrs. Merrit is not here? A No; she is sick.

Q (*By the Court.*) What is the matter with her? A She has got a little one.

Mr. Stewart. She just gave birth to a child.

Re-direct examination by Mr. Stewart.

Q Just state, Mr. Donovan, why the property in 1916 was put in the name of Miss Leonard? A Well, the only thing I can say in that regards is that she had lots of confidence in me and I had in her and she had raised my boy, and through an act of appreciation I left it go as it stood, I furnished the money and she procured the property, and I let it go that way, not ever dreaming of anything like this to come out of it, and in 1919—1918, I believe it was, going to convey that property over to me anyway, before she went West, but then after she went West and had the stroke, why, it was different. Now, I owed her—

Mr. Stewart. That is all. Never mind.

Re-cross examination by Mr. Davis.

Q You thought enough of what she had done for you that you were willing to make her a present of the money you had put up? A For an act of appreciation I allowed her to take the house and take it in her own name—no, not to give the money away entirely, no.

Q Did she put up any money of her own in buying the house? A She did not have any.

Q You know that? A Yes, not none.

Q Where did she get the balance to pay the balance of the sixty or seventy dollars? A Out of my pocket.

Q Where did you get it? A I had saved up, I had a little.

Q There was a long time that you were not working, wasn't there? A Not long.

Q About a year? A No, sir.

Q How long? A It may have been five months one stretch there, but if I am not working that would not signify I did not have anything.

Q Mr. Donovan, I show you checks here, one dated October 3, 1916, and one March 18, 1920; are those— A Yes; those are the checks from the Prudential Life Insurance Company, yes, one hundred and forty-six and six hundred and seventy.

Checks marked D. 3 and D. 4 for identification.

RECESS.

WILLIAM NELSON DONOVAN, resumed.

Examined by Mr. Stewart.

Q Mr. Donovan, I show you this paper, and ask you if you recall seeing that before? A Yes, sir.

Q What is that, may I ask? A That is when we got the first loan, six hundred and seventy.

Q What paper is that, is that the—what does it say there? A The original first loan.

Q And that is your signature there (indicating)? A Yes, sir.

Q And that is Mrs. Leonard's signature also there? A Yes, sir; that is her own signature.

Cross examination by Mr. Davis.

Q Mr. Donovan, this $670 was raised on an insurance policy? A Yes, sir.

Q And whose benefit was that insurance policy made in the name of? A My son's.

Eleazer A. Sherwood, direct.

Q And it was before your son was under the age of twenty-one years that you were able to get the money? A Yes, sir.

Q Wasn't Miss Leonard also one of the persons named in the policy as guardian of the boy? A At my death.

Q At your death? A Yes, sir; and at my boy's death.

Q Didn't Miss Leonard pay some of those insurance premiums herself? A Yes, sir; when I gave her the money.

Q Didn't her sisters sometimes give the money for those insurance premiums? A I paid all those insurances myself.

Q No doubt about it? A With my own money, yes, sir.

Mr. Stewart. I offer this loan certificate.

Loan certificate marked D. 5.

ELEAZER A. SHERWOOD, sworn for the defendant.

Direct examination by Mr. Stewart.

Q Mr. Sherwood, you are employed by the Prudential Insurance Company? A I am.

Q And have you got any papers with you relating to a loan on policy number 381229? A I have some, yes.

Q What papers have you got? A I have got what we call our top sheet, which is used in connection with the making of a loan.

Q And what does that show? A Do you mean what do they show? I have two here.

Q Yes.

Mr. Davis. I object to what the papers show.

The Court. The papers speak for themselves.

Q What are those papers, again? A They are our top sheet for policy loans.

Eleazer A. Sherwood, cross.

Q And what loan is that—does the top sheet show? A It shows the making of one loan in the sum of $670 under date of October 3, 1916, and then the making of an additional loan of $820 on March 18, 1920, which absorbed or included in its amount that of the first loan.

Q I show you this check dated October 3, 1916; is that one of the checks of the premiums? A It is, yes, sir.

Q And it went through the bank all right? A Yes, sir.

Q And also this check dated March 18, 1920? A Yes, sir.

Q That is another check made to William N. Donovan? A Yes, sir.

Q And what is this paper, Mr. Sherwood (showing witness paper)? A That is what we call a loan certificate which combines the assignment of the policy to the company and collateral for the loan.

Q What is your position in the surance company? A It is that of chief clerk of the ordinary policy loan department.

Cross examination by Mr. Davis.

Q The check dated October, 1916, to whose order is that made? A That is made to the order of Lillian L. Leonard and William N. Donovan, nominator of Howard N. Donovan.

Q What does the term "nominator" mean? A We differentiate, or did at that time, between a beneficiary and a nominator in this particular or respect; we were then insuring minors under the age of twelve or fifteen—he was, as a matter of fact, three years of age, and therefore incompetent to apply for insurance himself through our ordinary branch, and the insurance was applied for by the father and he was classified by us, as was our practice at that time to call him, the father, the nominator.

Q On whose life was this policy? A Howard N. Donovan.

Ray Hunt, direct.

Q Oh, on the boy's life? A Yes.

Q And who would be the beneficiary under it, who was the beneficiary? A Well, there were two that were denominated as beneficiaries.

Q And they were? A William N. Donovan; then there was a contingent beneficiary whose interest began when that of the nominator ceased.

Q Was this an endowment policy? A It was known as a child's endowment which matured at eighteen years after its date.

Q And the person entitled under that would not be the child, but the nominator? A The nominator if he were alive, should he predecease.

Q If the boy had reached the age of twenty-one before the policy was paid, would anybody else be entitled to the money? A No one but the nominator.

Q But the nominator could get it without the boy's consent if he had reached twenty-one? A Yes, sir.

Re-direct examination by Mr. Stewart.

Q And also the nominator would be allowed to borrow money on the policy? A Yes, sir.

Mr. Stewart. I offer those papers in evidence.

The Court. Any objection?

Mr. Davis. I don't think they are material, but they will be received.

The Witness. Your Honor, I would not want the checks impounded; I have photographs of them here.

(Photographs marked instead of originals, Exhibits D. 3 and D. 4.)

RAY HUNT, sworn for the defendant.

Direct examination by Mr. Stewart.

Q Doctor, you are a minister of the Gospel in this State? A I am, sir.

Ray Hunt, direct.

Q And what church do you preside over? A Park Avenue Church, Disciples of Christ, East Orange.

Q And whereabouts is it located? A Park avenue and Seventeenth street, East Orange.

Q And do you know William N. Donovan? A I do, sir.

Q And did you know his wife, Lillian Leslie Donovan? A I did, sir.

Q How long have you known them? A Rather intimately since the date of their marriage.

Q And did you know them before that marriage? A I cannot answer as to that; casually, if at all.

Q Was Mr. Donovan a member of your church, do you know? A No; he is not.

Q And you performed the marriage ceremony between Mr. Donovan and Miss Leonard? A I did.

Q Do you recall when that was? A I do not recall the date. My records are incomplete as respect to dates.

The Court. Is the date admitted?

Mr. Davis. I do not think there is any doubt about the date.

The Court. What is the date?

Mr. Davis. September, 1920.

Mr. Stewart. 1921.

The Court. September, 1921, is the admitted date of the marriage.

Mr. Davis. No; that is not it. Well, yes; I guess that is right.

Mr. Stewart. This is a month after the deed.

The Court. That would be 1920.

Mr. Stewart. 1920.

The Court. September, 1920.

Mr. Stewart. September, 1920, yes. (To witness.) Doctor, did you observe the condition of Mrs. Leonard, or Mrs. Donovan at that time?

A I did.

Q And did she appear rational? A I had no reason to question her rationality at all.

Q Did she appear to you to be rational? A I should say so.

Q Did she answer the questions you asked her in performing the marriage ceremony in a rational manner? A She did.

Cross examination by Mr. Davis.

Q Had you seen her in regard to the marriage previous to the occasion on which she was married? A I had not.

Q How did you happen to be there? A At the invitation of Mr. Donovan.

Q And he had previously seen you and made arrangements to have the ceremony performed? A He had.

Q And who else was present? A I cannot answer, sir; there were four or five people; I have the names of the witnesses of the marriage, if that is of interest.

Q Please let us have them? A Anna Elizabeth Oakes, Gertrude Williams Donovan are the legal witnesses of the marriage.

Q And where was Mrs. Donovan at the time of the ceremony, was she in bed or was she sitting up? A Sitting in her chair.

Q Did you have any conversation with her aside from the ceremony? A It was necessary to inquire as to her birthplace and her age, and such things as have interest in filling out the marriage record.

Q And she answered all those questions? A I cannot say, sir, whether she answered personally or not; she and Mr. Donovan were together; my impression is that she did her part of the answering.

James R. Stewart, direct.

Q Did you remain after the ceremony for any length of time? A I probably was in the house for three-quarters of an hour to an hour.

Q And did you have any conversation with her separate and apart from the others present? A No, sir.

JAMES R. STEWART, sworn in behalf of the defendant.

I am an attorney at law in the State of New Jersey and I was on or about August 25, 1920, called to the home of Mr. Donovan on 17th street, East Orange, as I recall it, and he wanted to see about having a deed to these premises drawn, and I saw Mrs. Lillian Leonard, the name was then, and talked to her about it, and she stated she wanted to convey the premises to Mr. Donovan, and as a result a deed was drawn and signed and acknowledged on the part of Mrs. Leonard, Lillian Leonard she was then, and Mr. Leonard stated he would like—

The Court. Mr. Donovan?

Pardon me, Mr. Donovan stated that he would like to have some agreement to the effect that in consideration of this conveyance that he would support Mrs. Leonard for the rest of her life, and I told him that there was no harm in having a little memorandum or agreement drawn to that effect and signed by him; as a result that agreement which is before the Court was signed by Mr. Donovan.

Q (*By the Court.*) What was the mental condition of the— A I meant to say that. Mrs. Leonard appeared to understand my questions thoroughly, and appeared to be rational, and as far as I could see was sane and able to execute the conveyance.

James R. Stewart, cross.

Q (*By the Court.*) Did you explain to her what the paper was that she was signing? A I did. I told her it was a deed conveying the property to Mr. Leonard, and she seemed to understand; she was sitting down at the time in a chair. Mrs. Merrit was also present but on account of Mrs. Merrit's present illness we cannot have her here today.

Cross examination by Mr. Davis.

Q How did you happen to go to the residence of Mrs. Leonard? A If I recall correctly, Mr. Donovan asked me to.

Q He had previously seen you at your office? A Yes.

Q At the time he saw you at your office did he explain to you what you were to do? A Well, he told me he wanted me to draw a deed.

Q And did he bring with him to you the old deed to Miss Leonard? A Well, if I recall correctly, he asked me to go down to the house and see Mrs. Leonard and then I got the deed.

Q Were you there on two occasions? A If I recall correctly; I was, yes.

Q Well, is there any doubt in your mind about it? A Well, my recollection is that I was there twice; the first time to consult with Mrs. Leonard and the second time to have the deed signed and acknowledged.

Q Now, how long a time were you there the first time? A Well, I got there, as I recall it, about eleven o'clock in the morning and stayed there 'till about nearly twelve.

Q And the second time was how much later? A Well, the second time I did not stay very long, possibly ten or fifteen minutes.

Q Now, was the agreement signed by Mr. Donovan, signed simultaneously with the deed? A Well, I could not say as to that. I think it was signed later on.

Q You think it was executed— A About that time. If your Honor will let me—

Q Was it executed at your office, do you think, the paper by Mr. Donovan? A Yes; I believe it was.

Q To whom was it delivered? A To Mrs.—to Mr. Donovan.

Q And was it recorded? A No; it was not recorded.

Q I am referring to the paper— A Yes; I understand.

Q —agreement to support, was delivered to Mr. Donovan? A Yes, sir.

Q And did you converse on any other subject with Mrs. Leonard than the matter at hand? A Well, only in a casual way as you might ask her how she felt, and so forth.

Q When you first saw her the purpose of your visit was already in mind, was it? A Oh, yes.

Q That you were to execute a deed from her to Mr. Donovan? A Yes.

Q Did any consideration pass in your presence? A Well, I think Mr. Donovan and I told Mrs. Donovan to make it formal to give a dollar and that agreement.

