INDEX.

Petition of Appeal.

(Filed Dec. 3, 1919.)

NEW JERSEY

Court of Errors and Appeals

J. HENRY LEONHARD, ALBERT F. LEONHARD and GEORGE L. LEONHARD, Trustees under the Last Will and Testament of Theodor Leonhard, deceased, Appellants, vs. FREDERIC BEGGS, Surrogate of the County of Passaic, Respondent.	On Appeal from Prerogative Court. Petition of Appeal.

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

The petition of J. Henry Leonhard, Albert F. Leonhard and George L. Leonhard, trustees under the last will and testament of Theodor Leonhard, deceased, the appellants in the above-stated cause, respectfully shows that your petitioners find themselves aggrieved by an order made in the New Jersey Prerogative Court by his Honor, Edwin Robert Walker, Ordinary of New Jersey, bearing date eleventh day of November, in the year Nineteen

Hundred and Nineteen, in a matter entitled in said cause, "In the Matter of the appeal of J. Henry Leonhard, Albert F. Leonhard and George L. Leonhard, trustees under the last will and testament of Theodor Leonhard, deceased, from a decree of the Orphans' Court allowing the Surrogate of the County of Passaic the sum of $1035.52 for auditing the second intermediate account of said trustees," in which proceeding the said appellants were appellants in said Prerogative Court and the said Frederic Beggs, Surrogate of the County of Passaic, was respondent, in this respect, to wit,

That the said order adjudges that the said petition of appeal of the said J. Henry Leonhard, Albert F. Leonhard and George L. Leonhard, trustees under the last will and testament of Theodor Leonhard, deceased, from the decree of intermediate accounting made by the Passaic County Orphans' Court on the 16th day of March, 1919, allowing the Surrogate the sum of $1035.52 for auditing said account should be, and the same was, thereby dismissed, and that the said appellants should pay to Frederick W. Van Blarcom, Proctor for Respondent, his costs to be taxed. And your petitioner humbly appeals from the whole of said order, which decrees as aforesaid, upon the ground that the same is erroneous, for that the whole principal money received by your petitioners during the period covered by said account was $50,000, entitling said Surrogate under the statute to an allowance of $30 only for auditing, stating and reporting said account, nevertheless the Orphans' Court in its decree, from which said appellants appealed to the said Prerogative Court, made an allowance to said Surrogate of 1/10th of 1%, not upon the amount of the estate of the said Theodor Leonhard, deceased,

but upon the amount of said principal money received during the period covered by said account ($50,000) added to the income received during the same period ($985,515.02), making $1,035,515.02, the amount of said allowance being $1035.52, although all of said income, except a balance of $186,942.45 had been disbursed and distributed by your petitioners prior to the filing of said account, and had ceased to be a portion of said estate; and for that (in the alternative) if said Surrogate was entitled to any allowance in excess of $30 for auditing said account (which your petitioners deny) the maximum allowance he was entitled to receive under those circumstances was $229.28, or 1/10th of 1% on $229,288.32, said last mentioned amount being made up as follows:

$50,000 principal money received during period covered by account added to balance of income in the hands of trustees at the time of filing said account ($186,942.45), after first deducting therefrom the balance of income brought forward from the previous accounting, viz., $7,654.13, making the said sum of $229,288.32.

Your petitioners therefore pray that the said order of the said Prerogative Court may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

HUMPHREYS & SUMNER,
Solicitors and of Counsel with Appellants

Answer.

(Filed Dec. 15, 1919.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

J. HENRY LEONHARD, ALBERT F. LEONHARD and GEORGE L. LEONHARD, Trustees under the Last Will and Testament of Theodor Leonhard, deceased, Appellants, vs. FREDERIC BEGGS, Surrogate of the County of Passaic, Respondent.	On Appeal. Answer.

The answer of Frederick Beggs, Surrogate of the County of Passaic, respondent, to the petition of appeal of J. Henry Leonhard, Albert F. Leonhard and George L. Leonhard, Trustees under the Last Will and Testament of Theodor Leonhard, deceased, appellants.

1. This respondent, answering, says that he admits that by an order made in the New Jersey Prerogative Court by his Honor, Edwin Robert Walker, Ordinary of New Jersey, bearing date eleventh day of November, in the year Nineteen Hundred and Nineteen, in the Matter entitled in said cause, "In the Matter of the Appeal of J. Henry Leonhard, Albert F. Leonhard and George L. Leonhard, trustees under the last will and testament of Theodor Leonhard, deceased, from a decree of the Orphans' Court allowing the Surrogate

of the County of Passaic the sum of $1035.52 for auditing the second intermediate account of said trustees," in which proceeding the said appellants were appellants in said Prerogative Court and the said Frederick Beggs, Surrogate of the County of Passaic, was respondent, it was adjudged that the said petition of appeal of the said J. Henry Leonhard, Albert F. Leonhard and George L. Leonhard, trustees under the last will and testament of Theodor Leonhard, deceased, from the decree of intermediate accounting made by the Passaic County Orphans' Court on the 16th day of March, 1919, allowing the Surrogate the sum of $1035.52 for auditing said account should be, and the same was, thereby dismissed, and that the said appellants should pay to Frederick W. Van Blarcom, Proctor for Respondent, his costs to be taxed.

2. This respondent is advised, believes and submits that said decree is just and in accordance with law, and denies that said decree or any part thereof is erroneous, improper or illegal, but, on the contrary, alleges that said decree in every part thereof is legal, proper and correct.

