

NEW JERSEY

Court of Errors and Appeals

Between

VALENTINE S. WOODRUFF, surviving  
executor of Smith Woodruff, de-  
ceased,

Appellant,

and

SARAH W. LOUNSBERRY,  
Respondent.

On Appeal  
from Prerog-  
ative Court.

POINTS OF APPELLANT.

STATEMENT OF FACTS.

Smith Woodruff, the appellant's testator, died in the year 1871, leaving a will bearing date January 10th, 1871.

By his will he disposed of his residuary estate as follows; He directed his executors (his wife Ann Eliza Woodruff, his cousin Amos P. Scudder, and his nephew the appellant) to sell and convey the residuary estate, real and personal, as soon as possible after his decease and invest the proceeds thereof immediately upon first bond and mortgage on property worth double the amount or in stocks or bonds of the United States or the State of New Jersey, and pay the interest and profits whatsoever thereof, to

his wife semi-annually (beginning six months after his death) or oftener for her life. He then gave after her death the principal to his brothers and sisters, substituting their issue in case of their death, &c.

Facts recited in Ordinary's opinion, pp. 41, 42.

Amos P. Scudder, one of the executors, died in 1874. Ann Eliza Woodruff, executrix and widow of the testator, died July 5, 1884. p. 42.

During the lifetime of the deceased executor and executrix in December, 1873, the executors purchased for the estate as an investment four bonds of the City of Rahway, of \$500 each, aggregating \$2000, and on January 18, 1875. another bond of the same city for \$1000.

The first four bonds of \$500 each were paid by the city, and the executors on November 1, 1876 (after the death of Amos P. Scudder and in the lifetime of Ann Eliza Woodruff) with \$1840 of the principal of these paid bonds purchased two \$1000 bonds of the City of Rahway.

Testimony V. S. Woodruff, p. 10.

The \$160 difference was paid the widow.

Testimony, Woodruff, p. 29.

The executors therefore held \$3000 Rahway City bonds.

These purchases were made at the solicitation of the life-tenant to increase her income.

Testimony, p. 16 and 17.

Against the objection of the appellant and his father.

Testimony, pp. 16 and 17.

After the purchase of these last bonds the City of Rahway defaults in payment of interest, and the bonds had depreciated in value.

In 1883 the City of Rahway offered a compromise by which it proposed to issue new bonds for thirty-five per cent. of the total principal and interest accrued on the old bonds up to November 1st, 1882, \* \* \* the holders of the old bonds to give up, surrender and exchange the bonds held by them for the new bonds.

Testimony V. S. Woodruff, pp. 17, 19.

Agreement, Ex. A. 3, p. 37.

The Rahway City Bonds then held by the executors having depreciated and paying no revenue (p. 19) at the suggestion of Mrs. Woodruff, the life-tenant, an agreement from all the remainder-men was obtained whereby they agreed and consented, "to and with the said Ann Eliza Woodruff, as executrix, and the said Valentine S. Woodruff, as executor, as aforesaid, that they may give up, surrender, and exchange, the said three bonds for one thousand dollars each, and interest, which they have heretofore held and now hold against the said City of Rahway, and take the new bonds proposed to be given by the City of Rahway, for thirty-five per cent. of the amount of the first or former bonds, now held by them, as is herein before more particularly mentioned; and we hereby authorize them, the said Ann Eliza Woodruff, as executrix, and Valentine S. Woodruff as executor, to surrender the said first or former bonds, and take the same bonds proposed to be given by the City of Rahway, in the place thereof, according to the best judgment and discretion of the said executrix and executor, without holding them liable for any loss or damage that they may or might result from so doing. Reference is here made to the propositions made by the said City of Rahway, and certain holders of bonds of the said city for the purpose of compromising the debts of said city, for further particulars thereof."

The surviving executor, the appellant in his account for distribution after the death of Ann Eliza Woodruff, claimed allowance for the loss on the Rahway bonds, \$1,684.58.

To this the respondent excepted, and the Orphan's Court of Union county ordered the account to be restated and the appellant to be charged with and make good "the sum of money which was unlawfully invested in Rahway City bonds."

This part of the order was affirmed by the Ordinary.

The Orphans' Court allowed the executor commissions on the income collected by him and paid over to the life-tenant.

From this the respondent appealed in her answer on appeal in the Prerogative Court and the Ordinary reversed the order in that respect.

The Ordinary also ordered the appellant to pay the costs in the Prerogative Court and allowed no counsel fee to either party.

From these parts of the order the appellant appeals to this Court. Page 50.

## I.

The first and main question turns on the investment in Rahway bonds.

*What was the effect of the agreement (Exhibit A. 3,) on the appellant's liability for the investment?*

The language of the agreement is: "We do hereby consent and agree to and with the said Ann

Eliza Woodruff as executrix and Valentine S. Woodruff as executor that they may give up, surrender and exchange the said three bonds," &c., &c. "*And we hereby authorize them to surrender the first or former bonds and take the new bonds proposed to be given by the City of Rahway in the place thereof, according to the best judgment and discretion of the said executrix and executor without holding them liable for any loss or damage that may or might result from so doing.*"

The cestus que trust, those who are to receive the residuary estate after Mrs. Woodruff's death, by this recognize the investment and direct the exchange of the securities.

The agreement constitutes an acquiescence in what was the unauthorized or illegal act of the executors.

In Walker vs. Symonds, 3 Swanston, 64 Lord Eldon said :

"It is established by all the cases that if the cestui que trust joins with the trustees in that which is a breach of trust, knowing the circumstances, such a cestui que trust cannot complain of such a breach of trust. I go further and agree that their concurrence in the act or acquiescence without original concurrence will release the trustees.

This doctrine affirmed in Burrows vs. Wallis, 5 DeG., M. & G. 251.

The acquiescence must be a consent on the part of the persons who have a right to call the trustees to account, that they shall be absolved from liability and that they will adopt the misapplication of the funds as having been done under their assent and sanction,

See also Farrant vs. Blanchford, 1 D. J. & S. 107.

Munch vs. Cockerell, 5 My. & Cr. 178.

In the present case no objection had ever been made to the investment. The investment was one

contrary to the terms of the will and the illegality known to the cestuis que trust.

The cestuis que trust signed this paper knowing the investment, knowing its illegality. They make a disposition of the Rahway City bonds in the executor's hands. They recognize them as assets of the estate.

The original investment being illegal, the securities so purchased became in no sense by their purchase, assets of the estate. The executor was liable for the money so invested, and that money still continued the asset of the estate, the securities being the property of the executor. By this agreement and disposition of these bonds the cestui que trust or remaindermen recognize the bonds as assets and acquiesce in the investment.

The cestuis que trust moreover cannot now call into question the effect of their consent.

The old bonds which the executor had in his hands at the time the agreement was made had a value.

That value might be more than that of the new bonds. The old bonds might possibly in the future attain their price at which they had been purchased and save the executor harmless.

The cestuis que trust have by their agreement induced the executor to part with these old bonds and to accept new bonds having a face value which can never by any possibility reach that of the former bonds, and the are now, they executor having acted on the faith of that agreement, estopped from setting up the illegality of the original investment.

We must also consider in connection with this investment the relations of the parties and their action after the making of the investment and the death of Ann Eliza Woodruff.

The persons executing the agreement were Amos Woodruff, the brother of the testator, Martha Burrows, the sister of the testator, and the others, including the appellant, the nephews and nieces of the testator, and therefore closely bound to the life-tenant. Mrs. Smith, Amos Woodruff, Jr., Henry C. Woodruff and Bayard Woodruff were brothers and sisters of appellant and children of Amos Woodruff who was on most intimate terms with the life-tenant. She was on very intimate terms with the signers of this investment.

The testimony of appellant is: "Mrs. Woodruff was always on the most friendly terms with my father and myself and was with my father and mother at their death-bed. They died, my mother on 28th of June, 1884, my father June 29th, 1884, and Mrs. Ann Eliza Woodruff on July 5th, 1884." P. 26.

The investment was made at the solicitation of Mrs. Woodruff against the strenuous objection of Amos Woodruff, father of appellant and appellant himself. P. 16, l. 10, p. 17.

She had said that she could not live on the income of government bonds.

p. 17, l. 15-30

She was the active party in the purchase as co-executrix and life tenant.

She collected part of the interest herself, and took an active part in the management of the estate.

p. 19, lines 33-37

" 26, " 20-26.

When the investment turned out disastrous she suggested the getting of the agreement so as to receive

an income the new bonds paying interest, the old ones not.

p. 21, lines 10-30

Agreement, p. 37

The cestuis que trust knew of the state of the investment, the agreement informed them of it; they signed it releasing the executors, one of whom was the life tenant.

She had suggested the investment, it was for her benefit, the change of securities was suggested by her and for her benefit.

Is it reasonable to suppose that the sestui que trust wanted to assist Mrs. Woodruff to better her position and at the same time hold her liable for a loss of several thousand dollars?

And what did they, the cestui que trust, do after the death of Ann Eliza Woodruff?

No objection was made to taking Rahway City bonds in the distribution.

The bonds as held by the appellant were to be divided into smaller denominations so as to be capable of more easy distribution. This was done under the direction of the respondent's proctor himself, Mr. Elmer.

p. 18, line 20; p. 19, line 10; p. 22, line 22;  
p. 23, line 19.

And the objection was made for the first time on February 17, 1885, seven months after the life-tenant's death and when the assets were about to be passed in the lawyer's office. page 26, bottom.

Then after the parties had agreed on the distribution, and were to take the securities, then the respondent's husband who has known of the invest-

ment all along and never objected to the proposed distribution, for the first time raises this question.

p. 21, line 40 ; p. 27, line 12.

“ *We hereby authorize them to surrender the first or former bond &c., without holding them liable for any loss or damage that may or might result from so doing.*

The word “surrender” has a technical meaning.

It is an instrument by which the particular tenants for life or years of lands doth yield up his estate to him that hath the immediate estate in remainder or reversion.

Co. Litt. p. 337.

The technical and proper words of this conveyance are surrender and yield up.

Perkins, § 607.

1 Term, 441.

Comyns Digest Surrender “A.”

The word “authorize” is the clothing of the agent with the power of his principal.

The agent in pursuance of this authority, surrenders the bonds *according to his best judgment and discretion.*

What loss or damage is it for which the agent is not to be liable?

The Court below substantially held that this loss was the difference between the *par* and *market value* of the *new bonds*.

That is, the respondent must take the new bonds at par, and that the executor must make good to respondent the difference between the par value of the old and the new bonds.

We respectfully insist that this agreement says and means the opposite of this, viz., that the loss for which the executors shall not be liable is the differ-

ence between the par value of the old and the new bonds.

The executors make an investment not authorized.

The legatees' right is to make the executor take the investment at the price he paid.

By this agreement, if the legatees do not recognize these old bonds as belonging to them, they at least authorize their surrender before they are due and the taking of new bonds in their place.

The Court holds that the respondent is obliged to take the new Rahway bonds, but the executor is liable for the loss between par value of new bonds and the old ones.

We respectfully insist that the agreement says the opposite of this.

If this agreement A. 3, p. 37, was not an acquiescence in the original purchase of the bonds yet by its language and intent it relieves the executor from any liability to the respondent because of the loss by the exchange. This loss was the difference between the par value of the old bonds and the new ones.