Q And was there an understanding in your presence that anything more than the dollar was to be given? A Except that agreement.

Q The agreement to support? A Yes.

Q (*By the Court.*) Did he give her this agreement at that time? A I could not recall as to that, I am not sure about that.

Q You never saw him give her the agreement at any time? A I could not say as to that.

Q After you had delivered the agreement to Mr. Donovan, the agreement to support, when did you next see the agreement to support? A I don't know.

Q Was it after the announcement of this suit? A Yes.

Q Did Mr. Donovan produce it? A Oh, yes; he produced all the papers that I have relating to the conveyance.

Q You never saw it then in the hands of Mrs. Donovan at all? A No.

HOWARD N. DONOVAN, sworn for the defendant.

Direct examination by Mr. Stewart.

Q Mr. Donovan, you are a son of William N. Donovan? A Yes.

Q How old are you? A Twenty-three this month, 10th of this month.

Q Did you have occasion to be at the home of Mr. Donovan, your father, on Seventeenth street? A Oh, yes.

Q When? A Oh, the time they took the place; as a matter of fact, it was my home permanently.

Q You lived there? A Oh, yes.

Q With whom? A With the folks, including the—

Q Who lived there? A My father, my uncle and my aunt and myself.

Q Mrs. Leonard? A Yes, sir.

Q And during what period did you live at that house? A Well, I think in 1916 when the place was bought until I got married in 1920, in March.

Q And did you observe Mrs. Leonard's condition, mentally speaking? A Well, I made no analyzation of her condition, that is to say, thorough study of it.

Q No, but how did she appear to be, rational? A Well, from my standpoint at times she was all right and knew perfectly well, and at times apparently she was not just as she ought to have been, possibly due to the condition, she was paralyzed and possibly nervous strain, and so forth.

Ada Leonard, direct.

Q Well, how did she appear in 1920? A Well, from the time when she had that stroke, from then on she was subjected to these conditions.

Q Was that all you can say as to her condition? A Well, I have no special qualifications to make any statement as to whether or not she was sane or insane.

Examined by the Court.

Q Well, do you think that she understood enough to make a deed? A Well, at the time this deed was made I do not recall her condition. You understand what I mean, I have no reason to remember these dates and therefore cannot make any positive statement as to her condition at the time the deed was made.

Cross examination by Mr. Davis.

Q Did you know at the time the deed was made it was being made or had been made? A No; I had no reason to know.

Q You evidently were not informed at all? A No; I had not been informed as to the conditions.

The Court. Have you anything further to offer?

Mr. Davis. I would like to go into the question of insurance.

ADA LEONARD, sworn for the petitioner.

Direct examination by Mr. Davis.

Q Miss Leonard, were you familiar with the circumstances connected with this insurance policy? A Yes, I was.

Q Did you ever pay any of the insurance premiums on this policy? A I have given the money personally.

Mr. Stewart. I object to this.

A (Continuing.) To my sister to pay.

Mr. Davis. When the question is objected to just wait.

The Court. I will admit it. Let the answer stand. She gave money to her sister to pay the insurance.

Q On how many occasions? A Two.

Cross examination by Mr. Stewart.

Q Well, now, when were those payments, please? A One—I could not tell you the exact date, but, oh, I suppose about eight years after he was insured, and the last occasion—

Q How much was that? A What is that?

Q How much was that? A The insurance that I paid?

Q Yes. A Well, that I could not say; I think it was around $32, something like that.

Q And did you get a receipt for this payment? A No, sir; I have receipts for nothing.

Q I see. And when was the second occasion? A The second occasion was around, I think it was in December of 1920, Mr. Donovan, if I may tell it, had not been working for a long time and he was away.

Q Never mind. Just answer the question. You say the second payment—

The Court. Was in December, 1920.

Q And how much was that? A Well, I don't know just how much it was, but I sent the money for two insurances.

Q To whom did you send the money? A I mean I gave the money to my sister to give the agent when he called.

Q And did you tell your sister that this money was to go on the insurance policy? A Certainly did.

Examined by the Court.

Q Miss Leonard did not live with her family, did she? A Who do you mean, my sister?

Ada Leonard, cross.

Q Yes; Miss Leonard, did she live with the family? A It was my home; I am a trained nurse.

Q I say, did she live permanently with her family or did she live separately from the family? A I do not get the question.

Examined by Mr. Stewart.

Q Will you explain the circumstances under which Miss Leonard lived, why she did not live with any of the rest of your sisters if she did not? A We had—I have always had—

Examined by the Court.

Q What I want to know is, did or did she not live with any member of her family permanently? A Permanently, no.

Q Only for short visits; is that the idea? A That is it.

Mr. Davis. I do not know whether we have got it clearly before your Honor.

(Argument.)

The Witness. My sister, my mother and I lived together; and I lived with her any time I was off duty; that was what I was trying to explain.

Examined by Mr. Stewart.

Q When did you live with her? A Why she was in my home always, because I always contributed to the support of it.

Q Are you referring to the Seventeenth street house? A Yes; I never stayed all night in the house, but I was always there from the time my sister went there.

Q Is that the house you refer to as "my home"? A Yes, sir; that is the house I refer to; wherever my sister was that was my home because I contributed to the support of that home.

Q You only made occasional visits there after 1916? A Every time I was off duty just the same as I had done all the while I have been nursing.

Q And you would visit your sister? A Yes; I went there; the only home I had. I am not married, and my sister was not married and it was our home together.

Q Did Mr. Donovan live there? A Yes; boarded there, as far as I know.

Q And did you get along harmoniously with Mr. Donovan at that time? A Oh, practically, I never had any dealings with him.

Q Well, you had social intercourse, didn't you, conversation? A Just conversation, yes.

Q Well, your relations were pleasant, were they not? A Always, yes.

Q Mr. Donovan acted cordially towards your sister Ada, didn't he? A I am Ada.

Q Eh? A I am Ada.

Q I mean Lillian? A Always the same to her as he did to me; I never could see any difference.

MAUD BUNN, sworn for the petitioner.

Direct examination by Mr. Davis.

Q You are a sister of Lillian Leonard? A I am.

Q Did you know about this insurance policy? A I did.

Q Did you ever pay any of the insurance premiums? A I did.

Q How many times? A Well, I cannot just tell you, but on several occasions she came to me and borrowed money of me because she did not have it to pay it, and then when my sister would give it to her, why, she would pay this insurance.

Q (*By the Court.*) You gave her of your own money? A I did; and my husband.

Maud Bunn, cross.

Cross examination by Mr. Stewart.

Q When did you give her money? A That I could not tell the date, but more than once when he was in Canada.

Q How many times more than once? A Well, I think three or four times, but I just could not say now.

Q How did you come to give her money? A Because she asked me for it, whenever she wanted anything she came to me; she always got it.

Q And this was on three or four occasions? A Yes; as long ago as before she moved from Summit when my mother was living.

Q Oh, that was in 1916? A Yes; and of recent times, too.

Q When was the last time you gave her money? A I could not tell you just that, but when she bought her house I remember—

Q Was it in 1920? A I do not think it was quite as recently as that, but I could not tell you the date no matter—I could not tell you the date.

Q You are not very positive of your testimony? A I am just as positive as I am telling you.

Q And you cannot tell us— A I cannot tell you the date, no.

Q You cannot tell it.

The Court. She has already said she does not know.

Mr. Stewart. All right. That is all.

Mr. Davis. That is all the testimony I have.

The Court. I will not announce any decision today, and will give you an opportunity to prepare briefs.

Exhibit D. 2.

EXHIBIT D. 2.

Whereas, Lillian L. Leonard, of the City of East Orange, County of Essex and State of New Jersey, has conveyed the premises located on the westerly side of North 17th street, East Orange, to William L. Donovan, and that the said deed covers the same premises as were conveyed to her by deed dated October 26, 1916, and recorded in the Register's Office of Essex County in Book W-57, page 451, etc.

Now Therefore Witnesseth, That as part of the consideration mentioned in the said deed of conveyance this day conveyed to said William N. Donovan, the undersigned, I do hereby stipulate and agree that I shall during the lifetime of the said Lillian L. Leonard provide a home and maintain and support the said Lillian L. Leonard suitable to her circumstances for and during the remainder of her said life.

In Witness Whereof, I have hereunto set my hand and seal this twenty-fifth day of August, 1920.

WILLIAM N. DONOVAN.

James R. Stewart,

OPINION.

Filed February , 1923.

Messrs. Howe & Davis (by Mr. Davis) for the complainant.

James R. Stewart for the defendant.

CHURCH, *V. C.*

This suit is brought to set aside a conveyance of property in East Orange, made by Lillian Leonard to William N. Donovan, in August 20, 1920, on the ground of undue influence and mental incapacity. In September, 1919, Lillian Leonard, a woman of about fifty years of age, suffered an apoplectic stroke. In 1920 she conveyed the property in which she lived to the defendant and a year after she was committed to the asylum as mentally incompetent, and died there.

It appears from the testimony that she and the defendant had lived together for many years, she keeping a rooming house and he living with her. He had a son whom she took care of up to the time of her death. I am called upon to decide whether under these circumstances undue influence was used on a mind incapable of understanding what it was doing.

The counsel for the defendant has cited many cases showing that independent advice should be asked where parties are of feeble mind and in transactions as the above the weaker mind should be protected. The complainant called five doctors to testify as to the mental condition of Lillian Leonard. No one of them would say that her insanity was due to the apoplectic stroke which she had a year before she was committed to the asylum. She having lived with this man so many years, having had, apparently, a great affection for his son, and being in close touch with the defendant and the son, I cannot say that she did not realize what she was doing when she conveyed the property to him.

Final Decree.

The testimony of the physicians convinced me that apoplexy in itself is not a cause of insanity.

I feel, therefore, that when she made the deed to the defendant she knew what she was doing and that her deed was voluntary and of her own free will and accord.

I, therefore, decline to set the conveyance aside, and will advise a decree according to these conclusions.

FINAL DECREE.

Filed February 20, 1923.

This cause coming on to be heard in the presence of Howe & Davis, of counsel with complainant, and James R. Stewart, Jr., of counsel with the defendant, and the pleadings and proofs having been read and the arguments of the respective counsel having been heard and considered and the Court having duly considered the said pleadings and proofs and arguments and it appearing to the Court that the complainant is not entitled to the relief sought and prayed for by her in her bill of complaint:

It is on the 20th day of February, 1923, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED that the complainant's bill be and the same hereby is dismissed with costs.

E. R. WALKER,

C.

Respectfully advised,

ALONZO CHURCH,

V.-C.

We approve of the form of the foregoing order.

HOWE & DAVIS,

Solicitors for Complainant.

JAMES R. STEWART, JR.,

Solicitor for Defendant.

Notice of Appeal.

NOTICE OF APPEAL.

Filed February 21, 1923.

The complainant hereby appeals from the final decree made in this court in the above-stated cause, on the twentieth day of February, 1923, dismissing the bill of complaint in this cause, to the Court of Errors and Appeals, in the last resort in all causes.

HOWE & DAVIS,
Solicitors of Complainant.

EDWARD L. DAVIS,
Of Counsel with Complainant.

Dated, February 20, 1923.

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

EDWARD L. DAVIS,
Of Counsel with Complainant.

PETITION OF APPEAL.

Filed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ADA LEONARD, *Appellant,* *and* WILLIAM N. DONOVAN, *Respondent.*	*Petition of Appeal.*

To the Honorable, the Court of Errors and Appeals, in the last resort in all causes:

The petition of Ada Leonard, 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 the twentieth day of February, 1923, wherein the said Ada Leonard was complainant and the said William N. Donovan was defendant, in this respect, to wit: That the said decree adjudges that, "Complainant's bill be and the same hereby is dismissed, with costs."

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

HOWE & DAVIS,
Solicitors of Appellant.

EDWARD L. DAVIS,
Of Counsel with Appellant.

ANSWER TO PETITION OF APPEAL.

The answer of the above-named respondent to the petition of appeal of the above-named appellant:

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a decree was, on the twentieth day of February, 1923, last past, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the circumstances and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity and he prays that the same may be affirmed with costs to be adjudged to this respondent.

