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SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND.

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v.

JOHN KNIGHT, SR.'S ADMR., ET ALS.

BRIEF FOR APPELLEES.

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To the Honorable Justices of the Supreme Court of Appeals of Virginia:

The transcript of the record in this case shows that John Knight, Sr., departed this life, testate, on the 23rd day of December, 1928; that he left surviving a widow, Eliza Knight, the appellant, and four children, namely, John Knight, Jr., William Knight, Mary Fitchett and Susan Stafford, all begotten out of wedlock but owned and acknowledged by him as his children; that the said John Knight, Sr., intermarried with the appellant in the year

1903, and executed his will in 1915, and left same in the office of Otho F. Mears, attorney-at-law, Eastville, Northampton County, Va., who had drafted said will; that at some period after the execution of said will the said John Knight told his wife, the appellant, when he died to go to the office of Mr. Mears, that all the papers were there and that he had properly provided for her; that after the death of her said husband, she did go to the office of Mears & Mears, successors to Otho F. Mears, said Otho F. Mears being now the senior partner, but practically incapacitated because of deafness, and told Benj. W. Mears, the junior and active member of the firm, who she was and the purpose of her trip; that Benj. W. Mears found the will in the will box in the safe of Mears & Mears and read it to appellant and told her the meaning of same; that she desired him to qualify as administrator with the will annexed and wanted him to look after renting the land and see that she was treated right and got her share in the estate. All this happened on the 29th of December, 1928, about a week after the death of John Knight. So far there is no conflict in the evidence. When Mr. Mears and Eliza Knight began to talk about the estate for the purpose of his qualifying and giving bond, Eliza Knight says she showed him the pass books to the two banks; said Mears says she did not show him the pass books, and that he never saw same until the taking of evidence in this cause. There was present at this conference with Eliza Knight, Fannie Nottingham, a colored nurse who had nursed John Knight, Sr., and who later nursed Eliza Knight; that said Mears asked said Eliza Knight what monies he had and that the said Eliza Knight, when asked this question, looked around at Fannie Nottingham, the nurse, who was sitting beside her, then she, Eliza Knight, turned to the said Mears and said,

"This money is as much mine as it was his. We both worked for it." See evidence of said Mears, Record page 50. See also evidence of Eliza Knight on cross-examination, page 32 Record:

> "Q. When you came up to see me about this matter you told me didn't you that your husband had informed you that when he died, to go to our office that all the papers were there and that he had properly provided for you?
>
> "A. Yes.
>
> "Q. I asked you who your husband was and you told me John Knight, Sr.?
>
> "A. Yes, sir.
>
> "Q. I got out the will and read it over to you?
>
> "A. Yes, sir.
>
> "Q. Aunt Eliza, when I asked you about what monies he had, you made this statement did you not, that you worked for the monies like he did and that it was as much yours as it was his?
>
> "A. Yes.
>
> "Q. Wasn't the reason that you gave me at that time why you were entitled to the money was that you had both worked for it?
>
> "A. Yes, sir."

Is not the said Eliza Knight therefore mistaken when she said she showed the said Mears the pass books and told him that the said John Knight had given her the money? If he had given her the monies before he died, why should she have told the said Mears that she and her husband had both worked for it and therefore it was as much hers as it was his?

Furthermore, it seems clear from the undisputed evidence in this case that the said Eliza Knight did not present said pass books to the said Mears, for it appears that just a few days after the said Mears qualified as administrator on said estate, he wrote to the Farmers & Merchants Trust Bank and the Townsend Banking Co., said letters being in part as follows: "We will thank you to please advise us just the amount now in your bank to the credit of John Knight, Sr. If it is on the interest bearing side of your bank, please advise. Also the accrued interest." See Record page 51. If the said Eliza Knight had showed said Mears said pass books, he surely would not have written to the bank inquiring the amount on deposit in said bank and if same was on the interest bearing side of said bank. Furthermore, if the said Eliza Knight had presented said pass books, wouldn't it be the most reasonable thing for the said administrator to have retained possession of same? Furthermore, if the said Eliza Knight had showed said Mears said pass books and had stated that her said husband had given her the monies in said banks, it would seem that she would have corroborated this fact by Fannie Nottingham, the nurse, who was present with her at the time, who testified in her behalf about other facts, and who it appears from the evidence has a pecuniary interest in the outcome of this litigation.