The Court below took the opposite view, p. 46, and holds the executor liable for the difference between the par value of the old bonds and the new ones.

The trustee had made an investment not authorized by the will.

The right of the cestui que trust was to make the trustee take the investment and return the cash paid for it.

By this agreement if they do not recognize these bonds as belonging to them they at least authorize this surrender before they are due and the taking of new bonds in their place.

We contend that :

The cestuis que trust have acquiesced in the investment and are now estopped from challenging the act of the executors in making it and from seeking to charge them with the loss.

Perry on Trusts, Sec. 849-51.

It is apparent on reading the decree that it is not entered in accordance with the opinion.

The order of the Orphan's Court (p. 31), is that the executor shall be charged with and make good the sum of money which was unlawfully invested in Rahway City Bonds.

The opinion of the Ordinary (p. 46, line 35,) says : "This agreement has reference to the proposed exchange alone. It discharges the executors for liability for any loss for damage that may result from the exchange," &c. "Those who signed that instrument cannot question the propriety of the act of the executors in making the exchange, but they are free to question the legality of the original investment," &c.

"Seeing that the appellant is now required to make good the loss to the estate to the extent of \$2000 with interest after crediting the amount of the new bonds taken in exchange, there is no ground for this claim."

The decree *affirms* the order of the Orphans' Court which by its terms does not allow credit for the new bonds.

## II.

As to the commissions:

The appellants should be allowed commissions on the income collected by him.

At the least if to be charged against the life-tenant they should be allowed and charged against the amount due the life tenant's estate in appellant's hands, viz., the sum of \$131.99, on p. 5, line 2.

## III.

The Prerogative Court should not have charged the appellant with costs.

The respondent in her answer on appeal in Prerogative Court appealed from that part of the Orphan's Court (p. 30-31) which allowed the securities taken on the sale of real estate.

# N. J. COURT OF ERRORS & APPEALS

IN THE LAST RESORT IN ALL CAUSES.

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BETWEEN,  
VALENTINE S. WOODRUFF, Surviving  
Executor, etc., of SMITH WOODRUFF,  
deceased,

*Appellant,*

*and*

SARAH W. LOUNSBERRY,

*Respondent.*

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*On Appeal from  
Prerogative Ct.*

## Brief of Respondent.

The respondent excepted to the account of the appellant, as executor, etc., in Union Orphans' Court. The only exceptions now involved were:

1. To the investment of the funds of the estate in Rahway bonds.
2. To the allowance out of the *corpus* of the estate, of commissions, *on income*.

The Orphans' Court decided the first point in favor of the exceptant, the second in favor of the executor.

The executor appealed, and the exceptant, by the practice allowed by the rules of the Prerogative Court, made a cross-appeal. The Ordinary affirmed the decree on the first point and reversed it on the second; thus deciding the whole of the present controversey in favor of

the exceptant, and gave her costs in his court, but no counsel fee. He denied the executor costs and counsel fee in his court.

The executor appealed to this court, and four subjects are presented for consideration here:

1. Rahway bonds.
2. Commissions on income.
3. Costs and counsel fee in the Prerogative Court.
4. Costs and counsel fee in this court.

We will present them in order.

## I.

### *Rahway Bonds.*

The question is one of construction of the paper-writing, shown at page 37 of the printed case.

It cannot be claimed that the original investment was permissible. As the Ordinary tersely puts it (Case, p. 46) "The investment of the money of the estate in these securities was not only contrary to law, but contrary to the plain and explicit directions of the will."

The authority he cites is conclusive, viz:

Tucker *vs.* Tucker, 6 Stew., p. 235.

The appellant therefore is driven to the paper signed by the beneficiaries of the will. He contends that that instrument amounted to an acceptance of the original improper investment. An agreement to that effect could not be supported, as there was no consideration for it, and the paper is not under seal. But there is no foundation for the contention of the appellant. That the true interpretation of the instrument is that of the Ordinary, is too plain to admit of argument. The instrument ratified no past transaction. It simply permitted the executors to make the exchange they proposed to make, and its effect would be to estop the signers from claiming that the Rahway bonds exchanged were worth more than

the bonds of less amount which were taken in exchange, but nothing more. It *assumes* that the original investment was lawful and that the securities were valid investments of the estate. For all that appears by the instrument, or so far as the proof shows, the persons who signed may have supposed that the bonds were a part of the assets left by the decedent, or that they had been lawfully acquired by the executors in such a way as to make them part of the assets of the estate. Even if it may be presumed that the paper was signed with full knowledge of the circumstances of the original investment, it may well be that the signers thought such investment binding on them. "Knowledge of the law" will not be presumed in such a case. Unless the appellant can show some loss sustained *by the exchange*, which he has not attempted to do, he can not come within the terms of the so-called agreement, nor invoke any estoppel from it.

## II.

### *Commissions on Income.*

The proposition that an executor can pay the person entitled to a life interest in an estate, the entire income thereof and then claim commissions on that income out of the principal, from those entitled in remainder, is not worthy of discussion. The mere statement carries with it a negative answer. When we add that the person entitled to the income was co-executrix with the executor now making the claim, and only committed to him the collection, at his request, the appellant in advancing the proposition seems to be trifling with the Court.

## III.

### *Costs in the Prerogative Court.*

The appellant was not only unsuccessful on the points raised by him in the Prerogative Court, but also on one of the points made by the cross-appeal. The decree of

the Ordinary was too liberal. The appellant should have been compelled to pay respondent's counsel fee, or at least such fee should have been ordered paid out of the estate. Respondent, perhaps, had cause of appeal on this point. Appellant surely had not.

#### IV.

*Costs in this Court.*

If respondent shall be successful in this Court, she should have costs and counsel fee awarded her out of appellant's private estate.

LUTHER S. ELMER, *Proctor.*

GILBERT COLLINS,

*Of Counsel with Respondent.*

# UNION ORPHANS' COURT.

The account of Valentine S. Woodruff, surviving executor of the last Will and Testament of Smith Woodruff, deceased.

This accountant charges himself :

To balance on final account.....		\$17,160 82	
To interest income of estate collected since last account :			
1875.			10
Mar. 2.	Interest on Denmark P. Collins' bond.	\$280 00	
May 11.	“ J. L. Krook's bond.....	39 90	
“	“ A. Woodruff's bond 1100.	38 50	
“	“ “ 615.	21 52	
June 9.	“ Dick & Robinson bonds..	15 40	
July 1.	“ \$660 waiting for investm't	12 01	
4.	“ Holdsworth bond.....	87 50	
Aug. 91.	“ Denmark P. Collins' bond.	280 00	
Nov. 17.	“ Robinson bond.....	7 00	
17.	“ Dick bond.....	8 40	
17.	“ Krook's bond.....	39 90	
17.	“ A. Woodruff bond 1100...	38 50	
17.	“ “ 615...	21 52	20
Dec. 21.	“ Coffin mtge. 4.85 Rahway bonds 51.33.....	56 18	
1876.			
Feb. 21	“ Holdsworth bond.....	87 50	
Mar. 1	“ D. P. Collins.....	280 00	
22	“ Cash invested.....	19 80	
May. 17	“ Rahway bonds.....	70 00	
17	“ A. Woodruff bond 1100...	38 50	
17	“ “ 615...	21 53	
17	“ Krooks & Ewest bond....	39 90	
31	“ Dick & Robinson bonds..	15 40	
July. 17	“ Holdsworth bond.....	87 50	
17	“ Rahway bonds.....	35 00	30
Sept. 5	“ To interest on D. P. Collins' bond.....	280 00	
21	“ Money waiting for inv't..	19 80	
Nov. 14.	“ A. Woodruff bond \$1100..	38 50	
14.	“ A. Woodruff bond \$615...	21 53	
14.	“ Krooks & Ewest bond....	39 90	
28.	“ Dick's bond.....	8 40	
1877.			
Jan. 9.	“ Holdsworth bond.....	88 50	
Mar. 1.	“ D. P. Collins.....	280 00	
22.	“ \$565.82 wait'g for investment.....	19 80	40

	May 1.	Interest on Rahway bonds.....	70 00
	15.	" A. Woodruff bond \$1100..	38 50
	15.	" A. Woodruff bond \$615...	21 52
	15.	" Krooks & Ewest bond...	39 90
	June 20.	" Dick & Robinson bonds...	15 40
	Sept. 8.	" D. P. Collins' bond.....	280 00
	22.	" \$565.82 on hand.....	19 80
	Nov. 1.	" Rahway bonds.....	70 00
	14.	" A. Woodruff bond \$1100..	38 50
	14.	" A. Woodruff bond \$615...	21 52
	15.	" Rahway bonds.....	60 00
10	15.	" Krooks & Ewest bonds....	39 90
	15.	" Dick bond. ....	8 40
	Dec. 26.	" Rahway bond .....	35 00
	1878.		
	Mar. 6.	" D. P. Collin's bond.....	280 00
	28.	" Rahway bonds and cash on hand.....	117 70
	May 14.	" A. Woodruff bond \$1100..	38 50
	14.	" A. Woodruff bond \$615...	21 50
	15.	" Krook's bond.....	39 90
	Aug. 28.	" Holdsw'th & Collins bond	367 50
	Sept. 26.	" \$445.82 cash.....	15 60
	Nov. 13.	" A. Woodruff bond \$615...	21 52
20	14.	" A. Woodruff bond \$1100 .	38 40
	14.	" Krook's bond.....	39 90
	Dec. 7.	" Dick bond.....	8 40
	1879.		
	Jan. 7.	" Rahway bonds.....	35 00
	Feb. 11.	" Holdsworth bond. ....	84 87
	Mar. 3.	" D. P. Collins bond.....	280 00
	Apl. 28.	" \$445.82 cash uninvested..	15 60
	May 12.	" A. Woodruff bond \$615...	21 52
	14.	" " 1100...	38 50
	June 10.	" \$500 cash uninvested ....	17 50
	21.	" Dick bond.....	8 40
30	July 10.	" Krook's bond. ....	39 90
	17.	" Holdsworth bond.....	56 70
	Sept. 11.	" D. P. Collins.....	280 00
	Oct. 3.	" Cash uninvested.....	36 60
	Nov. 14.	" A. Woodruff's bond \$615..	21 52
	Dec. 2.	" " \$1100	38 50
	16.	" Cash on hand.....	17 50
	16.	" Pt. of int. due Krook's bd.	14 00
	1880.		
	Jan. 12.	" On Holdsworth bond....	49 00
	Mar. 1.	" Collins and Ewest bonds..	319 90
	30.	" Robinson bond.....	7 00
	Apl. 27.	" Holdsworth bond and cash	63 82
40	June 3.	" A. Woodruff bond \$615...	21 52
	28.	" Cash on hand.....	17 50

