

NEW JERSEY Court of Errors and Appeals.

Between

SARAH E. HEISLER ET AL.,

Appellants,

and

HENRY S. PRICKETT ET AL.,

EXEC'RS OF WM. SHARP, DEC'D,

Respondents.

Appeal from
Pregrogative
Court.

Brief.

William Sharp, the testator, died January 31st, 1886. By his last will and testament, bearing date January 16th, 1884, he bequeathed to one Edith A. Dewson the sum of \$2,000 and several specific articles.

Edith A. Dewson had been a member of testator's household from the age of twelve years until the death of testator, a period of some thirty years. During those years she had grown from childhood to middle age, and had served as handmaid, general servant, housekeeper, companion and nurse.

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At the age of eighteen, having become a young lady in the family, the testator very properly consented to allow her for spending money \$1 per week, which after three years was increased to \$1.50, and after eighteen years more again increased to \$2.

Cue, pages 30 and 10.

That this was a very insufficient recompense for services rendered, the wife of Mr. Sharp seems clearly to have

understood; that Miss Dewson would be so remembered by the will as to remunerate her, and even that, should she then consider herself insufficiently compensated, she might bring a bill against the executors, appears to have been the understanding.

Case, pages 30 and 31.

And that Mr. Sharp himself never considered the payment of \$1, \$1.50 or \$2 per week sufficient recompense, appears plainly from the fact that, contrary to his habit as
10 manifested with others, he never had a settlement with this woman marked in his book of account.

Case, page 17.

That there was any agreement or understanding between the testator and Miss Dewson, that his will should settle differences, appears nowhere; but that the testator and his wife considered that there was a difference seems plain from the above considerations.

Consequently, after the death of the testator, the duties of Miss Dewson having, since the death of Mrs. Sharp,
20 December 8th, 1883, increased from those of servant and attendant to those of the very responsible position of housekeeper and nurse, Miss Dewson presented a claim, duly verified, to the executors, for those services as housekeeper and nurse over the general duties of servant, which she also performed. The bill amounted to \$560, and after mature deliberation and consideration the executors allowed and paid it.

Their credit in their account for the amount of the claim was excepted to by the appellants here, and the exception
30 being overruled by the Burlington County Orphans' Court, and its decree being affirmed by the Prerogative Court, it is now brought before this Court.

The sole question presented to this Court is whether the executors having in good faith, on their interpretation of the wishes of the testator, as signified by his will, having regard to the interests of the estate, paid this claim, they shall be allowed the same as a credit in their account.

It is not a question as to whether Miss Dewson could have established her claim in a court of law, but whether the
40 executors, having allowed it, as they thought, *for the benefit*

of the estate, they shall be obliged from their own resources to pay the amount again; and to persons who make no claim that the services were not performed, who do not say that they themselves, related as they were, by ties of kinship, attended the old gentleman in his last days, managed his household and ministered to his many needs, but who, admitting the services and the necessity for the same, merely say enough has been paid.

Nor is it a question as to amount. There is no dispute that the amount allowed was excessive, but simply that it 10 should not have been allowed at all.

I.

The legacy cannot be taken to be in satisfaction of the debt due to Miss Dewson, for not only one, but nearly all of the facts which Courts have held sufficient to avoid the lightly regarded rule that, "If one, being indebted to another in a sum of money, does, by his will, give his creditor a sum of money as great as or greater than the debt, without taking any notice at all of the debt, this shall, nevertheless, be in satisfaction of the debt, so that the creditor shall 20 not have both the debt and the legacy," are present in this case.

The presumption of satisfaction shall not be made when the debt was not contracted until after the making of the will.

Thomas v. Bennet, 2 P. Wm. 343.

Fowler v. Fowler, 3 P. Wm. 355.

Cranmer's Case, Salk. 508.

Nor where the debt is due on a running account.

Rawlins v. Powel, 1 P. Wm. 299.

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Nor where the consideration of the debt is a continuing one or not fully performed.

2 Lead. Cases in Equity 825.

Strong v. Williams, 12 Mass. 391.

Williams v. Crary, 3 Cnven 246.

Horner v. McGaughy, 12 P. F. Smith 189.

Nor where will orders "debt paid." (p. 11.)

Chaucey's Case, 1 Pr. Wm. 408.

Hales v. Durell, 3 Beav. 324.

Jefferies v. Michell, 20 Beav. 324.

Cole v. Willard, 25 Beas. 568-593.

Penchin v. Simmons, 30 Beav. 119.

Charlton v. West, 30 Beav. 124.

Atkinson v. Littlewood, 18 L. R. Eq. 595.

Lord Chichester v. Coventry, 2 L. R. H. L. 71.

Dawson v. Dawson, 4 L. R. Eq. 504.

2 *Leading Cases in Eq.* 821, and cases thereunder.

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In *Richardson v. Greese*, 3 Atk. 69, Lord Chancellor Hardwicke says, "Legacies to servants have never been held to be in satisfaction of debts."

Some of these are the reasons mentioned for avoiding the general rule in *Van Rippers v. Van Rippers' Ex.*, 1 Gr. Ch. 1.

The bequests of specific articles, mentioned on page 36 20 and elsewhere, have no part in this case—

1. Because they were Miss Dewson's property before the will was made made (page 34); and

2. "A legacy of a specific chattel, however great its value, will not be a satisfaction of the debt, unless so expressed."

2 *Williams on Exec.* 1409.

Bac. Abr. Legacies, D.

II.

If the contention be that Miss Dewson was under contract to perform all services for the sums received by her, \$1, 30 \$1.50 and \$2 per week, we reply in the words of the Vice-Ordinary, "No such contract has been proved."

The only proof regarding the same is that, by the account-book of the testator, it appeared that these sums had been

paid, but, also, that no settlement appeared *Pages 10 and 17*. And the word of Miss Dewson that she had received the same, but that it was for spending-money, and that she had had no settlement. *Pages 30, 34, 37 and 38*.

This is all ; nothing more.

Surely a contract under the attendant circumstances cannot be inferred from that.

Even were there sufficient proof to show that the testator considered the payment as full, which idea is, however, fully negatived by the lack of settlement in his book, there is not 10 a single thing in the whole case to show that Miss Dewson accepted it as such ; that there was in any respect the meeting of minds necessary to make a contract to that effect.

The only thing on which their minds met, as appears from the testimony, was that Miss Dewson should be allowed certain sums for *spending money*, the payments of which the testator of course noted in his account-book as credits of cash, but, as before repeatedly said, without any intimation of settlement thereby. *Pages 30 and 17*. 20

But even could it be fairly said that a contract was made for services at those figures, notwithstanding what Miss Dewson says, the Court will notice that that contract, if any (*page 30*), was made when Miss Dewson was *eighteen years of age*, an infant, and surely her word that what she received was for "spending money," should be given at least sufficient credit as to be believed to have created such an impression in her mind as would prevent a ratification by failure to disaffirm.

And further, such a contract, if any, would undoubtedly 30 be for the performance of such duties as she was engaged in at the time of making the same. The parties cannot be supposed to have contemplated that, over and above those ordinary services, eighteen or twenty years afterwards Miss Dewson would be obliged to serve as housekeeper and nurse in addition to her other duties, and to have provided for such contingency ; and the Court will notice that the bill allowed by the executor was for *housekeeping and nursing*

(page 1), services characterized by Miss Dewson (page 33, line 27) as "extra services."

But it is respectfully insisted that we have no need to emphasize this position, for the acts and words of the testator and his wife, aside from the positive assertion of Miss Dewson, show affirmatively and conclusively (which is unnecessary, as the burden of proof is with the exceptants) that the understanding was that the sums paid were not full compensation.

10 Should it not be insisted that the full compensation was to come by legacy and that that being understood by Miss Dewson, she was bound by that; we answer—

01 1. There is no such understanding on the part of Mr. Sharp proven.

2. As expressed by Mrs. Sharp, if the remembrance by will were insufficient, Miss Dewson might do just as she has done.

20 3. Assuming the worst against us, the legacy can only be set off against the proper value of the services from the beginning.

Hammond v. Smith, 33 Beav. 452.

Reynolds v. Robinson. 64 N. Y. 539. Approved in

Same v. Same, 82 N. Y. 103.

Considering then the length of time Miss Dewson served, and the character of those services, is it not almost positive that Miss Dewson could have established a claim, which, setting off the amount of the legacy, would have greatly exceeded the amount paid?

30 For twenty-one years after she attained the age of eighteen, and before Mrs. Sharp's death, she had, Mrs. Sharp being an invalid (page 31), performed *all of the work in the household*, except the regular washing and house-cleaning.

See page 31, and testimony of all concerning these services.

And for the two years succeeding Mrs. Sharp's death did all this and entirely directed and managed the household and nursed the old gentleman besides.

An average valuation of these services at \$4 per week, deducting the amounts paid and the legacy, would leave a balance of nearly double the amount claimed and allowed.

4. But supposing that the amount paid and bequeathed covered all the ordinary services, this claim, as we said above, is for "extra services;" and

5. For services which, save a few weeks, were performed after the making of the will, and could not be included under the legacy. (*See supra*, page 5.)

III.

But, as suggested above, this is not now a question between Miss D. and the executors, but between the executors and the residuary legatees, and becomes, more than any- 10 thing else, a question of their good faith, prudence and discretion.

We submit that, as the executors acted in good faith, upon a reasonable view of the case their act cannot be impugned.

"The universal test for modern times should be, whether, in compromising or submitting to arbitration, the representative acted with fidelity and due prudence."

Schouler on Executors, § 386.

Williams' Executors, page 1900.

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See *Blue v. Marshall*, 3 P. Wm. 381.

Pennington v. Healey, 1 Cr. & M. 402.

Murray v. Blatchford, 1 Wend.

And reporter's notes to *Rogers v. Hand*, 12 Stew. 270.

In *Ritter's Appeal*, 23 Pa. St. Repts. 95, 97, the Court says:

Where the executor is not interested in the demand, where he acts in perfect good faith and pays a debt which he believes, upon reasonable grounds, to be justly due, without any notice from any of the persons interested in the estate that they desire to contest it, there is no justice 30 in charging him with the amount.

If the persons interested stand by, making no inquiry into the affairs of the estate, and permitting their representative to pay off creditors without giving notice of their objections, they are bound by his act. He is in the nature of an agent or trustee for them. His discretion over this

particular question, where the parties in interest make no objection, is well established. Where that discretion is exercised in good faith, he is not liable for the money thus paid.

The rule which seems to have been followed in this State, although not affirmed by this Court, is that laid down by Chief-Justice Hornblower, in *Meeker v. Vanderveer's Exrs.*, 3 J. S. Gr. 392, 398. "An executor may compromise a lawsuit; he may buy the peace of the estate he represents, and
10 extinguish even doubtful claims against it, provided he acts discreetly and in good faith."

Judged by the rules laid down in these cases, there can be little question in this case, for no attempt is made to attack the good faith of these executors; there is not a word about it in the book; and so far as the wisdom and discretion of the act is concerned, it seems to have met the approbation, or at least assent, of the very exceptants themselves. Pages 22, 23, 49, 50 and 52.

From the above considerations respondents respectfully
20 submit:

1. That the legacy to Edith A. Dewson did not extinguish her claim against the estate.

2. That it cannot be applied to an indebtedness unless so understood and agreed upon between the parties, and even then can be applied only so far as it will go, and not in liquidation, and cannot possibly be applied to that which did not exist at time of making bequest, or which was not contemplated in understanding and agreement, if any.

3. That the executors having in good faith acted for the
30 benefit of the estate, upon careful consideration, their act cannot be impugned unless so indiscreet as to indicate or be equivalent to fraud.

SAMUEL W. BELDON,
Of Counsel with Respondents.

No. 29.

MARCH TERM, 1889.

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Between

SARAH E. HEISLER AND ANOTHER,

Appellants,

and

HENRY S. PRICKETT AND ANOTHER,

EXECUTORS OF WILLIAM SHARP,

DEC'D,

Respondents.

Appeal from

Prerogative

Court.

BRIEF FOR APPELLANTS.

The executors of William Sharp, deceased, in their final account before the Burlington Orphans' Court, claimed allowance, among other items, for

1886, 12th Mo., 14th, Cash paid E. A. Dewson, services as nurse
and housekeeper..... \$560.00

Appellants filed exceptions to this item. The Orphans' Court dismissed the exceptions and awarded costs, which were taxed at \$72.63, including fees to proctors. Appellants appealed to Prerogative Court; that Court affirmed the Orphans' Court; from this decree of affirmance the pending appeal is taken.

The claimant lived with decedent from the time she was twelve years of age, and was educated, fed and clothed by him. At the age of eighteen she had an agreement with decedent that she should receive at various times one dollar, one dollar and fifty cents, and two dollars per week, and that she should be remembered in his will. It "was impressed upon her mind" that if she was not remunerated sufficiently by the will she should or could bring in a bill against the executors of the estate. She received the weekly sums agreed upon, also money for clothing, traveling expenses, and church purposes, up to the death of decedent. She received by the will a legacy of two thousand dollars in cash. She put in a claim to the estate for \$1,560; this the executors refused to pay. The executors revised the bill and allowed her a certain compensation by the week for the time between Mrs. Sharp's death and Mr. Sharp's death; they computed the time she had been employed by Mr. Sharp and the amount received by her, from his books, and found that she did not average one dollar and fifty cents per week. They concluded that that was not sufficient compensation, and, as the will said "pay his debts," she having performed the service and not received an adequate compensation, it was a debt. They paid it without notice to or consent of residuary legatees, and without advice of counsel. One of the residuary legatees wrote to one of the executors to know if this claim had been put in and if they had paid it. She received no reply.

THERE WAS A *devastavit*, AND THE EXECUTORS SHOULD NOT BE ALLOWED THE FIVE HUNDRED AND SIXTY DOLLARS (THE ITEM EXCEPTED TO) IN THE ACCOUNT.

The principles upon which the general rule adopted with respect to the liability of executors, &c., for *devastavit* is founded, are stated by Williams (*Williams on Executors*, 1796,) to be: 1. "That, in order not to deter persons from undertaking these offices, the Court is extremely liberal in making every possible allowance, and cautious not to hold executors liable upon slight grounds;" and 2. "That care must be taken to guard against an abuse of their trust."

