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Bill.

In Chancery of New Jersey

TO THE HONORABLE EDWIN ROBERT
WALKER,

CHANCELLOR OF THE STATE OF NEW
Jersey.

10

Complainant, the Provident Institution for Savings in Jersey City, a corporation of this state, respectfully shows that:

1. Complainant is a Savings Bank doing business in Jersey City.

2. On October 11th, 1909, Hannah L. Bowdoin opened an account with it in her own name by depositing the sum of \$25 to her credit and thereupon complainant numbered said account No. 147654 upon its books and delivered to said depositor a pass book representing the said account and bearing her name and the same number. Afterwards, at sundry times, said depositor made other deposits of money on the account and complainant credited to the same sundry amounts for interest accrued thereon. The balance now due and payable upon the said account is the sum of \$5,700.

20

3. On September 8th, 1914, said depositor signed a check upon said account, for the sum of \$3,000 payable to St. Francis Hospital, which is the name by which the corporation entitled "Sisters of the Poor of St. Francis" is commonly known. A copy of said check is hereto annexed marked Schedule A.

30

4. On the same day (September 8th, 1914) the said payee presented said check to complainant, together with said pass book and demanded payment of the check.

40

Bill.

10 5. Complainant declined to make the payment so demanded, on the ground that there was no consideration for said check and that complainant had probable cause to believe that at the time of signing the same the said Hannah L. Bowdoin was mentally incompetent to understand the nature of the transaction in which the check was given; and that, in fact, she did not understand the same. The said Hannah was at that time, as complainant then knew, sick and mentally enfeebled by serious illness.

20 6. On September 9th, 1914, said Hannah L. Bowdoin died leaving a will in which she appointed Benjamin C. Meade executor thereof. Said will was admitted to probate by the Surrogate of Union County on October 14th, 1914, and letters testamentary were on that day issued to said Benjamin C. Meade, who accepted the same.

7. Said executor has given a written notice to complainant by letter dated November 12th, 1914, not to pay the said check and in said notice claims all the moneys due upon the said account as the property of the estate of Hannah L. Bowdoin. A copy of said letter is hereto annexed, marked Schedule B.

30 8. On October 13th, 1914, the said Sisters of the Poor of St. Francis began an action against this complainant in the Hudson County Circuit Court, to recover the amount claimed to be due to it upon the said check, and in its complaint alleged that Hannah L. Bowdoin had delivered to it (the payee) the said check and the said pass book, and that by delivering said check and pass book she had assigned and given to the payee the said sum of \$3,000 and that the delivery by her

Bill.

of said check and pass book was with the intent and purpose that said payee, on presenting the same to this complainant and demanding payment, should have and receive said amount of money and that thereby and upon making said presentment and demand this complainant became indebted to said plaintiff in the sum of \$3,000. Said action is still pending. This complainant has not yet filed an answer to the plaintiff's complaint therein. 10

9. Complainant has always been, and still is, willing to pay said sum of \$3,000 to such person or persons as may be lawfully entitled to receive the same, and to whom it can pay the amount with safety; and it hereby offers to pay said amount into this court, or to retain the same subject to the order of this court and as this court may direct. 20

10. Complainant does not, in any respect, collude with either the said Benjamin C. Meade, as executor, or with the said Sisters of the Poor of St. Francis touching the matters stated in this bill and it says that it has not been indemnified by either of them and brings this suit of its own free will, and to avoid being molested and injured in the premises. 30

In consideration whereof, and because it has no remedy in the courts of law, this complainant prays:

1. That Benjamin C. Meade, as executor of the will of Hannah L. Bowdoin and the Sisters of the Poor of St. Francis, who are the defendants in this cause, may, without oath, answer this bill and interplead and settle their right to the said sum of \$3,000, and;
2. That complainant, upon paying said amount 40

Bill.

10 into this court, or holding the same subject to the order of this court (if this court shall so direct) and upon causing said defendants to interplead, may be decreed to be discharged from all liability to the said defendants and to both of them, and may have its costs in this cause, together with a reasonable counsel fee to be paid under the order of this court and;

20 3. That the state's writ of subpoena may issue out of this court, to be directed to the said Benjamin C. Meade as executor of the will of Hannah L. Bowdoin, and to the Sisters of the Poor of St. Francis, commanding them to appear in this court and answer this bill and abide by such decree as this court may make; and also that the state's writ of injunction may issue out of this court directed to the Sisters of the Poor of St. Francis restraining it from further prosecuting its said action in the Hudson County Circuit Court against this complainant.

HARTSHORNE, INSLEY & LEAKE,
Solicitors and Counsel of Complainant.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.

30

JAMES S. NEWKIRK, being duly sworn on his oath says: That he is Treasurer of the Provident Institution for Savings, complainant in the above stated cause; that complainant has exhibited the foregoing bill of interpleader against the defendants therein named, without any fraud or collusion between the complainant and the said defendants, or either of them, but merely of its own accord for relief in this court; and that the complainant is not indemnified by the said de-

40

Bill.

pendants or by either of them; and that this bill is exhibited with no other intent than to avoid being further sued or molested touching the matters stated in said bill.

Deponent further says that an action at law was begun by the defendant, Sisters of the Poor of St. Francis, against the complainant in this cause in the Hudson County Circuit Court to recover the sum of \$3,000 alleged to be due to the plaintiff therein upon the check stated in the foregoing bill of complaint and that he is advised by the counsel of the said complainant (who is the attorney for it in the said action) that the said action is still pending. 10

JAMES S. NEWKIRK.

Subscribed and sworn to before me this 23rd day of November, 1914. 20

(Seal)

FLORENCE I. NICHOLS,
Notary Public of N. J.

SCHEDULE A.

Pass Book

No. Jersey City, Sept. 8th, 1914. 30

THE PROVIDENT INSTITUTION FOR SAVINGS IN JERSEY CITY.

Pay to St. Francis Hospital or Bearer
Three Thousand.....Dollars
\$3,000.00

Hannah L. Bowdoin
Sign here

Bill.

WITNESS William H. Brown

If the depositor cannot write, the signature must be witnessed by some one known at the bank.

(Endorsed) St. Francis Hospital
Sr. Pancratia Treas.

10

No Payment made without
the Deposit Book.

SCHEDULE B.

November 12, 1914.

The Provident Institution for Savings,
Jersey City, N. J.

Gentlemen:

As the executor of the estate of the late Hannah L. Bowdoin, I hereby notify you not to pay any check, or any paper purporting to be drawn by Hannah L. Bowdoin in her life time, to the order of St. Francis Hospital of Jersey City, as all of the funds on deposit in your bank in the name of Hannah L. Bowdoin are the property of the estate and you will be held liable therefor to pay the same to me, as the executor.

30

Yours truly,
Benjamin C. Mead,
Executor.

40

Interlocutory Decree.

IN CHANCERY OF NEW JERSEY.

<p>BETWEEN THE PROVIDENT INSTITUTION FOR SAVINGS IN JERSEY CITY, <i>Complainant,</i> <p style="text-align: center;">and</p> SISTERS OF THE POOR OF ST. FRANCIS AND ANOTHER, <i>Defendants.</i></p>	}	<p>On Bill of Interpleader. 10 Interlocu- tory Decree.</p>
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This cause coming on to be heard in the pres-
ence of Hartshorne, Insley and Leake, of counsel
with the complainant, no answers having been
filed herein; and due notice having been given to
Harriet L. Biggs, in pursuance of the order of
this court entered herein on the twenty-ninth day
of December, Nineteen hundred and fourteen;
and the arguments of counsel for the complainant
having been heard, and no objection being made
on behalf of the said Harriet L. Biggs; and it ap-
pearing to the court upon consideration thereof
that the complainant held the funds in its bill
mentioned for the true owner, without having or
claiming any right of interest therein: 20

It is thereupon on this twenty-fifth day of Janu-
ary, Nineteen hundred and fifteen, by his Honor,
Edwin Robert Walker, Chancellor of the State
of New Jersey, ORDERED, ADJUDGED and
DECREED, and the said Chancellor doth, by
virtue of the power and authority of this Court,
hereby ORDER, ADJUDGE and DECREE, that
the said bill of interpleader is properly brought

Interlocutory Decree.

by the complainant in this Court, and that it is entitled to relief in this Court; and that the complainant be permitted to retain until the further order of this Court, the fund mentioned and described in the bill.

10 AND IT IS FURTHER ORDERED, AD-
JUDGED AND DECREED, that said complainant be dismissed from the further prosecution of this suit, with its costs to be taxed, and a counsel fee of fifty dollars, to be paid by the complainant out of the fund; and that it be relieved, acquitted and discharged from all claims or liability to any or either of the defendants in this suit, for, upon, or by reason of said suit.

20 AND IT IS FURTHER ORDERED, AD-
JUDGED AND DECREED, that the said defendants do interplead, settle and adjust their several claims, demands and matters in controversy in this suit as between themselves.

Respectfully advised,

VIVIAN M. LEWIS,
V. C.

E. R. WALKER,
C.

30

A True Copy.

ROBERT H. McADAMS,
Clerk.

40

Order.

IN CHANCERY OF NEW JERSEY.

39/65.

BETWEEN

THE PROVIDENT INSTITUTION FOR
SAVINGS IN JERSEY CITY,*Complainant,*

and

SISTERS OF THE POOR OF ST.
FRANCIS AND ANOTHER,*Defendants.*On Bill of
Interpleader. 10
Order.

On application of Orlando H. Day, Solicitor for the defendant, Benjamin C. Mead, Executor, etc., Treacy and Milton, Solicitors for the defendant Sisters of the Poor of St. Francis, being present, 20

It is on this 29th day of December, 1914, ORDERED, That the defendant, Benjamin C. Mead, Executor, etc., be and he hereby is granted leave to file an amended statement of his claim to the \$3,000 fund involved in this cause and mentioned in the Complainant's Bill, within 3 days from the date hereof, and it is further,

ORDERED, That the time within which the defendants shall file supplemental statements setting forth their respective affirmative defences to the claims of co-defendants, be and the same is hereby extended for a period of fifteen days from the time when their respective statements of their claims to the fund in question are filed. 30

Respectfully advised,

JOHN R. EMERY.

Statement of Claim of Defendant. . .

IN CHANCERY OF NEW JERSEY.

10	BETWEEN THE PROVIDENT INSTITUTION FOR SAVINGS IN JERSEY CITY, <div style="text-align: right;"><i>Complainant,</i></div> <div style="text-align: center;">and</div> SISTERS OF THE POOR OF ST. FRANCIS AND ANOTHER, <div style="text-align: right;"><i>Defendants.</i></div>	} On Bill of } Interpleader. } Statement of } Claim of } Defendant, } Benjamin C. } Mead, Execu- } tor, etc.
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20 Defendant, Benjamin C. Mead, Executor of the last Will and Testament of Hannah L. Bowdoin, deceased, makes the following statement of his claim to the fund of Three Thousand Dollars mentioned in the Complainant's Bill filed in this cause:

The said sum of Three Thousand Dollars was deposited with the Complainant by the said Hannah L. Bowdoin during her lifetime, and credited by Complainant to her, on her account.

The said sum remained on deposit with the said Complainant to the credit of the said Hannah L. Bowdoin at the time of her decease.

30 The said Hannah L. Bowdoin departed this life on September 9, 1914, leaving a last Will and Testament in which she appointed this defendant as Executor thereof.

On October 14, 1914, the said last Will and Testament was duly admitted to probate by the Surrogate of the County of Union, and letters testamentary were issued to this Defendant.

*Statement of Claim of Defendant.
Amendment to Statement of Claim Filed by
Defendant.*

This Defendant has claimed said sum of Three Thousand Dollars, but the Complainant refuses to pay the same to him.

ORLANDO H. DEY, 10
*Solicitor for Defendant, Benjamin C. Mead,
Executor, etc.*

A True Copy.

ROBERT H. McADAMS,
Clerk.

**Amendment of Statement of Claim Filed by
Defendant.** 20

IN CHANCERY OF NEW JERSEY.

<p>39/65 BETWEEN THE PROVIDENT INSTITUTION FOR SAVINGS IN JERSEY CITY, <i>Complainant,</i> and SISTERS OF THE POOR OF ST. FRANCIS AND ANOTHER, <i>Defendants.</i></p>	<p style="font-size: 3em; line-height: 1;">}</p>	<p>On Bill of Interpleader. Amendment to Statement of Claim filed by Defendant; 30 Benjamin C. Mead, Executor, etc.</p>
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Pursuant to an Order of this Court, made in the above-entitled cause, on the Twenty-ninth day of December, Nineteen Hundred and Fourteen, the Defendant, Benjamin C. Mead, Executor of the Last Will and Testament of Hannah L. Bowdoin, deceased, amends the Statement of his Claim 40

*Amendment to Statement of Claim Filed by
Defendant.*

filed in the above-entitled cause on December 28,
1914, in the following respects:

10 1. Paragraph One of said Statement be and
the same is hereby amended to read as follows:
Defendant Benjamin C. Mead, Executor of the
Last Will and Testament of Hannah L. Bowdoin,
deceased, not intending to contest the complain-
ant's right to relief, makes the following state-
ment of his Claim to the fund of Three Thousand
Dollars, mentioned in the Complainant's Bill filed
in this cause.

20 2. The last paragraph of said Statement be and
the same is hereby amended to read as follows:
This Defendant has claimed and still does claim
said sum of Three Thousand Dollars, but the
Complainant refuses to pay the same to him.

ORLANDO H. DEY,
*Solicitor for Defendant, Benjamin C. Mead,
Executor, etc.*

A True Copy.

ROBERT H. McADAMS,
Clerk.

30

40

Supplemental Statement of Defendant.

IN CHANCERY OF NEW JERSEY.

39/65.

BETWEEN

THE PROVIDENT INSTITUTION FOR
SAVINGS IN JERSEY CITY,
Complainant,

and

SISTERS OF THE POOR OF ST.
FRANCIS AND ANOTHER,
Defendants.

On Bill of
Interpleader. 10
Supplemental
statement of
defendant,
Benjamin
C. Mead,
Executor, etc.

Defendant Benjamin C. Mead, Executor of the
last Will and Testament of Hannah L. Bowdoin,
deceased, makes the following Supplemental
Statement, pursuant to Rule No. 221 of this Court,
of his affirmative defences to the Claim of the Co-
defendant Sisters of the Poor of St. Francis, filed
in this cause: 20

1. The check for \$3,000 alleged by said co-de-
fendant to have been given to it by the said Han-
nah L. Bowdoin, was without valuable considera- 30
tion and void.

2. At the time of the alleged execution and de-
livery of said check, the said Hannah L. Bowdoin
was mentally incompetent to understand, and in
fact did not understand, the nature of the trans-
action.

3. The said Hannah L. Bowdoin repudiated the
execution and delivery of said check, and revoked
the alleged gift thereof.

40

Supplemental Statement of Defendant.

4. This defendant has not sufficient knowledge or information to form a belief as to the statement in the 4th and 6th Paragraphs of said Claim of said Co-defendant and leaves it to make such proof thereof as it may be advised.

10 5. This defendant denies the charges in Paragraph 5 of said Claim of said Co-defendant.

ORLANDO H. DEY,
*Solicitor for Defendant, Benjamin C. Mead,
Executor of the Last Will and Testament of
Hannah L. Bowdoin, dec'd.*

A True Copy.

ROBERT H. McADAMS,
Clerk.

20

30

40

Statement of Sisters of the Poor of St. Francis.

IN CHANCERY OF NEW JERSEY.

BETWEEN

THE PROVIDENT INSTITUTION FOR
SAVINGS IN JERSEY CITY,
Complainant,

and

SISTERS OF THE POOR OF ST.
FRANCIS AND ANOTHER,
Defendants.

Statement of
Sisters of the 10
Poor of St.
Francis.

The statement in writing of the claim of Sisters of the Poor of St. Francis to the fund of three thousand dollars tendered to Court by The Provident Institution for Savings in Jersey City. 20

This defendant having started action in the Hudson County Circuit Court against The Provident Institution for Savings in Jersey City to recover the sum of three thousand dollars, and The Provident Institution for Savings having filed its bill of interpleader in the Court of Chancery, alleging that Benjamin C. Mead, executor of the estate of Hannah L. Bowdoin, deceased, has claimed said sum of three thousand dollars, this defendant for that reason does not dispute the right of The Provident Institution for Savings in Jersey City to pay into Court the said three thousand dollars and to interplead this defendant and Benjamin C. Mead, executor. 30

This defendant says that on September eighth, nineteen hundred and fourteen, Hannah L. Bowdoin made and delivered to this defendant a check for the sum of three thousand dollars payable to 40

Statement of Sisters of the Poor of St. Francis.

St. Francis Hospital (the name St. Francis Hospital being the name by which this defendant is commonly known) on the Provident Institution for Savings in Jersey City, a copy of said check is annexed hereto and marked Schedule A.

10 At the same time Hannah L. Bowdoin delivered to this defendant the pass book showing the account of the said Hannah L. Bowdoin with The Provident Institution for Savings in Jersey City. Said pass book being numbered 147654 and showing an excess over and above three thousand dollars to the credit of the said Hannah L. Bowdoin with The Provident Institution for Savings in Jersey City. On the same day this defendant presented said check together with said pass book
20 to The Provident Institution for Savings in Jersey City and requested payment which was refused.

This defendant charges that by the delivery of said check and said pass book to this defendant the said Hannah L. Bowdoin assigned and gave to this defendant the said sum of three thousand dollars.

30 This defendant further shows that by its rules the said The Provident Institution for Savings in Jersey City had made the presentment of said pass book to the said The Provident Institution for Savings in Jersey City a condition precedent to the payment of any of the fund represented by said pass book.

This defendant therefore claims the said fund of three thousand dollars.

TREACY & MILTON,
Solicitors of Sisters of the Poor of St. Francis.

Statement of Sisters of the Poor of St. Francis.

#Pass book

No. Jersey City, Sept. 8th, 1914.

PAY to St. Francis Hospital or Bearer

Three ThousandDollars

\$3,000.00

Hannah L. Bowdoin

Sign here

10

WITNESS William H. Brown

If the depositor cannot write, the signature must be witnessed by some one known at the bank.

Endorsed St. Francis Hospital.

Sr. Paneratia Treas.

No payment made
without the Deposit Book.

20

A True Copy.

ROBERT H. McADAMS,

Clerk.

30

40

Order of Reference.

IN CHANCERY OF NEW JERSEY.

10	BETWEEN THE PROVIDENT INSTITUTION FOR SAVINGS IN JERSEY CITY, <i>Complainant,</i> and SISTERS OF THE POOR OF ST. FRANCIS et al., <i>Defendants.</i>	}	On Bill, &c., Order of Reference.
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20 This matter being opened to the Court by Treacy & Milton, Solicitors for Sisters of the Poor of St. Francis and it appearing that by decree of interpleader entered in this Court that the Provident Institution for Savings in Jersey City was required to hold the fund in question in this matter until the determination of the right to said fund as between the Sisters of the Poor of St. Francis and Benjamin L. Mead, Executor, and it appearing that the defendants have filed statements of the claim as prescribed by the rules of this Court and that this cause is at issue.

30 It is on this first day of February, Nineteen hundred and fifteen ORDERED that the same be referred to Hon. E. Stevenson, one of the Vice-Chancellors, to hear the same for the Chancellor and to advise him what order or decree should be made herein.

E. R. WALKER,
C.

I consent to the entry of this order,
 ORLANDO H. DEY,
Solicitor for Benjamin L. Mead, Executor, &c.
 A True Copy.

40

ROBERT H. McADAMS,
Clerk.

Testimony.

IN CHANCERY OF NEW JERSEY.

BETWEEN

THE PROVIDENT INSTITUTION FOR
SAVINGS IN JERSEY CITY,

Complainant,

and

SISTERS OF THE POOR OF ST.
FRANCIS AND ANOTHER,

Defendants.

On Bill, etc.

10

BEFORE Hon. Eugene Stevenson, Vice-Chancellor,
at Chancery Chambers, Jersey City, New Jer-
sey, on Wednesday, September 22nd, 1915, at
ten o'clock in the forenoon.

20

APPEARANCES:

BENJAMIN H. VAIL, ESQ., Solicitor
for Carrie L. Bowdoin.

JOHN MILTON, ESQ., (Treacy & Mil-
ton) for defendant Sisters of the Poor of
St. Francis.

ORLANDO H. DEY, ESQ., Solicitor of
Defendant Benjamin C. Mead, Executor,
&c.

30

(Counsel opened.)

MR. MILTON: I suppose, claiming this
check, we might be said to occupy the posi-
tion of plaintiff, and the duty of unfolding
the proof is perhaps on us.

THE VICE-CHANCELLOR: Which
side do you represent?

MR. MILTON: The hospital.

40

THE VICE-CHANCELLOR: Yes, I think so. You have to affirmatively establish your right to this money.

10 MR. VAIL: If your Honor please, I think I ought to have it appear clearly whom I represent in this case. Mr. Dey represents the executor. I represent Miss Carrie L. Bowdoin, the adopted daughter, who, as the next of kin would be entitled to the residuary estate. The will does not provide for any disposition of the residuary estate; it made some specific legacies and left the estate really in the air, so, of course, it would go to the next of kin.

I made application to Vice-Chancellor Emory last fall when this suit was brought for an order to intervene on behalf of the next of kin. I make this statement so as to have it appear clearly whom I represent.

20

THE VICE-CHANCELLOR: Now before the Court you are associated with counsel for the executor?

MR. VAIL: Yes, sir; I suppose so; but it might be that before the end of the case our interests might separate, and for that reason I make this statement now.

Vice-Chancellor Emory said that if at any time during the progress of the case, it is necessary to intervene it might be done, and I make that statement for I feel that if I want to renew that motion I might do so.

30

THE VICE-CHANCELLOR: Yes, but it is hardly possible. The executor represents all the interests in the estate.

MR. VAIL: I do not believe it would be necessary, but I want to preserve my rights.

40

Benjamin C. Mead—for Defendants—Direct.

BENJAMIN C. MEAD, sworn for the defendants.