By the testimony of Benj. W. Mears it was not until March, 1929, when he refused to pay nearly $400.00 for tombs for John Knight, Sr., did she ever mention the fact that he had ever given her the money. Record page 54. That although he had conferences with the said Eliza Knight in February, March, April, May and July, 1929, and had advanced her monies on account of interest on said funds and had taken receipts from her showing same

as advances on interest on three of said occasions, she never mentioned to him that her husband had given her the funds in said banks by delivering the bank books to her. In fact, as appears from the evidence of the said Mears and from the receipts signed by the said Eliza Knight and witnessed in certain instances by the said nurse, Fannie Nottingham, the said Eliza Knight had ceased making any contention for said fund until sometime about July when settlement was made with her for rent from the farm. See evidence of said Mears, Record page 55:

> "The next visit, as I recall it, was after I had made a settlement with her tenant, William Knight, who cultivated the farm for the year 1929. I think the rent was $104.04. She came to our office and we had some little conference at that time. There was with her at the time, as was practically every time she came, Fannie Nottingham, the nurse. She, Eliza Knight, asked me if this was all she was to get, and I gave her a copy of the account and told her this was all the rent she could get at this time. She told me she owed Fannie Nottingham, the nurse, for a nursing bill, as I recall it for something over $100.00, and she wanted to get the money to pay her. I advised her I had advanced her all the interest I could on the fund at this time and therefore I could give her no more. She seemed to be dissatisfied and I told her on that occasion that I was trying to administer the estate to the best of my ability, and if she was not satisfied I would be glad if she would talk with other counsel, as I felt

> they would tell her I was doing all I could in the proper administration of the estate."

That it appears from the testimony of the said Mears that it was sometime after this that he first learned, and this information came from Topping & Topping, attorneys, that Eliza Knight was claiming that the funds in the two banks belonged to her as a gift *inter vivos* by a delivery to her of the pass books by her husband prior to his death. Was there such a delivery of possession of the subject of the gift in the instant case as to make a valid gift *inter vivos?*

We will first dispose of the fund to the credit of John Knight, Sr., in the Farmers & Merchants Trust Bank, Cape Charles, Va. The original bank book showing deposits and withdrawals shows that same is not what is generally termed "a Savings Account Book," but only shows deposits, interest credited and withdrawals, under the authority of *Thomas' Admr.* v. *Lewis, et als.*, 89 Va. 67, and affirmed in *Snidow* v. *Brotherton,* 124 S. E. 183, which says:

> "That the gift by Mr. Thomas of his bank book showing the amount of his deposits in the Planters National Bank, was ineffectual in law as a donation *mortis causa* of the money to his credit in said bank."

This was from the opinion of the trial judge but was affirmed by this court. So, from the above and an inspection of the bank book itself, we feel that this court would be bound by the above decision, even if we admit, which we surely do not, that all the requirements of making a gift *inter vivos* valid had been complied with.

While the bank book in the Townsend Banking Company was apparently of the form of a savings account book, nevertheless said fund must not have been treated strictly as a savings account by said bank, inasmuch as after the qualification of the administrator the funds in both banks were withdrawn by the administrator without the surrender of the bank books. In any event it is incumbent upon the appellant to fulfill all the requirements of a gift *inter vivos*, which is not done in this case even if every word which the appellant and her witnesses testified to were true.

To constitute a valid gift *inter vivos* this court, speaking in *Sterling et als.* v. *Wilkinson et als.*, 83 Va. 797, says:

> "Gifts *inter vivos* are upheld if the notes or bonds or choses in action are delivered to the donee so as to invest him with an equitable title to the fund they represent, and to divest the donor of all present control and dominion over it, absolutely and irrevocably; and a delivery which does not confer upon the donee the present right to reduce the fund in possession by enforcing the obligation according to its terms, will not suffice. A delivery which confers on the donee power to control the fund, only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift."

Again in *Shankle* v. *Spahr*, 121 Va. 607 and 609, the court says:

> "Only executed parol gifts, whether *inter vivos* or *causa mortis*, are valid. Such gifts, if executory, being without consideration to support them, are invalid."

