

appointment of a trustee. If, as he claims, he has title to the real estate in question, that fact can be shown when the trustee proceeds against him, or he against the trustee. It is not now in issue.

Exception overruled.

All concurred.

Hillsborough, }
Oct. 9, 1908. }

STEVENS, *Trustee, Ap't, v. STEVENS & a.*

PROBATE APPEAL, heard by *Peaslee, J.* The appellant received the fund in controversy as trustee under the will of William Stevens. He did not invest the fund, but commingled it with his own estate and paid over from time to time various sums to the *cestuis que trustent*, who were entitled to the income. The sums so paid exceeded six per cent interest on the fund, for which the trustee consented to be charged. It was found that the excess was a gift from the trustee to the beneficiaries. The trustee excepted to this finding, upon the ground that there was no evidence to support it. As such evidence was found in the manner in which the trust was conducted for a long period and from the relations of the parties, and in letters and oral admissions of the the trustee, the order was,

Exception overruled.

PEASLEE, J., did not sit.

George D. Beattys (of New York), for the plaintiff.

George B. French, for the defendants.

Merrimack, }
Nov. 4, 1908. }

DRISCOLL v. ROLFE & a.

CASE, for negligence. Trial by jury and verdict for the plaintiff. Transferred from the October term, 1907, of the superior court by *Pike, J.*, upon the defendants' exceptions to the denial of their motions for a nonsuit and the direction of a verdict in their favor.

The evidence tended to prove that the plaintiff, a boy twelve