INDEX.

TESTIMONY.

EXHIBITS.

Bill of Complaint.

Filed May 24, 1916.

In Chancery of New Jersey.

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To the Honorable Edwin Robert Walker,
Chancellor of the State of New Jersey:

The complainant, Fidelity Trust Company, as executor of and trustee under the last will and testament of William H. Bennett, deceased, respectfully shows that:

1. The complainant is a corporation organized and existing under the laws of the State of New Jersey; is located in Newark, New Jersey, and is authorized to act as executor and trustee of decedents' estates. 20

2. William H. Bennett died on November 19, 1913, a resident of Newark, New Jersey, leaving a will wherein he appointed complainant executor thereof and trustee thereunder. The will was admitted to probate by the Surrogate of Essex County on December 1, 1913, and letters testamentary thereon were issued by him to complainant. 30

3. Defendant, Newark Milk and Cream Company, is a corporation organized under the laws of the State of New Jersey, having its principal office in Newark, New Jersey, and having a capital stock of $25,000, divided into 250 shares, all of which are issued and outstanding.

4. William H. Bennett, in his lifetime, was the owner of 124 shares of said capital stock standing in his name on the books of said de- 40

fendant corporation, and in addition thereto, was the owner of one share of said capital stock represented by stock certificate "No. 9," issued by said defendant corporation, dated May 6, 1902, to Robert E. Bennett, which certificate was sold, assigned and transferred by the said
10 Robert E. Bennett to the said William H. Bennett in his lifetime.

5. Complainant as executor of and trustee under the will of said William H. Bennett, deceased, is now the owner of said 125 shares of the capital stock of said defendant corporation, Newark Milk and Cream Company.

6. On March 3, 1916, said Robert E. Bennett assigned to complainant all his right, title and
20 interest in said one share of capital stock of Newark Milk and Cream Company, represented by its stock certificate "No. 9," and confirmed the assignment to William H. Bennett of May 6, 1902.

7. Defendant, Newark Milk and Cream Company, after the death of said William H. Bennett, transferred said 124 shares of its capital stock on its books to complainant.

30 8. Complainant has paid inheritance taxes assessed by the State of New Jersey against the estate of William H. Bennett, deceased, and has obtained from the Comptroller of said State a waiver consenting to the transfer to it of said one share of the capital stock of defendant, Newark Milk and Cream Company, and has produced to the officers of said defendant corporation said certificate of stock, the assignment thereof to William H. Bennett, certified copy
40 of the letters testamentary issued to complain-

ant, and said waiver, and has demanded that said one share of stock, represented by stock certificate "No. 9" be transferred to it on the books of said defendant corporation, but said defendant corporation, Newark Milk and Cream Company, refused and still refuses so to do.

9. Complainant is informed that one Stanley A. Rutz, an employee of said Newark Milk and Cream Company, and acting as secretary thereof, claims to own said one share of capital stock, represented by stock certificate "No. 9," and pretends that it was a gift to him from said William H. Bennett, in his lifetime.

10. Said stock certificate "No. 9" of Newark Milk and Cream Company was in the control and possession of said William H. Bennett, in his lifetime, and since his death has been and still is in the possession of complainant.

11. In the lifetime of said William H. Bennett and until his death all dividends and profits declared and paid by Newark Milk and Cream Company on said one share of capital stock represented by certificate "No. 9" were paid to said William H. Bennett and were appropriated by him to his own benefit, and no part thereof was ever paid to said Stanley A. Rutz by said Newark Milk and Cream Company, or by said William H. Bennett.

12. Since the death of said William H. Bennett said Newark Milk and Cream Company has paid to complainant yearly dividends and profits on said 124 shares of its capital stock so standing on its books in complainant's name, but has refused and still refuses to pay to complainant the dividends and profits declared and

set apart on said one share of its capital stock represented by certificate "No. 9," and has paid the same to said Stanley A. Rutz.

13. Complainant has in its possession said stock certificate "No. 9," issued by the Newark Milk and Cream Company. Schedule "A," hereto annexed, is a true copy of said certificate; schedule "B," hereto annexed, is a true copy of the assignment thereof; schedule "C," hereto annexed, is a true copy of the confirmatory assignment thereof.

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That said Newark Milk and Cream Company and Stanley A. Rutz, who are the defendants to this suit, may answer this Bill of Complaint, without oath, and each statement therein made.

2. That said Newark Milk and Cream Company may be decreed to transfer on its book to complainant said one share of its capital stock, represented by stock certificate "No. 9."

3. That an account may be taken of the dividends and profits declared and set apart by said Newark Milk and Cream Company on said one share of its capital stock represented by its stock certificate "No. 9," and that said defendants, or either of them, may be decreed to pay the same to complainant, with interest and costs.

4. That complainant may have such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

5. That a writ of subpoena may issue, commanding said defendants to answer this Bill of Complaint and to abide by such decree as this Court may make in the premises.

FRANCIS LAFFERTY,
Solicitor and Counsel with Complainant.

10

SCHEDULE "A."

ISSUED FOR PROPERTY PURCHASED.
Capital, $25,000.

No. 9. Shares.

NEWARK MILK AND CREAM COMPANY.

Incorporated Under the Laws of the State of New Jersey.

20

THIS IS TO CERTIFY, That Robert E. Bennett is entitled to one (1) ..... share in the Capital Stock of the NEWARK MILK AND CREAM COMPANY.

Transferable only on the books of the Company in person, or by Attorney on the surrender of this Certificate.

30

Dated Newark, N. J., A. D. May 6*st*, 1902.

WILLIAM H. BENNETT,
Treasurer.

40

SCHEDULE "B."

For value received, I hereby sell, assign and transfer unto W. H. Bennett

One (1) Shares of the Capital Stock of the

NEWARK MILK AND CREAM COMPANY,

10 and I do hereby constitute and appoint the said

W. H. BENNETT

true and lawful Attorney, irrevocably for and in name and stead, to transfer and set over all or any part of the within shares, and for that purpose to make and execute all necessary acts of assignment and transfer, hereby ratifying and confirming all that said Attorney shall lawfully do by virtue hereof.

20 IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of May, 1902.

R. E. BENNETT.

SCHEDULE "C."

KNOW ALL MEN BY THESE PRESENTS, that

30 Whereas, on the sixth day of May, 1902, the Newark Milk and Cream Company, a corporation of the State of New Jersey, issued to Robert E. Bennett Certificate No. 9 for one share *if* its capital stock; and

Whereas, on the same day, for value received, the said Robert E. Bennett assigned to William H. Bennett, by assignment on the back of said certificate, said Certificate No. 9 for said one share of stock, with full power to transfer said stock on the books of said company to said

40 William H. Bennett; and

Whereas, said William H. Bennett departed this life on or about November 10, 1913, leaving a last will and testament in which he named the Fidelity Trust Company of the City of Newark his executor and trustee, with power to execute and carry out the provisions expressed in his said last will and testament; and 10

Whereas, thereafter, to wit, on about November 29, 1913, the said Fidelity Trust Company, as executor and trustee as aforesaid, became possessed of said Certificate No. 9 for one share of the capital stock of said Newark Milk & Cream Company, as aforesaid, by delivery of said certificate to it by Ida M. Bennett, the widow of said William H. Bennett; and

Whereas, the said Newark Milk & Cream Company refuses to transfer said stock on its books 20 to said Fidelity Trust Company, as executor and trustee as aforesaid, and also refuses to pay to said Fidelity Trust Company the dividends that have accrued on said share of stock for the years 1914 and 1915;

Now, therefore, for the purpose of vesting in said Fidelity Trust Company a more perfect legal title than it now has, if such be possible, to said share of stock, I, Robert E. Bennett, of the City of Newark, County of Essex, State of 30 New Jersey, of the first part, in consideration of the premises and for and in consideration of the sum of one dollar lawful money of the United States of America, to me in hand paid by the Fidelity Trust Company, of the same place, of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, 40

assign, transfer and set over, unto the said party of the second part, its successors and assigns, all of my right, title and interest of, in and to said share of stock and of, in and to said certificate No. 9, representing said share, and to any and all dividends declared thereon.

10 And I do hereby authorize and appoint the said party of the second part my true and lawful attorney, irrevocable, in my name or otherwise, but, as executor and trustee, as aforesaid, at its proper costs and charges, to have, use and take all lawful ways and means necessary to have said share of stock transferred on the books of said Newark Milk & Cream Company to it, as executor and trustee, as aforesaid; and also to take all lawful ways and means to recover from said Newark Milk & Cream Company the dividends 20 that have accrued to said share of stock for the years 1914 and 1915, and such other dividends as may from time to time accrue or be declared thereon.

In witness whereof, I have hereunto set my hand and seal the third day of March, 1916.

ROBERT E. BENNETT. [L. S.]

30 Signed, sealed and delivered
in the presence of

CLARENCE SACKETT.

40

Answer of Stanley A. Rutz.

Filed July 22, 1916.

The answer of the defendant Stanley A. Rutz.

This defendant, Stanley A. Rutz, answering the bill of complaint, says that: 10

1. Paragraphs 1 and 2 are admitted.

2. Paragraph 3 is admitted save that this defendant says that the principal office of the defendant Newark Milk and Cream Company of Newark, N. J. (in the said bill of complaint mentioned as Newark Milk and Cream Company), is at No. 525 Main street, East Orange, N. J.

3. He admits that William H. Bennett in 20 the said bill of complaint mentioned was in his lifetime the owner of 124 shares of the capital stock of the said company standing in his name on its books, and that prior to about the month of May, 1904, the said William H. Bennett was also the owner of an additional share of such stock represented by stock certificate No. 9, issued by said company on or about May 6, 1902, in the name of Robert E. Bennett, a son of the said William H. Bennett, and that prior 30 to May, 1904, the said Robert E. Bennett parted with all of the right, title and interest which he may have had in and to the said stock certificate or the share of stock represented thereby to and in favor of the said William H. Bennett, but this defendant is without knowledge or information sufficient to form a belief as to whether or not the said stock certificate or the share of stock represented thereby was ever sold, assigned and transferred by the said 40

Robert E. Bennett to the said William H. Bennett.

4. He denies that the complainant as the executor and trustee under the last will and testament of the said William H. Bennett is the owner of 125 shares of the capital stock of the said company, but admits that it is the owner of 124 of such shares, and claims that the additional one share of the 125 of such shares mentioned in the bill of complaint is his property and should in this suit be decreed so to be and to be surrendered and delivered to him by the complainant and thereupon to be transferred to him by the said company on its books.

5. He has no knowledge or information sufficient to form a belief as to the truth of the statements of paragraph 6, but says that the action therein referred to as taken by the said Robert E. Bennett on March 3, 1916, with regard to the said stock certificate No. 9, if in fact taken, had no effect as against this defendant.

6. Paragraph 7 is denied.

7. Paragraph 8 is admitted.

8. He admits that he is an employee of the said company in that he is the general manager thereof and is in receipt from it of a salary as such general manager. He says that he is the duly elected and qualified secretary of the said company. He admits that he claims to own the one share of capital stock of the said company represented by its said stock certificate No. 9, but denies that he claims or pretends, or ever did claim or pretend, that the said share was

a gift to him from the said William H. Bennett in his lifetime. On the contrary thereof, he says that such share of stock was transferred to and vested in him by the said William H. Bennett in the latter's lifetime in recognition of and payment for services rendered by this defendant to the said William H. Bennett, and as an inducement to and in consideration of his remaining in the employ of the said company after he had concluded no longer so to do and had so informed the said William H. Bennett, in pursuance of the agreement hereinafter stated.

9. He admits that said certificate No. 9 was in the control and possession of the said William H. Bennett in his lifetime, but says that he has no knowledge or information sufficient to form a belief as to where it has been since his death.

10. Paragraphs 11 and 12 are admitted.

11. He has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13.

He denies that the complainant is entitled to the relief prayed for in its said bill of complaint or any part thereof.

Further answering the said bill of complaint, he says as follows:

12. In and prior to the month of May, 1904, he rendered to the said William H. Bennett services in connection with the latter's personal affairs for which at such time he received no compensation. At such time he was also the assistant general manager of the said company, and under the supervision of the said William H. Bennett in immediate charge and direction

of the details of its business, which was profitable and resulted in the payment of large dividends upon the stock of the said company, of which stock the said William H. Bennett then held and owned one-half. In or about May, 1904, this defendant determined, and informed
10 the said William H. Bennett, that unless he could then acquire at least one share of the capital stock of the said company as his own property and become an officer thereof, he would sever his connection with the company. Thereupon the said William H. Bennett stated to this defendant that it was his desire that this defendant should remain in the employ of the said company in the position which he was then holding and continue in the immediate charge
20 and direction of the details of its business, and that if he would do so, and in consideration of the services theretofore rendered by this defendant to him in his personal matters as aforesaid, he would then transfer to and vest in this defendant one share of such stock from his own holdings, which share would thereupon become and thereafter be this defendant's own property, but that if this was done he desired to retain the certificate for such share of stock in his possess-
30 sion and to receive and retain the dividends thereon during his lifetime, but that from and after his death this defendant should have such certificate and be entitled to have the same immediately transferred to him of record, and also from such time to receive and retain the dividends declared thereon so long as this defendant should own such share of stock. The said William H. Bennett also then informed this defendant that if he would accept such proposition he would cause him to be elected a director
40 and officer of the said company as long as this

defendant should remain in the employ of the said company. The said proposition was thereupon accepted by this defendant, and in accordance with the agreement so made between him and the said Bennett this defendant refrained from severing his connection with the said company and continued to perform his said duties as its assistant general manager until the time of the death of the said William H. Bennett, since when he has been the general manager of the said company. In accordance with the said agreement the said William H. Bennett at the annual meeting of the stockholders of the said company held on May 3, 1904, caused this defendant to be elected a director of the said company, and at a meeting of its board of directors held on the same day to be elected as the vice-president thereof, and from year to year thereafter until and including the year 1913, during which last mentioned year the said William H. Bennett died, to be re-elected as such director and vice-president. At each of the annual meetings of the stockholders of the said company held in such years the said William H. Bennett was present in person or represented by duly authorized proxy, and voted the said 124 shares in favor of the election of this defendant as such director, and at a meeting of the board of directors of the said company held on the day of and succeeding its annual meeting in each of such years the said William H. Bennett, being a director in the said company, also voted for the election of this defendant as the vice-president of the said company. At each and every of such stockholders' meetings this defendant with the knowledge, approval and consent of the said

William H. Bennett also voted the said one share represented by the said stock certificate No. 9 as his own stock. During all of the said time the said William H. Bennett repeatedly admitted that this defendant was the owner of said one share and uniformly recognized him as the owner thereof and his ownership therein as being full and unqualified, save only for the right of the said William H. Bennett to receive the dividends paid on such share of stock during his lifetime. During said period the said William H. Bennett also caused this defendant's name to be entered upon the stock book of the said company as the owner of such share and from the month of May, 1904, until the time of his death always treated this defendant as the owner thereof.

13. By reason of the facts stated in paragraph 12 hereof the complainant as the executor of and trustee under the last will and testament of the said William H. Bennett is estopped from claiming title to the said share of stock or of questioning this defendant's ownership thereof.

COUNTER-CLAIM.

By way of counter-claim against the complainant herein and the co-defendant Newark Milk and Cream Company of Newark, N. J., this defendant says that:

1. He repeats and makes part of this counter-claim each and every of the allegations of paragraphs 12 and 13 of the foregoing answer. He further says that the share of stock in the said company therein mentioned is represented by the stock certificate No. 9 of said company

in the bill of complaint herein mentioned, and that the said stock certificate and share are his property.

2. He prays (1) that said certificate of stock and the said share represented thereby may be awarded to him in this suit; (2) that the complainant as executor of and trustee under the last will and testament of the said William H. Bennett be decreed and directed to surrender said stock certificate to him; and (3) that upon his obtaining the said certificate the said company be decreed and directed to transfer of record said one share to this defendant upon its stock books. 10

LINDABURY, DEPUE & FAULKS,
Solicitors for and of Counsel with Defendant, Stanley A. Rutz. 20

Answer of Newark Milk and Cream Company of Newark, N. J.

Filed July 21, 1916.

The answer of the defendant NEWARK MILK AND CREAM COMPANY OF NEWARK, N. J. (in the bill of complaint herein mentioned as Newark Milk and Cream Company). 30

This defendant, Newark Milk and Cream Company of Newark, N. J., answering the bill of complaint, says that—

1. Paragraphs 1 and 2 are admitted.

2. Paragraph 3 is admitted, save that this defendant says that its principal office is at No. 525 Main street, East Orange, N. J. 40

3. It admits that William H. Bennett in the said bill of complaint named in his lifetime was the owner of 124 shares of its capital stock standing in his name on its books, and that prior to May 6, 1902, the said William H. Bennett was the owner of an additional share of such stock. It says that its stock certificate No. 9 for such additional one share in the said bill of complaint mentioned was issued by it under date of May 6, 1902, in the name of Robert E. Bennett, a son of the said William H. Bennett. It is informed and believes that in or prior to May, 1904, the said Robert E. Bennett parted with any right, title or interest which he may theretofore have had in or to the said stock certificate or the share of stock represented thereby, but it is without knowledge or information sufficient to form a belief as to whether or not said Robert E. Bennett ever sold, assigned and transferred the said stock certificate or the share of stock represented thereby to the said William H. Bennett in his lifetime.

4. It admits that the complainant as executor of and trustee under the will of the said William H. Bennett is the owner of 124 shares of its capital stock, but says that it is informed and believes that the remaining one share of the 125 shares mentioned in the fifth paragraph of the bill of complaint as so owned by the complainant is the property of Stanley A. Rutz, a defendant herein.

5. It has no knowledge or information sufficient to form a belief as to the truth of the statements in paragraph 6.

6. Paragraph 7 is denied.

7. Paragraph 8 is admitted.

8. It says that the said Stanley A. Rutz in the 9th paragraph of the said bill of complaint mentioned is one of its employees and that he is its general manager, and it also says that he is its duly elected and qualified secretary and claims to own the said one share of its capital stock represented by its said stock certificate No. 9, and that so far as it is informed and believes the said Stanley Rutz is the owner of such share of stock and has been such owner at least ever since the death of the said William H. Bennett.

9. It is informed and believes that the said stock certificate No. 9 was in the control and possession of the said William H. Bennett in his lifetime, but it has no knowledge or information sufficient to form a belief as to whether or not since his death the said certificate has been and still is in the possession of the complainant.

10. Paragraphs 11 and 12 are admitted.

11. It has no knowledge or information sufficient to form a belief as to the truth of the statements contained in paragraph 13.

It denies that complainant is entitled to the relief prayed for in its said bill of complaint or any part thereof.

BARRETT & BARRETT,
Solicitors for and of Counsel with Defendant,
Newark Milk and Cream Company
of Newark, N. J.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

The answer of the defendant, Newark Milk and Cream Company of Newark, N. J., was taken this .. day of July, 1916, before me, under the common seal of the said corporation, as by its said seal thereto affixed appears.

10

Replication and Answer to Counter-Claim.

Filed Nov. 18, 1916.

The complainant joins issue on the answer of the defendant, Stanley A. Rutz.

20

As to the counter-claim contained in said answer complainant says:

1. Paragraph 1 is denied.

FRANCIS LAFFERTY,
Solicitor of Complainant.

We consent to the filing of the above replication and answer to counter-claim as of time.

30

LINDABURY, DEPUE & FAULKS,
Solicitors of Defendant, Stanley A. Rutz.

40

Replication.

Filed Nov. 18, 1916.

The complainant joins issue on the answer of the defendant, Newark Milk and Cream Company of Newark, N. J. 10

FRANCIS LAFFERTY,
Solicitor of Complainant.

We consent to the filing of the above replication as of time.

BARRETT & BARRETT,
Solicitors of Defendant, Newark Milk and Cream Company of Newark, N. J.

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IN CHANCERY OF NEW JERSEY.

Between

FIDELITY TRUST COMPANY, Executor and Trustee of WILLIAM H. BENNETT, deceased,

Complainant,

and

NEWARK MILK & CREAM COMPANY and STANLEY A. RUTZ,

Defendants.