Moreover, as stated by Judge Burks in his learned and able brief in the case of *Thomas* v. *Lewis, supra* (which by general consent has come to have the force of authority on this subject) :

> "All gifts, whether *inter vivos* or *causa mortis,* are gifts *in presenti.* There must be words of *present* gift as well as delivery. The one without the other is insufficient. Though there be actual delivery, yet if the words of gift accompanying the delivery indicate an intention on the part of the donor not to confer on the donee the power of taking physical possession of the thing *until the donor's death,* then the proceeding is an abortive testamentary act and not a gift."

And the same is affirmed in the case of *Grace* v. *Virginia Trust Co.,* 150 Va. 56; 142 S. E. 381, decided in March, 1928.

Now let us take the evidence of the appellant and see if same comes up to the requirements set out in aforesaid two opinions:

The old man had just been to Townsend Banking Co. and had drawn a check on that bank, and as soon as he returned he came into the house and said, "Eliza, you take these books, they are yours, they are all yours, nobody can take them away from you and all I want you to do is give me a decent burial and a tombstone and *you take the balance.*" (Italics ours). Record p. 28.

"After his death, I understood that I would have to have an administrator to turn the money over to me and I carried them to Mr. Mears." Record p. 29.

Can anyone read the first quotation, said to have been

made by the doner, and say that he intended for his wife to take immediate possession of the funds and do as she pleased with same, or is not the most reasonable construction to be placed on it, that he intended it should take effect at his death, give him a decent burial and tombs and she to take what was left? This was certainly the construction the old woman put on it for she said, *"I understood that I would have to have an administrator to turn the money over to me—"*

Is not this position further strengthened by the testimony of her brother, John Spady, who at page 42 of the Record says that he heard the old man say, "Eliza, you take these books, they are yours. Take these books and take care of them, they are yours, you give me a decent burial and give me a tombstone and you take *the balaance* of the money and *live off of it."* (Italics ours).

If this testimony is correct, can there be any doubt but that it was the intention of John Knight that his wife should have these funds only after his death? What use did she have for it during his life? He owned his home, was getting a pension at that time of $72.00 a month and the interest on the funds in bank.

All the above argument is based on the fact that we take these statements of the three negro witnesses as correct. We feel in a case of this kind that their testimony should be very carefully scrutinized. The gift was not asserted until after the death of the donor, and hence the testimony of the donee, the appellant, must be corroborated.

Was Fannie Nottingham, the nurse, present at the time of the alleged gift? The donor at this date was well enough to walk out to his buggy from his house, was strong enough to get out of the buggy at the Townsend Bank and

go in the bank without assistance; was strong enough to get out of the buggy and walk in the house when he returned home. Now what use did he have at this time for a nurse? To show how unusual and unreasonable her testimony is see Record pages 39 and 40:

> "Q. You stated that you were nursing him on July 2nd, what time did you go there to begin nursing him at that time?
>
> "A. I can't think of the exact date. I couldn't tell positively.
>
> "Q. Had you been there a month at that time, do you think?
>
> "A. I wouldn't like to tell you anything but the truth about it and I don't know exactly.
>
> "Q. Do you have any idea whether you had been there that long or not?
>
> "A. I couldn't tell.
>
> "Q. Have you an idea at that time, whether you had been there as much as a week?
>
> "A. I couldn't tell positively.
>
> "Q. You have stated a definite date that you were there, on July, 1928, how did you know that you were there on that date?
>
> "A. I remember him going out.
>
> "Q. How did you remember that it was July 2nd?
>
> "A. I remember because I was there and we looked at the calendar and dated it.
>
> "Q. Have you got that calendar with you here?
>
> "A. No, sir.
>
> "Q. What day of the week was that day on, was it on Saturday, Friday or Monday?

"A. I don't remember the day.

"Q. When have you last seen that calendar?

"A. I have it home.

"Q. Why should you have it home?

"A. That calendar was in my room. I went up into my room and dated it.

"Q. Have you got anything else marked on that calendar?

"A. No, sir.

"Q. What kind of calendar was that? What was the picture on that calendar on which you have got this date of July 2nd, 1928, marked?

