

NEW JERSEY COURT OF ERRORS AND
APPEALS.

HUGH B. REED, EXECUTOR,
Plaintiff-Respondent, }
vs. } ACTION AT LAW.
HENRY S. BONNER, } ON APPEAL.
Defendant-Appellant. }

APPELLANT'S BRIEF.

STATEMENT.

Plaintiff, as executor, brought suit to recover from the defendant \$5000.00, with interest, alleged to have been loaned by plaintiff's testatrix to the defendant.

The proof of the alleged loan consisted of a check (Ex. P. I., p. 35), made by plaintiff's testatrix and endorsed by defendant, and a conversation testified to by plaintiff (pp. 17-18) on direct examination, to the effect that defendant said that "he had received \$5000.00 from Mrs. Skinner, and that he had paid interest to her up to a certain time; that he had had some arrangement with her with regard to it, but that now he supposed he would have to pay it."

No promissory note, due bill or other written memorandum or evidence of an indebtedness was produced in evidence.

On cross-examination plaintiff testified (p. 18):

"Q. No, but when he told you that he had received \$5000 from her, but that he had some

arrangement with her about it, what did you say to him then?

A. There was a little more to what he said in that sentence; he said that he had had some arrangement about it, but that he supposed now that he would have to pay it, and I said that I wished he would make arrangements to do so."

The defendant testified as to the conversation already testified to by the plaintiff as follows (p. 30):

"A. I told him that Mrs. Skinner had given me \$5000, with the understanding that I was to pay interest on it until the time of her death, and at which time the \$5000 was to be mine; in other words, it was a present of \$5000, bearing interest during her life."

And further (p. 31) that he did not say to plaintiff that "he supposed he would have to pay the money now."

The Court directed a verdict for the plaintiff on the ground that there was no evidence for the defendant to go to the jury.

Appellant insists that the action of the trial Judge in thus directing a verdict for plaintiff was erroneous.

I.

Plaintiff-respondent having introduced in evidence part of a conversation with defendant-appellant, the latter was, by the clearest rules of evidence, entitled to have the entire conversation in evidence also, so far as it tended to explain or qualify the part admitted.

"Where a witness testifies to part of a statement of a party as an admission, the party is

entitled, by cross-examination or redirect examination of the same witness or by other witnesses, to show his entire statement made at the same time, provided the part which he thus proves relates to the subject-matter of the admission in evidence and tends to explain or qualify it. This principle applies not only to statements in conversation, but to letters or other written statements and to judicial admissions in the same or in another case." 16 Cyc., p. 1039.

Defendant was entitled to have the whole go to the jury and to have the jury determine the degree of credence to be given to each part.

In *Parret vs. Craig*, 56 N. J. Eq., 280, 38 Atl. Rep., 305, the administrator of C brought suit against the executor of Y to recover money of C deposited by Y during a series of years in a savings institution. C had made two wills, the first favoring Y, the second favoring another. Y contested the second will, and on the contest admitted, as a witness, that he had appropriated to his own use moneys of C, so deposited, but justified his act by declaring that C had given him the moneys before they were deposited.

Complainant, the administrator of C, relied on Y's admission in his testimony in the will contest to prove against his estate the fact of misappropriation, and defendant's counsel contended that since complainant so relied he must accept the whole evidence as true and that on the whole story it appeared that the money had been given to Y.

The Court said:

"While I think that the defendant was entitled to have the whole of Young's evidence

read, I do not think that the Court is bound to give equal credit to every part of it."

It does not matter that the defendant-appellant would not have been permitted, on his own initiative, to give in evidence any of the conversation. The fact that one party puts in evidence part of a conversation of the other, opens the door for the rest of the conversation so far as it relates to the part already admitted, even though the remainder of the conversation would, of itself, be wholly incompetent and inadmissible.

In *Grattan vs. Metropolitan Life Ins. Co.*, 92 N. Y. 274-284, 44 Am. Rep. 372, suit was brought to recover on a life insurance policy, payment of which was resisted on the ground of fraudulent representation in procuring the insurance.

The defendant company introduced a part of a letter written to the company, in answer to its accusation of fraud, the portion introduced and read by the defendant containing an admission that the applicant knew his sister died with consumption. The plaintiff, under objection and exception, was permitted to read the rest of the letter. The Court of Appeals said:

"We think she had the right to do so. The whole of the letter was one connected narrative and an explanation of a single definite accusation. It was written to contradict the charge of a false representation as to the cause of a sister's death. To read part of it and suppress the rest distorts its purpose and meaning and turns a justification into a confession. The plaintiff could not have read it at all. When the defendant read a part of it, he was bound to take with it all that explained or qualified what

preceded. The rule appears to be firmly settled, both as to a conversation or writing, that the introduction of a part renders admissible so much of the remainder as tends to explain or qualify what has been received, and that is to be deemed a qualification which rebuts and destroys the inference to be derived from or the use to be made of the portion put in evidence.

“*Rouse vs. Whited*, 25 N. Y. 170; *Forrest vs. Forrest*, 6 Duer, 126-7; *Gildersleeve vs. London*, 73 N. Y. 609.

“Here the admission of knowledge by Hugh of the cause of his sister's death, relatively to the written answer signed by him, tended to convict him of a falsehood and a fraud. That was the use to be made of the admission and the purpose of its proof. Whatever else in the letter tended to modify or destroy that effect of the admission and change its purport from a confession of guilt to an assertion of innocence, was a qualification of the statement to which the plaintiff was entitled.”

In *Robeson vs. Schuylkill Nav. Co.*, 3 Grant (Pa.) p. 1881, Black, J., said:

“You can not have one part and suppress another part of a conversation, an admission, a deed, contract, record, a letter or any other document.”

In *Farley vs. Rodocanchi*, 100 Mass. 427-9, the Court said:

“When a part of a conversation or admission is introduced, the other side may prove all that was said.”

“A defendant in an action on a promissory

note, the genuineness of which is denied, may testify concerning a conversation about the note between himself and another person, though no representative of the payee was present, if such person has testified about the same conversation as a witness for the payee, the plaintiff in the action." *First Nat. Bank vs. Wolff*, 79 Cal. 69, 21 Pac. 748.

"Where the declarations of a party are admitted in evidence against him, he is entitled to have the whole conversation related, and the portions of it in his favor are to be received as explanatory only of other parts, and not as evidence for him." *Ives vs. Bartholomew*, 9 Conn. 309.

"Where part of a conversation has been put in, the other party may put in the rest, though it may be objectionable in itself, as tending to contradict a writing." *Doonan vs. Mitchell*, 26 Ga. 472.

II.

The self-serving part of a conversation must be admitted along with the part admitted to show an admission, if it relates to the same matter. 16 Cyc., p. 104.

In *Whitwell vs. Wyer*, 11 Mass. 6, the Court said:

"Where you rely upon a confession, you must take it all together; and the rule is peculiarly necessary to be observed, where the confession is in a form of evidence essential to the establishment of the contract to be proved."

III.

Defendant-appellant was entitled to have his version of the conversation considered by the jury as qualifying or neutralizing the part testified to by the plaintiff.

The purpose of the testimony of the plaintiff was to show an *admission by defendant*, that he owed plaintiff's testatrix \$5000.00. This alleged admission consisted of the statement that he had paid interest. Standing alone this, according to the ruling of the trial Judge, was, in connection with the check, sufficient to make a *prima facie* case for plaintiff. This *prima facie* case absolutely falls without this alleged admission of indebtedness.

If the rest of the conversation so qualifies or explains the words thus relied on to show an admission of indebtedness, that, if believed, it may show that the alleged words of admission of debt, were in reality part of a claim of gift of the principal fund on which interest had been paid and a denial, in fact, of any indebtedness, then defendant clearly was entitled to have the jury consider the whole conversation and determine *whether or not there was in fact an admission*.

Parret vs. Craig, supra; Grattan vs. Life Ins. Co., supra.

The conversation is admissible not to prove that Mrs. Skinner gave the money to defendant, but to show that defendant's statement that he paid interest was coupled with the further statement that the principal fund was a gift to him on consideration that he should pay this interest, and, therefore, *was no admission of indebtedness at all, but, on the con-*

trary, was part and parcel of a positive denial of an indebtedness.

If this was not, in fact, an admission, plaintiff had no *prima facie* case. A non-suit must have been allowed. But the Court said this alleged admission supplied the necessary element of a *prima facie* case. Hence, if the alleged admission is shown by other parts of the conversation not to be an admission, the *prima facie* case is destroyed and defendant would be entitled to a verdict.

This was a question for the jury to decide.

IV.

It is true that the statute made defendant-appellant incompetent to testify to transactions with plaintiff's testatrix. But the question before the trial Court when the verdict was directed, was *not whether defendant had or could, under the statute, prove a gift to him, but whether plaintiff had proved a debt due from the defendant.*

That was the issue. That was a question for the jury to determine and the consideration of the entire conversation between plaintiff and defendant was necessary to determine it.

