SARAH HITCH, BY HER NEXT FRIEND,
vs.
JACOB G. DAVIS, AND OTHERS.

MARCH TERM, 1851.

[DONATIO INTER VIVOS, OR MORTIS CAUSA—CHANCERY PLEADING AND PRACTICE.]

IT is essential to the validity of both a *donatio inter vivos* and a *donatio mortis causa*, that there should be a *delivery* according to the manner in which the particular thing, the subject of the gift, is susceptible of being delivered; but this delivery need not be proved by witnesses who actually saw it done, but it may be inferred from facts and circumstances.

The donor must part with the legal power and dominion over the subject of the gift; if he retains the dominion, and if there remains to him a *locus penitentiæ*, there cannot be a perfect and legal donation, and that which is not a good and valid gift at law, cannot be made good in equity.

A promissory note, payable to the order of the testator, which was never endorsed by him, but which he retained during his life, and after his death was found in possession of his executor, was claimed by his daughter, as a gift, upon the ground that he had given it to her, but had retained it in his possession as her agent, to collect the interest thereon for her, which he regularly paid over to her during his life. HELD—that whatever may have been the *intention* of the testator, he had not *executed* it in the mode recognised by law to the perfection of a parol gift, not having parted with his legal power and dominion of the subject of the gift, which is therefore void in law, and equity will not make it good.

The Court cannot, under the general prayer, grant relief not warranted by the allegations of the bill; the relief under the general prayer must be consistent with the case made by the bill, and its extent and character depends upon the facts charged in the bill.

A bill charged an executor and trustee with, 1st, neglect to pay rents and profits; 2d, failure to invest a $5,000 legacy; and 3d, refusal to deliver to complainant a certain note claimed by her as a gift from the testator. The relief prayed, was an account and payment of the legacy, and rents and profits, delivery up of the note, and if assets were not admitted, an account thereof, and their application, in due course of administration, and for *general relief*. HELD—that under this bill, the defendant could not be charged as executor with the note, as assets for the payment of the legacies of the will, exceptions having been filed to the sufficiency of the averments of the bill in this particular.

The bill, so far as it sought recovery for the note, was dismissed in May, 1851, but retained as to other matters; and in February, 1852, the cause was sent to the Auditor, for an account as to such other matters. HELD—that the Court cannot order an amendment, so as to present the question of the applicability of the note as assets.