Direct Examination by Mr. Milton:

Q. Where do you live? A. Rahway, New Jersey. 10

Q. And your business? A. Real estate and insurance.

Q. Did you know Hannah Bowdoin in her lifetime? A. Oh, yes.

Q. When did she die? A. September 8th,—9th, 1914.

Q. You are the executor of her will, Mr. Mead? A. Yes.

MR. MILTON: We offer certified copy of the will. I suppose there is no objection to it? 20

MR. VAIL: No.

(Marked Exhibit D, No. 1.)

Q. Have you filed an inventory of the estate in the Union County Surrogate's office? A. We have.

MR. MILTON: I offer a certified copy of the inventory.

(Marked Exhibit D, No. 2.) 30

Q. Where was Mrs. Bowdoin at the time she died? A. St. Francis Hospital.

Q. In Jersey City? A. Yes.

Q. How long had she been confined there prior to her death? A. I think about a year.

Q. Had you been to see her? A. Yes.

Q. How frequently? A. On the average of about once a week. 40

Benjamin C. Mead—for Defendants—Direct.

Q. What had been your relationship with Mrs. Bowdoin? A. Just her "Business man" she called me.

Q. Did she talk with you regarding her affairs?

A. Oh, yes.

10 Q. Did you ever have any conversation with her in respect to her desires regarding St. Francis Hospital? A. What was that, Mr. Milton?

Q. (Last question read.) A. Yes.

Q. When? A. Well, at various times, from the time she first went down there.

Q. Do you mean on the occasion of her last visit there? A. Yes.

20 Q. She had been there many times in the last few years, had she not? A. Only once before that that I am aware of.

Q. Had you talked to her once or more than once regarding the hospital? A. Several times.

Q. Can you fix with reasonable accuracy how long before her death it was that you discussed the hospital with her? A. Well, discussed it in what way?

30 Q. With regard to her feeling towards the hospital or whether she had any intention of doing anything for the hospital. A. Well, it was in June when she first broached the subject.

Q. The June before her death? A. Yes.

Q. That would be June, 1914? A. Yes.

Q. What did she say then about it? A. Well, she said that the sisters had been very good to her and she wanted to do something for the hospital.

Q. Is that all she said? A. No. She asked me what I would suggest in the nature of a gift or a memorial.

Benjamin C. Mead—for Defendants—Direct.

Q. What did you say to her? A. That was all the conversation at that particular time.

Q. When next, did you talk to her about it? A. About two weeks later.

Q. And what was the conversation at that time? A. She wanted to know if I had thought the matter over, and if I had any suggestions to make, and I suggested a memorial window or something of that sort, and that was about all, I think.

10

Q. Did you talk to her about it later? A. Yes.

Q. Do you recall what was said then? A. Yes. I said I would talk to the sisters themselves, and ask what suggestions they would have to make.

Q. Did you ask the sisters? A. Yes.

Q. Now, do not tell me what they said. You did ask the sisters about it? A. Yes.

20

Q. Did you report to Mrs. Bowdoin what they thought about it? A. Yes.

Q. What did you say to Mrs. Bowdoin? A. I repeated what the sisters had suggested to me.

Q. What was that? A. That she endow a bed in her memory.

Q. What did she say about that? A. She wanted to know how much it would cost.

Q. Did you know? A. I did not.

Q. Did you find out? A. Yes. Not at that particular time.

30

Q. Later on? A. Later on, yes.

Q. Having ascertained the information, did you later communicate it to Mrs. Bowdoin? A. Did I?

Q. Yes. A. Yes, sir.

Q. How much did it cost to endow a bed, how much did it amount to? A. Three thousand dollars.

40

Benjamin C. Mead—for Defendants—Direct.

Q. What did Mrs. Bowdoin say when you reported that to her? A. She said, "My, that is a great deal of money, isn't it?"

Q. Did you later talk to her about this bed? A. Oh, yes, several times.

10 Q. Did you see Mrs. Bowdoin on September 8th, 1914? A. Yes.

Q. Where? A. In her room at St. Francis Hospital.

Q. Was the subject of endowing a bed at the hospital discussed between you that day? A. Not to any extent.

23 Q. I show you a paper writing, dated September 8th, 1914, and ask you in whose handwriting the body of the paper is. A. That is in my handwriting.

Q. Do you know whose name is signed to the paper? A. Do you mean whose check it is?

Q. Yes. A. Hannah L. Bowdoin.

Q. Was that signed in your presence? A. Yes.

MR. MILTON: If the court please, subject to the production of the subscribing witness who is here, I will offer the check.

30 THE VICE-CHANCELLOR: Let it be marked for identification.

MR. VAIL: We will admit the check.

THE VICE-CHANCELLOR: Very well. It will be admitted in evidence.

(Marked Exhibit D, No. 3.)

Q. Mr. Mead, how did you come to make out this check? A. I made it out by Mrs. Bowdoin's directions.

40 Q. What did she say when she directed you to make it out? A. She told me to go to a certain white box she kept on the table, and get a check

Benjamin C. Mead—for Defendants—Direct.

on the Provident Savings Institution and draw a check to the order of St. Francis Hospital for three thousand dollars.

Q. Did she say anything about the purpose for which the check was to be drawn? A. No, not at that time, that I can recall, because it was perfectly understood between us—

10

MR. VAIL: I move that part of the answer be stricken out.

MR. MILTON: I consent to have "it was perfectly understood between us" stricken out.

Q. This check is witnessed by William H. Brown, Mr. Mead. Did you know Mr. Brown? A. No, sir.

20

Q. Do you know who caused Mr. Brown to witness the check? Who procured him? A. I don't know who sent for Mr. Brown, but it was my suggestion that a notary be called in.

Q. Mr. Brown was in the room at the time the check was signed? A. Yes.

Q. And saw Mrs. Bowdoin sign it? A. Yes, sir.

Q. Now, after the check was signed, what was done with it? A. Well, I can't remember every detail, but I think that Mrs. Bowdoin took the check and the bank book, and handed it to the Sister, the Sister Superior, I think.

30

Q. Did she say anything to the Sister Superior when she handed it to her? A. She did make some remark but I could not tell you what it was. Something like "Here is your check" or something of that kind.

40

Benjamin C. Mead—for Defendants- Direct.

Q. The bank book to which you refer was upon what bank? A. The Provident Institution for Savings of Jersey City.

10 MR. MILTON: I suppose there is no dispute that this is the bank book of the Provident Institution.

MR. Vail: No.

Q. I show you pass book on the Provident Institution for Savings, No. 147654, made out in favor of or in account with Hannah L. Bowdoin showing a balance of \$5,700 and ask you if that is the book which was delivered by Mrs. Bowdoin to the Sister Superior on that day at the time the check was delivered? A. Yes, it is.

20 MR. MILTON: I offer this book and ask that it be marked.

(Marked Exhibit D, No. 4.)

Q. Did the Sister Superior carry the book and check away with her? A. I don't know, I left almost immediately after that.

Q. You did not find the pass book among Mrs. Bowdoin's effects? A. No.

30 Q. And so far as you know the book has remained ever since in the possession of the hospital or its representatives? A. Yes.

Q. Was there any discussion after the book and check were delivered to the Sister Superior about the presentation of the check to the bank for payment?

MR. VAIL: By whom?

MR. MILTON: In the presence of Mrs. Bowdoin.

40 A. No, there was not.

Benjamin C. Mead—for Defendants—Cross.

Cross-Examination by Mr. Vail:

Q. Why did you think it necessary to call in a notary, Mr. Mead, to witness this check? A. Well, because I thought a notary or somebody from outside the hospital would be preferable as a witness on the check to one of the internes or nurses. 10

Q. Did you think it was necessary to have any witnesses to the check? A. There is a space on the check where it says "witness."

Q. But it has printed on the bottom of this check "If the depositor cannot write the signature must be witnessed by some one known to the bank. You say she wrote her signature. A. I didn't notice that.

Q. And that was the only reason you thought it necessary to call in a notary? A. That is it, yes. 20

Q. Why did you think it necessary to have a notary? A. I thought a notary would be some one who would probably be well known and would be known to the institution.

Q. And that was your only reason, because you thought the institution would know all the notaries, or know their signature? A. Yes, I thought the signature of a notary would have more weight or effect with the institution than somebody not so well known. 30

Q. But he did not witness it as a notary. He witnessed that individually. A. I didn't notice that.

Q. Did you see the check at all after it was signed? A. Only as I am seeing it now.

Q. Only as you see it in court here now? A. Yes.

Q. You had not seen it before? A. No. 40

Benjamin C. Mead—for Defendants—Cross.
William H. Brown—for Defendants—Direct.

Q. And this was given the day before Mrs. Bowdoin died, was it not? A. On the 8th, yes.

Q. What time of day was it? A. I think it was about eleven o'clock in the morning, but I am not sure.

10 Q. It was in the morning? A. Yes, sir, it might have been a little later.

Q. When did she die? A. On the 9th.

Q. What time? A. About three o'clock, as near as I can remember. As near as I could ascertain from the sisters.

Q. Was she in bed when this check was signed? A. Yes.

20 Q. Who was present in the room? A. Well, the notary and the Sister Superior and myself and Mrs. Bowdoin, and, I think, one of the other sisters.

Q. That is all? A. Yes.

Q. The Sister Superior, one other sister and Mr. Brown and yourself? A. Yes.

WILLIAM H. BROWN, sworn for the defendant.

30 *Direct Examination by Mr. Milton:*

Q. You live where, Mr. Brown? A. 226 Pavonia Avenue, Jersey City.

Q. And your business is what? A. Real estate and insurance.

Q. You are connected with the Frank J. Matthews Co.? A. I am treasurer of the company.

40 Q. Where is the office of the company? A. On the same block as St. Francis Hospital.

William H. Brown—for Defendants—Direct.

Q. That is to say the company's office is located on the corner of— A. Pavonia Avenue and Erie Street.

Q. And the hospital— A. Contains the rest of the block, Erie Street, Pavonia Avenue, East Hamilton Place and Ninth Street.

Q. Do you remember being called to the hospital in the month of September, 1914, to witness a paper? A. I do. 10

Q. Who was it came to you? A. I received a telephone communication to come around the hospital.

Q. When you got there who did you meet? A. The Sister Superior.

Q. Were you taken to any room in the hospital? A. Yes, I think it was the third floor in the women's ward and the Sister Superior left me at the door and said some one in there wanted to see me. 20

Q. Whom did you find inside? A. I found Mr. Mead, I found on old lady in bed, and a Sister of Charity.

Q. I show you Exhibit D-3, and ask you if your signature appears on that paper anywhere? A. It does, as a witness.

Q. Was Exhibit D-3 signed by Mrs. Bowdoin in your presence? A. It was. 30

Q. Who else was present at the time it was signed? A. Mr. Mead and a Sister of Charity.

Q. Before it was signed, did you have any conversation with Mrs. Bowdoin? A. I did. The old lady seemed to be in rather a feeble way and I asked her if she knew what she was doing. Usually in those cases I want to make sure that people were in their right senses— 40

William H. Brown—for Defendants—Direct.

MR. VAIL: Well, never mind about that.

Q. State what you said to her and what she said to you. A. She said to me she had wanted to prepare two checks, and I asked her who to, and she said one to Mr. Mead and one to St. Francis Hospital, and as I was having my conversation with her the Sister Superior said she did not want to remain in the room; that there might be said something about her influencing the patient and she stepped outside the door, and after I had questioned the old lady—

MR. VAIL: I submit that testimony is hardly competent, what the Sister Superior said to him.

THE VICE-CHANCELLOR: If it was said in the presence of the testatrix, it is part of the *res gestae*, part of this transaction.

MR. VAIL: If it appears it was said so that the testatrix could hear it.

THE VICE-CHANCELLOR: You might cross-examine on that subject.

MR. VAIL: I do not want to take up the time.

THE VICE-CHANCELLOR: Proceed.

WITNESS: I asked her in relation to these checks and she said it was her wish that two checks be drawn, and I think one was for \$500 to Mr. Mead, that she was giving that to him as her "Business Man" or "Manager," he had had a lot to do, and came to see her, and one for \$3,000 to endow a bed in St. Francis Hospital, and I said I did not see any necessity of a notary

William H. Brown—for Defendants—Direct.

public or a commissioner of deeds in the case, and they said, "Would you mind witnessing the checks?"

By the Vice-Chancellor:

Q. Who said that? A. Mrs. Bowdoin and Mr. Mead. 10

Q. Well, who was it? A. I said to Mrs. Bowdoin, "I do not see it is necessary for you to have a Commissioner of Deeds or Notary Public in this case; all you want is to have the checks prepared.

Q. What did she say to that, anything? When you told her that, do you recall what she said? A. She said, "It is all right; have the checks prepared," and Mr. Mead stood alongside the bed and he got up and went some place and secured the checks and the books and came back and sat alongside the old lady and drew the checks and she signed them and I witnessed them. 20

By Mr. Milton:

Q. After that was done, did the Sister Superior return to the room? A. She did, and Mrs. Bowdoin called her over to the bed and she said, "Here, Sister," and I saw her hand her some papers, but I did not know what she handed her. 30

Q. What did she say? A. She said, "Here, Sister, is what I promised you," or something. I do not exactly recall it, but I saw her hand her something and say, "Here, Sister."

Q. You are not able to say whether it was the pass book and check? A. No. She had the pass book and check in bed with her at that time.

Q. Before you left the room the Sister came back and she handed her some papers and said that? A. She did. 40

*William H. Brown—for Defendants—Cross.
James S. Newkirk—for Complainant—Direct.*

Cross-Examination by Mr. Vail:

Q. You say, Mr. Brown, there were two checks drawn? A. Yes.

Q. By Mr. Mead? A. Yes.

10 Q. At the same time? A. Yes, sir.

Q. You witnessed them both? A. I believe I did. I am not positive, I have not seen the other check or any of the papers until just now.

Q. Did you receive them both at the time you witnessed them? A. I believe I did.

Q. Can you say from recollection what the amounts were? A. My impression is one was for \$500 and the other for \$3,000.

20 Q. And the \$3,000 check is the one you have seen this morning? A. Yes.

Q. And you think the other was \$500? A. I think so.

Q. Can you say what was done with the other check? A. No, I do not know what was done with either one of them.

MR. MILTON: We rest.

30 JAMES S. NEWKIRK, sworn for the complainant.

Direct Examination by Mr. Vail:

Q. Mr. Newkirk, you are the treasurer of the Provident Savings Institution of this city? A. Yes, sir.

Q. Did you know Mrs. Bowdoin in her lifetime? A. Yes.

40 Q. She had an account in your bank? A. She did.

James S. Newkirk—for Complainant—Direct.

Q. How long has she had an account? It appears she died on the 9th of September, 1914. How long had she had an account before that time, as near as you can tell? A. Oh, I should say ten years.

Q. Was she a frequent visitor to the bank? A. I never knew her until I met her in St. Francis Hospital. 10

Q. What was the occasion of your seeing her at St. Francis Hospital, the first occasion. A. The first occasion, Mr. Mead—

Q. The Executor, this gentleman (indicating)? A. Yes, sir. Mr. Mead presented an order for the money purporting to have been signed by Mrs. Bowdoin and she having notified us not to pay any orders, we refused payment. 20

Q. What was the date of this? A. I will have to refer to notes.

Q. You made a memoranda at the time? A. Yes, sir.

Q. You may refer to it. A. It was some time in August, I think. (Referring to papers). This correspondence goes back to 1913.

Q. Oh, I do not care about that. I only want what occurred in August and September, 1914. A. August 26th. On that date Mr. Mead presented a letter— 30

MR. MILTON: If the Court please, I do not see how this is relevant or material. It has no relation it seems to me, to the execution of the check in question.

THE VICE-CHANCELLOR: There are several reasons why this is proper. This is conduct in relation to this alleged gift on

James S. Newkirk—for Complainant—Direct.

the part of the deceased shortly before the gift is alleged to have been made.

MR. MILTON: If it appears it is conduct in relation to this gift I have no objection to it, but I think it will develop that it is not.

10

MR. VAIL: It will lead up to it.

THE WITNESS: Mr. Mead presented an order with the letter which reads as follows: "Provident Institution, Jersey City. Please inform the bearer of the amount of the balance in your institution." It is signed by Hannah L. Bowdoin. We gave him the balance of the account at that time. And my recollection is Mr. Mead presented us with an order for the money, which we refused on account of the stop-payment order which we received some two or three years prior. Mr. Mead stated at the time that he would have an order re-

20

voking that within an hour.

THE VICE-CHANCELLOR: What do you mean by stop payment notice?

WITNESS: She notified us not to pay any orders on her account to any person.

30

Q. That was the year before? A. Oh, that is two years before.

By the Vice-Chancellor:

Q. And during that period had you paid any orders? A. No, sir.

Q. When you say "orders" you mean checks? A. Yes. Well, we use receipts. When the money is drawn at the bank, but otherwise we use ordinary checks.

40

James S. Newkirk—for Complainant—Direct.

Q. During that period had she drawn money?
A. No, sir.

By Mr. Vail:

Q. What occurred next? A. On the 27th—I am referring to my notes. On the 27th of August I visited Mrs. Bowdoin at St. Francis Hospital, Jersey City, and questioned her about revoking the order to stop payment. 10

By the Vice-Chancellor:

Q. How did you come to do that? A. Because we were suspicious that this old lady was not—

Q. That is enough. Proceed. A. She denied ever having signed such an order, to her knowledge, and did not want the money withdrawn, and signed an order revoking any order previous to it, which is signed by her in the presence of the two house physicians. Both of the doctors stated to me, Doctor— 20

MR. MILTON: I object to what the doctors said to the witness.

MR. VAIL: You cannot state it, unless it was stated in the presence of Mrs. Bowdoin—in her hearing. 30

A. Yes, if she could hear.

Q. The question is if the statement of the doctors was heard by her, in your judgment?

By Mr. Vail:

Q. How close were the doctors to her when they made the statement? A. Probably as close as you are to me. We were at the bedside. 40

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MR. VAIL: I assume that makes it competent.

WITNESS: She was in a very weak condition.

10 Q. Did you have a conversation with her? A. Yes, a little.

Q. And in the tone of voice you spoke to the doctors, do you think she could hear? A. I think so.

Q. What did they say?

MR. MILTON: I object to it on the ground it is not binding on St. Francis Hospital, the claimant for this check.

20 THE VICE-CHANCELLOR: That is not the question. We are investigating now the mental condition of this woman, and all her conduct, all things that she said, all things that were said in her presence which she could hear about the time of the transaction which we are investigating are competent.

30 MR. MILTON: Can it be competent for the witness to testify, as I have no doubt he is going to testify, to an expression of opinion by a physician made under circumstances, and at a time when we were not present.

40 THE VICE-CHANCELLOR: The opinion is not evidence, but the way in which the testatrix received the statement is evidence. It is a transaction in which she was concerned and in which she behaved in a certain way. If she was accused of crime and remained silent that would be evidence.

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A woman in control of her faculties would not lie in bed and allow a false statement imputing a crime to her to be made. If she remained silent, it would be evidence she was not in control of her faculties. She may have said something foolish, she may have admitted it; we do not know. When it comes to the question of mental condition of a person by transactions in which the person is concerned, it is entirely competent, and in that light—I do not take the opinion of the doctors expressed in that way as evidential of anything in that case. 10

Q. Proceed and state what they said in her presence. 20

MR. MILTON: May I ask what the witness is testifying from?

By Mr. Milton:

Q. Is this a typewritten statement? A. Yes, sir, I made these notes on that day believing that there would be a suit in this case. I had it typewritten because I could not remember these things. 30

Q. When was it typewritten? A. The same time, the next day, and the following days, when—as these things came up. I have the whole correspondence. All I know about Mrs. Bowdoin I have here.

Q. Do I understand that what you held is a typewritten copy of the original notes that you made at the time of the happening of these events? A. I have the original notes in my handwriting, 40

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lead pencil writing. These are notes I made at the time.

Q. And were they transcribed? A. Yes, sir.

MR. MILTON: All right.

10 WITNESS: I will read these if you prefer.

MR. VAIL: As a matter of convenience, I suggest you take the typewritten ones.

A. Both of the doctors stated to me each of them witnessed her signature, one to a check for a blank amount, the other to an order, directing the bank to pay Benjamin C. Mead all the moneys due to her, but that neither of them had seen her sign her name. Dr. McCormack, who witnessed
20 the revoking order, said that he did not know the contents of it.

By the Vice-Chancellor:

Q. What do you mean by the revoking order?

A. I asked her whether she had ever signed such an order. Mr. Mead presented me with an order revoking the stop payment order.

30 Q. Give us the date of that. A. That was dated August 26th. This is the revoking order. On the 27th I wrote this out myself in her presence: "I hereby revoke all previous orders or instructions and order that you pay to Benjamin C. Mead the full amount due to me from your institution."

Q. Who wrote that? A. I wrote it.

Q. Where? A. In the hospital.

40 Q. Did she sign it? A. She signed it in my presence and Dr. McCormack and Dr. McLoughlin. I have the original here somewhere. I asked

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her if she had signed such an order and she said she had not to her knowledge.

Q. Why did you ask her that? A. Because of the feeble condition of this old lady.

Q. You knew she had signed it? A. She signed the stop-payment.

Q. But you drew the order? A. August 26th revoking the stop-payment notice and she signed that in my presence.

10

MR. VAIL: August 27th.

Q. Do I understand that subsequently she said that she had not signed that order revoking the stop notice? A. Let me see when she said that. (Referring to papers.) That was on the 27th.

Q. What was on the 27th? A. The day she denied having signed the order.

20

Q. What order? A. The revoking order.

Q. What was the date of the revoking order? A. The 26th.

Q. The day before? A. The day before.

Q. Then you were at the hospital on the 26th and also on the 27th. A. No, I was there on the 27th. Mr. Mead went there on the 26th to get this revoking order.

Q. I understood you to say you saw her sign the revoking order. A. No, she signed the revoking order revoking another order purporting to have been signed by her.