If the ruling of the trial Court should be upheld the door would be opened to the grossest fraud. Representatives of deceased persons suing, could make a *prima facie* case by testifying to conversations with the defendant in which the latter might admit the purchase of goods or the borrowing of money of the deceased, and the most positive declarations made at the same time by the defendant that he had subsequently paid the deceased for the goods or repaid the loan, would be excluded because

of the statute forbidding one to testify as to transactions with the deceased when sued by the representative of the deceased.

The statute was intended to protect estates against fraudulent claims of the living, not to enable representatives of the dead to perpetrate palpable fraud by taking advantage of its provisions.

V.

The plaintiff by testifying to the conversation with defendant *ex necessitate* made defendant's version of the conversation admissible, notwithstanding the statute.

Plaintiff could ask the Court to charge the jury to confine their consideration of defendant's testimony to the single point as to whether it showed, if believed, no admission of indebtedness had in fact been made by defendant in that conversation.

In *Trenton Passenger Rwy. Co. vs. Cooper*, 60 N. J. L. 219-223, 37 A. 730, the Court of Errors, by Justice Collins, said:

“Evidence legal for some purpose cannot be excluded because the jury may erroneously apply it otherwise. The Court, on request, will always guard against such an error, or, if not, a party aggrieved may then take his exception.” *Williams vs. Sheppard*, 13 N. J. Law, 76, 78.

To the same effect is *Perry vs. Levy*, 87 N. J. 670, 94 Atl. 569 (Court of Errors).

Jeralamon vs. Town of Belleville, 101 Atl. 244.

While, therefore, the excluded evidence was not competent to go to the jury to prove affirmatively that the deceased made a gift to the defendant of the principal fund sued for, it was competent to go to the jury to show, if believed, that defendant had not admitted a debt due the estate of the deceased. To exclude it, for that purpose, was error.

As was said by V. C. Stevens in *Parret vs. Craig, supra*, the defendant was entitled to have the whole of the conversation in evidence, the jury in this case, as the Court in that, would not be "bound to give equal credit to every part of it."

The defendant, nevertheless, was entitled to have the jury pass upon that credibility.

VI.

Part of the alleged admission to which plaintiff testified was that defendant said (p. 18), referring to the \$5,000, "that now he supposed he would have to pay it."

Defendant denied (p. 31) that he made such a statement.

Here was an issue of fact as to the conversation which did not involve transactions with the deceased, to wit, whether or not defendant admitted to plaintiff that he would have to pay the \$5,000 and involving the question of a tacit admission of the alleged debt.

The case should have been submitted to the jury and the direction of a verdict for the plaintiff was error.

Respectfully submitted.

LINTON SATTERTHWAITE,

*Counsel for Defendant-
Appellant.*

New Jersey Court of Errors and Appeals

HUGH B. REED, Executor,
Plaintiff-Respondent,

vs.

HENRY S. BONNER,
Defendant-Appellant.

*Action at
Law.*

On Appeal.

Brief for Plaintiff-Respondent.

Statement.

Plaintiff brought suit to recover from defendant \$5,000., loaned to defendant by Sarah A. G. Skinner in her lifetime, with interest thereon from May 1st, 1915.

Upon the trial, plaintiff introduced in evidence a check on Guaranty Trust Company of New York, dated New York, May 1st, 1914, payable to the order of defendant for the sum of \$5,000., signed by Sarah A. G. Skinner, endorsed by defendant and, as was stated by the trial judge (Case, page 23), bearing various bank stamps on the back of it which indicated that it went through one or more banks and was paid.

Plaintiff testified that he had a conversation with defendant as follows:

“Shortly after I qualified as executor I saw the defendant and told him that I had found what I considered evidence of the fact that he was indebted to Mrs. Skinner’s estate in the sum of \$5,000. and asked him what arrangements he would make to pay it. He said that he had received \$5,000. from Mrs. Skinner and that he had paid interest to her upon it to a certain time; that he had

had some arrangement with her with regard to it but that now he supposed he would have to pay it."

(Case, pages 17 and 18.)

Plaintiff testified that this was the entire conversation had on that occasion, a fact which the defendant did not deny. The only denial which defendant made of any portion of this conversation was that which appears in defendant's direct examination at top of Case, page 31, as follows:

"Q Do you recall whether you said to him that you supposed you would have to pay it now?

A I never made any such statement to my knowledge."

Defendant on his direct examination admitted receipt of the \$5,000. in question and testified that he had paid interest thereon from May 1st, 1914, to May 1st, 1915 (Case, page 31).

The court below directed a verdict in favor of plaintiff, from which defendant appeals.

Judgment appealed from should be affirmed.

I.

The receipt of money and subsequent payment of interest thereon, *prima facie*, establishes a debt.

In the conversation testified to by plaintiff, above quoted, defendant admitted receipt of \$5,000. and payment of interest thereon "to a certain time." In his direct examination, defendant again admitted receipt of \$5,000. and said that he had paid interest thereon to May 1st, 1915.

"The natural presumption is, when a fact is proved, wherefrom by reason of the con-

nection founded on experience, the existence of another fact is directly inferred.”

Gulick v. Loder, Gr. 68, at page 72.

See also 16 Cyc., 1050.

“Interest is the compensation allowed by law or fixed by the parties for the use or forbearance of money or as damages for its detention.”

22 Cyc., 1469.

“Interest arises on an agreement expressed or implied or as damages for the default in the payment of a debt or for the use and benefit derived from the money of another.”

Board of Freeholders v. Veght, 7 N. J. L. J., 145.

“Interest properly arises whenever money is lent or forborne with an understanding expressed or implied that an equivalent shall be given for its use.”

Jersey City v. O’Callaghan, 12 Vr., 349, at page 353.

“There can be no interest unless there is a debt except where it is allowed as damages.”

State v. County of Multnomah, 10 Pac. Rep., 639.

In *Black v. White*, 42 N. Y. Super. Ct. 446, the court, citing 2 Greenleaf on Evidence, Sec. 112, in which it is stated to the effect that the receipt of money, *prima facie*, is only evidence of the payment of a debt antecedently due, says, “A very slight circumstance may show that it was a loan or that it was given at the request of the receiver, but there must be that circumstance to overthrow the presumption.”

II.

The indebtedness of defendant was admitted by him in his direct examination, as appears at bottom (Case, page 28), in which he quotes the conversation had by him with plaintiff, in which plaintiff said to him, "I see you owe the Skinner Estate \$5,000." and he answered, "Do I, I will have to hustle then, won't I?" This he states was the entire conversation at that time. If he had not owed the money, he then and there would have denied his indebtedness.

"Where a definite statement of a matter of fact is made in the presence or hearing of a party so that he understands it, in regard to facts affecting him or his rights, and the statement is of such a nature to call for a reply; and the party addressed is possessed of knowledge concerning the matter referred to, enabling him to reply if inclined to do so; and the nature of the statement, the right to information of the person who makes it, or other circumstances are such as to render a reply proper and natural, the statement, in connection with the total or partial failure to reply, is admissible evidence tending to show a concession of the truth of the facts stated."

16 Cyc., 956

"A party's failure to reply to a statement in his presence is significant in proportion to the extent to which a reply would be natural."

16 Cyc., 958.

See also, *Hand v. Howell*, 32 Vr., 142; aff. 32 Vr., 694.

III.

The court below properly directed a verdict.

“The court is justified in controlling a jury in its verdict by binding instruction in a case in which the testimony will not support a verdict other than that which is directed.”

Vandegrift Const. Co. v. Camden &c. Ry. Co., 45 Vr., 669.

“The testimony in the case would not have supported any other verdict than that directed by the trial judge and there was consequently no error in the instruction complained of.”

Coyle v. Griffing Iron Co., 34 Vr., 609.

When plaintiff testified to the admission by defendant of the receipt of the money in question and the payment of interest thereon, there arose a presumption of a loan. That presumption made it unnecessary for plaintiff to produce further testimony and was conclusive unless rebutted by competent testimony on part of defendant. In the absence of such testimony there was no jury question. *Bower v. Bower*, 49 Vr., 387.

Defendant produced no competent evidence which in any way negated his admission of indebtedness as made in his conversation with plaintiff. Even though that conversation were entirely eliminated from the evidence, we still have an admission by the defendant at the trial, that he received the sum in question and paid interest thereon, and there is no competent evidence of the defendant in any way qualifying that admission.