JAMES R. STEWART, JR.,
Solicitor with Respondent.

New Jersey Court of Errors and Appeals

Between

ADA LEONARD,
Complainant-Appellant,

and

WILLIAM N. DONOVAN,
Defendant-Respondent.

On appeal from Chancery

BRIEF FOR COMPLAINANT-APPELLANT

This is an appeal from a decree of the Court of Chancery dismissing a bill of complaint filed for the purpose of setting aside a conveyance of property in East Orange, made by Lillian Leonard to William N. Donovan on August 25, 1920, on the ground of undue influence and mental incapacity of the donor.

STATEMENT OF FACTS

The general circumstances are as follows: In September, 1919, Lillian Leonard, then a woman over fifty years of age, suffered an apoplectic stroke which left her paralyzed on one side and an invalid from that time until her death in 1922. She was never able to help herself without assistance. At the time of the conveyance an August 25th, 1920, the members of her household were herself (a bedridden invalid), the defendant, a strong, healthy man, of perhaps her own age, a housekeeper who acted also as nurse, and an old uncle over seventy years of age. They were all living on the property which was conveyed. There were four sisters who visited her frequently, but three of them were married, and the fourth, the complainant, who was a trained nurse out on duty all the time. The sisters did not know of the deed until after it was made. The next month the defendant married the donor. In March of the following year the donor was sent to the Essex County Hospital for the Insane as a lunatic.

There is no doubt as to her helpless physical condition at the time of the making of the deed.

In his opinion, the learned Vice-Chancellor says: "The complainant called five doctors to testify as to the mental condition of Lillian Leonard. No one of them would say that her insanity was due to the apoplectic stroke which she had a year before she was committed to the asylum." This is misleading, inasmuch as it might lead to the negative inference that the physicians testified that she was sane at the time of the conveyance. Such is not the case. As a matter of fact there was the testimony of only four doctors, and they give this evidence as to the donor's mental condition:

Dr. Rathgeber attended her from September, 1919, to April, 1920. He says that when he first visited her (S. C., page 11) "her mental condition was fairly good. All of these cases of apoplexy, however, the mental condition is not normal, and she was typical of that condition." And that "her mental con-

dition got worse." This showed itself "by being very dopey at times and then occasionally she would have acute spells at night in which she would be absolutely disoriented and would not know where she was or the time or anything," and that she would get "in a sort of hysterical state." He said he could not state whether she had enough intelligence to execute a deed (which, after all, is not the test, as will be indicated by the authorities herein quoted), "because at times she seemed to be perfectly rational and then at times she did not."

Dr. Blakely attended her once, in December, 1919. He says (S. C., p. 13), "she did not answer questions rationally; she appeared at times to be all right and would answer and then she would lapse off into these unconscious or semi-conscious spells." He says that at the time, in his opinion, she was not in sufficient control of her mental faculties to appreciate the effect of making a deed.

Dr. Moulton attended her from September, 1920, until he helped to have her committed to the insane asylum in March, 1921. Although he said that in September, 1920, when he first treated her, that "she knew what she was doing," and that her actions were rational, he still admitted that her mental condition was not what it had been previous to the stooke. (S. C., page 8). "Her mental condition at that time was good; that is, any stroke of apoplexy they would not be quite as good, but the mental condition seemed to be so that she knew what she was doing." And that every stroke of apoplexy to some extent, more or less, affects the mental powers.

Dr. Smith did not attend her until March, 1921, at which time she was so insane as to justify her commitment to the insane asylum.

So much for the medical testimony. As to the conditions observeable by untrained persons:

Elizabeth Palmer was a woman who nursed and did housework for Miss Leonard from October, 1919, to April, 1920. She says (S. C., page 15), her mental condition was "not right." "She would be hys-

terical and at times she might call you for a few minutes and then again she would not at all—and she would want—I—she would want to get out of bed all the time, and at times I could not leave the room at all, and if I did leave the room I would have to go back and see if she was trying to get out of bed; she would try to get out of bed and sometimes she did not know where she was."

Mrs. Taylor saw her soon after the first stroke. (S. C., p. 17). "At first she did not recognize me and she had known me all her life."

Emma Harvey saw her a number of times at her sister's home in South Orange, while Miss Leonard was there on a visit during July and part of August, 1920. (S. C., p. 19). She says "I noticed she did not act as she had before she had been taken sick. I had seen her and she would get hysterical." When she was not hysterical "she would act very quiet, if you were in the room she would rest her hand like that (indicating a desire to hide her face from others) and would not look at you for quite a while." "She would cry and then she would laugh, different ways like that." The witness could not carry on a conversation with her.

Jennie Probeck saw her in June, 1920. (S. C., p. 21). "She did not act very good, don't you know, she would be all right one minute and the next she would be off." "I don't think she was normal" mentally. At times she understood what the witness said and then again she would not.

Elizabeth Nickl visited her during the period when she was visiting her sister in South Orange, in the summer prior to the making of the deed. (S. C., p. 24). She says the donor "seemed odd to me, not like she used to be, because I knew her many years before that. She did not act right . . . She talked a great deal and said things over and over, not the way she used to." In her opinion Miss Leonard would not "understand what she was doing when she made a deed."

Howard M. Donovan, the son of the defendant,

called to the stand by him, said (S. C., page 43), "at times she was all right and knew perfectly well, and at times apparently, she was not just as she ought to have been, possibly due to the condition, she was paralyzed and possibly nervous strain, and so forth." He evaded giving an opinion as to her sanity, stating that he had "no special qualifications to make any statement as to whether or not she was sane or insane" and that he did not recall her condition at the time the deed was made.

A perusal of the testimony given by the defendant himself fails to show any statement by him as to the mental condition of the donor, although he was allowed to testify as to the transaction itself.

The testimony of Dr. Hunt, who performed the marriage ceremony, confined as it is to that one occasion, may be disregarded. He says, "I had no reason to question her rationality at all." To him she appeared to be rational and answered the questions asked her in a rational manner. Certain questions had to be asked, and he is unable to state whether she answered personally or not.

Mr. Stewart's testimony is almost as unsatisfactory. (S. C., p. 40). "Mrs. Leonard appeared to understand my questions thoroughly, and appeared to be rational and as far as I could see she was sane and able to execute the conveyance." He did not converse on any other subject with Mrs. Leonard than the matter at hand "only in a casual way, as you might ask her how she felt, and so forth."

On the matter of Miss Leonard's understanding of the transaction:

Mr. Donovan, over objection, testified to what the transaction was but not as to the circumstances on the occasion of the execution of the deed. He says, however (S. C., page 28), that Mr. Stewart, who drew the deed, came to the house "at my request." That Mr. Stewart was at the house in relation to this transaction on only one occasion (page 29). That he did not sign the paper agreeing to support Miss Leonard at that time; "that paper came later." That

he actually handed Miss Leonard one dollar. That Mrs. Alma Merritt was present at the transaction (although she is not produced as a witness, and no attempt made to get her testimony de bene esse).

Mr. Stewart says (page 40) that he was called to the home of Mr. Donovan, and "he wanted to see about having a deed to these premises drawn and I saw Mrs. Lillian Leonard, the name was then, and talked to her about it, and she stated she wanted to convey the premises to Mr. Donovan, and as a result, a deed was drawn and signed and acknowledged . . . and Mr. Donovan stated that he would like to have some agreement to the effect that in consideration of this conveyance, that he would support Mrs. Leonard for the rest of her life and I told him that there was no harm in having a little memorandum or agreement drawn to that effect and signed by him; as a result, that agreement, which is before the court, was signed by Mr. Donovan." (If Mr. Stewart told Mr. Donovan that there was "no harm" in drawing such an agreement, whom did he represent, Miss Leonard or Mr. Donovan? If he represented Miss Leonard, not only would there be "no harm" but much good accomplished by such an agreement, and if he was looking after her interests, he signally failed in his duty in not recording such an agreement or seeing that it was incorporated in the deed). He says he explained to Miss Leonard the paper she was signing. "I told her it was a deed conveying the property to Mr. Leonard, and she seemed to understand; she was sitting down at the time in a chair." He admitted that Mr. Donovan had previously seen him at his office and "he told me that he wanted me to draw a deed." He thinks the agreement to support "was signed later on." It was executed at his office. It was delivered by him to Mr. Donovan! It was not recorded. The next time he saw this agreement (page 42) was after the commencement of this suit when Mr. Donovan produced it. He never saw it in the hands of Mrs. Donovan,

and the case is absolutely devoid of any indication that she ever had it in her possession. A legitimate in ference is that she never had, and that it remained all the time in the custody of the defendant, who could have destroyed it at will.

As to the relations existing between Miss Leonard and the defendant:

He was a second cousin. Miss Leonard had brought up his boy from the time that he was a baby. (Page 30). The defendant had boarded with her at different times from then on. He had lived with her in Summit and when she moved to East Orange in 1916, he moved with her. He says she consulted him about the purchase of the East Orange property. She always consulted his advice in matters of importance, and seemed to think considerably of his opinion in various things (page 31). "She had lots of confidence in me and I had in her." (Page 33). He apparently attended her a great deal in the sick room. He says that the reason for the marriage was that the sisters objected to his handling her. "When I came home she used to look for me to handle her, to do for her, and said she was always glad to see me come, and she knew that I would do for her willingly."

Such is the state of facts presented by the evidence. The testimony is quoted practically verbatim. No attempt has been made to exaggerate any of the circumstances, nor have any essential points been omitted. Nothing has been said about the purchase of the property, where the money came from, the insurance premium, etc., because no counterclaim has been filed to impress a trust on the property, to amend the deed, or for any other equitable relief. The sole question remaining is whether, on the foregoing situation, the deed to the defendant should be permitted to stand.

STATEMENT OF LAW

There is but one principle of law involved in this appeal, and that is whether or not the conveyance under the circumstances of this case should be per-

mitted to stand. For convenience, the authorities have been grouped under three headings:

I. Authorities showing that where a situation of dependency or confidence exists, the burden is shifted to the donee to show the fact of independent advice to the donor.

II. Authorities showing that an agreement to support given under similar circumstances is not sufficient consideration to take the case out of the rule.

III. Authorities discussing the effect of mental defects or illness on the power of a donor to convey.

I.

We fear that the issue in this case has become somewhat beclouded by the question of the donor's insanity. The lower court must have thought that in order to set aside the deed, it must find that the donor was so mentally deficient as to be unable to understand thoroughly what she was doing. But such a finding is not essential to the decision in this case.

The legal and equitable principles involved have been unusually easy to trace because of the great mass of decisions on the question in this State alone. It has not been necessary to go beyond the State reports to find all the authority necessary to a complete elucidation of the law in the case. No attempt has been made to exhaust the decisions but we were unable to find any case, in which the facts resembled the case at bar, where the court failed to set aside the conveyance or transaction. The principle, and the most important cases which have applied it, are covered by the following extracts:

Slack vs. Rees, 66 N. J. Eq. 447, holds that a gift made by a father of advanced years and infirm health, to a daughter who is furnishing him care and service, made necessary by his physical condition, is, presumptively, the result of undue influence, and, in a suit brought to have a gift, made under such conditions, declared invalid for this reason the burden of proving absence of undue influence rests upon the

donee. It is important to observe that the question of insanity was not involved. The Court of Errors, Chief Justice Gummere speaking, said, "But although his mind was somewhat weakened, we fully concur in the conclusion of the learned Vice-Chancellor who hear the case below, that he retained sufficient mental capacity to dispose of his property."

On the question of undue influence, the opinion proceeds as follows:

"The Second ground of attack upon the conveyance—that it was the product of undue influence—presents a more difficult question. For a period of nearly three months prior to his death he was an inmate of his daughter's home. He was, during all that time, dependent upon her for the care and service which a man in his weakened physical and mental condition constantly requires. The normal relation of parent and child, as it had existed in earlier years, had been reversed, and the daughter had become the guardian of the father. In this situation the law presumes that a gift made by the parent to the child is the product of undue influence, and casts upon the latter the burden of proving the contrary. It was considered by the vice-chancellor before whom the case was tried, that she had discharged this burden. After a careful review of the testimony we are not one as to the soundness of the conclusion. A decision upon this point in the case, however, is rendered unnecessary, as we conclude that the conveyance must be set aside, because, in making it, the donor did not have the benefit of competent and independent advice as to its effect.