30

Q. You drew a revoking order and gave it to Mr. Mead? A. No. Mr. Mead presented us with an order—I told Mr. Mead we would not pay because of the stop-payment and on the 27th, I, in the presence of the two doctors, and Mrs. Bowdoin, drew up a paper in which she says: “I here-

40

James S. Newkirk—for Complainant—Direct.

by revoke all previous orders and instructions and order and direct that you pay to Benjamin C. Mead the full amount due me from your institution." That was signed by Mrs. Bowdoin in the presence of Dr. McCormack and given to Mr. Mead.

10 Q. Did you see that done? A. No.

Q. Tell us what you know. Don't tell us what you heard from other people. Where did you draw that order, in your bank? A. If your Honor will allow me—that is not the order. That is the order Mrs. Bowdoin gave to Mr. Mead. She had by three or four written letters stopped payment on her account—

20 Q. We understand that fully. She had stopped payment, and now you drew an order. A. Not then. She said, "I revoke all previous orders or instructions and order and direct that you pay to Mr. Mead the full amount."

Q. What is it you are reading, a written paper? You say "She said." Did she say it or write it? A. She wrote it.

Q. Who wrote it? A. I do not know.

Q. What is the date of it? A. August 27th.

30 Q. And it revokes the stop order? A. I take it so, yes, sir.

Q. Did you see her sign it? A. No, sir.

Q. When did you see it? Who brought it to you? A. Mr. Mead.

Q. When? A. I think the same day.

Q. All you know about it then is that Mr. Mead on or about August 27th presented to your bank this paper? A. Yes, sir, purporting to revoke all previous orders.

James S. Newkirk—for Complainant—Direct.

Q. Now, have you got the paper. A. Yes, I think we have.

MR. VAIL: I do not think you have, Mr. Newkirk. I think you returned that to Mr. Mead. Didn't he?

MR. MILTON: I don't know, Judge. •

THE VICE-CHANCELLOR: All he knows about the paper is that it was presented to the bank. 10

I am not speaking about what occurred afterward. He does not know who signed it, and he does not know the doctors who witnessed it. All he knows is that on or about August 27th, the paper was produced at the bank, and the rest of the evidence is hearsay. 20

By Mr. Vail:

Q. After that, Mr. Newkirk, what did you do?

A. I reported to the officers of the bank and—

Q. No. What did you do as far as Mrs. Bowdoin was concerned? A. I called and saw her.

Q. What occurred then? A. I wrote this order: "Jersey City, Aug. 27/14. To the Provident Institution for Savings: I hereby revoke order purporting to have been signed by me authorizing you to pay to Benj. C. Mead the full amount due me from your institution. I have no recollection of signing such an order." That was signed by Mrs. Bowdoin in the presence of Drs. McLoughlin and McCormack. 30

By the Vice-Chancellor:

Q. Now, tell us about that, about your going there, and what took place in the presence of the deceased, the testatrix. A. Well, on account of 40

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10 the weak and feeble condition of Mrs. Bowdoin, we felt she was not competent to either revoke an order or to give an order and I referred it to our officers and they said, "If you have time, can't you run up and see her," and I did so one afternoon, after banking hours, somewhere around four o'clock, and I talked with the old lady and I asked her if she had signed that order that Mr. Mead had presented and she said—I am only speaking from my knowledge of it—that she did not remember having signed any such an order. I said, "Will you sign an order revoking any order purporting to have been signed by you?" and she said, "Yes," and I drew this.

20 MR. VAIL: That I offer in evidence.
(Paper referred to is marked Exhibit C-1.)

THE VICE-CHANCELLOR: Read it.

30 WITNESS: Jersey City, Aug. 17, 14.
To the Provident Institution for Savings:
I hereby revoke order purporting to have been signed by me, authorizing you to pay to Benj. C. Mead, the full amount due me from your institution. I have no recollection of signing such an order. Hannah L. Bowdoin.

Signed in the presence of

F. J. McLoughlin,

F. C. McCormack,

St. Francis Hospital.

THE VICE-CHANCELLOR: Do I understand the whole body of the paper, Exhibit C-1 is in your handwriting?

THE WITNESS: Except the signatures.

James S. Newkirk—for Complainant—Direct.

By Mr. Vail:

Q. Did you have any other conversation with her on that day? A. I think not. I did not know the old lady.

Q. Then you left and went away, did you? A. Yes.

10

Q. What occurred after that? A. We had some correspondence between Mr. Mead and our attorneys—

Q. I don't care about that. Then what occurred in relation to the check? A. On the first visit—no,—yes, on that visit—

Q. August 27th? A. On August 27th, Dr. McCormack, who witnessed the revoking order, he said he did not know the contents of it, and Dr. McLoughlin said he had compared Mrs. Bowdoin's signature with one on a Rahway National Bank check which the Sister Superior said was genuine before he signed his name, before signing his name to it.

20

By the Vice-Chancellor:

Q. Did these two witnesses, Dr. McLoughlin and Dr. McCormack sign this paper, Exhibit C-1, in your presence? A. Yes, sir.

30

Q. And in the presence of Mrs. Bowdoin? A. Yes, sir.

By Mr. Vail:

Q. Now, come down to September 8th. A. On September 8th I called again on Mrs. Bowdoin and found her—she was then in a much more feeble condition.

40

James S. Newkirk—for Complainant—Direct.

Q. What was the occasion of your calling on that day? A. I think one of the Sisters presented—

Q. You are a little ahead of your story. What occurred that induced you to go to see Mrs. Bowdoin? A. As I stated before, on account of this woman's condition. I did not feel she was competent.

10

MR. MILTON: Was there a check presented at the bank?

WITNESS: Yes, one of the Sisters presented a check.

Q. Was this check presented, the \$3,000? A. A check was presented.

Q. Would you know it if you saw it? A. I suppose I would.

20

Q. I show you Exhibit D-3. A. I think that is the check. It was witnessed by Mr. Brown.

Q. Now, that check was presented to you by whom? A. The first time by one of the Sisters. The next time by Treacy & Milton.

Q. Well, that was after she died, I don't care about that. A. Yes, after she died.

Q. When it was presented by the Sister did you pay it? A. No.

30

Q. Why not? A. We did not think the woman was competent to draw the check.

MR. MILTON I move to strike that out.

THE VICE-CHANCELLOR: The objection is rather late. The opinion has no force.

Q. For some reason you did not pay the check? A. No, sir.

40

James S. Newkirk—for Complainant—Direct.

Q. What did you do then? A. I went and saw her again on September 8th. I think she died the next day.

Q. What occurred on September 8th? A. I found her much more feeble than she was the week before the 27th. I asked her if she signed the check to the order of St. Francis Hospital and she admitted she had, and this question of the endowment of a bed in the hospital was brought up and I asked if she wanted to give the hospital \$3,000 and she first replied, "I don't know, I might need it myself." She made that answer. 10

Q. You say the question of the endowment was brought up? Who brought it up? A. I don't know whether it was the Sister Superior, but one of the Sisters was there. 20

THE VICE-CHANCELLOR: Mr. Newkirk who was there when you got there?

WITNESS: Mr. Mead was there for one, and the Sister Superior—I presume she was—she was the Sister Superior, yes, and a nurse, I think.

Q. And you had this conversation with Mrs. Bowdoin in their presence? A. Yes. 30

THE VICE-CHANCELLOR: Begin at the beginning.

WITNESS: That was all about it. I asked if she signed that check. She said, "Yes," and when I asked her if she wanted to give the hospital \$3,000 she said, "I don't know. I might need it myself," and a little later on I asked her what she intended the \$3,000 to be used for. 40

James S. Newkirk—for Complainant—Direct.

Q. That same day? A. Yes, and the reply she made was "Bed." The woman was, I think, on her death-bed at the time, but she did imply "bed" and I took it she did want to give the hospital this \$3,000.

10 Q. Were you in the doctor's presence then? A. No, I think not. Mr. Mead, I think, was the only one in the room at the time, and the Sister Superior, and I saw Dr. McCormack as I was going out and he said she was gradually growing weaker.

Q. That was on September 8th—what time of the day? A. I should say around four o'clock.

Q. In the afternoon? A. Yes.

Q. And the evidence is she died the next day. A. The next day the Board asked me not to pay it, but I did not know she was dead.

20 Q. I suppose that is not competent what the Board asked you to do.

THE VICE-CHANCELLOR:: I did not hear what the witness said.

MR. VAIL: He said the next day the Board directed him not to pay it.

WITNESS: At the time I did not know Mrs. Bowdoin had died.

30 *By the Vice-Chancellor:*

Q. Do I understand this last interview you had with her in the hospital was on the 8th? A. Yes.

Q. The day before her death? A. The day before her death.

Q. The day of the date of the check which has been presented to your bank? A. Yes.

Q. So you went up to the hospital the same day this check was presented by the Sister? A. Yes, the same day.

40

*James S. Newkirk—for Complainant—Direct—
Cross.*

By Mr. Vail:

Q. That is all you know about it, Mr. Newkirk?
A. That is all I know.

Cross-Examination by Mr. Milton: 10

Q. She did remember, Mr. Newkirk, that she had signed and given a check for St. Francis for \$3,000 that day? A. Yes; she admitted that she had.

By the Vice-Chancellor:

Q. I understand, Mr. Newkirk, your bank has not got the order which Mr. Mead brought directing you to pay the entire amount of Mrs. Bowdoin's account to him? A. No, I don't find it here. 20

Q. When the order was presented you declined to honor it? A. Yes.

Q. Presumably it was taken away—wouldn't it be? A. Yes, it would be.

MR. DEY: Mr. Mead, the executor, has that order.

THE WITNESS Oh, he has it. 30

MR. VAIL: That is all the testimony we have.

Benjamin C. Mead—Recalled—Direct.

BENJAMIN C. MEAD recalled for the defendants.

Direct Examination by Mr. Milton:

10 Q. Mr. Mead, were you present in the hospital, on the afternoon of September 8th when Mr. Newkirk called in? A. I do not think I was; no, sir.

Q. Sir? A. I think not.

Q. You think not? A. Yes.

Q. On the morning—I take it it was in the morning—that Mrs. Bowdoin signed the Exhibit C-3, which is the check for \$3,000, did she appear to know what she was doing?

MR. VAIL: Haven't you gone into that?

20 MR. MILTON: Not with this witness. I did with Mr. Brown, but not with this witness.

MR. VAIL: Is not that part of your affirmative case? I do not suppose it makes much difference whether it comes in order or not.

30 THE VICE-CHANCELLOR: There was practically no testimony with respect to the capacity of the decedent to make this gift when Mr. Milton put in his case. He put in his case, but the burden rests upon the person attacking it, to show that the party was incapable. Now, Mr. Milton, may go into the whole subject and produce any number of witnesses on that point.

MR. VAIL: Proceed.

(Last question read.)

Benjamin C. Mead—Recalled—Direct.

A. Yes.

Q. You don't recall Mr. Newkirk coming in the afternoon of that day? A. The gentleman who just was in the chair?

Q. Who just testified? A. No, I do not remember seeing him there at any time. I do not remember it. 10

Q. Did you present an order to the Provident Institution for Savings in August to pay to you the money on deposit there? A. Yes.

Q. What became of the order? A. I took it back to Mrs. Bowdoin.

Q. Did you give it to her? A. Do you mean the check?

Q. Yes, the check. A. Yes, I took it back and gave it to Mrs. Bowdoin. 20

Q. It was a check, was it? A. Yes.

Q. What were the circumstances under which that check was signed? A. I was in the hospital on that day and she brought up the subject of this gift or endowment and ordered me or instructed me to draw this check. The amount was not filled in, because she did not know the exact amount of her balance at the bank, so she told me to go down and ascertain what the balance was, and fill in the check for that amount and draw the money. 30

Q. What date was this, do you recollect? A. It was the 26th or 27th of August. I am not sure.

By the Vice-Chancellor:

Q. Did she give you any instructions as to what you should do with the money? A. Take it back to her, and she would instruct me further what to do with it. I think it was her intention to give

Benjamin C. Mead—Recalled—Direct.

the hospital three thousand dollars and deposit the balance of it—

MR. VAIL: Well, now—

10 Q. Did she say what her intention was? A. No, she just told me to go and get the money.

Q. How do you know what her intention was?

A. I knew since June it was her intention to give something to the hospital.

By Mr. Milton:

Q. Because of what? A. Because of her statement that she so intended to.

20 *By the Vice-Chancellor:*

Q. Mr. Mead, did you think it was a sensible thing for an old woman to draw four or five thousand dollars in cash out of a savings bank and have it brought to her there in the hospital? A. I thought she had a right to do it if she wanted to. She would have immediately, I presume, given three thousand dollars to the hospital.

MR. VAIL: Not what you presume.

30 *By Mr. Milton:*

Q. On the day this check was drawn, August 26th, had you and she had any other conversation in reference to her desire to give three thousand dollars to the hospital? A. No. She simply said she wanted me to draw the check—pardon me. She wanted me to draw that money for the hospital.

40 Q. Have you got the check? A. Yes, sir.

Benjamin C. Mead—Recalled—Direct.

Q. In your possession? A. Yes, sir.

Q. Here now? A. No.

Q. This was on the 26th? A. Yes, sir.

Q. Of what month? A. August.

Q. Did you know, Mr. Mead, that she denied signing this check? A. No, I was not aware of that

10

Q. Did you ever talk to her afterwards about the signing of this check? I am referring now to the check of August 26th. A. Only when I took it back again and told her the bank refused to pay it. I made two trips to the bank on that day. The first was with the order from her to inform me what the balance was and then to fill in the amount of the check and draw whatever it was, and when they refused to do that, on account of her previous communications, and showed them to me, they said, "We can't pay out any money on Mrs. Bowdoin's checks because she has ordered us not to do so," and I said, "I will go back to the hospital and get an order from her revoking her previous orders," and I did. I went right back to the hospital and I wrote out the order revoking her previous instructions and she signed it and I took that back to the bank with the check and they still declined—

20

30

THE VICE-CHANCELLOR: And the book?

WITNESS: And the book, yes, sir; but they still declined to satisfy the check.

THE VICE-CHANCELLOR: What was the amount of the check?

WITNESS: It was not filled in; the amount was not filled in.

40

Benjamin C. Mead—Recalled—Direct.

THE VICE-CHANCELLOR: What was the amount of her balance?

WITNESS: \$5,700.

Q. What became of the order revoking the stop-order? A. It is with the check now.

10 Q. In your possession? A. Yes.

Q. Now, between that date, Mr. Mead, August 26th, and the date of the three thousand dollar check, Exhibit D-3, did you see Mrs. Bowdoin? A. That would be between August 26th and September 9th, wouldn't it?

Q. Yes—September 8th. A. No, I think not.

Q. Now, when you saw her on September 8th, who was it that brought up the subject of giving the check to the hospital? A. She did.

20 Q. How would she bring it up. A. Why, she told me to go into a little white box which she kept on her bureau and she said, "Get one of those Provident checks and fill it in for three thousand dollars to the order of St. Francis Hospital."

Q. Now, with respect to her physical and mental condition on that day, was it the same as it had been for some time past? A. Her mental condition was fully equal to what it had been, but she was weak physically.

Q. Had she any business experience during her lifetime, do you know? A. Yes, that is—her private business. She had never been in business.

Q. Did she own real estate? A. Yes.

Q. Where? A. In Rahway and in Woodbridge Township.

Q. What is the value of her real estate. A. About \$3,500.

Benjamin C. Mead—Recalled—Direct.

Q. And she had some stocks and bonds, did she?

A. Yes.

Q. And mortgages? A. Yes.

Q. And cash in bank? A. Yes. She had no mortgages.

Q. The inventory which you have filed shows an estate of about twenty-three thousand dollars? 10

A. In that neighborhood, yes.

By the Vice-Chancellor:

Q. That does not include real estate, of course?

A. No, sir.

Q. Then her total estate was worth about what, when she died? A. Well, in the neighborhood of \$18,000; in that neighborhood.

Q. You said the inventory of the personal estate—Did she owe money? A. Very little. 20

Q. You said the inventory amounted to about \$20,000. Is that right?

By Mr. Milton:

Q. Mr. Mead, your inventory is \$20,439.07. A. Does that include the real estate?

Q. No, sir. A. Well, that is correct.

Q. In addition to that there was some real estate? A. There was, yes. 30

Q. The value of that was approximately how much? A. Thirty-five hundred dollars.

Q. In the inventory you have treated the deposit in the Provident Bank as being \$2,700? A. Yes.

Q. When it should be, \$5,700, that is true, isn't it? A. Yes.

Q. You have assumed that the \$3,000 represented by D-3 has been paid? A. Yes. 40

Benjamin C. Mead—Recalled—Direct.

Q. So that the inventory, treating the account in the Provident as \$5,700 should be \$23,000? A. Yes.

Q. That is true? A. Yes, sir.

Q. \$23,000 plus the real estate will make her whole estate about \$26,000? A. Yes.

10 Q. Who attended to the collection of the interest and dividends on the stocks and bonds which she held? A. I did.

Q. Did she have an understanding of your accounts when you rendered them to her? A. Oh, yes, certainly. I kept no regular accounts; I merely handed her a statement of what they were each time.

20 Q. What would you say as to whether or not she was a shrewd, competent business woman. A. She was, very.

Q. Did you notice any appreciable change in her mental condition from the time she went to the hospital until her death? A. No. She was just as active mentally up to a very few hours before her decease, I think.

By the Vice-Chancellor:

30 Q. Do you know what her disease was? A. Well, she died of old age.

Q. How old was she? A. Eighty-six.

Q. What was her religious faith? A. She was an Episcopalian.

Q. Is St. Francis Hospital Episcopalian or a Catholic Institution. A. Roman Catholic.

*Benjamin C. Mead—Recalled—Cross.**Cross-Examination by Mr. Vail:*

Q. You say you don't recall Mr. Newkirk's being at the hospital on September 8th when this check was signed? Do you say so? A. Yes, I don't remember seeing him there.

Q. He says positively you were there. If he says so, you might be mistaken, might you not? A. I might be, yes. 10

Q. Mr. Brown says that Mrs. Bowdoin told you to get two blank checks and draw one for \$3,000 and one for \$500. Is he correct? A. No, the other check was for a larger amount than \$500.

THE VICE-CHANCELLOR: What is that?

WITNESS: It was for a larger amount, it was \$2,000. 20

Q. Then he is mistaken when he says she told you to draw one for \$500? A. Yes.

Q. And you did draw two checks, one for \$3,000 to the hospital, and one for \$2,000 to your order? A. Yes.

Q. And she signed the \$2,000 check at the time she signed the other? A. No, the check for \$2,000 was the check she had previously drawn but had not filled in the amount. She told me to fill in that check for \$2,000 and handed it to me, and I said, "What is that for?" and she said, "That is for Mr. B. C. Mead." 30

Q. Then the check with the amount not filled in is not a check at all? A. Yes, with the amount filled in.

Q. Then Mr. Brown is mistaken when he said she told you to draw a check for \$500 to the order of yourself? 40

Benjamin C. Mead—Recalled—Cross.

MR. MILTON: He did not say so.

MR. VAIL: I think he said that she said to Mr. Mead to go over and get two Provident checks and draw one for \$500 and one for \$3,000, but he did not say who the \$500 was to be paid to.

10

THE VICE-CHANCELLOR: My recollection is that she took the check she had given you the day before that was blank and not filled in and filled in two thousand dollars.

WITNESS: Yes, by her instructions.

Q. And she said, "That is for you"? A. "That is for Mr. B. C. Mead."

20

Q. You thought she was competent at that time to sign checks, didn't you? A. Naturally.

By Mr. Milton:

Q. Does the fact that a check for \$2,000 was made to your order affect your desire to tell the truth, Mr. Mead? A. No, sir, not in the least.

By the Vice-Chancellor:

30

Q. You have that check still? A. Yes.

Q. Does that amount of \$2,000 appear in your inventory, or is that left out, together with the \$3,000. A. That is included in the \$2,700, charged to the Provident Bank.

40

..... *William H. Brown—Recalled—Direct.*

WILLIAM H. BROWN, recalled for the defendant.

Direct Examination by Mr. Milton:

Q. Mr. Brown, there seems to be some question as to just what was said by Mrs. Bowdoin at the time the check for \$3,000 was made out. 10

MR. VAIL: Hadn't we better have the stenographer's notes on that.

THE VICE-CHANCELLOR: Well, this is apparently competent. I cannot tell until I hear it.

Q. Will you be good enough to re-state what Mrs. Bowdoin said at the time the checks were made up, and state what happened, briefly and succinctly, if you please. 20

THE VICE-CHANCELLOR: If you are asking the witness to repeat the testimony, I think the objection is good.

MR. VAIL: I don't want it repeated. I will take the stenographer's notes.

MR. MILTON: All right; strike it out.

Q. From your observation of Mrs. Bowdoin at the time this check was signed, what have you to say as to her ability to understand the nature of the transaction? A. On September 8th, 1914, when I called there, I thought she was rational and she knew what she was doing. 30

Q. On what basis was that thought predicated? What did she do and say? A. I asked her several questions as to what she wanted to do, and I convinced myself that she was rational. 40

William H. Brown—Recalled—Cross.

Cross-Examination by Mr. Vail:

Q. Had you ever seen her before? A. I never did.

Q. How long were you in the room? A. About half an hour.

10 Q. Who was there besides Mrs. Bowdoin? A. Mr. Mead, a Sister of Charity, the Sister Superior and myself.

Q. Who took you into the room? A. The Sister Superior.

Q. What did she say to Mrs. Bowdoin when she took you in? A. She said, "Mrs. Bowdoin, I have brought a Notary Public."

20 Q. Did she say for what purpose? A. She introduced me to Mr. Mead, and she said, "I believe that you want to use a Notary Public in drawing some paper or executing some paper to make an endowment to the hospital."

