

vol. LXXIV

1882

N. J. Court of Errors and Appeals.

STEPHEN O. SMITH, SURVIVING
EXECUTOR, &C.,

Appellant,

and

EMMA L. BURNETT,

Respondent.

*On
Exceptions
to an
Accounting.*

On Appeal from Prerogative Court.

BRIEF OF J. FRANK FORT,

Of Counsel for Appellant.

NEWARK, N. J.:

WARD & TICHENOR, LAW CASE PRINTERS, 832 & 834 BROAD ST.

1881.

SECTIONS OF STATUTES REFERRED TO IN THE OPINION
OF THE ORDINARY, AND DISCUSSED IN THE BRIEF.

Sections 3 and 4, of "Act concerning evidence,"
[Rev., page 378,] read—

SECTION 3. "No person shall be disqualified as a witness in any suit or proceeding at law or in equity, by reason of his or her interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his or her credit; *provided nevertheless*, that no party shall be sworn in any case when the opposite party is prohibited by any legal disability from being sworn as a witness, or either of the parties in a cause, sue or are sued in a representative capacity, *except* as hereinafter provided." 10

SECTION 4. "A party to a suit in a representative capacity may be admitted as a witness therein, and if called as a witness in his own behalf and admitted, the opposite party may, in like manner, be admitted as a witness." 20

Section 1, Act 1880, [Laws 1880, p. 52,] reads—

SECTION 1. "That in all civil actions in any court of law or equity of this State, any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; *provided nevertheless*, that this supplement shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator, or intestate represented in said action." 30

Sections 105 and 106, Orphans' Court Act, [Rev., 775,] read—

"If any person interested in the settlement of the account of any executor, administrator, guardian or trustee, shall by himself or attorney, appear 40

and make exceptions to said account, the Court shall either proceed to hear the proofs and allegations, at such time as they may appoint, and correct any mistake or errors that may happen in the account as reported, or refer the same to auditors or a Master in Chancery, to examine and restate the account after hearing parties and witnesses, and make report to the next or some subsequent Court, for confirmation and allowance."

10 SECTION 106. "The Court to whom any account is reported for an allowance as aforesaid, or the auditor or master to whom an account is referred as aforesaid, at the instance of any party interested in the same, or by their own proper authority, may examine any executor, administrator, guardian or trustee exhibiting such account, on oath or affirmation, touching the truth and fairness of the same, or any part or item thereof."

Mr. J. Newark Court for appellant

BRIEF.

The first and second reasons assigned for reversal, are :

(*First.* Because the Ordinary erred in holding that the testimony of Stephen O. Smith, given in the cause, was illegal.)

(*Second.* Because the Ordinary erred in affirming the ruling of the Orphans' Court excluding the offer of testimony as stated in the exception to the ruling of the Orphans' Court, at pages 28 and 29, of the printed case.)

The appellant in this case is the surviving executor of Oliver Smith, deceased ; as such he filed his account, October 25th, 1880. (See *Case*, pages 5 and 6.) On November 16th, 1880, the respondent excepted to said account for four separate reasons, all of which were abandoned in the Orphans' Court, except reason No. 2, which alleges that the appellant had failed to charge himself with 101 shares of the Newark Mutual Fire Insurance Company scrip, and with the dividends received by him on the same.

See *Case*, page 7.

On the hearing of these reasons before the Orphans' Court, the appellant (their accountant,) offered himself as a witness to establish a gift of the stock from his father to himself. The Court held that he was an incompetent witness for that purpose, and that he could not testify as to any statement by the testator, his donor, or to any transaction between them in relation to that matter. The Ordinary, in his opinion on appeal, holding that the witness was not competent to testify from whom he received the stock, or even to the fact that the testator had knowledge that he, (the appellant,) had the stock in his possession.

See printed case for questions, pages 27 and 28.

See Ordinary's opinion, page 35, line 30 to bottom.

I

II

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The Ordinary in his opinion contents himself with citing the 106th section of the Orphans' Court act, the third section of the act respecting evidence and the supplements to that act passed in 1880, as conclusive against the appellant's right to testify.

See the sections referred to, page 1 of this brief.

10 He does not favor us with his reasons for this conclusion. Whether because of interest in the event of the suit, or because some other party in the suit is in a representative capacity, and not voluntarily offering himself as a witness, therefore the appellant could not be sworn and testify as offered at pages 28 and 29.

Interest is clearly no objection to his testimony.

Revision, page 378, section 3.

20 Was it because the other party was in a representative capacity? The accountant and appellant was the executor—who then was suing or being sued in a representative capacity? The respondent excepted to the account. The Court certainly was not a party to the suit in a representative capacity. The exceptant cannot be claimed to stand in that capacity within the sense of the statute. What objection could there have been to the accountant being sworn as a witness even if the enabling act of 1880 had never been passed?

30 I contend that a hearing upon exceptions to the accounts of an executor in the Orphans' Court is not a case where "*either of the parties in a cause sue or are sued in a representative capacity.*" That in fact it is not a suit. (*Exton vs. Zule*, 1 McCart., 509.)

40 Can it be pretended that the exceptant could not have been a witness in a proceeding on exceptions to an executor's account prior to the passage of the act of 1880? I do not think that position would be seriously insisted upon. If the exceptant could have been a witness, could not the accounting executor? There is no interdiction in sections 3 and 4 of the act respecting evidence against the executor and representative being called by *himself* in any suit. He could always do that since

the passage of the act removing interest disability. If the accounting executor does not stand in the representative capacity upon exceptions to his account in the Orphans' Court, then who does? If he is not the representative then there is none. The opinion of the Ordinary, however, goes beyond this, and he insists that the act of 1880 settles the question of the right of the appellant to testify in this cause.

The act of 1880 has, I am informed, received different constructions by the different judges in the several circuits. 10

What character of an act is it?

To my mind it is an enabling act. It is not an act of restriction, it is an act of *enlargement*.

As I read the opinion of the Ordinary, he seems to hold that in no case could a witness to a suit, when either sued in a representative character give any testimony relative to any statement by or transaction with the testator or intestate. The proviso of the act is in effect held to be *restrictive* of the rules of evidence as they existed prior to its passage in causes where either party is in a representative capacity. 20

See proviso to section 1, act 1880, third page of brief.

I do not understand this section as the Ordinary seems to hold. The act was not intended to restrict the right to testify in cases where it existed prior to its passage. It was intended to enable parties to swear, where they could not under the law as it then existed, and to testify, except as to such matters as were prohibited in the proviso. 30

The language of the proviso is this: "*provided that the supplement shall not extend so as to prevent testimony, &c.*;" evidencing by the use of this language that the legislative intention by the restrictive proviso in the section was only to apply to those cases where the witness was called *solely* and *only* under and by force of the enabling clause in the first part of the section. That is where the witness could not be sworn under the statute as 40

it existed prior to the passage of the act, and left the rule of evidence where a witness was sworn, as he could have been prior to the passage of the act of 1880, in exactly the same position as to his testimony as if no such act had been passed.

There is nothing in the act of 1880 that can be construed into an intention on the part of the legislature to change the rules of evidence as they existed respecting the rights of a party suing or being sued to be sworn and
10 testify, where the representative suing or sued *first* goes upon the stand in his own behalf.

It was only intended to apply where the representative suing or sued does not testify in his own behalf; then it becomes an enabling act to remedy what the legislature evidently thought a defect in our law of evidence, and authorizes the party to the suit not in a representative character, to be sworn and testify, provided that in such case he shall not be allowed to give evidence of any transaction with or statement by the testator.

20 I insist that this proviso is only a restriction where the witness gets upon the stand only by force of the first part of this supplement, and applies to *no other case*.

(If the Court think the construction here put is inadmissible, then I hold that the executor was a competent witness under the 105 and 106 sections of the Orphans' Court act.

~~See pages 3 and 4 of Brief, [Rev., page 775.]~~

Conover vs. Conover, 3 Gr., 420-422.

30 *Davison vs. Davison's admr.*, 2 Harr., 169.)

The 105th section provides that in case of exception by party interested, the Court shall either proceed to hear the proofs and allegations, and correct errors, &c., or refer, &c., to auditor or master to restate after hearing *parties* and witnesses, &c.

The 105th section makes all *parties* competent in such cases, and the 106th section makes it *compellable* for the executor to testify in case the Court shall deem it neces-

40 sary.

(The 106th section of this act was passed prior to the act of 1859, removing disability to be a witness from interest in the cause, and the act of 1849, which allowed an adverse party to be called as a witness.

Revision, p. 378, Secs. 2 and 3, marginal notes.

Nixon's Digest, p. 645, Secs. 24 and 26.

Elmer's Digest, p. 364, Secs. 19 and 20.)

The decree of allowance is a proceeding *in rem*, and unless removed by appeal, conclusively determines the rights of all parties. 10

Exton vs. Zule, 1 McCart., at page 509.

The 57th section of the Orphans' Court act says no suit at law or in equity shall be brought, &c., within six months. This language is held not to apply to foreclosure of mortgage, because it is rather a proceeding *in rem*, and consequently not a suit at law or equity in the legal acceptance of that term as used in the statute.