"A. Just a calendar with a picture of water and trees I think, I am not positive.

"Q. Do you know whose calendar it was, that is, what business house that calendar was issued by?

"A. I don't know.

"Q. Did Eliza request you to mark it at that time?

"A. No one requested me to mark it but I said I would date it.

"Q. You have no idea how long you had been there at that time?

"A. No, sir.

"Q. Do you have an idea how long you stayed after July 2nd, 1928?

"A. I can't tell.

"Q. How much did John Knight pay you per week for nursing him?

"A. He paid me $30.00 a week."

While the record does not show that there was any blood relationship between the appellant and this witness, the

record does show that she has a pecuniary interest in the outcome of this litigation. See Record page 40:

"Q. Fannie, since John Knight died, have you been nursing Eliza Knight?

"A. I have.

"Q. How much has she paid you since that time for nursing services?

"A. I presented you the bill, she wanted you to do that paying.

"Q. Has she ever paid you the money?

"A. No, sir.

"Q. Has she told you that if and when she got this money she would pay you this bill?

"A. She said she would try.

"Q. How much does she owe you for the entire bill?

"A. I have it home but I don't know how much it was."

The other witness, who claimed to have been present when the gift of the bank books was made, was a brother of the appellant who lived in her home and to whom she furnished food and clothing. He testified that, although he heard John Knight say he was giving her the books, he did not see him give her same, although he was in the room where the parties were at the time. His testimony is very contradictory and he remembers nothing happening about that time but the gift. See Record p. 43. On cross-examination he testified as follows:

"Q. You have testified that this was about July, 1928, how did you know it was July, 1928?

"A. I didn't say it was July, 1928.

"Q. What time was it to the best of your knowledge?

"A. I just don't know.

"Q. Do you know whether it was July or January?

"A. I know it wasn't January, it was July.

"Q. Do you know it was July?

"A. I know it was July.

"Q. How do you know it was July?

"A. I remember about the month coming in and going out.

"Q. What day of the week was it?

"A. I think it was on Wednesday.

"Q. You think it was Wednesday in July that you carried him down to the bank?

"A. Yes, sir.

"Q. Had you carried him to the bank before that time?

"A. Yes, sir.

"Q. When was that?

"A. I don't know."

It seems very strange that the appellant and her two interested witnesses could remember so well just what was said on this occasion about the bank books and remember no other conversation, and also how the time was stamped in their memory although they were unable to recall other dates.

Another fact worthy of notice is that, although he told his wife he was going to the Townsend Bank, she gave him both of the bank books. In justice to her, we will

say that she could not read, but it seems that this nurse, if she was there as she says, could have put them right as to the book.

According to the testimony of the donee, these books were always kept in a trunk and that after the alleged gift was made to her, she put them in the same place. Was not the custody or possession in this case just as consistent with a possession for the purpose of safe keeping, or other like purpose, as with a gift? If it is, then by *Grace* v. *Virginia Trust Co.*, 150 Va. 66; 142 S. E. 381, the gift must fail for want of necessary proof on the part of the donee.

This gift was alleged to have been made in July, 1928, about five months prior to death of donor, and certainly so far as the record discloses, no mention was ever made of same to anyone, no steps were ever taken to possess the money or to exercise in any way any dominion over it, neither bank was ever notified. Even after the death of the donor no such claim was ever set up to the administrator until about July, 1929, six months after his death, though in about four months after his death, she did tell him that her husband told her that after a decent burial and tombstones, he wanted her to have the balance in the banks.

Judge Burks, in *Grace* v. *Virginia Trust Co.*, 150 Va. 66; 142 S. E. 381, says that with such facts as set out above:

"A great opportunity for fraud in the donee is

afforded, and an alleged gift should not be upheld, unless it is clearly and plainly established."

For the reasons set out above and others apparent on the record, we submit that the decree of the Circuit Court should be affirmed.

Respectfully submitted,

BENJ. W. MEARS,
Administrator of John Knight, Sr., deceased,

BENJ. W. MEARS,
JOHN KNIGHT, JR.,
WILLIAM KNIGHT and
MARY FITCHETT,
Appellees.

By MEARS & MEARS,
Attorneys.