"That the absence of such advice will invalidate a deed of gift, which contains no power of revocation, where a relation of trust and confidence exists between the donor and donee, is not denied, and, indeed, it was so held by the Vice-Chancellor. He seems to have considered, however, that such relationship was not shown, unless it was made to appear that the donee occupied such a dominant position toward the donor as to raise the presumption

that the latter was without power to assert his will in opposition to that of the donee. But this is not the situation. The rule has a much broader sweep. Its purpose is not so much to afford protection to the donor against the consequences of voluntary action on his part, induced by the existence of the relationship between them, the effect of which, upon his own interests, he may only partially understand or appreciate. The following citations from our own decisions make this plain: "In all transactions between parties occupying relations, whether legal, natural or conventional in their origin, in which confidence is naturally inspired, or, in fact, reasonably exists, the burden of proof is thrown upon the person in whom the confidence is reposed, and who has acquired an advantage, to show affirmatively not only that no deception was practiced therein, no undue influence used, and that all was fair, open and voluntary, **but that it was well understood.**" Hall vs. Otterson, 7 Dick. Ch. Rep. 527; S. C., on appeal, 8 Dick. Ch. Rep. 695. "Where parties hold positions in which one is more or less dependent upon the other, courts of equity hold that the weaker party must be protected, and they set aside his gifts if he had not proper advice, independently of the other." Haydock vs. Haydock, 7 Stew. Eq. 575. "The rule to be gathered from the English and American cases is that the burden of proof is cast upon the donee to establish that the donor fully appreciated what he was doing, or, at all events, in the doing had the benefit of disinterested and competent advice." Coffey vs. Sullivan, 18 Dick. Ch. Rep. 302.

"The present case is a marked example of the wisdom of the rule. The deed was made by Mr. Slack almost immediately after a prostrating attack, which was a phase of the disease from which he was suffering. Neither of the physicians who were in attendance upon him expected the attack to be fatal. As soon as he was sufficiently recovered from its violence to permit it, an attorney, who had previously been employed by him in other matters, was sent

for, and, upon his arrival, Mr. Slack stated to him that he wished him to draw a deed, conveying to Mrs. Rees certain property which he owned in Trenton, and asked the attorney whether he had better make a will or a deed. He was advised by the attorney that it would be better to make a deed, and did so. No power of revocation was reserved in the deed, and its effect, if valid, was to practically strip him of his whole estate, for his personal property, as has already been stated, was insufficient to pay his debts. If the opinion of his physicians, as to the effect of the attack upon him, had turned out to be accurate, he would, for the rest of his life, have been a dependent upon the charity of others, except so far as a pension which he received from the national government would have sufficed to support him. From his inquiry made of the attorney, whether it would be better for him to make a will or a deed, it seems quite probable that he considered the one would be no more effective than the other to presently deprive him of all further interest in the estate to be embraced in the instrument which he proposed to execute."

The situation is not assisted by the presence in this case of an agreement to support, as will be shown by other authorities herein quoted.

We have here absolutely no evidence to show that Miss Leonard (or Mrs. Donovan) "well understood" what she was doing. The attorney who prepared the deed testified that he informed her as to its contents, and that she appeared to clearly understand what she was talking about. But there is nothing to show that she said anything indicating this misunderstanding. She apparently never talked to anybody else about the conveyance. The attorney was called by the donee, and had been informed of the purpose for which he was to come. And there is a difference of opinion between the donee and the lawyer as to how many times he had been there. Indications point to the fact that he was there but once,

and then brought with him the deed prepared and ready for execution.

The case of Post vs. Hagan, 71 N. J. Eq. 234, in an opinion reversing the decision of the Vice-Chancellor, held that if a child, upon whom a parent by reason of advanced years or infirmity has in fact come to be dependent, accepts from such dependent parent a voluntary conveyance of all of his or her estate, a court of equity, moved by the apparent improvidence of such gift, will presume that the donor did not appreciate the consequence to himself of his voluntary act, and hence will place upon the donee the burden of overcoming this presumption by showing that the donor in making the conveyance had the benefit of proper independent advice. In that case there was no question of the donor's mental capacity. The Court of Errors at the commencement of the opinion says that the facts were correctly found by the learned Vice-Chancellor. The donor was 63 years of age, and confined to her room, if not to her bed, suffering from the disease from which she died. The Vice-Chancellor said that he was entirely convinced "that these deeds were the voluntary intelligent act of Mrs. Telfer in execution of a purpose which she formed in her own mind unaffected by any influence or suggestion from the defendants." And again, "I find as a fact that when these deeds were made the grantor, though weak, was in the full possession of her intellectual faculties, and that her will power was practically unimpaired, and that as a matter of fact no influence of any kind was exerted upon her by or on behalf of the defendant or either of them." In a state of facts, much more strongly in favor of sustaining the conveyances than in the present case, and a decision so given by the Vice-Chancellor, yet the Court of Errors unanimously reversed his decision, not on the facts, but the law. It held as follows:

"That the donor in the present case ought to have had independent advice must be taken to be entirely established. That she did not have it is also clearly

shown. Judge Paxton, the lawyer who drew the deeds and took the donor's acknowledgments, was employed for that purpose by the donee and appeared for her in the court below. She called upon him with the old deeds, from which he was instructed to draw to new deeds, in all respects similar to the old ones, saving as to the names of grantor and grantee, and when he had the deeds ready, he was to attend upon the donor and have them executed. His instructions were both limited and explicit. These instructions he carried out. He was in no sense the adviser of the donor and at no time acted in that capacity. His only remark to the donor, as I recall it, was that cited by the Vice-Chancellor, viz., that he reminded her that she had a son. The consequences to the donor's son of the disposition she was making of her property, and her repeated expressions of a desire to provide for him or his family, are not material, in the present aspect of the case, save as they throw light upon the donor's lack of knowledge and her need of advice. It may be true, as the Vice-Chancellor suspects, that if she had known of such a thing as a spendthrift trust she would have made such a disposition of part of her estate; it is equally probable that if she had understood the doctrine of precatory words she might have impressed such a trust in favor of her son upon the conveyances made to her daughter—indeed, in a vague way, she seemed to have thought that she had done so. However well founded in the testimony these surmises as to the donor's intentions or desires may be, they do no more than emphasize her need of counsel, not with respect to the protection of her son, but of herself. The fundamental error of the learned Vice-Chancellor as to the rule to be applied by him to such a case appears from the concluding words of his opinion, in which, in summarizing the case before him, he says: "We are not inquiring whether if Mrs. Telfer had been properly advised she would have made these conveyances. The sole question is, did Mrs. Telfer act voluntarily and intel-

ligently in making these conveyances, or were they obtained from her by fraud or undue influence?" This is precisely the error pointed out in Slack vs. Rees, in the citation above quoted.

"For the reasons there stated, the question considered by the Vice-Chancellor as the sole question was not the question upon which the case turned, while the question that he did not consider was not only an essential inquiry in the cause, but under Slack vs. Rees, was absolutely dispositive of it in favor of the appellant."

In Bensel vs. Anderson, 85 N. J. Eq. 391, Vice-Chancellor Backes set aside a transaction with an old man of ninety, dependent for his temporal wants entirely upon his children, and in a large measure upon his son-in-law, a member of his household, in whom he undoubtedly reposed great confidence, these transactions being with the son-in-law. The Vice-Chancellor said, "In all transactions between parties occupying relations, whether legal, natural or conventional in their origin, in which confidence is naturally inspired, or, in fact, reasonably exists, the burden of proof is thrown upon the person in whom the confidence is reposed, and who has acquired an advantage, to show affirmatively not only that no deception was practiced therein, no undue influence used, and that all was fair, open and vountary, but that it was well understood. Hall vs. Otterson, 52 N. J. Eq. 522; same case on appeal, 53 N. J. Eq. 695. Where parties hold positions in which one is more or less dependent upon the other, courts of equity hold that the weaker party must be protected, and they set aside his gifts if he had not proper advice, independently of the other. The presumption against the validity of the gift is not limited to those instances where the relation of parent and child, guardian and ward, or husband and wife exists, but in every instance where the relation between the donor an donee is one in which the latter has acquired a dominant position. Haydock vs. Haydock, 34 N. J. Eq. 570. And where one so situated is despoiled of

all his property, a rule putting an additional burden upon the beneficiary is brought into play. Mr. Justice Garrison explains it with marked clarity thus (Post vs. Hagan, 71 N. J. Eq. 234): "That a person already aged or infirm, or otherwise dependent, should give to the one upon whom he thus depends practically his whole living beyond recall, and at the very time when apparently he had most need to retain it, raises in the mind of a chancellor the presumption that the donor may not have appreciated the irrevocable character of his act or that he did not foresee its legal consequences to himself. This presumption of apparent improvidence gives rise to the special rule followed in Slack vs. Rees, which may be called the rule of independent advice. By force of this rule, if a person upon whom another has in fact come to be dependent, accepts a gift from such dependent person of all his or her estate, a court of equity, moved by the apparent improvidence of such a gift, casts upon the donee the burden of showing that the donor had the benefit of proper independent advice. Proper independent advice in this connection means that the donor had the preliminary benefit of conferring fully and privately upon the subject of his intended gift with a person who was not only competent to inform him correctly as to its legal effect, but wh was furthermore so dissociated from the interests of the donee as to be in a position to advise with the donor impartially and confidently as to the consequences to himself of his proposed benefaction."

This whole opinion of Vice-Chancellor Backes is a very valuable one inasmuch as it discusses a number of authorities supporting the principle.

In Lyons vs. Van Riper, 26 N. J. Eq. 337, a conveyance was set aside on the ground of fraud, the grantor, at the time of its execution, being old, infirm and ignorant, and entirely under the influence of the grantee, in whom she had the most implicit confidence. "Adrian Van Riper admits, at the time the deed was executed, and for years before, he was the confidential adviser and friend of this old wo-

man, perfectly familiar with her weaknesses and oddities, and possessing almost unbounded influence over her. According to his own story, at the time this deed was made, she believed he was almost the only person in the world she could trust; that everybody else with whom she came in contact was seeking to rob and despoil her of her property, and that even the woman who lived with her, and took care of her, was plotting her murder, and intended to administer poison to her in her food. Miss Van Winkle was over seventy years of age, entirely blind, profoundly ignorant, unable to read or write, utterly unacquainted with business matters and the ways of the world. The property conveyed constituted nearly her entire means. Her defenceless and unfortunate condition, and the position of power and influence over her, occupied by Van Riper, renders it preeminently the duty of the court to examine, with the utmost care and scrutiny, the circumstances surrounding this most extraordinary transaction.

"The circumstances attending the execution of this deed, as given by the scrivener, do not show that any effort was made, at least such as the condition of affairs required, to place before the mind of this ignorant and sightless old woman, the nature and importance of the act she was about to perform. Van Riper and he met at her house by appointment. The papers had been prepared in advance, under Van Riper's instruction. They found Miss Van Winkle with the person who took care of her. Soon after they entered the house, they, with Miss Van Winkle, went into an adjoining room, leaving her attendant in the other, and there, while the three were alone, the papers were read, and the deed executed, without explanation or comment, except either before or after the execution of the deed the scrivener thinks he said to Miss Van Winkle, he supposed she understood she was giving Van Riper a deed for her farm, and she replied she did, and then said something about Van Riper's attending to her business, and she was satisfied he would do what was right. She had

no business to be attended to; if she meant what she was doing, she was stripping herself of all her possessions for a bare promise she should be sheltered, fed, clothed and buried. She was about to deprive herself of the power to make the most trifling gift, or of recognizing, at any time thereafter, the ties of blood or the claims of friendship; she was, indeed, reducing herself to a condition of respectable pauperism. Such a complete surrender of personal independence and abandonment of property by a person under fear of being cheated, is highly improbable. The only evidence, outside of that given by the defedant himself, showing Miss Van Winkle understood or had the slightest appreciation of what she was doing, is that of the scrivener already quoted. No person ever heard her say she contemplated such a disposition of her property, or that she had made it. Although her struggle to induce him to accept a deed, extended over a period of three years, no evidence whatever has been offered, showing she ever uttered a word on the subject to any other person, or to him in the presence of a third person; but the proof is clear, that at almost every interview occurring between them, after the date of the deed, she claimed to be the owner of the farm, and he fully recognized her claim. In dealing with persons in the helpless condition of this old woman, an officer, having power to authenticate the execution of deeds, is bound to go further than a simple, formal reading of the instrument. The contents are to be made known to the grantor by such means as will enable him to comprehend the nature and effect of his act." There was no question of mental capacity, other than that which might be assumed from her years.