The language in the act respecting evidence is, "no party shall be sworn in any cause where either of the parties *sue* or are *sued* in a representative capacity," except where the party in the representative capacity is sworn as a witness in his own behalf. 20

I contend that neither the proviso to section 3 nor section 4 of the act concerning evidence, nor section 1 of the supplement of 1880 to said act, apply to proceedings for the allowance of accounts in Orphans' Court. That such proceedings are in no sense *suits*, within the meaning of the statute. That they are proceedings *in rem*, and are governed in matter of evidence by the sections of the Orphans' Court act above quoted, and the common law rules of evidence as modified by the statutes removing disability on the ground of interest in the event of the suit. 30

Exton vs. Zule, 1 McCarter, 501.

The Ordinary cites but two cases in support of his position—one, *Purcel vs. Purcel*, [1 McCarter, 514.] and the other *Davison, et al. vs. Davison's admr.*, [2 Harr., 169.] 40

In *Purcel vs. Purcel*, there seems to be a *dictum* that bears out the position taken by the Ordinary. There the question was whether the executor had, as individual or as agent, paid certain moneys for the testator in his life time. The receipt was in the usual form, in cases where money is paid by an agent with funds of the principal. The executor testified. The Court said :

10 "The evidence of the executor is not competent to prove that he advanced the money, and that it remains unpaid. If it were so, there are circumstances and evidence in the case that tend very strongly to discredit the evidence and to render it unreliable."

There is no reason here given for the declaration that the executor was not competent to testify.

20 *Davison, et al., vs. Davison's admr.*, does not bear out the position taken by the Ordinary. The Court in this case do not pass upon the question of the right of the executor to be sworn. They only hold that the interest of the executor will not disqualify his being a witness, and secondly that the Orphans' Court act, [now section 106,] gave the Court power to compel the executor to be sworn in matter of accounting.

II

The third reason assigned for reversal is—

(III)
30 *Third.* (Because the Ordinary erred in holding that the facts proven in the cause were not sufficient to establish a gift *inter vivos* at law between a father and son.

The facts proven in this case seem to me to make out a clear gift *inter vivos*.

It should be remembered that the gift sought to be sustained here is between father and son, and will be presumed upon much less positive proof, and when, in fact, it might not be inferred in other cases.

2 *Schouler on Personal Property*, Vol. 2, p. 89.

Smith vs. Montgomery, 5 Monf., 502.

Hepworth vs. Hepworth, L. R. (10 Eq.) 10.

40 *Bells vs. Francis*, 1 Vroom, 152, (at page 155.))

Declarations of an intention to give before donee had possession, are also strong evidence.

Rhodes vs. Childs, 64 Penn. St. 18.

McCluney vs. Lockhart, 1 Bailey, 117.

As also subsequent declarations and admissions of having given.

Dean vs. Dean, 43 Vt., 337.

Burney vs. Ball, 24 Geo., 505.

Reid vs. Colcock, 1 Nott. & McCord., 592, (S. Carolina.)

Grangiac vs. Arden, 10 Johns., 293.

Allen vs. Cowan, 23 N. Y., 502.

In the case before the Court, Louisa B. Riker, an intelligent witness, and one in a position to know the truth, testifies clearly of an expressed intention of the testator to give the scrip to his son Stephen, while Stephen was at Washington away from home.

Printed Case, page 22, lines 30 to 40.

Subsequently the testator told this same witness, after Stephen had returned home from Washington, that he had given him the scrip.

See *Case*, lines 10 to 20, page 23.

Also line 35, page 23.

The donor told this witness that Stephen was to have this scrip transferred to him, and was to see Mr. Henry, the secretary of the Company, about transferring it to him, (Stephen.)

Case, page 24, lines 1 to 10.

Stephen testifies that he received this stock from his father. That it was in his (Stephen) possession at the time of his father's death, and that he had had possession of it from January the 7th or 8th, prior to his father's death, which occurred March 6th, 1875, and that his father had knowledge of this possession from the time he (Stephen) received it up to his death.

Case, page 27, line 30 to bottom.

Case, page 28, lines 10 to 40, inclusive.

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It further appears that the wife of Oliver Smith, the father, was a co-executrix with Stephen, and knew of this gift, and it is a strong circumstance that she, although taking with Stephen the burthen of the estate, never once required the scrip to go in the inventory, or called upon him or suggested that he account for it, although she knew by the evidence he had it.

Case, page 27, lines 10 to 20.

10 In addition to this it is proven that Oliver Smith gave to his son Stephen, the order in evidence.

Exhibit A, page 41 of *Case*.

This order was used to transfer stock. It was usual in case of sick people. Oliver Smith, at the time he signed it, was sick.

He had told Mrs. Riker that he *had given* Stephen the scrip, and he was to see Mr. Henry and have it transferred.

20 The paper [Exhibit A] I contend is a sufficient assignment of the scrip to Stephen to pass the title, even if the scrip itself had not been delivered. It is a memoranda or writing of the gift, and a power of attorney authorizing Stephen to transfer the scrip to himself, and is strongly corroborative of the truth of the fact of a gift *inter vivos* in this case. It seems to me, in view of all the circumstances, it is conclusive.

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(A writing purporting to give a bond which was transferable by delivery but not delivered, has been held effectual.

Morgan vs. Mallerson, L. R. (10 Eq.) 475.

Voyle vs. Hughes, 2 Sm. & G., 18.

Jones vs. Lock, L. R. (1 Ch.) 25.

Marling vs. Marling, 27 Am. R., 635.

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2 Kent, 438, Note 1.)

At line 10, *Case*, page 18, Mr. Henry, the Secretary of the Insurance Company, testifies:

“Q [Showing witness Exhibit A.] What is that order for?”

“A It is for drawing dividends, and can be used for the transfer of stock.”

Line 27, page 19, he further says:

“Q You accept one of these as a transfer of stock, and so notify parties; if they ask that question, you tell them so? 10

“A Yes, sir.”

Mr. Henry further testifies, at bottom of page 21, that he cannot remember whether Stephen showed him the scrip when he presented the order known in this cause as Exhibit A, but admits he may have done so, and Stephen himself testifies, at bottom of page 32, that he is pretty positive he did show it to Mr. Henry at that time.

Schouler, in his work on Personal Property, (Vol. 2, p. 92.) sums up all the authorities as to what constitutes a sufficient gift *inter vivos*, as follows: 20

“Such gifts are incomplete and ineffectual so long as they rest in the donor’s unfulfilled intention, or mere promise to give in the future. * * * * * But when the present intention to give has once manifested itself in acts, words, and conduct, amounting on the donor’s part to delivery, or a permission to assume dominion, as the case may be, and on the part of the donee to acceptance, or some other corresponding assumption of dominion, the gift becomes complete, and fully executed.” 30

(A gift of railroad shares, where assigned in blank but never recorded while donor was alive, sustained in *Stone vs. Hackett*, 12 Gray, 227.)

(The courts are now sustaining a doctrine of equitable assignment where a gift is shown to have been intended.

Camp’s Appeal, 36 Conn., 88.

Tillinghast vs. Wheaton, 8 R. I., 358.) 40

(The gift of a promissory note will be sustained when made by payee without endorsement, and donee may sue in name of personal representatives without their consent.

Grover vs. Grover, 24 Pick., 261.

Wing vs. Merchant, 57 Maine, 383.

Boles vs. Kempton, 7 Gray, 382.

Simons vs. Mosely, 7 Gray, 87.

See 2 *Redfield on Wills*, pages 312, 313, &c.)

10 (The gift of a savings bank book without any assignment in writing or otherwise, will pass the deposit of the donor represented in the book to the donee.

8 R. I., 536, *Tillinghast's admr.*, vs. *Wheaton's exr.*

See page 539.

Brown vs. Brown, 18 Conn., 410.

Waring vs. Edmonds, 11 Md., 424.

Parish vs. Stern, 14 Pick., 198.

Turpin vs. Thompson, 2 Met. R., 420.

20 *Lee vs. Boak*, 11 Gratt., (Va.) 182.

Coldwell vs. Renfraw, 33 Vt., 213.

Westulo vs. De Witt, 35 Barb., 215.

Martin vs. Funk, 75 N. Y., 134.)

(In *Hackney vs. Vrooman*, 62 Barb., 650, the Court held the delivery of the original bond and mortgage, without any assignment thereof in writing, good.)

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30 In 2 E. H. Smith R., 305, (*Penfield vs. Public Admr.*) the Court held the following facts to constitute a valid gift, viz: "A man and woman lived in the same boarding house, and he maintained and treated her as a daughter, and both had access to the room in which he had a trunk. Being about to go away, and being in another room of the house, he said to her 'My trunk up stairs, and what is in it, I give to you; there is enough in it to take care of you a spell.' He went away and returned in a few days and occupied the room and used the trunk and clothes as usual until he died a short time thereafter. The woman took the trunk and contents after his death, 40 and it then contained a pass book on a savings bank.