Sept. 4.	Interest on	D. P. Collins bond.....	280 00	
Oct. 26.	"	Cash uninvested.....	85 60	
Dec. 13.	"	A. Woodruff bond \$615...	21 52	
13.	"	Cash on hand.....	17 50	
13.	"	Dick bond. ....	8 40	
1881.				
Mar. 3.	"	Collins bond.....	240 00	
Apl. 12.	"	Cash uninvested.....	31 37	
May 6.	"	" .....	42 00	
June 14.	"	A. Woodruff bond \$615...	18 45	
14.	"	Cash uninvested.....	15 00	
14.	"	Dick bond.....	7 20	10
14.	"	Robinson bond.....	12 00	
Sept. 14.	"	Collins bond.....	240 00	
Oct. 11.	"	Cash uninvested.....	31 37	
Nov. 4.	"	Cash uninvested.....	42 00	
Dec. 29.	"	A. Woodruff mtg \$615 and		
1882.				
		cash.....	33 45	
Feb. 22.	"	Dick bond.....	7 20	
Mar. 2.	"	Collins bond.....	240 00	
Apl. 11.	"	Cash uninvested.....	31 37	
May 1.	"	Robinson bond.....	6 00	
1.	"	Cash uninvested.....	42 00	
June 30.	"	A. Woodruff mtg.....	18 45	20
30.	"	Cash uninvested.....	15 00	
Sept. 1.	"	Collins and Robinson bds	246 00	
Nov. 1.	"	Cash uninvested.....	73 37	
Dec. 19.	"	A. Woodruff bd. and cash	33 45	
1883.				
Mar. 3.	"	D. P. Collins bond.....	240 00	
Apl. 21.	"	Cash uninvested.....	60 00	
June 16.	"	A. Woodruff bd. and cash	33 45	
30.	"	Dick bond. ....	10 00	
Sept. 3.	"	D. P. Collins bond.....	240 00	
Oct. 26.	"	Cash uninvested.....	60 00	
Dec. 15.	"	A. Woodruff bd, and cash	33 45	30
1884.				
Mar. 1.	"	D. P. Collins bond.....	240 00	
May 8.	"	Cash uninvested.....	62 48	
27.	"	D. P. Collins bond.....	120 00	
June 26.	"	A. Woodruff bd. and cash	33 45	
Nov. 1.	"	Rahway bonds.....	26 31	
1885.				
Feb. 10.	"	Dick bond. ....	15 60	
25.	"	A. Woodruff bd. \$615....	29 20	
25.	"	\$8174.52 cash.....	389 47	
25.	"	\$4000 bd. V. S. W.....	178 66	

\$9,279 99 17,160 82

9,279 99

\$26,440 81 40

Forw'd .....	\$26,440 81
Received from sale of lands	
1883.	
May 1. Amos Woodruff for plots 5 and 7, map of property Smith Woodruff .....	300 00
Total amount of charges	<u>300 00</u>
	\$26,740 81

This accountant prays allowance.

(1.) Income paid to Ann Eliza Woodruff.

1875.		Nov. 15....	108 30	Oct. 26. . .	85 60
Mar. 2.....	\$280 00	Dec. 26....	38 00	Dec. 13....	21 52
May 11.....	99 92	1878.		" 13....	17 50
June 9.....	15 40	Mar. 6....	280 00	" 13....	8 40
July 1.....	12 01	" 28....	117 70	1881.	
" 4.....	87 50	May 14....	60 02	Mar. 3....	240 00
Aug. 31.....	280 00	" 15....	39 90	Apr. 12....	31 37
Nov. 17.....	7 00	Aug. 28....	367 50	May 6....	42 00
" 17.....	108 32	Sept. 26....	15 60	June 14....	52 65
Dec. 21.....	56 18	Nov. 13....	21 52	Sept. 14....	240 00
1876.		" 14....	78 40	Oct. 11....	31 37
Feb. 21.....	87 50	Dec. 7....	8 40	Nov. 4....	42 00
Mar. 1.....	280 00	1879.		Dec. 29....	33 45
" 22.....	19 80	Jan. 7....	35 00	1882.	
May 17.....	70 00	Feb. 11....	84 37	Feb. 22....	7 20
" 17.....	38 50	Mar. 3....	280 00	Mar. 2....	240 00
" 17.....	21 53	Apr. 28....	15 60	Apr. 11....	31 37
" 17.....	39 90	May 12....	21 52	May 1....	6 00
" 31.....	15 40	" 15....	38 50	" 1....	42 00
20 July 17.....	87 50	June 10....	17 50	June 30....	33 45
" 17.....	35 00	" 21....	8 40	Sept. 1....	246 00
Sept. 5.....	280 00	July 10....	39 90	Nov. 1....	73 37
" 21.....	19 80	" 17....	56 70	Dec. 19....	33 45
Nov. 14.....	99 93	Sept. 4....	280 00	1883.	
" 28.....	8 40	Oct. 3....	36 60	Mar. 3....	240 00
1877.		Nov. 14....	21 52	Apr. 21....	60 00
Jan. 9.....	87 50	Dec 2....	38 50	June 16....	33 45
Mar. 1.....	280 00	" 16....	31 50	" 30....	10 00
" 22.....	19 80	1880.		Sept. 3....	240 00
May 1.....	70 00	Jan. 12....	49 00	Oct. 26....	60 00
" 15.....	99 92	Mar. 1....	319 90	Dec. 15....	33 45
June 20.....	15 40	" 30....	7 00	1884	
Sept. 8.....	280 00	Apr. 27....	63 82	Mar. 1....	240 00
" 22.....	19 80	June 3....	21 52	May 8....	62 48
Nov. 1.....	70 00	" 28....	17 50	" 27....	120 00
30 " 14.....	60 02	Sept. 4....	280 00	June 26....	33 45
					<u>\$8640 75</u>

2. By losses on securities charged in final account :

Robinson bond.....	\$200 00
Krook's bond.....	1140 00
Cost of Foreclosure.....	154 21
	<u>1294 21</u>

The property was bought in by executors; part was sold for \$300 above charged.

Executor holds one plot, value \$50.....	1244 21
40 Loss on \$3000 Rahway bonds .....	1684 58— 3128 79

3. By taxes paid on real estate.....	12 28
4. By interest due estate of Ann Eliza Woodruff.....	131 99
Total amount allowances.....	<u>\$11,913 81</u>
Total amount charges.....	\$26,740 81
Total amount allowances.....	11,943 81
Balance.....	<u>\$14,827 00</u>

Accountant also prays an allowance :

Surrogate's fees.....	
Commissions on \$9579 99.....	10
Paid counsel fees.....	

The amounts on hand \$14,828 is in the form following ;

Bond and mortgage T. S. Dick.....	240 00
Bond and mortgage of R. Robinson (purchase money mtg. not believed worth cost of foreclo.	
Bond and mortgage Amos Woodruff.....	615 00
Bond and mortgage Valentine S. Woodruff.....	4000 00
Rahway City bond, 1005.....	1000 00
Rahway City bond, 537.....	315 42
Cash on hand.....	8656 58
	<u>14,827 00</u>

20

STATE OF NEW JERSEY }  
UNION COUNTY. } ss.

Valentine S. Woodruff, the executor above named maketh oath and saith, that the above account is in all things just and true, both as to the charge and discharge thereof, according to the best of his memory and belief.

Sworn and subscribed before me this            day of 30  
March, 1885.

## UNION COUNTY ORPHANS' COURT.

In the matter of the estate of }  
 SMITH WOODRUFF, dec'd. } Exceptions.

10 Sarah W. Lounsbury, one of the beneficiaries under the will of Smith Woodruff, deceased, excepts to the allowance of the accounts of Valentine S. Woodruff, surviving executor of the last will and testament of Smith Woodruff, deceased.

1. This exceptant excepts to the allowance of all the securities alleged to be investments of the assets of the estate stated in the account rendered by said executor, except the item of cash on hand of \$8656.58, because the said assets were not invested according  
 20 to the direction of the will.

2. Also excepts to the allowance of commissions on \$9579.99, revenue collected as alleged and paid over to Ann E. Woodruff under the will, because Ann E. Woodruff was able and competent to collect the revenue, and did so collect until the original assets of the estate were forced from her custody and control by this executor and his father; (and she did after that collect some portion of it,) and for other good  
 30 and sufficient reasons.

3. Also to an allowance for counsel fee, because the executor should have settled and distributed the estate within a reasonable time after the death of Ann E. Woodruff. And if the estate had been invested according to the will, distribution of the assets or securities could have been made without the aid or assistance of counsel.

4. Also excepts to the allowance for losses on securities, to wit:  
 40

Robinson bond .....	\$200 00	
Krook's bond. ....	\$1140 00	
Cost of foreclosure. ....	154 21	
	<hr/>	
	1294 21	
Less lot valued at. ....	50 00	
	<hr/>	
	1244 21	
Loss on \$3000 Rahway bonds. ....	1684 58	
	<hr/>	
	\$3128 79	10

Because said securities are not invested according to the will, and said estate was wasted by the neglect and mismanagement of the said executor by investing the funds of said estate in Rahway bonds to the amount of. .... \$3000 00  
 Also the loss above stated of. .... 1294 21

Whole amount of waste .....	\$4294 21	20
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5. This exceptant also excepts to the account of the executor by reason of the mismanagement of the two executors, or either of them, in their or his conduct of the management of the estate.

Dated March 16th, 1885.

LUTHER S. ELMER,  
 Proctor for Exceptant.

## UNION COUNTY ORPHANS' COURT.

In the matter of the estate of )  
 SMITH WOODRUFF, deceased. ) Testimony, &c.

10 Testimony taken before me JAMES J. GERBER, Surrogate, in pursuance of order of the Orphans' Court bearing date February 18th, 1885. Appearances, LUTHER S. ELMER, Esquire, counsel for petitioner, M. T. ROSENBERG, Esquire, counsel for accountant.

VALENTINE WOODRUFF, being duly sworn, on his oath says :

I am the sole surviving executor of Smith Woodruff, deceased ; I, together with the co-executrix filed  
 20 a final account on the 18th day of January, A. D. 1875, which was approved by the Court ; said account shows a balance in our hands at the time of \$17,160.82, which account is marked Exhibit P. 1. The account that I filed to-day does not cover those assets the deficiency between the final statement and the account I filed to-day.—

Q. What is the deficiency between the final account and the account filed to-day ?

A. I can tell by figuring. The account that I have  
 30 filed to-day shows how the assets are invested now. Mrs. Woodruff, the co-executrix, died fifth day of July last ; at the time of her death she was acting partially ; she collected a part of the income ; at the time of her death she had no control of her assets ; the assets were deposited with Amos Woodruff, my father.

At this point counsel for accountant objects to this line of examination as irrelevant.

Q. When were the assets deposited with your father ?  
 40 ther ?

Question objected to, same reasons.

A. About 10 or 12 years ago ; I think it was 1873.

Q. And Mrs. Woodruff had no control of them after that period, had she ?

Objected to.

A. She didn't have the keeping of the securities, they were deposited with Amos Woodruff.

Q. You have charged a bond and mortgage of Amos Woodruff principal \$615, for what was that given ?

A. That was given for that of the purchase money 10 of real estate that was sold, belonging to the estate Smith Woodruff.

Q. Do you know what the purchase money of said sale was, in part payment of which this mortgage was given ?

A. It was 60 per cent. of the purchase money of the sale.

Q. You have charged here in this account a bond and mortgage of yourself, principal \$4000, upon what property is that mortgage ? 20

A. That is a mortgage upon a property in the City of New York.

Q. Is it a first mortgage upon the property ?

A. No, sir.

Q. How much of a mortgage is there ahead of it ?

A. Twenty thousand dollars (\$20,000) in three mortgages held by one party.

Q. Any accrued interest ?

A. No, sir ; interest was paid first of February.

Q. Any unpaid taxes or assessments on that property ?

A. Last year's taxes are unpaid.

Q. This bond and mortgage of \$200 principal of Dick, what property is that on ?

A. The mortgage is on a plot of ground in Clark Township, Union county, New Jersey, on the part of this estate and for a part of the purchase money, 60 per cent. of the purchase money.