10

20 Before his Honor, Vice-Chancellor Stevens,

Mr. Louis Hood and Mr. Edward Campbell, for complainant.

Messrs. Lindabury, Depue & Faulks, for Stanley A. Rutz.

Mr. Clarence Sackett and Mr. Philemon J. Woodruff, for the *cestui que trusts,* the widow and sons of William H. Bennett.

Messrs. Barrett & Barrett, for the Newark
30 Milk & Cream Company.

Transcript of shorthand report of the evidence given upon the trial of the above cause, on Wednesday, May 2, 1917, at Chancery Chambers, Newark, N. J.

EDWARD A. PRUDEN, sworn.

Direct examination by Mr. Campbell.

Q You are the trust officer of the Fidelity
40 Trust Company? A I am.

Q And they are the executors and trustees of the estate of William H. Bennett, deceased? A Yes.

Q As such trust officer, are you in charge of the affairs of the estate of William H. Bennett? A I am.

Q I show you what purports to be a certificate of stock of the Newark Milk & Cream Company marked No. 9, for one share, and ask you how that came into the possession of the Fidelity Trust Company? A That was brought in by Mrs. Bennett. 10

Q When? A After Mr. Bennett died.

Mr. Campbell. I will offer it in evidence.

Marked Exhibit C. 1.

Q Is that certificate still in the possession of the Fidelity Trust Company as executor of the Bennett estate? A It is. 20

Q (*By the Court.*) Where do you say the possession is?

Mr. Campbell. In the executor of William H. Bennett, deceased, Fidelity Trust Company.

Q (*By the Court.*) The Fidelity Trust Company is the executor of William H. Bennett, and your evidence is that you found this among the assets? A Mrs. Bennett brought it in to me, the widow brought it to me with the rest of the papers. 30

Q (*By the Court.*) You have had it ever since? A Yes, ever since.

Mr. Campbell. I believe the defendants will admit that Mrs. Bennett found that certificate of stock among the papers of William H. Bennett, deceased. Mrs. Ben- 40

nett herself is ill and has not appeared this morning.

Mr. Faulks. We will admit that.

ROBERT E. BENNETT, sworn.

Direct examination by Mr. Campbell.

10

Q Mr. Bennett, what relation are you to the late William H. Bennett? A The oldest son.

Q Are you the Robert E. Bennett whose name appears on the face of the certificate offered in evidence? A Yes, sir.

Q Is that your signature on the back of the paper? A Yes, sir.

Q I show you paper purporting to be an assignment, or confirmatory assignment to the same share of stock, and ask you if that is your signature? A Yes, sir.

20

Mr. Campbell. I offer it in evidence.

Mr. Faulks. I object to the reception in evidence of this confirmatory assignment as having no effect in this action and being of no effect against Mr. Rutz whom I represent.

The Court. This is signed in the presence of Clarence Sackett. Do you want him called?

30

Mr. Faulks. I do not object on the ground that it is not proved.

The Court. Then I will admit it. What its effect will be, of course, is a different question; whether it has any effect is a different question.

Marked Exhibit C. 2.

COMPLAINANT RESTS.

40

FRANK TRANSUE, sworn.

Direct examination by Mr. Faulks.

Q You are connected with the office of the Secretary of State, are you not, at Trenton? A Yes, sir.

Q Have you produced this morning the records in the office of the Secretary of State relating to the Newark Milk & Cream Company? A I have; yes, sir. 10

Q I show you five papers, marked respectively, report for 1898, report for 1897, report for 1896, report for 1895, report for 1894, of the Newark Milk & Cream Company; are those the annual reports filed by that company with the Secretary of State during each of the years just mentioned? A Yes, sir, they are. 20

Mr. Faulks. I will offer those in evidence and ask that they be marked with one number, if your Honor please.

Q I next show you, Mr. Transue, paper headed the Newark Milk & Cream Company Annual Report, which is dated June 17, 1913; is that the annual report of that company filed in the Secretary of State's office for that year? A Yes, sir. 30

Mr. Faulks. I also offer that in evidence.

Q Are those the only annual reports of the company filed in the Secretary of State's office prior to 1914? A Yes, sir.

Q I show you next, Mr. Transue, a paper endorsed certificate of stockholders of Newark Milk & Cream Company, without date, but having in the last typewritten line the date six- 40

teenth day of April, 1912, and ask you if that document is also on file in the Secretary of State's office as part of the records of this company? A Yes, sir, it is.

Mr. Faulks. I offer that in evidence.

10 Q I show you next a paper entitled Certificate of Change of Name of Newark Milk & Cream Company, verified April 16, 1912, and ask you whether that is the certificate of change of name of the Newark Milk & Cream Company on file in the Secretary of State's office? A Yes, sir.

Mr. Faulks. I offer that in evidence.

Mr. Hood. With regard to these various offers, I think in so far as they pur-
20 port to be corporate acts that they are irrelevant; in so far as any signature on them may be a declaration on the part of Mr. Bennett, I fancy that there isn't any proof before the Court at this time to make the documents admissible, and for that reason I think that they are incompetent at this time.

The Court. I will not admit them just
30 now, but they can be considered as offered.

Mr. Faulks. I will prove Mr. Bennett's signature on each one of them.

Not cross examined.

STANLEY A. RUTZ, sworn.

Direct examination by Mr. Faulks.

Q Mr. Rutz, are you the Stanley A. Rutz who is one of the defendants in this case? A
40 I am.

Q Did you know Mr. William H. Bennett in his lifetime? A I did.

Q For how long prior to his death had you known him? A Since 1899.

Q Were you familiar with his signature? A I am.

Q Have you seen him sign his name? A Yes. 10

Q Once or more? A Oh, a number of times.

Q I show you the five annual reports of the Newark Milk & Cream Company filed with the Secretary of State for the years 1894 to 1898, which have heretofore been identified as such by Mr. Transue, and ask you whether or not the signature William H. Bennett appearing on each of these reports is in the hand writing and is the signature of Mr. William H. Bennett, who was formerly connected with the Newark Milk & Cream Company? 20

Mr. Hood. We object. The defendant is a party to the record, and it seems to me that this involves a transaction with the deceased. He bases his conclusion as to whether or not that signature is Mr. Bennett's signature upon the fact that he says that he saw Mr. Bennett do some things in his lifetime in which he apparently participated, and it seems to me that it is within the purview of the terms of the evidence act, and therefore that proof is not competent by this witness because he is a party to the record, he is one of the defendants. 30

The Court. Well, here is an executor on one side and an opposite party on the other, and their interests are hostile; now, why is not the objection good? 40

Mr. Faulks. I am not asking this witness to testify as to any transaction, at this time, with Mr. Bennett; I am asking him if he was familiar with Mr. Bennett's signature.

The Court. How could he be familiar with it, except as a result of some transaction, not, perhaps, this immediate transaction, but some other. Cannot you prove it in some other way?

Mr. Faulks. Yes, I can.

The Court. Well, you better prove it in some other way.

Mr. Faulks. I will ask leave to withdraw this witness while I do that.

GEORGE O. SCHEERER, sworn.

Direct examination by Mr. Faulks.

Q Were you acquainted with Mr. William H. Bennett, who was formerly connected with the Newark Milk & Cream Company, during his lifetime? A Yes, sir.

Q Were you associated with him in that company? A Yes.

Q How long had you known him at the time of his death? A Well, about twenty odd years.

Q And were you familiar with his signature? A Yes, sir.

Q Ever see him sign his name? A Yes, thousands of times.

Q I show you the five reports which I just exhibited to Mr. Rutz, and ask you whether or not the signature William H. Bennett appearing on each of those reports is in the hand writ-

ing of and is the signature of Mr. Bennett to whom I have just referred?

Mr. Hood. May I stop you a moment, Mr. Faulks, at this point. Mr. Scheerer is the president of the defendant company, is he not?

Mr. Faulks. I think he is at this time; are you not?

A Yes, sir.

Q (Question read.) A Yes, sir.

Q I show you another of the annual reports produced by Mr. Transue, being the one dated June 17, 1913, and call your attention to the words William H. Bennett appearing on that report? A Yes, that is his signature.

Q I also show you the paper endorsed certificate of stockholders of Newark Milk & Cream Company, produced by Mr. Transue, and ask you whose signature that is that appears signed secondly on that certificate? A William H. Bennett's signature.

Q That is the signature of the same Mr. Bennett? A Yes, sir.

Q I show you next the certificate of change of name of Newark Milk & Cream Company, produced by Mr. Transue, and call your attention to three signatures appearing on this instrument as William H. Bennett; whose signatures are they? A William H. Bennett.

Q You identify each of them as being the signature of the same Mr. Bennett? A Yes.

Mr. Faulks. I now offer these papers in evidence.

Mr. Hood. I suppose they are competent for some purposes, and I assume that being received would make them received only

for such purposes as they may be competent. I think the name has been identified and properly proven, so I have no further objection.

Cross examination by Mr. Hood.

10 Q Mr. Scheerer, calling your attention to the paper certificate of stockholders of Newark Milk & Cream Company, you say you identify the signature as that of Mr. Bennett? A Yes, sir.

Q How much of that line do you identify as being in Mr. Bennett's hand-writing? A This line across here?

Q Yes. A Well, you refer to the figures here?

20 Q I am asking you a question which I would like you to answer. How much of that line do you identify as being in Mr. Bennett's hand-writing? A Why, I don't know anything about the figures, but I presume he put them down there.

Q I am not asking you what you presume, I am asking you what you identify as being in Mr. Bennett's hand-writing; do you identify 30 anything more than William H. Bennett as being in his hand-writing? A Yes, William H. Bennett.

Q That is as far as you can go there? A I couldn't identify the figures.

Q Now, in this paper which is called certificate of change of name of Newark Milk & Cream Company, how much of Mr. Bennett's signature, being the last of his signature that appears on the second page of the paper, do 40 you identify as being in his hand-writing? A

That is his hand-writing, that is his hand-writing (indicating).

Q This William H. Bennett is all his hand-writing? A Yes.

The Court. Well, that does not mean anything on the stenographer's notes.

10

A If you want to get expert figuring—

Q No, no, never mind about that? A —we can compare the figures.

Q I do not want you to compare anything at all; I am asking you simply to answer my questions. A As far as his name, he wrote it.

Q Then you identify only his name as being in his hand-writing? A That is as far as I can on that; figures are figures; I can't tell anything about that.

20

Re-direct examination by Mr. Faulks.

Q I will ask you about another matter, Mr. Scheerer. I show you a book, being a minute book of the Newark Milk & Cream Company, and having on its title page the words "Minutes of Newark Milk & Cream Company," and I call your attention to the portion of this book beginning on page 13, and I ask you to look through the remainder of the book from that point on and tell me in whose hand-writing the entries are made? A William H. Bennett.

30

Q The same Mr. Bennett that you mentioned before? A Yes, sir.

Q Are you connected with the Newark Milk & Cream Company? A Yes.

Q In what capacity? A President.

Q How long have you been an officer of that company? A Twenty odd years.

40

Q Is this book to which I have just directed your attention the first minute book of the company? A As near as I can recollect; yes, sir.

Q Does it contain the minutes of both the directors and stockholders meetings? A Yes, sir.

10 Q Down to May 7, 1912? A That is correct.

Q Now I show you another book, Mr. Scheerer, the title on the first page of which is "Newark Milk & Cream Company. Record of Stockholders and Directors meetings, from and including May 22, 1913," and I call your attention to a signature of William H. Bennett on the first page of that book; is that the signature of the same Mr. Bennett? A The same
20 Mr. Bennett.

Q I also call your attention to what seems to be the signature of the same gentleman on the second page? A Yes.

Q That is his signature? A Yes, that is his signature.

Q And is this the second and present minute book of the company? A Yes, sir.

30 STANLEY A. RUTZ, recalled.

Direct examination by Mr. Faulks.

Q Mr. Rutz, what position do you hold, if any, in the Newark Milk & Cream Company? A Secretary and treasurer.

Q And how long have you held those positions? A Why, about four years.

Q Prior to that were you connected with the company in any other capacity? A Yes, as
40 vice-president.

Q When did you become vice-president? A 1904.

Q Had you been an officer or director or stockholder in the company prior to 1904? A No.

Q When were you first elected a director of the company? A Why, I think some time during 1904; I don't remember the date. 10

Q You were also elected an officer of the company at the same time? A At the same time, yes.

Q You have continued to be director and officer of the company ever since then? A Yes.

Q Now I show you, Mr. Rutz, the first minute book of the company, which has been identified by Mr. Scheerer, its president. 20

Mr. Hood. You have not offered those minutes yet, as I understand.

Mr. Faulks. I am going to offer part of them shortly.

Q I call your attention to the entries appearing on pages 60 and 61 of that book, which purport to be the minutes of a meeting of its stockholders held May 3, 1904; will you look at that record, please, and let me know whether or not those are the minutes of the meeting at which you were first elected a director of the company? A Yes, they are. 30

Mr. Faulks. Now, if your Honor, please, I offer in evidence the minutes of the various meetings of the directors and stockholders of this company appearing in the minute book just referred to, beginning with the stockholders' meeting on May 3, 1904, which appear on pages 60 and 61 of the 40

book, and continuing down to the last entry in the book, which is under date of May 7, 1912.

Marked Exhibit R. 1.

Mr. Faulks. I also offer the first two pages in the second minute book, which has heretofore been identified by Mr. Scheerer as bearing the signatures of William H. Bennett.

Marked Exhibit R. 2.

Q Mr. Rutz, when did you first become connected with the Newark Milk & Cream Company? A In 1899.

Q In what capacity? A As bookkeeper.

Q At that time who was the president of the company? A George O. Scheerer was the president.

Q At that time who was the general manager of the company? A William H. Bennett.

Q Who was in active charge of the conducting of the business carried on by the company? A William H. Bennett.

Q Were your services as bookkeeper of the company rendered under the direction and control of Mr. Bennett as its general manager?

Mr. Hood. I object to that. Isn't that a transaction with the deceased?

Mr. Faulks. I do not think it is, your Honor. I do not think that everything that this witness may have done in the presence of Mr. Bennett was by any means a transaction with him, and if as an employee of the company he performed certain services, I think the fact that they were performed under the direction and control of

Mr. Bennett are clearly not transactions of the kind which are excluded by section 4 of the Evidence Act.

The Court. I will admit the evidence subject to the objection, and rule upon it afterwards.

10

Q (Question read.) A Yes, sir.

Mr. Hood. Of course, it will be needless for me to continue objecting to this line of examination relating to transactions with or statements by the deceased.

The Court. Yes. Well, of course, I shall make this distinction. In so far as Mr. Bennett was speaking or acting for the corporation the evidence is admitted subject to the objection. But in so far as this is a personal transaction between Mr. Bennett and the witness, as it is with respect to the share of stock, purely personal, the corporation does not come in at all, and consequently the statute applies in full force.

20

Q How long did you continue to serve in the capacity of bookkeeper for the company, Mr. Rutz? A About five years.

30

Q That is until about 1904? A About that time.

Q During that time did you render any services to Mr. Bennett as distinguished from any services which you may have rendered to the company?

Mr. Hood. I object.

The Court. What is the precise thing you want to show?

40

Mr. Faulks. I want to show that during this period of five years which the witness has testified that he was employed as a bookkeeper in the company he collected rents personally accruing to Mr. Bennett from properties which Mr. Bennett owned.

10 *The Court.* You mean he went to the tenants and the tenants handed him certain money?

Mr. Faulks. Yes, sir; he collected those rents.

The Court. You can show that.

Q Now, bearing in mind what has just been said, will you tell us what, if anything, you did in this period of five years in the way of collecting rents from tenants of Mr. Bennett? A

20 Why, I devoted some time during office hours and some time outside of office hours collecting rents and doing other personal favors, personal obligations.

Mr. Hood. Well, that you see goes beyond the question. He says he collected rents and did him other personal favors.

The Court. I will strike out everything but that which is strictly responsive to the

30 question.

Q Did I understand you to say that in the matter of collecting these rents you devoted some of your time during ordinary business hours, and some of the time which was your own? A Yes.

Q Did that work continue down to 1904? A Yes, it did.

Q In 1904 did you reach any conclusion as to whether or not you would continue in the

40 employ of the company? A I did.

Q What was that conclusion?

Mr. Hood. I object, what his own conclusion was as to whether he would stay with the company, as being altogether immaterial and incompetent.

Mr. Faulks. What I had in mind, your Honor, is the fact that the cases hold that even where a party is not allowed to testify as to a contract or agreement between himself and the decedent, nevertheless he may testify as to the condition of his mind and the circumstances surrounding him when he executed the contract with the decedent. 10

The Court. I will allow him to testify to his mental operation; he made up his mind not to continue; he can testify to that. 20

Q (Question read.) A I wanted to resign; from the employ of the company.

Mr. Hood. Well, now.

The Court. Yes, he wanted to resign; that is mental operation.

Q Did you determine whether or not you would resign? A Why, I determined that I would. 30

Q Did you tender your resignation to any officer of the company? A I did, to Mr. Bennett.

Q And he was at that time the president of the company? A He was at that time general manager.

Q When was it you did that, as nearly as you can fix the time? A Some time in 1904. 40

Q Well, in the early, middle or latter part of the year? A Why, I should judge about the middle of the year.

Q Did you in fact resign your employment with the company at that time? A No, I did not.

10 Q Why not?

Mr. Hood. I object.

The Court. I exclude that if the reason why is that he had a conversation or transaction with Mr. Bennett.

Q Leaving out for the moment, Mr. Rutz, any conversation which you then had with Mr. Bennett, did you as a result of anything which occurred at that time continue in the employ of the company? A I did.

20 Q Was there any change in your employment after that time? A There was; yes.

Q And what change was that? A I was made a director and became vice-president, made vice-president and director of the company.

Q What duties did you thereafter—

The Court. Well, the duties prescribed by the by-laws.

30 *Mr. Faulks.* I did not mean the mere duties of those offices, but in connection with the business of the company.

The Court. What do you want to show?

Mr. Faulks. I want to show that as a result of what occurred at that time this witness not only did not carry out his intention of resigning from the company, but continued with it in a more important capacity, and continued to perform other

40 duties.

The Court. In the capacities that he has stated. Do you want to ask him what the duties of those offices were, outside of the by-laws?

Mr. Faulks. No, your Honor.

The Court. They are prescribed by the by-laws. If there is anything outside of the by-laws that he undertook to do you can show that. 10

Mr. Faulks. I want to ask him whether he thereafter performed any duties for the company other than the duties which the by-laws prescribed should be performed by a vice-president or director thereof.

The Court. You can show that.

Q In addition to whatever duties you may have rendered as vice-president of the company or as a director, did you after this time in 1904 which you have mentioned render any other service to the company than that of bookkeeper? A I did as assistant manager. 20

Q When did you assume the duties of that office? A When I became a director and vice-president.

Q How long did you continue to perform those duties? A Until about some time during the latter part of the year 1913. 30

Q Is that the time when Mr. Bennett died? A Yes.

Q What were the nature of the duties which you—

The Court. I do not think that is important. What difference does it make, it is long after the transaction occurred.

Mr. Faulks. My purpose in seeking to bring this testimony out, your Honor, is 40

this, to show that this witness as a result of something which occurred in 1904 not only did not leave the employ of the company, but thereafter rendered to it services which were more valuable than he had theretofore rendered, which were of a more
10 responsible character and greatly benefited the corporation.

The Court. That appears from the position he occupied. Now, what difference does it make what he did in 1913?

Mr. Faulks. I did not intend to ask him what he did from 1913 on, but I did intend to ask him what the character of the duties were that he performed as assistant manager of this company from 1904 to 1913?

20 *The Court.* I do not think that is at all important; he said he was appointed assistant manager, and we all know what manager means.

Q When did you first attend a meeting of the stockholders of this company? A 1904.

Q Thereafter, down to the time of Mr. Bennett's death, how frequently did you attend those meetings? A Once a year.

30 Q That is every meeting? A Yes.

Q Every annual stockholders' meeting? A Yes.

Q From the time that you became a director in the company how frequently did you attend the organization meetings of its board of directors? A Why, at least once a year or more when special meetings were held.