Held to be a valid gift of the book and of the money mentioned therein standing to his credit in the bank."

(Approved in *Allen vs. Cowan*, 23 N. Y., 502.

See *Allerton vs. Lang*, 10 Bosw., (N. Y.) 362.)

In *Reid vs. Colcock*, 1 Nott & McCord, 592, (S. Carolina) the Court held, citing several cases, that the declarations of the donor that he *intended to and had given* the negroes in dispute to his daughter, was sufficient evidence of a gift, and that in every instance where there is evidence of a repeated declaration of the donor that he *had given*, although no proof of actual delivery is made, the jury are authorized to infer every thing that is necessary to the consummation of a legal gift, including the intention to give, the act of giving, the delivery and the consent to accept. 10

Reported in 8 *American Decisions*, page 729.

In (*Grangnac vs. Arden*, 10 Johnson, 293) a leading case in this country, the proof was, that the defendant bought six tickets in a lottery, one of which was numbered 7,470, and drew a prize of \$5,000, which was paid to the defendant in person. A witness testified that soon after the drawing he congratulated the defendant upon his good fortune, when he said "*the ticket did not belong to him ; that he had given it to his daughter.*" Other witnesses testified to similar acknowledgments at various times. The daughter never had the ticket or the money in her possession, and both remained with the defendant up to the time of the suit by the daughter for the money. 20

The Court, in their opinion, say :

"The evidence from which the jury have inferred a delivery is the declaration and acknowledgments of the defendant. These declarations did not relate to a gift intended to be made, and are not to be viewed in the light of executory promises to be carried into effect at some future day. But they were confessions that a gift had already been made. All these declarations refer to and recognize a gift as having been made. They afford reasonable ground for a jury to infer that all the formality 40

necessary to make it a valid gift had been complied with and the right and title of the plaintiff to the money complete and vested."

The Supreme Court of Maine in (*Wing vs. Merchant*, 57 Maine, 387), say :

10 "It matters not whether the change of possession takes place before or after, or at the time of the utterance of the words [importing of a gift, if there is a manifest design on the part of the donor that the donee should thence afterwards hold such possession absolutely as of his own property. Thence forward the possession and right are concurrent in the same person, and the gift is perfect and irrevocable."

The Court of Errors, in New York, cite this last case with approval in *Allen vs. Cowan*, (23 N. Y., 502,) above referred to, and it is frequently approved in cases where it has been considered by the Courts of the various States.

20 (See also,
Bourne vs. Fosbrooke, 18 C. B. (N. S.), 515.
Westerlo vs. De Wolf, 36 N. Y., 340.)

30 The case under review is stronger in its facts and circumstances than many cases approved by the Courts of this country as valid gifts *inter vivos*. It is stronger in its affirmation proof than *Betts vs. Frances*, and certainly equally strong in its inferential proof. Declarations of a person that he *had given*, are declarations against interest and should be taken strongly against the donor, and as *prima facie* evidence of a full gift until overthrown by some testimony to the contrary.

I submit that the decision of the Ordinary and Orphans' Court should be reversed on all the grounds stated

[PETITION OF APPEAL]

In the Prerogative Court,

OF THE STATE OF NEW JERSEY.

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IN THE MATTER OF THE EXCEPTIONS
TO THE ACCOUNT OF STEPHEN O.
SMITH, SURVIVING EXECUTOR OF
OLIVER SMITH, DECEASED.

*On appeal
from the Essex
Orphans'
Court.*

*To the Honorable THEODORE RUNYON, Ordinary of the
State of New Jersey :*

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The humble petition of Stephen O. Smith, the executor above named, and appellant in the matter above stated, respectfully shows that your petitioner as surviving executor of Oliver Smith, deceased, late of the city of Newark, Essex county, in this State, filed with the Surrogate of said county for audit and allowance, on the twenty-fifth day of October last past, an account of his executorship to said last date.

That said account was on the sixteenth day of November, eighteen hundred and eighty, excepted to by Emma L. Burnett, a legatee under the will of your petitioners' testator, for this among other things:

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"That your petitioner, as accountant, had neglected to charge himself with one hundred and one shares of the Newark Mutual Fire Insurance Company's stock, and with the dividends received by him, the same not having been inventoried or charged against said executor in any former account."

Your petitioner further presents that pending the hearing on said exception above recited, and the question of

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have been the market value of said stock, and which was not heretofore accounted for by said executor and on the income of the estate worth fifty dollars and fifty cents with lawful interest thereon from the first day of January, in the year eighteen hundred and seventy-six, and the same sum with interest in like manner from the first day of January in the year eighteen hundred and seventy-seven, said last two amounts being the dividends received upon said stock at said dates by said executor and not accounted for by him, and also the interest upon said sum of six hundred and six dollars from the nineteenth day of December in the year eighteen hundred and seventy-seven, when the said stock was sold by said executor in addition to the last item of said account as filed. 10

“And the Court do further order and direct that said Stephen O. Smith, as such executor, be allowed for his disbursements as stated, in the discharge of said account of said executor, and that the costs of this accounting and the proceedings thereon be paid by the said executor out of his individual estate. 20

“And the said Court do order and direct that a counsel fee of one hundred dollars be allowed to the exceptant out of the estate of said Oliver Smith.

“And the Court having, on due notice and motion, ordered and decreed that the letters testamentary in the will of said Oliver Smith, deceased, heretofore issued, be revoked, and the said Stephen O. Smith removed from his said executorship; the Court further order and decree that the items in said account of seventy-seven dollars and thirty-eight cents, for commissions of said executor, be stricken out and disallowed. 30

Dated April 4, 1881.

LUDLOW McCARTER,
JOHN H. MEEKER,
S. W. TICHENOR.”

Your petitioner complains of the whole and every part of said order or decree above recited, as erroneous. 40

Your petitioner, therefore, prays that the said order or decree of the said Orphans' Court may be in everything reversed, set aside and for nothing holden.

And that your petitioner may have such relief in the premises, as to this Honorable Court shall seem meet.

And your petitioner will ever pray, &c.

J. FRANK FORT,

Proctor and Counsel of Petitioner.

*TRANSCRIPT OF THE PROCEEDINGS IN THE
ORPHANS' COURT.*

The account of Stephen O. Smith, executor of Oliver Smith, late of the city of Newark, in the county of Essex, deceased, as well of and for the estate which hath come to his hands to be administered, as for his payments and disbursements out of the same. 10

This accountant chargeth himself—

To balance in hand per settlement of account as passed by the Orphans' Court of Essex county,	\$6,946 10	
To profit on sale of Morris & Essex Railroad stock,	\$76 37	
Less W. J. Knight, stenographer, bill ordered paid by court, amounting to	\$31 40	
	44 97	20
To rents and interest received from August 17, 1879; to August 26, 1880, per statement herewith filed and marked Exhibit A,	1,184 93	
Total,	\$8,176 00	

This accountant prays allowance—

August 26th, 1880.		30
For expenses paid water rents, repairs of property, insurance, taxes and court expenses in tenancy, from August 18, 1879, to August 26, 1880, as per voucher No. 1,	\$341 18	
For cash paid Emma L. Burnett, (per Geo. F. Tuttle,) on account of income, per voucher No. 2,	177 16	
For cash paid self, on account of income,	177 16	
For commissions on \$1,184 73,	77 38	
Total,	\$772 88	40

Recapitulation—

Total income received from estate,	\$1,184 93
“ expenses, &c., account and income paid over, including executor's commissions,	772 88
	<hr/>
Balance of income for distribution,	<u>\$412 05</u>

Statement of condition of estate—

Total estate at last accounting,	\$6,946 10
“ increase since last accounting,	44 97
	<hr/>
10 Net estate in the hands of executor, to date,	<u>\$6,991 07</u>

Investments—

\$1,300 in Government 4 per cent. bonds, cost,	\$1,329 25
\$800 in Government 4 per cent. bonds, cost	826 00
\$2,500 in Harrison town bonds,	2,500 00
\$1,800 in Mtg. No. 109 Thomas street,	1,800 00
20 \$484.94 in note of E. L. B. Riker,	<u>484 94</u>
Total amount of investments, cost,	\$6,940 19
Total estate in hands of executor,	\$6,991 07
Total estate invested,	<u>6,940 19</u>
Cash in hands of executor unin- vested,	\$50 88

ESSEX COUNTY, ss:

30 Stephen O. Smith, the executor above named, on his oath, says that the foregoing account is in all things just and true, both as to charge and discharge thereof, according to the best of his memory and belief.

Sworn before me,
December 13th, 1880,

STEPHEN O. SMITH.

C. MEYER ZULICK, *Surrogate*.

Endorsed:

Account of Stephen O. Smith, executor of Oliver Smith, deceased.

Filed October 25th, 1880.