In Parker vs. Parker, 45 N. J. Eq. 224, the Court of Errors sustained a finding of the Vice-Chancellor setting aside a gift of a large sum of money from a mother to a son. No question of insanity was involved. The Vice-Chancellor had said "I am satisfied, however, that Mrs. Parker was a woman of

great vigor of intellect, retaining her faculties of thought and action to a great degree, excepting only so far as indicated by the physician. Nevertheless, I must consider the fact that she was an aged woman and the mother of Henry, in whom she had unbounded confidence. This confidence is particularly striking in that she not only trusted him with her securities, evidences of indebtedness by others, but also with the securities which Henry himself had given. . . . I have no doubt from the testimony and from what I have seen of Henry upon the witness stand, that, to his mother, he was a prepossessing son, and that his influence was very great indeed, and that, too, without any special effort upon his part.

"These things being so, such confidential relations existing, the burden of proof is on Henry, who claims the benefit of the gift; he has the money, it is true, and shows the formal way by which it passed to his credit. There he rests his case. Does this bring him within the rule of law and save him from accounting for the $7,000?

"I think Henry is obliged to account for the $7,000. This view seems to be sustained by all the authorities. Huguenin vs. Baseley, 14 Ves. 273; Kerr Fraud & Mis. 182, 183, 189 (Am. notes)."

In Martling vs. Martling, 47 N. J. Eq. 122, Vice-Chancellor Pitney set aside a deed from a mother, who was advanced in years and had implicit confidence in her son, to him. There an attempt was made to get independent advice.

"Furey's account of the execution is, that he frankly stated to complainant that he was acting as counsel for, and entirely in the interest of, the defendant, and was therefore unfit to advise her, and for that reason he called in a Mr. Kelly, a young attorney of Jersey City, who advised and counseled with her. Kelly did come in and saw complainant, but he had neither previous acquaintance with the complainant nor present knowledge of her affairs. He had no consultation with her, but went through

the ceremony of stating the contents of the two deeds to her and signing them as a witness. Called as a witness at the hearing, he had no recollection at all of the circumstances. It seems hardly necessary to say that there was in all that no approach even to independent counsel and advice."

It is difficult to see how Mr. Stewart's explanation was any more satisfactory than in the Martling case. He had been employed by the defendant, he knew the purpose of the visit, and all he did was explain, he says, the nature of the deed, and that she seemed to understand what she was doing. He does not say that he advised her about the agreement to support. Certainly he was acting strangely, if he considered himself her counsel, in giving the agreement to support to the very person who might have a reason to conceal or suppress it. He should have included that agreement in the deed, or at least put it on record with the deed.

In Corrigan vs. Pironi, 48 N. J. Eq. 607, a deed from a woman to a Roman Catholic priest was set aside, the burden being on the priest to prove that his granter was fully apprised of the legal effect of her act when she signed the deed, and that she was not influenced by her confidential relations with him. This was a Court of Errors decision, and in the opinion Beasley, C. J. says "In such a posture of things, it is incumbent on the donee to show not only that his own conduct has been fair and wholly unobjectionable, as has been shown in this case, but to show further that the donor has not acted from the influence of an implicit confidence, rather than from the exercise of his own reason." No question of insanity or mental incapacity was raised. "The first suggestion of making this conveyance occurred in a private conversation between herself and her donee, no one else being present. Her instructions to draw the necessary instruments were conveyed to her own lawyer by the donee, she having no personal inter-

view with such scrivener; and the papers were finally executed in the presence and under the supervision of the counsel of the donee, so that from first to last, with respect to this all-important transaction, she had no adviser of any kind, either legal or lay."

In Hall vs. Otterson, 52 N. J. Eq. 522, a deed from a wife to her husband was set aside on a suit by the heir of a married woman. There was no question of the donor's sanity, or of her mental capacity. "This deed was executed at a critical period of Mrs. Otterson's life (a child was born six days later) she was in extremely delicate health; it was doubtful if she would survive the peril of her approaching confinement. She was a refined lady, unacquainted with business, relying for its care first on her agents and then on her husband, who, after their marriage, became her agent and was entrusted by her with the entire management of her estate and exclusively of the property in question; in short, she was most dependent on him and devoted to his interests; her affection for and attention to him were marked, as was her anxiety to please him. He was a prominent lawyer; so was the selected trustee, who was the husband. So far as the evidence shows, this inexperienced lady, without any competent independent adviser, was surrounded by these gentlemen, of whose legal ability she must have been aware, and in one of whom she reposed the most implicit confidence.

"In all transactions between persons occupying relations, whether legal natural or conventional in their origin, in which confidence is naturally inspired, is presumed, or in fact reasonably exists, the burden of proof is thrown upon the person in whom the confidence s reposed and who has acquired an advantage, to show affirmatively, not only that no deception was practiced therein, no undue influence used, and that all was fair, open and voluntary, but that it was well understood. Mott vs. Mott, 4 Dick. Ch. Rep. 192; Gibson vs. Jeves, 6 Ves. 266; Hoghton vs. Hogh-

ton, 15 Beav. 278; Simeon vs. Wilson, 3 Edw. Ch. 36; Coutts vs. Acworth, L. R. 8 Eq: 588; Boyd vs. De La Montagnic, 73 N. Y. 502; Darlington's Appeal, 86 Pa. St. 512; Hugenin vs. Baseley, 2 White & T. Lead Cas. (T.B.S.) 597 and notes.

"It is essential to the maintenance of a deed of gift that the donor comprehends the full force and effect of his acts, as Sir George Jessell puts it, "thoroughly understands what he is about." (Dutton vs. Thompson, 23 Ch. Div. 278, 281); or, in the words of Lord Edon, in Eugenin vs. Baseley, 14 Ves. 273, "with that knowledge of all their effect, nature and consequences, which the defendants and the attorney were bound by their duty to communicate to her, before she was suffered to execute them." See, also, Mulock vs. Mulock, 4 Stew. Eq. 594, 602. It is to establish this thorough understanding that the burden of proof is thrown on the donee in cases of gifts between persons standing in fiduciary relations.

"The state, in its careful protection of the rights of a married woman in the transfer of her real estate, requires by statute that a public officer shall make known to her the contents of the instrument, and take her acknowledgment, when she is separate and apart from her husband, that her execution thereof is her voluntary act and deed, freely done and without any fear, threats or compulsion of her husband. This law is to secure to her, through an officer, knowledge of the contents of the paper and an opportunity, when not in the actual presence of her husband, of exercising her own will and purpose. The certificate of the officer, in compliance with the statute, completes the formality and makes it a legal conveyance. It is evidence that the contents of the deed have been made known to the wife, and that she has acknowledged that its execution is free and voluntary. Yet, while it may be true that the deed has been read to her, she may be as far from thoroughly understanding the effect of the act as she may be

unconscious of the dominant influence of her husband's will inducing her action.

It is to secure this thorough understanding that courts of equity require, in cases of this kind, except those involving mere trifling gifts, that the donor shall have independent advice. Sir G. J. Turner, L. J., in Rhodes vs. Bate, L. R. I Ch. App. 252 (at p.257) says: "I take it to be a well-established principle of this court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show, to the satisfaction of the court, that the person by whom the benefits having been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the court, and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle." Kekewich, J., in Allcard vs. Skinner, 36 Ch. Div. 145 (at p. 158) says: "Where the paramount influence presumedly exists, it (the law) casts on the possessor of such influence the burthen of proving that the gift was free, and it holds an essential part of that proof to be that the donor had "competent independent advice;' " and Lindley, L. J., (at p. 181): "In this class of cases it has been considered necessary to show that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made." See, also, Prideaux vs. Lonsdale, I De G., J. & S. 433; Savery vs. King, 5 H. L. Cas. 627; In re Garnett, 31 Ch. Div. I; Dolliver vs. Dolliver, 94 Cal. 642; Leech vs. Fare, cited in 13 Am. L. Reg. (N. S.) 350.

In Hart vs. Hart, 57 N. J. Eq. 543, Vice-Chancellor Reed set aside a deed to a stepson made by a woman over eighty years of age, made without counsel and living with her stepson, under an agreement to take care of her and her imbecile son while they lived.

In White vs. White, 60 N. J. Eq. 104, a voluntary conveyance by an illiterate man, unaccustomed to business transactions, of substantially all his property, in making which he did not have the benefit of independent, competent and disinterested counsel, to make him fully understand, realize and appreciate the full practical effect and consequence of the deed during his lifetime, though he was told generally that it conveyed the property, and which contains no provisions to effect the understanding of the parties that he was to retain the use and benefit of the property during his life, will be set aside. The Vice-Chancellor held that "the conveyance was purely voluntary and disposed of substantially all the grantor's property, and in making it he did not have the benefit of the advice of independent, conpetent and disinterested counsel to make him fully understand, realize and appreciate the full effect and consequence of the deed during his lifetime. It is not enough that it was read to him, and that he was told generally that it conveyed the property to John, and that he so understood it. Such an 'understanding' is not sufficient in the case of an illiterate man unaccustomed to business transactions. The word 'understand,' so much used by lawyers and jurists in connection with the execution of deeds, wills and such instruments, includes the realization of the practical effects and consequences in every direction of the proposed act, be it deed or will."

In Hollard vs. John, 60 N. J. Eq. 435, a voluntary deed and assignment made by a woman eighty years old, paralyzed and childish, to a young man of no kin to her who lived with and had complete control over her was set aside. We do not contend that Miss Leonard's age was such as to make the transaction suspicious, but her condition was such as to make her helpless and dependent on others, and particularly on the defendant.

The same princples have been applied in Coffey vs.

Sullivan, 63 N. J. Eq. 296, another Court of Errors decision, reversing the decree advised by Vice-Chancellor Stevens. No question of insanity was raised, and the Vice-Chancellor found as a matter of fact that "The grantor, it is true, was about seventy-eight years old when he executed the deed, but the evidence, so far as it goes, shows that at that time he was an active old man, engaged in farming and capable of transacting business, whose mind did not become impaired until within a few months of his death." The Court of Errors said "Testing the present transaction either by the rule as stated by Chancellor Vroom and Pomeroy, that fraud would be presumed from gross inadequacy of price alone, or by the later modifications announced in Gifford vs. Thorn, supra, and by this court in the case of Phillips vs. Pullen, just referred to, to the effect that the position, circumstances and relations of the parties are to be considered before the making of such presumption, this deed, so far as its validity depends upon the feature of bargain and sale, cannot be sustained. The parties to it did not occupy a position of equality. John lived within three or four blocks from his father, and had continual access to him; the other children lived at a distance, and only saw their parents occasionally. The father was, in some degree at least, under the weight of the evidence, enfeebled both mentally and physically, and the mother, who joined him in the conveyance, instead of being capable of assistance by her advice, must rather have been an obstacle to a correct appreciation by the father of the gavity of the act. The grantors had not the benefit of independent advice in the making of this important transfer. The lawyer who seems to have been consulted about the matter as the "medium of the transfer of the property" was the selection of the grantee alone. No family consultation or arrangement appears ever to have been had or held upon this subject. That the defendant exercised great influence upon the father cannot be doubted.

"If we are to regard this deed as a voluntary settlement from donor to donee, and such, there is some reason for believing from the evidence to have been its real character, it cannot be doubted, under the uniform authorities, both English and American, that, at the close of complainants' evidence, the burden of proof was cast upon the donee to establish that the donor fully appreciated what he doing, or at all events, in the doing had the benefit of disinterested and competent advice. Hall vs. Otterson, 7 Dick Ch. Rep. 528, and cased cited. The facts in White vs. White, 15 Dick. Ch. Rep. 104, and the authorities there cited by Vice-Chancellor Pitney, are so apposite in almost all respects to the case in hand that especial attention is here called to them. See, also, Pironi vs. Corrigan, 2 Dick. Ch. Rep. 135, 153, and the English cases of Parfitt vs. Lawless, L. R. 2 P. & D. 468; Rhodes vs. Bate, L. R. I Ch. App. 257."