He therefore prays that the said decree may be in all things affirmed, with costs to be adjudged to this respondent.

FREDERICK W. VAN BLARCOM,
Proctor for and of Counsel with Respondent.

Notice of Appeal.

(Filed Nov. 20, 1919.)

NEW JERSEY PREROGATIVE COURT.

In the Matter

of

The Appeal of J. Henry Leonhard, Albert F. Leonhard and George L. Leonhard, trustees under the last Will and Testament of Theodor Leonhard, deceased, from a decree of the Orphans' Court allowing the Surrogate of the County of Passaic the sum of $1035.52 for auditing the second intermediate account of said trustees.

Notice of Appeal.

J. Henry Leonhard, Albert F. Leonhard and George L. Leonhard, trustees under the last Will and Testament of Theodor Leonhard, deceased,
Appellants,

vs.

Frederic Beggs, Surrogate of the County of Passaic,
Respondent.

To Fred W. Van Blarcom, Esq.,
Proctor for Respondent.

Take notice that the appellant appeals to the Court of Errors and Appeals from the order made in this cause by the New Jersey Prerogative Court

on the eleventh day of November, Nineteen Hundred and Nineteen, dismissing the petition of appeal of said appellants from the decree of intermediate accounting made by the Passaic County Orphans' Court on the sixteenth day of March, Nineteen Hundred and Nineteen, allowing the Surogate the sum of $1035.52 for auditing the intermediate account of the appellants, and directing the appellants to pay the proctor for the respondent his costs to be taxed.

HUMPHREYS & SUMNER,
Proctors for Appellants.

Petition of Appeal in Prerogative Court.

(Filed Mar. 11, 1919.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Appeal of J. HENRY LEONHARD, ALBERT F. LEONHARD and GEORGE L. LEONHARD, trustees under the last Will and Testament of Theodor Leonhard, deceased, from a decree of the Orphans' Court allowing the Surrogate of the County of Passaic the sum of $1035.52 for auditing the second intermediate account of said trustees.	On Petition of Appeal. Petition of Appeal.

To the Ordinary of the State of New Jersey:

The petition of J. Henry Leonhard, Albert F. Leonhard and George L. Leonhard, trustees under the Last Will and Testament of Theodor Leonhard, deceased, respectfully shows that your petitioners find themselves aggrieved by a decree on intermediate accounting made by the Orphans' Court of the County of Passaic, bearing date the sixth day of March, 1919, in the matter of the intermediate account of your petitioners as trustees under the Last Will and Testament of Theodor Leonhard, deceased, in this respect, to wit: that the said decree adjudges that the Surrogate of the County of Passaic be allowed the sum of $1035.52 for auditing said account.

And your petitioners humbly appeal from that part of said decree of said Orphans' Court which decrees as aforesaid upon the ground that the same

is erroneous in that the whole principal money received by your petitioners during the period covered by said account was $50,000, entitling the Surrogate under the statute to an allowance of $30 only for auditing, stating and reporting said account, nevertheless said Orphans' Court in its said decree made an allowance to said Surrogate of one-tenth of 1%, not upon the amount of the Estate of the said Theodor Leonhard, deceased, but upon the amount of said principal money received during the period covered by said account ($50,000) added to the income received during the same period ($985,515.02), making $1,035,515.02, the amount of said allowance being $1035.52, although all of said income, except a balance of $186,942.45 had been disbursed and distributed by your petitioners prior to the filing of said account and had ceased to be a portion of said estate; and for that (in the alternative) if said Surrogate was entitled to any allowance in excess of $30 for auditing said account (which your petitioners deny) the maximum allowance he was entitled to receive under those circumstances, was $229.28, or one-tenth of 1% on $229,288.32, said last mentioned amount being made up as follows:

$50,000 principal money received during period covered by account added to balance of income in the hands of trustees at the time of filing said account ($186,942.45), after first deducting therefrom the balance of income brought forward from the previous accounting, viz., $7,654.13, making the said sum of $229,288.32.

Your petitioners, therefore, pray that the aforesaid decree of the said Orphans' Court may be, in the particulars aforesaid, reversed by this Court.

Dated, Paterson, N. J., March 10, 1919.

HUMPHREYS & SUMNER,
Proctors for and of Counsel with Appellants.

Answer in Prerogative Court.

(Filed Mar. 24, 1919.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Appeal of J. HENRY LEONHARD, ALBERT F. LEONHARD and GEORGE L. LEONHARD, trustees under the last Will and Testament of Theodor Leonhard, deceased, from a decree of the Orphans' Court allowing the Surrogate of the County of Passaic the sum of $1035.52 for auditing the second intermediate account of said trustees.	On Petition of Appeal. Answer.

The answer of the Surrogate of the County of Passaic, respondent, to the petition of appeal of J. Henry Leonhard, Albert F. Leonhard and George L. Leonhard, trustees under the last will and testament of Theodor Leonhard, deceased, appellants:

1. This respondent, answering, admits that by a decree of intermediate accounting made by the Orphans' Court of the County of Passaic, bearing date the sixth day of March, 1919, in the matter of the intermediate account of said appellants as trustees under the Last Will and Testament of Theodor Leonhard, deceased, adjudged that the Surrogate of the County of Passaic be allowed the sum of $1035.52 for auditing said account.

2. This respondent is advised, believes and submits that the portions of said decree complained of

by appellant are just and lawful, and this respondent denies that the aforesaid portions of the said decree or any parts thereof are erroneous, improper or illegal, and alleges that said portions of said decree are legal, proper and correct.