IN THE MATTER OF THE ESTATE OF } *Essex Orphans'*
 OLIVER SMITH, DECEASED, ON EX- } *Court.*
 ECUTOR'S ACCOUNT. } *Exceptions to Ac-*
 } *count of Execu-*
 } *tor, filed Octo-*
 } *ber 25th, 1880.*

Emma L. Burnett, one of the legatees under the will of Oliver Smith, deceased, by GEORGE F. TUTTLE, her proctor, excepts to the account above stated, because—

1. The said account, both in the charge and discharge 10
 thereof, gives no items or dates, but only an aggregate sum in gross, both of moneys received and expended.

2. Because the said accountant hath neglected to charge himself with one hundred and one shares of the Newark Mutual Fire Insurance Company stock, and with the dividends received by him, the same not having been inventoried or charged against said executor in any former account.

3. Because the said account, as filed, is not verified 20
 by the oath of said accountant; and

4. Because said account is in many other respects irregular and insufficient.

Dated November 16th, 1880.

GEORGE F. TUTTLE,
Proctor of Exceptant.

Endorsed:

ESSEX ORPHANS' COURT.

Emma L. Burnett, exceptant, and Stephen O. Smith, executor, &c. Exceptions to account.

GEORGE F. TUTTLE, *Proctor.* 30

Filed November 16th, 1880.

To the Orphans' Court of the county of Essex:

IN THE MATTER OF THE ESTATE OF }
 OLIVER SMITH, DECEASED. }

Emma L. Burnett, who is a daughter of said Oliver Smith, now deceased, respectfully shows to this Court that the said Oliver Smith departed this life on the sixth 40

day of March, in the year eighteen hundred and l seventy-five, having first made his will in writing, duly executed, and which has been duly admitted to probate by the Surrogate of said county of Essex; that Ann T. Smith, the widow, and Stephen O. Smith, the son of said testator, were the executors appointed by said testator, who duly proved said will; that the said Ann T. Smith has since departed this life, and the said Stephen O. Smith is now the sole surviving executor of said will; that said
10 testator left an estate of over \$8,373, besides valuable real estate in the State of New Jersey, and by his said will, after making provision for the payment of his just debts, funeral and testamentary expenses, and some specific devises, he directed his executors, among other things, to pay one third of the income from his residuary estate to his daughter, this complainant, in half yearly payments, and, upon the death of his widow, the said Ann T. Smith, he gave the one-half of said income to
20 this complainant, and the remaining one half of said income to said Stephen O. Smith, his son, and at the death of both the said Stephen O. Smith and this complainant, said testator gave said residue to his grand-children in equal shares.

And the said Emma L. Burnett complains that the said Stephen O. Smith, surviving executor as aforesaid, has abused his trust as such surviving executor in that he has failed and neglected to pay to her, in half yearly payments, the income to which she is so entitled as aforesaid, and has abused the trust and confidence reposed in him
30 as such executor by said will, by taking eighteen hundred dollars, part of the funds in his hands as such executor, and applying the same to his own use, and has also invested, or claims to have so invested, the further sum of four hundred and eighty-four dollars and ninety-four cents, upon a simple promissory note of one Mrs. Emily L. B. Riker, who is the wife of Oliver S. Riker, and has also made other investments not authorized by law, thereby jeopardizing the estate in his hands as such executor; and this complainant, for the reason aforesaid,
40 prays that the letters testamentary of and upon said will

issued to Stephen O. Smith as aforesaid may be revoked, and administration *de bonis non* with the will annexed of said Oliver Smith, may be issued to some proper person in the stead of said Stephen O. Smith.

EMMA L. BURNETT.

Dated March 29, 1881.

Endorsed :

Filed March 29, 1881.

C. MEYER ZULICK, *Surrogate*.

10

ESSEX ORPHANS' COURT.

IN THE MATTER OF THE ACCOUNT OF STEPHEN O. SMITH, EXECUTOR, &C., OF OLIVER SMITH, DECEASED.	}	<i>Decree on Ex- ceptions to ac- count filed Oct. 25, 1880.</i>
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The exceptions coming on to be heard and the Court having heard and considered the evidence and allegations 20 of the parties, and examined the said executor on his oath, the Court do order and decree that the account of the said Stephen O. Smith, executor, &c., be restated, and the Court hereby order and direct the Surrogate to state an account against the said executor as follows :

To charge him on account of the principal estate with six hundred and six dollars, in addition to the first two items of his said account as so filed, being the value of one hundred and one shares of the stock of the Newark Mutual Fire Insurance Company, with the premium of 30 twenty per centum on the par value thereof, which appears by the evidence taken upon said exceptions to have been the market value of said stock, and which was not heretofore accounted for by said executor ; and on the income of the estate, with fifty dollars and fifty cents, with lawful interest thereon from the first day of January, in the year eighteen hundred and seventy six, and the same sum, with interest in like manner from the first day of January, in the year eighteen hundred and sev-
 enty-seven, said last two amounts being the dividends 40

received upon said stock, at said dates by said executor, and not accounted for by him; and also the interest upon said sum of six hundred and six dollars from the nineteenth day of December, in the year eighteen hundred and seventy-seven, when the said stock was sold by said executor, in addition to the last item of said account as filed.

And the Court do further order and direct that said Stephen O. Smith, as such executor, be allowed for his
 10 disbursements as stated in the discharge of said account of said executor, and that the cost of this accounting and the proceeding thereon, be paid by the said executor out of his individual estate; and the said Court do order and direct that a counsel fee of one hundred dollars be allowed to the exceptant out of the estate of said Oliver Smith; and the Court having on due notice and motion ordered and decreed that the letters testamentary on the will of said Oliver Smith, deceased, heretofore issued, be revoked, and the said Stephen O. Smith removed
 20 from his said executorship, the Court further order and decree that the item in said account of seventy-seven dollars and thirty-eight cents for commissions of said executor be stricken out and disallowed.

LUDLOW McCARTER,
 JOHN H. MEEKER,
 S. W. TICHENOR.

Dated April 4, 1881.

Endorsed :

Filed April 4, 1881.

30

C. MEYER ZULICK, *Surrogate.*

IN THE MATTER OF THE ESTATE OF	}	<i>Essex Or-</i>
OLIVER SMITH, DECEASED.		<i>phans' Court.</i>
		<i>On motion to</i>
		<i>remove Ex-</i>
		<i>ecutor.</i>

Complaint having been made to this Court by Emma L. Burnett, who is one of the legatees under the will of
 40 said deceased, that Stephen O. Smith, the surviving ex-

ecutor of said will, has abused his trust as such executor, and has not performed his duties as such executor according to law and the provisions of the last will of said Oliver Smith, deceased, and the Court having upon due notice to said executor considered the same and heard the testimony offered by the parties, do hereby adjudge that said executor has abused his said trust, and failed to perform the duties required of him as such executor according to law under the said will.

The Court do, on this fourth day of April, in the year 1881, order and decree that the letters testamentary of the estate of Oliver Smith, deceased, issued to the said Stephen O. Smith, executor named in said will, by the Surrogate of the county of Essex, be and the same are revoked, and the said Stephen O. Smith removed from office, and that George D. G. Moore be and hereby is appointed administrator with the will annexed in his stead, who shall enter into bond in the sum of fifteen thousand dollars, with sufficient sureties, for the faithful performance of his duty, according to the form of the statute in such case made and provided; and it is further ordered that the said Stephen O. Smith state and settle his account as executor of the said Oliver Smith, deceased, on the seventh day of June next, and pay and deliver the balance due and the goods, chattels and effects and choses in action in his hands within ten days after such settlement.

LUDLOW McCARTER,
JOHN H. MEEKER,
S. W. TICHENOR.

30

Statement of the account of Stephen O. Smith, executor of Oliver Smith, late of the county of Essex, deceased, made pursuant to the order of the Orphans' Court of the county of Essex, this fourth day of April, A.D. 1881.

40

DR.

The said executor is charged as to principal estate—

	To balance on hand per statement of accounts as passed by Orphans' Court,	\$6,946 10
	Profit on sale of Morris & Essex Railroad stock, less stenographer's fees,	44 97
	Value of 101 shares Newark Mutual Insurance Company, par value and 20 per cent. premium,	606 00
10		<u>\$7,597 07</u>

The said executor is charged as to income of estate—

	To dividend on 101 shares Newark Mutual Insurance Company, 1876, January,	\$50 50
	Interest thereon, to April 4th, 1881,	15 93
	To dividend on 101 shares Newark Mutual Insurance Company, 1877, January,	50 50
	Interest thereon to April 4th, 1881,	12 90
20	Interest on \$606, from December 19th, 1877, to April 4th, 1881,	119 79
	To rents and interest received from August 17th, 1879, to August 26th, 1880, as per statement filed,	1,184 93
		<u>\$1,434 35</u>

The said executor is allowed on account of income—

30	For expenses paid water rents, repairs of property, insurance, taxes and court expenses in tenancy, from August 18, 1879, to Aug. 26, 1880, as per voucher No. 1,	\$341 18
	For cash paid Emma L. Burnett, on account income, voucher No. 2,	177 16
	For cash paid self on account income,	177 16
	For allowance by court of counsel fees on behalf of the exceptant,	100 00
40		<u>\$795 50</u>

As to principal estate, the said executor is charged,	\$7,597 07	
	\$7,597 07	
Balance in executor's hands,	\$7,597 07	
As to income of the estate, the said executor is charged,	\$1,434 55	
The said executor is allowed,	795 50	
	\$639 05	10
Balance in executor's hands,	\$639 05	
\$7,597 07		
639 05		
\$8,236 12		

C. MEYER ZULICK, *Surrogate*.

And the said Surrogate having stated and reported an account as heretofore ordered, it is on this fourth day of April, A.D. 1881, ordered and decreed, that the said account be settled as so stated and reported, and that there is a balance in the hands of said Stephen O. Smith, amounting to eight thousand two hundred and thirty-six dollars twelve cents (\$8,236.12), which said sum the said Stephen O. Smith is ordered to pay to George D. G. Moore, administrator, with the will annexed, of Oliver Smith, deceased. 20

LUDLOW McCARTER,
S. W. TICHENOR.