Q. You have charged here in this account a Rahway City Bond, No. 1005, for one thousand dollars ; 40

another, No. 537, for \$317.42, for what were those bonds given ?

A. Those are called adjustment bonds, and were given in place of other bonds that we held.

Q. What were the other bonds that you held that these were given for?

Q. They were Rahway City bonds that we held amounting to \$3000 ; I mean the estate, when I say we.

10 Q. Were those \$3000 in Rahway bonds purchased by you for the estate as an investment ?

A. They were purchased by the executors for the estate.

Q. When ?

A. I don't know that I can fix the date without looking at my book ; I think it was in '77 ; one was purchased January 18, 1875, for \$1000, and the other two November 1, 1877, for \$2000 ; the last two named were purchased in place or stead of four bonds of  
20 said city for the same amount of money, which bonds were paid by the city ; the four bonds of \$500 each above spoken of, were purchased December 9th, 1873, from Mr. Shotwell, A. F. Shotwell, I think ; he is president of the bank there. The four bonds amounting to \$2000 were purchased for \$1840, the \$1000 bond bought in 1875 from city, I think we paid par value. I am not sure, either paid par value or 98 cents. Mrs. Woodruff, co-executrix, proposed the purchasing of the bonds.

30 Witness being shown a letter dated December 5th, 1873, says that is my signature,—from Valentine S. Woodruff to Mrs. Ann Eliza Woodruff.

Letters offered in evidence and marked Exhibit P. 2.

Q. Mr. Woodruff, after reading this letter marked Exhibit P. 2, do you now say that Ann Eliza Woodruff proposed taking these bonds ?

A. Yes, sir, she did and urged me to take them.

40 Examination was at this point adjourned until February 27, 1885, at ten o'clock in the forenoon.

February 27, A. D., 1885, examination continued, appearances same as first day.

Q. Mr. Woodruff, this Robertson mortgage, which appears in your account of assets, was that for 60 per cent. of purchase, same as the others?

A. Yes, sir; I am the owner of the lands upon which this \$615 mortgage is. I have been the owner about 11 years; I assumed this mortgage when I became the owner of this property. 10

Q. What is the date of the \$4000 mortgage held against you by the estate?

A. Dated April 24, 1883.

Q. Was that mortgage given for money of the estate that came to your hands at that time?

A. No.

Q. When was it assigned to you?

A. May 28th, 1884, it was assigned to the estate of Smith Woodruff.

Q. At the time of the assignment of that mortgage the consideration was money that you had received from the estate, was it? 20

A. It was a part of the money that was received from the payment of a bond and mortgage to the estate; the bond and mortgage was \$8000, it was paid May 27th, 1884. I took the assignment of this mortgage next day as a part of the investment of the \$8000.

Q. How did you invest the other \$4000?

A. I gave the estate Amos Woodruff's Son's note for \$4000 that has since been turned into cash, and is now represented in the item of cash in said statement of assets and forms, a part of the cash statement in the account, \$8487.87. 30

Q. Had you any other cash not invested belonging to the estate?

A. I did; about \$2700, I think it was.

Q. How long did you have that on hand?

A. It came in different amounts and different times. 40

Q. Give dates and amounts when it came to your hands.

A. December 7, 1878, \$500 ; March 10, 1879, \$600 ; April 14, 1880, \$1400—that accounts for \$2500 ; the balance of about \$200 I had on hand before, as long as two years before the first \$500 was received ; that represented all the cash that I had on hand.

Q. Did you pay Ann Eliza Woodruff interest upon these cash amounts that you had ?

10 A. I did.

Q. Up to what time ?

A. I paid her semi-annually from the dates I have given you, when due, up to the time of her death.

Q. Did you pay her the interest on the \$4000 mortgage also ?

A. There was no interest due on the \$4000 mortgage at the time of her death ; I paid her the interest of \$8000 on May 27th, 1884.

Q. Do you know William H. Clarkson ?

20 A. I don't know that I know him.

Q. Notary public in the State of New York.

Counsel for accountant. I object to these until counsel for petitioner tells us what he wants to prove.

A. I have no doubt that that is my signature (witness having been shown a paper.)

30 By counsel for petitioner. I propose to offer in evidence a bond, being the paper shown witness, made by Amos Woodruff to Ann Eliza Woodruff, acknowledged before William H. Clarkson, a notary public for the City and County of New York.

40 Counsel for accountant. I object to the admission of the bond in evidence—first, that the same is not properly proved, and next because it is irrelevant to subject-matter of the present examination.

Paper offered in evidence and marked P. 3, for petitioners.

Counsel for petitioner also offer in evidence probate copy of the last will and testament of Smith Woodruff, dec'd, which is marked Exhibit P. 4, on part of petitioner.

*Cross-examination* by counsel for accountant :

Q. You stated that there was a difference in the amount of the assets in your hands now and the 10 amount which appeared to be in your hands by your account filed in 1875 ?

Counsel for petitioner objects to the question because the account now filed by him and sworn to, shows that he has on hand \$14,394.94 and interest account on it amounting to \$534.24, and that it is merely a question of subtraction between the two accounts to show the deficiency ; also, because in this last 20 account filed, he has not prayed for any allowance for losses on his investments.

A. Well, in one item, mortgage against E. W. Ervest for \$1140, was foreclosed and a part of property again sold for \$300, together with the expense of foreclosing the mortgage made a difference of \$994.21.

This mortgage was given as a part of the purchase money for 3 plots of ground bought from the 30 estate of Smith Woodruff, was taken by the executors for 60 per cent. of the purchase money of said lots, given November 10, 1873 ; we foreclosed this mortgage and bought in the property ; a portion of the land was afterwards sold ; we hold one lot yet ; it is the plot shown on the account that we have left.

Q. Why did you not sue Ervest for the deficiency ?

Question objected to.

A. Because the bondsman was not responsible ; I 40

took the advice of counsel on the question of suing Ervest.

Question and answer objected to.

Q. Who was your counsel?

A. Luther S. Elmer, the gentleman here present.

Q. What other items were there?

A. There is one bond and mortgage of \$200 which the estate holds, not considered worth while to fore-  
10 close it.

Q. What other loss?

A. There was a loss on the Rahway City bonds of \$1684.58.

Q. When you said at your last examination Mrs. Ann Eliza Woodruff had no control of the securities of the estate after 1873, what did you mean?

A. I meant that she did not have the custody of them, as I said before they were deposited with Mr. Amos Woodruff, in his custody; she had no more  
20 control of them than I did, nor more I than she. Prior to that time she had the entire control and custody of the assets.

Q. Did she after 1873 concern herself in the management of the estate?

A. Yes, sir.

Q. Up to the time of her death?

A. Yes, sir.

Q. She collected part of the income of the estate, did she?

30 A. Yes, sir.

Q. And applied it?

A. Yes, sir.

Q. Then you used the word control, meaning custody, merely?

A. Yes, sir.

Q. This property for which you have Amos Woodruff's bond and mortgage for \$615 was that property sold at public or private sale?

A. Public sale, at auction.

40 Q. And were the terms of the mortgage the same as those to other purchasers?

A. Yes, sir.

Q. This bond and mortgage on your property of \$1000, Mr. Woodruff, to whom was that given?

A. To Amos Woodruff, my father.

Q. And by him assigned to the estate?

A. By him assigned to the estate of Smith Woodruff.

Q. What is the value of the property upon which that mortgage was placed?

Question objected to.

10

A. \$50,000 to the best of my judgment.

Q. What does the property consist of?

A. It consists of two lots and a half of ground, one brick building, four stories and basement, 23x60 feet, one brick building, three stories and basement, 17x45 feet, and one brick building 62½x30 feet, two stories high, and a frame building about 22x50, two stories high, situated on the south side of Fortieth street, about 262½ feet east of Eighth avenue, New 20 York City.

Q. Are you willing to take this mortgage in the distribution of the assets?

A. Yes, sir.

Q. Do you know whether your brothers and sisters are willing to take it?

A. I do not know.

Q. This bond and mortgage of T. S. Dick, that was also given as part purchase money on lot sold at public sale?

30

A. Yes, sir.

Q. Have you any letters here, Mr. Woodruff, from Ann Eliza Woodruff, with reference to the purchasing of Rahway City bonds?

A. Yes, sir.

Q. Produce them. I show this letter of December 6, 1873, addressed to dear nephew, signed your aunt, "A. E. W.," from whom is that letter?

A. That letter is from my aunt, Ann Eliza Woodruff; that is in her handwriting?

40

Q. And it was received by you?

A. Yes, sir ; December 8th, 1873.

Letter offered in evidence, marked Exhibit A I, on part of accountant.

Q. Was that letter in answer to your letter produced at last examination and marked Exhibit P 2, on part of petitioner?

10 A. I suppose it is, sir.

Q. Do you remember an interview between yourself and Mrs. Ann Eliza Woodruff, a short time before you wrote the letter P 2, at your father's house?

Question objected to as not cross-examination.

A. I do.

20 Q. Tell us what the substance of that interview was?

A. The discussion was in relation to the investment of money which we, the executors, had in our hands. I objected to the investment of money in Rahway City bonds or any other securities not named in the will. Mrs. Woodruff was anxious to invest the money in Rahway City bonds, believing them to be as good as any other securities. My father, who was present, objected strongly to the investment. After making inquiries, father and I both  
30 consented to invest in the Rahway City bonds, Mrs. Woodruff seemed so anxious.

Q. And that letter, Exhibit P 2, was written after you had so consented?

A. Yes, sir.

Q. What other letter have you got of Mrs. Woodruff in relation to Rahway City bonds. (Witness produces a letter dated Rahway, July 5th, 1877, addressed to dear nephew, signed A. E. Woodruff.)  
40 From whom is this letter?

A. That is from Ann Eliza Woodruff, executrix, directed to me, and I received it; it is in the handwriting of Mrs. Woodruff.

Q. What were the circumstances under which this letter was written?

A. The bonds of the City of Rahway that we had on hand were nearly matured, and this was in relation to taking new bonds of the City of Rahway for same amount of money.

Q. What induced you then, Mr. Woodruff, to take 10  
Rahway bonds instead of those that were paid?

A. They were taken under the same inducement that the first ones were.

Q. Did Mrs. Woodruff ever express herself to you that she could not live on the income of government bonds, or something to that effect?

Question objected to because it is not cross-examination; also, because there has been nothing said in any of the testimony about 20  
government bonds.

A. She did.

Q. Do you recollect when?

A. It was prior to the purchase of the first bonds; when I objected to investing in Rahway City bonds they were paying seven per cent; government bonds were only paying three or four per cent., and were at a premium.

Q. Witness being shown a paper was asked, What 30  
is this?

A. That is a consent and agreement of all the heirs of Smith Woodruff to take Rahway City bonds, or for the executors of said deceased to take Rahway City bonds.

Paper offered in evidence and marked Exhibit A 3, on part of accountant.

Q. You were one of the parties who signed this 40  
agreement?

A. I am.

Q. What was your understanding when you signed it?

Question objected to as improper and irrelevant, and the instrument will speak for itself.

A. The understanding was that it settled the question of the future liability of any of the Rahway City bonds that we had on hand.

10 Q. Mr. Woodruff, after the death of Ann Eliza Woodruff, did you make any exertions to make a distribution of the estate?