This respondent, therefore, prays that the said petition of appeal may be dismissed, with costs.

FREDERICK W. VAN BLARCOM,
Proctor for and of Counsel with Respondent.

Stipulation in Prerogative Court.

(Filed Oct. 2, 1919.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Appeal of J. HENRY LEONHARD, ALBERT F. LEONHARD and GEORGE L. LEONHARD, trustees under the last Will and Testament of Theodor Leonhard, deceased, from a decree of the Orphans' Court allowing the Surrogate of the County of Passaic the sum of $1035.52 for auditing the second intermediate account of said trustees.	On Petition of Appeal. Stipulation.

It is stipulated between the proctors of the appellants and respondent respectively that this mat-

ter shall be submitted to the determination of the Court upon briefs, and upon the following statement of facts:

1. By the decree of intermediate accounting made by the Passaic County Orphans' Court March 16, 1919, in the matter of the intermediate account of the appellants as trustees under the last will and testament of Theodor Leonhard, deceased, the Surrogate was allowed $1035.52 for auditing said account.

2. Said allowance consisted of 1/10th of 1% of the sum of $1,035,515.02, which sum was made up of $50,000, the amount of principal money received during the period of nine years covered by the account, together with $985,515.02, the amount of income received during the same period.

3. The whole principal money received during said period was $50,000.

4. During the same period $985,515.02 was received for income.

5. All of said income so received during said period had been distributed to the beneficiaries entitled to the same prior to the filing of the account, with the exception of the sum of $179,288.32.

6. At the time of the filing of the account the trustees held, besides the corpus of the estate, including the said sum of $50,000 principal money received during said period, and besides the said sum of $179,288.32, consisting of income received during said period and undistributed, the additional sum of $7,654.13, the last mentioned sum being the

balance of income brought forward from the previous accounting, leaving a balance of income in the hands of the trustees at the time of filing the account of $186,942.45.

It is further agreed that the briefs shall be filed on or before June 28th inst., and in case either party fails to file his or their brief by said date, that the case may be disposed of upon the brief of the other party.

Dated, June 9th, 1919.

HUMPHREYS & SUMNER,
Proctors of Appellants.

FRED W. VAN BLARCOM,
Proctor of Respondent.

Opinion of Lewis, Vice Ordinary.

(Filed Oct. 2, 1919.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Appeal of J. HENRY LEONHARD, ALBERT F. LEONHARD and GEORGE L. LEONHARD, trustees under the last Will and Testament of Theodor Leonhard, deceased, from a decree of the Orphans' Court allowing the Surrogate of the County of Passaic the sum of $1035.52 for auditing the second intermediate account of said trustees.	On Petition of Appeal. Memorandum.

On appeal from the Passaic County Orphans' Court.

Messrs. HUMPHREYS and SUMNER, proctors for appellants.

Mr. FREDERIC W. VAN BLARCOM, proctor for respondent.

LEWIS, *V. O.:*

The following stipulation between the proctors of the appellants and the respondent sets forth the facts with sufficient particularity:

"1. By the decree of intermediate accounting made by the Passaic County Orphans' Court March 16, 1919, in the matter of the intermediate account of the appellants as trustees under the last will and testament of Theodor Leonhard, deceased, the Surrogate was allowed $1,035.52 for auditing said account.

2. Said allowance consisted of 1/10th of 1% of the sum of $1,035,515.02, which sum was made up of $50,000, the amount of principal money received during the period of nine years covered by the account, together with $985,515.02, the amount of income received during the same period.

3. The whole principal money received during said period was $50,000.

4. During the same period $985,515.02 was received for income.

5. All of said income so received during said period had been distributed to the beneficiaries entitled to the same prior to the filing of the account, with the exception of the sum of $179,288.32.

6. At the time of the filing of the account, the trustees held, besides the corpus of the estate, including the said sum of $50,000 principal money received during said period, and besides the said sum of $179,288.32, consisting of income received during said period and undistributed, the additional sum of $7,654.13, the last-mentioned sum being the balance of income brought forward from the previous accounting, leaving a balance of income in the hands of the trustees at the time of filing the account of $186,942.45."

The fee allowed the Surrogate, from which this appeal is made, is the fee for auditing, stating and reporting the account of executors, administrators, guardians, trustees and ~~assigns~~ assignees provided for in Section 200 of the Orphans' Court Act, Compiled Statutes, Vol. 3, page 3887.

That section of the Act provides for fees of the Surrogate for auditing, stating and reporting such accounts.

> "On estates * * * over $10,000 and not exceeding $50,000, thirty dollars;
>
> "Over $50,000 and not exceeding $500,000, at the rate of one-tenth of one per centum, and where estates exceed $500,000, the Court shall fix and determine the additional fees to be allowed on such excess, provided such further and additional fees may be allowed in any case as the Court shall think reasonable."

It appears, therefore, that under the facts as shown in the stipulation filed, the account in question accounted for $50,000 of corpus, and for $985,515.02, income, no part of which amounts, or either of them, had ever been accounted for in any prior accounting, and hence, no account in respect of these two sums could have theretofore been audited by the Surrogate.

The rate allowed to the Surrogate for auditing the account, to wit, one-tenth of one per cent. upon the total of the two sums above mentioned, seems clearly, therefore, to come within the limitations set forth by this Court in Heath's case, 52 *N. J. Eq.*, 807.

I am unable to see, therefore, that there has been any error, and the appeal must be dismissed.