It is submitted that, as the practice is growing rapidly of

having corporations administer estates, and corporations are created for these express purposes, there is little danger of deterring persons from undertaking these offices, the Courts should be careful about establishing precedents as to allowances, and show a disposition to hold these officers liable upon slight grounds.

1. These executors were not bound to satisfy the claim, and had the evidence in their control to defeat any action that the claimant might have brought.

The Court below is in error in saying "no such contract has been proved." "The proofs, on the contrary, serve rather to show that while Miss Dewson had, for many years, been a member of the testator's family, she was not there as an adopted daughter, or as a dependent, but as a servant working for wages, with no definite arrangement, however, as to the amount of compensation she should receive."

That there was an agreement as to compensation will appear by the testimony of claimant, page 30, line 20, as follows:

"Q. When you first went to live with Mr. and Mrs. Sharp, did they pay you anything for your services?

"A. No, sir.

"Q. Now, at any time after that, did they agree to pay you for your services?

"A. At the age of eighteen Mrs. Sharp had a controversy with me, or a conversation, and she agreed, or they agreed, to give me from time to time, as I needed it, for spending money, a dollar or a dollar and a half or two dollars.

"Q. What then?

"A. Well, then I was to be remembered in the will; frequently, during the time, Auntie reminded me I should be taken care of—that I should be remembered in their will.

"Q. And what then, if anything; was there anything further than that?

"A. Yes, sir; it was impressed on my mind frequently that if I was not *remunerated* sufficiently by the will, I should or could bring in a bill against the executors of the estate."

The executors found the testator's books to show the payments of one dollar, one dollar and a half and two dollars per week to claimant (*bottom of page 9 and page 10*). Walton, one of the executors, says:

"Q. You had the custody of Mr. Sharp's books, had you not?

"A. Yes; all that we thought were of any importance at all for our own purposes.

"Q. In the book that you had, you found entries in his handwriting of money paid to Miss Dewson, did you not?

"A. Yes.

"Q. For services weekly, or at a weekly rate?

"A. I think it was at a weekly rate—one dollar a week.

"Q. Some of it?

"A. Some of it.

"Q. And some more?

"A. For the first three years at one dollar per week.

"Q. After that it was how much?

"A. For the eighteen subsequent years only one dollar and a half a week.

"Q. And after that?

"A. Two years to the close of her services I think two dollars per week."

This agreement was made with claimant when she reached the age of eighteen years. She understood that at that time she was free to go elsewhere or to remain at that compensation. She remained; the money was paid. This certainly was an agreement or contract to pay so much per week for her services, and a promise to remember her in the will. She was remembered in the will to the extent of two thousand dollars. The agreement had been performed upon both parts. The executors could not make a new agreement. The claim put in was not a debt of the testator.

The executors knew of this before the claim was paid.

Walton, page 11, line 10; page 12, line 15. (Read.)

Prickett, page 20, line 15:

"Q. You knew from this book that Miss Dewson had been paid various sums all this time?

"A. Yes, sir.

"Q. And that she had a substantial legacy by the will?

"A. Yes, sir; we knew that."

And page 24, at bottom:

"Q. Now, my question to you is, had you any knowledge of a contract prior to the payment of this claim?

"A. Outside of what we could learn from the books do you mean?

"Q. Yes?

"A. Simply a hearsay knowledge.

"Q. Well, from whom?

"A. From Miss Dewson.

"Q. From Edith?

"A. Yes.

"Q. Now, just please state what knowledge you had, and how you derived that knowledge?

"A. Miss Dewson told me that she had a talk with Auntie Sharp, and that she had told her that Uncle Sharp would provide for her in his will, but that she was afraid that Mr. Sharp would forget, and said to her that in the event of his not satisfying her in the amount of the legacy she could bring a bill against the executors.

"Q. Now, was that before or after the time, or after the first bill was presented?

"A. It was after the first bill was presented and before the second.

"Q. Did she on that occasion name any terms that she was to receive for her services or otherwise?

"A. No; I think not."

The payment by the executors in this case was not by advice of counsel that it was a proper claim to be paid; on the contrary, it was because the executors, after calculating what the claimant had received in decedent's lifetime and by his will, were of opinion that the sums so paid were not, in the aggregate, sufficient compensation for the services rendered, although they were the result of an agreement between the testator and the claimant as to compensation and services.

Prickett, page 26, line 2, says:

"Q. What made you think that this claim of Miss Dewson's could be established at law?

"A. On account of the equity of the claim.

"Q. That is, that she had performed the services, and Mr. Sharp had not paid her a sufficient sum, in your opinion, for the services?

"A. Yes."

The payment was not purchasing the peace of the estate by compromising a law suit.

She had neither sued nor threatened to sue.

Walton, page 18:

"Q. Did she make any effort to sue the executors?

"A. I do not think it had culminated to that; it was not necessary."

Prickett, page 26:

"Q. Did Miss Dewson threaten to sue the estate?

"A. Not formally; no."

The payment was not compromising a doubtful claim to avoid scandal. The payment was of a claim, not recoverable, upon which no suit had been brought or threatened without the advice of counsel, and without the consent, authority or knowledge of the residuary legatees, and solely because of sympathy or friendship by the executors for the claimant.

Executors cannot be allowed to administer estates in such a way, and to so appropriate the moneys and property of these residuary legatees.

If such payment was beneficial to the estate, when objection is made to its allowance, the burden of proof is on the executors to show the benefit.

Wyman's Appeal, 13 N. H. 118.

Where an executor has paid a claim and asks allowance for it in his account, and exceptions are filed, the burden is on him to show that it was the debt of the testator.

Kirby v. Cole's exrs., 3 J. S. Green 441.

In the present case appellants are compelled to take the statements of the executors, and call them as witnesses.

The reasons of the executors for making the payment, all the reasons they would give, are found on pages 11, 12, 13

and 26. The statement as to what Miss Heisler said is on page 48, line 12.

The reasons given are, in full, as follows:

"Q. Why did you pay the claim of \$560 to her?

"A. Well, we thought we had several good reasons; we "predicated our claim greatly upon this: in looking over "these accounts of payments to Edith, the services began, I "think, on the 5th of November, 1862, at a very low price "of \$1 per week for an intelligent laborer and nice house- "keeper, competent to give the very best service in a family; "at \$1 per week; the next eighteen years, as I recited a "few moments ago, at only a \$1.50, and then following "that to the very end of the service, only \$2 per week for "the service of a nice housekeeper, that was competent to, "and did, as we were at different times informed, entertain "the old gentleman Sharp's company, prepared entertain- "ment for them in the way of board, and everything per- "taining to the housework; that, we considered, was very "low indeed, and in his will he said we should "pay all his "just debts;" we considered that it was a just debt—the "last one that was accepted, I mean the \$560—in consider- "ation of all those things; we considered it was only just "and equitable, and that the will commanded it, and we paid "it mainly because we thought it was right; another thing "that influenced us, was that, after the reading of the last "will and testament of William Sharp—the first expression, "after the solemnity was over, Sarah E. Heisler herself vol- "untarily and deliberately said—now, I was asked the ques- "tion why we paid it?

"Q. That is exactly what I want to know?

"A. Well, she was the first to speak; Sarah E. Heisler "said, and it was about in these words, that she thought "Uncle Sharp's will (she called him Uncle Sharp), was very "well, except he did not leave Edith enough; she had been "a faithful friend and helper to him; he did not leave "Edith enough; that did, to a certain measure, determine "the conclusion of this matter; myself and associate, we "pondered over this; we did not do it at the spur of the "moment; we could not pay the first bill, but we united "and agreed upon the second, and we felt clean and clear "in the matter, I have from that moment to the present.

"Q. Were those the only reasons that you had for paying it?

"A. No, not exactly.

"Q. I would like to know all of them?

"A. It was this, when you come to look over these books in question and compute the time, which was over twenty-three years, you find that it does not average a \$1.50 per week; why, the very cheapest common servants in the kitchen get about double that pay; it does not average that; the calculation is easily made; it does not pay \$1.50 a week.

"Q. Is that the only reason?

"A. Well right at the spur of the moment I do not know that I can comprehend all of the reasons that influenced us. My associate probably can make up the rest that you may want. Nothing occurs especially to me just now."

The associate on the examination of his counsel states the reasons as follows, page 24:

"Q. Now, Mr. Prickett, why did you pay this claim; what was the moving and actuating reason for your paying this claim?

"A. The desire to fulfill the terms of the will, as much as anything else.

"Q. Did it assist you in settling the estate early, in your judgment, I mean?

"A. In my judgment it did.

"Q. In your judgment, did it release the debt against the estate?

"A. That is the way I looked upon it.

"Q. Have you any doubt in your mind but that the claim could have been established in a court of law?

"A. I had no doubt in my mind or I would not probably have considered the thing seriously, but my own object, and the object of my co-executor, when we talked upon the subject, was to avoid any litigation; we thought we were best serving the interest of the estate in settling it as we did."

And on page 26, on re-direct, says:

"Q. What made you think that this claim of Miss Dewson's could be established at law?

"A. On account of the equity of the claim.

"Q. That is, that she had performed the services and Mr. Sharp had not paid her a sufficient sum in your opinion for the service?

"A. Yes."

So that the only benefit to the estate claimed by the executors was the prevention of litigation not threatened.

It was negligence on the part of the executors to pay this claim without legal advice and without consent of, or notice to, the residuary legatees.

Prickett, page 20, line 20, says:

"Q. Did you have any consultation with the residuary legatees before you paid the claim?

"A. Not a direct consultation as to asking them whether we might do it or not.

"Q. Did you let them know whether you were going to pay it?

"A. We were in possession of the fact that they knew we expected to pay or had paid the claim—that they were in possession of that fact.

"Q. That you had paid the claim?

"A. Yes."

Miss Heisler, one of the appellants, page 51, says she wrote Mr. Walton, one of the executors, to know if any such claim had been put in, and she received no answer.

In *Vez v. Emery*, 5 Vesey 141, an executor paid a note because of a decree in Switzerland and his own notion of the law of England, without taking advice of counsel. He made the payment in good faith, innocently. The Master of Rolls held him liable to be charged, but intimated that he would not have held the executor liable had he been advised by counsel to pay.

In *Winchcombe v. Bishop of Winchester et al.*, *Hobart's Reports*, bottom of page 167, it is said: "If a man be bound in an obligation usurious, the bond is void between the parties, and, therefore, if such an obligor makes his executor and dies and the executor pay an usurious bond, other creditors may show it and make a devastavit of it."

The Court below say that "All that the respondents were required to do was simply to do what any man of ordinary prudence and caution would, under like circumstances, have done."

It is submitted that any man of ordinary prudence and caution would, under the circumstances, have obtained the consent of the residuary legatees to the payment of the claim, or at least consulted counsel.

The opinion below refers to *Pursel v. Pursel*, 1 *McCarter* 526; *Vreeland v. Vreeland's admr.*, 1 *C. E. Gr.* 512.

In *Pursel v. Pursel*, the executor paid a judgment to which he might have pleaded the statute of limitations. It was held he was not bound to plead the statute. The judgment was evidence that the debt was due, no proof of bad faith in the payment of it.

In *Vreeland v. Vreeland's admr.*, the Court passed upon the question whether a claim was a disputed claim to take it out of the jurisdiction of the Orphans' Court, and said, page 528:

"The administrator is the legal representative of the estate, and, as a general rule, he may, at his discretion, and without the assent of those interested in the estate, pay or compromise any claim against it, even though barred by the statute of limitations. Claims against the estate paid by the executor or administrator constitute properly a part of his account. If the claims are illegal or unfounded, the charges in the account are open to exceptions, and thus the question is brought within the jurisdiction of the Orphans' Court."

The opinion below also cites *Meeker v. Executor of Vandever*, 3 *J. S. Green* 392; *Rogers v. Hand*, 12 *Stew.* 270.

In the former case executor was allowed for payments made in compromising a suit in Chancery upon agreement of heirs.

The amount was allowed by the Orphans' Court in the settlement of the account of executor of James Vandever, and it appears, by the opinion, it was paid with the consent of the parties interested.

The opinion in *Rogers v. Hand* cites the Meeker case and goes further.

Yet it appears in this case the *claimant was about to commence an action*; the payment was made *on advice of counsel* and to *avoid scandal*. This was also for services as housekeeper. The executors testified—one that he found no evidence of any payment to Mrs. Adams, nor anything which referred to any payments whatever to her; the other, that he made full inquiry into the claim *and the relations between her and the testator*, and that he found no evidence of any payment to her, for her services as housekeeper, for any part of the long period of time that she lived with him.

I submit no one of the four cases cited furnishes a precedent for the allowance to the executors of this payment of \$560.

There is no doubt that claimant lived in the family of the testator and worked as a member of the family, received her board and clothing, expenses to the seaside, church money and a weekly payment of money, and a substantial legacy by the will.

The Court below takes the view that she was a servant working for wages, with no definite arrangement as to compensation.

Yet the claimant's testimony, produced in behalf of the executors, is (page 36):

"Q. Did they give you any money at all during the time you were living with them?

"A. When I would ask them for it, yes; as I asked them for money, they gave me.

"Q. You said something about having spending money—a \$1, \$1.50 and \$2; was your asking limited to that amount?

"A. No, sir.

"Q. Then when you wanted money for clothing or for any other purpose, you asked for it and received it?

"A. Yes, sir.

"Q. Have you any idea of how much you did receive during all that time?

"A. No, sir.

"Q. You lived with Mr. and Mrs. Sharp as a companion from your girlhood up, did you not?

"A. Yes, sir.

"Q. Who furnished you an education?

"A. Yes, sir.

"Q. And took care of you always?

"A. Yes, sir; from twelve years old."

The executor Walton, page 11, says:

"Q. That book also contained memorandum or entries of other payments to Miss Dewson, did it not, in the way of expenses and moneys?

"A. Of other payments?

"Q. Yes; for expenses—traveling expenses and dress?

"A. Well, I cannot speak definitely; I do not feel so well ascertained about that; I think there were some memorandum of expenses or charges during visits to the seashore, may be, or in church service, but I do not mean to speak ascertainedly about it."