In the case of *Hartman v. Alden, extrx.*, 5 Vr., 518, plaintiff sued to recover on a judgment obtained by her testator during his lifetime against defendant. Defendant pleaded payment and introduced evidence in view of which, in the opinion of the Court of Errors and Appeals, a verdict in favor of the defendant's plea might have been rendered. The Court said: "If the evidence offered by the defendant was clearly insufficient to justify a verdict in his favor on the plea of payment, there can be no doubt that it was the duty of the judge who presided at the trial so to instruct the jury and to direct them as he did to render a verdict for the plaintiff." The Court of Errors and Appeals, however, was of the opinion that the court below, under the particular circumstances there present, erred in withdrawing that case from the jury.

In the case at hand, there was no competent evidence of a valid gift. All that was left, therefore, was the presumption that plaintiff's testator had loaned the amount in question to the defendant, and it was therefore the duty of the court below to instruct the jury to render a verdict for the plaintiff.

DEFENDANT'S POINTS, II, III, IV AND V.

Defendant complains that certain self-serving statements made by him were either treated by the court below as not admissible in evidence or were not submitted to the jury for its consideration. As a matter of fact, such statements relied upon by defendant were admitted in evidence against the objection of plaintiff. The trial court properly refused to submit such evidence to the jury.

(a) Defendant assumes as a basis of his contentions, that such statements were a part of the same conversation testified to by plaintiff, above quoted. Such fact nowhere affirmatively appears. The contrary is true. Plaintiff testified that the entire conversation had upon that occasion was as above quoted. This is not denied by defendant. He merely denies that he stated, referring to the \$5,000. in question, "that he supposed that now he would have to pay it." The elimination of such statement from that conversation could not affect defendant's admission. The testimony of defendant is, that the statements which he contends should have been submitted to the jury, were made by him to plaintiff in later conversations had by him with plaintiff. (Case, page 29.)

"It is generally held that where part of a conversation, of a written statement, or a judicial admission is introduced by one party as an admission, the other party is not entitled to the remainder on his own behalf unless it relates to the subject-matter of the admission and explains or modifies the same; nor can he introduce his own self-serving statements made on another and separate occasion, and the burden is upon him to prove that statements offered by him were not thus made."

16 Cyc., 1040.

"The general principle for which defendant contends, namely, that when the admission of a party is offered in evidence he is entitled to have the whole of what he said on the subject, at that interview, stated as part of the evidence, is correct, and is not

denied, but it does not extend to what he said on another and distinct occasion. It would be unreasonable and dangerous to permit him on another and separate occasion to make other statements and put them in evidence, and none of the authorities stated for the defendant authorizes such a practice. The evidence excluded related to another conversation at another interview and was properly excluded."

Adam v. Eames, 107 Mass., 275.

"It is a question for the court and not for the jury to determine whether the statement offered was a part of the statement offered by his opponent."

Robinson v. Ferry, 11 Conn., 460.

(b) If the alleged statements upon which defendant relies as qualifications of his admission had been made by him in the conversation testified to by plaintiff, above quoted, they would not in any way have affected his admission of indebtedness, nor made the direction of verdict improper.

The testimony given by defendant upon which he relies to negative his admission of indebtedness made by him to plaintiff appears (Case, page 30).

"A I told him that Mrs. Skinner had given me \$5,000 with the understanding that I was to pay interest on it until the time of her death, *and at which time the \$5,000. was to be mine*; in other words, it was a present of \$5,000. bearing interest during her life."

The last clause of his statement is, of course, his own conclusion and of no probative force.

At best, there was but a promise to make a gift and as such it was *nudum pactum*.

“It is essential to a gift that it goes into effect at once and completely. If it regards the future it is but a promise and being a promise without consideration, cannot be enforced and has no legal validity.”

Parsons on Contracts, 8th Ed. Star, page 234.

“Courts will not enforce a promise to make a gift.”

Wittingham v. Lighthipe, 1 Dick., 429.

“It is an elementary rule that such a gift (*inter vivos*) cannot be made to take effect in possession in *futuro*. Such a transaction amounts only to a promise to make a gift which is *nudum pactum*. There must be a delivery of possession with a view to pass a present right of property.”

Young v. Young, 80 N. Y., 422, at page 435.

Of course it could not be contended that there was either a gift *causa mortis* or a testamentary gift. It is essential to the former that it be made in view of and because of approaching death. To say that it was the latter would be, as was said by Chief Justice Gummere, in *Stevenson v. Earl*, 20 Dick, 721, “To practically repeal the statute of wills.”

In order to have any effect therefore, assuming that it was part of the conversation in which his admissions were made to plaintiff, defendant must show that there was a valid gift *inter vivos*.

“The burden of proof is on one claiming to be the donee of property to establish all

facts essential to the validity of such gift.”
20 Cyc., 1219, citing *Parker v. Parker*, 18
Stew., 224.

“Whoever alleges a gift must prove it
satisfactorily. A doubtful case will not do.”
Doty v. Wilson, 47 N. Y., 583.

“To constitute a valid gift *inter vivos*,
there must be such a transfer of the sub-
ject-matter as will pass the donor’s title
at once to the donee, absolutely and irrevoc-
ably, divesting the former of, and invest-
ing the latter with, all of the donor’s right
or title therein, and control and dominion
thereof.”

Mathews v. Hoagland, 3 Dick., 455, at page
485.

“A gift *inter vivos* must be complete *in
presenti*; it has no reference to the future;
there must be a delivery and it must be an
actual one, ‘so far as the subject is capable
of delivery. It must be *secundum sub-
jectam materiam*, and be the true and
effectual way of obtaining the command
and dominion of the subject.’ 2 Kent Com.
Star page 439.”

Id., page 485.

“But in order to legalize such a gift (*in-
ter vivos*) there must be not only a dona-
tive intention, but also, in conjunction with
it, a complete stripping of the donor of all
dominion or control over the thing given.”

Stevenson v. Earl, 20 Dick., 721.

“The test was this, that the transfer
was such that in conjunction with the dona-

tive intention, it completely stripped the donor of his dominion over the thing given, whether that thing was a tangible chattel or a chose in action."

Cook v. Lum, 26 Vr., 375.

"To establish a gift *inter vivos* there must be a donative intention on the part of the donor, actual delivery of the subject-matter, except in the case of a chose in action, in which the delivery must be of the character of which it is most capable, and the donor must divest himself of all dominion over the subject-matter."

Swayze v. Huntington, 12 Buch., 127.

"To complete a gift *inter vivos* there must be a donative intention, a delivery of the gift, or what amounts to a delivery, and the donor must rid himself of all control over the subject matter."

East Rutherford Savings Loan and Bldg. Ass'n. v. McKenzie, 100 Atl. Rep., 931.

Bailey, et al. v. Orange Memorial Hospital, et al., 102 Atl. Rep., page 7.

"An absolute gift, which will divest the donor's title, requires the renunciation on his part and the acquisition on the part of the donee of all the title to and interest in, the subject of the gift."

Irish v. Nutting, 37 Barb., 370.

The only evidence which appears in this case of a gift, is the testimony of the defendant, above quoted. By that its validity must clearly be established or the contention of the defendant must fail. It is apparent upon the defendant's own statement, that the gift was not

to take effect *in presenti*; that at any time before her death, Mrs. Skinner might have demanded payment of the sum in question, and that, therefore, no valid gift *inter vivos* was established. It is clear that defendant took no vested right in the amount given to him, for if he had failed to pay the interest, Mrs. Skinner could certainly have demanded back from him the \$5,000. By the terms of his own statement, the money was to be his at the time of her death and not before.

DEFENDANT'S POINT VI.

Defendant contends his denial of that portion of the conversation testified to by plaintiff in which defendant stated, referring to the \$5,000. in question, "that now he supposed he would have to pay it," raised an issue of fact which should have been submitted to the jury. As has been said above, assuming that such statement was not made by the defendant, the elimination thereof from said conversation could have no effect upon the question of his indebtedness.

Respectfully submitted,

REED AND REYNOLDS,
Attorneys for Plaintiff-Respondent.

ROBERT D. REYNOLDS,
Of Counsel.

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NOTICE OF APPEAL

NEW JERSEY SUPREME COURT

APPELLANT
vs.
APPELLEE

Case No. _____
Docket No. _____
Date of Decision _____
Date of Filing _____

APPEAL FROM THE DECISION OF THE

COURT OF CHANCERY

IN AND FOR THE COUNTY OF _____

FILED FOR APPEAL ON _____

AT _____

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

HUGH B. REED, Executor,
&c.,
Plaintiff-Respondent,
VS.
HENRY S. BONNER,
Defendant-Appellant.

ACTION AT LAW.
NOTICE OF APPEAL.

10

To Hugh B. Reed, Attorney of Plaintiff:

Take notice that the defendant appeals to the
Court of Errors and Appeals from the whole of the
judgment entered in this cause.

20

Yours respectfully,

LINTON SATTERTHWAITE,
Attorney of Defendant.

(Dated July 6th, 1917.)

Service of a copy of the foregoing notice of appeal
acknowledged this 7th day of July, A. D. 1917.

30

HUGH B. REED,
Attorney of Plaintiff-Respondent.