ESSEX COUNTY ORPHANS' COURT.

30

IN THE MATTER OF ACCOUNT OF STEPHEN O. SMITH, EXECUTOR OF OLIVER SMITH, DECEASED.	}	<i>On Appeal.</i>
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Notice is hereby given that the above named executor, Stephen O. Smith, under and by virtue of the one hundred and seventy-sixth section of the Orphans' Court Act of the Revised Statutes, respectfully appeals from the order and judgment of the said Orphans' Court made 40

on the fourth day of April, eighteen hundred and eighty-one, in the above stated matter.

J. FRANK FORT,

Proctor and counsel with Stephen O. Smith as aforesaid.

Dated April 20, 1881.

ESSEX COUNTY, ss :

I, C. Meyer Zulick, Surrogate of the county of Essex,
 10 and Clerk of the Orphans' Court of said county, do certify the foregoing to be a true copy of the account of Stephen O. Smith, executor of Oliver Smith, deceased, with the exceptions filed thereto, the decree of said Court made thereon, the complaint of Emma L. Burnett, and the order of removal of said executor, together with the appeal from the several orders of said Court, as the same appears on file and of record in my office.

Witness my hand and official seal, this seventh day of
 20 May, A.D., eighteen hundred and eighty-one.

C. MEYER ZULICK,

[L. s.]

Surrogate and Clerk.

TESTIMONY.

Testimony taken in the above stated cause before His Honor Judge McCARTER, and associate Judges, at the Essex County Court House, on Tuesday, the 8th day of March, 1881, on the exceptions referred to in the petition of appeal filed in this case.

10

JOHN J. HENRY, for the exceptant, testified as follows:

Direct examination:

Q You are the Secretary of the Newark Fire Insurance Company—are you not?

A I am.

Q And have been so how long?

A Ten years.

Q Did you know Oliver Smith in his lifetime?

A I did.

Q What books have you there?

20

A I have the transfer book of stock, the dividend book.

Q Was Oliver Smith a holder of your stock, in his lifetime.

A He was.

Q How much did he hold?

A At what time?

Q On the 7th of January, 1875?

A One hundred and one shares; five hundred and five dollars.

30

Q When was the dividend payable?

A January the 1st, of each year.

Q By whom was the dividend of January 1st, 1875, drawn?

A (Witness referred to a book). By Stephen O. Smith—per order.

Q In what capacity?

A By an order;—by Stephen O. Smith, per order.

Q In what capacity? I mean did he draw it, as owner, attorney, or agent, or what?

40

A As attorney.

Q As attorney in fact?

A Not exactly,—there was an order from Mr. Oliver Smith.

Q Have you a copy of that order?

A I have got the original. (Witness produces a paper).

Q That is a power of attorney, is it not?

A Power of attorney, or order.

10 (Proctor for the exceptant offered in evidence the paper produced by this witness, and the same was marked Exhibit A, on the part of the exceptant.)

Q (Handing witness Exhibit A.) Here are some figures on the lower left hand corner; whose are they?

A My hand-writing.

Q Do you know when they were put there?

A I presume at the time the dividend was drawn and the interest paid; it seems to be the figures of it.

20 Q Explain that—just how it came about?

A The dividend drawn on the 7th day of January, 1875, was \$45.45; the interest paid on Oliver Smith's mortgage of \$1,000, was \$35.40; leaving a balance, \$10.05; I presume the \$10.05 was the balance I paid Mr. Smith.

Q (Handing witness another paper.) Are those figures on the copy yours?

A Yes, sir; that is my hand-writing, all through.

Q You made this copy yourself?

30 A Yes, sir.

Q Just trace that stock and tell us what became of it?

A (Witness referred to books.) On the first day of April, 1875, Stephen O. Smith, executor of Oliver Smith, deceased, transferred it to Stephen O. Smith.

Q Individually?

A Individually.

Q Look at the next dividend and tell us how that was drawn?

A The next dividend—1876?

40 Q 1876.

A (Witness referred to book.) Stephen O. Smith, it was then.

Q Drawn by him, individually?

A Drawn by Stephen O. Smith, individually; the stock was in his name.

Q What was that amount?

A Fifty dollars and fifty cents.

Q Turn to the next dividend.

A (Witness referred to a book.) Stephen O. Smith drew that, January 2d, 1877; fifty dollars and fifty 10 cents.

Q Who drew the next dividend?

A (Referring to book.) Stephen H. Plum drew it then.

Q See then, by your transfer book, what had become of it in the mean time?

A "December 19th, 1877, Stephen O. Smith, to S. H. Plum."

Q Stephen O. Smith, individually, I suppose?

A Stephen O. Smith, individually. 20

Q Do you know what other transaction occurred on the same day—the 7th of January, 1875, with reference to Mr. Smith?

A A mortgage of one thousand dollars was paid off at the same time the interest was paid; the two transactions follow on the cash book.

Q I understand you do not know how that mortgage was paid off, except as to the interest; have you any knowledge now, in regard to that?

A Mr. Smith told me since it was by the savings 30 bank.

Q At the time that Mr. Stephen O. Smith, as executor, assigned that stock to himself, was there any conversation between you and him in regard to the mode of his signing?

A Well, I could not say as to that; there was only one mode for him to sign at the time, that I would accept.

Q Do you recollect whether it was signed in the first place without the word "executor," or not? 40

A I could not say; he never left the office without he put executor on it; I can say that, unless it was an oversight; and if he did I should have sent for him to come back.

Q Do you recollect whether there was any conversation between you and him in regard to that?

A I do not recollect; there may have been some conversation.

Q (Showing witness Exhibit A.) What is that order for?
10

A It is for the drawing of a dividend, and can be used for the transfer of stock.

Q Have you any other form of order for the transfer of stock?

A We have forms that we use—from brokers.

By Mr. Fort:

Q The question is if you—your company have?

A No; our company does not furnish any blanks except those.
20

By the Court:

Q Those blanks are furnished by the company as a matter of convenience to the company?

A Yes, sir.

Further direct examination:

Q I understand you that that (Exhibit A) is for drawing dividends and assigning stock?

(Question objected to.)

Q Repeat your answer to my former question then?
30

A The principal use has been for drawing dividends and it can be used for assigning stock.

Q Now, then, as to "can be used for assigning stock," is it ever used for that purpose to any extent?

A Not to any extent. It combines the receipt and assignment, both.

Q In point of fact was that ever used for assignment in this particular case?

A Not for assignment—no, sir.

Q It was not?
40

A Certainly not.

Q The assignment was made by virtue of the executorship?

A By virtue of the executorship.

Q Do you know what the value of this stock or scrip was in December, 1877—I believe it is—when it was assigned to S. H. Plum?

A From 120 to 125.

Cross examination, by Mr. Fort:

10

Q I understood you to say the other day when you were here, that this (Exhibit A) was the certificate or order commonly used by persons for the transfer of stock in your company?

A It has been used when they were sick at home and could not get out.

Q That is the order you generally send when you send an order for a person to sign at home for the transfer of stock, is it?

A No, sir, not when we send an order for the transfer of stock. 20

Q I mean to say if a person calls upon you and asks for an order for the transfer of stock?

A We always send them next door, to the book store, we do not keep them; but if they produce one of these we accept it.

Q You accept one of these as a transfer of stock and so notify parties; if they ask you that question, you tell them so?

A Yes, sir. 30

Q If Mr. Smith asked you that question you undoubtedly told him that was your custom?

(Question objected to.)

(Question withdrawn.)

Q Do you remember as to whether or no Mr. Smith asked you that question—whether that was good to transfer this stock?

A I do not recollect that.

Q You do not remember about that?

A No, sir. 40

Q Is the original order in your hand-writing?

A No, sir; it is in Mr. Stephen O. Smith's hand-writing, I should say from the looks of it. The copy is in my hand-writing, the original I should say was in Mr. Stephen O. Smith's hand-writing.

Q Stephen O. Smith, when he signed this transfer, did not sign it in the first place, "Stephen O. Smith, executor"?

A I presume he has;—it is so in the book here.

10 *Q* I mean at the same time—right at the same time—before he took his pen off—did he sign himself "Stephen O. Smith, executor"?