A. I did.

Q. What have you been doing between the date of Ann Eliza Woodruff's death and the return day of the citation in this cause?

A. I have had several interviews with Mr. Elmer in relation to making a distribution, and proposed dividing the assets and securities as I had them—  
 20 Rahway bonds and other securities; it was decided to have the Rahway bonds exchanged for bonds of the same city for a smaller denomination, and ten \$100 bonds are drawn and ready at Rahway to exchange for the \$1000, so that a division could be made of the bonds; when I say decided, I mean between Mr. Lounsberry, Mr. Elmer and myself. I believe that Mr. Elmer has sent word to Mr. Longstaff, Treasurer of Rahway, to have him make out the ten \$100 bonds; by Mr. Elmer I mean the gentleman present who represents the petitioner; Mr.  
 30 Lounsberry is present and represents some of the heirs of the estate.

Q. What else did you do about settling up the estate?

A. I went to see one of the principal heirs, Hetty Woodruff, to see if she would take some of the securities that I had for her portion in the division; she told me that she wanted a certain amount of money; I think she named \$3000 that she would want in  
 40 money, but that she had left the matter in Mr.

Lounsberry's hands, and that she would write to him about our interview.

Q. Was any objection made to the investment of Rahway City bonds during the period since Mrs. Woodruff's death?

Question objected to as irrelevant.

A. No, sir; there was no objection, and it was supposed that they were to be divided among the heirs. 10

*Re-direct examination :*

Q. You say that prior to that time she had the entire custody and control of the assets of the estate; what time was that?

A. She had the entire control of the securities of the estate prior to September 27, 1873.

Q. How did she come to give up the control and custody and assets of the estate?

A. Well, one of the principal heirs objected to her having the entire custody; that's the reason. 20

Q. What heir?

A. Amos Woodruff, my father, the one who gave this bond.

Q. What was his objection?

A. He thought they were safer in his hands than in hers.

Q. So to get the custody he gave this bond to her?

A. Yes, sir, to satisfy her.

Q. Your father kept the custody and control of the assets until his death, did he not? 30

A. He kept them in his safe, the whole of them.

Q. How could she, Mrs. Woodruff, have any control over them and collect a part of the revenue for them?

A. She did collect a part of the revenue; she went to the parties and collected the interest.

Q. You knew how the assets were to be invested according to the will, did you not? 40

Question objected to.

A. I had a copy of the will.

Q. By the will how were the moneys to be invested when invested on bond and mortgage?

Question objected to.

A. On first bond and mortgage on property worth double the amount.

Q. Then the \$4000 on your property in New York City was not invested according to the will, was it?

10 A. As far as the value of the property was concerned it was, but not as to being a first mortgage.

Q. Mr. Woodruff, why did you and your father consent to taking Rahway City bonds, when you both knew it was not investing the money of the estate as directed by the will, and your having so much regard to saving the estate from waste while in the hands of Mrs. Woodruff, as to give his bond to her to get the control of the assets?

20 Question objected to as to form as being unintelligible and framed so as to mislead the witness, and in substance being immaterial, irrelevant and incompetent.

A. One reason was that she was very anxious to make the investment in that way, and the other reason was that we felt convinced that the investment was a good one.

30 Q. How did you become convinced that the investment was a good one?

A. By inquiring.

Q. Was that at the time when you made first the purchase of the Rahway City bonds?

A. Yes, sir; that was in 1873—we bought \$2000 worth at that time—those are the bonds we bought from Shotwell; they were paid up and we bought new bonds with the money.

40 Q. How long before the purchase of the \$2000 in bonds was the interview at your father's house, spoken of, when your father so strongly objected to them?

A. It was a short time and not more than a few days.

Q. You say that this paper, A 3, is a consent and agreement of all the heirs of Smith Woodruff to take Rahway City bonds, or for the executors to take Rahway City bonds; was not that consent made long after you had purchased Rahway City bonds to the amount of \$3000?

A. It was.

Q. What is the date of that consent? 10

A. It is dated February, 1883.

Q. Who suggested the procuring of that consent and agreement?

A. I think Mrs. Ann Eliza Woodruff suggested that.

Q. Did not you suggest it?

A. We had conversations about it, Mrs. Woodruff and myself, I think she suggested it.

Q. What reason did she give?

A. Well the bonds at that time had depreciated 20 very much in value.

Q. Were they of any value at that time?

A. I was informed that they were.

Q. Did not your father make the suggestion to have that paper drawn and executed?

A. I don't think he did.

Q. Did you and Mrs. Woodruff have any interview with him in regard to it?

A. I don't remember of any.

Q. How long after the death of Mrs. Woodruff was 30 it before you made any movement or effort to settle up and distribute this estate?

A. It was a couple of months afterwards.

Q. What did you do then?

A. I called to see you then, Mr. Elmer, and don't know but I saw Mr. Lounsberry before I saw you.

Q. How did you come to call to see me?

A. I think upon your request to call upon you by letter; I think it was in response to your letter or communication; I think it was in September. 40

Q. What was done when you called to see me ?

A. I gave you a statement of the assets.

Q. Were those assets the same as appears in your account filed here ?

A. Except those that have been turned into cash.

Q. In that statement you then gave me you had down as cash on hand \$2774.52, did you not ?

A. I think that is the amount.

Q. Did you not afterwards tell me that you did  
10 not then have that cash in hand ?

A. I don't remember telling you that Mr. Elmer.

Q. Did you have it ?

A. Well I suppose I had it, I put it in as cash on hand \$2774.52.

Q. Did you not go to see Hetty Woodruff to see if she would take any part of those Rahway City bonds and what did she say to you about it ?

A. I went to see her to ask if she would take the  
20 mortgage of \$4000, as a part of her share ; I don't remember anything being said at that interview about Rahway City bonds.

Q. Did you not write to Treasurer of the City of Rahway to divide up those bonds into bonds of small fractional parts, so that they could be divided equally to each of the heirs or beneficiaries of this estate ?

A. I wrote to the Treasurer of the City of Rahway asking him if that could be done and never received  
30 any answer to that letter.

Q. In that letter did you not give him the amounts into which you wanted the bonds changed ?

A. Yes ; I gave him the figures.

Q. You say that you had several interviews with Mr. Elmer in relation to making distribution, and proposed dividing the assets and securities as you had them ; were not those interviews had in the endeavor to settle and distribute the estate mutually, and then the question of dividing the Rahway bonds  
40 and the other securities came up ?

A. Those interviews were for the purpose of dividing the securities as we had them, but in the last interview it was requested that we get all the securities into cash except the Rahway bonds, and the Rahway bonds were to be exchanged into smaller bonds, and divided among the heirs.

Q. Did I not tell you that the heirs that I represented would not accept the assets, because they were not invested according to the will and that you had better convert them into cash? 10

A. I don't remember any such statement in regard to the Rahway bonds. I don't remember with reference to the statement; I recollect your suggestion converting note of \$4000, and mortgage, \$4000, into cash.

Q. Was not the proposal of dividing the Rahway bonds based upon an amicable settlement and distribution of the estate?

Question objected to. 20

A. I don't know.

Q. Was not all our interviews with reference to an amicable settlement of the estate?

A. Yes.

Q. How long was it from the receipt of my first letter to you to call and see if we could not settle this matter to the last interview we had about it. I mean before issuing the citation?

A. More than a month I should think. 30

Q. Who caused the delay?

A. I suppose the delay was on my part, and unavoidable.

Q. Did I not write to you several times to call upon me?

A. You did and I always called when you wrote to me. I want to state about the delay that there was one appointment that was made; I attended with my counsel, but Mr. Lounsberry was not—that made some delay. 40

Q. Did Mr. Lounsberry make any suggestion or decision about having the thousand dollar bond divided up in \$100 bonds?

A. I don't remember now whose suggestion that was.

*Re-cross*

Q. In this Exhibit A. 2 Mrs. Ann Eliza Woodruff refers to the payment to her of \$87.50 interest by 10 Mrs. Holdsworth, is that part of the income of the estate or not?

A. It is.

Accountant offers in evidence postal card from L. S. Elmer to V. S. Woodruff, dated J. City, Nov. 28, '84.

Admitted by consent and marked A. 4.

VALENTINE S. WOODRUFF.

20 Sworn and subscribed before me February 27th, A. D. 1885.

JAS. J. GERBER,  
Surrogate.

BAYARD WOODRUFF, being duly sworn on part of accountant, says :

30 I am one of the beneficiaries under the will of Smith Woodruff, deceased.

Q. This \$4000 mortgage on your brother's property, are you willing to have it distributed to you in the distribution of said estate?

Objected to.

A. Yes.

*Cross-Examination* by Mr. ELMER :

I have three brothers, and one sister, including the 40 executor, now living.

Sworn and subscribed before me, February 27, A.  
D. 1885.

JAS. J. GERBER,  
Surrogate.

Testimony closed on both sides.

JAS. J. GERBER,  
Surrogate.

10

Additional testimony taken by mutual agreement  
of the parties :—

MARX RIEFEL, sworn on part of the accountant,  
says :

I am the collector of taxes of Clark Township,  
Union County, and have been such for six years  
last past ; I am familiar with the value of real estate  
in Clark Township and have dealt in real estate 20  
there ; have had about four transactions ; I know the  
situation of plots 5 and 7 on certain map, entitled  
Map of 12 Desirable Building Plots, part of the  
property of the late Smith Woodruff, of Rahway, N.  
J. ; these plots are in Clark Township ; I consider  
\$150 is a fair value for those lots. Each lot \$150. I  
mean I should think that \$150 for each lot was a fair  
value in 1883 also.

Counsel for exceptant objects to the fore-  
going testimony as being irrelevant. 30

The lots are assessed at \$150 each at this same  
time.

MARX RIEFEL.

Sworn and subscribed before me, this 24th day of  
March, A.D. 1885.

JAS. J. GERBER,  
Surrogate.

40

Counsel for accountant offers deed from Ann Eliza Woodruff and others, Exrs., to Amos Woodruff, dated May 1st, 1883, recorded in Book 161 of Deeds for Union Co., page 273-4 in evidence on part of accountant, and is marked Exhibit A. 5.

VALENTINE S. WOODRUFF, the accountant, recalled  
10 in his own behalf.

The assets of the estate of Smith Woodruff were not forced from the custody and control of Ann Eliza Woodruff, the circumstances under which the transfer of the assets of said estate were made—are as follows: Mr. Amos Woodruff, my father, thought the assets would be more secure in his custody than in that of Mrs. Woodruff, and she consented to the arrangement amicably. The conduct and manage-  
20 ment of estate was not in the least altered by this arrangement. Mrs. Woodruff, collected a considerable part of the interest and income after such transfer. She never made any demand to collect the part of the income that I was collecting. Mrs. Woodruff was always on the most friendly terms with my father and myself, and was with my father and mother at their death bed. They died—my mother 28th of June, 1884, and my father 29th of June, 1884, and Mrs. Ann Eliza Woodruff died on the fifth day  
30 of July, the same week. I tendered myself ready to distribute the estate before coming into Court.

Counsel for exceptant objects to above.