II

"But," it might be urged, "in those cases, a gift was under consideration. Here there is a valid contract made upon a good and sufficient consideration to wit, the agreement to support the donor during the remainder of her life." But the authorities of this State have already answered that objection. They have definitely held that an agreement to support will not validate a conveyance otherwise invalid. The situation is discussed in the following authorities.

In Mott vs. Mott, 49 N. J. Eq. 192, a deed obtained by a son from an aged mother was set aside. In that case it had been charged that the deed had "been effected either while she (donor) was non compos or at some time or by some means when her mind was deranged or unsound or weak, or by undue influence exerted by him over her." And while the Court held that she had sufficient mind to understand the act she was engaged in, the deed was still set aside.

"Whatever mental infirmity Mrs. Mott evidenced prior to the visit made by her to the defendant in 1888, and which will be considered in detail on another branch of the case, it cannot, in the light of the testimony of Judge Donohue and Dr. Eldridge, and the other witnesses as to her mental condition, at and about the time of the execution of the deed, he said that she did not possess sufficient mind to understand, in a reasonable manner, the nature and effect of the act she was engaged in, which is the test in such cases if unmixed with fraud. Hill vs. Day, 7 Stew. Eq. 150; Earle vs. Norfolk &tc. Co., 9 Stew. Eq. 188; affirmed, 10 Stew. Eq. 315; Eaton vs. Eaton, 8 Vr. 109. The complainant's attack on this conveyance solely on the ground of lunacy must fail."

"Conveyances by an aged parent to a child, in consideration of the agreement by the latter to support and provide for the former, are up-held if the transaction appears to have been free from fraud and the evidence does not show that confidence has been resposed by the infirm in the stronger, but does show that the parties dealt "at arm's length." Collins vs. Collins, 18 Stew. Eq. 913.

"Another principle, however, is to be applied when confidence has been reasonably reposed between the parties which may have been abused.

"In Low vs. Holmes, Dru. t. Napp. 290 (at p. 320), the lord chancellor says: "It is not the duty of this court, and it may not be within its province, to rectify in all cases the various inequalities of contracting parties, or to undo the advantage which may be gained by the strong or sagacious over the weak and improvident, but in every relation which induces confidence and involves dependence is not abused."

"In Sears vs. Shafer, 6 N. Y. 268, (at p. 272) Gridley, J., says: "A court of equity interposes its benign jurisdiction to set aside instruments executed between persons standing in the relation of parent and

child, guardian and ward, physician and patient, solicitor and client, and various other relations in which one party is so situated as to exercise a controlling influence over the conduct and interest of another. In some cases undue influence will be inferred from the nature of the transaction alone, in others from the nature of the transaction and the exercise of occasional and habitual influence."

"In Cowee vs. Cornell, 75 N. Y. 91-99, Hand, J., says: "It may be stated as universally true that fraud vitiates all contracts, but as a general thing it is not presumed but must be proved by the party seeking to relieve himself from an obligation on that ground. Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practised, no undue influence was used, and that all was fair, open, voluntary and well understood."

"The principle applies, and the rule of evidence is enforced in all transactions between persons occupying relations, whether legal, natural or conventional in their origin, in which confidence is naturally inspired, is presumed, or in fact reasonably exists.

"It is that great rule of the court that he who bargains in a matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence—a rule applying to trustees, attorneeys, or anyone else." Lord Eldon, in Gibson vs. Jeves, 6 Ves. 266, 278. "The principle applicable to the more familiar relations of this

character have been long settled by many well-known decisions, but the courts have always been careful not to fetter this useful condition by defending the exact limits of its service." Lord Chelmsford, in Tate vs. Williafson, L. R., (2 Ch. App.) 55, 61. "The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied, whatsoever may be the nature of the confidence reposed or the relations of the parties between whom it had subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised, those of trustee and cestui que trust, guardian and ward, attorney and client, surgeon and patient, to be merely incidents of the application of the principle." V. C. Turner, in Billage vs. Southee, 8 Nare 439, 440.

"Equity assumes that instruments creating estates in favor of a party standing in certain confidential relations with a person from whom the interest is obtained, are made under conditions of confidence and trust inspired by the relation, and will either absolutely avoid the transfer or the application of the alienor, or throw the burden of proof on the alienee to establish the good faith of the transaction. Dealings between trustee and cestui que trust are illustrations of this. When a controlling influence is not conclusively inferred from the character of the relation, it may be necessary to prove that confidence was in fact reasonably reposed by the one in the judgment, sincerity and honesty of the other, but the relation and confidence established, the burden of proof is on the person in whom confidencee is placed to prove the entire fairness of the bargain.

"The relations we have to consider as existing between the parties in this case are those of principal and agent, and parent and child.

"In Farmer's Exrs. vs. Farmer, 12 Stew. Eq. 211 (at p. 216) Vice-Chancellor Van Fleet says: "A

contract made by an agent with his principal in relation to the subject-matter of the agency, will not be allowed to stand unless it appears that it is entirely free from undue influence, advantage and imposition. The transaction must be characterized by the utmost good faith, and the burden of establishing the perfect fairness of the contract is on the agent;" citing Condit vs. Blackwell, 7 C. E. Gr. 48; Porter vs. Woodruff, 8 Stew. Eq. 174.

"With reference to transactions between parent and child, the law presumes that the influence of the parent over his child, during the tender years of infancy, is so controlling that it regards transfers from the child to the parent, on arriving at majority or immediately thereafter, as having been made under the influence of over-weening confidence. As the child matures and acquires experience and independence the presumption weakens and at last ceases. As the parent, however, advances in years, the condition of dependence may be reversed by the hand of time. If life draws to a close with a failing intelligence and enfeebled frame, the parent naturally looks with confidence to a son or daughter for advice and protection. The parent becomes the child, "with the samee dependence, over-weening confidence and implicit acquiesence" which had made the other, in infancy, the willing instrument of the parent's desires. Highberger vs. Stiffler, 21 Md. 338; Martin vs. Martin I. Heisk, 644, 655; Brice vs. Brice, 5 Barb. 533; Comstock vs. Comstock, 57 Barb. 473; Whelan vs. Whelan, 3 Cow. 557; 2 White & T. Lead Cas. (4th ed.) 1206.

"If under such circumstances, a son obtains a conveyance from a parent, this court will not permit it to stand unless such son establishes by abundant proof that the contract was not only free, but fair, and made with the utmost good faith."

In discussing the donor's condition, the Court says "These infirmities, while they may not have culmin-

ated in a degree of imbecility which would render her incompetent to convey, show that her mind was in a condition of susceptibility to influence if sought to be exerted by one who had her confidence or affection." (Which is exactly the condition of affairs we think exists in the case pending before your Honors. The woman was physically helpless; it cannot be doubted but that at times her mind was not clear. The only strong mind in the house was that of the defendant, a man in full health and vigor. He admits that she had the greatest confidence in him and always consulted him in every undertaking of any importance. No counteracting influences were present. The sisters were unaware of the proposed transaction, and were there only when visiting. Three of them were married and the fourth a trained nurse, working. Can there be any doubt but that there was a situation of confidence, if not of affection?) In discussing the question of independent advice, the learned Vice-Chancellor said "The transfer of her property was made without opportunity for her to have outside advice. The deed was prepared by the procurement of the defendant. He sent to Hackensack and had it prepared and took his mother to Judge Donohue to have it executed. Judge Donohue was and had for years been his counsel, but even he was not called in to advise the old lady. His part of the transaction seems to have been that of explaining the effect of the deed and taking her monosyllabic replies to his formal inquiries. Sears vs. Shafer, I Barb. 408; Owing's Case, I Bland 392."

But there was another point involved in this case which hears strongly on the case at issue, that was the question of the donee's agreement to support the donor. The Vice-Chancellor said 'It was a fraud for him to permit his agreement to support his mother, the only consideration for this conveyance, to rest in parol. The will was a makeshift; it was not delivered to her or anyone for her; it was subject

to his control; he produced it on the trial; he could at any moment have revoked it.

"The question has not arisen in this state in any reported case, but there are well-considered cases in other jurisdictions which hold that where a deed, made by a parent to a child on such an agreement, expressly states it as the consideration of the conveyance, on failure to perform by the child, a court of equity will, on proper pleadings, set aside the agreement and conveyance and do equity between the parties, some on the ground of the rescission of a contract for fraud as the converse of specific performance, others on the ground of a condition subsequent. Reed vs. Burns, 12 Ohio St. 49; Jenkins vs. Jenkins, 3 Mon. 327; Leach vs. Leach, 4 Port. (Ind.) 628; Scott vs. Scott, 3 B. Mon 2; Yaokum vs. Yoakum, 77 Ill. 85; Devereaux vs. Cooper, II Vt. 103; Bogie vs. Bogie, 41 Wis. 209; Bresnahan vs. Bresnahan, 46 Wis. 514; Blake vs. Blake, 56 Wis. 392; DeLong vs. DeLong, 56 Wis. 514.

"It is held to be a badge of fraud if such an agreement is a part of the consideration and is omitted from the instrument. Sweet vs. Bean, 67 Barb. 91; Carpenter vs. Muren, 42 Barb. 300.

"Vice-Chancellor Van Fleet, in Mulock vs. Mulock, 4 Stew. Eq. 594 (at p. 601) holds that it is a fraud in a son obtaining a conveyance from his aged mother, under conditions to be performed by him, not to see that what she intended to reserve was secured to her as fully and as perfectly as that which she intended to give was granted to him. Although this case was reversed in part (S. C., 5 Stew, Eq. 348), I do not understand that this position of the learned Vice-Chancellor to be disturbed.

"The failure to either insert the agreement in the deed as a statement of the consideration, or make it the subject of a distinct agreement in writing, was, in this case, a clear fraud. He knew his mother's condition was a failing one. Whatever he may say

to the contrary, he had a question as to her mental capacity. No other theory explains his application to Eldridge to examine the old lady as to her mental condition. He was taking from her all the means of support she had, and it has a badge of fraud not to give her independent evidence of his agreement to support her, which would avail her if her mind gave way or other instruments of evidence should fail."

True there was an agreement in writing in this case, but it was a separate agreement, so far as the evidence shows undelivered to the donor, unrecorded, delivered to the donee, produced by him on this hearing, and at all times in his power to conceal or suppress. It was not prepared and executed simultaneously with the deed, and how it happened to be made does not appear.

In Hammell vs. Hyatt, 59 N. J. Eq. 174, Vice-Chancellor Grey set aside a deed obtained by the caretaker of an extremely aged person, of feeble strength and failing memory from that person, where the only substantial consideration was an agreement to support, where the agreement to support did not appear on the face of the deed, and was so under the control of the grantee that she might at her option have avoided it. "She (donor) was feeble in strength and was invariably attended by some competent person. Mrs. Hyatt (donee) was her niece, who she loved, whom she had been in the habit of visiting. Mrs. Hyatt (donee) was her niece, whom she loved, whom she had been in the habit of visiting. Mrs. Hyatt's relations to Mrs. Hammell for years had been so intimate that there can be no question that she knew fully all of Mrs. Hammell's weaknesses and dependence upon her care and protection." On the agreement to support "the counsel for the defendants insists that the deed to Mrs. Hyatt was not a gift and that it must not be tested by he rules applied o gifts; that a valuable consideration was in fact given for the deed, and that it was a matter

of commercial contract for an adequate consideration between Mrs. Hammell and Mrs. Hyatt." Now observe the court's decision of this agreement to support and its astounding similarity to the facts in the case at bar: "The contract to support Mrs. Hammell was in now way indicated on the face of the deed—was executed without witnesses or acknowledgment by Mrs. Hyatt—and if it ever was delivered to Mrs. Hammell, the delivery, considering Mrs. Hammell's utter dependence upon Mrs. Hyatt, was no more than a delivery to the latter. Nothing prevented Mrs. Hyatt from at any time suppressing the contract, and Mrs. Hammell's enfeebled mind and impaired memory would have been useless in support of any attempt to assert rights under it. Had the contract for support been BONA FIDE it should have been so referred to in the deed that the grantee could have been bound by it. But this agreement to support, which was wholly executory, was not only omitted from the deed but it is doubtful if it ever was delivered. Mrs. Hyatt, in her answer, alleges that she has possession of it and tenders its production. She did produce it at the hearing. She had it always in her power to have suppressed it. Such a retention was, in Mott vs. Mott, 4 Dick Ch. Rep. 209, held to be a fraud, and it was declared that the omission of such a contract from the deed is of itself a badge of fraud, upon the broadly-equitable ground that it is the duty of one occupying the position of a caretaker, who makes a contract with one dependent upon him for protection, to see that the consideration which is to proceed to the weaker party is secured as fully and as perfectly as that which passes to the caretaker.