From the testimony it is clear that the claimant remained in the testator's family with the understanding that she was to be paid the weekly allowance, and a remembrance in the will, all of which she received.

But this claim is paid because the claimant says, bottom page 30, it was impressed on her mind frequently that if she was not *remunerated* sufficiently by the will she should or could bring in a bill against the executors of the estate.

If these executors had acted the part of prudent men they would have given these residuary legatees notice of this claim, so that it might have been objected to and a trial had. Having acted on their own judgment, without the advice of counsel, without notice to or consent of the residuary legatees, it was at their peril. They must show that the claim was a debt of the testator. They have failed to show it.

Taking all the testimony in the case, the claimant appears to have performed the services upon a promise to be remunerated in the will of testator, which promise was made when she was eighteen years of age.

The Court below says, "There can be no presumption of an intent to satisfy a debt by a legacy, which the testator does not incur until after he has made his will."

As no amount was ever specified or agreed upon, she relied entirely upon the testator's generosity as to amount. The debt was long before the making of the will. The will is dated January 16th, 1884. The testator died January 31st, 1886. The services claimed for are for the two years prior to the death of testator. As executors on their part showed a promise to remunerate by the will, it is certain the legacy was in satisfaction. The time the will was made makes no difference; it might have been made the day after the promise or the day before the testator's death, the effect would be the same.

If the testator had failed to make a remuneration by will, the claimant might have had an action under *Stone v. Todd*, 20 Vroom 280, and cases cited.

In *Patterson v. Patterson*, 13 John's 379, an action by son against father for services on promise of father that son should have farm, paying legacies to other children, it was held that the suit was premature; should the defendant wholly overlook the plaintiff in his will, this would be such an act of injustice there could be no doubt the plaintiff might maintain an action and recover a reasonable compensation for his services.

In *Shallcross v. Wright*, 12 Beavan 562, executor paid physician one hundred pounds for his services on an affidavit that the testator "promised to pay him for his services or leave him an equivalent," payment was disallowed by Master.

The Master of the Rolls: "I think that in this case there "is neither debt nor contract. This gentleman went on "from year to year without claiming anything whatever, "but, manifestly, with a view of receiving a legacy. "Where is the contract? I cannot find any, and the claim "cannot be allowed as a debt.

"The executor who has taken upon himself to pay this "sum, stands in the situation of the person he has paid, and "if there is no legal debt the payment cannot be allowed "him."

So far as I know there are no adjudications of the Court of Errors of this State upon the subject.

The services rendered were those only of a member of the family; testator was not confined to his bed. The claimant did not perform nor did testator need services of a nurse. (Knight's testimony on cross-examination, pp. 40 and 41; Josiah Hackney, pp. 42 and 43.) She was assisted by Hackney about the house, and by a woman to do the washing and scrubbing.

If, as the Court below says, there was no agreement, then there was no debt. The services were, at most, such as are usually rendered by the female members of a family, as a matter of course and as a due contribution to the requirements of a household, and for which no action can be maintained in the absence of an express contract or agreement to pay for them.

Udike v. Titus, 2 Beasley 153.

Gardner's admr. v. Schooley, 10 C. E. Green 154.

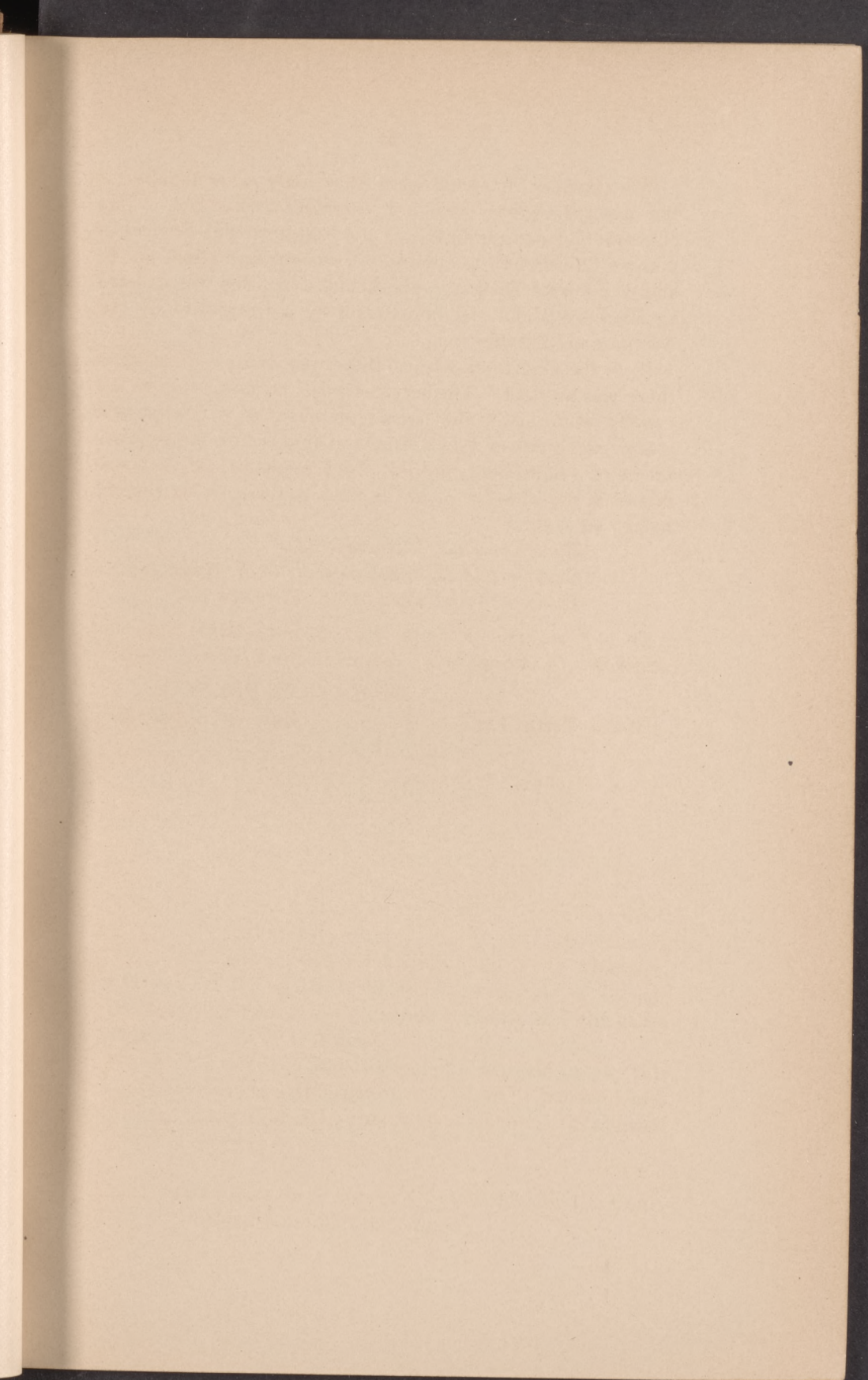
Brown v. Welsh's exr., 12 C. E. Green 429.

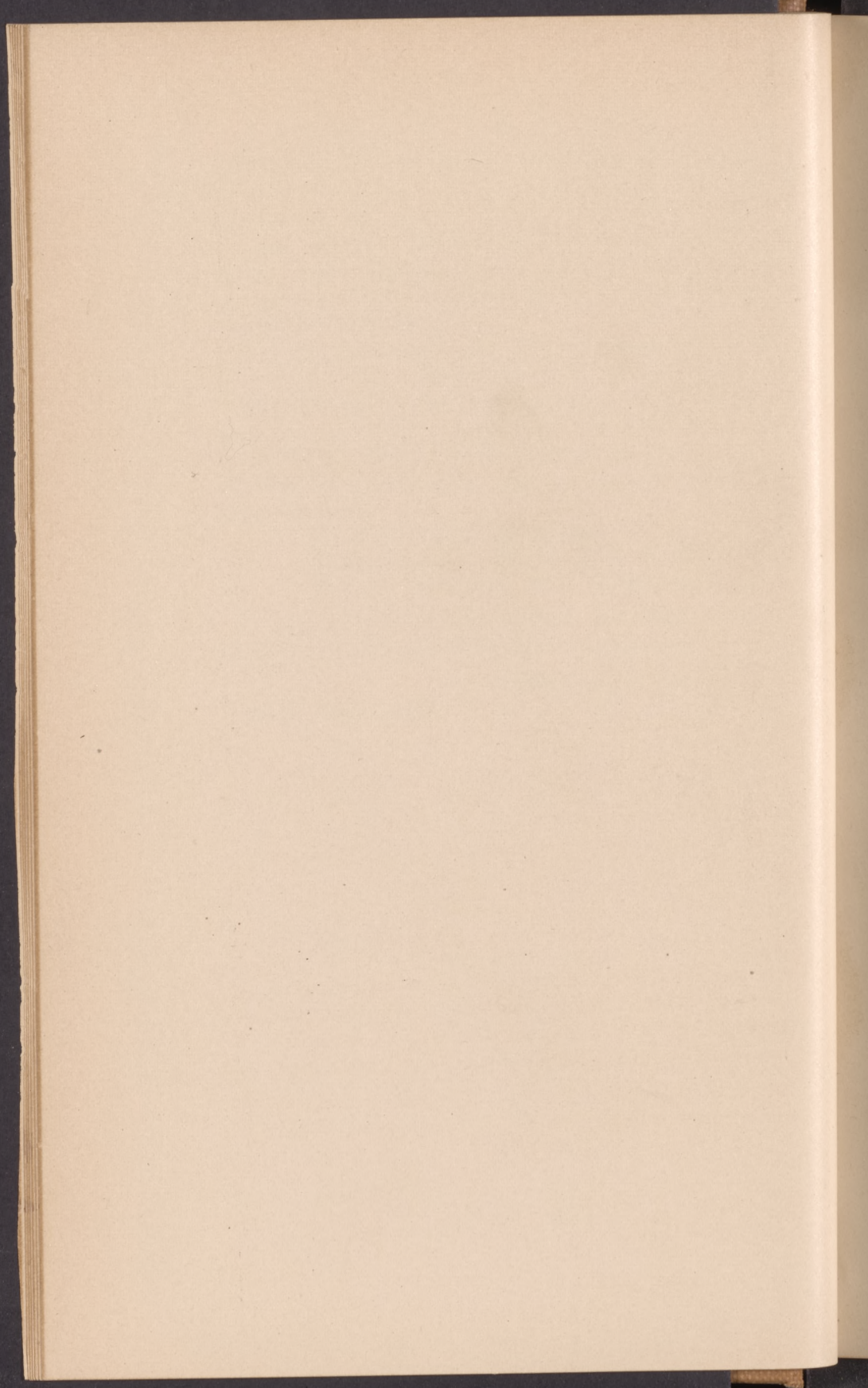
IN THE MATTER OF COSTS, page 5, our statute does not allow fees to attorneys as Proctors in the Orphans' Court.

THOMAS E. FRENCH,

March Term, 1889.

Solr. for Appellants.





COURT OF ERRORS APPEALS.

Between

SARAH E. HEISLER and Another,

Appellants,

and

HENRY S. PRICKETT and Another, Ex-

ecutors, &c., of WILLIAM SHARP,

Deceased,

Respondents.

Appeal From

Prerogative

Court.

RECORD OF ORPHANS' COURT.

ITEM IN EXECUTOR'S ACCOUNT EXCEPTED TO.

1886, 12th Mo., 14th, cash paid E. A. Dewson,
her charges as nurse and housekeeper, \$560 00

EXCEPTION.

Burlington County Orphans' Court. In the matter of the estate of William Sharp, deceased. Exception to the account of Henry S. Prickett and Silas Walton, Executors of the last will and testament of said William Sharp.

Sarah E. Heisler and Susanna D. Marcer, two of the devisees under said will, except to the allowance of the

account of Henry S. Prickett and Silas Walton, executors of the last will and testament of William Sharp, deceased, for the following reasons:

1. Because the said accountants ought not to be allowed credit in said account for the sum of five hundred and sixty dollars, paid to E. A. Dewson, for charges as nurse and housekeeper, the same being improper payment, no sum being due her for such services.

10

SARAH E. HEISLER,
SUSANNA D. MARCER,

By THOMAS E. FRENCH,
Proctor.

Burlington County Orphans' Court. In the matter of the estate of William Sharp, deceased. Decree on an exception to the account of the executors.

The exception filed by Sarah E. Heisler and Susanna D. Marcer, two of the residuary legatees and devisees under the last will and testament of William Sharp, deceased, to the account of the executors of said estate, coming on to be
20 heard, on the sixth day of October, A. D. eighteen hundred and eighty-seven, and the court having heard the evidence and allegations of the parties, and having examined Silas Walton and Henry S. Prickett, the executors under the said last will and testament of the said William Sharp, deceased, on their respective oaths and affirmations, and the arguments of counsel being heard, and the court having taken time to consider thereon: It is on this seventeenth
30 day of October, A. D. eighteen hundred and eighty-seven, ordered and decreed, that the said exception, filed by the aforesaid Sarah E. Heisler and Susanna D. Marcer, to the said account of the said Silas Walton and Henry S. Prickett, executors as aforesaid, be, and the same is hereby dismissed, with costs to be taxed, to be paid by the said executors out of the corpus of the residuary estate.

And it appearing to the court that from the sale of the real and personal property of the said decedent, there is a balance in the hands of the said executors of fifty-two hundred and twenty-one dollars and sixty-seven cents, after the payment of the debts of the decedent, and the specific legacies directed to be paid by the said last will and testament and the costs and charges of administering and settling said estate; and that the nephews and nieces of the said testator now living are George Heisler, Israel P. Heisler, Susanna D. Marcer, wife of Joseph F. Marcer, 10 and Sarah E. Heisler, and that William Sharp Heisler, another of the nephews of said testator hath departed this life, leaving Isaac F. Heisler, George M. Heisler, William H. Heisler and Mary E. Heisler his children him surviving.