The day before the citation was returnable I went to Mr. Elmer's office and said to him I was ready to settle with the heirs he represented, and we together went over to Mr. Lounsberry's office in New York, and Mr. Lounsberry then objected to settle. Mr.  
40 Elmer asked him why not settle now, as Mr. Wood-

ruff was ready ; Mr. Lounsberry said he did not know but what it would be contempt of court to settle then, and said that he wanted the Court to settle the question of the Rahway City bonds. We left the office then and went to Jersey City, and I engaged Mr. Vredenburgh as my counsel to act for me.

*Cross-examination by Mr. ELMER :*

Q. Mr. Woodruff, did not Mr. Lounsberry object 10  
to the securities you held because they were not invested according to the will ?

A. He had objected to some of them, but he never objected to the Rahway bonds until that morning.

Q. Did he not that morning say to you that the matter had gone that far that he preferred to have the whole matter settled by the Court; so that he could not be found fault with by those whom he represented ?

A. He said, as I understood him, that the Rahway 20  
bonds was the only thing to be settled by the Court. He said he wanted the question settled by the Court, so that the person he represented could not find fault.

Q. The question of the securities other than the Rahway bonds have been objected to before that, had they not ?

A. They were two pieces of securities that he objected to for the parties he represented ; he objected to take them for those parties, but that morning his 30  
objection was no good, for I had the objectionable ones converted into money. One of the objectionable securities was a bond and mortgage for \$4000—Valentine S. Woodruff to Amos Woodruff, and assigned to the estate of Smith Woodruff ; the other was a promissory note of Amos Woodruff Sons to the estate of Smith Woodruff for \$4000, with interest.

Q. Did you state to Mr. Lounsberry that you had money for those securities that morning ?

A. I don't know that I stated so ; I was prepared, 40  
although.

Q. Did you say anything to me before we went to Mr. Lounsbrey's office that you had converted those securities into money?

A. I stated to you that I was ready to settle with Mr. Lounsberry for the people he represented, and I did have the money; I had upwards of \$8000; I don't remember how much more than \$8000; I had enough money to settle with him for the parties he represented, by taking their portion of the Rahway bonds.

10 Q. Did not your father give the bond Exhibit P. 3, to Ann Eliza Woodruff, for your faithful performance as executor and trustee in the sum of \$30,000, before she would yield up the custody and control the assets of the estate?

A. That was his own offer.

Counsel for exceptant objects to answer as not responsive.

20 Q. Question repeated.

A. When he suggested to her to give up the securities to his custody, he offered to give this bond which is in evidence.

Q. Did she not require that bond before she would yield the securities to him.

A. No, sir.

Q. In your account last rendered in this matter, you claim to have paid to Ann Eliza Woodruff various sums of income from the estate aggregating  
30 \$8640.75, have you the receipts or vouchers from her for those payments?

A. Yes, sir.

Q. Will you produce them?

A. I will.

Q. Have you them with you?

A. I have.

Q. Produce them?

A. Yes, sir.

Q. Those bonds and mortgages on the lots you  
40 have spoken of which you have sold, have you them with you?

A. I have some of them.

Q. All bonds and mortgages taken at the sale bear date November 10th, 1873, and had five years to run at interest at 7 per cent.

A. Yes, sir.

Paper offered in evidence and being shown to witness, he says that is a diagram of the lots October 9, 1873, and also contains a memorandum of the price of each lot sold, 10 showing amount sold for, amount paid in cash, and amount on bond and mortgage, and marked Exhibit P. 5 on part of exceptant.

Q. Have you charged yourself in your account any where with the discount on the purchase of those Rahway bonds—item of \$160 and item of \$40?

A. No, sir. That is to say, I paid out the \$160 to Mrs. Woodruff as part of the profit or income from the estate and have her receipt for same. I paid 20 her \$100 at one time and \$60 at another. I paid it by advice of counsel, Senator Vail.

Q. What did you do about the \$40?

A. I did nothing.

*Re-direct :*

Q. What did you do about the \$40, spoken as discount of purchase of bonds?

A. Before the Rahway bonds became due we exchanged them for the compromise bonds, which we 30 hold now, and, of course, we did not realize the profit of \$40.

Q. The investment of \$4000 on mortgage in New York and the note of Amos Woodruff's Sons, were they intended to be permanent investments?

A. They were not. The principal reason was that Mrs. Woodruff, the beneficiary under the will, wanted the income, and that is why the investment was made in that way.

Q. Did you ever have any talk with Mr. Louns- 40

berry about that lot in your account appraised at \$50?

A. I did. He asked me what I thought it was worth; what I would either give or take. I said \$50; he did not take the lot, he did not say anything.

Q. (By Mr. ELMER.) Was not the \$40 realized at the time the bonds were purchased taken out of the estate?

10 A. No: bought the bonds paid at 98 for them and we charged the fund with the investment.

VALENTINE S. WOODRUFF.

Sworn and subscribed before me March 24th, 1885.

JAMES J. GERBER,

Surrogate.

MARX RIEFEL, recalled on part of exceptant.

20 Q. What is the value, in your opinion, of plot 11 on this diagram?

A. I think \$100 would be a full valuation for it.

UNION COUNTY ORPHANS' COURT.

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In the matter of the account of VAL- ENTINE S. WOODRUFF, surviving ex- ecutor of SMITH WOODRUFF, de- ceased.	}	On exceptions of Sarah W. Lounsberry, exceptant. Order.
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Exceptions having been filed to the account of said executor, and the court having heard and considered the evidence and allegations of counsel for the exceptant and accountant, it is ordered that the surro-  
40 gate restate said account of said executor by making

the following deductions and allowances, that is to say: The securities stated in said account, which were taken upon the sale of the real estate of said decedent, are to be allowed as stated. That commission upon the moneys that came to the hands of said executor, and were paid over by him to the life tenant, Ann E. Woodruff, are also to be allowed. That a counsel fee of fifty dollars be allowed to both said accountant and said exceptant. That said executor shall be charged with and make good the sum of money, which was unlawfully invested in Rahway City bonds. That said investment of four thousand dollars invested on bond and mortgage on real estate in New York City was made contrary to law and said will, and is not to be allowed, and is to be made good by said executor. 10

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### PETITION OF APPEAL.

To the Honorable the Prerogative Court of the State of New Jersey :

The petition of Valentine S. Woodruff, surviving executor of the last will and testament of Smith Woodruff, deceased, respectfully showeth : 30

That your petitioner finds himself aggrieved by an order of the Orphans' Court of the County of Union, made on the eighth day of April, A. D. eighteen hundred and eighty-five, on the proceedings herein-after stated.

Your petitioner and Ann Eliza Woodruff (widow of the testator) and Ann P. Scudder were by the will of said Smith Woodruff, which said will is proved and on record in the Surrogate's office of Union county, appointed executor of said will and duly 40

qualified as such. By said will the property, real and personal, of said Smith Woodruff was to be converted into cash and invested during the lifetime of said Ann Eliza Woodruff, and the income paid to her, and after her death the estate was to be distributed. Your petitioner refers to said will and the record thereof for greater certainty. Said Amos P. Scudder departed this life about the year 1874, and said Ann Eliza Woodruff departed this life on the 10 fifth day of July, 1884.

That some time in January, 1885, Sarah W. Lounsberry, one of the legatees under said will, filed her petition for distribution of the said estate, in the Union County Orphans' Court, and your petitioner thereupon having been cited, duly filed his account in the said Court, wherein among other things he prayed allowance.

"Loss on \$3000 Rahway bonds, \$1684.58."

The said Sarah W. Lounsberry excepted to the 20 said account and alleged among other things an exception to said item of loss on Rahway bonds, on the ground that the investment therein was contrary to the terms of the will.

That thereupon testimony was taken before the Surrogate of Union county and thereon the matter discussed before the said Court; and the said Court did by its said order, dated the eighth day of April, A. D. eighteen hundred and eighty-five, order among 30 other things, that an account be restated by the surrogate, and that on said restatement the said executor, your petitioner, should be charged with and make good the sum of money which was unlawfully invested in Rahway City bonds.

Your petitioner, appealing from so much of said order, respectfully alleges and complains that the said order, in that it orders said restatement and charge, is erroneous, improper and illegal in that :

(1.) That said Orphans' Court disregarded a certain consent and agreement made and entered into 40 by all the legatees of Smith Woodruff, dated Febru-

ary, 1883, offered in evidence and marked Exhibit A. 3, whereby all of said legatees released said executor from any liability on said investment.

(2.) That said charge should not have been made against said executor.

(3.) That said exception should have been overruled.

And your petitioner prays that the said order may 10  
in the particulars aforesaid be reversed, set aside  
and for nothing holden, and that he may have such  
further and other relief in the premises as to this  
Honorable Court shall seem meet, and your petitioner  
shall ever pray, &c.,

JAMES B. VREDENBURGH,  
Proctor and of Counsel with Petitioner.

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## NEW JERSEY PREROGATIVE COURT.

	Between	
	VALENTINE S. WOODRUFF, surviving	
	executor, &c., of SMITH WOODRUFF,	
10	deceased,	On appeal
		from Union
	Appellant,	County Or-
		phans' Court
	and	
	SARAH W. LOUNSBERRY,	
	Respondent.	

The answer of the above named respondent to the  
 20 petition of appeal of the above named appel-  
 lant.

This respondent not acknowledging all or any of the  
 matters which in this said petition of appeal are  
 contained to be true, for answer thereto nevertheless  
 says, and admits that an order of the Orphans' Court  
 of Union county, was on the eighth day of April  
 last past, made and entered in said Court in this  
 cause for that purpose mentioned in the said peti-  
 tion as therein stated; but as to the substance and  
 30 form thereof, this respondent prays to refer thereto  
 when the same shall be produced.

And this respondent is advised and believes that  
 that part of said order stated in said petition of ap-  
 peal is agreeable to law and equity, and that she  
 prays that that part of said order in said petition of  
 appeal stated may be affirmed with costs to be ad-  
 judged to this respondent.

And this respondent in further answer to the pe-  
 tition of appeal says, that she finds herself aggrieved  
 40 by that part of the said order of the Orphans' Court

made on the eighth day of April last past, in said cause, in which it was by said Court ordered that the securities stated in said account, which were taken upon the sale of the real estate of said decedent, are to allowed as stated, thereby overruling the exceptions of this respondent, in which she excepted to such securities, because not taken according to the directions of the will. That said order in that respect is erroneons, improper and illegal, and that said exception in that particular should have been sustain- 10  
ed. This respondent is also aggrieved by that part of said order which allows commissions upon the moneys that came to the hands of said executor and were paid over by him to the life tenant, Ann E. Woodruff, thereby overruling the exceptions of this respondent to any allowance for commission in that respect. That said order in that respect is erroneous and illegal, and that said exception should have been sustained.

This respondent is also aggrieved by so much of 20  
said order that allows to said appellant a counsel fee of fifty dollars, thereby overruling the exception of this respondent to any allowance for counsel fee in that respect. That said order in that respect is erroneous and illegal, and that said exception should have been sustained.

And this respondent, in conform.ty with the rules of this Court, herein specifies the following items in the account on exceptions whereto said order was made, as to which items this respondent supposes, 30  
and humbly submits the sentence or decree of said Court made in said order is erroneous as against her and in favor of said appellant, viz: Wherein said appellant prays allowances as follows:

	" By losses on securities charged in final account :		
	" Robinson bond.....	\$200	
	" Krooks bond.....	1140	
	" Cost of foreclosure.....	154	21
			<u>\$1294 21</u>
	" The property was bought in by		
	" executors—part was sold for		
	" \$300, above charged—execu-		
10	" tors hold one plot, value \$50	1244	21
	" Loss on \$300 Rahway bonds..	1684	58
			<u>\$3128 79</u>
	" Commissions on \$9579.99."		
	" Paid counsel fee" (no sum named.)		