The Court. Do not the minutes show all that?

40

Mr. Faulks. They do not necessarily, your Honor; some times they speak of the stockholders being represented.

Q Referring to those annual stockholders' meetings, can you tell us how often Mr. Bennett attended those meetings during the years from 1904 to 1913? A Yearly. 10

Q Did he at those meetings vote for the directors of the company which were then elected? A He did.

Mr. Hood. Well, I suppose the record is the thing that ought to prove that. I do not know that Mr. Rutz is in any position to say whether or not Mr. Bennett voted for the election of officers at these meetings or not; I suppose the record is the thing that establishes it, if anything. 20

Mr. Faulks. Well, the minutes in this case are not sufficiently full to show all that I want to bring out; that is, they show that at these various annual meetings of the stockholders at which the board of directors of this company were elected all of the stock of the corporation was voted for certain directors, but they do not show that in every case the vote was made by the stockholder present. Now, if Mr. Bennett was present at each of these meetings and voted for Mr. Rutz as a director of this company that would be evidence, and we think strong evidence, that Mr. Rutz was a stockholder in the company, and it would create an estoppel against the complainant. 30

Mr. Hood. If Mr. Rutz knows how Mr. Bennett voted his stock I haven't any objec- 40

tion to his testifying to it, if he knows. I do not know how the proceeding was conducted. When I spoke to your Honor about it I had in mind more particularly a directors' meeting that followed immediately upon the annual meeting, I was looking at the annual meeting in 1904.

10

Mr. Faulks. From 1904 to 1913.

The Court. If there is any one meeting of which the record is not complete you may complete it by the testimony of this witness.

Q Mr. Rutz, after calling your attention to the fact that the minutes of the annual stockholders' meeting of this company held in May, 1912, and not written up in the minute book, I ask you whether or not you were present at that meeting? A To the best of my recollection we were all present at that meeting.

20

Q At that meeting do you know whether or not Mr. William H. Bennett voted for the directors of the company? A He did.

Q Were you one of the directors of the company that were elected at that meeting? A I was, yes.

30

Q Did or did not Mr. Bennett vote for your election as a director of the company at that meeting? A He did.

Q Now, going back to 1904, Mr. Rutz, did you have any conversation with Mr. Bennett following your announcement to him of your intention to leave the employ of the company?

Mr. Campbell. I object to that.

Q (Question read.)

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Objection withdrawn.

A Yes, I did.

Q Will you state what that conversation was?

Mr. Campbell. I object to that, your Honor.

The Court. Why, is it competent? 10

Mr. Faulks. I presume that the executor has the privilege of excluding anything with reference to a transaction with or a statement made by the deceased, but I think that that rule is not broad enough to apply to anything which may have shown the intention of the deceased with reference to the matter which was discussed at that time.

The Court. Well, your evidence to be 20 competent must relate to this share of stock; that is the only controversy that we have here, and the conversation must necessarily be a conversation in relation to the share of stock, otherwise it would not have any tendency to throw light upon the issue. I assume, therefore, you may correct me if I am wrong, that this conversation has reference to that share of stock. Has it or not? 30

Mr. Faulks. It has, sir.

The Court. Then I overrule it.

Mr. Faulks. I asked the question for the purpose of bringing out the evidence as to the intention of the decedent with reference to that share of stock, not for the purpose of relating a transaction which occurred then, although such relation may be necessary for the purpose of showing what the intention of the testator was. If 40

he had any intention with reference to the transfer of that share of stock, or with reference to the disposition of it I think that under the cases we are entitled to show it.

The Court. If it was not a transaction with the deceased at that time it was certainly a statement by the deceased at that time, and I think it comes within the language of the statute.

10

Q Did Mr. Bennett at that time express any satisfaction or dissatisfaction with the services rendered by you either to him or to the company, or as to his intention or desire with respect to your continuing in the employ of the company?

20

Mr. Hood. I object to that.

The Court. I overrule it.

Q I show you, Mr. Rutz, a stock certificate book; is this the stock certificate book of the Newark Milk & Cream Company? A It is.

Q And is produced from your custody as the secretary of that company? A Yes.

Q I call your attention to certificate No. 7 and its accompanying stub: in whose hand-writing are the words "W. H. Bennett" as those words appear on this stub and this certificate? A Mr. Bennett's.

30

Q And in whose hand-writing is the balance or the remainder of the writing?

Mr. Hood. Well, I suppose that is strictly covered by the ruling of the Court before, but I will let it go.

A Mr. Bennett's.

Q I also call your attention to the stub of certificate No. 4 and to that certificate, on each

40

of which is written the words "Cancelled for non-payment"; do you know in whose handwriting such words are in? A That is Mr. Bennett's.

Mr. Hood. Well, now, I object to that question, because I do not see what the relevancy of that certificate is to what we have in hand. That certificate is No. 4. 10

Q Well, certificate No. 4 is the one in lieu of which No. 9 was issued.

The Court. I do not see that it has any relevancy myself.

Mr. Faulks. Now I offer this stock certificate book in evidence, and call attention to certificate No. 7 and the stub therefor, and the stub for certificate No. 9, which is the certificate involved in this suit, and I will have noted on the record for the purposes of convenience that the stub shows this certificate No. 9 as issued in the name of Stanley A. Rutz. 20

Marked Exhibit R. 3.

The Court. That seems to contradict the certificate itself; I do not understand that; this is certificate No. 9, and it is issued to Robert E. Bennett. 30

Mr. Faulks. Well, we can explain that in part; we could explain it fully if the evidence which has been excluded were admitted.

Q In addition to this stock certificate book does the company have a stock transfer book and a stock ledger? A Yes.

Q Are they kept at its principal office in East Orange? A Yes. 40

Q And with the company of which Mr. Picking, who is here, is a representative? A Yes.

Q Is that company the registered agent of your company? A Yes, sir.

Cross examination by Mr. Hood.

10 Q Just a question or two, Mr. Rutz. With your change in position in the company was there also a change in your compensation? A Yes.

Q With each change of position that you held?

Mr. Faulks. I object to that, as I was not allowed to go into that matter, if your Honor please.

20 *Mr. Hood.* I am talking of the company.

The Court. I think the question is plainly competent. Was there a change in the compensation?

Q And by a change of the compensation you mean an increase of compensation, do you not? A Yes.

Q At the meeting of 1912 that you have testified to was the voting done by ballot? A Why, it was always customary to do it by ballot, and to the best of my memory it was done by ballot.

30

Q Did you have tellers? A Well, I couldn't say as to that.

Q Well, how do you know that Mr. Bennett voted for you? A I don't know, any more than we were all present and the usual method of voting was gone through.

Q And that you were elected? A And that I was elected.

40

Q And so declared? A And served as such.

Q How do you know Mr. Bennett voted his stock for you? A I don't know, excepting at subsequent meetings he did vote it.

Q Then you haven't any recollection with regard to the meeting of 1912? A Not as to its details. 10

Q Not as to his voting his stock for you, have you? A Well, I couldn't say that.

Re-direct examination by Mr. Faulks.

Mr. Faulks. Now I submit that over my objection the door has been opened by Mr. Hood for the admission of the evidence that I sought to bring out before; he has asked this witness as to whether or not his compensation was not increased subsequent to the time when he changed his mind of leaving the employ of the company, and I submit I have a right to show what that compensation was. 20

The Court. How much it was before and how much after?

Mr. Faulks. What the increase was.

The Court. You have a right to show what his compensation was as bookkeeper; then you have a right to show what his compensation was as vice-president and assistant manager. 30

Q What was your compensation as bookkeeper of the company in 1904? A Why, I can't tell exactly what it was.

Q Well, give it as nearly as you can recollect it? A Why, I should judge about twenty-seven dollars a week. 40

Q Now, what was your compensation as a director of the company and as its assistant manager when you continued in its employ in those capacities, from 1904 on? A In the matter of money or other compensation in addition?

10 Q Whatever compensation there was as a result of your continuing in the employ of the company?

Mr. Hood. I suppose you mean by the company; that was the point of my inquiry.

Mr. Faulks. No, I mean whatever compensation he may have received, whether it be in the way of stock or increase of salary or what.

The Court. Well, if he received a divi-
20 dend on the stock he can show that; if he received an increase in salary he can show that.

Mr. Faulks. Suppose he received the stock itself, why cannot I show that?

The Court. What do you mean, the certificate of stock?

Mr. Faulks. Yes, sir, or an interest in it.

The Court. You can show any act
30 which was not the act of Mr. Bennett.

Mr. Faulks. But I submit, your Honor, that under the testimony as it stands now I am entitled to show by this witness whatever compensation he received after 1904 that may have been an increase over what he was receiving prior to that time.

The Court. Certainly, so far as it concerns the company.

Mr. Faulks. No, not only so far as it con-
40 cerns the company.

The Court. Well, I shall limit it to that. Mr. Hood's cross examination was limited to that, and I will limit you to that on the re-direct examination. I will allow you to show what his salary was, whatever he received from the company after he made up his mind to continue with the company. 10

Q Mr. Rutz, as part of your compensation for remaining in the employ of the company after the time in 1904 about which you have testified, and when you say that you told Mr. Bennett it was your intention to resign your position with the company, did you receive either from Mr. Bennett or the company any additional compensation, and, if so, what was it?

Mr. Hood. I object. 20

The Court. That question is overruled as far as it relates to the compensation received from Mr. Bennett.

Q As a result of your continuing in the employ of the company after that time did you or not obtain the share of stock represented by certificate No. 9?

Mr. Hood. I object.

The Court. If the question is intended 30 to show the delivery of the stock certificate by any person other than Mr. Bennett I will allow it.

Mr. Faulks. No, I cannot say that it goes as far as the delivery, your Honor.

The Court. I will allow it to that extent and no further. I will allow this question to be answered if it does not relate to a transaction between the witness and Mr. Bennett. He might have received a certifi- 40

cate of stock from some third person; if he did you may show that. He might have received dividends on this stock; if he did you can show that.

Mr. Faulks. Under the restrictions placed by your Honor on the other question I cannot press it. I think I ought to be permitted to show whatever compensation this witness received as a term of his remaining with the company, whether he received it from Mr. Bennett or from the company; Mr. Bennett may have advanced it in the interest of the company.

The Court. That is a different thing, then it would be compensation from the company. Anything that he received from Mr. Bennett I shall exclude.

HARRY H. PICKING, sworn.

Direct examination by Mr. Faulks.

Q Mr. Picking, with what company are you connected? A New Jersey Registration & Trust Company.

Q Located in East Orange? A Yes, sir.

Q Is your company the principal and registered agent of the Newark Milk & Cream Company? A It is.

Q How long has it been such? A About four years.

Q I show you two books, one with loose leaves fastened in it, and marked on the cover "Newark Milk & Cream Company No. 115;" what book is that? A That is what we term the transfer book.

Q Is that the stock transfer book of this Newark Milk & Cream Company? A Yes.

Q The other book to which I refer is a bound book, bearing the same title; what book is this? A That is the stock ledger.

Q Of the same Newark Milk & Cream Company? A Of the same company.

Q Does the first of these books show the various stock transfers which have been made of the company's stock? A Yes. 10

Q Does the second show the present record holdings of its stock? A Yes.

Q These are part of the regular corporate records of that company? A They are.

Q Kept by your company as its registered agent? A Yes.

Mr. Faulks. I offer these books in evidence, if your Honor please, and call attention to the fact that certificate No. 9 appears by the stock transfer book to have been transferred to and now stands in the name of Stanley A. Rutz, and that by the stock ledger book Mr. Stanley A. Rutz appears as the owner of two shares represented by two different certificates. 20

Q When was this second share transferred to Mr. Rutz? A The date shows.

Q Certificate No. 10? A On December 8, 1913. 30

Q There is no date given for the transfer of the certificate No. 9 representing one share, is there? A None appears there, no.

Marked Exhibits R. 4 and R. 5.

Q I direct your attention to the company's stock certificate book marked R. 3, and particularly to the stub for certificate No. 9, which bears the name Stanley A. Rutz; in whose hand- 40

writing does that name appear there? A That is my writing.

Q When did you write that name in there? A At the first time I saw Mr. Bennett, that is, about four years ago.

Q Did you have a conversation with him
10 at that time? A I did.

Q Did that conversation relate to the matter of the ownership of the share of stock represented by this certificate No. 9 of the Newark Milk & Cream Company? A Yes.

Q State what that conversation was. A Well, Mr. Bennett requested a conference with our company, the representative of our company, with regard to taking care of these reports and meetings, and this was in the early
20 part, as I remember, of 1913, when I saw Mr. Bennett in his office in Newark, and he then intended, and did turn over to me all of the records of the company in order that we might take care of them. I asked him for the other books which seemed to be missing, which were the stock ledger and transfer books; he said he didn't have any, the only record they had was the stock certificate book, but I told him that before we would assume charge of the
30 affairs of the company he would be required to file with us a stock ledger and a transfer book, and he ordered me to furnish those, and before leaving the office that day, before leaving his office that day I went over in a casual way the stock certificate book and other records, and found the stub of No. 9 blank; I told him that our company would have to have a numerical and complete record of the owners of the stock, otherwise the record would be incomplete, and
40 I called his attention to the blank stub No. 9,

and asked him who the owner of the share was, of the stock, and he said: "That stock is owned by Stanley A. Rutz, and that certificate is issued for one share." "Then," I said, "the stub should be filled in accordingly;" and he requested me to do it, and handed me the pen, which I did. I asked him for the date, but he couldn't furnish me the date. That is how I remember it.

Q Did you or not thereupon write Mr. Rutz's name on the stub opposite certificate No. 9, and do that in Mr. Bennett's presence? A I did; oh, yes.

Cross examination by Mr. Hood.

Q You say your company took charge of the books in 1914? A May, 1913, I think the record shows.

Q And at that time the only thing that the Milk & Cream Company had was just this little stock book? A That is one of the records.

Q Stock certificate book? A Record of ownership of the stock.

Q That is the only thing they had? A As far as I know, yes, sir.

Q And then you furnished these two additional books that you have presented here today? A Yes.

Q And you wrote those up from this little book? A They were entered from this book, yes.

Q From this little stock certificate book? A Yes, sir.

Q And it was simply a compilation of the information that you got from this little stock certificate book? A Yes.

Q It does not record the transactions as they occurred at the time of the occurrence? A Oh, no.

Q Well, that is true with regard to the last share owned by Mr. Rutz, is it not? A I don't quite get that question.

Q Well, you have two shares of stock entered as owned by Mr. Rutz, and what I wanted to find out from you was whether the second transaction occurred at the time,—does that show he had two shares of stock? A Yes, now.

Q He now has two shares of stock? A Yes.

Q Can you tell me when the second of these shares of stock was acquired by him? A Yes, sir; on December 8, 1913.

Q Did you at that time have charge of these books? A Yes, sir.

Q And was the transfer made at your office? A I can't remember the physical,—there are so many of those things.

Q Can you tell me as to whether or not it related to a transaction of that time, or whether it, too, was a part of the compilation of this record? A Oh, no, no; that was another transaction; at the time that—

Q Well, was it a transaction that had occurred before you compiled these records or was it a transaction that occurred after you compiled the record? A In regard to what number?

Q In regard to the second share of stock? A After.

Q After you compiled the records? A Yes, sir.

Q I understood you with regard to the conversation that you had with Mr. Bennett, that at the time when you looked over this stock

certificate book the stub of certificate No. 9 was not filled in? A It was absolutely blank.

Q Was that the only one that was absolutely blank? A That was the last one.

Q That was the last one of the certificates that had been issued? A Yes, sir, up to that time. 10

Q And that was the only one that was blank? A The stub, yes.

Q You say that you said to Mr. Bennett that you could not take over the books unless you had all information about it? A Yes, numerical order of its issue.

Q Give me all that he said to you on the subject of filling in the blanks there? A Well, I don't think I can think of anything more; I gave it to you as it occurs to me. 20

Q Well, didn't you say: "Mr. Bennett, I think that you must fill in the blanks on that certificate before we can take it over?" A Yes, sir.

Q You did say that to him? A Yes, or I told him, at least, we should have to have the information that should be contained on No. 9 stub.

Q Did you ask him who had No. 9 certificate? 30 A I asked him who the owner of it was, that we had to have the record owner of the shares.

Q Did he tell you who was in possession of certificate No. 9? A No, sir, he did not.

Q Did he say: "What is the difference in whose name it is?" A No. I have tried to think of all I could.

Q Well, I am trying to bring your memory back. Did he say: "What is the difference in whose name it is?" A No, he didn't say that. 40

Q Did he say to you: "Well, if you have to have a name, put in Stanley Rutz's name?" A He told me it was in the name of Stanley A. Rutz.

Q Won't you answer my question if you can? You have not been repeating to us his identical
10 words, have you? A Oh, no; just as I recall the instance, of course.

Q I am asking you whether he didn't say to you: "Well, if you have to have a name in there, put in Stanley Rutz's name?" A No, he didn't say that.

Q He didn't say that? A No, sir.

Q Can you tell me accurately what words he used about it? A Yes.

Q What were the words? A I asked
20 him who was the owner of record of certificate No. 9, and for how many shares it was issued, and he said: "Stanley A. Rutz is the owner of that certificate for one share of stock." "Then," I said, "the name should be entered on the stub, because I couldn't take the book unless we have a numerical record of the certificates that are missing; we must have a record of No. 9; if it is cancelled and not used we must know of it."

30 Q So that you asked him for the record owner of it? A Yes.

Q And he told you that Stanley A. Rutz was the record owner? A Yes, sir.

Re-direct examination by Mr. Faulks.

Q Did he say that Stanley A. Rutz was the record owner, or that Stanley A. Rutz was the owner? A I think I injected the word "record" into the conversation; he said he was the owner
40 of a share of stock, but I didn't know how many

shares there were until he told me it was for one share, and I asked him for the date and he couldn't give it to me.

Q Just what did he say with reference to the ownership of this share of stock, as nearly as you can recollect it? A Well, I asked him who was the owner of the certificate of stock, and he said "Stanley A. Rutz is the owner of the certificate, which reads for one share of stock." That is as I am trying to bring my memory back four or five years.

Q How clear are you as to whether that is the substance of what he said or not? A Well, that is so, Mr. Faulks.

Re-cross examination by Mr. Hood.

Q Now, Mr. Picking, as a matter of fact, have you any distinct recollection at all as to what was said by him and by you in regard to that share of stock, as to the words of it? A Nothing more than I said.

Q Well, have you that? A Why, certainly I have or I wouldn't have said it.

Q Is it not a fact that all you remember about it is that you talked to Mr. Bennett about that stub being blank and asked him for a name, and that he gave you the name of Stanley A. Rutz, and gave you the certificate as No. 1, and that you entered it? A Yes.

Q Isn't that all that you really remember about it? A What I have said I remember.

Q I am asking you now on further consideration whether you do as a matter of fact remember the identical words that passed between you and Mr. Bennett? A Yes.

Q You do? A Yes.

Q You do specifically remember the words? A As I have related already.

Q Did you ask him who was the record owner, and he answered that Stanely A. Rutz was the owner and the number of shares is one? A That is right.

Q And that you do remember specifically, you say? A Yes, sir.

10

GEORGE O. SCHEERER, recalled.

Direct examination by Mr. Faulks.

Q Were you in the habit of attending the annual stockholders' meetings of the Newark Milk & Cream Company from 1904 to 1913? A Yes; there were some I missed.

Q At such meetings as you were present was Mr. William H. Bennett also there? A Yes, sir.

20

Q At those meetings was Mr. Rutz also there? A Sometimes.

Q Did or did not they each vote at those meetings for the election—such of those meetings as you were present at—for the election of directors of the company? A As to the amount of stock?

Q No, first as to whether they voted at those meetings for the election of directors? A Yes.

30

Q Do you know from what you observed at those meetings as to the number of shares which Mr. Bennett voted and the number which Mr. Rutz voted? A Yes, one hundred and twenty-four and one.

Cross examination by Mr. Hood.

Q How did you conduct your vote, was it by ballot? A No, I just said we voted so many and that ended it; they made no record of it outside of the minute book.