And it further appearing that the Court of Chancery of this State hath appointed Caleb D. Shreve, Esquire, receiver of all the estate, right, title and claim of the said George Heisler, nephew as aforesaid, in and to his distributive share in the estate of the said testator: 20

It is ordered that the said sum of fifty-two hundred and twenty-one dollars and sixty-seven cents, balance as aforesaid in the hands of the said executors, be distributed among the said residuary legatees by the executors on receiving proper acquittances and releases, as follows, to wit: One-fifth part thereof, amounting to the sum of ten hundred and forty-four dollars and thirty-three cents, to Caleb D. Shreve as the receiver of the estate of George Heisler, one of the nephews of the said testator; one-fifth part thereof, amounting to the sum of ten hundred and forty- 30 four dollars and thirty-three cents, to Israel P. Heisler, one of the nephews of the said testator; one-fifth part thereof, amounting to the sum of ten hundred and fifty-four dollars and thirty-three cents, to Susanna D. Marcer, wife of Joseph F. Marcer, one of the nieces of the said testator, and one-fifth part thereof, amounting to the sum of ten hundred and forty-four dollars and thirty-three

cents, to Sarah E. Heisler, one of the nieces of the said testator, and one-twentieth part thereof, amounting to the sum of two hundred and sixty-one dollars and nine cents, to Isaac F. Heisler, one of the children of William Sharp Heisler, deceased, who was one of the nephews of the said testator, and one-twentieth part thereof, amounting to the sum of two hundred and sixty-one dollars and nine cents, to George M. Heisler, one of the children of William Sharp Heisler, deceased, nephew of the said testator, and
 10 one-twentieth part thereof, amounting to the sum of two hundred and sixty-one dollars and nine cents, to William H. Heisler, one of the children of William Sharp Heisler, deceased, nephew of the said testator, and one-twentieth part thereof, amounting to the sum of two hundred and sixty-one dollars and nine cents, to Mary E. Heisler, one of the children of William Sharp Heisler, deceased, nephew of the said William Sharp, deceased, testator as aforesaid.

20

JAS. O. GLASGOW,
 BEN P. WILLS,
Judges of the Orphans' Court.

Burlington County Orphans' Court. In the matter of the estate of William Sharp, deceased. Decree allowing counsel fee.

It being made to appear to the court that the executors of the last will and testament of William Sharp, deceased, were compelled to employ counsel to assist them in the management and settlement of said estate:

It is on this seventeenth day of October, A. D. eighteen
 30 hundred and eighty-seven, ordered and decreed that the said executors be allowed in the settlement of their accounts fifty dollars, to be paid to Alfred Flanders, Esq., as and

for a fee to said counsel in addition to the taxed costs in said estate.

JAS. O. GLASGOW,
BEN. P. WILLS,
Judges of the Orphans' Court.

Burlington County Orphans' Court. In the matter of exceptions to the account of Henry S. Prickett and Silas Walton, executors of William Sharp, deceased.

COSTS.

September Term, A. D. 1887.

	Proct. for Excepts.	Proct. for Exec'ors.	Ct.	Clk.	Als.
Retaining fee,	\$1 00	\$1 00			
Motion to file exceptions,	1 25		\$ 50	\$ 18	
Drawing exceptions, (3 fol.)	90				
Court and clerk recording same and seal,				1 06	
Motion to set a day for hear- ing,		1 25	50	18	
Argument fee on same,	2 05	2 05	20	18	
Motion for hearing,		1 25			
Argument fee on same,	2 05	2 05	50	18	
Four foreign witnesses for exception and mileage,					12 73
9 Domestic witnesses for ex- ception and mileage,					4 50
3 Subpoenas,		1 20		1 89	
12 Tickets,		1 20			
Serving subpoenas, 9 wit- nesses,					3 15
Swearing 12 witnesses Ct.				84	
Court hearing cause,			50		
Breviat and copy,	2 54	2 54			
Motion for final decree,		1 25	50	18	
Argument fee on same,	2 05	2 05			
Drawing final decree (9 fol.)		2 70	80		
Copy reciting and court and seal,				2 28	

	Proct. for Excepts.	Proct. for Exec'ors.	Ct.	Clk.	Als.
Motion for costs to be paid out of estate,		\$1 25	50	18	
Argument fee on same,	\$2 05	2 05			
Drawing, taxing and filing costs and copy,	54	54	80	1 80	
Term fee and crier,	80	80		09	
Proctor for exceptants,	\$15 23	\$23 18	\$4 80	\$9 04	\$20 38
Proctor for executors,	23 18				
Court,	4 80				
Clerk,	9 04				
Als.,	20 38				
	\$72 63				

Taxed at seventy-two dollars and sixty-three cents.

JAS. O. GLASGOW,

BEN. P. WILLS,

Judges of the Orphans' Court.

Dated October 17th, 1887.

PETITION OF APPEAL.

[Filed October 27, 1887.]

To the Prerogative Court of the State of New Jersey:

20 The petition of Sarah E. Heisler and Susanna D. Marcer, appellants in the above matter, respectfully shows that they find themselves aggrieved by the decree entered in said matter by the Burlington County Orphans' Court, on the seventeenth day of October, eighteen hundred and eighty-seven, in this respect, to wit: That the said decree adjudges that the said exceptions filed by your petitioners to the said account of the said executors be and the same is dismissed with costs to be taxed, and your petitioners humbly appeal from that part of the decree recited as aforesaid

upon the ground that same is erroneous for that the said exceptions should have been sustained, and said item of five hundred and sixty dollars paid to Edith Dewson by said executors, claimed as an allowance by said executors in their account, be stricken out from said account and not allowed to said executors. Your petitioners therefore pray that the said decree of the said Burlington County Orphans' Court may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this honorable 10 court shall seem meet.

THOMAS E. FRENCH.

Proctor of Petitioners and Appellants.

ORDER TO ANSWER.

[Filed October 27, 1887.]

Appeal from the Burlington county Orphans' Court.

The appellants having filed their petition of appeal and the transcript of proceedings in the court below with the register, it is on this twenty-seventh day of October, eighteen hundred and eighty-seven, on motion of Garrison 2) & French, proctors of appellants, ordered that the respondents answer said petition of appeal, within twenty days after the service of a copy of the petition of appeal and notice of this order, or that appellants be heard *ex parte*.

ALEX. T. MCGILL, C.

ORDER TO TAKE TESTIMONY.

[Filed May 8, 1888.]

On appeal.

It appearing that this is an appeal from an order of the Burlington Orphans' Court on exceptions to executors account, that at the hearing below the testimony was taken orally before the court, without a stenographer; that neither court nor counsel have notes, and a state of the case cannot be agreed upon. Due notice of this motion having
10 been given, and proctor of respondents assenting thereto, it is on this eighth day of May, eighteen hundred and eighty-eight, on motion of Thomas E. French, proctor of appellants, ordered that the parties have leave to take testimony, to be used on the hearing of this appeal.

ALEX. T. MCGILL, C.

TESTIMONY.

[Filed June 8, 1888.]

CAMDEN, N. J., Saturday, May 12th, 1888.

20 Testimony taken before George S. West, surrogate of the county of Camden, pursuant to order in this cause and notice, in the presence of Thomas E. French, esquire, proctor of appellants, and Alfred Flanders, esquire, proctor of respondents.

The testimony was taken stenographically by consent.

Silas Walton, affirmed.

Direct examination.

By Mr. French.

Q. Where do you reside?

A. Near Moorestown, in Burlington county.

Q. Were you one of the executors of William Sharp, deceased?

A. Yes; I was one.

Q. Do you know Edith A. Dewson?

A. I do.

10

Q. Was she a legatee under that will?

A. Yes; I think she was.

Q. What was the amount of her legacy?

A. Two thousand dollars in money and some specials in the way of furniture.

Q. Did she put in a claim to the estate?

A. Yes.

Q. When?

A. I do not remember strictly the date.

Q. What was the amount?

20

A. I do not remember strictly the amount first produced or claimed.

Q. About how much?

A. We considered it excessive, and informed her that we did not think we could allow it.

Q. I see in your account that on the 12th month, 14th, 1888, you paid her \$560—what was that claim?

A. It was a verified claim for board and nursing.

Q. Have you the claim here?

A. I have not; my associate probably may have; I have not.

30

Q. You had the custody of Mr. Sharp's books, had you not?

A. Yes; all that we thought were of any importance at all for our purposes.

Q. In the book that you had you found entries in his handwriting of moneys paid to Miss Dewson, did you not?

A. Yes.

Q. For services weekly, or at a weekly rate?

A. I think it was at a weekly rate—\$1 a week.

Q. Some of it?

A. Some of it.

Q. And some more?

A. For the first three years at \$1 per week.

Q. After that it was how much?

A. For the eighteen subsequent years only \$1.50 a
10 week.

Q. And after that?

A. Two years to the close of her services, I think, \$2
per week.

Q. Have you that book here?

A. I have not.

Q. You were subpoenaed to produce it, were you not?

A. I was not—not now; I was subpoenaed in the Oc-
tober Term last, and produced it and gave it into thy
hands, and have not seen it since.

20 Q. You left it in court?

A. I left it to thy order.

Q. Have you the book now?

A. I have not.

Q. Do you know where it is?

A. I do not.

Q. Have you made an effort to find it?

A. I have.

Q. What effort have you made—of whom did you in-
quire?

30 A. I have called at thy office for the book, or knowl-
edge of it; I called at the surrogate's office in Mt. Holly,
and at the clerk's office in Mt. Holly, and at Judge Wells'
office in Mt. Holly.

Q. The last you saw of the book was where?

A. I think in thy possession, in Mt. Holly court-house.

Q. During the trial of the exceptions?

A. Yes.

Q. That book also contained memoranda or entries of other payments to Miss Dewson, did it not; in the way of expenses and moneys?

A. Of other payments?

Q. Yes, for expenses—travelling expenses and dress?

A. Well, I cannot speak definitely; I do not feel so well ascertained about that; I think there were some memoranda of expenses or charges during visits to the seashore, maybe, or in church service, but I do not mean to speak ascertainedly about it. 10

Q. Why did you pay the claim of \$560 to her?

A. Well, we thought we had several good reasons; we predicated our claim greatly upon this: in looking over these accounts of payment to Edith, the services began, I think, on the 5th of November, 1862, at a very low price of \$1 per week for an intelligent laborer and nice housekeeper, competent to give the very best service in a family; at \$1 per week; the next eighteen years, as I recited a few moments ago, at only a \$1.50, and then following that to the very end of the service, only \$2 per week for the service of a nice housekeeper, that was competent to, and did, as we were at different times informed, entertain the old gentleman Sharp's company; prepared entertainment for them in the way of board, and everything pertaining to the housework; that, we considered, was very low in deed, and in his will he said we should "pay all his just debts;" we considered that it was a just debt—the last one that was accepted, I mean the \$560—in consideration of all those things; we considered it was only just and equitable, and that the will commanded it, and we paid 20
30
it mainly because we thought it was right; another thing that influenced us, was that, after the reading of the last will and testament of William Sharp—the first expression, after the solemnity was over—Sarah E. Heisler herself voluntarily and deliberately said—now, I was asked the question why we paid it?

Q. That is exactly what I want to know?

A. Well, she was the first to speak; Sarah E. Heisler said, and it was about in these words, that she thought Uncle Sharp's will (she called him Uncle Sharp), was very well, except he did not leave Edith enough; she had been a faithful friend and helper to him; he did not leave Edith enough; that did, to a certain measure, determine the conclusion of this matter; myself and associate—we pondered over this; we did not do it at the spur of the moment, we could not pay the first bill, but we united
10 and agreed upon the second, and we felt clean and clear in the matter; I have, from that moment to the present.

Q. Were those the only reasons that you had for paying it?

A. No, not exactly.

Q. I would like to know all of them?

A. It was this, when you come to look over these books in question and compute the time, which was over twenty-three years, you find that it does not average a \$1.50 per week; why, the very cheapest common servants in the
20 kitchen get about double that pay; it does not average that; the calculation is easily made; it does not pay \$1.50 a week.

Q. Is that the only reason?

A. Well, right at the spur of the moment, I do not know that I can comprehend all of the reasons that influenced us. My associate probably can make up the rest that you may want. Nothing occurs especially to me just now.

Q. Then, as I understand you, the reason you paid the
30 claim was because it was presented?

A. No; I take exceptions to that; I say because we thought it was right; did I say because it was presented?

Q. Oh, no, but you would not have paid it if had not been presented?

A. Would not have paid it without it had been presented, no; it was not only presented, but it was verified by oath or affirmation.

Q. What was the verification?

A. I do not remember; it was verified.

Q. Was it that the account was just and true?

A. I think so.

Q. Who were the residuary legatees under this will?

A. Well, at the time the will was written, I think there were three nephews and two nieces, George Heisler's children, I think.

Q. Did you consult with them before you paid this claim? 10

A. I do not think we did.

Q. Did you let them know anything about it?

A. I spoke to Sallie at one time, stating that Edith had presented such a bill; now, I cannot say whether it was the first bill she presented or the latter, but I think I named it to Sarah; we saw Sarah more frequently than any of the others; I cannot say I remember so distinctly about that; we exercised our best judgment and paid the bill, believing it, under the circumstances, to be a just one and allowable. 20

Q. How did you arrive at the amount of \$560?

A. Well, I think in the revised bill it was made up of something like two years; following Mrs. Sharp's sickness, I think.

Q. Then you allowed her a compensation from the time Mrs. Sharp died until Mr. Sharp died, at a certain rate per week, making \$560?

A. I think it was made up in that way.

Q. Who made it up?

A. I cannot say. 30

Cross-examined.

By Mr. Flanders.

Q. As executors did you take a rule to bar creditors?

A. Yes, I think we did.

Q. Before the expiration of that rule, was this claim of Edith's presented?

A. Well, now the time of its presenting and the time of of its payment I think were previous to the expiration of the rule.

Q. You say there was a bill presented that you did not pay?

A. Yes.

Q. Why did you not pay the first bill?

A. Well, we thought it excessive.

Q. That was withdrawn and the bill that you did pay
10 was presented?

A. Yes.

Q. And the bill that you paid was presented under oath or affirmation?

A. Yes, under oath or affirmation.

Q. That is in the office of the Surrogate, is it not—that bill or voucher; is it in the office of the Surrogate, or in your possession, or where is it?