And wherein said appellant gives a list of the assets of said estate in part as follows :

	" Bond and mortgage, J. S. Dick . . . . .	\$240	00
	" Bond and mortgage of R. Robinson (pur-		
	" chase money, mortgage not believed		
20	" worth cost of foreclosure.).....		
	" Bond and mortgage of Amos Woodruff..	615	00
	" Bond and mortgage, Valentine and Wood-		
	" ruff.....	4000	00
	" Rahway City bond .....	1000	00
	" Rahway City bond.....	315	42

And this respondent prays that said order may be so far affirmed as she above alleges it right to be affirmed, and so far reversed as she above alleges it  
 30 ought to be reversed, and be allowed her costs and counsel fee in this Court, and that the Orphans' Court of Union county may be ordered to have said account restated and the proper sum ascertained to be charged against said appellant with interest to said restatement.

LUTHER S. ELMER,  
 Proctor, for Respondent.

GILBERT COLLINS,  
 Of Counsel.

## EXHIBIT A. 3.

Know all persons by these presents, that, Whereas, Ann Eliza Woodruff, formerly of Rahway, in the State of New Jersey, now of the City of New York, as executrix, and Valentine S. Woodruff, of the City of New York, as executor, of the last will of Smith Woodruff, late of Rahway, deceased, are the owners 10 and holders of three certain bonds, made by the City of Rahway, in the State of New Jersey, in its corporate capacity, each of which bonds was made to secure the payment of one thousand dollars and interest thereon, reference being made to the same for a more particular description thereof ;

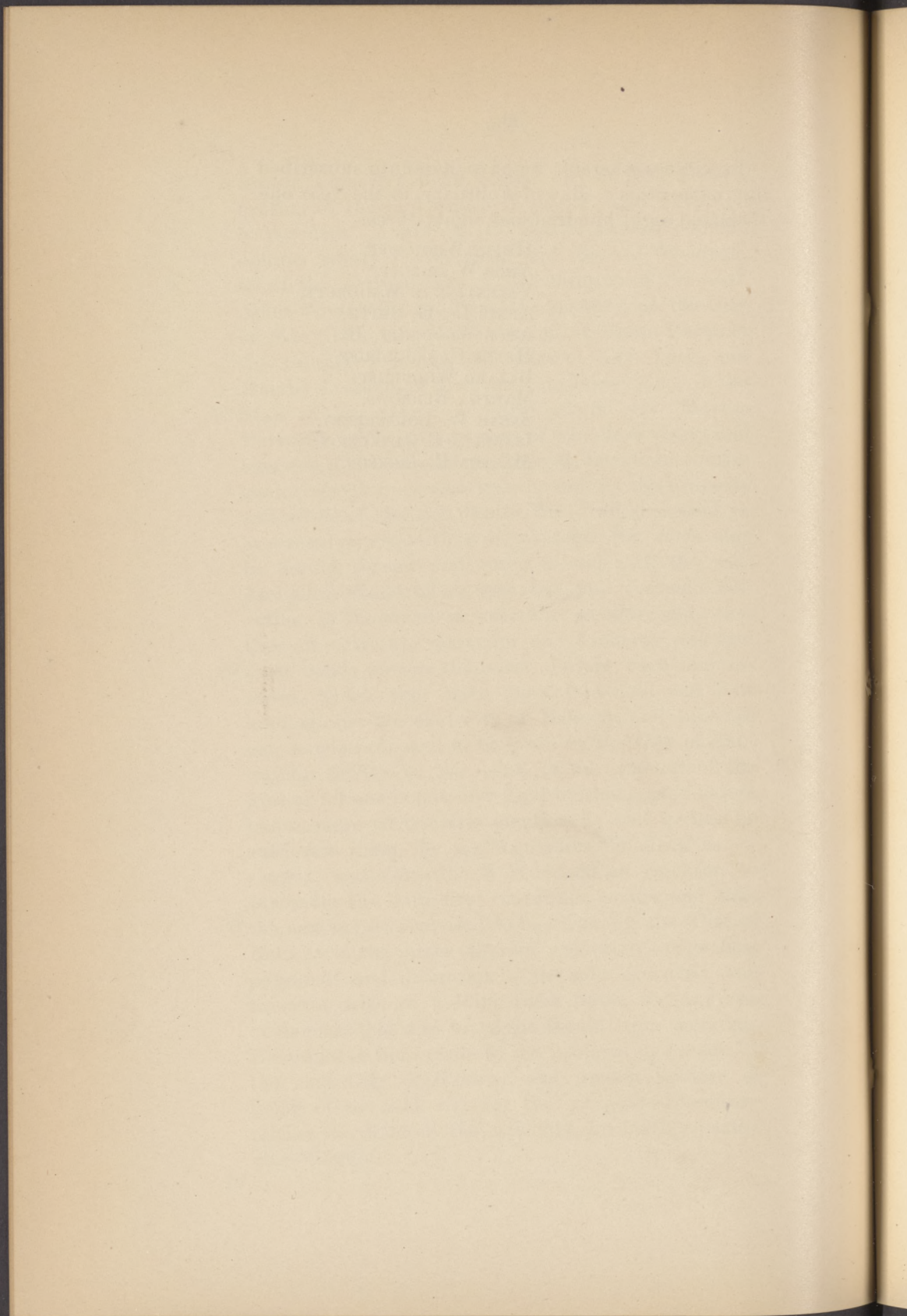
And whereas, The said City of Rahway has been, and now is, represented to be insolvent and unable to pay its bonds and judgment creditors in full ; and it has been proposed by and between the said City 20 of Rahway, and some of the holders of its bond, and its creditors, that the said city issue new bonds for thirty-five per cent. of the total principal and interest accrued thereon, on the first or former bonds, up to the first day of November, 1882, payable at the end of forty years, or sooner, at the option of the city, drawing interest at two per cent. per annum for the first two years, and three per cent. for the third year, payable annually, and four per cent. per annum thereafter, payable semi-annually ; which new bonds 30 for thirty-five per cent. and interest thereon are proposed to be given to the holders of the first or former bonds, respectively ; and the holders of the first or former bonds are thereupon to give up, surrender and exchange the bonds, now held by them, for the new bonds, for thirty-five per cent. of the amount as aforesaid.

Now we, Hetty Woodruff, of Cranford, in the State of New Jersey, and Martha Burrows, of the City of New York, sisters of the said Smith Woodruff, de- 40

ceased, Amos Woodruff, of the city of New York, a brother of the said Smith Woodruff; and Valentine S. Woodruff, Annie Le. G. Smith, Amos Woodruff, Junior, Henry C. Woodruff and Bayard Woodruff, all of the City of New York, children of the said Amos Woodruff; and Sarah Lounsbury, of the City of New York, Isabella Jenkinson, of Green Point, in the County of Kings, and State of New York, and Martha Jackson, of Lafayette, or Jersey City, in the  
10 State of New Jersey, children of the said Martha Burrows, being heirs or next of kin, or devisees and legatees, and having some interest, certain or contingent, present or prospective, in and to the property and estate of the said Smith Woodruff, deceased, or to a residuary part thereof, whatever the same may be, hereby consent and agree to and with the said Ann Eliza Woodruff as executrix, and the said Valentine S. Woodruff as executor, as aforesaid, that they may give up, surrender and exchange, the said  
20 three bonds for one thousand dollars each and interest, which they have heretofore held and now hold against the said City of Rahway, and take the new bonds proposed to be given by the City of Rahway for thirty-five per cent. of the amount of the first or former bonds now held by them, as is herein before more particularly mentioned; and we hereby authorize them, the said Ann Eliza Woodruff as executrix, and Valentine S. Woodruff as executor, to surrender the said first or former bonds, and take  
30 the new bonds proposed to be given by the City of Rahway in the place thereof, according to the best judgment and discretion of the said executrix and executor, without holding them liable for any loss or damage that may or might result from so doing. Reference is here made to the propositions made by the said City of Rahway, and certain holders of bonds of the said city for the purpose of compromising the debts of the said city, for further particulars thereof.

In witness whereof, we have hereunto subscribed  
our names this     day of February, in the year one  
thousand eight hundred and eighty-three.

HETTY WOODRUFF,  
AMOS WOODRUFF,  
VALENTINE S. WOODRUFF,  
ANNIE Le. G. SMITH,  
AMOS WOODRUFF, JR.,  
HENRY C. WOODRUFF,  
BAYARD WOODRUFF.  
MARTHA BURROWS,  
SARAH W. LOUNSBERRY,  
ISABELLA E. JENKINSON,  
MARTHA R. JACKSON.



## PREROGATIVE COURT.

OCT. T., 1885.

VALENTINE S. WOODRUFF, Ex'r,  
Appellant.

and

SARAH W. LOUNSBERRY,  
Respondent.

OPINION. 10

Appeal from decretal order of Union Orphan's Court.

Mr. J. B. VREDENBURGH for Appellant.  
Mr. G. COLLINS for Respondent.

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THE ORDINARY—Smith Woodruff, deceased, late of Rahway, died in the beginning of the year 1871. By his will, which is dated January 10th in that year and was admitted to probate in February following, he gave his wife, Ann Eliza Woodruff, \$4000 and all his household goods. He then authorized and directed his executors (who were his wife, his cousin, Amos P. Scudder, and his nephew, Valentine S. Woodruff) to sell and convey all the remainder of his property, real and personal, as soon as possible after his decease, and invest the proceeds thereof immediately upon first bond and mortgage on property worth double the amount, or in stocks or bonds of the United States or the State of New Jersey, and pay the interest and profits whatsoever thereof, to his wife semi-annually (beginning six months after his death) or oftener for her life. He then gave after her death, the principal to his brothers and

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sisters, substituting their issue in case of their death, &c.

All the executors proved the will. Mr. Scudder subsequently died in 1874. A final account was filed by Mrs. Woodruff and the appellant as surviving executors in 1875. In that account they charged themselves with the balance, \$8852.88, of an account rendered in 1872, and the amount, \$10,117.50, received from the sale of the testator's real estate, and they received commissions, \$384.70 upon the latter amount

The intention appears to have been to allow the commissions at the rate fixed by statute, but a little more was allowed undoubtedly by mistake. The account showed a balance against the accountant of \$17,160.82. The widow died July 5th, 1884. In March, 1885, the appellant, as surviving executor, filed his account, in which he charged himself with the balance of the final account of 1875 (\$17,160.82), and the interest and income (\$9279.99) of the estate collected by him since that account, and \$300 received from Amos Woodruff for the price of two plots of land sold by Mrs. Woodruff and the appellant as executors to him in May, 1883. The plots were part of some land of the testator which had previously been sold by the executors, and a mortgage taken for part of the purchase money. Under foreclosure of that mortgage they bought in the property, which consisted of those two plots and another still held by the appellant and mentioned in his account as part of the assets of the estate. By his account the appellant prayed allowance for certain moneys—\$8640.75 altogether—income paid over by him to the widow ; also for certain losses on securities charged in the account of 1875. The losses are designated as follows : Robinson's bond, \$200 ; Krook's bond, \$1140, with costs of foreclosure, \$154.21 less the value (\$50) of the lot above mentioned, now held by the appellant ; loss, \$1684.58 on \$3000 Rahway city bonds—in which the executors invested money of the estate—and bond and mort-

gage of T. S. Dick, \$240. The Robinson, Krook and Dick bonds were all taken for purchase money of land of the testator sold by the executors. The Robinson and Dick mortgages are said to be of no value, the property not being now worth the costs of foreclosure. The Krook mortgage is the one before mentioned as having been foreclosed, and under the proceedings upon which the property was bought in.