JUDGMENT RECORD.

(Filed Sept. 11, 1917)

NEW JERSEY SUPREME COURT.
ESSEX COUNTY.

10	HUGH B. REED, Executor under the will of SARAH A. G. SKINNER, deceased, vs. HENRY S. BONNER.	}	JUDGMENT RECORD. ACTION AT LAW. ON POSTEA. HUGH B. REED, AT- TORNEY.
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Henry S. Bonner, the defendant in this cause, was summoned to answer unto Hugh B. Reed, executor under the will of Sarah A. G. Skinner, deceased, plaintiff therein, in an action at law upon the following complaint:

(Summons issued January 17, 1917.)

Plaintiff who resides at Orange, Essex County, New Jersey, says:

1. On the first day of May, 1914, Sarah A. G. Skinner in her lifetime lent to defendant five thousand dollars (\$5,000) to be repaid on demand.

2. On December 6, 1915, said Sarah A. G. Skinner departed this life, having first executed and published a last will and testament wherein she appointed plaintiff the executor thereof.

3. On December 17, 1915, plaintiff duly qualified as executor under said will.

4. On the eighteenth day of February, 1916, defendant demanded payment of said sum of said defendant.

5. Defendant has not paid said sum.

Plaintiff claims as damages the sum of five thousand dollars (\$5,000) with interest from May 1, 1915. 10

HUGH B. REED,
Attorney of Plaintiff.
Pro se.

(Filed Jan. 27, 1917)

Defendant, residing in the city of Trenton, County of Mercer and state of New Jersey, says that:

1. He denies the first paragraph. 20

2. He admits the second paragraph.

3. He admits the third paragraph.

4. He admits that the plaintiff demanded payment as set forth in the fourth paragraph, and can not say as to the date.

5. He admits the fifth paragraph. 30

LINTON SATTERTHWAITE,
Attorney of Defendant.
Trenton, N. J.

(Filed Jan. 30, 1917.)

This case was tried before Judge Frederic Adams to whom the same was referred for trial by Honorable William S. Gummere, Chief Justice, with a jury at the Essex Circuit on June 29th, 1917.

The jury rendered a general verdict in favor of the plaintiff and against the defendant for \$5541.00.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of five thousand five hundred forty-one dollars damages, and his costs, which have been taxed at the sum of forty-seven dollars and eighty-one cents, making in the whole the sum of five thousand five hundred eighty-eight dollars and eighty-one cents.

\$5541.00 damages

47.81 costs

\$5588.81

Judgment entered July 2, 1917.

20

WM. S. GUMMERE,

C. J.

30 I, WILLIAM C. GEBHARDT, clerk of the Supreme Court of the state of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above-stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand and the seal of said court at Trenton, this (Seal) twenty-first day of August, A. D. nineteen hundred and seventeen.

WM. C. GEBHARDT,

Clerk.

REASONS FOR APPEAL.

(Filed Jul. 19, 1917)

NEW JERSEY COURT OF ERRORS AND APPEALS.

<hr/> HUGH B. REED, Executor, <i>Plaintiff-Respondent,</i> VS. HENRY S. BONNER, <i>Defendant-Appellant.</i>	}	ACTION AT LAW. 10 ON APPEAL. REASONS FOR APPEAL.
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To Hugh B. Reed, Attorney of Plaintiff:

Take notice that the following are the grounds upon which the defendant-appellant has appealed to the Court of Errors and Appeals from the judgment entered in the above-stated matter: 20

1. That the trial Judge took the case from the consideration of the jury when both plaintiff and defendant rested and instructed the jury to find a verdict in favor of the plaintiff and against the defendant for \$5,541.00; whereas he should have submitted the case to the jury to render a verdict upon the evidence which had been admitted.

2. That the Court overruled defendant's motion for non-suit based on the ground that the plaintiff had not made out a *prima facie* case, on the ground that the testimony of the plaintiff showed a conversation between the plaintiff and the defendant in which the defendant admitted having paid interest to plaintiff's testatrix on the sum sued for, that such 30

an admission of payment of interest together with proof of the check admitted in evidence raised a *prima facie* case or presumption that at the time of the payment of interest there was an obligation to pay interest, thus basing the submission of the case to the jury on behalf of the plaintiff upon the testimony of this alleged admission of the defendant, but refused at the close of the testimony to submit for the consideration of the jury the testimony of the
10 defendant as to a further part of the same conversation with the plaintiff which tended to explain and qualify said admission of payment of interest as raising a presumption of the existence of a debt.

3. That the plaintiff testified in his own behalf, on direct examination, as follows:

“Q. What was that conversation?”

20 A. Shortly after I had qualified as executor I saw the defendant and told him that I had found what I considered evidence of the fact that he was indebted to Mrs. Skinner’s estate in the sum of \$5000, and asked him what arrangements he would make to pay it. He said that he had received \$5000 from Mrs. Skinner, and that he had paid interest to her upon it to a certain time; that he had had some arrangement with her with regard to it, but that now he supposed he would have to pay it.”

And plaintiff testified on cross-examination as
30 follows:

“Q. No, but when he told you that he had received \$5000 from her, but that he had some arrangement with her about it, what did you say to him then?”

A. There was a little more to what he said in that sentence; he said that he had had some ar-

rangement about it, but that he supposed now that he would have to pay it, and I said that I wished he would make arrangements to do so."

And after plaintiff rested defendant testified concerning said conversation as follows:

"Q. What conversation did you have with Mr. Reed?

A. On visits afterwards in his office he spoke to me about it; we had conversations about it then.

10

Q. Did you say anything to him about arrangements with Mrs. Skinner?

A. I did.

Q. What did you tell him?

A. I told him that Mrs. Skinner had given me \$5000 with the understanding that I was to pay interest on it until the time of her death, and at which time the \$5000 was to be mine; in other words, it was a present of \$5000, bearing interest during her life."

20

And the Court refused to submit to the consideration of the jury the part of said conversation testified to by the defendant in connection with the part of said conversation testified to by the plaintiff as aforesaid, but directed the jury to find a verdict for the plaintiff on the ground that the defendant could not testify as to transactions with the plaintiff's testatrix.

30

4. That plaintiff testified, in his own behalf, that in a conversation defendant had said to him that he, the defendant, supposed he would have to pay to the plaintiff the sum of \$5000 for which suit was brought in the above-stated matter, and the defendant testified, in his own behalf, that he did not say to the plaintiff that he supposed he would have to

'pay said sum of money, yet the trial Judge refused to give the case to the jury on the ground that there was no evidence on the part of the defendant to go to the jury; whereas there was here a disputed question of fact as to an alleged admission by the defendant.

5. That the Court permitted the plaintiff to testify to part of a conversation with defendant to show an alleged admission of indebtedness or obligation to pay money on the part of the defendant, and refused to submit to the jury the rest of said conversation as testified to by the defendant; whereas the defendant was entitled to have the whole conversation as testified to submitted to the jury to consider whether the part testified to by the defendant so qualified and explained the part testified to by the plaintiff as, if believed by the jury, to overcome the *prima facie* presumption raised by that part of said testimony offered by the plaintiff as an admission by the defendant of liability.

6. That the plaintiff introduced in evidence, in his own behalf, a part of the conversation between himself and defendant, and the Court declined to permit the defendant to offer the whole of said conversation in evidence to be considered by the jury.

LINTON SATTERTHWAITE,
*Attorney of Defendant-
Appellant.*

30 Service of a copy of the foregoing statements of reasons for appeal, acknowledged this 16th day of July, 1917.

REED & REYNOLDS,
HUGH B. REED,
*Attorneys of Plaintiff-
Respondent.*

TESTIMONY.

NEW JERSEY SUPREME COURT,
ESSEX CIRCUIT.

Friday, June 29, 1917.

10

HUGH B. REED, Executor
under the Will of SARAH
A. G. SKINNER, De-
ceased,

vs.

HENRY S. BONNER.

ACTION AT LAW.

20

Before HON. FREDERIC ADAMS, J., and a Jury.

For plaintiff appear: HUGH B. REED, Esq., and
ANDREW L. BOYLAN, Esq.

For defendant appears: LINTON SATTERTHWAITE,
Esq.

30

(Mr. Reed opens for plaintiff.)

(Mr. Satterthwaite opens for defendant.)

SARAH J. HIGGINS, sworn in behalf of plaintiff.

Direct examination.

By Mr. Reed:

Q. Miss Higgins, you live in Newark, do you not?

A. I do.

Q. Did you know Mrs. Sarah A. G. Skinner, of
10 East Orange, in her lifetime?

A. I did.

Q. And she died when, do you know?

A. December, about the 6th of December, I think
it was 1915.

Q. Did you ever see her write?

A. I have.

Q. More than once?

A. A number of times.

Q. Are you familiar with her handwriting?

20 A. I am.

Q. I show you a letter and ask you if that letter
is in her handwriting (paper shown to witness)?

A. It is.

Q. And the signature, is that her signature?

A. It is, yes.

(The paper referred to is marked P1 for identification.)