A. I think it is in the possession of my associate.

Q. After payment of this bill, did you make it known
20 to Miss Sallie Heisler?

A. I am not clear on the time; I think I named it to Sallie Heisler; I feel confident I did, but I do not know the date; I do not remember the date.

Q. I direct your attention now to the 25th of March, 1887; do you remember meeting her at Bridgeboro on that day?

A. I do.

Q. At that time did you make known this bill to her?

A. It was talked of; it was named, and in a measure
30 discussed.

Q. At that time had you paid to Miss Sallie Heisler any part of her share in the estate?

A. On that occasion we did, in land.

Q. I mean at the time you were discussing it?

A. Well, upon the same occasion; we were sitting around the table as we are here to-day.

Q. Now, after that discussion, did you pay her part of her share—her distributive share?

A. Indirectly we did; paid them in land; they bought land and we gave them title.

Q. What did Miss Sallie Heisler on that occasion say about this claim—Edith's claim—if anything?

A. I do not think there was any positive objection made to it, except by the husband of Susanna.

Q. I confine myself now entirely to Miss Sallie?

A. I remember no positive outspoken objection. 10

Q. She took her portion of the estate, save about how much money?

A. About sixteen or seventeen dollars.

Q. Now, Silas, from what you knew of William Sharp's affairs, did you believe that this claim of Edith's could have been established in a court of law?

A. Most assuredly I do; I would not presume to pay a claim that would not bear investigation in a court or anywhere else.

Q. That, too, was one reason why you consented to its 20 payment, was it not?

A. Yes, and it might have resulted in a lawsuit; we should look to the best interests of the estate all around.

Q. Give to us the names of the residuary legatees of this estate?

A. At the time of the death of William Sharp—that I am more conversant with, as he enumerated them in the will (I think there was a change by death afterwards); I do not know that I can name them in the order.

Q. Well, just name them? 30

A. William Sharp Heisler, George M. Heisler, Israel P. Heisler, Susanna D. Marcer and Sarah E. Heisler.

Q. Now, you say you think there has been a change by death since?

A. I think the first-named, William Sharp Heisler, died after I wrote William Sharp's will—after he had it written.

Q. And he left how many children ?

A. He left, I think, four children, three sons and a daughter.

Q. What are their names ?

A. I do not feel ascertained about it ; I would rather not answer.

Mr. French—We will admit that the names are William, Isaac, George and Ella.

Q. Were you present at the examination in the
10 Orphans' Court of the county of Burlington of this claim ?

A. I think I was.

Q. What testimony, if any, was offered by the appellants in this cause ?

A. Not any ; not a word while I was present during the trial.

Q. Have you a copy of the will with you ?

A. I think not.

Q. Have you a copy in your possession ?

20 *A.* I have.

Q. Could you furnish us with a copy between now and Tuesday morning next ?

A. I can.

Q. Will you ?

A. Yes.

Re-direct examination.

By Mr. French.

Q. Was the first bill that was put in by Miss Dewson under oath the first claim ?

30 *A.* I really do not remember.

Q. When was this bill discussed with Miss Heisler ; at the time of the settlement for the real estate ?

A. Yes ; I think it was.

Q. That was after it had been paid to Miss Dewson ?

A. I think it was ; she accepted her portion of the estate, though, understand me.

Q. How do you know that Miss Dewson's claim could be established in law?

A. I have not said I know it.

Q. I understood in your cross-examination that you said you knew her claim could be established at law was the reason you paid it?

A. I do not mean to say so.

[The stenographer at the request of Mr. French repeated the witness' testimony on this point in cross-examination as follows:] 10

"*Q.* Now, Silas, from what you knew of William Sharp's affairs, did you believe that this claim of Edith's could have been establish in a court of law?

"*A.* Most assuredly I do; I would not presume to pay a claim that would not bear investigation in a court or anywhere else."

The witness—I repeat that answer.

Q. Why did you believe it could be established at law?

A. On account of its fairness and justice and reasonableness, or rationality of the whole thing. 20

Q. How was it fair?

A. Upon the principle that it was fair to be paid for adequate services.

Q. Hadn't she been paid for those services?

A. It was never so accepted to my knowledge, although there is a memorandum in William Sharp's books, and if you look through those books (I criticised it pretty closely) you will find where there were substantial settlements made he had the party to subscribe to it, "This day settled so and so;" I never saw anything of the kind with Edith's 30 signature to it; you find in divers places where settlements were made with other parties.

Q. She admitted that she had received that, did she not?

A. I do not think I ever heard her make such an admission; I do not know that I ever heard that she would

pretend to say she did not receive those sums named in that book.

Q. She did not say she did not receive them?

A. I do not think she did; nor do I think she positively said (never to my knowledge) that she accepted them as paid.

Q. Did she make any effort to sue the executors?

A. I do not think it had culminated to that; it was not necessary.

10 Re-cross-examination.

By Mr. Flanders.

Q. Silas, how long before Mr. Sharp's death was it, you drew this will?

A. Not until after Mrs. Sharp's death.

Q. After Mrs. Sharp's death, how long before his death did you draw that will?

A. Really, I do not remember.

Q. Well, give us an approximate time?

A. Probably a year and a half.

20 *Q.* A year and a half before his death?

A. Well, now, I do not feel ascertained enough to define the time.

Q. It was at least a year before his death?

A. I think so; more than a year.

Henry S. Prickett, sworn.

Direct examination.

By Mr. French.

Q. Where do you reside, Mr. Prickett?

A. At Burlington, N. J.

30 *Q.* Are you one of the executors of William Sharp?

A. Yes, sir.

Q. As such executor did you pay a claim of Edith A. Dewson of \$560?

A. In connection with my co-executor I did.

Q. Who made the settlement with Miss Dewson, you or he?

A. Do you mean whose check?

Q. No; I mean who made the settlement—who agreed to pay it?

A. Why we agreed together and talked the matter over.

Q. With her?

A. Oh, no; the bill was handed me and it was referred by me to Mr. Walton.

Q. Do you speak of the first bill or the last one? 10

A. Both of them.

Q. Was the first bill under oath?

A. I was thinking of that when you asked the question of Mr. Walton, but I cannot positively state whether it was or not.

Q. You think it was?

A. I really could not say which way my thoughts bear on the subject.

Q. How much was the first claim for?

A. Fifteen hundred and sixty dollars—six years' service at \$5 per week. 20

Q. Why did you object to paying that?

A. Well, we deemed it excessive, and particularly so as a part of the time Mrs. Sharp was alive, and we reasoned that as she was living she was acting the part of house-keeper and nurse to Mr. Sharp, and so we refused to pay the bill.

Q. What did you agree to pay her?

A. Finally?

Q. Yes? 30

A. The amount of the bill that was presented to us under oath.

Q. How did you arrive at that amount?

A. We did not arrive at it; the bill came to us already arrived at.

Q. It was in pursuance to some previous understanding

as to what you would pay—between she and you as to what you would pay?

A. By no means.

Q. I understand Mr. Walton to say the time you paid for was the time between Mr. and Mrs. Sharp's death at \$5 a week?

A. That is true, but I understood your question to say we made some arrangement with Miss Dewson as to how much we would pay her.

10 Q. What I want to know is just the facts?

A. We said to Miss Dewson that it would be out of all manner of question of justice or equity to allow a bill of that kind on account of Mrs. Sharp's being alive; she reasoned the matter out from that.

Q. You knew from this book that Miss Dewson had been paid various sums all this time?

A. Yes.

Q. And that she had a substantial legacy by the will?

A. Yes, sir; we knew that.

20 Q. Did you have any consultation with the residuary legatees before you paid the claim?

A. Not a direct consultation as to asking them whether we might do it or not.

Q. Did you let them know whether you were going to pay it?

A. We were in possession of the fact that they knew we expected to pay or had paid the claim—that they were in possession of that fact.

Q. That you had paid the claim?

30 A. Yes.

Q. What was this claim that was put in; what was the language of it?

A. Which?

Q. The claim that was paid; what was the language of it?

A. For services as housekeeper and nurse from the date

mentioned of Mrs. Sharp's death to the date of Mr. Sharp's death; the dates I do not remember.

Q. What was the verification?

A. Under affirmation before a justice.

Q. That the account was just and true?

A. Just and true.

Cross-examination.

By Mr. Flanders.

Q. Prior to the payment of this claim had you consulted with your co-executor? 10

A. Prior to the payment of it?

Q. Yes?

A. Oh, yes; it could not be otherwise; we gave our joint check.

Q. Yes, but before its allowance, I mean; before you agreed to allow it?

A. Yes.

Q. How often; more than once?

A. Yes; there was one time when we were laying out the woodlands; I think there was another time, I do not remember the reason, but something brought us to Bridgeboro together, and we talked the matter over there at Bridgeboro, at the homestead. 20

Q. Were you present the night or on the occasion of the reading of William Sharp's will?

A. Yes, sir.

Q. Do you remember Miss Sallie Heisler being there at that time?

A. Yes, sir.

Q. Was Mr. Marshall there? 30

A. Yes, sir.

Q. What, if anything, was said by Miss Sallie Heisler or Mrs. Marshall on that occasion in relation to Edith?

A. After the reading of the will?

Q. Yes?

A. Miss Heisler said that she was very well satisfied,

and that it was a very just will, but she was sorry for one thing, and that was that uncle did not leave Edith more than two thousand dollars.

Q. Was that said in the hearing of Mrs. Marshall?

A. Mrs. Marshall stood facing me with Miss Heisler at the time.

Q. What did Mrs. Marshall say at that time, in response to that?

A. "Yes, that is so."

10 Q. You had some knowledge of Edith's services to Mr. Sharp for years past, had you not?

A. Yes.

Q. Describe as briefly as you can her character, will you?

A. I was frequently at the house, and her services always appeared to be as much that of a member of the house rather than a member of the kitchen, rather than a servant; more of a companion and housekeeper and nurse, everything—a daughter, if you may.

20 Q. Did you know of any failure in the health of Mr. Sharp after the death of Mrs. Sharp?

A. Yes; there was a breaking down; he was very much affected by the death of his wife.

Q. Now, who nursed and took care of him after that, if any one?

A. Well, as far as I know Edith did; I never heard of any other person.

Q. Now, I direct your attention to the interview on the 25th of March, 1887; was Miss Sallie Heisler present

30 then?

A. Yes, sir.

Q. And Mrs. Marshall also present?

A. Yes.

Q. Was this claim then made known to these ladies?

A. I do not know; I cannot speak positively that it was made known on that day, but we knew they were conversant with it; they knew it.

Q. You had a kind of a settlement with them on that occasion, did you not?

A. Yes.

Q. Did you exhibit to them how you arrived at their interest in the estate?

A. We had an exhibit of the state of the estate; yes, sir.

Q. Was this claim of Edith's incorporated in that statement?

A. Yes, sir.

10

Q. And after that they accepted the larger portion of their share of the estate, did they not?

A. They did.

Q. What remonstrance, if any, did they put in at that time?

A. There was nothing said by any of the legatees.

Q. Not anything said?

A. Nothing.

Q. I direct your attention now specifically to the claim of Edith; what was said, either for or against that claim? 20

A. Upon that day?

Q. Yes?

A. I do not recollect anything?

Q. Nothing?

A. Nothing at all; there might have been something said, and I might have missed it, in the settlement of matters?

Q. There was a rule to bar creditors, Mr. Walton has already said?

A. Oh, yes; at the present time.

30

Q. And this claim was presented before the expiration of that rule?

A. Yes.

Q. Now, Mr. Prickett, why did you pay this claim; what was the moving and actuating reason for your paying this claim?

A. The desire to fulfill the terms of the will, as much as anything else.

Q. Did it assist you in settling the estate early, in your judgment, I mean?

A. In my judgment it did.

Q. In your judgment, did it release the debt against the estate?

A. That is the way I looked upon it.

Q. Have you any doubt in your mind but that the
10 claim could have been established in a court of law?

A. I had no doubt in my mind or I would not probably have considered the thing seriously, but my own object, and the object of my co-executor, when we talked upon the subject, was to avoid any litigation; we thought we were best serving the interest of the estate in settling it as we did.

Q. Were you present at the hearing of the cause in the Burlington Orphans' Court?

A. Yes, sir.

20 Q. What testimony, if any, was offered by these appellants on that occasion?

A. Not a word.

Q. Did these ladies—these appellants, ever give you notice not to pay Edith's claim?

A. None; nothing that I have ever noticed or seen, or received.

Q. Did you have some knowledge that a contract had existed between Edith and William Sharp and his wife?

A. Yes.

30 Q. Won't you tell us what that was?

A. Well, there was a talk had before the death of Mrs. Sharp—

Mr. French—In whose presence, Mr. Prickett?

The witness—Well, not in mine.

Mr. French—I object to it.

Q. Now, my question to you is, had you any knowledge of a contract prior to the payment of this claim?

A. Outside of what we could learn from the books, do you mean?

Q. Yes?

A. Simply a hearsay knowledge.

Q. Well, from whom?

A. From Miss Dewson.

Q. From Edith?

A. Yes.

Q. I ask this question—please state what she told you?

[Objected to.] 10

Q. Now, just please state what knowledge you had, and how you derived that knowledge?

A. Miss Dewson told me that she had a talk with Auntie Sharp, and that she had told her that Uncle Sharp would provide for her in his will, but that she was afraid that Mr. Sharp would forget, and said to her that in the event of his not satisfying her in the amount of the legacy, she could bring a bill against the executors.

Q. Now, was that before or at the time, or after the first bill was presented? 20

A. It was after the first bill was presented and before the second.

Q. Did she on that occasion name any terms that she was to receive for services or otherwise?

A. No, I think not.

Re-direct examination.

By Mr. French.

Q. Had this bill of Miss Dewson's been paid before this settlement that you speak of? 30

A. Oh, yes, sir.

By Mr. Flanders.

Q. Which settlement?

A. The settlement of the 25th of March, 1887.

By Mr. French.