Order Dismissing Appeal in Prerogative Court.

(Filed Nov. 18, 1919.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF The Appeal of J. HENRY LEONHARD, ALBERT F. LEONHARD and GEORGE L. LEONHARD, trustees under the last Will and Testament of Theodor Leonhard, deceased, from a decree of the Orphans' Court allowing the Surrogate of the County of Passaic the sum of $1035.52 for auditing the second intermediate account of said trustees.	On Petition of Appeal. Order.

J. Henry Leonhard, Albert F. Leonhard and George L. Leonhard, trustees under the last will and testament of Theodor Leonhard, deceased, having filed their petition of appeal from a decree of intermediate accounting made by the Passaic County Orphans' Court on the 16th day of March, 1919, in the matter of the intermediate account of the appellants, as trustees under the last will and testament of Theodor Leonhard, deceased, whereby the Surrogate by such decree was allowed the sum of $1035.52 for auditing said account and it appearing that the said allowance to the Surrogate for auditing said account was justified under the law, and that there was no error therein.

It is thereupon on this 11th day of November, one thousand nine hundred and nineteen, on motion of Fred W. Van Blarcom, Esq., Proctor for Respondent, ordered, adjudged and decreed that the said petition of appeal of the said J. Henry Leonhard, Albert F. Leonhard and George L. Leonhard, trustees under the last will and testament of Theodor Leonhard, deceased, from the decree of intermediate accounting made by the Passaic County Orphans' Court on the 16th day of March, 1919, allowing the Surrogate the sum of $1035.52 for auditing said account be and the same is hereby dismissed, and that the said appellants do pay to Frederick W. Van Blarcom, proctor for the respondent, his costs to be taxed.

E. R. WALKER,
Ordinary.

Respectfully advised,
VIVIAN M. LEWIS,
V. C.

NEW JERSEY

Court of Errors and Appeals

J. HENRY LEONHARD, ALBERT F. LEONHARD and GEORGE L. LEONHARD, Trustees under the Last Will and Testament of Theodor Leonhard, deceased, Appellants, vs. FREDERIC BEGGS, Surrogate of the County of Passaic, Respondent.	On appeal from Prerogative Court.

BRIEF ON BEHALF OF APPELLANTS.

This is an appeal from an order made by the Ordinary in the Prerogative Court, advised by Vice-Ordinary Lewis, dismissing an appeal from a decree of the Passaic County Orphans' Court allowing the Surrogate the sum of Ten Hundred and Thirty-five Dollars and Fifty-two Cents ($1035.52) for auditing the second intermediate account of the trustees, the above-named appellants.

The matter was submitted in the Prerogative Court upon the facts set forth in the stipulation of counsel filed in the cause (p. 11).

The fee allowed the Surrogate from which this appeal is made is the fee for auditing, stating and reporting the accounts of executors, administrators, guardians, trustees and ~~assigns~~ assignees provided for in Section 200 of the Orphans Court Act, Compiled Statutes, Vol. 3, page 3887.

That section of the Act provides for fees of the Surrogate for auditing, stating and reporting such accounts

> "On estates * * * over ten thousand dollars and not exceeding fifty thousand dollars, thirty dollars;
>
> "Over fifty thousand dollars and not exceeding five hundred thousand dollars at the rate of one-tenth of one percentum, and where estates exceed five hundred thousand dollars the Court shall fix and determine the additional fees to be allowed on such excess, provided such further and additional fees may be allowed in any case as the Court shall think reasonable."

The fee allowed the Surrogate in this case was one-tenth of 1 per cent. upon the sum of $1,035,515.02. This sum was made up of $50,000, the amount of principal money received during the nine-year period covered by the account, and $985,515.02, the entire amount of income received during the same period, although all of this income, with the exception of $179,288.32, had been distributed prior to filing the account.

Besides the corpus of the estate, including the $50,000 added to the same during the nine-year period, the trustees held at the time of filing their account a balance of undistributed income amount-

ing to $186,942.45. This latter amount included $7654.13, a balance of undistributed income brought forward from a previous accounting.

Inasmuch as according to the rule laid down in *Heath's* case, 52 *N. J. Eq.*, 807, in computing the amount of an estate for the purpose of fixing the fees of the Surrogate under this section of the Act the balance transferred from a prior account should be excluded, the very maximum amount upon which the fee should have been computed in this case was, according to our contention, $229,288.32, made up of the $50,000 addition to the corpus, and $179,-288.32, the amount of income received during the period covered by the account and undistributed at the time of filing the same. Upon that basis the maximum fee would be $229.29.

We, however, contend that the fee should have been calculated solely upon $50,000, the increase in the corpus of the estate; that is to say, that the fee should only be $30.

The fee is based by the section of the Act upon *the amount of the estate,* and that term as so used we contend refers to the corpus or principal.

The language of the statute is unobscure, and fixes in clear language the size of the estate as the basis of the fee, and not profits or income derived therefrom.

The size of the estate is necessarily to be determined at the time of filing the account, for auditing and stating which the fee is allowed. The fee allowed in this case, from which the appeal is made, was based upon the entire amount of principal and income, which came into the hands of the trustees

during the nine-year period covered by the account. The fee actually allowed the Surrogate was fixed upon exactly the same basis as that upon which commissions to executors and trustees are fixed under Section 129 of the Act.

Section 129 provides that on the settlement of the accounts of executors or trustees under a will their commissions shall not exceed the following rates: *"On all sums that come into their hands,* not exceeding one thousand dollars, seven percentum," etc. (Orphans Court Act, C. S., Vol. 3, p. 3860).