40

Q Well, was there any public declaration as to the number of shares of stock that were being voted? A Yes.

Q How was it done? A Simply counted up the share and put it in a book and said so many voted two hundred and fifty shares.

Q The secretary did that? A Well, that is all there was to it. 10

Q Well, the secretary did all the voting, did he? A No, he added them up.

Q Did you have tellers? A No.

Q (*By the Court.*) Did not have any tellers, or any ballots? A No.

Q (*By the Court.*) What was the proceeding; the usual proceeding is by tellers and ballots? A The proceeding in this case was, the secretary said, they put up the nomination for directors and George O. Scheerer voted one hundred and twenty-four and Mr. Bennett one hundred and twenty-four, and that is all there was to it, verbal. 20

Q (*By the Court.*) Orally? A Yes.

Q (*By the Court.*) He asked how many shares you voted, and you said one hundred and twenty-four? A Yes.

Q (*By the Court.*) And then he asked the others how they voted? A Yes, and then they said we were nominated, and that is all there was to it. 30

Q Who asked the question how many shares were voted? A Sometimes I did, sometimes Mr. Bennett did, according to who was there.

Q So that you made a declaration as you voted, I vote one hundred and twenty-four shares of stock for Mr.— A Mr. So and So and So and So.

DEFENDANTS REST. 40

ROBERT E. BENNETT, recalled.

Direct examination by Mr. Campbell.

Q Were you formerly employed by the Newark Milk & Cream Company in any capacity? A Yes, sir.

10 Q Were you employed at the same time with Mr. Rutz? A Yes, sir.

Q You were not an officer of the company, were you? A No, sir.

Q Did you ever see Mr. Rutz sign himself as vice-president of the company, or declare himself an officer? A Yes, sir.

Q Did you have any conversation with him about being a stockholder or a vice-president at that time? A Yes, sir.

20 Q What did he say.

Mr. Faulks. I would like to have the time fixed, if your Honor please.

Q At any time when he represented himself as vice-president of the company.

Mr. Faulks. I think we are entitled to have the time fixed.

The Court. You can find out on cross
30 examination. You better fix the date as nearly as you can. You say you had a conversation with him in reference to that, now when, how long ago?

Q Was it before or after 1904? A It was after 1904.

Q Long after?

The Court. Cannot you fix it more definitely than that; you say 1904; fix it more
40 definitely?

Q What year was it in? A As near as I can remember, possibly it was in 1906; it may have been later than that.

Q In 1906 did you ask Mr. Rutz if he was a stockholder in the Newark Milk & Cream Company? A Yes, sir.

Q What did he say? A Why, I saw him signing his name vice-president to some article or other standing at the desk, and I asked him if he was vice-president and a stockholder, and he said no, he said he is only a dummy stockholder.

Cross examination by Mr. Faulks.

Q What is the nearest time you can fix when you say this conversation took place? A I can't tell you that.

Q Where did it take place? A In the office of the Newark Milk & Cream Company, 20 and 22 Bridge street.

Q Were you employed there at that time? A Yes.

Q In what capacity? A I was bookkeeper, assistant bookkeeper.

Q Who else was present when this conversation took place? A Nobody; we both stood there; the other bookkeeper was the other side of the desk.

Q Who was he? A I have forgotten his name.

Q What time of day was this? A Can't tell you that; it was in day time.

Q Do you remember in what room it occurred? A Front office.

Q How long had you been employed by the company at that time? A How long had I been employed?

Q Yes. A I was employed by the company ever since I was sixteen years old.

Q Have you ever had any higher position there than that of bookkeeper? A No, sir; I was collector, salesman and collector.

10 STANLEY A. RUTZ, recalled.

Direct examination by Mr. Faulks.

Q Mr. Rutz, have you heard the testimony that was just given by Mr. Robert E. Bennett with reference to a conversation which he says he had with you at the office of the company in possibly 1906, in which he asked you if you were a stockholder in the company and you said no, you were only a dummy stockholder, or words to that effect? A I heard the testimony.

20 Q Did you ever make any such statement to Mr. Bennett? A I did not.

Q Did any such conversation ever take place? A No, never.

Cross examination by Mr. Hood.

Q Mr. Robert E. Bennett was working at the Cream Company, was he not? A Oh, yes, he was working there.

30 Q And he had been working there for a good many years? A Yes.

Q Do you know how long he continued to work there? A I couldn't tell offhand, no.

Q Was he assistant bookkeeper there? A Yes.

Q Were your relations with him friendly? A Why, only in a business way.

Q Those were the only relations you had with him? A That is all.

40 CASE CLOSED.

Opinion.

Filed August 2, 1917.

Mr. Louis Hood, for complainant.

Mr. Frederick J. Faulks, for defendants. 10

STEVENS, *V. C.*

This is a suit to compel the defendant company to transfer, on its books, a share of its stock to complainant. The defendant Rutz asserts title to the same share and asks similar relief.

The complainant is the executor of William H. Bennett, who died in November, 1913. Bennett had been, for many years, general manager of the defendant, the Newark Milk & Cream Company. 20 In 1904 he was the owner of 125 shares of its stock. This was half of its total issue of 250 shares. The defendant, Stanley A. Rutz, had, in 1899, become its bookkeeper. In 1904 he says that he wanted to resign from the company. He did not. On the contrary, he was elected a director and vice-president, and rendered service as assistant manager at an increased compensation. He continued in these positions until Mr. Bennett's death in 1913, when he became secretary and treasurer. 30 In his answer and counter claim, he says that prior to the month of May, 1904, he had rendered service to Bennett, in connection with Bennett's personal affairs, for which he had received no compensation; that in May, 1904, he informed Bennett that unless he could then acquire at least one share of the capital stock of the company as his own property and become an officer. 40

thereof, he would sever his connection with it; that thereupon Bennett stated to him that it was his desire that he, Rutz, should remain in the company's employ, and that if he would do so "and in consideration of the service theretofore rendered by him to Bennett in his personal
10 matters, he would transfer to him one share of stock from his own holdings, which share would thereupon become and thereafter be his own property; that if this was done, he (Bennett) desired to retain the certificate for such share and to receive and retain the dividends thereon during his lifetime, but that after Bennett's death, he (Rutz) should have the certificate and be entitled to have it transferred to him of record."

20 This alleged agreement was not reduced to writing. As the controversy is between an executor, in his representative character, on the one side, and Rutz on the other, the latter was unable to give evidence of what occurred, and the alleged agreement has not been proved, at least directly.

The question is, has it been proved circumstantially? The proof relied upon is the following: In 1904, and the years following, Rutz,
30 at the stockholders' annual meetings, voted as the owner of one share. He was elected and reelected a director and vice-president at meetings which Bennett as secretary recorded. In a certificate of change of name filed with the Secretary of State in April, 1912, Bennett *in* represented as the owner of 124 shares and Rutz as the owner of one. In a report filed with the Secretary of State in June, 1913, Rutz is stated to be a director and vice-president. In the year
40 1913 the defendant company employed the New

Jersey Registration & Trust Company to act as its registered agent. When the stock certificate book was being turned over, it appeared that stub No. 9, corresponding to the stock certificate in controversy, had not been filled in, and the Registration Company's agent called Mr. Bennett's attention to the omission. After considerable questioning and cross questioning on the subject, the agent testified as follows:

> Q Did you ask him who was the *record* owner and he answered that Stanley A. Rutz was the owner, and the number of shares is one? A That is right.

Then the agent filled in the stub with the name "Stanley A. Rutz." This was nine years after the alleged agreement was made and in the same year that Bennett died.

This evidence shows that Bennett permitted Rutz to hold himself out to the world as the owner of a share and that Bennett admitted on one occasion that Rutz was the owner of the share in question. It does not show how Rutz became owner; it does not show the terms of the agreement under which he became owner, and it does not show the consideration, if any.

On the facts proved we might conjecture either that Rutz was a "dummy" director or that he had the promise of a share by way of gift, or that there was an agreement to give him a share based on valuable consideration. It will be noted that the proof fails to show that there was any actual transfer of any share or that Rutz ever received any dividend, although the company was paying dividends.

The evidence on the part of the complainant is as follows: Bennett was the owner of 125 shares long prior to 1904. A certificate for one

of these shares was made out in the name of Bennett's son, Robert, who at the time it was issued, assigned it, by formal words endorsed on the back of the certificate, to his father, who thereafter and up to the time of his death, held it unassigned and received and appropriated the dividends. Robert testified that about the year 1906, when he saw Rutz sign his name as vice-president, he asked him if he was vice-president and a stockholder, and he said no; that he was only a dummy stockholder. This conversation Rutz denies.

It is well settled that as between the transferror (Robert) and the transferee (William), title to the stock certificate was completely vested without transfer on the books. Matthews *v.* Hoagland, 3 Dick. 486, Farrell *v.* Passaic Water Co., 12 Buch. 97. The burden of proof is on Rutz. Bennett was unquestionably, up to his death, the legal owner. As between the complainant executor and the company, the former has the right to insist that a certificate be issued to it. Farrell *v.* Water Co., *supra.* Being thus the owner, it is for Rutz to show that Bennett made a contract founded on valuable consideration, to transfer the share to him. Uncertainty in the contract is fatal to a claim for specific performance. Myers *v.* Metzger, 18 Dick. 780, Potter *v.* Hollister, 18 Stew. 508, 1 Dick. 609.

The question, therefore is, has a contract to transfer, certain in all its parts, been shown? It seems to me that it has not. The court is asked to infer such a contract from three circumstances. First, that prior to 1904, Rutz had collected rents for Bennett personally. There is nothing in the evidence to connect the obligation, if any, to pay for the collection of these

rents with any agreement to transfer. Second, that Bennett would not have permitted Rutz to vote as a stockholder, or act as a director, unless he really was a stockholder. But Rutz was not, on his own proofs, entitled to vote as a stockholder, although he did vote. His position was that of a man to whom stock had been promised, but not transferred. A stockholder is not entitled to vote unless he be an original subscriber, or unless he be registered on the company's books. Johnson *v.* Jones, 23 N. J., Eq., 216. In re election of directors, 61 N. J. Law, 422. Chapman *v.* Bates, 61 N. J., Eq. 667. And no person can be elected a director unless he be at the time of his election a bona fide holder of some stock (Sec. 39 Corporation Act). Are we at liberty to infer a contract, complete in all its parts, from an irregular act? Third, that Bennett admitted to Picking, the registrar, that Rutz was the *record* owner of the share in controversy. He was, admittedly, *not* the record owner. But aside from this the admission does not show in what way he became so. His claim is consistent with any one of the three suppositions that I have mentioned. If either of the first two were made, the contract could not be enforced; for, of course, there would be none to enforce, if, as suggested by Robert Bennett's testimony, Rutz were only a dummy director; and nothing is better settled than that equity will not direct the specific performance of a promise to make a gift, or to perfect an imperfect gift. From what fact are we to infer a valuable consideration? It seems strange that this consideration was not regarded as being of sufficient consequence to call for the immediate delivery of a share, whose face value was only one hun-

dred dollars; and to entitle the holder to the immediate payment of the dividends thereon.

Counsel suggests that Mr. Rutz's agreement to remain with the company was a consideration. The difficulty with this is that it is not proved that he did agree in consideration of the promise to transfer. All that appears is that after having made a resolution to leave—a resolution that, as far as the proofs go, was not communicated to anybody, he stayed at an increased salary, an obvious consideration, and, without illegal title, acted as a stockholder.

While there must have been some arrangement between the parties, the evidence fails to disclose, with certainty, what it was. It cannot, therefore, under well settled rule, be specifically performed.

Decree.

Filed November 9, 1917.

This cause coming on to be heard in the presence of Louis Hood, Esquire, of counsel with the complainant; Randolph C. Barrett, Esquire, of counsel with the defendant, Newark Milk & Cream Company of Newark, New Jersey, and of Frederic J. Faulks, Esquire, of counsel with the defendant, Stanley Rutz, and the court having read and considered the pleadings and the proofs taken in the said cause and having heard and considered the arguments of counsel as aforesaid, and it appearing to the court that the complainant is entitled to the relief prayed for by its bill of complaint, and that the defendant Stanley Rutz is not entitled to any relief under his counter claim;

It is on this 7th day of November, 1917, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor doth hereby order, adjudge and decree, as follows:

(1) That William H. Bennett, deceased, in the bill of complaint herein named, was at the time of his death the owner of that certain share of stock in the Newark Milk & Cream Company of Newark, N. J., a corporation organized under the laws of the State of New Jersey, represented by its stock certificate No. 9, and that Fidelity Trust Company, as executor and trustee under the last will and testament of the said William H. Bennett, deceased (the complainant herein), now lawfully holds the same as part of the estate of the said William H. Bennett, deceased,

and is entitled to cause the same to be transferred to itself as such executor or trustee, or upon its order, as it may deem proper;

(2) That the said Newark Milk & Cream Company of Newark, N. J., do forthwith transfer or cause to be transferred by its transfer agent on the books of the Newark Milk & Cream Company of Newark, N. J., the said share of stock represented by said certificate No. 9, to the complainant as the registered holder of the said share of stock and deliver or cause to be delivered the new stock certificate therefor to the said complainant upon the surrender of said certificate No. 9, duly endorsed for transfer, to the said Newark Milk & Cream Company of Newark, N. J., or its said transfer agent.

(3) That the complainant is entitled to the dividends declared and paid upon the said share of stock by the said Newark Milk & Cream Company of Newark, N. J., since the death of the said William H. Bennett on November 19, 1913; and that the defendant, the said Newark Milk & Cream Company of Newark, N. J., shall forthwith account for and pay over the same to the said complainant; and that unless the amount so paid to the complainant shall be accepted by the complainant as the full amount of such dividends so declared and paid on said share of stock since November 19, 1913, this cause shall without further order be referred to John M. Emery, one of the special masters of this court, who shall state the said account and ascertain the amount due and owing for dividends from the said Newark Milk & Cream Company of Newark, N. J., to the said complainant upon such share of stock, and shall file his report with all convenient speed, and that upon the

ascertainment of the said amount so due and owing for dividends the defendant, Newark Milk & Cream Company of Newark, N. J., shall be decreed to be indebted to the complainant in said amount, and the complainant shall have execution therefor according to the practice of this court. 10

(4) That the counter claim of Stanley Rutz herein be and the same is hereby dismissed.

(5) That the complainant shall be entitled to its taxed costs.

EDWIN ROBERT WALKER,
Chancellor.

Respectfully advised,

FREDERIC W. STEVENS,
V. C. 20

Notice of Appeal.

Filed November 9, 1917.

The defendant, Stanley Rutz, hereby appeals from the whole and every part of the final decree made in this court on November 7, 1917, in the above stated cause, to the Court of Errors and Appeals in the last resort in all causes. 30

LINDABURY, DEPUE & FAULKS,
Solicitors of Defendant-Appellant,
Stanley Rutz.

Dated November 8th, 1917.

I conceive there is good cause for appeal in the above stated cause.

FREDERIC J. FAULKS,
Of Counsel with Defendant-Appellant,
Stanley Rutz. 40

Notice of Appeal.

Filed November 15, 1917.

The defendant, Newark Milk & Cream Company, hereby appeals from the whole and every part of the final decree made in this court on November 7, 1917, in the above stated cause, to the Court of Errors and Appeals in the last resort in all causes.

Dated November 14, 1917.

BARRETT & BARRETT,
Solicitors of Newark Milk & Cream Company, Defendant-Appellant.

I conceive there is good cause for appeal in the above stated cause.

RANDOLPH C. BARRETT,
Of Counsel with Newark Milk & Cream Company, Defendant-Appellant.

Petition of Appeal of Stanley Rutz.

Filed November 28, 1917.

New Jersey Court of Errors and Appeals

10

Between FIDELITY TRUST COMPANY, as Executor of and Trustee under the last will and testament of William H. Bennett, deceased, *Complainant-Appellee,* *and* NEWARK MILK & CREAM COMPANY, *Defendant-Appellee,* *and* STANLEY RUTZ, *Defendant-Appellant.*	*Petition of Appeal.*

20

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

30

The petition of Stanley Rutz, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin R. Walker, Chancellor of the State of New Jersey, bearing date the 7th day of November, 1917, wherein the said Fidelity Trust Company as executor of and trustee under the last will and testament of William H. Bennett, deceased, was complainant, and your peti-

40

tioner and others were defendants, in this respect, to wit:

That the said decree ordered, adjudged and decreed that William H. Bennett, deceased, in the bill of complaint herein named, was at the time of his death the owner of that certain share of stock in the Newark Milk & Cream Company of Newark, New Jersey, a corporation organized under the laws of the State of New Jersey, represented by its stock certificate No. 9, and that Fidelity Trust Company as executor of and trustee under the last will and testament of the said William H. Bennett, deceased, the complainant herein, now lawfully holds the same as part of the estate of the said William H. Bennett, deceased, and is entitled to cause the same to be transferred to itself as such executor or trustee or upon its order as it may deem proper.

And it was further decreed that the said Newark Milk & Cream Company of Newark, New Jersey, do forthwith transfer or cause to be transferred by its transfer agent on the books of the Newark Milk & Cream Company of Newark, New Jersey, the said share of stock represented by said certificate No. 9 to the complainant as the registered holder of said share of stock and deliver or cause to be delivered a new stock certificate therefor to the said complainant upon the surrender of said certificate No. 9, duly endorsed for transfer to the said Newark Milk & Cream Company of Newark, New Jersey, or its said transfer agent.

And it was further decreed that the said complainant is entitled to the dividends declared and paid upon the said share of stock by the said Newark Milk & Cream Company of Newark, New Jersey, since the death of the said William H.

Bennett on November 19, 1913, and that the defendant, the said Newark Milk & Cream Company of Newark, New Jersey, shall forthwith account for and pay over the same to the said complainant, and that unless the amount so paid to the complainant shall be accepted by the complainant as the full amount of such dividends so declared and paid on said share of stock since November 19, 1913, this cause shall without further order be referred to John M. Emery, one of the special masters of this court, who shall state the said account and ascertain the amount due and owing for dividends from the said Newark Milk & Cream Company of Newark, New Jersey, to the said complainant upon such share of stock, and shall file his report with all convenient speed and that upon the ascertainment of the said amount so due and owing for dividends, the defendant Newark Milk & Cream Company of Newark, New Jersey, shall be decreed to be indebted to the complainant in said amount and the complainant shall have execution therefor according to the practice of this court."

And it was further decreed "that the counter claim of Stanley Rutz be and the same is hereby dismissed."

And it was further decreed "that the complainant shall be entitled to its taxed costs."

And your petitioner humbly appeals from that part of the decree of the chancellor which decrees as aforesaid upon the ground that the same is erroneous for that it ought not to have been ordered, adjudged and decreed that William H. Bennett, deceased, in the bill of complaint herein named, was at the time of his death the owner of that certain share of stock in the Newark Milk & Cream Company of Newark, New Jersey,

a corporation organized under the laws of the State of New Jersey, represented by its stock certificate No. 9, and that Fidelity Trust Company as executor of and trustee under the last will and testament of the said William H. Bennett, deceased, the complainant herein, now law-
10 fully holds the same as part of the estate of the said William H. Bennett, deceased, and is entitled to cause the same to be transferred to itself as such executor or trustee or upon its order as it may deem proper.

And that it ought not to have been ordered, adjudged and decreed that the said Newark Milk & Cream Company of Newark, New Jersey, do forthwith transfer or cause to be transferred by its transfer agent on the books of the Newark
20 Milk & Cream Company of Newark, New Jersey, the said share of stock represented by said certificate No. 9 to the complainant as the registered holder of said share of stock and deliver or cause to be delivered a new stock certificate therefor to the said complainant upon the surrender of said certificate No. 9 duly endorsed for transfer to the said Newark Milk & Cream Company of Newark, New Jersey, or its said transfer agent.