Q. Did not George Heisler object to the claim at the time?

A. Not that I remember ; not in my presence.

Q. What made you think that this claim of Miss Dewson's could be established at law ?

A. On account of the equity of the claim.

Q. That is, that she had performed the services and Mr. Sharp had not paid her a sufficient sum in your opinion for the service ?

A. Yes.

Q. Did Miss Dewson threaten to sue the estate ?

10 A. Not formally, no.

Q. This testimony about the agreement between Mrs. Sharp and Miss Dewson was not disclosed in the Orphans' Court, was it ?

A. I do not recall whether it was brought forward there or not.

Q. You knew that it was not, didn't you ?

A. I do not know ; actually and honestly I do not ; the testimony, of course, will show that.

TESTIMONY FOR THE RESPONDENTS.

20 *Samuel G. Gaskill*, affirmed.

Direct examination.

By Mr. Flanders.

Mr. French—Mr. Flanders, what do you propose to prove by Mr. Gaskill ?

Mr. Flanders—I propose to prove by a number of these witnesses the meritorious character of this claim under what we might call at common law a *quantum meruit*.

Q. You are now residing where ?

A. Allentown, Monmouth county, New Jersey.

30 Q. Your profession is what ?

A. Clergy.

Q. Were you ever stationed at Bridgeboro, Burlington county ?

A. I was.

Q. About when?

A. I left Bridgeboro two years ago last March.

Q. You knew William Sharp and his wife?

A. I did.

Q. Did you officiate at the funeral of both of them?

A. I did.

Q. They were members of your church and congregation, were they?

A. They were.

10

Q. Do you know Mrs. Sleeper?

A. I do.

Q. All of the time you were in Bridgeboro?

A. All the time.

Q. Did you frequently visit the house of Mr. and Mrs. Sharp?

A. Quite frequently; at least weekly on an average.

Q. Who had charge of the house after Mrs. Sharp's death?

A. Mrs. Sleeper it is now; it was then Miss Dewson. 20

Q. Was Mr. Sharp an invalid?

A. Yes, sir.

Q. And an aged man, was he not?

A. Yes, sir, he was over eighty years of age.

Q. When he died?

A. Yes, sir.

Q. Was he not over ninety?

A. I think he was only eighty-four or eighty-five, or something like that.

Q. Do you know of his having sinking spells, as they are called, or something of that kind? 30

A. Yes, sir, I have seen him have them.

Q. Were they frequent or seldom?

A. They were said to be frequent; of course, I only saw them seldom.

Q. Now, who looked after his comfort and welfare?

A. Mrs. Sleeper.

Q. Entirely so, or nearly so?

A. I cannot think of anybody else that was concerned at all.

Q. During the period that you name, from the death of Mrs. Sharp to the death of Mr. Sharp, would it have been wise and safe to have gone out and left Mr. Sharp in the house alone? [Question objected to.]

A. No, I cannot think it would have been a wise thing to have left him there alone in the condition of health and
10 body which he was.

Q. How far did they live from the town of Bridgeboro?

A. It was a good half-mile, I should judge.

Q. Do you know how far to the nearest physician?

A. There was no physician residing in Bridgeboro; I suppose the nearest physician would have been Beverly; that is about two miles and a half.

Q. Then, if I understand you, the house was kept by Mrs. Sleeper?

A. She was the head of the household.

20 *Q.* There were no children?

A. No children.

Q. Nor other members of the household?

A. None.

Q. You are a married man?

A. I am, sir.

Q. In your judgment what were the services rendered by Mrs. Sleeper reasonably worth during the two years mentioned. [Objected to.]

A. I am not well posted on what such services are
30 worth; I know we have to pay an ordinary servant girl \$2 a week at our house, but I would not put an estimate on her services; I should not think less than \$5 or \$6 a week, assuming all the responsibility as she did.

Q. Now, you say you have known Mrs. Sleeper for a number of years; is she a lady of education?

A. I so consider her.

Q. Is she, as Mr. Walton describes her, a nice, tidy housekeeper?

A. I consider her exceedingly so.

Q. As compared with household help generally, what is her character?

A. In what particular do I understand?

Q. I mean as to intelligence, particularly?

A. Oh, she is superior to ordinary help.

Cross-examination.

By Mr. French.

10

Q. To what extent was Mr. Sharp an invalid?

A. Well, what do you mean by that?

Q. Was he confined to his bed?

A. I never knew him to be confined to his bed more than occasionally; once in awhile he would not get up so early in the morning.

Q. Did he wait upon himself?

A. Sometimes he did and sometimes he did not.

Q. Did he shave himself?

A. I cannot answer.

20

Q. What was the extent of those spells? Did they last any considerable length of time?

A. To the best of my knowledge, I think they would last two or three minutes, but then after that, after the spell had gone off, he was stupid.

Q. Was there a church near his house?

A. The church was possibly three-quarters of a mile away.

Q. Was Mrs. Sleeper a member of that church?

A. She was.

30

Q. Did she attend the church frequently?

A. She was an attendant, but she did not attend as much latterly as she did the fore part of our time there.

Q. Did she go at all after Mrs. Sharp's death?

A. Yes.

Q. Frequently?

A. I would not like to say how frequently, but I know she did not come as frequently after Mrs. Sharp's death as she did before.

Q. Did she go in the evenings?

A. I have seen her there sometimes, but I would not say how many in the evenings.

Mrs. Edith Dewson Sleeper, affirmed.

Direct examination.

10 By Mr. Flanders.

Q. How old are you now, Mrs. Sleeper?

A. Forty-three.

Q. When did you go to live with Mr. and Mrs. Sharp?

A. At the age of twelve years.

Q. And you continued until they both died?

A. Yes, sir.

Q. Mr. Sharp died when?

A. 31st of January, 1886.

20 Sharp, did they pay you anything for your services?

A. No, sir.

Q. Now, at any time after that did they agree to pay you for your services?

A. At the age of eighteen, Mrs. Sharp had a controversy with me, or a conversation, and she agreed, or they agreed, to give me from time to time as I needed it for spending money, a \$1 or a \$1.50 or \$2.

Q. What then?

30 A. Well, then I was to be remembered in the will; frequently during the time, Auntie reminded me I should be taken care of—that I should be remembered in their will.

Q. And what then, if anything; was there anything further than that?

A. Yes, sir; it was impressed on my mind frequently that if I was not remunerated sufficiently by the will I

should or could bring in a bill against the executors of the estate.

Q. Now, who made this statement to you, that you were to have a dollar, and a dollar-and-a-half, and so on?

A. Mrs. Sleeper, or "Auntie," as I always called her, as she wished me to call her.

Mr. French—Appellants object to all of this testimony in regard to conversations with Mr. and Mrs. Sharp.

Q. Was she related to you in anywise?

A. No, sir; not at all. 10

Q. And what did you do about that household during the lifetime of Mrs. Sharp; state generally.

A. From the age of fifteen I took almost entire charge; did baking and everything.

Q. Of the household?

A. Yes.

Q. Was Mrs. Sharp an invalid?

A. Five years, I think, after she was married, she became quite an invalid.

Q. After you were there, I mean; we don't know when 20 she was married?

A. Yes; I went there the next month after she was married.

Q. Then during that time you had, practically, charge of the household; is that it?

A. Yes, sir.

Q. Did you do the marketing?

A. Yes, sir.

Q. And attended to the up-stairs work?

A. Yes, sir. 30

Q. And the household generally?

A. Yes, sir.

Q. Did they have any other servants in and about the house?

A. We had a washerwoman every two weeks, and to assist in cleaning the house during the spring; that was all.

Q. There was no family ; no children, I mean ?

A. No, sir.

Q. Mr. and Mrs. Sharp, and yourself, then composed the household ; was that it ?

A. Once in awhile we had a boy in the family, a few years during their lifetime.

Q. What was that—a bound boy ?

A. He helped on the farm ; that was all.

Q. These people were farmers, were they ?

10 A. Just for ourselves ; just farmed for themselves at that time.

Q. They owned land, did they ?

A. Yes, sir.

Q. Who worked it ?

A. There were two or three had it ; Mr. Hackney was the last one who had the farm.

Q. Do you know how it was worked—on the shares, or what ?

A. No, sir ; they had the farm and were to be remunerated by taking care or looking after the outside work of the farm, and taking Uncle Sharp over to church, or looking after him in that way when it was necessary for him to go out in the carriage.

Q. And when did Mrs. Sharp die ?

A. The 8th day of December, 1883, I think.

Q. Now, during this time you were there, did you ever have guests and visitors, and so on ?

A. Yes, sir ; a great many.

Q. Now, who provided for their entertainment ?

30 A. I did the work.

Q. During this time, all this period, did you ever have a settlement with Mr. Sharp ?

A. No, sir.

Q. Something has been said about some books, and you doubtless saw them in the Burlington County Orphans' Court ; did you ever have any settlement on those books, or through those books ?

A. No, sir.

Q. Now this claim for \$560, was it the first claim that you presented after his death?

A. No, sir; I presented a larger claim.

Q. Do you remember the amount of that?

A. I do not know that I do, and yet I think it was \$5 a week for six years.

Q. You had heard Mr. Sharp's will read, had you?

A. Yes, sir.

Q. Were you satisfied with its terms? 10

A. No, sir; I was not satisfied with them.

Q. The dissatisfaction being that it did not provide sufficiently for your services?

A. I had supposed it would have provided more largely for me.

Q. Now was it for services that this provision was to be made?

A. I think not; I do not know; they had always said that I should be taken care of—well taken care of.

Q. And you withdrew the first bill, did you? 20

A. Yes, sir.

Q. And presented a second one?

A. Yes, sir.

Q. When that was paid?

A. Yes, sir.

Q. What was that for?

A. It was for extra services rendered during Uncle Sharp's sickness after auntie's death, as nurse and house-keeper and everything.

Q. Now, that was for two years and two months, was it 30 not?

A. Yes, sir.

Q. At \$5 a week?

A. Yes, sir.

Q. And that money was paid to you?

A. Yes, sir.

Q. Had that claim not been paid to you, Mrs. Sleeper, what would you have done, if anything?

A. I should have had to have made an effort to recover something, for I was left without anything at the time.

Q. Something has been said about a few articles having been left you in the will independent of the specific legacy—can you tell what those articles were? One was an organ, was it not?

A. Yes, sir.

10 *Q.* Now to whom did that organ belong?

A. It belonged to me; it was given me.

Q. What else was there?

Q. A bed-room suite that was given me on my eighteenth birthday.

A. Your freedom suit?

A. Yes, sir.

Q. What else was there, do you know?

A. A sewing machine.

Q. To whom did that belong?

20 *A.* That belonged to auntie, but she gave it me a number of years before she died.

Q. Was there anything else?

A. That were mentioned in the will, do you mean?

Q. Well, you haven't a copy of the will here, unfortunately—in these books there was an item, I believe, for camp meeting expenses, or something, which is charged against you, wasn't there?

A. I think there was; I saw it afterwards.

Q. Did you ever see the inside of those books, the contents of those books, before the death of William Sharp?

A. I cannot say that I did; occasionally he would want me to look over some notes, and I would see once in awhile the names, but I never took time or trouble to look through his books to examine them.

Q. Well, during the examination in the Burlington Orphans' Court, there was something said about camp-meeting expenses, wasn't there—Ocean-Grove expenses?

A. Yes, sir.

Q. They were charged against you, were they not?

A. Yes, sir; I saw that after his death.

Q. Now, as a matter of fact, did he give you money to go to Ocean Grove?

A. Well, I would generally ask him for money if I was going; generally ask him for money to go, and he gave it me.

Q. Why did you go?

A. The latter part of the time I went for his benefit; 10 two or three times I went for his and her benefit.

Q. Do you mean that you accompanied them there?

A. Yes, sir; I was obliged to go with them to take care of them.

Q. What was said about your expenses before you started, or afterward?

A. Nothing at all.

Q. Nothing?

A. No, sir.

Q. It was just simply that they wanted to go to Ocean 20 Grove, and "we want you to go with us"; was that it?

A. They were not able to go without me; I was obliged to go.

Q. Do you remember how much money you have received in all from Mr. and Mrs. Sharp during their lifetime?

A. I do not think I could say.

Q. Mrs. Sleeper, Mr. Walton made from those books at some time or other memorandas, and he said the charge found in there against you was three years at \$156; 30 eighteen years at \$1,404, and two years and four months, \$243, making \$1,803; have you any doubt of the correctness of these payments? It is possible that is the correct amount, is it not?

A. Yes; that is the correct amount.

Q. And then the claim for nursing, \$560, making \$2,363; did you receive a legacy of \$2,000?

A. Yes, sir.

Q. And you acknowledge receiving the organ and various other articles, which were appraised at \$101?

A. Yes, sir.

Q. These amounts throughout are correct?

A. Yes, sir; they are correct.

Cross-examination.

By Mr. French.

Q. There was no testimony before the Orphans' Court
10 as to this arrangement between Mrs. Sharp and yourself, was there?

A. No, sir.

Q. Did you have any assistance in your household duties while you were living with Mr. and Mrs. Sharp?

A. No, sir; only as I have stated, a washerwoman and one to help during house-cleaning.

Q. Did they give you any money at all during the time you were living with them?

A. When I would ask them for it, yes; as I asked
20 them for money they gave me.

Q. You said something about having spending money, a \$1, \$1.50 and \$2; was your asking limited to that amount?

A. No, sir.

Q. Then when you wanted money for clothing or for any other purpose, you asked for it and received it?

A. Yes, sir.

Q. Have you any idea of how much you did receive during all that time?

30 A. No, sir.

Q. Mr. Sharp made an entry of these amounts in his books, did he not?

A. I saw it in the books afterward.

Q. Was the first claim that you put in under oath?

A. I think not, sir.

Q. You lived with Mr. and Mrs. Sharp as a companion from your girlhood up, did you not?

A. Yes, sir.

Q. Who furnished you an education?

A. Yes, sir.

Q. And took care of you always?

A. Yes, sir; from twelve years old.

Re-direct examination.

By Mr. Flanders.

Q. Mrs. Sleeper, you say no testimony was given before 10 the Orphans' Court in relation to this contract; I mean about your receiving \$1 and \$1.50?