A He had to take his pen off before writing "Executor," after writing "Smith," but I presume it was a continuous transaction.

Q Don't you remember anything about it at all?

A I do not—it is five years ago. There is no cramming here (referring to transferring book) as if it was interlined, at all.

20 *Q* What date is that?

A April 1st, 1875.

Q Was nothing said about his ownership of the stock at that time by Mr. Smith—as to his ownership of it under an order he had produced prior to that?

A Not to my knowledge—I could not recollect, it is years ago.

Q Was there not anything peculiar about this transaction which calls it to your memory at all?

30 *A* Well, nothing that I recollect of. It has been called to my memory two or three times in the last year or two, by parties coming in to know about it—that is all.

Q You do not remember anything in regard to your requiring Mr. Smith to sign his name as executor?

A Nothing more than the usual course of events; what I should require of any one.

Q Was there anything said by Mr. Smith as to supposing that the stock was his by virtue of the order that had been filed with you in January, previous?

40 *A* I do not recollect any such remark.

Q The matter is not sufficiently fresh in your mind to remember whether that did occur, or not?

A No, sir.

Q Such conversation in relation to the signing as executor and in relation to that order, and Mr. Smith's understanding of that order, may have occurred?

A It may have occurred; it is an every-day occurrence to talk about matters in that way.

Q In regard to the claiming by Mr. Smith that the stock had been given to him; you say you paid him the excess, \$10.05? 10

A Yes, sir.

Q Do you remember any conversation in relation to that, at that time?

A Nothing that I can recollect, except my figures on here (Exhibit A,) show the transaction; I looked up the books to find that and saw the transaction of the mortgage and interest are both on the same day.

Q Do you remember when Mr. Smith gave you the scrip and the order; you had the scrip in this case, did you not, or saw it? 20

A Well, sir, we do not require the certificate at the drawing of dividends, but do on the transfer of stock.

Q Do you remember of having seen this scrip in possession of Mr. Smith?

A I must have seen it at the time of the transfer; of course he delivered it at the time of the transfer.

Q He must have?

A Yes, sir.

Q And then you deliver the new scrip? 30

A We do; and the old scrip is to be delivered up to be canceled.

Q And are you right sure that you did not see this scrip in the possession of Mr. Smith prior to that time?

A I am not positive I did not see it.

Q You cannot remember if he showed it to you at the same time that he presented the order?

A I cannot; he may have; I cannot say.

Q Can you tell the date when that money was paid—
that interest?

A January 7th, 1875.

Q On the same day that the order is dated?

A Yes, sir.

Re direct examination :

Q You have been asked if you remember whether
he said anything about supposing that stock to have been
10 his already, and you say you do not remember; if he
had said such a thing as that, would you not remember?
suppose Mr. Smith had said at that time that he thought
that stock was his already, would you not have remem-
bered such a thing as that, if he said it?

A Well, no, sir; not at this length of time; I don't
think so.

(Proctor on behalf of the exceptant offered in evi-
dence a letter from the accountant to the exceptant, dated
20 March 20th, 1880, and the same was thereupon marked
Exhibit B, on the part of the exceptant.)

Exceptant rests.

LOUISA B. RIKER, a witness called and sworn on behalf
of the accountant, testified as follows :

Direct examination, by Mr. Fort :

Q You were present sometimes during the last sickness
30 of Oliver Smith, deceased, just prior to his death, and had
been with him for a number of years; now please detail to
us any circumstance, any act of delivery or otherwise, or
any conversation in relation to stock or scrip of the
Newark Fire Insurance Company?

A After looking over his papers one day, taking out
the scrip, he said he was going to give that to his son
Stephen; he was not at home then.

Q Stephen was not at home?

A He was not at home then.

40 Q Go on.

A And—well; I do not know that there is anything more I recollect about it.

Q Just say anything in relation to that matter; in reference to his papers that you spoke of?

A His wife rather objected, but he said very little about it until after his son came home in January.

Q This was before his son came home, and while he was where?

A In Washington.

Q The wife was the step mother, I believe? 10

A Yes, sir.

Q What was said when his son came back in January?

A He told me one evening—

By Mr. Tuttle:

Q (Interrupting.) Told you?

A Told me that he had given Stephen that scrip; I had counted it several times before for him.

Further direct examination:

20

Q Were you in the habit of counting his papers for him during his last sickness?

A All through his life, after I was grown up.

Q And how was it, frequently or otherwise, that he would ask to look at his papers?

A During his last sickness he had nothing else to amuse him; he used to look at his papers and talk about them.

Q Had you seen the scrip—where did he keep the scrip? 30

A In a small trunk that he had and kept his papers in.

Q Had you seen it there prior to the time he told you he had given it to Stephen?

A Yes, sir.

Q Do you remember what time it was he told you he had given it to Stephen, how long before he died?

A Oh, he told me more than once, I think, about it.

Q He told you more than once, did he?

40

A He said that Stephen would see Mr. Henry about it.

Q He was to see Mr. Henry about it?

A He was to see Mr. Henry about it.

Q Do you know who Mr. Henry was?

A Yes, sir.

Q Who do you mean—who did you understand?

A John J. Henry, Secretary of the Insurance Company.

10 Q About what was he to see Mr. Henry, did he tell you?

A About transferring the stock to Stephen.

Cross-examination, by Mr. Tuttle:

Q You are the adopted daughter, are you not, of Mr. Smith?

A Not legally; but I was always called his adopted daughter.

20 Q I don't mean legally, but you were his adopted daughter in his household for years?

A Yes, sir.

Q I understand you to say that you frequently examined the trunk for him in his last sickness?

A Yes, sir.

Q You did his nursing mostly, did you not?

A Yes, sir; no one else did anything for him.

Q When was this conversation; was it in January—the conversation you have spoken of?

A The first conversation with regard to the stock?

30 Q No—that you say was before Stephen came home,—I mean the conversation after he came home?

A Yes, sir—it was after;—just about the first of January—it was the first of the month.

Q How late did you see that scrip in his box; how long after that time?

A I cannot positively say as to that.

Q Did you see it in the month of February?

A No, I cannot say as to that.

Q Did you see it after this conversation, in his box?

40 A Yes.

Q How long after would you say, certainly?

By Mr. Fort: Which conversation—there were two conversations.

Mr. Tuttle: The conversation with Stephen, I mean.

Mr. Fort: There has been no conversation proven with Stephen in this case.

A No, not with Stephen.

Q Well, how long after the 7th of January did you see it? 10

A I cannot say positively as to that. I could not say as to dates, but it was some little time after that.

Q Did you see this box opened at any time in the month of February?

A Yes.

Q By Mr. Smith?

A Yes.

Q How late?

A Well I saw it opened just a day or two before he died. 20

Q When did he die?

A On the 6th of March.

Q Then you are certain enough to say that that is a fact, that you saw that box opened in March of the year he died?

A It may have been the very last of February, but I think in March—as near as I can be sure of anything.

Q At that time did you hand him the trunk yourself? 30

A Yes.

Q Did you see it opened?

A Yes, sir.

Q Was the scrip in there at that time?

A I cannot say.

Q You don't know whether it was or not?

A No, sir.

Q At what time, or how long before that time had you seen the scrip in the box?

A I cannot say positively how long before. 40

Q Can you fix the time pretty nearly?

A No, I cannot say positively when it was.

Q You frequently saw this scrip?

A Yes.

Q What other papers did you see there?

A Well, they were almost all old papers—mortgages and old papers that were of no real use and value, but he kept them.

Q Did you see any United States bonds in it?

10 A Yes, I have seen them, not very lately.

Q How lately?

A I don't think after he was confined to the house.

Q Not after that?

A I am not positive—but I think not.

Q Did you see the scrip delivered?

A I did not.

Q You did not?

A No, sir.

20 Q I have asked you, but I do not remember whether your answer is precise as to that or not—I have asked you whether you saw that scrip there in the month of February, 1875—I do not remember what you said?

A I said that I could not say positively.

Q Did you say it was after the middle of January, then?

A I think it was in the trunk all through that time.

Q All through what time?

A Through January and February. I simply think so—I won't say positively that it was so.

30 Q But you think so?

A I think it was.

Re-direct examination:

Q You are not positive then as to whether the scrip was in the trunk after the deceased, Oliver Smith, told you he had given it to Stephen?

A I think it was in the trunk after that.

Q After he had told you that?

A After he had told me that.

Q After he told you he had given it to him, or intended to give it to him?

A He told me he had given it to him, I don't know if he passed it over to him or whether he just—

Q You mean to say you are not positive about that, you think so?

A Yes, sir.

Q Mrs. Ann T. Smith, who died, and others were present at these conversations you would have with Oliver Smith? 10

A Yes, sir.

Q And heard the same as you did?

A Yes, sir.

Q And there was some conversation, I understand you to say, between the deceased and his wife in relation to this very matter, about this giving it to the son?

A Yes, sir.

STEPHEN O. SMITH, the accountant, being called and sworn on his own behalf, testified as follows: 20

Direct examination, by Mr. Fort:

Q You are the executor?