Q. The Sister Superior said that to Mrs. Bowdoin? A. Yes, sir.

Q. Then what did Mrs. Bowdoin say? A. I then had a talk with her.

30 Q. Relate the talk. Talk, you know, is sometimes cheap—Just what you and she said to each other. A. I asked how she was feeling and told her I was sorry she was in the hospital and I asked her what I could do for her. And she told me she wanted to execute some papers and give away some money, and I asked her by what method and she told me she had money in the bank and I said, "Well, I do not see that you need a Notary Public or Commissioner of Deeds to get the money out of the bank." I said, "If you have any bank orders, you could have them filled out and present them to the bank," and she seemed to think that

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William H. Brown—Recalled—Cross—Re-Direct.

was all right, and she asked Mr. Mead to get the orders and the bank book and told him to fill in those two checks and he filled them in and I witnessed her signature.

Q. You saw them both? A. Yes.

Q. What was the other check for—how much?

A. My recollection is not clear on that. I think I stated it, but I thought it was for five hundred dollars.

10

Q. You saw them both? A. I saw both checks and witnessed them both.

Q. As Mead drew them both in your presence?

A. Yes, sir.

THE VICE-CHANCELLOR: Are you sure he drew both of them?

THE WITNESS: Yes.

20

Re-Direct Examination by Mr. Milton:

Q. You say he drew them, Mr. Brown? Do you mean—

MR. VAIL: No, not what he means.

Q. Did you see Mr. Mead write out the entire check? A. I saw Mr. Mead write out the checks.

Q. Were you watching over his shoulder? A. No; I was sitting alongside the bed.

30

Q. Where was Mr. Mead? A. He was alongside the bed just adjoining me.

Q. Could you swear you saw Mr. Mead fill in the date of the other check? A. No, I could not.

Q. When you say you saw him draw both checks, what do you mean by that? A. Well, I knew there were two checks and I witnessed them both.

40

Dr. Frank C. McCormack—for Defendant—Direct.

DR. FRANK C. McCORMACK, sworn for the defendant.

Direct Examination by Mr. Milton:

10 Q. What is your address, Doctor? A. 58 James Street, Englewood, N. J.

Q. You were formerly connected with St. Francis Hospital? A. Yes, sir.

Q. You are not now? A. No, sir.

Q. Were you so connected with the hospital in September, 1914? A. Yes, sir.

Q. For how long prior to that? A. From the 15th of June previous to that September.

Q. You were there about three months? A. June 15th, 1914, I went there as House Physician.

20 Q. When did you leave the hospital? A. July 7th, 1915.

Q. During the time you were at the hospital, were you acquainted in a professional way with Mrs. Hannah Bowdoin? A. Yes, sir; I was her attending physician in the hospital for about two months.

Q. What two months? A. Part of July, August and September.

30 Q. How frequently did you see her during that period? A. Two or three and sometimes four times a day, the latter part of the time she was there, always twice a day.

Q. Did you have occasion to chat with her or talk to her? A. When I would be on my rounds I would see her and talk to her.

Q. Did you have an opportunity to form an opinion as to her mental condition? A. I did, through my attending to her.

*Dr. Frank C. McCormack—for Defendant—Direct
—Cross.*

Q. And did you form an opinion? A. My opinion was formed, yes, sir.

Q. What is it? A. With regard to her mental condition?

Q. With regard to her mental condition, say, during September, and prior to her death. A. Her mental condition to me was—I think the woman was of sound mind with the exception of being a little forgetful, she apparently was of a sound mind. 10

Q. Was she capable of understanding her business affairs? A. I think she was, yes, sir.

Q. And appreciating a business transaction? A. Yes, sir.

Cross-Examination by Mr. Vail: 20

Q. Do you recall an occasion when Mr. Newkirk came there to see Mrs. Bowdoin a day or so before she died, do you recall that? You know Mr. Newkirk? A. Yes, I know him. I recall him being there to see Mrs. Bowdoin.

Q. Can you say how long that was before she died? A. It was four or five days previous to her death.

Q. August 27th, wasn't it? A. About that time, I cannot recollect exactly. 30

Q. Do you recollect saying to him at that time that she was in a very weak condition? A. Yes, sir; her physical condition at that time was rather low.

Q. Do you recollect putting your name as a subscribing witness to a paper revoking an order on the bank to pay Mr. Mead his money? A. Yes, sir.

Q. Did you say to Mr. Newkirk that you did not 40

Dr. Frank C. McCormack—for Defendant—Cross.

see her sign that order? A. See her sign this order she gave Mr. Newkirk?

10 Q. No, the order revoking— Mr. Newkirk says this: The revoking order was witnessed by Dr. McLoughlin and yourself and Mr. Newkirk says that you said that you witnessed the signature, one to a check for a blank amount and the other to an order directing the bank to pay Benjamin C. Mead all the moneys due her, but that you did not see her sign the check. “Dr. McCormack who witnessed the revoking order said he did not know the contents of the same.” You are Dr. McCormack? A. Yes.

Q. Did you say that to Mr. Newkirk? A. I remember telling him about an order to Mr. Mead.

20 Q. Did you say you witnessed a revoking order but you did not know the contents? A. Oh, I knew the contents.

Q. Then you were mistaken if you told him you did not know? A. I don't recall telling him I did not know, because he showed me the order myself, before I signed it.

30 Q. The order was dated August 27th. “I hereby revoke all previous orders or instructions and order and direct that you pay to Benjamin C. Mead the full amount due me from your institution,” that was witnessed by you. Now, do you recollect saying to Mr. Newkirk that you did not see her sign that, although you are signed as subscribing witness? A. I do not recollect with regard to that order.

Q. You don't recollect whether you said that to Mr. Newkirk or not? A. No, sir, not with regard to that order.

Dr. Frank C. McCormack—for Defendant—Cross.

Q. Then if Mr. Newkirk is positive as to your statement to him, you probably are mistaken, aren't you? If he recalls positively, and you don't, wouldn't you say he would be more apt to be correct? A. I don't recollect saying so, I am sure.

Q. You do not answer my question. I do not want to catch you, Doctor, that is not my idea at all. I only want to test your recollection. He says positively that you said to him that you did not see her sign that revoking order, although you signed as subscribing witness, and if you do not recollect whether you said it, is not his statement entitled to credit rather than yours—not meaning that you are testifying falsely at all—well, I guess we won't pursue that. 10

THE VICE-CHANCELLOR: What is the fact, doctor? Do you remember witnessing an order which has not been produced here today directing the Provident Savings Institution to pay to Mr. Mead any money? 20

WITNESS: That is the point. I do not recollect signing that order.

THE VICE-CHANCELLOR: Do you recollect witnessing any paper signed by Mrs. Bowdoin and addressed to the bank? 30

WITNESS: I recollect signing one for Mr. Newkirk in association with Dr. McLoughlin witnessing her signature to an order revoking previous orders on the bank, or giving an order to the bank not to pay any money out.

Q. That is the order in evidence? A. I remember signing that one, yes, sir. 40

Dr. Frank C. McCormack—for Defendant—Cross.

THE VICE-CHANCELLOR: Do you remember signing any other paper?

WITNESS: No, sir, I do not recollect signing any other paper.

THE VICE-CHANCELLOR: Or witnessing any other paper?

10

WITNESS: No, sir.

MR. MILTON: We rest. I am ready to argue it if the court wants to hear argument.

THE VICE-CHANCELLOR: Yes.

(Counsel proceeded with argument.)

20

THE VICE-CHANCELLOR: I will ask you one question, Mr. Milton, which I put to you in your opening argument. I did not make the matter plain, however, and you did not grasp my meaning.

30

It is well settled in this state and throughout the country generally that a valid gift of a Savings Bank Account can be made by a gift of the book by the donor to the donee so that the book is beyond the control of the donor, with donative intent to vest the fund in the donee. We do not have to go back very far before no such principle was recognized; in fact, such a principle was repudiated; a gift could not be effected in that way, either *inter vivos*, or *causa mortis*. But gradually the law has been relaxed and the gift of Savings Bank Accounts can be made by delivery of the book so as to vest title to the book in the donee, and a

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gift of a life insurance policy can be made by a like delivery of the policy to the donee with intent to vest in the donee the title to that particular paper. I may say it is also well recognized and not disputed here, I understand, that a gift cannot be effected by giving a party a check or draft; that does not effect a gift at all. The check must be cashed: the money must be procured by the payee and donee or the gift is incomplete. The donor may stop payment: the donor's death before the check is cashed will defeat the intended gift. Now, here, we have a case where a check is given which is ineffectual in itself, to effect the gift, and we have a manual delivery of the Savings Bank Book, but no gift of the book. The property in the book is retained by the alleged donor; the book is only delivered with the check in order to comply with the rule of the Savings Bank which makes the check inoperative unless the book is produced, and so the book is lent for the purpose of procuring payment of the check. The property in the book is retained by the alleged donor; she has given a check for \$2,000 to somebody else and the book will have to be secured in order to procure that payment. She retained \$700 of the money herself, and she would have to have that book back in order to get possession of the money if she wished to do so, or her executor will have to have it.

Now, I must confess I am in doubt about this technical rule of law. Assuming this woman was of sound and disposing mind, capable of doing business and capable of making a gift of three thousand dollars to

10 the Sisters' Hospital, and that she had been well cared for there, and that she was a woman of some fortune, worth about \$25,000, and it was a reasonable thing for her to do to give this charitable institution \$3,000; and assuming that she did have full intent to make this gift, the question is, is the technical law in regard to gifts complied with—was it complied with in this case or is this a case of an ineffectual attempt to make a gift.

MR. MILTON: I think I did not quite comprehend your Honor's question in the opening of the argument, perhaps it was a little too refined for me. I do appreciate it now, and I think it ought to be really examined.

20 THE VICE-CHANCELLOR: I would like to have the aid of counsel.

(After discussion.)

MR. MILTON: Your Honor does not want any discussion of the facts, I assume, all you want is a discussion of this point?

THE VICE-CHANCELLOR: No, nothing further. You mean in the brief?

MR. MILTON: Yes, sir; I want to prepare a discussion of that question of the law.

30 THE VICE-CHANCELLOR: In what time?

MR. MILTON: Ten days, I should think.

THE VICE-CHANCELLOR: The testimony may be written out, then. Counsel can put in briefs if they want to. The testimony will have to be written out.

MR. MILTON: Yes, sir.

40 MR. VAIL: I will agree to put in a brief within five days after I get the testimony.

Memorandum of Conclusions.

THE VICE-CHANCELLOR: Then we will make it October 5th.

MR. VAIL: The briefs to be in October 5th?

THE VICE-CHANCELLOR: You will exchange briefs, of course.

MR. VAIL: Yes, sir.

10

Memorandum of Conclusions.

(January 11th, 1916)

IN CHANCERY OF NEW JERSEY.

BETWEEN

THE PROVIDENT INSTITUTION FOR SAVINGS IN JERSEY CITY,

Complainant,

and

SISTERS OF THE POOR OF ST. FRANCIS, *et als.*,

Defendants.

20

Memorandum
of
Conclusions.

30

On hearing of contesting claimants to fund in savings bank after decree of interpleader.

MR. JOHN MILTON, for Sisters of the Poor of St. Francis.

MR. BENJAMIN A. VAIL, for Benjamin C. Mead, Executor.

STEVENSON, *V. C.*:

An old lady, Mrs. Hannah L. Bowdoin, eighty-six years of age, died in the hospital in Jersey

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Memorandum of Conclusions.

10 City kept by one of the claimants, the Sisters of
the Poor of St. Francis, on the ninth day of
September, 1914. The day before she died, when
she was in a feeble condition of body and mind,
she gave a check upon her savings bank account
with the Provident Institution for Savings of
Jersey City for three thousand dollars, to the
claimant, the Sisters of the Poor. At the same
time she gave a check to her executor and busi-
ness agent, Mr. Mead, for two thousand dollars.
Both of these attempted transfers of money are
conceded to have been without any legal consid-
eration, or, in other words, must stand, if they
stand at all, as pure gifts. The total amount of
the deposit as Mrs. Bowdoin knew, was fifty-seven
20 hundred dollars, so that if we deduct the amount
of these two alleged gifts from that deposit, there
was still seven hundred dollars left which be-
longed to Mrs. Bowdoin and passed to her execu-
tor upon her decease. Mr. Mead has made no
attempt to claim anything upon the check for
two thousand dollars, which was given to him,
but has included that amount in the item of his
inventory which exhibits the amount of money
which Mrs. Bowdoin's estate owns on deposit
30 with the Provident Institution for Savings.

1. The main question toward which the testi-
mony offered on each side and the arguments of
counsel were directed, was whether this old lady
was competent to make this gift, and in fact knew
what she was doing, and made the donation with-
out pressure or undue influence of any kind. I
recall a considerable number of weighty consid-
erations on each side of this question.

Memorandum of Conclusions.

It may be noted in favor of the gift that for all that appears Mrs. Bowdoin had few, if any, relatives dependent upon her; that the gift or alleged gift of three thousand dollars transferred less than an eighth of her estate; that she had been cared for in the hospital of the Sisters of the Poor for some time, and according to the testimony of her executor and man of business, Mr. Mead, had formed the purpose two or three months before her death of making a suitable donation to the hospital. 10

On the other hand, Mrs. Bowdoin was eighty-six years of age, and although she talked about making a gift from time to time through a period of some months, she did not take measures to effect such gift until she was in an extremely feeble condition, in fact, on her dying bed, the day before her death. Mrs. Bowdoin also was in the custody and under the control of the active agents of the alleged donee and her memory had greatly failed. The circumstances under which this gift was made, made it the duty of the claimant, the donee, to produce all the testimony obtainable to show that Mrs. Bowdoin was competent to make the gift, and in fact knew what she was doing and acted without undue influence from the agents of the donee. The fact that neither the Mother Superior nor the other Sister who took part in this transaction was produced as a witness, has weight against the validity of the alleged gift, although reasons, of course, may be surmised why these ladies were reluctant to go upon the stand. 20 30

I am glad that I am able to avoid the perusal and study of the entire testimony as written out 40

Memorandum of Conclusions.

10 by the stenographer, in order to answer the questions indicated above, because I am satisfied that under our law of gifts, so far as the same has been declared, no gift of the three thousand dollars in question was effected, assuming that the alleged donor was competent to make the gift and in fact acted intelligently and voluntarily when not subjected to any undue influence.

20 I understand that counsel agree that if this gift was made it was a gift *inter vivos* and not a gift *causa mortis*, notwithstanding the fact that the alleged donor was on her dying bed, and if she understood her condition must have known that she had not long to live. Alleged gifts made by old and feeble persons and persons stricken with fatal illness, if valid, often must be classified as gifts *inter vivos*, nevertheless, being asserted after the death of the alleged donor, they seem to be in many respects in the same category with gifts *causa mortis* in respect of the safeguards and protective conditions which the law should throw around the transaction. There seems to be as much danger in permitting a person to establish a gift *inter vivos* to himself by producing a key or a savings bank book obtained from the death bed of an alleged donor, as there is in permitting a person under such circumstances to establish a gift *causa mortis*.

30 Under the facts as we are now assuming them to be, there can be no question about the donative purpose of Mrs. Bowdoin in giving to this hospital her check for three thousand dollars. While this check was a gratuity, it was also a recognition of the kindness with which she had been treated, and the evidence shows that she had been

Memorandum of Conclusions.

contemplating making a gift of some sort to the hospital for over two months before this check was delivered. Whether she failed to make up her mind what she would do as an expression of her gratitude, and postponed the determination of the matter until it was too late, is one of the questions the consideration of which I have avoided. 10

The narrow question which is under consideration in this case is whether the delivery of the check with donative purpose, and the delivery of the savings bank book in order to enable the payee to cash the check, effected a complete donation. In other words, was the external form of the gift, or attempted gift, sufficient to pass the legal test. 20

The evidence as to the delivery of the pass book to the representative of the hospital when the check was delivered, or as a part of the same transaction, is meagre and is rendered more unsatisfactory because the Mother Superior who received the check, and the other Sister who was present, were not put on the stand. The same day when the check was given (September 8th, 1914) a representative of the hospital presented the pass book and check to the savings bank, and thereupon payment was refused, not necessarily, I think, absolutely, but for the time being until investigation could be made. An officer of the bank promptly visited Mrs. Bowdoin at the hospital and testified as to her condition. Mrs. Bowdoin, as stated, died the next day before any further efforts had been made to collect the check. 30

There can be no possible escape, in my opinion, from the conclusion of fact that no gift of the 40

Memorandum of Conclusions.

savings bank book as a chattel was made or intended to be made by Mrs. Bowdoin. The title to this book as a chattel remained vested in Mrs. Bowdoin until her death, and then passed to her executor. What Mrs. Bowdoin did or intended to do under the facts as we now assume them to be, was to give this check for three thousand dollars to the Mother Superior with intent that it should be cashed for the benefit of the hospital, and to give or permit the Mother Superior to take the savings bank book in order that the bank might honor the check in accordance with its rules. It was conceded at the argument, whether it appears to have been proved in the evidence or not, that the rule of the bank absolutely required the presentation of the pass book with any check on the account.

In the absence of any evidence to show an intention on the part of Mrs. Bowdoin to vest the title in the pass book as a chattel in the contemplated donee, by delivery of the same, the inference that there was no such intention is unavoidable. Mrs. Bowdoin at the same time when she gave or attempted to give three thousand dollars of her bank account to the hospital, gave or attempted to give two thousand dollars of the same bank account to her business agent and executor, Mr. Mead, and also retained seven hundred dollars. The situation would not have been different legally if she had attempted a distribution of five thousand dollars of this money to fifty different persons in one hundred dollar checks, and allowed the donee of the first check to take the pass book. The inference from such a proceeding is absolute that the intention is that the re-

Memorandum of Conclusions.

ipients of the checks shall go together or in succession to the bank and have the use of the pass book for cashing their checks, and after that the pass book is to return to its owner. At most in this case the pass book was lent. There was a mere bailment.

It is well settled that a gift cannot be effected by the delivery of a check upon an ordinary bank of deposit where the drawer's account is good for the amount. The reason is that until the check is cashed the drawer may stop payment. In such a case the donative purpose may be absolute when the check is given, and ten minutes, or ten hours, or ten days later, at any time before the check has been cashed, such donative purpose may be wholly changed and abrogated. The fundamental principle of the law of gifts is that the gift to be effective must place the thing donated beyond the control of the donor. Where a check on a bank of deposit is given for value, it often operates as an equitable assignment, but such is not the case where a check is given to the payee as a pure donation. *Hopkinson vs. Foster*, L. R. 19 Eq. 74. 3 Pom. Eq. 3rd Ed. §1284. See *Id.* §1148, page 2238. Note. 3. *Beaumont vs. Ewbank* (1902), 1 Ch. 889. *Harris vs. Clark*, 3 N. Y. 93.

While, of course, the capacity to acquire property in all lawful ways is a right which all men enjoy, in a narrow sense it may be said that no one has any legal right to have an intended or attempted gift to him carried into effect. With an exception so rare that it need not be noticed, equity will not aid an incomplete gift. Until a legal gift has been effected so as to vest property

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Memorandum of Conclusions.

10 in the donee, the only party who has any right calling for consideration in the transaction, is the donor, and that right is a part of the great and sacred right which the law insures to every one under certain limitations and conditions to dispose of his own property in accordance with his own wish and will.

20 The right to make a will accorded by law is a most valuable right, but the law has in modern times allowed its exercise only under certain very rigid conditions. In the case of gifts *inter vivos* we are dealing with a common law right, but, as heretofore intimated, where the gift is made under circumstances which render it almost inevitable that it will not be inquired into until after the alleged donor's death, it would seem to be advisable that all parties who are contemplating making such donations should be subjected to reasonable limitations.

30 In my judgment the delivery of this check on a savings bank with the loan of the pass book, which had to be presented with the check in order to secure its payment, placed the contemplated donee in precisely the same position that such donee would have occupied if the check had been drawn on an ordinary bank of deposit where the account was good and no pass book or other voucher had accompanied the check. It cannot be questioned in this case that if Mrs. Bowdoin had given a check on an ordinary bank of deposit, no gift would have been effected until the check had been cashed. Nor does it make any difference what may delay or prevent the check from being cashed. It happened in this case that the absolute or conditional refusal of the bank to pay

Memorandum of Conclusions.

the check was based upon some information which the bank had received in regard to Mrs. Bowdoin's condition or her wishes. The situation would have been precisely the same if an accident, such as the loss of the pass book in the street, had prevented the intended donee from presenting the check until after the intended donor's death. 10

The test question in this case is, could Mrs. Bowdoin after delivery of the check and pass book, have stopped payment of the check at the bank and lawfully demanded immediate possession of the pass book? I am unable to perceive any reasonable ground upon which this test question can be answered otherwise than in the affirmative. The brief of counsel in favor of the finality of the gift, after referring to the proposition that in order to establish a valid gift *inter vivos* "the donor must strip himself of all ownership and dominion over the subject matter of the gift" (*Swayze vs. Huntington*, 82 N. J. Eq. 127) proceeds as follows: "The subject matter of the gift is not the bank book, but the *fund* in the bank. Here donor drew a check for three thousand dollars and delivered the pass book with the check. What else was required in order to effectually divest her of ownership and dominion over that sum of money on deposit with the Provident bank?" 20 30

The above argument is based upon the false premise that the delivery of the pass book and check "divested" Mrs. Bowdoin of three thousand dollars supposed to be deposited in the bank, or, in other words, divested Mrs. Bowdoin of the right to receive on her own behalf under her con- 40

Memorandum of Conclusions.

tract with the bank, three thousand dollars of the money which the bank was under contract to pay her. The argument assumes that Mrs. Bowdoin upon delivery of the check and loan of the pass book for the purpose of having it cashed, stripped herself of the power to stop the check and demand back her pass book. The argument also seems to ignore the proposition which counsel quotes from *Swayze vs. Huntington*, that in cases of this kind the donor must strip himself of "dominion over the subject matter of the gift." In my opinion there is no transfer, either transient or permanent, of "dominion" over a savings bank account or any part thereof when the depositor gives a check on the bank for a part of his account with donative purpose, and lends the contemplated donee the pass book in order to enable him to get the check cashed.