A. Yes, sir.

Q. But you did tell Mr. Flander's before, didn't you; before the hearing in the Orphans' Court?

A. I told you about it before; at the hearing I was not asked.

Q. I say, you had told the Proctor, hadn't you, before the hearing?

A. Yes, sir. 20

Q. You told him from the beginning, didn't you?

A. Yes, sir.

Q. Did you tell Mr. Walton?

A. I think I did; I cannot be positive.

Q. Now you say you saw the entries in Mr. Sharp's book; did you see these entries during his lifetime?

A. Only once or twice.

Q. Did you see them in your own account?

A. Only my own name.

Q. Did you see any amounts charged to you or other- 30 wise?

A. I think I did once.

Q. One time?

A. Yes, sir; at one time.

Q. When was your attention called to it specifically?

A. After Uncle Sharp's death.

Q. Now, prior to his death had you had any settlement or understanding with him in relation to the entries in that book?

A. No, sir; not at all.

Q. How much of these accounts did you see upon this one occasion that you speak of; did you go over it?

A. No, sir; I just looked at two or three entries he had made, and one was to Ocean Grove.

Q. Well, now, Ocean Grove, you say; would he give
10 you the money to go to Ocean Grove, or did he pay your expenses; who handled the money?

A. Well, frequently he would give it to me, and sometimes would pay my expenses.

Q. Well, what money he gave you, did that pay your united expenses; pay all the expenses that were incurred down there?

A. I think the last two or three times we were there I settled the bills.

Q. He gave you the money to settle the bills?

20 *A.* Yes, sir.

Q. And was it after his death? was that the first notice you had of the Ocean Grove expenses, or was it prior to his death?

A. This was before his death I saw it.

Re-cross examination.

By Mr. French.

Q. You had frequently gone to Ocean Grove, before that, on visits?

A. Yes, sir.

30 *Q.* And alone?

A. I have been alone; yes, sir.

Q. Did he pay your expenses?

A. Yes, sir.

Re-direct examination.

By Mr. Flanders.

Q. Well, those were charged against you in this book, were they not?

A. Yes, sir; so I was told.

Q. And as part of the moneys that you think Mr. Walton has correctly copied?

A. Yes, sir.

John B. Knight, sworn.

Direct examination.

10

By Mr. Flanders.

Q. You live and do business at Bridgeboro, New Jersey, do you not, Mr. Knight?

A. Yes, sir.

Q. And have done so for many years?

A. Yes, sir, for fifteen years.

Q. During all that time you knew Mr. and Mrs. William Sharp?

A.. Yes, sir.

Q. And you knew Mrs. Sleeper, did you?

20

A. Yes, sir, Dewson then.

Q. Did you visit the house much, Mr. Knight?

A. No, sir, very seldom; I was at the house occasionally.

Q. And did they come to your place of business and deal with you?

A. Yes, sir.

Q. Generally who did the marketing and buying?

A. Miss Dewson, or Mrs. Sleeper.

Q. Now, what was the character of her dealings—as to 30 being economical and careful and so on, I mean?

A. Well, I always thought she was very economical.

Q. And a careful buyer?

A. Yes, sir.

Q. Mr. and Mrs. Sharp were careful, economical people, were they not?

A. Yes, sir.

Q. Now, did Edith depart from what would have been fairly their rule about that?

A. No, I do not think so.

Q. She also was a careful buyer—she had general charge of the household, had she, so far as you know?

A. So far as I knew, yes, sir.

Q. Did you know of Mr. Sharp's health being feeble the latter part of his time?

10 A. Yes, sir, I knew that it was feeble.

Q. He was quite a feeble man, was he not?

A. Towards the latter part, yes, sir.

Q. Requiring care and attention?

A. Yes, sir, he required care and attention.

Q. Could you form any idea of the value of the services rendered?

A. No, sir; I would not want to have been responsible for the services rendered in the latter part when he was there alone; I would not have wanted the responsibility.

20 Q. Mrs. Sleeper is an intelligent woman, is she not?

Q. Yes, sir.

Q. As compared with the ordinary help, Mr. Knight, what estimate would you have placed upon her?

A. What do you mean, taking the ordinary line of women that do house work?

Q. Yes, sir.

A. Well, I should suppose she was superior to the ordinary run.

Cross-examination.

30 By Mr. French.

Q. How feeble was Mr. Sharp, Mr. Knight?

A. I do not know that I know just how to answer that question; in what respect do you mean?

Q. Was he sick abed?

A. No, sir.

Q. Able to walk around?

A. Yes, sir.

Q. Able to take care of himself?

A. Yes, sir.

Q. Did he shave himself?

A. I could not answer about that.

Q. How frequently did you see him?

A. Sometimes once a week, or once in two weeks.

Q. To what extent did he need care?

A. Well, he needed some one to look after him; it was not safe in the latter part of the time for him to be alone 10 on account of these spells they said he had; I never saw him have one.

Q. You never saw him have one?

A. No, sir.

Q. Then your opinion is made up from what they have said?

A. In respect to his having spells; yes, sir.

Q. And the care that he needed?

A. It was very evident to see that he was a man who needed care if you saw him walking around. 20

Q. Do you mean care to support him to keep him from falling?

A. Not in walking, no, sir.

Q. Then how would he need care?

A. Most all of us would judge from the appearance of a man whether he was a person that was capable of being left alone to look after himself and all the interests of his household, or whether he needed some one with him.

Q. Then the care you mean was a housekeeper or some one to take care of the house—what I want to get at is the 30 care he needed?

A. It is evident he needed some one to take care of the house and to wait on him to a certain extent.

Re-direct examination.

By Mr. Flanders.

Q. Could he walk any great distance?

A. I never saw him walk a great distance; occasionally a couple of years before he died, he used to walk over to the bridge early in the morning and then sit down and rest and complain of being tired.

Q. How far is it from the house to the bridge—half a mile?

A. About half a mile.

Josiah Hackney, sworn.

Direct examination.

10 By Mr. Flanders.

Q. You are a farmer, are you not, Mr. Hackney?

A. Yes, sir.

Q. You farmed for a number of years for Mr. Sharp, did you, on his farm?

A. Well, I had the farm; do you want to know how I had the farm?

Q. Not particularly; I want to know whether you worked there?

A. I had the farm in this way, I found my own manures
20 and everything, and he paid the taxes and everything, and all I done for him was I gave him what produce he wanted for the use of his house and took him wherever he wanted to go and his family, and I was called in occasionally for to help around the house or around the yards, and so forth.

Q. How long did that last—how many years?

A. I was there four years to within about a month.

Q. Was that just before his death?

A. Just before his death.

30 Q. Then you went there during Mrs. Sharp's lifetime?

A. Yes.

Q. Who had charge of the house then, when you went there?

A. Edith Dewson.

Q. To what extent did she have charge, so far as you could say, Mr. Hackney—exclusive charge, entire charge?

A. Exclusive charge; I know that for a fact; I was there more or less every day right around and in the house and out of the house, and so forth.

Q. Mrs. Sharp was a feeble woman for a number of years, was she not?

A. Quite feeble.

Q. An invalid.

A. Yes.

Q. And after her death Mr. Sharp was quite an invalid, was he not? 10

A. Quite an invalid; yes, sir.

Q. Did you ever see him in these spells?

A. Yes, sir; I have.

Q. Just describe them to us briefly—can you?

A. Well, he seemed to rather go away for a minute or two; he seemed to have sinking spells; I could not tell you what they were really.

Q. And then that would be followed by depression, long depression?

A. Yes; for a short time; not very long. 20

Q. How frequently did these spells occur?

A. Well, he had several of them during the day.

Q. And at night?

A. I do not know anything about night; after he went to bed, at least.

Q. Now, what time did he get up in the morning?

A. I do not know; he did not get up very early, ordinarily.

Q. Did he do any work at all?

A. Not of any amount. 30

Q. Could he carry in his wood?

A. He could carry in some wood occasionally.

Q. Could he split his wood?

A. Well, he would go out and try to split sometimes, but he did not split a good deal.

Q. Did he care for his horse?

A. No; he had no horse.

Q. Would he go far from his home at any time without somebody taking him?

A. No; I always went with him when he wanted to go out in the woods or anywhere around.

Q. And then you would take him in your wagon, or would he walk?

A. I would mostly take him in the wagon.

Q. Could he walk?

A. Oh, some.

10 *Q.* Any distance, I mean?

A. No, not any distance; he could go out in his woods occasionally—out in his timber a little piece.

Q. How far would that be?

A. Oh, I could not hardly tell you; not a great ways, though.

Q. A quarter of a mile?

A. Probably, yes.

Q. Would he go alone?

A. I always went with him, mostly.

20 *Q.* He had somebody to go with him?

A. Yes.

Q. Well, Edith was kept in the house quite a good deal, was she not, Mr. Hackney?

A. Well, she was there almost constantly.

Q. Both before Mrs. Sharp's death, and afterwards?

A. Yes.

Q. Who did the marketing, do you know?

A. I think Edith done it, as far as I know.

Q. And she looked after the household affairs generally?

30 *A.* Oh yes, sir.

Q. Could you form any idea, or did you form any idea, of the value of her services?

A. I never thought anything about that; I never thought anything about that particularly much; it was something that did not interest me, and I did not think anything about it.

Q. Have you any idea, now—any opinion, as to the value of her services?

A. Well, I always thought that she did not get paid for her labor; that she did not get paid for her actual labor during his lifetime; she was there the principal part, and all of her best days, from a child up to forty, or more; over forty she was, I think, when he died.

No cross-examination.

Mrs. Anna Hackney, affirmed.

Direct-examination.

10

By Mr. Flanders.

Q. Mrs. Hackney, you are the wife of Mr. Hackney, who just left the stand?

A. Yes, sir.

Q. Have you lived in the vicinity of Sharp's house for four or five years?

A. Four years.

Q. That was the latter part of Mr. Sharp's lifetime?

A. Yes, sir.

Q. But you had lived in that neighborhood a number of years, had you not?

20

A. Yes.

Q. How many years, do you suppose?

A. Seven, I think.

Q. Around about Bridgeboro and Beverly, and so on?

A. Yes.

Q. Was it not more than seven?

A. It is over nine now.

Q. Did you see much of Mr. Sharp's household before his death?

30

A. Yes, sir.

Q. Did you see Edith there?

Q. Yes, sir.

Q. Now, who managed the household affairs?

A. Edith, as far as I know.

Q. Who else was there to manage them, but Edith?

A. No one after Mrs. Sharp's death.

Q. But before Mr. Sharp's death?

A. Mrs. Sharp's death, I say.

Q. What kind of a housekeeper was she?

A. Very good.

Q. Did she do the marketing and so on?

A. Yes, sir.

Q. Did she attend to Mr. Sharp and Mrs. Sharp during
10 their lifetimes?

A. As far as I know.

Q. What kind of attention do you think she gave
them?

A. Very good.

Q. What would you like to perform the like services
for—for how much money?

A. Well, I do not know; not less than \$5 or \$6 a
week.

Q. She had to help Mr. Sharp to bed frequently, did
20 she not, or do you not know that?

A. I do not know.

Q. When Mr. Sharp went out, generally he went in a
wagon, did he not?

A. Yes, sir.

Q. That was not often, was it?

A. Every Sunday.

Q. When he went to church?

A. Yes, nearly every Sunday when the weather was
favorable.

30 Q. Did Edith go to church in the evenings; do you
know?

A. Sometimes.

Q. Whom did she leave with Mr. Sharp at home at
those times?

A. My husband staid with him some of the times, and
sometimes I stayed with him.

Q. Could Edith entertain such persons as called at Mr. Sharp's house?

A. As far as I know.

Q. Did I understand you to say you staid sometimes when Edith went to church?

A. In the evenings, once or twice I staid.

Q. Either your husband would stay or Edith would stay at other times?

A. Yes.

No cross-examination.

10

IN REBUTTAL.

Miss Sallie Heisler, sworn for the appellants.

Direct examination.

By Mr. French.

Mr. Flanders—For what purpose do you desire to call her?

Mr. French—To show what notice she received of this claim.

Mr. Flanders—I make a general objection to it.

Q. Are you one of the residuary legatee of this estate? 20

A. I am.

Q. When did you first learn of the claim of Miss Dewson against the estate?

A. On the 25th of March, at the settlement of the real estate.

Cross-examined.

By Mr. Flanders.

Q. And after that you received from the executors your share of the estate, did you not?

A. Yes, sir; on the 25th of March.

30

Q. Is that the only notice you had?

A. The only notice; it was general.

Q. After the reading of the will, however, you then said, did you not, that it was a very fair will, but you were sorry that he did not leave Edith more?

A. I did not say it was a fair will.

Q. You did not think it was a fair will?

A. I did not say it was a fair will.

Q. Did you say "a just will?"

10 A. I did not say "just."

Q. Well, what did you say on that occasion?

A. My impressions lead me astray by the fact of a legacy of \$2,000 being left to one man whom I did not know and to another man, and on the impulse of the moment I said, "I feel sorry; I would rather have seen Edith have that;" that was my remark, not that it was a just will; I did not understand it, and I did not know what had been done for her; I never knew my uncle had given her a cent for her services; I was led to suppose
20 nothing had been done for her, only what little he chose to give.

Q. Is the 25th of March the first time that you heard of Edith's claim?

A. Hearsay.

Q. From any person?

A. It was hearsay before, but I wrote to the executors and Mr. Walton never replied on that question, and he never spoke to me personally about it.

Q. Did you ever hear of Edith's claim from any person, the executors or otherwise, prior to the 25th of March?
30

A. It was hearsay; I cannot say who particularly; it was going around among the neighbors, and different ones said something about hearing it.

Q. Did you live in that neighborhood?

A. No, sir.

Q. Wherein, in your judgment, was the will of your uncle unjust?

A. Well, in the case of this Jeffers, but I recall the reflection when I found the man was a cripple that walks on his hands and knees.

Q. In any other respect than that?

A. I do not like to say.

Q. I understood you to say that the first you heard of the claim from the executors and so on was on the day you settled for the real estate? 10

A. Yes, sir.

Q. Didn't you hear of it on the day of the sale of the real estate?

A. Reports came to me.

Q. Oh, now, didn't you hear that on the day of the sale of the real estate?

A. I do not think I did, Mr. Flanders.

Q. Will you say yes or no?

A. I cannot remember that I heard anything about it that day. 20

Q. Did you not on the day of the sale of the real estate speak to Mr. Prickett, one of the executors, on the subject?

A.