The Orphans' Court, upon exceptions filed<sup>10</sup> to the account, ordered that the securities mentioned in the account which were taken upon the sale of the testator's real estate, and for which allowance was claimed, be allowed as stated; that commissions be allowed the accountant on the income received by him and paid over to the widow; that a counsel fee of \$50 dollars be allowed to the accountant and exceptant, respectively; that the accountant be charged with the loss upon the Rahway<sup>20</sup> bonds; and that an investment of \$4000 mentioned in the account, made on fourth mortgage of real estate of the accountant in the City of New York (the prior mortgages on that property amount to \$20,000) was made contrary to law and that it be not allowed. From that order, so far as the loss on the Rahway bonds was concerned, the accountant appealed and in the answer to the petition of appeal, the respondent appealed from so much of the order as allowed commissions upon the income paid to the widow, and allowed<sup>30</sup> counsel fees and the losses on mortgages taken on sale of the testator's property. The questions for consideration and adjudication therefor are whether the appellant is entitled to allowance for the losses on the Robinson, Dick and Krook mortgages; whether he should be allowed commissions on the income paid to the widow, whether he should be allowed counsel fees either in his administration (his account contained a claim for counsel fees) before the exceptions were filed or upon those exceptions, and<sup>40</sup>

whether he should bear the loss upon the Railway bonds.

As will have been seen, the will directs the executors to sell and convey all the testator's real and personal property, except so much of the latter as was thereby specifically bequeathed as soon as possible after his decease, and invest the proceeds for the benefit of the widow. The executors appear to have sold the land in October, 1873, and to  
 10 very good advantage. It appears to have consisted of a piece of salt meadow and a tract of upland of about twenty-three acres. They sold the former for \$200. The latter they divided into twelve lots and sold for \$9917.50 in the aggregate. On the sale of that property they gave liberal terms to purchasers.

The terms were 40 per cent. of the purchase money to be paid in cash, and the balance, 60 per cent., to be secured by mortgage of the property,  
 20 payable in five years. They appear to have obtained good prices. The three lots sold to Krook brought \$1900. According to the evidence they are now worth only \$350. Although the executors were by the will directed to invest the proceeds of the sale of the property upon first bond and mortgage of property worth twice the amount invested or in stocks or bonds of the United States, or of this State, it would not be just to hold them bound by that provision in taking mortgages for part of the purchase  
 30 money of the property. Those mortgages were not taken as an investment of proceeds of the sales, but to secure the payment of part of the price at which the property was sold. They were themselves proceeds of the sales. In taking the mortgages for which the accountant asks allowance the executors appear to have acted in good faith and for the best interest of the estate. They therefore ought not to be charged with them. There is no error in the order of the  
 40 Orphans' Court so far as they are concerned.

The next question is as to the commissions. As has already been stated, the debit side of the account consists, with the exception of a charge of \$300 for the price of land sold to Amos Woodruff, of collections of income, and the payments are of income to the widow and taxes (\$12.28) upon the real estate. It does not appear by the account that any of the investments were changed after the filing of the account of 1875 except the Rahway bonds, which will be spoken of hereafter. The proof is that the widow was desirous of collecting the interest herself, and up to 1873 she had all the securities of the estate in her hands and collected the income. In that year she was induced to deliver the securities into the custody of Amos Woodruff for safe keeping, and she did it only upon receiving a bond against loss from so doing. Even after that time she collected part of the interest herself. <sup>10</sup>

The accountant insists that he is entitled to commissions upon the income collected by him and paid over to her, and the Orphans' Court so held. But this is an error. The commissions for collecting and paying over the income should have been paid out of the income. <sup>20</sup>

Danly vs. Cummins' Exr., 4 Stew. Eq. 208; Booth vs. Ammerman, 4 Bradf. 129; Pickney vs. Pickney, 1 Bradf. 269; Spangler's Estate, 21 Penn. St. 335.

Upon any moneys in which he may be entitled to commissions in this account the accountant should be allowed commissions at the rate of two per cent. in view of the fact that commissions have been already allowed in the account of 1875 at full statutory rates upon more than \$10,000. Tucker vs. Tucker, 6 Stew. Eq. 235. <sup>30</sup>

There should be no allowance of counsel fees except in the matter of the exceptions. Upon them the accountant was partially successful. There is no error in the order under consideration on that head. <sup>40</sup>

As to the loss upon the Railway bonds. The investment of the money of the estate in those securities was not only contrary to law (Tucker vs. Tucker, ut. sup.) but contrary also to the plain and explicit directions of the will. But it is urged on the part of the accountant that the distributees, including the respondent, released the appellant and his co-executor from all liability on that score by an instrument signed by them and executed in February, 1883. Before that time the City of Railway had become bankrupt and had made default in the payment of its bonds and it had continued bankrupt and in default up to that time. It then proposed a compromise with the bondholders by exchanging the bonds held by them for new ones of the city for 35 per centum of the principal and interest accrued upon the former. Before making such exchange the appellant and his co-executor, Mrs. Woodruff, obtained the before mentioned agreement from the distributees. It recites that the executors are the holders of bonds of the city to the amount of \$3000 and interest, and that the city proposes the compromise; and the distributees thereby consent and agree with the executors that the latter may give up, surrender and exchange the bonds for the new ones, and they authorize them to surrender the former and take the latter in place thereof according to their best judgment and discretion without holding them liable for any loss or damage that may or might result from so doing. The agreement has reference to the proposed exchange alone. It makes no reference to the illegality of the action of the executors in making the investment in the bonds. It discharges the executors from liability for any loss or damage that may result from the exchange, but goes no farther and does no more, either expressly or by implication. Those who signed that instrument cannot question the propriety of the action of the executors in making the exchange, but they are free to question the legality of the original invest-

ment, and the agreement in nowise estops them from demanding indemnity from the consequences of that illegal action. The Orphans' Court was right in charging the appellant with the loss on that investment. It appears from the evidence of the appellant that in making the investment four bonds of \$500 each were bought (December 9th, 1873) for \$1840 and that the appellant paid to the widow as profits, the difference, \$160, between the par value of the bonds, \$2000, and the price \$1840, paid for them. It is urged that the appellant should be charged with the \$160, but there was no exception on this point and no mention is made of it in the answer to the petition of appeal. Seeing that the appellant is now required to make good the loss to the estate to the extent of the \$2000 with interest after crediting the amount of the new bonds taken in exchange, there is no ground for this claim.

The order appealed from will be reversed so far as the allowance of commissions upon the income is concerned. In other respects it will be affirmed.

The appellant will be required to pay costs of the appeal but not counsel fees.



November, in the year of our Lord one thousand eight hundred and eighty-five, on motion of Luther S. Elmer, proctor for, and Gilbert Collins, of counsel with the said respondent, by his Honor Theodore Runyon, Ordinary and Judge of the Prerogative Court of the State of New Jersey, ordered, adjudged and decreed that the said order of the Orphans' Court of the County of Union be and the same hereby is reversed so far as the allowance of commissions upon income as aforesaid are concerned, and that in all other respects the said order be and the same hereby is affirmed, and that the respondent do recover against the appellant her costs on this appeal to be taxed, and that no counsel fee be allowed either party in this Court. It is further ordered that the proceedings be remitted to the said Orphans' Court, and that the account of said appellant as executor be there restated by said Court or the Surrogate of said county in accordance with this decree. 10

THEODORE RUNYON, O.

True copy, Dec. 4, 1885.

HENRY C. KELSEY,

Register.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

To the Honorable the Court of Errors and Appeals  
in the last resort in all causes:

The humble petition of Valentine S. Woodruff,  
surviving executor of the last will and testament of 40

Smith Woodruff, late of Union county, New Jersey, deceased, respectfully shows—

That your petitioner finds himself aggrieved by decree made in the Prerogative Court of this State, by his Honor, Theodore Runyon, Ordinary, bearing date the twenty-fourth day of November, eighteen hundred and eighty-five, wherein the said Valentine S. Woodruff, your petitioner, surviving executor as  
 10 was respondent, on appeal from Union Orphans' Court in these respects, to wit:

1. That said decree orders, adjudges and decrees that the said order of the Union Orphans' Court be affirmed so far as the same charges the said appellant with and orders him to make good the sum of money invested by the executors of Smith Woodruff, deceased, in Rahway city bonds.

And your petitioner humbly appeals from that  
 20 part of said decree which decrees as aforesaid, on the ground that the same is erroneous, for that it should have been decreed that your petitioner be allowed the loss on the Rahway city bonds, as prayed for by said petitioner in his account before the said Union Orphans' Court.

2. That the said decree orders, adjudges and decrees that the said order of the Union Orphans' Court be reversed and set aside so far as the same  
 30 allows the appellant commissions on the income of said estate collected by him, and your petitioner humbly appeals from that part of the decree which decrees as aforesaid on the ground that the same is erroneous, for that it should have been decreed that the said order of the Union Orphans' Court should be in the said particular affirmed.

3. That the said decree orders that the respondent should recover against said appellant her costs  
 40 on said appeal, and that no counsel fee should be allowed appellant in said Prerogative Court.

And your petitioner humbly appeals from that part of the decree which decrees as aforesaid on the ground that the same is erroneous, for that it should have been decreed that your petitioner should recover his costs of the said appeal in said Prerogative Court against the said respondent, and should be allowed a counsel fee in said Prerogative Court.

Your petitioner therefore prays that the said decree in the particulars aforesaid be reversed, set aside and for nothing holden, and that your petitioner may have such further and other relief as to this Honorable Court shall seem meet. <sup>10</sup>

JAMES B. VREDENBURGH,  
Proctor for and of Counsel  
with Appellant.

True copy. Jan. 2, 1886.

HENRY C. KELSEY,  
Clerk.

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NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10	<p>Between— VALENTINE WOODRUFF, surviving ex- ecutor, &amp;c., of Smith Woodruff, deceased,</p> <p style="text-align: right;">Appellant.</p> <p style="text-align: center;">and</p> <p>SARAH W. LOUNSBERRY, Respondent.</p>	<p>On appeal from the Pre- rogative Court.</p>
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The answer of the above named respondent to the  
petition of appeal of the above named appellant

20 This respondent not acknowledging all or any of  
the matters, which in the said petition of appeal are  
contained, to be true, for answer thereto, neverthe-  
less, says and admits that a decree was on the  
twenty-fourth day of November last past, made and  
entered in the Prerogative Court in the cause for  
that purpose mentioned in the said petition, as is  
therein stated, but as to the substance and form  
thereof, this respondent prays to refer thereto when  
30 the same shall be produced. And this respondent  
is advised and believes that the said decree is agree-  
able to equity, and she prays that the same may be  
affirmed with costs to be adjudged to this respond-  
ent.

Dated, February 4, 1886.

LUTHER S. ELMER,  
Proctor for Respondent.

GILBERT COLLINS,  
Of Counsel.

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