30 And that it ought not to have been ordered, adjudged and decreed that the said complainant is entitled to the dividends declared and paid upon the said share of stock by the said Newark Milk & Cream Company of Newark, New Jersey, since the death of the said William H. Bennett on November 19, 1913, and that the defendant, the said Newark Milk & Cream Company of Newark, New Jersey, shall forthwith account for and pay over the same to the
40 said complainant, and that unless the amount so paid to the complainant shall be accepted

by the complainant as the full amount of such dividends so declared and paid on said share of stock since November 19, 1913, this cause shall without further order be referred to John M. Emery, one of the special masters of this court, who shall state the said account and ascertain the amount due and owing for dividends from the said Newark Milk & Cream Company of Newark, New Jersey, to the said complainant upon such share of stock and shall file his report with all convenient speed, and that upon the ascertainment of the said amount so due and owing for dividends, the defendant Newark Milk & Cream Company of Newark, New Jersey, shall be decreed to be indebted to the complainant in said amount and the complainant shall have execution therefor according to the practice of this court.

And that it ought not to have been ordered, adjudged and decreed that the counter claim of Stanley Rutz be and the same is hereby dismissed.

And that it ought not to have been ordered, adjudged and decreed that the complainant shall be entitled to its taxed costs.

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

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

LINDABURY, DEPUE & FAULKS,
Solicitors for Appellant, Stanley Rutz.

FREDERIC J. FAULKS,
Of Counsel with Appellant, Stanley Rutz.

Formal answer filed.

Petition of Appeal of Newark Milk & Cream Company.

Filed December 1, 1917.

The petition of Newark Milk & Cream Company, the appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin R. Walker, Chancellor of the State of New Jersey, bearing date the seventh day of November, 1917, wherein the said Fidelity Trust Company as executor of and trustee under the last will and testament of William H. Bennett, deceased, was complainant, and your petitioner and others were defendants, in this respect, to wit:

That the said decree ordered, adjudged and decreed that William H. Bennett, deceased, in the bill of complaint herein named, was at the time of his death the owner of that certain share of stock in the Newark Milk & Cream Company of Newark, New Jersey, a corporation organized under the laws of the State of New Jersey, represented by its stock certificate No. 9, and that Fidelity Trust Company as executor of and trustee under the last will and testament of the said William H. Bennett, deceased, the complainant herein, now lawfully holds the same as part of the estate of the said William H. Bennett, deceased, and is entitled to cause the same to be transferred to itself as such executor or trustee or upon its order as it may deem proper.

And it was further decreed that the said Newark Milk & Cream Company of Newark, New Jersey, do forthwith transfer or cause to be transferred by its transfer agent on the books

of the Newark Milk & Cream Company of Newark, New Jersey, the said share of stock represented by said certificate No. 9 to the complainant as the registered holder of said share of stock and deliver or cause to be delivered a new stock certificate therefor to the said complainant upon the surrender of the said certificate No. 9 duly endorsed for transfer to the said Newark Milk & Cream Company of Newark, New Jersey, or its said transfer agent.

And it was further decreed that the said complainant is entitled to the dividends declared and paid upon the said share of stock by the said Newark Milk & Cream Company of Newark, New Jersey, since the death of the said William H. Bennett on November 19, 1913, and that the defendant, the said Newark Milk & Cream Company of Newark, New Jersey, shall forthwith account for and pay over the same to the said complainant, and that unless the amount so paid to the complainant shall be accepted by the complainant as the full amount of such dividends so declared and paid on said share of stock since November 19, 1913, this cause shall without further order be referred to John M. Emery, one of the special masters of this court, who shall state the said account and ascertain the amount due and owing for dividends from the said Newark Milk & Cream Company of Newark, New Jersey, to the said complainant upon such share of stock, and shall file his report with all convenient speed and that upon the ascertainment of the said amount so due and owing for dividends, the defendant Newark Milk & Cream Company of Newark, New Jersey, shall be decreed to be indebted to the complainant in said amount and the complainant shall have execution therefor according to the practice of this court.

And your petitioner humbly appeals from that part of the decree of the chancellor which decrees as aforesaid upon the ground that the same is erroneous for that it ought not to have been ordered, adjudged and decreed that William H. Bennett, deceased, in the bill of complaint herein named, was at the time of his death the owner of that certain share of stock in the Newark Milk & Cream Company of Newark, New Jersey, a corporation organized under the laws of the State of New Jersey, represented by its stock certificate No. 9, and that Fidelity Trust Company as executor of and trustee under the last will and testament of the said William H. Bennett, deceased, the complainant herein, now lawfully holds the same as part of the estate of the said William H. Bennett, deceased, and is entitled to cause the same to be transferred to itself as such executor or trustee or upon its order as it may deem proper.

And that it ought not to have been ordered, adjudged and decreed that the said Newark Milk & Cream Company of Newark, New Jersey, do forthwith transfer or cause to be transferred by its transfer agent on the books of the Newark Milk & Cream Company of Newark, New Jersey, the share of stock represented by said certificate No. 9 to the complainant as the registered holder of said share of stock and deliver or cause to be delivered a new stock certificate therefor to the said complainant upon the surrender of said certificate No. 9 duly endorsed for transfer to the said Newark Milk & Cream Company of Newark, New Jersey, or its said transfer agent.

And that it ought not to have been ordered, adjudged and decreed that the said complainant

is entitled to the dividends declared and paid upon the said share of stock by the said Newark Milk & Cream Company of Newark, New Jersey, since the death of the said William H. Bennett on November 19, 1913, and that the defendant, the said Newark Milk & Cream Company of Newark, New Jersey, shall forthwith account for and pay over the same to the said complainant, and that unless the amount so paid to the complainant shall be accepted by the complainant as the full amount of such dividends so declared and paid on said share of stock since November 19, 1913, this cause shall without further order be referred to John M. Emery, one of the special masters of this court, who shall state the said account and ascertain the amount due and owing for dividends from the said Newark Milk & Cream Company of Newark, New Jersey, to the said complainant upon such share of stock and shall file his report with all convenient speed and that upon the ascertainment of the said amount so due and owing for dividends the defendant Newark Milk & Cream Company of Newark, New Jersey, shall be decreed to be indebted to the complainant in said amount and the complainant shall have execution therefor according to the practice of this court.

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

Exhibit C. 1.

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

BARRETT & BARRETT,
Solicitors for Appellant
Newark Milk & Cream Company.

10

RANDOLPH C. BARRETT,
Of Counsel with Appellant
Newark Milk & Cream Company.

Formal answer filed.

Exhibits.

COPY OF EXHIBIT C. 1.

20 ISSUED FOR PROPERTY PURCHASED.

No. 9. Shares.

NEWARK MILK & CREAM COMPANY.

Incorporated Under the Laws of the State of New Jersey.

Capital $25,000.

THIS IS TO CERTIFY, That Robert E. Bennett is
30 entitled to one (1).....share in the Capital Stock of the NEWARK MILK & CREAM COMPANY,

Transferable only on the books of the Company in person, or by an Attorney on the surrender of this Certificate.

Dated Newark, N. J., A. D. May 6th, 1902.

WM. H. BENNETT,
Treasurer.

40

Exhibit C. 2.

(ENDORSEMENT.)

For value received, I hereby sell, assign and transfer unto W. H. Bennett

one (1) Shares of the Capital Stock of the

NEWARK MILK & CREAM COMPANY,

10

and I do hereby constitute and appoint the said

W. H. BENNETT

true and lawful Attorney, irrevocably for and in name and stead, to transfer and set over all or any part of the within shares, and for that purpose to make and execute all necessary acts of assignment and transfer, hereby ratifying and confirming all that said Attorney shall lawfully do by virtue hereof.

20

IN WITNESS WHEREOF, I have hereunto set my hand this 6th day of May, 1902.

R. E. BENNETT.

EXHIBIT C. 2.

KNOW ALL MEN BY THESE PRESENTS, that

Whereas, on the sixth day of May, 1902, the Newark Milk & Cream Company, a corporation of the State of New Jersey, issued to Robert E. Bennett certificate No. 9, for one share of its capital stock; and

30

Whereas, on the same day, for value received, the said Robert E. Bennett assigned to William H. Bennett, by assignment on the back of said certificate, said certificate No. 9 for said one share of stock, with full power to transfer said stock on the books of said company to said William H. Bennett; and

40

Exhibit C. 2.

Whereas, said William Bennett departed this life on or about November 19, 1913, leaving a last will and testament in which he named the Fidelity Trust Company of the City of Newark his executor and trustee, with power to execute and carry out the provisions expressed in his said last will and testament; and

Whereas, thereafter, to wit, on about November 29th, 1913, the said Fidelity Trust Company, as executor and trustee as aforesaid, became possessed of said certificate No. 9, for one share of the capital stock of said Newark Milk & Cream Company, as aforesaid, by delivery of said certificate to it by Ida M. Bennett, the widow of said William H. Bennett; and

Whereas, the said Newark Milk & Cream Company refuses to transfer said stock on its books to said Fidelity Trust Company, as executor and trustee as aforesaid, and also refuses to pay to said Fidelity Trust Company the dividends that have accrued on said share of stock for the years 1914 and 1915;

Now, therefore, for the purpose of vesting in said Fidelity Trust Company a more perfect legal title than it now has, if such be possible, to said share of stock, I, Robert E. Bennett, of the City of Newark, County of Essex, State of New Jersey, of the first part, in consideration of the premises and for and in consideration of the sum of one dollar lawful money of the United States of America, to me in hand paid by the Fidelity Trust Company, of the same place, of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign,

Exhibit C. 2.

transfer and set over, unto the said party of the second part, its successors and assigns, all of my right, title and interest of, in and to said share of stock and of, in and to said certificate No. 9, representing said share, and to any and all dividends declared thereon.

And I do hereby authorize and appoint the said party of the second part my true and lawful attorney, irrevocable, in my name or otherwise, but, as executor and trustee, as aforesaid, at its proper costs and charges, to have, use, and take all lawful ways and means necessary to have said share of stock transferred on the books of said Newark Milk & Cream Company to it, as executor and trustee as aforesaid; and also to take all lawful ways and means to recover from said Newark Milk & Cream Company the dividends that have accrued to said share of stock for the years 1914 and 1915, and such other dividends as may from time to time accrue or be declared thereon.

In witness whereof, I have hereunto set my hand and seal the third day of March, 1916.

ROBERT E. BENNETT. [L. S.]

Signed, sealed and delivered
in the presence of

CLARENCE SACKETT.

STATEMENT BY CORPORATION TRANSACTING BUSINESS IN THE STATE OF NEW JERSEY.

As required by the forty-third section of an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," the Newark Milk & Cream Company, a corporation organized under the laws of the State of New Jersey, renders the following statement, to be filed in the office of the Secretary of State of the State of New Jersey:

The character of the business of said corporation is dairy.

The principal office in this State is at No. 51 Bank street, Newark, N. J.

The name of the agent in charge of said office, upon whom process may be served, is W. H. Bennett.

An election for directors of said company was held on the 10th day of May, 1898. The names of the directors elected at that time, as well as all other directors (if any), and of the officers, with the date of the election or appointment, term of office, residence and post office address of each, are as follows:

Names of Directors and Officers.	Residence and Post-Office Address.	Term of Office	Date of Election or Appointment
Director Geo. O. Scheerer,	Broad St.	1 year	
" Wm. Scheerer	Orange	1 "	
" Wm. H. Bennett	909 So. 17th St., Newark	1 "	
" Ida M. "	" " "	1 "	

President, George O. Scheerer.
Vice-President, William Scheerer.
Second Vice-President,
Third Vice-President,
Secretary, William H. Bennett.

Treasurer, William H. Bennett.
Dated June 16th, 1898.
The foregoing statement is correct and true.

GEORGE O. SCHEERER,
President.

Attest: 10

WM. H. BENNETT,
Secretary.

Endorsed:

"Filed June 18, 1898,

"GEORGE WURTS,
"*Secretary of State.*"

20

STATEMENT BY CORPORATION TRANSACTING BUSINESS IN THE STATE OF NEW JERSEY.

As required by the forty-third section of an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," the Newark Milk & Cream Company, a corporation organized under the 30 laws of the State of New Jersey, renders the following statement, to be filed in the office of the Secretary of State of New Jersey:

The character of the business of said corporation is milk, cream and dairy products.

The principal office in this State is at No. 51 Bank street, Newark, N. J.

The name of the agent in charge of said office, upon whom process may be served, is Wm. H. Bennett, sec'y. 40

An election for directors of said company was held on the third day of May, 1897. The names of the directors elected at that time, as well as all other directors (if any), and of the officers, with the date of the election or appointment, term of office, residence and post office address of each, are as follows:

Names of Directors and Officers.	Residence and Post-Office Address.	Term of Office.	Date of Election or Appointment.
Director, Henry Scheider,	51 Bank St.		
" Mary E. Scheider,	51 " "		
" Wm. H. Bennett	338 Summer Ave.,		
" Ida M. Bennett	" " "		

President, Henry Scheider.
Vice-President, Mary E. Scheider.
Second Vice-President,
Third Vice-President,
Secretary, Wm. H. Bennett.
Treasurer, Wm. H. Bennett.
Dated October 8, 1897.

The foregoing statement is correct and true.

HENRY SCHEIDER,
President.

Attest:

WM. H. BENNETT,
Secretary.

Endorsed:

"Filed October 14, 1897.

"GEORGE WURTS,
"*Secretary of State.*"

STATEMENT BY CORPORATION TRANSACTING BUSINESS IN THE STATE OF NEW JERSEY.

As required by an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations," approved April 7, 1875, and by the acts amendatory thereof and supplemental thereto, Newark Milk & Cream Company, a corporation organized under the laws of the State of New Jersey, renders the following statement, to be filed in the Department of State of the State of New Jersey:

The principal office of the company in New Jersey is located at No. 51 Bank street, Newark, N. J.

The officer or agent in charge of said office is .....

The principal office of the company out of New Jersey is located at No. 51 Bank street, Newark, N. J.

The business of the company is that of milk, cream and dairy products.

An election for directors of said company was held on the first day of May, 1896. The names of the directors elected at that time, as well as those holding over (if any), and of the officers, with the date of election or appointment, term of office and residence of each, are as follows:

Names of Directors and Officers.	Residence.	Term of Office.	Date of Election or Appointment.
Henry Scheider	Warren St.	1 year	May 1st/96
Mary E. Scheider	"	1 "	" 1st/96
Wm. H. Bennett	338 Summer Ave.	1 "	" 1st/96

President, Henry Scheider.
Vice-President, Mary E. Scheider.
Second Vice-President,

Third Vice-President,
Secretary, Wm. H. Bennett.
Treasurer, Wm. H. Bennett.
Dated May 15th, 1896.

The foregoing statement is correct and true.

10 H. SCHEIDER,
President.

Attest:

WM. H. BENNETT,
Secretary.

Endorsed:

"Filed June 8, 1896,

"HENRY C. KELSEY,
20 *"Secretary of State."*

STATEMENT BY CORPORATION TRANSACTING BUSINESS IN THE STATE OF NEW JERSEY.

As required by an act of the Legislature of the
30 State of New Jersey, entitled "An Act Concerning Corporations," approved April 7, 1875, and by the acts amendatory thereof and supplemental thereto, Newark Milk & Cream Company, a corporation organized under the laws of the State of New Jersey, renders the following statement, to be filed in the Department of State of the State of New Jersey:

The principal office of the company in New Jersey is located at No. 51 Bank street, Newark.

The officer or agent in charge of said office is
40 Henry Scheider, president.

Annual reports of Newark Milk & Cream Co.

The principal office of the company out of New Jersey is located at No. 51 Bank street, Newark, N. J.

The business of the company is that of wholesale and retail deals in milk, cream and dairy products.

An election for directors of said company was held on the seventh day of May, 1895. The names of the directors elected at that time, as well as those holding over (if any), and of the officers, with the date of election or appointment, term of office and residence of each, are as follows:

Names of Directors and Officers.	Residence.	Term of Office.	Date of Election or Appointment.
Henry Scheider	63 Warren Street Newark, N. J.	1 yr	1st Tuesday May 1896.
Mary E. Scheider	63 Warren Street, Newark, N. J.	1 yr	1st Tuesday May 1896
William H. Bennett	51 Bank Street Newark, N. J.	1 yr	1st Tuesday May 1896
Ida M. Bennett	51 Bank Street, Newark, N. J.	1 yr	1st Tuesday May 1896

President, Henry Scheider.
Vice-President, Mary E. Scheider.
Second Vice-President.
Third Vice-President,
Secretary, William H. Bennett.
Treasurer, William H. Bennett.
Dated July 13, 1895.

The foregoing statement is correct and true.

HENRY SCHEIDER,
President.

Attest:

WM. H. BENNETT,
Secretary.

Endorsed:

"Filed July 15, 1895,

"HENRY C. KELSEY,
"*Secretary of State.*"

10

STATEMENT BY CORPORATION TRANSACTING BUSINESS IN THE STATE OF NEW JERSEY.

As required by an act of the Legislature of New Jersey, approved March 8th, 1877, the Newark Milk & Cream Company render the following statement, to be filed in the Department of State of the State of New Jersey:

20 The principal office of the company is at No. 51 Bank street, Newark, N. J.

The principal office of the company in New Jersey is at Newark.

The business of the company is that of buying, selling and dealing as wholesale and retail of dairy products, &c.

At an election held at Newark, on the first day of May, 1894, the following named persons were chosen directors, as noted:

30

Name.	P. O. Address.	Term.	Expiration of Term.
Henry Scheider	Newark, N. J.	1 yr.	1st Wednesday May 1895.
William H. Bennett	Newark, N. J.	1 yr.	1st Wednesday May 1895.
Mary E. Scheider	Newark, N. J.	1 yr.	1st Wednesday May 1895.
Ida M. Bennett	Newark, N. J.	1 yr.	1st Wednesday May 1895.

The officers of the company are:
President, Henry Scheider.
Vice-President, Mary E. Scheider.
Second Vice-President,
Third Vice-President,

40

Secretary, William H. Bennett.
Treasurer, William H. Bennett.

Dated May 1, 1894.

The foregoing statement is correct and true.

HENRY SCHEIDER,
President. 10

WM. H. BENNETT,
Secretary.

Endorsed:

"Filed May 2, 1894.

"HENRY C. KELSEY,
"*Secretary of State.*"

20

THE NEWARK MILK & CREAM COMPANY. ANNUAL REPORT.

The corporation above named, organized and registered under the laws of the State of New Jersey, does hereby make the following report in compliance with the provisions of an act of the Legislature of New Jersey entitled "An Act Concerning Corporations (Revision of 1896)," 30 and the various acts amendatory thereof and supplemental thereto:

FIRST.

The name of the corporation is
NEWARK MILK & CREAM COMPANY.

SECOND.

The location of the registered office is No. 525 Main street, East Orange, New Jersey, and the New Jersey Registration & Trust Company is 40

the agent upon whom process against the corporation may be served.

THIRD.

The character of the business is dealing in milk and dairy products, and as otherwise specified in the certificate of incorporation.

FOURTH.

The amount of the authorized capital stock is $25,000.

The amount actually issued and outstanding is $25,000.

FIFTH.

The names of all the directors and officers and the time when the term of office of each expires are as follows:

Names of Directors.		Expiration of Term.
George O. Scheerer,		First Tuesday of May, 1914.
William H. Bennett,		Do.
Stanley A. Rutz,		Do.
August F. Eckert,		Do.
Officers.		Expiration of Term.
President,	George O. Scheerer,	As Stated Above.
Vice-President,	Stanley A. Rutz,	" " "
Treasurer,	William H. Bennett,	" " "
Secretary,	William H. Bennett,	" " "

SIXTH.

The next annual meeting of the stockholders for the election of directors is appointed to be held on first Tuesday of May, 1914.

SEVENTH.

The name of the corporation has been at all times displayed at the entrance of its registered office in this State, and the corporation has kept at its registered office in this State a transfer book, in which the transfers of stock are made, and a stock book containing the names and

addresses of the stockholders and the number of shares held by them respectively, open at all times to the examination of the stocholders, as required by law.

The post office address of each of the foregoing directors and officers is No. 525 Main street, East Orange, New Jersey. 10

The agent in New Jersey for the transfer of stock is the New Jersey Registration & Trust Company, East Orange, N. J.

In Witness Whereof, this report is signed in behalf of the corporation this 17th day of June, 1913.