30 Q. I show you a small, black book (book shown to
witness). Will you look at that and tell me in whose
handwriting that book is?

A. It is the same handwriting as the letter; it is
Mrs. Skinner's handwriting.

Q. It is Mrs. Skinner's handwriting?

A. It is.

Q. I want to show you particularly a page headed "June 8, 1915," and ask you if that page is in her handwriting also (shown to witness)?

A. It is.

Mr. Reed: I shall ask that this be marked for identification.

(The book referred to is marked P2 for identification.)

10

Q. Now, I show you a check dated May 1, 1914, and ask you in whose handwriting that is (paper shown to witness)? Whose handwriting is that?

A. That is Mrs. Skinner's.

Q. Mrs. Sarah A. G. Skinner's?

A. Yes.

Q. Are you familiar with the handwriting of Mr. Harry S. Bonner, the defendant?

A. No.

20

(The paper referred to is marked P3 for identification.)

Q. Are you familiar with this book that is marked P2 for identification?

A. I am not certain about that, not positively certain. I remember Mrs. Skinner using a black book for entries, but I don't know about that being exactly the book.

30

Cross-examination waived.

Mr. Reed: Now, I want to offer in evidence the first interrogatory submitted to the defendant in this cause and the answer thereto.

Mr. Satterthwaite: If your Honor please, some interrogatories were submitted to the defendant and were answered, and I shall interpose an objection to counsel offering any of those interrogatories with the answers unless he offers them all, for the reason
10 that all the interrogatories and answers are related to one another, they are related to the same subject-matter, and that the answers to some will explain or qualify the answers to others.

The Court: (After argument) The question is whether the answers to the other interrogatories are material to the issue or tend to explain, qualify or limit the answer admitted, assuming it to have been admitted.

20 This discussion had perhaps better be conducted in the absence of the jury.

To the jury: You are excused for a few moments, gentlemen.

(The jury retires.)

The Court: (After further argument) It seems to me very clear that the answers to the other interrogatories tend to explain the answer to the
30 first interrogatory. It is very true that the Court cannot compel you to offer them all; the question is whether you shall be allowed to offer only one.

Mr. Reed: Yes, sir.

The Court: The Court cannot compel you to offer

them all; the question is whether the Court should allow you to offer only one, if it appears that the answer to the one, which, in my opinion, they do. You made this in the form of an offer, I think?

Mr. Reed: Yes, sir.

The Court: I express my opinion, after perusing the interrogatories and answers, that the interrogatory and answer ought not to be received. 10

Mr. Reed: Of course, the same ruling would apply to any other one of the interrogatories that I should offer?

The Court: I do not know; I have not considered any other.

Mr. Reed: While the jury is still out, may I offer the others that I intended to offer, so as to have your ruling? 20

The Court: Certainly.

Mr. Reed: I offer the second interrogatory and the answer. I shall read it, since the jury is absent. "If the answer to the foregoing interrogatory be, 'Yes, upon what date did the defendant receive it?' " The answer is, "About May 1, 1914."

I want to offer the sixth interrogatory, which is, 30
"Did defendant pay to said Sarah A. G. Skinner any interest on said sum of \$5000 or on any other sum of money paid to him by said Sarah A. G. Skinner during the year 1914?" The answer is "Yes."

The seventh interrogatory: "If the answer to

the preceding interrogatory be, 'Yes, what payments of interest were made by defendant to said Sarah A. G. Skinner, how often were such payments made and in what amounts?' ' The answer is, "\$250, paid June 8, 1915."

10 The Court: Then the question again arises whether the answers to the other interrogatories, which you have not read, are material to the issue or tend to explain, qualify or limit the answer admitted. It seems to me that they tend to explain it.

Mr. Reed: My idea was that they gave a reason why it was paid, but they did not explain the fact that it was paid in any way. I thought that the Court must have referred in those cases to an answer that was incomplete without the rest of the answers; that it might be a partial answer only to the question asked. The question in this case is 20 whether the answer is in each case complete in itself. It merely asks if a certain act was performed, and the answer is, "Yes," and it seems to me that those are complete in themselves in each case.

The Court: I shall not admit these. Have I ruled on everything?

Mr. Reed: I think your Honor ruled that you would not permit any of them, yes, sir.

30 The Court: Yes.

(Plaintiff's counsel pray an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

(The jury returns into court.)

Mr. Reed: Counsel for the defendant admits that the indorsements on Exhibit P3 for identification are the indorsements of the defendant, and I now offer in evidence P3 for identification.

The Court: Did not Miss Higgins say that that was the signature of the defendant?

10

Mr. Reed: She said the signature to the check was the signature of Mrs. Skinner. The defendant admits the indorsements.

The Court: He admits it?

Mr. Reed: Yes, sir. The paper was identified; the defendant admitted his indorsement, and I offer it in evidence. No objection is made, I understand.

20

The Court: It stands in this way: The witness, Sarah J. Higgins, testified that she recognized the signature of Mrs. Skinner, and the indorsement of the defendant is admitted. You are probably within your rights, therefore, in offering the check.

(The paper referred to is marked Ex. P3.)

HUGH B. REED, sworn in behalf of plaintiff.

30

Direct examination.

By Mr. Boylan:

Q. Mr. Reed, where do you reside?

A. In Orange, New Jersey.

Q. And you are executor under the will of Sarah A. G. Skinner?

A. I am.

Q. Do you know Henry S. Bonner, the defendant in this case?

A. I do.

Q. I shall show you this book marked P2 for identification, and ask you to tell us about that book (book shown to witness).

10

Mr. Satterthwaite: That is objected to. It has not been shown that it is relevant to the case. I object to it as being irrelevant and incompetent. All that we have before us is that it is a book, and one witness has identified it as a book which she knew Mrs. Skinner had and that Mrs. Skinner's writing was in it. That does not connect it at all with this case.

20

The Court: Miss Higgins said that the book was in Mrs. Skinner's hand, and then she said that she was not sure that P2 was the book which she had seen her use. What is the objection to the witness telling us what he knows about the book, if he knows anything?

Mr. Satterthwaite: He was asked to tell about the book. I do not know what he would tell, but my objection is that ——

30

The Court: Nobody knows that.

Mr. Satterthwaite: No, but I make the objection now that the book is not shown to be anything that is relevant or competent. There might be a dozen books found among Mrs. Skinner's papers that

would be absolutely incompetent to shed any light on the issues in this case, and merely to produce a book and show that it was Mrs. Skinner's property and that she had made entries in it —

The Court: It goes further than that; that it is in her handwriting.

Mr. Satterthwaite: Well, in her handwriting— and then ask the witness to tell what he knows about it, is incompetent. There is no foundation for that. 10

The Court: I think there is some foundation for it. I shall overrule the objection.

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

A. After Mrs. Skinner's death I looked over the papers which I found in her house, and among them I found this book. It was either in her desk or in a box, a tin box, which I found among her possessions in her house, in East Orange. 20

Q. Did you have any conversation with the defendant shortly after the death of Mrs. Skinner in regard to the claim of her estate against him?

A. I did.

Q. What was that conversation? 30

A. Shortly after I had qualified as executor I saw the defendant and told him that I had found what I considered evidence of the fact that he was indebted to Mrs. Skinner's estate in the sum of \$5000, and asked him what arrangements he would make to pay it. He said that he had received \$5000 from

Mrs. Skinner, and that he had paid interest to her upon it to a certain time; that he had had some arrangement with her with regard to it, but that now he supposed he would have to pay it.

Cross-examination.

By Mr. Satterthwaite:

10 Q. Where was this conversation, Mr. Reed?

A. In my office, on the eleventh floor, 810 Broad Street, Newark.

Q. Who was present?

A. In my office, Mr. Bonner and I alone; I mean that there were others in the outer office, but in my office, we were there alone.

Q. Now, you said that you told him that you found evidence that he owed Mrs. Skinner's estate \$5000?

A. I did.

20 Q. And he said to you that he had got \$5000, but that he had some arrangement with Mrs. Skinner about it?

A. Yes, sir.

Q. Did he?

A. Yes, sir.

Q. He told you that?

A. Yes.

Q. What did you say to him then?

30 A. Well, I said, as far as appeared from the book that I had found, it appeared that he owed her estate \$5000.

Q. No, but when he told you that he had received \$5000 from her, but that he had some arrangement with her about it, what did you say to him then?

A. There was a little more to what he said in that sentence; he said that he had had some arrangement

about it, but that he supposed now that he would have to pay it, and I said that I wished he would make arrangements to do so.