The numerous cases which in comparatively recent times have extended the ancient law of gifts so as to permit the gift of a savings bank book or a life insurance policy, or other non-negotiable contract, to carry and include the money or contract right which the book or instrument so delivered represents, are all based upon the fact that by vesting an absolute title to the voucher, to the savings bank book, for instance, in the donee thereof, with full donative purpose with respect to the fund, the donor has placed the real subject matter of the gift, which, of course, is the fund, beyond his control forever, and has put the same in the absolute and perpetual control of the donee. *Cook vs. Lum*, 55 N. J. L. 373, 376. If Mrs. Bowdoin had delivered her pass book, which stood as a voucher

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controlling fifty-seven hundred dollars, to the Mother Superior, with the intention of vesting an absolute title to the book in the donee in order that the donee might have absolute dominion over the fund which it represented and thereby become its owner, the gift would have been complete at once—complete and irrevocable. There would have been no *locus penitentiae*. Ten minutes later if Mrs. Bowdoin had changed her mind and demanded back her book, her demand could not lawfully have been enforced. The situation would have been precisely the same as if Mrs. Bowdoin had delivered a diamond ring to the Mother Superior with intent to effect an absolute donation of the same and later had changed her mind. 10

This case is in many respects analogous to the one which was presented to the Court of Errors and Appeals in *Keepers vs. Fidelity Title & Deposit Company*, 56 N. J. Law 302, in which I think our Court of Last Resort in a brief but forcible opinion, through Mr. Justice Dixon, intended to call a halt on the modern tendency to relax the ancient precautions which the older law observed with respect to the recognition of gifts *causa mortis*. 20

Let us suppose that Mrs. Bowdoin had desired to make an absolute gift—a gift *inter vivos*—of a diamond necklace to an intimate friend, and with ample expressions of donative purpose had delivered to the friend a key to a trunk, not then under her physical control, containing in addition to the necklace a number of other articles belonging to Mrs. Bowdoin. If the friend, the intended donee, takes the key and before Mrs. 30

Memorandum of Conclusions.

10 Bowdoin has made any change of purpose, actually obtains possession of the necklace, immediately upon thus obtaining possession of the necklace the gift becomes complete, but not one moment before. Until such possession had been obtained the gift would be revocable, and after the death of Mrs. Bowdoin the whole transaction would have stood legally as an incomplete gift entirely unenforceable at law or in equity.

20 I do not recall a single reported case where a gift *inter vivos* of a savings bank account or an amount of money due on a life insurance policy, or other non-negotiable contract, has been sustained in the courts against the alleged living donor by proof of delivery of the savings bank book or policy or other instrument which represents the subject matter of the gift with absolute donative purpose. It is a significant fact that our modern relaxed law has been developed in cases of gifts *causa mortis* or *gifts inter vivos* which have been for the first time asserted not against the donor but after his death against his estate.

30 Counsel for the parties in this case who at the request of the Court have searched the authorities on the subject, produce no case having authority in New Jersey which controls the present case. Counsel for the alleged donee in his brief states that the "precise question has never been passed upon in this State," but he thinks that authorities which he cites from other States sustain his contention. In regard to some of these authorities which I have examined, I may say in the words of Mr. Justice Dixon in the Keepers case, that I am "not willing to approve the extreme views

Memorandum of Conclusions.

which have been adopted in the cases cited." (p. 308).

The principal authority cited to sustain a gift of a part of a savings bank account evidenced by delivery of a draft for the amount so intended to be donated, together with the pass book, seems to be *Larrabee vs. Haskell*, 88 Me. 511, 34 Atl. Rep. 408. Without intimating approval of many of the propositions laid down in this case, it will, I think, be sufficient to deprive the decision of much if not all force and influence in this present case, to point out what was the exact state of facts with which the Maine court had to deal. The alleged donor was seventy-two years of age, and at the time of the alleged gift was suffering from his last illness, and the Court found that the gift was a gift *causa mortis*. The deceased gave a draft on his savings bank account for two hundred dollars and his pass book to the defendant who was nursing him and caring for him. The total deposit was \$486.26. When the draft and savings bank book were delivered, deceased said to the defendant: "Take this, Jim, when I am gone, draw the money, put a monument over my brother Stillman's grave and pay my funeral expenses, and the rest is yours." Defendant retained the book and draft until after the donor's decease, then drew the money, paid the funeral expenses, erected the monument and had twelve dollars left for his remuneration. It is not surprising that the administrators of the deceased were not permitted to recover the two hundred dollars from "Jim."

It is somewhat difficult to see why the law of gifts was discussed or applied in this case. There seems to have been a contract, and there are also

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Memorandum of Conclusions.

10 elements of a trust. After full performance of the contract on the part of the defendant without any interference or attempted revocation on the part of the administrators, it would be strange, indeed, if the administrators had been permitted to ignore all the contractual and fiduciary characteristics of the transaction between their decedent and the defendant, and to compel the defendant to pay over to them the one hundred and eighty-eight dollars which in pursuance of his engagement with the deceased he had expended upon the monument and funeral expenses, and also the residue of twelve dollars which the deceased agreed he was to have for his services. All of these expenditures and these services had been
20 rendered by the defendant in reliance upon his possession of the draft and the pass book. The draft or check might be regarded as an equitable assignment because it was not delivered as a gift, but as the consideration of a contract which the defendant performed.

In *Weatheron vs. Lord*, 58 N. Y. Sup. 778, the donor when approaching dissolution "expressed a desire to give the plaintiff, who was an old friend and had cared for him, the amount of deposit represented by the book," i. e., the amount of a savings bank deposit in the joint names of the donor and his wife "payable on draft of either." The Court found that the donor and his wife had an equal interest in the fund and hence presumably they held title to the pass book as joint tenants or tenants in common. The husband with donative purpose signed and delivered to the plaintiff a check for a larger amount than his half of the fund, and also delivered to the plaintiff the
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Memorandum of Conclusions.

savings bank book. There is nothing in the case to show that the donor did not effectually transfer his title to the book to the donee so as to give the donee the same dominion over the fund which the donor theretofore had. Without accepting the main proposition which was reached, I may say that the facts of the case are so different from the one at bar, that no authority can be attributed to it. I cannot discuss in detail the other cases cited by counsel for the Sisters of the Poor, in his elaborate brief, without unduly extending this memorandum. I may say, however, that I have examined all these cases and I find in them many propositions which as yet have not in any way been recognized as law in New Jersey, and which I am constrained to regard as unsound. 10

There is a marked contrast between the attitude of our modern law on the one hand, toward the right to make purely testamentary dispositions of property, and on the other hand, toward the right to make these *quasi* testamentary dispositions which are called gifts *causa mortis*, and the further right to make dispositions which in large numbers of cases in fact are testamentary by gifts *inter vivos* in form, which, however, are not asserted or subjected to hostile examination until after the donor's death. When land was made devisable, according to Blackstone, 2 Com. 376, "innumerable frauds and perjuries were quickly introduced * * * to remedy which the statute of frauds and perjuries, 29 Car. II c. 3 directs" that devises should be in writing signed by the devisor and subscribed in his presence by three witnesses. These guards for devises of land were recognized and confirmed in New Jersey by a 20 30 40

Memorandum of Conclusions.

statute passed in 1713. *Bradford* p. 34, *Kinsey* 46, *Pat.* 5, *Elmer's Dig.* 594.

10 Wills of personal property—testaments—were still left in a dangerously unprotected condition. At length statutes were passed limiting the use of verbal testamentary dispositions of personal property commonly called nuncupative wills. Mr. Paterson's act of 1795 contains these restrictions. *Pat.* 189. *Elmer's Dig.* 596. It is a curious fact that the law of 1795 expressly reserves the right of all persons to make wills of personal property as theretofore provided only that they should be "in writing." Letters, deeds, memoranda of any kind could be probated as wills if the required testamentary purpose could be proved. Only in 20 1837 in England and in 1850 in New Jersey (*Laws of 1850*, 280) were statutes passed prescribing safeguards for wills of personal property similar to those which had been provided by law for devises of land for two centuries. It may be surmised that most testators had real estate to devise and hence were obliged to make their wills as prescribed by the statute of frauds. The view expressed by Blackstone, 2 *Comm.* 502, that "the safer and more prudent way" is to have testaments "signed or sealed by the testator and published in the presence of witnesses" would naturally occur to most testators and their advisors. 30 No doubt, however, the fact that about two hundred years intervened between the statutes of frauds protecting devises of land and our present statute of wills protecting testamentary dispositions of personal as well as real property, indicates how slowly the great change in the relative

Memorandum of Conclusions.

importance of these two kinds of property has taken place and has been recognized.

At present the policy of our law is to enforce rigidly the statute which prescribes the form of a will of either lands or chattels and the ceremonies necessary for its valid execution.

When we come to examine our law of gifts *causa mortis* which are in effect a testamentary disposition of personal property, we find that not only has no statute been passed in many States including New Jersey, safeguarding the transaction against fraud, but the decisions of the courts have even repealed some of the rules and conditions which formerly imposed some protective limitations.

Formerly the *donatio causa mortis*, which was an importation from the civil law, was regarded with disfavor. In 1827 Lord Eldon in the case of *Duffield vs. Elwas*, 1 *Bligh* (N. S.) 833, expressed the opinion that it would be an improvement of the law to strike out altogether this peculiar form of gift, and intimated his regret that he was obliged to consider the subject. Chancellor Kent in discussing gifts *inter vivos* declares that "if the thing given be a chose in action, the law requires an assignment or some equivalent instrument and the transfer must be actually executed." 2 *Kent Comm.* 439.

Since the day of Lord Eldon and Chancellor Kent, however, the courts seem to have greatly relaxed the limitations and safeguards which originally surrounded both gifts *inter vivos* and gifts *causa mortis*, by extending the theory of effective legal delivery of the subject matter of the gift so as to make that theory include the delivery of

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Memorandum of Conclusions.

10 the instrument or voucher, the possession of which controls the subject matter of the gift. Our law still, I think, makes the absolute vesting of title to the voucher or instrument as a chattel in the donee, so as to make the same irrevocable by the donor, indispensable to the effectuation of a gift *inter vivos*.

20 It seems very strange when we have in view the strict provisions and the well recognized policy of our statute of wills, that a dying man, possessed of a fortune of one hundred thousand dollars in money, jewels and negotiable securities, can make what is in fact a testamentary disposition of this entire fortune through the form of a gift *causa mortis* theoretically without any witness to the transaction except the donee himself. This extreme result practically, if the test case were properly tried on behalf of decedent's estate, might not be reached, but to sustain the gift a single witness who would be qualified subsequently to testify is all that our present law requires. Our law, I think, has not been adjusted to meet a case like this, because it is extremely improbable that such a case will arise.

30 If there is danger from the relaxation of the older law of gifts and the maintenance of the law of gifts *causa mortis* in its present form, such danger pertains to the savings of millions of the inhabitants of the United States which are kept invested in savings banks. None of these small fortunes under our law of wills can be disposed of by a written testament in the usual way, without strict compliance with the law which requires the execution and publication of the testamentary instrument in the presence of two witnesses who

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Memorandum of Conclusions.

sign as witnesses in the presence of the testator and each other. A dozen credible witnesses standing by and witnessing the whole transaction, cannot prevent the will from being declared invalid, if, for instance, one of the attesting witnesses was brought into the transaction and signed his name a few minutes after the other part of the ceremony had been performed. And yet the little fortune invested in a savings bank account upon which this attempted testamentary disposition could not operate, can be obtained from the dying bed of the decedent, and with the aid of a single witness after the death of the decedent be established as a gift *inter vivos* or *causa mortis*. 10

In one or more of the States a statute has been passed providing that a gift *causa mortis* can only be established by two witnesses attempting plainly to assimilate the probate of the *donatio mortis causa* to the probate of a written will. 20

Entertaining the views which I do as to the danger of fraud through the easy establishment in the Courts of gifts *causa mortis* and gifts *inter vivos*, which are not subjected to scrutiny until after the death of the alleged donor, I do not think any one of these gifts should be upheld unless it is directly within what already has been declared and recognized as established law, and I am sustained in this attitude by the intimation of the policy of our law, which I think is most distinctly made by the Court of Errors and Appeals in the Keepers case. If the law of gifts of savings bank deposits attempted to be made by dying persons is to be extended so as to validate a donation like this, where the external form of the gift consists in the delivery of a check for 30
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Memorandum of Conclusions.
Final Decree.

10 a part of the account with the temporary loan of the pass book so as to enable the payee of the check to get it cashed at the bank, in my judgment such extension should be made by our court of last resort.

Final Decree.

IN CHANCERY OF NEW JERSEY.

	39/65.	
	BETWEEN	
20	THE PROVIDENT INSTITUTION FOR SAVINGS IN JERSEY CITY, <i>Complainant,</i>	} On Bill of Interpleader. Final Decree.
	and	
	SISTERS OF THE POOR OF ST. FRANCIS AND ANOTHER, <i>Defendants.</i>	

30 This cause coming on to be heard before the Court in the presence of Treacy and Milton, Esqrs., Solicitors for defendant Sisters of the Poor of St. Francis, and of Orlando H. Dey, Solicitor for defendant Benjamin C. Mead, Executor of the Last Will and Testament of Hannah L. Bowdoin, deceased; and the several statements and supplemental statements of the claims of said defendants being read, depositions of witnesses taken, and the arguments of the respective counsel heard; and it appearing that said

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Final Decree.

Hannah L. Bowdoin, in her lifetime, had deposited with the complainant the sum of \$3,000.00 to her account; that a deposit book with said sum credited therein to said Hannah L. Bowdoin, had been issued and delivered to her; that at the time of her decease, said sum of \$3,000.00 remained to her credit; that said sum was held by said complaint, for such person or persons as were lawfully entitled to receive the same, as appears by the Bill of Complaint filed in this cause; that the said defendant, Benjamin C. Mead, was and is the Executor of the Last Will and Testament of Hannah L. Bowdoin, deceased, and as such Executor was and is lawfully entitled to receive said sum, and that the said defendant Sisters of the Poor of St. Francis was and is not so entitled.

And it further appearing to the Court that the complainant was, by an interlocutory decree of this Court made on January 25, 1915, permitted to retain said sum of \$3,000.00 until the further Order of this Court, and that the same, with the accumulated interest thereon, less the costs of said complainant, still remains on deposit with it, and is subject to the Order and direction of this Court,

It is therefore, on this day of
 1916, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, and the said Chancellor, by virtue of the power and authority of this Court, does hereby ORDER, ADJUDGE and DECREE, that said sum of \$3,000.00 on deposit with complainant at the time of the death of the said Hannah L. Bowdoin, was the property of the said Hannah L. Bowdoin, and that upon her

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Final Decree.

10 death and the probate of her Last Will and Testament, the said defendant, Benjamin C. Mead, who was therein appointed the Executor thereof, and who has duly qualified as such, became, was, and now is entitled to said sum, together with all accumulation of interest thereon, as assets of the estate of the said Hannah L. Bowdoin, deceased; and that the balance of said sum, remaining on deposit with Complainant as aforesaid, after deducting Complainant's said costs, together with all interest accumulated thereon, be paid to said defendant, Benjamin C. Mead, Executor as aforesaid, or to his solicitor.

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Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

BETWEEN

THE PROVIDENT INSTITUTION FOR
SAVINGS IN JERSEY CITY,

Complainant,

and

SISTERS OF THE POOR OF ST.
FRANCIS, et al.,

Defendants.

Notice of
Appeal. 10

The Defendant, Sisters of the Poor of St. Francis, hereby appeals from the decree made the twenty-eighth day of February, 1916, in the above-stated cause and from the whole and every part thereof to the Court of Errors and Appeals as the last resort in all causes. 20

TREACY & MILTON,
Solicitors of the Defendant Sisters of the Poor of St. Francis.

JOHN MILTON,
Of Counsel.

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Dated April 7th, 1916.

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

JOHN MILTON,
Counsellor at Law.

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Petition of Appeal.

of the said Hannah L. Bowdoin and upon her death and the probate of her last will and testament the said defendant, Benjamin C. Mead, who was appointed executor thereof and who has duly qualified as such became, was and now is entitled to said sum, together with all accumulations of interest thereon as assets of the estate of the said Hannah L. Bowdoin, deceased, and that the balance of said sum remaining on deposit with complainant as aforesaid after deducting complainant's said costs together with all interest accumulated thereon be paid to said defendant, Benjamin C. Mead, Executor as aforesaid or to his solicitor. 10

And your petitioner humbly appeals from that part of the decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous for that this petitioner was and is entitled to the said sum of \$3,000, together with all accumulations thereon and the same was not at the time of the death of the said Hannah L. Bowdoin the property of said Hannah L. Bowdoin and did not become upon her death and probate of her last will and testament payable to Benjamin C. Mead and the said Benjamin C. Mead as Executor of the said Hannah L. Bowdoin did not become entitled thereto or if said fund at the time of the death of the said Hannah L. Bowdoin was her property the same did not upon her death and the admission to probate of her will pass to said Benjamin C. Mead as such executor, but in fact became the property of this petitioner. 20 30

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. 40

Answer to Petition of Appeal.

are contained, to be true, for answer thereto, nevertheless, says and admits, that a decree was, on the 20th day of February, 1916, made and entered in the Court of Chancery, in the cause for the purpose mentioned in the said Petition as therein stated; but as to the substance and form thereof, this Respondent prays to refer thereto when the same shall be produced; and this Respondent is advised and believes that the said Decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this Respondent. 10

*Solicitor for Respondent.
Of Counsel with Respondent.*

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Exhibit D-1.

IN THE NAME OF GOD, AMEN.

I, HANNAH L. BOWDOIN, of the City of Rahway, County of Union, and State of New Jersey, being of sound mind, memory and understanding, do make, publish and declare this writing to be my Last Will and Testament in manner following, that is to say: 30

FIRST: I direct and order that all my just debts and funeral expenses be paid and satisfied as soon after my death as conveniently can be.

SECOND: I give and bequeath unto my Executor hereinafter named, to hold in trust for Howard K. Biggs, of Evanston, Illinois, six shares of stock of the First National Bank of Jersey City, New Jersey, and direct my Executor when the said 40

Exhibit D-1.

Howard K. Biggs shall have reached the age of twenty-five years, to pay the same over to him, and in case the said Howard K. Biggs shall die before me, or before reaching the age of twenty-five years, then I direct the said legacy shall lapse and said stock shall become and be made a part of my residuary estate.

THIRD: I give and bequeath to Mary V. Coleman, of Trenton, New Jersey, the sum of Two Hundred Dollars in cash.

FOURTH: I give and bequeath to Martin Gundaker, son of Martin B. Gundaker, the sum of Fifty Dollars in cash.

FIFTH: I give and bequeath to the persons hereinafter named the following sums of money:

Susan Williams,	\$ 25.00
Hattie Biggs,	25.00
Anita Biggs,	25.00
Howard Biggs,	25.00
Foster H. Biggs,	25.00
Gussie Randolph,	25.00
M. B. Gundaker,	50.00
Agnes Bagley,	50.00
Rebecca (Bound Girl),	25.00
George E. Morris, of Morris Plains, N. J.	50.00
George M. Friese,	100.00
Benjamin C. Mead,	500.00
George E. Morris, my stock in N. Y. Central Railroad Company, John F. Newcomb, Cashier of National State Bank of Elizabeth, N. J.	250.00

Exhibit D-1.

SIXTH: I give, devise and bequeath unto Lucy E. Morris, the daughter of George E. Morris, of Morris Plains, New Jersey, my house and lot situated on the Southerly side of West Milton Avenue in the City of Rahway, New Jersey, to her and her heirs in fee simple forever.

10

SEVENTH: I request my Executor, hereinafter named, to give such of my personal effects as may be mentioned in a letter attached to and accompanying this Will, and to be taken as part of the same, to such persons named therein.

EIGHTH: I give and bequeath to the Rector, Wardens and Vestry of St. Paul's Church of Rahway, N. J., the Memorial Altar erected by me in memory of my late husband and now standing in the Chancel of said Church.

20

NINTH: I nominate; constitute, and appoint Benjamin C. Mead, of Rahway, Union County, New Jersey, Executor and Trustee of my estate, giving him full power to execute good and sufficient deeds for any and all real estate of which I may die seized, when and at such time in his judgment the sale of the same will be for the best interests of my estate.

30

IN WITNESS WHEREOF I have hereunto set my hand and seal this Sixth day of June, One Thousand Nine Hundred and Thirteen.

Hannah L. Bowdoin. (Seal)

40

Exhibit D-1.

Signed, Sealed, Published and De-
 clared by the said Hannah L. Bow-
 doin, to be her Last Will and Testa-
 ment, in the presence of us, who, at
 her request, in her presence, and in
 the presence of each other, have sub-
 10 subscribed our names as witnesses
 thereto.

Mrs. Laura LaForge,
 75 Milton Ave., Rahway, N. J.
 Charles H. Angleman, 83 Jacques Ave.
 Rahway, N. J.

STATE OF NEW JERSEY

UNION COUNTY SURROGATE'S OFFICE

20 I, GEORGE T. PARROT, Surrogate of the
 County of Union, do certify the annexed to be a
 true copy of the Last Will and Testament of
 HANNAH L. BOWDOIN, late of the County of
 Union, deceased, and that Benjamin C. Mead,

.....

 the executor therein named, proved the same be-
 fore me, and is duly authorized to take upon
 30 himself the administration of the estate of the
 Testatrix agreeably to the said Will.

WITNESS my hand and seal of
 office, this fourteenth day of Octo-
 ber in the year of our Lord one
 thousand nine hundred and four-
 teen.

Geo. T. Parrot,
Surrogate.

40 (Seal)

Exhibit D-1.

STATE OF NEW JERSEY

UNION COUNTY SURROGATE'S OFFICE

I, GEORGE T. PARROT, Surrogate and Clerk of the Surrogate's Court of the said County of Union, do hereby certify that I have compared the annexed copy of the last Will and Testament of HANNAH L. BOWDOIN, late of the County and State aforesaid, deceased, and of the Letters Testamentary issued thereon,.....

10

.....
.....
.....
.....
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.....
.....
.....

20

with the record thereof..... now remaining in this office, and have found the same to be a correct transcript thereof, and of the whole of such record.

WITNESS my hand and seal of office, this twentieth day of September, in the year of our Lord one thousand nine hundred and fifteen.