By WM. H. BENNETT.
Stanley A. Rutz. 20

Endorsed:

"Filed June 19, 1913.

"David S. Crater,
"*Secretary of State.*"

We, the undersigned, being two-thirds in interest of the stockholders of Newark Milk & Cream Company, having voting powers, do hereby give our written assent to the amendment of the certificate of incorporation by changing the name of the corporation to Newark Milk & Cream Company of Newark, New Jersey. 30

A certificate of which change has heretofore been executed by George O. Scheerer, attested by William H. Bennett, secretary, and proof of

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such execution made by William H. Bennett on the 16th day of April, 1912.

George O. Scheerer,	124 shares of stock.
Wm. H. Bennett,	124 shares of stock.
Stanley A. Rutz,	1 share of stock.

10 Endorsed:

"Filed and recorded April 24, 1912.

"David S. Crater,
"Secretary of State."

CERTIFICATE OF CHANGE OF NAME OF NEWARK MILK & CREAM COMPANY.

20 Newark Milk & Cream Company, a corporation of New Jersey, does hereby certify:

1. That the principal office of the company is at 20-22 Bridge street, Newark, New Jersey, and the agent therein, in charge thereof, and upon whom process may be served, is William H. Bennett.

2. That the board of directors thereof on the sixteenth day of April, nineteen hundred and 30 twelve, duly passed a resolution declaring it advisable that the certificate of incorporation of the Newark Milk & Cream Company be amended by changing the name of the corporation to Newark Milk & Cream Company of Newark, N. J., and called a meeting of the stockholders to take action thereon.

3. That thereafter on the same day at a meeting of the stockholders, two-thirds in interest of such stockholders having voting powers 40

voted in favor of such amendment and change of name.

GEORGE O. SCHEERER,
President.

Attest:

WM. C. BENNETT,
[COR. SEAL] *Secretary.*

10

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } *ss.*

BE IT REMEMBERED, that on this sixteenth day of April, nineteen hundred and twelve, before me, the subscriber, an attorney at law of New Jersey, personally appeared William H. Bennett, who, being by me duly sworn on his oath, says that he is the secretary and well knows the corporate seal of Newark Milk & Cream Company, the corporation named in the annexed certificate, that the seal affixed thereto is the proper corporate seal of the said corporation, that the same was affixed thereto and the said certificate signed by George O. Scheerer, who was at the date and execution thereof the president of said corporation, in the presence of said deponent, who thereupon signed the same as a subscribing witness thereto.

20

30

WM. H. BENNETT.

Subscribed and sworn to
before me this 16th day
of April, A. D. 1912.

EDWARD O. STANLEY, JR.,
Attorney at Law of New Jersey.

40

Certificate of change of name.

We, the undersigned, being two-thirds in interest of each class of the stockholders of Newark Milk & Cream Company, having voting powers, do hereby give our written assent to the increase of capital stock above mentioned.

Wm. H. Bennett, 124 Number of shares.
10 George O. Scheerer, 124 Number of shares.
Stanley A. Rutz, 1 Number of shares.

Endorsed:

"Filed and recorded April 17, 1912.

"David S. Crater,
"Secretary of State."

EXHIBIT R. 1.

20 Minute book stockholders' meeting May 3, 1904, pp. 60-61, up to May 7, 1912. (Not printed.)

EXHIBIT R. 2.

First two pages of 2nd Minute Book. (Not printed.)

EXHIBIT R. 3.

30 Stock Certificate Book. (Not printed.)

EXHIBIT R. 4.

Stock Transfer Book. (Not printed.)

EXHIBIT R. 5.

Stock Ledger. (Not printed.)

40

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between FIDELITY TRUST COMPANY, Executor and Trustee of William H. Bennett, deceased, *Complainant-Respondent,* *and* NEWARK MILK & CREAM COMPANY, and STANLEY A. RUTZ, *Defendants-Appellants.*	*On Bill, &c.* *On Appeal from Chancery.*

Brief on Behalf of Newark Milk & Cream Company, Defendant-Appellant.

I.

Concise Statement of Case.

The Newark Milk and Cream Company has taken no active part in this cause, the nature of which is set forth in the brief submitted on behalf of the other defendant-appellant, Stanley A. Rutz. It is of the opinion that such brief correctly states the evidence in the Court of Chancery.

II.

Ground of Appeal.

Its sole ground of appeal is that by such decree it has been erroneously adjudged to be liable to the complainant to account for and pay over to it the dividends declared and paid since the death of William H. Bennett on No-

vember 19, 1913, upon the one share of its capital stock represented by its stock certificate No. 9 (Case, p. 68, l. 20).

III.

Argument.

The evidence shows that at the direction of Mr. Bennett, this share of stock was shortly before his death, caused to be transferred of record to such defendant Rutz. (Case, pp. 45-52.) The bill of complaint states that all dividends paid upon this share in the lifetime of the said Bennett were "paid to said William H. Bennett and were appropriated by him to his own benefit, and no part thereof was ever paid to said Stanley A. Rutz." (Case, p. 3, l. 22.) This allegation was admitted in both of the answers filed (Case, p. 11, l. 22; Case, p. 17, l. 10). No claim was made upon the hearing that the dividends paid to Mr. Rutz on this share after Mr. Bennett's death when the defendant Rutz was the duly registered record holder of this share, should be accounted for and again paid over by the company to the complainant.

It is respectfully submitted, therefore, that under the evidence, this appellant was warranted in paying such dividends to Mr. Rutz and required so to do, that it is not liable to pay the same again to the complainant and that the portion of the decree appealed from which directs it so to do, should be reversed.

Respectfully submitted,

BARRETT & BARRETT,
Of Counsel with Newark Milk and Cream Company.

New Jersey Court of Errors and Appeals

Between FIDELITY TRUST COMPANY, executor and trustee of WILLIAM H. BENNETT, deceased, *Complainant-Respondent,* *and* NEWARK MILK AND CREAM COMPANY and STANLEY A. RUTZ, *Defendants-Appellants.*	*On Bill, etc.* *On Appeal from Chancery.*

Brief on Behalf of Fidelity Trust Company, Executor, etc., Complainant-Respondent.

Statement.

The complainant is the executor of and trustee under the last will and testament of William H. Bennett, who died on November 19, 1913. Defendant-appellant, Newark Milk and Cream Company, is a New Jersey corporation having a capital stock of $25,000 divided into 250 shares, all of which are issued and outstanding (case, p. 1, l. 31; p. 9, l. 12; p. 15, l. 38). Prior to the year 1904, William H. Bennett owned 125 shares of the capital stock of said Newark Milk and Cream Company, and was secretary and treasurer and general manager of the business of the company. It is admitted that at the time of Mr. Bennett's death, he was the owner of 124 of these shares of stock and this suit involves the remaining one share of the stock owned by William H. Bennett up to the year 1904. This

share is represented by certificate No. 9, issued by the defendant company on May 6, 1902, to Robert E. Bennett, a son of William H. Bennett (case, p. 5, line 15), and on the same day Robert E. Bennett assigned the certificate to the said William H. Bennett by assignment endorsed on the certificate (case, p. 6, line 1; p. 81, l. 1). This certificate No. 9, remained in the possession of William H. Bennett until his death (case, p. 11, l. 17), and after his death it came into the possession of the complainant-respondent, his executor, as part of his estate (case, p. 21, line 10).

Up to the year 1913, the Newark Milk and Cream Company kept no stock ledger or stock transfer book, but had a bound book of stock certificates with stubs numbered to correspond with the certificates (case, p. 50, l. 26). On each stub was written the number of shares represented by the certificate detached therefrom and the name of the person to whom the same was issued, except in the case of No. 9, being the stub of the certificate in controversy, which stub was blank.

For a number of years prior to 1904, defendant Stanley A. Rutz was employed in the office of Newark Milk and Cream Company; his position in the year 1904 being that of bookkeeper. At a meeting of the stockholders held on May 3, 1904, he was elected a director of the company and thereafter became a vice-president thereof and acted as assistant manager. From that time on until Mr. Bennett's death, Stanley A. Rutz continued as a director and officer of said company, and in reports filed with the Secretary of State William H. Bennett is represented as the owner of 124 shares of stock of the company and Stanley A. Rutz as the owner

of one share; and the minutes of the company show that Stanley A. Rutz appeared and voted as a stockholder.

In the year 1913, Newark Milk and Cream Company employed the New Jersey Registration & Trust Company, a corporation located in the city of East Orange, New Jersey, to act as its registered agent and turned over to such agent its corporate records including the stock certificate book. William H. Bennett, on his attention being called to the blank stub No. 9, and being told by an officer of said New Jersey Registration & Trust Company, that it was necessary to have a "numerical and complete record of the owners of the stock," informed said officer that Stanley A. Rutz was the record owner and that the certificate represented one share. (Case, p. 56, l. 1.) Thereupon said officer filled in said stub No. 9 in the name of Stanley A. Rutz, which is the condition of the stub at the present time.

It is admitted by the answers of the defendants-appellants, Newark Milk and Cream Company and Stanley A. Rutz, that all dividends and profits declared and paid by said company on the share of capital stock represented by certificate No. 9, were paid to William H. Bennett until his death and no part thereof was ever paid to said Stanley A. Rutz by said Newark Milk and Cream Company or by William H. Bennett (case, p. 3, line 23; p. 11, l. 22; p. 17, l. 27).

It is claimed by the defendant-appellant Stanley A. Rutz that in the year 1904 and prior to his election as a director and officer of said company he "wanted to resign from the employ of the company" and tendered his resignation to Mr. Bennett as an officer of the com-

pany; but as a result of something which "occurred" at that time, he continued in the employ of the company and thereafter there was a change in his relationship to the company by his election as a director and officer thereof and an increase of compensation. It is claimed by the defendant-appellant Stanley A. Rutz that during his employment in said company and until his election as director and officer thereof in 1904, he rendered services to William H. Bennett of a personal character apart from his duties as an employee of the Newark Milk and Cream Company, and devoted thereto time both during and after office hours (case, p. 34, l. 20).

There is testimony that after 1904 Stanley A. Rutz admitted to Robert E. Bennett, a son of William H. Bennett that he was "only a dummy stockholder" in the company, which statement is denied by Rutz (case, p. 59, l. 10; p. 60, l. 20).

The complainant-respondent seeks to have the one share of stock of the Newark Milk and Cream Company, represented by certificate No. 9, transferred on the books of the corporation to itself as executor of and trustee under the last will and testament of said William H. Bennett, deceased; and the defendant-appellant, Stanley A. Rutz claims to be the owner of the said share of stock and asks that the complainant-respondent be decreed to surrender said certificate to him and that the company be directed to transfer the same of record to him; and to that end counterclaims asking for the specific performance of an alleged contract with William H. Bennett, a remarkable arrangement (considering the insignificant amount involved), whereby Bennett agreed to vest in the defendant-appellant this share of stock, but was to

retain the certificate thereof in his possession and "to receive and retain the dividends thereon during his lifetime," but that from and after his death defendant-appellant should have such certificate and be entitled to have the same immediately transferred to him of record. (Case, p. 12, l. 20; p. 14, l. 30).

Argument.

I.

The possession of a certificate is *prima facie* evidence of the ownership of the shares of stock represented thereby.

Certificate No. 9 was issued to Robert E. Bennett and by him assigned to William H. Bennett with an irrevocable power of attorney, authorizing the transfer of the stock. This certificate was in the possession of William H. Bennett during his lifetime, and his possession thereof is admitted by the defendants to have been lawful because the dividends on the said share of stock were paid to William H. Bennett by the defendant company and with the knowledge and acquiescence of the defendant Rutz. The certificate remained in William H. Bennett's possession until the time of his death and is now in the hands of his executor as part of his estate. It was never surrendered to the company for transfer or assignment. Until 1913 William H. Bennett kept the stub representing that certificate blank.

> "It is settled that one in possession of a certificate of stock in an incorporated company accompanied by an assignment in blank executed by the record owner with an irrevocable power of attorney authorizing

the transfer of the stock is presumptively the equitable owner of the shares, whose title thereto cannot be impeached if he has given value for that without notice of any intervening equity.

"But independent of the legal question, the rule that the possession of the certificate assigned or accompanied by authority to transfer is evidence of ownership, is now a recognized law of all mercantile communities in this country, and under it all transactions in the sale or pledge of stocks are carried on. The usage is so universal that the transfers are printed on the certificates, as on the one in question."

Matthews v. *Hoagland,* 48 N. J. Eq., p. 455.

"The transfer book is not the only evidence of the ownership of stock. The certificate, which has always been deemed *prima facie* evidence of ownership, is the only evidence in possession of the owner, and where there has been no transfer, it is the only recognized evidence of title."

Broadway Bank v. *McElrath,* 13 N. J. Eq., p. 24.

The complainant herein thus being the *prima facie* owner of the stock in question, it necessarily follows that the burden of proof is on the defendant, Stanley A. Rutz, to establish his ownership or interest therein.

Two cases are cited by the defendant-appellant Rutz, one *Richards* v. *Wells Fargo Express Company,* 109 N. E. 482; and the other *Adams* v. *Board of Trustees,* 20 So. 266, as supporting the contention that the presumption of ownership which follows the possession of securities may be rebutted. There can be no doubt about

the principle that any such presumption may be rebutted if evidence of ownership in someone else can be established, but the burden of proof is on the one who claims as against the possession.

In the New York case, *Richards* v. *Wells Fargo Express Company,* which related to shares of stock, it appeared that the person in whose possession the stock was at the time of his death had never claimed ownership to it, had never received any dividends on it, but on the contrary the dividends had always been paid to his brother in whose name the stock was issued; and further that there was no assignment by the person in whose name the stock was issued to the one in whose possession the certificate was, although the assignment on the back of the certificate was endorsed in blank.

In our case the certificate was absolutely assigned to William H. Bennett, was in the possession of William H. Bennett, and the dividends always paid to William H. Bennett until the time of his death.

In the Florida case, *Adams* v. *Board of Trustees,* the securities in that somewhat complicated matter consisted of coupons clipped from bonds and the decedent in whose possession the coupons were found had been a trustee and agent of other trustees to whom the coupons were to be delivered, and their identity with coupons delivered to him as such trustee and agent was reasonably well established; and besides in his lifetime he had never claimed ownership of them although opportunities in the course of litigation were presented for such claim.

Neither of the cases cited are in any way helpful to the decision of the question involved here.

II.

The facts proved lead to the conclusion that Rutz:

1. *Was promised the share of stock in question as a gift from William H. Bennett, or*

2. *That William H. Bennett for a valuable consideration agreed to assign said share to him; or*

3. *That Rutz was only a "dummy stockholder."*

1. *As to the question of a gift.*

The retention by William H. Bennett of the certificate of stock and of the dividends and profits therefrom during his lifetime is fatal to any attempted gift *inter vivos,* and the defendant-appellant in his brief expressly disclaims the theory of a gift.

> "In order to legalize such a gift there must be not only a donative intention, but also in connection with it a complete stripping of the donor of all dominion or control over the thing given."
>
> *Stevenson* v. *Earl,* 65 N. J. Eq., p. 721.
>
> "Again it is necessary to the validity of a gift *inter vivos* that all the title of the donor, whatever it may be, should be transferred at once to the donee. He cannot retain any interest therein without destroying its character as a gift. *Young* v. *Young,* 80 N. Y. 422.

"The handing over of a certificate of stock without a written assignment or power certainly does not transfer the legal title. If we admit it confers an equitable title, the legal has remained in the donor and cannot be enforced, for equity recognizes and makes effective only assignments founded on a valuable consideration and does not aid a volunteer. *May Fraud, Conv.,* 406; *Weale* v. *Ollive,* 17 Beav. 252.

"Nor under the decisions will equity build up a trust with the fragments of an incomplete gift. *Antrobus* v. *Smith,* 12 Ves. 39; *Richards* v. *Dolbridge,* L. R. (18 Eq. Cas.) 11; *Moore* v. *Moore,* L. R. (18 Eq. Cas.) 474; *Milroy* v. *Lord,* 4 DeG., F. & J. 274; *Heartley* v. *Nicholson,* L. R. (19 Eq. Cas.) 233; *Young* v. *Young, supra.*

"In my judgment the character of the property in shares of a corporation, as well as the distinctive qualities of a gift *inter vivos,* forbid a departure from the rule, that a valid gift of such property cannot be made by the delivery of the certificate of stock without formal transfer, or an assignment and power in writing to transfer the shares."

Matthews v. *Hoagland,* 48 N. J. Eq., p. 455.

2. *As to agreement to assign.*

There is no evidence of any benefit derived by William H. Bennett individually by the retention of Mr. Rutz's services by the Newark Milk and Cream Company.

There is testimony that defendant Rutz performed services for Mr. Bennett personally in the matter of collecting rents for him until

1904 when he was elected a director and officer of the defendant company. These services were rendered before any act of William H. Bennett in prompting the election of defendant Rutz as such director and is a past consideration and not a legal consideration to support an incomplete contract, even if such were contemplated.

> "It appears, therefore, that the consideration for the promise was a by-gone consideration, and not a present or future consideration. Can such a promise be enforced in equity? Equity only compels the performance of contracts based on valuable consideration. Is a by-gone consideration a valuable consideration. The rule is (1 Add. Cont. 7) that a by-gone consideration cannot be made a good consideration for a promise. That this is the rule in this state is shown by the decision of the Court of Errors and Appeals in *Trust Company* v. *Trustees of William M. Fisher Co.,* 67 N. J. Eq. (1 Robb) 604. Justice Dixon there said: 'The general rule is that one who acquires property (outside of commercial paper) as mere security for antecedent debts is not a holder for value,' and see Pom. Eq. Jur., p. 1405. In the leading case of Ellison *v.* Ellison, 6 Ves. 656, Lord Eldon put the very case now in controversy. He says: 'I take the distinction to be that if you want the assistance of the Court to constitute you a certain *cestui que trust,* and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you a *cestui que trust;* as upon a covenant to transfer stock, if it rests in covenant and is purely voluntary, the Court will not

execute that voluntary covenant; but if the party has completely transferred the stock, though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced in this court."

Andrews v. *Guayaquil and Quito R. R. Co.*, 73 N. J. Eq., p. 150.

There is no testimony of any contract between William H. Bennett and Stanley A. Rutz to assign or deliver this share of stock. The existence of a contract is claimed by inference from circumstances. These circumstances consisted of the election of Rutz as a director and officer of the company, by the minutes showing that he appeared at the meetings of stockholders and voted, and by reports to state officers in which he is represented as the owner of one share of stock, besides the declaration of Bennett to the registrar of the stock; but these circumstances together fail to show any contract, especially in view of the fact that Bennett continued to hold the stock and reaped the benefits therefrom. The said circumstances are not inconsistent with the theory of a gift not fully performed, or that Rutz was merely a dummy stockholder and director. At best the evidence only suggests the possibility of the existence of a contract without definiteness to its terms and conditions. Specific performance, therefore, is impossible as will be shown hereafter.

3. *As to Rutz being a "dummy stockholder."*

There is no evidence of any contract made by William H. Bennett to sell or give the share of stock in question to Stanley A. Rutz. There is evidence that there was no immediate gift of said share because William H. Bennett retained

possession of the certificate and received the dividends until his death.

There is evidence that Stanley A. Rutz was represented as a stockholder of said company and acted as such with the consent of William H. Bennett in his lifetime. Such a situation is not uncommon and the person acting as a stockholder is known as a "dummy stockholder." There is testimony of Robert E. Bennett that while acting as such stockholder, Stanley A. Rutz admitted to him that he (Rutz) was only a "dummy stockholder" (case, p. 59, l. 10). Rutz denies making this admission, but an examination of the evidence leads irresistibly to the conclusion that such a statement was right and is corroborative of Bennett's testimony.

Defendant Rutz argues that as this was an illegal act, the assumption is one which should not be indulged and cites a number of cases establishing the principle that the presumption is in favor of innocence and good faith.