Section 130 of the same Act further provides:

> "Whenever, in pursuance of the provisions of any will, or by the direction of the court, any property from which income is derived shall remain in the hands of or be entrusted to executors, administrators with the will annexed, or trustees under a will, or commissioners in partition, the income or interest of which is required to be paid to any legatee or other person who may be entitled thereto, it shall and may be lawful, upon any accounting, either intermediate or final, for the court before which said account shall be presented for settlement and allowance, to consider the actual pains, trouble, and risk of such accountant, and to allow such commission upon the interest or income received as by the said court shall be deemed fair and just; provided, that said allowance shall not exceed the sum of five per centum on such interest or income" (P. L., 1898, p. 762, as amended; P. L., 1901, p. 178). *Id.*, p. 3860.

Section 131 of the same Act also provides:

> "Whenever, upon the settlement of the account of a guardian of an infant, idiot, lunatic or feeble-minded person it shall appear that the estate of such infant, idiot, lunatic or feeble-minded person received into the hands of such guardian exceeds the sum of twenty thousand dollars, it shall and may be lawful, upon such and any subsequent accounting, for the court before which said account shall be presented for settlement and allowance, to consider the actual pains, trouble and risk of such accountant, and to allow such commission upon the estate *and interest or income* received as to the said court shall be deemed fair and just; provided, that said allowance, with all former or other allowances made to such guardian, shall not together exceed the sum of five per centum on such estate and the income received by such guardian for such infant, idiot, lunatic or feeble-minded person" (P. L., 1898, p. 763). *Id.*, p. 3861.

In the instant case the fee has been fixed at one-tenth of 1 per cent. on all sums, both principal and income, that came into the hands of the trustees during the nine-year period. This, we submit, was erroneous, as there is a very clear distinction between the terms of the two sections of the Act, namely, between the provisions of Section 129, allowing commissions to trustees based *"on all sums that come into their hands,"* and Section 200, fixing the fees of the Surrogate for auditing *on "estates"* over $10,000, etc.; and it is evident that the Legislature intended to fix a different basis of computation in the two cases, namely, in the case of commis-

sions allowed to trustees for managing the estate and the fees allowed the Surrogate for auditing their accounts. Certainly there is a distinction between the two terms which should not be ignored. "All sums that may come into the hands of trustees," during a period of years, is something quite distinct from the amount of the estate in their hands at any particular time; for instance, the time of filing their account.

The term "estate" as used in Section 200 must necessarily refer to something in existence at some particular time, and evidently as used in that section the time referred to is the time when the auditing is done for which the fee is allowed.

If such is the case an estate consists at any particular time of the assets or property of every kind then owned and held together constituting a fund or corpus considered as a unit. In this sense it consists not only of the original fund which came into the hands of its present owners or custodians, but all accretions which may have been added thereto and which are still held together and are unexpended, just as a man's present wealth consists of his original capital, together with all of his profits which he has not expended. But it is just as absurd to hold that an estate under the management and in the custody of trustees consists not only of the original trust fund and additions thereto in the form of corpus or capital and undistributed income, but also of the income which has been distributed by the trustees to the persons or beneficiaries entitled to receive the same, who may have expended such income for their own support, as it would be to hold that a man's individual wealth or estate included all the income which he had earned and spent in past years. Note too that in Section 131

the word "estate" is used in apposition to the words "interest or income," treating the two terms as things distinct the one from the other.

If there were any doubt on this subject it should be resolved so as not to enlarge the fees allowed to the Surrogate by construction.

In Heath's case, above cited, Vice-Ordinary Van Fleet, used this significant language:

> "The rule regulating payment, prescribed by the statute of 1890, is a purely arbitrary exaction. It is not compensation according to the value of the work, but the one-tenth of one percent must be allowed whether the work occupies ten days or ten minutes, and whether the work is fairly worth the sum which must be allowed or only an infinitesimal part of it. For auditing and reporting the account of an estate of $500,000, consisting of twenty items or less, the Surrogate is entitled to $500, though the actual value of the skill and labor bestowed is worth less than $5. It is obvious that the effect of a statute which imposes burdens in this arbitrary manner, and without the slightest regard to benefit, should not be enlarged by construction. As the legislature cannot compel one citizen to give his property to another, it would seem logically to follow that it is not within its power to ordain that the estates of decedents shall be required to pay a particular class of public officers $50 for a service which is not reasonably worth $1."

We contend that the term "estate" as used in Section 200 of the statute refers solely to the corpus

or capital, the fund entrusted to the management of the trustees which they are required to hold intact during the period of the trust, but does not include income to which the beneficiaries of the trust are entitled, although the trustees may have some discretion as to the time of distributing the latter, and may at any particular time be holding some of the income undistributed.

There is clearly a distinction between the corpus of an estate held by trustees, which by the terms of the trust they are entitled and required to hold for a period of time, and a balance of undistributed income which the trustees are required to distribute among the beneficiaries and to which the beneficiaries have become legally entitled, although the trustees may be allowed a certain discretion as to the time of distributing the same. In such a case the corpus or principal and any such balance of undistributed income are altogether distinct funds, and, we submit, the first, the corpus or principal, is the "estate" as that term is used in Section 200 of the statute, and the second, the undistributed income, is not. If, as we have already submitted, there is any doubt on this question, it should also be resolved so as not to enlarge by construction the fees to be allowed the Surrogate.