"That there was an attempt to give to the transaction now in dispute a commercial character is shown by the actual payment of the nominal consideration of $1. But this unusual payment is of itself an indication of a purpose to give color to the matter which

it was felt by those conducting the business, it would not otherwise have."

Could there be a more exact parallel in the facts. Here the agreement, an absolute surprise to counsel for the complainant, unrecorded, and unreferred to by the pleadings, delivered to the donee and produced by him! Also the ACTUAL payment of $1., a most unusual thing to do.

III.

In the following cases, some question of the donor's mental capacity was involved and the discussions are highly illuminative of the facts in the present situation:

Bidwell vs. Piercy, 63 Atl. 261, is of great inerest because, in it, Vice-Chancellor Pitney discusses the effect of apoplexy on the mind. He says: "Mr. Bidwell, in the month of August, 1902, had a very severe stroke of apoplexy, so that he was unconscious for some time, I forgot how many days, but absolutely unconscious for a considerable time. Now that involves a serious lesion or wound of the brain; it is the bursting of a blood vessel on the brain, and that is a serious matter; the extent of its seriousness depends on two or three things. First, the amount of vitality and strength in the tissue of the brain and in the general condition of the man's or woman's health, and second, on the extent of the rupture. There is as much difference in the injury to the brain from a stroke of apoplexy, varying with the extent of the rupture, as there is between the prick of a needle and the slash of a butcher knife on the external organs. It may be very slight; it may be very severe, and according to its severity is its effect upon the brain, which is the organ of the mind and thought. And it is common knowledge that a stroke of apoplexy affects a person's mind because the brain is the seat of the mind and it affects the brain. Now, without going into the extent of that injury at this time, the result was that he stopped business sub-

stantially. He had been pursuing some business in New York, but after he got a little better, after the first effects of theapoplexy were over, and his physical disability was considerably relieved, so that his inability to use his left hand and left leg were so far removed that he walk with assistance, he did go accasionally to his business in New York and stay for a little while until it was sold out. But substantially he was a confirmed invalid from that time until he died. And the doctor says other serious symptoms appeared; softening of the brain and Bright's disease of the kidneys, and all those things. He was able to be about, but was an invalid.

"Now, I am not going into the extent of the mental impairment any more than that; that he was disabled from doing any steady business, and certainly his mind was affected to a serious extent. We all know that the effect of softening of the brain is to weaken the mind, and the intervention of Bright's disease has the same tendency." In discussing the circumstances of the case, the court held that the burden was on Mr. Piercy to show that Mr. Bidwell understood the contract, and gave his reasons: "First, that he was palpably an invalid, unable to attend to his business, lounging around day in and day out, and amusing himself in Piercy's greenhouses. Mr. Piercy knew that he had suffered a stroke of apopplexy, and he is chargeable with knowledge—I must hold every man of intelligence chargeable with knowledge—of the fact that a man who has had a stroke of apoplexy is more or less affected in his mind. There is no question about that. In the second place, by the answer, he was on terms of confidential relations with Piercy, and in my judgment, it matters not whether it be a lawyer or a trustee or a mere agent, when one man is on confidential terms with another, and a transaction takes place between them that is questionable, the burden is on the man that occupies the confidential relation and has had the

benefit of the contract to sustain it. The burden may be greater or less. You cannot draw an exact line. But the burden was on Mr. Piercy. In the third place, when you come to examine the paper itself, the burden is very strongly on Piercy to explain it."

"My conclusion from the evidence is that his mental capacity did not come up to the standard of Chief Justice Kirkpatrick which I applied in Kastell vs. Hillman, 53 N. J. Eq. 49. 30 Atl. 535, and again in Thorp vs. Smith, 63 N. J. Eq. 70, at page 92, 51 Atl. 437 at pages 445 and 446, and again in Collins vs. Toppin, 65 N. J. Eq. 439 55 Atl. 124. These last two cases were affirmed on appeal (65 N. J. Eq. 400, 54 Atl. 412; 66 N. J. Eq. 430, 57 Atl. 1131) and the Chief Justice in Thorp vs. Smith adopts the last part of my opinion including the quotation from Chief Justice Kirkpatrick, wherein he states the true standard of testamentary capacity to be the ability "clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair and just disposition of his property." It is a familiar rule that a less degree of mental capacity is sufficient to sustain a testamentary disposition where the testator is not subjected to undue influence than is necessary to sustain an important business transaction involving the purchase and sale of landed property." Miss Leonard was, at the time of the execution of the deed, able to understand generally what was going on, in view of all the circumstances and all the testimony; surely it could not be said that she clearly discerned and discreetly judged the effect of what she was doing; that she would be depriving her sisters of her estate, although she was on friendly terms with them, and there was no particular reason why she should choose the donee as the object of her bounty."

In Groff vs. Stitzer, 75 N. J. Eq. 452, a decision of

Howell, V. C., a woman living with a stepdaughter and her son suffered a stroke of paralysis resulting in the impairment of her mental vigor and making it necessary for her to rely for her safety and comfort on the stepdaughter and son. She was under the influence of the stepdaughter.....Held that a voluntary transfer by her of corporate stock to the stepdaughter and her was presumptively void, and the burden of proof rested on them to show that she understood the nature of the act and that it was not done through their influence. Incidentally,, this case also held that under P. L. 1900, p. 363, Sec. 4, providing that a party to any transaction with a decedent shall not be permitted to testify thereto, donees of corporate stock, when sued by the representative of the deceased donor to set aside the gift, are incompetent to testify to the transactions with the donor. In this case nearly as many witnesses testified as to the uniform intelligence and mental capacity of the donor, as against it.

In the case of Walsh vs. Harkey, 69 Atl. 726, Vice-Chancellor Emery had occasion to decide the same question, and followed the rule and set aside the conveyance. He held that where a deed conveying unconditionally and at once instead of by will to the son-in-law and daughter of the grantor practically all of her property was due altogether to the express advice of the grantees, which was apparently accepted without any question and where the grantees employed an attorney solely to draw the deed, they, in thus influencing in their own favor the execution of the deed, took the risk that, if the conveyance was made to them without any opportunity to the grantor for independent counsel as to her protection, the whole transaction was subject to an inquiry as to whether the grantor's interests had been properly protected and in a court charged with the protection of grantors acting under the dominant influence of confidential relations. The circumstances in con-

nection with the execution of the deed are more strongly in favor of full mental capacity than in this case. "Mr. Harkey then saw an attorney and requested him to come to his house, stating that there was a deed to be drawn, and not giving the attorney any particulars. The attorney went to the house and to the sickroom with the daughter and son-in-law, and, according to his statement, the mother, taking out her deed from under her pilliw, gave it to him, with directions as to how the deed was to be drawin. She said that she wished to have a deed made to James, her son-in-law, and Mary, his wife, and to both of them, saying that she considered her son-in-law as her son. The attorney returned the next night with the deed in question, and, the grantor being still in bed, was taken to her room again by the son-in-law and daughter. Mrs. Walsh could neither read nor write, and he then explained to her, as he says, the effect of the deed. This apparently seems to have been confined to the legal effect of the deed as transferring the property, and especially that if either the son-in-law or daughter died the survivor would be sole owner of the property. There was not inquiry or explanation as to its effect on the grantor herself in its bearing as a conveyance of substantially her entire property without any legal adequate provision for her protection and support. The deed was then executed and acknowledged. At the time of this explanation and acknowledgment he says Mr. Harkey and his wife were not in the room, as he had sent them out. Mrs. Walsh at this time also again expressed her strong feeling for her son-in-law, saying she had lived with them for a number of years, that they had been kind and good to her, and that was the reason she wanted it drawn as she did. After acknowledging the deed the attorney, as he says, gave it to her. Before signing the deed nothing was said about Mrs. Walsh having any life right, but after Mr. and Mrs.

Harkey came back into the room there was something said about her retaining possession for her life, and the attorney was requested by Mr. Harkey to draw up a life lease to Mrs. Walsh. He subsequently did so, and this lease, dated three days after the acknowledgment of the deed, was acknowledged February 3rd. In relation to the execution of the deed the attorney's attention seems to have been directed solely to the question of Mrs. Walsh's mental capacity to understand the transaction, and I think his evidence shows that the grantor, notwithstanding her weak physical condition, did then have sufficient mental capacity to understand that she was conveying the property to her son-in-law and daughter, and to execute and deliver the deed."

In the case of Vass vs. Warner, 114 Atl. 563, (Errors & Appeals) a deed by an aged woman was set aside. She was 83 years of age, and the court decided that her mental condition was weak. No attempt was made to show that she was actually insane, but only that she was not in full possession of her faculties. The doctor testified that she had been suffering from a disease which would cause a dulling of the mental faculties. In the opinion of Vice-Chancellor Buchanan, affirmed by the Court of Errors, he said "The rule is, that, where a relationship of confidence exists, the burden of proof is cast upon the donee to shoy, not only that there was no fraud exercised by him, but that the donor understood CLEARLY what she was doing. It is practically the same thing as the doctrine of independent advice mentioned in the Slack-Rees Case. The result amounts to the same thing."

Again, "There is, therefore, nothing whatever to show the condition of this woman's mind at the time of the occurrence, or to show what she had in mind, or that she did fully understand and clearly comprehend what she was doing, except the testimony of Frank Warner himself. On the other hand,

there are several circumstances, several bits of testimony, which do not harmonize with an idea that the defendants have been entirely frank in their testimony. It is to be expected, I presume,, that the interest which they have in the suit should result in sokething of that kind."

In the case of McCully vs. Rowland, 118 Atl. 741, only decided by Vice-Chancelior Lewis on November 9th last, the rules were again sustained, setting aside a deed by a woman over 90 years of age, and showing that the grantee has the burden of proving that she fully appreciated the nature of her act and had the preliminary benefit of independent and impartial advice, and that no undue advantage was taken of her.

. . . . . .

It is respectfully urged that the facts in this case bring the matter within the rules laid down in the foregoing cases. We have a donor who while not old, was certainly infirm. Physically she was almost helpless. Mentally there is considerable doubt as to her condition. Of the four doctors who testified to her condition, only one said that he thought she could understand thoroughly the nature of her acts, and even he said that in all cases of apoplexy the mind was somewhat injured. She must certainly be classed among the "infirm" referred to by the authorities.

As to her surroundings, she was undoubtedly under the domination of the defendant. Of all the persons in the household, he was the only one of any commanding influence. The donor was ill. The housekeeper changed from time to time. The old uncle was only in a condition to do little odd jobs about the house. The son of the defendant had married and was no longer a member of the household. Defendant was a strong man, mentally and physically. He himself says that the donor regarded his opinion as of importance and consulted him in

all her affairs. The circumstances are those referred to in the cases—a transaction, between persons occupying a relation in which confidence was naturally inspired and which in fact reasonably existed. A "presumption of apparent improvidence" is at once raised, which puts upon the defendant the burden of complying with the "rule of independent advice." That burden he has not sustained. The evidence is no stronger, indeed is not so strong, as in some of the cases above quoted, in which it was declared to be insufficient, to wit, the cases of Post vs. Hagan, Bensel vs. Anderson, White vs. White, Mott vs. Mott, Hammel vs. Hyatt, Bidwell vs. Piercy, all supra, and the other cases quoted.

The agreement to support does not save the situation for the reasons given in the authorities. The burden shifted to the defendant, and as he has not sustained that burden, the conveyance should not be allowed to stand. There are here no moral elements that would tempt the court to lean toward the donee, as there were in several cases in which the transactions were set aside.