The difficulty with this is that such a presumption is impossible in this case because it is admitted that at the time of his election as a director and at the time of his voting as a stockholder in 1904, up until the year of Mr. Bennett's death in 1913, Rutz had neither the possession of the share of stock nor did the share of stock stand in his name on the books of the company, nor was he in possession of a certificate standing in the name of another and assigned to him. A stockholder is not entitled to vote unless he be an original subscriber or unless he be registered on the company's books. (*Johnson* v. *Jones,* 23 N. J. Eq. 216; In *re Election of Directors,* 61 N. J. L. 422; *Chapman* v. *Bates,* 61 N. J. Eq. 667.) No person can be elected a director of a corporation un-

less he be at the time of his election a *bona fide* holder of some stock therein. (Corporation Act, Sec. 39.)

There can be no presumption of innocence and good faith on the face of such facts.

III.

The representations of William H. Bennett as to the ownership of this one share of stock would not estop him from claiming title thereto as against the defendant-appellant Rutz.

Whatever effect upon third persons the acts, representations or silence of William H. Bennett might have in relation to this share of stock, there is no estoppel to be invoked against him by Stanley A. Rutz who was a party to the transaction. The doctrine of estoppel is based upon the theory that the party who invokes it would suffer harm unless he receives this equitable assistance. There is nothing to show that any misrepresentations were made to Mr. Rutz; on the contrary, it would appear that whatever was done was with the full knowledge of the defendant and that instead of harm, benefit accrued to him through increase of dignity of position and increase of compensation for his services.

> "To constitute such an estoppel, the defendant must have done an act or made an admission, the natural effect of which was to influence the conduct of the complainants, and which has induced them to change their position or condition, so that, if he is now permitted to deny the truth of his words or conduct, the complainants must suffer harm."

Mutual Life Insurance Co. of N. Y. v. *Norris,* 31 N. J. Eq., p. 583.

The only harm that could come to the defendant Rutz by the decree of this Court asked for by the complainant would be to strip him of the shadow of that of which apparently he was never actually possessed.

The statement by William H. Bennett to the agent of the Registration Company that the share of stock in question belonged to Stanley A. Rutz, was not made in the presence of Rutz, and it must be noted that after such statement and after the statements as to the ownership of said share of stock to be gathered from the reports filed with the Secretary of State and from the minutes of the company, there was no change of relationship by William H. Bennett, by Stanley A. Rutz or by the Newark Milk and Cream Company with regard to said share as a consequence of said statements or declarations; but on the contrary the defendant company continued to pay the dividends on said share of stock to William H. Bennett up to the time of his death and the certificate for said share continued in the possession of William H. Bennett to the time of his death and with the knowledge of defendant Rutz.

IV.

The action of William H. Bennett in permitting Rutz to act as a director of defendant company without having the legal title to a share of stock therein, is a question between him and the state whose law was violated or evaded.

In a recent Connecticut case decided in 1914, a share of stock in a corporation was in dispute. The plaintiff, without consideration, had transferred to her son-in-law a share of stock in order to qualify him as a director to represent her interest in the management of the company in which she was a large stockholder. The stock was actually transferred to the son-in-law on the books of the company and the son-in-law received and used the dividends and profits therefrom, but the certificate of stock was and remained in the possession of the plaintiff. Judgment having been obtained against the son on some indebtedness, an attachment was issued against his holdings in the corporation and the mother-in-law, plaintiff, sued out an injunction to restrain the sale on execution of the stock.

The Court said:

> "The only feature of a stock transfer which resembles a physical possession is the certificate of stock, and Mrs. Gray always had this in her possession * * *. Though Mrs. Gray's conduct in giving Caswell the legal title to the share of stock has wronged the corporation and the public, that does not affect the beneficial ownership of the stock. Her conduct could have no relation to her ownership unless positive law or public policy forbids one person

holding the beneficial ownership while the other holds the legal title.

"The use made of the title and the consequence flowing from the use are considerations quite apart from the question of ownership. We know of no law or public policy which forbids one holding the legal and the other the equitable title to stock. Nor can we hold that Mrs. Gray's conduct has deprived her of the right to enforce her ownership in a court of equity. She has done no wrong to any creditor of Caswell. No one interested in the question of ownership between her and Caswell has or will suffer by her action. She has helped violate a statute; her wrong is to the public and to the corporation. In enforcing her right to the stock she is not relying on her wrongful course in aiding Caswell to be a director. She is relying on the proven facts which show her beneficial ownership, an ownership which has defrauded no one and in reliance upon which no one has been wronged."

Gray v. *Graham,* 89 Atl. Rep., p. 262.

If the act of the transfer agent of the defendant company in writing the name of Stanley A. Rutz on stub No. 9, constituted a transfer of that share of stock without the surrender of the certificate, even then Stanley A. Rutz is in no better position than was Caswell, the son-in-law director in the above case, in which the Court decided he held the legal title as trustee for the plaintiff who had the real, substantial and equitable ownership. *Gray* v. *Graham, supra.*

V.

The complainant-respondent being a party to the action in a representative capacity, Rutz's testimony as to statements by and transactions with the decedent were properly excluded.

Our statute on this subject is as follows:

> "In all civil actions any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; provided, this section shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator or intestate represented in said action, unless the representative offers himself as a witness on his own behalf, and testifies to any transaction with or statement by his testator or intestate, in which event the other party may be a witness on his own behalf as to all transactions with or statements by such testator or intestate, which are pertinent to the issue."
>
> *N. J. Comp. Stat.*, Vol. 2, p. 2218, Sec. 4.

The question is raised by the defendant-appellant Rutz that after having testified on direct examination of his resolution to resign from the employment of the company and his change of resolution as a result of something which "occurred" and his subsequent election as a director and officer of the company, the way was opened for Rutz to testify to additional compensation presumably referring to some alleged agreement made by Mr. Bennett to give or trans-

fer to him the share of stock in question, as he was asked on cross examination as follows:

> "Q Just a question or two, Mr. Rutz. With your change in position in the company was there also a change in your compensation? A Yes.
>
> Q With each change of position that you held?
>
> *Mr. Faulks.* I object to that, as I was not allowed to go into that matter, if your Honor please.
>
> *Mr. Hood.* I am talking of the company.
>
> *The Court.* I think the question is plainly competent. Was there a change in the compensation?
>
> Q And by a change of the compensation you mean an increase of compensation, do you not? A Yes." (Case, p. 44, l. 10.)

A number of cases of New York, Pennsylvania and elsewhere are cited to uphold that principle, the defendant-appellant alleging that they are based upon similar statutes. An examination of these statutes shows a vital difference; the New York statute, for instance, making the exception where the executor is examined in his own behalf, or the testimony of the deceased person is given in evidence concerning the same transaction; the Pennsylvania statute especially provides that if the adverse party whose mouth is sealed by the presence of an opponent in a representative capacity, if cross examined as to such statements or transactions thereby becomes a fully competent witness on his own behalf on all relative matters. Likewise the statutes of the other states are ma-

terially different from that in effect here. This Court has construed the statute in question in the following language:

> "We conclude therefore that, by the true construction of the act, as it now appears on the statute book, no person is disqualified as a witness by reason of his being interested as a party to the suit, and that such party may be sworn and examined as a witness, notwithstanding, that either one or both of the parties appear on the record in a representative capacity; but that where this is the case, the party offering himself as a witness shall not be permitted to testify concerning any transaction with, or statement by the decedent of his adversary, unless his adversary first offers himself as a witness and testifies to a transaction of or statement by such decedent."

Lodge v. *Hulings,* 64 N. J. Eq., p. 761.

The principal weakness with the contention, however, is that the questions asked on cross examination did not touch any transaction with the decedent. It was a filling out of the evidence of Rutz brought out on direct examination on a subject on which he was held competent to testify, namely that on a certain day he was elected a director and officer of the defendant-appellant company.

On direct examination defendant-appellant Rutz was asked and over objection permitted to answer the following questions:

> "Q Leaving out for the moment, Mr. Rutz, any conversation which you then had with Mr. Bennett, did you as a result of anything which occurred at that time continue in the employ of the company? A I did.

"Q Was there any change in your employment after that time? A There was; yes.

"Q And what change was that? A I was made a director and became vice-president, made vice-president and director of the company."

Case, p. 36, line 15.

"Q In addition to whatever duties you may have rendered as vice-president of the company or as a director, did you after this time in 1904 which you have mentioned render any other service to the company than that of bookkeeper? A I did as assistant manager.

"Q When did you assume the duties of that office? A When I became a director and vice-president.

"Q How long did you continue to perform those duties? A Until about some time during the latter part of the year 1913."

Case, p. 37, line 20.

If that had been a transaction with the decedent, the evidence on direct examination could not have been received, but it was received as a transaction with the Newark Milk and Cream Company and not with the decedent, William H. Bennett; and the fact that there was an increased compensation brought out by the cross examination, naturally fits in with and rounds out such testimony. The compensation was not paid by the decedent, but by the company, and was, after all, the consideration which actuated Rutz in changing his resolution to leave the employ of the company.

VI.

If any contract existed between William H. Bennett and Stanley A. Rutz in relation to this share of stock, its terms have not been proved and specific performance of it cannot be decreed.

> "A specific performance will not be decreed unless the existence and terms of the contract be clearly proved. It must be shown that a contract has been concluded. If it is reasonably doubtful whether the contract was finally closed, equity will not interfere by decreeing a specific performance. Ridegway *v.* Wharton, 6 H. L. Cas. 238; Brewer *v.* Wilson, 2 C. E. Gr. 182; Potts *v.* Whitehead, 5 C. E. Gr. 85. Nor will it interfere when the evidence leaves the agreement as to any of its terms in uncertainty. Clow *v.* Taylor, 12 C. E. Gr. 418; Cooper *v.* Carlisle, 26 C. E. Gr. 530."

Brown v. *Brown,* 33 N. J. Eq., p. 650.
Moore v. *Galupo,* 65 N. J. Eq. 194.
Myers v. *Metzger,* 63 N. J. Eq. 780.
Potter v. *Hollister,* 45 N. J. Eq. 508.

VII.

Defendant-appellant Newark Milk and Cream Company was directed to account for and pay over the dividends on such share of stock declared since the death of William H. Bennett, unto complainant-respondent and in this as in all other matters that decree should be affirmed.

Defendant-appellant, Newark Milk and Cream Company, asks that this portion of the decree be reversed on the ground that Mr. Bennett di-

rected this share of stock to be transferred to defendant-appellant Rutz and that no claim was made upon the hearing that the dividends paid to Mr. Rutz on this share after Mr. Bennett's death "when the defendant Rutz was the duly registered record holder of this share" should be accounted for.

The defendant-appellant company overlooks the fact that after the alleged transfer of the share of stock they continued to recognize William H. Bennett as the owner of the said share and they admit in their answer the allegation of the complainant-respondent that "in the lifetime of said William H. Bennett and until his death all dividends and profits declared and paid by Newark Milk and Cream Company on said one share of capital stock represented by certificate No. 9 were paid to said William H. Bennett." (Case, p. 17, line 26.)

Nowhere in the testimony does it appear that the relationship of the defendant-appellant company and William H. Bennett in relation to this share of stock was in any way changed by the "transfer" referred to. A claim was made in the bill of complaint that the dividends paid since Mr. Bennett's death should be accounted for to the complainant and at the hearing the claim was certainly made that William H. Bennett was the owner of said share of stock at the time of his death and that the legal title thereto is now in the complainant-respondent and if such has been established it is certainly entitled to the dividends declared on said share, but paid to another.

The complainant-respondent respectfully submits that the decree of the Court of Chancery should in all respects be affirmed.

Respectfuly submitted,

LOUIS HOOD,

Counsel for Complainant-Respondent.

New Jersey Court of Errors and Appeals.

Between FIDELITY TRUST COMPANY, Executor and Trustee of William H. Bennett, deceased, Complainant-Respondent, AND NEWARK MILK AND CREAM COMPANY and STANLEY A. RUTZ, Defendants-Appellants.	**On Bill, etc.** **On Appeal from Chancery.**

BRIEF ON BEHALF OF STANLEY A. RUTZ, DEFENDANT-APPELLANT.

I.

Concise Statement of Case.

The bill of complaint in this suit was filed (1) to compel the defendant, Newark Milk and Cream Company, to transfer on its books a share of its capital stock to the complainant, and (2) to compel the defendants or one of them to pay to the complainant the amount of dividends heretofore declared and paid upon said share of stock by such defendant company to the other defendant, Stanley A. Rutz, during the time that he has been the record holder of such share. The defendant Rutz, both in his answer and by way of counterclaim,

asserted title to such share, and also sought to have the complainant directed to surrender the certificate therefor to him.

The cause was heard on May 2, 1917, before Vice-Chancellor Stevens, who advised a decree in favor of the complainant upon both of the above-mentioned points and dismissed the counterclaim of the defendant Rutz. From this decree both the defendant company and Rutz have appealed.

II.

Grounds of appeal urged upon behalf of defendant Stanley A. Rutz.

(*a*) The evidence established that Rutz is the owner of the share of stock in question.

(*b*) The decree should have awarded such share to Rutz and not to the complainant, and directed the latter to surrender to Rutz the certificate therefor.

(*c*) The court below erroneously excluded evidence with regard to the contract under which Rutz claims to be entitled to such share.

III.

Statement of the Facts.

The complainant is the executor of and trustee under the last will and testament of William H. Bennett, who died in November, 1913 (Case, p. 1, line 22; p. 9, line 10; p. 15, line 37). In and prior to the year 1904 Mr. Bennett was the general manager and secretary of the defendant Newark Milk and Cream Company, and the owner of 125 shares of its capital stock. One of these shares was repre-

sented by a separate stock certificate, No. 9, issued May 6, 1902, in the name of his son Robert E. Bennett (Case, p. 5, line 15). Under the same date such son of Mr. Bennett assigned this share to him (Case, p. 6, line 1). No name or number of shares, or other writing was entered on the stub of the stock certificate book from which this stock certificate was detached either at the time of the issuance of such certificate or of its transfer to Mr. Bennett, nor in fact until in the year 1913 when under the circumstances hereinafter related such stub was filled in with the name of the defendant Stanley A. Rutz and the statement entered thereon that it represented one share of such stock.

For some years prior to 1904 Mr. Bennett, as the general manager of the defendant company, had been in active charge of its business. In 1899 Rutz became a bookkeeper for the company, and he continued to hold this position until 1904 (Case, p. 32, line 15). During this period of five years, in addition to assisting Bennett with the details of the company's business, he rendered him personal services by collecting rents from properties owned by Mr. Bennett. The work thus done for Mr. Bennett personally was done by Rutz both within and without business hours (Case, pp. 33–34).

In 1904, he determined to resign his position with the company and tendered his resignation to Bennett as its general manager (p. 35). He did not in fact however resign, but instead became the assistant manager of the company and was elected as a director and vice-president therof (Case, pp. 36–37). He was elected as such director at the annual meetting of the stockholders of the company in 1904, and as such vice-president at the organization meeting of the directors, following the stockholders' meeting. He was re-elected as such director and vice-president annually thereafter, until after Mr. Bennett's death in November, 1913, and during this period of more than nine years filled and performed the duties of these offices, as well as that of such

assistant manager (Case, p. 29, line 22; pp. 37–39). Bennett during all of this period continued to be general manager and secretary of the company. At no time during this period did Rutz own any share or stock interest in the company, unless it was the share in controversy represented by said certificate No. 9.

At each of the annual stockholders' meetings held during these nine years Bennett was present and personally voted *124* shares in favor of himself, Mr. Rutz and others as directors. At each of such meetings Rutz was present and similarly voted 1 share. The remaining 125 shares of the company were voted for the same directors at each of these meetings. At each of the organization meetings of the board of directors during the same period Mr. Bennett and the other directors voted for and elected Mr. Rutz as vice-president and the other directors voted for and elected Mr. Bennett as secretary (Case, p. 29, line 15; pp. 38–39; pp. 56–57). As such secretary Mr. Bennett in his own handwriting kept the minutes of all of such meetings of both the stockholders and directors held prior to 1913. In all of the stockholders' minutes he recorded himself as the owner of *124* shares and Rutz as the owner of 1 share. In all of them he recorded the votes and elections as just stated (Case, p. 29, line 15).

Prior to 1904, none of the annual reports of the company filed with the Secretary of State named Mr. Rutz as a director (Rutz Exhibits, pp. 85–91). The only annual report thereafter so filed, being the one filed in 1913, showed him to be a director in and vice-president of the company. This report was signed by both Bennett and Rutz as two of the directors (Rutz Exhibit, pp. 91–93).

In 1912, the Company in the method provided by the statute, changed its corporate name. Both in the Certificate of the Change of Name and in the Assent of the Stockholders appended thereto, Bennett appeared as the owner of *124* shares and Rutz as the owner of *1* share. Where Bennett's name appeared

in such assent it was in his own handwriting (Rutz Exhibit, pp. 94–96).

Prior to its annual meeting in 1913 the defendant company selected the New Jersey Registration & Trust Company of East Orange as its registered statutory agent (Case, p. 48, line 23; p. 50, line 13). Before assuming the duties of this office the company so appointed sent one of its officials, Mr. Harry H. Picking, to the office of the defendant company to go over its stock records with Mr. Bennett. The latter thereupon produced the defendant company's stock certificate book and explained to Mr. Picking that this was the only stock book or record of its shares kept by the defendant company. He was thereupon advised by Mr. Picking that the defendant company would have to secure a stock ledger and stock transfer book, and agreed that this should be done. Upon examining the stock certificate book at that time in Bennett's presence Mr. Picking noticed that the stub opposite certificate No. 9 (being the certificate for the one share in controversy) was blank, and asked Mr. Bennett (1) who was the owner of such certificate, and (2) the number of shares it represented. Mr. Bennett thereupon stated to Mr. Picking—"That stock is owned by Stanley A. Rutz and that certificate is issued for one share." Although repeated efforts were made to have Mr. Picking change the substance of this testimony by stating that Mr. Bennett's reply was to the effect that Rutz was the *record* owner of this share, they were unsuccessful, and Mr. Picking adhered to his testimony which was to the effect that Mr. Bennett then stated that Stanley A. Rutz was the owner of such certificate which had been issued for one share of the stock (Case, pp. 48–56). At this interview Mr. Bennett requested Mr. Picking to fill in the stub accordingly and handed him a pen for this purpose, whereupon in Mr. Bennett's presence Mr. Picking wrote Mr. Rutz' name on the stub opposite Certificate No. 9 and also made thereon an entry of the fact that it had been issued

for one share (Case, p. 49, line 36; p. 50, line 40). At this same time Mr. Bennett also directed Mr. Picking to provide a stock ledger and transfer book, in which with the approval of Bennett, Picking thereafter caused to be made entries recording Rutz as the owner of such one share (Case, p. 48, line 35; p. 50, line 25).

After all this had been done Bennett at the stockholders' meeting in 1913 again personally voted *124* shares for himself, Rutz and others as directors and Rutz similarly voted *1* share. At the succeeding organization meeting of the board Bennett voted for Rutz and Rutz for Bennett as directors and officers of the company as theretofore and they were again so elected. The minutes of these meetings held in 1913 were signed by Bennett as secretary (Case, p. 30, line 12). His death occurred a few months later.

The stock certificate No. 9 for the 1 share here in dispute was thereafter found among Mr. Bennett's papers and thus came into the possession of the complainant as his executor (Case, pp. 21–22). The proofs also showed that the dividends declared upon this share of stock prior to Mr. Bennett's death had always been paid to him.

In his answer and counterclaim Rutz stated that such share of stock was transferred to and vested in him by Bennett in the latter's lifetime in recognition of and payment for services rendered by him to Bennett and as an inducement to and in consideration of his remaining in the employ of the defendant company after he had concluded no longer so to do and had so informed Bennett; that this occurred in and about May, 1904, when he advised Bennett that unless he could then acquire at least one share of the capital stock of the defendant company as his own property and become an officer thereof, he would sever his connection with the company; that Bennett thereupon stated to him (Rutz) that it was his desire that he should remain in the employ of the company in the imme-

diate charge and direction of the details of its business, and that if he would do so and in consideration of the services theretofore rendered by Rutz to him in his personal matters as aforesaid, he would then transfer to and vest in Rutz one share of such stock from his own holdings, which share would thereupon become and thereafter be Rutz' own property; that if this was done, he desired to retain the certificate for such share of stock in his possession and to receive and retain the dividends thereon during his lifetime, but that from and after his death, Rutz should have such certificate and be entitled to have the same immediately transferred to him of record; that Bennett thereupon also then informed him that if he would accept such proposition he (Bennett) would cause him to be elected a director and officer of the company as long as Rutz remained in its employ; that said proposition was thereupon accepted by Rutz and in accordance with the agreement so made, he refrained from severing his connection with the company and continued to perform his duties as its assistant general manager until the time of Bennett's death, and that during all of this period he was elected and served as a director and vice-president thereof as hereinabove has been outlined.