If, however, as it may be argued, the "estate" at any particular time consists of all the property and assets of every kind, including income not distributed, then under the rule in Heath's case cited above, that the balance transferred from a prior account should be excluded, in the present case the fee should be calculated upon the basis of the $50,000 addition to capital and $179,288.32, the amount of undistributed income received during the nine-year period covered by the account, or upon the

total sum of $229,288.32, the fee so calculated amounting to $229.29.

It was argued by the respondent in the brief submitted to the Vice-Ordinary, and we suppose the same argument will be relied upon by the respondent in this court, that as by Section 115 of the Act "Every guardian or trustee shall exhibit to the Orphans' Court once in three years, and oftener if required, an account of all moneys, goods and chattels he shall receive, and of the rents, issues and profits of any real estate in his possession belonging to his ward or held in trust" (P. L. 1898, p. 756; 3 C. S., p. 3853); if our contention that the fees allowed to the Surrogate for such auditing must be based upon the corpus of the estate, or, at any rate, upon the corpus, together with the amount of any undistributed income in the hands of the trustee at the time of the accounting, the result would be that for auditing any account after the first, if there were no increase in the corpus during the period covered by the account, and if all the income received by the trustee during that period had been distributed before filing the account, there would then be no fee for the auditing, and that such might continue to be the case during the remaining life of the trust; and we may concede that such probably would be the result in the case supposed.

It was further argued by the respondent, however, that a similar result would follow in the case of an executor who pays the legacies and distributes the estate before his accounting, but that is not so, according to our contention. In such a case the fee should be calculated upon the total amount of the property or estate coming into the possession of the executor for administration before the payment of debts or legacies or the distributive shares.

The argument of the respondent is simply an attempt at a *reductio ad absurdum* of our contention. The absurdity to which it is supposed to be reduced consists in the theoretical possibility, if our contention should prevail, that this public official, the Surrogate, in a hypothetical case, might be required to render his services in auditing an account without the payment of any fee by the accountant; and the absurdity of so construing the provision in the Act is supposed to be all the greater in that at the time the Legislature enacted the provision of the statute regulating the amount of fees to be paid (1898), the Surrogates were then compensated for their services by an appropriation of the fees collected in their offices, a thing inconceivable to the mind of counsel of respondent, namely, that the Legislature could have contemplated such officials doing anything for nothing.

As pointed out by Vice-Ordinary Van Fleet in the *Heath* case, supra, in many cases the fees allowed for auditing accounts are purely arbitrary, and in many actual cases are absurdly large, based upon any consideration of the amount or value of the work actually performed in the Surrogate's office. In the instant case, upon any consideration of the value of the work of auditing this particular account, which could not have required over a half hour's time of a clerk in the Surrogate's office, who actually did the work, the fee of $1,035 is utterly absurd, so that there are two absurdities for the Court to consider; the actual absurdity of the fee allowed in the case under determination, or the possible absurdity that in a hypothetical case no fee at all might be allowed if the provision of the statute is construed as we contend it should be.

We need not point out that in every case whatever, the Surrogate would always get a fee for auditing the first account filed by an executor or trustee, and that it is only in relation to subsequent accounts that the possibility of no fee being required might arise.

We are aware, of course, of the rule that in construing a statute a construction will be avoided, if possible, which leads to an absurd result; but the rule is equally binding that the intention of the Legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. *State* v. *Woodruff*, 68 *N. J. L.*, 89.

It is quite possible, indeed probable, that if the possibility pointed out by counsel for respondent of the Surrogate in some given case being required to audit accounts without receiving any fee for the same had been in the mind of the Legislature, such a result might have been avoided by the Legislature at the time of enacting the statute by making provision for such cases or by using such language that no such doubt could arise. But if our construction of the language of the Act is otherwise correct, we submit that the Court should not undertake to remedy the defect due to a possible oversight on the part of the Legislature, but should leave it to that body to remedy the supposed defect if it desires.

We submit that in view of the other provisions in this Act, which must be taken into consideration in construing the particular section of the Act now under consideration, there is no ambiguity regarding the meaning of the term "Estate" as used in Section 200 of the Act regarding fixing the fees of the Surrogate for auditing accounts of executors

and trustees; that the previous provisions of the Act show that a distinction was intended to be made between the principal or corpus of an estate and the income, and that where the term "Estate" is used, it is intended to refer to the corpus as distinguished from the income.

Section 130, which we have set forth in full above, draws a clear distinction between "any property" and the income derived therefrom, in providing for a commission as compensation to a trustee based upon the "interest or income" of such property.

Section 131, also set forth in full above, expressly refers to the estate of an infant, etc., and the interest or income, and provides that whenever, upon the settlement of the account of a guardian of an infant, etc., it shall appear that the *estate* of such infant exceeds the sum of $20,000, it shall and may be lawful upon such and any subsequent accounting for the Court to allow such commission to the guardian upon *the estate and interest or income received* as to the said Court shall be deemed fair and just.

Section 129, which limits the rates of commissions payable to executors and trustees, provides that they shall be based "on all sums that come into their hands."

We submit that in considering these various provisions of the Act to which we have referred, the use of these various terms should not be deemed to have been altogether haphazard, and that a distinction should be drawn between the reference in Section 129 to all sums that come into the hands of trustees, and in Section 131 to the estate of an infant or feeble-minded person and the interest or in-

come received, and in Section 200 to the reference to estates not exceeding $10,000, etc.