Q. Was not anything said by you that led him to say that now he supposed he would have to pay it?

A. No, sir,—at least, I told you what he said.

Q. I am trying to probe your memory, that is all.

A. I think that was all that was said on that occasion.

Q. But did you suggest to him that, unless he had something to show for that, that he would have to pay it?

A. Not at that time.

Q. Do you remember exactly the words that he said?

A. I told you them, as near as I could recall it.

Q. Did he not express surprise when you told him that you had found evidence that he owed \$5000?

A. Not in my estimation.

Q. He did not intimate to you what the arrangement with Mrs. Skinner was?

A. Not at that time.

Q. But he did say, "But I suppose now I will have to pay it," after he said that he had an arrangement with her?

A. Yes, sir.

Q. This book which was spoken about, Mr. Reed, you found that among what papers of Mrs. Skinner's?

A. Well, I found it among her papers. She had a great many papers in her desk and in a tin box and various places in her house, and this, as I recall it, was either in her desk or in this tin box, which was probably —

Q. Did she have a box in which she kept her securities?

A. Not all of them, Mr. Satterthwaite. In her house there was a tin box, as I say; it was about maybe eight inches long and four inches high approximately, and in that there were two or three mortgages and some notes.

Q. Notes receivable, notes of people owing to her?

A. Yes, people that owed her. This book may have been in that box; I think it was; but I cannot now recall whether it was there or whether it was
10 not.

Q. What family had Mrs. Skinner?

Mr. Boylan: I do not see that that is pertinent to this case and I object to it.

The Court: Do you think that is cross-examination?

Mr. Satterthwaite: Possibly not. It is pertinent,
20 but possibly not cross-examination.

Q. What relationship did Mr. Bonner sustain to Mrs. Skinner?

A. Oh, he was no relation to her; that is my understanding.

Q. What relationship? That does not mean blood relationship necessarily. Do you know whether Mrs. Bonner was a member of Mrs. Skinner's family?

30 A. Well, Mrs. Bonner was a daughter of Mr. Skinner, Mr. Satterthwaite, and she had been married a number of years and away from home—away from the home. She was not a member of the family at the time of Mrs. Skinner's death.

By the Court:

Q. You say a daughter of Mrs. Skinner?

A. A daughter of Mr. Skinner, not a daughter of Mrs. Skinner.

By Mr. Satterthwaite:

Q. Did Mrs. Skinner have any children of her own? 10

A. Not as far as I know, sir.

Q. Mrs. Bonner was always recognized as a daughter by Mrs. Skinner, was she not?

A. Well, I can't tell you that, Mr. Satterthwaite. I never met Mrs. Bonner, I think, until after Mrs. Skinner's death, as I recall it. I frequently called on Mrs. Skinner, or, at least, I had called on Mrs. Skinner at her house a number of times, but I never saw Mrs. Bonner there. It was during the last twenty years that I have known Mrs. Skinner, and I had never seen Mrs. Bonner. 20

Q. Mrs. Bonner was married and living away at that time?

A. Yes, I understand so.

Mr. Reed: Now, I desire to offer P2 for identification in evidence (handing P2 for identification to defendant's counsel).

Mr. Satterthwaite: Show me the particular entry in there. 30

Mr. Reed: I offer the book with particular reference to this page headed "June 8, 1915."

Mr. Satterthwaite: Objection is made to this, if the Court please, as being incompetent.

This is offered, I suppose, for the purpose of establishing the plaintiff's claim, and at the very best it is a self-serving statement. Evidence could not be made against a person by entries which one might make on a memorandum about his own affairs. If that were true, anyone could prepare evidence against anyone. If this were a book of accounts, in the ordinary commercial sense, there are exceptions made in that case, because it is a book in which

10 entries of daily transactions are entered. That is an exception. Now, I do not understand that I could today make an entry in some memorandum in my possession and leave it in my safe, or in my desk, and if it was denied, that my executor could take that memorandum as any proof whatever against the person mentioned in that memorandum. It would be highly incompetent. If I have something signed by him, that would be another matter, but that would be self-made evidence of the most flagrant

20 character. I do not think that would be so in the case of a living person, as it would in the case of a person who is dead, more particularly as death has closed the mouth of the other party.

Mr. Reed: I offer this as a book of entries made by Mrs. Skinner. It is, I confess, not as full and complete as I should like. It is, however, as appears in evidence, a book in her handwriting, found among her effects. That is the only claim it has of being

30 of evidential value. Without discussing just what it contains, I shall ask your Honor to look at it and determine whether, in your opinion, that comes within the scope of a book of accounts (handing book to the Court).

The Court: (After further argument) My ruling does not prove anything but my opinion, but I agree with you so far as to think that it is very doubtful. I shall sustain the objection.

(Plaintiff's counsel pray an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

PLAINTIFF RESTS.

10

Mr. Satterthwaite: I should think, if your Honor please, I am justified in asking for a non-suit on the ground that the case has not been proved. It is true that a check bearing Mr. Bonner's indorsement, signed by the defendant, is produced; but that in itself proves nothing. It might be in payment of a debt, it might be a gift, it might be anything.

20

The Court: This check is on the Guaranty Trust Company of New York, dated "New York, May 1, 1914. Pay to the order of Harry S. Bonner \$5000." Signed "Sarah A. G. Skinner," and indorsed by Mr. Bonner, and it bears various bank stamps on the back of it, which indicate, I suppose, that it went through one or more banks and was paid.

On just what ground do you think there ought to be a non-suit?

30

Mr. Satterthwaite: On the ground that it does not establish a case, if your Honor please. There are thousands of checks paid daily, and they are paid for many different purposes. The mere fact of a

payment through a check signifies nothing, in the absence of some proof showing the purpose for which it is paid. I might receive \$5000 from counsel today in payment of a claim which I had against one of his clients, or in payment of a claim against him, or it might be that someone sent it to me for a gift, and upon the check being cashed the gift would be effected by delivery of the money represented by it; it might be repayment of a loan, and it might
10 be anything; and if a suit be brought against me for having borrowed money of him, he could prove his case by simply producing a check drawn to my order and indorsed by me. It seems to me that there would be no trouble for anybody at any time who had had dealings with me to put me on defense on a charge of owing money or having borrowed money, when it might be payment of a debt due to me by him. There is nothing on the face of it to show what it was for.

20

The Court: The question is whether it is *prima facie* evidence.

Mr. Satterthwaite: My objection is that it is not *prima facie* evidence. Now, when a promissory note is presented, and it is in the possession of the plaintiff, with my name on as signer or indorser, when that is taken as *prima facie* evidence the case is entirely different, because the note does on its face
30 purport a debt to the holder of it; but a mere check does not.

The Court: I shall hear Mr. Reed.

(Counsel argue.)

The Court: I think the fact that some payment of interest appears is enough to raise a presumption that there was at the time that interest was paid an obligation to pay interest. Just when the interest was paid does not appear. The defendant said, "to a certain time," without stating what that time was. For that reason I deny the motion to non-suit.

(Defendant's counsel prays an exception to this ruling of the Court.) 10

(Exception noted as ground of appeal.)

HARRY S. BONNER, defendant, sworn in his own behalf.

Direct examination.

By Mr. Satterthwaite: 20

Q. Mr. Bonner, you are the defendant?

A. I am.

Q. You knew Mrs. Skinner in her lifetime?

A. I did.

Q. How long did you know her?

Mr. Reed: I think that this is immaterial, if your Honor please. I object to it.

30

The Court: I will receive it.

(Plaintiff's counsel pray an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

(Question read.)

A. About twenty-four years.

Q. Was your wife any relative or connection of hers?

A. My wife was her stepdaughter.

Mr. Reed: I object to that for the same reason.

10 The Court: Does not that already appear?

Mr. Reed: On cross-examination by Mr. Satterthwaite I said something about it.

The Court: I shall receive it.

(Plaintiff's counsel pray an exception to this ruling of the Court.)

20 (Exception noted as ground of appeal.)

(Question and answer read.)

Q. How long since you married your wife?

Mr. Reed: May it be considered that my objection goes to this line of questions?

A. Twenty-two years.

30 The Court: I shall not rule on anything but a particular question. I shall allow this question to be answered.

(Plaintiff's counsel pray an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

By the Court:

Q. You say you have been married to your wife for twenty-two years?

A. Twenty-two years.

By Mr. Satterthwaite:

Q. Did you marry her from Mrs. Skinner's home? 10

A. Not from the home, no; we were then in Philadelphia, and we were married in a church in Philadelphia.

Q. Was she living at home with Mrs. Skinner then?

A. Yes and no. Her home was there, but she visited a good deal around. Her home was there up until the time of her marriage.

Q. Did you have a conversation with Mr. Reed, Mrs. Skinner's executor, after her death at his office? 20

A. I did.

Q. Just tell us what that conversation was, as nearly as you can remember it.

A. I had several conversations —

The Court: No, you are asked as to one conversation.