30

GEORGE T. PARROT,
Surrogate and Clerk of the Surrogate's Court.
(Seal)

40

Exhibit D-2.

In the mater of the Estate of
Hannah L. Bowdoin, deceased.

Union County Surrogate's Office.

Appointment of Appraisers.

10 I, BENJAMIN C. MEAD, Executor of the Last
Will and Testament of Hannah L. Bowdoin, de-
ceased, hereby appoint Nathan V. Compton and
Arthur E. Mead, two discreet and impartial per-
sons, to make an appraisement of the goods, chat-
tels, rights, credits, and effects whereof said de-
ceased died possessed, in pursuance of the statute
in such cases made and provided.

20 Dated, Rahway, N. J.,
December 1st, 1914.

Benjamin C. Mead,
Executor of the Last Will and
Testament of Hannah L. Bow-
doin, deceased.

I hereby approve the appointment of the above-
named Appraisers this fourteenth day of January,
Nineteen Hundred and Fifteen.

Geo. T. Parrot,
Union County Surrogate.

30 **INVENTORY AND APPRAISEMENT.**

The following is an inventory and appraisement
of the goods, chattels, rights, credits and effects
of Hannah L. Bowdoin, deceased, late of Rahway,
Union County, New Jersey, made by Benjamin C.
Mead, Executor, and Nathan V. Compton, and
Arthur E. Mead, Appraisers.

Exhibit D-2.

GOODS AND CHATTELS FOUND IN THE
HOME OF DECEASED, AT 68 WEST MIL-
TON AVENUE, RAHWAY, N. J.

BASEMENT DINING-ROOM.

Mahogany Table,	\$14.00	
3 chairs,	3.00	
4 Kitchen Chairs,	1.00	10
Refrigerator,	2.00	
Step Ladder,	.30	
Mirror,	.25	
2 Urns,	.25	
Carpet,	1.50	
China,	1.00	
Trunk,	.50	
	—	\$23.80

KITCHEN.

Gas Range,	1.00	20
2 Tables,	4.00	
Kitchen Utensils,	.50	
Lawn Mower,	.75	
2 Kitchen Chairs,	.10	
Small Mirror,	.10	
Basement Stair Carpet,	.25	
	—	6.70

HALL

Hall Carpet & Stair carpet	1.50	30
Hall Rack,	2.00	
2 Marble Top Stands,	2.50	
2 Oil paintings, 1 motto,	2.00	
2 chairs,	.50	
1 Lamp,	.50	
1 Trunk,	3.50	
Mat,	.25	
Lantern, Brooms, etc.	.50	
Chimes,	.25	
	—	13.50 40

Exhibit D-2.

PARLOR.

	Parlor Suit,	10.00	
	Slate Top Table,	2.00	
	2 Old Chairs,	.25	
	Gas heater,	1.25	
10	3 Vases,	1.00	
	1 Clock,	2.00	
	6 Pictures,	5.00	
	Bookcase,	8.00	
	1 Rug,	.75	
	Andirons,	1.00	
	Fire Irons,	4.00	
	3 Pillows,	.75	
	Tray, Tea-kettle, etc.	.75	
	Books,	1.00	
20			37.75

SITTING-ROOM.

	Parlor Suit,	14.00	
	2 Marble top stands,	2.00	
	1 Table (2 sections)	20.00	
	1 Sofa,	4.00	
	1 Side Board,	6.00	
	Cutlery, Glassware, Chinaware,	1.50	
	3 Pictures,	.75	
30	Lamp,	1.00	
	Ornaments,	.75	
	Part Blue Dinner set,	5.00	
	Rush Bottom Chair,	1.50	
	Mantle,	1.50	
	2 Mats,	.75	
	Jardoneir	.15	
			58.90

Exhibit D-2.

BACK BED-ROOM (2nd Floor)

Bed room suit and bedding,	15.00	
1 bed lounge,	2.00	
Small Mirror,	1.00	
2 Rush Bottom Chairs,	1.50	
Books, Ornaments,	.50	10
Rugs,	.50	
	<hr/>	20.50

FRONT BED-ROOM.

Cylinder Stove,	.50	
Gas Heater,	.25	
Rug,	1.50	
3 Clocks,	1.50	
Desk,	4.00	
Mahogany stand,	4.00	
Marble top stand,	3.00	20
Iron cot and bed clothes,	1.00	
Rocker,	1.00	
Rush Bottom Chair,	1.00	
3 covered chairs,	3.50	
2 pictures,	.75	
1 Large Mirror,	15.00	
	<hr/>	37.00

BATH ROOM.

Fixtures, Chairs, etc.	1.50	1.50	30
------------------------	------	------	----

UPSTAIRS HALL.

Stand,	.25	
Lamp,	.75	
Carpet,	1.00	
	<hr/>	2.00

Exhibit D-2.

BACK BED-ROOM (3rd Floor)	
	Bed, Bedding, etc. 3.00
	Rug, .30
	Trunk and contents, 3.00
	Bureau, 15.00
10	Stove, .50
	Chair, .30
	Bed-Room Stand, .25
	Andirons, 3.00
	Contents of Box, 2.00
	Trunk and Quilt, 2.00
	Steamer Trunk and Contents, 2.50
	————— 31.85
SMALL BACK BED-ROOM (3rd Floor)	
	Iron cot and bedding, 1.00
20	Rug, .25
	Bureau, .25
	Rush Bottom Chair, 1.00
1	Samm box, 1.00
	————— 3.50
FRONT BED-ROOM (3rd Floor)	
	White Enamel bed and bedding, 3.00
	Stand, .25
	Matting and Carpet, .50
30	2 Chairs, .50
	Hat rack, 3.00
	Bowl and Pitcher, .50
	Pictures, .50
	————— 8.25
WOOD-HOUSE.	
	Contents, 1.00
	Curtains throughout the entire dwelling, 7.00
	—————

Exhibit D-2.

-
- ° Appraised Value of Goods
and Chattels at #68 West
Milton Avenue, Rahway,
New Jersey, \$ 253.25

DEPOSITS IN BANKS.

Deposit in Security Savings Bank of Newark, N. J.,	967.14	10
Deposit at German Savings Bank of Newark, N. J.,	4,690.77	
Deposit at National State Bank of Elizabeth, stand- ing to the credit of Han- nah L. Bowdoin or Martin B. Gundaker,	1,324.69	
Deposit in the Howard Sav- ings Institution of New- ark, N. J.,	5,857.34	20
Deposit in the Provident In- stitution for Savings in Jersey City,	2,700.00	
Deposit in the Rahway Na- tional Bank at Rahway, N. J.,	379.88	
° Total amounts on deposit in Banks,	\$15,919.82	30

STOCKS, BONDS, ETC.

Fractional stock scrip certifi- cate #13 of the New York Central & Hudson River Railroad Company, Dated January 3, 1910,	75.00	
Stock Certificate #A-61836 representing 3 shares,		40

Exhibit D-2.

	\$100 each of the capital stock of the New York Central and Hudson River Railroad Company, Dated April 25, 1904,	216.00
10	Stock Certificate #A-40661, representing 10 shares, \$100 each, of the capital stock of the New York Central & Hudson River Railroad Company, dated October 20, 1904,	720.00
20	Stock Certificate #A-95893, representing 1 share, \$100, of the capital stock of the New York Central & Hudson River Railroad Company, Dated May 8, 1902,	72.00
30	Stock Certificate #171031, representing 3 shares, \$100 each, of the capital stock of the New York Central & Hudson River Railroad Company, Dated January 3, 1910,	216.00
	Stock Certificate #A-93990, representing 1 share, \$100, of the capital stock of the New York Central & Hudson River Railroad Company, dated April 29, 1902,	72.00

Exhibit D-2.

Stock Certificate #180, representing 6 shares, \$100 each, of the capital stock of the First Na- tional Bank of Jersey City, dated February 27, 1865,	1,950.00	10
Four (4) Interest Coupons, \$10 each, Series #15756, of the United Electric Company of New Jersey,	40.00	
Four (4) Interest Coupons, \$10 each, Series #15757, of the United Electric Company of New Jersey,	40.00	
4% Gold Bond of the United Electric Company of New Jersey. Amount \$500, Series #15756,	375.00	20
4% Gold Bond of the United Electric Company of New Jersey. Amount \$500, Series #15757,	375.00	
° Total appraised value of Stocks, Bonds, etc.,	\$4,151.00	30

JEWELRY, ETC.

1 Gold Watch and Chain,	15.00
6 Vest Buttons,	1.00
1 Watch Charm,	2.00
2 Cluster Rings,	50.00
1 Hair Breast Pin,	2.00
1 Hair Chain,	3.50
1 Stick Pin,	4.00

Exhibit D-2.

1 Opal and Diamond Ring,	30.00
1 Plain Gold Ring,	2.50
1 Ebony and Gold Cross,	3.00
1 Gold Medal,	2.00

10 ° Total appraised value of Jewelry, etc., \$115.00

RECAPITULATION.

Goods and Chattels at #68 W. Mil- ton Avenue, Rahway, N. J.,	253.25
Deposits in Bank,	15,919.82
Stocks, Bonds, etc.,	4,151.00
Jewelry, etc.,	115.00

° Total, \$20,439.07

Dated, January 2, 1915.

20

Benjamin C. Mead,
Executor.

Nathan V. Compton,
Arthur E. Mead,
Appraisers.

STATE OF NEW JERSEY, }
COUNTY OF UNION, } ss.:

30 BENJAMIN C. MEAD, of full age, being duly
sworn on his oath according to law, deposes and
says:

That he is the Executor of the Last Will and
Testament of Hannah L. Bowdoin, deceased, and
that the foregoing Inventory by him made is a
just, true and perfect Inventory of the goods and
chattels, rights, credits, and effects of the said
Hannah L. Bowdoin, deceased, as far as they have
come to his possession or knowledge.

40

Exhibit D-2.

Subscribed and sworn to,
before me, this 12th day
of January, 1915.

Benjamin C. Mead.

Chas. J. Stamler,
Master in Chancery of N. J.

10

STATE OF NEW JERSEY, }
COUNTY OF UNION, } ss.:

NATHAN V. COMPTON, of full age, being
duly sworn, on his oath, according to law, deposes
and says: That he is one of the Appraisers who
signed the foregoing Inventory, and that the goods
and chattels, rights, credits, and effects in said
Inventory specified were appraised by him at their
just and true respective values, according to the
best of his judgment; and that Arthur E. Mead,
the other Appraiser, whose name is subscribed to
said Inventory, was present at the same time,
and consented to the said valuation and appraise-
ment.

20

Subscribed and sworn to,
before me, this 12th day
of January, 1915.

Nathan V. Compton.

30

Chas. J. Stamler,
Master in Chancery of N. J.

40

New Jersey Court of Errors and Appeals.

Between

THE PROVIDENT INSTITUTION FOR
SAVINGS IN JERSEY CITY,

Complainant,

and

SISTERS OF THE POOR OF ST. FRAN-
CIS,

Defendant-Appellant,

and

BENJAMIN C. MEAD, Executor, &c.,

Defendant-Respondent.

10

On Appeal
from
Chancery.

20

BRIEF FOR APPELLANT.

This is an appeal from a decree of the Court of Chancery by the Sisters of the Poor of St. Francis, one of the defendants in an interpleader suit.

Mrs. Hannah L. Bowdoin, an old lady eighty-six years of age, died September 9, 1914, in St. Francis Hospital in Jersey City, which institution is under the management and control of the Sisters of the Poor of St. Francis.

30

The day before she died Mrs. Bowdoin gave to the Sisters a check upon her savings bank account with the Provident Institution for Savings in Jersey City for \$3,000. The balance in the account at this time amounted to \$5,700. She turned over to the Sisters of the Poor of St.

40

Francis her bank book. The check, together with the pass book, was presented to the bank and payment was refused. After Mrs. Bowdoin's death the check and bank book were again presented to the bank by the Sisters of the Poor of St. Francis and payment was again refused. Subsequently a suit was instituted by the Sisters of the Poor of St. Francis against the Provident Institution for Savings to compel them to pay the amount of the

10 check. The bank thereupon filed its bill of interpleader making defendants therein the Sisters of the Poor of St. Francis and Benjamin C. Mead, executor. Decree was granted by the Court of Chancery interpleading the two defendants. Both defendants filed claims and the matter came on for a hearing before Vice-Chancellor Stevenson, who signed a decree denying the right of the Hospital to the fund on the ground that it was not a valid gift.

20

I.

The donor was competent to make the gift. She had the benefit of independent counsel and the donee is shown not to have exercised any influence over the donor by the best possible proof—that of independent witnesses.

The testimony appears to be clear that Mrs.

30 Bowdoin was not actuated by any sudden impulse in giving this money to the Hospital. She had expressed her intention of doing something for the Hospital for some time prior to the actual turning over of the check to the hospital authorities, having been a patient in the hospital on at least one occasion prior to the one which proved to be her last illness.

Benjamin C. Mead (p. 22):

40

“Q. She had been there many times in the

last few years, had she not? A. Only once before that that I am aware of.

"Q. Had you talked to her once or more than once regarding the hospital? A. Several times.

"Q. Can you fix with reasonable accuracy how long before her death it was that you discussed the hospital with her? A. Well, discussed it in what way?

"Q. With regard to her feeling towards the hospital or whether she had any intention of doing anything for the hospital? A. Well, it was in June when she first broached the subject. 10

"Q. The June before her death? A. Yes.

"Q. That would be June, 1914? A. Yes.

"Q. What did she say then about it? A. Well, she said that the Sisters had been very good to her, and she wanted to do something for the hospital.

"Q. Is that all she said? A. No. She asked me what I would suggest in the nature of a gift or a memorial. 20

"Q. What did you say to her? A. That was all the conversation at that particular time.

"Q. When next did you talk to her about it? A. About two weeks later.

"Q. And what was the conversation at that time? A. She wanted to know if I had thought the matter over, and if I had any suggestions to make, and I suggested a memorial window or something of that sort, and that was about all, I think."

Case, p. 24:

"Q. Did you later talk to her about this bed? A. Oh, yes, several times." 30

Case, p. 50:

"Q. Did she say what her intention was? A. No, she just told me to go and get the money.

"Q. How do you know what her intention was? A. I know since June it was her intention to give something to the hospital.

"Q. Because of what? A. Because of her statement that she so intended to." 40

Nothing can be clearer than that the donor in this case had determined after the most mature deliberation to make a gift to the Hospital. For more than two months she had had it on her mind and had a number of times during the period from sometime in June to September 8th conferred with the man who transacted her affairs about the matter. This is not a case in which a person in the custody or under the control of another has made

10 a gift to the latter without opportunity for independent counsel. Her consultant was her own business agent. He had no connection with the Hospital and it is clear that nobody connected with the Hospital had ever talked to her on the subject because she didn't know what would be the most appropriate gift until her agent said he would find out. The check for the gift was drawn at her direction by her business agent who procured another

20 business man in the neighborhood to witness the check (it being a savings bank check). And this other business man, Mr. Brown, had a conversation with her in which she said she wanted to endow a bed in the hospital and says that while the check was being prepared by her business agent, Mr. Mead, and signed by Mrs. Bowdoin and witnessed by himself, he and Mrs. Bowdoin and Mr. Mead were the only persons in the room (Case pp. 30-31).

30 In the light of this testimony from unbiased witnesses we respectfully submit that the statement in the Vice-Chancellor's opinion that "The circumstances under which this gift was made made it the duty of the donee to produce all the testimony obtainable to show that Mrs. Bowdoin was competent to make the gift and acted without undue influence from the agents of the donee" is not a correct statement of the facts or the law of this case.

40 Indeed the Vice-Chancellor states that he does

not decide the case upon those grounds; that there can be no question of donative interest and that the attempted gift was a recognition of the kind treatment the donor had received at the Hospital, and he proceeds to decide it upon the question as to whether or not delivery of the check with donative purpose, and delivery of the savings bank book in order to enable the payee to cash the check and accomplish the purpose of the donor, effected a complete donation. It will be remembered that the donee presented the check and bank book to the bank for payment during the life of the donor. (Case, pp. 44, 45). 10

The Court bases its decision solely upon the question, was the external form of the gift sufficient to pass the legal test? It says, page 76:

“If Mrs. Bowdoin had delivered her pass book, which stood as a voucher controlling fifty-seven hundred dollars, to the Mother Superior, with the intention of vesting an absolute title to the book in the donee in order that the donee might have absolute dominion over the fund which it represented and thereby become its owner, the gift would have been complete at once—complete and irrevocable. There would have been no *locus pœnitentiæ*.” 20

It makes a distinction between such a case and one in which the pass book is delivered to the donee with a check for part of the fund evidenced by the pass book. 30

II.

The delivery of the check, together with the pass book, to the donee, followed as it was, by the presentation of the pass book to the bank, constituted a consummated gift.

The question then resolves itself into this: Can
10 a valid gift inter vivos be accomplished of part of
a fund in a savings bank by delivery of a check or
draft and the bank book to the donee for the pur-
pose of giving the donee the effective means to
withdraw the subject matter of the gift followed
by the donee's presentation of the check and book
to the bank? In other words, can a gift of part of
a savings bank fund be made? The Court below
holds it cannot and that the donor must give the
entire fund or nothing. For there is no other
20 method of making a gift of part of a fund than
that adopted in this case. Everything that the
donor could do to effectuate the gift was done by
her and everything that could have been required
of the donee to obtain possession of the gift was
likewise done. We are sure that there is no such
paradox in the law and we assert that if a person
can give the whole of a fund he can give part of it.
It would seem to us that the mere statement of
that proposition was sufficient and we would not
30 proceed further were its soundness disputed by a
less learned person than the distinguished Vice-
Chancellor who decided the case. If Mrs. Bowdoin
had 5700 barrels of flour in a warehouse she could
make an assignment of 3000 of them to another
and the delivery of the written assignment to-
gether with the warehouse receipt is all that would
be necessary to transfer title to the 3000 barrels to
the assignee. Upon presentation of the assignment
and the warehouse receipt to the warehouseman
40 the assignee would be entitled to possession of the
amount assigned. In theory the case at bar is

similar, viz., an assignment of \$3,000 out of \$5,700 by the delivery of a check and the bank book to the assignee who presents the same to the bank for payment.

We are in absolute accord with the Court's statement that the donor must strip himself of all ownership and dominion over the subject matter of the gift, and the case of *Cook vs. Lum*, 55 N. J. L., cited by the Court instead of being against our view confirms it. For, our insistment is that the delivery to the donee of the check and the indicia of ownership was a stripping of the owner's dominion over the fund assigned. 10

"It is regarded as the settled law of this state that the delivery of a saving's bank pass book without more, with intent to make a gift of the deposit, carries with it the fund". *Laing v. Durand*, 93 Atl., 884, citing *Van Wageningen v. Bounot*, 72 N. J. Eq., 143, 74 N. J. Eq., 843. 20

The Vice-Chancellor treats as analogous to the case at bar the case of *Keepers v. Fidelity & Deposit Company*, 56 N. J. Law, 302. The Keepers case dealt with securities which were lodged in a box which was kept in a closet in another room than that in which the donor lay and the donor merely delivered the key to the box. The key to the closet was in the possession of a third person and the donee made no attempt to take possession of the book. We may add that the Keepers case was concerning a gift causa mortis. The analogy utterly fails in the case at bar. We are dealing with a fund in a bank. The pass book and check were given to the Hospital and the Hospital presented them to the bank for payment prior to the death of the donor and it was only by reason of the hesitancy of the bank in paying the same so as to enable it to make inquiry that the gift was not completed in such a manner that it could never be questioned (Case pp. 44, 45). 30 40

In the case of *Travelers Insurance Company vs. Grant*, 54 Equity, 208, Vice-Chancellor Pitney says, page 212, in speaking of the validity of a gift:

10. "The sensible rule is that the delivery must be such a tradition as the nature of the subject admits of. And surely the delivery of the formal writing which evidences the debt and forms the foundation of the right of action is the best and only delivery of which the subject is capable."

While the precise question as to the gift of part of a savings bank fund has never been passed upon in this State, it has been passed upon in other states.

20. The case of *Larribee vs. Hascell*, 88 Me. 511, 34 Atl., 408, which was cited by us in our brief before the Chancery Court and which is criticised by Vice-Chancellor Stevenson was quoted with approval in the case of *Pfeifer vs. Badenhoff*, 86 N. J. L., 492 by the Supreme Court, Justices Swayze, Parker and Kalish sitting.

Justice Parker, page 494, says:

30. "In *Larribee vs. Hascall*, 88 Me. 511, 34 Atl. Rep., 208, a gift causa mortis of \$200., part of a savings account, by draft, was upheld where the book showing more money than that amount on deposit was delivered with the draft. The test of a valid delivery in such a case seems to be the transfer of the legal power to control the fund. It is common knowledge that payment of savings bank deposits cannot be enforced without the title as a gift causa mortis. There was ~~destruction.~~"

40. The Larribee case was in the Supreme Judicial Court of Maine. It was a suit by the plaintiff as administrator to recover of the plaintiff \$200. claimed to belong to the estate of decedent and drawn by defendant from a savings bank two

book except perhaps in cases of loss or destruction.

days after the death upon a check. Decedent had delivered the check together with the savings bank book to the defendant saying: "Take this Jim. When I am gone draw the money, put a monument on my brother Stillman's grave, pay my funeral expenses and the rest is yours." Defendant took the check and book and retained them until after the death. He then drew \$200. and afterwards surrendered the bank book.

The Court held:

10

"Had the order been for the full amount represented by the savings bank book, there could be no question but that such an order, accompanied by the bank book, would constitute a valid transfer of the funds, without further notice, or even an acceptance of the order by the bank."