The learned vice-chancellor's errors appear clearly in the following extracts from his opinion: "I am called upon to decide whether under these circumstances undue influence was used on a mind incapable of understanding what it was doing." Also, "I feel, therefore, that when she made the deed to the defendant she knew what she was doing and that her deed was voluntary and of her own free will." This was the same error made by the Vice-Chancellor in the case of Post vs. Hagan, supra, and which error was pointed out by the Court of Errors in the following language: "The fundamental error of the learned Vice-Chancellor as to the rule to be applied by him to such a case appears from the concluding words of his opinion, in which, in summarizing the case before him he says 'We are not inquiring whether if Mrs. Telfer had been properly advised

she would have made these conveyances. The sole question is, did Mrs. Telfer act voluntarily and intelligently in making these conveyances, or were they obtained from her by fraud or undue influence?" This is precisely the error pointed out in Slack vs. Rees, in the citation above quoted. For the reasons there stated, the question considered by the vice-chancellor as the sole question was not the question upon which the case turned, while the question that he did not consider was not only an essential inquiry i nthe cause, but under Slack vs. Rees was absolutely dispositive of it in favor of the appellant."

So that in the case at bar, when the vice-chancellor said "I feel, therefore that when she made the deed to the defendant she knew what she was doing and that her deed was voluntary and of her own free will and accord" he was making the same mistake made by the vice-chancellor in the Post-Hagan case, when he said "The sole question is, did Mrs. Telfer act voluntarily and intelligently in making these conveyances, or were they obtained from her by fraud or undue influence." "This" as the Court of Errors shows, "is precisely the error pointed out in Slack vs. Rees." To continue the application of that opinion to the present case, "The question considered by the Vice-Chancellor as the sole question" (whether the donor knew what she was doing and whether the act was voluntary and of her own free will and accord) "was not the question upon which the case turned, while the question that he did not consider" (the question of independent advice) "was not only an essential inquiry in the cause, but under Slack vs. Rees was absolutely dispositive of it in favor of the appellant."

The vice-chancellor seems to have considered that unless the donor "did not realize what she was doing when she conveyed the property to him" that the conveyance must stand. Lack of understanding did not exist in most of the principal authorities in support of the rule of independent advice. In Slack

v. Rees, supra, the Court of Errors held that the donor "retained sufficient mental capacity to dispose of his property." In Post v. Hagan, while the Court of Errors found the facts reported by the vice-chancellor to be correct "that these deeds were the voluntary intelligent act of Mrs. Telfer in execution of a purpose which she formed in her own mind unaffected by any influence or suggestion from the defendants." In Parker v. Parker, supra, "Mrs. Parker was a woman of great vigor of intellect, retaining her faculties of thought and action to a great degree." In Hall v. Otterson, supra, the donor was a comparatively young woman, and the only weakening feature was her expectancy of child-birth. In Coffey v. Sullivan, the vice-chancellor had found that "the grantor, it is true, was about seventy-eight years old when he executed the deed, but the evidence, so far as is goes, shows that at that time he was an active old man, engaged in farming and capable of transacting business, whose mind did not become impaired until with a few months of his death."

It is our contention that even if the donor in this case had herself conceived the idea of making the deed, that it would still be invalid because of lack of independent advice. Certainly the relations between these parties was such as to demand the application of this principle. As before shown, the donor, whole not old, was a helpless invalid, living in the same house with the donee. And, while evidence as to her exact mental state at the time of the making of the conveyance is lacking, it is clear that she had suffered an apoplectic stroke, about a year previous, that on a number of occasions since that stroke, her mind was not clear enough to know what she was doing, and that about six months later she was so insane that she had to be sent to an asylum.

It is therefore respectfully insisted that the decree dismissing the bill of complaint should be reversed, and that the relief sought should be granted, and that the conveyance should be set aside.

HOWE & DAVIS,
Solicitors for Appellant.
EDWARD L. DAVIS,
Of counsel.

New Jersey Court of Errors and Appeals

Between

ADA LEONARD,
Appellant,

and

WILLIAM N. DONOVAN,
Respondent.

On Appeal from Court of Chancery

Brief for Respondent

JAMES R. STEWART, JR.
284 Main Street,
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In Chancery of New Jersey

Between

ADA LEONARD,

Appellant,

and

WILLIAM N. DONOVAN,

Respondent.

Points for Respondent

1. Respondent contends that the appellant, complainant below, failed to prove insanity or undue influence as alleged in the bill of complaint.

2. The rule as to independent advice does not apply to the case at bar, because there is no evidence to show failure of consideration or fraud, or to warrant the presumption of fraud that would cast the burden of proof upon the defendant.

Brief for Respondent

Defendant contends that the appellant did not sustain the proof of insanity which was alleged in the petition as the cause of action, yet appellant produced four physicians for the purpose of doing this. Dr. Moulton, the family physician, treated Lillian Leonard in September of 1920 and testified that Mrs. Lillian Leonard was rational at that time and knew what she was doing. In answer to a question by the Court he testifies that her mental condition was good and that "She knew what she was doing." Dr. Smith examined her in March of 1921 and apparently at no other time, nearly

a year after the deed of conveyance was made. He was unable to state the inducing feature of insanty in this case and testified that he only knew of her condition of insanity in March of 1921. Dr. Rathgeber examined Lillian Leonard on September 15, 1919. He testifies that "When he first went there, her mental condition was fairly good." Later on in answer to a question by the Court, he says, "Referring to April 7, 1920, whether or not Lillian Leonard had enough intelligence to execute a deed says: "It is very hard for me to answer, your Honor, because at times she seemed to be perfectly rational." Dr. Blakely testified that he saw Lillian Leonard only once, that was in December of 1919. He did not testify to any condition of insanity, so that the appellant was unable to offer satisfactory evidence to substantiate the material issue in this cause. The conveyance was executed in Aug., 1920, and Lillian Leonard was not committed to an asylum until March of 1921. In 1920 she was not aged or infirm. The defendant had supported her, had advanced the money with which to purchase the premises in question and to show good faith and honorable dealing subsequently a month after the conveyance married Lillian Leonard. No one, it would seem from the circumstances, had a more natural and just claim for the premises. The testimony shows that the defendant had advanced the money by which the premises were purchased and had later on accepted a deed for a valuable consideration.

The defendant did not "inject" the question of insanity which in the brief of appellant it is set forth was injected into the issue and appellant had ample opportunity at the hearing of this cause to prove acts of undue influence on the part of the defendant, but appellant made no effort and produced absolutely no evidence on this point. The appellant herself, Ada Leonard, a very unsatisfactory witness, as will be noticed by her testimony, says, (See page 59) she made one payment on the insurance policy, was uncertain as to the date, but testifies to a second occasion and testified that Mr. Donavan had not been working for a long time, he was away, but is unable to recall the amount of this payment, but later on in answer to a further question by the Court, says,

she gave the money to her sister and on cross-examination states she never stayed all night in the house, but was always there from the time her sister went there. Yet further on she testifies that this was her home and that Mr. Donovan acted cordially towards her sister, Lillian Leonard, "same to her as to me."

In the brief of the appellant, numerous cases are cited and discussed, but which will be found upon examination relate to a particular class of cases that seems to support or justify the special rule and called the rule of independent advice to which the appellant has referred, namely, the case of *Haydock* vs. *Haydock,* 34 N. J. Eq., page 570. *Corrigan* vs. *Pironi* 46 N. J. Eq., page 607. *Slack* vs *Rees* 66 N. J. Eq., page 447, and the more recent case of *Bensel* vs *Anderson* 85 N. J. Eq., page 391. In all of these cases cited by appellant, the Court will note that the transaction discussed is mentioned as a gift and the words donor and donee are used and the donor is as a rule a person of advanced years, aged and infirm. Witness the expression, 71 N. J. Eq., 234, "A Court of Equity moved by the apparent IMPROVIDENCE of such a gift will presume that the donor did not appreciate the consequence to himself of his VOLUNTARY act." Also in the case of *Bensel* vs *Anderson* 85 N. J. Eq., page 391, the Court speaks of a transaction with an old man of ninety. In all of these cases the circumstances are fraud, and failure of consideration has been clearly shown and the Court has been in each instance satisfied by the overwhelming evidence that was produced of the fraud or undue influence that existed.

In the case of *Lyons* vs *Van Riper* 26 N. J. Eq., page 337, the Court here speaks of the fact that the transaction was a gift and that the proof is clear. The case of *Corrigan* vs *Pironi* 48 N. J. Eq., page 307. Here again the transaction was in the nature of a gift a transfer without any consideration, and the Court in reaching its conclusions mentions the fact that the donor was seventy years of age, ignorant, eccentric and entirely illiterate, and the Court, page 609, in speaking of the situation that prevailed said, "In the presence of such a spiritual ascendency all gifts or benefactions from the subject of such an influence to the possessor of it

have been frequently avoided on the grounds of public policy and without any suspicion that fraud or imposition of any kind had been practiced. In the case of *Slack* vs *Rees* above referred to, the Court said, "A gift made by a *father of advanced years and infirm health* to a daughter who is furnishing him care and service made necessary by his physical condition, is presumptively result of undue influence and therefore, the burden would be upon defendant to prove absence of undue influence. This rule is referred to and reaffirmed in the cases which have been cited by the appellant, namely, *Corrigan* vs *Pironi, Bensel* vs *Anderson* 85 N. J. Eq. In the latter case, the Court in rendering decision said, "The circumstances of fraud were clear and apparent, Mr. Bensel being a man of ninety years of age," and as the Court remarked, the determination of the issue if it were confined to Bensel and Kleine would involve no difficulty in condemning the transaction as fraudulent, for here we have a tottering old man in years, far beyond the allotted time, dependent for his temporal wants entirely upon his children, in whom he would undoubtedly repose great confidence, involving himself at the latter instance in obligations which *in no wise would have benefited him.*

It would seem that the doctrine as to the rule of independent advice, the element of fraud or failure of consideration has always entered into the transaction. The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set the transaction aside. *Fry* vs *Lane* 20 Ch. D., page 322. Bispham's principles of equity 6th edition, page 331, lays down these rules. A transaction which takes place under undue influence may be either in the nature of a gift or a contract. In either aspect, it is regarded by the Courts of Equity with a jealous eye; *but the scrutiny in cases of gifts is more severe and searching than in those of contracts.* The same author Bispham, on page 329, sets forth the following principle: As to the first of the two claims, mere weakness of mind is not of itself a sufficient ground for equitable interference It would be impossible to carry on the business of the courts if they undertook to interfere in every case in

which a superior and more astute intellect obtains an advantage over a dull or feeble mind, but an entire absence of intellectual power or great mental abberation will be sufficient to cause a contract to be rescinded. In the case at bar, no evidence of undue influence whatever was offered on the part of the appellant, nor was this issue seriously contended for by the appellant at the hearing, and there is nothing whereby the Court can say that the party stood in the relation of donor or donee as to bring the case at bar within the class of cases recognized and classified by Lord Harwicke in the case of *Chesterfied* vs *Janssen* 1 Atk. 301; 2 Ves. 125; 1 Lead. Cas. Eq. 428 (541 4th Eng. ed.) . A class of cases where the transaction seems to lack any consideration and are in the nature of *gifts* and the donor occupying such confidential relations and where the fraud is presumed and no application to the present suit. The defendant testified to his honorable relations with Lillian Leonard, to the manner and care with which he provided for her, of the money he advanced to purchase the property, which in addition to the testimony of the officer who took the acknowledgment and the testimony of the reputable physicians produced by the appellant, shows that the said Lillian Leonard was rational at the time of the execution of the deed, which was given for a valuable consideration, was sufficient to overcome any possible contention that the defendant should be compelled to advance affirmative proof as to lack of undue influence on his part. And furthermore, no better claims existed on the part of the relatives or of any creditors who were near or had any greater claim to the premises than did the defendant, and the burden of proof rested on the appellant to establish by due proof the allegations of insanity as alleged in the complaint, which burden the appellant failed to sustain in the Court below.

For these reasons, the defendant contends that the decree should be affirmed with costs.

Respectfully submitted,

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Of Counsel with Respondent.