Upon the hearing counsel for the complainant rigorously objected to any testimony sought to be given by Mr. Rutz as to any transactions had by him with Mr. Bennett, or any statements made by the latter, with the result that the learned Vice-Chancellor excluded all such testimony, except as it is included in the foregoing statement. Rutz was not permitted to testify why he did not carry out his intended resignation, so as aforesaid tendered to Mr. Bennett, or as to the conversation he then had with the latter, or as to any inducement which Mr. Bennett had offered him to remain with the company, or as to what, if anything, he was to receive, or did receive from Mr. Bennett for so doing (Case, pp. 33–35; p. 36, line 10; p. 40, line 33; pp. 46–48).

There is no disputed question of fact in the case except that arising from Rutz' denial that in or about the year 1905 he told Robert E. Bennett that he was a "dummy stockholder" (Case, pp. 58-60).

IV.

Argument.

(1) *The evidence established that in the year 1904 William H. Bennett, for a valuable consideration, entered into a contract to transfer the one share of stock represented by said certificate No. 9 to Rutz, and that this contract was fulfilled in 1913, except in so far as part thereof by its terms was to be deferred until after Bennett's death, viz., the delivery of the certificate and the payment of dividends upon such share to Rutz.*

A material part of the brief of the complainant in the court below was devoted to a discussion as to what is necessary to constitute a gift *inter vivos* of a share of stock. Rutz made no claim of a gift in such court, nor does he here. He asserts the claim set up in his answer, namely, that he is entitled to such share under a contract made with Bennett in the latter's lifetime.

The complainant also argued below that there was no valid consideration to support a gift of stock incomplete in itself. Leaving aside any discussion as to what may or may not be a sufficient consideration for such a purpose, I submit that the evidence shows that there was a valid consideration given by Rutz for the contract which he claims to have made with Bennett in 1904. It consisted of his withdrawal of his resignation and his continuance in the service of the company for the further period of more than nine years which thereafter occurred prior to Bennett's death. There is no denial of his evidence that in 1904 he determined

to resign and after so notifying Bennett and tendering his resignation to the latter changed his position and assumed a new relation toward the company, to fill which lawfully he must have been a *bona fide* stockholder therein. While Rutz was not permitted to relate the conversations or the transactions which he then had with Bennett, the evidence taken as a whole shows that an agreement was then made between them which involved Rutz becoming a stockholder in the company. The change from that of employe to stockholder, director and officer occurred immediately after the conversation and was not only acquiesced in by Bennett for over nine years, but was brought about by his devoting to such purpose the share of stock represented by certificate No. 9 which he had theretofore owned. The arrangement which resulted in this change in Rutz' position was personal between Bennett and him. It is true that Rutz received more money as director, vice-president and assistant manager than he had theretofore received as bookkeeper, but it cannot be said that such additional compensation constituted the entire consideration for the abandonment of his determination to sever his connection with the company, in view of the undisputed fact that he was also then made a stockholder in the company, which status could not be conferred upon him by the company but only by one of its stockholders, and could only be legally conferred by his becoming a *bona fide* stockholder. The essential and only necessary fact to establish a valid consideration for the alleged contract was the undisputed withdrawal by Rutz of his resignation.

Moreover, it is clear that Bennett received a consideration for the continuance of Rutz in the company's employ since he (Bennett) was, until the time of his death, the holder of approximately one-half of its stock. The learned Vice-Chancellor fell into an error in stating as he did in his opinion that Rutz' resolution to leave the company was not com-

municated to Bennett. He says—"A resolution, that as far as the proofs go, was not communicated to anybody" (Case, p. 66, line 3).

Referring to page 35 of the record it will be seen that Rutz testified as follows:

> "A. I wanted to resign from the employ of the company.
>
> Q. Did you determine whether or not you would resign?
>
> A. Why I determined that I would.
>
> Q. Did you tender your resignation to any officer of the company?
>
> A. I did, to Mr. Bennett."

If the learned Vice-Chancellor had given this evidence the weight to which it was entitled instead of having treated it as not in the case, it seems safe to conclude he would have been compelled to find that there was a sufficient consideration for the contract relied upon by Rutz, assuming that the other elements of such contract were established by sufficient evidence.

With reference to such other elements, the learned Vice-Chancellor found that the alleged agreement had not been proved, "at least directly" (Case, p. 62, line 20), and decided against Rutz the question of whether or not it had been proved circumstantially. In view of the strict attitude of the court in excluding the evidence of Rutz as to what had induced him to remain in the employ of the company after he had tendered his resignation to Mr. Bennett as its general manager in 1904, the contract relied upon by Rutz could not be proved otherwise than indirectly. That it was so proved with sufficient certainty to require the complainant to surrender to Rutz the share of stock which he claims, is, I submit, clear.

The uncontradicted evidence showed that from 1904 until the time of his death Bennett continuously recognized and acknowledged that Rutz was the owner of such share—

(*a*) by recording in his own hand as the secretary of the company in the company's minute book

Rutz as the holder thereof at the annual stockholders' meetings, and by similarly recording Rutz' election as a director of the company.

(*b*) by regularly voting for Rutz as a director of the company during this period of more than nine years.

(*c*) by stating in the certificate pertaining to the change of name of the corporation and the assent thereto filed with the Secretary of State in April, 1912, that he held 124 shares and Rutz 1 share.

(*d*) by certifying in the company's annual report for 1913 that Rutz was a director of the company whose term would expire in May, 1914, this being the only report filed by the company subsequent to 1903. It should be noted that this report was not authenticated in the manner required by law unless Rutz was a director. Section 43 of the General Corporation Act requires that such reports be authenticated by the signatures of the president and one other officer or " by any two directors ".

(*e*) by telling Mr. Picking in the early part of 1913 that Rutz was the *owner* of one share of stock represented by certificate No. 9, and that his name should be entered as such owner on the stub of said certificate.

(*f*) *by causing the said certificate No. 9 to be then transferred of record to Rutz.* (See *In re U. S. Cast Iron Pipe & Foundry Co.*, 74 N. J. L., 315.)

(*g*) by causing such record to be carried into the stock ledger and stock transfer book which were thereafter shortly opened.

By the actions (*f*) and (*g*) just referred to Bennett in 1913 not only caused the share of stock in question to be transferred of record to Rutz, but thereby created and furnished direct and reliable evidence, which, coupled with the testimony of Rutz and the other records of the company, admitted in evidence, was sufficient to establish that the contract set forth

in the answer and counter-claim of Rutz was in fact made. This direct evidence appeared in the case entirely apart from any transactions had by Rutz with Bennett or any conversations between them. In view of the exclusion of all evidence of this latter kind it is entitled to peculiar weight, particularly so, when it is remembered that it was created solely by Bennett. Moreover, I submit that it goes beyond the mere establishment of the contract claimed by Rutz to have been made in that it shows a partial performance by Bennett of such contract. Having in 1913 caused such share to be transferred of record it is of no importance in the decision of this case that he had not at the time of his death handed the certificate over to Rutz, or permitted him to receive the dividends paid thereon. As he was entitled to the dividends until that time he was entitled to retain the certificate of stock until then. Neither of such features proves that at the time of Bennett's death Rutz did not have a present interest in the share in question, for the full enjoyment of which he only needed the delivery of the certificate itself.

(2) *The presumptions to be drawn from the evidence require that the share in question should be awarded to Rutz.*

At the close of the hearing the learned Vice-Chancellor suggested that a proper decision of the suit might necessarily depend upon the presumptions to be drawn from the evidence. Should such prove to be the case it is submitted that this requires the reversal of the decree appealed from, and the entry of a decree directing the complainant to surrender the stock certificate in question to Rutz. It was contended on behalf of the complainant that the court should presume that Bennett merely constituted Rutz a "dummy stockholder"—or in other words that for nine years Rutz at the direction and with the connivance of Bennett unlawfully voted

the stock and filled the office of director. There is no evidence to warrant such a presumption unless it be that Bennett retained the certificate in his possession and until the time of his death received the dividends on the share of stock it represented. At most this constituted merely *prima facie* evidence of ownership capable of being overcome by evidence inconsistent therewith.

The rule applicable in the present case was stated by the New York Court of Appeals in *Richards* v. *Wells-Fargo Express Company*, 216 N. Y. 351 (109 N. E. 482), as follows:

> "The appellant contends that the fact that George C. Porter died possessed of the certificate of stock in question, indorsed in blank by Albert G. Porter, raises a presumption of ownership in George C. Porter, and that this presumption was not overcome by the other circumstances proved, and establishes conclusively that George C. Porter was the owner of the certificate. In support of this contention numerous extracts from adjudicated cases are called to our attention which assert that delivery is to be presumed from the fact of possession. These statements are doubtless correct in reference to the particular facts involved in the cases from which they are taken. Where similar facts recur, doubtless the same conclusion would be reached, but where different groups or combinations of facts are presented, their legal effect is to be determined after due consideration of all the accompanying circumstances. The question as to the ownership of this certificate of stock is one of fact. The determination as to its ownership is to be made upon a consideration of all the evidence adduced and the inferences and probabilities that naturally and logically arise from it, rather than by the application of artificial rules and a nice balancing of one so-called presumption against another."

In *Adams* v. *Board of Trustees*, 20 So. 266 (Sup. Ct. of Florida, 1896), the court said, at page 276:

> "The complainant contends that, the coupons in suit having been found among the effects of

his testator, John S. Adams, after his death, the presumption arising from such possession is that he was the owner thereof; that possession of personal property is evidence of ownership thereof by the possessor, and that the defendants have shown nothing to overcome this presumption. The possession of personal property raises a presumption of title in and ownership of the property by the possessor. Lawson, Pres. Ev. 420, and cases cited; 1 Greenl. Ev. (15th Ed.) Sec. 34. But this presumption of ownership from possession arises only when the character of the possession is unexplained; when the possession, and nothing more is shown. If the possession is shown to be equally consistent with an outstanding ownership in a third person as with a title in the possessor the presumption is rebutted. It is said to be the lowest species of evidence, and liable to be overcome by any evidence showing the character of the possession, and that it is not necessarily as owner."

The receipt by Bennett of the dividends during his lifetime is, under all of the circumstances of the case, entirely consistent with his having made an agreement with Rutz by which the latter was to become the immediate owner of the stock subject to the right of Bennett to have the dividends declared thereon as long as he lived, and to retain the certificate itself during this time as evidence of his right so to do.

Complainant's real effort is to explain away Bennett's course of conduct from and after 1904 by asking the court to assume that it was part of an illegal scheme by which Rutz became and was a "dummy stockholder" in the company and nothing more. Such an assumption is one which should not be indulged, the presumption against illegal acts being well established.

As was said in *Knox* v. *The Ninth National Bank*, 147 U. S. 91,

"Where an act is done which can be done legally, only after the performance of some

prior act, proof of the latter carries with it a presumption of the due performance of the prior act."

And again in *Brewer* v. *Bowersox*, 92 Md. 567 (48 Atlantic 1060):

> "Every presumption obtains in favor of innocence and good faith. Where an act may be innocent or culpable, as antecedent circumstances make it the one or the other, and those antecedent circumstances are not disclosed, the plainest dictates of justice require that the act shall be treated as an innocent act. And so, when the alternative is as to whether the act is rightful or wrongful, the act being one that may be either, according to its environments, and there is nothing to show that it is wrongful, the natural and the general presumption, founded on observation and experience, is that it is rightful."

A recent case in this court involving the same principle is *Bayonne* v. *Standard Oil Co.*, 81 Law, 707. That was an action brought by the City of Bayonne to recover the price of water averred to have been sold and delivered to the defendant. The plaintiff proved that according to the readings of the city meters the defendant had used water for which it had not paid. It appeared that the city meters registered a larger amount than the defendant's meters, but there was no evidence tending to show the accuracy of either set of meters. Chief Justice Gummere said, at page 721:

> "But counsel for the plaintiff contends that, in the absence of proof to the contrary, all of the meters should be assumed to have registered accurately, and argues that on this assumption the conclusion follows that the defendant unlawfully abstracted from the main, from some point or points between the barrel factory meter and those installed upon its plant, the amount of water for which this suit is brought. Such a conclusion, it seems to us, demonstrates the impropriety of the assumption. The rule is

> universal that fraud will never be presumed. It must always be proved, either by direct and positive evidence, or by proof of circumstances from which it is fairly and reasonably to be inferred. It will never be adjudged against a party upon facts which are assumed, but not proved."

It is respectfully submitted that the only fair presumptions to be drawn from the evidence are as follows:

(1) Bennett during the last nine years of his life had the legal right to retain possession of said stock certificate and receive the dividends declared thereon during this time.

(2) During the same period Rutz was lawfully entitled to vote the stock and to act as a director of the company by virtue of a *bona fide* ownership thereof, subject only to the above mentioned rights of Bennett.

(3) In the absence of proof that Rutz fraudulently and unlawfully filled the office of director, Bennett acted lawfully in permitting Rutz to vote the stock and to act as a director of the company.

(4) Rutz' right to vote the stock, to become a director, and to have the stock as his own property, subject only as aforesaid, resulted from a contract which Bennett made with him.

If presumptions (3) and (4) are correct, Bennett was not at the time of his death the absolute owner of the stock, and his executor is not entitled to the decree for which it prays. The complainant's case rested wholly upon a *prima facie* presumption which has been met and overcome, and Rutz is entitled to the relief prayed for by him.

(3) *The learned Vice-Chancellor erred in excluding certain evidence sought to be adduced on behalf of Rutz.*

Upon his direct-examination Rutz was permitted to testify that in 1904 he had determined to resign his position with the company, had then tendered his resignation to Mr. Bennett, had not then in fact carried out such determination, but on the contrary had remained with the company as above stated (Case, pp. 35-37). He was then asked as to whether he had had a conversation with Mr. Bennett following his announcement to the latter of his intention to leave the employ of the company, and after replying in the affirmative was asked to state what that conversation was, but was not allowed to do so, by reason of the provisions of Section 4 of the Evidence Act (Comp. Stat., Vol. 2, p. 2218). It also appeared from his testimony that this change in his determination and course of action was the result of something which followed immediately after the conversation just referred to (Case, p. 36, line 4; p. 40, line 33).

The beginning of Rutz' cross-examinination was as follows:

> "Q. Just a question or two, Mr. Rutz. With your change in position in the company was there also a change in your compensation? A. Yes.
>
> Q. With each change of position that you held?
>
> *Mr. Faulks:* I object to that, as I was not allowed to go into that matter, if your Honor please.
>
> *Mr. Hood:* I am talking of the company.
>
> *The Court:* I think the question is plainly competent. Was there a change in the compensation?
>
> Q. And by a change of the compensation you mean an increase of compensation, do you not? A. Yes" (Case, p. 44, line 10).

Counsel for Rutz thereupon claimed that over his objection the door had been opened by counsel for

the complainant for the admission of the evidence thus sought to be brought out upon the direct-examination and excluded, claiming that as the witness upon cross-examination had been asked and had testified as to whether or not his compensation was not increased subsequent to the time when he abandoned his intention to leave the employ of the company, this made it permissible to show what that compensation was. Mr. Rutz was thereupon asked the following questions:

> "Q. Now, what was your compensation as a director of the company and as its assistant manager when you continued in its employ in those capacities, from 1904 on? A. In the matter of money or other compensation in addition?
>
> Q. Whatever compensation there was as a result of your continuing in the employ of the company?" (Case, pp. 45-46).

After argument the court refused to allow the question to be answered except as to the increased salary received by Rutz from the company after he had made up his mind to continue with it (Case, p. 47, line 1).

Then followed this:

> "Q. Mr. Rutz, as part of your compensation for remaining in the employ of the company after the time in 1904 about which you have testified, and when you say that you told Mr. Bennett it was your intention to resign your position with the company, did you receive either from Mr. Bennett or the company any additional compensation, and if so what was it?"

Upon objection the court ruled:

> "That question is overruled as far as it relates to the compensation received from Mr. Bennett."
>
> "Q. As a result of your continuing in the employ of the company after that time did you or not obtain the share of stock represented by certificate No. 9?"

Upon objection the court ruled:

> " If the question is intended to show the delivery of the stock certificate by any person other than Mr. Bennett I will allow it. * * * I will allow it to that extent and no further."

Counsel for Mr. Rutz then asked leave to be permitted to show whatever compensation the witness received as a term of his remaining with the company, whether he received it from Mr. Bennett or from the company, adding that Mr. Bennett may have advanced it in the interest of the company. But the court adhered to its ruling, saying: " Anything that he received from Mr. Bennett I shall exclude " (Case, pp. 47–48).

It is submitted that by the questions thus asked of Rutz by counsel for the complainant the way was opened for Rutz to testify of what such additional compensation consisted, and if any part thereof came to him from Mr. Bennett what this was, notwithstanding the above mentioned provision of the Evidence Act. The effect of the exclusion of the answers to the questions thus overruled was to give the complainant the benefit of Rutz' evidence as to part of a vital subject and then to prevent him from completing his testimony with regard thereto. This under the authorities was error.

In *Nay* v. *Curley*, 113 N. Y. 575, Judge Andrews, speaking of the effect of the similar New York Statute said:

> " But that section was not intended to abrogate the principle in the law of evidence, that where a party calls a witness and examines him as to a particular part of a communication or transaction, the other party may call out the whole of the communication or transaction bearing upon or tending to explain or qualify the particular part to which the examination of the other party was directed."

In re Cozine, 93 N. Y. Supplement, 557 (Supreme Court Appellate Division, 1905), Woodward, *J.*, after

referring to the same section of the New York Code, and the rule laid down in *Nay* v. *Curley*, *supra*, said:

> "The same principle properly applies where the party attempts on cross-examination to reach a similar result. The bond and mortgage were not necessary to establish the administrator's account; they were called into the case for the purpose of raising a presumption that the account was incorrect, and, when the contestant undertook to examine the administrator in reference to this bond and mortgage, he assumed the risk of the witness explaining the whole transaction."

In *Fox* v. *Barrett's Estate*, 75 N. W. 440 (Supreme Court of Michigan, 1898), the court speaking of a cross-examination under similar circumstances said:

> "It is in effect the calling of such party as a witness by and for the representative of the deceased party, who desires to prove the transaction by him, and why should it be said that he may have so much of such testimony as he wishes, without giving an opportunity for explanation of the subject, any more than where the party was sworn upon the trial? There would be little justice in so construing the statute as to permit counsel for the estate to prove a part of a transaction by the claimant's own testimony, and then close the mouth of the witness as to the remainder. That seems to be what was attempted in this case. The court correctly held that, when a subject is gone into under such circumstances, it may be explained fully by the witness, on redirect-examination."

To the same effect see also *In re Clad's Estate*, 63 Atlantic 542 (Supreme Court of Pennsylvania, 1906) and *Pierce Loan Co.* v. *Killian*, 132 S. W. 280 (Court of Appeals, Missouri, 1910).

The weight which was given by the learned Vice-Chancellor to the cross-examination thus allowed without opportunity being given for an explanation

of it upon redirect-examination is shown at the close of his opinion where it is said:

> "He stayed at an increased salary, an obvious consideration, and without legal title acted as a stockholder. While there must have been some arrangement between the parties the evidence fails to disclose, with certainty, what it was."

For the reasons stated I respectfully submit that the decree appealed from should be reversed and direction given that a decree be entered requiring the complainant to surrender to Rutz Certificate No. 9 for one share of stock of the defendant company.

Respectfully submitted,

FREDERIC J. FAULKS,
Counsel for Stanley A. Rutz.

Dated, February 28, 1918.