*"In the case at bar, the order, it is true, was not for the full amount of the deposit represented by the bank book, but, notwithstanding that fact, the intention of the deceased is clearly manifest, and that was to transfer a specific and definite sum. With the delivery of that order and the bank book to the defendant, we are unable to perceive any valid reason why the deceased did not thereby transfer his title to that specific sum as effectually as though it had been for the entire amount of the deposit. Such was undoubtedly his intention, manifested by the language of the order itself and the attendant circumstances. * * * This delivery of the evidence and means of reducing the gift to possession was sufficient, so far as the element of delivery was concerned, to pass the title as a gift causa mortis. There was actual delivery so far as the nature of the property would admit of."*

20

30

The same question has been considered by the courts of New York and the same conclusion arrived at. In the case of *Weatheron vs. Lord*, 58 N. Y. Sup. 778, it was held:

40

10 “The fact that the sum was less than the amount of money represented by the book does not appear to us to be of any consequence. The gift was of money. The amount was specified; it was absolute and certain. The evidence of the gift was the delivery of the bank book and the order. This was essential in order to place the plaintiff in the same position that the donor would have been in if he had gone to draw the money in person; and there was nothing more that could have been done to effect the delivery of the thing itself except the donor in person drew the money and handed it to the donee * * *.”

There are also numerous decisions in other states some of which are the following:

Jacobs vs. Jolly, 29 Ind. App. p. 25
(62 N. E. 1028).

20 “The return of a book to the donor to enable her to draw her portion of the deposit will not invalidate the gift. The fact that donor retains a portion of her deposit which is evidenced in the deposit book delivered to the donee does not invalidate the gift as there is a complete transfer of the possession of the portion thereof constituting such of the gift as it is capable of.”

30 “The return of the book to the donor for the sole purpose of enabling her to obtain the balance from the bank without relinquishing the prior gift of a portion of the fund would not invalidate or affect the previously executed gift. If a gift has been fully executed the title having passed by words of gift accompanied by delivery of possession the return of the property by the donee to the donor for a purpose not inconsistent with the continued ownership of the donee will not render the executed gift invalid.”

40 *Whitford v. Horn*, 18 Kan., 455; in re Wachter's Estate, 17 Misc. Rep., 137, 38 N. Y. Supp., 941; *Easley v. Dye*, 14 Aka., 158; *Danley vs. Rector*, 10 Ark., 211; *Aller v.*

Knowlton, 47 Vt., 502; *McNally v. McAndrews*, 98 Wis., 62, 73 N. W., 315; *Crittender v. Insurance Co.*, 41 Mich., 442.

Goodridge vs. Rutland Savings Bank, 81 Vt., 147, 69 At. 651.

“A present valid gift of a deposit in bank may be found from the delivery by the depositor to her donee with the deposit book and an order on the bank notwithstanding that the depositor said at the time that she wanted the interest if she needed it to accumulate and that when she got through with it the remainder should go to the donee; such a reservation of interest not modifying the gift.”

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The case of *Swayze vs. Huntington*, 82 N. J. J. Eq., 127, is also referred to by the Vice-Chancellor in his opinion. In this case M. gave a large envelope containing nine small ones to H. who put them back in the donor's safe. After the latter's death it was found that the small envelopes contained certificates of stock intended for various persons. M. continued to receive the dividends on the stock up to the time of his death. It was held that there was not a delivery. There is certainly no parallel between that case and the one at bar.

20

The \$3,000 is the subject matter of the gift and not the bank book and the donor has stripped himself of all ownership and control of this as well as the means of drawing out the balance of the fund for the bank book is the property of the Hospital until the purpose for which it was given has been accomplished, i. e., the withdrawal of the \$3,000.

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III.

The delivery of the bank book to the hospital constituted a bailment and the hospital thereby acquired a property right in the bank book.

It is true that in the case at bar Mrs. Bowdoin only gave a draft of part of the fund and only
 10 gave the pass book to the Hospital for the purpose of drawing out the money represented by the draft, but when the pass book came into the possession of the Hospital it immediately became a bailee and thereby acquired a property right therein.

The bailment was a mere commodation but nevertheless the Hospital could by legal means
 20 *prevent anyone* from taking away from it the subject matter of the bailment (the pass book).

5 Cyc. 171.

“The bailee has by virtue of the bailment and until its termination a special property or possessory interest in the subject matter which entitles him whatever be the class of the bailment to avail himself of any legal means to defend it against any person who may interfere with his accomplishing the purpose of the bailment.

30 “In cases where the bailment is for a time certain or for a specific purpose the donor is answerable to the bailee for removing the property before the time has expired or the purpose is accomplished.”

McConnell vs. Maxwell, 3 Blacks (Ind.) 419, 26 A. M. Dec., 428;

Snowden vs. Kessler, 76 Mo. App., 581;
Neafie vs. Patterson, 42 Leg. Int. (Pa.) 395;

40 *Burdick vs. Murray*, 3 Vt., 302, 21 A. M. Dec., 588.

The fact that the bank book is still in the possession and control of the Hospital and that the executor has made no attempt to regain possession for the estate is a strong indication that this principle is recognized by the executor.

The Courts which have passed upon the question involved in the case at bar have all sustained the contention of the Sisters of the Poor of St. Francis. We have been unable to find any decision holding the contrary view. 10

It is respectfully urged that a valid gift *inter vivos* was established—the donative intention proved, delivery was made of the subject matter of the gift, i. e. the funds in bank and the donor stripped herself of all ownership and dominion over the subject matter.

The delivery that was made in this case was as complete and full as could have been made by the donor. Nothing further could have been done by her to put the Hospital in the position to obtain the money. By the delivery of the pass book together with the check the donor stripped herself of all dominion over the subject matter of the gift, viz, the fund. 20

It is respectfully submitted that judgment should be for the Sisters of the Poor of St. Francis.

TREACY & MILTON,
Solicitors for Appellant. 30

JOHN MILTON,
Of Counsel.

The fact that the bank book is still in the possession and control of the hospital and that the executor has made no attempt to transfer possession for the estate is a strong indication that this property is controlled by the hospital.

The Court will grant summary judgment in the case at bar only if sustained the contention of the estate of the foot of the estate. We have been unable to find any evidence holding the contrary view.

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It is respectfully urged that a final ruling give you established—the doctrine of the general delivery was made of the subject matter of the gift & the funds in bank and the donor stripped himself of all ownership and dominion over the subject matter.

The delivery that was made in this case was an absolute and full one and could have been made by the donor. Nothing further could have been done by her to put the hospital in the position to obtain the money by the delivery of the pass book to the hospital as the donor retained control of the funds.

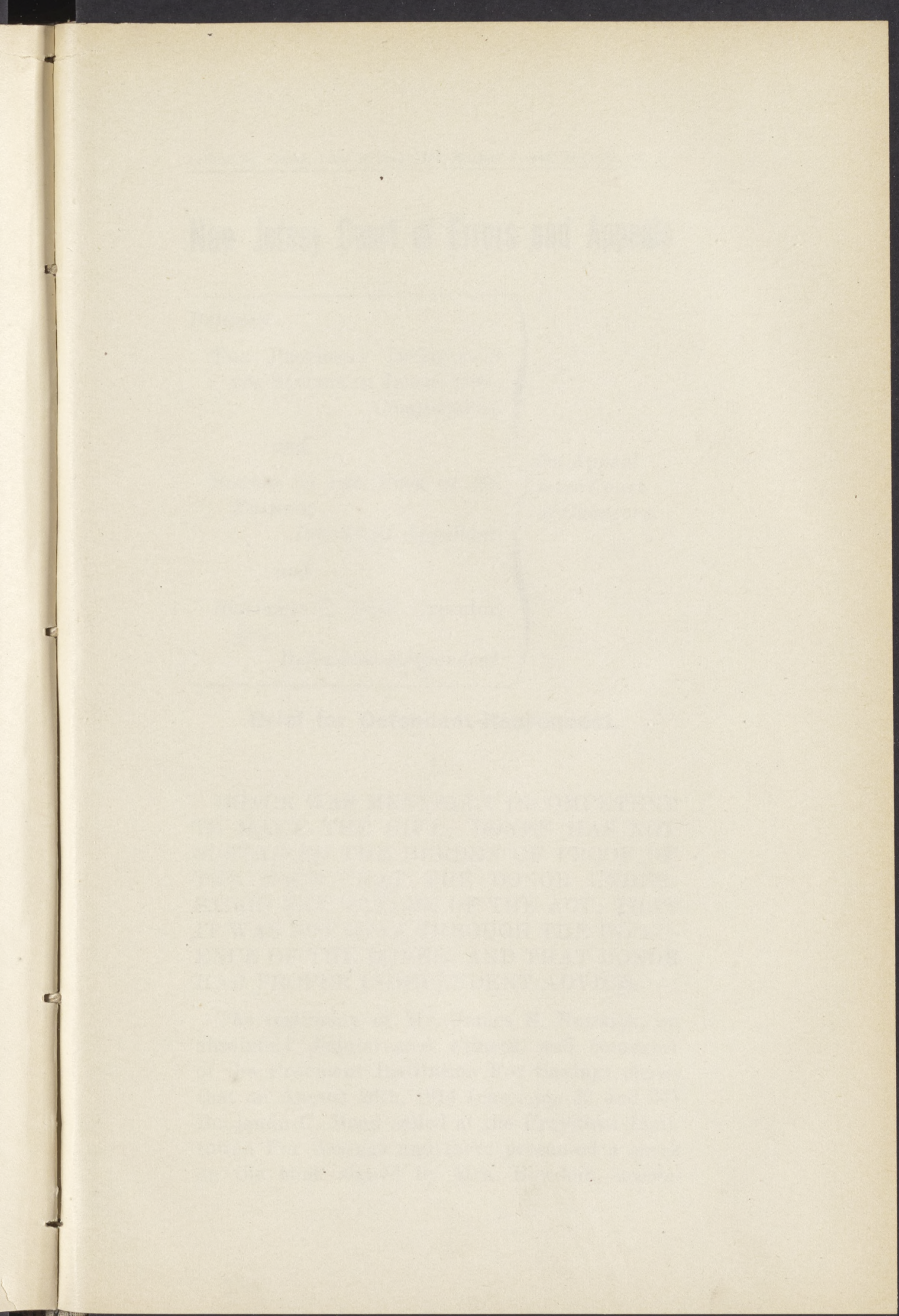
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The Court is respectfully submitted that judgment should be for the estate of the foot of the estate.

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Very respectfully,
 JAMES H. HAYES
 Of Counsel

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New Jersey Court of Errors and Appeals

Between

THE PROVIDENT INSTITUTION
FOR SAVINGS IN JERSEY CITY,
Complainant,

and

SISTERS OF THE POOR OF ST.
FRANCIS,
Defendant-Appellant,

and

BENJAMIN C. MEAD, Executor,
&c.,
Defendant-Respondent.

*On Appeal
from Court
of Chancery.*

Brief for Defendant-Respondent.

1.

DONOR WAS MENTALLY INCOMPETENT TO MAKE THE GIFT. DONEE HAS NOT SUSTAINED THE BURDEN OF PROOF OF THE FACT THAT THE DONOR UNDERSTOOD THE NATURE OF THE ACT; THAT IT WAS NOT DONE THROUGH THE INFLUENCE OF THE DONEE; AND THAT DONOR HAD PROPER INDEPENDENT ADVICE.

The testimony of Mr. James S. Newkirk, an absolutely disinterested witness, and treasurer of the Provident Institution For Savings, shows that on August 26th, 1914 (case, pp. 33 and 34) Benjamin C. Mead called at the Provident Institution For Savings and there presented a check on the bank signed by Mrs. Bowdoin, accom-

panied by a letter in which she requested the bank to

“please inform the bearer of the amount of the balance in your institution,”

that Mr. Mead was informed of the balance of the account and then presented the check for the purpose of drawing the money from the bank. The bank refused to pay the check on account of the fact that some two or three years prior Mrs. Bowdoin had served on the bank a so-called “stop-payment-order,” the object of which was to notify the bank not to pay anyone, any of the funds in Mrs. Bowdoin’s account. Upon the bank’s refusing to honor the check Mr. Mead stated that he would have an order revoking the stop-payment-order within an hour. Mr. Mead obtained from Mrs. Bowdoin an order revoking the stop-payment-order and presented it to the bank and on the following day to wit, August 27th, 1914, Mr. Newkirk visited Mrs. Bowdoin at St. Francis Hospital and questioned her about having revoked the stop-payment-order. Mrs. Bowdoin

“denied ever having signed such an order, to her knowledge, and did not want the money withdrawn, and signed an order revoking any order previous to it, which is signed by her in the presence of the two house physicians” (page 35).

At the time of this interview with Mr. Newkirk, Mrs. Bowdoin was in a very weak condition (page 36). The following is a copy of the order signed by Mrs. Bowdoin at that time (page 42):

“To the Provident Institution For Savings: I hereby revoke order purporting to have been signed by me, authorizing you to

pay to Benjamin C. Mead, the full amount due me from your Institution. I have no recollection of signing such an order.

Hannah L. Bowdoin.

Signed in the presence of F. J. McLoughlin,
F. C. McCormack,
St. Francis Hospital."

On the occasion of this interview Mrs. Bowdoin also said to Mr. Newkirk (page 42)

"that she did not remember having signed any such order (referring to the order which Mr. Mead had obtained and which purported to revoke the stop-payment-order). Mr. Newkirk testifies (page 42):

"I said, 'Will you sign an order revoking any order purporting to have been signed by you?' and she said 'yes,' and I drew this."

Witness then referred to the order witnessed by Drs. McLoughlin and McCormack, a copy of which is set forth *supra*.

On September 8th, 1914, the day before Mrs. Bowdoin's death, one of the Sisters presented a \$3,000 check, which is the basis of the hospital's claim to a gift, together with Mrs. Bowdoin's deposit book, to the bank, but payment was refused. On this day after refusing payment of the check Mr. Newkirk went to see Mrs. Bowdoin again. He says (page 45):

"I found her much more feeble than she was the week before the 27th. I asked her if she signed the check to the order of St. Francis Hospital and she admitted she had, and this question of the endowment of a bed in the hospital was brought up and I asked if she wanted to give the hospital \$3,000 and she first replied,

'I don't know. I might need it myself.'
She made that answer.

Q You say the question of the endowment was brought up. Who brought it up?

A I don't know whether it was the Sister Superior, but one of the nurses was there.

The Vice-Chancellor. Mr. Newkirk, who was there when you got there?

Witness. Mr. Mead was there for one, and the Sister Superior—I presume she was—she was the Sister Superior, yes, and the nurse, I think.

Q You had this conversation with Mrs. Bowdoin in their presence? A Yes."

Although it appears that Mrs. Bowdoin had spoken to Mr. Mead on several occasions about making some appropriate gift to the hospital nevertheless there appears to be very meagre and no definite proof that she had positively made up her mind—if she was competent to make up her mind—to give the hospital \$3,000. When Mr. Mead told her it would cost that much to endow a bed she said (page 24):

"My, that's a great deal of money, isn't it?"

On September 8th, 1914, when the \$3,000 check is alleged to have been delivered, Mr. Mead says that the subject of endowing a bed was not discussed to any extent (page 24).

Q Mr. Mead, how did you come to make out this check? A I made it out by Mrs. Bowdoin's directions.

Q What did she say when she directed you to make it out? A She told me to go to a certain white box she kept on the table, and get a check on the Provident Savings Institution and draw a check to the order of St. Francis Hospital for \$3,000.

Q Did she say anything about the purpose for which the check was to be drawn?

A No, not at that time that I can recall. * * *

Q Now after the check was signed what was done with it? A Well, I can't remember every detail, but I think that Mrs. Bowdoin took the check and the bank book and handed it to the Sister, the Sister Superior, I think.

Q Did she say anything to the Sister Superior when she handed it to her? A She did make some remark but I could not tell you what it was. Something like "Here is your check" or something of that kind." * * *

(Page 26):

Q Was there any discussion after the book and check were delivered to the Sister Superior about the presentation of the check to the bank for payment?

Mr. Vail. By whom?

Mr. Milton. In the presence of Mrs. Bowdoin?

A No, there was not.

William H. Brown, whose name appears as the witness on the \$3,000 check, testifies to the facts surrounding the alleged execution and delivery of the check to the Sister Superior (page 31):

Q After that was done did the Sister Superior return to the room? A She did and Mrs. Bowdoin called her over to the bed and she said, "Here Sister," and I saw her hand her some papers, but I did not know what she handed her.

Q What did she say? A She said, "Here, Sister, is what I promised you," or something, I don't exactly recall it but I

saw her hand her something and say, "Here, Sister."

Q You are not able to say whether it was the pass book and check? A No. She had the pass book and check in bed with her at that time.

At the time this \$3,000 check was prepared Mr. Mead, at Mrs. Bowdoin's direction, also prepared another check to his own order for \$2,000 (page 55):

Q She signed the \$2,000 check at the time she signed the other? A No, the check for \$2,000 was the check she had previously drawn but had not filled in the amount (referring to the check which Mrs. Bowdoin at first signed in blank and which Mr. Mead had taken on his first trip to the bank when Mrs. Bowdoin had requested him to withdraw the total amount of her deposit). She told me to fill in that check for \$2,000 and handed it to me, and I said, "What is that for?" and she said "that's for Mr. B. C. Mead."

These facts bring the case within the rule enunciated in *Haydock v. Haydock* (Err. & App.), 34 N. J. Eq., page 570, where Justice Reed at page 574 says:

"I take the rule to be settled that where a person enfeebled in mind by disease or old age, is so placed as to be likely to be subjected to the influence of another, and makes a voluntary disposition of property in favor of that person, the courts require proof of the fact that the donor understood the nature of the act, and that it was not done through the influence of the donee."

And again on page 575:

“The influence which is undue in cases of gifts *inter vivos*, is very different from that which is required to set aside a will. In testamentary cases, undue influence is always defined as coercion or fraud, but, *inter vivos*, no such definition is applied. 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.”

In the Haydock case it was contended that donor was mentally incompetent to make the gift and it was said that admitting that the donor had sufficient mental power yet the burden was upon the recipients of the gifts to show the fairness of the transaction. Donor was a man of weak mind and feeble body. The wife, who was the donee, was the one upon whom he naturally leaned. She watched his movements and cared for his wants and he submitted himself to her control. She naturally and necessarily became the head of the house while they so lived together, and while none but the wife and her brothers were about him, without the advice of disinterested counsellors, the old man made the gifts of which she was the recipient. Numerous instances of the donor's forgetfulness were proven and showed that he had a mind upon which the business occurrences with which he was concerned left but a feeble impression. It appeared by the testimony that the remembrance that he had done any of the recurring business acts which he had been accustomed to transact, faded from his mind almost as soon as they were done, and he would within a short period

of time, offer to do the same act again and again.

These facts closely parallel the facts of Mrs. Bowdoin's case. She was a lady of 86 years of age and had been in the hospital for many months prior to her death. She was of course dependent for her wants upon the Sisters. She was very feeble in body and the testimony clearly shows that her mind was weak. She lived barely one day after she made the check to the hospital. Her mind was so weak that she did not remember having served on the bank the stop-payment-order. She first directed Mr. Mead to draw the entire amount of her deposit, \$5,700, and bring it back to her. She was in bed at the hospital at the time and the fact that she had no place to put \$5,700 in cash raises a question as to her mentality. She then signed an order, which Mr. Mead presented to the bank, revoking the stop-payment-order, but on the day after she had signed it when she was visited by Mr. Newkirk, she told him that she did not remember having signed any such order and at Mr. Newkirk's request signed another order revoking the previous order authorizing Mr. Mead to obtain the full amount due from the institution. Then shortly after this she signed the two checks for \$3,000 and \$2,000 respectively. And after their presentment to the bank Mr. Newkirk again called on her asking her if she had signed the hospital's check and if she wanted to give the hospital \$3,000, to which she replied, "I don't know. I might need it myself."

It is submitted that these facts manifest mental incompetency on the part of the donor. But, assuming that they do not go to this extent, still, at the very least, they are sufficient to invoke the rule in the Haydock case which requires

proof by the donee of the fact that the donor understood the nature of the act and that it was not done through the influence of the donee. This burden the donee has failed to support.

Counsel for the donee in its brief say that the donor had proper independent advice from Mr. Mead. Without intending to assail the truth of Mr. Mead's testimony, for it seems to have been given in the utmost good faith, still that testimony is not entitled to much weight because of the fact that Mr. Mead was also given a check at the same time that Mrs. Bowdoin executed the check to the hospital. On this question of independent advice Justice Garrison said in *Post v. Hagan*, 71 N. J. Eq., page 234 (Err. and App.), at page 243:

“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 who was furthermore so disassociated 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.”

The advice received by Mrs. Bowdoin from Mr. Mead, does not satisfy the requirements of this test.

DONEE HAS NOT PROVEN ALL OF THE ESSENTIAL ELEMENTS OF A VALID GIFT *INTER VIVOS* AND THEREFORE ITS CONTENTION FAILS.

In order to establish a gift *inter vivos* the following factors must appear:

a. A donative intention on the part of the donor.

b. Actual delivery of the subject matter of the gift except in cases where it is a chose in action, like a certificate of shares of stock or evidence of indebtedness, in which case the delivery must be of the variety of which it is most capable.

c. Donor must strip himself of all ownership and dominion over the subject matter of the gift. *Swayze v. Huntington*, 82 N. J. Eq. 127; *affirmed* 83 N. J. Eq. 335.

For the further purposes of this argument we are assuming that the donor was mentally competent and that she had acquired the donative purpose of making the gift. It is, however, submitted that there is no such delivery of the subject matter of the gift, nor such an absolute stripping of all ownership and dominion over the subject matter as the law requires.

There was no gift to the hospital of the deposit book. This is admitted. The very most that can be said is that Mrs. Bowdoin loaned the book to the hospital to enable it to comply with the rules of the bank which required presentation of the deposit book upon payment of a check. The title to the book remained vested in Mrs. Bowdoin. After deducting the hospital's \$3,000 check, and Mr. Mead's \$2,000, a balance of \$700

still remained in the account to Mrs. Bowdoin's credit.

As was said by V. C. Stevenson,
 "There was a mere bailment."

And the bailment was one for the sole benefit of the bailee. There is no element of benefit to the bailor. She loaned the deposit book to the bailee solely for its accommodation; to enable it to cash its check.

Where the bailment is for the bailee's sole benefit, the bailor may terminate the bailment when he pleases. 5 Cyc. 207.