Q. You are quite sure of that?

A. I was not present at either sale; I was sick.

Q. Didn't you hear of this claim of Edith's through Amelia Dugan before the 25th of March?

A. No, sir, not first.

Q. Second? 30

A. I cannot say whether it was second.

Q. Did you ever hear of it through Amelia Dugan?

A. She made some mention of it.

Q. Did not she tell you that Edith had put in a claim?

A. Not until after I heard several others speak of it.

Q. Then the case you mention is the only one wherein

you say the will of your uncle was unjust—the case that you mention of Jeffers?

A. Yes; I will say so.

Q. Did you ever notify the executors not to pay this claim of Edith's?

A. I said something to them about it in my letter to Mr. Walton; I always addressed Mr. Walton; I do not remember the words.

Q. Now, what was it you said?

10 A. I do not remember the exact words.

Q. Did you give him any notice not to pay it?

A. I do not remember that I gave him notice not to; I wrote him something about it.

Q. Do you know about when that was?

A. No, sir.

Q. Was it after the settlement of the 25th of March?

A. I think it was before; I do not think I wrote about it afterwards; I would not say positively.

Q. On the 25th of March, when he told you of it, the
20 claim had been paid, had it not?

A. I think he stated so there generally.

Q. What do you mean by "generally?"

A. Before the whole of the heirs; he addressed the room full of heirs.

Q. Were you all there—were all the heirs there?

A. No, sir, not all; I said all, but I mean what were there.

Q. Prior to your uncle's death, how often had you seen him?

30 A. Well, I could not say exactly how often.

Q. Once a year?

A. Yes, sir.

Q. More than once?

A. Yes, sir.

Q. Twice?

A. Yes, sir.

Q. Three times?

A. I cannot say that; my business would not allow me to go as much as I would like to have done; I was the servant of another.

Re-direct examination.

By Mr. French.

Q. What prompted you to write to Mr. Walton?

A. For what?

Q. You say you wrote a letter to Mr. Walton about Miss Dewson's claim—what caused you to write that letter?

A. I thought it was unjust. 10

Q. How did you know there was such a claim?

A. Why, from different ones, and I wanted to know the truth of it, and I wrote to him to know it; it had come to me from different ones that I thought had no authority to tell me, and I wanted to know from the right source.

Q. What did the different ones tell you?

A. They said they had heard that she had put in a claim of so much a week?

Q. After hearing that you wrote to Mr. Walton?

A. Yes, sir. 20

Q. Now, what did you write to him?

A. To know if it was so, that she had put in this claim, and if they had paid it.

Q. Did you get any answer to that?

A. I got no answer to it.

By Mr. Flanders.

Q. You were present at the hearing of this case in the Burlington Orphans' Court?

A. Yes, sir.

Q. There was no testimony offered in your behalf at that time, was there? 30

A. I did not offer any.

Silas Walton, recalled for the Respondents.

By Mr. Flanders.

Q. Did Miss Heisler write to you on the subject of Edith's claim?

A. I have no recollection that she did, distinctly, upon that subject.

Q. When was her letter, before, or after the payment of the claim?

A. The correspondence she has alluded to I could not
10 say; she had written to me several times, and I made it a point to answer, probably not immediately, for the reason that I would not be conversant enough with the matters to answer her, but I hope I am gentleman enough to answer every letter I receive.

Q. Now, did you ever receive from her a notice not to pay this claim?

A. Never.

OPINION.

[Filed June 5, 1888.]

20 THE VICE-ORDINARY. The appeal in this case presents but a single question for review, and that is whether a credit claimed by the respondents, as the executors of William Sharp, deceased, and allowed by the court below, was rightfully allowed or not. The item in dispute is \$560. This sum was paid to Edith A. Dewson for services rendered by her, as nurse and housekeeper, to the testator, for a period of one hundred and twenty weeks, immediately preceding his death, at \$5 a week. Miss Dewson exhibited her claim to the respondents under
30 affirmation, and they, after full examination into its merits, paid it, and prayed allowance for it in their final account. The appellants excepted to its allowance, and the court be-

low, after hearing proofs and arguments, disallowed the exception and allowed the item. It is from the decree made on their exception that the appellants have appealed.

The case must be decided here on a somewhat different state of facts from that on which it was decided in the court below. The evidence taken before the Orphans' Court was not preserved, and the appellants were, in consequence, obliged, in order to put their appeal in such condition that it could be heard on its merits, to obtain an order permitting new proofs to be taken. Such proofs 10 have been taken, and the question of fact, raised by the appeal, must be determined, not by the evidence which was before the Orphans' Court, but by the new proofs which have been taken under the order of this court. The new proofs are properly before the court and constitute the evidence which must control the decision of the question of fact involved, for the practice is settled that the Ordinary may in cases on appeal, where the subject matter of the litigation is one over which he has original, as well as appellate jurisdiction, hear the case on the proofs sent up from the 20 court below alone, or permit additional proofs to be taken, and then hear the case on the additional proofs in connection with those sent up from the court below, or if the proofs taken in the court below have not been preserved, or are so imperfect that they cannot be used with safety, he may give the parties leave to take new proofs and hear the appeal on such new proofs. *Read v. Drake*, 1 Gr. Ch. 78; *Rusling v. Rusling*, 8 Stew. Eq. 120; *S. C. on appeal*, 9 Stew. Eq. 603; *Personette v. Johnson*, 13 Stew. Eq. 173.

The testator died January 31st, 1886. Miss Dewson's 30 claim covered the period intervening between October 11th, 1883, and the date of the testator's death. She was a legatee under his will. Besides a sewing machine and some other chattels, he gave her a legacy of \$2000, payable within six months after his death. The will contains no intimation that these gifts were intended as compensation for her services, nor that they were to go in satisfaction of

a debt due to her. Much the largest part of her claim accrued subsequent to the date on which the will was executed. The will bears date January 16th, 1884. There are cases where a gift by a debtor to his creditor will operate as a satisfaction of the debt, or put the creditor to his election to either accept the legacy and forego his debt, or take his debt and forego the legacy. The rule on this subject was stated by the Master of the Rolls, in *Talbot v. Duke of Shrewsbury*, *Prec. in Ch.* 349, as follows: "If one, being

10 indebted to another in a sum of money, does by his will give his creditor a sum of money as great as or greater than the debt, without taking any notice at all of the debt, this shall nevertheless be in satisfaction of the debt, so that the creditor shall not have both the debt and the legacy." 2 *Lead. Cas. in Eq.* 751. This rule has been repeatedly recognized in this state. *Van Ripers v. Van Ripers' Exr.*, 1 *Gr. Ch.* 1; *Petrie v. Voorhees' Exr.*, 3 *C. E. Gr.* 291; *Rogers v. Hand*, 12 *Stew. Eq.* 270; *Russell v. Minton*, 15 *Stew. Eq.* 123. But it is regarded with great disfavor,

20 and courts, almost universally, manifest a strong disinclination to enforce it. Consequently very slight circumstances are considered sufficient to take a case out of its operation. Thus, where a testator directs that his debts shall be paid, or charges them upon his real estate, the inference is that a bequest to a creditor is meant to be, as it appears, a gift, and not that it is to operate as payment. 2 *Lead. Cas. in Eq.* 821. The testator in this case by his will directed that all his just debts be duly paid as soon after his decease as convenience and propriety would admit. The rule rests

30 entirely upon presumption—it attributes to a testator, who gives a legacy to his creditor, an intention which he has neither expressed nor intimated—and so cannot be applied to a case where there is nothing to sustain the presumption on which the rule rests. It is clear that it cannot be applied to this case, for it was impossible for such an intention, with respect to Miss Dewson's debt, to have existed in the mind of this testator, at the time he made his will, unless

we say he had the prescience to know what was to take place in the future. It is plain that there can be no presumption of an intent to satisfy a debt by a legacy which the testator does not incur until after he has made his will. 2 *Lead. Cas. in Eq.* 825; 1 *Pom. Eq. Jur.*, § 535. As the Master of the Rolls said, in *Talbot v. Duke of Shrewsbury*, *supra*, "whatever is to be a satisfaction of a debt ought to be so in its creation and at the very time it is given." This statement of the rule, with its limitations, renders it obvious, as I think, that the legacies given to Miss Dewson did 10 not operate as a satisfaction of her debt, nor impose upon her the duty of making an election.

The case, on its merits, seems to me to be free from the least difficulty. The litigants are not Miss Dewson and the appellants, but the executors and the appellants. Miss Dewson has been paid, and has, therefore, no pecuniary interest in this controversy. The question in dispute is whether the executors shall be compelled to pay certain moneys to the appellants, which the executors have already paid to another person, but which the appellants say they 20 should not have paid, because, the person to whom the payment was made, had no right, by strict law, to the money. The appellants do not, however, say that Miss Dewson did not render very valuable services to the testator, such as were, in consequence of his great age and impaired health, essential to his comfort; nor that the sum which the executors paid to her was so out of proportion to the value of her services as to evince wanton improvidence; but what they say is this: that during the whole period covered by Miss Dewson's claim she was under a contract to give her 30 services to the testator, at the rate of \$2 a week; that the executors knew of the existence of this contract, and that Miss Dewson had been paid all she was entitled to under it, yet, in the face of such knowledge, and for the purpose of carrying out their own notions of what was just under the circumstances, they paid her claim. But no such contract has been proved. The proofs, on the contrary, serve

rather to show that while Miss Dewson had, for many years, been a member of the testator's family, she was not there as an adopted daughter, or as a dependent, but as a servant working for wages, with no definite arrangement, however, as to the amount of compensation she should receive.

- On the presentation of Miss Dewson's claim, a state of affairs arose which required the executors to act with caution. It became their duty to examine into the merits of the claim carefully, to see whether it was just or not, and after getting all the facts obtainable respecting it, to exercise their best judgment as to whether it should be paid or not. They were not bound to exercise a faultless judgment. They were in a position where it was impossible for them to escape trouble and annoyance if the legatees were inclined to be litigious. If they paid without suit, the legatees could say that the claim was unfounded, and should not have been paid until established by a judgment at law; or, if they had refused to pay, and compelled the claimant to sue, then the legatees might have said that they should have paid without suit, and that as they had causelessly resisted the payment of a just claim, they should be required to pay the costs of the suit out of their own pockets. All that the respondents were required to do, was simply to do what any man of ordinary prudence and caution would, under like circumstances, have done. So long as an executor acts in good faith, and with ordinary discretion, and within the scope of his powers, his acts cannot be successfully assailed. No man is infallible; the wisest make mistakes, but the law holds no man responsible for the consequences of his mistakes which are the result of the imperfection of human judgment, and do not proceed from fraud, gross carelessness, or indifference to duty. An executor may pay a debt which is just, though barred by the statute of limitations. *Pursel v. Pursel*, 1 McCar. 526; *Vreeland v. Vreeland's Adm'r.*, 1 C. E. Gr. 512. He may also buy the peace of the estate which he represents by

compromising a lawsuit, or a doubtful claim. *Meeker v. Vanderveer's Ex'rs.*, 3 C. E. Gr. 392; *Rogers v. Hand*, 12 *Stew. Eq.* 270. Indeed, he may do anything within the scope of his powers, without the least risk of personal liability for the consequences of his acts, provided he exercises the care and judgment of a man of ordinary prudence and sagacity. That is the test which the courts are required to apply in all cases.

Judged by this rule, it seems to be entirely clear that the respondents stand free, in this particular matter, from 10 least suspicion of wrong-doing. Their conduct was characterized by the highest good faith, and by more than ordinary prudence. They did just what it was their duty to do. If they had, on the contrary, refused to pay, and put the estate to the expense of defending a suit, which it now appears would, on the facts before the court, in all probability, have resulted in the recovery of a judgment against them, there would have been much more reason to complain of their conduct than now exists. As it is, I think, the appellants have suffered no grievance. 20

The decree appealed from must be affirmed, with costs.

DECREE.

[Filed August 13, 1888.]

This cause having been brought to a hearing on an appeal from the Burlington Orphans' Court, at the May term of this court, and the testimony taken under a rule of this court having been read, and Thomas E. French, Proctor with the appellants, and Alfred Flanders, Proctor with the respondents, having been heard, and the questions brought up by said appeal having been duly considered, 30 it is, on this 13th day of August, A. D. 1888, ordered, ad-

judged and decreed, that the decree made on the 17th day of October, A. D. 1887, which is appealed from by the appellants, be, and the same is hereby in all things affirmed, with costs of appeal to be paid by the appellants.

On motion of Alfred Flanders, of Proctor with respondents.

ALEX. T. MCGILL, JR., C.

Respectfully advised,

A. V. VAN FLEET, V. C.

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PETITION OF APPEAL.

[Filed August 30, 1888.]

To the Court of Errors and Appeals in the Last Resort in all Causes :

The petition of Sarah E. Heisler and Susan D. Marcer, the appellants, show that your petitioners find themselves aggrieved by a decree made by the Ordinary in the Pre-rogative Court, on the thirteenth day of August, eighteen hundred and eighty-eight, in the matter of the appeal from the Burlington County Orphans' Court, of the above stated
20 matter, in that said decree adjudged that the decree made in said Orphans' Court on the seventeenth day of October, eighteen hundred and eighty-seven, which was appealed from by the appellants, be and the same was thereby, in all things affirmed, with costs of appeal to be paid by appellants.

And these petitioners appeal from the said decree upon the ground that the same is erroneous, for that the said decree made by the Ordinary aforesaid, ought to have been reversing the said decree of the Orphans' Court, and ad-
30 judging that the exceptions, by the said appellants filed in the said Orphans' Court, should have been by said court

allowed, and the account of the respondents in the above-stated matter as executors, in that particular be disapproved, and that the costs of the said appeal should have been ordered to be paid by appellees.

They therefore pray that the said decree may be reversed, set aside and for nothing holden, and that they may have such relief as may be just.

THOMAS E. FRENCH,
Solicitor of Appellants.