Q. Anything with reference to an indebtedness or supposed indebtedness by you to Mrs. Skinner's estate? 30

A. I was in Mr. Reed's office in company with a friend of mine —

Q. Who was it?

The Court: Can you give us the time?

Witness: I cannot give you the date, sir; I think it was in the morning.

Q. About when?

A. Oh, possibly two weeks after the funeral; I wouldn't undertake to say exactly.

10 By the Court:

Q. What was your friend's name?

A. Fred Lehlbach.

By Mr. Satterthwaite:

Q. Is that Congressman Lehlbach?

A. Yes, sir.

Q. A Newark man?

20 A. Yes.

By the Court:

Q. About two weeks after Mrs. Skinner's death?

A. Yes.

By Mr. Satterthwaite:

Q. What was that conversation?

30 A. Just as I was passing out—Mr. Lehlbach had preceded me and was waiting; we were to take lunch—he asked me to take lunch with him—Mr. Reed said to me, “I see you owe the Skinner estate \$5000.” I said, “Do I? I will have to hustle, then, won't I?”

Q. Did you say anything to him that you would pay?

A. No, at that time I had no conversation other than that; I passed out; I was passing out of the door, I think.

Q. And that was all the conversation you had at that time?

A. That was all the conversation we had at that time.

Q. What conversation did you have with Mr. Reed?

A. On visits afterwards in his office he spoke to me about it; we had conversations about it then.

Q. Did you say anything to him about arrangements with Mrs. Skinner?

A. I did.

Q. What did you tell him?

The Court: When was that?

20

Witness: I can't give you the dates; it was different visits that I paid to Mr. Reed's office.

By the Court:

Q. Was it before or after the interview that you spoke of?

A. After that.

Q. After that you were again at Mr. Reed's office?

A. Yes.

30

Q. And you had an interview with him?

A. Yes.

Q. And now, you are asked whether you said anything about an arrangement?

Mr. Reed: I think, your Honor, anything that he said about an arrangement would be a self-serving declaration, and I object to that as incompetent for that reason.

The Court: (After argument) I think you may go and give your account of what you remember as to the conversation that you were about to speak of.

10' (Plaintiff's counsel pray an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

(The stenographer reads from the record as follows: "Q. What conversation did you have with Mr. Reed? A. On visits afterwards in his office he spoke to me about it; we had conversations about it then. Q. Did you say anything to him about arrangements with Mrs. Skinner? A. I did. Q. What
20 did you tell him?")

A. I told him that Mrs. Skinner had given me \$5000, with the understanding that I was to pay interest on it until the time of her death, and at which time the \$5000 was to be mine; in other words, it was a present of \$5000, bearing interest during her life.

By Mr. Satterthwaite:

30 Q. Anything further said?

A. Oh, I was in his office for an hour and a half, I presume, or quite a long time. There was a long conversation; I couldn't remember everything that we said. We had a discussion about many things, with regard to the estate, the personal property, my wife's interest, and that sort of thing.

Q. Do you recall whether you said to him that you supposed you would have to pay it now?

A. I never made any such statement, to my knowledge.

By the Court:

Q. You say you did not?

A. I did not.

10

By Mr. Satterthwaite:

Q. Mr. Bonner, as a matter of fact, did you pay interest on that \$5000?

A. I did.

Q. From what date to what date?

A. From May 1, 1914, to May 1, 1915.

Q. Do not answer this question until counsel has an opportunity to object. Did you at Mrs. Skinner's death owe her any part of that principal?

20

Mr. Reed: I object to that. That calls for a conclusion.

The Court: That, as counsel correctly states, calls for a conclusion. For that reason it is objected to, and I think it is objectionable.

Q. I shall ask you this question. Do not answer this until counsel has an opportunity to object. Did you at the time the \$5000 was paid over to you or or at any subsequent time promise to repay that \$5000 to Mrs. Skinner?

30

Mr. Reed: I object to that as calling for a transaction with the deceased, in contravention of the statute.

The Court: (After argument) Of course, the policy of the act is plain enough, that death having closed the mouth of one party the law would close the mouth of the other. So that Mr. Bonner would be precluded from giving any testimony as to a personal transaction with Mrs. Skinner, unless the bar of the statute has been removed by the representative, in this case, Mr. Reed, the executor, offering himself as a witness and testifying to any trans-
10 action with or statement by the deceased. Now, what transaction with or statement by Mrs. Skinner has Mr. Reed testified to? What has Mr. Reed testified to? He says that he knows Mr. Bonner; that he found the book among Mrs. Skinner's effects, and he had a talk with Mr. Bonner, and Mr. Bonner said that he had had \$5000, and so forth, and so forth. That is not a transaction with Mrs. Skinner; that is a conversation with Mr. Bonner; that is his statement to Mr. Reed. That is as far as Mr. Reed
20 went. I sustain the objection.

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

Q. Mr. Bonner, do you know whether or not Mrs. Skinner was a woman of considerable wealth?

30 Mr. Reed: I object to that as entirely immaterial.

The Court: What difference would that make?

Mr. Satterthwaite: If your Honor please, I am simply trying to prove the atmosphere about the case, that surrounds the transaction, on the same

principle on which the Court will permit counsel to ask any witness what his business is, where he lives, how old he is. It is part of the atmosphere of the case, or the surroundings. Otherwise I should say that it has no relevancy.

The Court: What legal difference would it make whether she was rich or poor?

Mr. Satterthwaite: No difference whatever, your Honor, but on the question of probability of the fact it would have its bearing, it seems to me. 10

The Court: It seems to me to be irrelevant.

Cross-examination waived.

DEFENDANT RESTS.

20

Mr. Reed: I shall ask your Honor to direct a verdict in favor of the plaintiff for \$5000 and interest from May 1, 1915, amounting to \$541, at five per cent.

The Court: (After argument) This is the difficulty that I see in your path, Mr. Satterthwaite. The statute precluded the defendant from testifying as to any transaction with the deceased, and he has not done so; he has not proved any transaction with the deceased; he could not. He has made a statement as to something that he told Mr. Reed; but how can that bind the estate? 30

(Counsel argue.)

The Court: It appeared to me that there was nothing to go to the jury, and I am still of that opinion, because the words of the statute are an absolute bar, in my judgment. I have not the slightest doubt about it.

It is only in one case that the defendant can be a witness in his own behalf as to transactions with the testator, or, in this case, the testatrix, and that is when the representative, the executor in this case, offers himself as a witness in his own behalf and testifies to some transaction with or statement by the testatrix. Mr. Reed has offered himself as a witness in his own behalf, but he has not testified to any transaction with or statement by Mrs. Skinner. He has testified to a conversation with the defendant; but statements made in that conversation by the defendant as to any transaction with Mrs. Skinner are not evidence in this case, because he could not make them. The statute forbids it, unless the representative has first opened the door.

The responsibility in this case is on me, and it is a responsibility that I am bound to bear and that I am perfectly willing to bear. The questions arising under this statute are questions for the Court. If the case goes up, as it ought to, it will present the point to the mind of a Court or Courts whose jurisdiction is superior to that of the Circuit Court; but I am bound to put it in a shape which commends itself to my judgment.

My direction to the jury is to find a verdict in favor of the plaintiff and against the defendant for \$5541.

(The jury accordingly renders a verdict in favor of the plaintiff and against the defendant for \$5541.)

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

EXHIBIT P1 FOR PLAINTIFF.