A Yes, sir.

Q Of Oliver Smith, deceased?

A Yes, sir.

Q Did you ever have the stock in question in your possession?

By Mr. Tuttle: What do you mean by "stock"? 30

By Mr. Fort: "Scrip" you call it, I call it stock.

Q Did you ever have any scrip in your possession?

A Yes, sir.

Q Did you get it before or after your father died?

A Before.

Q From whom did you receive it?

A Oliver Smith.

(Proctor on behalf of the exceptant objected to the last answer and question.) 40

The Court (Judge McCarter): I think the exception is well taken, for the reason that the witness is giving evidence of a transaction between the executor and testator in respect to the title of the stock in question. Under the act of 1880, I think the Court ought to exclude that. I shall exclude both the question and the answer.

(Proctor on behalf of the accountant prayed an exception, and the same was allowed.)

10 Q At the time of the death of your father, in whose possession was this stock?

A My possession.

Q How long prior to that had it been in your possession?

A Since the 7th of January, or the 8th of January.

By the Court:

Q What year?

A 1875.

Further direct examination, by Mr. Fort:

20 Q How long after the paper that Mr. Henry produced here, was signed, was it before you came in possession of the stock?

A I think it was the next day; I cannot say positively; it was a short time after.

Q Did your father have knowledge of the fact that you had that stock in your possession from January 7th or 8th, up to the time of his death?

(Question objected to.)

By the Court:

30 Q Did you know whether he did or not, from anything he told you?

A Yes, sir.

The Court: (To Mr. Fort.) Do you propose to let him detail that?

Mr. Fort: No; merely to let him answer "yes," or "no."

The Court: As a preliminary question, the Court sees no objection to it.

Q What is your answer; did he have any knowledge of the fact?

40 A Yes, sir.

Q Prior to the time of your obtaining this stock, where was it kept?

A It was kept in a little trunk, father kept his papers in.

Q After you had the stock in your possession, did you ever see your father examine or inspect that trunk?

A Oh, yes; he used to go over-hauling his papers pretty nearly every day.

Q I mean when the stock was not in it?

A Yes, sir.

By Mr. Fort: I offer to prove by this witness that his 10
father, Oliver Smith, gave him one hundred and one shares of the stock in question prior to his death, and delivered these to him in person about or at the date of the order signed by the testator, directing the Insurance Company to pay the dividends to the witness, and at the same time told the witness, Stephen O. Smith, that he intended by the delivery and execution of said assignment, to give him the said scrip.

The Court: That offer is excluded.

By Mr. Fort: I also make this offer: To prove by 20
this witness that his father told him when he made the assignment, or power of attorney in this case, which is in evidence, to go to the Insurance Company and get a power of attorney to make the assignment of the scrip, and then to pay the interest on his father's mortgage then due the Insurance Company, out of the dividends due January 1st, 1875, upon the scrip, and to get the stock for himself, and delivered the stock to him; and at that time or immediately after, signed the power of 30
attorney.

The Court (Judge McCarter): That is also excluded, on the ground that this executor is seeking to establish his title to the scrip by giving in evidence declarations made by the testator to him during his lifetime, and that for the purposes of this case, although it is an exception to an account, the Court holds that this executor stands in the position of a plaintiff having brought a suit to recover against the estate.

(Proctor on behalf of the accountant prayed an exception, and same was allowed.) 40

Cross examination, by Mr. Tuttle :

Q There was a certificate or rather power of attorney, executed by your father, under which you drew the dividend of January 1st, did you not, on January 7th, 1875?

A No, sir.

By Mr. Fort: The witness does not understand you.

Q Did you not have a power of attorney from your father to draw that dividend which you drew on January 7th, 1875?

10 A January 7th he gave me an order to pay the interest on the bond and mortgage for \$1,000.

Q I did not ask you that; I will come to that bye and bye.

A What was your question?

Q I asked you this question; if you did not have a power of attorney from your father under which you drew the dividend due on this scrip, on January 7th, 1878?

A I had an order to that effect.

Q Have you got a copy of it?

20 Mr. Fort: I have it (producing a paper.)

Q Is that substantially, if not exactly, a copy of what you call an order?

A Yes, it looks like it.

Q This was an appointment of you as attorney to receive scrip—or dividend—did you draw the dividend on an order of which this is a copy or upon a power, rather?

A I think I had that order from my father.

Q That paper of which this is a copy?

A I think it is.

30 Q What did you do that day besides for your father?

A Paid off the mortgage.

Q What was the amount of it?

A One thousand dollars.

Q Was there any interest due on it?

A Yes, sir.

Q From what funds did you pay the principal of the thousand dollars?

A From the dividends of the scrip.

Q The principal?

40 A From the dividend of the scrip.

Q No, the principal of that \$1,000 mortgage; you do not understand me?

A I think I gave Mr. Henry a check on the Newark Savings Institution for a thousand dollars.

Q There was some interest due, was there not?

A I think there was six months' interest and a few days.

Q What did you pay that with?

A With the dividend of this scrip.

Q That is, from the dividend you drew at that time? 10

A Yes, sir, and the balance was paid to me.

By Mr. Fort:

Q The balance of the dividend?

A Yes, sir.

Further cross examination:

Q Was not the whole dividend paid to you?

A Only the balance of what was left over.

Q Only the balance?

A The interest was paid and I got what was left over 20 the interest on a thousand dollars.

Q You mean this—that you only received the excess above the interest that was applicable to the mortgage?

A Yes, sir, six months' interest.

Q Your father died the 6th of March, 1875, did he not?

A He did.

Q You were one of the executors?

A Yes, sir. 30

Q And your mother with you?

A Yes, sir.

Q You are the surviving executor now?

A Yes, sir.

Q What did you do with these 101 shares of scrip or stock?

A I let it be there in the Insurance Company.

Q Did you change the ownership?

A I have. 40

Q Who owns it now?

A I do not know who owns it now.

Q Who did you sell it to?

A I sold it to S. H. Plum.

Q At what price?

A I could not exactly tell; it was one hundred and twenty something. I think it was 126. I am not certain, but those figures run in my mind.

Q Can you tell about when you sold it?

10 A I think it was in 1877; I am not certain; January, 1877, or December, 1876, I could not tell you exactly which. Mr. Plum could tell you better than I could.

Re-direct, by Mr. Fort:

Q Tell us how you came to sign as executor?

A Well, I had taken out my probate papers and I think it was a day or two after that I went into the Newark Mutual to see about some insurance, I think, and I was there talking to Mr. Henry, and Mr. Henry shoved
20 the big book around and said "You want to sign your name there." I read it and I said "I thought that was transferred to me long ago." I picked up a pen and said "How do you want me to sign it?" and I started to write it, and he said, "Sign it Stephen O. Smith, executor," so I signed it just as he said; that is all I know about it.

Q At the time you had the order, or about that time—prior to the death of your father, did you ever show Mr. Henry this scrip?

30 A I think I did. I had full possession of it a long time before he died.

Q The question was simply whether you remember showing it to Mr. Henry?

A I think I did, I am pretty positive I did; I think I gave it to Mr. Henry before father died. But there was the order transferring it to me and I was not in a hurry; I did not want to be over anxious about inheriting people's money.

Testimony closed.

OPINION OF THE ORDINARY.

THE ORDINARY: The question presented and discussed on this appeal is whether the appellant who is the surviving executor of his father, has established his title by gift to certain insurance company stock which his father owned, and which at his death still stood in his name on the books of the company. The respondent, excepted to the appellant's account as executor, because he had not charged himself with the stock and the dividends thereon, and the Orphans' Court, by order made April 4, 1881, charged him therewith, and refused to allow him commissions and ordered him to pay the costs of the exceptions, undoubtedly because they deemed his conduct, in claiming the stock as his individual property, fraudulent. They also, by another order made on the same day, adjudged that he had abused his trust and failed to perform the duties required of him by law as executor and revoked his letters testamentary, and appointed another person administrator with the will annexed.

The Court below refused to permit the appellant to testify as to the transactions between him and the testator in regard to the gift of the stock or as to any statement of the testator on the subject. The appellant's counsel urges that under the 106th section of the Orphans' Court act the appellant was admissible as a witness in his own behalf notwithstanding the prohibition of the third section of the act concerning evidence, and the proviso of the supplement of 1880, to that act. The section of the Orphans' Court act referred to provides that the Court to whom any account is reported for allowance, or the auditors or masters to whom an account is referred at the instance of any party interested in the account or by their own proper authority, may examine the executor,

administrator, guardian or trustee exhibiting such account, on oath or affirmation, touching the truth and fairness of the account or any part or item thereof. The third section of the act concerning evidence removes the disqualification of persons interested in suits or proceedings at law or in equity from being witnesses therein, except where the opposite party is prohibited by any legal disability from being sworn as a witness or either

10 except where as provided in the next section. That section provides that a party to a suit in a representative capacity may be admitted as a witness therein, and if called as a witness in his own behalf and admitted, the opposite party may in like manner be admitted as a witness. The supplement of 1880, (P. L., 1880, p. 52,) provides that in all civil actions in any court of law or equity of this State, any party thereto may be sworn and examined as a witness notwithstanding any party thereto

20 may sue or be sued in a representative capacity, provided that the supplement shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator or intestate represented in the suit. The above mentioned section of the Orphans' Court act did not qualify the fiduciaries therein named to prove their own demands against the estates in their hands. *Pursel vs. Pursel*, 1 McCart., 514-525; but it made them compellable to testify if called, in reference to their accounts, and made it the duty of the Court to require them to testify at the instance of any other party interested in the account. *Davison vs. Davison*, 2 Harr., 169.