Clearly, in applying the provisions of Section 131, the Court, in determining whether or not the account of a guardian relates to an estate received into the hands of such guardian, exceeds the sum of $20,000, and in determining, therefore, whether or not to allow such guardian a commission upon the estate and interest ~~upon~~ on the income received, must determine whether or not the corpus of the estate exceeds the sum of $20,000, and not that the estate and the interest or income received together amount to such sum. There can be no doubt that, so far as that section of the Act is concerned, the term "Estate," as there used, applies solely to the corpus, and we submit that the term "Estates" used in Section 200 (p. 3887) is used in entirely the same sense, and should therefore be construed in the same manner, to refer to the corpus so as to exclude the income, and that while a trustee is allowed commissions by Section 129 based on all sums that have come into his hands, the Surrogate for auditing the same estate under Section 200 is not entitled to a fee based on all sums that have come into the hands of the trustee, but only upon the amount of the estate, namely, the corpus of the fund administered by the trustee.

There is one further point that may require notice. The statute provides that the fees for auditing "estates * * * over $50,000 and not exceeding $500,000 shall be at the rate of one-tenth of one per cent., and that where estates exceed $500,000 the court shall fix and determine the additional fees to be allowed on such excess; provided such further and additional fees may be allowed in any case, as the court shall think reasonable."

In the instant case the fee allowed was $1,035.52. This amount, as a matter of fact, is one-tenth of 1 per cent. on $1,035,515.02, the latter amount being, according to the contention of the respondent, the amount of the estate for auditing which the fee should be allowed. To have complied strictly with the provisions of the Act, assuming that the amount of the estate was what it was claimed to be by the respondent, the fee should first have been allowed at the rate of one-tenth of 1 per cent. on the first $500,000, and then such additional and further sum upon the excess over $500,000 as the Court thought reasonable. The Court, however, so far as appears upon the face of the order appealed from, did not go through the mental or arithmetical process of allowing a fee of $500 upon the first $500,000, and then allowing an additional fee upon the excess over $500,000, but simply fixed the fee at a lump sum, which in fact was equivalent to one-tenth of 1 per cent. on the amount claimed to be the amount of the estate; but, if the Court had strictly complied with the provisions of the Act, and, after allowing a $500 fee upon the first $500,000, had fixed an additional fee upon the excess of the estate over $500,000 as being reasonable within the requirements of the statute, *non constat,* but that that additional fee might not have been $535.52, making the total allowance precisely what it was.

We merely refer to this point because it was referred to in the brief of respondent submitted to the Vice-Ordinary. But while it may be that the appellants might have objected because of the Orphans' Court's failure to comply strictly with the provisions of the Act, we do not see what possible advantage respondent can derive from it. The appellants are complaining because in fixing the

amount of the fee the Orphans' Court assumed, for the basis of calculating the fee, that the estate amounted to $1,035,515.02, but assuming that this latter figure is the correct one for the purpose of the calculation, then the appellants are willing to concede that the fee fixed was a proper one, although the Court may not have gone through the form of strictly complying with the provisions of the Act.

We respectfully submit that the fee in this case should have been calculated solely upon $50,000, the amount of increase in the corpus of the estate during the period covered by the account; that is to say, that the fee should only be $30. If, however, the Court concludes that that is not the correct construction of the provision of the statute, then we further submit that the fee should be fixed at one-tenth of 1 per cent. of $229,288.32, the amount of the increase of the corpus of the estate, together with the amount of undistributed income received during the period covered by the account and in the hands of the trustees at the time of filing same.

HUMPHREYS & SUMNER,
Of Counsel with Appellants.

NEW JERSEY

Court of Errors and Appeals

J. HENRY LEONHARD, ALBERT F. LEONHARD and GEORGE L. LEONHARD, Trustees under the Last Will and Testament of Theodor Leonhard, deceased,

Appellants,

vs.

FREDERIC BEGGS, Surrogate of the County of Passaic,

Respondent.

On Appeal from Prerogative Court.

BRIEF

ON BEHALF OF RESPONDENT.

This is an appeal from an order made by the Ordinary in the Prerogative Court, advised by Vice-Ordinary Lewis, dismissing an appeal from a decree of the Passaic County Orphans' Court allowing the Surrogate the sum of Ten Hundred and Thirty-five Dollars and Fifty-two Cents ($1035.52) for auditing the second intermediate account of the trustees, the above named appellants.

The facts are very clearly and briefly set forth in the

stipulation of facts (State of the Case, p. 11) and the contention of the appellants is very clearly defined in the petition of appeal.

The main contention of the appellants as to the Surrogate's fees for auditing their account (that such fees should be $30.00) and the alternative view which they set up, but do not press to the exclusion of their first contention (that the Surrogate's fees might be as great as $229.28), are both rejected by this respondent, whose contention is that the Surrogate's fees ($1035.52) allowed by the Orphans' Court was correct and should not be changed.

ARGUMENT

The rate at which fees of Surrogates in these cases are fixed is regulated by statute.

> "For auditing, stating and reporting the accounts of executors, administrators, guardians, trustees and assignees on estates not exceeding ten thousand dollars, fifteen dollars;
>
> "Over ten thousand dollars and not exceeding fifty thousand dollars, thirty dollars;
>
> "Over fifty thousand dollars, and not exceeding five hundred thousand dollars, at the rate of one-tenth of one per centum, and where estates exceed five hundred thousand dollars the court shall fix and determine the additional fees to be allowed on such excess; provided, such further and additional fees may be allowed in any case as the court shall think reasonable (P. L. 1898, p. 789)."
>
> 3 Com. Stat., p. 3887, Sec. 200.