Since Mrs. Bowdoin, the bailor, might terminate the bailment at will, recover back possession of the deposit book, and thereby render it absolutely impossible for the hospital to cash the check, it necessarily follows that she did not absolutely strip herself of all dominion and control over the \$3,000 which was subject matter of the gift, and therefore the gift fails.

In point 3 in his brief, counsel for the hospital quotes from 5 Cyc. 171, as follows:

"The bailee has by virtue of the bailment and until its termination a special property or possessory interest in the subject matter which entitles him whatever be the class of bailment to avail himself of any legal means to defend it against any person who may interfere with his accomplishing the purpose of the bailment."

"In cases where the bailment is for a time certain or for a specific purpose the donor is answerable to the bailee for removing the property before the time has expired or the purpose is accomplished" (citing cases).

This latter quotation is one of the notes to the former statement taken from 5 Cyc. page 171.

Neither the main statement nor the foot-note has any application to cases such as the one at bar, where the bailment is for the bailee's sole benefit, for in such cases the bailor may terminate the bailment when he pleases (5 Cyc. 207). It may, and probably does, refer to the bailee's rights as against third persons, but where there was no consideration moving to the bailor, the bailee acquires from the bailment no legal right to the property which he can enforce against the bailor.

In *Swayze v. Huntington, supra*, donor had endorsed and delivered certificates of shares of stock in a corporation with the intention of making gifts to several persons. He gave the person to whom he handed the shares the authority to deliver them to the respective donees whenever she saw fit in her discretion. They were not actually delivered until after donor's death. He had in his lifetime voted on them and received the dividends thereon and *V. C. Howell* said that he had not therefore stripped himself of all control and dominion over them. It is to be observed that the donor never revoked the gift. The fact that he might have revoked it, and that he retained some control and dominion over the subject matter, invalidated the gift.

In the *Bowdoin* case, the fact that Mrs. Bowdoin had control and dominion over the subject matter by retaining the title to the deposit book, invalidates the gift. As shown above, she was in a position to lawfully demand the return of the book at any time, thus positively preventing the hospital from cashing its check. The fact that she did not demand the return of the book, does not alter the case. All that is necessary is that donor had the right or power to revoke.

Counsel states in his brief on page 7:

“It is regarded as the settled law of this state that the delivery of a savings bank pass book without ^{more}~~move~~, with intent to make a gift of the deposit, carries with it the fund.” Citing cases.

There is no question about the correctness of this statement. But that is far from stating that the delivery of a check for a portion of a savings bank account, with merely a loan of the deposit book, constitutes a valid gift *inter vivos* where it appears that there was absolutely no intention to make a gift of the deposit book; that the donor retained title to it; and that payment of the check was refused.

In the cases cited in support of that statement, there was an intention to give both the entire amount of money represented by the book, and also the book itself. Plainly, after the book has been unconditionally given away—not merely loaned for the accommodation of alleged donee—the donor’s rights in both the book and the money represented by it, are gone beyond his recall. The donor in such a case has no further interest in or control or dominion over the book or the money. But this cannot be said of a case where the book is only loaned, subject to be recalled at any time at the donor’s pleasure, for then the donor has not relinquished all control and dominion over the subject matter.

Travelers Insurance Co. v. Grant, 54 Eq. 208, cited on page 8 of appellants’ brief, is another case not in point, for there the facts show an unconditional gift of insurance policies and the amounts to become due thereon. The policies as well as the money represented by them, were

given and delivered by the donor to the donee. Title to the policies passed with their delivery which distinguishes that case from ours.

Counsel asks the question on page 6 of his brief:

“Can a valid gift *inter vivos* be accomplished of part of a fund in a savings bank by delivery of a check or draft and the bank book to the donee for the purpose of giving the donee the effective means to withdraw the subject matter of the gift followed by the donee's presentation of the check and book to the bank? In other words, can a gift of part of a saving bank fund be made?”

He says:

“The court below holds it cannot and that the donor must give the entire fund or nothing.”

The court below held nothing of the sort. There is no doubt but that a gift of a part of a savings bank account can be made. But such a gift must be entirely complete, *i. e.*, there must be not only presentation of the check and deposit book to the bank, but it must also appear that the check has been paid by the bank. Then, and not until then, is the gift complete, and the subject matter of the gift beyond all dominion and control of the donor.

THE DELIVERY OF THE CHECK TO THE HOSPITAL, WITH A LOAN OF THE PASS BOOK WHICH HAD TO BE PRESENTED WITH THE CHECK IN ORDER TO SECURE ITS PAYMENT, PLACED THE CONTEMPLATED DONEE IN PRECISELY THE SAME POSITION THAT SUCH DONEE WOULD HAVE OCCUPIED IF THE CHECK HAD BEEN DRAWN ON AN ORDINARY BANK OF DEPOSIT WHERE THE ACCOUNT WAS GOOD AND NO PASS BOOK OR OTHER VOUCHER WAS NEEDED TO SECURE PAYMENT.

The question by which this case is to be tested is: Could Mrs. Bowdoin, after delivery of the check and pass book, have stopped payment of the check or lawfully demanded immediate possession of the pass book? If she could, she had not stripped herself of all ownership and dominion over the subject matter of the intended gift. This question cannot reasonably be answered except in the affirmative.

In this connection it must be remembered that the donor must strip herself of all ownership and dominion over the subject matter of the gift—that is, the \$3,000—not merely over the deposit book which represented it. The subject matter of a gift is the fund, not the deposit book. So if it be assumed that the deposit book was beyond her control—which is not conceded—still she retained control over the fund because she could have stopped payment of the check. Her death, before the check was cashed, stopped payment and revoked the intended gift.

“The general rule is that an indorsement and delivery of a check or certificate of deposit by the owner or payee thereof will constitute a valid gift of a fund represented

by such check or certificate. The rule, however, in regard to the donor's personal check or note is otherwise, and the mere delivery does not constitute a perfected gift, since it is revocable at any time prior to its presentation and payment, and is *ipso facto* revoked by the death of the donor. 20 Cyc. 1205.

In such a case the donative purpose may be absolute when the check is given, and ten minutes or ten days later or at any time before the check has been cashed, such donative purpose may be wholly abrogated. And as stated above the death of the donor prior to the actual payment of the check, revokes the gift. The fundamental principal of the law of gifts is that the gift to be effective must place the thing donated beyond the control of the donor."

The essential requisites to a valid gift of a portion of a fund in an ordinary bank account attempted to be made by the delivery of a check for such portion, are considered in *Pullen v. Placer County Bank* decided in the Supreme Court of California in 1902 and reported in 71 Pac. Rep. 83. The facts in that case were these: Donor in November, 1897, had on deposit with the defendant bank \$1,200 and this amount remained on deposit to his credit until after his death. During that month, for the purpose of making a gift of \$1,000 to his son, he drew a check on that bank for \$1,000 and delivered it to his son, saying that he could get the money from the bank. After delivering the check the donor said he wished the son would not present it until after his death. The son complied with the wish and did not present the check until the morning after his father's death when the

amount was paid him by the bank. The bank knew of the donor's death. Suit was then commenced against the bank to recover the \$1,000 for the donor's estate. The Court stated that the question for consideration was this: was the intended gift complete before the father's death or was it merely inchoate? and held as follows:

“There can be no gift without an intention to give and the delivery, either actual or constructive of the thing given. There must be both a purpose and an execution of the purpose. The purpose must be expressed either orally or in writing, and it must be executed by the actual delivery to the donee of the thing given, or of the means of getting possession and enjoyment thereof. It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and complete gift. *Knight v. Tripp*, 121 Cal. 674; 54 Pac. 267. A gift vests the donee with the absolute property in the thing given, and it is no longer subject to the control of the donor. If on the other hand, the thing given remains under the control of the donor or (except in the case of a gift *causa mortis*) is subject to his revocation, his gift is not complete. There is no difference, however, in this particular, between a gift *inter vivos* and a gift *causa mortis*. In either case it is not complete unless there is either an actual or symbolic delivery to the donee of the thing to be given? *Knight v. Tripp, supra*.

In the present case the gift was verbal, and the property which the father intended to give to his son was money on deposit in the bank. The check was not itself the

property which the father intended to give, but was merely a direction to the defendant to pay \$1,000 to the son. It indicated the amount to be given and the place at which the money was to be delivered. The check was not a symbolic delivery of the money, but it was a delivery of the means by which the son could obtain possession of the money. It was, however, subject to revocation by the father at any time before its presentation to the bank, and was in fact revoked by his death. The request of the father that the son would not present the check until after his death did not affect the sufficiency of the gift. If the gift were complete by his delivery of the check, such subsequent request would not destroy its validity; and if not then complete, this request would not have the effect to dispense with its presentation for the purpose of making it complete. By the failure of the son to present the check, there was no delivery of the money during the lifetime of the father, and the gift was therefore not complete." * * *

"Until the check was either paid or accepted, the gift was incomplete; and in the absence of such payment or acceptance, the death of the drawer operated as a revocation of the check. It is well settled that in order to constitute a valid gift there must be a complete delivery of the subject of the gift, either actual or constructive. The check in the present instance was a mere order or authority to the payee to draw the money and being without consideration, it was subject to be countermanded or revoked while it remained unacted on in the hands of the payee." *Simmons v. Society*, 31 Ohio St. 457; 27 Am. Rep. 521. * * *

“The relation between a bank and its depositor is that of debtor and creditor, respectively, and the money deposited with the bank becomes its property, and is no longer under the control of the depositor. A check is only a direction to the bank to pay a certain sum of money to the person therein named. The money does not thereby become the property of the payee, nor is it placed beyond the control of the depositor. Until it is presented to the bank, the drawer may countermand its payment or he may direct a different disposition of the moneys to his credit in the bank. Neither does a check, of itself, before presentation, operate as an assignment to the payee of the money for which it was drawn.”

“An ordinary uncertified check upon a general account is neither a legal nor an equitable assignment of any part of the sum standing to the credit of the depositor, and confers no right upon the payee that he can enforce against the bank. *O'Connor v. Bank*, 124 N. Y. 324; 26 N. E. 816.”

“A check upon a bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder. It is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien upon the money which the holder can enforce against the bank. It does not of itself operate as an equitable assignment. *Mining Co. v. Brown*, 124 U. S. 385; 8 Sup. Ct. 531; 31 L. Ed. 424.”

“If it could be held that by drawing a check the drawer thereby assigned that

amount of money to the payee, it would follow that the money represented by the check became thereby the property of the payee, and that he could maintain an action against the bank for its recovery, subject to any defense that the bank might have against the depositor; but the almost universal line of authority is that such action cannot be maintained. The bank upon which the check is drawn has no contract with the payee, and is under no legal obligation to him, and its refusal to pay the check does not give the payee a right of action against it. *Creveling v. Bank*, 46 N. J. L. 255."

Another case on this point is *Bainbridge v. Hoes*, decided in the appellate division of the New York Supreme Court in 1914 and reported in 149 N. Y. Supp., 20. Here a donor drew a check on his bank account and mailed it to the donee, to whom he was betrothed, in a letter stating his intention to commit suicide, which he did immediately thereafter. Donee indorsed the check and handed it to her father who promptly presented it to the bank for payment but payment was refused, the bank's president saying to the father that he "would be very glad to pay the check" but that Mr. Foster (who presented it) being himself a bank officer "knew enough about banking law to know that he (the president) could not do anything." The Court made the following remarks:

"As to gifts of either species (*inter vivos* or *causa mortis*) the general rule is:

Things in action in which the donor himself is the debtor cannot be the subject matter of a valid gift. The reason is that, whatever the form, these gifts would amount to nothing more than the donor's own naked

executory promise to pay at some further day, without any consideration to support it; and such a voluntary promise cannot be enforced against the donor nor against his executors or administrators. Pomeroy Eq. 1148.

But the gift may be operative if the check be paid, certified, or accepted before the donor's death. *Id.* note 2, *Picksly v. Starr*, 149 N. Y. 432; 44 N. E. 163; 32 L. R. A. 703, 52 Am. St. Rep. 740.

To the list of circumstances which may make the check a complete transfer of title to money, given by Pomeroy, must be added: If the banker delays payment to investigate the signature. (*Bromley v. Brunton*, L. R. 6 Eq. 275) where the decision is explained by Buckley, *J.*, as grounded on constructive acceptance * * * or if the check has been negotiated for value to a third person in the donor's lifetime. There is no evidence that there was any 'constructive payment,' or acceptance or agreement to hold the balance, as in *Bromley v. Brunton*. Mr. Foster (the person who presented the check) says the bank stated no reason for refusing payment. We may conjecture that the bank refused because it thought Simpson's death revoked the check, and it may be that it was mistaken. *Gluman v. Rochester*, 152 App. Div. 316, 136 N. Y. Supp. 750 * * *. But assuming both propositions, it refused payment unconditionally, and it did not accept or certify."

The gift was held incomplete and invalid.

In the present case the bank unconditionally refused to pay the hospital's check for it had investigated the signature and decided that it

could not safely do so. Whether its conclusion was legally sound or not is immaterial. The fact is it refused to pay and on the following day Mrs. Bowdoin died. Because of non-payment of the check the gift was incomplete and was revoked by Mrs. Bowdoin's death.

This is the theory on which Vice-Chancellor Stevenson based his conclusions. He says in his opinion on page 74 of the case, "in my judgment the delivery of this check on a savings bank with the loan of the pass book which had to be presented with the check in order to secure its payment, placed the contemplated donee in precisely the same position that said donee would have occupied if the check had been drawn on an ordinary bank deposit where the account was good and no pass book or other voucher had accompanied the check."

And again on page 75 he says:

"The test question in this case is, could Mrs. Bowdoin after delivery of the check and pass book, have stopped payment of the check at the bank and lawfully demanded immediate possession of the pass book? I am unable to perceive any reasonable ground upon which this test question can be answered otherwise than in the affirmative. The brief of counsel in favor of the finality of the gift after referring to the proposition that in order to establish a valid gift (*inter vivos*) 'the donor must strip himself of all ownership and dominion over the subject matter of the gift' (*Swayze v. Huntington*, 82 N. J. Eq. 127) proceeds as follows: 'The subject matter of the gift is not the bank book, but the fund in the bank. Here donor drew a check for \$3,000 and delivered the pass book with the check. What else

was required in order to effectually divest her of ownership and dominion over that sum of money on deposit with the Provident bank?'

The above argument is based upon the false premise that the delivery of the pass book and check 'divested' Mrs. Bowdoin of \$3,000 supposed to be deposited in the bank, or in other words, divested Mrs. Bowdoin of the right to receive on her own behalf under her contract with the bank, \$3,000 of the money which the bank was under contract to pay her. The argument assumes that Mrs. Bowdoin upon delivery of the check and loan of the pass book for the purpose of having it cashed, stripped herself of the power to stop the check and demand back her pass book. The argument also seems to ignore the proposition which counsel quotes from *Swayze v. Huntington*, that in cases of this kind the donor must strip himself of 'dominion over the subject matter of the gift.' In my opinion there is no transfer, either transient or permanent, of 'dominion' over a savings bank account or any part thereof when the depositor gives a check on the bank for a part of his account with donative purpose, and lends the contemplated donee the pass book in order to enable him to get the check cashed."

THE PRECAUTIONS WHICH THE LAW OBSERVES WITH RESPECT TO THE RECOGNITION OF GIFTS SHOULD BE STRICTLY ADHERED TO AND NOT RELAXED SO AS TO INCLUDE NEW CASES WHICH HAVE NOT HERETOFORE ARISEN.

The reason for this proposition is amply explained in an opinion written by Justice Dixon for the Court of Errors in *Keepers v. Fidelity Title and Deposit Co.*, 56 N. J. L. 302. Here the plaintiff's sister on her death bed delivered to the plaintiff the key of a box saying, "I give you the box and all it contains." The box was in another room of the house locked in the closet the key of which was in possession of plaintiff's mother with whom the sister lived. Plaintiff lived elsewhere and made no attempt during her sister's life to obtain possession of the box.

It was argued that though some delivery is necessary to support a gift *causa mortis*, yet delivery of the thing itself it not required, but delivery of anything by way of a symbol is sufficient. Justice Dixon said, however, at bottom page 305, "but I can't agree to that, nor do I find any authority for that in the civil law which required delivery in some gifts, or in the law of England which required delivery throughout." After referring to some of the cases which relaxed the ancient law requiring delivery of the thing itself and which asserted the proposition that the situation as well as the nature of the thing must be taken into consideration, and that only such delivery was requisite, as under all circumstances, the donor could conveniently make, the learned Justice says at page 308:

"We are not willing to approve the extreme views which have been adopted in

the cases cited. We agree with the sentiment expressed in *Ridden v. Thrall*, 125 N. Y. 572, that 'public policy requires that the laws regulating gifts *causa mortis* should not be extended, and that the range of such gifts should not be enlarged.' When it is remembered that these gifts come into question only after death has closed the lips of the donor; that there is no legal limit to the amount which may be disposed of by means of them; that millions of dollars' worth of property are locked up in vaults the keys of which are carried in the owners' pockets, and that, under the rule applied in those cases, such wealth may be transferred from the dying owner to his attendant provided the latter will take the key and swear that it was delivered to him by the deceased for the purpose of giving him the contents of the vault, the dangerous character of the rule becomes conspicuous. Around every other disposition of the property of the dead, the legislative power has thrown safeguards against fraud and perjury. Around this mode the requirement of actual delivery is the only substantial protection, and the courts should not weaken it by permitting the substitution of convenient and easily proven devices.

We think the trial justice properly decided that the evidence would not warrant the jury in finding such a delivery as is essential to a donation *mortis causa*."

Although the reasoning for the refusal to extend or relax the law, was applied in the *Keepers* case to a gift *causa mortis*, it is equally applicable to a gift *inter vivos* such as that sought to be enforced in the case at bar. This

gift, although *inter vivos*, was made on the day preceding the donor's death and could not of course come into question or be subjected to scrutiny until after the lips of the donor had been forever closed. When safeguards against fraud, perjury, unfair dealing and suspicious circumstances have been thrown around every other disposition of the property of the dead, manifestly the courts should not relax any of the rules now existent regulating gifts, or in anywise extend their range.

The following quotations from the Vice-Chancellor's opinion are pertinent on this phase of the case, at page 70:

"I understand that counsel agree that if this gift was made it was a gift *inter vivos* and not a gift *causa mortis*, notwithstanding the fact that the alleged donor was on her dying bed, and if she understood her condition must have known that she had not long to live. Alleged gifts made by old and feeble persons and persons stricken with fatal illness, if valid, often must be classified as gifts *inter vivos*, nevertheless, being asserted after the death of the alleged donor, they seem to be in many respects in the same category with gifts *causa mortis* in respect of the safeguards and protective conditions which the law should throw around the transaction. There seems to be as much danger in permitting a person to establish a gift *inter vivos* to himself by producing a key or a savings bank book obtained from the death bed of an alleged donor, as there is in permitting a person under such circumstances to establish a gift *causa mortis*."

And at page 83:

“At present the policy of our law is to enforce rigidly the statute which prescribes the form of a will of either lands or chattels and the ceremonies necessary for its valid execution.

When we come to examine our law of gifts *causa mortis* which are in effect a testamentary disposition of personal property, we find that not only had no statute been passed in many states including New Jersey, safeguarding the transaction against fraud, but the decisions of the courts have even repealed some of the rules and conditions which formerly imposed some protective limitations.”

And at page 85:

“Entertaining the views which I do as to the danger of fraud through the easy establishment in the courts of gifts *causa mortis* and gifts *inter vivos*, which are not subjected to scrutiny until after the death of the alleged donor, I do not think anyone of these gifts should be upheld unless it is directly within what already has been declared and recognized as established law, and I am sustained in this attitude by the intimation of the policy of our law, which I think is most distinctly made by the Court of Errors and Appeals in the Keepers case.”

The decisions which have adopted the symbolic delivery theory and which have extended the ancient law of gifts so as to permit the gift of a savings bank book or life insurance policy or other non-negotiable contract, to carry and include the money or contract right which the book or instrument so delivered represents, are all

based upon the fact that by vesting an absolute title to the voucher, to the savings bank book for instance, in the donee thereof, with full donative purpose with respect to the fund, the donor has placed the real subject matter of the gift, which, of course, is the fund and not merely the deposit book, beyond his control forever and has put the same in the absolute, perpetual control of the donee. Our law still makes the absolute vesting of title to the voucher, instrument, or deposit book as a chattel in the donee, so as to make the same irrevocable by donor, indispensable to the effectuation of a gift *inter vivos*. When tested by this rule the appellants' case fails, for as shown above there is no claim that title to the book was transferred, and in view of the decision of the Court of Errors in the Keepers case, the present requirements of the law should not be relaxed or enlarged so as to permit the effectuation of a gift under these new conditions which have never before in this state been approved.

It seems unnecessary to add anything to the remarks of Vice-Chancellor Stevenson as found on pages 79-80 and 81 of the case, in order to distinguish from the case under consideration, the cases of *Larrabee v. Haskell*, 88 Maine 511, 34 Atl. Rep. 408, and *Weatheron v. Lord*, 58 N. Y. Supp. 778. It might be observed in the *Larrabee* case that there, although the gift was of a portion of the fund in the bank, that the check had actually been cashed thereby rendering the gift complete. The gift in the present case would also have been complete had the check actually been cashed before death intervened. This fact of payment undoubtedly controls other decisions in foreign states cited for the hospital. But without this, and for the reason stated by the

Vice-Chancellor below it is plain that these decisions are not applicable. And if they were applicable they should not be approved here, because of the reasoning in the Keeper's case.

It is therefore respectfully submitted that the donee's failure to sustain the burden of proof of the fact that the donor was mentally competent to understand and in fact did understand the nature of the transaction, and that she was not controlled by the undue influence of the donee, is sufficient to declare the attempted gift invalid; but that if this court finds that there was a donative purpose and intent present, still the elements of a legal delivery of the subject matter and the absolute stripping of donor's ownership and control of the subject matter of the gift, are not present in this case. The law should not be extended so as to validate the gift which the hospital seeks to sustain.

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