30 In the case in hand the executor was not called by the Court or any party interested in the account within the meaning of the act, but offered himself as a witness in his own behalf, and under those circumstances he was not competent to testify in his own behalf as to any transaction with or statement by the testator.

On the merits of the controversy as proved by the competent testimony the decree must be sustained. The proof is that up to about the first of January, 1875, the

40 testator, (who lived and died in Newark,) owned the stock

in question, which was stock of the Newark Mutual Fire Insurance Company. He died on the sixth of March, of that year. The stock stood on the books of the company in his name up to the first day of April following, when the executor transferred it to himself individually. Louisa B. Riker testifies that before the first of the month of January, 1875, and while the appellant was absent from the State, the testator taking the scrip out of the box in which he kept it with his other valuable papers, told her that he was going to give that scrip to his son 10 Stephen. She further says that the first of January after Stephen had returned the testator told her that he had given that scrip to Stephen, and she also says that he told her the same thing she thinks more than once before he died, and that he said that Mr. Henry, the secretary of the company, "would see about transferring the stock to Stephen." On the seventh of January, the testator signed and delivered to Stephen a writing, by which he appointed him his attorney to receive and assign any scrip or dividends due or belonging to him in the com- 20 pany, and to receive the interest thereon. Stephen did not transfer the stock under this power, but on the day of its date drew as attorney of the testator a dividend of \$45.45, of which \$35.40 were retained by the company for interest due on a mortgage of the testator held by it, and the remainder was paid over to Stephen. The power was such a one as was usual as an authority for merely drawing dividends by an attorney, and under such powers the company would make transfer in case of the known disability of the stockholder from sickness. But 30 in other cases a different paper was required.

There is no proof that the scrip was ever delivered to Stephen. He swears indeed that he had possession of it from the seventh or eighth of January, but that does not prove delivery to him in pursuance of a gift, and he is not competent to prove delivery. The delivery to and acceptance of the scrip by him is a most material part of the transaction. 2 *Kent's Comm.*, 438; *Betts vs. Francis*, 1 Vr., 152. Louisa B. Riker testifies that she thinks she saw the scrip in the testator's box through January and 40

February, 1875, (he died March 6th, 1875,) after he had told her that he had given it to Stephen. The power of attorney before mentioned did not in terms authorize Stephen to transfer the stock to himself; it only authorized him as the testator's attorney to receive and assign the scrip or any dividends due or belonging to the testator in the company, and to receive the interest thereon.

10 It did not in itself indicate an intention on the part of the testator to give the scrip to Stephen or to part with the property. Had Stephen under it transferred the stock to himself he would have been liable to account for it unless he could have shown *aliunde* a right to do so for his own benefit. It therefore is not evidence that the testator had given the stock to him. The fact that he did not transfer the stock to himself under it but drew the dividend as attorney in fact of the testator, and applied part of it to the payment of the testator's debt to the company, is an important and significant circumstance also. His claim to the stock then rests upon the
20 testimony of Louisa B. Riker, that the testator declared that he intended to give the stock to him, and afterwards that he had given it to him. This of itself is not enough to support the claim of a gift *inter vivos*. For aught that appears he may have changed his mind before his death. Until delivery and acceptance there is *locus penitentiae* in such cases.

And according to the testimony, notwithstanding these declarations, the testator kept possession of the scrip
30 and never did any act from which the conclusion can be drawn that he in fact delivered it to Stephen, or assigned the stock to him legally or equitably.

The decree appealed from will be affirmed, with costs.

DECREE OF THE ORDINARY.

This cause having been brought to a hearing on an appeal from the Orphans' Court, of the county of Essex, before the Ordinary, and J. FRANK FORT, of counsel with the appellant, and GEORGE F. TUTTLE, of counsel with the respondent, having been heard and the questions brought up by said appeal having been duly considered, 10

It is on this eleventh day of August, in the year eighteen hundred and eighty-one, ordered, adjudged and decreed that the decree of said Orphans' Court which is appealed from by the appellant, be and the same is hereby in all things affirmed, with costs of appeal and a counsel fee of fifty dollars to the respondent, to be paid by the appellant, and that the petition of appeal be dismissed; and it is further ordered that the record be remitted to the said Orphans' Court to proceed further thereon according to law and the practice of said Court. 20

THEODORE RUNYON, C.

PETITION OF APPEAL.

N. J. Court of Errors and Appeals.

10	STEPHEN O. SMITH, SURVIVING EXECUTOR, &C.,	}	<i>On Appeal.</i> <i>Petition.</i>
	<i>Appellant,</i>		
	<i>and</i>		
	EMMA L. BURNETT,		
	<i>Respondent.</i>		

20 *To the Honorable the Court of Errors and Appeals in the
last resort in all cases:*

The humble petition of Stephen O. Smith, surviving executor of the last will and testament of Oliver Smith, deceased, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Prerogative Court, by his Honor THEODORE RUNYON, Ordinary of the State of New Jersey, bearing date the eleventh day of August, in the year eighteen hundred and eighty-

30 one, wherein the said Stephen O. Smith, executor as aforesaid, was appellant, and the said Emma L. Burnett was respondent, in this respect, to wit: That the said decree adjudges that "the decree of the Orphans' Court, of the county of Essex, which is appealed from by the appellant, be in all things affirmed, with the costs of the appeal and a counsel fee of fifty dollars to the respondent, to be paid by the appellant, and that the petition of appeal be dismissed; and it is further ordered that the record be remitted to the said Orphans' Court to proceed

40 thereon according to law and the practice of said Court."

And your petitioner humbly appeals from that part of the decree of the Ordinary which decrees as aforesaid, upon the ground that the same is erroneous, for that the said decree should have been one of reversal of the order and decree of said Orphans' Court so appealed from, and should have decreed that your petitioner be not charged with the one hundred and one shares of stock of the Newark Mutual Fire Insurance Company, and with the dividends received by your petitioner thereon, and further to pay the costs of the exceptant in the Orphans' Court and her counsel fee there, and her costs and counsel fee as respondent in the Prerogative Court on appeal, and should have ordered and decreed that the said decree of the Orphans' Court should be reversed in said respect and for nothing holden, with your petitioner's costs of appeal. 10

Your petitioner therefore prays that the said decree of the said Ordinary may be, in the particulars aforesaid, reversed, set aside and for nothing holden. 20

And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

J. FRANK FORT,
Proctor and of Counsel with Appellant.

ANSWER TO PETITION OF APPEAL.

N. J. Court of Errors and Appeals.

10	STEPHEN O. SMITH, SURVIVING EXECUTOR, &C., <i>Appellant,</i> <i>and</i> EMMA L. BURNETT, <i>Respondent.</i>	}	<i>On Petition of Appeal.</i>
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20 The answer of Emma L. Burnett to the petition of appeal of Stephen O. Smith, surviving executor of the last will of Oliver Smith, deceased, appellant.

30 The respondent, not confessing or acknowledging all or any of the matters and things in the said petition of appeal mentioned, to be true, as therein set forth, and reserving to herself all benefit and advantage of exception to the errors, defects and imperfections in the said appeal contained, for answer thereunto, saith she admits that the Prerogative Court of the State of New Jersey did make the said decree in said petition and appeal mentioned and complained of, but as to the date and contents of the said decree, the respondent for greater certainty refers to said decree when the same shall be produced, but the respondent is advised and humbly apprehends that the part of said decree complained of is not erroneous, but is in all things agreeable to right and justice, and she therefore humbly prays that said decree may be in all things affirmed and the appeal dismissed with costs.

40 GEORGE F. TUTTLE,
Proctor and of Counsel with Respondent.

[*Exhibit A of Exceptant.*]

I hereby appoint Stephen O. Smith, my attorney to receive and assign any scrip or dividends due or belonging to me in The Newark Mutual Fire Insurance Company, and to receive the interest thereon.

OLIVER SMITH.

Dated January 7th, 1875.

REASONS FOR REVERSAL.

First. Because the Ordinary erred in holding that the testimony of Stephen O. Smith, given in the cause, was illegal.

Second. Because the Ordinary erred in affirming the ruling of the Orphans' Court excluding the offer of testimony as stated in the exception to the ruling of the Orphans' Court, at page ²⁸⁺29, of the printed case.

Third. Because the Ordinary erred in holding that the facts proven in the cause were not sufficient to establish a gift *inter vivos* at law between a father and son.

Fourth. Because the opinion of the Ordinary is against law.

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