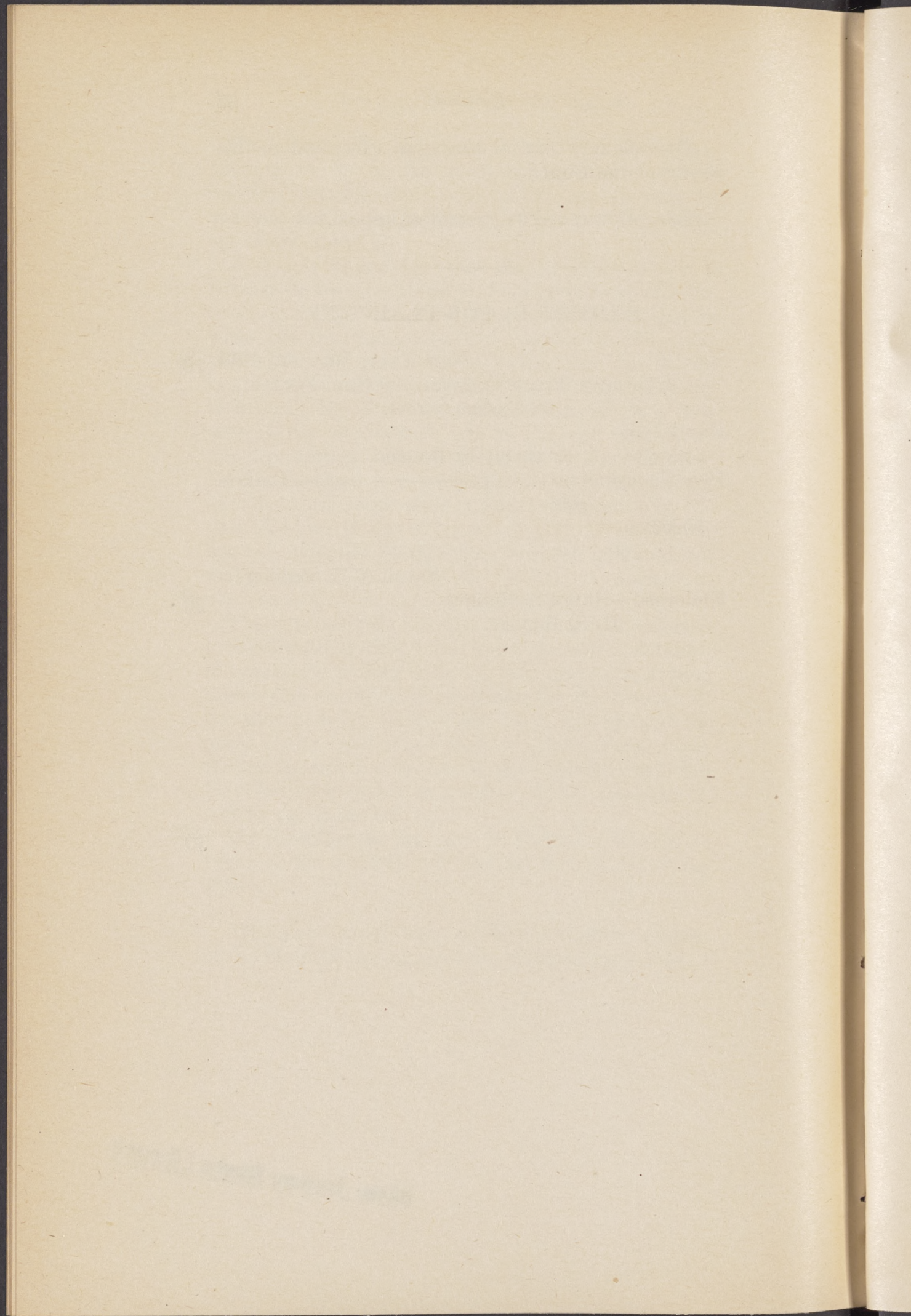
No. 197 New York, May 1st, 1914 10
Guaranty Trust Company of New York
28 Nassau Street

Pay to the order of Harry S. Bonner
Five Thousand no _____ Dollars
100

\$5000 no
100

Sarah A. G. Skinner.

Endorsed—Harry S. Bonner 20
H. S. Bonner.



New Jersey Court of Errors and Appeals

HUGH B. REED, EXECUTOR,
Plaintiff-Respondent,

VS.

HENRY S. BONNER,
Defendant-Appellant.

Action at Law.
On Appeal.

Appellant's Reply Brief.

"Silence or acquiescence is a species of evidence to be received with caution, and the weight to be given to it is a question for the jury." 16 *Encyc. of Law*, 960.

In *Bower v. Bower*, 78 N. J. L. (49 Vr.) 387, it was held that to constitute a conflict in testimony such as to compel submission to a jury it is not necessary that facts be in dispute, for if the inference to be drawn from undisputed facts is one about which there may reasonably be an honest difference it is for the jury, not the court, to draw the inference.

The trial judge really propounded the question to defendant and when he gave his version of the conversation with plaintiff so far as it related to statements with regard to "arrangements" with Mrs. Skinner (p. 29, l. 22; p. 30, l. 12).

It was the conversation with plaintiff in which "arrangements" were talked about that defendant was here interrogated about.

The trial judge evidently had no doubt as to the identity of the conversation referred to by plaintiff and defendant.

It is clear in the reasons given by the court for directing the verdict (p. 34) that there was no intimation in his mind that defendant's testimony as to the conversation should be withheld from the jury because it was not part of the same conversation (p. 34).

The court withheld it because it involved statements as to transactions with Mrs. Skinner. Under the authority of *Robinson v. Ferry*, 11 Conn. 460, cited in brief of plaintiff-respondent, the objection now made on appeal for the first time should be disregarded.

It does not appear by the record that plaintiff objected to the admission of the evidence because it was not part of the same conversation. His objection was based on the sole ground that it was a self-serving statement (p. 30, l. 1).

There is nothing in defendant-appellant's statement to show that the gift of \$5,000 was not to take effect *in presenti*; nothing to show that Mrs. Skinner might have demanded payment of the sum at any time before her death.

It does not appear "by the terms of his own statement, the money was to be his at the time of her death and not before."

He says (p. 30, l. 22), that "the money was given him with the understanding that he was to pay interest on it until the time of her death "and he then adds "at which time the \$5,000 was to be mine; in other words, it was a present of \$5,000, bearing interest during her life."

He first says Mrs. Skinner gave him the money with the understanding that he should pay interest until her death, then follows an amplification of the statement, but nothing to indicate that Mrs. Skinner had a right to recall the gift or that the principal was not to become his *before* her death.

To his layman's mind, doubtless, the important consideration was that after her death he would no longer be required to pay interest, the money would then be his in that sense.

The \$5,000 was delivered when the check was paid, until then the donor could have withdrawn the gift. But not afterwards.

"A condition attached to delivery would invalidate a gift *inter vivos*, but a promise of the donor, or a condition imposed on the donee, not constituting a condition of delivery or title, but consistent with it, will not have that effect. Thus a gift upon condition that the donee shall give a part of the property to a designated third person is a valid gift." 20 *Cyc. of Law*. 1210.

Nor does the payment of interest militate against the theory of a gift.

In *Beatty v. Western College*, 177 Ill. 280, certificates, setting forth that in consideration that Western College would maintain its college and advance Christian education, etc., and would pay to Mary Beatty \$187.50 each year of her life, the first payment one year from date, the said Mary Beatty had deposited with the college \$2,500 for the benefit of and to become the property of the college, etc., were claimed to be mere conditional gifts, not executed in the lifetime of the donor. It was claimed there was no gift *in presenti* of the money named in the certificate because of the conditions annexed to the proposed gift, because it was not absolute and that the death of Mary Beatty did revoke it.

The court held that if the money was delivered to the college to be used as the board of trustees should direct, Mrs. Beatty parted with all control over it. "The title to the money vested in the college." It held further that the requirement of the payment of annuities did not make the gift conditional, that if the annuities were conditions they were conditions subsequent and not precedent.

The court held the college should pay all unpaid annuities and the interest thereon.

In *Doty v. Willson*, 47 N. Y., 580, Chief Justice Church said, where a claim was made against a son for an alleged loan made by his father then deceased, where no writing was made, and no evidence of debt taken, and "under circumstances rendering it uncertain as to whether it was intended as a loan or a gift and not inconsistent with either." The son was permitted to testify to a declaration made by the father that it was intended as a gift, "not as evidence of the fact, because he was incompetent for that purpose, but by way of contradiction of admissions proved by the other side against him." The court below was held to have erred in ruling that the gift was "necessarily invalid because the right to call for six per cent. was reserved."

Chief Justice Church said further: "If this was a gift of \$3,000, the title and control of the money immediately vested in the donee, and his promise to pay the donor six per cent. in no degree effected such title or contract. * * * * *

"The donor could never recover back the principal, nor in any manner control it, and it is not material to inquire whether he could recover the interest."

In *Flint v. Ruthrauff*, 53 N. Y. Supp., it was held that the delivery of securities with reservation of the income was a valid gift of the securities.

The real question is not whether a gift has been proven as a matter of fact, but whether the circumstances which were proven including the conversation by the appellant with respondent, which was in the case intending to qualify the admission involved in the acknowledgment of paying interest, both in the conversation and on the witness stand, the fact that the appellant was practically a member of the family of deceased, that no note or other evidence of a loan or debt was produced by the

plaintiff, leaving the inference to be drawn that none was taken, the fact that the deceased had a box in which were found notes of other persons who owed her money, whether the inferences which might be drawn from all these circumstances by the jury would be consistent with a gift rather than a loan. The question of these inferences is for the jury and not for the court. The circumstances in the case of *Hartman v. Alden*, 5 *Vr.* 518, cited by respondent, were scarcely stronger in affording inference in favor of the defendant than those in the case at bar.

The conversation testified to by the appellant should have been laid before the jury.

It was part of the conversation brought into the case by the respondent. Without the part he brought in, the case could not have been submitted to the jury on behalf of the plaintiff. The whole of that conversation became, therefore, necessarily an integral part of the evidence in the case, and belonged there to qualify, if in the minds of the jury it might qualify, any other fact or admission which appeared in the case.

Respectfully submitted,

LINTON SATTERTHWAITE,
Counsel for Defendant-Appellant.