This section establishes the *rate*, which is dependent upon the size of the estate. In the first two instances the rate is a fixed sum, but in the third instance, it is a per-

centage rate, which is determined by the size of the estate. The statute is silent, however, as to what moneys the rate is to be applied and on what funds the calculation of fees is to be made. If the statute said that the rate should be applied upon so much of the estate as came into the hands of the accountants during the period accounted for, there might be some virtue in the appellants' contention, provided the term "estate" is limited only to the principal sum in the hands of the trustees. The fact that the term "estate" has a broader meaning is admitted by the appellants in their alternative contention.

Our law, too, has long recognized a broader meaning.

> "And in Roe *v.* Harvey, 5 Burr. 2638, Lord Mansfield, with the concurrence of Willes and Ashurst, justices, said, 'The word estate, carries everything, unless tied down by particular expressions.'"

Den *vs.* Drew, 14 N. J. L., p. 73.

The section of the statute under consideration, however, is silent as to what moneys the rate applies and we must look further for information as to that point. The fees of the Surrogate above provided for are in satisfaction of his services in "auditing, stating and reporting the accounts of * * * trustees," and under the statute their duties in this regard are very clearly defined.

> "Every guardian or trustee shall exhibit to the Orphans' Court once in three years, and oftener if required, an account of all moneys, goods and chattels he shall receive, and of the rents, issues and profits of any real estate in his possession belonging to his ward, or held in trust (P. L. 1898, p. 757)."

3 Com. Stat., p. 3853, Sec. 115.

It is such an account that the Surrogate is required to audit, state and report and on which the fees are allowed and it was undoubtedly the intention of the legislature, and is the law, that the rate of the Surrogate's fees should be applied to the amount of moneys accounted for regardless of its disposition.

It seems to this respondent to be immaterial whether the moneys received by these trustees was distributed or used to pay debts, and it is inconceivable what the balance remaining in the hands of these trustees at the time of the accounting has to do with the calculation of the Surrogate's fees. If these trustees had gone a step further and distributed such balance, I presume that they would have contended that the Surrogate was entitled to no fees for auditing, stating and reporting this account, which extended over a period of nine years (3 times the statutory period), and in which is involved and accounted for over one million dollars in money.

Prior to 1906 these fees were the personal property of the Surrogate, allowed to him as compensation for his services and which he retained for his own use as such compensation. But under the act of 1906 (P. L. 1906, page 76, and 4 Com. Stat. 4643, Sec. 38, etc.) the Surrogates were placed on a salary basis and these fees were turned into the county treasury. The statute providing for the fees, however, was enacted in 1898, when the fee system for Surrogates was in operation, and was necessarily enacted with the fact in mind that the fees provided thereby were to be compensation to the Surrogate. If the main contention of the appellants is correct, this statute would then have operated in many cases so that the Surrogate auditing, stating and reporting the first account of the trustees in which was accounted for the principal moneys in their hands, would receive the full fee prescribed by law and, if there were no change in

the investment of the principal, his successors in office called upon to perform those duties in subsequent accountings would have to perform their labors without any compensation whatsoever.

Carrying the appellants' reasoning a little further, we find that where, as is frequently the case, the trust fund is a fixed amount and never changes, all of the income thereof being paid to beneficiaries, the Surrogate, auditing, stating and reporting the account of the trustees of such fund, would have to do so without compensation. Take again the case where an executor under a will, who before his accounting pays the legacies to the legatees, leaving a small or no balance in his hands at the time of the accounting; according to the appellants' reasoning, the Surrogate would be entitled to no fees for auditing, stating or reporting such an account.

Numerous instances may be cited where the Surrogate could be deprived of the fees allowed by law with strict propriety and in a legal way if either of the contentions of the appellants is correct.

In other words, the effect of the appellants' reasoning is that the Surrogate is not entitled to any fee for auditing, stating and reporting an account which deals exclusively with income, no matter how frequent or complicated these accounts may be, which is his main contention, or, in the alternative, if the Surrogate were entitled to any fees at all for auditing, stating and reporting accounts which deal exclusively with income, he would be entitled only to fees on the unexpended balance in the hands of the trustees as shown by the accounting. It appears to this respondent that both of these propositions are almost too unreasonable to require argument.

The foregoing argument has been based upon the assumption that in fixing the Surrogate's fees in this

accounting, the court followed strictly the rate and its application prescribed by the statute above quoted, but whether the court did so or not seems to be inconsequential in view of the broad powers given it by the statute above quoted, which provides that "Such further and additional fees may be allowed in any case as the court shall think reasonable." Whether the court fixed the Surrogate's fees in this accounting at $1,035.52 according to the rate and its application laid down by the statute or according to this unlimited power does not appear, but inasmuch as the court did so fix the Surrogate's fees, it had the fullest power so to do, and this respondent submits that the fees as allowed should not be changed.

It does not appear that the appellants object to the rate at which the Surrogate's fees are computed, nor do they make any claim that the balance carried over from the last accounting was included in the amount on which the Surrogate's fees were calculated.

This respondent, therefore, respectfully submits that the fees allowed by the Passaic County Orphans' Court to the Surrogate for auditing, stating and reporting this account is a proper allowance and justified by the law and that this appeal should be dismissed with costs.

FREDERICK W. VAN BLARCOM,

Proctor for Respondent.